

The Supreme Court of South Carolina

City of North Myrtle Beach, Respondent,

v.

East Cherry Grove Realty Co.,
LLC, The State of South
Carolina and John Doe, Defendants,

Of whom East Cherry Grove
Realty Co., LLC is the Appellant,

and The State of South
Carolina is Respondent.

ORDER

The City of North Myrtle Beach moves to certify this appeal from the Court of Appeals to this Court pursuant to Rule 204(b), SCACR. The State of South Carolina and East Cherry Grove Realty Co., LLC do not oppose the motion. The motion is granted and the appeal is hereby certified to this Court.


C. J.
FOR THE COURT

Columbia, South Carolina

July 7, 2011

cc: Gene McCain Connell, Jr., Esquire
Michael Warner Battle, Esquire
Assistant Deputy Attorney General J. Emory Smith, Jr.
The Honorable Tanya Gee

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
Tracking # 2011191609

RECEIVED

JUN 10 2011

APPEAL FROM HORRY COUNTY
Court of Common Pleas
William H. Seals, Jr., Circuit Court Judge

S.C. SUPREME COURT

CASE NO. 2009-CP-26-5782

City of North Myrtle Beach

Respondent

vs.

East Cherry Grove Realty Co., LLC,
The State of South Carolina and John Doe

Defendants

Of whom East Cherry Grove Realty Co., LLC is Appellant
and The State of South Carolina is Respondent

RULE 204(b) MOTION FOR CERTIFICATION


Respondent City of North Myrtle Beach (City) hereby moves before the South Carolina Supreme Court pursuant to Rule 204(b) SCACR for certification to transfer jurisdiction to the SC Supreme Court of the above captioned case filed in the SC Court of Appeals by Appellant East Cherry Grove Realty Co., LLC. The grounds for the motion are the case involves a matter of significant public interest.

The case arises in connection with the City's plans to perform much needed maintenance dredging improvements for public canals bordered by approximately 600 home sites in the East Cherry Grove section of North Myrtle Beach. The canals contain

public waters which are navigable and used by the general public. Appellants claim they own the bottoms of the canals and the City's maintenance dredging will constitute a taking of their property. The State of South Carolina claims it owns the property through a quitclaim deed it received in 1969 from Appellants' predecessor in title. Declaratory judgments were filed by the parties to determine ownership of the canals. On March 31, 2011, a jury found the State of South Carolina owned the canals which had been dedicated to the public and were held in trust for the public by the State.

The City's Motion for certification will be supported by the attached Memorandum of Authorities, Appellants' Notice of Appeal, the parties Pleadings and such affidavits as may be requested by the Court.

The City cannot issue public improvement bonds and perform the maintenance dredging until the ownership of the canals is resolved. The City of North Myrtle Beach respectfully requests that this Court inquire into the matters set forth in the motion together with its supporting memorandum and grant the City's Motion for Certification.


MICHAEL W. BATTLE
Battle & Vaught P.A.
Post Office Box 530
Conway, South Carolina 29528
(843)248-4321
Attorneys for Petitioner
Respondent City of North Myrtle Beach

Conway, South Carolina
June 9, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
Tracking # 2011191609

APPEAL FROM HORRY COUNTY
Court of Common Pleas
William H. Seals, Jr., Circuit Court Judge

CASE NO. 2009-CP-26-5782

City of North Myrtle Beach

Respondent

vs.

East Cherry Grove Realty Co., LLC,
The State of South Carolina and John Doe

Defendants

Of whom East Cherry Grove Realty Co., LLC is Appellant
and The State of South Carolina is Respondent

MEMORANDUM IN SUPPORT OF
THE CITY OF NORTH MYRTLE BEACH'S
RULE 204(b) MOTION FOR CERTIFICATION

MICHAEL W. BATTLE SCB # 584
Battle & Vaught P.A.
Post Office Box 530
Conway, South Carolina 29528
(843)248-4321
Attorneys for Petitioner/
Respondent City of North Myrtle Beach

Conway, South Carolina
June 9, 2011

Statement of the Case

The case arises from a dispute over ownership of all the canals in the East Cherry Grove Section of North Myrtle Beach. The State of South Carolina claims ownership of the canals through a 1969 quitclaim deed from C.D. Nixon and the East Cherry Grove Realty Company. The City of North Myrtle Beach, with permission from the State, plans to improve the canals through a public improvement, maintenance dredging project. Appellants claim ownership of the canals through the last will of C.D. Nixon, now deceased. Appellants claim the dredging project will constitute a taking of their property and they are entitled to compensation if the canals are dredged.

Declaratory judgment actions were filed by the parties and consolidated. On March 31, 2011, a jury returned a verdict in favor of the Respondents finding: 1) the canals belonged to the State of South Carolina by virtue of the 1969 quitclaim deed; 2) Appellants' predecessors in title had dedicated the canals to the public; and 3) the State of South Carolina held title to the canals in trust for the general public. (Copy attached). Appellants duly appealed the jury's verdict and the Court's order upholding the jury's verdict.

Factors that favor certification.

1. The appeal affects the interests of the general public in that area. The canals are in serious need of maintenance dredging. East Cherry Grove is a relatively large canal community. The general public has used the canals for transportation and recreation for the past fifty years. Approximately 600 home sites adjoin the canals in East Cherry Grove. Former Chief Justice Hon. David Harwell testified for the

Respondents that the canals are silting in and now, at low tide, the canals are not useable for much other than breeding mosquitoes. During the past six years the silting in of the canals appears to be growing worse. An extended appellate delay will drive up the maintenance dredging costs and the amount of work necessary to complete the City's plans.

2. Notwithstanding the trial verdict, the City cannot proceed with its dredging plans. The City is required to obtain a dredging permit from the U.S. Army Corps of Engineers. The Corps of Engineers will not act on the City's application because of the pending dispute over ownership of the canals. In addition, public improvement bonds cannot be issued if the property is determined to be private property.

3. An eminent domain proceeding is not a viable alternative. Even if the City attempted to condemn Plaintiffs' alleged interest in the canals, it could not condemn property claimed or owned by the State. See *South Carolina State Ports Authority v. Jasper County*, 368 S.C. 388, 397, 629 S.E.2d 624, 628 (2006). The City contends that the only way to proceed with a dredging plan is to get the appeal on the property ownership dispute resolved one way or the other.

4. Both the State and the Appellants have informally indicated through their attorneys that the matter will have to be decided by the SC Supreme Court before the matter is ended.

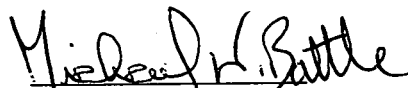
5. The significance of the public's interest in the resolution of the dispute can be demonstrated by the fact that legislation was recently enacted and supported by SCDHEC and environmental groups which will allow the City and other similarly situated municipalities or counties to do maintenance dredging in canal communities such

as East Cherry Grove with the proper permits from the U.S. Army Corps of Engineers.

See R. # 75, signed by the Governor on June 7, 2011(Copy attached).

Conclusion.

The City of North Myrtle Beach respectfully requests that the Court grant its Motion for Certification pursuant to Rule 204 (b), SCACR, and that the Court transfer jurisdiction of the appeal to itself from the S.C. Court of Appeals.



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(843)248-4321
Attorneys for Petitioner
Respondent City of North Myrtle Beach

Conway, South Carolina
June 9, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

CASE NO. 2009-CP-26-5782

City of North Myrtle Beach Respondent

vs.

East Cherry Grove Realty Co., LLC,
The State of South Carolina and John Doe..... Defendants

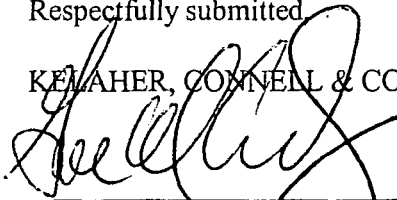
of whom East Cherry Grove Realty Co., LLC is Appellant
and The State of South Carolina is Respondent

NOTICE OF APPEAL

The Defendant, East Cherry Grove Realty Co., LLC, appeals the jury verdict rendered on March 31, 2011 before The Honorable William H. Seals, Jr. Appellant received notice of this jury verdict on March 31, 2011.

Respectfully submitted

KELAHER, CONNELL & CONNOR, P.C.



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1500 U.S. Highway 17 North
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Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
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gconnell@classactlaw.net
Attorney for Appellant

April 27, 2011

Other Counsel of Record:

Michael W. Battle, Esquire

Battle & Vaught, PA

P.O. Box 530

Conway, SC 29528

(843) 248-4321

Attorney for Respondent City of North Myrtle Beach

J. Emory Smith, Jr., Esquire

Office of the Attorney General

Post Office Box 11549

Columbia, SC 29211

803-734-3680

Attorney for Respondent State of South Carolina

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2009-CP-26-5782

City of North Myrtle Beach

East Cherry Grove Realty Co., LLC,

VS.

The State of South Carolina and

John Doe

PLAINTIFF(S)

DEFENDANT(S)

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 43(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; 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:

1. *We the jury find that, according to the two quitclaim deeds in evidence as Plaintiff's Exhibits 4 and 5, that title to the canals in dispute in this case belongs to The State of South Carolina.*
2. *Did the original east Cherry Grove Realty Co. or C.D. Nixon dedicate the canals involved in this lawsuit to the public? Yes*
3. *Does the State of South Carolina hold the title to the canals involved in this lawsuit in trust for the public? Yes*

Dated at Conway, South Carolina, this 31st day of March, 2010.


PRESIDING JUDGE

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

Michael W. Battle

Gene M. Connell Jr.

Emory J. Smith Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

FILED
HORRY COUNTY
11 MAR 31 PM 3:54
CLERK OF COURT

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

City of North Myrtle Beach,)
)
Plaintiff,)
)
vs.)
)
East Cherry Grove Realty Co., LLC,)
The State of South Carolina and)
John Doe,)
)
Defendants.)

C/A NO. 2009-CP-26-5782
(Consolidated)

Verdict

MELANIE HUGHES-WARD
CLERK OF COURT

11 MAR 31 PM 3:00

FILED
HORRY COUNTY

1. We the jury find that, according to the two quitclaim deeds in evidence as Plaintiff's Exhibits 4 and 5, that title to the canals in dispute in this case belongs to (please check one)

_____ East Cherry Grove Realty, LLC

The State of South Carolina .

2. Did the original east Cherry Grove Realty Co. or C.D. Nixon dedicate the canals involved in this lawsuit to the public?

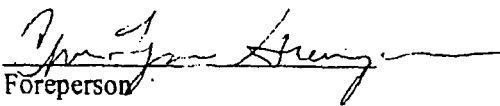
Yes.

_____ No.

3. Does the State of South Carolina hold title to the canals involved in this lawsuit in trust for the public?

Yes.

_____ No.


Foreperson
March 31, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM Horry COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

CASE NO. 2009-CP-26-5782

City of North Myrtle Beach Respondent

vs.

East Cherry Grove Realty Co., LLC,
The State of South Carolina and John Doe..... Defendants

of whom East Cherry Grove Realty Co., LLC is Appellant
and The State of South Carolina is Respondent

PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served a **Notice of Appeal** on the Respondents, through their attorneys of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

Michael W. Battle, Esquire
Battle & Vaught, PA
P.O. Box 530
Conway, SC 29528
Attorney for Respondent City of North Myrtle Beach

J. Emory Smith, Jr., Esquire
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Attorney for Respondent State of South Carolina

DATE OF MAILING: April 27, 2011

Shelia Y. McCumbee
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 27th day of April, 2011.

Sharon M. Ryer
Notary Public for South Carolina
My Commission Expires: 2-25-19

H*3587

H*3587(Rat #0075) General Bill, By Edge, Viers, Hardwick, Hearn, Clemmons, Barfield, Hayes and Loftis

Similar(S 497)

AN ACT TO AMEND SECTION 48-39-10, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE DEFINITION OF TERMS USED IN THE REGULATION OF COASTAL TIDELANDS AND WETLANDS BY THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, SO AS TO DEFINE "MAINTENANCE DREDGING"; TO AMEND SECTION 48-39-130, RELATING TO PERMITS REQUIRED TO UTILIZE CRITICAL AREAS AND EXEMPTIONS FROM SUCH PERMITS, SO AS TO EXEMPT DREDGING BY MUNICIPALITIES AND COUNTIES IN CERTAIN EXISTING RECREATIONAL USE CANALS AND ESSENTIAL ACCESS CANALS CONVEYED TO THE STATE OR DEDICATED TO THE PUBLIC SINCE 1965 IF THE DREDGING IS AUTHORIZED BY A PERMIT FROM THE UNITED STATES ARMY CORPS OF ENGINEERS AND TO PROVIDE THAT DEPARTMENT ADMINISTERED CERTIFICATIONS FOR SUCH DREDGING ARE WAIVED; TO AMEND SECTION 48-39-150, RELATING TO THE PROCEDURES AND REQUIREMENTS FOR THE APPROVAL OR DENIAL OF CRITICAL AREA USE PERMITS, INCLUDING THE TIME WITHIN WHICH WORK MUST BE COMPLETED UNDER SUCH PERMITS, SO AS TO PROVIDE THAT WORK AUTHORIZED UNDER A MAINTENANCE DREDGING PERMIT MUST BE COMPLETED IN TEN YEARS, RATHER THAN FIVE YEARS; TO REQUIRE THE DEPARTMENT TO PROMULGATE REGULATIONS FOR MAINTENANCE DREDGING; AND TO PROVIDE THAT THE PROVISION AUTHORIZING DREDGING PURSUANT TO THIS ACT IS REPEALED JULY 1, 2026. - ratified title

- 02/03/11 House Introduced and read first time (House Journal-page 6)
- 02/03/11 House Referred to Committee on Agriculture, Natural Resources and Environmental Affairs (House Journal-page 6)
- 02/16/11 House Member(s) request name added as sponsor: Hayes
- 03/02/11 House Committee report: Favorable with amendment Agriculture, Natural Resources and Environmental Affairs (House Journal-page 2)
- 03/03/11 House Member(s) request name added as sponsor: Loftis
- 03/03/11 House Amended (House Journal-page 26)
- 03/03/11 House Read second time (House Journal-page 26)
- 03/03/11 House Unanimous consent for third reading on next legislative day (House Journal-page 27)
- 03/03/11 Scrivener's error corrected
- 03/04/11 House Read third time and sent to Senate (House Journal-page 2)
- 03/08/11 Senate Introduced and read first time (Senate Journal-page 33)
- 03/08/11 Senate Referred to Committee on Agriculture and Natural Resources (Senate Journal-page 33)

- 04/14/11 Senate Polled out of committee Agriculture and Natural Resources (Senate Journal-page 19)
- 04/14/11 Senate Committee report: Favorable Agriculture and Natural Resources (Senate Journal-page 19)
- 04/26/11 Senate Amended (Senate Journal-page 31)
- 04/26/11 Senate Read second time (Senate Journal-page 31)
- 04/26/11 Senate Roll call Ayes-41 Nays-0 (Senate Journal-page 31)
- 04/27/11 Scrivener's error corrected
- 05/19/11 Senate Read third time and returned to House with amendments (Senate Journal-page 17)
- 05/25/11 House Concurred in Senate amendment and enrolled (House Journal-page 29)
- 05/25/11 House Roll call Yeas-107 Nays-1 (House Journal-page 29)
- 06/01/11 Ratified R 75
- 06/07/11 Signed By Governor

VERSIONS OF THIS BILL

2/3/2011
3/2/2011
3/3/2011
3/3/2011-A
4/14/2011
4/26/2011
4/27/2011

H. 3587

NOTE: THIS COPY IS A TEMPORARY VERSION. THIS DOCUMENT WILL REMAIN IN THIS VERSION UNTIL PUBLISHED IN THE ADVANCE SHEETS TO THE ACTS AND JOINT RESOLUTIONS. WHEN THIS DOCUMENT IS PUBLISHED IN THE ADVANCE SHEET, THIS NOTE WILL BE REMOVED.

(R75, H3587)

AN ACT TO AMEND SECTION 48-39-10, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE DEFINITION OF TERMS USED IN THE REGULATION OF COASTAL TIDELANDS AND WETLANDS BY THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, SO AS TO DEFINE "MAINTENANCE DREDGING"; TO AMEND SECTION 48-39-130, RELATING TO PERMITS REQUIRED TO UTILIZE CRITICAL AREAS AND EXEMPTIONS FROM SUCH PERMITS, SO AS TO EXEMPT DREDGING BY MUNICIPALITIES AND COUNTIES IN CERTAIN EXISTING RECREATIONAL USE CANALS AND ESSENTIAL ACCESS CANALS CONVEYED TO THE STATE OR DEDICATED TO THE PUBLIC SINCE 1965 IF THE DREDGING IS AUTHORIZED BY A PERMIT FROM THE UNITED STATES ARMY CORPS OF ENGINEERS AND TO PROVIDE THAT DEPARTMENT ADMINISTERED CERTIFICATIONS FOR SUCH DREDGING ARE WAIVED; TO

AMEND SECTION 48-39-150, RELATING TO THE PROCEDURES AND REQUIREMENTS FOR THE APPROVAL OR DENIAL OF CRITICAL AREA USE PERMITS, INCLUDING THE TIME WITHIN WHICH WORK MUST BE COMPLETED UNDER SUCH PERMITS, SO AS TO PROVIDE THAT WORK AUTHORIZED UNDER A MAINTENANCE DREDGING PERMIT MUST BE COMPLETED IN TEN YEARS, RATHER THAN FIVE YEARS; TO REQUIRE THE DEPARTMENT TO PROMULGATE REGULATIONS FOR MAINTENANCE DREDGING; AND TO PROVIDE THAT THE PROVISION AUTHORIZING DREDGING PURSUANT TO THIS ACT IS REPEALED JULY 1, 2026.

Be it enacted by the General Assembly of the State of South Carolina:

Definition of term

SECTION 1. Section 48-39-10 of the 1976 Code is amended by adding:

"() 'Maintenance dredging' means excavation to restore the depth of underwater lands or restore channels, basins, canals, or similar waterway accesses to depths and dimensions that support and maintain prior or existing levels of use that previously have been dredged pursuant to a license issued by the department or an exemption as provided in Section 48-39-130(D)(10) as added by Act ___ of 2011."

Exemption from permit

SECTION 2. Section 48-39-130(D) of the 1976 Code is amended by adding:

"(10) Dredging in existing navigational canal community developments by counties or municipalities of manmade, predominately armored, recreational use canals and essential access canals conveyed to the State or dedicated to the public for that purpose between 1965 and the effective date of this act if the maintenance dredging is authorized by a permit from the United States Army Corps of Engineers pursuant to the Federal Clean Water Act, as amended, or the Rivers and Harbors Act of 1899. All other department administered certifications for such dredging are deemed waived."

Completion of work required

SECTION 3. Section 48-39-150(F) of the 1976 Code is amended to read:

"(F) Except for maintenance dredging permits, work authorized by permits issued under this chapter must be completed within five years after the date of issuance. Maintenance dredging permitted under this chapter must be completed within ten years after the date of issuance. The time limit may be extended for good cause showing that due diligence toward completion of the work has been made as evidenced by significant work progress. An extension only may be granted if the permitted project meets the policies and regulations in force when the extension is requested or the permittee agrees to accept additional conditions which would bring the project into compliance. The time periods required by this subsection must be tolled during the pendency of an administrative or a judicial appeal of the permit issuance."

Regulations to be promulgated

SECTION 4. The Department of Health and Environmental Control shall promulgate regulations, pursuant to Chapter 23, Title 1, to provide for maintenance dredging as defined in Section 48-39-10. The maintenance dredging regulations must:

- (1) take into account the fact that areas subject to maintenance dredging have previously been impacted and should be evaluated on the incremental impact of the maintenance dredging on existing conditions;
- (2) require the submission of a dredging program document depicting the estimated dimensions, including the existing and proposed depths and location of the general areas proposed to be dredged; the estimated quantity of material to be dredged; the proposed methods

and techniques to accomplish the dredging; and the anticipated dredge material placement information at approved dredge disposal locations;

(3) require that, to the extent practicable and reasonable, such maintenance dredging should be timed to minimize interference with and impacts to aquatic life designated as a threatened or endangered species;

(4) require that such maintenance dredging should not cause significant erosion above the ordinary high water mark;

(5) provide that the department must send notice of the expiration of any maintenance dredging permit to the permittee no later than thirty days prior to such permit's expiration;

(6) provide that the department may issue a five-year extension for any department permit for maintenance dredging as defined in Section 48-39-10 existing as of the effective date of the regulation.

The regulations should not exceed the scope or stringency of any applicable federal regulations to maintenance dredging and should, to the maximum extent possible, avoid duplication of analysis or evaluation of considerations subject to review by the United States Army Corps of Engineers pursuant to a Clean Water Act Section 404 permit for the same maintenance dredging project.

Prospective repeal

SECTION 5. Section 48-39-130(D)(10) of the 1976 Code is repealed on July 1, 2026. Any maintenance dredging occurring after July 1, 2026, in areas that were dredged pursuant to Section 48-39-130(D) must be performed pursuant to the provisions contained in Chapter 39, Title 48 and the maintenance dredging regulations promulgated pursuant to this act.

Effect of act on department's authority and on pending applications

SECTION 6. Nothing in this act shall be construed to expand or increase the department's jurisdiction or to require permits for activities or projects that are not currently subject to regulation by the department. Except for the extension of the permit duration for maintenance dredging permits to ten years, nothing in this act shall be construed to impact any pending request or application for any license or approval from the department.

Severability clause

SECTION 7. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

Time effective

SECTION 8. This act takes effect upon approval of the Governor.
Ratified the 1st day of June, 2011.

President of the Senate

Speaker of the House of Representatives

Approved the _____ day of _____ 2011.

Governor

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF Horry)

City of North Myrtle Beach,)

Plaintiff(s))

CIVIL ACTION COVERSHEET

2009-CP - 26-

5782
COPY

vs.)

Ray Nixon, LLC, Windle Skipper, Individually and
as the personal representative of the Estate of C.D.
Nixon, N.F. Nixon, Jr., John W. Ray, State of SC,
and John Doe)

Defendant(s))

(Please Print)

Submitted By: Michael W. Battle
Address: 1200 Main Street
Conway, SC 29526

SC Bar #: 584
Telephone #: 843-248-4321
Fax #: 843-248-4512
Other:
E-mail: mbattle@battlevaught.com

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

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

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

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|--|---|--|
| <p>Contracts</p> <ul style="list-style-type: none"> <input type="checkbox"/> Constructions (100) <input type="checkbox"/> Debt Collection (110) <input type="checkbox"/> Employment (120) <input type="checkbox"/> General (130) <input type="checkbox"/> Breach of Contract (140) <input type="checkbox"/> Other (199) | <p>Torts - Professional Malpractice</p> <ul style="list-style-type: none"> <input type="checkbox"/> Dental Malpractice (200) <input type="checkbox"/> Legal Malpractice (210) <input type="checkbox"/> Medical Malpractice (220) <input type="checkbox"/> Notice/ File Med Mal (230) <input type="checkbox"/> Other (299) | <p>Torts - Personal Injury</p> <ul style="list-style-type: none"> <input type="checkbox"/> Assault/Slander/Libel (300) <input type="checkbox"/> Conversion (310) <input type="checkbox"/> Motor Vehicle Accident (320) <input type="checkbox"/> Premises Liability (330) <input type="checkbox"/> Products Liability (340) <input type="checkbox"/> Personal Injury (350) <input type="checkbox"/> Wrongful Death (360) <input type="checkbox"/> Other (399) | <p>Real Property</p> <ul style="list-style-type: none"> <input type="checkbox"/> Claim & Delivery (400) <input type="checkbox"/> Condemnation (410) <input type="checkbox"/> Foreclosure (420) <input type="checkbox"/> Mechanic's Lien (430) <input type="checkbox"/> Partition (440) <input type="checkbox"/> Possession (450) <input type="checkbox"/> Building Code Violation (460) <input checked="" type="checkbox"/> Other (499)
Declaratory Relief |
| <p>Inmate Petitions</p> <ul style="list-style-type: none"> <input type="checkbox"/> PCR (500) <input type="checkbox"/> Mandamus (520) <input type="checkbox"/> Habeas Corpus (530) <input type="checkbox"/> Other (599) | <p>Judgments/Settlements</p> <ul style="list-style-type: none"> <input type="checkbox"/> Death Settlement (700) <input type="checkbox"/> Foreign Judgment (710) <input type="checkbox"/> Magistrate's Judgment (720) <input type="checkbox"/> Minor Settlement (730) <input type="checkbox"/> Transcript Judgment (740) <input type="checkbox"/> Lis Pendens (750) <input type="checkbox"/> Transfer of Structured Settlement Payment Rights Application (760) <input type="checkbox"/> Other (799) | <p>Administrative Law/Relief</p> <ul style="list-style-type: none"> <input type="checkbox"/> Reinstate Driver's License (800) <input type="checkbox"/> Judicial Review (810) <input type="checkbox"/> Relief (820) <input type="checkbox"/> Permanent Injunction (830) <input type="checkbox"/> Forfeiture-Petition (840) <input type="checkbox"/> Forfeiture-Consent Order (850) <input type="checkbox"/> Other (899) | <p>Appeals</p> <ul style="list-style-type: none"> <input type="checkbox"/> Arbitration (900) <input type="checkbox"/> Magistrate-Civil (910) <input type="checkbox"/> Magistrate-Criminal (920) <input type="checkbox"/> Municipal (930) <input type="checkbox"/> Probate Court (940) <input type="checkbox"/> SCDOT (950) <input type="checkbox"/> Worker's Comp (960) <input type="checkbox"/> Zoning Board (970) <input type="checkbox"/> Administrative Law Judge (980) <input type="checkbox"/> Public Service Commission (990) <input type="checkbox"/> Employment Security Comm (991) <input type="checkbox"/> Other (999) |
| <p>Special/Complex /Other</p> <ul style="list-style-type: none"> <input type="checkbox"/> Environmental (600) <input type="checkbox"/> Automobile Arb. (610) <input type="checkbox"/> Medical (620) <input type="checkbox"/> Other (699) | <ul style="list-style-type: none"> <input type="checkbox"/> Pharmaceuticals (630) <input type="checkbox"/> Unfair Trade Practices (640) <input type="checkbox"/> Out-of State Depositions (650) <input type="checkbox"/> Sexual Predator (510) | | |

Submitting Party Signature:

Michael H. Battle

Date: June 11, 2009

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.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville,
Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

COPY

STATE OF SOUTH CAROLINA)
)
COUNTY OF Horry)

COURT OF COMMON PLEAS
C/A No. 2009-CP-26-

City of North Myrtle Beach,)
)
Petitioner,)

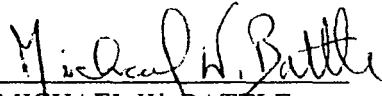
v.)

Summons)

Ray Nixon, LLC, Windle Skipper,)
individually and as the personal)
representative of the Estate of C.D.)
Nixon, N.F. Nixon, Jr., John W. Ray,)
State of South Carolina, and John Doe)
)
Respondents.)

Horry County, SC
JUN 11 PM 3:35
Clerk of Court

YOU ARE HEREBY SUMMONED and required to mail or hand deliver your written Answer to the Complaint of Petitioner City of North Myrtle Beach in this action, a copy of which is hereby served upon you, to the attorneys for Petitioner City of North Myrtle Beach, Michael W. Battle, Battle & Vaught, P.A., P.O. Box 530, Conway, South Carolina 29528 within thirty (30) days from the date of delivery of the Summons, Complaint and Lis Pendens or a judgment of default will be entered against you for the matters demanded in the complaint.


MICHAEL W. BATTLE
Battle & Vaught P.A.
Post Office Box 530
Conway, South Carolina 29528
(843)248-4321
Attorneys for Petitioner

Conway, South Carolina
June 11, 2009

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

COURT OF COMMON PLEAS
C/A No. 2009-CP-26-

City of North Myrtle Beach,)
)
Petitioner,)

v.)

Ray Nixon, LLC, Windle Skipper,)
individually and as the personal)
representative of the Estate of C.D.)
Nixon, N.F. Nixon, Jr., John W. Ray,)
State of South Carolina, and John Doe)
)
Respondents.)

COMPLAINT
(Declaratory Judgment)
(Non-Jury)

PROPERTY DIVISION
HORRY COUNTY
09 JUN 11 PM 3:38
CLERK OF COURTS
1000 MARKET ST
MYRTLE BEACH, SC 29577

Petitioner City of North Myrtle Beach respectfully alleges and would show unto this Honorable Court as follows:

PARTIES & PROPERTY

1. The above captioned lawsuit has been filed to determine the parties' rights and quiet title to certain canals existing or constructed in the Cherry Grove Section of North Myrtle Beach. The canals are shown on the plat created for East Cherry Grove Realty and recorded in the Office of the Register of Deeds for Horry County in Plat Book 52 at page 51.

2. Petitioner City of North Myrtle Beach (City) is a duly incorporated municipal corporation under the laws of the State of South Carolina and the City has purchased property in the Cherry Grove Section of North Myrtle Beach. The deeds conveying the property to the City refer to plats which show the canals which are the subject of the within lawsuit. The City has an interest in the property in question because the statutory authority delegated to it by the State of

South Carolina, because the canals were dedicated to the public and because of the property the City owns in the area.

3. The State of South Carolina has delegated to the City the responsibility for streets, and canals, and other property and doing such other acts as may be necessary to protect the safety, health and welfare of the public in connection with the use of such property located within the City's jurisdiction.

4. Defendants Ray Nixon, LLC, Windle Skipper, individually and as the personal representative of the Estate of C.D. Nixon, N.F. Nixon, Jr., and John W. Ray (Nixon's heirs) are residents of the State of South Carolina or corporations duly organized under the laws of the State of South Carolina with their principal place of business located in Horry County, South Carolina. Nixon's heirs may have or claim an interest in the canals that are the subject of the above captioned lawsuit.

5. Defendant State of South Carolina (State) is made a party to this lawsuit because it has an interest in the property in question through a quitclaim deed from East Cherry Grove Realty Company, C. D. Nixon and John H. Nye, as officers, directors or stockholders of East Cherry Grove Realty Company and as individuals to the State of South Carolina dated December 12, 1969 and recorded in Deed Book 420 at page 586.

6. John Doe is a fictitious party who represents any property owner who has or may claim an interest in the canals because he or she acquired property through deeds that refer to plats showing the canals that are the subject of the within lawsuit.

FACTS

7. On or about September 19, 2005, the City of North Myrtle Beach was issued a permit by the SC Department of Health and Environmental Control (SCDHEC) to perform certain limited dredging of canals located in the Cherry Grove Section of North Myrtle Beach. The permit, Permit Number 2004-1W-215-P, shows the scope of the work together with the particular canals (permit canals) to be dredged. The permit has been amended by consent of the parties to allow the City to haul spoilage from the dredging offsite. (Attached Exhibit A).

8. The City in the exercise of its powers in relation to roads, streets, law enforcement, health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government has determined that it is necessary to dredge the canals in the areas specified in the amended permit and brings this lawsuit to determine its rights to effect that purpose.

9. Over many years the canals have been the subject of repeated litigation over legal and possessory rights to the canals.

10. East Cherry Grove Realty Company, C. D. Nixon and John H. Nye, as officers, directors or stockholders of East Cherry Grove Realty Company and as individuals (East Cherry Grove Realty) swapped deeds with the State of South Carolina in settlement of one such lawsuit whereby East Cherry Grove Realty quitclaimed to the State any interest in property generally "below the mean high watermark" and the State quitclaimed interest to the 1969 Grantors generally any interest in property "above the mean high water mark". (Copies of the deeds are attached as Exhibit B).

11. The quitclaim deed from East Cherry Grove Realty to the State contained the

following provisions:

“That all areas lying below the agreed mean high water mark on the Northeast Canal, Nixon Canal, proposed Nixon Canal Extension, Main Channel, Nye Cut and all other existing canals are quitclaimed to the State of South Carolina....”

....

“That all areas that become areas lying below the mean high water mark as a result of excavation above the agreed mean high water mark are quitclaimed to the State of South Carolina.”

12. The area to be dredged in the permit canals (permit area) was quitclaimed to the State in 1969 as shown in Exhibit B and East Cherry Grove Realty and the Nixon heirs' rights to the permit areas were terminated by that quitclaim deed and settlement agreement.

13. In addition to the quitclaim deed, East Cherry Grove Realty dedicated the canals to the public and City duly accepted their dedication along with other streets and canals outside of the permit areas.

14. East Cherry Grove Realty also sold lots in the Cherry Grove Section of North Myrtle Beach with property descriptions that incorporated plats recorded in the Register of Deeds for Horry County that showed canals and streets. Property owners who have purchased property which refer to the plat may have or claim an interest in the canals.

FOR A FIRST CAUSE OF ACTION
(DECLARATORY RELIEF AS TO QUITCLAIM DEED)

15. Each and every pertinent allegation above is re-stated as fully as if set forth verbatim herein.

16. The City is informed and believes it is entitled to a judgment from the Court determining its rights to the canals under S.C. Code Ann. §15-67-10, et.eq.

17. The State of South Carolina has title to the property through the quitclaim deed issued by East Cherry Grove Realty.

18. The City as a political subdivision of the State has maintained control and possession of the property through the authority delegated to it by S.C. Code Ann. § 5-7-30.

**FOR A SECOND CAUSE OF ACTION
(DECLARATORY JUDGMENT AS TO DEDICATION OF CANALS)**

19. Each and every pertinent allegation above is re-stated as fully as if set forth verbatim herein.

20. East Cherry Grove Realty and their successors in interest intended to dedicate to the canals to the general public for the use and enjoyment of the State, its citizens and other members of the public. This intent may be found in the recordation of plats showing the canals on recorded plats; the sale or disposition of lots with reference to the map; the advertisement of the property to the public, the above mentioned quitclaim deed to the State of South Carolina and the unimpeded, longstanding, continuous and widespread public use of the canals without interference from the Respondents.

21. The City, the State and the general public accepted the dedication of the canals.

22. The City is informed and believes that Respondents do not have any private legal rights or private claims to legal title to the canals.

23. The City is informed and believes it is entitled pursuant to the Uniform Declaratory Judgment Act, S.C. Code Ann. §15-53-10, to an order from this Court declaring that the canals were dedicated to the State of South Carolina, the City and the general public as a public rights of way and that the City has the right to dredge the canals as set forth in the

SCDHEC's amended permit and perform such other acts and services as are authorized under the statutes of the State of South Carolina.

FOR A THIRD CAUSE OF ACTION
(Prescriptive Easement)

24. Each and every pertinent allegation above is re-stated as fully as if set forth verbatim herein.

25. For over twenty years until the present, the City and its citizens have continuously used the canals in question as right of ways to travel the waters of the United States of America, to recreate and to access the Atlantic Ocean.

26. Those uses are usual and customary for such canals.

27. Those uses by the City and the general public were under a claim of right and adverse to Respondents' interest in the canals.

28. The City is informed and believes that it is entitled to a prescriptive easement over the property for the purpose of declaring the canals public right of ways.

29. The City is informed and believes it is entitled pursuant to the Uniform Declaratory Judgment Act, S.C. Code Ann. §15-53-10, to an order from this Court declaring that the canals are public right of ways by prescriptive easement and that the City is entitled to exercise all rights of a municipality under the South Carolina statutes in connection with public rights of ways including but not limited to dredging the canals.

FOR A FOURTH CAUSE OF ACTION
(Law By Custom)

30. Each and every pertinent allegation above is re-stated as fully as if set forth verbatim herein.

31. The City's reasonable use of the canals for recreation, transportation, and marine activities has been long and general.

32. This use has been exercised without interruption by Respondents.

33. Respondents likewise knew of this custom and acquiesced in the continued exercise of this custom.

34. This customary use is reasonable, appropriate, peaceable and free from dispute.

35. The City is informed and believes that the custom of public use of the canals is of such a character so as to become law.

**FOR A FIFTH CAUSE OF ACTION
(Public Trust Doctrine)**

36. Each and every pertinent allegation above is re-stated as fully as if set forth verbatim herein.

37. If Respondents or their predecessors in interest obtained the property in question, that property was obtained from the State of South Carolina or from the English Crown.

38. Those sovereigns held in trust for the public's marine commercial and recreational use the canals affected by tidal waters.

39. This trust necessarily extends to the canals as they necessary for the full use and enjoyment of the tidal areas.

40. Plaintiff is informed and believes that any grant by the State of South Carolina or the English Crown of beach property, including the properties at issue, necessarily included an implied right of public use to the non-tidal portions of the canals.


**FOR A SIXTH CAUSE OF ACTION
(Easement Rights)**

41. Each and every pertinent allegation above is re-stated as fully as if set forth verbatim herein.

42. Plaintiff has purchased and currently owns property in the Cherry Grove Section of North Myrtle Beach. The deeds issued to the City refer to maps or plats which show the area in question as public canals. The City purchased the property in reliance on the information set forth in the plats and maps referred to in its deeds together with other maps and plats filed of record in the office of the Register of Deeds for Horry County, South Carolina.

43. The City is informed and believes it is entitled pursuant to the Uniform Declaratory Judgment Act, S.C. Code Ann. §15-53-10, to an order from this Court declaring that the City has vested easement rights to the canals and that the City is entitled to exercise all rights of a municipality under the South Carolina statutes in connection with easement rights of ways including but not limited to dredging the canals.

WHEREFORE, Plaintiff prays as follows that the City be issued an order from this Court quieting title to the canals and/or that the City is entitled to exercise all rights of a municipality under the South Carolina statutes in connection with the canals as public rights of ways including but not limited to dredging the canals and such further and other relief that this Court may deem just and proper.


MICHAEL W. BATTLE
Battle & Vaught P.A.
Post Office Box 530
Conway, South Carolina 29528
(843)248-4321
Attorneys for Petitioner

Conway, South Carolina
June 11, 2009

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF Horry)	
)	
The City of North Myrtle Beach,)	C/A No.09-CP-26-5782
)	
Petitioner,)	
)	
v.)	ANSWER OF THE STATE OF
)	SOUTH CAROLINA
Ray Nixon, LLC, Windle Skipper,)	
individually and as the personal)	
representative of the Estate of C.D. Nixon,)	
N.F. Nixon, Jr., John W. Ray,)	
State of South Carolina, and John Doe,)	
)	
Respondents.)	
)	

The Respondent State of South Carolina, by way of answer to the Complaint herein, alleges as follows:

FOR A FIRST DEFENSE

1. The State denies each and every allegation of the Complaint not hereinafter specifically admitted.
2. As to paragraph 1 of the Complaint, the State admits only that Petitioner has brought this suit for the purposes indicated regarding the referenced property, but the State is without sufficient information to admit or deny whether Petitioner is entitled to relief, and therefore denies that Petitioner is entitled to relief.
3. As to paragraph 2 of the Complaint, the State admits only that the City is a duly incorporated municipality. The State is without sufficient information to admit or deny the remaining allegations of this paragraph.

4. As to paragraph 3, the State craves reference to the statutes, constitutional provisions and case law of the State of South Carolina, and denies any of the allegations in that paragraph that are inconsistent with that authority.

5. The State admits the first sentence of paragraph 4 on information and belief. As to the last sentence of that paragraph, the State admits only that Nixon's heirs may claim an interest in the canals, but the State denies, on information and belief, that Nixon's heirs have a legal interest in the canals at issue. To the extent that any deeds or prior Court orders may specifically address the interests in the canals, the State craves reference to those deeds and orders to the extent that they are consistent with South Carolina law. The State also craves reference to applicable South Carolina law including, but not limited to, the applicable law regarding the State's presumptive ownership of tidelands. The State denies any allegations in this paragraph regarding ownership that are inconsistent with South Carolina law or with any ownership or public trust interest that the State has in the canals at issue.

6. The State admits paragraph 5 on information and belief and craves reference to the deed noted in this paragraph, but the State also alleges that it has presumptive ownership of the tidelands in this State and craves reference to that law to the extent that it may apply to the canals at issue.

7. As to paragraph 6, the State admits only that John Doe has been named in this complaint as alleged, but the State denies, on information and belief, any ownership of John Doe or any other claimant to this property. The State denies any allegations in paragraph 6 regarding ownership that are inconsistent with South Carolina law or the interests of the State in the canals at issue.

8. The State admits paragraph 7 on information and belief but craves reference to the Exhibit A noted therein and denies any allegations inconsistent with that exhibit.

9. As to paragraph 8, the State admits only that the City has determined that it is necessary to dredge the canals and that it has brought this suit for the purpose of determining the rights alleged. The State craves reference to the applicable law for a complete statement of the City's authority.

10. The State admits paragraph 9 on information and belief, but craves reference to any applicable lawsuits.

11. As to paragraph 10, the State craves reference to the referenced deeds for a complete statement of their provisions, and also craves reference to any applicable Court orders.

12. As to Paragraph 11, the State craves reference to the deed noted for a complete statement of its provisions.

13. The State admits Paragraph 12 on information and belief. The State craves reference to the deed and any pertinent Court Orders for a complete statement of their provisions.

14. The State is without sufficient information to admit or deny the allegations of paragraph 13.

15. The State is without sufficient information to admit or deny the allegations of paragraph 14 and therefore denies any such allegations except as follows: the State denies, on information and belief, that the referenced property owners have any interests in the canals; the State denies any allegations in this paragraph regarding ownership that are inconsistent with South Carolina law or the ownership or public trust interest that the State has in the canals at issue; and the

State admits that the public has a right under the Constitution and statutes of South Carolina to make use of navigable waters, including, but not limited to, the canals.

16. Paragraph 15 is a cumulative paragraph to which no response is necessary. To the extent that, *arguendo*, a response is necessary, the State incorporates by reference its answer to the previous allegations and paragraphs of the Complaint and reasserts them.

17. As to paragraph 16, the State admits only that the City is seeking the judgment referenced. The State denies any claim of the Petitioner that is inconsistent with any ownership interest or public trust interest that the State has in the canals.

18. The State admits paragraph 17 on information and belief, but the State craves reference to the quitclaim deed for a complete statement of its provisions, and the State preserves any other legal basis for ownership that it may have, including but not limited to the State's presumptive title to tidelands below mean high water.

19. The State is without sufficient information to admit or deny the allegations of paragraph 18, and therefore denies those allegations, and craves reference to §5-7-30 for a complete statement of its provisions. The State denies any claim of the Petitioner that is inconsistent with any ownership interest or public trust interest that the State has in the canals.

20. Paragraph 19 is a cumulative paragraph to which no response is necessary. To the extent that, *arguendo*, a response is necessary, the State incorporates by reference its answers to the previous allegations and paragraphs of the Complaint and reasserts them.

21. The State is without sufficient information to admit or deny the allegations of paragraphs 20 through 23 except as follows: the State denies that it does not have title or other legal interest in the canals; the State denies, on information and belief, that its co-Respondents have a

legal interest in the canals; as to dredging, the State admits, on information and belief, only that Petitioner has the permit documents attached as Exhibit A to the Complaint; the State admits that the public has a right under the Constitution and statutes of South Carolina to make use of navigable waters, including, but not limited to, the canals; and the State denies any claim of the Petitioner that is inconsistent with any ownership interest or public trust interest that the State has in the canals.

22. Paragraph 24 is a cumulative paragraph to which no response is necessary. To the extent that, *arguendo*, a response is necessary, the State incorporates by reference its answer to the previous allegations and paragraphs of the Complaint and reasserts them.

23. The State is without sufficient information and belief to admit or deny paragraphs 25 through 29 except as follows: the State denies, on information and belief, that Petitioner has any prescriptive easement applicable to any ownership interest that the State has in the property at issue; as to dredging, the State admits, on information and belief, only that Petitioner has the permit documents attached as Exhibit A to the Complaint; the State denies any claim of the Petitioner that is inconsistent with any ownership or public trust interest that the State has in the canals; the State admits that the public has a right under the Constitution and statutes of South Carolina to make use of navigable waters, including, but not limited to, the canals.

24. Paragraph 30 is a cumulative paragraph to which no response is necessary. To the extent that, *arguendo*, a response is necessary, the State incorporates by reference its answer to the previous allegations and paragraphs of the Complaint and reasserts them.

25. The State is without sufficient information and belief to admit or deny paragraphs 31 through 35 except as follows: the State admits that the public has a right under the Constitution and statutes of South Carolina to make use of navigable waters, including, but not limited to, the canals;

the State denies any claim of the Petitioner that is inconsistent with any ownership or public trust interest that the State has in the canals.

26. Paragraph 36 is a cumulative paragraph to which no response is necessary. To the extent that, *arguendo*, a response is necessary, the State incorporates by reference its answer to the previous allegations and paragraphs of the Complaint and reasserts them.

27. The State is without sufficient information and belief to admit or deny paragraphs 37 through 40 except as follows: the State admits that the public has a right under the Constitution and statutes of South Carolina to make use of navigable waters, including, but not limited to, the canals; the State admits that tidelands properties are public trust properties of the State; the State is without sufficient information to admit or deny whether the State or the English Crown ever granted the property in question and therefore denies any such allegations; the State denies any claim of the Petitioner that is inconsistent with any ownership or public trust interest that the State has in the canals.

28. Paragraph 41 is a cumulative paragraph to which no response is necessary. To the extent that, *arguendo*, a response is necessary, the State incorporates by reference its answer to the previous allegations and paragraphs of the Complaint and reasserts them.

29. The State is without sufficient information and belief to admit or deny paragraphs 42 and 43 except as follows: the State admits only that the public has a right under the Constitution and statutes of South Carolina to make use of navigable waters, including, but not limited to, the canals; as to dredging, the State admits, on information and belief, only that Petitioner has the permit documents attached as Exhibit A to the Complaint; the State denies any easement or other claim of

the Petitioner that is inconsistent with any ownership or public trust interest that the State has in the canals.

FOR A SECOND DEFENSE

30. As an affirmative defense, the State alleges that it has *prima facie* fee simple title, in public trust, of all lands now or formerly lying below the high water mark of all tidal navigable waters in the State, including any lands involved in this case which now lie or formerly lay below the mean high water mark. unless those lands are properly granted and deeded under State law.

FOR A THIRD DEFENSE

31. At least to the extent that any navigable waters are involved, regardless of the ownership of the subject property, the general public cannot be excluded from the property, because the public has a right under the Constitution and statutes of South Carolina to make use of navigable waters.

WHEREFORE, having fully answered the Complaint herein, the State prays that the Court take action consistent with this Answer and the proof in this case.

Respectfully submitted,

HENRY D. MCMASTER
Attorney General
J. EMORY SMITH, JR.
Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3680
Email: AGESmith@ag.state.sc.us

By: 
ATTORNEYS FOR THE STATE OF SOUTH CAROLINA

August 12, 2009

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2009-CP-26-5782

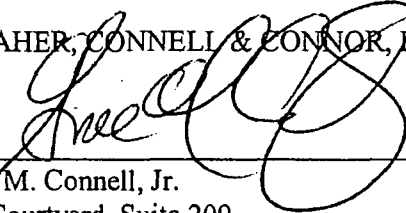
City of North Myrtle Beach,)
)
) Plaintiff,)
)
) vs.)
)
) Ray Nixon, LLC, Windle Skipper,)
) individually and as the personal)
) representative of the Estate of C.D.)
) Nixon, N.F. Nixon, Jr., John W. Ray,)
) State of South Carolina and John Doe,)
)
) Defendants.)
)

**SUMMONS
(Counterclaim)**

TO: THE PLAINTIFF, CITY OF NORTH MYRTLE BEACH., ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Counterclaim in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Counterclaim on the subscriber or subscribers at his or their office at Suite 209, The Courtyard, 1500 U.S. Highway 17 North, Post Office Drawer 14547, Surfside Beach, South Carolina 29587 within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to answer the Counterclaim within the time aforesaid; the Defendant in this action will apply to the Court for the relief demanded in the Counterclaim and judgment by default will be rendered against you for the relief demanded in the Counterclaim.

KELAHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net
**Attorney for Defendants Ray Nixon, LLC,
N.F. Nixon, Jr., John W. Ray, and Windle
Skipper Individually and as PR of the
Estate of C.D. Nixon**

August 21, 2009
Surfside Beach, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2009-CP-26-5782

City of North Myrtle Beach,)
)
 Plaintiff,)
)
 vs.)
)
 Ray Nixon, LLC, Windle Skipper,)
 individually and as the personal)
 representative of the Estate of C.D.)
 Nixon, N.F. Nixon, Jr., John W. Ray,)
 State of South Carolina and John Doe,)
)
 Defendants.)
)

**ANSWER AND
COUNTERCLAIM**

The Defendants, **Ray Nixon, LLC, N.F. Nixon, Jr., John W. Ray and Windle Skipper, Individually and as Personal Representative of the Estate of C.D. Nixon**, answering the Plaintiff's Complaint, would respectfully state as follows:

1. The Defendants admit the allegations of Paragraph 1 of Plaintiff's Complaint.
2. The Defendants admit the allegations of Paragraph 2 which state that the City of North Myrtle Beach is a duly incorporated municipal corporation. The Defendants deny the remaining allegations of Paragraph 2 of Plaintiff's Complaint.
3. The Defendants deny that provision of Paragraph 3 which states that the City has the responsibility for the canals. The Defendants do not have sufficient information and belief to answer the remaining allegations of Paragraph 3 of Plaintiff's Complaint.
4. The Defendants admit that Ray Nixon, LLC is a limited liability corporation and that its principal place of business is in Horry County, South Carolina, that John W. Ray is a citizen and resident of the State of South Carolina, and that N.F. Nixon, Jr. is a citizen and resident of Horry County, South Carolina.

5. The Defendants do not have sufficient information and belief to answer the allegations of Paragraph 5 of Plaintiff's Complaint.

6. The Defendants do not have sufficient information and belief to answer the allegations of Paragraph 6 of Plaintiff's Complaint.

7. The Defendants do not have sufficient information and belief to answer the allegations of Paragraph 7 of Plaintiff's Complaint other than to state that these Defendants who are owners of the property were not given notice of the permit.

8. The Defendants deny the allegations of Paragraph 8 of Plaintiff's Complaint.

9. The Defendants admit the allegations of Paragraph 9 of Plaintiff's Complaint.

10. The Defendants admit so much of Paragraph 10 which indicate that a deed swapping occurred. The remaining allegations of Paragraph 10 are denied.

11. The Defendants deny the allegations of Paragraph 11 of Plaintiff's Complaint.

12. The Defendants deny the allegations of Paragraph 12 of Plaintiff's Complaint.

13. The Defendants deny the allegations of Paragraph 13 of Plaintiff's Complaint.

14. The Defendants deny the allegations of Paragraph 14 of Plaintiff's Complaint other than to state that East Cherry Grove Realty at times sold lots in the Cherry Grove Section of North Myrtle Beach.

15. The Plaintiffs deny the allegations of Paragraph 15 of Plaintiff's Complaint.

16. The Plaintiffs deny the allegations of Paragraph 16 of Plaintiff's Complaint.

17. The Plaintiffs deny the allegations of Paragraph 17 of Plaintiff's Complaint.

18. The Plaintiffs deny the allegations of Paragraph 18 of Plaintiff's Complaint.

19. The Plaintiffs deny the allegations of Paragraph 19 of Plaintiff's Complaint.

20. The Plaintiffs deny the allegations of Paragraph 20 of Plaintiff's Complaint.

21. The Plaintiffs deny the allegations of Paragraph 21 of Plaintiff's Complaint.
22. The Plaintiffs deny the allegations of Paragraph 22 of Plaintiff's Complaint.
23. The Plaintiffs deny the allegations of Paragraph 23 of Plaintiff's Complaint.
24. The Plaintiffs deny the allegations of Paragraph 24 of Plaintiff's Complaint.
25. The Plaintiffs deny the allegations of Paragraph 25 of Plaintiff's Complaint.
26. The Plaintiffs deny the allegations of Paragraph 26 of Plaintiff's Complaint.
27. The Plaintiffs deny the allegations of Paragraph 27 of Plaintiff's Complaint.
28. The Plaintiffs deny the allegations of Paragraph 28 of Plaintiff's Complaint.
29. The Plaintiffs deny the allegations of Paragraph 29 of Plaintiff's Complaint.
30. The Plaintiffs deny the allegations of Paragraph 30 of Plaintiff's Complaint.
31. The Plaintiffs deny the allegations of Paragraph 31 of Plaintiff's Complaint.
32. The Plaintiffs deny the allegations of Paragraph 32 of Plaintiff's Complaint.
33. The Plaintiffs deny the allegations of Paragraph 33 of Plaintiff's Complaint.
34. The Plaintiffs deny the allegations of Paragraph 34 of Plaintiff's Complaint.
35. The Plaintiffs deny the allegations of Paragraph 35 of Plaintiff's Complaint.
36. The Plaintiffs deny the allegations of Paragraph 36 of Plaintiff's Complaint.
37. The Plaintiffs deny the allegations of Paragraph 37 of Plaintiff's Complaint.
38. The Plaintiffs deny the allegations of Paragraph 38 of Plaintiff's Complaint.
39. The Plaintiffs deny the allegations of Paragraph 39 of Plaintiff's Complaint.
40. The Plaintiffs deny the allegations of Paragraph 40 of Plaintiff's Complaint.
41. The Plaintiffs deny the allegations of Paragraph 41 of Plaintiff's Complaint.
42. The Plaintiffs deny the allegations of Paragraph 42 of Plaintiff's Complaint.
43. The Plaintiffs deny the allegations of Paragraph 43 of Plaintiff's Complaint.

FOR A SECOND DEFENSE AND COUNTERCLAIM

44. The Defendants reallege and reiterate each and every allegation as fully as if repeated verbatim herein.

45. That the Defendants are the owners of certain real property located in North Myrtle Beach, South Carolina.

46. That the aforementioned property is described in a Quit Claim Deed dated December 17, 2009 and filed December 22, 1969 (attached hereto as Exhibit "A").

47. That the aforementioned Quit Claim Deed is signed by the Governor of the State of South Carolina at that time, Robert E. McNair.

48. That further, the Defendants, as part of the settlement of a lawsuit, did deed to the State of South Carolina by Quit Claim Deed dated December 12, 1969 and filed December 22, 1969 certain real property (attached hereto as Exhibit "B").

49. That further, the Defendants obtained from the Office of the Attorney General an Opinion on October 31, 1980 (attached hereto as Exhibit "C"), which Opinion provides that the Defendants own the canals in Cherry Grove.

50. That, further, prior to this date, on or about August 1, 1968, the Honorable James B. Morrison, then Judge of the Fifteenth Judicial Circuit, found as a matter of law that East Cherry Grove Realty Company had good and valid title to the beds of all creeks and streams. (This document is attached hereto as Exhibit "D").

51. That further the South Carolina Court of Appeals on or about January 27, 2009 issued an Opinion whereby Defendants' predecessor in interest was found to be the owner of the aforementioned property and that this real property was deeded by Defendants' predecessor back to East Cherry Grove Realty Company. (This document is attached hereto as Exhibit "E").

52. That the South Carolina Department of Health and Environmental Control (DHEC) is a political subdivision of the State and has just authorized the City of North Myrtle Beach to be issued a dredging permit which allows the said City to dredge Defendants' property.

53. That Defendants as owners of the property were not advised of such permit until the South Carolina Administrative Law Court issued such permit the second week of May 2009.

FOR A FIRST CAUSE OF ACTION
(Trespass)

54. The Defendants reallege and reiterate each and every allegation as fully as if repeated verbatim herein.

55. The Plaintiff City of North Myrtle Beach is a landowner and is a municipal corporation and has obtained a permit from DHEC to perform excavation in man-made canals on the land of the Defendants and intends to trespass on Defendants' property.

56. That the proposed work includes performing excavation using hydraulic dredge to remove one hundred thousand cubic yards of material from approximately twenty-four acres of man-made canals on the land of the Defendants.

57. That the Plaintiff City of North Myrtle Beach intends to enter upon the lands of the Defendants to execute this permit and to do this work.

58. That the Plaintiff City of North Myrtle Beach has been informed by the Defendants that it does not have permission to enter upon Defendants' property and that the obtaining of a permit to do so is trespass without permission.

59. That Plaintiff City of North Myrtle Beach has also developed real property upstream from the Defendants' property. Such development has led to the contamination of water flowing from these developed areas onto Defendants' property.

60. That entry upon the property was intentional, reckless and willful without regard to Defendants' property rights and without permission of the Defendants.

61. As a result of the actions, the Defendants' property has been altered and damaged and Plaintiff City will continue to alter Defendants' property unless this court holds Plaintiff City liable for damages for trespass.

62. That Defendants ask for judgment for damages for trespass and for the trespass to obtain the permits. That further, Defendants are informed and believe that it is entitled to an Order requiring the City of North Myrtle Beach to refrain from entry upon its land during the pendency of this suit.

63. That Defendants seek judgment against Plaintiff City of North Myrtle Beach for the cost of trespass and for coming onto Defendants' property without permission pursuant to a permit that Plaintiff has without notice to the Defendants.

FOR A SECOND CAUSE OF ACTION
(Nuisance)

64. The Defendants reallege and reiterate each and every allegation as fully as if repeated verbatim herein.

65. The Plaintiff City of North Myrtle Beach's actions in developing real property upstream from Defendants' property and the contamination of the water flowing from these developed areas onto the Defendants' property are unreasonable, unwarrantable and unlawful uses of the property.

66. That the Plaintiff City of North Myrtle Beach in applying for a permit to dig the Defendants' property is also a nuisance and is violative of law.

67. That the Plaintiff City of North Myrtle Beach's actions in obtaining a permit are an unreasonable interference with the Defendants' use and enjoyment of its own land.

68. As a direct and proximate result of the nuisance created by the Plaintiff City of North Myrtle Beach, the value of the Defendants' property has been diminished as a result of the actual harm.

69. The Defendants have suffered as a direct and proximate result actual and consequential damages.

FOR A THIRD CAUSE OF ACTION
(Inverse Condemnation)

70. The Defendants reallege and reiterate each and every allegation as fully as if repeated verbatim herein.

71. The Plaintiff City of North Myrtle Beach has now obtained from DHEC a permit to dredge Defendants' property all without Defendants' consent.

72. That this excavation includes digging in canals owned by the Defendants pursuant to a deed held when the State of South Carolina granted such property to the Defendants.

73. The proposed work includes performing excavation using a hydraulic dredge to remove one hundred thousand cubic yards of material from approximately twenty-four acres of man-made canals on the land of the Defendants.

74. The obtaining of the permit from DHEC by Plaintiff City of North Myrtle Beach is an affirmative, positive, aggressive act on the part of the Plaintiff, which is a governmental agency.

75. That these affirmative, positive and aggressive acts means that the Plaintiff City of North Myrtle Beach intends to condemn Defendants' land.

76. That the filing of the application and the approval of the application constitute a taking of Defendants' property for public use with permanence by Plaintiff City of North Myrtle Beach.

77. The Defendants are entitled to recover the value of the land which has been taken by the Plaintiff City of North Myrtle Beach through the dredging process and Defendants ask for damages for inverse condemnation and for attorney's fees.

**FOR A FOURTH CAUSE OF ACTION AND MOTION HEREIN
(Temporary and Permanent Injunction as to Plaintiff City of North Myrtle Beach)**

78. The Defendants reallege and reiterate each and every allegation as fully as if repeated verbatim herein.

79. Despite protests from the Defendants, the Plaintiff City of North Myrtle Beach has obtained a permit to dredge Defendants' property without its consent.

80. The Plaintiff City of North Myrtle Beach seeks to take property of the Defendants without due compensation.

81. The Defendants have no adequate remedy at law and will be irreparably harmed if the Plaintiff City of North Myrtle Beach is not enjoined from entering upon the lands and taking the property of the Defendants herein described.

82. The Plaintiff City of North Myrtle Beach should be enjoined both temporarily and permanently from entering onto the lands of the Defendants during the pendency of this lawsuit and thereafter.

**FOR A FIFTH CAUSE OF ACTION
(Declaratory Judgment)**

83. The Defendants reallege and reiterate each and every allegation as fully as if repeated verbatim herein.

84. This is an action for declaratory judgment pursuant to the Uniform Declaratory Judgment Act of South Carolina as set forth in S.C. Code Ann. § 15-53-10 (1976), as amended,

et seq., to declare that Defendants are the rightful owners of the property Plaintiff City of North Myrtle Beach has a permit to dredge.

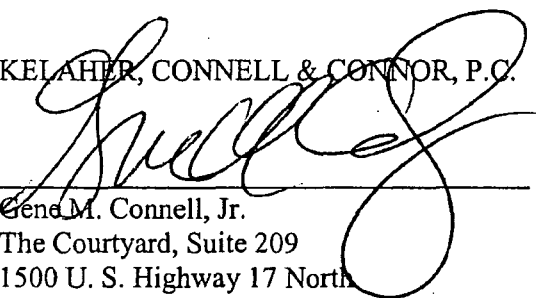
85. That the State of South Carolina provided a deed to the Defendants which deed has been in force and effect since 1969.

86. That the Plaintiff has no ownership in the property and has no right to have a permit for the Defendants' property without their consent.

WHEREFORE, the Defendants pray respectfully for a jury trial and an Order of the Court as follows:

- A. That Plaintiff's Complaint be dismissed.
- B. For an Order temporarily and permanently restraining and enjoining the Plaintiff City of North Myrtle Beach from entering upon the property of the Defendants.
- C. For a judgment for damages sustained to Defendants' property as a result of the trespass.
- D. For a judgment for damages sustained to Defendants' property as result of nuisance.
- E. For a judgment for damages sustained by the Defendants' for inverse condemnation of its property.
- F. For an Order of this Court declaring that the Defendants are the owners of the property pursuant to a deed given by the State of South Carolina and that the Plaintiff should be restrained from coming on Defendants' property without its permission.

KELAHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.

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Post Office Drawer 14547

Surfside Beach, South Carolina 29587-4547

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gconnell@classactlaw.net

Attorney for Defendants Ray Nixon, LLC,

N.F. Nixon, Jr., John W. Ray, and Windle

Skipper Individually and as PR of the

Estate of C.D. Nixon

August 21, 2009

Surfside Beach, South Carolina.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
Tracking # 2011191609

APPEAL FROM HORRY COUNTY
Court of Common Pleas
William H. Seals, Jr., Circuit Court Judge

CASE NO. 2009-CP-26-5782

City of North Myrtle Beach

Respondent

vs.

East Cherry Grove Realty Co., LLC,
The State of South Carolina and John Doe

Defendants

Of whom East Cherry Grove Realty Co., LLC is Appellant
and The State of South Carolina is Respondent

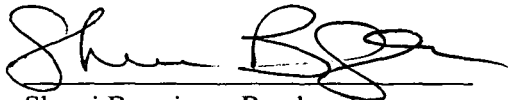
CERTIFICATE OF SERVICE

Sherri Benninga certifies that she is an employee with the law firm of Battle & Vaught, P.A., attorneys for Respondent City of Myrtle Beach, and that she has mailed the Rule 204(b) Motion for Certification and Memorandum to the addressees shown this 9th day of June 2011, with proper postage attached thereto.

ADDRESSEES:

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Kelaher, Connell & Connor, PC
P.O. Drawer 14547
Surfside Beach, SC29587
Attorneys for Appellant

J. Emory Smith, Jr.
Assistant Deputy Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

A handwritten signature in black ink, appearing to read "Sherri Benninga", written over a horizontal line.

Sherri Benninga, Paralegal
Battle & Vaught, PA
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KELAHER, CONNELL & CONNOR, P.C.

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GENE M. CONNELL, JR.
L. SIDNEY CONNOR, IV
LISA POE DAVIS

* OF COUNSEL

AREA CODE 843
238-5648
FAX: 238-5050

June 13, 2011

The Honorable Daniel E. Shearouse
The South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

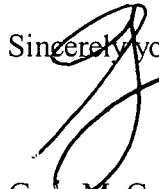
Re: City of North Myrtle Beach v. East Cherry Grove Realty Co., LLC, et al.
C/A No. 2009-CP-26-5782
Our File No. 2009-0133C

Dear Mr. Shearouse:

I received a copy of the letter from Mike Battle dated June 9, 2011 along with a Rule 204(b) Motion for Certification of the above-captioned case to the Supreme Court. I do not object to the Motion for Certification made by the City of North Myrtle Beach.

Should you have any question, please do not hesitate to contact me.

Sincerely yours,



Gene M. Connell, Jr.

GMC,Jr.:sm

cc: Michael W. Battle, Esquire
J. Emory Smith, Jr., Esquire

RECEIVED
JUN 14 2011
S.C. SUPREME COURT



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

JUN 15 2011

June 15, 2011

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of
South Carolina
HAND DELIVERY

Re: City of North Myrtle Beach v. E. Cherry Grove Realty Co. and State
09-CP-26-5782
Return to Motion for Certification

Dear Mr. Shearouse:

I would appreciate your accepting this letter Return consenting to the above Motion for Certification. I have enclosed the original and six copies of this letter.

Should the Court prefer a more formal return, please let me know, and I will be happy to file one. By copy of this letter, I am serving the Honorable Tanya Gee and counsel listed below by United States mail.

Respectfully submitted,

J. Emory Smith, Jr.
Assistant Deputy Attorney General

cc: Michael W. Battle, Esquire
Gene M. Connell, Esquire
The Honorable Tanya Gee

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JAMES R. BATTLE, II
E-Mail Address: jbattle@battlevaught.com

June 9, 2011

RECEIVED

JUN 10 2011

The Honorable Daniel E. Shearouse
The South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

S.C. SUPREME COURT

RE: City of North Myrtle Beach vs. East Cherry Grove Realty Co., LLC, et. al.

Dear Mr. Shearouse:


I have enclosed for filing the original and six (6) copies of a Rule 204(b) Motion for Certification with attached memorandum on Behalf of The City of North Myrtle Beach, a check in the amount of \$25.00, together with our Certificate of Service.

By copy of this letter to their counsel, I am serving East Cherry Grove Realty Co., LLC, et. al., with a copy of this Motion and enclose a certificate of service to that effect.

Please return a "clocked" copy of the Certificate of Service. I have enclosed an extra copy of the Certificate of Service, as well as a self-addressed, stamped envelope for your convenience.

I appreciate your assistance in this matter.

Sincerely,


Michael W. Battle
Battle & Vaught, P.A.

C Gene Connell, Jr.
J. Emory Smith
Chris Noury
The Honorable Tanya Gee