THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the lower court err in failing to hold that East Cherry Grove Realty is the owner in fee simple of the canals based on the June 13, 1963 Order of Judge Morrison?

II. Did the trial court err in refusing to estop the State from asserting ownership of the canals?

III. Did the lower court err in ruling that the issue of public dedication should be decided by the jury?

IV. Did the lower court err in failing to rule that East Cherry Grove Realty was the owner in fee simple of the canals in question based the United States Supreme Court case of *Kaiser Aetna v. United States*?

V. Did the lower court err in finding that the deeds were ambiguous in light of the Order of Judge Morrison dated June 13, 1963?

VI. Did the lower court err in sending the issue of the public trust doctrine to the jury?

VII. Did the trial court err in failing to grant Defendant's motions for non-suit and directed verdict and for a judgment as a matter of law on the issue of public dedication and ownership?

VIII. Did the trial court err in refusing Appellant's request to charge?

IX. Did the trial court err in failing to admit the transcript from the previous Supreme Court Appeal?

STATEMENT OF THE CASE

This case involves a dispute over ownership of certain land located in Cherry Grove Beach, South Carolina. In order to understand the complicated factual and procedural circumstances surrounding this matter, a complete recitation of the long legal history of this case over the last fifty years is necessary.

In the late 1960s, C.D. Nixon formed East Cherry Grove Realty Company to develop North Myrtle Beach and sell lots in Cherry Grove. Almost immediately thereafter, a dispute arose with the State of South Carolina over the ownership of the property. In the early 1960s, lawsuits were filed between the State of South Carolina and East Cherry Grove Realty and its predecessor–in-interest, C.D. Nixon. These lawsuits centered around C.D. Nixon's ownership and right to build and/or fill in certain canals and marshes in the Cherry Grove area. When the original lawsuit was commenced, the State of South Carolina sued East Cherry Grove Realty and C.D. Nixon over these construction activities and ownership of the marsh. Many of these activities occurred after Hurricane Hazel came through the Cherry Grove area. By 1963, the State of South Carolina had sued Nixon to stop construction of a bridge and/or causeway at Tenth Avenue and to further stop Nixon from diverting waters in the 8th Street to the 29th Street area of Cherry Grove Beach. (That lawsuit also involved who was the owner of certain marshlands and tidelands and ultimately produced a settlement in 1969 between the State and East Cherry Grove Realty.) (Def.'s Ex. 5, Trans. ___). On June 13, 1963, Judge Morrison, the Presiding Judge for the Fifteenth Judicial Circuit, signed a Consent Order (between the State and East Cherry Grove Realty) releasing certain portions of the property from any further litigation. In his Order, Judge Morrison found:

> That the below described property is hereby released and is declared not to be involved in nor within the scope of the above-entitled action as it has been determined and agreed upon by counsel that the said property is above the mean high water mark of any adjacent tidal water prior to any alleged changing of the level of the land or of the Waterway.

This June 13, 1963 Consent Order had a plat attached to it which described all property east of the bolded line on the plat to be that of East Cherry Grove Realty Company. (R. ___). Also, the plat attached to Judge Morrison's June 13, 1963 Order had a bolded line drawn through the main channel with the inscription "uplands" on the east side and the "creek" on the west side. (R. ___). All of the canals which are the subject of this lawsuit are on the east side of that line and the State had agreed by this Consent Order that East Cherry Grove Realty owned that property. In 1963, Attorney General Daniel McLeod joined in this Consent Order by filing a petition supporting this position that the State owned nothing east of the bolded line. (R. ___).

Eventually, the case was tried before Judge Morrison and an Order was entered finding for East Cherry Grove Realty and against the State of South Carolina. (R. ___). This Order held that East Cherry Grove Realty owned from the center of all non-navigable creeks to the low water mark on navigable creeks. (R. ____). The State appealed the Order and a transcript of record and appendix were filed with this Court in 1969. In that transcript which is an Exhibit in this record (Ex. ___), the State and East Cherry Grove Realty submitted to this Court agreed facts for the purposes of this litigation. Four of the agreed facts were:

1. That a title abstract of the property was attached to the transcript and is true and accurate and accepted as part of the record in this case (Trans. of Rec. of Supreme Court, p. 68).

2. That since 1785 the Defendant's predecessors in title have exercised possession of the property adversely as shown herein to the whole world and that similarly since 1785 the State of Carolina has accrued no right or title to the property nor received any of the rents or profits thereof. (Trans. of Rec. of Supreme Court, p. 68).

3. That the grants, as set out in the agreed abstract, cover the property in question and said grants were a valid exercise of the sovereign power over said lands. (Trans. of Rec. of Supreme Court, p. 68).

4. That the Defendant's title is derived from the grant in an unbroken chain. (Trans. of Rec. of Supreme Court, p. 68).

While the case was on appeal, the parties started talking settlement in the summer of 1969. While no written settlement agreement between the parties has ever been found, two deeds, a 1963 Consent Order, a 1969 Supplemental Order of Settlement, and a plat were agreed to by the State of South Carolina and East Cherry Grove Realty Company. (Trans. ___). The State, acting through the Budget Control Board and with the approval of then Governor McNair, executed a deed December 22, 1969 in which the State deeded all property above an agreed high water mark to East Cherry Grove Realty Company for One Dollar. (R. ___). In exchange East Cherry Grove Realty Company deeded to the State of South Carolina certain property below the agreed high water mark. (R. ___). These deeds referenced a single plat with a heavy bolded line which described the property being deeded by the parties. [1](R. ___). Both deeds were filed in the Horry County Clerk's Office, however, the deed to the State of South Carolina is the only deed which has a plat and was placed in the computer map records of the Horry County Assessor's Office years later. The

[1] The plat has been revised at least seven times over the years prior to the settlement. The version which was filed with the two deeds is Plat Revision No. 7. (Plaintiff's Ex. 7-A) (R. ___).

deed from the State to East Cherry Grove Realty Company has never been mapped by the Assessor's Office and the Assessor had no record of who owned the canals. Finally, Judge Morrison issued a Supplemental Order on December 23, 1969 declaring the case settled, but finding that the June 13, 1963 Order was still effective. (Both parties' attorneys consented to this Order.)

In 2008, thirty-nine years after the settlement of the tidelands dispute, the City of North Myrtle Beach brought this lawsuit against East Cherry Grove Realty Company and the State of South Carolina. In this case, North Myrtle Beach sought to dredge the manmade canals in East Cherry Grove Beach which were the subject of the 1963 Order of Judge Morrison and the deeds signed on December 22, 1969 by the Governor. The City also sued the State since it contended the State owned the manmade canals. The State answered and contended they owned the canals. In fact, the manmade canals are outside the agreed high water line found on the plat which was filed with the quit claim deeds. (Ex. __). The plat attached to the 1969 quitclaim deeds signed by Governor McNair is found in the Record as Exhibit ___. (Because of the complexity of this case, Appellant will provide a CD with the Plat (Ex. 7-A) and other exhibits of Defendant to the Final Brief and Record on Appeal).

The quoted language in both deeds is identical except one deed (State to East Cherry Grove Realty) uses the term above and the other (East Cherry Grove Realty to the State) uses the term below. (Unfortunately, a review of the plat will reveal that "below" and "above" have different meanings than what is commonly understood.) The Deed from the State to East Cherry Grove Realty (Horry County Deed Book 420 at page 595) states:

> That all areas lying above the agreed mean high water mark are quit-claimed to C.D. Nixon, et al. by the State of South Carolina by this deed.

> That all areas lying below the agreed mean high water mark are quit-claimed to the State of South Carolina by a separate deed.
>
> That all areas lying below the agreed mean high water on Northeast Canal, Nixon Canal, proposed Nixon Canal Extension, Main Channel, Nye Cut and all other existing canals are quit-claimed to the State of South Carolina by a separate deed: except that in the areas in Nye Cut and Main Channel to be closed: It is understood and agreed that the Nye cut will remain open until Main Channel ("proposed relocation of Creek") between 25th Avenue and Nixon Canal has been cut, at which time C.D. Nixon, et al, will have the right to build a bridge at either 22nd Avenue or 23rd Avenue across Main Channel, and close Nye Cut, all as shown on the said plat; closed areas title to be in C.D. Nixon, et al

The second deed from East Cherry Grove Realty to the State (Horry County Deed Book 420 at page 586) provides:

> That all areas lying below the agreed mean high water mark are quit-claimed to the State of South Carolina by this deed.
>
> That all areas lying below the agreed mean high water on Northeast Canal, Nixon Canal, proposed Nixon Canal Extension, Main Channel, Nye Cut and all other existing canals are quit claimed to the State of South Carolina except that: It is understood and agreed that Nye cut will remain open until Main Channel ("proposed relocation of Creek") between 25th Avenue and Nixon Canal has been cut, at which time C.D. Nixon, et al, will have the right to build a bridge at either 22nd Avenue or 23rd Avenue across Main Channel, and close Nye Cut, all as shown on the said plat; and title to land proposed to be closed will remain in C.D. Nixon, et al.

The issue of legal ownership of the manmade canals has been repeatedly raised by politicians and government officials since the 1969 settlement. In fact, an Attorney General's opinion was sought as to the meaning of the two deeds in October 1980. Kenneth Woodington, then an Assistant Attorney General, issued an October 31, 1980 opinion in which he stated:

> It is the opinion of this Office that the essence of the 1969 agreement was that all land within the perimeter of the line designated "agreed mean high water mark" or "north edge of the line" was quit claimed by East Cherry Grove Realty Company, et al to the State, regardless of the actual elevation

> of the lands within that line. In exchange for this, the State quitclaimed to the grantees all lands outside that perimeter regardless of actual elevation with certain exceptions. The exceptions are that East Cherry Grove Realty Company, et al., conveyed its interest in all areas lying below mean high water mark as the result of excavation above the agreed high water mark to the State .... (See: Opinion of S.C. Attorney General's Office dated October 31, 1980). (R. _____).[2]

In the current lawsuit, the City of North Myrtle Beach does not claim ownership of the manmade canals but argues that they have been publicly dedicated and that the State of South Carolina owns them.[3] East Cherry Grove Realty answered the declaratory judgment action filed by the City of North Myrtle Beach and counterclaimed that it was the lawful owner of the canals at issue. Both parties moved for summary judgment arguing that the ownership of the manmade canals was a question of law for the court. The Honorable Larry Hyman issued his Order denying summary judgment on October 19, 2010 and found "there is an issue of fact over the intention of the parties in connection with the quitclaim deeds issued and that summary judgment is not appropriate." (R. ___).

Prior to the trial, the presiding judge (The Honorable William Seals) issued his order taking judicial notice of the Order of Judge Morrison dated June 13, 1963 but refused to find this consent Order determined the ownership of the manmade canals. (R. ___). Judge Seals submitted this declaratory judgment action to the jury by way of a special verdict form He submitted three questions to the jury:

> 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] This Opinion makes no mention of the 1963 Consent Order signed by Judge Morrison.
[3] The City named the State of South Carolina as a Defendant in this lawsuit.

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.

(R. ____).

This appeal follows the denial of East Cherry Grove Realty's motion for nonsuit and directed verdict and the resulting jury verdict.

STANDARD OF REVIEW

This is an action for declaratory judgment and thus is neither legal nor equitable but is determined by the nature of the underlying issue. An issue essentially one at law will not be transformed into one in equity simply because declaratory relief is sought. *Legette v. Smith*, 226 S.C. 403, 85 S.E.2d 576 (1955) Here, the action is to construe deeds, a plat and various Order of the court thus it is one at law. Accordingly, this Court's jurisdiction is to correct errors of law and factual findings not supported by the evidence. *City of Hartsville v. S.C. Municipal Insurance and Risk Financing Fund*, 382 S.C. 535, 674 S.E.2d 574 (S.C. 2009). However, "an Appellate Court may determine questions of law with no particular deference to the trial court." *Verenes v. Alvanos*, 387 S.C. 11, 14, 690 S.E.2d 771,772,773 (2010). Appellant asserts numerous questions of law in this complex case. (See also *Estate of Tenney v. S.C. Dept. of Health & Env. Control*, 393 S.C. 100, 712 S.E.2d 395 (SC 2011).

Further, because Appellant asserts this case derives from a settlement with the State of South Carolina in 1969 determined by a Consent Order, deeds and a plat, there is strong public policy argument in the finality of that settlement. (See *Condon v. State*, 354 S.C. 634, 583 S.E.2d 430 (2003) ("The holding serves the public interest in the finality of settlement agreements, particularly in settlement with the State.") 583 S.E.2d at 434.

ARGUMENT

I. **The trial court erred in failing to find that East Cherry Grove Realty was the owner of the manmade canals pursuant to the Order of Judge Morrison dated June 13, 1963.**

Prior to the trial of this case, East Cherry Grove Realty Company advised the trial court that it had located in the records of the Clerk of Court an Order of Judge Morrison dated June 13, 1963 which was dispositive of the case. Appellant asked the trial court to take judicial notice of that Order and to find as a matter of law that East Cherry Grove Realty owned all property east of the line agreed to by the State and East Cherry Grove Realty in the 1963 Order. The trial judge refused to do so, but agreed to charge the jury that the 1963 Order was the law of the case. (R. ___).

The June 13, 1963 Order of Judge Morrison which was agreed to by the State provided in pertinent part:

> That all the land lying between the said unbroken blue line shown as the estimated line of demarcation between upland and marshland on the above-referred to plat and the Atlantic Ocean is hereby released and is declared not to be involved in nor within the scope of the above-entitled action as it is and was above the mean high water mark of the adjacent titled water prior to any alleged artificial changing of the level of the land or of the waterway. A copy of the plat made by said survey is hereto attached and another is on file in the office of the Attorney General of the South Carolina. A third copy will be filed with the Order in the records of Horry County.
>
> It is further ordered that this consent order is to have no effect whatsoever upon the title or rights of the parties in this action to all other property described in the Complaint. It is not an admission or denial on the part of either the plaintiff or defendants and not to be considered as evidence of such as all questions in regards to the title and rights in the remaining lands are being left for determination by the Court.[4]

(R. ____)[5]

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[4] This Order was found in the original records of the Horry County Clerk of Court

[5] Further, the Attorney General signed the Consent Order and filed a Petition asking the Court to sign the Order. (R. ____).

Simultaneously filed with the Order of Judge Morrison dated June 13, 1963 was a plat. This plat attached to the record as Exhibit_______ shows a bolded line running down the main canal in Cherry Grove. East of that line are the manmade canals in question in this litigation which the parties agreed in the June 13, 1963 Consent Order were owned by East Cherry Grove Realty. (See Order of June 13, 1963, "since this action was filed, the title to certain property not intended by the plaintiff (State) to be included in this lawsuit, has been questioned because the line of demarcation between the high land of East Cherry Grove Realty Beach and the marshland or land below the mean high water line could not be determined....") (R. ___). This Order is still the law of the case and was what the parties relied on in settling the original lawsuit in 1969.

In accordance with the 1963 Order, Appellant asked the Court in this case to declare the canals which were east of the line on the plat (Ex. _____) (A CD of this plat and other exhibits will be provided with Appellant's Final Brief and Record on Appeal) were owned by East Cherry Grove Realty. (R. ____). At the appropriate stage after the Plaintiff finished its case, East Cherry Grove Realty moved for a non-suit with prejudice based on the June 13, 1963 Order. (R. ___). The trial court refused such, but advised Appellant that it intended to charge the jury the June 13, 1963 Order was the law of the case. (See Court's jury charge: "I charge you that this Court has found that the June 13, 1963 Order is law.") (R. ___).

It is well settled in South Carolina that after the plaintiff in an action tried by a court has completed the presentation of his evidence, defendant may move for dismissal on the grounds that plaintiff has no right to relief. See *Duckworth v. Neely*, 319 S.C. 158, 459 S.E.2d 896 (Ct.App. 1995). In this case the law of the case was the Order of June 13, 1963

between the State of South Carolina and East Cherry Grove Realty Company. As a result of this Order, the State of South Carolina could not claim that the manmade canals east of the line on the plat attached to the Order were owned by the State.[6] Thus, the two deeds executed by the parties do not include the manmade canals since to do so would violate the 1963 Order. Appellant urged the trial court to rule that this was the law of the case on June 13, 1963 and that it was the law of the case when this trial was commenced; thus the State could not now claim it owned the manmade canals.

The question of the June 13, 1963 Order was not one for the jury but was one for the court and the court was bound to apply it to the facts of this case. Only the court can apply the law of the case and the court erred in failing to grant Defendant's motion for non-suit because nothing was presented by the Defendants that the June 13, 1963 Order was not binding on the parties. See *Richland County v. Palmetto Cablevision*, 261 S.C. 222, 199 S.E.2d 168 (1973) (An unchallenged ruling, right or wrong, becomes the law of the case.); see also *Carolina Chloride Inc. v. Richland County*, Opinion No. 27013 decided July 25, 2011 (Unchallenged ruling right or wrong requires affirmance because it was not timely disputed). See also *Charleston Lumber Co. v. Miller Housing Corp.*, 338 S.C. 171, 525 S.E.2d 869 (2000) (unchallenged ruling the law of the case).

II. <u>The State is estopped to deny the 1963 Order.</u>

Appellant also argued that the State was estopped to claim title to the land in question because of the 1963 Order which had been the law of the case for almost 46 years prior to when this lawsuit was commenced. South Carolina has long recognized estoppel against the government in certain circumstances. Judicial estoppel is applied when a party

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[6] All land lying between the said unbroken line shown as the estimated line of demarcation... is hereby released and is declared not to be involved. (R. __)

attempts to assert a position different than that which it is asserted in a previous litigation. The doctrine of estoppel applies when "actions, conduct, words or silence which amounts to a representation or a concealment of material facts causes another to alter his position to his prejudice or injury." *Rushing v. McKinney*, 370 S.C. 280, 293, 633 S.E.2d 917, 924 (Ct.App. 2007). Appellant asserted the doctrine of estoppel at the close of the case and requested the Court to rule that the State of South Carolina was estopped from asserting ownership of the manmade canals. (Trans. ____). The trial court refused such ruling and thus erred in failing to grant the motion for involuntary non-suit. (Trans. ____).

The purpose of judicial estoppel and estoppel generally is to enforce promises to avoid injustice and wrongdoing. *Davis v. Monteith*, 289 S.C. 176, 181, 345 S.E.2d 724, 727 (1986); *Quail Hill, LLC v. County of Richland*, 379 S.C. 314, 324, 665 S.E.2d 194, 199 (Ct.App. 2008); *Oswald v. County of Aiken*, 281 S.C. 298, 315 S.E.2d 146 (Ct.App. 1984) (Court of Appeals applies doctrine of estoppel to prevent application of a change in the law to the Plaintiff).

This Court first recognized the validity of judicial estoppel in *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997). In that case, the Court noted: "Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." The *Hayne* court went on to enunciate the purpose of the doctrine, making clear that it intended to "protect the integrity of courts rather than to protect litigants from alleging improper or deceitful conduct by their adversaries." 489 S.E.2d at 477. In *Hayne*, the Court limited the doctrine to inconsistent statements of fact holding that Hayne was prevented from arguing that he was the owner of certain property when he had successfully disclaimed ownership of the same property during his divorce.

This is similar to what the State now argues in this case -- that it is the owner of the manmade canals in question -- even when the 1963 Order executed and consented to by the State indicates that East Cherry Grove Realty was the owner of the manmade canals and this had been a fact which East Cherry Grove Realty had relied upon for 46 years prior to the commencement of this suit. See *Zimmerman v. Central Union Bank*, 194 S.C. 518, 8 S.E.2d 359 (1940) (Where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.) See also *Auto Owners Ins. Co. v. Rhodes*, 682 S.E.2d 857 (S.C.App. 2009) wherein the Court discussed the elements of judicial estoppel to include "two inconsistent positions taken by the same party in the same or related proceedings and the party taking the position must have been successful in maintaining that position and have received some benefit." (Here, both the State and East Cherry Grove Realty received a benefit from the 1963 Consent Order since the parties agreed to the property at issue in the lawsuit.)

As stated above, in the 1960s litigation between the State and East Cherry Grove Realty, the State and East Cherry Grove agreed in a Consent Order of the trial court that all property east of the main channel belonged to East Cherry Grove Realty Company. Further, when the settlement was agreed to in 1969, both parties had previously signed the Consent Order of 1963 agreeing that the manmade canals were not part of the settlement. Thus, for over 46 years the settled expectations of both East Cherry Grove Realty and the State of South Carolina were that the manmade canals in question were owned by East Cherry Grove Realty. This issue only arose because the City wishes to dredge the canals.

According to *Fraser v. Hext, 21 SC Eq 250, 2 Strob. Eq 250 (1848)*, "it is not the policy of the law to disturb settlements made with deliberation and with tolerable fairness, more particularly where they have been acquiesced in for any length of time afterwards." Further, "there is a public interest in the finality of settlement agreements particularly in settlements with the state." *Condon v. State*, 354 S.C. 634, 583 S.E.2d 430 (2003). Accordingly, the trial court erred in not finding that the State was estopped from asserting it was an owner to property when the 1963 Order of the trial court was the law of the case.

Appellant also cites to the Court SCRCP 43(k) entitled "Agreements of Counsel." While Appellant recognizes that SCRCP 43(k) was not in existence in 1963, Appellant believes that the applicable rules regarding consent orders and settlements were the same in 1963 as they are in 2011. SCRCP 43(k) provides in pertinent part: " No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record."

In this case, during the beginning stages of the litigation (in 1963), the parties agreed to a Consent Order that the manmade canals were not part of the litigation between the State and East Cherry Grove Realty Company because they had been highlands and, thus, the deeds signed by the Governor and the plat have no force and effect upon them (nor was it even contemplated in the deeds). Further, the Attorney General's Petition in which he asked Judge Morrison to sign the 1963 Order clearly indicates that he understood that the manmade canals were owned by East Cherry Grove Realty Company. (See R. ____).

While SCRCP 43(k) was not in existence in 1963, the case law is still applicable because the parties signed a Consent Order. (See *Cheap-O's Truck Stop, Inc. v. Cloyd*, 350

S.C. 596, 567 S.E.2d 514, 518) ("Even though the settlement agreement was not in writing, it complied with Rule 43(k) because it was made in open court and noted upon the record."); *Ashfort Corp. v. Palmetto Const. Group, Inc.*, 318 S.C. 492, 494, 458 S.E.2d 533, 534 (1995) (The purpose of rules such as Rule 43(k) is to prevent fraudulent claims of oral stipulations, to prevent disputes as to the existence and terms of agreements, and to relieve the court of the necessity of determining such disputes.); *Reed v. Associated Invs. of Edisto Island, Inc.*, 339 S.C. 148, 152, 528 S.E.2d 94, 96 (Ct.App. 2000). Further, the Supplemental Order ending the case, signed by Judge Morrison December 23, 1969 provided: "That it would not affect the Order of June 13, 1963.[7] (See Defendant's Exhibit No. 22, R. _____).

Thus, Appellant asserts that because a Consent Order had been signed by the parties and entered into the record, the 1963 Consent Order was binding and enforceable between the State of South Carolina and East Cherry Grove Realty Company and the State of South Carolina cannot revoke their consent to a binding Order of the trial court. Accordingly, it was error to deny Appellant's motions for nonsuit and directed verdict.

III. The trial court erred in finding that there was sufficient evidence to submit the issue of public dedication to the jury.

At the close of the City of North Myrtle Beach's case and at the close of all evidence, East Cherry Grove Realty timely moved the Court for an involuntary non-suit with prejudice and directed verdict as to the issue of public dedication.

The City of North Myrtle Beach had offered as witnesses, Wayne Beam, David Harwell, Hank Thomas, Chris Noury, N.F. Nixon, Lawrence Hickman, James M. Wooten,

[7] Judge Morrison's Order is in the Courts' records and signed by the State's and East Cherry Grove Realty's attorneys. Thus, it satisfies the rule that the settlement was final and binding. See *Motley v. Williams*, 374 S.C. 107, 647 S.E.2d 244 (2007) (Settlement on record is binding).

Ed Latimer and Otis Allen Jeffcoat on the issue of public dedication. A careful review of the testimony of each reveals that the elements of public dedication were not proven by strict, clear, cogent and convincing evidence and thus the trial court should have granted an involuntary non-suit with prejudice at the close of the Plaintiff's case. *Mack v. Edens*, 320 S.C. 236, 464 S.E.2d 124 (1995) ("Dedication is exceptional manner of passing interest in land.")

Plaintiff called Dr. Wayne Beam as its first witness to testify regarding this case. Beam testified that he had been the former director of the South Carolina Coastal Council and that he had been retained as an expert witness in the field of governmental relations and environmental permitting. (Trans., p. 68, lines 12-19). Beam further testified that everyone at Coastal Council knew Nixon had been fighting the State of South Carolina for 30 or 40 years over the East Cherry Grove area. (Trans. of Rec., p. 82, lines 8-19). He stated that there was a settlement in the late 1960s and that it was common knowledge that Nixon claimed the entire area (Trans. of Rec., p. 87, lines 9-23). Beam explained that Coastal Council issued dock permits to people on the canals at issue and that the permits had on them "subject to property rights which C.D. Nixon and his heirs and assigns have in adjacent bottom lands" (Trans. of Rec., p. 87, lines 13-25; p. 88, lines 1-8) (Ex. ___). Beam believed that this language was a warning to people that Nixon claimed he was the owner of the canals (Trans. of Rec., p. 88, lines 17-20). Beam knew that there was no maintenance by the City of North Myrtle Beach done on these canals (Trans. of Rec., p. 89, lines 20-25; p. 90, lines 1-8). He also knew that it would increase the tax value of the property if the City of North Myrtle Beach was able to get the lots dredged (Trans. of Rec., p. 94, lines 1-7).

The next witness, David W. Harwell, was offered as a homeowner of property on the canals at 51st Avenue and 312 Canal Street (Trans. of Rec., p. 101, lines 7-15). He stated the public used the canals and that he would like to have the canals dredged (Trans. of Rec., p. 102, lines 4-8; p. 203, lines 5-8). Justice Harwell was not aware of the identity of the owners of the canals in question and he could not offer any evidence that the City of North Myrtle Beach ever performed any maintenance on the canals (Trans. of Rec., p.107, lines 19-25; p. 110, lines 8-14).

The next witness offered was Hank Thomas, a local realtor in the Cherry Grove Section of North Myrtle Beach (Trans. of Rec., p. 116, lines 1-9). He stated that the City of North Myrtle Beach does not own the canals and the City of North Myrtle Beach has absolutely no title interest in the property in question (Trans. of Rec., p. 125, lines 13-17; p. 125, lines 9-12). Mr. Thomas testified that the City of North Myrtle Beach intended to do work on the canals and dredge them; however, he had no evidence of any maintenance by the City of North Myrtle Beach (Trans. of Rec., Hank Thomas, p. 116-141; p. 125, lines 17-19.)[8]

The next witness offered by the City of North Myrtle Beach was Chris Noury, the City Attorney (Trans. of Rec., p. 142, lines 1-3). He testified that the City of North Myrtle Beach intended to do work on the canals but could not get a permit from the Corps of Engineers until the ownership issue was resolved (Trans. of Rec., p. 142, lines 12-24). Mr. Noury also testified that the City of North Myrtle Beach does not own the canals and the

[8] Hank Thomas was also a City of North Myrtle Beach councilman who testified that the City tax base would be increased by $48 Million if the canals were dredged and the value of the lots increased. (Trans. of Rec., p. 138, lines 7-25) (Trans. of Rec., p. 160, lines 1-25).

City has never dug the first spade of dirt in these canals nor maintained them (Trans. of Rec., p. 145, lines 19-23; p. 147, lines 3-16). There are no records of maintenance by the City of North Myrtle Beach of these canals either. (Trans. of Rec., p. 148, lines 1-10). The city records that were found by Mr. Noury contained information submitted by former city attorney, Peter Coleman. Mr. Coleman indicated on these records that he questioned whether the City of North Myrtle Beach had any ownership of the bottoms of the canals. (Trans. of Rec., p. 149, lines 11-20.) Mr. Coleman's notes reflected prior homeowners' meetings in Cherry Grove showing that the City did not actually maintain any of these canals previously due to lack of interest by the property owners, since the owners reserved the right to revise the development map. (Trans. of Rec., p. 150, lines 12-24, p. 159, lines 1-20, and Exhibit 31.)

The next witness offered was Dr. N. F. Nixon. His testimony was that he is a member of East Cherry Grove Realty Company and is a retired doctor living in North Myrtle Beach. He testified that East Cherry Grove Realty Company owns the canals and that the bottom lands of the canals were never given away by East Cherry Grove Realty Company to anyone, nor was there a public dedication of the property. (Trans. of Rec., p. 167, lines 4-15, 17-21.)

The next witness offered was Lawrence M. Hickman. He testified that he was the assessment administrator for Horry County. (Trans. of Rec., p. 167, lines 23-25.) He testified that the records of Horry County do not indicate who the owner of the property is and therefore the City of North Myrtle Beach is not an owner of the canals (Trans. of Rec., p. 186, lines 8-11, 13-17.) Mr. Hickman stated that C. D. Nixon and East Cherry Grove Realty Company developed this property and dug the canals in question (Trans. of Rec., p.

193, lines 12-14.) Mr. Hickman could not offer any testimony regarding maintenance of the canals by the City of North Myrtle Beach. (Trans. of Rec. Hickman, p. 176-195.)

The next witness who offered testimony in the City's case was James M. Wooten, an engineer with D.D.C. Engineering. (Trans. of Rec., p. 196, lines 1-5.) He testified that in the early 1990s he was paid money to do a study for a remedy for the silting of the Cherry Grove canals, but the City decided to postpone and/or cancel the project. (Trans. of Rec., p.197, lines 7-11; p. 199, lines 23-25.) Mr. Wooten testified that he had no knowledge of who owned the canals and specifically stated, "the first blade of grass or the first shovel was never turned by the City of North Myrtle Beach in maintaining or constructing the canals." (Trans. of Rec., p. 200, lines 12-13; p. 204, lines 1-5).

The next witness offered by the Plaintiff was Ed Latimer, a retired Assistant Attorney General for the State of South Carolina. He offered no testimony regarding maintenance of the canals by the City of North Myrtle Beach. (Trans. of Rec., p. 207-256).

The final witness offered by the City was Allen Jeffcoat, an attorney who specializes in real property work in Horry County (Trans. of Rec., p. 257, lines 19-22). He offered no testimony regarding public dedication of the canals to the City of North Myrtle Beach. (Trans. of Rec., p. 310, lines 1-9).

At the close of Jeffcoat's testimony, Defendant moved for an involuntary non-suit as to the issue of public dedication. (Trans. of Rec., p. 362, lines 5-25; p. 363, lines 1-5). The Court denied this motion. Appellant asserts this was error in that the elements of public dedication had not been met by the Plaintiff.

A. **The elements of public dedication were not met by Plaintiff.**

Proof of public dedication must satisfy four elements: (1) intent by the owner to dedicate to the public; (2) it must be unmistakable; (3) it must be implied from long use; (4) the conduct by the landowner must be clear and convincing along with an unequivocal intent to create a right in the public. *Derby Heights v. Gantt*, 116 S.E.2d 13 (1960). Using the approach in *Derby Heights*, the testimony offered by the Plaintiff is deficient in proving public dedication. In fact, there is no testimony that there was ever any maintenance on the canals by the City of North Myrtle Beach, nor is there testimony that the original developer, C.D. Nixon, intended in unmistakable terms to dedicate the canals to the public. (See Beam testimony, Trans. p. 82, lines 8-19). (See *Anderson v. Town of Hemingway*, 237 S.E.2d 489 (1977) (Court holds that the burden of proof for public dedication is on the town and must be proven by strict, cogent and convincing evidence.)

The approach to strict and convincing evidence in public dedication has been consistently reaffirmed by this Court. See *K&A Acquisition v. Island Point*, 682 S.E.2d 252 (2009); *State v. Beach*, 248 S.E.2d 115 (1978); *Taylor v. Guerry*, 160 S.E.2d 889 (1968); and *Mack v. Edens*, 464 S.E.2d 124 (1995). Significantly, in all these cases, this Court has held that allowing one's property for recreational use does not create public dedication. (Similar to what the owners have done here in allowing individuals in boats to use the canals). See also *Mack v. Edens*, 464 S.E.2d 124 (1995); *Crossland v. Westvaco*, 431 S.E.2d 264 (1993) (Trial court directs verdict for the defendant; no public dedication of a road used over fifty years for recreational activities; Supreme Court affirms).

In sum, the testimony offered above does not pass for strict, cogent and convincing evidence since it is an exceptional mode of passing title to allow public dedication. Because

there is a high standard of proof of public dedication, most cases will fail. (See *Taylor v. Guerry*, 160 S.E.2d 889 (1968)) (public's use of a dirt road to the river is not enough to overcome the high standard of proof for dedication and a road cannot be proven to have been publicly dedicated just from use).

Further, in order for the government to prove that public dedication has occurred, it must have accepted the dedication. In this case, there is no record of any acceptance by the City of North Myrtle of the canals. Indeed, to this day, the canals are in disrepair, and while there have been numerous discussions over the past thirty years, there has never been any maintenance or repairs undertaken by the City. Indeed, city officials have done nothing. Every witness offered by the City had no knowledge of any maintenance. (See Beam Trans. p. 89, lines 20-25; p. 90, lines 1-8; Harwell Trans. p. 110, lines 8-14; Thomas Trans. p.p. 116-141; Noury Trans. p. 147, lines 3-16; Nixon Trans. p. 167, lines 17-19; Hickman Trans. pp. 176-195; Wooten Trans. p. 204, lines 1-5; and Jeffcoat Trans. p. 310, lines 1-9). This failure to maintain is fatal to the City's case on public dedication and as a result, the trial court should have granted the non-suit with prejudice at the close of the Plaintiff's case or a directed verdict at the close of all the evidence. See *Tupper v. Dorchester County*, 487 S.E.2d 187 (1997) (in order for acceptance of property to take place, there must be use, or repair by the City to indicate acceptance). See, also, *County of Darlington v. Perkins*, 239 S.E.2d 69 (1997) (Court approved public dedication because County maintained the dirt road for over fifty years.)

In sum, none of the witnesses offered by the City of North Myrtle Beach proves public dedication. None of the witnesses (Beam, Harwell, Thomas, Noury, Nixon, Hickman, Wooten, Latimer, Jeffcoat) ever testified that the City accepted the canals or that

they maintained them. As a result, the trial court erred in not directing a verdict and in not non-suiting the Plaintiff with prejudice as to this cause of action. Thus, Appellant respectfully requests that the jury verdict as to public dedication be reversed because there is no evidence of public dedication to the City of North Myrtle Beach.

IV. <u>**The trial court erred in failing to hold the manmade canals were owned by East Cherry Grove Realty Company based on constitutional law.**</u>

At the beginning of the trial (and throughout), East Cherry Grove Realty's counsel pointed out that there was a United States Supreme Court case which controlled the ownership of the canals. (Trans. of Rec., p. 16, lines 22-25). This issue was also raised by counsel at the end of the trial during the charge conference. (Trans. of Rec., p. 695, lines 8-25; p. 696, lines 1-25; p. 697, lines 1-6). At that time, the trial court refused to change its charge or to charge *Vaughn v. Vermillion Corp.*, 444 U.S. 206 (1979) and *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979) or to hold Appellant owned the canals as a matter of law. Counsel again objected to the charge after the Court read the charge to the jury (Trans. of Rec., p. 761, lines 1-25) and later asked for a judgment notwithstanding the verdict based on *Kaiser Aetna v. United States,* 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979) (Trans. of Rec., p. 769, lines 19-25). Appellant asserts that the Court erred as a matter of constitutional law in not finding that the manmade canals were owned by East Cherry Grove Realty Company. In both *Kaiser Aetna v United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979) and *Vaughn v. Vermillion Corp.*, 444 U.S. 206 (1979), the Court noted that artificial waterways built by a private citizen with private money on private land were not waters of the United States. Further, if there is a taking by the government, it required compensation under the Fifth Amendment.

In *Kaiser Aetna v. United States, supra,* the Supreme Court of the United States was faced with circumstances which are similar to the case at hand. 100. S. Ct. 383. In *Kaiser Aetna*, the petitioner's property was contiguous to a navigable bay and the Pacific Ocean but separated from the bay by a barrier beach. *Id.* Kaiser built an eight foot deep canal from the Pacific Ocean to a pond and started charging fees for access. *Id.* The United States sought to exercise the Commerce clause of the United Stated Constitution granting jurisdiction to the federal government over the surface of all navigable waters. *Id.* Specifically, the United States asked the court to declare the marina as navigable water and thus subject to navigational servitude or right of public access. *Id.* The owners of the marina argued that if the marina was required to be open for public use, the United States must pay just compensation; otherwise it would be taking of private property under the Fifth Amendment. *Id.* The Supreme Court held:

> "If the government wishes to make what was formerly Kuapa Pond into a public aquatic park after petitioners have proceeded as far as they have here, it may not, without invoking its eminent domain power and paying just compensation, require them to allow the public free access to the dredged pond. Although the dredged pond falls within the definition of navigable waters as this court has used that term in delimiting the boundaries of congressional regulatory authority under the commerce clause. This court has never held that the federal navigational servitude creates a blanket exception to the takings clause of the Fifth Amendment whenever Congress exercises its commerce clause authority to promote navigation. 444 U.S. at 165..."

Finally, the Court noted:

> "The government's attempt to create a public right of access to the improved land goes so far beyond ordinary regulation or improvements for navigation involved in typical riparian condemnation cases as to amount to a taking requiring just compensation." See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 390,170-180. (1922)

During this trial, Appellant sought repeatedly to remind the Court of *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979) and to argue as a matter of law that the taking of artificial manmade canals violated the United States Constitution. (Trans. of Rec., p. 16, lines 22-25; p. 695, lines 8-25; p. 696, lines 1-25; p. 697, lines 1-6).

The facts in this case are quite similar to *Kaiser Aetna* in that East Cherry Grove Realty Company built the manmade canals, was involved in protracted litigation with the State of South Carolina in the 1960s over the ownership, procured an Order from the State of South Carolina in 1963 indicating that the manmade canals were not part of the lawsuit and had successfully obtained a deed signed by the Governor of the State of South Carolina which had an attached plat that clearly showed the manmade canals were not part of the settlement. (Trans. of Rec., ________). Thus, Appellants believe, respectfully, that the court erred in not finding during the appropriate stages of the trial (nonsuit and directed verdict) that Appellant was the owner of the manmade canals in question based on established United States Constitutional Law and *Kaiser Aetna*.[9] To hold otherwise amounts to a taking and violates the Constitution unless just compensation is rightfully paid to East Cherry Grove Realty.[10]

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[9] *Nelson v. Hughes*, 303 S.C. 102, 399 S.E.2d 24 (1990) has no application to the facts of this case since no United States Constitutional issues were raised in that case.

[10] Appellant believes that the State will argue this case is controlled by *State v. Fain*, 273 S.C. 748, 259 S.E.2d 606 (1979) which has been cited for the proposition that canals which are dug in highlands are owned by the State. A careful reading of *State v. Fain, supra* does not reveal such a holding. First, to deprive a property owner of canals dug by him on his private property would violate the United States Supreme Court's proclamation in *Kaiser Aetna v. United States, supra* which implicates the Fifth Amendment in any taking of private property for public access. Second, in *State v. Fain, supra* this Court was not faced with the United States Constitutional issues raised in *Kaiser Aetna*. Third, *Fain* did not address private land and the construction of canals with private money on that land. Fourth, there was no consent order of settlement with the State as in this case.

V. **The trial court erred in holding the deeds were ambiguous and thus the jury should determine ownership.**

At the beginning of the trial, the Court announced as a matter of law that it had examined the two deeds between the State of South Carolina and East Cherry Grove Realty and that those deeds were ambiguous. The trial court stated:

> "I want to make a finding that the Court has examined the deeds which are the subject matter of this action and has found them ambiguous so we've got that out of the way." (Trial transcript, p. 14, lines 1-5).

Appellant asserts that this ruling was erroneous and that the prior orders of the lower court had previously resolved this issue. First, the 1963 Order of Judge Morrison, which was consented to by the Attorney General's Office, had found the manmade canals to be owned by East Cherry Grove Realty Company (Trans. ___, Exhibit 6). Second, the agreed statement of facts from the South Carolina Supreme Court transcript from the 1969 appeal clearly indicated that East Cherry Grove Realty Company owned the property and that its paramount title had been proven to the satisfaction of the State of South Carolina. (Trans. of Rec., ____). Third, Defendant has presented testimony from C.B. Berry, a well know surveyor and historian who had been present at the 1969 settlement meetings in the Attorney General's Office. His testimony established ownership of the manmade canals by East Cherry Grove Realty Company and he testified that he was involved in the lawsuit in 1968. (Trans. of Rec., p. 600, lines 10-16). When he testified before Judge Morrison in 1968, he elaborated that through research, he found the King's Grant which established C.D. Nixon's right to the property. (Trans. of Rec. p. 602, lines 24-25; p. 603, lines 1-25). Berry is very familiar with C.D. Nixon's property because he testified that he prepared all the plats for the 1968 trial. (Trans. of Rec., p. 601, lines 1-12; p. 602, lines 16-24). Berry was also intimately

involved with the negotiations of the settlement on appeal. Berry testified that he made several trips to the Attorney General's office to broker the deal by which the State received part of the marsh and C.D. Nixon received the other property. (Trans. p. 604, lines 21-25, p.605, lines 1-25.) Berry worked to help both parties come to an agreement in said settlement by preparing the plat for the negotiations for the marsh and drawing a line to establish the perspective property lines. (Trans. p. 606, lines 1-14; p. 607, lines 1-25, p. 609, lines 1-5). Berry testified that he drew the property line at the Attorney General's direction, and it was thereinafter decided that the State received all areas within the bolded line and agreed C.D. Nixon got everything else. (Trans. p. 607, lines 1-25, p. 610, lines 15-25.) This settlement set out that all areas east of the property lines will be deeded to C.D. Nixon forever in perpetuity. (Trans. p. 609, lines 1-11, p. 610, lines 1-25.)

In construing the deeds between the State and East Cherry Grove Realty, the Court failed to take into consideration the Order of Judge Morrison dated June 13, 1963 which was reaffirmed in his Supplemental Order dated December 23, 1969. (Defendant's Ex. 22, R. ____). In that Supplemental Order of December 23, 1969, the parties agreed that the Order of Settlement including the execution of the deeds and the plat would have no effect on the prior Order of this Court dated June 13, 1963. Further the June 13, 1963 remains in full force and effect to this day and is binding on the State. Accordingly, contrary to the circuit court's finding, there was no ambiguity in holding that the manmade canals which were the subject of this lawsuit were indeed owned by East Cherry Grove Realty Company since two orders of the circuit court had reaffirmed that the manmade canals were not the subject of the deeds (See Defendant's Exhibit 22 Supplemental Order of Judge Morrison and Judge Morrison's Order of June 13, 1963 Ex. __). See *Bennett v. Investors Title Co.*, 370 S.C.

578, 635 S.E.2d 649 (Ct. App. 2006); *Estate of Sherman ex rel Maddox v. Estate of Sherman ex rel Snodgrass*, 597 S.E.2d 850 (2004); *Hunt v. Forestry Comm.*, 595 S.E.2d 846 (2004) (holding when the granting clause in a deed purports to convey title in fee simple absolute title other provisions of deed cannot diminish that granted.)

(A) The court erred in not following the plat rule.

Further, the settlement between the State of South Carolina and East Cherry Grove Realty was consummated through the drawing of a plat. [11] (Ex. ____). South Carolina has adopted the rule that where a deed describes land as it is shown on a plat then the plat becomes part of the deed for purposes of showing boundaries, metes and courses and distances of property conveyed. *Bellamy v. Bellamy*, 355 S.E.2d 1 (1987). In this case, the plat was prepared by C.B. Berry. The plat with Revision Number 7 marked on it shows the adoption of the agreed high water mark by the parties as of December 20, 1969 and is recorded in Plat Book 51 at Page 52 in the Horry County records. (In fact, this is the only plat for the two deeds between the parties.) (Trans. of Rec., Ex. No. ____).

The rule that the plat becomes part of the deed when it is described in the deed is well known in South Carolina. See *Carolina Land Co., Inc. v. Bland*, 217 S.E.2d 16 (1975) (Where deed describes land as it is shown on a certain plat, such plat becomes part of the deed); *Blue Ridge Realty Co. v. Williamson*, 145 S.E.2d 922 (1965) (Purchasers of lots with reference to recorded plat of subdivision acquired every easement, privilege and advantage shown on such plat); *Lynch v. Lynch*, 115 S.E.2d 301 (1960); *Lancaster v. Smithco, Inc.*, 144 S.E.2d 209 (1965); *Bennett v. Investors Title Co.*, 370 S.C. 578, 635 S.E.2d 660 (Ct.

[11] When the plat was drawn the parties were obviously aware of the June 13, 1963 Consent Order and had no intention of violating that Order.

App. 2006); *Evans v. Corley*, 42 S.C.L. 315 (S.C.App. 1855); *Murrells Inlet Corp. v. Ward*, 662 S.E.2d 452 (S.C. App. 2008).

Berry was present and drew the plat based on the settlement discussions. (Trans. p. 605, lines 16-19). His testimony shows there was no ambiguity in the deeds because the deed and the plat must be construed together. It is also clear from the plat and the 1963 Order that all property outside the agreed high water mark on the plat was owned by East Cherry Grove Realty Company. (R. Ex. ___).

(B) <u>East Cherry Grove had a Kings Grant title.</u>

The final reason why the deeds are not ambiguous in this case is that Appellant had proven title through a Kings Grant which had previously been recognized by the State in the agreed statement of facts on appeal which was presented to this Court in 1969. In the agreed statement of facts filed between the State and East Cherry Grove Realty in the prior litigation it was admitted by the State that East Cherry Grove Realty had a Kings Grant. (Supreme Court Transcript, p. 68, R. ___). This is similar to *Folly Beach v. Atlantic House Properties*, 318 S.C. 450, 458 S.E.2d 426 (1995). In that case, the Atlantic House on Folly Beach was damaged by a hurricane. *Id.* This Court held regardless of the public trust doctrine that compensation was ordered when it was uncontested the plaintiff was owner of record of land below the high water mark. *Id.* Here, the State cannot contest what it agreed to before this Court in 1969 or when it signed the 1963 Consent Order and the Supplemental Order of Judge Morrison dated 12/22/1969.

Besides the agreed statement of facts in the previous case before this Court, Appellant offered expert testimony at this trial of a Kings Grant from the State of South

Carolina to John Morrall (Trans. of Rec. ___); [12] a Kings Grant from King George to John Morrall (Trans. of Rec. ___); a grant from the State of South Carolina to Daniel Morrall (Trans. of Rec. ____)[13]; a Kings Grant from King George II to John Alston (Trans. of Rec. ___); a Kings Grant dated December 4, 1735 (Trans. of Rec. ___); a Kings Grant dated August 8, 1776 (Trans. of Rec. ___); a Kings Grant dated July 4, 1785 (Trans. of Rec. ____); a King's Grant dated July 3, 1786 (Trans. of Rec. ___); and a comprehensive plat showing a compilation of all of the Kings Grants (Trans. of Rec. ____). Each of these grants showed that the manmade canals in question were part of a direct Kings Grant and in the chain of title of East Cherry Grove Realty.

Also offered into evidence during Plaintiff's case in chief was Plaintiff's Exhibit No. 31 from the South Carolina Wildlife and Marine Resources Department to Joel Perrone dated May 31, 1994. In that Exhibit Perrone asked the South Carolina Wildlife and Marine Resources Department if he needed a permit to carry out mariculture activities on his property in the Cherry Grove area. David Cupka, the Director of the Office of Fisheries Management, wrote:

> "Our information from the Senior Assistant Attorney General, Mr. Kenneth P. Woodington, is that the deed issued by the Budget Control Board in 1969 to C.D. Nixon, et al. for the bottoms generally known as the East Cherry Grove area is valid. If you plan to conduct mariculture activities in those areas which you own as legitimate successor to this deed, then you will not have to obtain any permits from this department for this activity..."
>
> "I have discussed this issue with one of our department's legal counsel, Mr. Jim Quinn, and he concurs with this opinion..." (Plaintiff's Ex. 31 R. ___).

---

[12] In that deed the language quoted as follows: "Together with all woods, underwoods, timber and timber trees, lakes, ponds, fifhings, waters, water-courfes..."

[13] Such deed provides: "all woods, trees, waters, water-courfes, profits, commodities..."

Appellant offered expert testimony to prove the Kings Grant existed over the area where the manmade canals were located including three surveyors who all concurred that the property in question was a Kings Grant. (See testimony of Wendell C. Powers, Surveyor; Michael S. Culler, Surveyor; and Joel Floyd, Surveyor. (R. ___).) Joel Floyd, an experienced surveyor in North Myrtle Beach for 29 years, testified that he has performed over 4800 surveys and is a qualified expert. (Transp. 462, lines 1-25). Mr. Floyd testified that the Kings Grants are directly over the area of the manmade canals and that this area is owned by East Cherry Grove Realty Company. (Trans. p. 476 , lines 1-25.)

Further, Floyd consulted Culler and Powers, two other surveyors with like experience (over a 100 years of combined surveying) (Trans. p. 476, lines 21-25); and that all agreed that the Kings Grants included the manmade canal areas which were subject of this litigation. (Powers testimony Trans. pp. 513-537) (Culler testimony Trans. pp. 544-556).

Finally, Gary Joseph Floyd, unrelated to Joel Floyd, testified as to compiling a comprehensive map of all Kings Grants over the area where the manmade canals had been built. (Trans. of Rec., p. 563, lines 1-25). Floyd presented Exhibit 38 which is a compilation of 17 slides (prepared by the three surveyors who previously testified) to show that the Kings Grants in this case included the manmade canals owned by East Cherry Grove Realty Company (Trans. p. 563, lines 6-19). He testified that the canals were constructed out of uplands and were in fact excavated from non-wetlands. (Trans. p. 575, lines 8-12, 15-19).

Significantly, the State did not call a surveyor to testify or contest that the canals derived from a Kings Grant. Thus, it was error for the court to send the question of whether

the property was a Kings Grant to the jury. Simply put, this fact was not contested by the City of North Myrtle Beach or the State and had previously been conceded by the State in the 1969 appeal which was settled by East Cherry Grove Realty and the State. (Trans. of Rec., ____).

In addition to the surveyor testimony offered by Appellant, the testimony of Fred Newby was also offered. Fred Newly is an attorney, licensed since 1974 and he has had extensive experience with Kings Grants and the understanding of how tidal waters work in South Carolina (Trans. of Rec., p. 429, lines 14-16). Newby has represented the Department of Interior and the U.S. Fish and Wildlife Department in determining Kings Grants where that department was attempting to buy approximately 40,000 acres along the Waccamaw River (Trans. of Rec., p. 429, lines 20-25). He has taken over a hundred parcels back to a Kings Grant in the past (Trans. of Rec., p. 430, lines 4-6). He has been offered as an expert in the field of title opinions and title research as well as he has been appointed as a special referee by the Court to determine title and/or land disputes (Trans. of Rec., p. 430, lines 4-17). Newby has used generally accepted title research methods in determining the Kings Grant as did Mr. DesChamps (Trans. of Rec., p. 432, lines 2-7). Mr. Newby submitted that the situation in this case is similar to Coquina Harbor which flows into Little River, wherein the developer built a marina and attached it to the Intercoastal Waterway (Trans. of Rec.., p. 433, lines 17-25; p. 434, lines 1-12). In that case, the Court found that merely cutting a dike and letting water flow in from the Waterway did not divest the owner of his ownership of the dirt underneath the water (Trans. of Rec., p. 435, lines 1-5). According to the Court, pursuant to the United States and South Carolina Constitutions, the only way to be divested of land in South Carolina is if it is condemned (Trans. of Rec., p.

435, lines 8-12). Newby also opined that the case of *Kaiser Aetna v. United States, supra* is applicable to the case at hand (Trans. of Rec., p. 436, lines 7-11). He testified that a person would still own the dirt under the water after he had dug a canal and the right to own the land underneath the water and the right of the public to use the water are two separate things (Trans. of Rec., p. 437, lines 20-30, 21-25). Newby testified that the beds underneath the privately dug canals are still owned by the landowner (Trans. of Rec., p. 441, lines 20-25).

In sum, Appellant proved a Kings Grant title to the area where the manmade canals were located as a matter of law. Also, the Kings Grant had been agreed to by the State in the 1969 appeal before this Court. (See Agreed Statement of Facts, R. ____). Thus, Appellant fully complied with the Court's rulings regarding Kings Grant title cases. (See *State v. Yelsen Land Co.*, 265 S.C.78, 216 S.E.2d 876 (1975) (land owner must prove perfect chain of title—which Appellant did in this case). Accordingly, Appellant was entitled to a directed verdict on the issue of a Kings Grant title regarding ownership of the bottom of the manmade canals.

VI. <u>The trial court erred in submitting the issue of public trust to the jury.</u>

At the close of the case, Defendant moved for a directed verdict on the issue of public trust. The Court denied Appellant's motion at the involuntary non-suit stage and the directed verdict stage and elected to submit to the jury the following question:

> 3. Does the State of South Carolina hold title to the canals in dispute in trust for the public?

It was error to submit to the jury the doctrine of public trust since Appellant had raised significant legal issues which prevented the jury from considering the issue. First, Appellant raised the Order of the 1963 Order signed by Judge Morrison and agreed to by the

State. In the 1963 Order, the Attorney General's Office had filed a petition (in support) and the Court had agreed to the following language:

> "Ordered that all the land lying between said unbroken blue line shown as estimated line of demarcation between upland and marshland on the above-referred to plat in the Atlantic Ocean is <u>hereby released and is declared not to be involved in nor within the scope</u> of the above-entitled action as it is and was above the mean high water mark of the adjacent title water prior to any alleged artificial changing of the level of the land or of the waterway. A copy of the plat made by said survey is hereto attached and another is on file in the Office of the Attorney General of South Carolina. A third copy will be filed with the Order in the records of Horry County.... "(R. _______)

Second, Appellant presented the only evidence regarding a Kings Grant. Expert testimony was offered of a title examination performed by William DesChamps. This same title examination was backed up by a title abstract from C.B. Berry found in the records of the Supreme Court Transcript of Record on Appeal in 1969. (Trans. ___). DesChamps testified that he researched the deeds and took this title back to 1801, which is the earliest record that Horry County Courthouse has on record. (Trans. p. 368, lines 9-10; p. 369, lines 1-3). The title search revealed that King George II conveyed the property which is the subject of this action on December 4, 1735, August 19, 1767, July 4, 1785 and July 12, 1786 and he took the deeds and overlaid them on the existing Cherry Grove map. (Trans. of Rec., p, 369, lines 1-25; p. 370, lines 20-25; p. 371, lines 1-2 and Def's Ex. 1). DesChamps hired three surveyors to do this who had over 100 years of experience and DesChamps testified that the deeds in C.B. Berry's title abstract in the Supreme Court's Record on Appeal were deeds from the State Archives (Trans. of Rec., p.371, lines 13-16; p. 373, lines 1-25 and Def's Ex. 33, 34, 35, 36). DesChamps showed the chain of title found in the title search by using the following exhibits in trial:

Exhibit 33	Kings Grant from George II to Morrall 453 Acres December 4, 1735
Exhibit 34	Kings Grant from George II to Morrall 300 Acres August 19, 1767
Exhibit 35	South Carolina State Grant to Morrall 200 Acres July 4, 1785
Exhibit 36	South Carolina State Grant to Morrall 20 Acres July 12, 1786

Mr. DesChamps explained that these deeds include all property currently owned by East Cherry Grove Realty, and these deeds (grants) include the canal area. (Trans. Record, p. 376, lines 12-18; p. 377, lines 1-12). DesChamps stated that the term, "agreed", on the plat means settlement and that each side conveyed to the other in the 1969 deeds what they had. (Trans. of Rec. p.388, lines 22-25; p. 399, lines 12-25.) Lastly, DesChamps testified that the attached abstract from Berry found in the Transcript of Record from the Supreme Court is true and accurate. (Trans. of Rec. p. 368, lines 1-25.)

This testimony of DesChamps regarding the Kings Grant coupled with the testimony of Berry and the abstract of the title were not contradicted by the State. Further, the Kings Grants themselves (Ex. 33, 34, 35 and 36) were sufficiently detailed in their description to show that those properties covered the area where the canals had been built by Nixon (Trans. of Rec., p. 376, lines 12-25). (See also, *Hobonny Club v. McEachern*, 272 S.C. 392, 252 S.E.2d 122 (1979) (detailed Kings Grants showed property below the high water mark owned by plaintiff); see also, *Coburg v. Lesser*, 318 S.C. 510, 458 S.E.2d 1547 (1995); *Estate of Tenney v. S.C. Dept. of Health & Env. Control*, 393 S.C. 100, 712 S.E.2d 395 (SC

2011). In fact, this is why the State signed the June 13, 1963 Consent Order since it knew it did not have ownership of the manmade canals.

It should also be noted that when the deeds were exchanged between the State of South Carolina and Nixon in 1969 with the attached plat (Ex. ___) such amounted to a sale of land by the Attorney General with a signature from the Governor and approval of the Budget and Control Board. This coupled with the 1963 Order and the Supplemental Order of Judge Morrison was proof the State agreed it did not own the manmade canals. *State v. Hardy*, 259 S.C. 535, 193 S.E.2d 497 (1972); 193 S.E.2d 500 (1972) (private ownership of marshland allowed in South Carolina). See also testimony of DesChamps (deeds pieced together show that the area in question was part of a Kings Grant (Trans. of Rec., p. 407, lines 1-20 and Ex. 37).

VII. <u>The trial court erred in failing to admit the transcript from the previous Supreme Court Appeal</u>.

During the trial of the case, Appellant sought to introduce Exhibit 6 into the record for review by the jury. (R. ___). Exhibit 6 was the complete trial transcript from the previous appeal between East Cherry Grove Realty and the State of South Carolina. The trial court denied this Exhibit should be entered into evidence. (Trans. of Rec., p. 685, lines 1-8).

Appellant suggests to this Court that this was error and that Appellant was entitled to present evidence of the prior proceedings to the jury to explain that East Cherry Grove Realty Company had previously litigated the same matter or matters before the Court. If Exhibit 6 had been admitted in its totality, Appellant would then have been entitled to argue and point to areas of the transcript in his closing argument. Failure to admit Exhibit 6 was

prejudicial to East Cherry Grove Realty Company and restricted its defense because the transcript of record was relevant evidence that the State did not own the manmade canals

The relevance was the transcript of the Supreme Court in the 1969 appeal included the June 13, 1963 Order, the Supplemental Order of December 22, 1969, and statements by the Attorney General that the manmade canals in question were not claimed by the State of South Carolina. These statements in the transcript which was filed in this Court in 1969 were admissible under SCRE 803 Hearsay Exception (§15). South Carolina Rule of Evidence 803(15) provides in pertinent part:

> *Statements in documents affecting an interest in property.* A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

While Appellant can find no case law in South Carolina explaining SCRE 803(15) the plain text of the rule allows for admission into evidence documents affecting an interest in property. Clearly in this case the State's prior position as put forth in the transcript of record from 1969 was an appropriate document to show the jury. See *Wilson v. Moseley*, 113 S.C. 278, 102 S.C. 330 (1920) (a record book from a Clerk's Office, wherein a deed was authorized to be recorded and was recorded, is admissible to prove the existence and contents of the deed if sufficient evidence is presented to prove that the original deed is not available.) See also *Smith v. Williams*, 141 S.C. 265, 139 S.C. 625 (1927) (husband's statement in a deed and accompanying memorandum purporting to convey an interest in property admissible to show whether family agreement had been made following husband's death entitling widow to retain use and possession of the property.)

There were also other grounds under SCRE 803(16) to admit the transcript from the 1969 South Carolina Supreme Court appeal into evidence. They include SCRE 803(16) which allows "statements in a document in existence twenty years or more the authenticity of which is established." In this case, the parties agreed that the document had a Supreme Court seal on it and thus was authentic. Accordingly, the statements made by the Attorney General and other government officials in the transcript were appropriate and relevant to the issues at hand in this case should have been admitted. See *Atlantic Coastline Rail Co. v. Searson*, 137 S.C. 468, 135 S.C. 567 (1926); *Johnson v. Pritchard*, 302 S.C. 437, 395 S.E.2d 191 (Ct.App. 1990) (duly authenticated documents thirty years or more constituted an exception to the hearsay rule).

VIII. **<u>The trial court erred in failing to use Appellant's Request to Charge.</u>**

At the close of the trial, Appellant submitted requests to charge to the court. Those included a request to charge 17 through 21 which are identified as Court's Exhibit No. 7 and Court's Exhibit No. 9 which was the case of *Vaughn v. Vermillion Corp.*, 444 U.S. 206 (1979). After consideration, the Court refused to charge Appellant's request to charge including language from *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed. 2d 332 (1979) (See Appellant's request to charge No. 21 and Court's Exhibit No. 7). While Appellant steadfastly maintains that this was an issue of law to be decided by the court if this Court were to hold otherwise Appellant believes that the jury charge did not allow Appellant to fully argue due process of law and private property rights ownership. Request to Charge No. 21 stated in pertinent part:

> When channels are built on private property with private funds, there is no general right of the public to use them by reason of the authority over navigation conferred under the commerce clause.
> *[Kaiser] Aetna v. U.S.*, 444 U.S. 164, 62 L.Ed. 2d 332 (1979).

Trans. of Rec., p. 761, lines 1-25.

Appellant also asserts error in not charging Requests to Charge Nos. 17, 18, 19 and 20:

> Request to Charge No. 17:
> I charge you that the South Carolina and United States Constitutions hold that the State shall not deprive any person of life, liberty or property without due process of law.
> *Lucas v. S.C. Coastal Council*, 424 S.E.2d 484 (S.C. 1992)
> (sic) 505 U.S. 1003 112 S.Ct. 2886
>
> Request to Charge No. 18:
> You, the jury, are to accept as conclusive any fact judicially noticed. Judicial notice takes the place of proof and simply means that the court will admit into evidence and consider without proof of the facts matters of common and general knowledge.
> *Moss v. Aetna Life Ins. Co.*, 267 S.C. 370, 228 S.E.2d 108 (1976)
>
> Request to Charge No. 19:
> A person's right in property consists not only of a right to possession, but also of a right to do with the property as he pleases, including selling it or giving it away. [1] The Supreme Court of South Carolina has stated, "[P]roperty consists... [of] an unrestricted right of use, enjoyment and disposal. Anything which destroys one or more of these elements to that extent, destroys the property itself." [2]
> [1] *Gwynette v. Myers*, 237 S.C. 17, 24, 115 S.E.2d 673, 676 (1960)
> [2] *Painter v. Forest Acres*, 231 S.C. 56, 60, 97 S.E.2d 71, 73 (1957)
> (citing *Henderson v. City of Greenwood*, 172 S.C. 16, 172 S.E. 689 (1934)).
>
> Request to Charge No. 20:
> When channels are built on private property with private funds, there is no general right of the public to use them by reason of the authority over navigation conferred under the commerce clause.
> *Kaiser Aetna v. U.S.*, 444 U.S. 164, 62 L.Ed. 2d 332 (1979).

It is well settled in South Carolina the trial judge must charge the correct statements of law. *State v. Rabon*, 275 S.C. 459, 272 S.E.2d 634 (1980). Here, the trial judge refused to charge Nos. 17-21 which were not covered in his general charge. It is respectfully suggested that the trial judge had a duty to give the requested instruction (Request to Charge

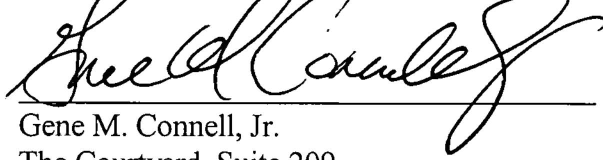
Nos. 17-21) because it correctly stated the law and was applicable to the issues and facts in the case. *Brown v. Smalls*, 325 S.C. 547, 481 S.E.2d 444 (Ct.App. 1987) (when general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and issues involved a refusal to give a request to charge is reversible error). See also *Dalon v. Golden Lanes Inc.* 320 S.C. 534, 466 S.E.2d 368 (Ct.App. 1996) (the primary purpose of the rule is to permit counsel to argue to the jury intelligently the evidence within the frame work of the applicable law and to deal with the issues to be placed before the jury.)

CONCLUSION

East Cherry Grove Realty has been fighting for its property for over 46 years. This litigation was ended with a settlement and Court Order in 1969. For the many reasons set forth in this brief, this Court should affirmatively declare that East Cherry Grove Realty owns all the bottoms of the manmade canals in fee simple. The prior settlement, the deeds and the Orders of the trial court point to only one inescapable conclusion – the trial judge should have declared as a matter of law that Appellant owned the manmade canals in question.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



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Attorney for Appellant

October 7, 2011

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

RECEIVED
OCT 11 2011
S.C. SUPREME COURT

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

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellants propose the following to be included in the Record on Appeal:

1. Complaint June 11, 2009
2. Answer and Counterclaim of East Cherry Grove Realty – August 21, 2009
3. Answer of State of South Carolina – August 12, 2009
4. Order to Consolidate cases March 19, 2010
5. Jury Verdict – March 31, 2011
6. Transcript of Record March 28-31, 2011 with Exhibits
   Plaintiff's Exhibits:
   P-1 Map of dredging project
   P-2 Permit
   P-3 Two letters dated 7/19/10 and 7/27/10
   P-4 Deed from East Cherry Grove to State of SC

P-5. Deed from State of SC to East Cherry Grove
P-7A Plat
P-15 Three Deeds East Cherry Grove Company
P-16 Judge Morrison's Order dated 04/26/1973
P-18 Petition and Order - Channel Dev. Corp.
P-20 Five Exhibits from Deposition of Dr. Nixon
P-21 Documentation of Navigability of Cherry Grove Channels dated 29 October 10
P-22 Documentation of Navigability of Cherry Grove Channels dated 24 September 10
P-23 Contract with DDC (Wooten)
P-24 Microfilm Letter
P-25 S.C. Dept of Health and Env. Control mounted on large poster
P-26 C.B. Berry article mounted on poster
P-27 Quit-Claim deed, Book 420 at page 586 mounted on five posters
P-28 Blow up of 1968 Plat from Latimer Deposition
P-29 1979 large Plat
P-30 1977 Deed of Dissolution
P-31 Two-Page Jim Quinn Letter dated May 13, 1994
P-32 Two page October 31, 1980 letter mounted on two posters
P-33 Twenty-seven color photographs with legend

Defendant's Exhibits:
D-2 Chain of Title
D-4 Map with Color Markings
D-5 Petition of State of S.C.
D-6 Order of Judge Morrison 6/13/63
D-7 Agreed Statement of Facts
D-8 Transcript of Land - Pages 1-17 only
D-10 Ten Dock Permits
D 11 Three photos of Marsh in Old Cherry Grove
D-15 Map of Cherry Grove Beach
D-17 Deed of Distribution -- Estate of Nixon to Ray T. Nixon
D-18 Warranty Deed Ray T. Nixon to East Cherry Grove
D-19 Real Estate Tax Receipts 2009
D-20 Map of Cherry Grove Beach (same as P-20)
D-21 Judge Morrison's Order dated 8/2/68
D-22 Judge Morrison's Supplemental Order dated 12/23/69
D-23 Map of Heritage Shores
D-24 Qualifications of C.B. Berry
D-25 Grant – State to David Morrall
D-26 Grant – King George II to John Morrall
D-27 Grant - State to Daniel Morrall
D-28 Grant – King George to John Alston
D-29 Map of Area from Old File
D-30 Tax Letter w/attachments dated 7/19/10
D-31 Map
D-32 Written Demo. of Tax Amount w/check & Hickman Business Card

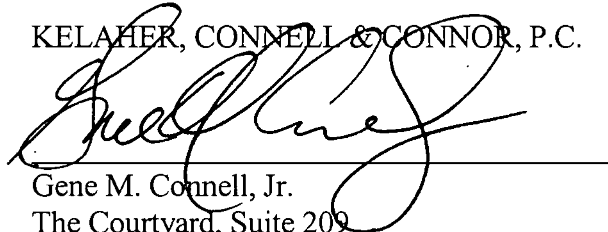
D-33 Kings Grant Deed 12/4/1735
D-34 Kings Grant Deed 8/8/1767
D-35 Kings Grant Deed 7/4/1785
D-36 Kings Grant Deed 7/3/1786
D-37 Plat showing Compilation of King's Grants
D-38 Compilation of 8-1/2x11slides (1-17)
D-39 Taped map
D-40 Check #2027 dated 1/1/11 in the amount of $445.50

Court's Exhibits:
C-1 Deposition of Dr. Nixon (written)
C-2 Video Deposition of Ed Latimer
C-3 Sealed paper Deposition of Ed Lattimer
C-4 Video Deposition of C.B. Berry
C-5 Verdict Form
C-6 Transcript of Appendix
C-7 Plaintiff's Request to Charge 1
C-8 Plaintiff's Request to Supplement Charge
C-9 Copy of *Vaughn V. Vermillion* Case

We certify that this designation contains no matter which is irrelevant to this appeal.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



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Attorney for Appellant

October 7, 2011

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William H. Seals, Jr., Circuit Court Judge

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vs.

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

PROOF OF SERVICE

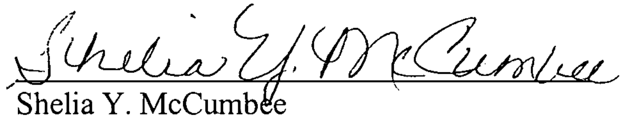
PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served Appellant's **Designation of Matter to be Included in Record on Appeal** on the Respondents, through their attorneys 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

and

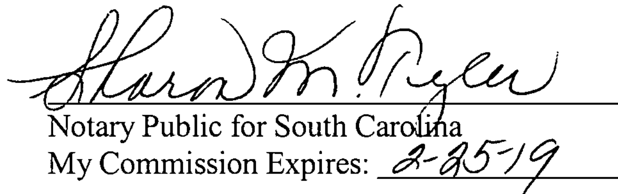
J. Emory Smith, Jr., Esquire
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Attorney for Respondent State of South Carolina

DATE OF MAILING: October 7, 2011



Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 7th day of October, 2011.



Notary Public for South Carolina
My Commission Expires: 2-25-19