IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE BEAUFORT COUNTY
COURT OF COMMON PLEAS

HONORABLE MARVIN H. DUKES, III, MASTER IN EQUITY
AND SPECIAL CIRCUIT COURT JUDGE

CASE NO.: 2013-CP-07-02066

CAROLINA CENTER BUILDING CORP.,

Appellant,

vs.

ENMARK STATIONS, INC. AND
THE TOWN OF HILTON HEAD ISLAND,

Respondents.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE

A. Procedural History

This action over a disputed prescriptive easement was commenced by the filing of a Summons and Complaint in the Beaufort County Court of Common Pleas on August 15, 2013. After a period of initial discovery, an Amended Complaint was filed on November 19, 2014.

In its Amended Complaint, the Appellant Carolina Center Builder Corporation ("Carolina Center") asserts seven (7) causes of actions against the Respondent Enmark Stations, Inc. ("Enmark") and one (1) cause of action against the Respondent the Town of Hilton Head Island ("Town").

The first cause of action seeks a determination or declaration from the Court that the Respondent Enmark does not possess an express easement over the Appellant's property.

The second cause of action seeks a determination or declaration from the Court that the Respondent Enmark does not possess a prescriptive easement over the Appellant's property.

The third cause of action alleges that the claimed easement is an illegal encroachment and seeks its removal.

The fourth cause of action seeks an order compelling the Respondent Enmark to bring the encroachment into compliance with the Ordinances of the Town existing at the time the encroachment was illegally paved by the Respondent Enmark.

The fifth, sixth and seventh causes of action allege slander of title, trespass, and nuisance, respectively and, in addition to removal of the encroachment, request the entry of a judgment for actual and punitive damages against the Respondent Enmark.

The eighth and final cause of action, which is the sole cause of action against the Respondent Town, seeks a Writ of Mandamus compelling the Respondent Town to enforce its

Ordinances against the Respondent Enmark with respect to the encroachment.

In its Answer and Counterclaim to the Amended Complaint filed on December 18, 2014, the Respondent Enmark denied the material allegations of the Amended Complaint and affirmatively claimed that it had either an express easement or a prescriptive easement for purposes of ingress and egress over the Appellant's property.

In its Answer to the Amended Complaint filed on January 21, 2015, the Respondent Town denied the material allegations of the Complaint, expressly denying that the Appellant was entitled to a Writ of Mandamus.

On October 23, 2015 the Trial Court granted the Appellant's Motion for Summary Judgment with respect to the Respondent Enmark's claim for an express easement. This Order was not appealed. With the entry of summary judgment in favor of the Appellant as to the express easement claim, the only remaining easement claim for the Court to decide was Enmark's claim to a prescriptive easement.

This case was referred to the Honorable Marvin H. Dukes, III, Beaufort County Master in Equity, in accordance with §14-11-85 of the South Carolina Code of Laws, with authority to enter a final judgment, directly appealable to the South Carolina Court of Appeals as provided by the South Carolina Appellate Court Rules.

The non-jury trial of this action was conducted before the Master in Equity on June 20 and 21, 2016.

Over 9 months later, on March 30, 2017, the Master in Equity issued his decision, captioned "Final Order Ending Case," in which he ruled that the Respondent Enmark, its successors and assigns, had a prescriptive easement over the Appellant's property for purposes of ingress and egress. Judge Dukes accordingly dismissed the Appellant's claims for slander of

title, trespass and nuisance, and denied the Appellant's request for a Writ of Mandamus against the Respondent Town.

The Appellant filed a Motion to Alter, Amend or Reconsider on April 7, 2017, which was denied on July 14, 2017.

The Appellant filed its Notice of Intent to Appeal to the South Carolina Court of Appeals on July 18, 2017.

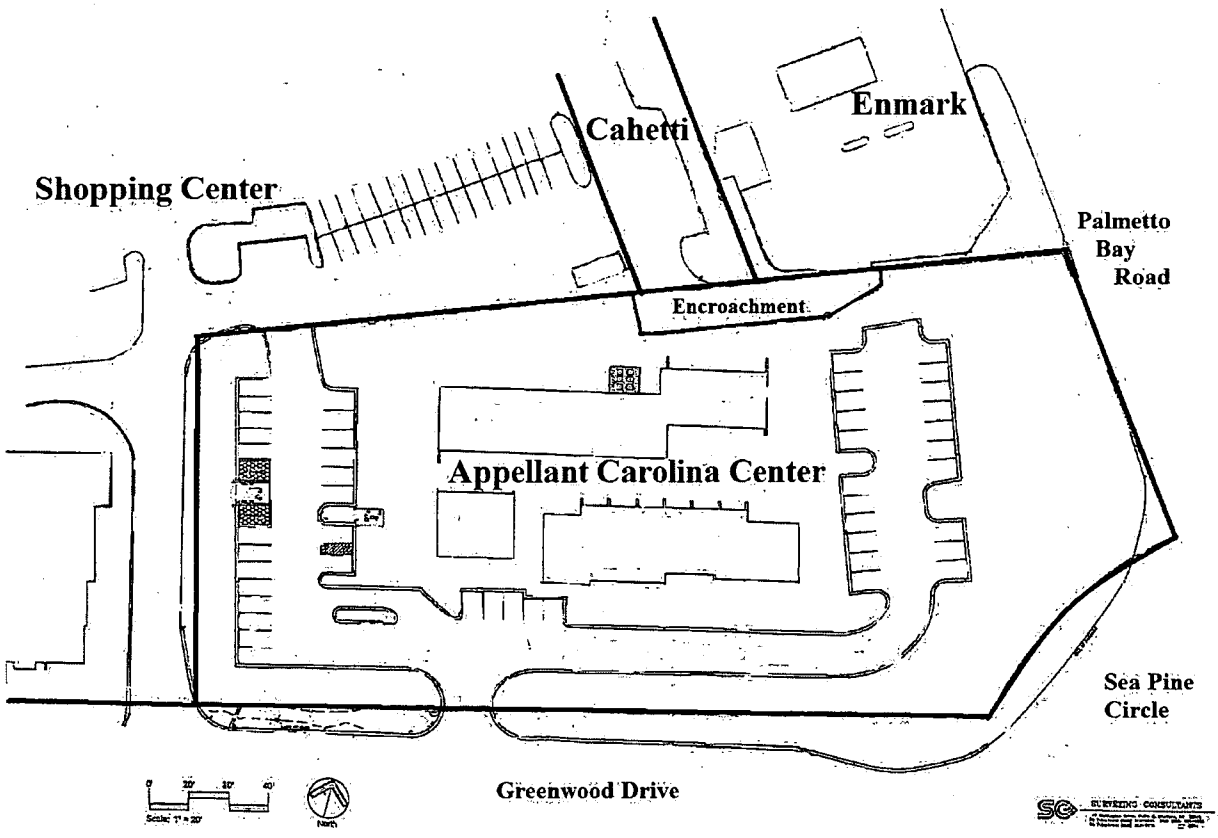
B. Factual Background

The Appellant and the Respondent Enmark own adjoining parcels of real property located within the jurisdiction of the Respondent Town. The Appellant's property has frontage on and direct access to Greenwood Drive, which is a public road. Situated on the Appellant's property is a bank, real estate, and medical offices. The Respondent Enmark's property has frontage on and direct access to Palmetto Bay Road, which is also a public road. Situated on the Respondent Enmark's property is a gas station with an ancillary convenience store and car wash.

The alleged easement (hereinafter the "encroachment"), which is the subject of this dispute is accessed by customers of the Respondent Enmark, as well as the general public, by crossing over the common boundary separating the property of Appellant and the Respondent Enmark. Those wishing to use the alleged encroachment must traverse over property owned by the Appellant. In order to reach a public road, after traversing over the Appellant's property, those using the encroachment must then trepass over property owned by a non-party, Cahetti, Inc., on which a restaurant is located, and then cross and trespass over property currently owned by Publix Supermarkets, Inc., also a non-party. The Publix Supermarkets, Inc. property is a large parcel, which was previously owned by Market Place Shopping Center, on which a shopping center is located. The shopping center property provides access points equipped with a

stop light on Palmetto Bay Road and to Greenwood Drive Use of the encroachment by customers of Respondent Enmark and the general public is a matter of convenience, not necessity, as the Enmark service station has direct frontage on and access to Palmetto Bay Road. Among other things, use of the encroachment avoids the heavy congestion created by a traffic circle adjoining the properties of these parties on which both Palmetto Bay Road and Greenwood Drive terminate.

A diagram of the encroachment, as well as the properties it affects, is set forth below. This diagram is based upon the plat attached to the Final Order of Judgment. Tr. pg. ____.



C. Chronological History

1. The Enmark Tract

The property on which the Enmark gas station is now located was originally owned by

Sea Pines Plantation Company. On March 12, 1974, the Sea Pines Plantation Company sold this property to the Chevron Oil Company (Exhibit 2). At that time, the property was unimproved. The plat referenced in the deed from Sea Pines to Chevron (Plat Book 22 at Page 47) shows no improvements on the Enmark tract. (Exhibit 18). A subsequent plat (Plat Book 22 at Page 85) likewise shows no improvements on the Enmark tract. (Exhibit ___).

The properties of Appellant and Respondent Enmark are both located within Beaufort County, South Carolina. A 1979 aerial photograph maintained by Beaufort County's Geographical Information Service (GIS) shows no improvements on the Enmark tract. (Exhibit ____).

Following prolonged litigation[1] Chevron began building its gas station on the Enmark tract. The Development Permit was issued on August 1, 1983, construction was commenced on February 20, 1984, (after the incorporation of the Town of Hilton Head Island in 1983)and the Certificate of Occupancy was issued on June 1, 1984. (Exhibit 78, pp. 1460, 1470, and 1475).

A 1986 aerial photograph maintained by Beaufort County's GIS shows the service station and car wash buildings located on the Enmark tract, and the although the photograph is of poor resolution, the encroachment does not yet appear to exist. Exhibits 44 and 31.

The encroachment is shown for the first time on a plat dated November 1, 1989 and recorded on March 9, 1990 in Plat Book 38 at Page 53. Exhibit 21. As shown on this plat, the encroachment splits or separates around an "island" as it exits off of the property of Carolina Center. One segment travels eastwardly around this island onto the property belonging to Cahetti Inc. on which a restaurant is located and from there onto the property currently belonging to Publix. The other segment of the encroachment travels to the western side of the island and exits directly onto the property of Publix Super Markets.

[1] This litigation is discussed in more detail in Issue I, supra.

A plat recorded on April 19, 1991 in Plat Book 41 at Page 18 depicts the encroachment in the same location as the earlier plat. Exhibit 22.

On August 23, 1993, Chevron sold the Enmark tract to ASA, Inc., which was owned and operated by Alice Means.

On March 19, 2009, ASA, Inc. sold the Enmark tract to Enmark, which has owned it since that time. Exhibit 5. With this sale, the Chevron Station became an Enmark Station.

At some point in time prior to February 17, 2004 Publix placed a large dumpster on the encroachment, effectively blocking that portion of the encroachment which traversed to the western side of the "island" and directly onto its property. Exhibit 49. Thereafter, only that portion of the encroachment which traversed to the eastern side of the island was utilized, forcing users to travel over the properties of both Cahetti and Publix Super Markets before reaching a public road.

2. Appellant's Tract

The chain of title for the Appellant's tract is discussed in conjunction with Issue V. Appellant's Brief, pp. 34 – 35, infra.

I. THE MASTER IN EQUITY ERRED IN AWARDING TO THE RESPONDENT ENMARK A PRESCRIPTIVE EASEMENT WHERE THE ENCROACHMENT EXISTS ONLY AS A RESULT OF WRONGFUL ACTS.

Enmark is barred from being awarded a prescriptive easement, inasmuch as the encroachment exists only by virtue of the illegal, wrongful, and criminal acts and conduct of Enmark and its predecessors in title.

The equity maxim: He who seeks equity must do equity." is well established in South Carolina Jurisprudence. See, e.g., *Ingram v. Kasey's Assoc.*, 340 S.C. 98, 107, 531 S.E.2d 287, 291 (2000). "In order for justice to be done between parties, a party is required to do equity

when asking the Court in invoke the aid of equity." *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 259, 715 S.E.2d 348, 358 (Ct.App. 2011).

This is a corollary of the equally well-established principle that a party with unclean hands is precluded from recovering in equity. The Doctrine of Unclean Hands precludes a party from recovering in equity if it acted unfairly in a manner that is the subject of the litigation to the prejudice of the other party. See, e.g., *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 75, 698 S.E.2d 244, 247 (Ct.App. 2010).

In short, a Court will not grant relief to a party, where the party seeking relief bases its claim upon wrongful conduct. In the instant case, the conduct was not only inequitable, it was illegal. The encroachment came into existence only as a result of the deliberately, wrongful, criminal and illegal acts and conduct of Enmark and its predecessors in title.

When Chevron purchased the property from Sea Pines in 1974 (Exhibit 2) the property was undeveloped (Exhibits 18 and 19).

Chevron obtained a Development Permit to develop the property and construct its gas station many years later, only after filing a lawsuit which culminated in the issuance of an Order by the Honorable Luke N. Brown, Jr., Judge of the Fourteenth Judicial Circuit on February 11, 1983. During pendency of this lawsuit, the Town of Hilton Head Island was not yet in existence, and the property was part of the unincorporated area of Beaufort County. Development of the property was controlled by Beaufort County's Development Standards Ordinance ("DSO"). The DSO was administered by the Beaufort County Joint Planning Commission.

Judge Brown's Order recites that in December, 1981 Chevron submitted site plans to the Beaufort County Joint Planning Commission requesting a Development Permit for the development of a service station on its property. Accompanying its site plans, among other

things, was a request for a variance from Section 4.2.3 of the DSO which required a distance of 500' between access points to major thoroughfares. Chevron desired an access point onto Palmetto Bay Road closer than the aforesaid 500'. The Joint Planning Commission denied this variance request and Chevron appealed, contending that Beaufort County abused its discretion in failing to grant to Chevron the requested variance.

In its appeal before Judge Brown, Chevron argued that the variance should have been granted because Chevron had proven a "unique hardship in order to justify the requested variance." Exhibit 77, pg. 1364. Judge Brown agreed, finding that this "particular property suffers a singular disadvantage through the operation of the Ordinance." *Id.*

In ordering the variance to be issued Judge Brown relied upon several facts advocated by Chevron in support of its variance request. In addition to the general layout and function of the property, these facts included:

(1) There is a power line easement, which runs generally along the southern boundary of the property, which *prohibits* the placement of any structures within this easement. *Id.*, pg. 1366.

(2) The development must be approved by the Sea Pines Plantation Architectural Review Board. *Id.*, pp. 1366-67.

(3) Without the requested variance, the property would have only one curb cut, which would be problematic for the maneuvering of tanker trucks. *Id.*, pg. 1366.

(4) In support of the latter factor, Chevron had argued to Judge Brown that it had made "numerous efforts" to obtain alternate access to its property, and had "contacted the owner of the property behind it in order to obtain a rear access point into the Market Place Shopping Center, however this proposal was rejected by the shopping center owners."

This is confirmed by a letter dated July 3, 1981 to Chevron, which states in pertinent part as follows:

> "As agent for the owner of the Market Place Shopping Center Complex, I have been instructed to advise you that your request for access

> to your property, other than directly from Palmetto Bay Road, would create unreasonable traffic flow problems to our existing facilities. Further, such access, if granted, would interfere with our future development plans for the expansion of the shopping area.
>
> Based on the above, we do not feel that we can grant access through or over the existing Center property as the sole access to your station." *Id.*, pg. 1397.

This letter closes with the observation that access to the Chevron property "was intended to be from Palmetto Bay Road." *Id.*

In sum, Chevron obtained its Development Permit by representing that no structure could be built within the power line easement area, its development was subject to approval by the Sea Pines Architectural Review Board ("ARB"), and it could not access its property from the rear over the shopping center property.

In reliance upon the aforesaid representations by Chevron, Judge Brown ordered Beaufort County to issue the Development Permit. The Development Permit was issued in compliance with his Order on August 1, 1983. Exhibit 78, pg. 1475. In accordance with the Development Permit, the Building Permit was issued on January 27, 1984. *Id.*, pg. 1473. In accordance with the Development Standards Ordinance, the permit expressly recites that no alterations from the application can be made without further approval from the permitting authority. *Id.*

As required by the Restrictive Covenants applicable to the property (Exhibit 26), the Sea Pines Plantation Architectural Review Board approved Chevron's plans. Exhibit 78, pg. 1477. This approval expressly recites that "any changes thereto must be submitted for approval" to the ARB. *Id.*

The aforesaid plan submitted by Enmark to Beaufort County and the Sea Pines Plantation ARB *clearly and plainly show a 6-inch concrete curb running the entire length of the boundary between the Chevron/Enmark parcel and the property now belonging to the Plaintiff Carolina*

Center. Exhibit 77, pp. 1313-14.

The encroachment now at issue exists only because sometime after the Certificate of Occupancy was issued on June 1, 1984 (Exhibit 77, pg. 1460) and prior to the making of the plat on November 1, 1989 (Exhibit 21) the 6-inch raised concrete curb that blocked access to the Appellant's property was illegally and surreptitiously removed and a curb-cut was created in order to allow encroachment from the Enmark property onto Appellant's property. This was done without the approval of either Beaufort County or the Town of Hilton Head, and without the approval of the Sea Pines ARB. **This was a conscious, willful, illegal, criminal and deliberate violation of the Development Permit, without which the encroachment could not exist.**

The curb-cut is depicted on Exhibit 42, pg. 2. See also Transcript, Volume I, pg. 59, lines 19 – 22.

The Respondent Town was organized in 1983. Prior to that time, development was controlled by Beaufort County's Development Standards Ordinance (DSO). After 1983, the Respondent Town continued to operate under the DSO (Transcript, Volume II, pg. 44, line 14 – pg. 45, line 3). The DSO remained in effect until January of 1987, when the Respondent Town enacted its Land Management Ordinance (LMO). *Id.* The DSO under which the Town operated prior to its enactment of the LMO was largely the same as the County's DSO. *Id.* While the Town operated under the DSO, it utilized Beaufort County for the permitting as it did not yet have the staff and facilities in place to do it itself. *Id.*

The Development Permit, which mandates a 6-inch concrete curb along the border with Appellant's property expressly provides that no alterations to the permit would be allowed without further approval. Transcript, Volume II, pg. 61, lines 14 – 20 and pg. 67, line 25 – pg.

68, line 5. Destroying the raised 6-inch concrete curb and adding a curb-cut constitutes an alteration that would have required further approval. Transcript, Volume II, pg. 68, line 6 - pg. 70, line 25. Neither the Respondent Town nor Beaufort County has ever approved this curb-cut. Transcript, Volume II, pg. 75, line 24 - pg. 76, line 4.

Additionally, even if a 6-inch concrete curb had not been mandated by the Development Permit, simply adding a curb-cut constitutes "development" and would have required a permit under either the DSO or the LMO. Curtis Coltrane, the Respondent Town's former Assistant Town Manager for Community Development, which was the zoning and permitting arm of the Respondent Town, testified as follows:

> Q. And that definition of development (in DSO and LMO) has been consistent from day one?
>
> A. Yes.
>
> Q. And day one being since at least 1984 - - or '83?
>
> A. For all intents and purposes, yes. And it was broadly defined in the DSO as well as the LMO.
>
> Q. Did you find, in reviewing the County or the Town's permitting files, any permit to add a curb-cut between the gas station and Mr. Viswanathan's (Appellant's) property, as depicted on that photograph that's part of Exhibit 42?
>
> A. No.

Tr., Vol. II, pg. 70, lines 12 – 25.

Teri Lewis, who is currently the Land Management Official for the Respondent Town, agreed, testifying as follows:

> Q. This is the permit that was issued for the construction of this station. Now, we know now that there is now a curb-cut cut within the 6-inch concrete curb. Has the Town of Hilton Head ever given a permit for that curb-cut?

A. Not that I can find in our records.

Q. Would that require a permit?

A. To make a change to the site, yes.

Q. To add a curb-cut?

A. Yes.

Tr., Vol. II, pg. 256, line 18 to pg. 257, line 3.

In addition to violating the local ordinances, the unauthorized creation of the curb-cut violated the applicable restrictive covenants. As previously noted, when the Development Permit was obtained, Sea Pines Plantation Company's approval was required. The addition of the curb-cut would have required approval of the Sea Pines Plantation Company, which was never given. Tr.Vol. II, pg. 75, lines 2 - pg. 76, line 4.

Additionally, the curb-cut allowed the encroachment to be constructed within the powerline easement, which was not only wrongful in and of itself, but also directly contradicted the representation Chevron had made to Judge Brown in order to obtain a variance that it could not disturb the powerline easement.

Finally, this encroachment created a rear access point, the very thing that Chevron represented to Judge Brown it could not acquire, thus necessitating a variance. Having been expressly told by the owners of the shopping center property that it could not traverse over the shopping center property, Chevron/Enmark willfully and intentionally began to do so.

Illegally obtained "rights" confer no legal status. A Court will not, and should not, hear a claim when a party seeking relief bases his claim upon acts undertaken in open defiance of the law. Violations of the DSO and the LMO are not only unlawful and illegal, but criminal. Criminal conduct cannot be the basis of a lawful claim. Having obtained a variance in the

development of its property by representing that it could not construct anything within the power line easement and could not obtain rear access, Enmark is now estopped from claiming the exact opposite. This Court cannot simply look the other way, as Enmark now asks, and condone such illegal and wrongful conduct.

Over one hundred years ago, the United States Supreme recognized that a legal right cannot be founded on a legal wrong, and quoted Lord Mansfield, who perhaps said it best, as follows:

> "And Lord MANSFIELD, in *Holman* v. *Johnson*, Cowp. 343, stated the ground on which, in such cases, courts proceed. He said: 'The principle of public policy is this: *ex dolo mala non oritur actio*. **No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act**. If from the plaintiff's own stating or otherwise, the cause of action appear to arise *ex turpi causa*, or the transgression of a positive law of this country, then the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.'"

Ewell v. Daggs, 108 U.S. 143, 149, 2 S. Ct. 408, 412, 27 L. Ed. 682 (1883)(*emphasis added*). In this case, the Court should not lend its aid to Enmark, who founds its cause of action for a prescriptive easement upon numerous prior wrongful and illegal acts.

II. THE MASTER IN EQUITY ERRED IN AWARDING TO THE RESPONDENT ENMARK A PRESCRIPTIVE EASEMENT WHERE THE ENCROACHMENT VIOLATES LOCAL ORDINANCES.

At some point in time, the encroachment was paved (more than once) and speed bumps installed. It is certain that this was done after the passage of the LMO in 1987. It is also certain that the paving was done without a permit. The Master-in-Equity ruled that the paving of the encroachment without a permit was not a violation of the Town LMO because paving did not constitute "development" within the meaning of the LMO and a permit accordingly was not required. Tr., pg. ____. It is respectfully submitted that this conclusion is erroneous. Common sense dictates that paving a road is "development" as that term is commonly understood. Paving

a road also constitutes "development" as that term is specifically defined by the LMO. Section 16-10-201 of the LMO defines development as follows:

> "Development means the use of a structure or land; or the construction, re-construction or alteration of a structure; or an increase in land use intensity; or filling, excavating or dredging a parcel or intertidal or underwater land; or a change in effects or conditions of a site; or the alteration of a shore, bank or flood plain; or the construction or extension of a utility; or the subdivision of land."

Id., §16-10-201. Paving a road certain involves "construction," and certainly results in a change in the "conditions of the site."

Additionally, §16-1-105 lists several "development activities" that are subject to the LMO. This includes anything that affects the area's "natural environment" or "transportation patterns," or anything that increases the amount of "impervious coverage." By contrast, under the LMO activities that do not constitute development essentially involve activities that result in no physical change to the land, such as transferring title, execution a lease, or recording documents or plats. Compare §16-1-105 with §16-1-106, of the LMO (Exhibit 73).

In *Read Phosphate Company v. South Carolina Tax Commission*, 169 S.C. 314, 168 S.E. 722 (1933), the South Carolina Supreme Court adopted the "deference doctrine" from United States Supreme Court precedent, stating: "The construction given to a statute by those charged with the duty of exercising it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons." *Id.*, 169 S.C. 330, 168 S.E. 728, quoting *United States v. Moore,* 95 U.S. 760, 763, 24 L.Ed. 588 (1877). The rationale for the rule has been stated as "The officer's concerned are usually able men, masters of the subject. Not infrequently they are the draftsman of the laws they are . . . called upon to interpret." *Id.,* quoting *Moore, supra*, 95 U.S. at 763. As the South Carolina Supreme Court later stated, "We give deference to agencies both because they have been entrusted with administering their statutes and regulations

and because they have unique skill and expertise in administering those statutes and regulations." *Kiawah Development Partners, II v. South Carolina Department of Health and Environmental Control,* 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014).

In this case, the former Assistant Manager for the Respondent Town, who had overall responsibility for enforcing development within the Town, testified as follows:

> Q. In reviewing the County and Town's permitting file, did you find any permit for paving the encroachment?
>
> A. No.
>
> Q. Is paving something that would require a permit under either or both of those Ordinances?
>
> . . .
>
> Q. That was the question. Is paving something that would require a permit under either the DSO from '83 – '87 and/or the LMO from '87 forward?
>
> A. It would require a permit of some description, depending on specifically what you were doing.
>
> Q. Okay. Did you find a permit of some description for paving in either of the permitting files?
>
> A. No.

Tr. Vol. II, pg. 71, line 2 - pg. 72, line 8 (overruled objection omitted). The Respondent Town's current LMO Official, Teri Lewis, agreed, stating:

> Q. Well, if you wanted to pave the road, what would I have to do with regard to the Town in 1999 to get permission to do?
>
> A. If you wanted to pave a roadway in 1999 - -
>
> Q. Yes.
>
> A. - - you would go through our Development Plan Review process.
>
> Q. And is there any record that that was done?

A. For the road in question?

Q. This roadway.

A. No, there's not.

Id., pg. 258, lines 5 – 17.

Significantly, the Respondent Town's current LMO Official testified that even if a permit had been applied for, it would not have been granted, inasmuch as the paved encroachment did not satisfy the Town's safety and other standards. She referred to the paved encroachment as an "informal access," meaning that "it wasn't a formal road that met all of our (the Respondent Town's) standards in terms of width and things like that." *Id.*, pg. 259, lines 12 – 16. See also, *Id.*, pg. 260, line 11 - pg. 262, line 8.

Mr. Viswanathan, the owner of the Appellant, agreed with the safety concerns, testifying as follows:

Q. Is there any sort of safety issue posed by the existence of this encroachment?

A. Yes, there is. As I showed in the earlier picture (Exhibit ___, pg. ___) 16– and 18–wheeler trucks are going through this easement, and I have noticed on several occasions bicyclists, cyclists using this encroachment in the opposite direction.

Q. Is it possible, physically possible, for two cars approaching from opposite directions to use the encroachment at the same time?

A. No, it's not. It's too narrow.

Tr.Vol. I, pg. 62, line 20 - pg. 63, line 7.

In his Order, the Master-in-Equity concluded that the roadway was paved sometime shortly after the station opened in 1984. Order, pg. 20, ¶44. This finding is not supported by the evidence.

As previously noted, the Enmark property was initially developed by Chevron Oil and a

Certificate of Occupancy was issued in 1984. In 1985 Chevron leased the station to Mr. Ballenger, the husband of Alice Means. Mr. Ballenger had the lease from 1985 through 1989, and during that period of time Alice Means played no role in operating the station. In 1989, Mr. Ballenger and Alice Means were divorced, and she was awarded the lease. Tr.Vol. II, pg. 178, line 9 - pg. 180, line 20. At that time, Alice Means took over the operation of the station. *Id.,* pg. 181, line 6 – 10. Alice Means formed ASA, Inc. and in 1993 ASA, Inc. bought the Enmark Property from Chevron. Tr.Vol. II, pg. 183, lines 9 – 14; and Exhibit 3.

Alice Means initially testified that when she took the station over from her husband in 1989 the encroachment was paved, and that she repaved the encroachment in 1994. In testifying that she repaved the encroachment in 1994 she was relying upon a depreciation schedule for her company which simply stated "Paving, July 1, 1994." *Id.,* pg. 181, lines 11–13 and pg. 184, lines 13–25. She then testified that in approximately 2005 or 2006 it was repaved again and speed bumps installed. *Id.,* pg. 187, lines 5–13. Later in her testimony, however, Mrs. Means testified that she was not certain about whether the encroachment had been paved prior to 1994 and that all she was certain about was that she paved it in 1994. *Id.*, pg. 202, line 19 - pg. 203, line 2. Alice Means testified as follows:

> Q. . . . How certain are you that - - it sounds like you are pretty certain that you paved the roadway in 1994 is that a fair statement?
>
> A. Yes.
>
> Q. How certain are you that the roadway was paved before anybody did that? Let me rephrase this. Can you swear that it's absolutely God's honest truth that it was paved before you did that?
>
> A. No.

Tr.Vol. II, pg. 204, lines 4–13. Alice Means confirmed that prior to the encroachment being paved, it was simply dirt and gravel. *Id.,* pg. 204, lines 14–17.

In 2000 or 2002 Alice Means stepped down from managing the day to day operations of the gas station and turned these responsibilities over to her son in law, Jim Scott Middleton. Mr. Middleton then managed the gas station for ASA until it was sold to Enmark in 2009. At trial, Mr. Middleton testified via deposition to the following points:

- In either 2000 or 2002, Mr. Middleton moved from Tennessee to Hilton Head Island at the request of his mother-in-law Alice Means to become the general manager of the Chevron Service Station located on Enmark tract. Deposition of Jim Scott Middleton, pg. 9, line 20 to pg. 10, line 24, pg. 30, lines 18-23.

- At that time, the encroachment was dirt and gravel. *Id.*, pg. 20, lines 7-9, pg. 22, lines 8-10.

- The encroachment was in such bad shape that customers of the service station would complain to Mr. Middleton and demand that he be responsible for the cost of repairs to their vehicles for damages sustained by striking potholes the customers encountered while using the encroachment. *Id.*, pg. 19, line 22 to pg. 20, line 6.

- Mr. Middleton recalled that Mrs. Means' husband on a couple occasions would try to fix the potholes by hand by filling with Quickrete or gravel. *Id.*, pg. 38, lines 12-22.

- As a result, Mr. Middleton decided to pave the encroachment. *Id.*, pg. 19, lines 16-17.

- Mr. Middleton recalled that he hired JS Construction Company to do the work at a cost of approximately $2,500.00, and the project took less than a day. *Id.*, pg. 21, line 10 to pg. 22, line 7.

- This changed the encroachment surface from dirt and gravel to asphalt, and two speed bumps were also installed. *Id.*, pg. 22, lines 14-19.

- Mr. Middleton did not get a permit from the Town of Hilton Head for this work, nor did he obtain permission from the Sea Pines ARB. *Id.*, pg. 23, line 22 to pg. 24, line 2.

This work was performed sometime between 2000 or 2002 when Mr. Middleton began working at the Chevron Service Station, and 2008 when he stopped working at the Chevron Service Station.

Accordingly, per the testimony of Mr. Jim Scott Middleton, Manager of the Gas Station for ASA Inc., it is clear that the initial paving of the encroachment was done *after* the enactment of the Town of Hilton Head Island's Land Management Ordinance (LMO) in 1987.

The paving of the encroachment, as well as the installation of the two (2) speed bumps, without a permit, violated the LMO. The work was "development," under Section 16-1-105, *Code of the Town of Hilton Head Island, South Carolina* (1998, as amended) of the LMO (the LMO was entered into evidence as Exhibit 83), and required a permit, see Section 16-3-301, *Code of the Town of Hilton Head Island, South Carolina* (1998, as amended), 16-8-101, *Code of the Town of Hilton Head Island, South Carolina* (1983, as amended), and 16-8-102, *Code of the Town of Hilton Head Island, South Carolina* (1998, as amended).

A permit would have been required because the paving of a vehicular access was "development" under the LMO. See Section 16-10-201, *Code of the Town of Hilton Head Island, South Carolina* (1998, as amended) and Section 16-5-809, *Code of the Town of Hilton Head Island, South Carolina* (1983, as amended).

Even if an application for a permit had been submitted, the permit would have been denied, inasmuch as permission of the owner of the property on which the improvement was made would have been required and the Plaintiff, Carolina Center, did not and does not consent to the encroachment.

The permit would also have been denied because the LMO required a 20' adjacent use buffer between commercial properties through which only perpendicular access can be allowed, and the encroachment violates this requirement. See Section 17-5-806, *Code of the Town of Hilton Head Island, South Carolina* (1998, as amended); Section 16-5-809, *Code of the Town of Hilton Head Island, South Carolina* (1983, as amended).

Accordingly, the encroachment was not only illegally created, it has been illegally maintained and improved.

III. THE MASTER IN EQUITY ERRED IN AWARDING TO THE RESPONDENT ENMARK A PRESCRIPTIVE EASEMENT WHERE THE ENCROACHMENT WAS ORDERED TO BE REMOVED IN A FINAL DECISION BY THE LAND MANAGEMENT ORDINANCE OFFICIAL FOR THE TOWN OF HILTON HEAD ISLAND.

Pursuant to the LMO, the decision making authority regarding the administration, interpretation, and enforcement of the LMO is vested in an individual who, prior to the amendment of the LMO on October 7, 2014 was known as the LMO "Administrator" and who is now known as the LMO "Official." See Section 16-2-101, *Code of the Town of Hilton Head Island, South Carolina* (1998, as amended) and Section 16-10-105, *Code of the Town of Hilton Head Island, South Carolina* (2014, as amended); and Appendix A: Advisory and Decision Making Bodies and Persons (2014, as amended). Since 2008 the LMO Administrator or Official has been Teresa "Teri" B. Lewis.

On August 8, 2013, Ms. Lewis, in her capacity as the LMO Official, issued a decision finding that the encroachment violated the Town's LMO, and directed that the encroachment be removed and that a vegetative buffer be established by the property owner. Exhibit 63. In her decision, Ms. Lewis states as follows:

> "A recent review of the adjacent use buffer on the north side of the subject property indicates that asphalt has been placed in this buffer to create an informal access between 2 adjoining properties. **Please be advised that this asphalt access is in violation the Town's Land Management Ordinance (LMO).** The Town requires a 20' adjacent use buffer between commercial properties through which there can only be perpendicular access. Additionally, this informal access way does not meet Town standards for access. Since the disturbance of the adjacent use buffer **was never approved, nor could it be approved**, the situation must be rectified".

Ms. Lewis directed that the encroachment be removed and the vegetative buffer planted. Exhibit

63(emphasis added).

This decision by the LMO Official was received by Enmark on August 26, 2013. Exhibit 64. The LMO, in accordance with state law, includes an appellate procedure by which decisions by the LMO Official can be appealed to the Zoning Board of Appeals by any person aggrieved by the decision. S.C. Code Ann. § 6-29-800 (Supp.2015); §16-2-103, *Code of the Town of Hilton Head Island, South Carolina* (1998, as amended); §16-2-305, *Code of the Town of Hilton Head Island, South Carolina* (1998, as amended); § 16-3-2001 and 2002, *Code of the Town of Hilton Head Island, South Carolina* (1998, as amended). Enmark had 14 days from the date of receipt of the decision of the LMO Official, i.e. August 26, 2013, to appeal the decision. Enmark chose not to appeal this decision by the LMO Official, and that decision is now final.

Rather than appeal, Enmark chose to complain directly to the Town attorney. The LMO, however, does not vest the Town attorney with the authority to make any decision regarding the administration, interpretation, and enforcement of the LMO. The LMO does not vest the Town attorney with the authority to overrule the final decision of the LMO Official. This can only be done by appealing any such decision to the Board of Zoning Appeals. See, § 16-2-103, *Code of the Town of Hilton Head Island, South Carolina* (1998, as amended); §16-2-305, *Code of the Town of Hilton Head Island, South Carolina* (1998, as amended), and 16-3-2001 and 2002, *Code of the Town of Hilton Head Island, South Carolina* (1998, as amended). To assert that the Town attorney can overrule a decision by the LMO Official is analogous to arguing that the County Attorney can overrule a decision by the Master in Equity, or that a staff attorney with the Court of Appeals in Columbia could overrule a decision rendered by the South Carolina Court of Appeals. There is simply no authority to support such a proposition.

As noted, rather than appeal, Enmark chose to complain to the Town attorney. In an

email to the Town Attorney dated August 26, 2013 Enmark's attorney requested that the decision by the LMO Official not be enforced, noting that this lawsuit, which had just been filed, would resolve the legal rights of the parties as to the encroachment. In support of his request, Enmark's attorney stated:

> ". . . [T]his driveway was built prior to the incorporation of the Town in 1983, and certainly prior to the passage of the LMO in 1987. I have attached Plat Book 38, Page 53, **dated February 11, 1974** which shows the existence of this driveway".

Exhibit 64 (emphasis added). The plat attached to the email is a copy of the plat recorded in Plat Book 38 at Page 53, and bears the *handwritten* date of February 11, 1974. Exhibit 64. In truth and fact, the plat recorded in Plat Book 38 at Page 53 is dated November 1, 1989, and was recorded on March 9, 1990. Exhibit 81. This, of course, is well after the passage of the LMO in 1987.

On January 16, 2014 the Town attorney, (some 5 months after the decision by the LMO Official), instead of verifying the true date of the preparation and recording of the Plat, and in blind reliance upon the aforesaid false representations made by Enmark's attorney, wrote a letter to the Plaintiff's then attorney in which he concluded that the driveway was "grandfathered". In his letter, the Town attorney expressly states that "upon reviewing the plat forwarded to us by Mr. Patterson (Enmark's attorney) (copy enclosed), it is clear that the driveway existed prior to 1987 . . .. Since the driveway has been "grandfathered" in, the Town will not be doing anything as it relates to the enforcement of the LMO or to require the removal of what appears to be a "legal nonconformity."" Exhibit 66.

Accordingly, as a result of the patently false representation that the 1989 plat showing the encroachment was a 1974 plat, the Town took no action to enforce the decision of its LMO Official.

The Master in Equity concluded that the August 8, 2013 decision by Ms. Lewis was not a final determination under the LMO because he concluded that Ms. Lewis rescinded and corrected her August 8, 2013 decision after consultation with the Town Attorney, Greg Alford, and Mr. Alford's letters of January 16, 2014 (Exhibit 66) and February 4, 2014 (Exhibit 68) constituted her revised determination. Final Order, pg. 24, ¶54. This conclusion is not supported by the evidence.

Under the Respondent Town's LMO, the LMO Official or Administrator is the sole person empowered to interpret and make decisions regarding development under the LMO. Tr., pg. 77, lines 7–10; pg. 79, lines 21–25 and Exhibit 73, pg. ___, §16-2-102 of the LMO.

The only decision issued by the LMO Official in this case regarding the encroachment is her decision of August 8, 2013 finding the encroachment to be in violation of the LMO. Tr.Vol. I, pg. 77, line 17 – pg. 78, line 2, and Exhibit 63.

The sole and exclusive remedy available to anyone aggrieved by a decision by the LMO Official is to appeal. §16-2-103, Exhibit 73, pg. ____. As previously noted, there is a specific procedure for appeal, and the appeal goes to the Respondent Town's Board of Zoning Appeals. See Exhibit 73, §§16-3-201 – 203. Contrary to the conclusion reached by the Master in Equity, the LMO does not allow the Town Attorney to supplant, supersede, reverse or revise a decision by the LMO Official. On this point, Mr. Coltrane, the Town's former Assistant Manager, testified that there is no provision in the LMO for the Town Attorney to hear an appeal or overrule the LMO Official. The exclusive remedy for one aggrieved by a decision by the LMO Official is to appeal to the Zoning Board of Appeals, which was not done in this case. Tr. Vol. I, pg. 83, lines 2 – 11and Tr.Vol. I, pg. 82, lines 20 – 25.

Moreover, the two (2) letters by the Town Attorney sent subsequent to the August 8,

2013 determination by the LMO Official, were based upon false and fraudulent information. The Respondent Enmark received the August 8, 2013 decision by the LMO Official on August 26, 2013. Exhibit 64. Rather than appeal to the Zoning Board of Appeals as required by the LMO and State Law, the Respondent Enmark chose to send an email to the Town Attorney asserting that the encroachment was "grandfathered," as shown on an attached 1989 plat-falsely represented as a 1974 plat. Exhibit 64.

The plat attached to the email has a *handwritten notation* indicating it is dated February 11, 1974, as represented in the body of the email. This plat, however, in truth and fact, is dated November 1, 1989 and was recorded on March 9, 1990. Exhibit 21. It is clear from Mr. Alford's letter of January 16, 2014, instead of verifying the recorded plat, that he relied upon the false representation that the encroachment had been in existence since 1974 and therefore predated the Town and was "grandfathered." Exhibit 66. The LMO Official admitted that this false information was material to the Town Attorney and but for this false information the Town Attorney would never have become involved. Tr. Vol. II, pg. 266, lines 18 – 22 and pg. 267, line 25 – pg. 268, line 7.

Contrary to the conclusion reached by the Master in Equity, the second letter sent by the Town Attorney following the decision by the LMO Official does not rescind that decision. Quite the contrary, the Town Attorney confirms that the LMO Official previously issued a final determination and that the proper avenue to challenge it would be to file an appeal. Exhibit 68.

Most importantly, the LMO Official herself testified that she never stated that her August 8, 2013 decision could be ignored or was being rescinded, and she confirmed that there was no further decision or determination made by her regarding the encroachment. Tr.Vol. II, pg. 270, lines 8 – 24.

IV. THE MASTER IN EQUITY ERRED IN AWARDING TO THE RESPONDENT ENMARK A PRESCRIPTIVE EASEMENT WHERE THE ENCROACHMENT FAILS TO PROVIDE INGRESS AND EGRESS, BUT RATHER, TERMINATES ON PRIVATE PROPERTY.

An element which the Defendant Enmark must prove by clear and convincing evidence in order to establish a prescriptive easement is the "identity of the thing enjoyed."

In this case, Enmark seeks a prescriptive easement for purposes of ingress and egress. Stated simply, Enmark desires to use the prescriptive easement in order to lawfully get on to and get off of its property. Enmark has failed to meet its burden of proving that this can be accomplished. To the contrary, in order to utilize the encroachment for ingress and egress, one must trespass over o are not parties to this action. As granted by the Master in Equity, the prescriptive easement is a dead-end – an easement to nowhere.

As previously noted, anyone exiting Enmark's property over the encroachment must first traverse over property belonging to the Appellant, and then onto property belonging to Cahetti on which a restaurant is located, and then onto property now belonging to Publix Super Markets, Inc., on which the large shopping center (originally Market Place Shopping Center Complex) is located, and from there on to one of two public roads, Greenwood Drive or Palmetto Bay Road.

The fatal flaw in Enmark's attempt to establish this element of a prescriptive easement is that it has failed to carry its burden that it has any right to travel over the properties of Cahetti or Publix Super Markets. Granting Enmark a prescriptive easement over the property of Appellant fails to provide rights of ingress and egress, inasmuch as Enmark has failed to prove any easement rights over the properties of the landowners which must subsequently be traversed in order to gain ingress or egress. Enmark has been given ample opportunity to bring these adjoining and necessary landowners into this action, but has intentionally refused to do so. "The general rule as to parties is that, when a bill is brought for relief all persons materially interested

in the subject of the suit ought to be made parties, either as Plaintiffs or Defendants, in order to prevent a multiplicity of suits, and that there may be a complete and final decree between all the parties interested." *Graham v. Alliance Ins. Co.,* 192 S.C. 370, 6 S.E.2d. 754, 755 (1940).

As it stands now, if this Court were to affirm the grant of a prescriptive easement over Appellant's property to the Respondent Enmark for purposes of ingress and egress, the Court is necessarily affecting the rights of nonparties inasmuch as ingress and egress can only be accomplished by trespassing over the properties of non-parties.

It is respectfully submitted that this Court lacks the power to grant to the Defendant Enmark the right to traverse over the properties of non-parties Cahetti or Publix Supermarkets in this case, a right which must be granted in order to give the Respondent Enmark an easement for purposes of ingress and egress.

There is no such thing as "an easement to nowhere," yet that is the bizarre result which would be obtained if the Court were to grant to Enmark a prescriptive easement over Appellant's property, without also granting easement rights over the properties of the nonparties which the Respondent Enmark currently does not possess and which was *expressly* denied to the Enmark by the MarketPlace Shopping Center Complex. Id., Page 1397.

The burden is on Enmark to bring these nonparties into this lawsuit. The Respondent Enmark has the burden of proof. Enmark is the one claiming the prescriptive easement. Enmark is the one asserting rights of ingress and egress over the properties of nonparties. The Appellant has no complaint with, and no causes of action against, these nonparties.

The Respondent Enmark has failed to meet its burden of proving by *clear and convincing* evidence that granting it a prescriptive easement over the property of the Appellant will grant to it the sought rights of ingress and egress. Indeed, the relief sought by Enmark results only in a

bizarre easement to nowhere.

It is respectfully submitted that the Master in Equity erred in granting to the Respondent Enmark a prescriptive easement, purportedly for purposes of ingress and egress, which simply dead-ends at the border of private property. Stated somewhat differently, the Respondent Enmark failed to prove by clear and convincing evidence that the requested easement could lawfully provide ingress and egress to its property.

V. THE MASTER IN EQUITY ERRED IN AWARDING TO THE RESPONDENT ENMARK A PRESCRIPTIVE EASEMENT WHERE THE RESPONDENT FAILED TO SATISFY ITS BURDEN OF PROVING AN ADVERSE USE FOR THE PRESCRIPTIVE PERIOD OF TIME.

A. Standard of Review

The determination of the existence of an easement is a question of fact in a law action. *Jowers v. Hornsby*, 292 S.C. 549, 551 357 S.E.2d 710, 711 (1987). However, the determination of the extent of a grant of an easement is an action in equity. *Inlet Harbour v. South Carolina Department of Parks, Recreation and Tourism*, 377 S.C. 86, 91, 659 S.E.2d 151, 154 (2008). In an action at equity, tried by a Judge alone, the Appellate Court may find facts in accordance with its own view of the evidence on the latter issue.

B. Burden of Proof

The party claiming a prescriptive easement has the burden of proof. *Morrow v. Dyches*, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct.App. 1997).

Not only does the party seeking a prescriptive easement bear the burden of proof, but the proof required to establish a prescriptive easement is a stricter and higher burden of proof than exists in a typical civil case. *Bundy v. Shirley*, 412 S.C. 292, 772 S.E.2d 163 (2015).

As early as 1917 the South Carolina Supreme Court alluded to this heightened standard of proof when it stated, "A private way is an easement in favor of another, in derogation of the

rights of the owner, and hence is not to arise without **clear**, **unequivocal proof** of such facts as will give the right from the owner to the claimant." *Williamson v. Abbott*, 107 S.C. 397, 401, 93 S.E. 15, 16 (1917) (emphasis added) (citation omitted).

The "fundamental reason for applying a heightened standard of proof" is that "by claiming a prescriptive easement, a claimant seeks for a property owner to forfeit rights to the subject property." *Bundy v. Shirley*, supra, 412 S.C. at 305, 772 S.E.2d at 170. "This stricter standard of proof may be a result of the general opinion expressed by Courts and commentators that **prescriptive rights are not favored** in the law since they result in corresponding losses or forfeitures of rights of other persons." *Id,* 412 S.C. at 305-06, 772 S.E.2d at 170, quoting with approval Daniel J. Smith, Establishment of Private Prescriptive Easement, 2 Am.Jur. Proof of Facts 3rd 125 § 3 (1988 & Supp. 2015) (emphasis added). Accordingly, the South Carolina Supreme Court has held as follows:

> "Given that a prescriptive easement results in diminished rights of the property owner, we find that a claimant seeking a prescriptive easement must be held to a **strict standard of proof**. Accordingly, we join the majority of state jurisdictions and hold that a party claiming a prescriptive easement has the burden of proving all elements by **clear and convincing** evidence."

Bundy v. Shirley, 412 S.C. 292, 306, 772 S.E.2d 163, 170 (2015) (emphasis added).

C. Not Adverse for Prescriptive Period

Traditionally, our Courts have held that to establish a prescriptive easement, one must show: (1) Continued and uninterrupted use or enjoyment of the right for a period of twenty (20) years; (2) The identity of the thing enjoyed; and (3) Use or enjoyment which is either adverse or under claim of right. See, e.g., *Pittman v. Lowther*, 363 S.C. 47, 50, 610 S.E.2d 479, 480 (2005). In *Simmons v. Berkeley Electric Cooperative, Inc.,* 419 S.C. 223, 797 S.E.2d 387 (2016) the South Carolina Supreme Court took the opportunity to "clarify" the foregoing third element of a

prescriptive easement and held that adverse use and claim of right cannot exist as two (2) separate methods of proving the third element of a prescriptive easement as the two (2) terms are, in effect, one and the same. *Id.*, 419 S.C. at 232, 797 S.E.2d at 392. As a result, the Supreme Court simplified the test for a prescriptive easement as follows:

> "In order to establish a prescriptive easement, the Plaintiff must identify the thing enjoyed, and show his use has been open, notorious, continuous, uninterrupted, and contrary to the true property owner's rights for a period of twenty (20) years."

Id.,419 S.C. at 233, 797 S.E.2d at 392. In so holding, the Supreme Court relied in part upon the fact that "it is well established that evidence of permissive use defeats the establishment of a prescriptive easement because use that is permissive cannot also be adverse. *Id.*, 419 S.C. at 232, 797 S.E.2d at 392, quoting *Bundy v. Shirley,* 412 S.C. 292, 310, 772 S.E.2d 163, 173 (2015) and 2 Am.Jur. Proof of Facts 3d 197, §6, at 218 (1988) ("Any use of property which is not hostile or adverse to the interests or title of the property owner cannot ripen into a prescriptive right.")

The earliest record as to the existence of the encroachment is the plat dated November 1, 1989. Exhibit 21. At the other end of the spectrum, prior to the filing of this lawsuit on August 15, 2013, the Appellant and the Respondent Enmark entered into a tolling agreement on July 24, 2013. Exhibit 62. The Respondent Enmark purchased its property from ASA, Inc. on March 14, 2009. Exhibit 7. Accordingly, in order to satisfy the prescriptive period of twenty (20) years, the Respondent Enmark must tack its use onto the use of its predecessor in title, ASA, Inc.

Chevron received its Certificate of Occupancy on June 1, 1984 and opened the gas station on the property now belonging to the Respondent Enmark. Exhibit 73, pg. 1460. Sometime thereafter, the 6-inch concrete curb obstructing passage between the properties now belonging to the Appellant and the Respondent Enmark was illegally removed and a curb-cut created, thereby allowing the encroachment to come into existence. At that time, the Respondent Enmark's

property was owned by Chevron Oil Company (Exhibit 2) and the property now belonging to Appellant was owned by State Service (Exhibit 10).

In 1986 State Service conveyed the property now owned by Appellant to Fogelman Properties, Inc., and on March 7, 1990 Fogelman Properties, Inc. conveyed this property to SEP Ltd. Partnership.

On August 23, 1993 Chevron Oil sold the property which now belongings to the Respondent Enmark to ASA, Inc.

While ASA, Inc. owned the Enmark tract, title to the Carolina Center tract changed hands several times. On January 20, 1994 the property was deeded from SEP Ltd. Partnership to Palmetto Federal Bank (Exhibit 13). A few months later, on July 21, 1994, Palmetto Federal deeded the property to Sea Pines Company. Exhibit 14. Lastly, on October 31, 1996, Sea Pines sold this property to the Appellant.

Significantly, the Respondent Enmark failed to present any testimony from any witness on behalf of Chevron Oil, State Service, Fogelman Properties, SEP Ltd. Partnership, Palmetto Federal Bank, or Sea Pines Company. There is a total lack of any evidence regarding the relationship between these parties and their use, or nonuse, of the encroachment. There is a total lack of any evidence as to whether or not the use of the encroachment during the times these entities owned their respective parcels was hostile or permissive. The only witnesses called by the Respondent Enmark to testify on this issue were two (2) representatives of ASA, Inc.: the owner Alice Means and her son in law Jim Scott Middleton. Even more significant, no witness testified on behalf of the Respondent Enmark as to Enmark's use of the encroachment.[2]

Since ASA, Inc. owned the Enmark parcel from August 23, 1993 until March 14, 2009, it

[2] Robert Roustoun Demery, III, who was the Vice President of Enmark Stations, Inc., was the only Enmark related witness to testify and he did not begin working for Enmark until 2012. Tr. Vol. II, pg. 290, lines 19 – 23 and pg. 291, line 23 – 292, line 3.

is essential to Enmark's claim of a prescriptive easement that Enmark be able to tack ASA's use of the encroachment onto its own.

A party may "tack" the period of use of prior owners in order to satisfy the twenty (20) year requirement for a prescriptive easement. *Morrow v. Dyches*, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct. App. 1997). It is not enough, however for Enmark to simply show that the encroachment existed and was used. The South Carolina Supreme Court has stated that there are "specific requirements" that must be met in order to tack, explaining:

> "Successive uses of land by different persons may be tacked or added together, to satisfy the prescriptive period. Tacking is permitted when the successive adverse users are in privity of the state. Although the requirement of privity has been variously defined, the prevailing view is that there must be some relationship whereby the successive users have come into possession under or through their predecessors in interest. It follows that claimant may not tack the claimant's adverse use to that of strangers, nor may a claimant tack the claimant's adverse use to that of a predecessor in title when the predecessor's usage terminated before claimant acquired the land. Moreover, a claimant cannot tack adverse use with prior adverse use when intervening parties used land with permission. Nor is tacking permissible when it is **unclear** that use by claimant's predecessor was adverse."

Bundy v. Shirley, supra, 412 S.C. at 313 – 14, 772 S.E.2d at 175 (emphasis added).

Applying the foregoing to the facts of the instant case, it is unclear that use by the claimant Enmark's predecessors prior to ASA, Inc. was adverse, as there is a total absence of evidence as to this fact. Moreover, Enmark failed to carry its burden of proving by clear and convincing evidence that the prior use by its predecessor ASA, Inc. was adverse.

While ASA, Inc. owned the Enmark tract, its neighbors were State Service, Fogelman Properties, SEP Ltd. Partnership, Palmetto Federal, Sea Pines Company, and the Appellant, successively. Up until the Appellant's purchase of its property, it is "unclear" that use by ASA, Inc. was adverse to Appellant's predecessors in title, as there was a total absence of evidence on this issue. Moreover, once Appellant purchased its property, the evidence is clear that ASA's

use of the encroachment was permissive.

Prior to purchasing its property, the Appellant through its attorney wrote the attorney for ASA, Inc. regarding the encroachment, stating:

> "Ultimately, that area (the encroachment) would be utilized by the purchaser of the Sea Pines Reception Center Property for parking and would not be able to be utilized for continued access."

Tr. Vol. I, pg. 35, lines 2 – 6, Exhibit 47. Appellant's principal, Kumar Viswanathan, testified that shortly after Appellant purchased its property, he began meeting with all of the adjacent property owners, as well as the Town and land planners, "to see if we could work out a common and mutually beneficial access easement agreement." With respect to ASA, he personally met with both its owner Alice Means and its manager Jim Scott Middleton, telling them that they were encroaching on his property and the encroachment would eventually have to be moved. Neither of them asserted a right to use the encroachment. In the meantime, Mr. Viswanathan gave them permission to use the encroachment while they explored alternatives. Tr. Vol I, pg. 40, line 12 – pg. 44, line 25 (objection omitted). Mr. Middleton, the General Manager of ASA, confirmed that he was contacted by Mr. Viswanathan and they began discussing closing and relocating the encroachment. Deposition of Jim Scott Middleton, pg. ___.

This is also confirmed and corroborated by several items of correspondence exchanged between the Appellant and ASA. On February 8, 2008 Mr. Viswanathan wrote Mr. Middleton, enclosing a copy of a proposed easement agreement. It is clear from this letter and the proposed easement agreement that this is this culmination of a long series of discussions and research over a significant period of time. Exhibit 51. Mr. Viswanathan testified that it took several years to "formulate a game plan." Not only did he have to negotiate with ASA, but also with the owners of the Japanese restaurant property and the owners of the MarketPlace property. Additionally, he

had to make sure that that it satisfied the requirements of his own tenant, which was a bank at that time. He also had to make sure that any easement agreement satisfied the Town's requirements. Tr. Vol. I, pg. 41, line 20 – pg. 42, line 2; pg. 151, line 24 – pg. 153, line 6. Engineers had to be hired to put together a conceptual site plan, which was finally drawn up on August 10, 2007 (Exhibit 50). After that, it took the attorneys several months to draft a proposed easement agreement, which was done by February 8, 2008 (Exhibit 51). See also Tr.Vol. I, pg. 46, lines 8 – 13.

During this time, the Appellant allowed the encroachment to be utilized. Mr. Viswanathan explained:

> Q. And at this point and time, were people still using the easement?
>
> A. Yes. We had allowed them to use it.
>
> Q. And why is that you were letting them use it while you were trying to negotiate this new realignment or whatever you want to call it, this conceptual site plan?
>
> A. First of all, in the interest of being a good neighbor, you want to work with all the parties concerned. And while we are trying to work an acceptable--mutually acceptable easement agreement, it does not make sense to take an adversarial position and not allow them to use the encroachment.

Tr. Vol. I, pg. 52, lines 7 – 20.

Shortly prior to September 15, 2008, however the negotiations fell apart and concluded when the owner of the shopping center decided that it would not allow any easements of any type across its property. As a result, on that date Appellant's attorney wrote ASA's attorney stating that the Appellant "must now cut off the encroachment on to his property so that he may make good and safe use of his property." Exhibit 55. In that same letter, however, the Appellant expressed a willingness to meet with ASA to discuss alternatives that did not involve the shopping center property. *Id.*

At the time the September 15, 2008 letter was sent, the Appellant was not made aware that ASA was planning to sell its property. Shortly after the letter was written, however, the Appellant learned that ASA had decided to sell its property to someone else. *Id.*, pg. 55, lines 14 – 25 and pg. 123, lines 2 – 24. That someone else turned out to be the Respondent Enmark.

On November 20, 2008 ASA entered into a purchase agreement to sell its property to the Respondent Enmark for $1,475,000.00. Exhibit 56. On January 30, 2009 Enmark's attorney sent a "Notice of Title Objections" to ASA, objecting to the fact "that there is no clear, express easement of record" for the encroachment. ASA and the Respondent Enmark thereafter renegotiated the purchase price, reducing it to $1,440,000.00. Exhibit 59. The Respondent Enmark, accordingly, purchased the property knowing, at the very least, the uncertain status of the encroachment and obtained a $35,000.00 reduction in the purchase price as a result. The closing on the sale of the property from ASA to the Respondent Enmark took place on March 19, 2009. Exhibit 60.

Alice Means confirmed that Enmark bought the property, "with their eyes open; they knew there was a problem with this roadway." Tr. Vol. II, pg. 215, lines 11 – 14 and pg. 200, lines 3 – 7.

When the Appellant learned of the pending sale of the property from ASA to the Respondent Enmark, the Appellant, rather than close the encroachment, decided to wait and see what Enmark's plans were. Once Enmark had closed on the property, the Appellant and Enmark then entered into a "dialog going back and forth on what the new development plan should be." Tr. Vol. pg. 125, lines 12 – 25. As it had with ASA, the Appellant gave the Respondent Enmark permission to use the encroachment "while we were trying to work out a solution." *Id.*, pg. 127, lines 3 – 11. Unfortunately, the parties were unable to reach an agreement and on October 29,

2012 the Appellant wrote Enmark, withdrawing its permission to utilize the encroachment and informed the Respondent Enmark that the encroachment was going to have to be closed. This letter also confirms that the use of the encroachment by Enmark's predecessor in title ASA was permissive while those parties were discussing relocating the encroachment. *Id.* This letter led to the filing of this lawsuit.

As noted above, a claimant cannot tack adverse use with prior adverse use when intervening parties used the land with permission. *Bundy v. Shirley*, supra, 412 S.C. at 314, 772 S.E.2d at 175. The permissive use by ASA defeats Enmark's claim of adverse use.

Finally, even if everything else were ignored, the "kiss of death" to Enmark's burden of proving adverse use is the fact that Alice Means made it perfectly clear that ASA's use of the encroachment was **not** adverse, testifying point blank as follows:

> Q. During your period of time that you were involved in the gas station were you attempting to take that property, that **easement**, that **roadway** in **any** way?
>
> A. **No**.

Tr.Vol. II, pg. 214, lines 15 – 19 (emphasis added).

VI. THE MASTER IN EQUITY ERRED IN AWARDING TO THE RESPONDENT ENMARK A PRESCRIPTIVE EASEMENT WHERE THE RESPONDENT FAILED TO SATISFY ITS BURDEN OF PROVING A CONTINUOUS AND UNINTERRUPTED USE OR ENJOYMENT FOR THE PRESCRIPTIVE PERIOD OF TIME.

Enmark failed to prove by clear and convincing evidence the continuous uninterrupted use or enjoyment of the encroachment for a period of 20 years.

Even if this lawsuit were commenced outside the 20-year prescriptive time frame, the use of the encroachment by Enmark and its predecessor in title during this time frame was not "continuous" and "uninterrupted."

Enmark has the burden of proving by clear and convincing evidence that use of the

encroachment during this period of time was continuous and uninterrupted. The facts in this case, however, show numerous interruptions.

The Master in Equity appears to be relying upon the erroneous premise that an interruption, when referencing a prescriptive easement, requires a physical barrier of some sort and a resulting discontinuance of use. It is true that "numerous Courts have held when the potential servient owner, by either by threats or physical barriers, succeeds in causing a discontinuance of the use, no matter how brief, the running of the prescriptive period is stopped." 4 Powell on Real Property, Section 34.10(3)(b) (2000). South Carolina, however, is not one of these Courts that requires threat or physical barrier. In *Pittman v. Lowther*, 363 S.C. 47, 610 S.E.2d 479 (2005) the South Carolina Supreme Court expressly declined to adopt the analysis adopted by North Carolina and other Courts which required an actual physical discontinuance, no matter how brief, of the use. Instead, the South Carolina Supreme Court "embraced" the opinion of Justice Oliver Wendell Holmes, Jr., who stated the following in determining what a landowner must do to interrupt prescriptive use:

> "A landowner . . . is not required to battle successfully for his rights. It is enough if he asserts them to the other party by an overt act, which, if the easement existed, would be a cause of action. Such an assertion interrupts the would-be dominant owner's **impression of acquiescence** and the growth in his mind of a fixed association of ideas; or, if the principle prescription be attributed solely to the acquiescence of the servient owner, it shows that acquiescence was not a fact."

Pittman v. Lowther, supra, 363 S.C. at 51, 610 S.E.2d at 481, quoting *Brayden v. New York, N.H. & H.R. Co.*, 172 Mass. 225, 51 N.E. 1081, 1081-82 (1898) (emphasis added). The South Carolina Supreme Court held as follows:

> "We conclude actions are sufficient to interrupt the prescriptive period when the servient owner engages in overt acts, such as erecting physical barriers, which cause a discontinuance of the dominant owner's use of the land, no matter how brief. **In addition to physical barriers**, verbal threats which convey to the

> dominant landowner **the impression the servient owner does not acquiesce** in the use of the land, are also sufficient to interrupt the prescriptive period. To adopt an interpretation of "effective interruption" which requires a servient landowner to take actions in addition to erecting barriers like fences and cables, would encourage wrongful or potentially violent behavior that is contrary to sound public policy considerations and the peaceful resolution of disputes."

Pittman v. Lowther, supra, 363 S.C. at 52, 610 S.E.2d at 481 (emphasis added).

On numerous occasions, the impression that the servient owner did **not** acquiesce in the use of the encroachment was conveyed to users of the encroachment.

First, as previously noted, the owner of the Market Place Shopping Center Complex attempted to block the encroachment by placing a dumpster on the encroachment. While this effectively blocked direct access to the shopping center property, users of the encroachment simply bypassed the dumpster and continued to trespass over the property belonging to Cahetti on which a restaurant is now located, before trespassing over the shopping center property and then onto a public road.

Also, on June 15, 1994, attorney Carey S. Griffin, Esquire, representing Appellant, wrote attorney John L. Wilson, Esquire, the attorney for ASA, Inc., informing Mr. Wilson that his client was a prospective purchaser of the Sea Pines Welcome Center property, and that the encroachment would ultimately have to be closed and therefore "would not able to be utilized for continued access." Exhibit 47. Having an attorney write another attorney and telling him that the encroachment cannot be used for continued access, is certainly sufficient to "convey the impression that the servient landowner does not acquiesce in the use of the land."

Additionally, Attorney Wilson received another letter, on September 15, 2008, sent on behalf of Appellant indicating that Appellant had now purchased the old Sea Pines Welcome Center and that its development plans required the closure and removal of the encroachment. Exhibit 55. In his letter, Mr. Arundell states that "Kumar (the owner of Carolina Center

Building) wishes to be a good neighbor, however . . . he must now cut off the encroachment onto his property . . .." *Id.* Again, this is certainly sufficient to convey the impression that the landowner does not acquiesce in the use of his land.

As previously discussed, ASA responded to the aforesaid September 15, 2008 letter from Mr. Arundell by selling the Respondent Enmark tract to Enmark. This closing took place on March 19, 2009. Exhibit 5.

Once again, on October 29, 2012, Appellant's attorney wrote, this time to Enmark's attorney stating that the encroachment will have to be closed. Exhibit 61.

In sum, on no less than 3 different occasions, i.e., June 15, 1994, September 15, 2008 and October 29, 2012, there is undisputed written correspondence from attorneys, which clearly "convey the impression the servient landowner does not acquiesce in the use of the land." ASA responded to the 2008 letter by selling the property, and Enmark's refusal to comply with the 2012 letter is what led to the bringing of this lawsuit.

Finally, and perhaps more telling, is the testimony of Alice Means, the Respondent Enmark's primary witness. Mrs. Means was the owner of the ASA, Inc., and she owned the Enmark property from August 23, 1993 (Exhibit 3) through March 19, 2009 (Exhibit 5). She testified that shortly after she purchased the property, she became aware that the adjoining landowner objected to her use of the encroachment and that **ever since that time** the owner of the Welcome Center property had always objected to her use of the encroachment.

At trial Alice Means, who had to have her memory refreshed through the use of her deposition, testified as follows:

> Q. This is actually Mr. Patterson, who is seated beside you now, asking you questions. And do you see on Line 2, Mr. Patterson saying, "Plaintiff's Exhibit 15, the June 15th, 1994 letter from Mr. Griffin would be the first time you are aware that the adjoining owner objected to your use in

writing?" I'll tell you that "A" stands for answer. If you would just read what your answer was then.

A. "Yes."

Q. Then the next question was, "And since that time, **the adjoining owner** of the Welcome Center **has always objected** to your use of the roadway, has he not?" And where it says "The Witness," what was your answer?

A. "Yes."

Q. Just that one simple word, yes; is that correct?

A. Yes.

Tr.Vol. II, pg. 213, line 17 – pg. 214, line 13 (emphasis added). In other words, ASA had actual knowledge from June 15, 1994, which is shortly after it purchased the subject property, that during its entire subsequent time of ownership the adjoining owner of what is now Appellant's property did not acquiesce in the use of the encroachment. *Id.* Prior to 1996 the non-acquiescing adjoining landowners were SEP Ltd. Partnership, Palmetto Federal Bank and Sea Pines Plantation Company. Exhibits 12, 13 and 14. After October 31, 1996, the non-acquiescing adjoining owner was the Appellant who, as previously discussed, supra, pp. ____ - _____, although it did not acquiesce in any claim of right to utilize the encroachment, gave permission for it to be utilized while the parties and their neighbors were attempting to see if a mutually beneficial easement could be established.

In other words, from 1994 through 2009 Enmark's predecessor in title confirmed that not only did it **not** have "the impression" that the landowner acquiesced in its use of the land, but it knew **for a fact** that the landowner did not acquiesce in its use of the land. This constitutes an "effective interruption" of the prescriptive use period of time under the holding of the South Carolina Supreme Court in *Pittman v. Lowther*, supra.

VII. THE MASTER IN EQUITY ERRED IN GRANTING A PRESCRIPTIVE EASEMENT TO THE RESPONDENT ENMARK WHERE THE RESPONDENT ENMARK'S USE OF THE ENCROACHMENT WAS NOT EXCLUSIVE, INASMUCH AS THE RESPONDENT ENMARK'S USE OF THE ENCROACHMENT WAS NO DIFFERENT FROM THAT OF THE GENERAL PUBLIC.

It is respectfully submitted that the Master in Equity erred in granting a prescriptive easement to the Respondent Enmark, where the use of the encroachment by the Respondent Enmark was no different from that of the general public.

In *Bundy v. Shirley* the South Carolina Supreme Court concluded that the Petitioner Shirley was not entitled to a prescriptive easement because, *inter alia*, because Shirley's use of the claimed easement was either with the permission of the owner, Bowater, or was not exclusive as he had not greater right than members of the public. In so holding, the Supreme Court explained:

> "Here, Shirley maintained that he was entitled to a prescriptive easement based on a claim of right to the property and, alternatively, that his use was adverse. We find that each of Shirley's theories fails due to his permissive use of the Bundy property. When Shirley's parents purchased the property in 1985, the SCDNR leased the property from Bowater and permitted the public to hunt on the property. Thus, during hunting season, Shirley's use of the property was either with the permission of Bowater **or not exclusive as he had no greater right than members of the public**."

Bundy v. Shirley, 412 S.C. 292, 310-11, 772 S.E.2d 163, 173 (2015) (emphasis added).

In so holding, the South Carolina Supreme Court cited *Cleland v. Westvaco Corporation*, 314 S.C. 508, 431 S.E.2d 264 (Ct. App. 1993), in which the South Carolina Court of Appeals stated:

> "[W]e agree with the trial judge that Cleland did not establish a private right under a prescriptive easement, because he failed to produce evidence that his use was exclusive and was different from the right which could be asserted by members of the general public."

Id., 314 S.C. at 511, 431 S.E.2d at 266.

In the instant case, the Respondent Enmark, as well as its predecessor in title ASA, do not assert a right to use the encroachment independent of the general public. Alice Means of ASA, in response to a question by the Master in Equity, testified as follows:

> Q. Ms. Means, the road that we're talking about here, the encroachment area, as it's been called, did you feel that was - - describe what you felt the ownership was and your right to use it during your period of ownership of the gas station.
>
> A. I always had used that road, from being just a customer before ever being involved in the station, and did not know anything about - - at that time about easements or whatever. It was just always there. And it was used not only for the station, **but the public would use it as a cut-through** to go from Palmetto Bay Road to Greenwood Drive.
>
> And my feeling was that it was just always there, and it was a road. And it was very important to my business, for people leaving the business, if they didn't want to go to the right, that they had an alternate route. **And so I just always felt that it was a road.**
>
> Q. So did you ever think or consider or have any thoughts about the title ownership associated with the road?
>
> A. **No**.
>
> Q. One way or the other, you never - -
>
> A. One way or the other.
>
> Q. You never thought about it?
>
> A. **No**.

Tr.Vol. II, pg. 217, line 11 – pg. 219, line 4 (emphasis added).

The Respondent Enmark's own Vice President, Mr. Demery, confirmed that the encroachment was utilized by the general public because it was convenient. Tr. Vol. II, pg. 295, line 8 to pg. 296, line 2 and pg. 293, lines 13 – 16. He explained that he did not mind the general public crossing his gas station parking lot in order to utilize the encroachment because it was his

hope that they would also "stop and shop" with Enmark. *Id.*, pg. 299, lines 3 – 12.

Ms. Lewis, the Respondent Town's LMO Official, also confirmed that the encroachment was utilized by the public "as a shortcut." *Id.*, pg. 224, lines 10 – 13.

In the instant case there is no claim of public dedication. The Respondent Enmark claimed an exclusive, private prescriptive easement. The Master in Equity erred in granting to the Respondent Enmark an exclusive, private, prescriptive easement where the only evidence in this case is that any use of the encroachment by the Respondent Enmark, as well as its predecessors in title, was simply incidental to the use of the encroachment by the general public.

VIII. THE MASTER IN EQUITY ERRED IN FAILING TO ISSUE A WRIT OF MANDAMUS COMPELING THE RESPONDENT TOWN OF HILTON HEAD ISLAND TO ENFORCE THE DECISION OF ITS LAND MANAGEMENT ORDINANCE OFFICIAL.

The Appellant's sole cause of action against the Respondent Town is for a Writ of Mandamus compelling the Town to enforce the decision of its LMO Official regarding the encroachment. As previously noted, Issue III, supra, the LMO Official for the Respondent Town issued a determination on August 8, 2013 that the encroachment violated the LMO, and directed that the encroachment be removed. Exhibit 63.

Mandamus is the highest judicial writ and is issued only when there is a specific right to be enforced, a positive duty to be performed, and no other specific remedy. A Writ of Mandamus is a coercive writ that orders a public official to perform a ministerial duty. Mandamus will issue only to compel a public official to perform a mandatory legal duty. The primary purpose of Writ of Mandamus is to enforce an established right in a corresponding imperative duty created or imposed by law. When the legal right is doubtful, or the performance of duty rest in discretion, or when there is another adequate remedy, a Writ of Mandamus cannot rightfully be issued. *City of Rock Hill v. Thompson,* 349 S.C. 197, 199-200, 563 S.E.2d 101, 102

(2002).

In the case *sub judice*, the LMO Official, Ms. Lewis, has issued a decision. Exhibit 63. ***The decision is plain and unambiguous.*** All interested parties received or were served with the decision. The Respondent Enmark, through its attorney, acknowledged receipt of this decision to the LMO Official on August 26, 2013. Exhibit 64. There was no appeal.

The only thing that remains to be done is enforcement of the decision. The Writ of Mandamus requested by the Plaintiff simply requests that the Town of Hilton Head perform its "mandatory legal duty." This is a purely ministerial duty. The enforcement of the LMO Official's decision is not discretionary.

The bottom line is that the LMO Official concluded (correctly) that the Respondent Enmark had violated the LMO and, without equivocating, directed that the encroachment be removed and a vegetative buffer established. There is nothing doubtful, discretionary, or vague about her directive. There is nothing left to be decided, debated, or performed other than to carry out her mandate that the encroachment be removed and the vegetative buffer re-established. The Appellant, accordingly, is entitled to a Writ of Mandamus compelling the Respondent Town to perform its mandatory legal duty of enforcing this decision by its own LMO Official.

IX. THE MASTER IN EQUITY ERRED IN FAILING TO ISSUE A JUDGMENT AGAINST THE RESPONDENT ENMARK ON THE APPELLANT'S CAUSE OF ACTION FOR SLANDER OF TITLE.

To maintain a claim for slander of title, the Plaintiff must establish (1) the publication, (2) with malice, (3) of a false statement, (4) that it is derogatory to Plaintiff's title and (5) causes special damages, (6) as a result of the diminished value of the property in the eyes of third parties. *Huff v. Jennings*, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (Ct.App. 1995). "Actual malice can mean the defendant acted recklessly or wantonly with conscious disregard of the

Plaintiff's rights." *Constant v. Spartanburg Steel Products, Inc.*, 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994). "[M]alice merely means a lack of legal justification and is to be presumed if the disparagement is false, if it caused damage, and if it is not privileged." *Solley v. Navy Federal Credit Union, Inc.*, 397 S.C. 192, 204, 723 S.E.2d 597, 603 (Ct.App. 2012).

As previously noted, the conduct of the Respondent Enmark as well its predecessors in title, has not only been in reckless disregard of the rights of the Appellant, but have repeatedly been illegal, wrongful, and even criminal, as follows:

- In order to obtain the variance needed to build the gas station, it was represented not only to Beaufort County, but also to a Court of law, that no structure could be built within the power line easement, yet upon obtaining the variance this is exactly what was done.
- It was further represented that a rear access could not be obtained, yet once the variance was granted, it was surreptitiously put in place. This rear access was put in place even after having been expressly refused permission from the shopping center owner to utilize the rear as an access point.
- Sometime after the gas station was constructed, the 6" concrete curb between the Enmark Station and Appellant's property was ***illegally*** removed and a curb cut installed. Not only did this violate the development permit, it violated the then existing Development Standards Ordinance as well as the Land Management Ordinance, as well as the Sea Pines Covenants. No permit was obtained for any of this work.
- Years later, the encroachment was paved and, again, no permit was obtained. It is clear that the permit requirement was known, inasmuch as permits had been sought and obtained for relatively minor things such as rearranging a sign. Exhibit 79. The only logical explanation is that a permit was not sought by Respondent Enmark and its

predecessor was because it was known that a permit could not be issued, inasmuch as there is a mandatory 20' vegetative buffer required for this area, and the approval of the Owner, the Appellant, would have to be obtained which would not have been given, and seeking a permit would have brought the clearly illegal encroachment to the attention of Town officials.

- Finally, once the illegal encroachment was brought to the attention of Town Officials, and the LMO Official issued a decision mandating the removal of the encroachment and establishing a vegetative buffer, this directive of the LMO Official was ignored.

In response to the decision by the LMO Official that the encroachment violated the LMO and directing its removal the Respondent Enmark, rather than appeal, chose to trick the Town Attorney into believing that the encroachment was grandfathered by sending to the Town Attorney a 1989 plat of the property (1) which was of so poor quality that the 1989 date was illegible, (2) on which a 1974 date was mysteriously handwritten, and (3) affirmatively representing in the cover letter that it was a 1974 plat. No explanation for this misrepresentation has ever been given.

The foregoing acts and conduct of the Defendant Enmark and its predecessors in title upon whom it relies constitute a clear and continuing pattern of *wrongful, illegal and criminal conduct* designed to deprive the Appellant of its property rights. This case cries out for an award of punitive damages, not only to punish the conduct of Respondent Enmark, but to deter similar conduct in the future.

It is worth pointing out that this Court should have no sympathy for the Respondent Enmark. All of the foregoing matters are matters of public record and matters of which Respondent Enmark not only should have known by virtue of constructive notice, but are matters

about which Enmark and the Town of Hilton Head had actual knowledge. Enmark purchased this property with open eyes, well aware of the fact that an easement did not exist and that this encroachment was illegal. Enmark initially contracted to purchase this property from ASA for $1,475,000.00. After checking the title, however, Enmark's attorney wrote ASA raising an objection to the title based upon the fact that the encroachment was not supported by any easement. Exhibit 58. ASA offered to remove the encroachment, but instead, Enmark convinced ASA to reduce the purchase price by $35,000.00. Exhibit 59. Enmark, accordingly purchased this property with open eyes, very aware of the fact that the encroachment was not supported by any easement rights and utilized that fact to leverage a $35,000.00 reduction in its purchase price. In other words, Enmark took the position with ASA that there was no easement and leveraged that into a $35,000.00 reduction in the price it paid for the property. Having acquired the property at a reduced price, Enmark now takes the opposite position, asserting that it possesses an easement.

As a result of the slander of its title, the Appellant has suffered various elements of actual damages, summarized below:

A. Remove and Restore

The cost to remove the encroachment and restore the property to its normal vegetative state is at least $18,130.00. Exhibit 75. Tim Drake, the owner of The Greenery who provided the foregoing estimate, testified that this estimate is conservative, and the actual cost will likely be higher. He also testified that the estimate included price discounts which were given to Mr. Viswanathan because he is a longstanding and valued customer, which discounts would not have been granted to another party. Tr.Vol. II, pg. 13, line 25 to pg. 14, line 25.

B. Rental Value

Mr. Viswanathan testified that the fair rental value of the area of the encroachment is $900.00 per month. Mr. Viswanathan is an experienced real estate developer and familiar with property values in the Hilton Head area. The encroachment is located on prime real estate within a stone's throw of the Sea Pines traffic circle, in the center of Hilton Head Island's commercial area. It is highly desirable real property. Tr.Vol. I, pg. 73, lines 10 – 24.

Mr. Viswanathan's testimony was unrefuted. No evidence challenging his testimony on this point was proffered by the Defendant Enmark. As of the time of trial, the Defendant Enmark has had the use of this encroachment for 195 months without paying one penny in rent. At the rate of $900 per month, the Defendant Enmark owes to the Plaintiff a fair rental compensation in the amount of $175,500.00. See also Tr. Vol. I, pg. 70, line 19 to pg. 72, line 6.

C. Damaged Property

As a result of an automobile wreck which occurred on May 18, 2016 an out building located on Plaintiff's property was damaged. One of the motor vehicles involved in the wreck had to traverse across the encroachment in order to make contact with the damaged property. If the encroachment had not existed and the buffer was in place as required by the LMO, it is fair to infer that the vehicle would have been forced stop short of the damaged property and the damage would not have occurred. The cost of repairing this property is $3,200.00. Tr. Vol I, pg. 72, lines 18 – 23.

D. Attorney's Fees and Costs

The Plaintiff is claiming reimbursement from the Defendant Enmark for the attorney's fees and costs incurred in connection with this lawsuit and defending its title. Tr. Vol. I, pg. 71, lines 6 – 9. At trial, the Defendant Enmark objected to this portion of the Plaintiff's claim for

damages, asserting that it had not been given adequate notice of this claim and needed time in which to examine the itemized billings and invoices which had been provided and to prepare for cross examination or defense of this claim. Upon motion of the Plaintiff and without objection the Plaintiff's claim for attorney's fees and costs was bifurcated from the rest of the trial, upon condition that if the prescriptive easement claim fails, the Court will reconvene to hear and try the Plaintiff's claim for attorney's fees and costs. Tr. Vol. II, pg. 158, lines 8 – 25.

X. THE MASTER IN EQUITY ERRED IN FAILING TO ISSUE A JUDGMENT AGAINST THE RESPONDENT ENMARK ON THE APPELLANT'S CAUSE OF ACTION FOR NUISANCE.

"The traditional concept of a nuisance requires a landowner to demonstrate that the Defendant unreasonably interfered with his ownership or possession of the land." *Sylvester v. Spring Valley Country Club*, 344 S.C. 280, 286, 543 S.E.2d 563, 566 (Ct.App. 2001). A "nuisance" is a substantial and unreasonable interference with the Plaintiff's use and enjoyment of his land. *Id.* "Nuisance law is based on the premise that every citizen holds his property subject to the implied obligation that he will use it in such a way as not to prevent others from enjoying the use of their property." *Clark v. Greenville County*, 313 S.C. 205, 209, 437 S.E.2d 117, 119 (1993) (citations omitted). See also, *FOC Lawshe Ltd. Partnership v. International Paper Company*, 352 S.C. 408, 413-14, 574 S.E.2d 228, 231(Ct.App. 2002).

Although the causes of action are different, the facts establishing the Respondent Enmark's use of the encroachment as a nuisance, and the resulting damages suffered by Appellant, are the same as the facts relied upon in establishing the Appellant's slander of title cause of action. Rather than repeat those facts, the Court's attention is directed to the Appellant's Brief, supra, pp. ____ - _____.

XI. THE MASTER IN EQUITY ERRED IN FAILING TO ISSUE A JUDGMENT AGAINST THE RESPONDENT ENMARK ON THE APPELLANT'S CAUSE OF ACTION FOR TRESPASS.

The proof and elements necessary to establish a claim for damages resulting from a civil trespass has been explained by the South Carolina Court of Appeals as follows:

> "At common law, all land held in peaceable possession is deemed to be enclosed. Subject to limited exceptions . . ., the person in peaceable possession has the right to exclude all others from the enclosure. **The unwarrantable entry on land in the peaceable possession of another is a trespass**, without regard to the degree of force used, the means by which the enclosure is broken, or the extent of the damage inflicted. The entry itself is the wrong. . . .. It is immaterial whether any further damage results. The mere entry entitles the party in possession at least to nominal damages. To constitute an actionable trespass, however, there must be an affirmative act, the invasion of the land must be intentional, and the harm caused must be the direct result of that invasion."

Snow v. City of Columbia, 305 S.C. 544, 552-53, 409 S.E.2d 797, 802 (Ct.App. 1991) (emphasis added and citations omitted).

The intent necessary to establish a trespass "is proved by showing that the Defendant acted voluntarily and that he knew or should have known the result would follow from his act. Although neither deliberation, purpose, motive, nor malice are necessary elements of intent, the Defendant must intend the act which law constitutes the invasion of the Plaintiff's right. Trespass is an intentional tort, and while the trespasser, to be liable, need not intend or expect the damaging consequence of his entry, he must intend the act which constitutes the unwarranted entry on another's land." *Id.*, 305 S.C. at 553, 409 S.E.2d at 802.

In the instant case, it is undisputed that the Respondent Enmark "broke the enclosure" and entered, repeatedly, on to the Appellant's land and that his entry on to the Appellant's land was not accidental, but illegal and intentional. The Master in Equity accordingly erred in finding that a trespass had not occurred.

The damages resulting from the trespass are the same as those flowing from the slander of title, and rather than be repeated, the Court's attention is directed to the Appellant's Brief, supra, pp. ___ - ___ , for discussion of these damages.

CONCLUSION

The encroachment was illegally created. It has been illegally maintained and improved. The LMO Official for the Respondent Town has ordered its removal. Its existence violates local ordinances and restrictive covenants. It fails to provide either ingress or egress, but is a dead-end encroachment to nowhere, facilitating trespass over the properties of third parties. Use of the encroachment was neither adverse nor continuous and uninterrupted for the prescriptive period of time. Use of the encroachment by the Respondent Enmark and its predecessors in title has been no different than the use by the general public.

It is accordingly respectfully requested that the Order of the Master in Equity be reversed and this Court declare that the Respondent Enmark failed to prove by clear and convincing evidence its ownership of a prescriptive easement over Appellant's property..

The Master in Equity also erred in failing to grant judgment in favor of Appellant against the Respondent Enmark for slander of title, nuisance and trespass. It is accordingly respectfully requested that these causes of action be remanded to the lower court for a determination of damages.

MOSS, KUHN & FLEMING, P.A.

By: _____

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October 16, 2017

CERTIFICATE OF SERVICE

Undersigned certifies that to the Appellant's Initial Brief to which this certificate is affixed, was served upon the party (s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record:

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in a post office or official depository under the exclusive care and custody of the United States Postal Service, on October 16, 2017.

By: _____
Sue Radford

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October 16, 2017

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Carolina Center Building Corp. v. Enmark Stations, Inc. and Town of Hilton Head Island
Case No.: 2013-CP-07-02066

Dear Mrs. Kitchings:

Enclosed please find the Appellant's Initial Brief and Designation of Matter to be Included in Record on Appeal regarding the above-referenced matter. By copy of this letter I am serving a copy of the same on Russell P. Patterson, Esquire and Gregory M. Alford, Esquire.

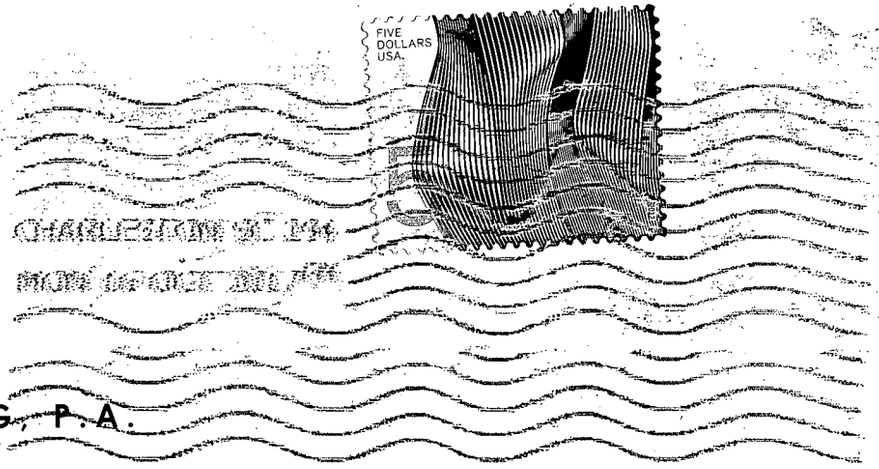
With kindest regards, I am

Very truly yours,

MOSS, KUHN & FLEMING, P.A.

H. Fred Kuhn, Jr.
HFKjr:sr
Enclosures

cc: Russell P. Patterson, Esquire (w/enclosure)
Gregory M. Alford, Esquire (w/enclosure)



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