

A. NPDES Permit

2. In 2006, Plaintiff received permit coverage for site work on the Development under the NPDES General Permit for Stormwater Discharges from Large and Small Construction Activities, commonly referred to as a “Land Disturbance Authorization” and identified as “S/W Permit Number 10-06-01-08” from Defendant OCRM (the “*NPDES Permit*”).

3. Shortly thereafter, the subprime mortgage crisis signaled the beginning of the Recession of 2008, the effects of which were pervasive for several years. Because of the economic conditions created by the Recession, there was no market for the Development and Plaintiff significantly slowed its development schedule and efforts.

4. In 2009, the South Carolina Legislature adopted a “Joint Resolution to Extend Certain Government Approvals Affecting the Development of Real Property Within the State.” This Joint Resolution is applicable to Land Disturbance Authorizations. In or around 2013 the South Carolina Legislature adopted a second Joint Resolution, identical to the first. The aggregate effect of both Joint Resolutions was to extend the NPDES Permit, such that it expired on February 14, 2021.

5. The NPDES Permit is necessary for the Plaintiff to conduct site work on the Subject Property. Because the NPDES Permit expired on February 14, 2021, it was critical to the Plaintiff to complete site work before that date.

B. Establishment of the OCRM Critical Line and Development Approval.

6. The Plaintiff restarted efforts to develop the Development Tract in 2012.

7. On September 29, 2016, OCRM approved a recorded plat which certified the OCRM critical line for the Development, including the Subject Property. The plat is entitled “OCRM Critical Line Drawing Clam Farm.” (“*OCRM Plat*”). The OCRM Plat includes a

signature of OCRM employee D. J. Thompson and a date of September 29, 2016. Thompson's signature block includes the following language:

THE AREA SHOWN ON THIS PLAT IS A REPRESENTATION OF DEPARTMENT PERMIT AUTHORITY ON THE SUBJECT PROPERTY. CRITICAL AREAS, BY THEIR NATURE ARE DYNAMIC AND SUBJECT TO CHANGE OVFR TIME. BY DELINEATING THE PERMIT AUTHORITY OF THE DEPARTMENT, THE DEPARTMENT IN NO WAY WAIVES ITS RIGHT TO ASSERT PERMIT JURISDICTION AT ANY TIME IN ANY CRITICAL AREA ON THE SUBJECT PROPERTY, WHETHER SHOWN HEREIN OR NOT.

D. J. Thompson 9/29/16

THE CRITICAL LINE SHOWN ON THIS PLAT IS VALID FOR FIVE YEARS FROM THE DATE OF THIS SIGNATURE, SUBJECT TO THE CAUTIONARY LANGUAGE ABOVE.

The Plat established the operative critical line as of September 29, 2016 (“*2016 Critical Line*”).

8. Following establishment of the 2016 Critical Line, Plaintiff began preparing development plans for the Subject Property for submittal to the City for approval.

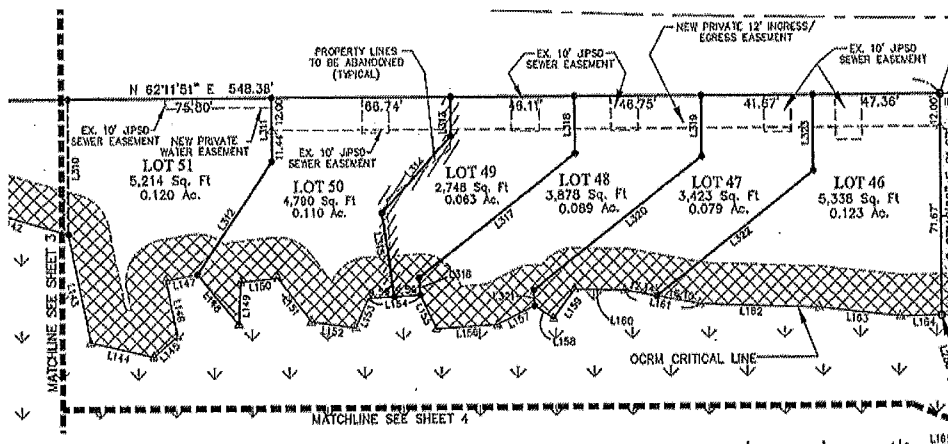
9. On April 9, 2019, the City passed Amended Ordinance 05-19, which, among other things, amended Folly Beach Code § 166.04-03, “Marsh Buffers,” to require a 15-foot buffer landward of the OCRM critical line.

10. Plaintiff's engineers then platted the Development Tract, including the Subject Property, to conform with the required 15' marsh buffer landward of the 2016 Critical Line.

11. The subdivision plat showing the marsh buffer landward of the 2016 OCRM critical line was approved by the City on July 10, 2020, and recorded in the Office of the Register of Deeds at Plat Book L20 Page 0259. (“*Subdivision Plat*”).

12. The Subdivision Plat shows the OCRM critical line, marsh buffers, easements, and developable area of the Subject Property, as demonstrated from the below excerpt showing Lots

46-51. The developable portions of the Subject Property are effectively all of those portions landward of the marsh buffer delineation (checked lines).



13. Upon recording the Subdivision Plat, Plaintiff entered into a purchase and sale agreement with Stanley Martin Homes in the amount of \$4,038,000.00. Plaintiff's obligation under the terms of the purchase and sale agreement was to deliver 26 buildable residential lots (including the Subject Property) to Stanley Martin Homes.

C. Development Interruption and Subsequent Action of the Defendants.

14. Plaintiff commenced preparing the property for sale to Stanley Martin Homes by grading the lots for construction and installing or adjusting utility lines. As set forth in the affidavit of Tim Stewart, the Plaintiff spent 6 months and \$ 298,402.89 on engineering and site work for the development of the site. Of this, Plaintiff spent approximately \$68,730.24 on the 13 lots that comprise the Subject Property.

15. On October 20, 2020, Aaron Pope, City Administrator for Folly Beach, transmitted an email to a representative of Stanley Martin Homes expressing concern about king tides in the area. The email reads:

I'm not sure how much time you guys have spent at that site lately but the high tides have generated a lot of interest. In particular, this one lot seems to go under pretty frequently. I wanted to see if there was any possibility that you guys would

be interested in donating this particular plot to the folly beach nature Conservancy for preservation?”

16. On October 23, 2020, OCRM entered the Subject Property, an active construction site with the resulting land disturbances, to conduct an inspection of the Subject Property.

17. On November 2, 2020, Plaintiff received a “Notice to Comply” from OCRM disclosing the October 23, 2020 inspection and advising that the critical line on the Subject Property must be re-established, despite the fact that the Subject Property had been substantially disturbed by Plaintiff’s lawful site work activities pursuant to the NPDES Permit.

18. OCRM again visited the Subject Property on November 9, 2020 without Plaintiff being present. During this site visit, OCRM staked and flagged a proposed revision to the critical line, adjusting it landward.

19. Also on November 9, 2020, Morgan Flake, the Manager for the Compliance and Enforcement Section of OCRM, verbally instructed contractors to cease work and transmitted an email to the Plaintiff and its consultants directing that the Plaintiff cease work on the site:

The Department was just made aware that construction activities are currently ongoing at this development site. Please cease and desist any activities that are adjacent to/near the silt fencing since these are the specific areas to be evaluated by the Department and discuss as part of our meeting tomorrow.

20. By letter dated November 24, 2020, Plaintiff responded to OCRM’s Notice to Comply, stating that Plaintiff acted in reliance on the NPDES Permit, informing OCRM that the site was heavily disturbed, and that it would be difficult to re-create the critical line as it existed on the date the alterations occurred. Plaintiff further advised that it intended to continue site prep work before expiration of the NPDES Permit on February 14, 2021.

21. On November 25, 2020, Plaintiff received notification from Morgan Flake of OCRM that any further work in areas that OCRM believed to be critical areas would result in additional enforcement.

22. On December 10, 2020, Eric Lutz, the Director of Building/Facilities/Public Works for the City, advised the Plaintiff that it had asked Charleston County to “put on hold” any lot specific permits due to the issues with the newly-flagged critical line.

23. According to Ron Felkel, an engineer hired by the Plaintiff, the City advised that it would impose a 15’ buffer adjacent to the proposed critical line flagged by OCRM.

24. Also according to Mr. Felkel, the revised critical line and proposed imposition of the City’s 15’ buffer to that new critical line would render most or all of the lots comprising the Subject Property unbuildable.

25. On January 8, 2020, Morgan Flake of OCRM sent a letter to the Plaintiff in which OCRM demands, among other things, that Plaintiff remove silt fencing in the newly-flagged critical area, remove fill in the newly flagged critical area, and discontinue plans for utilities and access points on lots 55 and 56.

26. On February 24, 2021, OCRM issued an “up to five-year” extension to the NPDES Permit on February 21, 2021 (“*NPDES Permit Extension*”).

27. However, the NPDES Permit Extension contains certain qualifiers which effectively preclude further site work to prepare the lots for building pursuant to the Subdivision Plat, including a requirement that the Plaintiff provide an updated critical line plat evidencing the area flagged by OCRM and requiring plan updates which are “likely major in nature and subject to review and approval.”

28. On April 8, 2021, OCRM issued a cease and desist letter which instructed the Plaintiff to cease and desist all work in the newly-flagged critical area.

PROCEDURAL POSTURE

In its Complaint, the Plaintiff asserts numerous causes of action against OCRM and the City. In Plaintiff's Motion, it seeks summary judgment only on its declaratory judgment causes of action.

As to OCRM, Plaintiff seeks an order:

1. That the 2016 Critical Line did not expire until September 29, 2021;
2. That OCRM violated S.C. Code Ann. § 48-39-210 and improperly precluded site grading on the Subject Property issuing cease and desist notices prior to September 29, 2021; and
3. That OCRM may not prohibit or impede Plaintiff's site grading activities landward of the 2016 Critical Line, including enforcement of any provisions in the NPDES Permit Extension related to the new critical line.

As to the City, Plaintiff seeks an order:

1. That Plaintiff has a vested right to complete site grading and to construct buildings on the Subject Property, so long as those buildings are within the buildable footprint outlined in the Subdivision Plat and such buildings conform in all other respects to the applicable requirements for obtaining a building permit.

Further, Plaintiff seeks preliminary injunction precluding the expiration of the 2016 Critical Line during the pendency of this lawsuit, and prior to completion of site grading operations on the Subject Property.

LEGAL STANDARD

A. Summary Judgment.

Pursuant to Rule 56(c), SCRCP, summary judgment should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Baird v. Charleston County*, 333 S.C. 519, 529 (1999). *See also Boone v. Sunbelt Newspapers, Inc.*, 347 S.C. 571, 579 (Ct. App. 2001) (explaining that "[t]he plain language of Rule 56(c)"

requires the court to grant summary judgment where a party “fails to make a showing sufficient to establish the existence of an element essential to the party’s case and on which that party will bear the burden of proof at trial”).

“The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact.” *Gauld v. O’Shaughnessy Realty Co.*, 380 S.C. 548, 558 (Ct. App. 2008). However, once that party carries its initial burden, the “opposing party must, under Rule 56(e), ‘do more than simply show that there is some metaphysical doubt as to the material facts,’ but ‘must come forward with specific facts showing that there is a genuine issue for trial.’” *Baughman v. Am. Tel. and Tel. Co.*, 306 S.C. 101 (1991) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (emphasis in original). See also *Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 390 (Ct. App. 2010) (non-moving party may not rely on speculation to survive summary judgment) (citations omitted); *McKnight v. S. Carolina Dep’t of Corr.*, 385 S.C. 380, 389 (Ct. App. 2009) (“[E]vidence must amount to more than speculation and conjecture to submit a case to the jury.”) (citations omitted).¹

B. Injunction.

Pursuant to Rule 65 of the South Carolina Rules of Civil Procedure, and our Supreme Court, when a prima facie showing has been made entitling the plaintiff to injunctive relief, an injunction will be granted without regard to the ultimate determination of the case on its merits. *Transcontinental Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969). A preliminary injunction should issue “if necessary to preserve the status quo ante, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a

¹ The Declaratory Judgment Act gives the judge the discretion to make a declaratory judgment ruling that does not terminate the entire controversy, but does remove uncertainty. *Silverman v. Campbell*, 326 S.C. 208, 211-212, 486 S.E.2d 1, 2 (1997).

likelihood of success on the merits, and that there is no adequate remedy at law.” *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586-587, 694 S.E. 2d 15, 17 (2010).

ORDER

1. The Court grants summary judgment as to Plaintiff’s declaratory judgment claim against OCRM.

It is undisputed that OCRM certified the 2016 Critical Line on September 29, 2016. The effect of that certification is clear under S.C. Code Ann. § 48-39-210, which provides that certification expire after five years except in narrow circumstances that are not applicable to this case:

(A) The department is the only state agency with authority to permit or deny any alteration or utilization within the critical area except for the exemptions granted under Section 48-39-130(D) and the application for a permit must be acted upon within the time prescribed by this chapter.

(B) A critical area delineation for coastal waters or tidelands established by the department is valid only if the line is depicted on a survey performed by a professional surveyor, the line is reviewed by the department, the department validates the location of the boundaries of the coastal waters or tidelands critical area on the survey by affixing a stamp and date to the survey, and the survey contains clearly on its face in bold type the following statement: “The area shown on this plat is a representation of department permit authority on the subject property. Critical areas by their nature are dynamic and subject to change over time. By delineating the permit authority of the department, the department in no way waives its right to assert permit jurisdiction at any time in any critical area on the subject property, whether shown hereon or not.”

(C) Notwithstanding any other provision of this chapter, a critical area line established pursuant to subsection (B) expires after five years from the department date on the survey described in subsection (B).

(D) Exceptions to subsection (C) are eroding coastal saltwater stream banks where it can be expected that the line will move due to the meandering of the stream before the expiration of the five-year time limit and where manmade alterations change the critical area line.

OCRM did not argue that the exceptions set forth in Paragraph (D) apply, and there is no evidence in the record that would support such a contention.

The undisputed evidence demonstrates that OCRM entered the Subject Property in October and November of 2020, flagged a proposed new critical line that was significantly landward of the 2016 Critical Line, and then instructed the Plaintiff to cease and desist any work in the area seaward of the proposed new critical line. OCRM further issued the NPDES Permit Extension which did not allow additional site work seaward of the proposed new critical line.

OCRM's actions effectively ceased the Plaintiff's work on the site starting on November 9, 2020, such that the Plaintiff could not complete its site work prior to the February 14, 2021 expiration of the NPDES Permit. Then, as set forth above, OCRM issued an extension to the NPDES permit which precludes work in the area seaward of the proposed new critical line and transmitted another cease work order. The effect of these actions is that the Plaintiff has been unable to complete site grading work to obtain additional permitting from the City (including building permits) to build on the Subject Property. As set forth in the affidavit of Ron Felkel, most or all of the lots are now unbuildable.

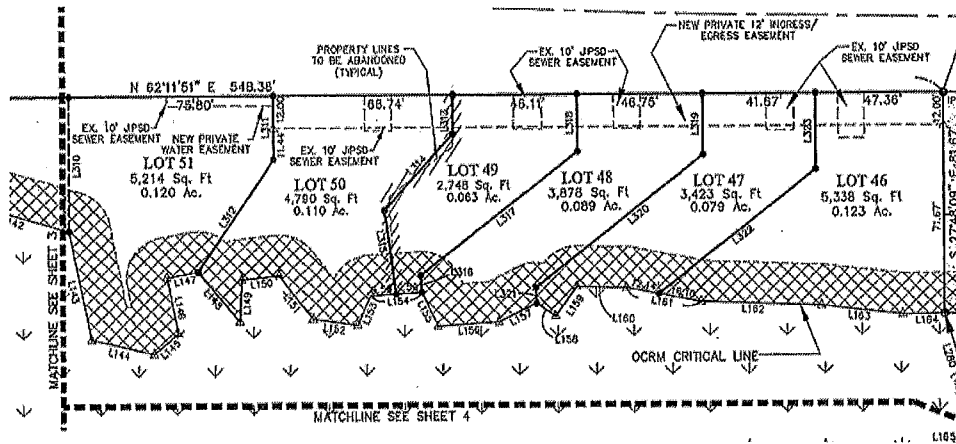
S.C. Code Ann. § 48-39-210(C) unambiguously provides that a certified critical line does not expire for 5 years. Therefore, OCRM had no authority to establish a new critical line before September 29, 2021, and no authority to preclude activities in the area landward of the 2016 critical line prior to that date. For that reason, the Court hereby grants Plaintiff's motion for summary judgment on its declaratory judgment cause of action, and holds as follows:

1. That the 2016 Critical Line did not expire until September 29, 2021;
2. That OCRM violated S.C. Code Ann. § 48-39-210 and improperly precluded site grading on the Subject Property issuing cease and desist notices prior to September 29, 2021; and

3. That OCRM may not prohibit or impede Plaintiff's site grading activities landward of the 2016 Critical Line, including enforcement of any provisions in the NPDES Permit Extension related to the new critical line.

2. The Court grants summary judgment as to Plaintiff's declaratory judgment cause of action against the City of Folly Beach because the Subdivision Plat provides Plaintiff with vested development rights.

The City approved the Subdivision Plat on July 10, 2020. The Subdivision Plat depicts the application of the 15' marsh buffer landward of the 2016 OCRM critical line and all easements, thereby delineating the developable area of each lot.:



There is no dispute that the Plaintiff relied on the Subdivision Plat to enter into its contract with Stanley Martin Homes and begin site grading activities on the Subject Property.

Folly Beach Code § 166.04-03 was amended in 2019 to require a 15-foot buffer landward of the OCRM critical line:

(C) Marsh buffer standards. Except for development identified in § 166.04-03(B), Exemptions, all new construction, substantial improvements, impervious surface or land disturbing activities shall maintain a minimum marsh buffer of 15 linear feet landward from the critical area demarcation as identified or certified by the Office of Ocean and Coastal Resources Management (OCRM). The marsh buffer area is to remain undisturbed other than the planting of native plant material as approved by the Building Official. In the Marsh Island Residential District the setback shall be 35 feet from the OCRM critical line.

Folly Beach Code § 166.04-03(C). This marsh buffer standard is subject to Folly Beach Code § 166.04-02 – “Time of Review” – which provides that the review for compliance is performed at the time of the subdivision preliminary plat:

These standards shall apply to all development in the city. Review for compliance with the standards of this section shall occur at the time of site plan, § 162.03-06; zoning permit, § 162.03-13; planned development master plan, § 162.03-02; or *subdivision preliminary plat*, § 162.03-07(D), as appropriate.

(emphasis added). Therefore, pursuant to its own ordinances, by approving the Subdivision Plat, the City applied the marsh buffer at the time of the subdivision preliminary plat.² This gave the Plaintiff vested rights to develop according to the dimensions in the Subdivision Plat, as set forth below.

The Vested Rights Act provides that “[a] vested right is established for two years upon the approval of a *site specific development plan*.” S.C. Code Ann. § 6-29-1530(A)(1)(emphasis added). The City’s vested rights ordinance contains no specific provisions providing for vested rights, or what constitutes a site specific development plan. The Vested Rights Act defines “site specific development plan” as, among other things, “the following plans or approvals: . . . *subdivision plat*; preliminary or general development plan . . .” S.C. Code Ann. § 6-29-1520(9) (emphasis added). Counsel for the City conceded that the Subdivision Plat was a preliminary subdivision plat.

In order to obtain vested rights in the site specific development plan (here, the Subdivision Plat), the Plaintiff must prove the elements set forth in S.C. Code Ann. § 6-29-1560(A), which provides:

² The City argues that Code § 166.04-02 permits it to apply the marsh buffer standard at multiple times during the development process. However, such a reading of the relevant code section flies in the face of the Vested Rights Act, which is designed to provide landowners with certainty when spending money in reliance on approved development plans, including subdivision plats.

(A) If a local governing body does not have land development ordinances or regulations or fails to adopt an amendment to its land development ordinances or regulations as required by this section, a landowner *has a vested right to proceed in accordance with an approved site specific development plan for a period of two years from the approval* . . . For purposes of this section, the landowner’s rights are considered vested in the types of land use and density or intensity of uses defined in the development plan and the vesting is not affected by later amendment to a zoning ordinance or land-use or development regulation if the landowner:

- (1) obtains, or is the beneficiary of, *a significant affirmative government act* that remains in effect allowing development of a specific project;
- (2) relies in good faith on the significant affirmative government act; and
- (3) incurs significant obligations and expenses in diligent pursuit of the specific project in reliance on the significant affirmative government act.

One of the “significant affirmative governmental acts” enumerated in the Vested Rights Act is: “(6) the local governing body or its designated agent has approved a *preliminary subdivision plat* . . .” S.C. Code Ann. § 6-29-1560(B) (emphasis added).

Therefore, there is no dispute that the Subdivision Plat is a “significant government act” as contemplated by the Vested Rights Act. The Plaintiff submitted the affidavits of Tim Stewart and Ron Felkel to confirm that the Plaintiff relied in good faith on the Subdivision Plat to enter into the contract with Stanley Martin Homes and begin site grading on the Subject Property. Finally, there is no dispute that the Plaintiff spent significant sums of money in pursuit of that project before the Plaintiff was ordered to cease and desist. As such, the Court hereby grants Plaintiff’s motion for summary judgment on its declaratory judgment cause of action against the City, and holds as follows:

Plaintiff has a vested right to complete site grading and to construct buildings on the Subject Property, so long as those buildings are within the buildable footprint outlined in the Subdivision Plat and such buildings conform in all other respects to the applicable requirements for obtaining a building permit.

3. The Court grants Plaintiff's motion for preliminary injunction against OCRM.

The legal requirements necessary to obtain an injunction are well established in case law. "A preliminary injunction should issue only if necessary to preserve the status quo ante, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law." *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010). Further, this Court has the authority to enjoin expiration of the critical line: "Although one may not generally enjoin a state agency from the performance of duties imposed by valid statutes, 43A C.J.S. *Injunctions* Sec. 116 at 192 (1978), where one is threatened with irreparable damage and does not have an adequate remedy at law, she may enjoin state officials who are acting in an illegal manner. 43A C.J.S. *Injunctions* Sec. 116 at 195-96. South Carolina courts have recognized the Court's power to enjoin enforcement of a statute where, as here, the Plaintiff has met its burden for injunctive relief. *Connor v. Town of Hilton Head Island*, 442 S.E.2d 608, 610, 314 S.C. 251, 254 (1994) (enjoining enforcement of statute); *Fraday v. Student Loan Servicing Ctr.*, 313 S.C. 561, 564, 443 S.E.2d 580, 582 (Ct. App. 1994) ("Although one may not generally enjoin a state agency from the performance of duties imposed by valid statutes, where one is threatened with irreparable damage and does not have an adequate remedy at law, she may enjoin state officials who are acting in an illegal manner.")

The Plaintiff has demonstrated irreparable harm as OCRM's acts of flagging a new critical line, issuing cease and desist orders and issuing a conditional NPDES Permit Extension have precluded the completion of site grading efforts and rendered the properties undevelopable. As set forth in the above granting of partial summary judgment, the Plaintiff is likely to succeed on the merits of its claim, and now has, in part. There is no remedy at law for the Plaintiff because

OCRM improperly issued a cease and desist order which precluded site grading work that would have been completed prior to the expiration of the original NPDES Permit. Now, the Plaintiff is faced with the NPDES Permit Extension which also precludes grading work seaward of the proposed new critical line and is also faced with the expiration of the 2016 Critical Line on September 29, 2021. As such, the Plaintiff would be left without a remedy if the NPDES Permit Extension and the expiration of the 2016 Critical Line is allowed to moot the issues in this case.

Therefore, for the reasons set forth above, the Plaintiff is entitled to an injunction precluding the expiration of the 2016 Critical Line and precluding OCRM from enforcing any restrictions related to the newly proposed critical line in the NPDES Permit Extension until the conclusion of this litigation or completion of final lot grading on the Subject Property, whichever is later.

SO ORDERED.

Circuit Court Judge Bentley Price

November __, 2021



Charleston Common Pleas

Case Caption: Clam Farm Partnership Llc VS South Carolina Dept Of Health & Environmental Control The , defendant, et al
Case Number: 2021CP1000562
Type: Order/Other

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766