THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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 the Appellant

and the State of South Carolina is a Respondent.

The Honorable William H. Seals, Jr.,
Horry County
Trial Court Case No. 2009-CP-26-5782

RESPONDENT CITY OF NORTH MYRTLE BEACH'S INITIAL BRIEF

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SUMMARY OF CASE

Respondent City of North Myrtle Beach began a dredging project for the canals in the East Cherry Grove section of North Myrtle Beach. Appellant East Cherry Grove Realty, LLC objected to the project and claimed it held legal title to the canals. The City contended it had the right to dredge the canals because the canals were owned by the State of South Carolina, the canals were dedicated to the public, and the canals were held in trust for the public as navigable waters.

Both the City and Appellants filed separate lawsuits to determine ownership of the canals which were later consolidated and tried by a jury. The first trial ended in a mistrial during jury deliberations. In the second trial, the jury found that the canals were owned by the State of South Carolina and held in trust for the public for three separate reasons. First, the State of South Carolina obtained legal title to the canals through the quitclaim deed of Appellant's predecessor in interest, C.D. Nixon. Second, Appellant's predecessor in interest had dedicated the canals to the public. Finally, the City had the right to dredge the canals because they were navigable waters held in trust for the public by the State of South Carolina.

Appellant duly filed the present notice of appeal. The City petitioned this Supreme Court to grant certiorari and hear the appeal because the issue of ownership must be resolved before the City can complete the dredging project. This Court granted certiorari.

STATEMENT OF FACTS

A. Nixon's quitclaim deed as a source of the State's title to the canals.

C.D. Nixon or East Cherry Grove Realty, Inc. (collectively referred to as "Nixon") created the canals in the East Cherry Grove Section of North Myrtle Beach primarily through dredging operations during the 1950's and 1960's. Nixon used the spoilage from the dredging to fill in marshlands and to create a Florida style canal residential development. Nixon's canal development of East Cherry Grove has spawned considerable litigation. Part of the litigation spawned was between the State of South Carolina and Nixon over the ownership of the marshlands or property the State claimed was below the mean high water mark. [Ex. P-26]

The State filed suit in 1961 and claimed ownership of all property below the mean high water mark in East Cherry Grove. The State obtained a temporary injunction preventing Nixon from selling any property below the mean high water mark. [Ex P-26] The mean high water mark was not clearly established when the State's suit was filed and the State's complaint created an unintended obstacle to Nixon's ability to convey certain undisputed high land areas in East Cherry Grove. To remedy the problem, the State agreed to release from the lawsuit certain property above or east of a surveyed high water demarcation line established in May of 1963 by three surveyors, C.B. Berry, Robert Bellamy and Sam Cox. [Ex P 26] Nixon also agreed to the high water mark established by those three surveyors. The parties entered an agreement that was reduced to an order removing that high land property east of the three surveyors mean high water mark from the lawsuit and the temporary injunction. [Ex P 26 & Ex D-6]. The consent order was signed by Judge James B. Morrison on June 13, 1963. Thereafter, the parties continued to litigate over ownership of the property west of the three surveyor's high water mark. Judge Morrison later ruled in favor of Nixon and the 1961 lawsuit was appealed by the

State. While the appeal was pending in the Supreme Court the parties settled their dispute and exchanged quitclaim deeds to formalize the settlement. [Ex. D-22]

The quitclaim deed from Nixon to the State of South Carolina established a new agreed mean high water mark and the quitclaim deed conveyed to the State (1) "all areas below the agreed mean high water mark," (2) "all other existing canals," and (3) "all areas that become areas lying below the mean high water mark as the result of excavation above the agreed mean high water mark." [Ex. P-4]

The appeal was dismissed and Judge Morrison issued a supplemental order dated December 22, 1969, which changed his earlier order to conform to the quitclaim deeds issued by the parties. [Ex. D-22] Judge Morrison's supplemental order also left intact the June 13, 1963 consent order together with two other orders releasing certain properties from the State's 1961 lawsuit.

Ed Latimer, a former attorney with the SC Attorney General's office testified at trial that he was one of the attorneys who participated in the State's litigation and helped prepare the quitclaim deed. He testified Nixon and the State intended for the settlement with the quitclaim deed to convey any interest Nixon had in the canals in question in the present appeal to the State of South Carolina. [R 214 & 217]

B. Public Dedication as a source of title.

Nixon sold lots referring to various plats recorded in the Register of Deeds for Horry County which showed the canals in question. [Ex P-20] Several of those plats contained the Note: "The owners reserve the right to revise this map. Nothing hereon shall constitute a dedication of any street, canal or other facility until such has actually been built and opened for public use." [Ex. P-28] The canals were actually built and used

by the public when the quitclaim deeds were signed. [Ex P-20] Navigable waters in the canals flowed freely with the tides to other navigable streams that connected the canals to the Atlantic Ocean. [R 77]

The public has had a long history of using the canals for transportation, boating and fishing. [R 166] Purchasers of the lots have constructed houses and docks along the canals. [R 172] Appellant and its predecessors have not paid property taxes on the canals in question. [R 177] N.F. Nixon, Jr., one of the principles with the appellant, testified that the public had always been allowed to use the canals just as they had been allowed to use the roads. [R 168]

C. Navigable waters as a source of title.

The canals in question are used by the public for recreation and transportation purposes and the canals connect through an unbroken system of navigable waterways to the Atlantic Ocean. [Ex P-20] Dr. H. Wayne Beam, the first Director of the former South Carolina Coastal Council, testified as the City's expert. He testified he did a study of the navigability of the canals shortly before the trial of the present case. [R. 68] He introduced pictures of motor propelled fishing boats in each canal in question. [R. 74] He testified that based on his personal observations, all of the canals in question were navigable waters as defined by the State of South Carolina. [R. 77]

STANDARD OF REVIEW

A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue. *Felts v. Richland County,* 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). Where, as here, the main purpose of the complaint concerns the determination of title to real property, it is an action at law. *Lowcountry Open Land Trust*

v. State, 347 S.C. 96, 101, 552 S.E.2d 778, 781 (Ct.App.2001) (citing *Wigfall v. Fobbs,* 295 S.C. 59, 60, 367 S.E.2d 156, 157 (1988) ("The determination of title to real property is a legal issue.")). In an action at law, on appeal of a case tried by a jury, the jurisdiction of this Court extends merely to the correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (S.C. 1976).

ARGUMENT

I. Judge Morrison's 1963 and 1969 consent orders do not affect the Nixon's quitclaim deed conveying his interest in the canals to the State of South Carolina.

Appellant's main argument throughout the present appeal is that Judge Morrison signed a consent order in 1963 by which the parties agreed to remove most of the general area where the canals in question were located from the scope of the State's 1961 lawsuit against Nixon. Appellant claims that Judge Morrison's order can be read only to mean that the State and Nixon agreed in the 1963 order that Nixon owned the canals in question. Further, Appellant claims Judge Morrison's 1969 consent order means Nixon's subsequent quitclaim deed to the State did not convey the canals. Appellant claims the quitclaim deed should be interpreted in view of Judge Morrison's 1969 consent order which contained a statement that his 1969 order did not affect the 1963 order or two other previous orders in which other property was released from the State's claims in the 1961 lawsuit. The City contends Appellant has misinterpreted Judge Morrison's orders.

a. Appellant's misinterpretation of the 1963 order.

The purpose of Judge Morrison's 1963 consent order was to remove undisputed high land from the scope of the State's 1961 lawsuit and a temporary injunction obtained by the State. [Ex. P-26, Ex. D-6] Judge Morrison stated in the 1963 consent order "title to certain property not intended to be included in the Plaintiff's (State) lawsuit has been questioned..." (parenthetical added) The order stated the "land" lying between the 1963 estimated line of demarcation and the Atlantic Ocean was released from the State's lawsuit. Judge Morrison's 1963 order did not mention ownership of the canals or waters east of the 1963 estimated line of demarcation.

C.B.Berry, Nixon's surveyor in 1963, interpreted Judge Morrison's 1963 Order in a newspaper article published in 2005:

> "In 1961, an injunction against Nixon and his family prohibited the operations of East Cherry Grove Beach. This action brought all operations to a standstill, marshland and highland. Subsequently the parties agreed to have a line of demarcation between the upland and the marshland established. Robert Bellamy of Myrtle Beach, Sam Cox of Conway and this writer were employed to establish this line. As a result, Judge James B. Morrison of the 15th Judicial District ordered (June 13, 1963) that all high land lying between the line of demarcation and the Atlantic Ocean be released from the injunction." [Ex. 26]

Appellant's attorney argued to the trial judge and to the jury that Judge Morrison's 1963 order's reference to land included the canals in question. Neither the trial judge nor the jury was willing to stretch the plain use of the word "land" to include canals. The jury's finding is conclusive on that issue because it is based on the evidence in the record. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (S.C. 1976).

As stated above, the actual 1963 order is silent as to any canals or waters between the 1963 estimated line of demarcation and the Atlantic Ocean. The silence as to canals

and waters is consistent with the expressed intent of the parties and Judge Morrison to allow Nixon to sell undisputed high lands notwithstanding the existence of the State's temporary injunction. [Ex P-26] The silence is also consistent with the fact that Judge Morrison did not need to determine ownership of the canals to allow Nixon to sell high lands in East Cherry Grove. There is no evidence that Nixon intended to sell the canals.

Subsequent matters and subsequent orders issued by Judge Morrison in connection with the area above the 1963 estimated high water mark provide further evidence that the parties and Judge Morrison did not intend to find that all areas under water in the uplands area were owned by Nixon.

Nixon's 1969 quitclaim deed to the State specifically referred to the "Recreational Lake" and stated: "this deed does not make any determination of title of the area shown on the said plat as "Recreational Lake" .... [Ex P-4] The City contends that if Nixon had obtained title to all areas in the 1963 consent order as claimed by Appellant and he would not have cast doubt upon that same title in a 1969 quitclaim deed.

On April 26, 1973, Judge Morrison decided a dispute over ownership of the "Recreational Lake" in the same uplands area. [R P-16] Judge Morrison found as a matter of fact in the 1973 order: That C. D. Nixon closed Cherry Grove Inlet in 1950 and formed the "Recreational Lake." He further found as a matter of law: "That the area comprising Recreational Lake is not now and never was owned by C. D. Nixon nor his predecessors in title." [Ex P-16] Judge Morrison's 1973 order contradicts Appellant's interpretation of Judge Morrison's prior 1963 & 1969 consent orders. The City contends that Judge Morrison would not find that Nixon owned the "Recreational Lake" in the 1963 and 1969 orders and then find that Nixon had never owned the "Recreational Lake"

in 1973. A reasonable interpretation of Judge Morrison's 1963 consent order is that it released only high lands from the State's 1961 lawsuit and the State's temporary injunction. [Ex. P-26]

c. ***Interpretation of prior lower court orders.***

In construing a trial judge's order this Court considers the order in light of the judge's intent as discerned from the order as a whole. *White's Mill Colony Inc. v. Williams* 363 S.C. 117, 609 S.E.2d 811(S.C.App.,2005); *Weil v. Weil*, 299 S.C. 84, 90, 382 S.E.2d 471, 474 (Ct.App.1989) (holding that "[t]he determinative factor is the intent of the court, as gathered, not from an isolated part thereof, but from all the parts of the judgment itself. Hence, in construing a judgment, it should be examined and considered in its entirety"). Adhering to this principle, this Court has refused to hold parties bound by language in a lower court order that the Court found was not necessary to the decision of the issues presented. *Id.* at 89, 382 S.E.2d at 473. (refusing to apply the "doctrine of the law of the case" to language found to be "mere dicta, an expression or statement by the court on a matter not necessarily involved in the case nor necessary to a decision thereof").

The City contends Appellant has misinterpreted Judge Morrison's order of 1963. But, even if Appellant's interpretation of the inclusiveness of "land" as used in Judge Morrison's order were correct, the language relied upon by Appellant would be considered as mere dicta in the context of the purpose of the order which was to allow Nixon to sell high land lots. *White's Mill Colony Inc. v. Williams* 363 S.C. 117, 609 S.E.2d 811(S.C.App.,2005).

c. ***Appellant's misinterpretation of Judge Morrison's 1969 order confirming settlement.***

Appellant claims Judge Morrison's 1969 order supports its interpretation of the 1963 order because Judge Morrison stated in the 1969 order that the 1963 order and two other prior orders releasing high land properties from the temporary injunction were not affected by the 1969 order. Appellant's construction of Judge Morrison's 1969 order is incorrect.

The primary purpose of Judge Morrison's 1969 order was to incorporate the party's settlement through the quitclaim deeds into a final order and end the lawsuit. Judge Morrison's 1969 order does not directly mention ownership of the canals and those canals were not necessary to accomplish his purpose. *White's Mill Colony Inc. v. Williams* 363 S.C. 117, 609 S.E.2d 811(S.C.App.,2005). On the other hand, the 1969 order does incorporate by reference the quitclaim deeds and those deeds do discuss the canals in question in detail.

The trial judge in the present appeal determined that those quitclaim deeds were ambiguous and should be construed by the jury. The jury construed the quitclaim deeds and determined that the intent of the parties in the quitclaim deeds was that the State owned the canals in question. The jury's finding is binding because it is reasonably supported by the evidence in the record. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (S.C. 1976).

The language used in the quitclaim deeds supports the jury's finding. First, Nixon's quitclaim deed to the State stated: "all areas lying below the agreed mean high water mark on 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." Those existing canals were all located in the area that the parties agreed in the

1963 consent order was part of Nixon's undisputed uplands. Nixon Canal is located entirely in the uplands area Appellant now claims it owns through Judge Morrison's order. [Ex P-4] Second, Nixon's quitclaim deed to the State stated: "That all areas that become areas lying below the mean high water mark as the result of excavation above the agreed mean high water mark are quitclaimed to the State of South Carolina." [Ex P-4] The statement would be absurd under Appellant's interpretation of the quitclaim deeds. Under Appellant's interpretation Nixon intended by reference to convey and to move future unexcavated canals in his uplands area to the area conveyed to the State. Appellant's unreasonable interpretation should be avoided by the Court. *Koon v. Fares* 379 S.C. 150, 666 S.E.2d 230 (S.C., 2008).

In addition to the language in the quitclaim deed, the City offered extrinsic evidence of the intent of the parties. As stated above, Ed Latimer, a former attorney with the SC Attorney General's office, testified at trial that he was one of the attorneys who participated in the State's 1961 lawsuit and he helped prepare the quitclaim deed. He testified Nixon and the State intended for the quitclaim deed to establish beyond doubt the canals in question in the present appeal were owned by the State. [R 216 - 217]

Ed Latimer, Assistant SC Attorney General, testified that he and SC Attorney General Daniel R. McLeod visited East Cherry Grove several times during the course of the 1962 litigation. [R 224]. The City contends it is not reasonable for Appellant to claim that the SC Attorney General would agree to a consent order giving Nixon canals that were considered navigable waters held in trust for the public while settling a lawsuit against Nixon for marshlands. Latimer testified that he and Attorney General McLeod

would not have signed the quitclaim deeds and settled the lawsuit if Nixon had not conveyed his interest in the canals to the State of South Carolina. [R 224].

In 1991, the City attempted a dredging project along similar lines as the present dredging project. [R 196] At that time C.D. Nixon was still alive. Mike Wooten, the chief engineer for the project, testified that he was not aware of any occasion where C.D. Nixon objected to the City's surveying the canals in preparation for the dredging project. [R 200] The City contends that if C.D. Nixon actually believed he owned the canals he would have made the same objection Appellant makes in the present appeal.

II. Judicial Estoppel is not applicable to the State's position on ownership of the canals.

Appellant claims that SC Attorney General Dan McLeod and his assistant Ed Latimer conveyed the State's rights over public navigable waters to Nixon by signing a consent order in the Court of Common Pleas through the doctrine of judicial estoppel. Appellant's misapplication of the doctrine of judicial estoppel violates well established South Carolina common law and South Carolina's constitution. See *The State v. Pacific Guano Company*.22 S.C. 50, 1884 WL 4624 (S.C.) (conveyance of interest in navigable streams requires a special act of the legislature); Also see S.C. CONST Art. XIV, § 4.

In its estoppel argument Appellant is asking the Court to use an equitable doctrine to complete what would have been an illegal act if it had been done by its attorneys. *Id.* In addition, Appellant cannot meet the test for the application of judicial estoppel against the State. Five elements are required for the application of judicial estoppel: (1) two inconsistent positions must be taken by the same party or parties in privity with each other; (2) the two inconsistent positions were both made pursuant to sworn statements;

(3) the positions must be taken in the same or related proceedings involving the same parties in privity with each other; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent-that is, the truth of one position must necessarily preclude the veracity of the other position. *Wright v. Craft*, 372 S.C. 1,640 S.E.2d 486 (S.C. Ct. App. 2006).

First, as shown in the previous section of this brief, the State has not taken inconsistent positions on ownership of the canals. Second, the alleged inconsistent positions were not taken pursuant to sworn statements of fact to the Court. Third, the alleged inconsistent positions were not taken in the same or related proceedings involving the same parties in privity with each other. The 1961 litigation involved establishing a mean high water mark between high lands and marshlands. [Ex P-26] The present appeal involves only the ownership of the canals. Fourth, Appellant has not offered any evidence to show the alleged inconsistency in positions was part of an intentional effort to mislead the court. In 1963, the State was assisting Nixon in his efforts to sell undisputed high lands. Finally, the State's position as to ownership of the canals is not totally inconsistent with its position that Nixon owned high lands in the same area where the canals are located. Canals and uplands are usually treated differently by South Carolina law. *Hughes v. Nelson,* 303 S.C. 102, 399 S.E.2d 24 (1990). The State is not barred from ownership of the canals by the doctrine of judicial estoppel. See *Wright v. Craft*, 372 S.C. 1,640 S.E.2d 486 (S.C. Ct. App. 2006).

III. The issue of public dedication was properly submitted to the jury.

This Court has held it is the duty of the fact finder to determine the question of public dedication. *McAllister v. Smiley* 301 S.C. 10, 389 S.E.2d 857 (S.C.,1990). If

conflicting evidence in regard to the issue of public dedication is introduced at trial, the trial court should submit the issue of public dedication to the jury. *Id.* In its argument on public dedication, Appellant is attempting to get this Court to substitute Appellant's view of conflicting facts for the view taken by the jury. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (S.C. 1976). The record contains substantial evidence to support the jury's finding of public dedication of the canals. Nixon quitclaimed his interest in the canals to the State. Nixon did not pay property taxes on the canals. [R 177] Appellant did not pay property taxes on the canals. [R 590] The non-assessment of taxes is a factor in the determination of dedication and acceptance. *Tupper v. Dorchester County* 326 S.C. 318, 487 S.E.2d 187 (S.C.,1997).

Nixon sold lots with references to plats that showed the canals laid out like streets. [Ex P-26] The surveyors' notes on the plats stated that the canals were not dedicated to the public until they were actually built and opened for public use. [R] The canals were built and opened for public use. One of Appellant's own principles, N.F. Nixon, testified the public used and had always been allowed to use the canals just as they had been allowed to use the roads. [R 168] Hank Thomas, a realtor in East Cherry Grove, testified the canals were open and used by the public. [R 117] Mike Wooten testified that he caused the canals to be surveyed for a prior planned dredging project in 1991. He testified that no one objected to the City surveying the canals. [R 199]

Attorney Allen Jeffcoat testified as the City's expert on public dedication. [R 266 – 280] He gave his opinion that based upon the evidence introduced in the present case, the canals were dedicated to the public. He gave a detailed factual and legal basis for his conclusions in during his testimony. [R 266-280]

The trial judge charged the jury that public dedication had to be proven by strict, cogent and convincing evidence. [R 749] The question of public dedication was a jury question which was properly decided by the jury. *McAllister v. Smiley* 301 S.C. 10, 389 S.E.2d 857 (S.C., 1990).

IV. The City's use of public canals is not unconstitutional.

Appellant claims that two U.S. Supreme Court cases are applicable to the present case. *Kaiser Aetna v. United States*, 444 US 164 (1979) and *Vaughn v Vermillion Corp.* 444 US 206 (1979). Both cases can be distinguished because they involved private property and the property laws of other States. See *Fish House, Inc. v. Clarke* 693 S.E.2d 208 (N.C.App.,2010))(case distinguishes both U.S. Supreme Court cases in connection with a public versus private canal citing South Carolina case: *Hughes v. Nelson,* 303 S.C. 102, 399 S.E.2d 24 (1990). The present appeal involves navigable canals that were openly and freely used by the public for navigational purposes. [R 166] Under South Carolina law those canals are public. See *Hughes v. Nelson,* 303 S.C. 102, 399 S.E.2d 24 (1990).

Under South Carolina law, the right of public access to navigable waters is guaranteed by our state constitution: "All navigable waters shall forever remain public highways free to the citizens of the State...." S.C. Const. art. XIV, § 4. South Carolina Code section 49-1-10 (1986) similarly provides that "[a]ll streams which have been rendered or can be rendered capable of being navigated by rafts of lumber or timber by the removal of accidental obstructions and all navigable watercourses and cuts are hereby declared navigable streams and such streams shall be common highways and forever free...." In upholding this constitutional and statutory mandate, our courts look to whether

the waterway in question is accessible by the public and it has the capacity to support "valuable floatage." If the waterway can meet those requirements, it is deemed navigable and thus open to the public. *Id.*

Dr. H. Wayne Beam, the first Director of the former South Carolina Coastal Council, testified as the City's expert. He testified he did a study of the navigability of the canals in question shortly before the trial of the present case. [R. 68] He testified that based on his personal observations, all of the canals in question were navigable waters as defined by the State of South Carolina. [R. 77] All the surveys and aerial photographs of the canals show they are connected to the Atlantic Ocean through a series of navigable waterways and they accessible to the public. [Ex P-21] Appellant's principal, N.F. Nixon testified the canals were open and accessible to the public.[R 168]

The two US Supreme Court cases cited by Appellant dealt with the issue of whether the US government has committed a taking of private property if it forces property owners to give up their rights to exclude the public from their private waterways. In those cases the property owners had always excluded the public from those waterways. The US Supreme Court held that if the US Government forced the property owners to open private property to the public under Louisiana or Hawaii state law and under the facts of those cases, such a government act would constitute a taking under the US Constitution. *Kaiser Aetna v. United States*, 444 US 164 (1979) and *Vaughn v Vermillion Corp.* 444 US 206 (1979).

The canals in the present appeal have always been open to the public. [R 168] The City will be dredging the canals to make them more navigable. Even if the Appellant did own the bottom areas under the water in the canals it would not be entitled

to a takings claim against the City for dredging navigable waters open to the public. See *Lewis Blue Point Oyster Cultivation Co. v. Briggs* 229 U.S. 82, 33 S.Ct. 679, 57 L.Ed. 1083 (U.S. 1913) (owner of legal title of land under the water of Great South Bay, whether derived from the state of New York or from royal patents, has no property right therein entitling him to compensation for the destruction of an oyster plantation thereon by the dredging of a deep-water channel across the bay by the United States, in the interests of navigation). Also see *U.S. v. Cherokee Nation of Oklahoma* 480 U.S. 700, 107 S.Ct. 1487, 94 L.Ed.2d 704, 55 USLW 4403 (U.S.Okl.,1987).

V. Appellant cannot show the deeds are unambiguous through use of extrinsic evidence.

The intention of a grantor of an unambiguous deed must be found within the four corners of the deed. *K & A Acquisition Group, LLC v. Island Pointe, LLC,* 383 S.C. 563, 581, 682 S.E.2d 252, 262 (2009). Only when intention is not expressed accurately in the deed is it determined to be ambiguous and evidence *aliunde* may be admitted to supply or explain it. *Id.* A deed is ambiguous only when it may fairly and reasonably be understood in more ways than one, i.e., when it is obscure in meaning through indefiniteness of expression, or containing words having a double meaning. *Santoro v. Schulthess,* 384 S.C. 250, 272, 681 S.E.2d 897, 908 (Ct.App.2009). The question of ambiguity of a deed is a legal question for the court. *Hammond v. Lindsay,* 277 S.C. 182, 184, 284 S.E.2d 581, 582 (1981); *Hunt v. Forestry Comm'n,* 358 S.C. 564, 568, 595 S.E.2d 846, 848 (Ct.App.2004).

Appellant's arguments that the deeds were not ambiguous are self defeating because Appellant uses only extrinsic evidence to support its claim. The evidence

Appellant uses to support its claim is the prior order of Judge Morrison, the transcript of the appeal from the 1961 litigation, and the testimony of C.B. Berry. Appellant fails to discuss the ambiguous language in the four corners of the deed. *K & A Acquisition Group, LLC v. Island Pointe, LLC,* 383 S.C. 563, 581, 682 S.E.2d 252, 262 (2009).

The trial judge was correct, Nixon's quitclaim deed was ambiguous. The ambiguities in the quitclaim deed can be shown in several ways. Two experienced Horry County real estate attorneys familiar with East Cherry Grove examined the quitclaim deed and gave very different opinions on the intent of the grantor as expressed in the quitclaim deed on the ownership of the canals. [R 280 & 377] The quitclaim deed referred to "all existing canals" but failed to name the canals that existed. The quitclaim deed refers to areas above or below the mean high water mark instead of using customary directional references of east or west of the mean high water mark as depicted on the plat. The references above or below usually refer to an actual mean high water mark affected by changing tides over time. *Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co.,* 148 S.C. 428, 146 S.E. 434 (1928). On the other hand, east or west references are usually mentioned in property descriptions and they refer to surveyed lines that are placed on plats. See *Standards Of Practice Manual For Surveying In South Carolina*, SC Code Reg. Chapter 49, Article 4, Regulations 400-490. The quitclaim deed description to an agreed high water mark instead of an actual survey line and it uses both above and below references and east and west references in an ambiguous manner in the main body of the property description. [R 319]

(A) The plat rule is not applicable to the ambiguities in the present quitclaim deed.

A plat becomes part of the deed for the purposes of showing the boundaries, metes, courses and distances of the property conveyed. *Hobonny Club, Inc. v. McEachern,* 272 S.C. 392, 252 S.E.2d 133 (1979). The present appeal does not involve a dispute over the boundaries, metes, courses and distances of the property conveyed. The present appeal involves a dispute over whether the canals which are correctly depicted on the plat in question were conveyed to the State in the quitclaim deed. The granting language in the quitclaim deed states that all existing canals and all property that becomes property below the mean high water mark as the result of excavation are quitclaimed to the State of South Carolina. The plats correctly show all the canals in the present appeal.

(B) Kings Grant title had no bearing on the State's ownership of canals created in 1950's and 1960's.

Appellant claims the quitclaim deed is not ambiguous because Nixon's title to the former uplands that were converted to canals can be traced to a King's grant. The City contends the King's grants have no bearing on the ambiguities in Nixon's conveyance of the canals to the State. All of the events giving rise to the State's ownership of the canals occurred after the canals were created in the 1950's and 1960's. [Ex. P-26] Nixon's quitclaim deed was issued, Nixon's public dedication and the public's use of the canals as navigable waters occurred approximately 200 years after the King's grants were made. If the King's grants have any bearing on the State's ownership of the canals, the grants show that the State can now trace its title to the canals back to the same King's grants.

Appellant claims the present appeal is similar to *Folly Beach v Atlantic House Properties*, 318 S.C. 450, 458 SE 2d 426 (1995). That case is not applicable because in that case the City of Folly Beach condemned property where it was uncontested that the

private landowner was the "owner of record" of land below high water mark. The Court held that the City had to compensate the landowner for the value of the land taken. The present case is different because it involves the question of who owns the canals. In the present appeal, the jury found that the State owns the canals. The State is not taking the Appellant's private property.

VI. The issue of public trust was properly submitted to the jury.

The State holds title to the canals in East Cherry Grove in *jus privatum,* and it holds title in *jus publicum,* in trust for the benefit of all the citizens of this State. *McQueen v. South Carolina Coastal Council* 354 S.C. 142, 580 S.E.2d 116 (S.C.,2003). The State's title *jus publicum* was created when Nixon dug navigable canals, connected them to other navigable waterways, and opened the canals to the public. See *Hughes v. Nelson,* 303 S.C. 102, 399 S.E.2d 24 (1990)(Fact that canal had been privately dug did not preclude finding that it was a navigable water, where the public had not been excluded from it). Appellant does not actually contest the fact that the public uses the canals. [R 166] Appellant questions whether the canals are in fact navigable. The jury decided that question in favor of the State when it found that the canals were held by the State in trust for the public. Dr Wayne Beam's testimony provided the evidence necessary to support that jury finding. [R. 68]

VII. The transcript from the 1962 Supreme Court appeal had no bearing on the State's ownership of the canals.

Appellant claims the trial court abused its discretion and committed reversible error by failing to admit the transcript of the State's 1961 litigation. The trial court did allow Appellant to introduce the Agreed Statement of Facts from the 1961 litigation. The

City contends the agreed statement of facts was sufficient. Introducing the entire 259 page transcript with pleadings, motions, and transcripts of testimony from unavailable witnesses would have been cumulative and would have confused the jury. The trial court properly exercised its discretion by excluding the transcript of the 1961 litigation. See *Gamble v. Int'l Paper Realty Corp. of S.C.,* 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996) ("The admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal.") and *Richardson v. Donald Hawkins Const., Inc.* 381 S.C. 347, 673 S.E.2d 808 (S.C.,2009)(where the jury would have been misled and/or confused on the issues presented, the court properly excluded the evidence)

Appellant has mischaracterized the scope and purpose of the 1961 litigation. The parties in the 1961 litigation were focused on who owned the marshlands and where the mean high water mark should be located. The upland area where the canals were dug was released from the scope of that lawsuit in Judge Morrison's consent order dated June 13, 1963. The fact that the ownership of the canals was not an issue in the 1961 litigation did not prevent Nixon from conveying the "existing canals" to the State as part of the consideration Nixon gave for settlement of the 1961 litigation. Further, nothing in the 1961 litigation concerned the questions of public dedication of the canals or whether the canals were navigable waters and held in trust by the State for the public. If the evidence was relevant, the trial court's exclusion of the evidence was not reversible error. *Id.* Also see *Rule 403*, SCRE & *Rule 220*, SCACR .

VIII. The trial court correctly charged the jury.

When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues. A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial. *Berberich v. Jack* 392 S.C. 278, 709 S.E.2d 607 (S.C.,2011).

The trial judge's refusal to give the requested charges was not erroneous because inverse condemnation or government taking of private property by the State of South Carolina were not issues in the lawsuit. The issues tried involved a declaratory judgment action over ownership of the canals. The purpose of the City's declaratory judgment action was not to force Appellant to give up its private canals or admit the public to those canals. The purpose of the City's action was to determine who owned the canals and how those properties were held. If the jury had found that Appellant owned the canals then the charge would have been proper. If the City had taken the position that it owed no money to the Appellant for taking Appellant's private canals, Appellant could claim that it had a constitutional right to just compensation and the jury charges requested. *Fish House, Inc. v. Clarke* 693 S.E.2d 208 (N.C.App.,2010). However, that was not the City's position in the lawsuit and the Appellant was not successful in establishing its ownership of the canals. The issues of due process and just compensation never arose because they were not part of the declaratory judgment action.

Even if the trial judge had erred in refusing Appellant's requested charges, the trial judge's refusal to give the requested charges was not prejudicial because of the "two issue" rule. *Bryant v. Waste Management, Inc.* 342 S.C. 159, 536 S.E.2d 380 (S.C.App.,2000) (Under the two issue rule, when a case is submitted to the jury on two or

more theories and a general verdict is returned, the verdict will be upheld if it is supported by at least one theory). Also see, *Rule 220*, SCACR.

In addition to finding canals were public navigable waters, the jury found the canals belonged to the State of South Carolina because of Nixon's quitclaim deed and because Nixon had dedicated the canals to the public. Those determinations were independent of Appellant's claim that its private property could not be taken. Appellant was not prejudiced by the trial judge's charge to the jury. *Id.*

CONCLUSION

For the reasons stated above, the City of North Myrtle Beach requests the Court to affirm the jury's verdict and dismiss the appeal.

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November 4, 2011

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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 the Appellant

and the State of South Carolina is a Respondent.

The Honorable William H. Seals, Jr.,
Horry County
Trial Court Case No. 2009-CP-26-5782

RESPONDENT CITY OF NORTH MYRTLE BEACH'S DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Respondent City Of North Myrtle Beach proposes 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. Response to Counterclaim by City of North Myrtle Beach

5. Order to Consolidate cases March 19, 2010

6. Jury Verdict - March 31, 2011

7. Transcript Pages 68 – 661 and Transcript Pages 766 - 770

Plaintiffs 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-7 A 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 Environmental Control mounted on large poster
P-26 C.B. Berry article mounted on poster (may substitute reduction)
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 IT 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 2
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 8-1I2x11 slides (1-17)
D-39 Taped map
D-40 Check #2027 dated 111/11 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 Latimer
C-4 Video Deposition of C.B. Berry
C-5 Verdict Form
C-6 Transcript of Appendix
C-7 Plaintiffs Request to Charge 1
C-8 Plaintiff's Request to Supplement Charge
C-9 Copy of *Vaughn V. Vermillion* Case

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

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