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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE CHARLESTON COUNTY COURT OF COMMON PLEAS
Mikell R. Scarborough, Circuit Court Judge

Appellate Case No. 2020-000937

City of Folly Beach, Coastal Conservation League, Save Folly Beach, Inc., John Collins,
Matt Napier, Paula Stubblefield, Troy Bode, and Carol Kruer. Appellants,

vs.

State of South Carolina, Amy Connelly, Jeffrey H. Morris, Michael Vandaele, Stephen Rawe, Juan
Enterprises, LLC, Juanita A Wright, Debbie's Folly, LLC, and
Vernon Staubes, ... Respondents.

**RECORD ON APPEAL
VOLUME II OF II**

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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

City of Folly Beach, Coastal
Conservation League, Save
Folly Beach, Inc., John Collins,
Matt Napier, Paula Stubblefield,
Troy Bode, and Carol Kruer,

Plaintiffs,

vs. CASE NO. 2019-CP-10-0717

State of South Carolina, Amy Connelly,
Jeffrey H. Morris, Michael Vandaele,
Stephen Rawe, Joan Enterprises, LLC,
Juanita A. Wright, Debbie's Folly, LLC,
and Vernon Staubes,

Defendants.

Hearing before the Honorable Mikell R.
Scarborough, reported by Christine A. Smith, Court
Reporter and Notary Public, at 3:08 p.m. on
January 28, 2020 at 100 Broad Street, Courtroom 2A,
Charleston, South Carolina.

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P R O C E E D I N G S

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3 THE COURT: Up next is the case captioned, The
4 City of Folly Beach, and there are other Plaintiffs,
5 versus the State of South Carolina, and there are
6 other Defendants. The case is 2019-CP-10-717.

7 I'm going to start on the Plaintiffs' side of
8 the room and have counsel introduce themselves and
9 their clients, and then I'll come across the room on
10 the Defense side and ask Defense Counsel to do the
11 same.

12 MS. LENHARDT: Thank you, Your Honor. Leslie
13 Lenhardt with the South Carolina Environmental Law
14 Project. I have here today with me, Mr. Joe Wilson,
15 who is Counsel for the City; Spencer Wentworth, who
16 is the Town Administrator; Mayor Tim Woodwin is here,
17 as well as Plaintiffs Matt Napier, Paula
18 Stubblefield, Carol Kruer, Troy Bode, and several
19 representatives of the Coastal Conservation League as
20 well.

21 THE COURT: Very good. I'm happy to have you.
22 I'm glad we could find most of you a seat.

23 And for the State?

24 MR. SMITH: Emory Smith, Your Honor, for the
25 Attorney General's office.

1 THE COURT: All right, Mr. Smith.

2 MR. KOON: Kerry Koon for Vernon Staubes.

3 THE COURT: Mr. Koon, got it.

4 MS. BARKER: Rita Bolt Barker for Juanita
5 Wright and Juan Enterprises represented by Juanita
6 Wright and John Cambo (phonetic).

7 THE COURT: Ms. Barker, thank you.

8 MR. WALLACE: I'm Bruce Wallace here on behalf
9 of Jeffrey Morris and Stephen Rawe. With me is my
10 co-counsel, Mary Shahid, and Dr. Rawe and his wife
11 are here, and Ms. Morris is here.

12 THE COURT: Very good. Ms. Shahid is on the
13 back row. Okay.

14 MR. TIBBALS: Your Honor, Jeff Tibbals. I'm
15 here for the Defendant, Debbies Folly LLC, and with
16 me here, as a representative of that LLC is Mr. Billy
17 Hennessee.

18 THE COURT: All right, Mr. Hennessee. Very
19 good.

20 I've got a number of motions. The case was
21 referred over not too long ago, but I've got a number
22 of motions on or in the nature of Motions to
23 Dismiss -- and I've got one from the State and the
24 Motions for Judgement on the pleadings. They're all
25 in the nature of Motions to Dismiss under Rule 12(b)

1 and Rules 17 and 19. I have received memorandum of
2 law. I have had a chance to review those. I
3 appreciate you-all doing that for me. So I'm going
4 to start, I guess, with the Defendants' motions.

5 Mr. Smith, let me start with the State because
6 one of the issues that seems to be cropping up here
7 is who is the real party in interest. I want you to
8 address that question for me.

9 MR. SMITH: Thank you, Your Honor. Our motion
10 is fairly simple, and it's based on boilerplate
11 standing law. The Plaintiffs do not have a right to
12 assert an ownership claim as to property that they
13 allege is owned by the State. They don't have the
14 authority to sue the State or anybody else for that
15 matter as to property they don't own. They
16 acknowledge that they don't claim an ownership
17 interest in this property. Therefore they have got
18 no standing to go make any such type of claim. This
19 is boilerplate standing law as to not having any
20 injury sufficient to assert standing.

21 I also cited in here Section 15-67-10, that
22 makes clear that they cannot bring an action against
23 the State of any person in possession of real
24 property by himself or any person claiming or having
25 title to or unoccupied real property may bring an

1 action against any person who claims or could claim a
2 stake therein. They are not in possession of the
3 property. They don't claim title to it. Therefore
4 they've got no standing to assert a claim against the
5 State here, and we believe that their first cause of
6 action should be dismissed for that reason.

7 They say that they're not bringing a quiet
8 title action, but that cause of action asks for a
9 declaration of ownership as to the property. They
10 cannot do that as it's property they do not own.

11 Their second cause of action is for injunctive
12 relief. They bring that against the other
13 Defendants, not the State of South Carolina.
14 Therefore they have asserted no viable claim as to
15 the State to which they have standing. We believe,
16 for this reason, the State should be dismissed as a
17 party pursuant to our motion. I would note that also
18 in their memorandum they said something like, Well,
19 they didn't really care that much whether the State
20 was in or out. Well, we'll take them up on that.
21 We're happy to have the State out. Thank you, Your
22 Honor.

23 THE COURT: All right. Let me ask this one
24 question, and I don't want to get too bogged down.
25 I'm wrestling with if the allegation is that the

1 property is somehow inundated with water and
2 therefore should belong to the State. Is that your
3 reading of the Complaint?

4 MR. SMITH: Well, they have this theory in
5 their Complaint that because of erosion of the beach
6 and the subsequent renourishment of the beach that
7 somehow this property at issue pursuant to erosion,
8 accretion or avulsion law is State property and the
9 Plaintiffs can't build on that.

10 That is an issue that I'm not prepared to
11 address today because they simply don't have the
12 standing to make it because they don't own the
13 property. Maybe they would have some other theory of
14 recovery against somebody here. Maybe they don't.
15 They cannot make ownership of the property a basis
16 for relief against the State. I'm not here to assert
17 a claim for the other Defendants on that basis, but
18 I'm not aware of anything that they could have
19 asserted.

20 THE COURT: Okay. Very good.

21 MR. SMITH: Thank you.

22 THE COURT: Mr. Koon -- I'm just going to come
23 across this way (indicating).

24 MR. KOON: Your Honor, I represent Vernon
25 Staubes. He's just a private guy who owns property

1 out here. Let me pass up, if I can, an aerial
2 photograph so you can see what property we're talking
3 about. Do you mind passing this around (indicating)?

4 Just for orientation purposes, Mr. Staubes
5 owns three lots. One of them is nominated Burkhardt
6 because that was the former owner, but that is the
7 only lot that is mentioned in the lis pendens. I
8 presume that's the lot that the Plaintiffs are
9 interested in.

10 First of all, I would like to at least in part
11 adopt Mr. Smith's argument. If the State is not
12 claiming an interest in this property, under these
13 facts, nobody else can. It either -- the State, if
14 they were so inclined, and evidently they're not,
15 would be the proper party to assert a claim.

16 The first thing I would like to take issue
17 with is the nomination of my client's property as
18 super beachfront. I didn't know what that was. The
19 way they define it in some of their papers is that
20 it's property that is out beyond the mean high water
21 mark and not serviced by an actual road. Well, my
22 client's property is right on East Ashley Avenue.

23 According to this definition in their
24 pleadings, he would not be a super beachfront
25 property owner. The second thing I would say, Your

1 Honor --

2 THE COURT: Let me just say this for the
3 record: So Mr. Staubes' lots are -- I'm not going to
4 give the whole TMS number, but they end in 16, 17,
5 and 18, and they front on East Ashley Avenue; is that
6 correct?

7 MR. KOON: That is correct, although the only
8 one mentioned in the lis pendens is the one ending in
9 16.

10 THE COURT: 16, okay.

11 MR. KOON: And I saw some of the other
12 Plaintiffs' affidavits about access being hampered by
13 "super beachfront owners". As you can see, there is
14 a public beach access right next to my client's lot.
15 So if there is an access problem, it's not caused by
16 Mr. Staubes or his property.

17 THE COURT: All right.

18 MR. KOON: The real crux of this is that there
19 is no standing because there is no case or
20 controversy. This is one of the nicest pleadings
21 that has ever been filed against one of my clients
22 because it doesn't accuse him of anything.

23 As I understand it there are general concerns
24 that the Plaintiffs are attempting to allege on
25 behalf of the State when the State is not alleging it

1 themselves, and there is a concern by the City that
2 this would be a good thing to have decided so they
3 could understand their administrative scope and plan
4 their jurisdiction and such as that. That's nothing
5 but a request for an advisory opinion, which is not
6 permitted under the Declaratory Judgment Act. That's
7 been decided many years ago in the McNair case which
8 says that even for a declaratory judgment there has
9 to be standing as Power versus McNair from 1970.
10 There has to be standing to bring a declaratory
11 judgment action.

12 The fact that it is one for declaratory
13 judgment does not create or take away any requirement
14 of standing. Standing is intertwined with case or
15 controversy. In my client's position, there is no
16 case for controversy alleged against him except that
17 there is a general allegation that the various
18 property owners were singled out because at one time
19 they had applied for permits.

20 Well, my client doesn't understand that he has
21 an active permit application pending. They didn't
22 plead that he did, and therefore there is no case or
23 controversy. They simply asked for an injunction to
24 prevent him from doing something that a property
25 owner might do in the future. That does not describe

1 an active case or controversy, but maybe even more
2 fundamental to that is that if it's a permitting
3 issue, a property owner has the right to an
4 administrative record before a permitting issue gets
5 into Court.

6 So what they're trying to do is go around that
7 and basically deprive a property owner who might
8 apply for a permit in the future of his right to due
9 process, to have the administrative record developed
10 fully, and then get into court on an appeal.

11 So our basic argument is that without an
12 active case or controversy this case cannot go
13 forward. Lennon versus Coastal Council, I believe,
14 indicates that the lack of a case or controversy is a
15 matter of subject matter jurisdiction. They just
16 have not pled an active, actual justiciable case or
17 controversy.

18 Now, they tried to get in the side door by
19 discussing accretion and erosion and of course all of
20 the existing law is favorable to the property owner.
21 If the property gets added onto by natural accretion,
22 you own it. If you lose it by erosion, you lose it.

23 Then they go into this issue of avulsion,
24 which doesn't seem to be recognized in any detail in
25 the South Carolina courts, but they give us a

1 definition of avulsion as a sudden act which changes
2 the boundaries of property.

3 They cite Am.Jur. and in their citation from
4 Am.Jur -- it is a sudden act by action of water, not
5 a human act, that creates an avulsion. They cite two
6 Supreme Court cases, Georgia versus South Carolina
7 and one other one.

8 I noticed when reading those cases that one of
9 them cited California by the United States, which
10 made the point that when fill is placed on submerged
11 land, the fill becomes the property of the owner of
12 the submerged land. So that's what we've got here.

13 No property owner that I know of, especially
14 Mr. Staubes, is claiming that this beach
15 renourishment process should extend or expand his
16 property lines. It was intended for the purpose of
17 renourishing the property on the front beach and
18 restoring it to what was there and what was owned by
19 the property owners.

20 I cited in my motion or memorandum the Federal
21 register, which said that the purpose of the Federal
22 renourishment process project is to nourish private
23 and public land along the shore. It was an
24 intentional act by the Federal government intended to
25 benefit private property owners including

1 Mr. Staubes, and on top of that after they did it,
2 Folly Beach sent them a bill.

3 Now they say we don't even own it. It's an
4 incongruous position, Your Honor. Thank you.

5 THE COURT: Just so I'm clear, Mr. Staubes has
6 got title to these lots by deed and they're all
7 platted out lots, correct?

8 MR. KOON: That is correct, Your Honor.

9 THE COURT: And these lots on the original
10 plat of the island?

11 MR. KOON: With an asterisks. They were in
12 effect cut in half by East Ashley Avenue when it was
13 relocated to its current location. That happened
14 many years ago.

15 THE COURT: Okay.

16 MR. KOON: So if you can see, all the other
17 lots are rectangular shaped. Ours are less than
18 rectangular shaped. It's because East Ashley Avenue,
19 in effect, bisected it. You know, if they're worried
20 about residential development, that's more than
21 speculative because of the size of the lots. There
22 might be other uses and it's his property and he
23 doesn't want it affected by this lawsuit.

24 THE COURT: I've got it. Okay. Very good.
25 Next? Ms. Lenhardt?

1 MS. LENHARDT: Thank you, Your Honor. Again,
2 I'm here on behalf of Defendants Juan Enterprises and
3 Juanita Wright. They are here in the courtroom
4 today. We moved for a dismissal for three reasons
5 pursuant to Rules 12 and 19. The first is that
6 Plaintiff has failed to state facts sufficient to
7 constitute a cause of action. The second is that
8 Plaintiff has failed to join necessary parties. The
9 third is that Plaintiff lacks standing.

10 I, too, would like to adopt the argument of
11 Mr. Smith and Mr. Koon particularly on the issue of
12 standing. I will discuss the first issue in more
13 detail.

14 Your Honor is familiar with the allegations in
15 the Complaint. The Plaintiffs are asking this Court
16 to determine if the State of South Carolina owns a
17 portion of Defendants' property. Under Rule
18 12(b)(6), a Complaint must state facts sufficient to
19 constitute a cause of action. It follows that if
20 there is no law to support a particular claim, there
21 can be no viable cause of action.

22 Here, not only has the Plaintiff failed to
23 state a viable cause of action because there is no
24 South Carolina law to support their position, but
25 they're also trying to accomplish something that is

1 wholly inconsistent with Federal law. As Mr. Koon
2 noted, the Rivers and Harbors Act and the related
3 regulations specifically allow for the type of
4 mitigation that this renourishment project
5 accomplished because of the Federal navigation
6 project in the Charleston harbor.

7 Second, Plaintiffs have failed to name
8 necessary parties as required by both the Declaratory
9 Judgment Act and Rule 19. As the Declaratory
10 Judgment Act provides, when declaratory relief is
11 sought all persons shall be made parties who have or
12 claim any interest which would be affected by the
13 declaration, and no declaration shall prejudice the
14 rights of persons not parties to the proceedings.

15 Likewise, Rule 12(b)(7) requires dismissal of
16 a Complaint that fails to join the necessary parties
17 under Rule 19. Rule 19 provides that a person shall
18 be joined as a party in the action if in his absence
19 relief cannot be afforded among those already
20 parties -- or two, he claims an interest relating to
21 the subject of the action and is so situated that the
22 disposition of the action's absence may, as a
23 practical matter, amper or impede his ability to
24 protect that interest -- or two, leave any of the
25 persons already parties subject to a substantial risk

1 as incurring multiple or otherwise inconsistent
2 obligations.

3 The complaint acknowledges that there are 50
4 so-called super beachfront lot owners at Folly Beach
5 yet named only eight lot owners as Defendants.

6 Because the Plaintiffs have no South Carolina
7 law supporting their position, it is inevitable that
8 if this case proceeds the South Carolina Appellate
9 Court will ultimately issue guiding precedents that
10 will certainly affect the property rights of all 50
11 owners of such lots.

12 It is axiomatic that persons with property
13 interests at issue are necessary parties to a case
14 that would determine those property interests as
15 cited in Slaten versus Slaten which requires that a
16 party with an interest in the property at issue be
17 joined as a necessary party.

18 Because Plaintiff has failed to name all
19 parties that own these so called super beachfront
20 lots at Folly Beach, they would definitely have an
21 interest in and would certainly be affected by the
22 requested declaration the Plaintiffs have made. The
23 Plaintiffs have not satisfied the very basic
24 requirements of the Declaratory Judgment Act and
25 Rule 19.

1 Finally, Plaintiffs lacked standing, and I'm
2 incorporating the arguments that have already been
3 made by my co-defense counsel.

4 To summarize, the Plaintiffs have not stated a
5 viable cause of action, have failed to name necessary
6 parties, and lacked standing. Therefore, the
7 complaint should be dismissed with prejudice.

8 THE COURT: Thank you, Ms. Lenhardt. All
9 right. You may proceed.

10 MR. WALLACE: Thank you, Your Honor. Bruce
11 Wallace again for Defendants Stephen Rawe and Jeffrey
12 Morris. Ms. Morris and Dr. Rawe and his wife are
13 here in the courtroom.

14 THE COURT: Mr. Wallace, you-all are the ones
15 that added the Public Law 99-662, right?

16 MR. WALLACE: That is correct, Your Honor.

17 THE COURT: All right.

18 MR. WALLACE: I'd like to -- since we've
19 briefed pretty much everything that's already been
20 argued, Your Honor, I'm trying not to repeat that,
21 but I would like to delve a little bit into the case
22 and controversy at issue.

23 I'd like to do that by referring the Court to
24 the complaint. If you look at Paragraph 6 of the
25 complaint, Folly Beach exists to prevent further

1 development of beachfront lots. Paragraph 11 says,
2 The Defendants all own undeveloped super beachfront
3 lots and have take steps to pursue development.

4 Paragraph 13 says, The lots are seaward of a
5 typical oceanfront development. Lots, under
6 Paragraph 20, owners are moving to build structures.
7 So the focus of the Complaint, the damage, the
8 concern that the Plaintiffs seek redress of this
9 Court is development of these lots.

10 What the Plaintiffs want the Court to do is to
11 establish a line that they claim will help them,
12 Folly Beach most importantly, enforce Folly Beach's
13 own development ordinances. They claim that this
14 line is unknowable or it's variable or it's -- pick
15 any of the language out of the Complaint you like,
16 Your Honor.

17 So I went to Folly Beach's ordinances. I've
18 got a copy I would like to hand up if I may. I have
19 a copy for opposing counsel as well. Folly Beach
20 Code of Ordinances, Section 166.04-04, has standards
21 under Subsection C. It says, All development shall
22 maintain a minimum setback of 40 feet from the
23 perpetual easement line, or where no perpetual
24 easement line exists the OCRM baseline.

25 For the purposes of this subsection perpetual

1 easement line shall mean a landward edge of the
2 Federal beach renourishment project as defined by the
3 Army Corps of Engineers.

4 That's a known line. That's a known point of
5 reference for every single lot and every single lot
6 owner has been sued in this lawsuit. Every single
7 lot owner that hasn't been sued Folly Beach says, No
8 development seaward of this 40-foot buffer.

9 Your Honor, I've taken the liberty of going on
10 Folly Beach's website, and the City was kind enough
11 to take pictures of every single beachfront lot in
12 relation to this buffer zone. Rather than ask the
13 Court to look at 30 pictures, I just pulled the ones
14 for the Defendants in this case. The notes are my
15 notes, Your Honor. Those don't appear on the web
16 page.

17 As you can see, when you compare each lot --
18 each Defendant -- each individual Defendant in
19 comparison to his known line in this
20 ordinance-created buffer zone -- the whole point is
21 to prevent development on the active beach. There
22 are rules against planting anything other than beach
23 appropriate vegetation in this zone. There are rules
24 against creating structures in this zone.

25 Folly Beach has taken the steps to do the very

1 thing they ask this Court to do: Prevent development
2 on the beach. They've done it in reference to a
3 fixed line.

4 I point this all out, Your Honor, because it
5 is not until a party, a lot owner, seeks to create
6 development within this zone or beyond, of course,
7 where a case or controversy actually exists.

8 There is no indication as my learned
9 co-counsel has stated that there is no pleading that
10 anybody sought to develop beyond that line
11 established by their own city's ordinances. So
12 unless and until that happens there is no case or
13 controversy and therefore no standing.

14 THE COURT: These photos you handed up are
15 from the City of Folly Beach website?

16 MR. WALLACE: Yes, Your Honor. If you Google
17 the City of Folly Beach Perpetual Easement Line, this
18 is the first website that comes up, these 30 pages.

19 THE COURT: All right.

20 MR. WALLACE: So the memo in support and the
21 opposition Motion to Dismiss, Your Honor, echos these
22 development things. The affidavits of the Plaintiffs
23 that were filed in opposition to the Motions to
24 Dismiss talk about how develop will harm their
25 interest. Develop will harm their ability to enjoy

1 the beach. The City talks about how Folly Beach
2 ordinances to minimize disturbance of the beach --
3 they need this property line defined so they can
4 enforce their own ordinance which is patently untrue
5 based on their own ordinances.

6 Your Honor, it bears repeating that a
7 declaratory judgment action is meaningless in and of
8 itself. You have to look at the underlying relief
9 sought in order to define what a declaratory judgment
10 action is.

11 So to the extent the Plaintiffs say, Hey,
12 we're not trying to do a quiet title action, Judge.
13 We're just trying to do a declaratory judgment
14 action. That again, is against the greater weight of
15 the State of South Carolina, that boundary lines can
16 be determined directly or indirectly by a quiet title
17 action.

18 That's what this is. They want you to believe
19 it's otherwise because that gets them around the
20 issue that they have no possession or control. So
21 based on that, there is simply no cause of action
22 that Plaintiffs can assert in this case.

23 Going to -- finally, Your Honor, I would like
24 to focus a little bit on the avulsion, the avulsive
25 event that allegedly brought us here today. The

1 Plaintiffs would have to focus on the avulsion
2 allegedly created by the renourishment project rather
3 than the avulsion created by the construction of the
4 jetties.

5 Every single statute regulation addressing
6 this issue blames the loss of beach sand on Folly
7 Beach on the construction and maintenance of the
8 jetties. The land and sand at Folly Beach that would
9 naturally flow south is prevented by the jetties.

10 So the avulsive event of the creation of the
11 jetties has deprived Folly Beach. It's a
12 sand-starved beach. Renourishment over the years has
13 been to try to bring us back to where we would have
14 been but for the creation of the jetties. So a lot
15 of perspectives, like the Yelsen land case, Your
16 Honor, the jetties are the dike that we're talking
17 about.

18 And so as a matter of law if there's an
19 avulsive event, it's one that happened decades ago,
20 and we've been playing catch up ever since with the
21 state, federal government, and private property
22 owners combined.

23 For that reason, with the jetties being the
24 avulsive event, the property lines should go back to
25 where they were, which is exactly what the

1 renourishment tries to establish.

2 THE COURT: Isn't that one of the reasons why
3 the Federal government enacted this?

4 MR. WALLACE: That's precisely the reason why.

5 THE COURT: The CFRs are pursuant to these
6 Rules?

7 MR. WALLACE: Yes, sir, Your Honor, and of
8 course there is an exception for Folly Beach with the
9 normal regulatory issues. It is because of the
10 conditions created by the jetties.

11 THE COURT: Right.

12 MR. WALLACE: Thank you, Your Honor.

13 THE COURT: Mr. Tibbals?

14 MR. TIBBALS: Your Honor, Jeff Tibbals for
15 Debbies Folly, and I'll be brief. Since I'm last I
16 get to adopt everybody else's argument. I will do so
17 and will talk to you about -- we've already made all
18 the arguments about standing. We've made the
19 arguments about the failure to name necessary
20 parties.

21 I just want to touch on briefly the fact that
22 these are platted lots. This is not a situation --
23 this was a beach renourishment project. This is not
24 a beach creation project, and so I think that's the
25 distinction that is paramount when you're looking at

1 these other cases that are cited by the Plaintiffs.

2 That's the real distinction between the
3 private property rights that the Plaintiffs are
4 seeking to convert versus the public rights that are
5 already in place. So for example, when they cite the
6 Smiley case and they talk about standing, well
7 Mr. Smiley had standing when the Isle of Palms had
8 their beach scraping because that was land in public
9 trust already.

10 In fact, there was an OCRM regulation in place
11 that said, Anybody who is adversely affected by the
12 granting of an OCRM permit can go ahead and make a
13 challenge, and that's because it was public property.
14 It was in a public trust. It was owned by the State.

15 Here we have lots that are platted that these
16 individual owners bought. They were in their title.
17 They paid taxes. They paid for the sand to come in
18 and renourish and create again what was previously
19 there. So it's not a situation of a creation where
20 the expanding property rights ad infinitum -- where
21 there was no property before. This is restoring what
22 was previously there.

23 What's really interesting about -- and I want
24 to take a quick moment to talk about the standing of
25 the City, which may be one issue, and the standing of

1 the individuals is another issue as well. As you
2 consider this and these issues and these arguments, I
3 would like for Your Honor respectfully to consider
4 whether or not some of the Plaintiffs may have
5 standing and some may absolutely not.

6 I think the individual owners are distinct
7 because if you look at some of the arguments in the
8 brief, in the memo, and I'm looking -- for example,
9 on Page 17 of the memo of the Plaintiffs, on Page 16,
10 what they're saying is that Mr. Napier has standing
11 because he's upset that somebody has put "No
12 Trespassing" signs and fences on their own private
13 property. Okay? He's upset because he no longer has
14 an unobstructed view.

15 Well, there's no allegation that he's got a
16 view easement, Your Honor, and I think it's fair to
17 say that people can do what they will with private
18 property, and so when you have -- I just want to read
19 this portion because I think it's expected -- it says
20 the barrier -- this is from Page 17 -- this barrier
21 is the embodiment of the uncertainty that dozens of
22 oceanfront property owners on Folly Beach deal with
23 as they try to plan and invest for the future use of
24 their property while never knowing when the owner of
25 an old previously submerged lot might come out of the

1 woodwork and assert property interest.

2 No. That's not the lesson. That's not the
3 lesson, Judge. The lesson is, when you're purchasing
4 property if you want oceanfront don't buy behind a
5 platted lot, right? I mean, that's real estate law
6 101. Take a look at what the platted lots are. If
7 you want an unobstructed view, don't buy with a lot
8 in front of you.

9 So I don't see how, under any set of
10 circumstances or any scenario, that these individuals
11 have the right and -- I think the real issue here is
12 the legally protected interest. How do the
13 individuals have a legally protected interest in
14 other private owners' lots?

15 You're talking about a situation where they
16 would like to see title revert to the State so they
17 want to take property from these private owners, they
18 want to give that property to the State, and they
19 don't want to pay any money to the owners of these
20 lots.

21 THE COURT: I was going to say, There's a
22 legally recognized way to do that; is there not?

23 MR. TIBBALS: Your Honor, not without just
24 compensation.

25 THE COURT: That's where I'm going.

1 MR. TIBBALS: Yes, sir. Takings laws, nor
2 shall private property be taken for public use
3 without just compensation.

4 THE COURT: Right.

5 MR. TIBBALS: That's all I have to add,
6 Your Honor. I would like for you to try to look at
7 the different classes of standing as well when you
8 examine these issues.

9 THE COURT: All right, very good. All right,
10 Mr. Tibbals. Thank you.

11 MS. LENHARDT: I'm not feeling outnumbered at
12 all, Your Honor.

13 THE COURT: You've sued plenty of people, but
14 they say you should sue some more. We'll just deal
15 with the ones we've got. How about that,
16 Ms. Lenhardt?

17 MS. LENHARDT: And I will address that, and
18 I'm going to try and hit all of --

19 THE COURT: Let's start with standing. Let's
20 talk about that and how we get to that which case or
21 controversy, which to some degree are one and the
22 same, flip sides of the same coin, but standing is
23 not the same as a case or controversy. So let's
24 start there.

25 MS. LENHARDT: Right. I think that there are

1 two aspects to their standing argument. The first
2 one really relates to the statutory standing basis
3 that is brought up with the quiet title action
4 statute. Then you have the more well-known standing
5 standard which is -- the constitutional standing, the
6 injury and traceability, those kinds of things which
7 I know Your Honor is very well aware of.

8 They are obviously bringing up the statutory
9 argument right off the bat because the standard for
10 standing is very strict in that regard. You have to
11 have possession. You have to have a claim to
12 possession or possession of the property and that's
13 it.

14 Well, obviously we don't have possession based
15 in part because it's what we consider to be public.
16 I would also -- I would just submit to the Court that
17 it's not a quiet title action for a couple of
18 reasons. Number one, if you look at our prayer for
19 relief, we are asking for not possession or control
20 of the property but a determination of the boundary
21 where the mean high water mark is, and does the
22 avulsion doctrine change that boundary? It's a
23 broader request for relief than merely we want you to
24 declare ownership by the State.

25 I will also say that another reason why this

1 doesn't fit exactly within a quiet title action is
2 because this is state-owned property and not just
3 state-owned high ground property but state-owned
4 public trust property. It's owned by the State in
5 trust for the citizens of the State of South
6 Carolina.

7 THE COURT: Property below the mean high
8 water, right?

9 MS. LENHARDT: That's correct, Your Honor.
10 And that's what we're arguing, is that the mean high
11 water mark is the line prior to the 2018
12 renourishment project.

13 THE COURT: Let me stop you there. Prior
14 to -- at the creation of Folly Beach, the island,
15 lots were platted out -- this was back in the 1920s.
16 I've had plenty of Folly Beach cases, and one of my
17 constant comments is the rules of law as you and I
18 know it cease to exist at Folly Beach. Okay? It's
19 its own world.

20 MS. LENHARDT: It is.

21 THE COURT: And these lots were platted out
22 100 years ago almost. Okay? So as I can see from
23 the diagram that was handed up to me, I think it was
24 Mr. Koon -- he says, Mr. Staubes owns three lots
25 seaward of East Ashley Avenue, but clearly they're

1 high land. There are lots seaward of that which are
2 clearly underwater.

3 Those of us who have been to Folly know that
4 there are plenty of lots under water out there. I
5 find it incredible that there's a market in those,
6 but apparently there is. I don't know what value
7 they have, but there is a market there.

8 So these Defendants, which you've named, have
9 all received title to platted lots which preexist any
10 of this, correct?

11 MS. LENHARDT: Yes. And that does not
12 change -- just because they have a platted lot does
13 not change the law of accretion and erosion.

14 THE COURT: Right.

15 MS LENHARDT: There are people in this state
16 who pay taxes on wetlands all the time that they
17 don't own. So you can have a platted lot and claim
18 ownership, but if you accept our theory, and actually
19 the erosion theory is not contested, that the
20 property has eroded and become submerged, then they
21 don't own it anymore.

22 So the question, the legal question for you,
23 and they're saying, Well, maybe the jetties have
24 created an avulsive event, and that's the one that
25 you should really be looking at. That's a merits

1 argument. That is not part of the basis for a Motion
2 to Dismiss in this case.

3 So going back to what I was saying about the
4 quiet title action, if you were talking about this
5 public trust property, it's very clear in South
6 Carolina that state ownership is presumed. The only
7 time that it's not or where there actually is a
8 presumption -- the only time you can overcome it is
9 if you are a presumptive property owner and you bring
10 a quiet title action against the State of South
11 Carolina.

12 So I would argue that there's no necessity to
13 find that there's been a continuous title of the
14 state in this case. If this is below the mean high
15 water mark then it's state owned. So it kicks it out
16 of the quiet title statute in my opinion.

17 Now, if you want to talk about the
18 constitutional standing issue, aside from -- and I
19 will address the claim of stating a cause of
20 action -- first of all, the City of Folly Beach has
21 had a tremendous conundrum, and it is because it's
22 its own world because of the exemption from the
23 beachfront management0. That's reality.

24 They have had multiple issues with enforcing
25 their ordinances. They've taken affirmative steps,

1 not only in this case but in others that are pending
2 currently in Circuit Court, and it's imperative that
3 they get clarity on how they -- for example with the
4 renourishment project, how they allocate costs.

5 We don't know how that is working. The
6 damages to the City include expenses that they've
7 incurred in some cases to condemn property. They
8 have to monitor these properties.

9 It is, in fact, true that there are multiple,
10 multiple super beachfront lots -- I believe there are
11 14 of them -- they've already constructed. I know
12 you've been out there, and we have pictures of -- we
13 have Ms. Wetmore's affidavit -- they're in the ocean.
14 It's created a safety issue, an access issue, and
15 puts at risk the infrastructure. Those are concrete
16 interests.

17 With regard to the individual properties, I
18 know that -- I put this with Mr. Napier's affidavit.
19 This is a picture that's worth 1,000 words. This is
20 affirmative steps to prevent Mr. Napier from
21 accessing public trust property in front of his
22 property. It's very, very clear that it happened
23 subsequent to the institution of this lawsuit.

24 So he has been actively injured. He also has
25 established a recreational interest in other lots

1 that are in that vicinity. He resides north of the
2 washout, I believe, and that's where many of these
3 spots are clustered.

4 THE COURT: North of the washout?

5 MS. LENHARDT: Yes, sir.

6 THE COURT: I would think so. I was going to
7 ask you about that because one of the questions I had
8 in reading your memo is on Page 18. In some
9 Defendants' assertion of ownership over property they
10 do not actually own under the law -- has already
11 impacted Mr. Napier and the other Plaintiffs
12 financially. That's the picture that you make
13 reference to?

14 MS. LENHARDT: Yes. There are multiple --

15 THE COURT: I can't recall whose lot that is.
16 I think you talked about it in here. If that lot is
17 owned in fee simple by the landowner between
18 Mr. Napier and the ocean, why can't he put up a
19 barricade and say, Don't come across my property.
20 This is my property.

21 MS. LENHARDT: Well, that's the question,
22 isn't it? I mean, if you were to take this case up
23 and make a Ruling on whether or not avulsion is
24 taking the property back to the State, there we have
25 it.

1 THE COURT: Okay. You're saying that that
2 sand did not exist there prior to the renourishment?

3 MS. LENHARDT: That's correct. They were
4 under water.

5 THE COURT: Those lots were all under water?

6 MS. LENHARDT: They were under water.

7 THE COURT: And so then they were --

8 MS. LENHARDT: Over the course of several
9 years and under our theory an avulsive event is a
10 noticeable cognitive change in the shoreline that is
11 not a slow, steady, gradual thing. So while --

12 THE COURT: In this instance, it's manmade; is
13 it not?

14 MS. LENHARDT: It's an artificial accretion.
15 The Donald case addresses that. Your Honor addressed
16 this in the Yelsen case. You said that under
17 appropriate circumstances avulsion can be a concept
18 that a Court would consider. I don't believe that
19 there is a lack of an imaginary claim because our
20 highest Court did directly address this avulsion
21 claim.

22 Erosion and accretion is a very well-settled
23 body of law, and this is a natural extension of that.
24 It's not as though we are coming up with something
25 out of the air. Let's see. What else did they say?

1 Mr. Wallace brought up the Folly ordinances
2 addressing development, landward of the PEL. Those
3 lots are, in fact, landward of the PEL. I don't
4 believe that that ordinance is a blanket approval for
5 development, and I don't think it prohibits the City
6 from taking steps to prevent this unwise development
7 in their opinion.

8 THE COURT: They would still need to meet
9 whatever development standards the town's got, right?

10 MS. LENHARDT: Yes, sir they would.

11 Also, with regard to the 50 properties, we
12 believe that we've demonstrated or alleged in our
13 Complaint that these Defendants named have either
14 gotten permits or otherwise demonstrated an interest
15 to develop.

16 As I've said there are multiple other lots.
17 They obviously have not been named. As I've said,
18 also 14 of those have developed. That really
19 doesn't -- there's not a lot we can do at this point
20 about that.

21 If the Court finds these parties need to be
22 named you can order they be named. That creates a
23 logistical, practical --

24 THE COURT: Problem.

25 MS. LENHARDT: -- problem, and I feel like we

1 have to draw the line somewhere. Courts all the time
2 establish new law that would impact future actions,
3 people who would want to do something.

4 THE COURT: Well, you stated in your memo why
5 you named these folks. That was because they either
6 had or were seeking permits; is that right? Isn't
7 that my recollection?

8 MS. LENHARDT: Yes. My understanding is that
9 they have all obtained permits from DHEC. I'm not
10 going to swear to that.

11 THE COURT: There's some disagreement about
12 that.

13 MS. LENHARDT: Mr. Staubes has not apparently.

14 THE COURT: Okay.

15 MS. LENHARDT: I believe -- Your Honor, may I
16 take just one second?

17 THE COURT: Sure.

18 MS. LENHARDT: Your Honor, I would --
19 Mr. Corley pointed out a point that I did not raise.
20 The aerials that were submitted to the Court
21 identifying the properties -- if you take a closer
22 look, it does have the PEL identified, the buffer and
23 the professional easement line.

24 The erosion line is pretty telling as well.
25 If you look back here, the erosion line goes way

1 landward of the PEL. With Mr. Staubes the erosion
2 line is almost at the street. Ms. Connelly, Juan
3 Enterprises, and Juanita Wright, Mr. Rawe's property,
4 way landward -- and Debbies Folly as well. So that's
5 just a pretty telling question.

6 So this is just -- we take the position that
7 we do have an actual case or controversy here. This
8 has got to be resolved. This legal concept needs to
9 be recognized. They need to understand where this
10 line is so they can effectively serve their citizens,
11 and this is one of the most valuable assets in the
12 state.

13 We think that a lot of these arguments, you
14 know, might have merit, but they're for you to
15 determine as you take up this case. It's premature
16 for you to address this at this point.

17 THE COURT: Okay. Thank you, Ms. Lenhardt.
18 Any response from the State?

19 MR. SMITH: Just briefly, Your Honor. I
20 wanted to clarify something one of the defense
21 attorneys said about the State not asserting a claim
22 here. The State is not saying whether it does or
23 does not own the property here. We're not asking the
24 Court to determine that or asserting a position for
25 that at this point.

1 What we are saying is that there's a lack of
2 subject matter jurisdiction of this Court as to the
3 State to make that determination because there is no
4 case in controversy due to the lack of standing
5 against the state. It doesn't matter whether they
6 are asserting quiet title or a declaration of
7 ownership.

8 When they don't have an ownership claim for
9 the property at issue, they lack standing to sue the
10 State and ask this Court to make a determination as
11 to whether the State owns it no more than if they
12 were suing a neighbor's property or making a claim.

13 THE COURT: The State is certainly not
14 asserting that right; is that correct, Mr. Smith? In
15 this action?

16 MR. SMITH: Not asserting --

17 THE COURT: -- its right as owner of the
18 property in this action?

19 MR. SMITH: At this point we're not, Your
20 Honor. If we remain as a party what position we
21 would take I don't know. Our position is we don't
22 need to get that far because they don't have
23 standing. Therefore, this Court lacks subject matter
24 jurisdiction.

25 THE COURT: All right. In my limited time to

1 research the law in this case -- I know you-all cited
2 to the Yelsen case, which was a case I heard back in
3 the 2007-2008 timeframe. That brought up some
4 memories including my first day of meeting Speedy
5 Felco.

6 I asked him why it had taken him so long to
7 bring the action. He said that he knew it took 40
8 years sometimes to make a decision. I won't take
9 that long. I am going to take it under advisement.

10 The one case that I went looking for --
11 frankly, I was at the bar convention over the weekend
12 and this case was cited. I went looking for it.
13 It's not exactly what we're talking about, but it was
14 of interest to me. I want to point it out to
15 you-all. I'm going to ask for proposed orders to
16 come in.

17 The State versus Beach Company case, which was
18 the sand on the Isle of Palms, the case we're talking
19 about, that's really a dedication case is what that
20 is. To the extent -- that just provided me with some
21 reading material that I wanted to look at. I think
22 the Plaintiffs' position is that this is a relatively
23 novel issue which needs to be addressed and shouldn't
24 be discounted at this stage in the proceeding.

25 I'm wrestling with that as to whether or

1 not -- you still have the right to bring the action.
2 Is there standing? Is there a cause of action? Is
3 there a case or controversy as I think Mr. Koon put
4 it? Is there a case or controversy here?

5 I don't know how the City of Folly Beach steps
6 into the shoes of the State of South Carolina if the
7 State of South Carolina is not asserting that
8 interest. That's what I'm wrestling with. Okay?

9 I haven't had a chance to read all those
10 cases. I'll do it. The eluvial question is what has
11 been presented to the Court. Clearly it seems to be
12 different law than other jurisdictions distinct from
13 erosion and accretion of land which is normally what
14 we deal with here.

15 The other part of the equation that concerns
16 me, frankly, is you have this public law outstanding
17 that allows for this beach renourishment, and it
18 clearly provides for renourishment of both public and
19 private lands.

20 Let me ask this question, one of the issues I
21 had from today: Do the landowners pay something
22 towards --

23 MR. TIBBALS: Yes.

24 THE COURT: They get a bill from the City of
25 Folly Beach?

1 MR. TIBBALS: Yes. They have paid money for
2 the beach renourishment. They have paid for that
3 sand. One of these issues here, if I understand the
4 theory correctly, it is when the land erodes it is
5 forever gone so that you cannot do anything to
6 renourish.

7 Well, if that's the case, then this action
8 should have been brought as an injunction to prevent
9 the beach renourishment. The beach renourishment was
10 clearly to serve both public and private property
11 interests, and these individual owners pay for that
12 sand. Why did they pay for the sand if they were not
13 going to receive any benefit of it?

14 You're talking about they're just paying money
15 voluntarily to donate property to the public trust.
16 It doesn't make any sense.

17 THE COURT: Okay.

18 MR. WALLACE: Your Honor, second to that point
19 is that private property owners were required to
20 raise their property line to an elevation with the
21 public renourishment. They had to meet that
22 elevation and pay for it. Folly Beach did send them
23 a bill and worked with them in that regard.

24 THE COURT: I'm with you. All right.
25 Mr. Wilson, are you familiar with that?

1 MS. LENHARDT: I was going to say that
2 Mr. Wilson might be more familiar with that than I
3 am.

4 MR. WILSON: Thank you, Your Honor.
5 Joe Wilson here for the City. I had some
6 involvement.

7 The City's problem is that the contract with
8 the Corps of Engineers fills in public land. They
9 don't fill in private property.

10 THE COURT: Right.

11 MR. WILSON: What that resulted in was -- we
12 call them blue holes on these platted lots. They
13 would not get filled in and the beach would get
14 renourished and they would leave these holes landward
15 of the renourishment on these platted properties that
16 threaten the integrity of the renourishment. There
17 wasn't any stability.

18 So what the City -- after a lot of
19 consternation because we kind of saw this coming down
20 the pike -- the City had, in fact, stepped in and
21 filled in separate and apart from what the feds were
22 doing -- filled in sand for owners. They've done
23 that for a couple of renourishments.

24 More recently we decided we were going to seek
25 to receive some compensation for that, what the City

1 was doing, filling in these platted lots behind the
2 Federal renourishment. So the City was still filling
3 them in or giving the owners the option to do it
4 themselves and sending them a bill. So that's all
5 that was.

6 THE COURT: Well, that's pretty substantial if
7 you're looking at it from a matter of equity. You
8 send somebody a bill and then you bring an action and
9 say, I own your property? That doesn't pass the
10 equity test.

11 MR. WILSON: Well, it was something that the
12 Corps also required of us to do.

13 THE COURT: From what I saw in the public law,
14 they have the right to fill both private and public
15 land. They only pay for public; is that what they're
16 saying?

17 MS. LENHARDT: They will not fill -- they will
18 threaten not to renourish the public land if it was
19 not brought to eight feet.

20 THE COURT: It has to be a certain height,
21 right?

22 MR. WILSON: Public law is one thing. Our
23 negotiations and contract with the Corps of Engineers
24 is something else. They refused -- if we weren't
25 dealing with this problem it would threaten the whole

1 renourishment. They threatened to withdraw it.

2 THE COURT: Well, having big holes would be a
3 problem. I see that being of no value. I'm with you
4 on that one.

5 MR. WILSON: Thank you, Your Honor.

6 THE COURT: I'm going to take it under
7 advisement. I would like you-all to submit to me
8 proposed orders. I would like to know how soon
9 you-all can do it. You have numerous Defendants
10 here. I would really prefer one as opposed to at
11 least five, but it may have to address different
12 issues. I would like you-all to circulate it. Why
13 don't we just say -- is 30 days enough time for
14 you-all to circulate something? Let's do that. I
15 would ask for the same from Plaintiffs.

16 MS. LENHARDT: Thank you, Your Honor.

17 THE COURT: Okay. I'll take it under
18 advisement. I'll do some research. If you-all find
19 some other law or something I should look at I will
20 be glad to do it. I do appreciate your briefing the
21 matter. It helps me a lot. Okay?

22 MR. SMITH: Your Honor?

23 THE COURT: Yes, sir?

24 MR. SMITH: Some judges have different
25 thoughts on them. Do you want us to e-file a

1 proposed order and e-mail it to you, or do you want
2 us to just send it directly to you?

3 THE COURT: No. E-mail it and I'll e-file it.
4 I typically work on them a little bit anyway. Do not
5 e-file it. That will mess us all up.

6 MR. SMITH: Well, there's some way to do it
7 within the system so that it doesn't get published on
8 the website.

9 THE COURT: Well, don't do it that way. Send
10 it to me in Word, and I can manipulate it the way I
11 want it. Okay? Thank you-all very much.

12 (The proceedings were concluded at 4:05 p.m.)
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1 State of South Carolina)
2 County of Charleston) C E R T I F I C A T E
3

4 I, Christine A. Smith, Court Reporter and
5 Notary Public for the State of South Carolina at
6 Large, do hereby certify that the foregoing
7 transcript is a true, accurate, and complete record.

8 I further certify that I am neither related to
9 nor counsel for any party to the cause pending or
10 interested in the events thereof.

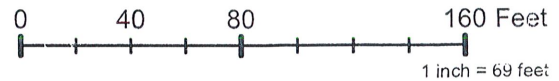
11 Witness my hand, I have hereunto affixed my
12 official seal this 22nd day of July, 2020 at
13 Charleston, Charleston County, South Carolina.
14
15
16

17 _____
18 Christine A. Smith
19 Notary Public
20 My Commission Expires
21 May 12, 2021
22
23
24
25





Charleston County SC



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Date: 4/5/2017

000259

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

City of Folly Beach, Coastal Conservation League, Save Folly Beach, Inc., John Collins, Matt Napier, Paula Stubblefield, Troy Bode, and Carol Kruer,

Civil Action No. 2019-CP-10-00717

Plaintiffs,

**ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS AND MOTIONS
FOR JUDGMENT ON THE PLEADINGS**

vs.

State of South Carolina, Amy Connelly, Jeffrey H. Morris, Michael Vandaele, Stephen Rawe, Juan Enterprises, LLC, Juanita A. Wright, Debbie's Folly, LLC, and Vernon Staubes,

Defendants.

This matter comes before this Court on the Motions to Dismiss filed by Defendants Stephen Rawe, Jeffrey H. Morris, Juan Enterprises, LLC, Juanita A. Wright, Debbie's Folly, LLC, Amy Connelly and Vernon Staubes, and the Motions for Judgment on the Pleadings filed by Defendants State of South Carolina and Amy Connelly (collectively, "Defendants' Motions"). Counsel for all parties appeared before this Court on January 28, 2020 for a hearing on the motions. For the reasons set forth below, the Court grants Defendants' Motions, dismissing this case *with prejudice*.

FINDINGS OF FACT

The action arises out of the latest beach renourishment project at Folly Beach in 2018. Plaintiffs are the City of Folly Beach, the Coastal Conservation League, and various private homeowners who own properties on Folly Beach. Defendants are the State of South Carolina (the "State") and private owners of undeveloped beachfront lots on Folly Beach (collectively, the "Defendant Owners"). Plaintiffs seek an adjudication that title to at least a portion of the Defendant Owners' lots lies with the State (Complaint, ¶¶ 36-37), as well as a prohibition of any

development of said property (*Id.*, ¶¶ 42-46). Plaintiffs allege that “Folly Beach is one of the most sand-starved and erosive beaches on South Carolina’s coast” as a result of “manmade erosion caused by the Charleston Harbor jetties.” *Id.*, ¶ 15. Plaintiffs further allege that “Folly Beach is reliant on a continual, repeating cycle of renourishment” conducted by the U.S. Army Corps of Engineers and that such renourishment is publicly funded. *Id.*, ¶¶ 15, 18. In fact, “Folly Beach is reliant on a continual, repeating cycle of renourishment. This has been the established mode of operation on Folly for many years ...” *Id.*, ¶ 16.

The Complaint alleges the Defendant Owners own undeveloped “super-beachfront” lots on Folly Beach (hereinafter, the “Property”). Complaint, ¶ 11. The Complaint also alleges the Defendant Owners have taken “affirmative steps to pursue development” of their lots. *Id.* It is unclear from the Complaint whether all of the Property is platted “seaward of existing oceanfront development,” *Id.*, ¶ 12, but the Court infers this fact for purposes of Defendants’ Motions. In any event, the Complaint alleges the Property is seaward or beyond the bounds of “typical oceanfront development.” *Id.*, ¶ 13.

Juxtaposed against these allegations stands the statutory and regulatory framework of beach renourishment, as overseen by the state and federal governments.¹ In accordance with Title V, Section 501(a), of the Water Resources Development Act, Public Law 99-662, 1986, “[t]he following works of improvement for the benefit of shoreline protection are adopted and authorized to be prosecuted by the Secretary substantially in accordance with the plans and subject to the conditions recommended in the respective reports designated in this subsection, except as otherwise provided in this subsection. . . . Folly Beach, South Carolina. The project for shoreline

¹ Consideration of this legislation in a Rule 12, SCRCp, motion to dismiss is proper, as the legislation is a matter of public record.

protection, Folly Beach, South Carolina: Report of the Chief of Engineers, dated March 17, 1981, at a total cost of \$7,040,000, with an estimated first Federal cost of \$3,870,000 and an estimated first non-Federal cost of \$3,170,000.” Moreover, Section 108 of Public Law 102-104, states: “The project for shoreline protection for Folly Beach, South Carolina, authorized by section 501(a) of the Water Resources Development Act of 1986 . . . is modified to authorize the Secretary to construct hurricane and stormwater protection measures based on the Charleston District Engineer’s Post Authorization Change Report dated May 1991[.]”

Shoreline, hurricane and stormwater protection measures are necessary because Folly Beach is “an area in which the erosion of the beaches located in its jurisdiction is attributed to a federally authorized navigation project as documented by the findings of a Section 111 Study conducted under the authority of the federal Rivers and Harbors Act of 1968, as amended by the federal Water Resources Development Act of 1986” S. C. Code Ann. § 48-39-290(E).

In the Complaint, Plaintiffs focus on the development of the individual beachfront lots. Some lot owners have allegedly taken steps to pursue development. Complaint, ¶ 11. Some lot owners possess valid septic tank permits for their lots. *Id.*, ¶ 21. Some lot owners have sought building permits on these lots. *Id.* Some lot owners “have demonstrated the intent to develop their property.” *Id.*, ¶ 22. According to the Complaint, development is imminent or already occurring. *Id.*, ¶ 24. Plaintiffs have alleged the actual boundary line for these subject lots does not allow the development activity the Defendant Owners have allegedly pursued. *Id.*, ¶ 39. Finally, Plaintiffs allege the Defendant Owners’ development of their lots would cause irreparable injury to the Plaintiffs. *Id.*, ¶ 41.

In their memorandum opposing the Motions to Dismiss, Plaintiffs expound on the alleged dangers of development of the Defendant Owners’ “super-beachfront” lots. Plaintiffs argue the

development of the Defendant Owners' Property diminishes the health and stability of the public beach. Plaintiffs' Response to Motions to Dismiss ("Plaintiffs' Response"), at p. 12. The individual Plaintiffs are worried about the development of seaward lots. *Id.*, at p. 18. In fact, Plaintiffs acknowledge the Defendant Owners are parties to this action only because they allegedly have taken steps to develop their lots. *Id.*, at p. 21. Finally, Plaintiffs note that this action exists solely to prevent private development on the public beachfront. *Id.*, at p. 24.

Plaintiffs acknowledge and concede that Folly Beach has ordinances in place to minimize the disturbance of the beach. Plaintiffs' Response, at p. 13. In fact, Folly Beach's Ordinance bans development seaward of the beach renourishment:

All development shall maintain a minimum setback of 40 feet from the perpetual easement line or, where no perpetual easement line exists, the OCRM baseline. For the purposes of this subsection, ***PERPETUAL EASEMENT LINE*** shall mean the landward edge of the federal beach renourishment project by the Army Corps of Engineers.

Folly Beach Ord. §166.04-04(C)(1) (emphasis in original). Therefore, by the terms of its own ordinance, Plaintiff City of Folly Beach prohibits development of the Defendant Owners' lots within 40 feet of the beach renourishment. In this context of the applicable statutes, regulations, and ordinances, the Court will consider whether Plaintiffs have sufficient standing, whether they have alleged sufficient facts to constitute a cause of action, and whether they have failed to name necessary parties to this action.

STANDARD OF REVIEW

Where a plaintiff lacks standing, the Court must grant a Rule 12(b)(1) motion to dismiss, because the Court is without subject matter jurisdiction over the dispute. *Energy Research Found. v. Waddell*, 295 S.C. 100, 367 S.E.2d 419 (1988). The Court should grant a Rule 12(b)(6) motion to dismiss if, after accepting all well-pleaded allegations in the complaint as true, a plaintiff has failed to allege any set of facts that would entitle him to relief. See Rule 12(b)(6), SCRPC; see

also *Williams v. Condon*, 347 S.C. 227, 232–33, 553 S.E.2d 496, 499 (Ct. App. 2001). The Court should grant a Rule 12(b)(7) motion to dismiss when the plaintiff fails to name a “necessary party under Rule 19, SCRPC,” that is needed “for a just adjudication of the issues.” *BancOhio Nat. Bank v. Neville*, 310 S.C. 323, 326, 426 S.E.2d 773, 775 (1993); see also *Ex Parte Gov’t Employee’s Ins. Co. v. Goethe*, 373 S.C. 132, 137, 644 S.E.2d 699, 701 (2007) (“This Court has interpreted Rule 19, SCRPC to require that a party be a ‘necessary party’ to be joined in an action pursuant to the rule. ‘A necessary party is one whose rights must be ascertained and settled before the rights of the parties to the action can be determined.’” (internal citation omitted)).

CONCLUSIONS OF LAW

I. AS PLAINTIFFS LACK STANDING, NO JUSTICIABLE CONTROVERSY IS PRESENT TO GIVE THIS COURT SUBJECT MATTER JURISDICTION.

Plaintiffs do not allege any basis whatsoever to have standing to sue in this case. As discussed below, because Plaintiffs lack standing, this suit does not present a justiciable case or controversy, and this Court lacks subject matter jurisdiction to consider it.

In their first cause of action, Plaintiffs seek a declaration that the State owns at least a portion of the Property. Complaint, ¶ 36. Plaintiffs do not have standing to seek that declaration because they do not have or claim an ownership interest in that land. Their second cause of action for injunctive relief against the Defendant Owners is also based upon alleged State ownership of the Property and similarly fails due to lack of standing.

“South Carolina courts, like the federal courts, require a justiciable case or controversy before any decision on the merits can be reached. See *Waters v. S.C. Land Res. Conservation Comm’n*, 321 S.C. 219, 467 S.E.2d 913 (1996); *Crocker v. Barr*, 303 S.C. 1, 397 S.E.2d 665 (Ct. App. 1990) (Goolsby, J., concurring), rev’d on other grounds, 305 S.C. 406, 409 S.E.2d 368 (1991).” *Lennon v. S.C. Coastal Council*, 330 S.C. 414, 417-18, 498 S.E.2d 906, 908 (Ct. App.

1998).² Plaintiffs have alleged no justiciable controversy because they lack standing. “The principle of standing under the United States Constitution is ‘an essential and unchanging part of the case-or-controversy requirement of Article III.’” *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 195-96, 669 S.E.2d 337, 339 (2008) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Because no case or controversy is presented due to the lack of standing, this Court lacks subject matter jurisdiction of this case. See *Lennon*, at 417-18, 498 S.E.2d at 907-08.³

“[S]tanding acts as an element of the constitutional requirement that there be a ‘case or controversy’; when thus applied, *it acts as a limitation on the subject matter jurisdiction of the federal courts.* . . .” 6A Charles A. Wright et al., *Federal Practice and Procedure* § 1542 (1990) (emphasis added [by the Court of Appeals]) (footnotes omitted). South Carolina courts, like the federal courts, require a justiciable case or controversy before any decision on the merits can be reached.

Bodman v. State, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013). Plaintiffs do not assert standing under the public importance exception, and they have no “constitutional standing” or standing by statute.

A. Plaintiffs Have No Constitutional Standing.

The principle of standing under the United States Constitution is ‘an essential and unchanging part of the case-or-controversy requirement of Article III.’ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Supreme Court has provided a three-part test to establish standing: ‘First, the plaintiff must have suffered an

² See also, *Tourism Expenditure Review Comm. v. City of Myrtle Beach*, 403 S.C. 76, 81, 742 S.E.2d 371, 373 (2013) (“[T]he parties cannot by consent or agreement confer jurisdiction on the court to render a declaratory judgment in the absence of an actual justiciable controversy.” (quoting *Power v. McNair*, 255 S.C. 150, 153, 177 S.E.2d 551, 552 (1970))).

³ “[S]tanding acts as an element of the constitutional requirement that there be a ‘case or controversy’; when thus applied, *it acts as a limitation on the subject matter jurisdiction of the federal courts.* . . . South Carolina courts, like the federal courts, require a justiciable case or controversy before any decision on the merits can be reached.” *Lennon*, 330 S.C. at 417-18, 498 S.E.2d at 907-08 (quoting 6A Charles A. Wright et al., *Federal Practice and Procedure* § 1542 (1990) (emphasis added [by the Court of Appeals]) (footnotes omitted); citing *Waters v. S.C. Land Resources Conservation Comm’n*, 321 S.C. 219, 467 S.E.2d 913 (1996); *Crockerv. Barr*, 303 S.C. 1, 397 S.E.2d 665 (Ct. App. 1990) (Goolsby, J., concurring), *rev’d on other grounds*, 305 S.C. 406, 409 S.E.2d 368 (1991)).

“injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical,’” Second, there must be a causal connection between the injury and the conduct complained of the injury has to be “fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”

ATS S., Inc., 380 S.C. at 195-96, 669 S.E.2d at 339 (quoting *Lujan*, 504 U.S. at 560-61; citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342, 12 S.Ct. 1854, 164 L.Ed.2d 589 (2006)). “Constitutional standing requires, at a minimum, that the party bringing the action sustain a direct injury or the immediate danger a direct injury will be sustained.” *Commander Health Care Facilities, Inc. v. S.C. Dep’t of Health & Envtl. Control*, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App. 2006). Plaintiffs fail to meet these standards.

Plaintiffs in this action have no “injury in fact” that is “concrete and particularized” and “actual or imminent” as to a “legally protected interest” to establish standing. In fact, according to the allegations in the Complaint, Plaintiffs have no interest whatsoever in the Property at issue. They contend that the State owns the Property, but Plaintiffs have no authority to assert claims of ownership for the State just as citizens have no standing to assert the property interests of their next door neighbors.⁴ Although Plaintiffs argue that citizens may sue to protect the public trust, they concede that “none of the Plaintiffs can assert that property interest [in public trust property] on behalf of the State.” Plaintiffs’ Response, at p. 23. Plaintiffs seemingly abandon claims against the State with that concession and by stating the following:

⁴ Plaintiffs claim they are suing as beneficiaries of the public trust doctrine, citing *Sierra Club v. Kiawah Resort Assocs.*, 318 S.C. 119, 456 S.E.2d 397 (1995), but the South Carolina Supreme Court’s opinion in *Sierra Club* did not address standing. The case was an appeal from the issuance of a permit for dock construction. The instant case, instead, is not an appeal from a regulatory decision. Although the holding in *Nat’l Audubon Soc’y v. Superior Court*, 33 Cal. 3d 419, 431, 658 P.2d 709, 716 (Cal. 1983) allowed suit over a public trust interest, that action was about water rights, not property ownership.

However, the Plaintiffs are, as a practical matter, apathetic about whether or not the state continues as a party in this case, because the involvement of the state and its property in this case is certainly secondary. This case is an effort by a municipality and certain private property owners to limit the individual Defendants' development activities to just the property those Defendants actually own, and the reason for such effort has nothing to do with harm to the public trust, but, rather, is intended to prevent harm to the Plaintiffs' personal and property interests.

Plaintiffs' Response, at pp. 24-25.

Apathy does not meet constitutional standards for standing. Having conceded that this case has "nothing to do with harm to the public trust" (Plaintiffs' Response, at p. 25) and having no claim of ownership or possession of the Property at issue, Plaintiffs completely lack standing in this case to seek a declaration of ownership as to the State in the first cause of action. They do not seek injunctive relief as to the State in the second cause of action.⁵

Plaintiffs have no greater standing as to the Defendant Owners:

For a plaintiff to possess standing three elements must be satisfied. First the plaintiff must have suffered an injury-in-fact which is concrete, particularized, and actual or imminent invasion of a legally protected interest. Second, a causal connection must exist between the injury and the challenged conduct. Third, it must be likely that a favorable decision will redress the injury.

Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S. C. 67, 75, 754 S. E. 2d 846, 850 (2014).

Plaintiffs' injuries arising from future development of Defendant Owners are speculative at best. As such, the alleged injury is neither actual nor imminent but is, instead, conjectural and hypothetical. Moreover, Plaintiffs' recreational interests "involve property that is privately owned by a party other than the plaintiff" and "the presence of an injury in fact cannot be assumed." *Town*

⁵ Because the Plaintiffs lack standing, the State has not taken a position in this case as to issues regarding avulsion and ownership of the property at issue, but reserves the right to do so and preserves any interest that the State may have in the property at issue should further proceedings occur in this case. Discussions or findings in this Order related to avulsion and ownership are not binding on the State in any future proceedings in this suit or in any future case.

of Arcadia Lakes v. S.C. Dep't of Health and Env'tl. Control, 404 S. C. 515, 531-32, 745 S. E. 2d 385, 394. Finally, Plaintiffs' claims of potential injuries from flooding and loss of beach use are merely injuries of a general nature common to all members of the public and not individualized.

Moreover, Plaintiffs have not alleged that any development has occurred within the area they claim is subject to the public trust doctrine. Without any actual development happening yet, there is no injury that can be claimed in relation to the Property. Nor may the Court infer development is imminent, because the Plaintiffs have not alleged that Plaintiff City of Folly Beach has issued building permits that authorize development on the active beach or even on land allegedly subject to the public trust doctrine.

Plaintiffs' Complaint fails to establish that they even have any protectable individual interests at risk of injury, and as such the private landowner Plaintiffs have no standing to pursue this case. Plaintiffs' Complaint rests in part on claims for potential loss of ocean views, should any development occur. However, in this State, a private landowner does not acquire "an easement of unobstructed ocean view, breezes, light or air" over adjoining property. *Schroeder v. O'Neill*, 179 S.C. 310, 315, 184 S.E. 679, 681 (1936); *see also Hill v. The Beach Co.*, 279 S.C. 313, 315, 306 S.E.2d 604, 605 (1983). Thus, no reasonable expectation can exist at the time of purchase that the then existing view will remain unchanged over time. Instead, especially for a view overlooking public trust property, no inherent right to a continued view exists. Rather, OCRM, the agency charged with overseeing the State's coastal public trust property, must balance all of the legitimate uses of the public trust property. In short, loss of view is not an actionable injury in South Carolina, particularly when such loss of view has not even happened. Plaintiffs simply cannot establish any injuries sustained as a result of allegedly pending permits. Defendant Owners' lots remain unchanged, since no development of the lots has commenced. Further, Plaintiffs have scant

support for the allegation that any development is imminent or to be started immediately on Defendant Owners' properties. The alleged issuance of a septic system permit alone cannot signify this, since other permits, and namely a building permit, are required to begin construction. This conclusion is bolstered by Plaintiffs' Complaint itself, whereby Plaintiffs allege several undeveloped lots have had "permits that were issued ... years or even decades in the past." Complaint, ¶ 21.

Moreover, a Folly Beach Ordinance prohibits development within 40 feet of the Perpetual Easement Line and the renourishment project. Plaintiffs have not alleged any Defendant Owner has developed its property within or past this line. Plaintiffs also have not alleged how, other than seeking or obtaining various permits, Defendant Owners have developed their Property in a way that creates an actual or imminent threat of injury to Plaintiffs. For these reasons, Plaintiffs have no constitutional standing to file this action.

B. No Statute Gives Plaintiffs Standing.

Plaintiffs do not claim an interest in any of the Defendant Owners' lots, and do not allege that any of the lots are abandoned. As such, Plaintiffs have no statutory standing to bring this action or to declare any portion of the Defendant Owners' lots in the State's name.

The purpose and effect of quiet title statutes are to enlarge the power of the court to determine adverse claims to land so as to authorize the quieting of title in cases where an action would not lie under the strict rules of equity practice. *Tolbert v. Greenwood Cotton Mill*, 213 S. C. 43, 48 S. E. 2d 599 (1948). They are designed to afford an easy and expeditious mode of quieting title to real estate. *Id.* The statutory remedy is broader and more comprehensive than that formerly afforded to a court of equity. *Id.* Such a statute, being of a remedial nature, should be liberally construed and be held to embrace all cases coming fairly within its scope. *Id.* It is not essential to the cause of action that there has been a trespass on the property or any showing of damage. *Id.* Where, from the allegation in the complaint, the adverse claim sought to be determined cannot be classified as imaginary or speculative, the complaint states a cause of action under the statute. *Id.* (Emphasis added.)

Benson v. United Guar. Residential Ins. of Iowa, 315 S. C. 504, 509, 445 S. E. 2d 647, 651 (1994). Plaintiffs’ claim is both imaginary and speculative because it is based on a legal theory that has never been applied in South Carolina for purposes of depriving a citizen of an interest in real property. Moreover, Plaintiffs ignore that the event they allege to be avulsive – the 2018 Folly Beach renourishment – is for the purpose of restoring private property. As is noted in the statute, Folly Beach is exempt from certain restrictions of the S.C. Beachfront Management Act because it is “an area in which the erosion of the beaches located in its jurisdiction is attributed to a federally authorized navigation project as documented by the findings of a Section 111 Study conducted under the authority of the federal Rivers and Harbors Act” S.C. Code Ann. § 48-39-290(E).

Section 111 of the Rivers and Harbors Act is set forth in 33 C.F.R. §263.27, entitled “Authority for mitigation of shore damage attributable to navigation works.” The general policies include “[t]his Act authorizes the study, construction and maintenance of work for prevention or mitigation of damages to both public and privately owned shores to the extent of the damages that can be directly attributed to federal navigation work located along the coastal and Great Lakes shorelines of the United States.” 33 C.F.R. §263.27(c)(1). (Emphasis added.) Plaintiffs’ assertion that the Corps of Engineers’ efforts to restore and maintain the beach only inure to the benefit of the State and not to the property owners is in conflict with the federal authorization of the renourishment project.

Defendant Stephen Rawe’s Motion to Dismiss, at p. 5. If, as Plaintiffs allege, no beach renourishment project can restore privately owned property, or confer any benefit to privately owned land, one of the primary stated purposes of the legislation would be rendered futile. Therefore, Plaintiffs have not pointed to any statute that confers standing to bring this action.

The S. C. Supreme Court recently opined on statutory standing in *Preservation Society of Charleston v. S.C. Dep’t of Health and Env’tl. Control*, 2020 WL 811729, (S.C. Sup. Ct. Feb. 19, 2020) (“*Preservation Society*”). At issue was the standing of parties who challenged the South Carolina State Ports Authority’s (“SPA”) construction of a new cruise terminal in the S.C. Administrative Law Court. The challenge was initiated under S. C. Code Ann. § 44-1-60, which

establishes procedures for challenging permits issued by the S.C. Department of Health and Environmental Control (“DHEC”). Sec. 44-1-60(E)(1) provides that “Notice of a department decision must be sent by certified mail, returned receipt requested to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified.” Sec. 44-1-60(E)(2) provides that “[t]he staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless written request for final review accompanied by a filing fee is filed with the department by the applicant, permittee, licensee, or **affected person.**” (Emphasis added). The lower courts (Court of Appeals and Administrative Law Court) concluded that an “affected person” under Sec. 44-1-60 was a person with constitutional standing in accordance with *Lujan v. Defenders of Wildlife*, 504 U. S. 555 (1992).

The Supreme Court in *Preservation Society* distinguished between civil actions and actions seeking administrative review of DHEC permits. The Court determined that downtown residents in proximity to cruise ships and the proposed new terminal were “affected persons” with standing despite the fact that the alleged injuries were unproven and considered speculative by the lower courts.

Here, Plaintiffs are not seeking administrative relief in accordance with S. C. Code Ann. Sec. 44-1-60(E), or in accord with any other statute. Rather, Plaintiffs’ claims are initiated in the Court of Common Pleas as a civil action based in common law and referred by consent to this Court. Plaintiffs have failed to allege a particularized injury either to themselves or their members, and instead simply “assert only generalized grievances suffered by the public as a whole which are insufficient to establish standing.” *Carnival Corp.*, 407 S. C. at 76, 753 S. E. 2d at 850. In the absence of a “particularized harm,”⁶ Plaintiffs fail to assert an injury.

⁶ *Carnival Corp.*, 407 S. C. at 76-77, 753 S. E. 2d at 850-51.

II. PLAINTIFFS HAVE NOT STATED ANY VIABLE CAUSE OF ACTION.

A. Plaintiffs Have Failed to Allege Facts to Invoke the Avulsion Doctrine.

This Court declines to create a cause of action, not previously recognized in South Carolina, that the federally sponsored beach renourishment program instituted on Folly Beach constituted an “avulsion” adding land to the Defendant Owners’ lots. The renourishment was made possible by the exemption of Folly Beach from certain portions of the South Carolina Beachfront Management Act.

In their Complaint, Plaintiffs cite the common law definition of “avulsion” from 73 Am. Jur P.O.F. 3d 167. The complete text of the definition from American Jurisprudence reads as follows: “‘Accretion’ and ‘erosion’ are direct opposites of ‘avulsion’, the process whereby the action of water causes a sudden and perceptible loss of, or addition to, riparian land.” Plaintiffs fail to allege a sudden addition to riparian land by action of water, or by any other natural event, and therefore fail to allege a true avulsion as defined in their own Complaint.

The Plaintiffs contend that beach renourishment under the federally sponsored program was in and of itself, an avulsive event. While under common law, an avulsion event may not increase riparian or littoral property owners’ land, here the renourishment program only restored the Defendant Owners’ lots within their original bounds.

The intent to benefit private property owners whose property has been damaged by federal navigation projects (such as the Charleston Harbor “jetties”) is established by 33 C.F.R. Section 263.27(c)(1) stating:

This act authorizes the study, construction and maintenance of work for prevention or mitigation of damages to **both public and privately owned shores** to the extent of the damages that can be directly identified and attributed to federal navigation work located along the coastal and Great Lakes’ shorelines of the United States...

Id. (emphasis added). Furthermore, the City of Folly Beach acknowledged in open court, at the January 28, 2020 hearing, that it invoiced the property owners for the sand that was deposited on the Property for the renourishments undertaken pursuant to the project.

Plaintiffs argue that their allegations of avulsion in the Complaint are akin to the facts in *Hilton Head Plantation Prop. Owner's Assoc., Inc. v. Donald*, 375 S.C. 220, 651 S.E.2d 614 (Ct. App. 2007). Plaintiffs' Response, at pp. 7-8. In *Donald*, the facts of which are described in more detail in Section II.B. of this Order below, the dispute involved a strip of land outside the bounds of platted lots that was created by dredging activities of a private developer which deposited spoil below the high water mark over a period of two years. The South Carolina Court of Appeals referred to creation of land by deposits of spoil as "artificial accretion." Quoting certain sections of American Jurisprudence and Corpus Juris Secundum, the Court stated:

("Any increase of soil to land adjacent or continuous to a navigable stream or water, formed by accretion or alluvion, belongs to the riparian or littoral owner.") However, 'artificial accretions' which are caused solely by the act of an upland owner should not inure to his benefit, for the upland owner **should not be permitted to enlarge his own estate** at the expense of the State." ("Under the common law, a littoral owner cannot extend its own property into water by landfilling or purposely causing accretion.").

Id. at 224, 651. S.E.2d at 617 (internal citations omitted) (emphasis added). Here, the deposits of sand from renourishment have not "enlarged" the Defendant Owners' properties, but only restored their lots.

Viewing the facts alleged in the Complaint, and all reasonably deducible inferences most favorably to the Plaintiffs, they are not entitled to relief under any theory of their case. See *Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 395, 596 S.E.2d 42, 45 (2004); *Brown v. Leverette*, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987). To allow this lawsuit to go forward, the Court would have to disavow the stated intent of the renourishment project, the mitigation of

damage to both public and private lands along the coast caused by federal navigation projects. This Court is not inclined to do so.

B. Existing Common Law is Distinguishable From, and Does Not Support, Plaintiffs' Claims.

In asserting its claim that title to a portion of the Property lies with the State, Plaintiffs rely upon the doctrine of avulsion, as distinguished from the doctrines of erosion and accretion, in support. Complaint, ¶¶ 29-30, 35-36; Plaintiffs' Response, at pp. 5-9. "The law gives the riparian proprietor the benefit of additions to his land caused by accretion or reliction. However, it also requires him to bear the corresponding risk that land will be lost by gradual erosion or submergence." *Horry Cty. v. Woodward*, 282 S.C. 366, 370, 318 S.E.2d 584, 586 (Ct. App. 1984). The avulsion doctrine, on the other hand, "has no effect on property boundaries" and "does not divest a riparian or littoral property owner of title to his or her property or change the underlying ownership of the property." 65 C.J.S. Navigable Waters § 111; 78 Am. Jur. 2d Waters § 332; *see also* 73 Am. Jur. Proof of Facts 3d 167. The case law cited in Plaintiffs' Response in support of court intervention in the instant matter is addressed more fully below.

Initially, Plaintiffs allege that the "reason for such an involved history" of "court intervention related to the location of moving property lines on the beachfront" is clearly expressed in the South Carolina Supreme Court's opinion in *Estate of Tenney v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 100, 712 S.E.2d 395. However, the *Tenney* opinion has very little, if anything, to do with the effect of shifting littoral or riparian property lines on land already acknowledged to be owned by private citizens. Rather, the opinion involved a disputed claim to private ownership of a marsh island, and whether the State held presumptive title to islands situated within marshland. *See id.* Additionally, the *Tenney* opinion warned against unprecedented and unwarranted expansion of the public trust doctrine – an accurate description of Plaintiffs' requested relief.

[O]ur jurisprudence has continued to reflect the longstanding principle that the public trust doctrine extends only up to the land below the high water mark . . . [T]he proposition that the State is the presumed owner of land that remains above the high water mark is at odds with coastal property jurisprudence that predated *Coburg*, and expands the public trust doctrine beyond its historic bounds . . . we do not believe the protection and preservation of these islands should be effected through the unprecedented expansion of the public trust doctrine.

Tenney, at 107, 110-11, 712 S.E.2d at 398-400.

Turning to the relevant doctrines of shifting waterfront boundaries, “[a]ccretion by natural alluvial action to lands on a navigable stream, such as ocean waters, become the property of the owner of the land accreted or increased.” *State v. Beach Co.*, 271 S.C. 425, 429, 248 S.E.2d 115, 117 (1978). As distinguished from the case at hand, the *Beach Co.* opinion centered on whether private beachfront property, the boundary of which had been increased by accretion, was subject to any dedication for public use. *Id.*, at 428, 431, 248 S.E.2d at 117-18. Similarly, the South Carolina Supreme Court’s opinion in *Hill v. Beach Co.*, 279 S.C. 313, 306 S.E.2d 604 (1983), which involved the same accreted beachfront property, is not applicable to the case at hand as it dealt with private citizens’ prescriptive rights over the property to access and view the ocean. *See id.*

Erosion, on the other hand, is the doctrine that “lands encroached upon by water cease to belong to the former riparian or littoral owner.” *Woodward*, 282 S.C. at 370, 318 S.E.2d at 586 (internal citation omitted). The *Woodward* opinion has no bearing here, as the issue was a dispute between private citizens as to who was entitled to the just compensation payment from Horry County for its taking of a portion of an island located at the mouth of the Little River. *Id.* at 368, 318 S.E.2d at 585. No party in *Woodward* sought to confirm title to land created by manmade forms to the State. Thus, the opinion’s holding does not provide authority or precedent for a claim that the State holds title to avulsive property. To the extent that Plaintiffs cite *Woodward* to support

a claim that past erosion has resulted in a loss of property, that claim ignores the present condition of the Property and has been mooted as a result of the renourishment.

As to the doctrine of avulsion, Plaintiffs plainly admit that the doctrine has never been formally applied by a South Carolina appellate court. Plaintiffs' Response, at p. 6. Without binding precedent, Plaintiffs cite to a hodgepodge of cases to cobble together a position that the beachfront property restored by the 2018 Folly Beach renourishment belongs to the State. Each of these opinions can be distinguished from the case at hand, and as such do not provide a basis for Plaintiffs' claims. First, as stated above, Plaintiffs urge the Court to apply the South Carolina Court of Appeals' decision in *Hilton Head Plantation Prop. Owners' Assoc., Inc. v. Donald*, 375 S.C. 220, 651 S.E.2d 614 (Ct. App. 2007), to the instant matter. Plaintiffs' Response, at pp. 7-8. In *Donald*, the developer of a residential neighborhood dredged a nearby creek, causing spoil to build up which created a berm between the neighborhood and the marsh area. *Donald*, at 223, 651 S.E.2d at 616. Prior to the dredging activities, the area that became the high ground berm was tidal. *Id.* The Court of Appeals held that the resulting high ground was not the result of accretion, but rather an "artificial accretion . . . caused solely by the act of the upland owner[.]" *Id.* at 224, 651 S.E.2d at 617 (internal citations omitted). It went on to hold that such an act performed solely by the upland owner "should not inure to his benefit, for the upland owner should not be permitted to enlarge his own estate at the expense of the State." *Id.* (internal citations omitted).

Plaintiffs urge the Court to make the term "artificial accretion" synonymous with the doctrine of avulsion, and argue that the developer's acts in *Donald* translate directly to the renourishment of Folly Beach. Plaintiffs' Response, at pp. 7-8. The Court disagrees with this assertion. In addition to the fact that the renourishment did not enlarge the Defendant Owners' Property, the developer's dredging in *Donald* was performed unilaterally, without permission from

any public agency, and certainly not taken pursuant to any federal or state project. In contrast, the private beach renourishment at issue here was part of the larger 2018 renourishment of Folly Beach, performed pursuant to the U.S. Army Corps of Engineers' (the "Corps") Folly Beach Shore Protection Project, which was implemented due to Folly Beach's proximity to the Charleston Harbor jetties. Complaint, ¶¶ 15-16, 18, n.1; Defendant Debbie's Folly, LLC's Mem. in Support of Mot. to Dismiss, at pp. 2, 6-7. Thus, the renourishment of the Property was not a standalone, unsanctioned act of the Defendant Owners, but was authorized, planned, and performed pursuant to a federally sanctioned project. Combined with the fact that the actual renourishment of the Property was performed by the Corps, not the Defendant Owners themselves, the underlying "avulsive event" here is a far cry from the facts and circumstances in *Donald*.

Moreover, a key point to be addressed as to the avulsion doctrine is that the *causal event or action* which creates land above the high water mark, not the response thereto, is the avulsive event. As such, the Court notes that the construction of the Charleston Harbor jetties, rather than the responsive renourishment, can be considered as the avulsive event. The fact that the 2018 cycle was the fourth stage of the project, which was implemented in response to the construction of the Charleston Harbor jetties, demonstrates that it is an effort to address the effects, including loss of private property, of the original avulsive event caused by the jetties' construction. Plaintiffs acknowledge this fact in their Complaint, alleging that due to "manmade erosion caused by the Charleston Harbor jetties, Folly Beach is one of the most sand-starved and erosive beaches on South Carolina's coast. Consequently, frequent beach renourishment is necessary to maintain the beach and to protect existing development." Complaint, ¶ 15.

Plaintiffs also lean upon a 2010 Order of this Court which previously addressed the doctrine of avulsion. "Avulsion is a process whereby the action of water causes a sudden and

perceptible loss of, or addition to riparian land . . . This authority shows that the construction of the huge spoils disposal structure is well outside accretion law and is more comparable to a very, very large avulsive event.” *Yelsen Land Co., Inc. v. the State of S.C.*, 2010 WL 8721640 (Docket No. 07-CP-10-2053) (Charleston Co. Court of Common Pleas Apr. 13, 2010). Recognizing that the jetties’ construction is similar to construction of a spoil dike, the jetties’ construction again seems to constitute the avulsive event, leading to a conclusion that the boundaries of the Defendant Owners’ Property did not change, unlike the legal impact of natural erosion. The renourishment, a federal project implemented to provide shoreline, hurricane and stormwater protection, merely restores these properties to platted boundary lines, after a manmade disturbance.

While the avulsion doctrine has yet to be applied by a South Carolina appellate court (Plaintiffs’ Response, at p. 6), Plaintiffs contend that the Supreme Court of New Jersey’s opinion in *City of Long Beach v. Liu*, 203 N.J. 464, 4 A.3d 542 (N.J. 2010) is “basically identical” to the instant matter. Plaintiffs’ Response, at p. 8. However, the *Liu* opinion is in no way identical, and is in fact inapplicable, to the case at hand. No part of the opinion in *Liu* makes reference to utilization of any private funds to perform the subject beach renourishment, or references any event or act that necessitated the one-time renourishment. In that case, the municipality sought to acquire the Liu’s and other similarly situated property as part of a public beachfront redevelopment project, but the Liu’s rejected the municipality’s offer to purchase the property. *Liu*, 203 N.J. at 471, 4 A.3d at 546. By the time the municipality filed its condemnation action in 2001, which described the property based upon the Liu’s 1977 deed, a beach replenishment program, funded by federal, state, and municipal governments, had been implemented, and the Liu’s alleged that their land had increased (as opposed to merely restored) as a result of the replenishment. *Id.* at 471-72, 4 A.3d at 546-47. In deciding that the Liu’s property boundary did not increase, the Court held that the

beach replenishment constituted an avulsive event because, in part, the “expansion of the Lius’ shoreline” was due to a “a government-funded beach replenishment project.” *Id.* at 484-85, 4 A.3d at 554-55. In contrast, the renourishment in the present matter, as discussed hereinabove, was undertaken to maintain and restore both public and private beach, and was funded with public and private monies. Complaint, ¶¶ 18, n.1. “The mean high water mark, generally, is the boundary line that divides private ownership of the dry beach and public ownership of tidally flowed lands.” *Liu*, at 476, 4.A3d at 549. The Defendant Owners expended their own funds to restore their own Property, which Plaintiffs now try to hoist upon a public grantee, the State, without any offer of compensation. Furthermore, the *Liu* opinion gives no indication that the renourishment in that case was a recurring event or undertaken in response to a causal incident, such as the impact of the Charleston Harbor jetties here.

Lastly, Plaintiffs’ general reference to the United States Supreme Court’s opinion in *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 130 S.Ct. 2592 (2010) is similarly not on point. In that case, the question was posed to the United States Supreme Court whether the Florida Supreme Court’s decision in upholding a Florida statute was unconstitutional in depriving citizens of claimed littoral rights without just compensation. *Id.* at 707, 130 S.Ct. at 2597. The Florida statute provided that the state entity that holds title to the submerged seabed had the power to replace the fluctuating mean high water line after setting a fixed erosion control line. *Id.* at 710, 130 S.Ct. at 2599. Once the control line was recorded, “the common law ceases to increase upland property by accretion (or decrease it by erosion).” *Id.* In the underlying action, a project planned under the authority vested by the statute was challenged by a nonprofit group of citizens that asserted rights to the affected beachfront property. *Id.* at 711-12, 130 S.Ct. at 2600. The group alleged that their constitutional rights to receive accretions to their property, and to have

the contact of their property with the water remain intact, were being taken without compensation. *Id.* While the opinion makes reference to the doctrine of avulsion, it is not in the context of a question as to ownership of the property created by a beach renourishment. Unlike the instant case, the parties in *Stop the Beach Renourishment* acknowledged the State owned the submerged land, prior to the challenged project. The question posed was whether constitutional rights exist to border the ocean and to receive accreted property, and if so, whether those rights were infringed upon. The Supreme Court answered in the negative, holding, in part, that “the State as owner of the submerged land adjacent to littoral property has the right to fill that land, so long as it does not interfere with the rights of the public and the rights of the littoral landowners.” *Id.*, at 730, 130 S.Ct. at 2611. Thus, the *Stop the Beach Renourishment* opinion is irrelevant as Plaintiffs cannot demonstrate that the State previously owned the Defendant Owners’ Property, which was renourished with private funds.

Accordingly, the cited authorities proffered by Plaintiffs provide no support for their claims alleged in the Complaint.

III. PLAINTIFFS HAVE FAILED TO NAME NECESSARY PARTIES.

Plaintiffs have failed to name necessary parties as required by the Uniform Declaratory Judgments Act, S.C. Code Ann. § 15-53-10, *et seq.* (the “Act”), and Rule 19, SCRCP. The Act provides: “When declaratory relief is sought **all persons shall be made parties who have or claim any interest which would be affected by the declaration**, and no declaration shall prejudice the rights of persons not parties to the proceeding.” S.C. Code Ann. § 15-53-80 (emphasis added). Likewise, Rule 12(b)(7), SCRCP, requires dismissal of a complaint that fails to join a necessary party under Rule 19, SCRCP. South Carolina Rule of Civil Procedure 19 provides that:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Rule 19(a), SCRPC.

Plaintiffs acknowledge that there are approximately fifty (50) “super-beachfront lots” on Folly Beach (Complaint, ¶ 14), yet name only eight (8) such lot owners as Defendants. Because Plaintiffs have no South Carolina law supporting their position, it is inevitable that, if this case goes forward, the South Carolina appellate courts will issue binding precedent that will affect the property rights of all 50 owners of such lots. It is axiomatic that persons with property interests at issue are necessary parties to a case that would determine those property interests. *Slatton v. Slatton*, 289 S.C. 128, 130, 345 S.E.2d 248, 249 (1986) (requiring that a party with an interest in the property at issue in the litigation be joined as a necessary party).

Courts have widely applied this line of reasoning to situations similar to the case at hand, finding property owners akin to the fifty “super-beachfront” lot owners here to be necessary parties. In *Bretton Ridge Homeowners Club v. DeAngelis*, 51 Ohio App. 3d 183, 555 N.E.2d 663 (Ohio Ct. App. 1988), the court dismissed a case where only two dozen of 508 total property owners within a subdivision were named as parties to a lawsuit. The suit concerned restrictive covenants that applied to all homeowners within the subdivision. In finding that all 508 property owners in the subdivision were necessary parties to the action, the court noted specifically that each of them had “a legal interest in the litigation that would determine their rights and liabilities.” *DeAngelis*, 51 Ohio App. 3d at 185. See also *Branham v. Holiday Lake Prop. Owners Ass’n*, 6th Dist. No. H-02-019, 2002-Ohio-5193, 2002 WL 31162730 (2002); *Hitchcock v. Boyack*, 277

A.D.2d 557, 715 N.Y.S.2d 108 (N.Y. App. Div. 2000) (plaintiff landowner's failure to join as necessary parties all landowners who would be affected by the outcome of a nuisance action regarding interference with Plaintiff's use of a roadway and access to a beach warranted dismissal of action).

The Court in *Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 527 S.E.2d 40 (N.C. 2000) issued a similar ruling. In *Karner*, the North Carolina Supreme Court held that all property owners affected by a residential use restrictive covenant were necessary parties to an action to invalidate that covenant. *Karner*, 351 N.C. at 438-40, 527 S.E.2d 42-44. The Court noted, "[a]n adjudication that extinguishes property rights without giving the property owner an opportunity to be heard cannot yield a valid judgment" and subsequently ruled that all non-party property owners should be joined. *Id.* See also *Page v. Bald Head Ass'n*, 170 N.C. App. 151, 154, 611 S.E.2d 463, 465 (N.C. Ct. App. 2005) (holding that all property owners affected by a residential use permit were necessary parties); *Durham Cty. v. Graham*, 191 N.C. App. 600, 603-604, 663 S.E.2d 467, 470 (N.C. Ct. App. 2008) (ruling that a property owner whose land "could be substantially altered" should a mandatory injunction to be enforced, had an interest in the property that "would be directly affected by the adjudication of the controversy").

Because Plaintiffs have failed to name as parties all of the "super-beachfront lot" owners who have an interest in and would be affected by the requested declaration, they have not satisfied the requirements of the Act or South Carolina Rule of Civil Procedure 19, and the Complaint should be dismissed.

PROPRIETY OF DISMISSAL UNDER RULE 12(b)(6), SCRPC

"Novel questions of law should not ordinarily be resolved on a Rule 12(b)(6) motion." *Chestnut v. AVX Corp.*, 413 S.C. 224, 227, 776 S.E.2d 82, 84 (2015). "Where, however, the

dispute is not as to the underlying facts but as to the interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss.” *Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office*, 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001). *See also Palmer v. State*, 427 S.C. 36, 43, 829 S.E.2d 255, 259 (Ct. App. 2019), *reh’g denied* (July 12, 2019). Here, there is no dispute as to underlying facts. The properties that are the subject of this case have platted boundaries and there is no dispute that the seaward boundaries may migrate due to the effects of erosion. Moreover, there is no dispute that the renourishment is for the benefit of the Property and that the Defendant Owners paid for the renourishment of the beachfront at the Property with their private funds. No party disputes the impact that the Charleston Harbor jetties have had on Folly Beach. It is reasonable to assume, and not disputed, that an oceanfront property owner may desire to develop and build-on an oceanfront house and would pursue necessary permits including septic tank permits. Consequently, should Plaintiffs’ assert the position that they have advanced a novel question of law, such question may be decided in accordance with Rule 12(b)(6), SCRPC, as there is no dispute as to the material factual allegations. The issues before this Court are questions of law, not fact.

CONCLUSION

Due to the grounds and reasons set forth hereinabove, Plaintiffs lack standing to bring this action, have not stated a viable cause of action in the Complaint, and have failed to name necessary parties to this action. Therefore, the Court hereby GRANTS Defendants’ Motions, and Plaintiffs’ Complaint is HEREBY dismissed in its entirety WITH PREJUDICE.

AND IT IS SO ORDERED.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON)

City of Folly Beach, Coastal Conservation League,) C/A No. 2019-CP-10-0717
Save Folly Beach, Inc., John Collins, Matt Napier,)
Paula Stubblefield, Troy Bode, and Carol Kruer,)

Plaintiffs,)

vs.)

State of South Carolina, Amy Connelly, Jeffrey H.)
Morris, Michael Vandaele, Stephen Rawe, Juan)
Enterprises, LLC, Juanita A. Wright, Debbie's)
Folly, LLC, and Vernon Staubes.)

Defendants.)

**PROPOSED ORDER DENYING
MOTIONS TO DISMISS**

This matter comes before the Court pursuant to motions to dismiss and for judgment on the pleadings under Rules 12(b)(1), 12(b)(6), 12(b)(7), and 12(c) of the South Carolina Rules of Civil Procedure ("SCRCP"), filed on behalf of the Defendants by their respective legal representatives. This Court conducted a hearing on those motions January 28, 2020. After careful consideration of the parties' arguments and applicable legal standards, this Court hereby denies the Defendants' motions to dismiss and for judgment on the pleadings.

FACTUAL BACKGROUND

In order to set the stage for the Court's legal analysis, a brief discussion of the circumstances leading to this dispute is instructive. Plaintiffs' allegations are of course taken as true at this stage of proceedings.

As is reflected by the relatively steady flow of litigation, headlines, and other conflict originating therefrom, management of the beachfront on Folly Island is uniquely challenging. This challenge is attributable to a variety of factors, most notably including Folly's exemption

from important state coastal laws and Folly's location downdrift of the Charleston jetties and related engineering. As alleged by the Plaintiffs, including the City of Folly Beach, these factors have led to a recurring and widespread property dispute on the beach, which is: the ownership status of platted property that is submerged, but then rebuilt through manmade beach renourishment.

According to the Plaintiffs' Complaint, residential lots are platted seaward of existing oceanfront development in several locations on Folly Beach. These relic properties, colloquially known as "super-beachfront lots," were platted in Folly's distant past. Some of the lots were never developable, based on proximity to the ocean, and others have been rendered undevelopable over time by erosion and sea level. The existence of these lots generally would not be apparent to anyone on the ground, as the lot lines typically encompass only ocean, wet beach, and/or oceanfront sand dunes.

The problem, at least from the Plaintiffs' perspective, arises following the regular beach renourishment projects that are undertaken on Folly Beach. Folly Beach is one of the most sand-starved and erosive beaches on South Carolina's coast, and, consequently, frequent beach renourishment is necessary to maintain the beach and to protect existing development. Through these projects, massive amounts of sand are pumped onto the beach from outside sources in order to build up the elevation of the beach. Folly Beach is reliant on a continual, repeating cycle of renourishment, especially on its northeastern end, where the super-beachfront lots are located. These renourishment projects temporarily convert portions of the super-beachfront lots from ocean, beach, and dune into sandy dry ground above the average high tide line—dry ground that, at least theoretically, could support residential construction.

Previous super-beachfront lot development has occurred in the window following a renourishment, when the amount of sand on the beach is at its peak. Seawalls are then constructed around these super-beachfront homes in order to prevent them from washing into the ocean. Of approximately fifty super-beachfront lots on Folly Beach, only a fraction are presently developed, and all of these super-beachfront structures are regularly imperiled by sea level, wave action, and erosion, to the extent that temporary condemnation has occurred several times in the past. Under typical conditions (i.e., not just after a renourishment), these super-beachfront structures extend well onto the active beach, kept out of the ocean only by seawalls.

This lawsuit is an attempt by the City and the other Plaintiffs to stop the spread of residential development on super-beachfront property by resolving the ownership status of land that would be underwater, but for artificial beach renourishment.

LEGAL ANALYSIS

I. The Plaintiffs Have Stated Viable Causes of Action.

The initial issue that must be addressed in relation to these motions is whether Plaintiff's legal claims, based on the public trust and avulsion doctrines, are cognizable and viable under South Carolina law, so as to survive dismissal under Rule 12(b)(6).

In considering a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, this court must base its ruling solely upon the allegations set forth on the face of the complaint and the motion may not be sustained if the facts alleged and the inferences drawn therefrom, viewed in the light most favorable to plaintiff, would entitle him to relief under any theory. Doe v. Greenville Cnty. Sch. Dist., 375 S.C. 63, 66–67, 651 S.E.2d 305, 307 (2007). “[P]leadings in a case should be construed liberally and the Court must presume all well pled facts to be true so that substantial

justice is done between the parties.” Charleston Cty. Sch. Dist. v. Harrell, 393 S.C. 552, 557, 713 S.E.2d 604, 607 (2011) (internal citations omitted); Doe v. Bishop of Charleston, 407 S.C. 128, 754 S.E.2d 494 (2014) (“Complaint should not be dismissed for failure of the pleading to state facts sufficient to constitute a cause of action merely because the court doubts the plaintiff will prevail in the action.”).

It is already well established under South Carolina law that a platted property, while perhaps continuing to exist on the books with the register of deeds, ceases to be private property when it is claimed by erosion and submerged. See Estate of Tenney v. S.C. Dep’t of Health & Envtl. Control, 393 S.C. 100, 108 (2011) (“Coastal lands are notoriously subject to the volatility of changing tides, erosion, and accretion. Landowners and potential landowners are well aware of the long-standing principle that the State is presumptive owner of lands below the high water mark. Accordingly, a person who possesses title to land especially vulnerable to this volatility takes title with the knowledge their land is at risk of loss to the State by natural forces.”). In a state with as much beachfront and riverfront as South Carolina, this principle, which is part of the public trust doctrine, is indelible and necessary for orderly management of public resources. Some of our state beaches and waterfronts have migrated a mile or more over the centuries, and the land on which entire settlements existed has in some cases been overtaken by the sea. And this isn’t just a phenomenon of the past. Properties like these are of course forever lost to time, as the sea and the tidal beach belong to the state as part of the public trust. See McQueen v. S.C. Coastal Council, 354 S.C. 142, 149 (2003).

South Carolina has a long history of cases concerned with the movement of sand on the beachfront and the corresponding shifts in private property, and these cases turn on the principles

of erosion, accretion, and avulsion. Our appellate courts have delineated the principles of accretion and erosion as follows: “The law gives the riparian proprietor the benefit of additions to his land caused by accretion or reliction. However, it also requires him to bear the corresponding risk that land will be lost by gradual erosion or submergence.” Horry Cty. v. Woodward, 282 S.C. 366, 370 (Ct. App. 1984). In other words, the basics of property ownership on the oceanfront are that owners of those parcels lose property by erosion and gain property by avulsion. See McQueen, 393 S.C. at 150 ([U]nder South Carolina law, wetlands created by the encroachment of navigable tidal water belong to the State. Proof that land was highland at the time of grant and tidelands were subsequently created by the rising of tidal water cannot defeat the State’s presumptive title to tidelands.”); Hilton Head Plantation Prop. Owners' Ass'n, Inc. v. Donald, 375 S.C. 220, 224, (discussing addition to property by accretion).

Less developed in South Carolina, at least on the appellate level, is the principle of avulsion. “Accretion and erosion are direct opposites of ‘avulsion,’ the process whereby the action of water causes a ‘sudden and perceptible’ loss of, or addition to, riparian land.” 73 Am. Jur. Proof of Facts 3d 167. “Unlike accretion or erosion, avulsion has no effect on property boundaries.” 65 C.J.S. Navigable Waters § 111. See also, 78 Am. Jur. 2d Waters § 332 (“An avulsion does not divest a riparian or littoral property owner of title to his or her property or change the underlying ownership of the property.”). This traditional distinction between the doctrines of erosion/accretion and that of avulsion has been “adopted by statute or judicial decision in nearly all states, as well as by the federal courts as federal common law.” 73 Am. Jur. Proof of Facts 3d 167.

While no South Carolina appellate court has been called upon to delineate the principle of

avulsion, it is effectively a logical and legal impossibility that a state could possess a lengthy jurisprudence on the doctrines of erosion and accretion, while rejecting avulsion. The principles are legs on the same stool. This conclusion is so apparent and necessary that trial courts, including this one, have applied the avulsion principle as established law in the state. For example, this court noted, in a 2010 decision based heavily on avulsion, the following: “[I]f the additions or subtractions from riparian land are sudden and perceptible the different rule of avulsion, with an opposite legal effect, applies... [I]f an avulsion has occurred, the boundary line remains the same regardless of the change in the river channel or shoreline.” Yelsen Land Company, Inc. v. S.C. Ports Authority, C/A No. 7-CP-10-2053, 16-17 (April 16, 2010).

Undoubtedly, the lack of appellate avulsion cases in South Carolina is merely reflective of the fact that avulsive events, by nature, are much rarer occurrences than the ubiquitous processes of erosion and accretion.

Plaintiffs’ claims fit squarely within the long history of South Carolina cases concerned with the shifting boundaries of riparian property, and the fact that this case presents a new question under a well-established genre of South Carolina law is certainly no basis for dismissal.¹

¹ Indeed, the legal claims presented here depart very little from those in Hilton Head Plantation Prop. Owners' Ass'n, Inc. v. Donald, a case in which a developer created additional high ground on the end of a lot by adding fill to salt marsh. 375 S.C. at 222. The marsh area had of course been public trust property prior to its conversion to high ground, but the plaintiff claimed property rights over the new high ground, as an accretion from the lot. Id. at 224. While using the term “artificial accretion,” rather than perhaps the more accurate “avulsion,” the Court of Appeals rejected this claim essentially on the same theory Plaintiffs advance in this case:

Generally, a riparian owner enjoys the right to any lands formed by accretion... However, “artificial accretions which are caused solely by the act of the upland owner should not inure to his benefit, for the upland owner should not be permitted to enlarge his own estate at the expense of the State.” Horry County v. Tilghman, 283 S.C. 475, 481 ... see also 65 C.J.S. Navigable Waters § 96 (2000) (“Under the common law, a littoral owner cannot extend its own property into water by landfilling or purposely causing accretion.”).

See Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs., 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001) (“As a general rule, important questions of novel impression should not be decided on a motion to dismiss. Where, however, the dispute is not as to the underlying facts but as to the interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss.”). Rather, it is plain that this case represents but the next incremental step in South Carolina courts’ long exploration and examination of the common law principles governing property lines on the oceanfront. As beach renourishment projects become more common and more widespread on South Carolina’s beaches, it is imperative to resolve how these activities impact the balance of ownership and control at the shoreline.

II. The Plaintiffs Have Standing to Maintain These Causes of Action.

The next issue that must be addressed in relation to Defendants’ motions to dismiss is whether the Plaintiffs have standing to bring the claims in this case, so as to survive dismissal under Rule 12(b)(1).

The South Carolina Supreme Court has adopted the “constitutional standing” test announced in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). See Sloan v. Greenville County, 356 S.C. 531 (2003); Beaufort Realty Co. v. Beaufort Cnty., 346 S.C. 298, 301 (Ct. App. 2001). The three-pronged test arising from Lujan is as follows:

First, the plaintiff must have suffered an ‘injury in fact’ – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not ‘conjectural’ or ‘hypothetical.’ Second, there must be a causal connection between the injury and the conduct complained of – the injury has to

Id. The fundamental principle in Donald—that public trust property can’t be taken away through artificial addition of sand—translates to this case directly.

be ‘fairly . . . trace[able] to the challenged action of the defendant. Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’

Lujan, 112 S. Ct. at 2136 (internal citations omitted). In short, the three required elements of standing are: (1) injury-in-fact, (2) causation and (3) redressability.

The lodestar for this and every other standing inquiry must be to fulfill the underlying purpose of the standing doctrine, which is to determine whether a plaintiff is “a real party in interest. A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action.” Sloan, 356 S.C. at 547 (Ct. App. 2003). In the context of a standing analysis, it is easy for lawyers and judges alike to slip into a hyper-technical and overwrought analysis of the myriad of standing law precedent and convoluted terms of art. At base, though, an accurate and effective analysis of standing always hearkens back to the same basic question: do these plaintiffs have a close enough relation to the subject matter of the dispute to effectively litigate this case? These Plaintiffs meet that standard.

A. The Plaintiffs’ Property-Based Interests in This Case:

Defendants’ primary argument in relation to standing is that Plaintiffs are effectively bringing a quiet title action on properties in which the Plaintiffs claim no ownership. It is indeed true that the Plaintiffs’ put forward state ownership, through the public trust doctrine, over property held by the Defendants, and not their own private ownership. Defendants’ argument on this point, though, fails on the bases that: while the Plaintiffs are not claiming outright ownership over the property at issue in this case, the Plaintiffs do have property-based littoral rights at stake in relation to that disputed property; and it isn’t necessary that Plaintiffs claim a property interest

in the disputed lots in order to have standing.

i. The Plaintiffs have littoral rights at stake.

Ownership of land directly abutting a public trust shoreline confers special status and rights under the law. “Under the common law, owners of land along rivers, streams, lakes and other bodies of water possess a property right incident to their ownership ... that is distinct from those rights that may be enjoyed by the public at large.” White's Mill Colony Inc. v. Williams, 363 S.C. 117, 129, 609 S.E.2d 811, 817 (Ct. App. 2005). These rights held by property owners adjoining the water’s edge are not possessed by proximate, but non-adjoining property owners. In other words, the owner of a property directly bordering the public beach possesses rights (called littoral rights) that the owner of a “second row” beach house does not have. See Id. at 129, 609 S.E.2d at 817–18 (“owners of land along rivers and streams are said to hold ‘riparian’ rights, while owners of land abutting oceans, seas, or lakes, are said to hold ‘littoral’ rights.”); Lowcountry Open Land Tr. v. State, 347 S.C. 96, 108, 552 S.E.2d 778, 785 (Ct. App. 2001) (“interests attached to property abutting an ocean, sea or lake are termed ‘littoral.’”).

As is particularly relevant to this inquiry, “littoral rights” include the right of access and the right to accretions. “[O]ur state has recognized the general right of access enjoyed by littoral property owners.” White's Mill Colony Inc., 363 S.C. at 130, 609 S.E.2d at 818. “This right guarantees access from the front of the owner’s land to the navigable [body of water].” Lowcountry Open Land Tr., 347 S.C. at 107, 552 S.E.2d at 784. In other words, littoral rights in this state “afford[] an owner of land fronting a navigable tidal [waterbody] access from his land to the water.” Id. at 109, 552 S.E.2d at 785. In addition to this right of access to the water, littoral owners also have a right to ownership of accretions forming out of that water. “An owner’s right

to accretion depends upon the contiguity of his lands to navigable waters and it is indispensable that there be an estate to which the accretion can attach.” Horry Cty. v. Tilghman, 283 S.C. 475, 480, 322 S.E.2d 831, 834 (Ct. App. 1984). See also Horry County v. Woodward, 282 S.C. 366, 369–70, 318 S.E.2d 584, 586 (Ct.App.1984) (recognizing “the general common law rule that accretions by a natural alluvial action to riparian or littoral lands become the property of the riparian or littoral owner whose lands are added to.”). In short, property directly adjacent to the tidal beach can grow as a result of accretion by natural forces, whereas the property dimensions of landward properties are fixed.

Among other interests in the subject matter of this litigation, certain Plaintiffs possess an interest in establishing themselves as owners of littoral property and, concomitantly, as holders of the special rights that accompany that status. In other words, certain Plaintiffs stand to gain littoral rights if the claims in this case are successful. Plaintiffs Napier and Stubblefield provide the ideal illustration of this stake in the outcome. As it stands now, Napier and Stubblefield hold no littoral rights (or at least they are forced to operate as such), though their property has every external appearance of oceanfront adjacency. Napier and Stubblefield own property and reside at 1661 East Ashley Avenue, Folly Beach, behind and abutting superbeachfront lots owned by Defendants Juan Enterprises, LLC and Juanita Wright. (Napier Affidavit, ¶¶ 3-4). While these lots are platted seaward of the Napier/Stubblefield lot, the lots have never been developed, do not have road access, and have been submerged during Mr. Napier’s ownership. (Id. at ¶¶ 6, 15). In short, anyone lacking prior knowledge of the property peculiarities on Folly Beach would assume without question that Napier and Stubblefield are littoral owners with littoral rights.

Yet, Napier and Stubblefield are confronted with the following view from their deck:



Under claim of ownership, Juanita Wright and/or Juan Enterprises has erected large barricades emblazoned with “Private Property – No Trespassing,” built into the dunes and blocking access between Mr. Napier’s lot and the public beach. (Id. at 19). In legal terms, Napier and Stubblefield are being denied the right of access that is part of the bundle of rights possessed by littoral property owners. Napier and Stubblefield do not claim to own the public beach, of course, but they certainly do claim a littoral right of access over such property—a right that can only be vindicated through this litigation.

If the Plaintiffs are successful in prosecuting this case, property claimed by the Defendants that has been submerged will be declared part of the public trust. As a natural consequence of such declaration, Napier, Stubblefield, and other Plaintiffs² are likely to become littoral owners, meaning that these Plaintiffs will gain property rights, including a right of access, a right to accretions, and other rights in and over the sections of property at issue in this case.

² Mr. Napier and Ms. Stubblefield are used as an example here because of the availability of Mr. Napier’s affidavit and the clear conflict with littoral rights embodied by the access barrier. However, other Plaintiffs, especially including the City of Folly Beach, own property that is presently considered non-littoral but that could become adjacent to the public trust beach as a result of the outcome of this case.

While these property rights do not constitute outright ownership, certainly they are valuable³ and sufficient interests in the property at issue in this case that establish the Plaintiffs' significant stake in the outcome.

ii. The Plaintiffs need not claim a property interest in the public trust.

While the Plaintiffs can demonstrate property rights at stake in this litigation, it is worth noting that Defendants are generally misguided in their assertion that Plaintiffs must claim property rights or property ownership in order to establish standing. Indeed, the field of environmental law very much rests on the concept of citizens litigating to prevent harm or misuse of public trust property, without asserting ownership of such property. Starting with the common law, public nuisance is an ancient claim used by citizens to curb misuse, abuse, and occupation of public trust resources. See, e.g., Harbor Beach Surf Club, Inc. v. Water Taxi of Ft. Lauderdale, Inc., 711 So. 2d 1230 (Fla. Dist. Ct. App. 1998) (holding that a water taxi company had standing to redress public nuisance caused by footbridge over navigable public lake.). Further, in a modern environmental permitting context, it is exceedingly common in South Carolina for citizens to challenge activities taking place on public trust land, obviously without claiming ownership of that land. See, e.g., Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 456 S.E.2d 397 (1995) (environmental group challenged permit for 36 docks to be constructed over public trust marsh,

³ Professionally, Mr. Napier is a property investor with a real estate license and “extensive experience and knowledge in valuating properties and in assessing the factors that lead to increased and decreased property value.” (Id. at 11). He explains in his affidavit that the barricade erected by his neighbors, and their purporting to have authority to exclude residents of his property from accessing the beach, significantly diminishes his property value and the return on the investment he’s made in the property, and that is not to mention the difficulty and inconvenience caused to him personally. (Id. at ¶ 20). By establishing his littoral rights, Mr. Napier stands to significantly boost his property value.

on basis that docks impeded public access to resources within the public trust.); Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env'tl. Control, 411 S.C. 16, 766 S.E.2d 707 (2014) (A developer sought a “permit to construct a bulkhead and revetment stretching 2,783 feet in length and 40 feet in width over the State’s tidelands.” Plaintiffs were granted standing to challenge that permit on the basis of their recreational use of the public trust tidelands.).

An important and significant difference exists between litigating against misuse of public trust resources and bringing literal enforcement litigation under the public trust doctrine. Compare, Harbor Beach Surf Club, Inc., 711 So. 2d 1230, with, Town of Nags Head v. Cherry, Inc., 219 N.C. App. 66, 723 S.E.2d 156 (2012). The Town of Nags Head case presents a narrow example of overreach in relation to the public trust doctrine, but the Defendants would have the rule in that case swallow all citizen reliance on such doctrine. Plaintiffs’ claims in this case clearly fit within the long history of citizen litigation for protection of public trust resources, and they needn’t claim a property right in the public trust in order to advance such claims.⁴

B. The City’s Interests in This Case:

Because the areas of beachfront disputed in this case are within the municipal boundaries of the City of Folly Beach, and the City therefore regulates and polices such properties and administers public projects on the adjacent beachfront, the City’s involvement as Plaintiff in this case is particularly compelling in relation to standing.

The City, as a political subdivision, may establish standing either by demonstrating that it

⁴ If it were up to the states alone to initiate litigation establishing the dimensions of the public trust doctrine, this fundamental common law principle would be woefully undeveloped. To the extent this action seeks to define the nature and extent of the public trust doctrine, that is a completely legitimate objective supported by hundreds of other similar cases.

is a real party in interest or by demonstrating that its claims raise an “issue of overriding public concern.” Cty. of Lexington, S.C. v. City of Columbia, 303 S.C. 300, 301, 400 S.E.2d 146, 147 (1991) (“Absent an issue of overriding public concern, a political subdivision must establish it is a real party in interest in order to maintain a suit.”); Richland Cty. Recreation Dist. v. City of Columbia, 290 S.C. 93, 95, 348 S.E.2d 363, 364 (1986), Sloan v. Greenville Cty., 356 S.C. 531, 548, 590 S.E.2d 338, 347 (Ct. App. 2003) (“Standing may be conferred upon a party ‘when an issue is of such public importance as to require its resolution for future guidance.’”). This Court concludes that the City has established standing both on the basis of the serious public need for resolution of the issues presented in this lawsuit and on the basis of the City’s individual stake in the outcome of this case.

i. The City has demonstrated overriding public concern.

First, while standing on the basis of “overriding public concern” should be conferred sparingly, it is certainly not a stretch to find such level of concern as it relates to the unresolved ownership status of significant sections of Folly Island’s beaches. Indeed, it would reflect a serious shortcoming in the function of judicial review if such an important question went unresolved, and the problems flowing from ownership uncertainty persisted, on the basis that no party can establish “real party in interest” status. In short, the City should be able to resolve the critically important public question of ownership of beaches within its jurisdiction, regardless of whether the City itself asserts outright ownership over the disputed areas.

Based on Plaintiffs’ Complaint and the affidavit of Spencer Wetmore, City Manager for the City of Folly Beach, the ownership status of previously submerged portions of Folly’s superbeachfront lots undoubtedly presents one of the most significant and consequential public

issues facing the City and its residents. Wetmore explains that, while most of Folly's 50+ superbeachfront lots are undeveloped and often submerged, residences have been constructed on fourteen of these lots. (Id. at ¶ 6). The consequences of this previous development reflect the overriding public interests at stake in this litigation, which include:

- Public safety. "The City considers the existing superbeachfront homes to constitute an enhanced risk to safety and infrastructure during storms, and any new development on superbeachfront lots would be the same." (Id. at ¶ 11). The City has reached this conclusion on the basis that superbeachfront residences inevitably end up on the active beach and, in that location, have been damaged and condemned with regularity. (Id. at ¶ 10). On the basis of protecting public safety, an overriding public interest exists in establishing the limits of superbeachfront development.
- Public infrastructure protection. As with any beach community, the creation and maintenance of healthy oceanfront dunes is a matter of utmost importance to the City. As Ms. Wetmore explains: "[D]evelopment of superbeachfront lots is antithetical to maintenance and growth of healthy oceanfront dunes, which the City desires to promote for the sake of protecting homes and infrastructure on the Island. Past development on superbeachfront lots has resulted in destruction of oceanfront sand dunes, and the properties that are the subject of this lawsuit could not be developed without similar loss." (Id. at ¶ 7). In other words, the City in bringing this case as a means of preserving oceanfront dunes that are necessary for infrastructure protection. On the basis of protecting public infrastructure, an overriding public interest exists in establishing the limits of superbeachfront development.
- Public beach protection. Finally, the Court must assume, based on allegations in the Complaint, that future superbeachfront development will necessarily result in obstructions and denial of public access on portions of the public trust beach. (Complaint, ¶ 41). Wetmore explains how, as a result of erosion, "superbeachfront houses end up on the beach, constituting an impediment to public use and enjoyment" of the beach. (Id. at ¶ 8). As explained further in the affidavit of Matt Napier, existing superbeachfront development has "made the beach impassible for walking and jogging when the tide is up to the seawalls, and the beach is submerged." (Napier Affidavit, ¶ 9). Napier has been forced to "abandon[] attempts to walk or jog along the beach because it has been impossible to navigate past superbeachfront homes without trespassing or walking through deep water." (Id.) On the basis of preventing foreseeable occupation and obstruction of the public trust beach, an overriding public interest exists in establishing the limits of superbeachfront development.

Under the circumstances, it would constitute a serious miscarriage of justice to force the

City and the public to continue enduring enhanced threats to public safety, public infrastructure, and public access/recreation—all caused by development that the Plaintiffs contend is taking place on public property—on the purported basis that the parties do not have standing to end such threats. If nothing else, this case must proceed on the basis that it presents issues of overriding public concern that has to be resolved.

ii. The City has individual interests sufficient to confer standing.

More than these public concerns, however, the City also has interests particular to its municipal responsibilities and authority that demonstrate its status as a real party in interest. Chief among these is the City’s role in administering beachfront renourishment projects. Regular beach renourishment has become a necessity for the viability of Folly Beach. Renourishment on Folly Beach, funded by millions of dollars in federal money, is scheduled to occur every seven years. (Wetmore Affidavit, ¶ 17). Folly only qualifies for this necessary federal funding if it can guarantee two conditions in relation to renourishment: (1) that federal funds will only be used to place sand on public property and (2) that adjacent private properties will be built up in order to match the height of the public property renourishment. (Id. at ¶ 19). Practically, what this means is that, in order for the City receive the funding required for these projects, it must be able to accurately assess the boundary between public trust property and private property as it relates to each oceanfront lot on Folly Island, including the superbeachfront lots at issue in this case. (Id.) Ms. Wetmore acknowledges that, as it stands now, with the claims raised in this action unresolved, “the City can’t be certain that it is accurately allocating the costs of renourishment.”⁵

⁵Indeed, some Defendants have made issue of the fact that the City previously required them to pay for

(Id.) This uncertainly jeopardizes the very availability of millions of dollars in federal funds that are needed to renourish Folly Beach. On this basis, once again, the City's stake in distinguishing between public and private property on the beachfront within its jurisdiction is quite significant.

Finally, it is self-evident that a municipality's inability to determine the ownership status of property within its jurisdiction is a hindrance to that municipality's effective administration of its laws and ordinances. That is especially true for Folly Beach, as it faces the particularly difficult task of regulating an imperiled beachfront where property lines are presently unclear. Ms. Wetmore's affidavit points to a variety of City ordinances and permitting regimes that are difficult or impossible to effectively apply on Folly's beachfront because of the City's uncertainty in who owns land created by renourishment. (Id. at ¶¶ 14-15). This is the exact type of interest that has regularly been found to confer standing upon a municipal body:

[A] municipality has an interest in, inter alia, its ability to **enforce land-use and health regulations**, *Scotts Valley Band of Pomo Indians of Sugar Bowl Rancheria v. United States*, 921 F.2d 924, 928 (9th Cir. 1990), and its **powers of revenue collection and taxation**, *Colorado River*, 776 F.2d at 848-49. A municipality also has a proprietary interest in **protecting its natural resources from harm**. *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 944 (9th Cir. 2002), amending 271 F.3d 911(9th Cir. 2001). We have also found constitutionally sufficient injury to proprietary interests where **"land management practices of federal land could affect adjacent [city]-owned land."** *Douglas County v. Babbitt*, 48 F.3d 1495, 1501 (9th Cir. 1995).

City of Sausalito v. O'Neill, 386 F.3d 1186, 1197-98 (9th Cir. 2004) (emphasis added).

renourishment of their lots (acknowledging private ownership), while this action seeks a declaration that those lots are actually part of the public trust. Certainly this potentially conflicting action by the City is indicative of the necessity for legal resolution of this issue. Beyond that, while the City's potentially conflicting previous action may eventually be relevant to the merits of this case or to some other independent action by the property owners, the Court can conceive of no basis for dismissing this action on the basis that the City may have previously considered the Defendants to be proper owners of the disputed parcels. The court notes that it is not particularly unusual for a governmental entity, with changing political administrations, staff, and legal counsel, to reevaluate and even reverse prior legal interpretations.

In sum, to deny the City standing under the circumstances laid out herein would require a detachment of the standing analysis from the purpose of the doctrine. It is alleged that the efficient operation of local government on Folly Beach has been hampered for many years by the presence of these seaward platted lots and the unresolved and recurring question of their ownership and development potential. According to the City, the need for some resolution on the merits in this case is dire: “All things considered, the Court’s favorable resolution of this lawsuit will: aid the City in pursuit of its beachfront policies, promote the City’s economic and safety interests; advance the City’s interest and stake in a healthier and more stable public beach; allow the City to operate more freely without fear of liability or conflict; and will alleviate inefficient or misallocated expenses and staff time.” (*Id.*, ¶ 20). The involvement of the City as a Plaintiff makes unquestionable the presence of standing in this case.

C. The Plaintiffs’ Additional Individual Interests in this Case:

While the Court needn’t reach this inquiry in light of the analysis above, the individual Plaintiffs do possess additional, independent bases upon which standing must be conferred, including their recreational and financial interests.

Recreational use of the public resource at issue is a common basis for establishing standing in environmental cases, and the Plaintiffs possess such interest here, as reflected in the affidavit of Plaintiff Matt Napier. Napier explains in his affidavit that his recreational and aesthetic interests have been negatively impacted by existing superbeachfront development and that this impact will expand if the Defendants are allowed to proceed with development on their lots. Napier specifically explains the impact of superbeachfront development as follows:

My attempts to use and enjoy the public beach in proximity to my property have

been disrupted by existing superbeachfront residences on the northeast part of the Island. Those residences have made the beach impassible for walking and jogging when the tide is up to the seawalls, and the beach is submerged. I have abandoned attempts to walk or jog along the beach because it has been impossible to navigate past superbeachfront homes without trespassing or walking through deep water. I have also observed that the presence of these superbeachfront residences and their seawalls exacerbates erosion on the public beach, which has diminished my opportunities for recreation, including walking, jogging, and other recreation.

(Napier Affidavit, ¶ 9). In sum, Napier’s asserts standing on the basis that the Defendants’ development activities will cut him off from portions of the public trust that he uses for recreation, both because such development will occupy public trust property and because such development will cause degradation of public trust resources.

Our courts have held that precisely the type of recreational interests at stake here are sufficient to confer standing. In Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc., the United States Supreme Court reaffirmed the long-standing principle that aesthetic and recreational interests can provide the basis for standing: “We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons ‘for whom the aesthetic and recreational values of the area will be lessened’ by the challenged activity.” 528 U.S. 167, 183 (2000), citing Lujan v. Defenders of Wildlife (“Of course, the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for the purposes of standing.”).

These principles from the U.S. Supreme Court were applied in circumstances akin to this case in Smiley v. SCDHEC, where the plaintiff was determined to have standing based on an alleged adverse effect on his use and enjoyment of the beach at Isle of Palms from a permit that authorized the scraping of sand on that public beach. 374 S.C. 326, 333 (2007). The particular

basis for Dr. Smiley's standing was his allegation that he used the part of the beach at issue in the case for "walking, jogging, nature-watching and similar pursuits." Id. at 330. As the South Carolina Supreme Court held: "The averments in Smiley's affidavit that he recreates and views nature on the beach on an almost daily basis is a sufficient allegation of a 'concrete and particularized invasion.'" Id. at 331-32. It is impossible to reconcile Smiley, one of our state's seminal cases on environmental standing, with the position that Mr. Napier lacks standing to maintain this action on the basis of his use of the beach. The Plaintiffs possess standing based on recreational use of the public trust beach, which has included the sections of property at issue in this case. (See Napier Affidavit, ¶ 10).

In addition, uncertainty over the ownership of land created by renourishment is also a drag on the property values of the individual Plaintiffs. This case presents the exceedingly unusual situation where the Plaintiffs are unable to determine whether their properties are oceanfront, or in some cases ocean view, because the ownership and development potential of seaward land is unresolved. Mr. Napier, drawing upon his extensive experience in the real estate business, explains how he has "observed that uncertainty over the ownership status of the undeveloped superbeachfront lots and the potential for those lots to be developed depresses the value of all oceanfront homes that border those lots, including [his] own." (Id. at ¶ 13). Specifically, "the existing superbeachfront development, along with the threat of future superbeachfront development, has been a matter of significant controversy and notoriety, generally making this portion of Folly Beach less desirable in the eyes of a potential investor." (Id. at ¶ 12).

Of course, if the platted lots in front of his property were actually developed, as the

Defendants intend, the harm to Mr. Napier is obvious: “If either of the seaward lots were developed, my physical access to the beach, my ability to use the public beach, and the view from my property would be drastically diminished, and my property value would decline substantially as a result.” (Id. at ¶ 14).

Once again, the Plaintiffs’, including Mr. Napier, claim the development that would strip their oceanfront or ocean view status, along with the related property value, would actually be occurring on public trust property. Certainly the Plaintiffs should not have to endure such direct financial loss from wrongful development, due to exclusion from this Court on the basis of standing. The Plaintiffs have a financial stake in the outcome of this case that is sufficient to confer standing.

III. The Proper Defendants Are Named in this Action.

The next issue that must be addressed in relation to Defendants’ motions to dismiss is whether the Plaintiffs have named all necessary parties to this action, so as to survive dismissal under Rule 12(b)(7).

The Defendants argue that Plaintiffs have failed to name necessary parties to the action, as all superbeachfront lot owners will be impacted by this case. Indeed, it is certainly true that, if Plaintiffs prevail and the Court announces the legal principle that dry land created by renourishment constitutes an avulsion, that principle will have relevance to property owners on Folly Beach who are not named here. But, by that measure, the same can be said not just of Folly Beach property owners, but of property owners on any South Carolina beach that is renourished. This Court is being asked to render what is seemingly South Carolina’s first holding on a “renourishment-as-avulsion” theory, and that holding would have relevance to any property

owner in the state who gains high ground as a result of renourishment. But, obviously, the standard for inclusion as a “necessary party” is not so broad as to include everyone who may be impacted by the Court’s announcement of a legal principle.

Rather, a party is not necessary to an action if no justiciable controversy exists in relation to that party. Plaintiffs have alleged that the reason why these particular property owners were named, while others were not, is because these are the only superbeachfront owners who have taken affirmative steps to develop their lots by pursuing permits related to residential construction (See Complaint, ¶ 11). In the context of a declaratory judgment action like this one, our courts require the presentation of a justiciable claim, meaning “a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character.” Graham v. State Farm Mutual Automobile Ins. Co., 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995). For the many superbeachfront owners on Folly Beach who are not pursuing development of their properties, the subject matter of this case is hypothetical and abstract. That is, any impact from the holding in this case is contingent on those property owners one day deciding to pursue development of avulsive land.

Had property owners beyond those named in this case been included as defendants, a strong argument would have existed for dismissal on the basis of ripeness. “The Declaratory Judgments Act is a proper vehicle in which to bring a controversy before the court when there is an existing controversy or at least the ripening seeds of a controversy.” Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 423 (2004). There is no “ripening seed” as to these other Folly property owners. Indeed, it is unknown whether such property owners even purport to own the land within their lot boundaries that has been created by renourishment. There is no such doubt

about the defendant class named here.

The other property owners on Folly Beach have no more direct interest in this action than owners of renourished property at Myrtle Beach, Isle of Palms, or Fripp, and it would be just as sensible to name the hundreds of property owners along the coastline whose properties are affected by renourishment as to name the other superbeachfront owners on Folly. Some acceptable class of “necessary parties” must exist in this case—the line must be drawn somewhere—and the Plaintiffs’ choice in this regard is certainly reasonable.

IV. Conclusion.

Through this litigation, the City of Folly Beach and some of its most impacted residents seek to resolve an issue that has bred chaos and difficulty on the Folly beachfront for years. The municipality and its residents seek legal clarity that will bring to the Folly beachfront certainty, workability, and a reasonable path forward. This case calls upon an important point of law that has been delineated in other states and that is overdue for delineation in South Carolina. Based on the particular circumstances of Folly Beach, these parties present an ideal case for an examination of avulsion and renourishment.

Some of the most important issues facing our state today fall beneath the umbrella of “environmental law.” If our judicial system is to fulfill its role in addressing these important issues, our courts must be willing to take on the often difficult underlying merits, when those merits are properly presented. On the basis of everything stated herein, the Court denies the motions to dismiss and for judgment on the pleadings pending in this case and directs the parties to proceed with the discovery process.

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Certificate of Counsel

The undersigned does hereby certify that this Record on Appeal complies with SCACR 210(g) in that it contains all material proposed to be included by any of the parties and not any other material.

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