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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

Point Farm Investors, LLC, and American Mitigation Company, LLC,

Plaintiffs,

vs.

The State of South Carolina,

Defendant.

Case No. 2020-CP-10-01841

ORDER

(Action to Quiet Title to Marshlands)

RECEIVED
APR 28 2021
SC Court of Appeals

APPEARANCES:

Attorney for Plaintiffs: Mary D. Shahid, Esq.
Attorney for Defendant: J. Emory Smith, Jr., Esq.

This action, filed in accordance with S. C. Code Ann. Sec. 48-39-220, seeks a declaration of title to tideland areas below mean high water located on the western end of Wadmalaw Island in Charleston County, South Carolina. Plaintiff Point Farm Investors, LLC ("Point Farm") is the record owner of four contiguous parcels identified as TMS 135-00-00-001, 134-00-00-008, 134-00-00-009, and 134-00-00-010. Plaintiff American Mitigation Company, LLC ("AMC") develops and manages ecological restoration projects intended to serve as mitigation. As such, AMC is seeking approval from the United States Army Corps of Engineers, Charleston District ("Corps") to utilize the parcels as a mitigation bank. The Corps requires a declaration of title to tidal wetland areas in order for those areas to be part of the mitigation bank. Plaintiffs initiated this action against the State of South Carolina seeking a declaration of title to interior tidal wetlands adjacent to Leadenwah Creek and the North Edisto River.

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As noted above, Plaintiffs filed this action in accordance with the procedures set forth in S.C. Code Ann. § 48-39-220[1]:

> (A) Any person claiming an interest in tidelands which, for the purpose of this section, means all lands except beaches in the coastal zone between the mean high-water mark and the mean low-water mark of navigable waters without regard to the degree of salinity of such waters, may institute an action against the State of South Carolina for the purpose of determining the existence of any right, title or interest of such person in and to such tidelands as against the State. Service of process shall be made upon the Secretary of the State Budget and Control Board.
>
> (B) Any party may demand a trial by jury in any such action by serving upon the other party(s) a demand therefor in writing at any time after the commencement of the action and not later than ten (10) days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.
>
> (C) Nothing contained in this chapter shall be construed to change the law of this State as it exists on July 1, 1977, relative to the right, title, or interest in and to such tidelands, except as set forth in this section.
>
> (D) The Attorney General shall immediately notify the department upon receipt of any private suit made under this section, his response to that suit, and the final disposition of the suit. The department will publish all such notifications in the state register.

This matter was before the Court on November 18, 2020, for a hearing to determine if Plaintiffs have title to the interior tidal wetlands located in four (4) parcels identified as TMS 135-00-00-001, that includes marsh on the North Edisto River, and TMS 134-00-00-008, 134-00-00-009, and 134-00-00-010 that include marsh adjacent to Leadenwah Creek. Based on the factual

[1] This statute is contained within the Coastal Tidelands and Wetlands Act, Title 48, Chapter 39 of the South Carolina Code (2008 & Supp. 2018). The Court of Appeals has interpreted the definition of "marshes" in the Act at S.C. Code Ann. 48-39-10(G) § 48-39-220, as a subset of "tidelands." *See* H. Marshall Hoyler v The State of South Carolina, *et al.*, 428 S.C. 279, 286, n.3, 833 S.E.2d 845, 849, n.3 (Ct. App.2019).

finding and legal analysis set forth herein, this Court finds that Plaintiffs have not established, by clear and convincing evidence, title to interior saltwater wetlands located within the parcels identified as TMS 135-00-00-001, TMS 134-00-00-008, 009, and 010

STANDARD OF REVIEW

"An action to determine ownership of tidelands pursuant to section 48-39-220 is an action at law. *See* Query v. Burgess, 371 S.C. 407, 410, 639 S. E. 2d 445, 456 (Ct. App. 2006). In considering an action filed pursuant to S. C. Code Ann. § 48-39-220, this Court is guided by the principles of common law set forth in precedent. "Land lying between the usual high water mark and the usual low water mark on a navigable watercourse enjoys a unique status since it is held by the State in trust for public purposes."

Ownership of tidelands and marsh is subject to the Public Trust Doctrine in South Carolina. "Title to land between the high and low water marks remains in the State and is held in trust for the benefit of the public." State v. Hardee, 259 S.C. 535, 539, 193 S.E.2d 497, 499 (1972). "Our State's tidelands are a precious public resource held in trust for the people of South Carolina." Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envt'l Control, 411 S.C. 16, 22, 766 S.E.2d 707, 710 (2014).

"Despite the special status accorded tidelands, the government, and specifically the King of England, had the power to grant, and did in fact grant, tidelands to subjects, who exercised private ownership." State v. Holston Land Co., 272 S. C. 65, 68, 248 S. E. 2d 922, 924 (1978). As a result, such grants are often referred to as "King's grants" or "Sovereign grants." "One asserting title to tideland must prove a specific grant from the sovereign which is strictly construed against the grantee." Hobonny Club, Inc. v. McEachern, 272 S.C. 392, 252 S.E.2d 133 (1979). "In areas subject to the public trust doctrine, presumption of State ownership may be overcome only by showing a specific grant from the sovereign, which is strictly construed against the

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grantee.'" Estate of Tenney v. S.C. Dep't of Health & Envt'l Control, 393 S.C. 100, 106, 712 S.E.2d 395, 398 (2011) (quoting McQueen v. S.C. Coastal Council, 354 S.C. 142, 149, n.6. 580 S.E.2d 116, 119, n.6 (2003); Grant v. State, 395 S.C. 225, 229, 717 S.E.2d 96, 98 (Ct.App. 2011). As such, where a grant may be offered by a claimant to assert ownership, it will be construed strictly in favor of the State ("A grant of tidelands by the State or a predecessor sovereign is construed strictly in favor of the State and the general public against the grantee." Grant, *supra*.

"[T]raditionally, South Carolina has granted private rights to tidelands through acts of the Legislature. ... Because tidelands are held in public trust, a grant of private ownership must contain 'specific language, either in the deed or on the plat, showing that [the grant] was intended to go below high water mark ...'" Lowcountry Open Land Trust v. State of South Carolina and James Atkins, 347 S C. 96, 552 S.E.2d 778 (2001).

In this case, Plaintiff Point Farm seeks a declaration of title to tidelands that separate the uplands from the river, similar to the vast tract of marsh that adjoins and separates the upland portions of the parcel identified as TMS 135-00-00-001 from the North Edisto River. See Grant v. State, 395 S. C. 225, 717 S. E. 2d 96 (Ct. App. 2011) as an example of a claim of adjoining marsh. Grant sought title to nine (9) acres of saltwater marsh on the northwest side of Folly Island, adjacent to the river and creek. Grant relied on the legal description in the 1696 grant of Folly Island from the Lords Proprietors to William Rivers which described an island bounded by tidal waters, marsh and the ocean. The Court noted that mere reference in the grant to a boundary as a navigable watercourse was not sufficient to claim title to the adjoining marsh separating the upland from the navigable watercourse. "A grant which names a navigable tidal stream as a boundary conveys land to the ordinary high water mark." Grant at 98, 717 S.E.2d at 229.

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Likewise, in Query v. Burgess and the State of S. C., 371 S. C. 407, 639 S. E. 2d 455 (Ct. App. 2006), Query claimed ownership of marsh located between his property and the Folly River, relying on a 1786 grant to Martha Samways for "the surplus contained in a Grant to William Rivers on the ninth of September 1696." The grant did not include a boundary description, but described the property as 1,940 acres as depicted on an attached plat. The plat, as described by the Court of Appeals, "roughly delineates Folly Island" and "contains the bare bones of a survey and is neither precise nor detailed." In Query, this court "reasonably determined the 1786 grant and accompanying plat did not demonstrate the State's intent to grant marshlands." *Id.* at 411, 457.

In instances where a claimant prevails against the State, it is because the granting documents evince an intent to convey land below the high water mark. As stated in Grant, *supra*:

> In State v. Holston Land Co., our Supreme Court found the plat at issue evinced an intent to convey land below the high water mark. 272 S.C. 65, 68, 248 S.E.2d 922, 924 (1978). There, the plat's legend indicated the property conveyed was a 200-acre tract of marshland. *Id.* at 67, 248 S.E.2d at 923. The plat depicted the marsh with a stippled pattern across which was written "two hundred acres marsh land." *Id.* The plat also included several small islands and adjacent marsh with an accompanying legend stating "all pieces of marsh that [are] commonly covered at high water." *Id.* at 67, 248 S.E.2d at 924. In Lowcountry Open Land Trust v. State, this court found a grant and plat were sufficient to convey land below the high water mark where the plat contained a surveyor's note which indicated a 1,102-acre tract of marshland was surveyed and the drawing of the tract included the word "marsh" on its face in two locations. 347 S.C. 96, 104–05, 552 S.E.2d 778, 782–83 (Ct.App.2001). Finally, in Hobonny Club, Inc. v. McEachern our supreme court found two "exceptional" plats were sufficient to convey the tidelands at issue. 272 S.C. 392, 398, 252 S.E.2d 133, 136–37 (1979). The court described the plats as follows: "They are not mere maps on which boundary waterways are drawn in free-hand to represent directions and conformations of boundaries. These plats are carefully scaled and platted so as to delineate the boundaries of the tracts granted with mathematical precision. It is undisputed that the boundaries are accurately relocatable on the ground by contemporary engineering methods. *Id.* at 398, 252 S.E.2d at 136. Because the plats were drawn with such a high degree of precision and encompassed tidelands, the court found the grant and plats were sufficient to convey the tidelands. *Id.* at 398, 252 S.E.2d at 137. Although the plat at issue here depicts tidelands, it lacks the other indicators of intent to grant land below the high water mark present in Holston and Lowcountry Open Land Trust. Additionally, in contrast to the plats

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in Hobonny Club, Grant's expert land surveyor, Bessent, testified the 1786 plat is poorly drawn and not capable of being relocated on the ground. Grant at 235, 101-102.

In reliance on Hoyler v. State of South Carolina *et al.*, 428 S. C. 279, 833 S. E. 2d 845 (Ct.App 2019), Defendant's and Plaintiffs' counsel agree that the burden of proof herein is "clear and convincing evidence." Tr. 84, ll. 9-10. In Hoyler, the Court of Appeals noted a claimant "must convince the court that the State intended to include the tidelands within the boundaries expressed in the deed." Hoyler at 293, 833 S.E.2d at 853. The Court of Appeals included language from Hobonny Club wherein the Supreme Court concluded, "It was the clear intent of the grants in question to convey title to all tidelands lying within the perimeter lines of the plats ...." *Id.*

PLAINTIFFS' CLAIM OF OWNERSHIP

Plaintiffs retained Doreen Larimer, a title abstractor, to research title to the parcels subject of this action to determine whether the property originated with a proprietary Sovereign's grant. Ms. Larimer testified to approximately thirty transactions in the chain of title originating with Joseph Morton, who obtained the property by way of a grant from the Lords Proprietor for 2,700 acres of land and concluding with Plaintiffs. The collection of records maintained by the S.C. Department of Archives and History includes an abstract[2] of a land grant, dated March 29, 1700, "for 2,700 Acres in Colleton County." The property is further described in the abstract as "lying and being on the North East side of the North Edisto River butting and bounding to the Southwestward on the marsh of the said River, to the Northwestward part on the marsh of Wadmalaw River and part on the lands of the said Morton, to the Northeastward part on the lands

[2] Ms. Larimer testified that the abstract is the only evidence extant to document a proprietary grant. The abstracts were created by the Secretary of the Carolina Province contemporaneously with the creation of the grants.

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of the said Morton and part on the lands of Peter Brown and to the Southeastward on a large creek out of the Edisto River commonly called Littenwah."[3] Ms. Larimer also located a Memorial with an attached plat[4] in the collection maintained by the Department of Archives and History. The Plat, bearing a date of 1699 ("1699 Plat"), contains a description of the platted property provided by Stephan Bull, the Surveyor General. It was transcribed by Ms. Larimer as follows:

> I have laid out unto Joseph Morton 2,700 acres of land or thereabouts situated within Colleton County lying and being on the North Edisto River butting and bounding to the (illegible) on the marsh of said river, northwestward part on the marsh of Wadmalaw River and part on the lands of the said Morton, northeastward part on land of said Morton and part on the land of Peter Brown, southeastward on a large creek out of the Edisto River called Littenwah. (n/k/a Leadenwah Creek)

The Memorial is not contemporaneous to the Grant and bears a date of 1732.[5] The significance of the Memorial is the inclusion of the 1699 Plat, which, by its date, Ms. Larimer believes had accompanied the Grant to Joseph Morton. Ms. Larimer further determined the Grant is a Proprietary Sovereign's Grant. The Memorial itself includes the following description:

> The Lord Proprietors ... give and grant unto Joseph Morton a plantation containing two thousand and seven hundred acres of land English measure now in the possession of Joseph Morton situate and lying in Colleton County and butting and bounding as appears by a plat thereof hereunto annexed to have and to hold the said plantation to the said Joseph Morton his heirs and assigns forever.

Ms. Larimer was qualified as an expert in the examination of ancient grants and concluded that Plaintiffs have clear title to the parcels that are the subject of this action. No breaks were identified in the 320-year chain of title Ms. Larimer reconstructed from the 1700 Grant to present.

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[3] *See* abstract and transcription identified as Exhibits 1A and 1B.

[4] *See* Memorial and 1699 Plat identified as Exhibits 1, 2 and 2A. No plat was attached to the abstract. The legal description on the 1699 Plat is identical to the legal description in the Grant, as reflected in the abstract, and the Memorial refers to the Grant to Joseph Morton for 2,700 acres with the description of it being in Colleton County with the plat annexed.

[5] Ms. Larimer explained that the Memorial was prepared in 1732 (the period after the Lords Proprietors no longer predominated the colony and South Carolina instead became a Royal Colony) when the King was enforcing his "Quit Rents Tax Program." Property owners were required to provide documentation of ownership that resulted in creation of the ancient memorial records.

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Ms. Larimer opined that language in the proprietary Sovereign's Grant demonstrated an intent to convey the interior marshes to Morton. Ms. Larimer noted that "marsh," which is specifically called out as the boundary line for the portion of the plantation on the North Edisto River and the Wadmalaw River, where the "creek" was called out as the boundary on the "Lettinwah" (now known as Leadenwah) Creek. Her opinion, based upon her examination of the 1699 Plat, arises from the detail provided for the "marsh fingers" located interior of the Leadenwah Creek and the North Edisto River. Her opinion is that the excluded marsh is the vast tract of marsh lying to the west between the area depicted on the plat and the North Edisto River, an area referenced, but not depicted in any detail, on the plat.

Plaintiffs registered, professional land surveyor, Elliotte Quinn, also opined that the 1699 Plat reflected property including the parcels of interest to the Plaintiffs. Mr. Quinn was qualified as an expert in land surveying with special expertise in locating the boundaries of historic grants. Mr. Quinn was able to overlay the 1699 Plat on current aerial imagery[6]. He was able to tie the 1699 Plat into the aerial imagery based on the specific depictions of marsh fingers on the Plat and the references to the North Edisto River and Leadenwah Creek.[7]

Mr. Quinn testified that he believed the property description in the Grant indicated an intent to include the interior marsh fingers adjacent to Leadenwah Creek and the North Edisto River. He concurred with Ms. Larimer's reasoning as boundaries are described as "on the south westward on the marsh of said River" in contrast to "a large creek out of the Edisto River." Mr. Quinn interpreted "marsh of [North Edisto] River" as the large expanse of marsh and tributaries on the

[6] Plaintiffs' Exhibit 4. Mr. Quinn testified that "the plat is lacking a lot be able to put it back on the ground but it is close enough of the same shape of the land that I was able to fit it reasonably well to the current geographic features, and know that this is a piece of property that we're dealing with."

[7] This court remains and again is impressed by how current aerial photography supports the description of plats created during the period of ancient SC history when such technology was unavailable to surveyors.

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western side of the tract identified as TMS 135-00-00-001, not inclusive of the two interior fingers[8] depicted on the plat. Mr. Quinn's interpretation of the boundary description is that the 1699 Plat includes a high level of detail of the marsh fingers that is lacking with regard to other elements of the plat. As related to the marsh fingers on the North Edisto, Mr. Quinn opined they are included in the grant based on the detailed depiction by the surveyor and the fact that a significant amount of acreage - the area between the upland boundaries on the 1699 Plat and the North Edisto River - is not reflected on the Plat.

Mr. Quinn described the interior marshes of interest to Plaintiffs through reference to Exhibit 2A which depicts the shaded areas from the overlay of the original grant reflecting the marsh inside the boundaries of the 1699 Plat. He testified that the level of detail provided for the interior marshes on the Leadenwah and North Edisto River indicated that the interior marshes were considered differently from the marsh on the exterior of the platted boundary lines. Accordingly, Mr. Quinn interpreted the 1699 Plat as intending to show what is conveyed, not what is omitted.

Mr. Quinn interpreted "southeastward" on the Leadenwah Creek as the boundary of the Creek which abuts closely to the land, excluding the interior fingers; significantly however, on cross examination, he acknowledged that the manner in which the boundary lines were drawn on the plat around the marsh could indicate both an intent to include, as well as exclude, the marshlands. Tr. 61, ll. 9-13. Cape Romain Land & Improvement Co. v Georgia-Carolina Canning Co., 148 SC 428, 146 SE 434 (1928).

Upon rectifying the 1699 Plat with current aerial imagery, Mr. Quinn calculated actual acreage of the conveyance at 3,500 acres. When the marsh areas adjacent to Leadenwah Creek

[8] The ancient 1699 Plat and the current aerial imagery both clearly reflect three fingers of marsh. The largest of these fingers is located east of the smaller fingers and has a serpentine shape. Plaintiff is not claiming this finger.

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and the North Edisto River are included, the calculated acreage increases to 3,700.[9] Mr. Quinn concluded that the plat was inherently unreliable with regard to acreage so the increase in acreage resulting from inclusion of interior marshes is not entitled to weight with regard to determining the intent of the Grantor.

While acreage is the lowest of all the calls in determining accuracy in a survey, the fact that the 2700 acre plat swells to over 4500 acres when including the serpentine area (an increase of 40% in land mass), this court finds this to be a sizable difference in area and a factor in reaching its decision that the interior marshes were not included in the grant. See Holden v Cantrell, 100 SC 265, 84 SE 286 (1915). Most notably, there is no reference to the marsh contained within the grant other than to state the substantial marsh to the west is a boundary. There is no conveyance of marsh within the grant showing that it was to go below the high water mark. As an additional ground, this court observes these marshlands appear to contain navigable waterways which would be an additional reason to exclude them from the grant. Cape Romain, *supra*.

Counsel for the State compared the 1699 Plat in this case with the plat in Query v. Burgess which was described as "bare bones" and "neither precise or accurate." Here, while the 1699 plat lacks a scale, it contains sufficient detail to allow immediate location of the property described and for Mr. Quinn to conclude that the plat contained the property that is the subject of this action. Mr. Quinn prepared Exhibit 3 that fit the plat over the aerial imagery of the parcels that were included in the original grant. Exhibit 4 reflects that portion of the Grant containing Point Farm's four parcels. Ms. Larimer also testified that it was easy to locate the property described in the 1699 Plat based on the property description and the reference to intersecting waterways. The 1699 Plat indicated the vast stretches of marsh adjacent to the North Edisto River in the same manner

[9] The acreage increases to 4,500 if the serpentine-shaped interior marsh finger outside of Plaintiffs' boundary is included.

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that the marshes around Folly Beach are depicted in the plat at issue in Query v. Burgess. On both plats, the marsh acreage is a thin "stippled" line; however, this court finds the lack of detail depicting a vast acreage of marsh not conveyed evinces no intent to include the marsh in the conveyance of the detail provided to interior marsh. I conclude it does not indicate a clear intent to convey marshland absent further reference thereto in the grant.

CONCLUSIONS OF LAW

Plaintiffs have the burden of demonstrating to this Court that their predecessor in title possessed a valid Sovereign's grant and that the grant's language is sufficient to convey title below the high water mark. Lowcountry Open Land Trust v. State of South Carolina and James Atkins, 347 S.C. 96, 552 S.E.2d 778 (Ct. App. 2001) A deed or grant by the State is construed strictly in favor of the State and the public and against the grantee. State v. Hardee, 259 S.C. 535, 193 S.E.2d 497 (S.Ct. 1972)

In South Carolina, where a deed describes land as it is shown on a certain plat, such plat becomes part of the deed for the purpose of showing the boundaries, metes, courses and distances of the property conveyed. Hobonny Club, Inc. v. McEachern, 272 S.C. 392, 252 S.E.2d 133 (S.C.1979), *citing* Carolina Land Co., Inc. v. Bland, 265 S.C. 98, 217 S.E.2d 16 (1975); Lynch v. Lynch, 236 S.C. 612, 115 S.E.2d 301 (1960). South Carolina courts have held plats to be sufficient to validate a claim of tidelands where the plats clearly conveyed the marshland.

Here, the plat accompanying the 1700 Grant to Joseph Morton, the 1699 Plat, is not sufficiently reliable in detail to allow this court to conclude that the property conveyed in the grant also includes the interior marshes. While the 1699 Plat provides details of interior areas with precision, as those interior areas readily match the interior marshes on the property, I cannot conclude, by clear and convincing proof, that the plat clearly indicates that these marsh fingers were to be conveyed with the upland. While the language of the grant describes the southern

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boundary on Leadenwah Creek when compared to the description of the boundary on the marsh of the North Edisto, a visual review of the plat shows that the marshlands of the creek are bounded by the highland and waterways.

It is, therefore, ORDERED, that the Proprietary Grant to Joseph Morton, dated 1700 as reflected in the abstract, does not clearly convey state tidelands located within the acreage now owned by Point Farm. The Plat is part of the Grant but does not evince a clear intent to convey marsh fingers contained within the parcel identified as TMS 135-00-00-001, on the North Edisto River, and TMS 134-00-00-008, 134-00-00-009, and 134-00-00-010, along Leadenwah Creek.

AND IT IS SO ORDERED.

[Electronic signature of Mikell R. Scarborough, Master in Equity, as follows]

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Charleston Common Pleas

Case Caption: Point Farm Investors Llc , plaintiff, et al VS State Of South Carolina The

Case Number: 2020CP1001841

Type: Master/Order/Other

So Ordered

s/Mikell R. Scarborough 3062