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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,

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REPLY BRIEF OF APPELLANTS

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ARGUMENT

As with the lower court's order, the Respondents misstate the facts, misinterpret the law, and misguide this Court, all in an effort to evade the straightforward, yet heretofore unanswered question: whether a significant, abrupt, man-made change to the shoreline causes public trust property to revert to private ownership.

This case is not simply about whether the Respondents may develop their super beachfront lots, as they state. (Brief, p. 13). Rather, it is seeking a declaration that the common law theory of avulsion applies in the state of South Carolina such that title to submerged lands accreted by avulsive events, specifically beach renourishment, remains with the state. It is also about the property rights of the non-City Appellants who own property abutting lands that were bounded by the mean high water mark prior to an artificial beach renourishment project. It is about the City's ability to determine the extent of, as well as its ability to manage, the shoreline within its jurisdiction. And it about whether these Appellants have a stake in this case.

I. Respondents' Standing Arguments Contravene the Facts and the Law

Respondents' assertion that Appellants "do not allege any basis for their standing to sue," (Brief, p. 17), can only be made by wholly disregarding the Appellants' allegations and sworn testimony. Respondents fail to address Appellants' bases for standing on pages 11-30 of their brief, and instead cloud the inquiry in an attempt to block the courtroom doors and prevent Appellants' entry.

A. Appellants Have Constitutional Standing

The Respondents cite to Lennon for the proposition that a party must meet some undefined standard beyond being a "real party in interest." (Brief, p. 20). Lennon was decided in 1998 by the

Court of Appeals, and since that time the Supreme Court has repeatedly reaffirmed that "**To have standing ... one must be 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." Charleston County Sch. Dist. v. Charleston County Election Comm'n, 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999) (emphasis added); Anchor Point, Inc. v. Shoals Sewer Co., 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992); Henry v. Horry County, 334 S.C. 461, 463 n. 1, 514 S.E.2d 122, 123 n. 1 (1999) ("To have standing, one must be a real party in interest."); Baird v. Charleston County, 333 S.C. 519, 530, 511 S.E.2d 69, 75 (1999). Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res., 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001) ("To have standing, one must have a personal stake in the subject matter of the lawsuit. In other words, one must be a real party in interest."); see also S.C. Lottery Comm'n v. Glassmeyer, 428 S.C. 423, 431, 835 S.E.2d 524, 527 (Ct. App. 2019), reh'g denied (Dec. 16, 2019), cert. granted (July 8, 2020).

This is the most basic of tests, and while Lujan further defines what it means to be a real party in interest, Respondents casually throw around its terms as if such words standing alone, without any analysis or discussion, can defeat Appellants injury. (Resp. Brief, p. 21). Simply because none of the Defendants has undertaken construction activities yet does not make such a threat "speculative," "conjectural," or "hypothetical." Apparently Respondents believe that because the alleged harm has yet to occur on the properties at issue here, standing is defeated. That is not the law.

i. Appellants Need to Wait Until the Injury Occurs

Courts have never required that a person must wait until the damage is done, or even begun,

to have standing to prevent harm; if the "perceived threat to [plaintiffs] is sufficiently real and immediate to show an existing controversy," standing is present. Blum v. Yaretsky, 457 U.S. 991, 1000 (1982); see also Sierra Club v. Simkins Industries, Inc., 847 F.2d 1109, 1113 fn. 4 (4th Cir. 1988), (citing Valley Forge Christian College for the proposition that "threatened rather than actual injury can meet minimum Article III standing requirements."). The question is whether the threat of harm is sufficiently real and immediate or imminent.

Here the injury is not only imminent, but has already occurred, making it very real. Contrary to the lower court's finding, the Appellants claimed that problematic development of on super beachfront lots has already occurred, which precipitated the City's initiation of this case. (Wetmore, ¶5-12, R. pp. 135-136). The undisputed evidence is that 14 super beachfront lots have already been built upon, causing harm to the Appellants because they are obstructions on the beach, interfering with recreational and aesthetic uses and causing considerable management dilemmas for the City. The exact same harm flowing from the development of the lots at issue in this case is certainly imminent. Indeed, the Appellants undertook a considered investigation regarding properties on Folly that, but for a declaratory ruling from the Court, could be imminently built upon regardless of the properties' status as public trust property. Along those lines, the Appellants are not some casual bystanders, but rather individuals with real property directly abutting the lots in question and the City under whose jurisdiction those lots lie. Moreover, Respondents err in asserting that the City has no claim of ownership of the affected property (Brief, p. 23). In fact, the City owns dozens of lots that will be affected by the outcome of this litigation. The lower court erred in failing to accept the Appellants' allegations as true and instead concluded, without any contrary evidence, that such allegations were "speculative." (Order, p. 9, R. p. 13).

ii. The City's Ordinances are Insufficient to Prevent the Injury

The Respondents' suggestion that the City's ordinance provides an adequate vehicle to redress Appellants' injuries is nothing but an attempt to distract the Court from the legal issue raised in this case. While the City passed the ordinance in an effort to regain some measure of control over its beachfront jurisdiction, it does not address the critical question of whether the super beachfront lots at issue are public or private property. If the lots are public trust property, the City could not authorize any maintenance or construction activities thereon. But without knowing the demarcation between private and public trust properties, not only is the City prevented from effectively applying its ordinances, but it very well could find itself illegally authorizing construction on public trust property. (Wetmore, R. p. 139). In other words, the question of whether the avulsed property belongs to the state or to private individuals directly affects the City's ability to regulate any activities thereon and to avoid authorizing the taking of public trust property. Id.

The Respondents and the lower court fail to acknowledge the two factors which render the Ordinance insufficient to address the City's harm. First, the Perpetual Easement Line (PEL) demarcates the limits of the federal component of the renourishment project, which is only part of the project. Because the City is obligated to renourish to the height of the federal project, and the City's portion of the project is landward of the federal portion, development could still occur on previously submerged lands. The lower court specifically acknowledged that the federal share of the $7,040,000 project is $3,870,000 – just over half of the total. (Order, pp. 2-3, R. pp. 2-3). The lower court also acknowledge that the renourishment was not simply a federally-funded project, but that some private funds were used, as well. (Order, p. 22, 26, R. p. 22, 26). As such, areas further than 40 feet landward of the PEL that were below MHW prior to the renourishment exist and could

still be subject to state ownership. In sum, the PEL has nothing to do with property boundaries, is thus not an adequate demarcation between private and public property, and thus does not remedy the City's injuries. Second, in cases where no PEL exists, the development setback is based on the state's jurisdictional baseline, which bears no relation to the location of the renourishment. For Folly, the baseline is set "where the crest of the primary oceanfront sand dune for that zone would be located if the shoreline had not been altered." S.C. Code Ann. § 48-39-280. Nothing in this language would prevent development from occurring on previously submerged lands.

Contrary to Respondents' assertion, the City does not have all the tools needed to regulate beachfront development. (Brief, p. 26). It is missing the most critical piece of information needed to make decisions under its ordinances: who owns the previously submerged lands that have been artificially accreted? The notion that the City can implement its ordinance without such information defies logic, and has been the root cause of the problems facing the City. (Wetmore, R. p. 139).

iii. Ownership in Disputed Property Not a Prerequisite for Standing

The Appellants, as adjacent owners, and the municipality within whose jurisdiction the Respondents' properties lie, need not assert any claim of ownership in order to establish standing, as suggested by the Respondents and the lower court.[1] (Resp. Brief, p. 21, Order, p. 7-8, R. pp. 7-8). At the risk of restatement, this case is not a quiet title action, thus an assertion of ownership is not necessary as claimed by the Respondents. (Brief, p. 17). Indeed Respondents' argument falls away in the context of the declaratory judgment action, which seeks "to declare rights, status and other legal relations." S.C. Code Ann. §15-53-20. The Declaratory Judgements Act does not require ownership to initiate an action, nor does it require actions to determine property ownership. And our

[1]Appellants do, however, assert property interests, see Brief, pp. 23-26.

appellate courts have repeatedly found standing under the Lujan test, without requiring property ownership. Smiley v. S.C. Dep't of Health & Envtl. Control, 374 S.C. 326, 649 S.E.2d 31 (2007); Pye v. U.S., 269 F.3d 459, 469 (4th Cir. 2001) ("aesthetic and environmental injuries can constitute an injury in fact sufficient to support a plaintiff's standing."); S.C. Wildlife Fed'n v. S.C. Coastal Council, 296 S.C. 187, 371 S.E.2d 521 (1988); Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision), 332 S.C. 551, 505 S.E.2d 598 (Ct. App.1998). Because Respondents' standing argument hinges on its inaccurate belief that the Appellants must claim a property interest, it must be rejected. In any case, where public trust property is at stake, citizens who are beneficiaries of the public trust have standing to protect it.

iv. Beneficiaries of the Public Trust Have Standing Where Public Trust Property is at Stake

Respondents and the lower court's belief that the Appellants lack standing to seek declaratory relief not only confuses this action with a quiet title action, as previously discussed, but also fails to acknowledge the Appellants' constitutional rights as beneficiaries of the public trust. (Order, p. 5, R. p. 5). Respondents erroneously claim that "Appellants completely lack standing" because they have "no claim of ownership or possession of the property at issue." (Brief, p. 20). Aside from the well-established law that a party need not have a property interest to have standing discussed above, the Appellants have standing where public trust property is at stake. Simply because the state itself has failed to take action here does not deprive Appellants of that ability.

Citizens have repeatedly been found to have standing as beneficiaries of the public trust, and they need not assert any personal property rights in that public trust property. "For a doctrine whose overarching principles might be thought of as public access to trust resources and to decision makers

who allocate those resources, public access to the courts to ensure enforcement requires no great intellectual leap." Blumm, Michael; Schwartz, Thea, "Mono Lake and the Evolving Public Trust in Western Water Law," 37 Ariz. L. Rev. 701 (1995). See, e.g., Paepcke v. Pub. Bldg. Comm'n, 263 N.E.2d 11 (Ill. 1970) (holding that public trust doctrine allows taxpayers to challenge conversion of city parks); Marks v. Whitney, 491 P.2d 374 (Cal. 1971) (holding that member of general public has standing to request court to declare public trust easement on privately-held tidelands); Gewitz v. City of Long Beach, 330 N.Y.S.2d 495 (Sup. Ct. 1972) (holding that state resident has standing to dispute city ordinance restricting beach access); Superior Pub. Rights, Inc. v. State Dep't of Natural Res., 263 N.W.2d 290 (Mich. Ct. App. 1977) (holding that nonprofit organization whose members were residents may seek to invalidate agreements that permitted private use of public trust lands); Sekirk-Priest Basin Ass'n v. State ex rel. Andrus, 899 P.2d 949 (Idaho 1995) (holding that public trust doctrine conferred standing to environmental group to challenge timber sale on state lands); Center for Biological Diversity, Inc. v. PPL Group, Inc., 83 Cal. Rptr. 3d 588 (Ct. App. 2008) (holding that private parties have standing to bring an action to enforce protection of wildlife because it is a public trust resource).

As the Illinois Supreme Court noted:

> If the "public trust" doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it. To tell them that they must wait upon governmental action is often an effectual denial of the right for all time.

Paepeke at 18.

The same can be said here: given the State's position in this case, it is evident that the Appellants cannot expect the State to take any action to assert its ownership interest, which would

result in Appellants' "denial of right for all time."

Indeed, "a public trust claim can be raised by members of the public who are affected by potential harm to the public trust–a showing of injury-in-fact is not required for standing." S.C. Law Review, Vol. 68, No. 5 (Spring 2017) (citing In re 'Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications, 287 P.3d 129, 183 (Haw. 2012). **"The court reasons that a citizen's interest in the public trust was a vested property interest and therefore, standing was based upon due process."** Id. at 141. The Hawaii Supreme Court further explained that:

> The current standing formulation for public trust claims, specifically the "injury in fact" requirement, see Akau v. Olohana Corp., 65 Haw. 383, 388–89, 652 P.2d 1130, 1134 (1982), conflicts with the broad constitutional basis underlying the public trust doctrine. . . . Indeed, the "injury in fact" test "relates essentially to individual harm and therefore emphasizes the private interest...." In re 'Īao, 128 Hawai'i at 281, 287 P.3d at 182 (Acoba, J., concurring). "Such a formulation would appear ill-suited as a basis for determining standing to sue to vindicate the public trust doctrine." Id. (citing Akau, 65 Haw. at 388–89, 652 P.2d at 1134).

Kilakila 'O Haleakala v. Bd. of Land & Nat. Res., 131 Haw. 193, 212–13, 317 P.3d 27, 46–47 (2013).

The court in In re 'Ioa concluded that because its Public Trust Doctrine is embodied in Hawaii's constitution, as is South Carolina's, any public citizen of the State who may be affected by potential harm has standing to bring an action under the Public Trust Doctrine. Where the public trust is at issue, "the common good is at stake, and this court is duty-bound to protect the public interest." In re 'Iao, 287 P.3d 129 (Haw. 2012). In re 'Īao, 128 Hawai'i at 281, 287 P.3d at 182; see also Arizona v. Cent. for Law in Pub. Interest v. Hassell, 172 Ariz. 356, 837 P.2d 158, 168–69 (App. 1991) ("Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res, so the legislative and executive branches are judicially accountable for the dispositions of

the public trust.... The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res.")

Appellants have squarely raised the issue of whether all or a part of the properties at issue in this case are part of the public trust. The common good is at stake and the outcome of this case stands to alter the individual property rights of adjacent owners and the legal rights and responsibilities of the City.

v. Injury to All is Not Injury to None

Similarly, Appellants standing is not defeated simply because other members of the public *may* experience harm related to flooding and loss of beach use. The U.S. Supreme Court has made it "clear that standing is not to be denied simply because many people suffer the same injury." United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 687 93 S. Ct. 2405 (1973). If an individual's injury is sufficiently personal, it is not defeated because others are harmed as well. Fed. Election Comm'n v. Akins, 524 U.S. 11, 24, 118 S. Ct. 1777, 1785 (1998); Sierra Club v. Morton, 405 U.S. 727, 734 (1972). The principles from Sierra Club v. Morton have been repeatedly affirmed and elaborated on in federal courts. The Fourth Circuit ruled that "So long as the plaintiff himself has a concrete and particularized injury, it does not matter that legions of other persons have the same injury." Pye v. U.S., 269 F.3d 459, 469 (4th Cir. 2001) (internal citations omitted). See also, Covington v. Jefferson County, 358 F.3d 626, 651 (9th Cir. 2004) (Gould, concurring) ("injury to all is injury to none" theory would "deny standing to every citizen such that no matter how badly the whole may be hurt, none of the parts could ever have standing to go to court to cure a harmful violation."); U.S. v. SCRAP, 412 U.S. 669, 688, 93 S. Ct. 2405 (1973) ("To deny standing to persons who are in fact injured because many others are also injured, would

mean that the most injurious and widespread . . . actions could be questioned by nobody. We cannot accept that conclusion."). Because the Appellants themselves are persons for whom those harms would be felt, the lower court's conclusion to the contrary is reversible error.

vi. Injury for Standing is Distinct from the Merits

Whether intentional or not, the Respondents erroneously equate the standing inquiry with the merits in asserting that because interference with Appellants views of the ocean is "not an actionable injury" they cannot have standing. (Brief, p. 22). Respondents are misguided because the presence of an injury is not dependent on the merits of the legal argument. Such assertion arises from a flawed analysis that equates harm necessary for standing with the merits. In Allen v. Wright, the U.S. Supreme Court explained the distinction as follows:

> **The "fundamental aspect of standing" is that it focuses primarily on the party seeking to get his complaint before the federal court rather than "on the issues he wishes to have adjudicated,"** (citing *United States v. Richardson*, 418 U.S. 166, 174, 94 S.Ct. 2940, 2945, 41 L.Ed.2d 678 (1974) (quoting *Flast*, 392 U.S., at 99, 88 S.Ct., at 1952). . . . the possibility that the relief might be inappropriate does not lessen the plaintiff's stake in obtaining that relief. If a plaintiff presents a nonjusticiable issue, or seeks relief that a court may not award, then its complaint should be dismissed for those reasons, and not because the plaintiff lacks a stake in obtaining that relief and hence has no standing. **Imposing an undefined but clearly more rigorous standard for redressability for reasons unrelated to the causal nexus between the injury and the challenged conduct can only encourage undisciplined, ad hoc litigation,** a result that would be avoided if the Court straight-forwardly considered the justiciability of the issues respondents seek to raise, rather than using those issues to obfuscate standing analysis.

Allen v. Wright, 468 U.S. 737, 791-92, 104 S. Ct. 3315, 3345-46, 82 L. Ed. 2d 556 (1984).

In Duke Power Co. v. Carolina Envtl. Study Group, Inc., the merits of the case involved the validity of the provisions of the Price-Anderson Act, which limited maximum liability in the event of any single nuclear incident to $560,000,000. 438 U.S. 59 (1978). The plaintiffs, who lived near

the proposed construction site for two nuclear power plants, challenged the constitutionality of that Act. Id. at 67. For purposes of standing, the plaintiffs asserted injuries related to the possibility of a nuclear accident, as well as injuries related to the normal operation of the plants. Id. at 73-74. First, the Supreme Court concluded that it need not determine whether the injuries based on the possibility of a nuclear accident were "sufficiently concrete to satisfy constitutional requirements." Id. at 73. Rather, "several of the 'immediate' adverse effects'" of the nuclear plants, including "environmental and aesthetic consequences" were of "the type of harmful effect which has been deemed adequate in prior cases." *Id.* at 73-74. The presence of aesthetic and environmental injuries was entirely distinct from the statute giving rise to the cause of action, as with the present case.

Contrary to Respondents' assertion, Appellants are not claiming a view easement, but aesthetic injuries such as viewing wildlife and outdoor vistas which have historically been sufficient to establish an injury for standing purposes. Pye v. U.S., 269 F.3d 459, 469 (4th Cir. 2001); S.C. Wildlife Fed'n v. S.C. Coastal Council, 296 S.C. 187, 371 S.E.2d 521 (1988); Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision), 332 S.C. 551, 505 S.E.2d 598 (Ct. App.1998). And while Appellants' allegations of harm go well beyond unobstructed views, even if they did not such allegations would be enough to enter the court room doors. Id. Moreover, the Respondents themselves note that view is one of the substantial elements of littoral ownership. (Brief, p. 36). As such, harm to view is sufficient to establish injury, albeit only one of the many injuries Appellants have asserted.[2]

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[2]Where the public trust is at issue, "the common good is at stake, and this court is duty-bound to protect the public interest." In re 'Iao, 287 P.3d 129 (Haw. 2012). In re 'Īao, 128 Some of those injuries include elimination of access (Napier Aff, ¶9, R. p. 122, Wetmore ¶8, R. p. 140); elimination of dunes which jeopardize public and private property (Wetmore ¶7, 11, R. pp. 140, 141). See also Brief at pp. 11-31.

B. The Appellants Have Statutory Standing

"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." S.C. Lottery Comm'n v. Glassmeyer, 428 S.C. 423, 432, 835 S.E.2d 524, 528 (Ct. App. 2019), reh'g denied (Dec. 16, 2019), cert. granted (July 8, 2020) (citing Sunset Cay, LLC, 357 S.C. at 423, 593 S.E.2d at 466). "Where a concrete issue is present, and there is a definite assertion of legal rights and a positive legal duty with respect thereto, which are denied by the adverse party, there is a justiciable controversy calling for the invocation of declaratory judgment action." Power v. McNair, 255 S.C. 150, 153-54, 177 S.E.2d 551, 553 (1970). Indeed, this Court has recognized that the Declaratory Judgment Act "confers standing" on a "[a]ny person ... whose rights, status or other legal relations are affected by" the subject matter of the declaratory action. Citizens for Quality Rural Living v. Greenville County Planning Commission 426 S.C. 97, 825 S.E.2d 721 (Ct. App. 2019).

Appellants are those persons whose rights, status, and other legal relations are affected by the issue presented in this case and have standing under the Declaratory Judgments Act.

C. Public Importance Standing is Properly Before the Court

Respondents assert that the Appellants failed to preserve public importance standing. Yet as Respondents' recognize, the Appellants asserted public importance standing in their arguments before the lower court, and specifically in their proposed order. (Resp. Brief, p. 23). In that regard, the lower court erred in finding that they did not raise public importance standing. (Order p. 7, R. p. 7). Moreover, even while Appellants asserted public interest standing before the lower court, it effectively ruled that Appellants, by not having standing, do not have public importance standing.

As discussed at length in their opening brief, the question raised in this appeal is of the type that typically rises to the level of public importance: an unanswered question over ownership of public trust property that has been artificially and suddenly accreted by renourishment. (Brief, pp. 17-22).

II. Avulsion is a Viable Cause of Action

In order to arrive at their determinations that Respondents own the avulsed lands, the lower court and Respondents must completely ignore the nature of the property in dispute prior to renourishment. Only by ignoring that such property, lying below the high water mark, was public trust property prior the renourishment can the Respondents assert that said renourishment somehow "restored" their property.

The Respondents cite Tilghman and City of Folly Beach v. Atl. House Properties, Ltd. to assert that they own the beach created by artificial renourishment which was previously underwater. Respondents reliance is misplaced. Atlantic House was an eminent domain cases where the plaintiffs were concerned with the amount of compensation due as a result of a condemnation action, and Tilghman was similarly a compensation case. Neither case raised the question of ownership of submerged lands that had abruptly accreted raised here.

In Atlantic House the City sought condemnation of property that was "the only known beach front parcel exempt from the Beach Front Management Act"[3] because the Corps of Engineers required the City to have title in order to conduct renourishment. City of Folly Beach v. Atl. House Properties, Ltd., 318 S.C. 450, 452, 458 S.E.2d 426, 427 (1995). The Plaintiff sought compensation

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[3]Because of this exemption, the owner could have rebuilt the restaurant that had been destroyed. Id.

for condemnation of the submerged lands. The City had condemned the adjacent upland parcel, but only after condemning the submerged lands. Because compensation must be determined at the time of condemnation, and the City did not own the adjacent upland at the time of condemnation,[4] the court upheld the jury's award. The court did not rule on whether the State held title to the submerged lands, as Respondents suggest. (Brief, p. 3). But the case shows the problem that the City has without clarity on ownership of artificially accreted lands: Because the property is exempt under the Beachfront Management Act, no state permit is needed leaving the City in a quandary over its own regulatory authority.

The crux of the Tilghman case is that no compensation is due to private owners when a federal navigation project converts submerged lands to high ground because the title to those submerged lands vested with the State as public trust property. This Court framed the issue as "whether the Tilghmans have shown some present title or interest in the submerged land that entitles them to compensation." Horry Cty. v. Tilghman, 283 S.C. 475, 478, 322 S.E.2d 831, 832 (Ct. App. 1984). Again, aside from the fact that Tilghman arose from a condemnation action, this Court's holding was that "condemnation [of adjacent uplands] divested the Tilghmans of any rights upon the accretion, reliction or re-emergence of the acreage, whether accomplished by natural or artifical causes." Tilghman at 480, 833–34.

The Respondents agree with Appellants that artificial avulsion belongs to the public, if that accretion is a result of a public purpose navigation project under Tilghman. (Brief, p. 34). In this case, the beach renourishment similarly serves a public purpose, albeit not for navigation, and it is

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[4]Atlantic House suggests that if the City purchased the adjacent high ground prior to condemning the submerged lands, the outcome would have been different because the City would become the littoral owner.

no stretch to similarly hold that a prior owner of submerged lands retains no rights after a publicly-funded renourishment raises those lands to high ground. Here, the "public purpose" of the beach renourishment project is the sole cause of the accretion and Respondents should not benefit from that sudden and dramatic change.

Respondents' suggestion that this Court ruled on the question at issue here is erroneous. While Tilghman cited to Michaelson v. Silver Beach Imp. Ass'n, Inc., that case was about whether the condemnee retained any interest in submerged lands, not about ownership of accreted lands, and ultimately rested on the purpose of the dredging and renourishment. In that regard, the suggestion that an upland owner gets the benefit of artificial renourishment is *dicta*.[5] Moreover, it is irrelevant here where at least some of Respondents' lots were entirely submerged[6] prior to the renourishment, and thus they were no longer upland or littoral owners. Indeed, at least some of the "upland owners" adjacent to the submerged lands are the Appellants in this matter. (Napier, R. p. 121). As Napier testified, his property directly abutted the mean highwater line in 2018 prior to the renourishment because the adjacent lot was entirely submerged. If title to those lands, submerged by the process

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[5]Also, in Michaelson, Massachuset's colonial ordinance grants private ownership to the low water mark, subject to navigation, unlike in South Carolina where private ownership only extends to the high water mark, absent a King's Grant. Id. Thus, the property owners held title in land that extended to their seawalls, which demarcated the low water line. In other words, Massachusetts littoral owners can claim ownership of the lands between the mean high water mark and mean low water mark, while in South Carolina, the public trust doctrine applies to those lands. The court held that "it thus becomes unnecessary to decide the extent to which the upland owners would have shared in the new land if their titles had been only to the high water mark." Michaelson at 261, 279.

[6]Again, because of the disposition of this case, the Appellants were deprived of the opportunity to present evidence regarding the location of the mean high water mark, and thus the extent of submergence of Respondents' lots, but have alleged that at least some of Respondents' lots would be completely submerged. (Napier, R. p. 121).

of natural erosion, vested with the State as public trust property, as our state's common law requires, Napier then became the littoral owner.

Finally, Respondents reliance on Lynnhaven is inapplicable because that case was about whether the property owners were entitled to compensation for loss of their littoral rights. Plaintiffs alleged that their "exclusive access to the sea" was eliminated when renourishment sand was added seaward of the boundaries of their property lines, thus creating a "strip" of sand between their property boundary and the Chesapeake Bay. Lynnhaven Dunes Condo. Ass'n v. City of Virginia Beach, 284 Va. 661, 673, 733 S.E.2d 911, 917 (2012). Importantly, that court held that **"formerly submerged land that has become dry land by avulsion continues to belong to the owner of the seabed (usually the State)."** Lynnhaven Dunes Condo. Ass'n v. City of Virginia Beach, 284 Va. 661, 672, 733 S.E.2d 911, 916 (2012) (emphasis added) (citing Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot., 560 U.S. 702, 130 S.Ct. 2592, 2598 (2010)).

This case is not about cutting off littoral rights of access; it is about whether a landowner whose property has become submerged below the high water mark by gradual erosion, and thus becomes state public trust property, can reclaim such property by way of a publicly-funded, artificial renourishment project. And in doing so, cut off the riparian/littoral rights that arose to Appellants. Tenny is relevant and applicable here because under the holding of that case the State held presumptive title to the lands below the highwater mark as it existed prior to the 2018 renourishment project. This case presents the question flowing from that common law doctrine: can the State lose title in those public trust lands by virtue of an artificial renourishment project?

Answering Respondents' claim that Hilton Head Propert Owners' Ass'n v. Donald is inapplicable, Appellants cited Donald because this case would merely be an extension of that

holding. Donald only addressed submerged lands that were accreted by the owner, but it did not hold that if the artificial accretion is by one other than the owner then a property owner can claim ownership. Both instances involve artificial accretion, but the lack of a direct answer to the question of a non-owner's artificial accretion is exactly why a declaratory ruling is warranted here. Similar to Tenney, the Donald court did hold that "the State owned the Property because it was below the high water mark before this dredging." Hilton Head Plantation Prop. Owners' Ass'n, Inc. v. Donald, 375 S.C. 220, 225, 651 S.E.2d 614, 617 (Ct. App. 2007). This Court should apply that same holding here, and determine the effect of a similar avulsive event.

Finally, Appellants' citation to federal common law is, at a minimum, instructive because no state common law exists on the question of law, and Respondents' only dissuade this Court from considering that law because it is does not like the result. (Brief, pp. 32-33).

III. No Additional Parties are Necessary for Adjudication

Again, this case is not a quiet title action and does not seek to establish property boundaries. Certainly, any case establishing a precedent is likely to effect future rights; that fact does not dictate that the world of possible effected parties be named in an action. Following Respondents' logic, not only would all 50 Folly Beach owners need to be named, but also every individual or entity owning property in, on or adjacent to a renourished beach in South Carolina. Respondents cite to cases involving application or invalidation restrictive covenants, entirely unlike the case at bar. This case is about the nature of public trust property, and the inherent changes in property abutting public trust navigable tidelands.

The absence of every beachfront property owner does not violate Rule 19 because those owners are not necessary to afford the relief sought here and their absence would not cause the

existing parties to incur any extra obligations. Should this Court agree that an avulsive event cannot convert public trust property to private property, additional actions would need to take place in order to establish the precise boundaries between State and private properties. In this way, any individuals not a party to this case will have an opportunity to present evidence about where the mean high water mark was prior to the 2018 renourishment. The lower court's foreclosure of this important question before any evidence had even been presented, is reversible error.

IV. No Additional Sustaining Grounds Exist to Support the Lower Court's Ruling

As Appellants trust is clear from the above and its opening brief, they have presented a concrete legal dispute against the Respondents, the result of which will have very real consequences for them, their recreational and aesthetic uses, their property interests, and their ability to carry out vital day-to-day municipal operations. Respondents understandably do not want this Court to reach the merits, but to the Appellants, this case is a very "real and substantial controversy," which is not only appropriate, but necessary to determine the legal rights and responsibilities of the parties.

A judicial ruling would not be purely advisory, but would have important immediate consequences. For the City, it would give the City a tool to prevent destruction of dunes associated with construction on super beachfront lots (Wetmore ¶7, R. p. 140); allow the City to administer its laws with respect to said lots, and specifically make determinations about whether construction is permissible (Wetmore ¶14, R. p. 141); allow the City to undertake beach maintenance project where said lots are situated (Wetmore ¶15, R. p. 142); and allow the City to properly allocate the high costs of renourishment (Wetmore ¶17, R. p. 142). Understandably these consequences do not mean much to the Respondents, but they are of critical importance to the City, and the adjacent property owners.

CONCLUSION

For the reasons set forth above and in their opening brief, the Appellants respectfully request that this Court reverse the lower court's dismissal for lack of standing and issue a declaratory ruling that an avulsion resulting from artificial renourishment does not convert public trust property to private property, correcting the lower court's serious error.

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Our Mission To protect the natural environment of South Carolina by providing legal services and advice to environmental organizations and concerned citizens and by improving the state's system of environmental regulation.

May 10, 2021

VIA U.S. MAIL

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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Columbia, SC 29211

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SC Court of Appeals

Re: City of Folly Beach et al. v. State of South Carolina et al.
Appellate Case No. 2020-000937

Dear Ms. Kitchings:

Please find enclosed the Appellants' Final Reply Brief in the above-referenced matter. We have already mailed the Final Initial Brief and Record on Appeal and I wanted to alert you that this follows the earlier mailing. Thank you for your consideration.

Respectfully,

Leslie S. Lenhardt
Staff Attorney

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