

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
No. 2014-001472

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MAY 23 2016
SC SUPREME COURT

Appeal from Newberry County
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge
Civil Action No. 2009-CP-36-415

Appellate Case No. 2014-001472
South Carolina Court of Appeals Unpublished Opinion No. 2016-UP-069

John S. Frick,

Petitioner,

v.

Keith Fulmer, Eleanor F. Bush,
Benny A. Bush, Joseph R. Childers,
Justin Chadwick, Victoria Chadwick,
S.C. Electric & Gas, and Newberry County

Respondents.

APPENDIX

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APPELLANT JOHN S. FRICK

Newberry, S.C.
May 23, 2016

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May 23, 2016

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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**

John S. Frick, Appellant,

v.

Keith Fulmer, Eleanor F. Bush, Benny A. Bush, Joseph
R. Childers, S.C. Electric & Gas, Newberry County,
Justin Chadwick, and Victoria Chadwick, Respondents.

Appellate Case No. 2014-001472

Appeal From Newberry County
Frank R. Addy, Jr., Circuit Court Judge,

Unpublished Opinion No. 2016-UP-069
Heard February 1, 2016 – Filed February 17, 2016

AFFIRMED

William Chadwick Jenkins, of Pope & Hudgens, P.A., of
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William H. Edwards, of Moore Taylor Law Firm, P.A.,
of West Columbia, and Rudolph C. Barnes, Jr., of Little
Mountain, for Respondent Keith Fulmer; Austin J.
Tothacer, Jr., of Newberry, for Respondent Newberry
County; and Jay Evan Bressler, of Cayce, for Respondent
S.C. Electric and Gas.

PER CURIAM: John Frick appeals the circuit court's order finding the roadway under dispute was an easement rather than a county road, Respondents were entitled to use a locked gate to the roadway as long as Frick was provided access, and the roadway was fourteen feet wide. We affirm.

1. We disagree with Frick's argument the circuit court erred in finding the disputed roadway was not a public road. *See Andrews v. McDade*, 201 S.C. 24, 28, 21 S.E.2d 202, 204 (1942) ("The question of abandonment is largely a question of intention and must be determined from all the surrounding facts and circumstances under appropriate instructions from the court."); *K & A Acquisition Grp., LLC v. Island Pointe, LLC*, 383 S.C. 563, 577, 682 S.E.2d 252, 259 (2009) (stating abandonment occurs when use of property becomes impossible or fails); *id.* at 576, 682 S.E.2d at 259 (providing discontinuance of a road may be evidence of abandonment); *Hoogenboom v. City of Beaufort*, 315 S.C. 306, 319 n.7, 433 S.E.2d 875, 884 n. 7 (Ct. App. 1992) (stating abandonment must be proved by acts showing a clear intent to abandon). The flooding of Lake Murray ended the intended use of the roadway under dispute. It was no longer maintained by the county and became an easement shared by the landowners along the roadway. We agree with the circuit court the roadway was no longer a public road.

2. We disagree with Frick's argument the circuit court erred in finding the landowners were entitled to maintain a locked gate across the roadway. *See Judy v. Kennedy*, 398 S.C. 471, 476, 728 S.E.2d 484, 486-87 (Ct. App. 2012) (providing whether a locked gate is justified over a right of way depends on each case and is controlled by the particular facts and circumstances); *Andrews*, 201 S.C. at 28, 21 S.E.2d at 204 (finding that in the abandonment of a public road, title to the center of the road remains vested in the abutting property owners on either side). Although Frick may have been inconvenienced by the locked gate, the landowners always supplied him with a means of access. We find the circuit court correctly determined the landowners were entitled to maintain a locked gate across the roadway.

3. We find no error in the circuit court's decision the roadway was fourteen feet wide. *See Rhett v. Gray*, 401 S.C. 478, 493, 736 S.E.2d 873, 881 (Ct. App. 2012) (stating an easement owner cannot increase the easement and the burden on the servient estate). Although the width varied along the roadway, we find the circuit court was correct in its decision.

AFFIRMED.

HUFF, A.C.J., KONDUROS, and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge
Civil Action No. 2009-CP-36-415

Unpublished Opinion No. 2016-UP-069
Filed February 17, 2016

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SC Court of Appeals

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Appellant,

v.

Keith Fulmer, Eleanor F. Bush,
Benny A. Bush, Joseph R. Childers,
Justin & Victoria Chadwick,
S.C. Electric & Gas, and Newberry County

Respondents.

PETITION FOR REHEARING

In accordance with the provisions of Rule 221(a), SCACR, the Appellant petitions this Honorable Court for rehearing of Unpublished Opinion No. 2016-UP-069 (The Opinion) filed on February 17, 2016.

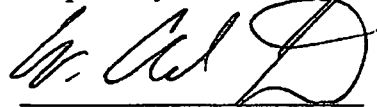
Appellant would respectfully assert that this Honorable Court misapprehended or overlooked important facts supportive of his position and/or the lack of facts supporting the Respondent's position and misapprehended the facts which were present in the Record on Appeal in this matter. Furthermore, the Appellant respectfully asserts that this Honorable Court misapprehended the

applicable legal theories supporting the Appellant's position in this matter. Attached to this Petition is a Memorandum in Support of Petition for Rehearing which identifies and analyzes the points which the Appellant contends The Opinion has overlooked or misapprehended. This Petition incorporates herein the Appellant's analysis and arguments contained in the attached Memorandum.

Wherefore, the Appellant respectfully requests that this Honorable Court re-hear the matters contained in The Opinion and reverse the judgment of the Circuit Court in the following particulars:

- A. Reversing the trial Court's finding that the road in question is not a public road and that the County had properly abandoned said road;
- B. Reversing the trial Court's finding that the landowners are entitled to maintain a closed and locked gate across the roadway prohibiting the Appellant from exercising free and unfettered access to his property;
- C. Reversing the trial Court's finding that the roadway in question was only 14 feet wide.

Respectfully Submitted,



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March 3, 2016

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
No. 2014-001472

Appeal from Newberry County
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge
Civil Action No. 2009-CP-36-415

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**MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING**

In support of his Petition for Rehearing of Unpublished Opinion No. 2016-UP-069 (The "Opinion"), Appellant respectfully submits this Memorandum in Support.

INTRODUCTION

The Appellant submits that the Opinion misapplied the applicable legal precedent in finding that the disputed roadway is not a public road. Appellant further submits that the Opinion overlooked or misapprehended the evidence contained in the Record which supports Appellant's position that the disputed roadway is a public road and that the County of Newberry failed to take any action to properly close same.

Furthermore, the Appellant respectfully asserts that the Opinion misapprehended or overlooked the evidence and misapplied the applicable legal precedents in affirming the Circuit Court's ruling that the landowners were entitled to maintain a locked gate across the disputed roadway and that the disputed roadway was only fourteen (14) feet wide.

ARGUMENTS

I.

In affirming the lower Court's finding that the county had abandoned the disputed roadway, the Opinion ignored the fact that part of the roadway is still in use and still county maintained and that the county took no affirmative steps to close said road.

S.C. Code Ann. §57-9-10 *et. seq.* did not completely abolish the common law doctrine of abandonment, but it did establish a clear, precise mechanism for the closure of a public road. While some roadways may have been abandoned prior to the enactment of S.C. Code Ann. §57-9-10 *et. seq.*, it did not happen in this case. The clear facts are as follows:

(1) The disputed roadway was a public road which ran between Wheeland School Road and Macedonia Church Road.

(2) A portion of the road, beginning at Macedonia Church Road, is still county maintained.

(3) The portion of the roadway at issue in this action was utilized to service homes and by the public for many years after the creation of Lake Murray.

The fact that Seibert Road is, in part, still county owned and maintained means that Newberry County would have to take affirmative action to close any portion of the same roadway, specifically the segment of the roadway in question. The Record reveals that Newberry County, as late as 1997, maintained that Seibert Road was a dedicated road that would remain county maintained and that county road signs would remain in place. (R. p. 157). Although the creation of Lake Murray may have split the road into two segments, both sections of the road should be treated the same unless and until Newberry County takes steps to close them pursuant to S.C. Code Ann. §57-9-10 *et. seq.*

The Opinion misapprehends the legal precedents regarding the abandonment and/or closure of roadways. The fact that this was a public roadway in which the general public had a right to utilize, as clearly shown on county highway and road maps as well as by the county's admission, puts a higher burden upon the governmental entity for closing the road. (R. pp. 148 – 151; R. p. 157).

The Opinion, citing K&A Acquisition Group v. Island Pointe, LLC, 383 S.C. 563, 682 S.E.2d 252 (2009), misapprehends the Supreme Court's ruling in

that case. The Opinion fails to consider that the case stands for the proposition that once a road is dedicated to the public for public use, the public easement in same is not revoked upon the governmental entity no longer utilizing or maintaining said roadway. The Supreme Court found that the mere act of relocating toll road that was dedicated to the public did not have the effect of abolishing the public easement created in the original route. K. & A Acquisition Group v. Island Pointe, LLC, 383 S.C. 563, 682 S.E.2d 252 (2009). If completely rerouting a road does not extinguish the public nature of said road, then certainly blocking a small portion of that road does not extinguish the public's right to utilize same.

The Opinion also failed to consider the S.C. Supreme Court's holdings in South Carolina Dept. of Transportation v. Hinson Family Holdings, LLC, 361 S.C. 649, 606 S.E. 2d 781 (2004). In that matter, the South Carolina Department of Transportation effectively abandoned "Water Tower Road" in 1994 when it actually closed the road and deeded it to another entity. The Supreme Court found that failure to follow the formal judicial procedure for terminating a public right of way over land as set forth in S.C. Code Ann. §57-9-10, coupled with the fact that the county still claimed ownership in another portion of Water Tower Road, lead to the conclusion that the roadway was still a public road. The basic facts of Hinson are almost identical to those in this case.

The Opinion misapprehended and misconstrued the law and the facts pertinent to the disputed roadway. The Opinion further failed to distinguish between the acts necessary to close a road that is merely utilized via an easement

and a road which was, at one time, a public road as shown on numerous maps and by the county's own admission. The Court should grant the Petition for Rehearing and reverse the lower court's findings finding that the disputed roadway is not a public road.

II.

In ruling that the landowners are entitled to maintain a closed and locked gate across the disputed roadway, the Opinion misapprehended or ignored the repeated statements and evidence contained within the record showing that there was no need for the gate and that it only served to harass the Appellant and limit his access to the property.

If a gate or blockade is erected that is not necessary to protect the land, it is merely to restrict human traffic and is improper. Brown v. Gaskins, 284 S.C. 30, 324 S.E.2d 639 (Ct. App. 1984). To be proper, there must be a necessity for the gate for the "preservation of the servient estate." Id at 34. In this matter, the only history of any trespassing was from many years ago. The most telling fact, which was misapprehended or ignored by the Opinion, was Defendant Fulmer's testimony that the instances of trespassing were a thing of the past. (R. p. 133, ll. 4-18). Also, the gate remained opened for a period of over four years beginning in 2009 with no instances of trespassing or vandalism. (R. p. 132, l. 25 – p. 133, l. 18). At this point, the gate is merely being utilized to harass the Appellant and to impede human traffic to Appellant's property.

The Opinion states that the Appellant has always been provided with a key to the gate, and while this may be true, the Opinion overlooked or misapprehended the facts showing that the locks would often be placed in such a

way that Appellant's key would not work and that same was likely an intentional plot to deny him access to his land so that he could not develop it. (R. p. 63, l. 17 – p. 64, l. 20). Also, SCE&G employees indicated that the gate was always open prior to the Appellant purchasing the land in question. (R. p. 101, ll. 11-16). Therefore, it served no useful purpose other than the harassment of the Appellant and is improper.

III.

In affirming the lower court's finding that the disputed roadway is only 14 feet wide, the Opinion misinterpreted or misapplied the facts contained in the Record and misconstrued the case of Rhett v. Grey, 401 S.C. 478, 736 S.E.2d 873 (Ct. App. 2012) as cited in the Opinion.

First and foremost, the Opinion incorrectly asserts that the Appellant's use of the roadway is by easement. As stated above in Argument I, the roadway is a public road which has been utilized since before the creation of Lake Murray and which once connected two other public roads.

Secondly, the Appellant has not sought to increase the width of the road, but merely wishes to utilize the full width of the road as it was on the date he purchased his property. The testimony contained in the Record shows that the road is 20 feet wide and that a 14-foot gate does not cover the entire roadway at its most narrow point. (R. p. 123, ll. 11-21; R. p. 130, l. 18 – p. 131, l. 10; R. p. 173-174).

Lastly, the Opinion indicates that pursuant to Rhett v. Grey, an easement owner cannot increase the easement and the burden on the servient estate. However, the clear testimony is that SCE&G, another servient estate owner if,

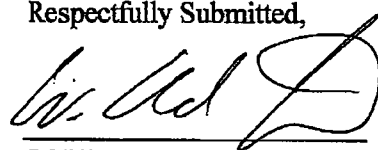
arguendo, the use of the roadway is only via easement, widened and improved the road on at least two occasions. (R. p. 68, ll. 11-20; R. p. 91, ll. 14-19). Both of these occasions were prior to the Appellant purchasing his property. The widened and improved roadway is what existed at the time of purchase and the Appellant expected to utilize the improved roadway.

CONCLUSION

For the reasons set forth in this Memorandum, the Appellant respectfully requests that this Honorable Court grant this Petition for Rehearing and issue its Opinion:

- (a) Reversing the lower court and finding that the disputed roadway is a public, county owned roadway; and,
- (b) Reversing the lower court and finding that the gate erected across the disputed roadway is unneeded, unnecessary and improper; and,
- (c) Reversing the lower court and finding that the disputed road way is at least 20 feet wide and not 14 feet wide.

Respectfully Submitted,



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March 3, 2016

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge
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Unpublished Opinion No. 2016-UP-069 SC Court of Appeals
Filed February 17, 2016

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Keith Fulmer, Eleanor F. Bush,
Benny A. Bush, Joseph R. Childers,
Justin & Victoria Chadwick,
S.C. Electric & Gas, and Newberry County

Respondents.

PROOF OF SERVICE

I certify that I have served a copy of the below stated pleadings on the below listed counsel of record in this matter by depositing a copy of same in the United States Mail, First Class, postage prepaid, on this the 3rd day of **March, 2016**:

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Attorney for SCE&G

PLEADING SERVED:

Petition for Rehearing

Memorandum in Support of Petition for Rehearing

A handwritten signature in black ink, appearing to read 'Katherine Barnett', is written over a horizontal line.

Katherine Barnett
Paralegal to W. Chad Jenkins

The South Carolina Court of Appeals

John S. Frick, Appellant,

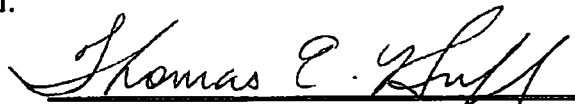
v.

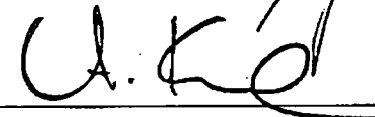
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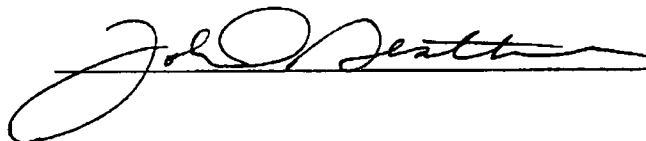
Appellate Case No. 2014-001472

ORDER

After 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. Accordingly, the petition for rehearing is denied.

 A.C.J.

 J.

 J.

Columbia, South Carolina

cc:

William Chadwick Jenkins, Esquire

William H. Edwards, Esquire

Rudolph C. Barnes, Jr., Esquire

FILED

4/21/16

Austin J. Tothacer, Jr., Esquire
Jay Evan Bressler, Esquire
Eleanor F. Bush
Benny A. Bush
Joseph R. Childers
Justin Chadwick
Victoria Chadwick
The Honorable Frank R. Addy, Jr.

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APPELLANT'S FINAL BRIEF

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Newberry, S.C.
November 25, 2014

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE LOWER COURT ERR IN DENYING APPELLANT'S MOTION FOR RECONSIDERATION REGARDING THE STATUS OF THE ROADWAY AS A PUBLIC COUNTY ROAD?**
- II. DID THE LOWER COURT ERR IN DENYING APPELLANT'S MOTION FOR RECONSIDERATION REGARDING THE RESPONDENTS UTILIZING A CLOSED, LOCKED GATE TO DENY THE APPELLANT AND HIS GUESTS ACCESS TO HIS PROPERTY?**
- III. DID THE LOWER COURT ERR IN DENYING APPELLANT'S MOTION FOR RECONSIDERATION REGARDING THE WIDTH OF THE ROADWAY UTILIZED TO ACCESS HIS PROPERTY?**

STATEMENT OF THE CASE

Appellant John S. Frick (hereinafter Appellant or Frick) filed a Summons and Complaint seeking a preliminary injunction and declaratory judgment regarding the parties' rights and responsibilities in regards to the portion of Seibert Road in Newberry County, South Carolina that begins at Wheeland School Road and traverses across the defendants' properties until it reaches the Appellant's property identified as Newberry County TMS 645-8. A bench trial was held before the Honorable Frank R. Addy, Jr. in Laurens County on November 1, 2013. The Court issued its decision via way of Form Order on November 18, 2013 and requested a more formal order to be prepared by defense counsel. The Court issued its Order of Final Judgment dated February 20, 2014 and filed with the Newberry County Clerk of Court on February 24, 2014 (R. p. 4). The Order of Final Judgment found that the roadway was not a public road and that it was a simple private easement for the necessary property owners. The Order further allowed the defendants to utilize a locked gate across the roadway and found that the appellant has a 10 to 12 foot wide easement for egress and ingress to his property.

Appellant timely filed his Motion for Reconsideration and/or Motion to Alter and Amend on March 3, 2014. After further argument, the trial court issued its decision dated June 9, 2014 amending its Order to reflect that the Appellant has a fourteen foot easement in the roadway in question but denying all other relief sought in the Motion for Reconsideration.

Appellant timely filed his Notice of Intent to Appeal and this Initial Brief follows.

STATEMENT OF FACTS

Appellant purchased an approximately 84 acre parcel of land located in the Little Mountain area of Newberry County, S.C. in 2003. (R. p. 50, lines 3-7). Appellant visited the land prior to the purchase and accessed it by driving in his vehicle from Wheeland School Road to the property. (R. p. 51, line 2 – p. 52, line 1). The roadway was unimpeded and the only gate was unnoticed due to it being open and overgrown with weeds to the point that it was easily overlooked. (R. p. 53, lines 2-15). This road, which traverses through or on the border of each defendant's land until it ends upon Appellant's property, is the subject of this lawsuit and appeal. (R. p. 52, line 16 – p. 53, line 1).

Appellant was familiar with the property prior to purchasing same as he is a lifelong resident of the Little Mountain community. (R. p. 49, line 20 – p. 50, line 2). The road was originally a part of Seibert Road, which continues on the other side of what is now Lake Murray as shown on a 1938 General Highway Map. (R. pp. 148-150). Other maps, including a Lake Murray map and 2006 road atlas, show the road as continuing to and hooking up with what is still Seibert Road on the opposite side of Lake Murray. (R. p. 151; Pl. Ex. 2 Not capable of Reduction for Inclusion in the Record). It is clear that historically this road was in fact Seibert Road which travelled from Wheeland School Road and across what is now Lake Murray to Macedonia Church Road.

In addition to its historic use as a road traversing between two other public roads, the part of the road which connects Wheeland School Road to the Appellant's property has been used well after the construction of Lake Murray. The road was utilized by at least two home owners, one of which resided on the Appellant's property and the road was utilized by mail carriers and other services providers for these homes. (R. p. 60, line

20 – p. 61, line 8). Furthermore, the road was utilized by Boy Scouts and others as access to the lake and camping sites. (R. p. 59, line 25 – p. 61, line 8). The road was able to be accessed with regular automobiles and was actually wider than some other county dirt roads. (R. p. 61, line 13 – p. 62, line 3). Although there were no documents indicating that the County had recently maintained the road, this is not unusual as the County has not retained any maintenance records prior to the late 1980's. (R. p. 62, lines 4-8).

The Appellant's property, when it was previously owned by Champion and the SCE&G property have also been a part of the South Carolina Wildlife Management Area program. (R. p. 47, lines 6-16). Without utilizing this road, these WMA lands would have been landlocked and unusable by the public unless they were able to access it via water and this was also impossible at times due to low water levels. (R. p. 66, lines 4-17).

After the Appellant purchased the property, Defendant Fulmer's father, his predecessor in title, approached the Appellant about closing and reutilizing a gate along the roadway. (R. p. 63, lines 17 - 23). Appellant protested against same but the gate was cleaned up and closed and locked over his protests. Although the Appellant was given a key, in the beginning the key would often not work and when some the defendants suggested the use of separate locks for each landowner, the Appellant would often find his lock out of sequence or arranged in such a manner that he was not able to access his property. (R. p. 63, line 20 – p. 64, line 20). The gate blocking Appellant's unfettered and uninterrupted access to his property was erected only after he purchased the land to the chagrin of Defendant Fulmer's family. (R. p. 52, lines 12-15). Van Hoffman, a recently retired employee from Defendant SCE&G agreed that the gate would sometimes

be locked incorrectly and that people would get locked out. (R. p. 98, line 14 – p. 99, line 5). Defendant Fulmer, who now spearheads the campaign to keep the gate closed and locked, argues that the gate is necessary to keep out trespassers and poachers. However, Defendant Fulmer testified that he was only able to remember one instance where he actually encountered a trespasser and one other incident via hearsay where Defendant Childers spotted a car near the gate. (R. p. 116, line 15 – p. 117, line 19). Defendant Fulmer further testified that between the institution of this litigation in 2009 and the time of the trial, over four years later, there were zero incidents of trespassing, littering or any other problems. (R. p. 132, line 25 – p. 133, line 18). In Defendant Fulmer's own words, "that's a thing of the past..." (R. p. 133, lines 16-18).

The Defendants further argued that the roadway was only 10 to 12 feet wide. It is clear from the testimony that the roadway was at least 20 feet wide, and wider in other spots, and that it ran 25 feet or more from "ditch to ditch." (R. p. 68, lines 11-20). Even Defendant Fulmer's testimony on direct examination by his own attorney shows the true width of the road:

Question: How wide is the road as it now goes through your property?

Answer: "...it's nothing under 20 feet wide, except where the gate and stuff is..." (R. p. 123, lines 11-18).

Mr. Fulmer further testified that log trucks can easily traverse the road and that the road was between 14 and 20 foot wide. (R. p. 123, lines 11-21). Also, Defendant Fulmer indicated that the 14 foot wide gate does not cover the whole road bed and that the gate is at the most narrow part of the road. (R. p. 130, line 18 – p. 131, line 10; R. p. 174).

Photographs offered in evidence show a roadway, not including ditches, that is 20 feet or more wide as evidenced by the 20 foot wide pipes running underneath the roadway. (R. p. 68, lines 15-20; R. pp. 173-174)).

Appellant purchased a piece of property that had clear, unimpeded access from Wheland Road on a roadway that is no less than 20 feet wide. Only after the Defendants attempted to continually deny him access did this litigation ensue.

ARGUMENT

I. THE APPELLATE COURT SHOULD REVIEW THE LOWER COURT'S DECISION FOR ERRORS OF LAW AND FACTUAL FINDINGS THAT ARE WITHOUT EVIDENCE REASONABLY SUPPORTING SAID FINDINGS.

This is an appeal from a declaratory judgment action seeking a judicial determination as to whether or not a road was, and remains, a public road and the parties' respective rights in said road. Declaratory judgments in and of themselves are neither legal nor equitable. *Campbell v. Marion County Hosp. Dist.*, 354 S.C. 274, 580 S.E.2d 163 (2003). Actions regarding rights in a roadway or easement are actions at law. *S.C. Dept. of Transportation v. Horry County*, 391 S.C. 76, 705 S.E.2d 21 (2011). This Court should review the lower court's decisions for errors of law and should further review the trial court's factual findings and overturn same if they are without evidence reasonably supporting those findings. *Id.* at 81.

II. THE LOWER COURT ERRED IN FINDING THAT THE ROADWAY IN QUESTION IS NO LONGER A COUNTY ROAD DESPITE THE FACT THAT THE GOVERNMENTAL AUTHORITY TOOK NO AFFIRMATIVE STEPS TO CLOSE IT AND PART OF SAID ROAD REMAINS OPEN AND COUNTY MAINTAINED.

Newberry County has failed to take any action to close the portion of Seibert Road in question in this matter. Due to the County's inaction, it remains a county road to this very day. It is uncontested that the road in question was once a part of Seibert Road, a road which connected Wheeland School Road and Macedonia Church Road prior to the flooding which created Lake Murray. (R. pp. 148-150; p. 151; R. p. 151; Pl. Ex. 2 Not capable of Reduction for Inclusion in the Record). Part of Seibert Road still exists and is still maintained by Newberry County. (R. p. 82, line 24 – p. 84, line 22; R. p. 157). The evidence presented shows that the portion of the road accessing the Appellant's property was utilized as late as the 1950's for mail delivery and access to two homes. (R. p. 60, line 20 – p. 61, line 8). Furthermore, the road was more recently used by the public via the Boy Scouts and other groups utilizing it to access camping areas. The road, which still appears on current maps, is also the only land route to access Wildlife Management Area lands held by the South Carolina Department of Natural Resources for public use.

S.C. Code Ann. §57-9-10 *et seq.* lays out the procedures which must be followed for the State, or any of its political subdivisions, to abandon or close any street, road or highway “whether opened or not.” (emphasis added). Newberry County did not petition the court, publish their notice of intention to file in the newspaper, send certified mail to all abutting property owners, or post signage along the roadway in question as required by S.C. Code Ann. §57-9-10 (2012). If, and only if, the County followed proper

procedures could the property be reverted back to the private landowners. S.C. Code Ann. §57-9-20 (2012).

The South Carolina Supreme Court and Court of Appeals have stated that “by creating a formal judicial procedure for terminating a public right of way over land, Section 57-9-10 removes the uncertainty attending the common law of dedication and abandonment.” *South Carolina Dept. of Transportation v. Hinson Family Holdings, LLC*, 361 S.C. 649, 606 S.E. 2d 781 (2004); *See also Hoogenboom v. City of Beaufort*, 315 S.C. 306, 433 S.E.2d 875 (Ct. App. 1992). In the *Hinson* case, the road in question had actually been rerouted and the portion subject to the lawsuit was no longer being utilized by the general public or maintained by the County. Regardless, the Court found that the South Carolina Department of Transportation and/or Horry County were required to follow the statutory scheme for abandoning or closing a road. *South Carolina Dept. of Transportation v. Hinson Family Holdings, LLC*, 361 S.C. 649, 606 S.E. 2d 781 (2004).

The trial court misapprehended *City of Myrtle Beach v. Parker*, 260 S.C. 475, 197 S.E.2d 290 (1973). In that case, a road which was made unusable for its original purpose due to a bridge being destroyed was declared to still be dedicated to public use because there was no evidence the City ever considered the matter, “let alone having concluded in the exercise of sound official discretion that any portion of Spivey Beach Road was no longer required for public use or convenience.” *Id.* at 296. In the present matter, there is no evidence of Newberry County officials discussing or utilizing any discretion in making a decision to close Seibert Road and abandon it, and certainly no evidence they followed the statutorily required procedures.

City of Myrtle Beach v. Parker actually supports Appellant's contention that Seibert Road is still a public road. A distinct difference was drawn between the abandonment of a public easement and a private easement. Mere non-use of a dedicated street for twenty years would not amount to abandonment as would destroy the right of the public to the street. Seibert Road was, and remains, a public road that was maintained by the County. Evidence of use by mail trucks and other vehicles for access to homes, public use for travel between two other public roadways, and use by organizations and groups to access other public areas all show continued public use and a lack of abandonment by the County.

The question is not whether the landowners have dedicated his/her land to the public, but rather has the County given up what was, and still is, a public roadway? The very cases cited by the Court support Appellant's contention. In *K & A Acquisition Group v. Island Pointe, LLC*, the Court found that the South Carolina Department of Transportation actually sold the tract of land that was formerly a toll road pursuant to the statutory scheme for abandoning former roads. Here, the County took NO action to abandon Seibert Road, a road that provided unencumbered access to Appellant's property and WMA lands. "The mere act of relocating the toll road did not have the effect of abolishing the public easement created in the original route." *K & A Acquisition Group v. Island Pointe, LLC*, 383 S.C. 563, 682 S.E.2d 252 (2009). Here, just because the original route was shortened by the introduction of water to create Lake Murray, does not equal a knowing abandonment of the road by Newberry County.

The lower court erred in finding that the portion of Seibert Road providing access to Appellant's property was abandoned and therefore no longer a public road. The

County, as well as the adjoining landowners, continued to allow general public access via way of mail delivery, use by scout troops and at least potential use by hunters engaging in hunts on Wildlife Management Area lands. (R. p. 59, line 25 – p. 61, line 8). Seibert Road was, at the time of Appellant's purchase of the property, a public road which traversed, unimpeded, from Wheeland School Road to Appellant's property.

III. ASSUMING ARGUENDO THAT THE ROAD IN QUESTION IS NOT A COUNTY ROAD, THE LOWER COURT ERRED IN FINDING THAT LANDOWNERS WERE ENTITLED TO MAINTAIN A CLOSED AND LOCKED GATE ACROSS THE ROADWAY PROHIBITING THE APPELLANT FROM EXERCISING FREE AND UNFETTERED ACCESS TO THE PROPERTY.

The lower court based its finding on Defendant's arguments that a gate was necessary for preservation of their property and protecting it from trespassers and vandals. The Defendant's arguments were simply offered as a red herring to justify their actions in denying Appellant reasonable access to his property. There was no credible evidence to support the trial court's finding and said finding is an error of law.

The only evidence of any past history of trespassing was antidotal and occurred long ago. No proof whatsoever of vandalism was offered. There is no necessity or even slight need for the gate for the "preservation of the servient estate." *Brown v. Gaskins*, 284 S.C. 30, 324 S.E.2d 639 (Ct. App. 1984). If a gate or blockade is erected that is not necessary to protect the land, it is merely to restrict human traffic and is improper. *Id.* at 34.

A gate may be erected across an easement if they "(1) are so located, constructed, and maintained as not to unreasonably interfere with the right of passage of the dominant

estate, (2) are necessary for the preservation of the servient estate, and (3) are necessary for use of the servient estate.” *Brown v. Gaskins*, 284 S.C. 30, 33, 324 S.E.2d 639, 640 (Ct.App.1984). Here, the gate was erected and/or re-erected for the sole purpose of interfering with the Appellant’s right of passage. There was no testimony that the gate was actually needed, as Defendant Fulmer testified that the only two instances of trespassing and/or vandalism were a thing of the past. (R. p. 133, lines 4-18). Defendants have other options, including gating the spurs that actually lead onto their property from the main road in question or fencing along the road such that those passing through to properties further along the roadway cannot unintentionally trespass. The fact that the gate was opened when this case was filed in 2009, and left open for over 4 years without incident of vandalism or trespassing, shows that the gate is not needed for the preservation of the defendants' properties. (R. p. 132, line 25 – p. 133, line 18).

Appellant's uncontroverted testimony shows that when Appellant purchased the property in question, he travelled unfettered between Wheeland School Road and his property, via his personal vehicle, and that any gate was open and seemingly permanently disabled via weeds and other growth. (R. p. 51, line 2 – p. 52, line 15). Even Van Hoffman, a former land manager for Defendant SCE&G who was responsible for the affected SCE&G tract, indicated the “...gate was always open....” (R. p. 101, lines 11-16). The testimony that gates have been erected in the past shows no current need for the gate in question and is irrelevant. Appellant purchased his property with an open road between said property and the nearest public road - i.e Wheeland School Road.

Appellant further testified that after his purchase, the gate and locking mechanisms were utilized by Defendant Fulmer or his predecessor in title to intentionally

deny him access. (R. p. 63, line 17 – p. 64, line 20). Even former SCE&G employee Van Hoffman indicated that the gate was always open when he visited the property. (R. p. 101, lines 11-16). The use of the gate and locks, both in reality and in theory, unreasonably interferes with Appellant's use of his property and his rite of passage to his property. It would also be unreasonable, if at some point in the future, subsequent purchasers (which could number 40+ landowners) all have to depart their vehicles each day to access their homes or land.¹ It would be extremely unreasonable and a burden of immense proportions if emergency vehicles could not reach a homeowner suffering from a stroke or heart attack, or if the gate locks were found to be improperly locked such that the landowner could not open them to take an injured child to the emergency room.

While landowners may protect their property, they may not do so when it creates an undue burden on other landowners. Landowners may not unreasonably burden other landowners with an interest in the property and the reasonableness of the impediment is to be determined on a case by case basis. *Judy v. Kennedy*, 398 S.C. 471, 728 S.E.2d 484 (2012); *Thomas v. Mitchell*, 287 S.C. 35, 336 S.E.2d 154 (1985). Here, the gate was re-erected or re-established after Appellant purchased his property in an effort to prohibit John Frick from developing his property. It was clear from the evidence that Defendant Fulmer, and his father before him, were not happy that Appellant was able to purchase the property in question and their plan was to limit Appellant's access, use and enjoyment of the property. (R. p. 94, line 15 – p. 95, line 8; R. p. 122, line 11 – p. 123, line 2; R. p. 135, lines 1-12). The gate and the locks were part of that plan and are an unreasonable

¹ The right of use in the road runs appurtenant to the land. There are no prohibitions on Appellant selling lots or parcels, regardless of their intended use, and other avenues exist for providing utilities, etc. If this were accomplished in the future, 40 homeowners would have to get out of their vehicle each morning and evening to unlock a gate to leave or reach their property. This would be an unreasonable burden.

burden that should not be allowed. This Court should reverse the lower court's finding that the Defendants may maintain the gate across the road in question.

IV. THE LOWER COURT ERRED IN FINDING THAT THE ROADWAY IN QUESTION WAS ONLY FOURTEEN FEET WIDE WHEN THE EVIDENCE CLEARLY SHOWS THE ROADWAY IS TWENTY FEET WIDE OR MORE.

Although Appellant asserts the roadway in question is a public road, if Appellant and any subsequent landowners are only entitled to an easement in the road, the roadway is much wider than determined by the Court. "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Townes Assoc. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976); *Rushing v. McKinney*, 370 S.C. 280, 633 S.E.2d 917 (Ct. App. 2006). In this instance, the trial court ignored the competent evidence, including Defendant Fulmer's own admissions, and made a clearly erroneous finding.

While the trial court indicates it found the testimony of Van Hoffman, a former employee of Defendant SCE&G, to be the most valuable in determining the width of the road, the court ignored the unchallenged visual evidence and testimony of Defendant Fulmer. The trial court further ignored the additional testimony of Mr. Hoffman himself, whereby he indicated the road had to be a minimum of 12 feet wide in the straightaways for log trucks and that the roadbed was widened in 1970 and again in 1990 by SCE&G. (R. p. 90, line 21 – p. 91, line 19; R. p. 92, lines 1-9; R. p. 103, lines 2-23). While the trier of fact is entitled to great deference in his or her findings, the lower court is not at liberty to simply ignore the clear, concise evidence presented.

Appellant testified that the road was 20 to 30 feet wide and Van Hoffman testified that the road was "much improved" in or around 1990. (R. p. 68, lines 11-20; R. p. 91, lines 14-19). Most telling is Defendant Joe Fulmer's testimony regarding the road width as follows:

A. On direct examination by his own attorney, Defendant Fulmer testified as follows:

Q: How wide is the road now as it goes through your property?"

A: "...it's nothing under 20 feet wide, except where the gate and stuff is..." (R. p. 123, lines 11-18).

B. Mr. Fulmer further testified that "Log trucks can get through there good" and that it was accurate to say the road was between 14 and 20 feet wide. (R. p. 123, lines 19-21).

C. Mr. Fulmer indicated the 14 foot wide gate does not cover the whole road bed and that the gate is at the most narrow part of the road. (R. p. 130, line 18 – p. 131, line 10).

Photographs offered into evidence show a roadway, not including ditches, that is 20 feet or more wide. (R. p. 173 - 174). Defendant Fulmer further testified that the road was wide enough for two cars to pass and that a fire truck could turn around. (R. p. 125, line 10 – p. 126, line 5). Evidence was also provided that 20 foot pipes run underneath the roadway, with the drivable surface extending the length of the pipes, and that SCE&G widened portions of the road when performing their logging operations. (R. p. 68, lines 11-20; R. p. 90, line 21 – p. 91, line 19; R. p. 92, lines 1-9; R. p. 103, lines 2-23).

The Court's finding that the roadway is 14 feet wide is not based upon the evidence presented at trial. One witness indicated that at some point, the roadway was 12 feet wide because that was the minimum needed for log trucks, but further stated that SCE&G had improved and widened the road substantially. This Court should reverse the trial court's finding and substitute a finding that the road in question is, at a minimum, 20 feet wide based upon the evidence presented at trial.

CONCLUSION

For the reasons set forth herein, this Court should reverse the trial court's denial of Respondent's Motion for Reconsideration and/or Motion to Alter and Amend. This Court should further grant the relief sought therein.

Respectfully Submitted

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge
Civil Action No. 2009-CP-36-415

RECEIVED

NOV 25 2014

SC Court of Appeals

John S. Frick,

Appellant,

v.

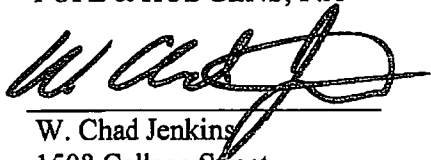
Keith Fulmer, Eleanor F. Bush,
Benny A. Bush, Joseph R. Childers,
Justin & Victoria Chadwick,
S.C. Electric & Gas, and Newberry County

Respondents.

CERTIFICATE OF COUNSEL

I, W. Chad Jenkins, Esquire, do hereby certify that the Appellant's
Final Brief complies with Rule 211(b).

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Respondents.

PROOF OF SERVICE

I certify that I have served Appellant's Final Brief on all Respondents by depositing a copy of same in the United States Mail, postage prepaid, on November 25, 2014, addressed to their attorneys of record, or them personally as follows:

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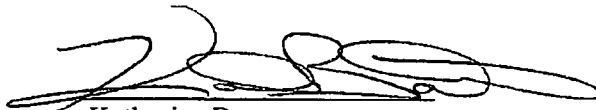
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A handwritten signature in black ink, appearing to read 'Katherine Barnett', with a horizontal line drawn underneath it.

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE LOWER COURT ERR IN FINDING THAT THE ROAD IN QUESTION WAS ABANDONED UNDER THE COMMON LAW AFTER LAKE MURRAY PERMANENTLY FLOODED THE ORIGINAL ROAD THAT ONCE CONNECTED TWO PUBLIC ROADS?**
- II. DID THE LOWER COURT ERR IN FINDING THAT THE GATE ON RESPONDENT FULMER'S PROPERTY DOES NOT UNREASONABLY INTERFERE WITH APPELLANT'S USE OF HIS PROPERTY SO LONG AS APPELLANT IS PROVIDED A KEY OR COMBINATION TO THE LOCK ON THE GATE?**
- III. DID THE LOWER COURT ERR IN FINDING THAT THE EASEMENT FOR THE ROAD IN QUESTION WAS 14 FEET WIDE?**

STATEMENT OF THE CASE

Appellant Frick filed a Summons and Complaint against Respondent Fulmer and other defendants seeking a preliminary injunction and declaratory judgment regarding the parties rights and responsibilities in a woods road in Newberry County, South Carolina, that begins at Wheeland School Road and traverses the properties of Respondent Fulmer and the other defendants until it reaches the property of Appellant identified as Newberry County TMS 645-8. A bench trial was held before the Honorable Frank R. Addy, Jr., in Laurens County on November 1, 2013. The Court issued an initial Form Order dated November 18, 2013, and then issued its Order of Final Judgment dated February 20, 2014, which was filed with the Newberry County Clerk of Court on February 24, 2014. The Order of Final Judgment found, *inter alia*, that the road in question was a private easement appurtenant, having been abandoned as a public road if it ever were a public road, and that the easement was ten (10) to twelve (12) feet in width, and that the gate currently on Respondent Fulmer's property may be locked provided that all parties have a key or combination to the lock.

Appellant Frick filed a Motion for Reconsideration and/or Motion to Alter and Amend on March 3, 2014, and following a hearing on May 23, 2014, the trial court issued its decision dated June 9, 2014, amending its Order to provide that the road in question provided a fourteen (14) foot wide easement while denying all other relief sought by Appellant Frick.

Appellant Frick filed a timely Notice of Intent to Appeal and subsequently filed Appellant's Initial Brief dated September 5, 2014.

STATEMENT OF FACTS

The ultimate issue before the Court is whether an unimproved road in Newberry County that begins at Wheeland School Road and runs through the properties of the Respondents (other than Newberry County) to the property of the Appellant on the shores of Lake Murray is a public road or a private easement for access and egress. The road in question was once part of a longer road that connected Wheeland School Road and Macedonia Church Road before it was flooded by Lake Murray in 1929-1930 making it impossible to traverse between those two public roads. (R. p. 71, lines 22-24; p. 76, lines 5-16; p. 132, lines 16-24; p. 151; p. 154; p. 155).

The relevant facts are set forth in the Findings of Facts in the Order of Final Judgment of the lower Court. Appellant takes issue with finding number 3, asserting that when Appellant purchased the property in 2003 "...it was unimpeded and the only gate was unnoticed due to it being open and overgrown with weeds to the point that it was easily overlooked." Evidence was presented that cables and/or gates have blocked the road since the 1950's. (R. p. 112, lines 6-25; p. 115, lines 2-14; p. 101, lines 1-6). In the early 1950's a fence blocked the entrance to the road along Wheeland School Road. (R. p. 118, lines 22-25). Appellant's predecessor in title, Champion Paper Company had cables or gates across the road on its property since the 1960's and there has been a gate or other obstruction on the Fulmer property since the 1970's. (R. p. 111, lines 21-25; p. 112, lines 1-25; p. 113, lines 1-23; p. 114, lines 1-18). When Appellant was given a key to the lock on the Fulmer property, he continued to complain about it and then pushed the gate over with his backhoe. (R. p. 74, lines 2-7). When SCE&G replaced the gate on the

road and tried to give Appellant a key, he told Van Hoffman, "I don't want a key, I want the gate down." (R. p. 172).

Appellant testified that there had been two occupied homes on the property with mail delivery, but Respondent Fulmer testified that there were no residents on the property or mail delivery since the 1950's. (R. p. 119, lines 24,25; p. 120, lines 1-14). Appellant testified that "...the road was utilized by Boy Scouts and others as access to the lake and camping sites," but acknowledged that only family or friends of the property owners used the road. (R. p. 77, lines 12-21). Fulmer testified that family and friends, including the Boy Scouts, were permitted to use the road for camping and recreational purposes, and that the chains and gates blocking the road were to keep trespassers out. (R. pp. 111-113, lines 21-25, 1-25, 1-23; p. 168, lines 8-20). Other than trespassers, there is no evidence that the road was ever used by the public after being flooded in 1929-1930.

Appellant testified that some of the property adjoining the road may have been in the South Carolina Wildlife Management Area program. Van Hoffman testified that SCE&G property may have been designated WMA lands in the past, but even if they were, they did not have to be accessed by a public road if accessible by boat, such as this property was. (R. pp. 130, 131, lines 13-25, 1-25).

Appellant testified that he was familiar with the property he purchased and that there could have been access problems at the time of his purchase (R. p. 51, lines 2-6; p. 79, lines 4-7); he relied entirely on the road in question being a public road and denied the need for an easement for access to his property at the time he purchased it. (R. p. 70, lines 7-20; p. 167).

Appellant challenged finding number 5 of the lower Court that the roadway was 10 to 12 feet wide, claiming "...the roadway was at least 20 feet wide, and wider in other spots, and that it ran 25 feet or more from 'ditch to ditch.'" There was testimony that the width of the road varied from 8 to 14 feet in most places to as much as 20 feet where necessary to accommodate heavy equipment needed to install transmission lines on SCE&G's right of way. (R. p. 102, lines 14-24; p. 103, lines 9-17; p. 119, lines 7-10; p. 121, lines 5-8; p. 123, lines 3-21). Following a hearing on Appellant's Motion to Reconsider, the lower Court modified its Order of Final Judgment and expanded the width of the easement appurtenant from 10-12 feet to 14 feet in a Form 4 Order dated June 9, 2014.

ARGUMENTS

I. The findings of fact and the conclusions of law of the lower Court are supported by the evidence of record and applicable law.

The Appellate Court must review the Order of the lower Court for errors of law and for evidence to support its findings of fact. Such a review will confirm that the findings of fact and the conclusions of law of the lower Court are fully supported by the evidence of record and applicable law.

II. The Court did not err in finding the road in question was abandoned under the common law after Lake Murray permanently flooded the original road that once connected two public roads.

The question of law before this Court is whether the abandonment of a public or neighborhood road must be accomplished by statute or whether the common law doctrine of abandonment remains applicable law. Appellant Frick argues that the failure of

Newberry County to close the road in question pursuant to S.C. Code of Laws Section 57-9-10 *et seq.* resulted in the two separated portions of the road having the same status as the original road, which had, prior to 1929-1930, connected two public roads, Wheeland School Road and Macedonia Church Road. The statutory provision for abandonment first appeared in the 1962 Code of Laws as Section 33-521 *et seq.*, 47-1327, and provides: "This chapter shall not be construed to repeal any other provisions of law but shall be cumulative thereto."

The Respondents rely on common law abandonment, and cases since the enactment of the statute confirm that the statutory process did not abrogate common law abandonment. Appellant has cited South Carolina DOT vs. Hinson Family Holdings, LLC, 361 S.C. 649, 606 S.E.2d 781 (2004). That case involved a summary judgment in a condemnation proceeding, with an issue being whether a road on the property (Watertown Road) was abandoned by the public. On review, the Court rejected the argument of SCDOT that the old Watertown Road had been abandoned when SCDOT opened a re-located road since the old road remained accessible to the public. *Id.* at 655, 606 S.E.2d at 783-84. The Supreme Court found no evidence of either a common law or statutory abandonment of what was admittedly a public road, finding "(t)he Watertown Road is an admittedly public road, although the record does not reveal whether it became public by dedication or through prescription or long-established use. It is undisputed that no interested person has instituted an action under the statutory process to effect an abandonment of old Watertown Road." And the Court concluded: "We affirm the circuit court's ruling old Watertown Road remains publicly accessible." *Id.* at 655, 656, 606

S.E.2d at 785. In the case before this Court, there is no evidence that the road in question remained accessible to the public after being flooded by Lake Murray.

Appellant also cites Hoogenboom v. City of Beaufort, 315 S.C. 306, 433 S.E.2d 875, (Ct. App. 1992), which is easily distinguished since in that case the Court focused on issues of title, not public use. In neither Hinson nor Hoogenboom did the Court address whether the statutory procedure for abandonment abrogated common law abandonment. S.C. Code Section 57-9-40 addresses that issue by providing: "This chapter shall not be construed to repeal any other provisions of law but shall be cumulative thereto."

Appellant also cites City of Myrtle Beach v. Parker, 260 S.C. 475, 486, 197 S.E.2d 290, 295 (1973), which holds: "(w)ith respect to the abandonment of a public, as opposed to a private easement [by common law], the following general principles of law seem to be firmly established: 'An abandonment occurs where the use for which the property is dedicated becomes impossible of execution, or where the object of the use for which the property is dedicated wholly fails.' Id. at 486, 197 S.E.2d at 296, citing 26 C.J.S. Dedication § 63 at 552. '...An easement created by dedication may be abandoned by unequivocal acts showing a clear intent to abandon. To constitute abandonment, the use for which the property is dedicated must become impossible of execution, or the object of the use must wholly fail. Generally, a mere misuser or nonuser does not constitute abandonment of land dedicated to public use.'" Id., citing 23 Am.Jur. 2d 57 Dedication § 66.

The City of Myrtle Beach Court found that the road in question was initially

dedicated to the City by a developer in 1937. Even after a bridge burned in the 1940's there was evidence of continued public use, and the City of Myrtle Beach paved a portion of the road and used it to access sewer facilities until a developer fenced off the part of the road in question for an amusement park between 1966 and 1970. The City brought an action in 1970 to determine its rights in the road, and the Developer claimed the City had abandoned the road. Id. at 477-83, 197 S.E.2d at 292-94. The Court held that the City of Myrtle Beach never abandoned the dedicated road, which "...in the controverted area has been and still was being used, at least to a limited extent, when this controversy arose for usual street purposes, and for other consistent lawful purposes." Id. at 487-88, 197 S.E.2d at 296.

The City of Myrtle Beach case is distinguished from the case before this Court since there is no evidence that the road in question was ever dedicated to public use or maintained by Newberry County and no evidence that there was any public use of the road in question after Lake Murray flooded the original road in 1929-1930, making it impossible to traverse the road from its original intersections with Macedonia Church Road and Wheeland School Road. As a result any public use of the road in question that may have existed before it was flooded by Lake Murray in 1929-1930 ceased and any use of the road as a public way became impossible of execution and wholly failed. See Id. at 486, 197 S.E.2d at 296, citing 26 C.J.S. Dedication § 63 at 552.

Appellant has also cited K & A Acquisition Group, LLC v. Island Pointe, LLC et alines, 383 S.C. 563, 682 S.E.2d 252 (2009), in which the Court found an abandonment had taken place and affirmed the applicability of the above principles of common law

abandonment that were cited in City of Myrtle Beach *supra*, negating the principle of law advanced by Appellant that common law abandonment was abrogated by statutory provisions of S.C. Code 57-9-10 *et seq.*, as the exclusive means of abandoning public roads. Id. at 563, 682 S.E.2d at 259, 260. There was no statutory abandonment used by SCDOT in K & A Acquisition Group, LLC, and the Court also noted, "...once the public easement on the...road was abandoned, we find it could not be "rededicated" as contended by K & A through nominal use by two or three...landowners or the placement of utilities during the 1970's or 1980's." Id. at 563, 682 S.E.2d at 260.

In both K & A Acquisition Group, LLC, and City of Myrtle Beach, the roads in question had been dedicated to a government entity. The facts and holding in the above cases are distinguishable from the present case, but both cases affirm that common law abandonment is still recognized law in South Carolina. In the case before this Court there was no evidence that the road in question was ever dedicated to Newberry County or that the County ever maintained it as a public road, and the County did not dispute the abandonment of the road in question.

Appellant argues that an improved segment of the original road on the other side of Lake Murray that was apparently maintained by Newberry County in a limited capacity is evidence that the road in question on Respondent Fulmer's side of the Lake is a public road. While named "Seibert Road", this marginally improved segment is a single-lane, milled-asphalt driveway for two private residences that extends approximately 500 feet from Macedonia Church Road to a gate that blocks further public access to the old roadbed that runs into the Lake. (R. p. 127, lines 6-25; p. 128, lines 1-

25; p. 129, lines 1-23). There are no county records of the original road being a public road before 1929, and no county records or any other evidence that since 1929 the road in question on Appellant's side of the Lake was or is a public road. (R. p. 87, lines 16-25; p. 88, lines 1-25; p. 129, lines 1-23). Whether any part of the original road on the opposite side of the Lake is now a public or publically maintained road is not relevant to determining the status of the road in question because the two roads have been separated since Lake Murray was created in 1929-1930.

Appellant further argues on p. 8 of his brief that the road in question "...was utilized as late as the 1950's for mail delivery and access to two homes," and "...was more recently used by the public via the Boy Scouts and other groups using it to access camping areas." Keith Fulmer testified that since 1951, when his father purchased the property that is now his, there were no residents or mail service on the property and no county maintenance of the road. (R. p. 120, lines 5-25). He recalled that the road at that time was blocked by a barbed wire fence along Wheeland School Road. (R. p. 118, lines 22-25). There was extensive testimony of Keith Fulmer, Van Hoffman and Randy Summer that since the 1960's there were cables or gates on the road as it entered the Champion Paper Company property (now Appellant's property) and later in the 1970's on the Fulmer property to keep out trespassers. (R. p. 111, lines 21-25; p. 112, lines 1-25; p. 113, lines 1-23; p. 114, lines 1-18; p. 115, lines 2-14; p. 135, lines 8-25; p. 101, lines 1-6). Thereafter, family, friends and neighbors had permission to use the road for hunting and fishing purposes, and there was no evidence of public use of the road, other than by trespassers. (R. p. 126, lines 6-10; p. 77, lines 12-25; p. 78, lines 1-2). Even if there were

residents on the property and mail service and neighbors who used the road for recreational purposes with the consent of the property owners, those uses are consistent with the road being a private rather than a public road.

It is uncertain whether any part of the land abutting the road was part of a Wildlife Management Area, but there was testimony that WMA land did not require access by public road if it could be accessed by Lake Murray, which portions of the abutting land are. (R. p. 107, lines 3-25, p. 108, lines 1-25).

Van Hoffman, Randy Summers and Keith Fulmer all testified to personal knowledge of obstructions to the public use of the road in question by chains and different types of gates across the road since the 1970's, (R. p. 111, lines 21-25; p. 112, lines 1-25; p. 113, lines 1-23; p. 114, lines 1-18; p. 115, lines 2-14; p. 101, lines 1-6), and there was no corroborating evidence of any public use prior to that time to support the allegations of the Appellant. The owners of property abutting the road did not intend to rededicate the road to public use, if it ever were a public road.

If the road in question was ever a public or neighborhood road, then the impossibility to use it to travel between the two public roads it once connected and its non-use by the public since it was flooded by Lake Murray in 1929-1930 constituted the abandonment of the road as a public road under the long-standing principles of common law affirmed in the cases cited above. See K & A Acquisition Group, LLC v. Island Pointe, LLC et alines, 383 S.C. 563, 682 S.E.2d 252, 259, 260 (2009); City of Myrtle Beach v. Parker, 260 S.C. 475, 197 S.E.2d 290, 295, 296 (1973).

The statutory process for abandonment that first appeared in the 1962 S.C. Code

of Laws did not abrogate common law abandonment as it applied to public roads. The lower Court's conclusion of law that the road in question, if ever a public road, was abandoned, is fully supported by the facts and applicable law cited above.

While the lower Court found that the road in question was not a public road, it found that Appellant had an easement appurtenant over the road for access and egress to his property from Wheeland School Road. It should be noted that Appellant did not appeal the findings of fact and conclusion of law that the road in question was never rededicated to the public use.

III. The Court did not err in finding that the gate on Respondent Fulmer's property does not unreasonably interfere with Appellant's use of his property so long as Appellant is provided a key or combination to the lock on the gate.

Appellant argues that a gate is not necessary to protect the property of Respondents from trespassers and that issues of trespassing were a "red herring." (Appellant's Brief at p. 11). Respondent Fulmer testified that public trespassing on the road was a problem, with people dumping debris and even trying to grow marijuana on the property. (R. p. 112, lines 6-25, p. 113, lines 1-23; p. 116, lines 12-23; p. 117, lines 2-17). Van Hoffman and Randy Summer testified that trespassing was common on similar private roads around Lake Murray. Mr. Hoffman sent a letter dated April 13, 2006, to all property owners defining the easement on the road and seeking their approval for a gate to keep out trespassers, and only Appellant Frick objected to the gate. (R. pp. 160-164; p. 96, lines 17-22, p. 97, lines 1-25; p. 98, lines 1-21; p. 105, lines 10-25; p. 106, lines 1-7).

Evidence of trespassing and dumping justifies a locked gate across the road to

protect the property, and the gate does not unreasonably interfere with Appellant's use of the road so long as he is given a key or combination to the lock. See Brown v Gaskins, 284 S.C. 30, 33, 324 S.E.2d 639 (Ct. App. 1984); Thomas v. Mitchell, 287 S.C. 35, 336 S.E.2d 154 (Ct. App. 1985); Judy v. Kennedy, 398 S.C. 491, 728 S.E. 2d 484 (Ct. App. 2012). These cases are relied upon in the Order of the lower Court, which properly applied the law to the facts. While Appellant has not disputed the applicability of the above cases, he has questioned the finding of the Court that the locked gate was reasonable under the circumstances. (Appellant's Brief at pp. 11-13).

Appellant had earlier complained of trouble with keys provided him and had pushed over the gate with his backhoe. (R. p. 74, lines 2-7). Appellant rejected the attempt of Van Hoffman of SCE&G to resolve the issue with a letter that defined the easement and sought the approval of the property owners for a gate to keep out trespassers. (R. pp. 160-164; p. 96, lines 17-25; p. 97, lines 1-25; p. 98, lines 10-21; p. 105, lines 10-25; p. 106, lines 1-4). Appellant told Hoffman: "I don't want a key. I want the gate down." (R. p. 172). At trial, Appellant testified that he did not need an easement over the road since it was a public road. (R. p. 70, lines 7-20).

The evidence and applicable law support the findings of the lower Court that the road was a private road and that Appellant had an easement for access and egress over the road, and that the gate was a reasonable burden on Appellant and others with an easement over the road to protect the property from trespassers. "Whether the owner of land over which a right of way runs is justified in erecting a locked gate across it depends upon the circumstances. No hard and fast rule may be prescribed. Each case must be controlled,

in large measure, by the particular facts and circumstances of the case.” Judy v. Kennedy, 398 S.C. 471, 728 S.E.2d 484, 486, 487 (2012), citing Thomas v. Mitchell, 287 S.C. 35, 39, 336 S.E.2d 154 (Ct. App. 1985). There is no evidence of any residents or development on Appellant’s property that would make the gate an unreasonable burden on Appellant. Should any future development make the gate an unreasonable burden on Appellant or any of the other property owners who rely on the road for access and egress, then the gate may need to be removed. Meanwhile, the gate remains a reasonable burden on Appellant and the other property owners to protect their property.

The findings of the lower Court and its conclusion of law that the locked gate does not unreasonably interfere with Appellant’s use of his property so long as he is provided a key or combination to the lock on the gate is fully supported by the evidence and the law.

IV. The Court did not err in finding that the easement for the road in question was 14 feet wide.

Appellant has an easement appurtenant for access and egress to his property over the road in question, and the easement is the width of the original road and cannot be widened without the approval of the owners of those lands encumbered by the easement. Andrews v. McDade, 201 S.C. 24, 21 S.E.2d 202 (1942), Hardin v. South Carolina Dept. Of Transp., 371 S.C. 598, 606, 641 S.E.2d 437, 442 (2007); Rhett v. Gray, 736 S.E.2d 873 at 881 (S.C. Ct.App. 2012, reh’g denied Jan. 25, 2013). The testimony of Keith Fulmer, Van Hoffman and Randy Summer support the width of the original road in question as being no more than 14 feet, although portions of the road were widened by

SCE&G to 20 feet to accommodate logging trucks and other heavy equipment. (R. p. 119, lines 7-10; p. 121, lines 5-8; p. 102, lines 14-24; p. 103, lines 9-17).

There is no evidence that any owners of the property encumbered by the easement agreed to any permanent widening of the easement beyond its original width of 10-14 feet. The lower Court cited Rhett in holding that such an easement is limited to a use "...as little burdensome to the servient estate as possible for the use contemplated," and that "...neither Mr. Frick, nor any of the other landowner Defendants may expand or alter the scope of the easement as set forth herein without the consent of all the landowning parties."

At a hearing on Appellant's Motion to Reconsider the Order, the lower Court modified its Order to widen the easement from 10-12 feet to 14 feet. There is no basis in fact or law to widen the easement to more than 14 feet.

CONCLUSION

Appellant appealed the conclusion of law that the road in question had been abandoned, and did not appeal the conclusion of law that the road has not been rededicated to the public use. The evidence considered by the Court at trial, including live testimony, depositions and exhibits, and the cases and statutes cited by the Court, fully support the findings of fact and conclusions of law in the Order of the lower Court, so that Appellant's appeal should be dismissed and the Order of the lower Court affirmed.

(signature page attached)

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IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
No. 2014-001472

Appeal from Newberry County
Court of Common Pleas

Frank R. Addy, Circuit Court Judge
Civil Action No. 2009-CP-36-415

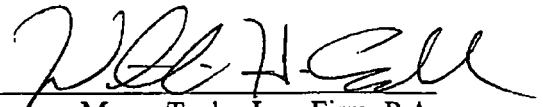
John S. Frick, Appellant,

v.

Keith Fulmer, Eleanor F. Bush, Benny A. Bush, Joseph R. Childers,
Justin Chadwick, Victoria Chadwick, S.C. Electric & Gas, and Newberry County,
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CERTIFICATE OF COUNSEL

I, William H. Edwards, Esquire, do hereby certify that the Respondent's Final Brief
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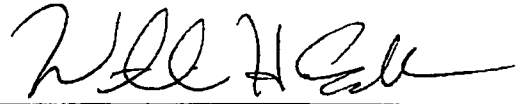
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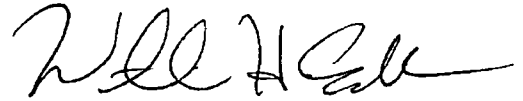
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ARGUMENT

I. CONTRARY TO RESPONDENT FULMER'S CONTENTIONS IN HIS INITIAL BRIEF, THE ROAD IN QUESTION HAS NOT BEEN CLOSED PURSUANT TO STATUTORY PROCEDURES OR VIA WAY OR ABANDONMENT

In his Initial Brief, Respondent Fulmer basically concedes that Newberry County, nor any other governmental agency, followed any of the statutory procedures for the closing of a road as presented in South Carolina Code §57-9-10 *et seq.* Therefore, the questions left to determine are whether or not a prior alleged abandonment of the road would negate the requirements of South Carolina Code §57-9-10 *et seq.* and, if so, had the road been previously abandoned? The answer to both questions is no.

When Appellant Frick purchased this land to which the roadway travels, the road was unimpeded and easily traveled. (R. p. 51, line 2 – p. 52, line 15). The road has historically been shown on general highway maps and continues to be shown on more recent road maps, including a 2006 road atlas. (R. pp. 148 – 151; Pl. Ex. 2 Not capable of Reduction for Inclusion in the Record). The road has been utilized by boy scouts, land owners and others to access the lake and homes which were previously located along the roadway. (R. p. 59, line 25 – p. 61, line 8). Furthermore, Newberry County still maintains a portion of this road, now named Seibert Road. (R. p. 83, line 1 – p. 84, line 20; R. p. 157). It is clear that the roadway has not been abandoned to this very day.

The discontinuance of a road does not equal abandonment. *Wilson v. Greenville County*, 110 S.C. 321, 96 S.E. 301 (1918). Abandonment must be shown by clear and unequivocal evidence. *Carolina Land Company v. Bland*, 265 S.C. 98, 217 S.E.2d 16 (1975).

Respondent argues that *K & A Acquisition Group v. Island Pointe, LLC*, 383 S.C. 563, 682 S.E.2d 252 (2009) supports their position. However, a close reading of this case indicates that the South Carolina Supreme Court found an old road was abandoned only after the Department of Transportation had built a new replacement road and actually deeded portions of the road to private landowners. In this case, the roadway was the only access to at least two homes that were formerly located along the roadway and continues to be the only vehicle access to game management lands, the Appellant's property, and any future potential landowners along the roadway. Furthermore, the road still exists in part and there has been no affirmative action taken by the South Carolina Department of Transportation, Newberry County, or any other governmental entity to close any portion of this road.

The roadway has not been abandoned. Even assuming *arguendo* that it was abandoned pursuant to common law, the county must still follow the statutory procedure as outlined in South Carolina Code §57-9-10 *et seq.* Whether the roadway is open or closed, the fact that it was a county road requires the statutory procedures to be followed.

**II. THERE IS NO EVIDENCE TO SUPPORT RESPONDENT
FULMER'S CONTENTIONS THAT THE GATE ACROSS THE
ROADWAY IS NECESSARY AND THE GATE IS AN UNDUE
BURDEN UPON APPELLANT AND ANY SUCCESSOR
LANDOWNERS**

Respondent Fulmer is correct in his assertion that whether or not a locked gate across a roadway is reasonable or justified must be determined by the particular facts and circumstances of each case. *Judy v. Kennedy*, 398 S.C. 471, 728 S.E.2d 484 (2012).

However, in this instance there is no evidence that the gate was needed given Respondent Fulmer's clear assertions that any incidents or trespassing or littering were "a thing of the

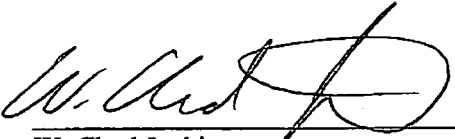
past” (R. p. 132, line 25 – p. 133, line 18). Testimony that trespassing and vandalism may occur on other SCE&G properties is simply irrelevant. Van Hoffman even testified the gate was always open. (R. p. 101, lines 11-16). Furthermore, Appellant Frick and Van Hoffman both testified about difficulties which have arisen with the gate and any locking mechanism which has been utilized. The most telling point is that at the beginning of this litigation, in 2009, the gate was opened and remained opened through the time of the trial in 2013. For four years, there were no incidences of trespassing or vandalism. (R. p. 132, line 25 – p. 133, line 18). There is simply no need for the gate and it is an undue burden upon the Appellant.

CONCLUSION

This Court should reverse the Circuit Court’s Order and find that the roadway in question was and remains a County road. Furthermore, any impediments, including any gates, should be removed from the roadway in question. Appellant relies upon and incorporates all arguments contained in his Initial Brief on these issues and all other issues.

Respectfully Submitted

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December 22, 2014

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge
Civil Action No. 2009-CP-36-415

John S. Frick,

Appellant,

v.

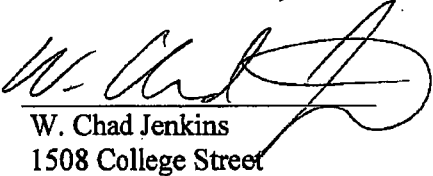
Keith Fulmer, Eleanor F. Bush,
Benny A. Bush, Joseph R. Childers,
Justin & Victoria Chadwick,
S.C. Electric & Gas, and Newberry County

Respondents.

CERTIFICATE OF COUNSEL

I, W. Chad Jenkins, Esquire, do hereby certify that the Appellant's
Final Reply Brief complies with Rule 211(b).

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December 22, 2014

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
No. 2014-001472

Appeal from Newberry County
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge
Civil Action No. 2009-CP-36-415

John S. Frick,

Appellant,

v.

Keith Fulmer, Eleanor F. Bush,
Benny A. Bush, Joseph R. Childers,
Justin Chadwick, Victoria Chadwick,
S.C. Electric & Gas, and Newberry County

Respondents.

RECORD ON APPEAL

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SC Court of Appeals

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2009CP3600415

John S Frick vs. Keith Fulmer

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; ☐ Statement of Judgment by the Court:

Order

Dated at Newberry, South Carolina, this 1st day of September 2010.

Court Reporter:

S/Eugene C. Griffith, Jr.

PRESIDING JUDGE - Eugene C. Griffith, Jr.

This judgment was entered on the 2nd day of September 2010, and a copy mailed first class this 3rd day of September 2010, to attorneys of record or to parties (when appearing pro se) as follows:

William Chadwick Jenkins Pope & Hudgens, PA
P.O. Box 190 Newberry, SC 29108

William H Edwards William H. Edwards Law Firm
PO BOX 5709 West Columbia, SC 29171
Rudolph C. Barnes Jr Attorney at Law 156 Barnes
Trail Little Mountain, SC 29075

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

S/Jackie S. Bowers (BJB)

Jackie S Bowers - Clerk of Court

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF NEWBERRY	)	C/A No. 2009-CP-36- 415
	)	
John S. Frick,	)	
	)	
Plaintiff,	)	
	)	
	)	ORDER
vs.	)	
	)	
	)	
Keith Fulmer,	)	
	)	
Defendant.	)	

This matter comes before the Court upon Plaintiff's Motion for a Preliminary Injunction and Defendant's Motion to Dismiss. Present at the hearing were Plaintiff and his attorney, W. Chad Jenkins, Esquire and Defendant's attorney, Rudolph C. Barnes, Jr., Esquire.

This Court has reviewed the pleadings filed in this matter and has carefully considered same along with arguments of counsel. Based thereon, this Court finds as follows:

1. Plaintiff's Motion for Preliminary Injunction: Plaintiff's Motion for a Preliminary Injunction is hereby granted by consent of both parties. Upon filing of the Summons and Complaint, the defendant removed any obstructions from the roadway and has agreed to do so until such time as this litigation is concluded.

2. Defendant's Motion to Dismiss: At the hearing, the defendant's attorney indicated that they do not wish for the Complaint to be dismissed in this matter; but simply want the surrounding land owners and/or the County of Newberry added as parties due to the fact that they have an interest in the relief sought by the plaintiff in this matter. Plaintiff argues that the other land owners have not interfered with or attempted to interfere with his use of the roadway in question and that the defendant, if he wishes, can name the other land owners

as parties.

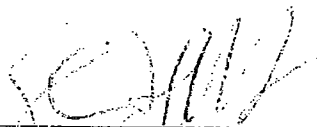
This Court finds that Eleanor and Vinnie Bush, Joseph R. Childers, and S.C. Electric and Gas are indispensable parties to the Declaratory Judgment action. Furthermore, if the plaintiff contends that the roadway in question is a public road, Newbery County must be added as a party. Due to defendant's Motion to Dismiss, the plaintiff shall have thirty (30) days from the entry of this Order to amend his Complaint to add the necessary parties. No Motion to Amend is necessary.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion for Temporary Injunction is granted via consent of the parties.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion to Dismiss is denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff shall, within thirty (30) days of the date of this Order, file an amended complaint naming all land owners affected by the alleged roadway in this matter.

IT IS SO ORDERED.



Hon. Eugene C. Griffith
8th Circuit Court Judge

September 18, 2010

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER **2009CP3600415**

John S Frick

Keith Fulmer
Benny A Bush
S C Electric & Gas
Justin Chadwick

Eleanor F Bush
Joseph R Childers
Newberry County
Victoria Chadwick

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (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. ☐ See Page 2 for additional information.
- ☐ **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:
Order of Final Judgment

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

S/ Frank R. Addy, Jr.

Circuit Court Judge

CPFORM4Cm

SCCA SCRPC Form 4C (Revised 3/2013)

2159

Judge Code

02/20/2014

Date

For Clerk of Court Office Use Only

This judgment was entered on **February 24, 2014**, and a copy mailed first class or placed in the appropriate attorney's box on **February 24, 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

William Chadwick Jenkins PO Box 190 Newberry, SC
29108

William H. Edwards PO Box 5709 West Columbia, SC
29171

Rudolph C. Barnes Jr. 156 Barnes Trail Little Mountain, SC
29075

Austin J. Tothacer Jr. PO Box 156 Newberry, SC 29108

Jay Evan Bressler 220 Operation Way Mail Code C222
Cayce, SC 29033

Eleanor F Bush 1714 Nursery Rd Little
Mountain, SC 29075

Benny A Bush 1714 Nursery Rd Little
Mountain, SC 29075

Joseph R Childers 1630 Wheeland
School Rd Little Mountain, SC 29075

Justin Chadwick 1622
Wheeland School Rd Little Mountain, SC 29075

Victoria
Chadwick 1622 Wheeland School Rd Little Mountain, SC
29075

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Jackie S. Bowers (mwm)

Jackie S Bowers - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

John S. Frick,

Plaintiff,

vs.

Keith Fulmer, Eleanor F. Bush,
Benny A. Bush, Joseph R. Childers,
S.C. Electric and Gas, Newberry County,
Justin Chadwick, and Victoria Chadwick,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE EIGHTH CIRCUIT

C/A #2009-CP-36-00415

ORDER OF FINAL JUDGMENT

FILED
NEWBERRY COUNTY
2014 FEB 24 AM 10 19
JACKIE S. BOWERS
CLERK OF COURT

This matter came before the Court by agreement of the parties on Friday, November 1, 2013 on a bench trial. Present at the trial were W. Chad Jenkins, Esquire for the Plaintiff John S. Frick, William H. Edwards, Esquire and Rudolph C. Barnes, Jr., Esquire for the Defendant Keith Fulmer, Jay E. Bressler, Esquire for the Defendant SCE&G, and Austin J. Tothacre, Esquire for the Defendant Newberry County. The other Defendants are in default and were not present or represented at the trial.

The ultimate issue before the Court is whether an unimproved road in Newberry County that begins at Wheeland School Road and runs through the properties of the Defendants (with the exception of Newberry County) to the property of the Plaintiff and terminates at Lake Murray is a public road or a private easement for access and egress. The road in question was once part of a road that connected Wheeland School Road with Macedonia Church Road and was flooded in 1930 with the creation of Lake Murray so that it no longer connected the two public roads. The Court holds that the road in question was abandoned as a public or neighborhood road and is now a private easement for the Plaintiff and all the Defendants except for Newberry County.

FINDINGS OF FACT

Based on the testimony and evidence presented, I find the following facts:

1. The road in question was once part of a neighborhood road that connected two public roads, Wheeland School Road and Macedonia Church Road in the Little Mountain community of Newberry County. The road runs south from Wheeland School Road and passes in order through properties now owned by Defendants Chadwick, Childers, Bush, Fulmer and SCE&G and then passes onto Plaintiff's property.
2. The road in question was permanently separated from the remaining part of the neighborhood road when Lake Murray flooded the original road in 1930 and made it impossible to travel the original road from Wheeland School Road to Macedonia Church Road.
3. Plaintiff presented anecdotal evidence of two (2) homes on the road being accessed via the roadway, as well as mail delivery to those homes, prior to the 1950's.¹ Testimony was also presented concerning Boy Scout troops periodically using the road to access natural areas. There were also isolated incidents of trespassers, and the presence of cables and/or gates at various locations across the road since the 1950's negates any intent of the owners to dedicate the road to public use. As early as the 1950's, the predecessors in title to Defendants Chadwick had erected an obstruction across the road on their property to prevent cattle from getting off their property. As early as 1970's, both the Defendant Fulmer and Plaintiff's predecessor in title, Champion Paper Company, erected cables or gates across the road on their property. A gate across the road on Defendant Fulmer's property has been present since at least the early 1980's. At times, the gate was in a questionable state of repair, and Plaintiff maintained that he was

¹ Defendant Fulmer contests this assertion and maintains the homes were vacant. The court is aware that Mr. Fulmer is older than Mr. Frick, and accordingly, Mr. Fulmer may possess a broader historical knowledge of the roadway's usage than Plaintiff.

denied access to his property after purchasing the property, although Defendants maintain that Plaintiff was offered a key to the gate, which he refused to accept. No one has lived along the road in question since at least the 1950's.

4. There was no evidence of public maintenance of the road by Newberry County since 1930. Maintenance of the road has been provided by landowners for access and egress in building and maintaining transmission lines, periodic personal use of the property by the private landowners, and for logging operations. The road has never been paved and has never been used to provide utilities to the properties of any of the parties or their predecessors in title. Defendant Newberry County does not own any property affected by the road in question and has no rights in or obligations associated with the road in question.

5. The remaining part of the original road that runs from Wheeland School Road to Lake Murray is not a neighborhood or public road but a woods road approximately ten (10) to twelve (12) feet in width and since 1930 has served the Plaintiff and Defendants and their predecessors in title as adjoining landowners as a private easement appurtenant for access and egress.

6. Plaintiff Frick purchased a block-shaped tract (TMS #645-9) on or about June 13, 2003. This tract adjoins a peninsula-shaped tract (TMS #645-8) which Plaintiff Frick purchased on or about May 19, 2003. As part of the resolution of another lawsuit in 2006, Plaintiff Frick purchased a sixty-six (66) foot wide strip of land connecting the block-shaped tract to a public road known as Wheeland Road. Though the two properties adjoin, they are separated by a creek, which prevents vehicular access from the peninsula-shaped tract to Wheeland Road by way of the sixty-six (66) foot wide strip of land.

7. Some Defendants have reported encounters with trespassers along the road. Instances of vandalism, illegal hunting, and marijuana cultivation have also taken place in years past.

CONCLUSIONS OF LAW

Based on the testimony and evidence presented and the above findings of fact, I conclude as follows:

1. The road in question was abandoned under the common law after Lake Murray permanently flooded the original road that once connected two public roads. The statutory provision for the abandonment or closing of a public road does not abrogate the common law relating to abandonment. See S.C. Code §§ 57-9-10 and, 57-9-40 (1976). Common law abandonment of a public road is still recognized. See *id.* and City of Myrtle Beach v. Parker, 260 S.C. 475 (1973). Common law abandonment is satisfied by "[nonuses] by the public for a long period of time with the intention to abandon." K & A Acquisition Group, LLC v. Island Pointe, LLC, 383 S.C. 563, ___, 683 S.E.2d 252, 259 (2009). A clear intent to abandon must be established. The intent to abandon requires that the public use of the property must become impossible or the object of that use must totally fail. City of Myrtle Beach v. Parker, 260 S.C. 475, 486, 197 S.E. 2d 290 (1973). The public use of the road in question became impossible and totally failed when Lake Murray flooded the original road in 1930 and there was "nonuse by the public" for more than eighty (80) years, so that the requirements of common law abandonment have been met by clear and convincing evidence. There is no evidence on record to overcome the public's intent to abandon. There is no evidence on record of Newberry County maintaining the road in any meaningful way since 1930. Any maintenance to the road has apparently been provided by the landowners whose property abuts the road.

2. The road in question has not been rededicated to the public use. Aside from isolated incident of trespassing, there was no credible evidence of any public maintenance or any public use of the road in question since it has only been used by property owners and their invitees since



1930; accordingly, the road has not been rededicated to public use. A landowner must "express in a positive and unmistakable manner the intention to dedicate his property to public use," followed by an "express or implied public acceptance of the property offered for dedication." Mack v. Edens, 320 S.C. 236, 239, 464 S.E.2d 124, 126 (Ct. App. 1995). For the public to accept a dedicated roadway, there must be evidence that the general public began using the road. Acceptance and/or the existence of a public way are not proven where the road is used merely by a limited class of people, such as abutting landowners and their licensees. In Burrell v. Kirkland, the court noted "...the route must be used by the public generally and not by particular individuals. In other words, the use must not be by a limited community or class of people." 242 S.C. 201, 208, 130 S.E.2d 470, 473 (1963). Except for occasional trespassers, the road in question has been used only by a limited class of people: the landowners, licensees, family and friends. "Permissive, sporadic, and recreational use" of a roadway across private property by the public is not sufficient to overcome the burden of "strict, cogent, and convincing" proof required to demonstrate that the owner intended to dedicate the road to public use. *Id.* Therefore the occasional use of the road with the express or implied permission of adjoining landowners did not establish intent to rededicate the road to the public after it was abandoned in light of the obvious intent of the landowners to prevent public access with cables and gates. Based on the findings of fact there has been neither a rededication of the road to public use nor the acceptance of the road for public use.

3. As adjoining landowners the Plaintiff and Defendants have an easement appurtenant over the woods road that is ten (10) to twelve (12) feet in width for access and egress. "In the event of the abandonment of a public highway, title thereto to the center of the road remains vested in the abutting property owners on either side." Andrews v. McDade, 201 S.C. 24, 21



S.E.2d 202 (1942). Ownership of the road was transferred to the predecessors in title of the Plaintiff and Defendants as adjoining landowners when the road was abandoned. In South Carolina, a landowner whose property "does not abut any public road" is granted an easement over neighboring properties if it is necessary to access a public road. Hardin v. South Carolina Dept. of Transp., 371 S.C. 598, 606, 641 S.E.2d 437, 442 (2007). Although Plaintiff does own an adjoining tract which has access to a public road, there is a creek that divides the two tracts, severely burdening the peninsula-shaped tract's access to a public roadway. Accordingly, the Court finds that the Plaintiff has a right to use the road in question due to the necessity to access a public roadway from the peninsula-shaped tract. But, an easement is limited to a use "...as little burdensome to the servient estate as possible for the use contemplated." Rhett v. Gray, 736 S.E. 2d 873, at 881 (S.C. Ct.App. 2012, reh'g denied Jan. 25, 2013). The woods road in question traverses the properties of the Plaintiff and Defendants, providing them access to a public road. After the original road was flooded by Lake Murray in 1930 and abandoned as a public road, all landowners abutting the road in question, including Plaintiff, acquired title to the center of the woods road on their property and an easement appurtenant that is ten (10) to twelve (12) feet in width in and along the road in question as it traverses other landowners' properties for access and egress to Wheeland School Road.

Neither Mr. Frick, nor any of the landowner Defendants may expand or alter the scope of the easement as set forth herein without the consent of all the landowning parties.

[T]he owner of the easement cannot materially increase the burden of the servient estate or impose thereon a new and additional burden. Although to the extent of the easement, the rights of the easement owner are paramount to those of the landowner, the easement owner's rights are not absolute but are limited, so the owners of the easement and the servient tenement may have reasonable enjoyment. The owner of an easement has all rights incident or necessary to its proper enjoyment, but nothing more.

Id. As such, Plaintiff and any of the landowner Defendants have only the right, absent the consent of all landowning parties, to maintain the road in good, passable condition for motor vehicles. This right, however, does not extend to paving, widening or utilizing the road for utilities.

4. The gate to the road on Defendant Fulmer's property does not unreasonably interfere with the Plaintiff's use of his property so long as the Plaintiff is provided a key or combination to the lock on the gate. An easement that grants one landowner the privilege to cross the property of another does not extinguish the other landowner's right of self-preservation. The owner of the servient estate may erect a locked gate across the easement depending on the circumstances of the case. Defendants agreed to keep the gate open during the pendency of this case and not close it without the consent of all affected landowners, but the gate can be closed if necessary to protect the property rights of the Defendants from public abuse so long as it meets the following criteria:

1. It does not "unreasonably interfere with the right of passage of the dominant estate;"
2. It is "necessary for the preservation of the servient estate;" and
3. It is "necessary for the use of the servient estate."

Brown v. Gaskins, 284 S.C. 30, 33, 324 S.E.2d 639, 640 (Ct. App. 1997). See also, Thomas v. Mitchell, 287 S.C. 35, 336 S.E.2d 154 (Ct. App. 1985); and Judy v. Kennedy, 398 S.C. 471, 728 S.E.2d 484 (Ct. App. 2012).

Though the gate may be an inconvenience for Mr. Frick, it is not an unreasonable interference with his use of the easement when balanced against the prevention of public trespass and illegal activity on the servient estates of the Defendants Fulmer and SCE&G. The Court of Appeals has held that maintaining a locked gate across the course of an easement is justified

AM

when instances of trespass have been reported by the owner of the servient estate. Brown v. Gaskins, 284 S.C. 30, 33, 324 S.E.2d 639, 640 (Ct. App. 1997). In Brown, the Court found that a locked gate blocking an easement on the servient estate was justified where the servient estate suffered trespassers, vandalism, littering and theft. 284 S.C. at 32, 324 S.E.2d at 640. In Thomas v. Mitchell, 287 S.C. 35, 336 S.E.2d 154 at 155 (Ct. App. 1985), the Court found that a locked cable erected over an easement on the servient estate was necessary for the efficient use of the servient estate and did not impose an unreasonable burden on the dominant estate's use of the easement where the servient estate had suffered trespassers, night hunters and vandals and where the dominant estate owner did not live on the property and had a locked cable across the easement as it entered his property. In Judy v. Kennedy, *supra*, the servient estate had fewer problems with trespassers than in Brown or Thomas, but the Court held that the owner of the servient estate was entitled to maintain a locked gate across the easement without unduly burdening the dominant estate so long as the dominant estate owner was provided with a means to open the gate.

The Defendants Fulmer and SCE&G have the right to protect their property as servient estates from trespassers, litter and criminal activity with a locked gate across the easement so long as the Plaintiff and any others whose easement is blocked by the gate are provided the means to unlock the gate.

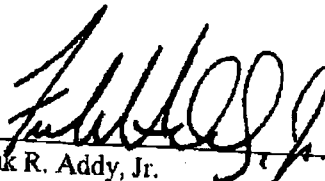
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the road running from Wheeland School Road through the property of the landowning Defendants to the property of the Plaintiff is a private easement appurtenant, having been abandoned as a public road, assuming for the moment that it was ever a public road; that the Plaintiff and the landowning Defendants each hold title to the center of the road for the length it crosses their respective



properties; that Plaintiff and the landowning Defendants have a ten (10) to twelve (12) foot easement appurtenant to, in, along and across this road for egress and ingress to Wheeland School Road; that Plaintiff shall be allowed to use the road for his and his licensees' egress and ingress to his otherwise landlocked tract; that no party and no parties' successor in interest may, without the consent of all landowning parties, expand the scope of this easement and may not improve, widen, run utilities or otherwise materially increase the use of the road and/or the associated burden on the servient tenements; and that the gate currently on Defendant Fulmer's property may be locked provided all parties have a key or combination to the lock.

Counsel for Defendant Fulmer shall ensure that a copy of this order is indexed in the public records for Newberry County in such a way that any subsequent, prospective purchaser of real estate abutting the roadway in question is put on notice of this court's holding.

IT IS SO ORDERED.



Frank R. Addy, Jr.
Judge, Court of Common Pleas
Eighth Judicial Circuit

February 20, 2014
Greenwood, South Carolina

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2009-CP-36-00415

John S. Frick

Keith Fulmer

PLAINTIFF(S)

DEFENDANT(S)

Submitted by	Attorney for Plaintiff	☐
JEORF	Attorney for Defendant	☐
	Self-represented Plaintiff	☐
	Self-represented Defendant	☐

Disposition Type (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:

Currently before the court is Plaintiff's motion to reconsider this court's order dated February 20, 2014 and filed February 24, 2014. Having reviewed all relevant materials, including the transcript of the bench trial, the court finds as follows. All previous rulings are upheld, with the exception of the width of the easement granted to Plaintiff and any subsequent landowners over Defendant's property.

In its original ruling, the court found Plaintiff has a 10-12 foot wide easement appurtenant for egress and ingress to his property from Wheeland Road. After a thorough review of the record, this shall be amended to reflect Plaintiff and any subsequent landowner shall have a fourteen (14) foot wide easement appurtenant for egress and ingress to Plaintiff's property from Wheeland Road. It is noted the record does reflect conflicting testimony as to the exact width of the road; however, the court finds a fourteen foot easement is appropriate in light of the circumstances and testimony at trial. Mr. Van Hoffman, a former SCE&G employee who previously worked on the land and was familiar with it, testified the road was around twelve feet wide. Tr. at 119. The court gave extra credence to Mr. Hoffman's testimony, as he is a neutral witness to this action. Further, Defendant Fulmer testified it would be accurate to say the road is between fourteen and twenty feet wide for the most part. Tr. At 156.

Again, all previous rulings are upheld except the ruling as to the width of the easement Plaintiff is granted across Defendant's property. This shall be amended to reflect a fourteen (14) foot easement. Having fully reconsidered this matter, the court's order of February 20, 2014 is modified as outlined above.

Order Information

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

SCRPC Form 4 (09/2011)

APPENDIX 087

Complete judgment requires payment of sum of money or other relief to real or legal claimant.

JUDGMENT AGAINST PLAINTIFF

Judgment Amount	
Costs	
Interest	
Other	
Total Amount to be Collected	

If applicable, describe the property including a map information and address, referenced in the order.

JUDGMENT AGAINST DEFENDANT

Judgment Amount	
Costs	
Interest	
Other	
Total Amount to be Collected	

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interests or costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

2159 June 9, 2014

Chad Jenkins Judge Code Date

Circuit Court Judge

For Clerk of Court Office Use Only

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:

Chad Jenkins

ATTORNEY(S) FOR THE PLAINTIFF(S)

Will Edwards

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

John S. Frick

Plaintiff(s)

vs.

Keith Fulmer

Defendant(s)

(Please Print)

Submitted By: W. Chad Jenkins, Esq.

Address: PO Box 190

Newberry, SC 29108

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2009-CP - 36- 415

JACKIE S. BOWERS
CLERK OF COURT

2009 SEP 29 P 1:38

FILED
NEWBERRY COUNTY

SC Bar #: 16694

Telephone #: 803-276-2533

Fax #: 803-276-8684

Other:

E-mail:

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)

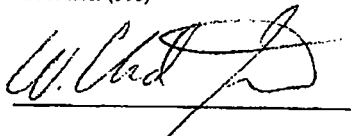
*If Action is Judgment/Settlement do not complete

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

Submitting Party Signature:



Date:

9/29/09

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)

IN THE COURT OF COMMON PLEAS

COUNTY OF NEWBERRY)

C/A No. 2009-CP-36- 415

John S. Frick,)

Plaintiff,)

SUMMONS

vs.)

Keith Fulmer,)

Defendant)

FILED
NEWBERRY COUNTY
2009 SEP 29 P 1:39
JACKIE S. BOWERS
CLERK OF COURT

TO: KEITH FULMER, DEFENDANT:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscriber at Post Office Box 190, Newberry, South Carolina, within thirty (30) days from the service hereof, exclusive of the date of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

POPE AND HUDGENS, P.A.

By:


W. Chad Jenkins (SC Bar #16694)
Joseph W. Hudgens (SC Bar #2741)
PO Box 190
Newberry, SC 29108
(803) 276-2532

Attorneys for Plaintiff

September 29, 2009

STATE OF SOUTH CAROLINA)
COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS

C/A No. 2009-CP-36- 415

John S. Frick,)

Plaintiff,)

vs.)

Keith Fulmer,)

Defendant)

COMPLAINT

FILED
NEWBERRY COUNTY
2009 SEP 29 P 1:39
JACKIE S. BOWERS
CLERK OF COURT

**FOR A FIRST CAUSE OF ACTION
(INJUNCTION)**

Plaintiff, complaining of the defendant herein, would respectfully show unto the Court as follows:

1. Plaintiff is a citizen and resident of Newberry County, South Carolina.
2. Defendant is a citizen and resident of Newberry County, South Carolina.
3. Plaintiff and defendant own separate tracts of land in Newberry County near Little Mountain, South Carolina.
4. The defendant's tract is south of Wheeland School Road and is identified as TMS# 645-60. Defendant's tract is bordered on the South by a tract of land owned by SCE&G and identified as TMS# 645-56 (hereinafter SCE&G tract). Defendant's tract is bordered on the North by land owned by Joseph R. Childers (TMS# 645-63) and Eleanor and Benny Bush (TMS# 645-10).
5. The plaintiff's tract adjoins the SCE&G tract on the Southern boundary of the SCE&G tract and is identified as TMS# 645-8.

6. A road exists from Wheeland School Road across the Childers and Bush tracts, the defendant's tract and the SCE&G tract and continues to plaintiff's property. Said road runs from Wheeland School Road to the plaintiff's property.

7. The aforementioned road for more than 30 years has been a neighborhood road or a public road serving property south of Wheeland School Road and before Lake Murray existed, traversed to Macedonia Church Road.

8. The aforementioned road provides access to the defendant's tract and is the historical access to the defendant's tract.

9. In the alternative, to the extent the road is no longer a public road, now abutting landowners have an easement in said road.

10. The plaintiff has an easement appurtenant in said road across defendant's tract to his tract of land.

11. The defendant is wrongfully interfering with plaintiff's use of his easement in said road by constructing or erecting gates or causing said gate to be erected and placing locks on said gates to limit and/or prohibit plaintiff's use.

12. The plaintiff is entitled to an Order of this Court enjoining the defendant from interfering with his use of the road across their tract of land, both temporarily and permanently.

13. If the defendant is not prevented from denying the plaintiff access to the road, the plaintiff will be denied full access to his tract and the full use of the tract to which he is entitled.

14. If the plaintiff's access is denied during the pendency of this action, the plaintiff will be thus prevented from the use of his property for a long period of time and plaintiff will ultimately prevail on the merits. With respect to that right, the plaintiff has no adequate remedy at law to redress it or recover from his injury.

**FOR A SECOND CAUSE OF ACTION
(DECLARATORY JUDGMENT)**

15. Each and every allegation of paragraphs 1 through 14 above is hereby re-alleged as if fully set out herein.

16. This cause of action is brought pursuant to the South Carolina Uniform Declaratory Judgment Act, South Carolina Code of Laws §15-53-10, *et seq.*

17. The plaintiff is entitled to an Order of this Court declaring the easement in favor of the plaintiff and the extent of plaintiff's easement as to travel, installation of utilities and improvements.

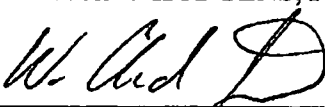
WHEREFORE, Plaintiff prays for an Order of this Court:

A. Declaring that the plaintiff has a full and complete easement in the road which is the subject of this action;

B. Issuing an injunction against the defendant prohibiting the defendant from interfering with the plaintiff's use of the road which is the subject of this action, both temporarily and permanently; and,

C. Delineating the extent of plaintiff's easement in the road and plaintiff's rights in regards to the use of said road as to travel, installation of utilities and improvements.

POPE AND HUDGENS, P.A.

By: 

W. Chad Jenkins (SC Bar #16694)
Joseph W. Hudgens (SC Bar #2741)
PO Box 190
Newberry, SC 29108
(803) 276-2532

Attorneys for Plaintiff

September 29, 2009

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

John S. Frick

☒ Plaintiff

v.

Keith Fulmer

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2009-CP-36-415

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: W. Chad Jenkins, Bar No. 16694 Address: PO Box 190, Newberry, SC 29108 phone: 803-276-2532 fax: 803-276-8684 e-mail: other:		Defendant's Attorney: , Bar No. Address: phone: fax: e-mail: 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 for Preliminary Injunction Estimated Time Needed: 30 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.			
Signature of Attorney for ☐ Plaintiff / ☐ Defendant		Date submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ 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		Date Filed:	
Collected by: _____		FILED NEWBERRY COUNTY 2009 SEP 29 PM 1:39 JACKIE S. BOWERS CLERK OF COURT	
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____			

SCCA/233 (11-03)

APPENDIX 094

STATE OF SOUTH CAROLINA)
COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS

C/A No. 2009-CP-36-415

John S. Frick,)
Plaintiff,)

vs.)

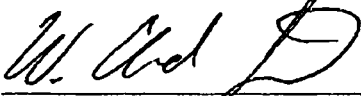
Keith Fulmer,)
Defendant)

MOTION FOR PRELIMINARY INJUNCTION

TO: KEITH FULMER, DEFENDANT:

YOU WILL PLEASE TAKE NOTICE That the undersigned attorney for the plaintiff moves for an order temporarily enjoining the defendants from obstructing the roadway involved in this action as to prevent the use thereof by the defendant to gain unencumbered access to his property. Said motion will be based upon all applicable statutes and case law as well as any affidavits and memorandum presented to the Court. Said motion will be heard as directed by the Court.

POPE AND HUDGENS, P.A.

By: 

W. Chad Jenkins (SC Bar #16694)
Joseph W. Hudgens (SC Bar #2741)
PO Box 190
Newberry, SC 29108
(803) 276-2532

Attorneys for Plaintiff

September 29, 2009

FILED
NEWBERRY COUNTY
2009 SEP 29 P 1:39
JACKIE S. BOWERS
CLERK OF COURT

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF NEWBERRY) C/A No. 2009-CP-36-415

John S. Frick,)
))
Plaintiff)
))
vs)
))
Keith Fulmer,)
))
Defendant.)

ANSWER TO COMPLAINT

FILED
NEWBERRY COUNTY
2009 NOV 24 P 2:18
JACQUES BOWERS
CLERK OF COURT

The Defendant, Keith Fulmer, answering the Plaintiff's Complaint alleges:

(FOR A FIRST DEFENSE)

1) All allegations not hereinafter specifically admitted, qualified, or explained are denied.

(FOR A SECOND DEFENSE)

2) The Defendant hereby reasserts and realleges each and every allegation set forth above as if set forth here verbatim.

3) Defendant admits the allegations paragraphs 1, 2, 3, 4, 5, and 6 of the Complaint.

4) The Defendant denies the allegations of paragraph 7 of the Complaint and demands strict proof thereof.

5) Defendant admits only so much of the allegations of paragraph 8 as allege this road provides an access to his property, but denies that the remainder of the allegations in paragraph of the Complaint and demands strict proof thereof.

6) Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the Complaint and, therefore, denies the same and demands strict proof thereof.

7) The Defendant denies the allegations of paragraphs 10, 11, 12, 13, and 14 of the Complaint and demands strict proof thereof.

8) In response to the allegations of paragraph 15 of the Complaint, Defendant reasserts and realleges the foregoing allegations as if set forth here verbatim.

9) Paragraph 16 of the Complaint does not require a response from the Defendant. To the extent a response is required, Defendant denies the allegations of paragraph 16 of the Complaint.

10) Defendant denies the allegations contained in paragraph 17 of the Complaint and demands strict proof thereof.

(FOR A THIRD DEFENSE)

11) The Defendant hereby reasserts and realleges each and every allegation set forth above as if set forth here verbatim.

12) Upon information and belief, SCE&G, Joseph R. Childers, and Eleanor and Benny Bush are necessary parties to the resolution of this matter, inasmuch as the road in question passes through their properties. While Defendant denies the road in question is a public road, Plaintiff has alleged alternatively that such is a public road, but has failed to add Newberry County as a party. Because Plaintiff has failed to join necessary parties for the resolution of this matter, this Court can not properly hear or dispose of this case. Therefore, Plaintiff's Complaint should be dismissed pursuant the South Carolina Rules of Civil Procedure, Rules 12(b)(7) and 19, as well as S.C.

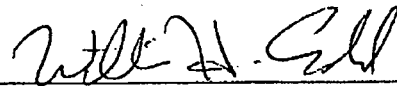
§15-53-80, as all persons who have or who claim an interest and who would be affected by the declaratory judgment sought by the Plaintiff have not been made parties hereto.

(FOR A FOURTH DEFENSE)

13. The Defendant hereby reasserts and realleges each and every allegation set forth above as if set forth here verbatim.

14. The Complaint fails to state a claim against the Defendant for which relief can be granted and should be dismissed.

WHEREFORE, having fully answered Plaintiff's Complaint, this Defendant prays for an Order dismissing Plaintiff's Complaint; for costs and fees to be assessed against the Plaintiff; and for such other and further relief as this Court might deem just and proper.



William H. Edwards
Moore, Taylor, & Thomas, P.A.
P.O. Box 5709
West Columbia, SC 29171
803-796-9160

Rudolph C. Barnes, Jr.
156 Barnes Trail
Little Mountain, SC 29075
803-364-4444

Attorneys for Defendant Keith Fulmer

West Columbia, SC
November 20, 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF NEWBERRY	)	C/A No. 2009-CP-36- 415
John S. Frick,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	TRIAL BRIEF
	)	
	)	
Keith Fulmer, Eleanor F. Bush,	)	
Benny A. Bush, Joseph R. Childers,	)	
Justin & Victoria Chadwick, S.C.	)	
Electric & Gas, and Newberry	)	
County	)	
	)	
Defendants.	)	

INTRODUCTION

Plaintiff filed a Summons and Complaint seeking a preliminary injunction and declaratory judgment regarding the parties' rights and responsibilities in regards to the portion of Seibert Road that begins on Wheeland School Road and traverses across the Defendants' properties until it reaches the Plaintiff's property identified as Newberry County TMS # 645-8. The main issues presented to the Court include whether or not this portion of Seibert Road was and continues to be a public road and if not, outlining the adjoining landowners respective rights and responsibilities in regards to the road.

Defendants Keith Fulmer, SCE&G and Newberry County have been actively involved in the litigation to date by and through their respective attorneys. Defendants Eleanor F. Bush, Benny A. Bush, Joseph R. Childers, Justin and Victoria Chadwick are in default and have had no active participation in the litigation thus far.

STATEMENT OF FACTS

Plaintiff purchased the approximately 84 acre parcel of land in 2003. The historical access to this parcel has been and continues to be the portion of Seibert Road that begins on Wheeland School Road and traverses to the Plaintiff's property. As shown on numerous maps and documents, this road previously traversed along its current path and continued across what is now a portion of Lake Murray. (See 1938 General Highway and Transportation Map; U.S. Geological Survey Topographical Map dated 1971; General Highway Map of Newberry County dated 1950; DeLorme S.C. Atlas and Gazetteer dated 2006.)

In addition to its historic use as a road which traveled from Wheeland School Road to Macedonia Church Road, the road has further been used even after the construction of Lake Murray bisected Seibert Road. The road was utilized by at least two home owners, one of which resided on the Plaintiff's property and utilized by mail carriers and the like to service these homes. Furthermore, plaintiff specifically remembered utilizing the road himself as a young child with his Boy Scout troop when they hiked and road down the road for camping, fishing and other activities. Furthermore, the property between the plaintiff's parcel and Lake Murray is currently included in the South Carolina Wildlife Management Area program and Plaintiff's parcel and the SCE&G parcel were previously in the Wildlife Management Area program. Any hunters would be able to utilize this portion of Seibert Road to reach the Wildlife Management area which is in essence a public hunting ground. This would be the only dry access to the Wildlife Management Area as the only other option to reach it would be via watercraft. In low water situations, it is possible the SCE&G tract would not be reachable at all.

Although the construction of Lake Murray greatly decreased the use of Seibert Road by the general public, it did not destroy the public nature of the road and no public entity has taken any action whatsoever to close this portion of Seibert Road. Unfortunately, Newberry County

maintenance department does not keep records of maintenance performed on roads. This makes it impossible to determine if Newberry County provided any maintenance, repair of other services to this portion of Seibert Road. It is clear by council's actions and letters to a landowner on the other side of Lake Murray adjoining Seibert Road that they do in fact maintain at least some portion of Seibert Road to this very date.

ISSUES

I. Necessary Parties.

Defendant Fulmer argues that landowners on the other side of Lake Murray who own property which abut what is or previously was Seibert Road would need to be added as defendants in this action. This assertion is incorrect as the Plaintiff is seeking only a determination as to the portion of Seibert Road that runs from Wheeland School Road through his property. Any ruling by the Court in this matter would have no effect on the portion of Seibert Road which runs from Macedonia Church Road to the opposite side of Lake Murray. If any persons on the opposite side of Lake Murray wish to establish their rights and responsibilities in regards to Seibert Road as it exists and as it abuts their land, they are certainly free to do so through the Courts. They are not a necessary party to this action and any attempt by Defendant Fulmer to claim same is simply an effort to further delay this case.

II. Is the portion of Seibert Road connecting Wheeland School Road and Plaintiff's property a public road?

Plaintiff contends that the road in question is in fact Seibert Road and was historically used to traverse between Wheeland School Road and Macedonia Church Road in the Little Mountain area of Newberry County, South Carolina. As shown by numerous maps and official documents, the road traversed across what is now Lake Murray before it was created. Randy

Summer indicated the road “went right on through his property because I used it... to thin some of our fringe land many years ago.” (Depo. of Randy Summer, p. 18). Given the fact that this was a county maintained public road, the county must take specific steps pursuant to S.C. Code Ann. §57-9-10 in order to properly abandon or close the roadway. They simply have not done so in this matter.

Newberry County has not taken any affirmative action to abandon or close the road in question. S.C. Code Ann. §57-9-10 *et seq.* lays out the procedures which must be followed for the State, or any of its political subdivisions, to abandon or close any street, road or highway “whether opened or not.” (emphasis added) The South Carolina Supreme Court has stated that “by creating a formal judicial procedure for terminating a public right of way over land, Section 57-9-10 removes the uncertainty attending the common law of dedication and abandonment.” South Carolina DOT v. Hinson Family Holdings, LLC, 361 S.C. 649, 606 S.E. 2d 781 (2004). In the Hinson case, the road in question had actually been rerouted and the portion subject to the lawsuit was no longer being utilized by the general public. Regardless, the Court found that the South Carolina Department of Transportation and/or Horry County were required to follow the statutory scheme for abandoning or closing a road.

Defendant Fulmer argues that if the road were to be declared a public road that Newberry County would have to take certain actions to bring it up to current standards. This is correct but this should not be a concern of this Court. To insinuate that forcing Newberry County to follow its own laws and ordinances would somehow create an undue burden upon them is simply without merit. Newberry County would also be free to go through the proper process to close the road as outlined in S.C. Code Ann. §57-9-10 *et seq.* Even the adjoining landowners could petition the Courts to close the road in question.

III. What are the rights and responsibilities of the landowners if the road is not determined to be a public road?

It is clear that the plaintiff has, at a minimum, an easement to utilize the road in question to access his property. It is the historical access for this property and when homes were previously located on it, it was the only direct access. Defendant Fulmer argues that the plaintiff would have access through another adjoining piece of property that he also purchased. This argument is disingenuous as the properties are separated by a creek and accessing the parcel in question in this matter would not be possible absent extraordinary means. Furthermore, the properties are not one individual piece and are in fact two separate parcels which were purchased separately and have always been maintained separately. If the plaintiff wished to sell one parcel and keep the other, the access through the parcel he kept would be useless to the purchasing party. Each individual tract must have separate and distinct access.

One major issue regarding the road in question is the erection of a locked gate along said road. The plaintiff has testified that he never wanted the gate there and that he would often find himself locked out of the property and feels that said exclusion was not accidental. Randy Summer of SCE&G indicated that even with the multiple lock system, people get locked out “a lot.” (Depo. of Randy Summer, p. 26). It is no secret that Defendant Fulmer, and previously his father, did not like the idea of Plaintiff purchasing this property and possibly developing it in any manner. (Depo. of Randy Summer, p. 29). Defendant Fulmer and his family have previously utilized the land for hunting and other recreational purposes and Plaintiff believes his purchase of the property created ill will. He has in fact removed one gate via way of a tractor and has repeatedly asserted his rights to unfettered access to his property.

While landowners may protect their property, they may not do so when it creates an undue burden on other landowners. The cases cited by Defendant Fulmer all state the same basic rule: Landowners may not unreasonably burden other landowners with an interest in the property and the reasonableness of the impediment is to be determined on a case by case basis. Judy v. Kennedy, 398 S.C. 471, 728 S.E.2d 484 (2012); Thomas v. Mitchell, 287 S.C. 35, 336 S.E.2d 154 (1985). Here, the gate was re-erected or reestablished to stop John Frick from developing his property. If Mr. Frick were to build a home, or sell the property to someone who wanted to build a home, the locked gate which often prevented him from entering his property is an undue hindrance. The Court should not allow Defendant Fulmer and SCE&G to curtail Mr. Frick's use of his lawfully purchased property because of a few isolated incidents of poaching or litter.

Regardless of the gate issue, plaintiff would like to be allowed to maintain the road in a suitable condition for ingress and egress to his property. This would include, but not be limited to, the possible graveling of the roadway and clearing of brush along the side of the road way so that vehicles, including his vehicle and his guests' vehicles, could easily travel to his property. The defendant's position seems to be that if a rainstorm washed out the roadway, no one could ever improve that roadway so that it would not wash out again and so that it would be passable. This is simply not the law. SCE&G has even widened the road in places to suit its purposes - i.e. the introduction of heavy equipment for the installation of power lines.

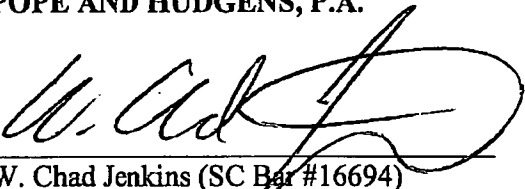
CONCLUSION

Seibert Road is, was and continues to be a public road from Wheeland School Road to plaintiff's property. A ruling by the Court in this matter that it is in fact a public roadway does not automatically place any extra burdens upon any of the parties. Newberry County could decide which route they wish to take in regards to this road at that time. In the alternative, if the road is not a public road, the plaintiff should be allowed unfettered use and access to the road and unlimited ingress and egress for him and his guests or subsequent landowners. This would include, but not be limited to, properly clearing and surfacing the roadway so that cars could easily pass.

Respectfully Submitted,

POPE AND HUDGENS, P.A.

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Attorneys for Plaintiff

November 1, 2013

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF NEWBERRY	)	
John S. Frick,	)	C/A #2009-CP-36-00415
	)	
Plaintiff,	)	
vs.	)	TRIAL BRIEF OF DEFENDANT
	)	KEITH FULMER
Keith Fulmer, Eleanor F. Bush,	)	
Benny A. Bush, Joseph R. Childers,	)	
S.C. Electric and Gas, Newberry County,	)	
Justin Chadwick, and Victoria Chadwick,	)	
	)	
Defendants.	)	

INTRODUCTION

The question before the Court is whether the woods road that begins at Wheeland School Road and runs through the property the Defendants to that of the Plaintiff is a public or neighborhood road or a private easement for access and egress. The Plaintiff alleges that it is a public or neighborhood road, while the Defendants deny that allegation and assert that it is a private easement for the benefit of the parties as adjoining landowners.

The road in question is part of an old road that once connected the two public roads now known as Wheeland School Road and Macedonia Church Road. In 1930 Lake Murray flooded the old road so that it was impassable no longer possible to travel between the two public roads. For more than eighty (80) years the woods road from Wheeland School Road to the Plaintiff's property has not been used by the public but only provided access and egress to adjoining landowners.

Part of the original road on the other side of Lake Murray that begins at Macedonia Church Road has apparently been maintained to some extent by Newberry County and part of it closed by statutory action, but it is separate and distinct from the road in question that provides access and egress from Wheeland School Road to the Plaintiff and Defendants. If the Court considers the status of the road from Macedonia Church Road in this matter, that decision will affect all landowners abutting that road, so that they should all be made parties to this action just all landowners abutting the road from Wheeland School Road are parties to this action.

I. The old road was abandoned when the creation of Lake Murray permanently flooded the connection between the state highways on each end.

The Plaintiff, Mr. Frick, stated in his deposition that the road is a public road because the State never formally closed the road. (Frick Dep. Aug 24, 2011, 42:24-43:8; 46:6-19). There is a statutory provision for the abandonment or closing of a public road, but it does not abrogate the common law relating to abandonment (see S.C. Code § 57-9-10, 57-9-40, 1976). The language of the statute uses a permissive term to provide that any interested person *may* petition the court to close a public road, and case law since the enactment of the statute confirms the continued applicability of common law abandonment. Also, the abandonment of this road by its flooding in 1930 occurred long before the passage of the statutory method for abandonment.

Common law abandonment of a public road is satisfied by “nonuser by the public for a long period of time with the intention to abandon.” *K & A Acquisition Group, LLC v. Island Pointe, LLC*, 383 S.C. 563, ___, 683 S.E.2d 252, 259 (2009). “To constitute abandonment, the use for which the property is dedicated must become impossible of execution, or the object of the use must wholly fail.” *City of Myrtle Beach v. Parker*, 260 S.C. 475, 197 S.E.2d 290 (1973). The road once connected two public roads. However, in 1930 Lake Murray permanently flooded the road making it impossible to traverse it from one public road to another. There is no evidence that the road has been used by those other than property owners and their licensees since 1930, with only isolated incidents of trespassing. (see Hoffman Dep. of Jan 25, 2012 at 16:10-18:2; 28:16-29:17, and Dep. Exhibit #2; 44:7-45:5; 49:8-16; 50:14-20; 55:8-21; see also Summer Dep. of Apr 19, 2012 at 17:12-18; 18:14-19:12; 20:15-21:1; 21:17-25; 35:6-9; 37:25-38:5; 40:19-41:5; 42:4-11; 43:17-19; 46:15-16; 50:13-53:6; also Fulmer Dep. of Aug 24, 2011 at 65:21-67:5; also Frick Dep. of Aug 24, 2011 at 69:24-80:13) Such “nonuse by the public” for more than eighty (80) years constitutes abandonment. And there is no evidence of public maintenance of the road by Newberry County since 1930. Maintenance has been provided by landowners, mostly by SCE&G or SCANA, for access and egress in building and maintaining transmission lines and for logging operations. (see Hoffman Dep. of Jan 25, 2012 at 21:25-23:20; 50:3-23; and Summer Dep. of Apr 19, 2012 at 29:7-31:25; also Fulmer Dep. of Aug 24, 2011 at 76:15-77:15; also Frick Dep. of Aug 24, 2011 at 34:8-19) Mr. Frick testified that Newberry County does not want to be involved in any of the current litigation. (see Frick Dep. of Aug 24, 2011 at 34:1-7).

II. The road is not a public road because it is not a neighborhood road.

The road in question is not a neighborhood or public road because it no longer connects public highways and has not been used as a neighborhood road, if it ever was, since it was flooded by Lake Murray in 1930. A neighborhood road is a public way. *Taylor v. Cox*, 218 S.C. 488, 63 S.E.2d 470 (1951). Each end of a neighborhood road must terminate in a public highway or a public place. *State v. Dodenhoff*, 153 S.C. 7, 150 S.E. 315 (1929). Before 1930 the road in question connected two public roads, Wheeland School Road and Macedonia Church Road; but after being flooded by Lake Murray in 1930 it was cut off from Macedonia Church Road and terminated on Mr. Frick's property. Furthermore, to be classified as a neighborhood road, a road connecting two public roads must be used for twenty (20) years by the general public. *State v. Hughes*, 147 S.C. 452, 145 S.E. 297 (1928). If Lake Murray is considered an appropriate terminus for a public road, there is no evidence that the road has ever been used for public access to Lake Murray. (see Hoffman Dep. of Jan 25, 2012 at 28:16-29:17, and Dep. Exhibit #2; 44:24-45:8 and Exhibit #2) And access by hunters to any land within the game management program has been by boat, not by road. (see Hoffman Dep. of Jan 25, 2012 at 49:12-16; also Summer Dep. of Apr 19 2012 at 42:4-15; 43:17-19). Because this road has not connected two public roads or a public place and has not been used by the public for over eighty (80) years, it is not now, if ever it was, a neighborhood road, and is therefore not a public road.

III. The road is not currently a public road because it has not been rededicated to public use.

"In the event of the abandonment of a public highway, title thereto to the center of the road remains vested in the abutting property owners on either side." *Andrews v. McDade*, 201 S.C. 24, 21 S.E.2d 202 (1942). Thus, when the road in question was abandoned as a neighborhood or public road, ownership of the portion of the road that crosses Mr. Fulmer's property was transferred to his predecessors in title and passed to him when he acquired title to the land. Since its abandonment, the road has not been rededicated to public use. A landowner must "express in a positive and unmistakable manner the intention to dedicate his property to public use," followed by an "express or implied public acceptance of the property offered for dedication." *Mack v. Edens*, 320 S.C. 236, 239, 464 S.E.2d 124, 126 (Ct. App. 1995). The presence of cables and/or gates on the road since the 1970s negates any intent to dedicate the road to public use.

(see Hoffman Dep. of Jan 25, 2012 at 16:10-18:2; 28:16-29:17, and Dep. Exhibit #2; 44:7-45:5; 49:8-16; 50:14-20; 55:8-21; see also Summer Dep. of Apr 19, 2012 at 17:12-18; 18:14-19:12; 20:15-21:1; 21:17-25; 35:6-9; 37:25-38:5; 40:19-41:5; 42:4-11; 43:17-19; 46:15-16; 50:13-53:6; also Fulmer Dep. of Aug 24, 2011 at 24:15-34:14; also Frick Dep. of Aug 24, 2011 at 69:24-80:13). “Permissive, sporadic, and recreational use” of a roadway across private property by the public is not sufficient to overcome the burden of “strict, cogent, and convincing” proof required to demonstrate that the owner intended to dedicate the road to public use. *Id.* Therefore, any occasional use of the road by Boy Scouts (Frick Dep. 44:15-21, Aug 24, 2011) or others with the express or implied permission of adjoining landowners does not establish an intent to rededicate the road to the public after it was abandoned in light of the obvious intent of the landowners to prevent public access with cables and gates. (see references to Deps. of Hoffman, Summer, Fulmer and Frick above).

In order to establish that the public has accepted a dedicated roadway, there must be evidence that the general public began using the road. Acceptance and/or the existence of a public way are not proven where the road is used merely by a limited class of people, such as abutting landowners and their licensees. In *Burrell v. Kirkland*, the court noted this requirement for public use to establish a public way: “[o]ur Court has held that the route must be used by the public generally and not by particular individuals. In other words, the use must not be by a limited community or class of people.” 242 S.C. 201, 208, 130 S.E.2d 470, 473 (1963). Except for occasional trespassers, the road in question here has been used only by a limited class of people: the landowners, licensees, family and friends. Therefore, this road is not a public way and has not been accepted by the public as such.

The road is one of many old neighborhood roads that once traversed the Lake Murray basin and connected public roads but that later were cut off when the lake was flooded in 1930. Since then such road fragments have been used by abutting landowners for access and egress, their public character abandoned and counties treating them as private roads for over eighty years. Plaintiff Frick bought his property in 2003, seventy years after the original road had been flooded by Lake Murray and disconnected from its original termini, and began his efforts to declare the private road a public road, denying abutting landowners their right to protect their property from trespassing members of the public. If the road in question is determined to be a public road it would deny the abutting landowners their property rights and require Newberry County to widen,

improve and maintain the road as a public road and require SCE&G to recognize a public access to Lake Murray where the road enters the Lake after running over Plaintiff Frick's property.

IV. The road is a private road over which the Plaintiff and other adjoining landowners have an easement appurtenant if necessary for access and egress.

The road in question provides access and egress to a public road (Wheeland School Road) for the Plaintiff and Defendants as adjoining landowners; but whether the road is *necessary* for Plaintiff's access and egress to a public road is questionable since Plaintiff owns another tract (the Hendrix tract) which has a sixty-six foot wide access to another public road, Wheeland Road,¹ which is adjacent to and adjoining the tract accessed by the road in question (the Enlow tract). If the road providing access to Wheeland School Road is necessary for Plaintiff's access and egress to his property, then Plaintiff and the other parties to this action share an easement appurtenant to the road. "Consideration must be given to what is essentially necessary to the enjoyment of [the dominant estate]." *Smith v. Commissioners of Public Works of City of Charleston*, 312 S.C. 460, 468, 441 S.E.2d 331, 336 (Ct. App. 1994). "An essential feature of a right of way appurtenant is that it must have one of its termini on the land to which it is claimed to be appurtenant." *Steele v. Williams*, 204 S.C. 124, 28 S.E.2d 644 (1944). The road in question traverses the properties of the Plaintiff and Defendants, providing them access to the state highway system. In South Carolina, a landowner whose property "does not abut any public road" is granted an easement over neighboring properties if it is necessary to access a public road. *Hardin v. South Carolina Dept. of Transp.*, 371 S.C. 598, 606, 641 S.E.2d 437, 442 (2007). Therefore, after the road in question was flooded by Lake Murray in 1930 and abandoned as a public road all abutting landowners, including Plaintiff, acquired title to the center of the road on their property and also the right to use the entire road as an easement appurtenant to their property by operation of law if necessary for access and egress to a public road (Wheeland School Road), but nothing more.

¹ Prior to initiating this suit, Mr. Frick purchased a sixty-six (66) foot wide easement from John Fulmer, Jr., to access an adjacent parcel in order to resolve a previous law suit. (See Frick Dep. 114:17-23, August 24, 2011).

V. The scope of Mr. Frick's easement may not be expanded in order to accommodate plans to build a subdivision.

Both the law of easements and Newberry County ordinances relating to public roads require the express consent of all adjoining landowners to expand or improve any existing right-of-way. "The right of the easement owner and the right of the landowner are not absolute ... but are so limited, each by the other, that there may be a due and reasonable enjoyment of both." *Hill v. Carolina Power & Light Co.*, 204 S.C. 83, 28 S.E.2d 545, 549 (1943).

In *Rhett v. Gray*, 736 S.E.2d 873 (S.C. Ct. App. 2012), *reh'g denied* (Jan. 25, 2013) a landowner had a larger tract and a smaller tract which were adjacent to one another. The smaller tract was land-locked, and the landowner had an easement across his neighbor's property to reach that tract. The larger tract did not need an easement for access because it was adjacent to the road. The landowner wanted to use the easement across his neighbor's property as the entrance to both tracts and to build a subdivision on the larger tract. *Id.* at 877-78. The court held that the easement was only appurtenant to the smaller tract. *Id.* at 881. The court then held that the easement could not be used for access to the larger tract, because this would increase the burden on the servient estate.

[T]he owner of the easement cannot materially increase the burden of the servient estate or impose thereon a new and additional burden. Although to the extent of the easement, the rights of the easement owner are paramount to those of the landowner, the easement owner's rights are not absolute but are limited, so the owners of the easement and the servient tenement may have reasonable enjoyment. The owner of an easement has all rights incident or necessary to its proper enjoyment, but nothing more. *Id.* (internal citations omitted).

The road in question is a single-lane, ten to twelve foot wide dirt road that has been maintained as a woods road by the abutting landowners for decades. (see Hoffman Dep. Jan 25, 2012, at 16:13-18:2; 34:8-20; 44:24-45:8; also Summer Dep. Apr 19, 2012, at 31:1-3; 33:22-34:1; 52:22-53:6; also Fulmer Dep. Aug 24, 2011, at 66:13-67:14) The road was temporarily widened in certain places by SCE&G for logging operations and to allow the access and egress of heavy equipment needed to build a transmission line in 1989-1990. (Hoffman Dep. Jan 25, 2012, at 22:4-24:1; also Summer Dep. Apr 19, 2012 at 29:7-31:17; also Fulmer Dep. Aug 24,

2011, at 76:15-77:15). An easement is “limited to a use ... as little burdensome to the servient estate as possible for the use contemplated.” *Id.* Mr. Fulmer testified that he wants the surrounding land to “stay country,” and Mr. Frick’s property has historically been a single-residence tract. (Fulmer Dep. 45:7-8, August 24, 2011) If he were to build a subdivision, Mr. Frick would change the rural character of the property by expanding the scope of his right-of-way privilege. “An easement owner may not materially increase the burden on the servient estate or impose a new or additional burden.” 12 S.C. Jur. *Easements* § 23 (2011). Additionally, developing a subdivision would dramatically increase the burden on the servient estates. In *Clemson v. First Provident Corp.*, the dominant estate owner desiring to subdivide his property widened his easement without the permission of nearby landowners. *Clemson v. First Provident Corp.*, 260 S.C. 640, 197 S.E.2d 914 (1973). The court ruled that the developing landowner was liable for trespass against the servient estate. *Id.* Mr. Frick acknowledged that the road in question has never been paved or used for buried utilities. (Frick Dep. 29:18 – 30:3, August 24, 2011). The Newberry County Code of Ordinances § 91.23(B) requires that all utilities for a subdivision “be buried in the right-of-way at a depth of at least 36 inches off pavement.” Thus, under *Clemson*, if Mr. Frick expands the road without the express permission of Mr. Fulmer, he would be liable for trespass and subject to injunctive relief.

Developing a subdivision on Mr. Frick’s property would require significantly increasing the current width of the road in question, thereby substantially and improperly increasing the burden on the servient estates. In Newberry County, “[a]ll roads shall be hard surfaced (portland cement, concrete, asphaltic concrete, or bituminous wearing) in all new subdivisions and expansions of existing subdivisions.” Newberry County Code of Ordinances §154.057(B)(2)(b). Moreover, Newberry County requires that subdivisions use roads with a minimum right-of-way of fifty (50) feet (triple the current right-of-way) or forty (40) feet for non-through roads. Newberry County Code of Ordinances §§154.057(B)(1)(a) and 91.20(B)(1). Lastly, Newberry County requires that roads in subdivisions have adequate infrastructure, like culverts, drains, and bridges. Newberry County Code of Ordinances §154.057(B)(2)(a). If Mr. Frick’s plans came to fruition, the road would need to be widened and paved, and traffic would inevitably increase. The current easement allows Mr. Frick to use the existing woods road for access and egress to Wheeland School Road, but nothing more. Any further use would unquestionably increase the burden on the adjoining property owners and constitute a trespass.

Plaintiff Frick owns property adjacent to and adjoining the Enlow tract that is accessed by the road in question, and his adjacent property (the Hendrix tract) has access to another public road, Wheeland Road, by way of a sixty-six foot wide tract that meets the requirements for a public road in Newberry County. While there is a creek between the Enlow Tract and the Hendrix tract, Plaintiff's access to Wheeland Road seems adequate to meet the requirements of the law for *necessary* access and egress to a public road for the Enlow tract.

If the woods road from Wheeland School Road to and through Defendants and Plaintiff's property is determined to be a public road and its width expanded to that required for a public road, the Newberry County Code of Ordinances requires the consent of all affected landowners prior to paving. After submitting a "Request for Paving" to Newberry County as an adjoining landowner to the road, Plaintiff Frick would need the consent of all other adjoining landowners. A majority of landowners does not suffice; all adjoining landowners must be unanimous in their consent for paving. (Newberry County Code of Ordinances § 91.51(A). "The property owner initiating a paving request is responsible for securing rights-of-way/easements from all affected property owners. (Newberry County Code of Ordinances § 91.51(B). "The granting of right-of-way by property owners for county road paving projects is voluntary, and requires unanimous agreement among the affected property owners (a mere majority will not suffice)". Additionally, Newberry County explicitly requires that "[r]equired signatures may only be from affected property owners *and must include all owners of each affected parcel, no matter how slight the owner's interest*, as shown on the deed recorded at the office of the Clerk of Court for Newberry County." (Newberry County Code of Ordinances § 91.52(C)(5).

Thus, to widen and/or pave the road in question would materially increase the burden on the servient estates and cannot be done without the express consent of all adjoining landowners.

VI. The gate constructed by SCE&G on Mr. Fulmer's property does not unreasonably burden Mr. Frick's use of the easement.

The existence of the gate across the road in question installed by SCE&G to prevent trespassing is currently open at the request of Plaintiff Frick. Defendants have agreed to keep the gate open during the pendency of this case and not close it without the consent of all affected landowners; but the gate can be justified to protect the property rights of the Defendants from public abuse. An easement that grants one landowner the privilege to cross the property of

another does not extinguish the other landowner's right of self-preservation. The owner of the servient estate may erect a locked gate across the easement depending on the circumstances of the case. The Court has developed a balancing test to weigh the factors affecting the servient and dominant estates. The Court considers whether the locked gate:

1. would "unreasonably interfere with the right of passage of the dominant estate;"
2. is "necessary for the preservation of the servient estate;" and
3. is "necessary for the use of the servient estate."

Brown v. Gaskins, 284 S.C. 30, 33, 324 S.E.2d 639, 640 (Ct. App. 1997). See also *Thomas v. Mitchell*, 287 S.C. 35, 336 S.E.2d 154 (Ct. App. 1985); *Judy v. Kennedy*, 2012 WL1861831 (S.C. App.).

Though the gate is a minor inconvenience for Mr. Frick, the interference is not unreasonable given the history of trespass and illegal activity. Defendant Fulmer and Mr. Van Hoffman of SCE&G testified that Mr. Frick was offered a key but would not accept it, and Mr. Frick conceded as much. (Fulmer Dep. 75:14-21, August 24, 2011; also Hoffman Dep. Jan 25, 2012 at 59:3-6; 64:4-12; 65:24-66:5; also Frick Dep. Aug 24, 2011 at 14:21-15:2). Mr. Fulmer testified that Mr. Frick did not want to unlock the gate every time he used the road (Fulmer Dep. 74:20-21, August 24, 2011), and Mr. Frick admitted that he pushed the gate down with his backhoe because he wanted to keep the road open. (Frick Dep. Aug 24, 2011 at 40:16-44:1).

In *Brown v. Gaskins*, the Court of Appeals held that maintaining a locked gate across the course of an easement may be necessary when instances of trespass have been reported by the owner of the servient estate. *Brown*, 284 S.E.2d at 641. Before the current gate was constructed, a cable had been placed across the roadway around 1980 to prevent trespassers from growing illegal drugs on what is now Plaintiff's property. (Fulmer Dep. Aug 24, 2011 at 24:15-34:14; also Summer Dep. Apr 19, 2012 at 17:12-18; 20:15-23; 27:19-28:2; 51:24-53-6). Plaintiff Frick conceded that abutting property owners previously experienced trouble with poachers (Frick Dep. 18:4-6, August 24, 2011); and Defendant Fulmer recalled having to ask trespassers to leave "quite a bit." (Fulmer Dep. 26:5-6, August 24, 2011).

In *Brown*, the Court found that a locked gate blocking an easement on the servient estate was justified where the servient estate suffered trespassers, vandalism, littering and theft. 284 S.C. at 32, 324 S.E.2d at 640. In *Thomas*, the Court found that a locked cable erected over an easement on the servient estate was necessary for the efficient use of the servient estate and did not impose

an unreasonable burden on the dominant estate's use of the easement where the servient estate had suffered trespassers, night hunters and vandals and where the dominant estate owner did not live on the property and had a locked cable across the easement as it entered his property.

Thomas v. Mitchell, 287 S.C. at 37, 336 S.E.2d at 155. In *Judy*, the servient estate had fewer problems with trespassers than in *Brown* or *Thomas*; however, the Court held that the owner of the servient estate was entitled to maintain a locked gate across the easement where an unknown child had entered his home without permission, there was evidence of others using the easement without permission and the servient estate owner had a confrontation with a trespasser. There were no allegations of vandalism, littering or theft in *Judy*, and the Court recognized that the necessity of protecting the servient estate was not as significant as in *Brown* or *Thomas* and that the burden on the dominant estate was substantial; yet, the Court in *Judy* held that, on balance, the locked gate was an appropriate means of protecting the servient estate without unduly burdening the dominant estate, so long as the dominate estate owner was provided with a means to open the gate (here, electronic keys and the numeric code to the gate).

The case at bar fits between *Brown* and *Thomas* on one end of this spectrum and *Judy* on the other end, but is closer to *Brown* and *Thomas*. The servient estate in this case seeks to protect itself from trespassers, litter and criminal activity. Mr. Frick testified that he was aware of illegal hunting on Mr. Fulmer's property. Mr. Fulmer and his father have had direct encounters with trespassers, and Mr. Fulmer desires to protect his property from trespassers, illegal activity and littering. (Fulmer Dep. Aug 24, 2011 at 24:15-34:14). Mr. Frick does not live on his property, and his predecessor in title, Champion Paper Company maintained a locked cable across the road in question as it enters the property he now owns. (Hoffman Dep. Jan 25, 2012 at 45:3-8; also Summer Dep. Apr 19, 2012 at 17:11-18; 19:6-12; 20:22-23; 50:13-51:7). On balance, Mr. Fulmer's desire to protect his property from trespassers, criminal activity and littering justifies the increased burden on Mr. Frick to have to unlock the gate in order to utilize the easement to his property. Therefore, the circumstances of this case justify the presence of a locked gate on Mr. Fulmer's property to block trespassers from using the road in question.

While the Defendants have legal authority to use a gate to block the road against trespassers, they have agreed to keep the gate open through the pendency of this action.

CONCLUSION

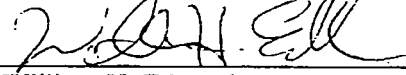
For the foregoing reasons, the road in question was abandoned as a public or neighborhood road, if ever it were, when flooded by Lake Murray in 1930, and it has not been rededicated or used by the public as a public way since that time. If the road in question is necessary for the Plaintiff's access and egress from a public road to his property then it is an appurtenant easement, but one limited to the ten to twelve foot width of the woods road, which cannot be expanded under common law, statute or Newberry County ordinances. Whether the road in question is necessary for Plaintiff Frick to have access to a public road is questionable since he has access to another public road, Wheeland Road, over his adjacent and adjoining property. In any event, if Plaintiff desires to acquire sufficient right-of-way from Wheeland School Road to his property that meets County requirements for a public road he will have to purchase it just as he purchased a sixty-six foot wide right of way to provide access from Wheeland Road to adjacent property after unsuccessful litigation in a similar case.

The woods road is one of many old neighborhood roads that once traversed the Lake Murray basin and connected public roads, but that were cut off when the lake was flooded in 1930. If the road in question is determined to be a public road after eighty years as a private road it would have far-reaching implications and set a damaging precedent. If the Court were to accept Plaintiff Frick's argument that "once a public road, always a public road, unless closed by statutory law" it would negate the established doctrine of common law abandonment, open the road to Lake Murray to the public, deny abutting landowners their property rights and create an obligation for Newberry County to widen, improve and maintain the road as a public road all the way to Lake Murray and require SCE&G and/or SCANA to provide for public access to the Lake as a public place. Such a precedent could change the status of many private roads that were once part of neighborhood roads that traversed Lake Murray, as well as private roads around other man-made lakes in South Carolina.

In conclusion, Plaintiff Frick has a ten to twelve foot common law easement appurtenant for access and egress over the road to Wheeland School Road if the Court finds it is necessary for his access and egress to a public road. The gate installed by SCE&G on the road on Mr. Fulmer's property is not an unreasonable interference with Mr. Frick's easement and is justified to protect the property of the Defendants as landowners along the road from public abuse by trespassers.

Respectfully submitted,

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October 28, 2013

1 on this map, there are landowners along the front part of
2 this yellow line, which is the road. I'm going to call it
3 a road. They may call it a woods path or a trail or
4 whatever, but I'm going to call it a road for purposes of
5 today. They're property owners here. They have not
6 appeared and are in default. Judge Griffith held them in
7 default when he started the previous trial and then could
8 not finish it.

9 Your Honor, this is the piece of property 645-8 owned
10 by John Frick that's in discussion here. He also owns a
11 piece of property here, 645-9. There were two separate
12 purchases. But this property, the long piece is the piece
13 that we're talking about today. This piece of property is
14 SCE&G property and this piece of property is owned by Mr.
15 Fulmer, Defendant Fulmer. Wheeland School Road runs to
16 the north of the property and there is a road, trail,
17 passageway that runs onto Mr. Frick's property through the
18 other Defendants and their property.

19 The Plaintiff's contention is that it also used to
20 run this way before this was Lake Murray and end up on the
21 other side and join in what is Seibert Road. Seibert Road
22 runs here and it ran here, all the way across to, it was
23 actually a public road connecting Macedonia Church Road on
24 the other side and Seibert Road, I mean Wheeland School
25 Road on the north of the property in question.

1 THE COURT: All right. The gate that SCE&G directed,
2 where is that? Is that right up there on the --

3 MR. JENKINS: It is at the pink line, at the
4 beginning of Mr. Fulmer's property.

5 THE COURT: Okay. All right. Very good.

6 MR. JENKINS: And, Your Honor, the only issue I think
7 would be is that we have stipulated, since Mr. Summer is
8 not here and that's probably who we would have asked about
9 it, he would probably be the person most knowledgable, but
10 I don't think we asked him about it a whole lot in his
11 deposition, that the Frick property, the SCE&G property,
12 both of those have at times within the last 50 years been
13 in and/or out of the WMA program, the Wildlife Management
14 Area program. And that the fringe lands along the lake
15 are in WMA land and have been at times in the past WMA
16 lands.

17 THE COURT: All right. Now, from reading the
18 pleadings, I think the primary dispute relates between Mr.
19 Jenkins' client and Mr. Edwards' client, but, certainly,
20 if y'all need to ask questions on behalf of SCE&G or
21 Newberry County, don't be shy about raising your hand and
22 jumping right in there. But I'll let them do most of the
23 talking. I'm assuming that's kind of how, just from
24 looking at the pleadings, that seems to be y'all's
25 position. I don't know if that's, he's taking a stand on

1 this.

2 MR. BRESSLER: Yes, Your Honor, that's correct. The
3 main dispute really is between the other Defendants and we
4 are, essentially, just here as a Defendant, but also, one
5 of our former employees will be a witness and Mr. Summer
6 is a current employee, who will be using the deposition
7 testimony. And if there is a need, I will take testimony.
8 Thank you.

9 MR. JENKINS: And, Your Honor, we'll hand up the
10 original of Mr. Summer's deposition. I went through and
11 discussed this with Mr. Edwards this morning, was trying
12 to find how to designate portions that would be most
13 relevant. After reading, after you get past the first 10
14 or 12 pages of introductory-type material, it's near
15 impossible to parcel out without reading the rest of the
16 entire thing. It's a fairly short deposition, so it's not
17 too heavy of a burden on the Court. So pretty much, page
18 14 on would be the designations for that deposition. I
19 mean, I think Mr. Edwards agrees with that.

20 MR. EDWARDS: I do, Your Honor. It was not a very
21 long deposition and it was fairly pointed, so I think the
22 Court can understand his testimony pretty quickly by
23 reading from about page 12 or 13 or so on.

24 THE COURT: Fair enough.

25 Newberry County's attorney stood up a moment ago, you

1 acted like you needed to tell--

2 MR. TOTHACER: Your Honor, I was just going to say
3 I'm pretty much like SCANA, we're just here as bystanders.
4 My only interest in it is we're not in the quibble, but we
5 have not maintained the road for quite some time and my
6 concern is that if it were to be required to be a County
7 maintained road. That's my interest in the action.

8 THE COURT: I understand that.

9 All right. You can call your first witness.

10 MR. JENKINS: Thank you, Your Honor. I call John
11 Frick.

12 JOHN FRICK,

13 After having been duly sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY MR. JENKINS:

16 Q Give us your full name.

17 A John Sidney Frick.

18 Q And how old are you, Mr. Frick?

19 A Fifty-nine.

20 Q Where do you live?

21 A Little Mountain.

22 Q Okay. Do you live in the general vicinity of the
23 property we're talking about?

24 A Yes, sir, I've lived there all my life. In fact,
25 even the people I'm descended from, Thomas Frick, lived

1 just a few miles right off of the Camping Creek water
2 shed, all the way back to the middle 1700's.

3 Q Now, when did you purchase the piece of property
4 delineated on this map, this aerial photograph at 645-8
5 containing 83 and a half acres, when did you purchase that
6 piece of property?

7 A 2003.

8 Q And that piece of property was purchased separately
9 from 645-9?

10 A Yes, sir.

11 Q And you purchased that piece, also, sometime in the
12 same general vicinity, but not the same day?

13 A About six months or so after.

14 THE COURT: Now, why don't we refer to the one, the
15 most recent purchase I think you were talking about, why
16 don't we call that the peninsula property since it looks
17 kind of like a peninsula. And we'll call the other one
18 whatever you want to call it, the square piece.

19 Q Do they have other names that you utilized before?

20 MR. JENKINS: This may help, Judge.

21 A Yes, the peninsula piece, that was, went back to the
22 Wheelers a long time back. The other piece was my, the
23 rectangular piece was my Uncle Franklin's home place.

24 Q So the peninsula property is the property that we're
25 talking about here today?

- 1 A That's the one I bought first.
- 2 Q Okay. Now, before you purchased the property, what
- 3 did you do? Did you go visit the property and look at it?
- 4 A Yes, I did.
- 5 Q Were you familiar with it anyway?
- 6 A Oh, yes.
- 7 Q Okay. And that's from living there and --
- 8 A That's correct. And we, my dad had two places that
- 9 we always fished. One was Bunk, (phonetic), Mayer's
- 10 place, which is on the other side of Wheeland School Road,
- 11 and the other place was Mr. Frick's place. And it's, you
- 12 know, right up at the top of the road. And we used the
- 13 road and we used the cut-through on Mr. Frick's property,
- 14 depending on how high the lake was at the time. Back
- 15 then, a lot of times the lake was low, so we used the
- 16 road. We traveled down it in dad's car.
- 17 Q Now, when you, before you purchased the property, did
- 18 you travel to that peninsula tract?
- 19 A Yes, I did.
- 20 Q How did you get to it?
- 21 A I drove down the road.
- 22 Q And what vehicle were you in?
- 23 A I was in my pickup.
- 24 Q Did you have to put it in four-wheel drive or
- 25 anything?

- 1 A No.
- 2 Q What condition was the road in when you went to the
3 peninsula property?
- 4 A It was fine. I mean, you could drive down the road
5 without any difficulty.
- 6 Q Did you have to stop and unlock a gate?
- 7 A No.
- 8 Q Was a gate there, do you know?
- 9 A It was, but I didn't notice it at the time. It was
10 grown up with weeds. It was on the side of the road, you
11 know, didn't even see it.
- 12 Q But later, you realized okay, this is where this gate
13 is?
- 14 A Yeah, because Uncle Joe came to me and told me that
15 he wanted to close the gate.
- 16 Q Now, the road we're referring to, is it shown by the
17 yellow line, beginning of this road shown by the yellow
18 line from what is Wheeland School Road?
- 19 A Yes.
- 20 Q And it traverses across several other people's
21 property and then this is Mr. Fulmer's property?
- 22 A That's correct.
- 23 Q And then property owned by SCE&G?
- 24 A That's correct.
- 25 Q And then onto and throughout your property?

- 1 A That's correct.
- 2 Q Now, what were your intentions for the peninsula
- 3 property?
- 4 A Well, it was a nice piece of property that had been
- 5 on, it had been for sale for well over a year when I found
- 6 out about it. And I had done a little subdivision up
- 7 called Little Creek, which was lots that I had,
- 8 subdivision that I had developed in three to nine or ten
- 9 acre lots. And I really intended on doing one-acre lots
- 10 on that property and developing it.
- 11 Q Are you aware of the history of this property?
- 12 A Absolutely.
- 13 Q What has it been used as in the past?
- 14 A Well, it cascaded through a number of property
- 15 owners. Some of them were Fricks. In fact, there was a
- 16 Frick house on the property about, I'd say, halfway down
- 17 the peninsula and it was farmed. Although, after SCE&G
- 18 built the lake, they took all the good bottom land and the
- 19 people basically starved on the land, had to move.
- 20 Q Okay.
- 21 A So sometime around in the late 40's or so, it got
- 22 sold to Champion Paper.
- 23 Q Okay. And you bought it not from Champion, but
- 24 someone who had just bought it from Champion?
- 25 A That is exactly right.

- 1 Q And Champion used it for?
- 2 A Just pulp, paper, timber.
- 3 Q Have you, in the course of researching the property,
4 looked at any old maps, any old documents or records that
5 indicate the original path of this road?
- 6 A Yes.
- 7 Q Where did it originally go?
- 8 A It, one finger went down say three-quarters or a
9 little bit better down the peninsula, sort of went down to
10 like the last field and then the other went across that
11 tied into Seibert Road.
- 12 Q Okay. Did you review a 1938 general highway and
13 transportation map for Newberry County?
- 14 A Yes, I did.
- 15 Q I'm going to ask you if you will step down with
16 permission of the Court and if you can show us on this map
17 where, and let me try, I'm trying to get it where
18 everybody can see it. If you can show us where the road
19 on your side, on the peninsula side of the lake ran in
20 1938?
- 21 A It came down right here and then went across the
22 creek back over there.
- 23 Q And you just marked that in orange for us?
- 24 A That's correct.
- 25 Q And the first piece came down straight onto the

1 peninsula?

2 A That's correct.

3 Q And then it also veered over to Seibert Road?

4 A That's correct. And the road's still on the ground
5 today. I mean, you can see if you go to the property.

6 Q Mr. Frick, I'm going to hand you a smaller version of
7 that map that has, it consist of three pages, but it's the
8 same map, and ask you to mark on that portion the same
9 road that you just marked on the big one so that we can
10 make it a Court's Exhibit.

11 A Okay. I've marked it.

12 MR. JENKINS: Your Honor, we would offer that as
13 Plaintiff's 1.

14 MR. EDWARDS: Without objection.

15 THE COURT: Without objection.

16 (WHEREUPON, Plaintiff's Exhibit No. 1 was admitted
17 into evidence.)

18 BY MR. JENKINS:

19 Q Do other maps show the road?

20 A Yes, sir.

21 Q As it runs across what is now Lake Murray over and
22 connecting to Seibert Road?

23 A Yes, sir.

24 Q Do current maps even show that?

25 A Yes, sir.

1 Q Did you purchase and review the Lake Murray and Lake
2 Monticello map?

3 A Yes, I did.

4 Q And does it show the same thing?

5 A Yes, it does.

6 MR. JENKINS: Your Honor, we would offer that as
7 Plaintiff's 2.

8 MR. EDWARDS: No objection, Your Honor.

9 THE COURT: Without objection, Plaintiff's 2 is in
10 evidence.

11 (WHEREUPON, Plaintiff's Exhibit No. 2 was admitted
12 into evidence.)

13 BY MR. JENKINS:

14 Q I'm going to hand you a South Carolina atlas and
15 Gazetteer and can you tell us what edition that is down at
16 the very bottom?

17 A It is 2006.

18 Q Okay. Now, looking at the page that includes the
19 peninsula piece of property, can you identify the road in
20 question on it?

21 A Yes, I can.

22 Q Okay. And does it also show it running across what
23 is now part of Lake Murray over and connecting with
24 Seibert Road?

25 A Yes, it does.

1 Q Can you mark that with the orange highlighter?

2 A (Witness complied.)

3 MR. JENKINS: I'd like to offer that as Plaintiff's
4 3. And if it's any easier, I'll take the page out and
5 just utilize that page.

6 THE WITNESS: Should we draw a big circle around it?

7 BY MR. JENKINS:

8 Q It may help, actually. If you'll draw a circle
9 around it to get us to the general area. Then I'm going
10 to ask you to mark Plaintiff's 2, also.

11 MR. EDWARDS: No objection to Plaintiff's 3, Your
12 Honor.

13 MR. JENKINS: Just take this page out and stipulate
14 it's the South Carolina atlas and Gazetteer from 2006.

15 (WHEREUPON, Plaintiff's Exhibit No. 3 was admitted
16 into evidence.)

17 BY MR. JENKINS:

18 Q And you just marked Plaintiff's Exhibit 2, which is
19 the Murray and Monticello lake map with the same road; is
20 that correct?

21 A That is correct.

22 Q Mr. Frick, is this another aerial photograph of the
23 peninsula property showing the road, also?

24 A Yes, sir.

25 Q And does it show the other side of the lake where

1 Seibert Road runs across Macedonia Church Road and the
2 thin line, actually, continues onto the other people--

3 A That is correct. And, you know, people in the
4 community know that, too. I mean, it's, it's been open
5 and notorious.

6 Q Is this, I hand you this. Do you recognize this
7 aerial photograph, also?

8 A Yes, I do.

9 Q And is it an aerial photograph depicting the area
10 around Seibert Road where it meets up with Macedonia
11 Church Road?

12 A That's correct, and the new fire station there at
13 Fairview.

14 MR. JENKINS: I'd like to offer that as Plaintiff's
15 4.

16 MR. EDWARDS: No objection.

17 THE COURT: Without objection, Plaintiff's 4 in
18 evidence.

19 (WHEREUPON, Plaintiff's Exhibit No. 4 was admitted
20 into evidence.)

21 BY MR. JENKINS:

22 Q Plaintiff's Exhibit 4 shows Seibert Road crossing
23 Macedonia Church Road. Have you visited that area
24 recently?

25 A Yes, I have.

1 Q I'm going to hand you Plaintiff's Exhibit 5. Do you
2 recognize that photo?

3 A Yes, I do.

4 Q Is that an accurate depiction of the recent way it
5 looks looking from the fire department side of Macedonia
6 Church Road towards Lake Murray down Seibert Road?

7 A Yes, it does.

8 Q Does it, actually, include a road sign that says
9 Seibert Road?

10 A Yes, it does.

11 MR. JENKINS: I'd like to offer that as Plaintiff's
12 5.

13 MR. EDWARDS: No objection, Your Honor.

14 THE COURT: Without objection, Plaintiff's 5 in
15 evidence.

16 (WHEREUPON, Plaintiff's Exhibit No. 5 was admitted
17 into evidence.)

18 BY MR. JENKINS:

19 Q Are you aware if the County ever took any action to
20 close any further portion of Seibert Road?

21 A I wasn't at the time of the deposition, but since
22 then, I found out that one of the property owners on the
23 road petitioned to have it closed and the County responded
24 that they couldn't because it was a public road.

25 Q Okay. Now, let's talk about the history of the road

1 a little bit further. Have you utilized the road in
2 question prior to purchasing the property?

3 A Yes, I did.

4 Q How long ago was that?

5 A Well, all the way back, my dad ran his own business,
6 so we never could hunt or fish or anything like that
7 unless it was raining when you didn't have any business.
8 So when I was a little kid, this is one of the places
9 where we fished. We'd go down and fish off the bank or
10 whatever on the creek and on down into, you know, to the
11 lake portion, cast from the bank and so forth. And then
12 when I was a Boy Scout at age 11, we camped down, there's
13 an old Civil War era mill pond dam that used to cross
14 Camping Creek and we camped in that, you know, in that
15 area right there around the old dam.

16 Q For those of us not out in the Little Mountain area
17 and the lake area, when you say Camping Creek, Camping
18 Creek is what forms that part of Lake Murray?

19 A That is correct.

20 Q Okay. Were there ever any homes that were accessed
21 by that road?

22 A Yes, there were two homes. The Enlow house, which I
23 remember, and it stood on Keith's property right across
24 from where the pond is, right in the little hook in the
25 road.

1 Q Okay.

2 A And then there was a Frick house, which was on down
3 about, you know, three-quarters of the way down the, you
4 know, half or three-quarters down the peninsula.

5 Q And both of those homes were accessed utilizing that
6 road?

7 A That is correct. And they also got mail delivered
8 there.

9 Q Obviously, given your age, you don't, you can't say
10 what it looked like back when, before the lake was built.
11 You weren't there before the lake was built?

12 A That's correct.

13 Q What was the condition of the road when you remember
14 using it and utilizing it?

15 A Well, I mean, it was in, it was like a lot of other
16 little country roads. I mean, it didn't differ, it was
17 actually a little bit wider than say Coley Todd Hill Road,
18 but you could go down it in a car.

19 Q With the Judge not being from the Newberry area,
20 describe what Coley Todd Hill Road is. Where is it at?

21 A Well, Coley Todd Hill, that road goes up and over
22 Coley Todd Hill and it joins up with another dirt road
23 that passes from 76 back to Macedonia Church Road. And,
24 you know, they're dirt roads. Now, a couple of years ago
25 because Kyle Page is handicapped, they paved a portion,

1 they widened and paved a portion of Coley Todd Hill Road,
2 but, you know, those roads are typically 20 feet or so
3 wide and, you know, the County grades them.

4 Q Now, were you able to find any records that the
5 County kept in regards to the road maintenance they do?

6 A Well, from a previous case, I know that the County
7 did not keep records up until the case where they sued me,
8 which was sometime in the late 80's, early 90's.

9 Q And we'll get to that one in a minute.

10 A Okay.

11 Q Let's talk about the gate, in particular. You
12 indicated Joe Keith Fulmer; is that correct?

13 A Well, I called him Uncle Joe, we always called him
14 Uncle Joe.

15 Q Okay. Uncle Joe.

16 A It's Keith's dad.

17 Q Okay. He came to you when he was still alive about
18 the gate; is that correct?

19 A That is correct.

20 Q Tell us what he indicated he wanted to do in regards
21 to the gate.

22 A Well, at the time, after I bought the property, he
23 came to me and said that the Haltiwangers, Doug
24 Haltiwanger was poaching on his property and he wanted to
25 close the gate to keep him out. I told him, I said, Well,

1 Doug's property joins up to this other property. He can
2 ride his four-wheeler back there any time he wants to
3 poach. I mean, I had neighbors poaching on the property,
4 you know, from the time I purchased it. And, you know, I
5 didn't know it at the time, but Uncle Joe had gone to the
6 real estate agent that was handling some of this stuff and
7 told him not to sell the property to me. And Uncle Joe,
8 you know --

9 MR. EDWARDS: I would object to testimony about what
10 Uncle Joe might have told other people. He's passed --

11 MR. FRICK: It's in his deposition.

12 MR. EDWARDS: Well, his deposition hasn't been
13 introduced, Your Honor.

14 BY MR. JENKINS:

15 Q You can't testify about that.

16 A Okay.

17 Q But Uncle Joe indicated he wanted to put that gate
18 back up to you?

19 A He said, yeah, he wanted to close off the road.

20 Q Did you indicate you were opposed to that?

21 A Yes.

22 Q Did he do it anyway?

23 A Yes.

24 Q What was the system going to be in regards to you
25 being able to access your property if that gate was up?

1 A Well, he kept telling me he would give me a key, you
2 know, he would give me a key and I told him I didn't want
3 a key. And he understood that houses were back there. He
4 knew the condition of the road.

5 Q But he indicated he would give you a key. Did he
6 eventually give you a key?

7 A Yes, he did.

8 Q Did the key work?

9 A No.

10 Q Did they institute a system whereby you would have
11 your own lock on the gate?

12 A That's correct.

13 Q Did you ever have any problems with that system?

14 A Yes, they would take my lock out of the series, hook
15 it to the side where it wouldn't work. And, of course,
16 with only one key, my brother-in-law hunted on the
17 property and there were a couple of other people I let
18 hunt on the property. There was no way for them to get
19 in. I mean, he was intentionally doing this to restrict
20 my access.

21 Q Now, did you have a contract with a potential
22 purchaser of this property at one point?

23 A Yes, I did.

24 Q I believe it was a guy from Florida?

25 A That's correct.

- 1 Q What was his intended use of the property?
- 2 A Well, I think he wanted to look towards the future,
3 you know, maybe developing the property as I had thought
4 about doing. But he got his wife and his two kids and I
5 took them down to the end of the peninsula in my truck.
6 And they got out and looked over, looked over the property
7 and they picked a spot right there at the end of the
8 peninsula to put their house. His kids were about, I
9 don't know, at the time, about 11 or 12 years old. And
10 they had four-wheelers. They liked to fish and they liked
11 to hunt and ride their four-wheelers. And he was going to
12 make that a private family compound for him and his
13 family, put a house down there on the end.
- 14 Q Was part of that contract or agreement that he would
15 have unfettered access to the property?
- 16 A Oh, absolutely.
- 17 Q Utilizing those roads?
- 18 A Absolutely.
- 19 Q And couldn't get the gate taken down, though?
- 20 A No. In fact, right along in those times, you know,
21 both Keith and his cousin, almost simultaneously tried to
22 lock things up and they were attempting to landlock me.
- 23 Q Okay.
- 24 A And, you know, both of them, Uncle Joe and John
25 Fulmer both told me that they wished they had bought the

1 property. They had looked at it. It should belong to
2 them. I shouldn't have been able to buy it, you know, so
3 forth and so on. I mean, it's just greed and jealousy.

4 Q Now, we stipulated that at times the SCE&G property,
5 645-56, the peninsula property and the fringe land running
6 along both of those properties have been in the Wildlife
7 Management Area program through the state?

8 A That is correct.

9 Q Other than by lake, is there any other access to
10 those properties other than utilizing that road?

11 A No.

12 Q Is the SCE&G property always accessible by lake?

13 A No.

14 Q And why would that be? Why would it not be
15 accessible by lake?

16 A Well, if the lake's down any at all, you can't get
17 back up in there.

18 Q Is this a fairly shallow cove?

19 A Well, when the lake was down, it's real shallow, but
20 now, you know, it's eight or ten feet of water out there.

21 Q Okay.

22 A But as you go back up the creek, obviously, it gets
23 shallower, plus, you know, trees fall down and stuff like
24 that. You can't always get back up in there.

25 Q Now, your contention is that this is a public road?

1 A Oh, absolutely. It always has been. I mean, it's a
2 County road.

3 Q And that the County never took any actions to close
4 that portion of Seibert Road?

5 A That is exactly right. And Uncle Joe and I discussed
6 all that. I even went over to Keith's house, you know,
7 and he didn't want to hear anything about it. He cursed
8 me and told me to leave, so I left.

9 Q Now, I'm going to ask you to assume for a minute, I
10 know you disagree with me, but assume for a minute that
11 it's not a County road, that that's off the table.

12 A It is a County road, but okay.

13 Q And given that assumption, do you feel like you have
14 the right to access and utilize this road to get to your
15 property?

16 A Absolutely. I mean, there are no County roads or
17 anything like that that have gates across them. In fact,
18 they'll come lock you up if you do that.

19 Q Have you and your wife ever considered building
20 anything on that property?

21 A Yes, we did. May still do it.

22 Q If you build a house or a weekend home out there, do
23 you want to have to stop and open a gate every time you go
24 to your property?

25 A Absolutely not.

1 Q Do you want to have to have your guests that may
2 visit you or may go hunting or fishing on your property
3 stop and open a gate every time?

4 A No. I mean, Keith would have it locked where they
5 couldn't even get in.

6 Q Now, as far as your rights to this road, if it's not
7 a County road, would you like to be able to do any
8 improvements to the road?

9 A Absolutely. I'd like to have unfettered access to my
10 property. I mean, they can't de facto landlock me.

11 Q As far as improvements, what do you want to do? I
12 mean, do you want to build a super four-lane highway
13 through there or do you want to put gravel down? What
14 would you like to be able to do if it's not a County road?

15 A Well, I'd like to open it back up to the ditches, you
16 know, the road, the pipes in there are 20 foot wide. The
17 road ditches are 25, you know, outside road ditches are up
18 to like 30 feet or so. I'd like to clean all that out
19 and, you know, be able to use the road. I mean, two cars
20 can pass on a 20-foot wide road.

21 Q Would you like to be able to utilize a car to get up
22 and down that road even if it's been a heavy rain?

23 A Absolutely.

24 Q And you would like to have the gate removed; is that
25 correct?

1 A Oh, absolutely. You can't do anything with the
2 property with the gate there and they know that. They've
3 tried to stall me for, in fact, they've stalled me for the
4 last 10 years. What's 10 years of a man's life worth?

5 MR. JENKINS: All right. I'm going to ask you to
6 answer any questions Mr. Edwards may have.

7 THE COURT: Before we do cross, the gentleman in the
8 blue is the Grand Jury Foreperson, right?

9 THE CLERK: Yes.

10 THE COURT: We're going to take a brief break and get
11 him out of here.

12 (WHEREUPON, a short break was taken.)

13 THE COURT: Cross?

14 MR. EDWARDS: Thank you, Your Honor, may it please
15 the Court?

16 THE COURT: Yes, sir.

17 CROSS-EXAMINATION

18 BY MR. EDWARDS:

19 Q Good morning, Mr. Frick.

20 A Morning. Could I have my water, please?

21 Q Oh, yes, sir.

22 A Thank you.

23 Q Isn't it true, Mr. Frick, that you do not understand
24 the distinction between a private right of access and a
25 public road?

1 MR. FRICK: Okay.

2 THE COURT: Answer his question and then I'll give
3 you an opportunity to explain your answer.

4 So if you would repeat the question.

5 MR. EDWARDS: Certainly, Your Honor.

6 BY MR. EDWARDS:

7 Q Mr. Frick, isn't it true you were never told you had
8 an easement when you purchased this property?

9 A Champion Paper Company never bought a piece of
10 property they didn't have access to. That road was open
11 and notorious. That road served two houses. Everybody in
12 the community knew--

13 Q Mr. Frick, if you could give me a yes or no answer--

14 A -- that that road --

15 Q -- and then give an explanation.

16 THE COURT: You're doing it again. Answer yes or no,
17 then I'll let you explain. Is it true that it was never
18 an easement granted to you?

19 MR. FRICK: That's correct. There's no easement
20 there. Didn't need one.

21 BY MR. EDWARDS:

22 Q And isn't it true you don't have any specific
23 documents indicating that you have an easement to this
24 property?

25 A That's not true. We've got road maps, County road

1 40 feet for non-through roads?

2 A Yes.

3 Q Would this be a through road or a non-through road?

4 A If they put the bridge across there, what they should
5 have done back in the 20's and 30's, it would be a through
6 road.

7 Q Is there a bridge there right now?

8 A This is immaterial because this road--

9 Q Mr. Frick--

10 A This road--

11 Q -- is there a bridge that crosses this road--

12 A No, this is a county--

13 Q -- over the lake?

14 A -- road. It was never closed, so this is
15 grandfathered. This has no bearing. The County has lots
16 of roads that are 13 foot and 20 foot wide--

17 Q Mr. Frick--

18 A This is immaterial.

19 THE COURT: Mr. Frick, if you could, just answer the
20 question.

21 BY MR. EDWARDS:

22 Q Can you travel in a car from Macedonia Church Road to
23 Wheeland School Road and cross the lake?

24 A Not without a boat.

25 Q And you testified that you believe the width of the

1 ditches on this road as a passage from, through your
2 property up through SCE&G property and Fulmer property,
3 all the way up to Wheeland School Road is approximately 25
4 to 30 feet?

5 A That's correct.

6 Q So that's less than 40 feet, right?

7 A That's right, but it's grandfathered because it
8 already is a County road.

9 Q And if you flip to section 91-23, construction
10 standards, buried utilities. You see that, it's near the
11 bottom?

12 A Yes.

13 Q All right. Flip to the next page, it's still the
14 same section, subpart B, buried utilities. You see that
15 part?

16 A Yes, I do.

17 Q For utilities to be placed on this road, wouldn't you
18 have to bury them 36 inches off the pavement?

19 A If I put them there. I don't have to put--

20 Q Do you have an intention to bring utilities down this
21 road?

22 A Yes, at some point in time, we would bring utilities
23 in, but I don't have to bring them down that road.

24 Q You couldn't bring them down on this road according
25 to the Newberry County ordinances?

1 right. You're right. It is in here. It goes from 91.34
2 exceptions to 91.54 no guarantee of paving. So I've got
3 that.

4 MR. JENKINS: And, Your Honor, I will let him
5 substitute the Court's exhibit with one that's just, or he
6 can take it apart and reassemble it.

7 THE COURT: We're in good shape. I'm sorry.

8 BY MR. EDWARDS:

9 Q Mr. Fulmer, I'm sorry, Mr. Frick, isn't it true that
10 you opened up this 66-foot wide easement that you
11 purchased from Mr. Fulmer and you can drive your truck
12 through there now?

13 A You can drive a truck through there. Not a car, but
14 a truck. I did that so people who leased the property
15 from me could access that side of the property.

16 Q And as far as the road in question that connects the
17 peninsula property with Wheeland School Road, I believe
18 you testified on direct examination you did see a gate,
19 but you testified it was not closed when you first drove
20 down there?

21 A I didn't see it when I first rode down there. I only
22 really became knowledgable about the gate when Uncle Joe
23 said he wanted to close it.

24 Q And later on, it was a corrugated metal gate, is that
25 how you would describe it?

1 A The first one was.

2 Q And then at some point, that was removed or torn down
3 and a pipe gate was placed up?

4 A I took it down because I was going back there, I had
5 my backhoe and they had fiddled with the locks again, I
6 couldn't get in. I didn't really have any other choice.
7 I just pushed it over. And then SCE&G, for some reason,
8 you know they put a gate up on somebody else's property,
9 which really doesn't make a lot of sense.

10 Q And is the pipe gate the gate that's there now?

11 A Yes, it is.

12 Q And is it pretty much in the same general vicinity
13 and same location--

14 A Yes, it is. SCE&G put a gate up on somebody else's
15 property.

16 Q They put it up on the Fulmer property?

17 A That's correct. For some reason, they didn't want me
18 in there. They were willing to landlock themselves to
19 landlock me. How odd.

20 Q And you've never lived on this peninsula property,
21 have you?

22 A No.

23 Q And you've never lived on the more square-shaped
24 property, have you?

25 A No, Uncle Frank lived there.

1 Q And Uncle Frank hasn't lived there for 60 years, has
2 he?

3 A Oh, it's been a long time.

4 Q And there's been no--

5 A The house is still there.

6 Q And there's been nobody living on the peninsula
7 property since probably the 40's, right?

8 A Well, probably, according to the Frick's, probably
9 more like the late 50's, early 60's.

10 Q I'm sorry. To your personal knowledge, you're not
11 aware of anybody living on the peninsula piece since--

12 A No, and when I was a kid--

13 Q Since you were alive?

14 A And when I was a kid, I don't ever remember -- I
15 remember the Enlow house, remember seeing it. I don't
16 ever remember seeing the Frick house.

17 Q And when were you born?

18 A I was born in '54.

19 Q So, at least, since 1954, nobody has lived on either
20 of those properties?

21 A Well, I can't say that because I was a kid, but, I
22 mean, for some time, you know, nobody has lived on there
23 probably since the late 50's, early 60's. But we do know
24 that that road served both houses and they got mail
25 delivered there.

1 A No. The bank, whenever you have a number of big
2 rains or whatever, the bank builds back up so the ramp
3 access or whatever to the slate rock outcrop, it built
4 back up.

5 Q Essentially, once Lake Murray flooded this area, and
6 I realize it took a little bit of time, but after about
7 1930, essentially, the middle of this road was covered up
8 by the lake?

9 A Well, according to a number of people, you know, like
10 I said, I wasn't around then, but they said the lake
11 didn't really fill up until somewhere in the 40's and for
12 whatever reason, SCE&G kept it low. So it's only been in
13 recent times, you know, the lake's been up.

14 Q In your lifetime, Lake Murray has flooded out the
15 middle of this road?

16 A Yeah, yeah.

17 Q And isn't it true, Mr. Frick, there has been little
18 to no use of the road in question by members of the public
19 since the time the lake flooded the road?

20 A That's not really true because people did go back in
21 there to hunt and fish. Even after Champion bought it,
22 people went back there and hunted and fished. Dard and
23 some of his brothers and, of course, my dad and my brother
24 and I, and a number of other people used that road and
25 hunted and fished. We didn't own it, we were just members

1 of the public.

2 Q So you're saying family members would use the road to
3 access the property to fish?

4 A Well, I talked to Dard and a number of other family
5 members that used to own the property. And even after it
6 got out of their hands and went to Champion, they went
7 there and hunted and fished and so forth. And like I
8 said, we went down the road to fish.

9 Q Let's look at Page 28 of your deposition. Let's look
10 at Line 11.

11 A Okay.

12 Q I'm going to read the question, What is your
13 knowledge of the use of this road that is highlighted in
14 yellow in Plaintiff's Exhibit No. 1 by members of the
15 public who either didn't own property that adjoined the
16 road or weren't related to people who lived along that
17 area? What was your answer?

18 A A little to none. And that's still probably true.
19 It wasn't a, you know, a thoroughfare or anything like
20 that. That's never claimed. But it was an open and
21 notorious road and people do use it.

22 Q So family members of yours used this road for hunting
23 and fishing, recreation, is that fair?

24 A Yeah, but that, you know, if you want to look at it
25 that way, I mean, we consider family on out, you know,

1 second, third and fourth cousins, you know, so however you
2 want to look at that.

3 Q And isn't it true to your knowledge there are no
4 Newberry County records that show there was County
5 maintenance on this side of the property that you bought,
6 from the peninsula side up to Wheeland School Road?

7 A The County is on record stating that they didn't keep
8 records until approximately the time they sued me, which
9 is sometime around in the 90's. The only records were the
10 County road maps, which is what the County relied on and
11 this is on the County road maps.

12 Q But there's no written documentation of County
13 maintenance--

14 A Of any kind during that time at all, period. They
15 didn't keep records.

16 Q Do you currently have plans to subdivide this
17 peninsula property?

18 A Since 2008 in the banking crisis, I honestly don't
19 know what I'm going to do with the property. I may just
20 put me a house down there on the end and say to hell with
21 it.

22 Q In your lifetime, you have never lived on either the
23 peninsula property or the square property?

24 A Never.

25 Q And to your knowledge, this portion of the road on

1 Q Mr. Frick, let's turn to Page 94 of your deposition
2 transcript.

3 A Okay.

4 Q Line 9, I'll read the question. So prior to buying
5 either one of these parcels, you knew there was an access
6 problem? What was your answer?

7 A I said I knew there could be.

8 Q And isn't it true you would have not purchased this
9 66-foot wide strip from Mr. Fulmer if there was no gate,
10 I'm sorry, if there was no gate on the Fulmer property--

11 A Listen, if that gate--

12 Q -- coming down from Wheeland School Road?

13 A If that gate had been down, Mr. Beck would own the
14 property now, I wouldn't and I'd be 2.4 million dollars,
15 plus the interest better off today.

16 Q So, Mr. Frick--

17 A And that was five years ago, five years ago, no, in
18 fact, seven years ago.

19 THE COURT: Sir, please, just one second.

20 BY MR. EDWARDS:

21 Q So, Mr. Frick, you would not, it's your testimony you
22 would not have had to buy this 66-foot wide strip if there
23 was no gate here?

24 A That's correct.

25 Q And isn't it also true you had the 66-foot wide strip

1 Q As part of this lawsuit, you're not contending that?

2 A No. I mean, it was a County road.

3 Q Okay.

4 A It's really the County's obligation.

5 MR. BRESSLER: Okay. No further questions.

6 MR. TOTHACER: Your Honor, I just have a few.

7 CROSS-EXAMINATION

8 BY MR. TOTHACER:

9 Q Mr. Frick, my name is Jay Tothacer. I'm the Newberry
10 County attorney. Just as a follow-up to Mr. Bressler's
11 question, in the lawsuit, you've just asked that it be
12 named a County road, is that correct?

13 A I'm not really sure.

14 Q You're not sure? I'm sorry, I thought when he asked
15 you the question you said that you just want--

16 A Yeah, that's what I want it to be is, I mean, it
17 always has been a County road.

18 Q The maps that have been presented into evidence, you
19 testified earlier that this road appeared on County maps?

20 A That's correct.

21 Q Those were all the maps you were referring to,
22 there's no other map, is there?

23 A There probably are, but those are the ones we've put
24 into--

25 Q For the purpose of your testimony--

1 A -- the court.

2 Q That's your basis for saying that they're shown on
3 County maps, is that correct?

4 A That's part of it, yes.

5 Q Is there some other basis that you have for saying
6 it's on a County map?

7 A Yeah, I mean, I've lived here all my life. I've
8 known the road. I know the community. I know the people.

9 Q Mr. Frick, I'm sorry, maybe I'm not clear. I'm
10 asking, you made reference to the fact that it's on County
11 maps and I'm just asking if there's any other map that you
12 would refer to as a County map beside what's been
13 admitted--

14 A That's all we chose to put into the court.

15 Q Are you aware of any other maps?

16 A I'm aware there could be.

17 Q So you're not personally aware of a map that exist
18 right now.

19 A Not that I have in my possession.

20 MR. TOTHACER: Thank you so much.

21 THE COURT: Redirect?

22 REDIRECT EXAMINATION

23 BY MR. JENKINS:

24 Q On the rectangular piece, 645-9, that's the piece you
25 purchased--

1 to Seibert Road, is that correct? If you even know, if
2 you don't know, that's fine.

3 A I can see where it says dirt road, but I don't see
4 where it says, names any roads.

5 Q Okay. And that was, all this was produced in
6 response to I think Mr. George Stockman wrote a letter,
7 that's the second page of it, dated January 8th, 1997,
8 asking the County not do any maintenance on his private
9 drive and that it's solely owned by me, by permission only
10 and asked that the road sign reading Seibert Road being
11 removed from that side of Macedonia Church Road, is that
12 correct?

13 A That's correct.

14 Q And the response to that was, Newberry County
15 Council's response says County road maintenance has been
16 performed on this road for a substantial number of years,
17 early maps indicate that this road, while not deeded to
18 the County has served as a dedicated road named Seibert
19 Road, is that correct?

20 A That's correct.

21 Q And said we have to deny your request?

22 A That's correct.

23 MR. JENKINS: That's all I have, Judge. And, Judge,
24 we'd like to offer that into evidence as Plaintiff's 9.

25 MR. EDWARDS: No objection.

1 THE COURT: Without objection, Plaintiff's 9 in
2 evidence.

3 (WHEREUPON, Plaintiff's Exhibit No. 9 was admitted.)

4 MR. EDWARDS: Very briefly, Your Honor, may it please
5 the Court.

6 CROSS-EXAMINATION

7 BY MR. EDWARDS:

8 Q Good afternoon, Ms. Renwick. How are you today?

9 A Fine, and you, sir?

10 Q I'm well, thanks. I represent one of the Defendants,
11 Mr. Fulmer. I just have a few questions for you. I
12 wanted to refer you to Defendant's Exhibit No. 1, just the
13 first page. Are you familiar that Newberry County has
14 code regarding its roads and requirements for the County
15 maintained roads?

16 A Yes, sir.

17 Q All right. And if we just look at 91.20, subpart B,
18 subpart one, do you agree that according to this Exhibit 1
19 that road or extension of roads for the County to accept
20 them cannot be less than 50 feet in total width for
21 through roads and not less than 40 feet for non-through
22 roads?

23 A If this is a copy of the current ordinance, that
24 would be correct.

25 Q Do you have any reason to believe that it's not the

1 current ordinance?

2 A No, sir.

3 Q You don't have?

4 A No.

5 Q To your knowledge, would the County accept a road
6 whose width was less than 40 feet for a non-through road?

7 MR. JENKINS: I'm going to object. That calls for a
8 legal conclusion from someone who is not authorized to
9 make that decision. Your Honor, we would stipulate that
10 these are the current County ordinances and ask you take
11 judicial notice of them, but, I mean, it's basically
12 asking her to read the ordinance.

13 THE COURT: I'm going to overrule the objection. I'm
14 going to allow her to answer. Obviously, at any time
15 Council can amend those ordinances. I'll take judicial
16 notice of that fact. And I don't know if Council has to
17 have it, perhaps, accepting other roads or overriding
18 ordinances, so I'll let him explore this a little bit.

19 MR. TOTHACER: Your Honor, if I could offer an
20 objection. Ms. Renwick is just a records custodian. She
21 doesn't interpret the ordinances or the codes. She
22 doesn't actually provide any work with those either. The
23 one thing that she does do with regard to the Codes is
24 when an ordinance is passed by County Council, she groups
25 them and sends them to the American Legal Publishing for

1 codification, so, yes, she's aware of the code, but as far
2 as it being in there, that's an action of the County
3 Council that's interpreted by either the administrator,
4 public works director or, perhaps, me as the County
5 attorney.

6 THE COURT: Mr. Edwards, why don't you ask her if
7 she's aware of any roads that have been accepted into the
8 County system or otherwise remain in the County system
9 despite them not complying with the ordinance or something
10 to that effect?

11 MR. EDWARDS: Sure.

12 THE COURT: I think that's what you're getting at
13 anyway.

14 MR. EDWARDS: Thank you, Your Honor.

15 BY MR. EDWARDS:

16 Q Mr. Renwick, to your knowledge, as the custodian of
17 records for Newberry, are there roads that have been
18 accepted into the Newberry County maintained system that
19 did not comply, that were, at least, not 40 feet in width
20 at the time this ordinance was in place?

21 A Not to my knowledge.

22 Q And on Seibert Road, it's on the other side, let's
23 see. I represent to you that Seibert Road is over on this
24 side of this aerial photograph. Are you familiar with
25 that area at all?

1 A No, sir.

2 Q All right. Did you know that there are two houses on
3 Seibert Road?

4 A No, sir.

5 Q Are there, to your knowledge, are gates or fences
6 allowed to cross public roads in Newberry County?

7 MR. JENKINS: Your Honor, same objection that Mr.
8 Tothacer had, and I would renew it at this time. He's
9 trying to get something through a records custodian that
10 simply can't be done.

11 BY MR. EDWARDS:

12 Q Are you aware that there's a gate across Seibert
13 Road, behind the second house on Seibert Road?

14 A I'm not aware of it.

15 Q Are you aware that the County has any records
16 indicating maintenance by the County on the portion of the
17 road that we've been talking about today that runs,
18 basically, north and south from Wheeland School Road, on
19 the other side of the lake?

20 A Are we talking about two sides?

21 Q Yes, ma'am. I apologize. It's my understanding that
22 the records you presented here today were the result of a
23 search you did regarding County maintenance on the Seibert
24 Road side of the lake, is that correct? Is that what you
25 were asked to do?

1 A On the property of it was then Mr. Stockman?

2 Q Yes, ma'am.

3 A Then that's correct.

4 Q Okay. Are you aware of any County records indicating
5 County maintenance of the road on this side of the lake?

6 A No, sir.

7 MR. EDWARDS: Thank you very much. I don't have any
8 further questions.

9 MR. TOTHACER: Nothing, Your Honor.

10 REDIRECT EXAMINATION

11 BY MR. JENKINS:

12 Q The fact that you're not aware that there may be some
13 County roads that are not 40 feet wide doesn't mean that
14 there's not, does it?

15 A That's correct.

16 MR. EDWARDS: Thank you. That's all I have.

17 THE COURT: Thank you, ma'am, you can step down.
18 You're free to go.

19 Call your next witness, please.

20 MR. JENKINS: We call Van Hoffman.

21 VAN HOFFMAN,

22 After having been duly sworn, testified as follows:

23 DIRECT EXAMINATION

24 BY MR. JENKINS:

25 Q Give us your full name, please.

1 Q And you were always aware of this Enlow tract and I'm
2 going to call it a road, like I said, the path road, trail
3 or whatever it may be leading into the Enlow tract from
4 Macedonia Church Road?

5 A I saw it the second week that I worked for SCE&G.

6 Q And that was back in 1970?

7 A It was in July of 1970. For some reason, I remember
8 going in there.

9 Q And is the road in the same basic position it's
10 always been in?

11 A The position from Wheeland School Road until you
12 reach the Champion, well, it's now the Frick property line
13 or common property line, it's in the same location up to
14 that point.

15 Q Okay. And at that point, back in, the Champion
16 property, that's what we've been referring to as the
17 peninsula property, is that correct, that John Frick now
18 owns?

19 A Yes, back in the 1970's, that belonged to Champion
20 Paper Company.

21 Q Okay. What did the road do back then when you first
22 saw it?

23 A All I can, well, I can remember, and it may not have
24 been that second week, but I can remember that back in the
25 70's, I, actually, drove down to the tip of that

1 peninsula. I remember that.

2 Q So the road went all the way to the end of the
3 peninsula property?

4 A Well, yes, single lane, what I'd call single lane
5 woods road, forest road.

6 Q Could you traverse it at that time in a car?

7 A Yes.

8 Q In fact, the road used to before that time, actually,
9 can you still see the old roadbed that runs down to the
10 fringe property for SCE&G?

11 A Okay, I'm going to back up. When I said car, yes.
12 We were in a truck. Okay. So a truck has a little more
13 clearance, so I want to clarify that.

14 Q Could a car have traversed it?

15 A That road was not in as good a shape the first time I
16 saw it as it is today. It was much improved about 1990.

17 Q Okay. Now, who improved it?

18 A SCE&G. It was the result of a transmission line
19 construction.

20 Q And they constructed a transmission line, for the
21 Judge's view.

22 A Yes, sir, that's--

23 Q This clearing that runs through part of the Enlow
24 property and part of the Fulmer property?

25 A Yes, sir.

1 Q Now, parts of that road, SCE&G, actually, widened it
2 a little bit so they could get their big trucks in, right?

3 A I was not there, but my forester, Randy Summer, told
4 me that Billy Caldwell and Bruce Caldwell, Little Mountain
5 Construction, actually widened the road for our
6 construction of the transmission line to get equipment and
7 things like that in there.

8 Q And when was that?

9 A That was in 1970.

10 Q Okay.

11 A That was when I really first had, 1990, excuse me,
12 1990. That's when I first, you know, had some involvement
13 there, really, from the standpoint the company was
14 building a transmission line. And I remember the
15 right-of-way agent, Ed Stevens, came to see me. They were
16 trying to figure out how to route that transmission line.
17 They knew that we owned, that the company owned land there
18 and they thought that it was such that they could keep it
19 on our property as much as possible for a stretch-through
20 there. And so I worked with him on, actually, routing
21 that section of line.

22 Q Okay. Now, were you ever able to see the old roadbed
23 as it ran down to Lake Murray across the peninsula
24 property?

25 A All I can remember was when you got on that Champion

1 tract, there was several places where the old roadbeds, I
2 say roadbeds, just several different roads, it ran over to
3 our fringe land, which runs along the shore line there for
4 probably about three-quarters of a mile. So there was
5 several different places where old road went to it.

6 Q And I'm going to try to refresh your memory if I can.
7 I believe in your deposition you stated that you,
8 actually, had looked at a 1927 land atlas that was
9 utilized by SCE&G that showed this road in the same
10 location as it is now?

11 A I looked at two things. Because, you know, this
12 thing, you know, I had questions and was trying to figure
13 out exactly what the situation was and I looked at our old
14 plats from 1928. And they showed the road running from
15 Wheeland School Road down through the Enlow tract. There
16 was an old, and it shows an old house site on the Enlow
17 tract. The Enlow tract was our property and the property
18 there that Mr. Fulmer owned because I've seen a plat
19 showing where it was, actually, subdivided. I didn't
20 originally know that until I started researching it. So I
21 saw that plat. And then I went to an old, there's a
22 mosaic map that's about 12 feet long that I knew we had
23 that was drawn showing every tract of land on the Lake
24 Murray project and it tended to show all the old roads.
25 And I said heck, you know, I'm going to go to that and

1 a timber thinning, so Randy knew he needed to probably,
2 you know, you generally take a bulldozer and clean out
3 some of these old roads that have been growing up, that
4 sort of thing--

5 Q And let me show you down. We've got Mr. Summer's
6 deposition that the Judge has and I don't want you to get
7 too far into what Mr. Summer would say or not, but were
8 you involved personally with the original construction or
9 placing of the original gate that was there?

10 A Randy had all those discussions with Mr. Fulmer. No,
11 I didn't meet Mr. Fulmer until many, many years later.

12 Q You, actually, met with Joe Keith Fulmer and Keith
13 Fulmer back in 2006, I believe, is that correct?

14 A It was around 2006.

15 Q And Joe Keith and Keith were concerned at that point
16 that John Frick might try to develop this piece of
17 property?

18 A That's the meeting that I went with Randy to meet
19 with him because I always clearly remembered Mr. Fulmer
20 saying that he, certainly, had no problem recognizing John
21 Frick's right of ingress and egress to come through the
22 road. He wasn't going to go along with that road being
23 improved to allow for a subdivision to be developed back
24 in that area. But he, clearly, told me, it was
25 interesting that day because I never forgot this. He told

1 me, though, he said, you know, I would always work with
2 John Frick, you know, to allow him to be able to have a
3 home back in there for he or his family members. And that
4 kind of stood out in my--

5 Q But he wanted to control it? He wanted to control--

6 A He, clearly, didn't intend to provide any additional
7 land there, right-of-way, whatever that would allow for
8 construction of the subdivision road through there.

9 Q Now, was that before or after you, well, let me ask
10 you this first before we get there. I'm going to show you
11 Defendant's Exhibit 7 and, specifically, the pages that
12 begin after the front page. Do you recognize that
13 document?

14 A Yes, I sure do. This is the result of things that
15 started happening back in 2003 and call from attorneys. I
16 first got a call from Mr. Frick in 2003. Then I remember
17 he came into the office there, talked to me. I think I, I
18 may have had Beth Trump in the meeting because I know I
19 had Beth Trump follow up writing him a letter and
20 providing some various information to him that would help
21 to educate him about the regulations and things that might
22 impact his property as far as Lake Murray--

23 Q But that was regarding the--

24 A That was--

25 Q -- fringe property?

1 A That was in 2003.

2 Q But that meeting was involving the fringe property,
3 correct?

4 A Right. But I then right after that, shortly after
5 that, I got a call from an attorney, Jeremy Martin. I
6 think his office was in Chapin. Anyway, he told me he was
7 calling me on behalf of John Frick.

8 Q Well, I'm going to stop you. I don't want to hear
9 about what somebody else said.

10 A Okay.

11 Q If somebody else wants to ask you that, that's fine,
12 but the meeting you had that you indicated you talked
13 about with Ms. Trump and, possibly, Mr. Frick was in
14 regards to the fringe property, correct?

15 A That was when he was thinking about buying that
16 property, the larger tract timberland he bought.

17 Q Now, the letter that we're talking about here, dated
18 April 13, 2006, that was shortly after your meeting with
19 Joe Keith and Keith Fulmer, is that correct?

20 A It had to have been within several months.

21 Q And who asked you to write that letter?

22 A I wrote that letter. I had also gotten a call from
23 John Frick advising me that he was, had gone to the
24 property and found that he was locked out of the property
25 and he couldn't get through the gate. And I remember, I

1 remember calling Mr. Fulmer, I think, and Mr. Fulmer's,
2 something had happened. I don't know what happened, but
3 as far as the locks on the gate, evidently, John Frick had
4 gotten locked out. I think they had some interlocking
5 locks. And I know Mr. Fulmer said, you know, he'd take
6 care of it. He'd get him a lock. Evidently, there was
7 going to be another lock, I don't know. And I called John
8 Frick up to tell him hey, look, we're responding. You
9 know, sorry this happened. Something got screwed up. And
10 I remember that I think was the first time that John had,
11 actually, told me well, I want the gate removed. That's
12 when that first came up.

13 Then right about, literally, almost, I mean, it had
14 to have been within a month or two, I got a letter from
15 John Hudgens and another attorney saying that Mr. Frick
16 had been locked out and demanding that Mr. Frick be
17 allowed ingress and egress into his property. And I sent,
18 I had it in my notes that I sent a key to Mr. Hudgens and
19 I also asked Mr. Fulmer to send, to carry a key to Charles
20 Frick's hardware store over at Little Mountain. Charles
21 was John's brother. So there was a heck of a lot of
22 activity going on. And so this letter was a result of all
23 of that, thinking that it would clarify that, you know,
24 nobody, everybody was recognizing everybody's easement
25 rights, whatever they were to use that road to get to

1 their land. That's what this was all about.

2 Q Did you have any legal opinion as to what the use of
3 that road was?

4 A I had talked to our corporate attorney, Craig Jarden,
5 (phonetic), and--

6 Q Don't tell me anything you talked to with the
7 attorney.

8 A Oh, okay.

9 Q You can't do that.

10 A Okay. I'm sorry. We thought this would clear the
11 air, give everybody a comfort level because we, at that
12 time, we thought that John was simply worried that he
13 might get denied access to his property on this old road.

14 Q And he had, in fact, been denied access?

15 A Well, but--

16 Q It was locked when he went to--

17 A Well, as best I know, it was just one time and it
18 was, it was something accidental. You know, when you're
19 locking several locks--

20 Q Well, you didn't lock him out, did you?

21 A I didn't do it.

22 Q So you don't know what the problem was?

23 A Well, I do because my forester, I talked to him and
24 he told me he went up there and the locks had gotten
25 screwed up. Sometime if everybody doesn't recognize how

1 you're supposed to lock those locks in sequence, somebody
2 will get locked out.

3 Q These are all country folks, shouldn't they know how
4 to lock a gate back?

5 A It happens. I'm serious. It's happened to me.

6 Q Now, did John Frick ask you to write this letter?

7 A No.

8 Q And, in fact, he didn't sign it either, did he?

9 A No.

10 Q Evidence he didn't agree with it?

11 A That's right. Now, this is after, even though had
12 called me much earlier saying that his, asking if we would
13 accommodate his client by providing some type of
14 recordable ingress and egress easement, that that would
15 satisfy his problem. That was Jeremy Martin.

16 Q And y'all weren't willing to provide that?

17 A It never proceeded because, well, it would have taken
18 everybody getting together and all that and we just never
19 got to that point.

20 Q Got you. Now, in regards to this property, any of
21 these properties, are you personally aware of any
22 trespassing, poaching, littering problem?

23 A For us, not on this particular property.

24 Q I think in your deposition, you indicated there may
25 have been some other problems where you may have had

1 issues, but this one, you never--

2 A We had some major problems in other problems.

3 Q But you've never been aware of any problems on this
4 property?

5 A Correct.

6 Q And this property, the road actually begins where it
7 begins at Wheeland School Road, it's within 50, 60 yards
8 of, at least, two houses, is that correct?

9 A Yes, sir.

10 Q And what would probably cut down on poaching and
11 trespassers, them realizing that this road is so close to
12 someone maybe watching?

13 A That's probably true, yes, sir.

14 MR. EDWARDS: Object, Your Honor, calls for
15 speculation.

16 THE COURT: Sustained.

17 BY MR. JENKINS:

18 Q It was clear to you that John Frick indicated I can
19 use this road, I don't want a gate, I don't want the gate
20 there at all?

21 A That became clear later on.

22 Q And it was clear that the Fulmers indicated we want
23 the gate up, they said we'll give John a key or we'll give
24 him his own lock, but we want the gate up and we don't
25 want John developing this property?

1 A Well, the gate had been up for about heck, 15 to 17
2 years before John ever came into the picture and all the
3 landowners had always, apparently, been comfortable with
4 the gate. And so, you know, John, it was John coming
5 along after the fact and, suddenly, he's a landowner
6 demanding that the gate come down.

7 Q Do you know if the gate was ever closed when John
8 first bought that property?

9 A I don't know. I don't know. I'm in Columbia in an
10 office, so I can't say.

11 Q Okay. Did you ever visit the property when the gate
12 was there, but it wasn't closed? It was left open for
13 long periods of time, wasn't it?

14 A Well, when I went up there to meet with people, the
15 gate was always open, so I, you know, so I drove right on
16 in and I don't know.

17 Q Did you ever go by when the gate was grown up, when
18 it was opened up and grown up around it where it would
19 take some work to close it?

20 A During that period of time, I never had reason to go
21 up there, so I can't say.

22 MR. JENKINS: Thank you, that's all I have.

23 THE COURT: Mr. Edwards?

24 CROSS-EXAMINATION

25

1 BY MR. EDWARDS:

2 Q Good afternoon, Mr. Hoffman.

3 A Hey.

4 Q How wide was this road in 1970 when you first came
5 out there to see it, coming down from Wheeland School
6 Road?

7 A I, clearly, I don't know why, but I, clearly,
8 remember turning off that road and, you know, it shows now
9 as woods and all there and I remember that we went through
10 a field. And as I recall, I visualize, there was a cut
11 there where the road, you had embankments on each side of
12 you, maybe two and a half, three feet high, for the first
13 section of that road. And I don't know why I always
14 remembered that. But this road was, I mean, this road was
15 wide enough for a truck, but that's it. It was a
16 single-lane road. And it wasn't, there was no
17 maintenance. You know, when I saw this road the first
18 time, it was there. It was being used and everything,
19 but, you know, it was in rough shape.

20 Q You mentioned on direct examination that you had
21 looked at a mosaic map that was about 12 feet long?

22 A (Witness nodded.)

23 Q I'm sorry, you've got to verbally say yes or no.

24 A Yes.

25 Q And you said that the road didn't show up the way you

1 BY MR. EDWARDS:

2 Q When SCE&G widened the road to bring in the
3 transmission lines, do you recall where the road was
4 widened or was it the entire length from Wheeland School
5 Road down to the SCE&G property?

6 A Yes. And there was a survey done by Glenn Associates
7 that was involved with that. And I know I've looked at
8 that in the past and it matches up with the old road.

9 Q Do you know about how much it was widened when SCE&G
10 had to come in there and do the transmission--

11 A Well, the Caldwells back at that time I think used a
12 V6C or D7 crawler and you've got a blade, right at a
13 12-foot wide blade. And I know that's the minimum width
14 it takes to get a logging truck out of the woods, I can
15 tell you that, on a straight-away. And the road was, it
16 might have been a foot or two wider than that, but that's,
17 basically, the road, 12, around 12 feet.

18 Q And before Mr. Frick purchased this peninsula
19 property here, are you aware of any complaints from
20 members of the public about SCE&G using this road?

21 A No. Everybody was happy.

22 Q Any complaints about blading the road?

23 A No, not to my knowledge.

24 Q Any complaints about SCE&G doing maintenance on this
25 road?

1 A No.

2 Q Before Mr. Frick purchased the peninsula tract, had
3 any of these other landowners complained to SCE&G about
4 this gate?

5 A No, sir.

6 Q Back in 1970, did you drive all the way down to the
7 Champion property, the peninsula property?

8 A Yeah, we did.

9 Q Did Champion have any obstruction across the road at
10 its property?

11 A I don't think so. I don't remember anything. That
12 was in 1970, though, okay.

13 Q Do you recall any other obstruction other than the
14 gate that was placed approximately at this location on
15 this road?

16 A Well, see, when I first saw it in 1970, there were no
17 obstructions anywhere. It was just an old, old road that,
18 you know, really, was only getting used now and then by
19 somebody.

20 Q Do you ever recall Champion having a gate up across
21 the road on this property?

22 A I don't. My forester says that they did--

23 MR. JENKINS: I'm going to object.

24 MR. HOFFMAN: I knew that was coming.

25

1 Q Yes, sir. Let me hand you a September 8, 2006,
2 letter that appears to be from you to Mr. Hudgens. Do you
3 recognize that letter?

4 A Yes, that's my signature.

5 MR. EDWARDS: Your Honor, I'd like to move this in as
6 the Defendant's next exhibit.

7 (WHEREUPON, Defendant's Exhibit No. 10 was admitted
8 into evidence.)

9 BY MR. EDWARDS:

10 Q Mr. Hoffman, I'm going to hand you what's been marked
11 as Defendant's Exhibit No. 10. You believe you wrote this
12 letter back to Mr. Hudgens after you got this strong
13 letter?

14 A Yes. Yes, sir.

15 Q And according to Defendant's Exhibit 10, it looks
16 like his strong letter to you is dated maybe August 18,
17 2006, is that right?

18 A That sounds right, yes, sir.

19 Q And if you look at the first sentence of the second
20 paragraph, isn't it true that you're indicating that the
21 other landowners were happy with the installation of the
22 gate because they had trespassing, trashing and vandalism
23 problems?

24 A It says 15 or 20 years ago, we installed the gate
25 before this letter.

1 Q And that was to protect the integrity and quiet
2 enjoyment of the adjoining landowners' property from
3 trespassing, trashing and vandalism?

4 A Yes, sir.

5 Q And do you reference the conversation in this letter
6 that you had with Mr. John Frick?

7 A Yes, I say I called John Frick, right.

8 Q What did you do to try to get Mr. Frick a key to this
9 gate?

10 A I talked to, I think this is when I had again talked
11 to Mr. Fulmer and told Mr. Fulmer, you know, that he had
12 to get, somebody had to get him a key, okay, if he didn't
13 have a key. I was pretty emphatic about that.

14 Q If you look at the last sentence of the second
15 paragraph, do you recall enclosing a key for Mr. Frick
16 with this letter to Mr. Hudgens?

17 A Let's see. Well, I, clearly, remember that Joe Keith
18 Fulmer was going to deliver a key and I, clearly, remember
19 calling Mr. Frick and I, clearly, remember his response
20 that's quoted here.

21 Q And the very last sentence of your letter, if you
22 would please read that for us.

23 A Which sentence?

24 Q It appears to us.

25 A It appears to us that John's frustration is not the

1 whether we already owned that and it all got put in at the
2 same time. I think it did, okay.

3 Q To your knowledge, has the SCE&G property or the
4 fringe land or the peninsula property that Mr. Frick now
5 owns ever come out of the game management?

6 A It's still, I'm not a hundred percent on that Enlow
7 tract. The fringe land, it's been in a certain
8 classification since about 1976 and it was associated with
9 that game management, okay. I'm not sure whether that
10 Enlow parcel is still in there or might have been pulled
11 out, you know, when all this started and the Champion
12 tract got sold. I just, I can't remember.

13 Q Does SCE&G have an obligation to provide public
14 access through privately owned property to reach WMA
15 lands?

16 A No, no, some of it has to be by boat access. It's
17 just the way a lot of our properties around Lake Murray
18 are positioned.

19 Q And to the extent the fringe lands and the peninsula
20 property were or are in WMA management, hunters could come
21 up the lake and get to those properties, is that right?

22 A Yes, sir.

23 Q To your knowledge, does SCE&G have any obligation to
24 allow the public to cross privately owned lands to reach
25 land owned by SCE&G?

1 A I don't think so.

2 Q To your knowledge, does SCE&G have any obligation to
3 open land that SCE&G owns to allow members of the public
4 to cross it to get to WMA land?

5 A I don't think so.

6 Q Mr. Hoffman, I'm going to hand you some Wildlife
7 Management Area maps that I was able to get ahold of from
8 different years. I had them previously marked as
9 Defendant's Exhibits 12A through 12E. If we introduce
10 them here, we will want to renumber them. Have you
11 studied any of these maps?

12 A Not in many years.

13 Q Well, these are put out by the South Carolina
14 Wildlife Department. It might be Natural DNR now. This
15 one was circled in orange indicating the, this one is
16 marked 12A right now for identification purposes. Do you
17 recognize that green shading right there to be--

18 A I'll have to look at it closer. It looks like
19 they're showing just the tract of land that I acquired
20 from Champion in the exchange is what I'm seeing here now.

21 Q On this side of the lake?

22 MR. JENKINS: Your Honor, in the interest of time,
23 we've stipulated that these properties were in and out the
24 WMA program at different times. And I'll probably
25 stipulate to whatever he's trying to get at.

1 until about 2:15.

2 (WHEREUPON, a lunch break was taken.)

3 THE COURT: Let's go ahead and resume with Frick v.
4 Fulmer. We're still in the Plaintiff's case in chief.

5 Any additional witnesses?

6 MR. JENKINS: No, Your Honor.

7 THE COURT: Mr. Edwards?

8 MR. EDWARDS: Yes, sir, I would call Mr. Joe Keith
9 Fulmer.

10 JOE KEITH FULMER,

11 After having been duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. EDWARDS:

14 Q Mr. Fulmer, can you tell us your full name, please?

15 A Joseph Keith Fulmer, Jr.

16 Q And where do you live?

17 A 2841 Wheeland Road, Little Mountain, South Carolina.

18 Q Now, is that close to this property and this road in
19 question we've been talking about today that goes from
20 Wheeland School Road down towards the lake?

21 A I am, I live a mile back through the woods.

22 Q And how long have you lived in Little Mountain?

23 A All my life.

24 Q And what kind of work do you do?

25 A I'm retired from Lexington County Public Works.

1 Q What did you do for Lexington County Public Works?

2 A I was a special project supervisor. We did road,
3 building roads and plant sites and so forth like that.

4 Q How long did you work in that business?

5 A In this business?

6 Q Yes, sir.

7 A Forty-five years.

8 Q And did you inherit some of this property from your
9 father?

10 A I did at his death.

11 Q When did he pass?

12 A Sir?

13 Q When did your father pass?

14 A In 2008, December the 20th.

15 Q Did he own the property up until that time where this
16 gate is located?

17 A Yes, he did.

18 Q Is this according to Plaintiff's Exhibit No. 6, this
19 is Newberry County Wheeland School Road area, two aerial
20 photographs, it looks like it's Tax Map No. 645-60. Can
21 you see that?

22 A Yes, I do.

23 Q That's the, that shows the property that your daddy
24 owned?

25 A That's correct.

1 Q Now, how do you physically access the property, do
2 you go up to Wheeland School Road?

3 A Very occasionally, but I, really, that land, my land
4 joins my brother's right beside my house and there's a
5 power line that goes down through there and I run on his
6 land all the way over there. We have a road, a little old
7 road through the woods and then it runs into my land and
8 then I go on, you know, my land and his all way.

9 Q So you go through some land your brother owns and
10 some other land that you own to get to this property?

11 A That would be correct.

12 Q Are you familiar with this area between Wheeland
13 School Road and Wheeland Road and the lake?

14 A Certainly.

15 Q Do you know who owned the property that Mr. Frick
16 ended up purchasing, this section in this peninsula
17 section?

18 A Champion.

19 Q Champion owned this part right here?

20 A That's correct.

21 Q To your knowledge, did Champion Paper Company have a
22 gate or a cable or some obstruction going across the road?

23 A They did. Back when I was a young guy, you know, in
24 my early teens, you know, middle teens, I used to ride my
25 bike back there. Once or twice, I went back there, but it

1 was a cable across there then when Champion owned it.

2 Q And it was approximately where the property line is
3 shown?

4 A That's right. It was put right there where Champion
5 and SCE&G's property ran, you know, collided together.

6 Q Did your father put up a cable or some sort of
7 obstruction across the road on his property across this
8 road?

9 A He did back at the property line where it comes in on
10 Wheeland School Road.

11 Q Is it about where we have this pink line?

12 A Yeah, right about 100 foot from the property line.

13 Q Did your dad initially put up a cable or a gate?

14 A Yes, we, I helped him. We put up a cable then.

15 Q Do you remember when that was?

16 A About 1976, right around there. It's pretty close.

17 Q Why did y'all put a cable up in the 70's?

18 A Well, of course, it's people, you know, going in and
19 out of there. They went down there and we had some people
20 dumping debris along the, out the side of the road on
21 ours. And there's a pond back there. And my dad was back
22 there one day at the pond and a fellow pulled up there and
23 told him to get out of the way, he wanted to go across the
24 pond dam with his vehicle. Daddy said, Do you know whose
25 land this is? He acted like he didn't know. And the

1 fellow said, No. He said, Well, turn around and get back
2 out, this is my land. So, you know, he ran him off. And
3 it was marijuana grown back there on back, I believe that
4 was on SCE&G's fringe, on that buffer back there. And
5 they got, somebody reported them. Of course, they went in
6 there and got them, too. You know, the law enforcement
7 and everything came down there of Newberry County. And
8 stuff like that was going on quite a bit.

9 Q Do you have any knowledge of any people riding
10 four-wheelers back here--

11 A Certainly.

12 Q -- at night?

13 A Certainly. Certainly, do. Dad said they would come
14 back in there sometime when he was over there at the pond.
15 And I was over there -- I've been over there once or
16 twice. It was mostly kids, but, you know, we didn't want
17 them to get hurt on our property or anything, so we felt,
18 we were liable, too, to start off with.

19 Q Did you and your father want to protect your property
20 from vandalism and trespassing?

21 A That's exactly what we were after.

22 Q And from illegal activity?

23 A That's exactly right.

24 Q Do you recall when SCE&G put up the corrugated metal
25 gate?

1 A Yes. They put that up when they got caught with the
2 marijuana down there. They took our cable down and went
3 on in there. And that's when it got caught up with it.
4 SCE&G came down and dad called them and they said well, we
5 need to all protect our property. And Champion, too. So
6 they put the gate up there.

7 Q Did that gate go about where your dad had the cable?

8 A Right exactly, right at the same place.

9 Q How long did that corrugated metal gate stay there?

10 A I'm going to say it was there probably 10 or 12
11 years.

12 Q What did y'all do to keep it closed?

13 A Well, we had it, they had it locked, we had a lock.
14 SCE&G had their lock on it and Champion had their lock on
15 it.

16 Q Did y'all keep it locked?

17 A Oh, yes. My dad would ride over there and keep
18 checking on it.

19 Q And Mr. Frick testified that one time he came in with
20 a piece of equipment and for whatever reason he couldn't
21 get through the gate and he just ran over it with his
22 equipment. Is that when the pole gate went up?

23 A That's true. That's correct.

24 Q And that happened around 2006?

25 A That's right.

1 where you could see it from the road up there.

2 Q During the days where it was a cable that your dad
3 put up, did y'all leave it, the cable locked?

4 A Yeah.

5 Q Were there periods of time when you would leave it
6 unlocked?

7 A No, not if, you know, if we were in and out, yeah,
8 we'd keep it locked all the time. I think SCE&G had their
9 lock to it, too, I mean, had their own lock and
10 everything. Champion, too, for the cable.

11 Q Now, during the days when it was a corrugated metal
12 gate, did you normally keep it closed?

13 A Well, we did. Every time we'd see it open, we'd
14 close it back.

15 Q During the time when there was a cable across the
16 road starting in the 1970's until the 1980's, did you or
17 your father receive complaints from people about the cable
18 being across the road?

19 A No. No, none at all.

20 Q During the time from the 1980's until 2006 when the
21 corrugated metal gate was there, did you and your dad
22 receive any complaints from people other than Mr. Frick
23 about the gate?

24 A No, none at all.

25 Q Since the time the pipe gate was put up, other than

1 from Mr. Frick, have you and your dad up until his death,
2 to your knowledge, ever receive any complaints from folks
3 about the pipe gate being there?

4 A No.

5 Q Has law enforcement from Newberry County ever
6 contacted you and said hey, you've got to take that gate
7 down?

8 A No.

9 Q Has anybody from Newberry County contacted you and
10 said you've got to take that gate down?

11 A No.

12 Q Have y'all put up no trespassing signs on this
13 property?

14 A Yes.

15 Q Have you run off some trespassers?

16 A Yes, I did one, occasionally.

17 Q Mr. Joe Childers, who's a party to this action, do
18 you know if he's ever had to run off any trespassers?

19 A He did. Joe told me, one day I was over there--

20 MR. JENKINS: Objection to hearsay.

21 MR. EDWARDS: He's a party, Your Honor. Mr.

22 Childers, he's in default, but he's a party.

23 THE COURT: All right.

24 THE WITNESS: Childers.

25

1 BY MR. EDWARDS:

2 Q I'm sorry, Childers.

3 A Yes, he told me one day I was over there and he came
4 out and he said that one night he was there about two
5 o'clock in the morning and he heard all this noise and
6 everything. And he said he finally got up and went down
7 there and there was a vehicle down there at the gate and
8 they had the, you know, the radio wide open and
9 everything. I don't know what they were doing. But he
10 told them they had to leave.

11 Q Did they leave?

12 A I guess so.

13 Q How long ago was that?

14 A He didn't say the date on that. I don't know.

15 Q How long ago was your conversation with him?

16 A Oh, it's been, it was two, about four or five years
17 ago.

18 Q Four or five years ago?

19 A Yeah.

20 Q To your knowledge, has the area around the gate grown
21 up so much that you couldn't close the gate?

22 A No.

23 Q Did you go with your dad when he, did you ever go
24 with him when you were a young boy to look at this
25 property?

1 A Yeah, we walked around on it, you know, cutting fire
2 wood and stuff, too.

3 Q Do you know who he bought it from?

4 A I think he bought it from Ms. Catherine Enlow.

5 Q And do you recall who owned the property up here near
6 the Wheeland School Road back then?

7 A Oh, yes.

8 Q Was that Lucille and--

9 A Ms. Lucille and Mr. Buck Frick. They're both
10 deceased now.

11 Q What was this property like up here that Ms. Lucille
12 and Mr. Buck owned by Wheeland School Road.

13 A Well, when you would pull in there, it was kind of
14 banks on the side of it and then you get into, more or
15 less, a field and you go on down through it. And on down
16 there, of course, on our land there was fields there then.
17 It wasn't grown up then. And I will say something else.
18 It was a big water hole right down about right where that
19 gate's at. In fact, we put a terracotta pipe in there and
20 put some ditches in there. Daddy did that right around
21 the time we put that gate up or maybe it was before.

22 Q Did Ms. Lucille and Mr. Buck Frick, did they have any
23 animals and a pasture up here by the road?

24 A They had a gate up there, it wasn't a gate. It was a
25 fence like the old farmers would put up fences and you'd

1 Q --on that property?

2 A No.

3 Q What was the general condition of this road as it
4 made its way past Ms. Lucille and Mr. Buck Frick's
5 property going on down to the Champion property when you
6 were a young boy?

7 A From Wheeland School Road down to the old Enlow
8 house, it was, of course, grass had grown up, you know,
9 but it wasn't but about 12 foot wide at the most, 10 to 12
10 foot wide from there down to the old house.

11 Q And I apologize, I've been confused about this. The
12 Enlow house, was that on property that your dad owned?

13 A Yes. Right there where that first curve bends.

14 Q Right about here?

15 A That's right.

16 Q I think I erroneously used the term Enlow property or
17 Enlow Road to refer to this peninsula piece, but that's
18 the Champion property?

19 A That's right. Correct.

20 Q And this is the SCE&G property?

21 A That's correct.

22 Q And then your property?

23 A That's correct.

24 Q To your knowledge, was there a house on the property
25 that your dad bought?

1 A Yeah, the old Enlow house, it was.

2 Q Nobody lived there when your dad bought it?

3 A That's right. And there was a shed with a tractor
4 under it, too, an old tractor.

5 Q And to your knowledge, since the time you were first
6 on this property, have you ever seen a mail carrier come
7 down this road?

8 A No, no.

9 Q Have you ever seen a motor grader from the County
10 come down that road?

11 A No, no, no.

12 Q Were you aware as a young child that there were any
13 houses on this peninsula piece?

14 A No.

15 Q Not whether or not they were occupied, but any houses
16 to your knowledge that were on this peninsula piece?

17 A The old Hendricks place, if you can show me the
18 Hendricks place, there was a house on it now, but I don't
19 remember any house on anymore, that's all. That was on
20 that other--

21 Q On this little more square-shaped piece?

22 A That's correct.

23 Q Right here. Okay. For the peninsula piece, are you
24 aware there was any house down there when you were a young
25 boy?

1 Q Going--
2 A That's right. The gate up there, that's right.
3 Q And that was in the 1970's?
4 A That's right.
5 Q When you would ride your bike as a young boy up from,
6 I guess, Wheeland School Road back down through the
7 Champion property, how wide was the road?
8 A Eight foot wide. And I'll tell you something else.
9 There was another water hole on down, down as you go
10 around that other curve right there, they had, when they
11 did, SCE&G put the road in there, they had to put a pipe
12 in there. I never did bring that to nobody's attention,
13 but it is a corrugated pipe under that road.
14 Q On SCE&G property?
15 A On my property.
16 Q On your property?
17 A That's right. And that's one reason I think they
18 went because they had to put the pipe down to get the flow
19 of the water to go out and they had to widen it out
20 enough, you know, to get the ditches to work.
21 Q So SCE&G put another pipe under the road on your
22 property?
23 A That's right. They do have that there. I meant to
24 tell, I didn't think about it on my position, but they
25 did.

1 Q To your knowledge, has Newberry County put in pipes
2 under the road?

3 A No.

4 Q To your knowledge, who has performed, to the extent
5 any maintenance has been performed on this road coming
6 from Wheeland School Road going through your property,
7 who's performed it?

8 A Us property owners. Us and SCE&G when they came in
9 to do it and Champion. And I have been over there before
10 and threw trees and stuff out the road myself.

11 Q Have you had any conversations with Mr. Frick before
12 this lawsuit started about what he wanted to do with his
13 property?

14 A Yes, I did. I did. In March of 2006, he came to my
15 house. He called down there and asked me could he talk
16 with me. I said well, yes. You know, I didn't have no
17 reason, I didn't know anything about this. And he came
18 down and we talked a little while. And he told me that he
19 wanted to get access and right-of-way in there because he
20 was going to put a subdivision back there. I said, No, we
21 don't want a subdivision in there, John. We want to keep
22 it as is, you know, as can be to keep the public from
23 getting in there so much. I said, But if you want to do
24 any more talking about it, talk to dad because it's still
25 in his estate, you know, life estate to him. He was still

1 living then. So when he left, he, I told him I wanted him
2 to just leave, you know, so he left.

3 Q What is your, to your knowledge, what was done to
4 widen this road?

5 A Well, they had to move the little ditches in places
6 to get the pipe in, you know, to scrape it all up with the
7 motor graders lined it out some. I mean, they had to
8 because--

9 Q When you say they, who are you referring to?

10 A SCE&G had Little Mountain Company to do it.

11 Q How wide is the road now as it goes through your
12 property?

13 A Well, it kind of goes in and out a little bit, but
14 it's nothing under, under 20 foot wide, except where the
15 gate and stuff is, it's 14 foot there and a little spot
16 through there is kind of narrow, just a little bit, but
17 not much. Log trucks can get through there good. They
18 didn't have any trouble.

19 Q Would it be accurate to say it's between 14 and 20
20 feet wide for the most part?

21 A That's right. It would be accurate.

22 Q Mr. Fulmer, I'm going to hand you a picture and ask
23 you if this is a decent representation of what the road
24 looks like on your property?

25 A Well, it looked like it, but the timber is not as big

1 on the side. It looked kind of like it, but I don't think
2 that's it. It might be down in there farther.

3 Q You think it might be farther down from your
4 property?

5 A Do what?

6 Q You think this might not be your property?

7 A It hadn't been too awful long, of course, the
8 timber's gone, but--

9 Q It's been cut back since right before the--

10 A That's right.

11 Q So this is probably before the timber was cut?

12 A That's right.

13 Q But other than the fact that there may be timber
14 shown there now, this is an older picture, do you believe
15 this accurately represents--

16 A It could be. It's almost like it's a little too
17 close to me. You know what I mean? I'm not talking with
18 you standing there either. I'm talking about where the
19 picture was made from. It could be very possibly be on
20 this.

21 Q Do these look more accurate to you as representations
22 of your property?

23 A That's right. That's right. That's correct there.
24 That's correct. That's correct.

25 MR. EDWARDS: We admit these two pictures as

1 Defendant's 11 and 12.

2 THE COURT: Without objection, they are in evidence.

3 (WHEREUPON, Defendant's Exhibit Nos. 11 and 12 were
4 admitted into evidence.)

5 BY MR. EDWARDS:

6 Q Did Mr. Frick ever talk to you or your dad about
7 going down the road on your property with a bush hog?

8 A He didn't me, but I think he did get permission from
9 dad.

10 Q Have you driven recently down this road from Wheeland
11 School Road?

12 A Yeah.

13 Q Is it wide enough that two cars could pass each
14 other?

15 A Well, you'd almost have to run down in a ditch like
16 most anywhere through there. You know, they could pass,
17 but it would be very tight. You know, I wouldn't want to
18 do it.

19 Q Could--

20 A I could do it, but I wouldn't want my wife over there
21 to do it or anything.

22 Q Could a passenger vehicle pass a fire truck?

23 A Oh, no.

24 Q Could a fire truck go down this road and come back
25 out?

1 A Oh, he could go down in it and come back out.

2 Q Would he have to back out or is there a big enough
3 place for him to turn around?

4 A There's a big enough place to turn around down there
5 on the power company.

6 Q Other than the folks, Mr. Frick's hunters and he and
7 his family and you and your family and folks from SCE&G,
8 are you aware of anybody else that's using this road?

9 A Not that I know of. No, not other than the hunters,
10 that's right.

11 Q To your knowledge, has anyone ever challenged your
12 father during his lifetime about his authority to run them
13 off of that property?

14 A No, after, no. After that episode that day over
15 there on the pond, no. They left.

16 Q Now, is the pond on this property?

17 A Yes.

18 Q Is that it right there?

19 A I think that's it right there, yes, sir.

20 Q So to your knowledge, has anyone ever challenged your
21 father's authority to keep them off this road?

22 A Well, that day that they pulled up on that pond dam
23 that they had to come through that road to get there and
24 they pulled up there and said for him to get out of the
25 way.

- 1 Q But he ran them off?
- 2 A That's right, he ran them off.
- 3 Q Has anyone ever challenged your authority to keep
- 4 people off this road?
- 5 A No.
- 6 Q We've had some testimony and some photographs of
- 7 Seibert Road. Mr. Fulmer, this is an aerial photograph
- 8 that we got from Newberry County showing part of Seibert
- 9 Road. Are you familiar with this part of the road on the
- 10 other side of the lake?
- 11 A That's the brick house, yeah. That's the brick house
- 12 down there and that's the double-wide trailer--
- 13 Q Is this Macedonia Church Road--
- 14 A That's right. And that's the double-wide trailer
- 15 right there.
- 16 Q All right. And the fire department is right here?
- 17 A That's right. And then on down, I don't know, four
- 18 or 500 feet, that's the brick house right down there on
- 19 the end.
- 20 Q This brick house?
- 21 A That's right.
- 22 Q Can you see, have you driven past this area and
- 23 looked at the road that's on--
- 24 A Yes, you can see it. Yeah.
- 25 Q About how far is this house from the road, can you

- 1 tell?
- 2 A About 500 feet.
- 3 Q All right.
- 4 A Four or 500 at the most.
- 5 Q And you've got experience in building roads?
- 6 A Yes, sir.
- 7 Q Do you have any observations about the paving that's
- 8 on this property?
- 9 A There is, if you want to call it paving. It's milled
- 10 asphalt. It's been ground up off of other roads and used
- 11 kind of for, instead of crush, and it will maybe hold a
- 12 little longer, but it's more expensive to deal with.
- 13 Q Does it look like the black top paving on Macedonia
- 14 Church Road?
- 15 A I've seen some look like that, but that one there
- 16 doesn't.
- 17 Q Does it look like the pavement on the other side of
- 18 Macedonia Church Road?
- 19 A No.
- 20 Q Do people live in these two houses?
- 21 A Yes, they do.
- 22 Q Have you driven by and looked, stopped and gotten out
- 23 and looked down this road?
- 24 A I've stopped out there, yeah. I've looked down the
- 25 road.

1 Q Is there a road sign out there that says Seibert
2 Road?

3 A It is.

4 Q Is there a road sign up here saying anything?

5 A No.

6 Q Is there any milled asphalt on this side?

7 A No.

8 Q Is there any sort of paving on this side?

9 A No, none whatsoever.

10 Q Is there a gate across this road here?

11 A Right at the end. You see the lines going on down
12 there, right by the edge of that house there. That must
13 be the property line right there. I don't know.

14 Q Have you seen that with your own eyes?

15 A Yes, I have.

16 Q And can you see past the gate and see what the
17 condition of the road looks like past there?

18 A Yes.

19 Q What's the condition of the road past the gate?

20 A The trees and limbs has grown on out about, you know,
21 where, narrowed up, 10 to 12 foot wide, I'm just guessing.
22 I didn't get out, I didn't go, you know, I wasn't getting
23 out and walking on down through there.

24 Q Do you know any members of the community, other than
25 folks that live here that use this part of the road that

1 goes behind the house?

2 A I think Mr. Stockman farms back in there.

3 Q When was that?

4 A I think he still does.

5 Q He still does?

6 A I think. I haven't been back in there, but I know he
7 farms. He does that. He's more farmer than he is timber.

8 MR. EDWARDS: Your Honor, I would move this aerial
9 photo as the next Defendant's Exhibit.

10 MR. JENKINS: Without objection.

11 THE COURT: Defendant's 13 admitted without
12 objection.

13 (WHEREUPON, Defendant's Exhibit No. 13 was admitted.)

14 MR. EDWARDS: Mr. Fulmer, thank you very much.
15 Please answer any questions other counsel may have.

16 CROSS-EXAMINATION

17 BY MR. JENKINS:

18 Q You, actually, measured the width of the gate--

19 A Yes, I did.

20 Q Shown in Defendant's exhibit 12?

21 A It's 14 foot.

22 Q Fourteen foot?

23 A Yeah.

24 Q And it doesn't quite cover up the whole roadbed--

25 A No, it's a little bit on each side.

1 Q Okay.

2 A You really, you couldn't drive anything around
3 anything. You could, you know, walk--

4 Q Right.

5 A That's about it, though. You'd be over in the ditch
6 pretty close on one side.

7 Q And you indicated that's probably one of the most
8 narrow portions of that road? It doesn't get a whole lot
9 narrower than that anywhere else?

10 A No, no. Huh-uh, no.

11 Q Now, I'm going to show you Plaintiff's Exhibit 4,
12 which I believe is just a smaller version of that
13 rolled-up thing he was trying to use. And I'm just using
14 it because it's a little easier to use.

15 A Yeah, yeah, yeah. I understand.

16 Q Do you know how wide that road is?

17 A It's probably about 10 or 12, no more than 12 foot
18 wide. It wouldn't be, you know, any more than that.

19 Q Is Plaintiff's Exhibit 5 an accurate depiction of
20 that road that runs down?

21 A That is the road.

22 Q Okay. That's the road?

23 A Yeah, that's the road.

24 Q Okay. And it's about as wide as you just said, 10 or
25 12 foot wide?

- 1 A That's right. That's right. I didn't get out and
2 measure anything. I just, you know.
- 3 Q And there is a road sign there?
- 4 A Yeah.
- 5 Q And there's a stop sign there?
- 6 A Yeah, on this end.
- 7 Q On this end. On the end--
- 8 A Toward the, Macedonia--
- 9 Q Toward Macedonia Church Road?
- 10 A --Church Road. That's right.
- 11 Q So it's pretty obvious the County will, in fact,
12 maintain a road that's not 40 foot wide?
- 13 MR. EDWARDS: Objection, calls for speculation.
- 14 MR. JENKINS: I'll withdraw it.
- 15 BY MR. JENKINS:
- 16 Q Now, I'm going to ask you to assume for just a moment
17 that right here where it says 645-8 and 83.4 acres, that
18 writing right there in the middle of what we've been
19 calling the peninsula property, which is what Mr. John
20 Frick owns that we're talking about here, if there's a
21 home right there, is there any way to access that home by
22 dry land other than the yellow road that we have
23 highlighted?
- 24 A No.
- 25 Q Okay. Now, you've opened the gate back when this

1 litigation was started and haven't had it closed since
2 then, is that correct?

3 A That's right.

4 Q And since that time, have you filed any police
5 reports about any trespassers?

6 A No, I haven't.

7 Q Have you seen any trespassers?

8 A You know, I have no idea who the deer hunters are. I
9 see people down there, but it would be hard for me to say
10 you trespassing and you not.

11 Q Have you had anybody trespassing on your property?

12 A Not that I can see.

13 Q Have you had any litter, anybody tearing up the
14 road--

15 A No.

16 Q --any problems that you're aware of?

17 A No, I don't think. That's a thing of the past, I
18 hope.

19 Q Okay. SCE&G, Champion and your dad at one time or
20 the other put gravel down on this road, didn't they?

21 A Certainly.

22 Q And I believe you indicated in your deposition that
23 pretty much did it from where it meets up with Wheeland
24 School Road all the way to the end?

25 A I--

- 1 Q To where it comes on the Champion property?
- 2 A They may have. The reason I say that, I been
- 3 working, you know, I worked the whole time. I never was
- 4 home and I never did go up through there much. I'd come
- 5 through my other way over there. And it would be hard for
- 6 me to tell where the rock really went down and where it
- 7 come, you know.
- 8 Q Right. But all three of them put gravel down on that
- 9 road somewhere--
- 10 A Oh, certainly.
- 11 Q Pretty much the length of that road?
- 12 A Yeah.
- 13 Q Over the time?
- 14 A Yeah, that's right.
- 15 Q And I think you said your dad put in some corrugated
- 16 piping?
- 17 A Put--
- 18 Q Underneath the road?
- 19 A Reinforced concrete pipe.
- 20 Q Okay. And there was some metal, looked like
- 21 corrugated piping up underneath the road--
- 22 A No, it looked like it, but it wasn't.
- 23 Q It wasn't. Okay. And I believe you said SCE&G had
- 24 put down some piping?
- 25 A They did. Their's was corrugated, though.

1 Q Okay. Now, you and your dad had some discussions, or
2 your dad, actually, wanted to buy this land that Mr. Frick
3 bought, didn't he?

4 A That's what he said. That's what he told me.

5 Q , And one main concern was y'all didn't want John to
6 come in and put some heavy development in here that would
7 increase the traffic a bunch?

8 A Well, that's true. That's true. We were worried not
9 about the traffic as much as we were people littering and
10 doing stuff, you know, that had gone on before, too. In
11 other words, when you open it up, there's no control on
12 nothing at all.

13 Q But since you've opened it up since this litigation
14 started back in, I believe, 2010, '90 or '10?

15 A 2009.

16 Q You haven't had any of those issues there?

17 A Not that I can, not that I am aware of. I went over
18 there one day and there was somebody that was deer hunting
19 beside my, where I had put no trespassing signs up and
20 they were parked right beside it.

21 Q Okay. But what I'm getting at is you haven't seen
22 any problems or had any problems--

23 A No.

24 Q On your land since you opened that gate up?

25 A No, I can't say I have.

- 1 Q And you said you go out there a couple times a week?
- 2 A Yeah.
- 3 Q Now, Mr. Frick indicated to you on numerous occasions
- 4 that he was having a problem getting in, either his key
- 5 wouldn't work or his lock was locked out of the sequence
- 6 or something? He indicated that to you and other people,
- 7 didn't he?
- 8 A He indicated that to my dad.
- 9 Q Okay.
- 10 A I was at work. I never was in on the key deal.
- 11 Q Okay. But it wasn't just one time, he indicated it
- 12 was a recurring problem, didn't he?
- 13 A I think that it happened once or twice.
- 14 Q Okay. And you indicated that it never happened to
- 15 your knowledge prior to John--
- 16 A No.
- 17 Q --purchasing that property?
- 18 A No. No, it hadn't.
- 19 MR. JENKINS: That's all I have.
- 20 MR. BRESSLER: No questions, Your Honor.
- 21 THE COURT: Mr. Tothacer?
- 22 MR. TOTHACER: No questions.
- 23 THE COURT: Anything on redirect?
- 24 MR. EDWARDS: No redirect, Your Honor.
- 25 THE COURT: Thank you, sir. You may step down. Call

1 your next witness.

2 MR. EDWARDS: That's the case, Your Honor.

3 THE COURT: Anything from SCE&G?

4 MR. BRESSLER: Nothing, Your Honor.

5 THE COURT: Nothing from Newberry County?

6 MR. TOTHACER: No, sir.

7 THE COURT: Nothing in rebuttal?

8 MR. JENKINS: No, Your Honor.

9 THE COURT: I have not, of course, had an opportunity
10 to review the deposition that y'all introduced into
11 evidence, so I will do that. I also still, of course,
12 need to read the Plaintiff's brief. I will hopefully have
13 a decision for y'all by next week at the earliest or the
14 week after.

15 Anything further on this?

16 MR. EDWARDS: Your Honor, one point of correction, if
17 I may, in the Defense brief, as I mentioned earlier, I had
18 incorrectly referred to the Enlow tract for the Enlow
19 Road. I think I have replicated that in one or more
20 places in the brief. I would just ask for the Court's
21 understanding that the Enlow tract is not actually Mr.
22 Frick's tract. If I improperly used Enlow tract for Enlow
23 Road, I was referring to the road in question. Enlow Road
24 and Enlow tract, essentially, should be Mr. Frick's tract.
25 And I apologize for that inaccuracy.

1 THE COURT: That's okay.

2 MR. JENKINS: Only the people that live there truly
3 get all the tract.

4 THE COURT: You said it's not Frick's tract, right,
5 or it is?

6 MR. EDWARDS: It is not. My understanding, Your
7 Honor, is the Enlow tract got subdivided up and is now
8 part on SCE&G's property and part on Mr. Fulmer's
9 property, but the peninsula tract was a Champion tract and
10 is now the Frick tract.

11 THE COURT: All right. Got it. I have it pictured
12 in my head, so that's the important thing.

13 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

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1 Keith Fulmer?

2 A: Yes, sir. As far as I know.

3 Q: Okay. And that's number 60?

4 A: Yes, sir.

5 Q: Now, how does SCE&G access the Enlow tract on
6 this Exhibit?

7 A: It would ... I can't see the road very well.
8 I see the road right here looks like. It looks
9 like probably this property line, this
10 photograph is not really good, but this
11 property line I'm guessing here but it comes
12 through here, from what I remember, and there's
13 a gate, from what I remember, I think years ago
14 it was a cable. And that's to the best of my
15 recollection. But that would have been in the
16 '70s. I believe that road comes right on
17 through, right on in. This used to be a
18 Champion tract.

19 Q: Okay. And you can see the road a little bit
20 better once it hits, well, about where the
21 number 60 is, can't you?

22 A: Yes, sir.

23 Q: Okay. If you would, mark it in yellow as best
24 you ... let me ask you a couple more questions
25 first before you mark it. When's the last time

1 fringe land would be along the left-hand border
2 of the SCE&G and John Frick property now; is
3 that correct?

4 A: Yes, sir. There was a point out there and we
5 had a thin sliver of fringe land on both sides.
6 And we had to get access from Champion because
7 they had a gate right here where it started
8 their property. They had a big, white, four-
9 inch pipe gate.

10 Q: Okay. How long ago was that?

11 A: That had to be in the late '70s and early '80s
12 that I remember it there.

13 Q: Okay. Now, are you aware of SCE&G putting a
14 gate up anywhere along that roadway you just
15 marked in yellow?

16 A: We put up, and I don't know whether it's one or
17 two gates, but I know we, because we used to
18 have farm gates or bull gates and people would
19 tear those down pretty quickly and then we
20 started using these what we call pipe gates
21 made out of two-inch pipe, four-inch hinge
22 posts. And we put a gate up right here at the
23 beginning of Mr. Fulmer's property.

24 Q: Okay. If you could, mark that in blue where
25 that gate was.

STEVE RANDALL SUMMER

21

- 1 we started using pipe gates.
- 2 Q: Okay. Something about the cables being
- 3 dangerous or something?
- 4 A: Evidently.
- 5 Q: Okay.
- 6 A: Somebody on a motorcycle or three-wheeler.
- 7 Q: Something ...
- 8 A: Yes, sir.
- 9 Q: ... to put up more visible gates at that point
- 10 instead of using ... serving the same purpose
- 11 but they were just more visible and less likely
- 12 to get sued over it I guess.
- 13 A: I don't think you would get decapitated or
- 14 whatever.
- 15 Q: Got you. Were you involved in putting up the
- 16 gate?
- 17 A: The pipe gate I do remember assisting putting
- 18 it up. I can't remember who helped. And the
- 19 reason I remember that is because when I came
- 20 through here I got stuck and I had to winch
- 21 myself all the way through one of these curves,
- 22 because I remember it being on a curve. The
- 23 road was impassable.
- 24 Q: Do you remember when that gate was put up?
- 25 A: It would have been the late '70s, early '80s.

CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

STEVE RANDALL SUMMER

22

1 Q: Okay. I'm sure there had to be some
2 discussions with the landowner that you were
3 putting it on his property. Do you remember
4 any discussions about the gate and who you had
5 them with?

6 A: Well, I know it had been Mr. Fulmer and at that
7 time it would have been Jack Kessler with
8 Champion because it was a general rule, even
9 with landowners or the paper companies, that,
10 you know, we all worked together as far as
11 people getting in and out of their properties
12 on these logging roads.

13 Q: Okay. Now, is there any other access to the
14 Enlow tract other than that roadway?

15 A: Not that I know of. I've never accessed it
16 from another tract.

17 Q: Now, what conversations do you remember having
18 with Mr. Joe Keith Fulmer about that gate or
19 the erection of that gate?

20 A: I don't remember any direct conversations back
21 when ... you're talking when we were putting it
22 up?

23 Q: Or afterwards. Any conversations you remember
24 having with Mr. Fulmer about that gate.

25 A: The only conversation I remember ... I don't

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STEVE RANDALL SUMMER

23

1 remember having a conversation when we put it
2 up, I mean as far as anything, but after
3 attention was brought as far as access, I think
4 Mr. Frick's property, we met out there and we
5 always wanted to make sure there was a chain up
6 and the only thing I told him is when you've
7 got chains if you lock the locks inside each
8 other, that's a great way to do it where people
9 can get locked out if you don't do that. So
10 then if you cut pieces of chain wide, you know,
11 wide enough where the other lock can't get to
12 it, you can't lock anybody out and everybody
13 has opportunities to lock those. One time we
14 had a combination lock years ago because those
15 gates are really set up for just one lock on
16 them and then everybody would have the
17 combination. But when it gets to be more
18 landowners we ended up putting a chain around
19 it and that way if it's just one lock, the lock
20 is protected and people can't cut it with a
21 pair of bolt cutters.

22 Q: All right. When ... so you don't remember any
23 conversations regarding putting it up?

24 A: No, sir.

25 Q: When's the last conversation, we'll work

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STEVE RANDALL SUMMER

27

1 to access it or have lots or buildings on it.
2 Because I think I remember saying that, you
3 know, even if you create it where it's a
4 privately maintained road, I don't know what
5 Newberry County's regs are but I know Lexington
6 County used to be you still couldn't have but
7 so many lots if it was a privately maintained
8 road. But normally you could get that passed
9 if it was a family, more so than if it was for
10 a development-type situation.

11 Q: Okay. So you sort of stopped, you said, he
12 didn't mind if Mr. Frick and his family were
13 back there but you sort of stopped at that
14 point, did he say but I don't want him
15 developing it?

16 A: I don't remember it.

17 Q: Or I don't want a whole bunch of people back
18 there?

19 A: Yeah, I don't remember. It was so much ...
20 years ago with roads we had dumping and people
21 tearing up the roads after you graded roads on
22 rural areas and you just couldn't ... in the
23 '70s and '80s when every teenager had a four-
24 wheel drive and they still do and they want to
25 go riding and they would destroy our roads as

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STEVE RANDALL SUMMER

35

- 1 A: Yes, sir.
- 2 Q: Where the daylight up at the top end ...
- 3 A: That's where I told you we accessed through Mr.
- 4 Fulmer's across the pond or right adjacent to
- 5 a pond now.
- 6 Q: Okay. Now, prior to that gate being erected
- 7 you indicated there was a cable that just
- 8 stretched across the road?
- 9 A: Yes.
- 10 Q: What did it attach to; just a tree or was there
- 11 a post there?
- 12 A: I do not remember. I do not remember.
- 13 Q: And picture number five, I think you said you
- 14 didn't remember installing any, but there's a
- 15 corrugated pipe along that roadway, there's
- 16 actually several of them. Do you remember
- 17 those being there at all?
- 18 A: Not when we first ... there were no pipes on
- 19 that road when we first went in in the '70s and
- 20 '80s.
- 21 Q: But you don't remember SCE&G putting any of
- 22 them in?
- 23 A: No, sir, but I'm not saying we didn't.
- 24 Q: Okay. Where else around Lake Murray, who
- 25 else's property have you been involved with

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STEVE RANDALL SUMMER

45

1 A: I would have to look at the map, but I can't
2 say for sure. But I would think it would be
3 WMA lands, but I do remember some on Mr.
4 Frick's years ago, and I believe that was in
5 future development. It might have been out
6 towards the point. But I don't know that for
7 sure but I know that we talked about it years
8 ago because when they first classified the
9 properties, I mean, you would ask, you know,
10 this makes sense this doesn't make sense, and
11 the Federal Energy Regulatory Commission was
12 involved in that.

13 Q: Okay.

14 A: Back in the I guess '70s and early '80s.

15 Q: Okay. So do you know if the land along the
16 Enlow tract, the far left side of the Enlow
17 tract is game management land or not?

18 A: I think it is. I'd have to look at the map to
19 confirm it.

20 Q: Okay. And other than the roadway that we're
21 talking about or by water is there any other
22 access to that game management land?

23 A: No, sir.

24 Q: Okay. And that would be the same for the Frick
25 property, it would either be by boat or by that

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1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

1 yellow road?

2 A: Yes, sir.

3 Q: Let's take about a five minute break.

4 (Off the Record)

5 Q: All right. Does SCE&G do any research on a
6 road's, how it's classified before they would
7 put a gate up on it?

8 A: No, sir.

9 Q: Okay. If it ... obviously you wouldn't put a
10 gate across 391, it's a paved highway, but
11 other than just what it looks like, would they
12 do any research into okay this is historically
13 a farm road or historically a public road or
14 anything along those lines?

15 A: If it's an active county road that they're
16 maintaining, we wouldn't put a gate up.

17 Q: Okay. But y'all don't do any research into
18 whether or not the county's taking any actions
19 to close the road or just sort of ...

20 A: No.

21 Q: ... if they're not actively using it, y'all
22 consider it?

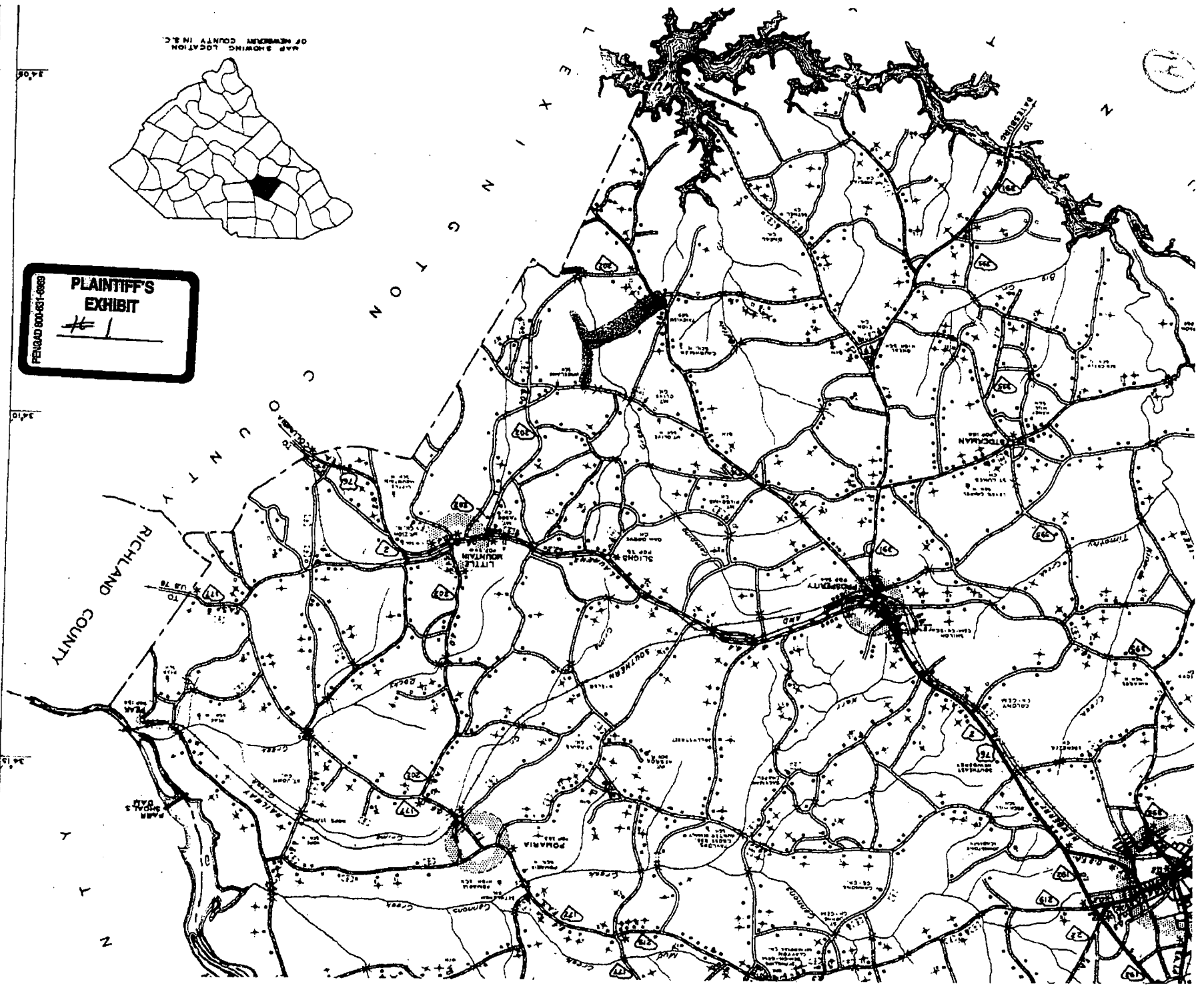
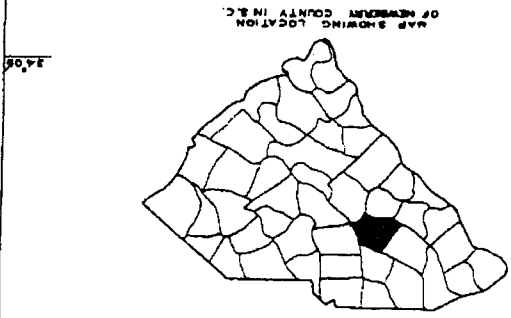
23 A: No, sir.

24 Q: Okay. Now, these other gates that have been
25 put up are they normally put up on SCE&G

CREEL COURT REPORTING, INC.

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(803) 252-3445 / (800) 822-0896

PLAINTIFF'S
EXHIBIT
1



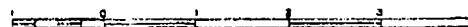
RICHLAND COUNTY

APPENDIX 200

GENERAL HIGHWAY
AND
TRANSPORTATION MAP
NEWBERRY COUNTY
SOUTH CAROLINA

PREPARED BY THE
SOUTH CAROLINA STATE HIGHWAY DEPARTMENT
IN COOPERATION WITH THE
U.S. DEPARTMENT OF AGRICULTURE
BUREAU OF PUBLIC ROADS
DATA OBTAINED FROM
STATE - WIDE HIGHWAY PLANNING SURVEY

SCALE OF MILES

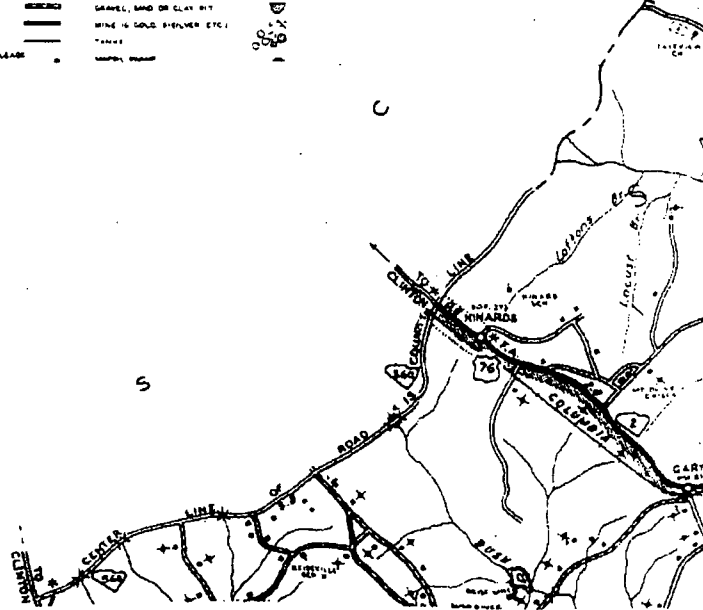


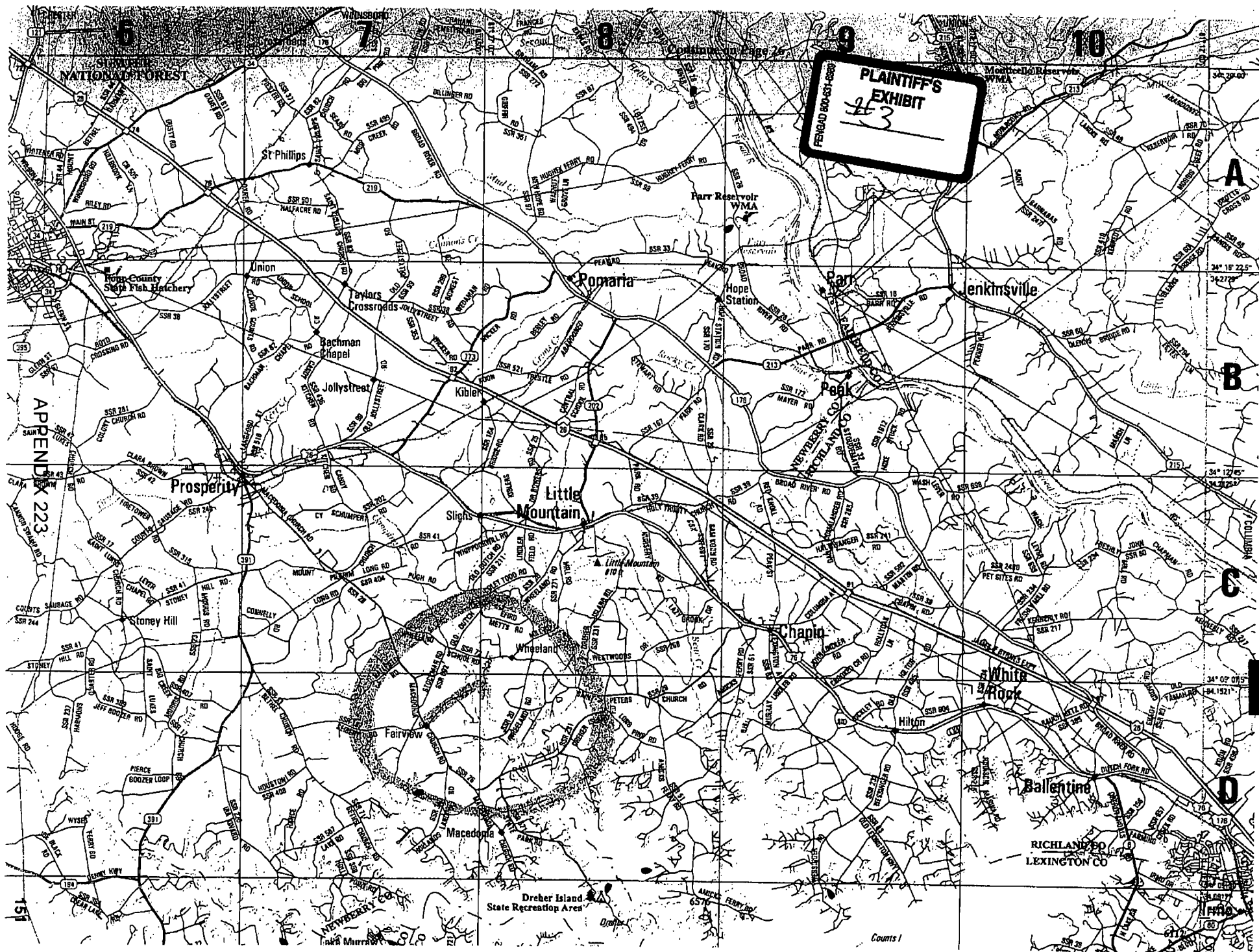
1938

[illegible]

APPENDIX 222

CENT
LOAD



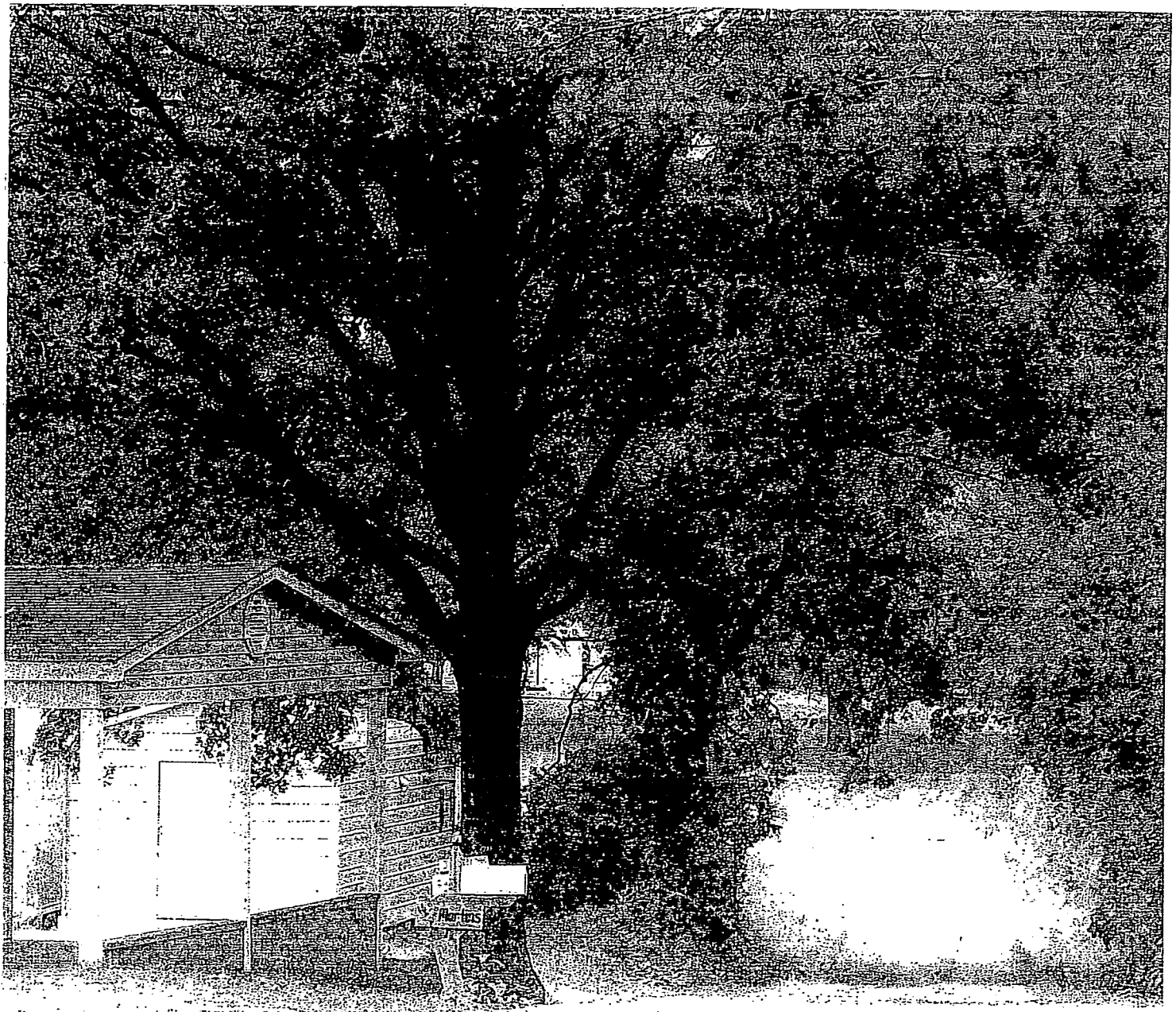


PLAINTIFF'S
EXHIBIT
#3
FENGAD 800-831-8888

APPENDIX 223

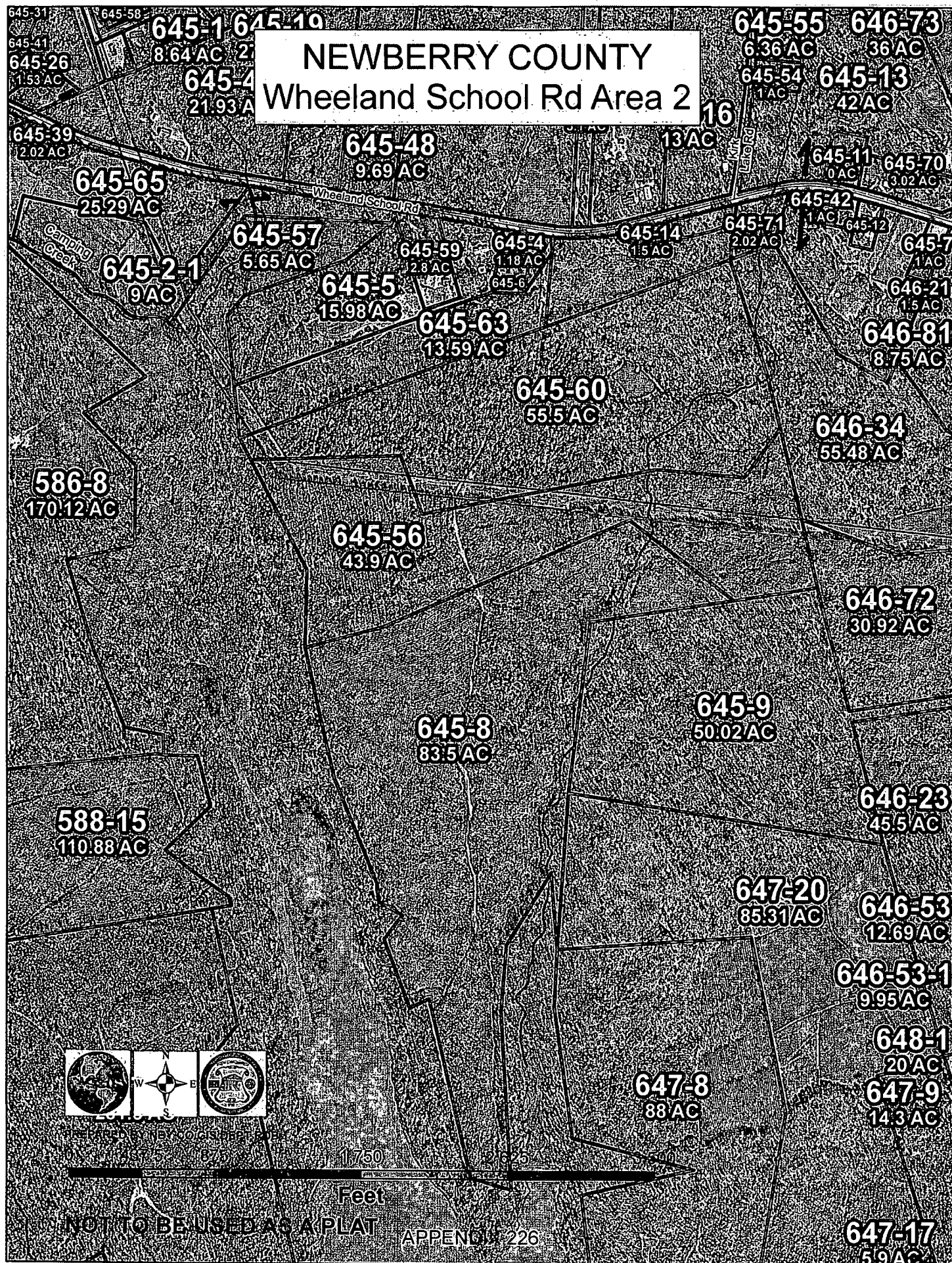
Counts 1





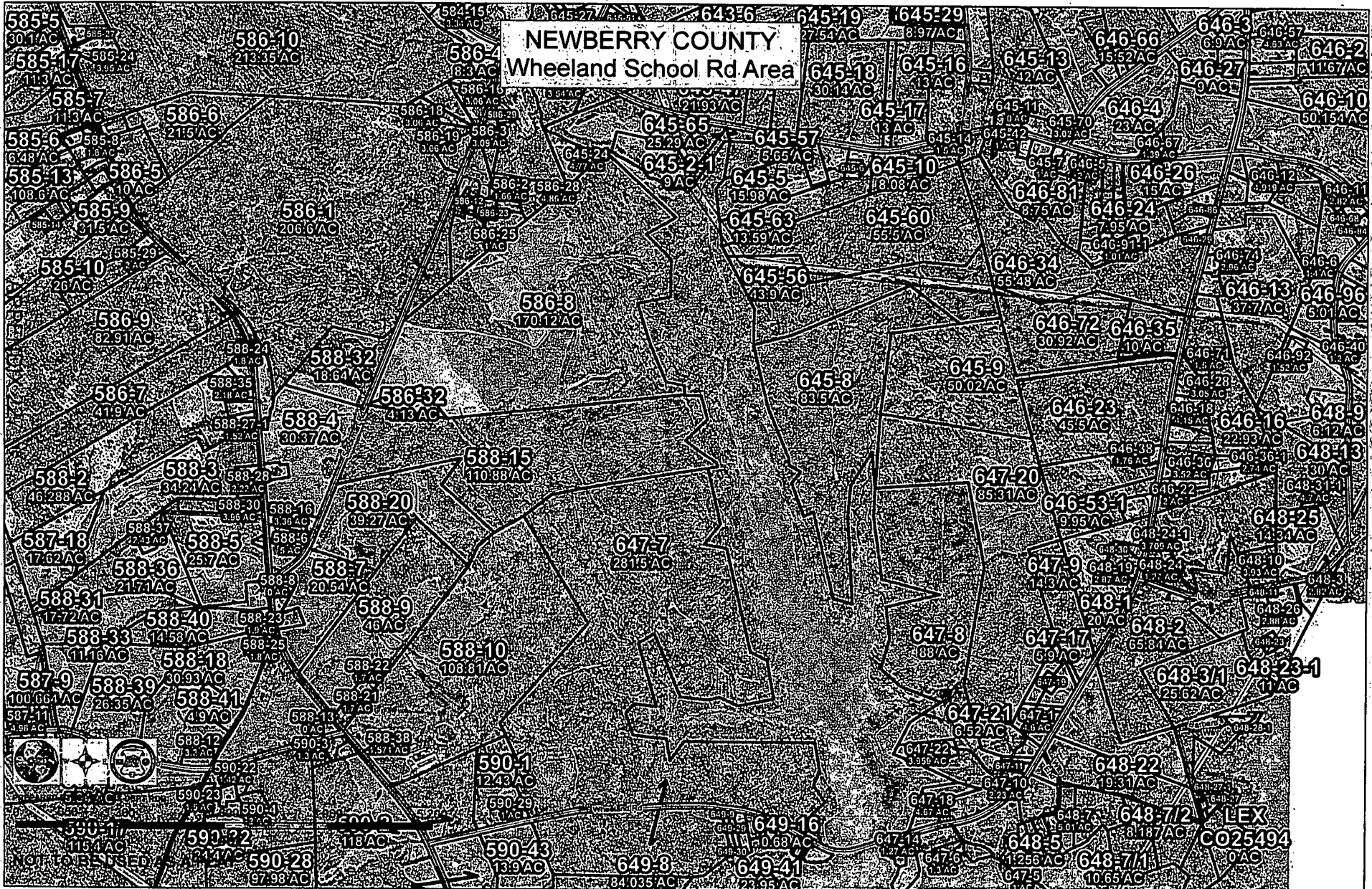
NEWBERRY COUNTY

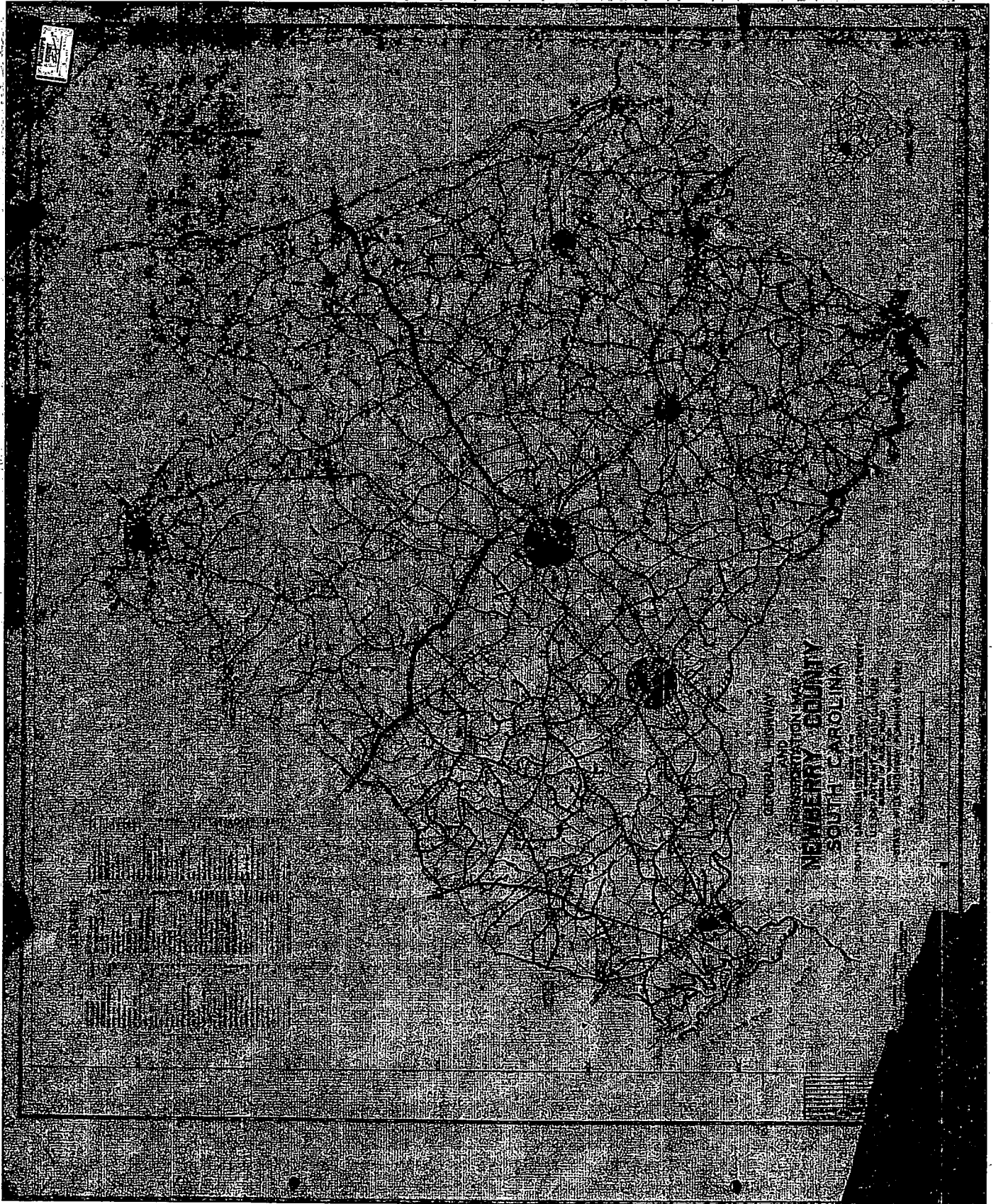
Wheeland School Rd Area 2

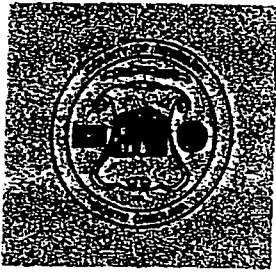


NEWBERRY COUNTY

Wheeland School Rd Area







OFFICE OF THE COUNTY COUNCIL
COUNTY OF NEWBERRY

POST OFFICE BOX 156
NEWBERRY, SOUTH CAROLINA 29108

(803) 321 - 2100
FAX (803) 321 - 2102



COUNCILMEN:

JOHN E. CALDWELL
Chairman
DARRELL W. GILLIAM, Sr.
Vice - Chairman
HENRY B. SUMMER
WILLIAM D. WALDROP
HENRY H. LIVINGSTON III
J. DALE DOMINICK
WIRT H. JENNINGS, Jr.

February 10, 1997

EDWARD F. LOMINACK, Jr.
County Administrator
HARDWICK STUART, Jr.
County Attorney
JEWELL D. KIBLER
Clerk to Council

Mr. George W. Stockman
3792 Macedonia Church Rd.
Prosperity, SC 29127

Dear Sir:

Newberry County Council has received your letter of January 8, 1997 in which you requested that:

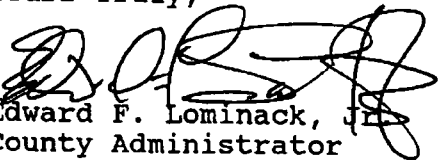
-No county road maintenance be performed on Seibert Rd. north of Macedonia Church Rd.

-Road sign reading "Seibert Rd." be removed.

A thorough review of your request reveals county road maintenance has been performed on this road for a substantial number of years. Early maps indicate that this road while not deeded to the County has served as a dedicated road named Seibert Road. Given this information to be documented by county records, we have no alternative but to deny your request.

Your request and the County denial will be entered into the records of County Council business for future reference.

Yours Truly,


Edward F. Lominack, Jr.
County Administrator

EFLjr/jk

George W. Stockman
3791 Macedonia Church Road
Prosperity, S. C. 29127

Newberry County Council
P. O. Box 156
Newberry, S. C. 29108

January 8, 1997

Dear Sirs:

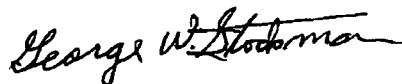
The purpose of this letter is to request that in the future no County road maintenance be performed on a private road owned by me and described in the attached property surveys.

This road is solely owned by me and it's use is by permission only.

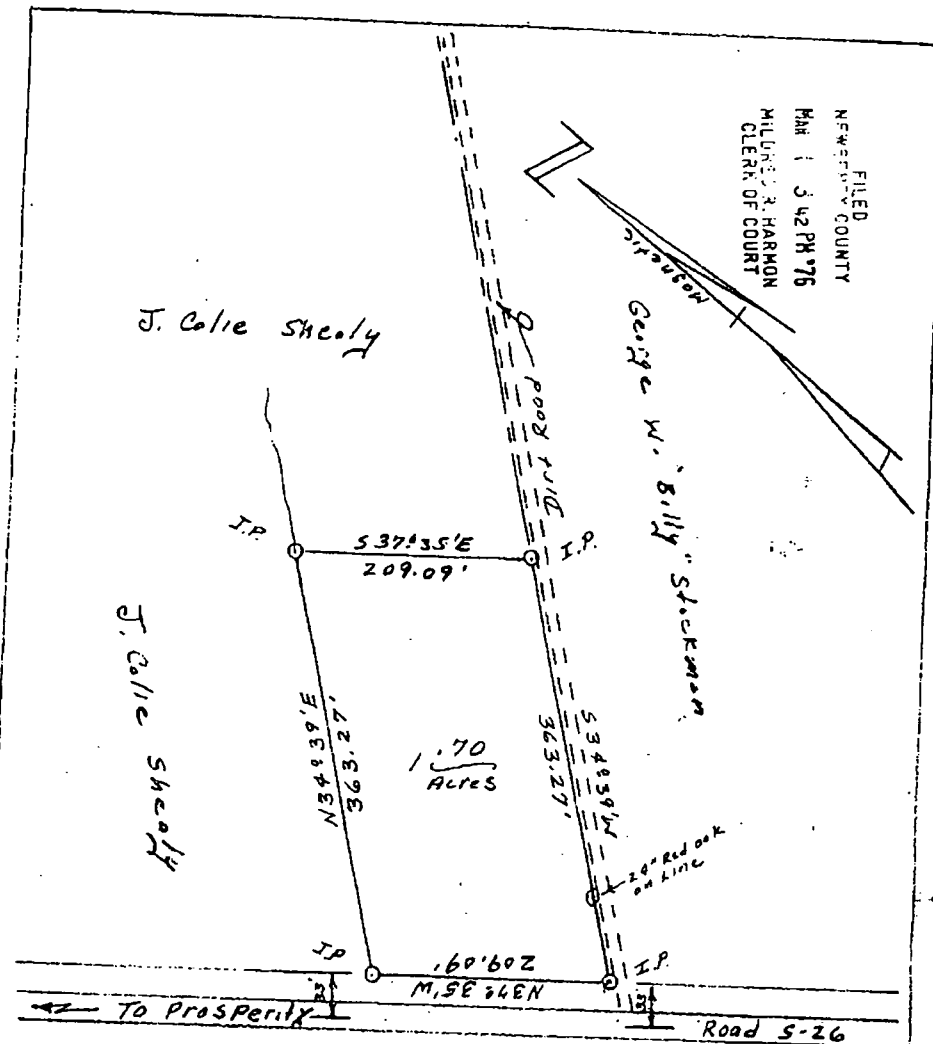
Furthermore, I ask that the road sign reading "Seibert Road" be removed from Macedonia Church Road right away. My private road has never been deeded to the County and has never been named.

Previously, I have objected to County equipment and personnel trespassing on this road without results. Hopefully, this written request will be all that is necessary to stop this practice.

Regards,



George W. Stockman



State of South Carolina
County of Newberry

Scale: 1" = 100'
Surveyed February 4, 1974

At the request of J. Colie Shealy, I have surveyed the above described lot and find it to contain one and seven tenths Acres. The property is located on the Northeast side of Road S-26 near the Intersection of Road S-187 with Road S-26.

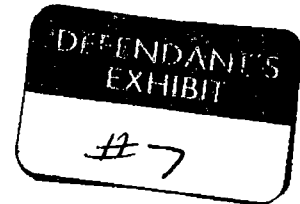
Vincent Ellis Shealy
S.C. Reg. Land Surveyor #3613
Newberry, S.C. 29108



Land Department (MZ6)
Columbia, SC 29128

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

May 11, 2006



Mr. William H. Edwards
Moore, Taylor & Thomas, PA
P. O. Box 5709
West Columbia, SC 29171

Mr. Joseph W. Hudgens
Pope & Hudgens Attorneys, PA
P. O. Box 190
Newberry, SC 29108

Dear Sirs,

Pursuant to your respective subpoenas, I am forwarding copies of a letter dated April 13, 2006 sent to various property owners adjacent to the road referenced in said subpoenas.

Sincerely,

Beth W. Trump 
Beth W. Trump
Real Estate Coordinator

C: File



File Copy

to: Van B. Hoffman
SCANA Services, Inc.
Mail Code MZ6
Columbia, SC 29218
Direct Dial (803)217-9308

April 13, 2006

Dear Neighbors,

It's become apparent that since we are all adjacent landowners on the east side of Camping Creek, we need to put to rest the current argument concerning the old woods road which provides ingress and egress from Wheeland School Road through all of our properties.

I have reviewed our old records and it is evident that everyone has a prescriptive right to access their respective property via this old road. It's also evident that this access is limited by the previous use and width of the old road. I am attaching an old 1930 drawing that depicts this road which appears to us to be the same road as shown on the survey plat by Glenn Associates Surveying, Inc.

I think that the disagreements involving the presence of a gate really stem from some concerns that someone might one day try to deny another access. Also, I believe everyone would recognize that as landowners, we really do need a gate to secure our properties from trespass and dumping, while at the same time acknowledging each other's access rights. Each affected party should have a key to the gate.

Therefore, SCE&G is proposing that all the affected landowners agree to sign this letter acknowledging each property owners' rights to use of the existing roadway for their land management and of their respective properties and to service the personal residences of direct family members, if so inclined.

We feel this approach is in everyone's best interest. Please feel free to call me at (803)217-9308 if you have any questions. Otherwise, please sign the letter and mail it back to me in the self addressed envelope.

Sincerely,

Van B. Hoffman

Van B. Hoffman
Manager, Land Department

ACKNOWLEDGEMENTS

Benny Albert Bush

Dwain Wessinger

Joe Childers

Jr. Keith Fulmer

John Frick



to: Van B. Hoffman
SCANA Services, Inc.
Mail Code M28
Columbia, SC 29218
Direct Dial (803)217-9308

April 13, 2006

Dear Neighbors,

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Sincerely,

Van B. Hoffman
Van B. Hoffman
Manager, Land Department

ACKNOWLEDGEMENTS

Benny Albert Bush

Dwain Wessinger

Joe Childers

Joe Keith Fulmer
Keith Fulmer

John Frick



to: Van B. Hoffman
SCANA Services, Inc.
Mail Code MZ6
Columbia, SC 29218
Direct Dial (803)217-9308

April 13, 2006

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Sincerely,

Van B. Hoffman
Manager, Land Department

ACKNOWLEDGEMENTS

Benny Albert Bush

Dwain Wessinger

Joe Childers

Keith Fulmer

John Frick



to: Van B. Hoffman
SCANA Services, Inc.
Mail Code MZ8
Columbia, SC 29218
Direct Dial (803)217-9308

April 13, 2006

Dear Neighbors,

It's become apparent that since we are all adjacent landowners on the east side of Camping Creek, we need to put to rest the current argument concerning the old woods road which provides ingress and egress from Wheeland School Road through all of our properties.

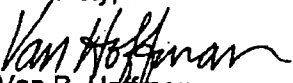
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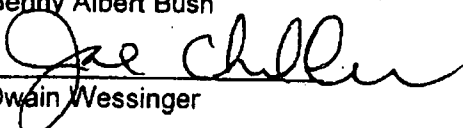
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Sincerely,


Van B. Hoffman
Manager, Land Department

ACKNOWLEDGEMENTS

Benny Albert Bush


Dwain Wessinger

Joe Childers

Keith Fulmer

John Frick

SCE&G Land Department
(MZ8)
Columbia, SC 29218



South Carolina Electric & Gas Co.
Columbia, South Carolina
29218

COLUMBIA SC 292

21 APR 2006 PM 1 T



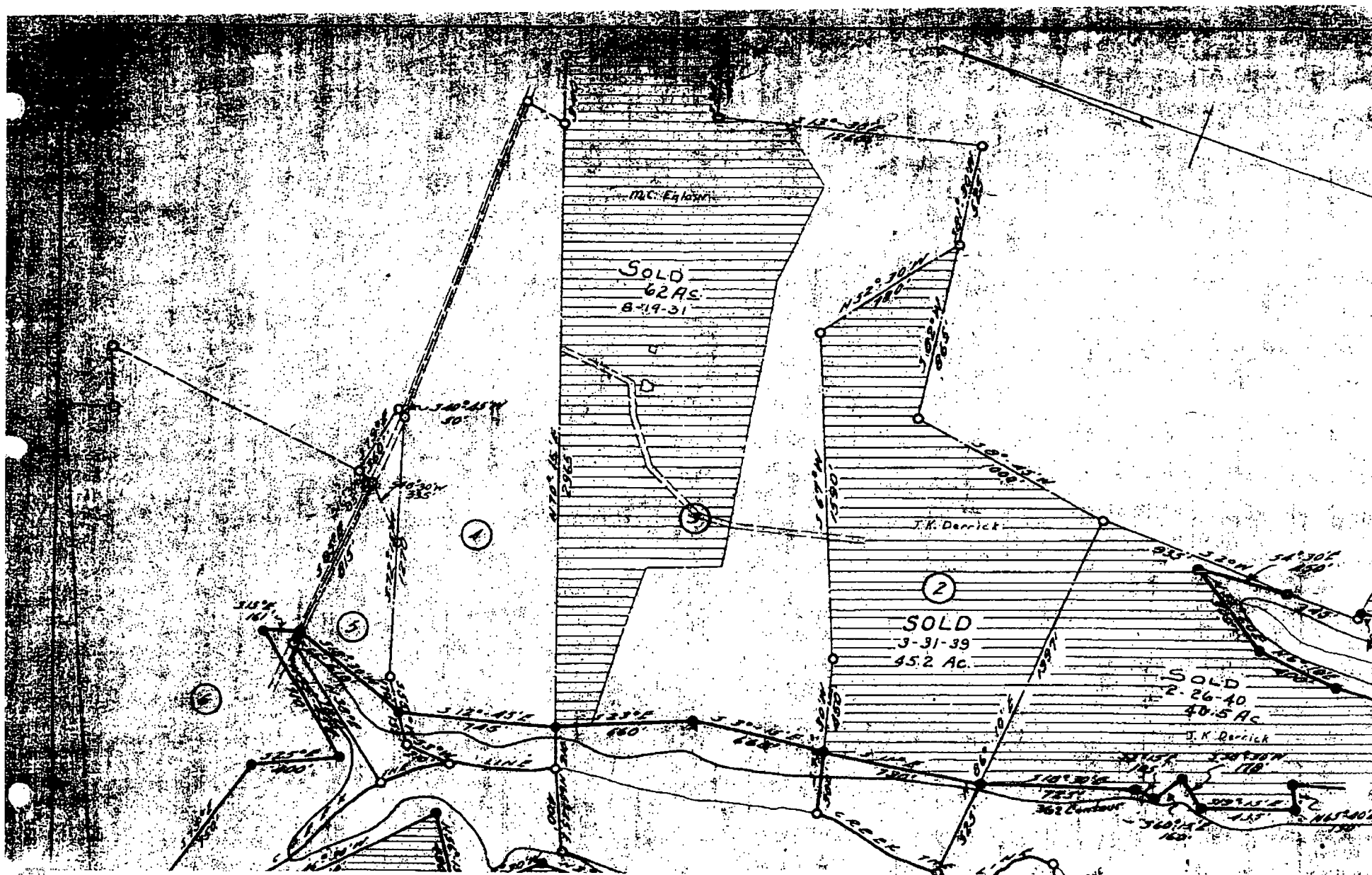
APPENDIX 23

SCE&G Land Department
Attn: Van B. Hoffman
Columbia, SC 29218

MZ6

29218+0000





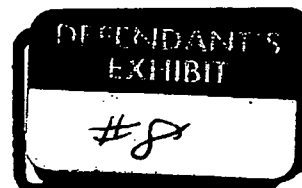
File



Corporate Real Estate (156)
Columbia, SC 29218

March 14, 2003

Mr. John Frick
PO Box 607
Chapin, SC 29036



Dear Mr. Frick:

I am responding to the inquiry you made in regard to the Lake Murray fringeland adjacent to the Abbeville Timber Company Tract in Newberry County. I discussed this situation with our legal counsel and several other Land and Lake Management staff. We concluded that it is not prudent for us to pursue a change in land use classification or the sale of additional fringeland at that location at this time. In general, we have ceased applications to sell Lake Murray fringeland. This is due in part to the general regulatory environment – including the Federal Energy Regulatory Commission's failure to take action on fourteen outstanding proposed fringeland sales – as well as other priorities on Project 516 that must take precedence over these types of issues. I did receive the latitude, however, to discuss right-of-way possibilities with you as long as you receive a recordable easement from an adjacent landowner.

In our initial meeting we made it clear that the scenarios we discussed were subject to management approval, so I hope you kept that in mind as you pursued your investment opportunities at that site. I did enjoy the opportunity to meet with you and wish you well in your real estate ventures.

If you have any questions, please call me at 803-217-7912.

Sincerely,

Beth W. Trump
Real Estate Coordinator

Mailing Address:
SCANA Corporate Real Estate (156)
Columbia, SC 29218

Phone Number:
803-217-7912

cc: Van Hoffman
Richard Morton

APPENDIX 239

Diversified Building & Engineering Services, Inc.

2311 Old Dutch Road, Little Mountain, SC 29075
P. O. Box 607, Chapin, SC 29036

Telephone (803) 345-9321
Pager (803) 376-9263

TO: Beth Trump
SCE&G

DATE: January 27, 2003

FROM: John S. Frick

PAGES: 4 pages including cover sheet

Ms. Trump,

Please research this piece of property located in Newberry County on Lake Murray. I am sending plat, legal description and an area map with this property's approximate location. If you need further information, please call Connie at 345-0244.

Does SCE&G own the fringe land?

Can the fringe land be purchased?

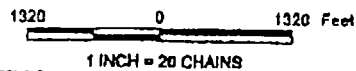
If so, what is the price range of the fringe land?

Thanks for your help!

Sincerely,

DIVERSIFIED BUILDING & ENGINEERING SERVICES, INC.

John S. Frick



Stand no	Acres	Type	Species	Year est
001	52	Plantation	Loblolly	1999
	4	Natural Hwd	Mixed Hwd	1964
003	23	Plantation	Loblolly	1994
004	4	Natural Pine	Loblolly	1991
093	1	Non-forest		0

SOUTHEAST REGION
COMPARTMENT 7354101
84 ACRES
NEWBERRY COUNTY,
SOUTH CAROLINA

0004075 Bk: 0590 Pg: 0103

EXHIBIT "A" - Page 23

All that certain lot, tract or parcel of land situate, lying and being in Newberry County, South Carolina containing 918 acres, more or less, and being shown as containing 874.00 acres more or less according to a plat prepared by T. J. Bobbett, Civil Engineer dated March 25, 1938 and recorded in the Office of the Clerk of Newberry County, South Carolina in Plat Book H, page 94, said property being conveyed to Fairfield Forest Products Company, Inc., by Patrick E. Scott by deed recorded in the Office of the Clerk of Court of Newberry County, South Carolina, at Book 54, page 256, to which deed and plat reference is hereby specially made for a more complete and accurate description of said tract of land. Tax ID# 429-1

As to the portion of the property lying between the old river bed as shown on the aforesaid plat and the current river bed of the Enoree River, the Grantor makes no warranty of title of any kind.

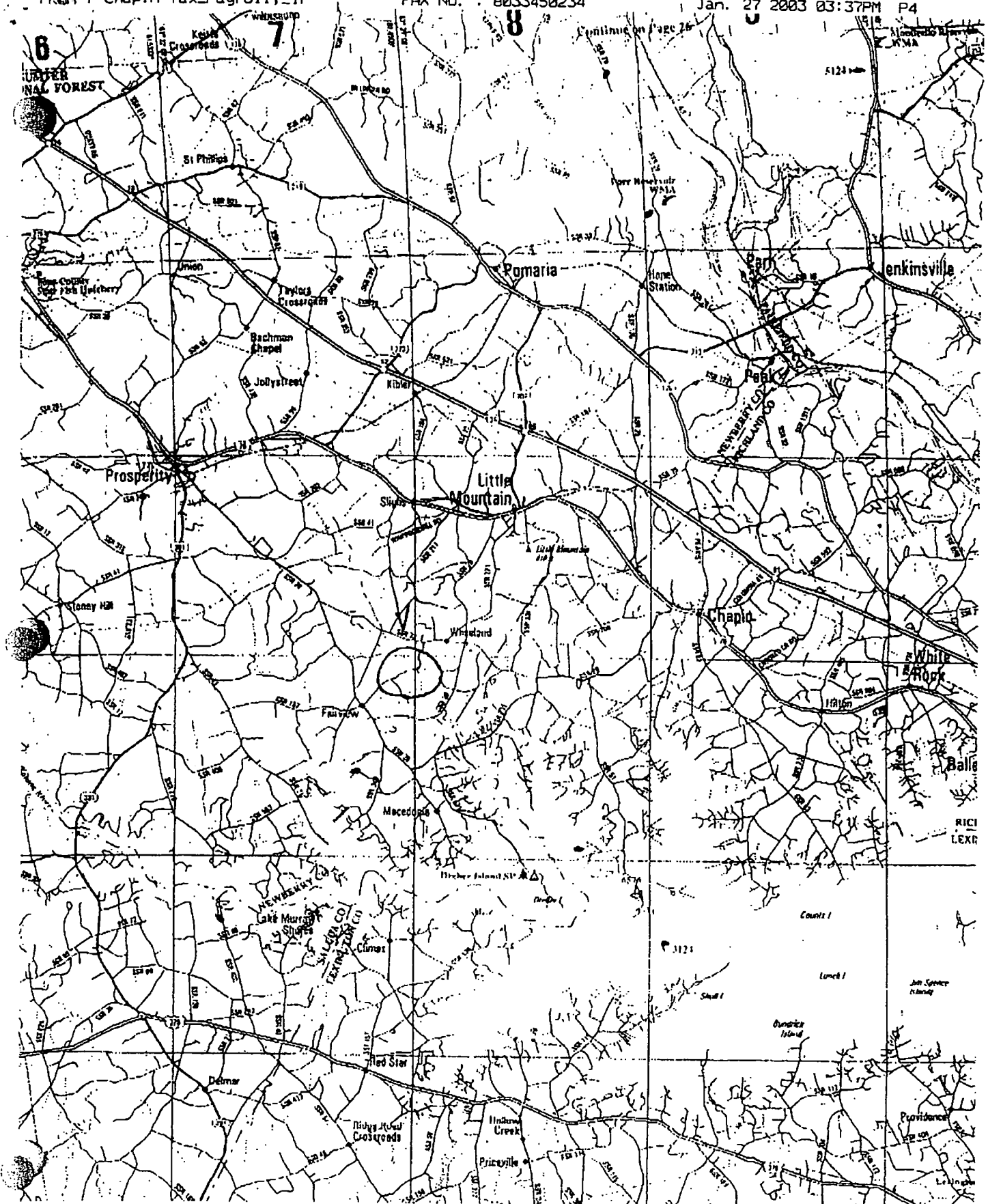
TRACT 101-1E KINARD RIDDLE TRACT:

All that tract or parcel of land lying and being in Newberry County, South Carolina, containing 85.7 acres, more or less, being the second and third tracts of land described in the deed to Fairfield Forest Products Co., Inc. from J. Alvie Kinard and Ernest O. Kinard dated November 12, 1946, recorded in the Office of the Clerk of Court of Newberry County, South Carolina, in Book 55, page 68, reference to which is hereby made for a more complete and accurate description of the property hereby conveyed. The second tract of land described in said deed is described as 40.5 acres, more or less, designated as Parcel "E" on the plat of lands of Marie L. Wheeler, dated March 26, 1928, for Lexington Water Power Company by Murray & Flood, Engineers, and the third tract of land is described in said deed as containing 45.2 acres, more or less, being designated as Tract "B" on the plat of a portion of the A. W. Eulow Land made for Lexington Water Power Company, dated March 20, 1928, by Murray & Flood, Engineers. Reference is hereby made to said plats in aid of this description.

Parcel "E", containing 40.5 acres, is described in the above referenced deed as being bounded, now or formerly, as follows: North by lands of A. W. Eulow; East by lands of J. G. Irby Riddle, formerly owned by C. S. Mathews and lands of Lexington Water Power Company Reservoir shown as Parcel "A" on the aforesaid plat of lands of M. L. Wheeler; South and West by Parcel "A" as shown on the aforesaid plat.

Tract "B", containing 45.2 acres, more or less, is described in the above referenced deed as being bounded, now or formerly, as follows: North lands of G. W. Eulow; East by lands of Jonas Arwick; South by lands of Jonas Arwick and Parcel "E" on the aforementioned plat of the M. L. Wheeler lands; and West by Parcel "A" on the aforementioned plat of the M. L. Wheeler lands.

Tax ID #645-8.



2/26/06 6/22/06



Reply to: Van B. Hoffman
SCE&G Land Department
Mail Code MZ6
Columbia, SC 29218
Direct Dial (803)217-9308

September 8, 2006

Mr. Joseph W. Hudgens, Atty.
Pope & Hudgens, PA
P. O. Box 190
Newberry, SC 29108

Dear Mr. Hudgens,

In response to your letter dated August 18, 2006, it has always been our understanding that each affected landowner has a right to use of the existing woods road for ingress/egress to each landowners parcel. It's been my experience since July 1970 that each landowner has utilized this right. In fact, our Company drawings from 1930 show the old road in its present location.

Some 15 or 20 years ago, the adjacent landowners welcomed SCE&G's installation of a gate which served to protect the integrity and quiet enjoyment of their properties from trespassing, trashing and vandalism. We acknowledge that the Company recently erected a new gate after the older one had been vandalized. It has always been the position of adjoining landowners that everyone was entitled to a key. In fact, I called John Frick to tell him that Mr. Joe Keith Fulmer wanted to deliver a key for him and would leave it at Charles Frick's store (his brother). Mr. Frick responded, "I don't want a key, I want the gate down." In further response to your false accusation that we are preventing Mr. Frick access to his property, I am enclosing the key for John that he earlier refused to accept.

Previously, Beth Trump mailed you a copy of the letter dated April 13, 2006, in which I interceded on behalf of the property owners in a good faith attempt to resolve this issue based on terms we believed that everyone would accept. I'm enclosing the signed copies that were returned to me for your information.

It appears to us that John's frustration is not the gate, but rather the narrowness of the road and its limited scope of use, which is an impediment to development of his property.

Sincerely,

Van B. Hoffman
Van B. Hoffman

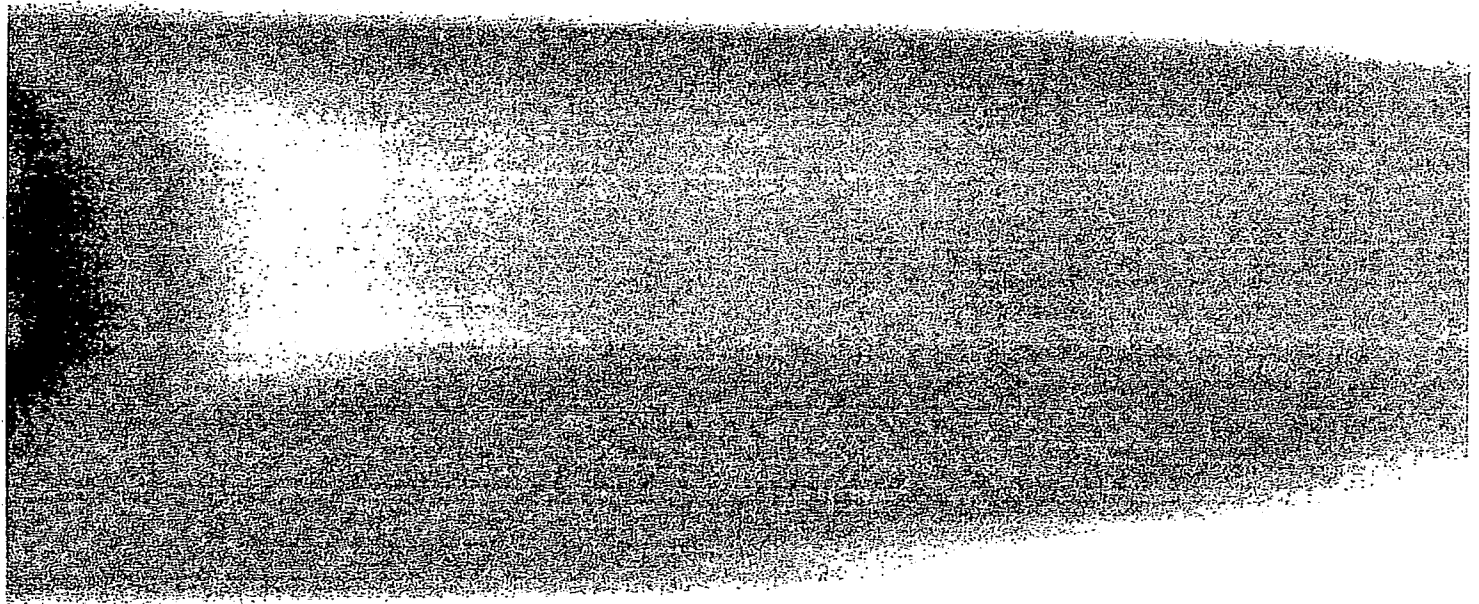
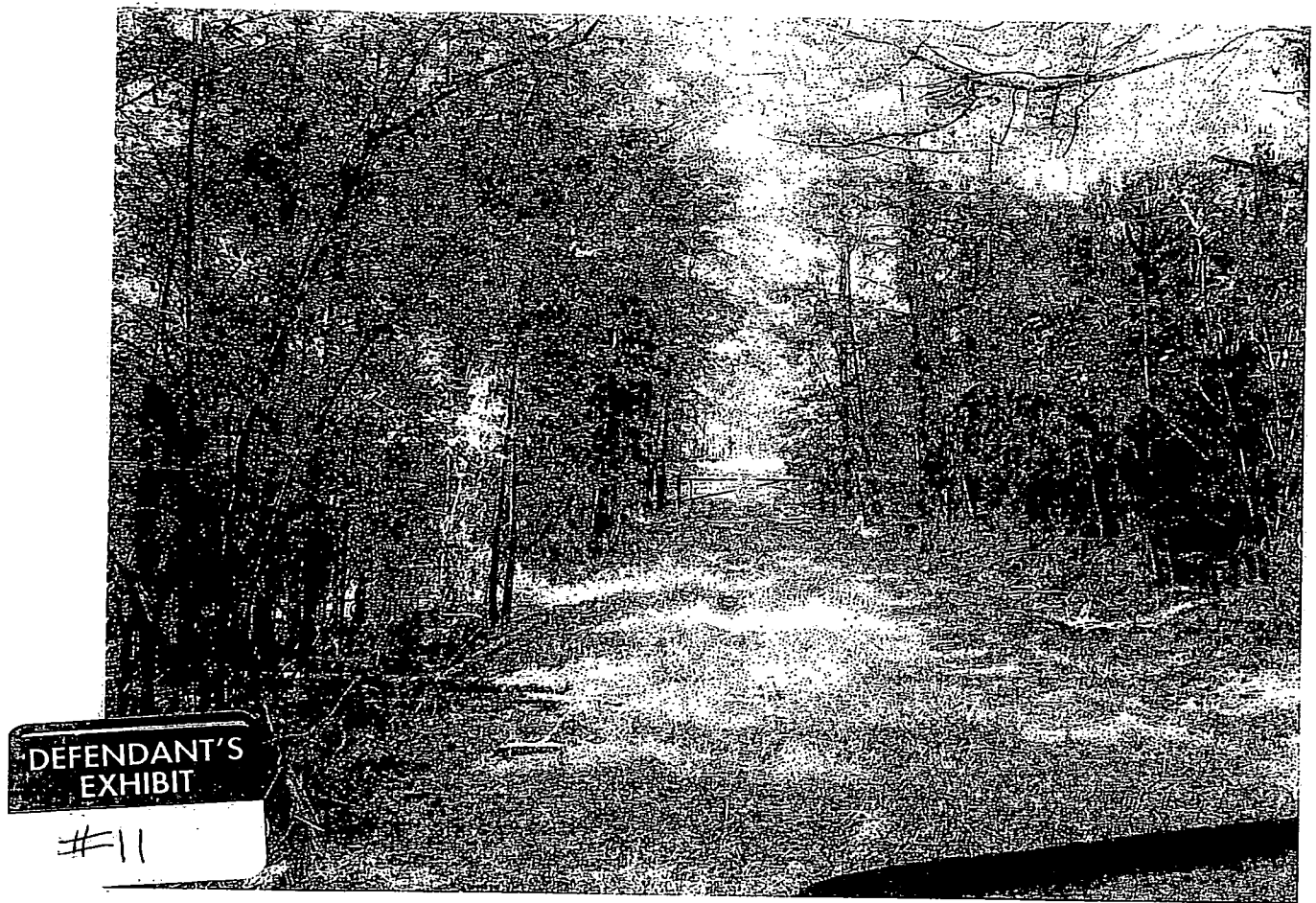
C: Craig Jardin, SCE&G Legal Dept.

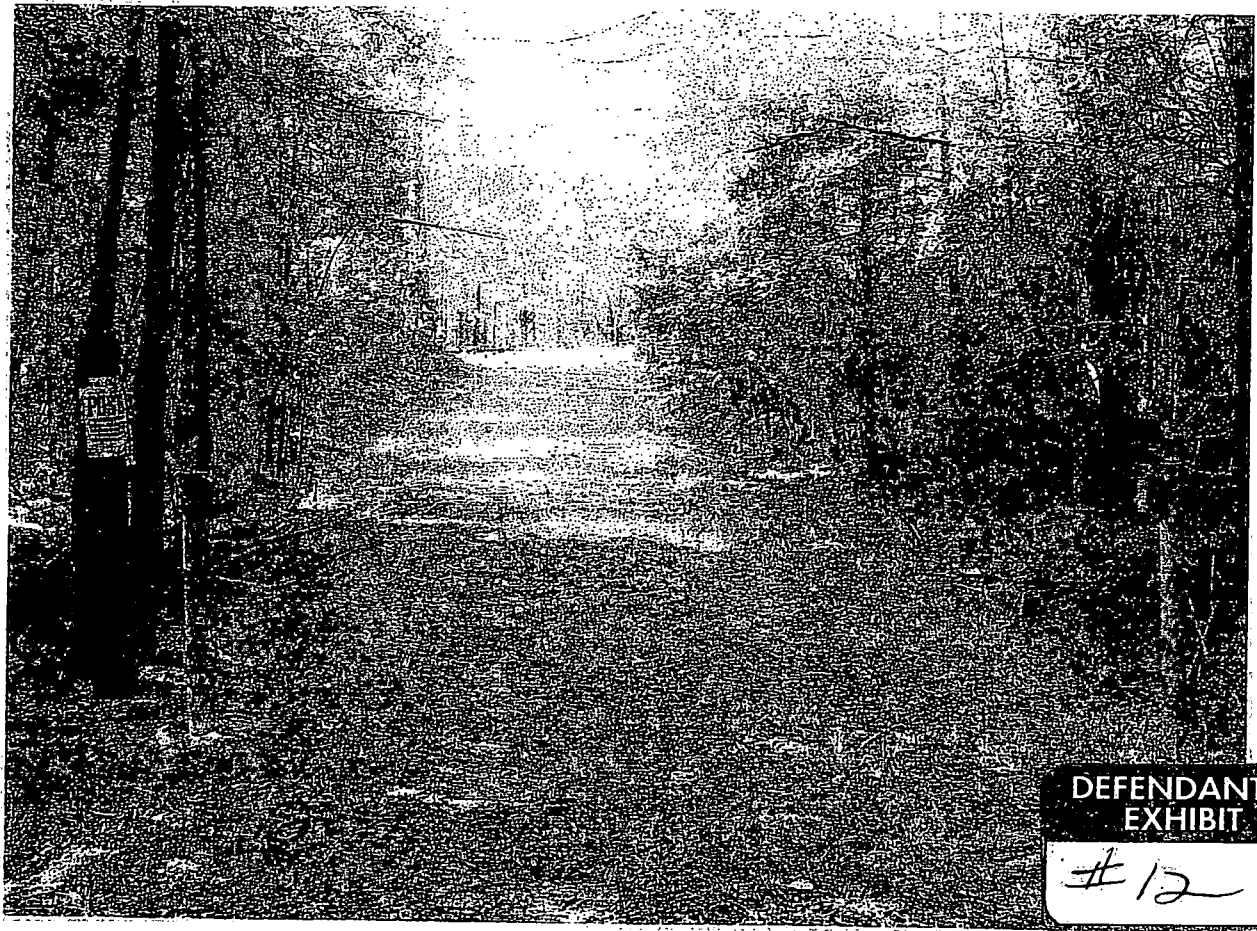
Key to Joe Keith Fulmer's lock attached to orig. letter to Hudgens

LAND\HOFFMAN\JOHN FRICK - ROAD ACCESS - KEY LETTER TO HUDGENS.DOC
APPENDIX 244

✓ Bc: Rudy Barnes

DEFENDANT'S
EXHIBIT
10





DEFENDANT'S
EXHIBIT

#12

588-7
20.54 AC

588-9
46 AC

588-22
17 AC

588-10
108.81 AC

588-21
17 AC



588-13
10 AC

NOT TO BE USED AS A PEA

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
No. 2014-001472

Appeal from Newberry County
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge
Civil Action No. 2009-CP-36-415

John S. Frick,

Appellant,

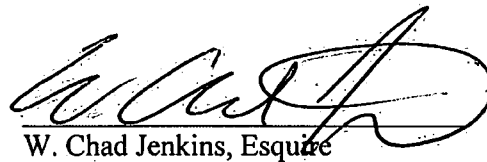
v.

Keith Fulmer, Eleanor F. Bush,
Benny A. Bush, Joseph R. Childers,
Justin Chadwick, Victoria Chadwick,
S.C. Electric & Gas, and Newberry County

Respondents.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Record on Appeal complies with Rule 210(g),
SCACR.



W. Chad Jenkins, Esquire
POPE AND HUDGENS, P.A.
1508 College Street
Post Office Box 190
Newberry, SC 29108
ATTORNEYS FOR APPELLANT

November 13 2014