STATEMENT OF ISSUES ON APPEAL

1. Whether Coburg, Inc. v. Lesser, 309 S.C. 252, 422 S.E.2d 96 (1992), known herein as Coburg I, and Coburg Dairy, Inc. v. Lesser, 318 S.C. 510, 458 S.E.2d 547 (1995), known herein as Coburg II, *control* the determination of ownership of Respondent's property known as Little Jack Rowe Island?

2. Assuming, *arguendo*, that Coburg I does control the determination of ownership of Little Jack Rowe Island, whether Respondent demonstrated a sovereign's grant when her chain of title originated with a Federal Tax Certificate from an 1865 Tax Sale conducted pursuant to 12 Stat. at Large 422 (June 7, 1862) as amended Feb. 6, 1863, known as the "Act for Collection of Direct Taxes in the Insurrectionary Districts within the United States and for other Purposes"?

3. Whether Respondent was required to exhaust administrative remedies related to her permit application for a private recreational dock, prior to seeking an adjudication of her title to Little Jack Rowe Island?

4. Whether the South Carolina Department of Health and Environmental Control's requirement that a permit applicant who is requesting access to a coastal island must demonstrate a sovereign's grant is unlawful regulation?

STATEMENT OF THE CASE

Respondent adopts Appellants State of South Carolina's ("the State") Statement of the Case. In addition, the following introductory paragraph is necessary to an understanding of the appeal:

Respondent is the record owner of 15.452 acres known as Little Jack Rowe Island, in Beaufort County, S. C., located adjacent to the Cooper River. On November 7, 2005, Appellant the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management ("SCDHEC" or "the Department") received a permit application from Respondent in which Respondent requested authorization to construct a dock from Little Jack Rowe Island to the Cooper River. The State and the Department requested Respondent demonstrate title to Little Jack Rowe Island that originated with a sovereign's grant and the Department refused to process Respondent's permit application until this title demonstration was made. This civil action is a consequence of the Department's refusal to process Respondent's permit application.

In addition, Respondent adds the following closing paragraph, which is also necessary to an understanding of the appeal:

After the lower court ordered the Department to process Respondent's permit application, the Department denied the permit application. Respondent immediately filed a request for contested case hearing with the Administrative Law Court ("ALC"). The matter was stayed before the ALC pending the hearing before the lower court on the issue of ownership of Little Jack Rowe Island. Once the lower court issued its Order, Respondent filed a Motion for Summary Judgment before the ALC, but the State and the Department filed Motions to Stay the proceedings before the ALC pending final determination of the ownership issue. On April 8,

2009, the Honorable John D. McLeod, S. C. Administrative Law Court, issued an Order staying the proceeding before the ALC "until a final determination of the appeal in Tenney v. South Carolina Department of Health and Environmental Control, etc. et al, 2007-CP-07-00596."

STATEMENT OF FACTS

In an effort to address the failure of the Confederate States to pay revenues to the Federal Government, the Thirty-Seventh Congress, on June 7, 1862, enacted "An Act for the Collection of Direct Taxes in Insurrectionary Districts within the United States and for Other Purposes." 12 Stat. at Large 422 (1862), as amended Feb. 6, 1863 ("Act"). Congress declared, "when in any State or Territory, or in any portion of any State or Territory, by reason of insurrection or rebellion, the civil authority of the Government of the United States is obstructed, … the said direct taxes … shall be apportioned and charged in each State and Territories, respectively, upon all the lands and lots of ground situate therein." The Act authorized the President to "declare in what States and parts of States said insurrection exists, and thereupon the said several lots or parcels of land shall become charged respectively with their respective portion of said direct tax, and the same together with the penalty shall be a lien thereon, without any other or further proceeding whatever."

The Act further provided, "the title of, in, and to each and every piece or parcel of land upon which said tax has not been paid as above provided, shall thereupon become forfeited to the United States, and **upon the sale hereinafter provided for, shall vest in the United States or in the purchasers at such sale, in fee simple, free and discharged from all prior liens, incumbrances, right, title, and claim whatsoever**." (emphasis added) The Act set forth procedures for sale of the forfeited lands by the board of tax commissioners.

On April 17, 1865, Wm. Henry Brisbane, W.S. Wording, and D. M. (illegible), as Commissioners, certified a "sale of lands for unpaid taxes under and by virtue of an act entitled 'An act for the collection of delinquent taxes in the insurrectionary districts within the United States and for other purposes' held. …the 17th day of April A. D. 1865 the tract or parcel of land herein after described … as follows, to wit: Savage Island was sold and struck off to George W. Atwood and Joshua G. Dodge." (R. p. 354.) Savage Island is described as a group of islands in the Parrish of St. Lukes, May River, 3 miles south of Bluffton consisting of 250 acres. (R. p. 310.) Atwood assigned his interested in the tax certificate to Dodge and Dodge assigned his interest to Fowler. At some point the Sheriff of Beaufort County obtained the property and conducted a Sheriff's sale on May 20, 1891. Wormack purchased at the Sheriff's sale but Wormack never reappeared in the chain of title and according to Respondent's expert witness, Edward M. Hughes, Wormack's claim was eventually barred by the statute of limitation and did not constitute a defect in title. The chain of title continued with a conveyance of Savage Island from Atwood to Fowler on May 1, 1867. Fowler executed a deed to R. F. Fripp on February 1, 1890, but the deed is for "Jack Rowe, being the southern portion of Savage Island 75 acres highland 150 acres marshland." (R. p. 310.) Between 1890 and 1989, and for almost 100 years, Jack Rowe Island consisting of 75 acres of highland and 150 acres of marsh was conveyed 16 times. Finally, on September 27, 2005, Bradbury Dyer III conveyed Little Jack Rowe Island to Patricia Tenney. Dyer's conveyance to Tenney was the first time that Little Jack Rowe Island was identified as a separate parcel from Jack Rowe Island. (R. pp. 312-315.)

On May 12, 2000, Bradbury Dyer, III, Respondent's predecessor in title for the 15.45 acres known as Little Jack Rowe Island, obtained a critical area permit from the Department

authorizing construction of a dock to the Cooper River from Little Jack Rowe Island. This permit expired on May 12, 2005. (R. p. 412-413.)

On December 5, 2003, South Carolina Attorney General Henry McMaster (hereinafter "AG"), issued an opinion on the following question:

> Is it legal for OCRM to consider and grant permits for bridges to islands, whose title is presumed to be in the state, for private development and use where the permit is tantamount to a de facto conveyance of these state lands (or the use of these state lands) and the ouster of the public, without requiring that the applicant clearly and convincingly demonstrate, by means such as an attorney's opinion and accompanying title abstract, a grant from the State or predecessor sovereign, e. g. a King's grant or Lord Proprietor's grant, in the applicant's chain of title sufficient to overcome the state's presumption of ownership of the island?

The AG opined, in response to this question, in accordance with the S. C. Supreme Court's opinion in Coburg Inc. v. Lesser, 309 S.C. 252, 422 S.E.2d 96 (1992) (Coburg I) and Coburg Dairy , Inc., v. Lesser, 318 S.C. 510, 458 S.E.2d 547 (1995) (Coburg II), the State is the presumptive owner of all "marsh islands" and permit applicants must demonstrate "an original grant from the State or predecessor sovereign." (Attorney General's opinion, December 5, 2003)

S.C. Code of Laws §48-39-140 sets forth the information a permit applicant, seeking a permit to alter critical area, must provide to the Department. This information includes "[a] copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property to carry out the proposal." This requirement is further embodied in the Department's regulations. In accordance with 23A S. C. Code Reg. 30-2(B)(4), submittal of "[a] certified copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property to carry out the proposal" is necessary in order for a permit application to be considered complete. On February 19, 2004, and in the absence of any amendments to § 48-39-140 or to 23 A S. C. Code Reg. 30-2(B)(4), the Department published a public notice advertising all permit applicants seeking authorization for

structures on undeveloped islands must provide a sovereign's grant as proof of ownership. This public notice cites to the AG's opinion of December 5, 2003, as the basis for the new requirement. (R. p. 536.)

On September 20, 2005, the Department submitted an Information Item to the Board of Health and Environmental Control ("the Board") entitled "Marsh Island Committee Report." (R. p. 463.) This Report included draft regulations amending 23A S. C. Code Reg. 30-2 and 30-12(N), related to access to coastal islands. These draft regulations included the following requirement:

> 4) According to South Carolina law, the State of South Carolina is presumed to hold title to marshes and coastal islands.
>
> a. In order to apply for a permit, the following information must be submitted as proof of ownership:
>
> i. A copy of the document upon which the applicant relies for the original grant of the coastal island from the sovereign such as a kings' grant or legislative grant,
>
> ii. An attorney's title opinion,
>
> iii. An accompanying title abstract,
>
> iv. A deed to the Applicant.

Respondent acquired title to Little Jack Rowe Island on September 27, 2005, by way of deed from Bradbury Dyer. (R. pp. 316-319.) Respondent submitted a critical area permit application to the Department on November 7, 2005, seeking authorization to construct a dock to the Cooper River from Little Jack Rowe Island. (R. p. 443-455.) On November 29, 2005, the Department forwarded the application to the Honorable Henry McMaster. (R. p. 493.)

On January 12, 2006, a title abstractor working at the direction of attorney Edward Hughes, with the law firm of Nexsen, Pruet in Hilton Head, South Carolina, prepared a "Take-Off Work Sheet" which demonstrated Respondent's chain of title. (R. p. 309-311.) The first link in Respondent's chain of title to Little Jack Rowe Island is the Tax Certificate from the

United States Tax Commissioners to Atwood and Dodge, dated April 17, 1865. This title search, or chain of title for Little Jack Rowe Island, was verified by Mr. Hughes, who handled the sale of Little Jack Rowe Island to Respondent and who testified before the lower court as an expert witness in real estate and matters of title. Mr. Hughes testified in his opinion, as an expert in matters of title, that Patricia Tenney had demonstrated fee simple record title free and clear of any defects of title. (R. p. 198, lines 4-13.)

On June 23, 2006, the S. C. Legislature adopted the coastal island regulations promulgated by the Department. Noticeably absent from those regulations is the Sovereign's Grant requirement presented to the Board on September 20, 2005. In fact, there is **no** reference in R. 30-12(A)(1)(N) to any additional demonstration of ownership other than what is required under S.C. Code Ann. § 48-39-140 and 23A S. C. Code Reg. 30-2(B)(4).

While Respondent's permit application was languishing for failure to produce a sovereign's grant, on May 1, 2006, Stephen B. Kiser obtained a dock permit for Lot 9, Jack Rowe Island. (R. pp. 414-442.) There is no dispute he was not required to produce a sovereign's grant before obtaining a dock permit.

On July 13, 2006, Richard L. Tapp Jr., as attorney for Respondent, contacted the AG's office by letter to J. Emory Smith, Jr., and provided additional information to Mr. Smith, including the fact that numerous dock permits were issued to the adjoining 40 acre island known as Jack Rowe Island. (R. pp. 292-307.) In fact, aerial photography depicts 5 existing docks on Jack Rowe Island. (R. p. 411.) On August 3, 2006, the AG's Office, Mr. Smith, wrote to Mr. Tapp and advised, "your client would need to produce a sovereign grant covering the property for which she has applied for a dock permit. This information is necessary for purpose of the

review of this Office of the application to determine whether a sovereign grant was issued for the property associated with the permit application." (R. p. 308.)

On November 10, 2006, in spite of the fact that the Department's newly promulgated regulations for access to coastal islands were silent as to whether an applicant needed to provide additional ownership information other than what is required under S. C. Code Ann. § 48-39-140 and 23A S. C. Code Reg. 30-2(B)(4), the Department published a second, updated public notice advertising the requirement to produce a sovereign's grant for permit applications seeking docks or bridges on coastal islands. (R. p. 537.)

In 2006, Respondent hired a historical researcher, Brent H. Holcombe, to search for a sovereign's grant. Mr. Holcombe, who testified before the lower court and was qualified as an expert in the research of ancient records maintained by the S. C. Department of Archives and History, was unable to find a sovereign's grant encompassing Little Jack Rowe Island. However, Mr. Holcombe opined at trial and by letter on March 8, 2006 (R. p. 5088) that in his opinion Little Jack Rowe Island "was granted very early (perhaps in the Proprietary period, before 1729) and the island was not named at the time." (R. p. 206, line 24-p. 207, line 12.)

Respondent purchased Little Jack Rowe Island for the purpose of having deep water access. (R. p . 223, lines 1-24.) Her ability to moor a large boat at Little Jack Rowe Island was the exclusive motivation for her purchase of Little Jack Rowe, which she acquired from Bradbury Dyer for $875,000.00. She also purchased a large boat, which cost $200,000.00, in anticipation of construction of a dock at Little Jack Rowe Island. (R. p. 236, lines 1-24.) There is no road or bridge access to Little Jack Rowe Island, and Respondent is unable to use her property without a dock and a place to moor her boat. (R. p. 23, line 19-p. 237, line 22.)

ARGUMENT

STANDARD OF REVIEW

The underlying civil action was captioned as a "quiet title action" and a request for "declaratory judgment." (R. pp. 51-59.) "All orders, judgments and decrees under the Declaratory Judgment Act may be reviewed as are other orders, judgments and decrees. Law matters are treated as one category. The trial court's ruling is affirmed if there is any evidence that reasonably supports its decision. Equitable matters are reviewed under another category. In review of equitable matters, the trial judge's decision is reviewed to see if it is supported by the preponderance of the evidence. Absent a clear abuse of discretion, the trial court's decision to grant declaratory judgment will not be disturbed." 23 S. C. Jur. Declaratory Judgments Sec. 13. "This Court reviews all questions of law de novo. *E.g.*, Fields v. J. Haynes Waters Builders, Inc., 376 S. C. 545, 564, 658 S.E.2d 80, 90 (2008). Review of the trial court's factual findings, however, depends on whether the underlying action is an action at law or an action in equity. *See* Townes Assoc. Ltd. v. City of Greenville, 266 S. C. 81, 85-86, 221 S. E. 2d 773 (1976)." Fesmire v. Digh, __ S. E. 2d __, 2009 WL 1456690 (Ct. App. 2009) "An action to remove a cloud on and quiet title to land is one in equity. Cathcart v. Jennings, 137 S. C. 450, 135 S. E. 558. However, when the defendant's answer raises an issue of paramount title to land, such as would, if established defeat plaintiff's action, it is the duty of the court to submit to a jury the issue of title as raised by the pleadings." State v. Yelsen Land Company, 257 S.C. 401, 185 S.E.2d 897 (1972).

This declaratory judgment action is an action at law – a determination of the reach of Coburg I and Coburg II. This Court will conduct a *de novo* review of the lower court's legal conclusions and must affirm the lower court's findings of fact if any evidence reasonably

supports those findings. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976) Whether at law or in equity, however, the lower court's order should be affirmed. Should this court conclude the relief sought is equitable and its review of the evidence is guided by the "preponderance" standard, there was no factual evidence introduced by Appellants to rebut the testimony and evidence provided by Respondent's witnesses. Notably, Appellants did not present any witnesses at the trial.

1. Coburg, Inc. v. Lesser, 309 S. C. 252, 422 S. E.2d 96 (1992), known herein as Coburg I, and Coburg Dairy, Inc. v. Lesser, 318 S.C. 510, 458 S.E.2d 547 (1995), known herein as Coburg II do not control the determination of ownership of Respondent's property known as Little Jack Rowe Island.

This Court may affirm the lower court decision without reaching the question of whether Coburg I and Coburg II are controlling precedent. This Court can simply affirm the lower court's findings and conclusions that Respondent has demonstrated ownership of Little Jack Rowe Island in accordance with S. C. Code Ann. §48-39-140(B)(4) and S.C. Code Ann. Regs. 30-2(B)(4). This Court can also rule, based on Arguments 3 and 4 below, the requirement to provide a sovereign's grant constitutes unlawful regulation. However, the State's assertion of ownership of Little Jack Rowe through the OCRM permitting process has cast a cloud upon Respondent's title which will certainly impact the marketability of Little Jack Rowe Island in the future if unresolved.

Should this Court decide the reach of Coburg I and Coburg II then the following findings and conclusions of the lower court set forth in its legal analysis are worthy of note:

1. There is no reference in Coburg I or Coburg II to a specific deed or history of record title for the two small islands that were the subject of the Coburg cases. (R. p. 35.)

2. The citation provided to support the rule in the Coburg cases that "ownership of islands situate within marshland follows ownership of the marshland" – McCullough V. Wall, 4 Rich. 68 (1850) is of limited applicability. (R. p. 35.)
3. Little Jack Rowe Island differs physically from the islands in Coburg I and Coburg II in size, and does not fit the description of "islands situate within marshlands" used by the Supreme Court. (R. p. 36.)
4. The islands in the Coburg cases seem to meet the description of what is commonly understood to be a "hummock." Little Jack Rowe Island, on the other hand, does not meet that description based on its size. (R. p. 37.)

It is further noteworthy the lower court recognized the public policy implications of the Supreme Court's conclusions regarding title to islands situate in the marsh. "This Court is not dismissive of the importance of Coburg I and Coburg II. The State's role as public trustee for coastal tidelands and marshlands is a significant role." (R. p. 43.) Both the lower court and Respondent understand the Supreme Court created important case law, not dicta, in the simple statement "title to islands situate within marshland follows title to the marsh." But the AG and the Department have expanded the Supreme Court's holding beyond its scope. This expansion extends not just to Little Jack Rowe Island, but potentially to 3,467 coastal islands, as identified in a study prepared for OCRM and cited in 23A S.C. Code Reg. 30-12(N), "An Ecological Characterization of Coastal Hammock Islands in South Carolina." (R. p. 256, line 10-p. 260, line 23.) It is difficult to believe that the S. C. Supreme Court intended to disenfranchise and alienate the owners of these 3,467 islands. Respondent paid $875,000.00 for Little Jack Rowe Island, or $58,000.00 per acre. The legal and financial consequences resulting from the

uncertainty the AG and the Department have caused regarding title to these thousands of islands are serious and significant.

The islands in the Coburg cases are depicted on an Exhibit which was attached by the lower court in Coburg to its Final Order of the Master in Equity for Charleston County. The State provided both the Final Order and the Exhibit in the State's Motion to Alter or Amend. A review of that Exhibit reveals two islands – "Glass Island" and "Small Island"- located adjacent to Wappoo Creek. (R. pp. 157-158.) While Respondent did not attempt to relitigate the Coburg cases before the lower court in the presentation of its case, the State's arguments in its Motion to Alter or Amend opened the door for Respondent to specifically illustrate the factual differences between Glass Island and Small Island and Little Jack Rowe Island. In Plaintiff's Return to State's Motion to Alter or Amend, Respondent advised the Court that a review of all of the deeds referenced in the Master's Order in the Coburg cases demonstrates that Glass Island and Small Island do not have a title history independent of Coburg's claim of ownership of the marsh. This is also evident from the Master's Order, which described the boundaries of the marsh claimed by Coburg as being between Gourdine's Creek and Wappoo Creek. Glass Island and Small Island lie situate in the marsh between those boundaries.

Further, there is a significant difference in size between Little Jack Rowe Island, at 15 acres, and Small Island and Glass Island, which fit between the extended lot lines of single family lots located within a relatively dense residential development. (R. p. 157.) Additionally, Little Jack Rowe Island is not "situate" in the marsh in accordance with the common understanding of "situate." Instead, Little Jack Rowe Island is situate on the Cooper River.

Finally, the holding in McCullough v. Wall should not be applied to this case. McCullough arose out of an alleged trespass by Defendant of a rock situate in the Catawba River

that the Plaintiff claimed to own. Defendant used the rock for fishing. The Court in McCullough ruled in Plaintiff's favor, finding that "islands in rivers, like rocks, (which are only small islands,) fall under the same rules concerning ownership which apply to the soil covered by water. This proposition, which seems to have been established by a consideration of the instances of islands formed by alluvial deposits, embraces all islands, whether of recent formation or remote origin. …If they have not been otherwise appropriated by some lawful means, they belong in severalty to the owners of the land on each side of the stream, according to the line of division which would have existed if they had continued under waters." McCullough v. Wall at 82. (emphasis added) Based on this rule the Court concluded since McCullough owned the Dearborn tract on the west side of the River, then McCullough also owned the rock which was adjacent to the west side of the River. McCullough v. Wall at 69.

Though the precedent created in McCullough v. Wall may have been correctly applied to Glass Island and Small Island in Coburg I and Coburg II, such precedent is inapplicable here where there is a demonstrated title history spanning from 1865-2005. The history consists of multiple conveyances and originates with a federal tax certificate, none of which has been directly challenged until Respondent submitted an application for a dock permit.

2. Assuming, *arguendo*, that Coburg I and Coburg II do control the determination of ownership of Little Jack Rowe Island, Respondent demonstrated a sovereign's grant when her chain of title originated with a Federal Tax Certificate from an 1865 Tax Sale conducted pursuant to 12 Stat. at Large 422 (June 7, 1862), as amended Feb. 6, 1863, known as the "Act for Collection of Direct Taxes in the Insurrectionary Districts within the United States and for Other Purposes."

A. Under 1865 Tax Certificate, Respondent is Fee Simple Owner of Little Jack Rowe Island.

The 1862 "Act For Collection of Direct Taxes in the Insurrectionary Districts within the United States and for Other Purposes," 12 Stat. at Large 422 (June 7, 1862), as amended Feb. 6, 1863, was passed in an effort to create a method for collection of the direct taxes left unpaid by

the southern states or "insurrectionary districts" who had seceded from the Union. If a state's portion was left unpaid, the federal government was allowed to place three federal tax commissioners in each state. These tax commissioners were granted authority to allocate the pro rata share of the state's total tax liability to each land-owning individual in the state. If the taxes were unpaid by the individuals pursuant to Section 4 of the Act, "the title to every parcel of land upon which tax has not been paid is therefore forfeited to the United States and at such time thereafter may be sold to a purchaser or to the United States." 12 Stat. at Large 422, 423 (1862), as amended. Section 4 of the Act states the sale of such title shall result in the title transferring to the purchaser "in fee simple, free and discharged from all prior liens, encumbrances, rights, title, and claims whatsoever." Id. Case law on the application of this statute and on the validity of title derived from a tax certificate is prevalent. See, Turner v. Smith, 81 U.S. 553 (1872); Keely v. Sanders, 99 U.S. 441 (1879); DeTreville v. Smalls, 98 U.S. 517 (1879); and Cooley v. O'Connor, 79 U.S. 391 (1871).

In or about 1865, the property known as Savage Island, which included Little Jack Rowe Island (TrR. P. 189, line 15-p. 190, line 4; R. p. 192, lines 2-13; Pl. Trial Exhibit 32-filed separately with Court of Appeals), was seized by the United States government for unpaid taxes and was sold pursuant to the Act at a tax sale as evidenced by United States of America Tax Sale Certificate No. 64 dated April 17th, 1865 to a Mr. George W. Atwood and Joshua G. Dodge ("Tax Certificate"). (R. p. 187, line 23-p. 188, line 21; R. p. 354.) The chain of title to Little Jack Rowe Island, as identified by Respondent's expert at the lower court, begins with this sale from the United States of America Tax Commissioners to a Mr. George W. Atwood and Joshua G. Dodge for the sum of $250. (R. p. 186, lines 22-25; R. pp. 309-311; R. p. 354.) While Appellants assert a defect exists on Respondent's chain of title because the early transfers in

Respondent's chain of title refer to Savage Island, Plaintiff/Respondent's experts clarified Little Jack Rowe Island was part of a group of islands commonly known and transferred as Savage Island. (R. p. 189, line 15-p. 190, line 4; R. p. 192, lines 2-13; R. p. 278, line 6-p. 280, line 25; R. p. 523; Pl. Trial Exhibit 32-filed separately with Court of Appeals.) Plaintiff/Respondent's expert Patrick Rogers, qualified by the lower court as an expert in the use and interpretation of navigational charts, testified he reviewed more than 20 historic maps and charts which identify Savage Island as including Little Jack Rowe. (R. p. 278, line 6-p. 280, line 25; R. p. 523, Pl. Trial Exhibit 32-filed separately with Court of Appeals.) Mr. Rogers also identified Savage Island's geographical limits as depicted on the historic maps and charts to be the Cooper River, the May River and other unidentified branch creeks. (R. p. 270, line 1-p. 280, line 25; R. p. 288, lines 1-8, R. p. 523; Pl. Trial Exhibit 32-filed separately with Court of Appeals.) Mr. Rogers testified Little Jack Rowe Island is located on the Cooper River and within the identified geographical boundaries of Savage Island. (R. p. 278, lines 18-25.) Based on this evidence, it is clear Little Jack Rowe Island is one of a series of islands making up the former commonly identified Savage Island transferred by the 1865 Tax Certificate.

Pursuant to the Act, the Tax Certificate is *prima facie* evidence that a fee-simple title, free and "discharged from all prior liens, incumbrances [sic], right, title, and claim whatsoever" to Savage Island passed to Respondent's predecessors in title. See 12 Stat. at Large 422, 423 (1862), as amended. There were no challenges to this sale and Tax Certificate at the time of its issuance or in the 143 plus years since its issuance. Little Jack Rowe Island has been transferred numerous times over the approximately 143 years before title transferred to Respondent. (R. p. 186, line 22-p. 196, line 7; R. pp. 309-410.) No encumbrances or record defects on the

Respondent's title have been identified. (R. p. 198, lines 4-13; R. p. 202, lines 3-7.) As such, under the Act, the Respondent holds clear fee simple title to Little Jack Rowe Island.

B. State v. Pinckney Does Not Preclude Respondent's Ownership of Little Jack Rowe Island.

Appellants argue extensively the precedent set forth by State v. Pinckney, 22 S.C. 484, 1885 WL 3613 (1885), which established that vacant ungranted lands cannot be sold or transferred by a tax certificate and thus a tax deed cannot overcome the State's "presumption of ownership of tidelands property." (Appellants' Br. at 15.) However, Pinckney is easily distinguishable from the case before this Court. In Pinckney, the property in question, purported to have been granted via a United States tax certificate, consisted of marshlands, not high ground. In reviewing the certificate and the title history to the marshlands in question, the S.C. Supreme Court recognized no grant or presumption of a grant from the State to these marshlands existed. The Court opined unless such evidence was presented, title to the marshlands remained in the State as part of the public trust because it was a well established doctrine that the State held presumption of title to all lands below the ordinary high water mark. Pinckney at 15-16, see also State v. Hardee, 259 S.C. 535, 539, 193 S.E.2d 497,499 (S.C. 1972) (internal citations omitted). However, no grant was required by the Court for lands not presumed to be held by the State, i.e., high ground property. This legal distinction between high ground and marshlands or lands below the mean high water mark was further discussed by the Supreme Court in Pinckney wherein, the Supreme Court recognized high ground property intrinsically had value and the salt marshes "being uninhabited, and daily swept by the tides, they were considered worthless." Pinckney at 14. The Court therefore determined a tax sale for "worthless" marsh lands did not make sense since the intent of the tax sale was to recoup taxes in arrears. Id. The Court in

Pinckney did not consider the transfer of the high ground to be in dispute or require proof of a grant for a valid transfer by tax certificate.

While the Appellants argue Respondent has failed to provide a grant and therefore the Tax Certificate is invalid, Appellants fail to recognize that the Court in Pinckney was specifically addressing transfer of title to marshlands, not high ground. There is no legal presumption of State ownership of high ground lands. Respondent's property clearly is high ground and above the mean high water mark. (R. p. 285, lines 13-19.) As previously stated, the State's presumption of title of marshlands only extends to the mean high water line. See State v. Hardee, 259 S.C. 535, 539, 193 S.E.2d 497,499 (1972) (internal citations omitted) and, State v. Pinckney, 22 S.C. 484 (1885). As such, Little Jack Rowe is not subject to the State's presumption of ownership of lands below the mean high water mark and thus a grant is not required under Pinckney to establish the validity of the tax sale. Appellants rely on the misguided 2003 AG opinion, discussed herein in more detail, to support their position that Little Jack Rowe Island is subject to the State's presumptive title of lands below the mean high water mark. However, it is clear from Pinckney that no proof of a grant was required by the Supreme Court for the high ground lands in question therein, and none is required in the present case.

Furthermore, Little Jack Rowe Island has an extensive title history. Respondent has a valid deed arising from 143 years of title history that has never been disputed by the State. (R. pp. 309-311.) As discussed in Pinckney, the Act does afford for a tax certificate to be "annulled by establishing the fact that the property was not subject to taxes." Pinckney at 16. "Under the act, therefore, proof was allowable tending to show '*the property was not subject to* taxes.' This could be effected …by showing that at the time of the sale the …lands were vacant lands." Id. Appellants have put no evidence in the record establishing the lands of Savage Island were

vacant at the time of the tax sale. No challenge under the Act or any other grounds has been raised by the State in over 143 years.

C. State May Not Stop Collection of Federal Taxes

Should the State assert the United States federal government had no right or no authority to take land held by the State of South Carolina and sell it, this position is contradicted by the implied fact that because the high ground land was seized, it must have been held by a defaulting taxpayer, not the State. Under the Act, upon failure by the landowner to pay its pro-rata share of the federal direct taxes, the land was forfeited to the United States and subsequently sold. The United State's actions to recoup unpaid taxes are independent of State action and the State has no right to relieve property subject to federal taxation from that liability. See, Keely v. Sanders, 99 U.S. 441, 443 (1879). The State has put forth no evidence that the lands of Savage Island, including Little Jack Rowe Island, were not held by a private landowner. Under the Act, the State had its opportunity to challenge the tax sale. It did not.

D. State is Barred from Asserting Title to Little Jack Rowe Island By Virtue of S.C. Code Ann. § 15-3-380.

Appellants allege the failure to plead the statute of limitations as an affirmative defense bars the issue from being before the Court. Respondent is unsure how she could have pled an affirmative defense in a Complaint but refers to South Carolina Rules of Civil Procedure, Rule 15(b)(2) providing an issue not raised by the pleadings but tried by the parties must be treated as if raised in the pleadings. SCRCP 15(b)(2). A party may move to amend the pleadings to conform with the evidence and to raise an unpleaded issue, but failure to amend will not affect the result of the trial on that issue. Id. The failure of the State to object to testimony and evidence supporting the Master's ruling on this issue evidenced the States' implied consent to

trial of this issue. Pursuant to Rule 15(b)(2), the statute of limitations as set forth by S.C. Code Ann. § 15-3-380 was properly ruled on by the Master and is properly before this Court.

Appellants also allege the Master erroneously ruled the forty year statute of limitations for recovery of real property cannot overcome the State's presumption of ownership of Little Jack Rowe Island. S.C. Code Ann. §15-3-380 states as follows:

> No action shall be commenced in any case for the recovery of real property or for any interest therein against a person in possession under claim of title by virtue of a written instrument unless the person claiming, his ancestor or grantor, was actually in the possession of the same or a part thereof within forty years from the commencement of such action. And the possession of a defendant, sole or connected, pursuant to the provisions of this section shall be deemed valid against the world after the lapse of such a period.

In seeking to convince this Court that § 15-3-380 is inapplicable, Appellants rely on State v. Yelsen Land Co., Inc., 265 S.C. 78, 216 S.E.2d 876 (1975). While it is true the Court in Yelsen was determining the applicability of a predecessor statute now codified at §15-3-380 to tidelands, this very fact distinguishes Yelsen from the present case. In Yelsen, the Court determined a property claimant could not invoke the forty year statute of limitations to bar the State's right of action to recover the tidelands in question because the claimant had failed to establish a grant from the State for the tidelands. As previously discussed, the present matter does not involve a claim of ownership by Respondent to tidelands or any lands presumptively held by the State and located below the mean high water mark. In contrast to the claimant in Yelsen, Respondent is the owner or claimant to 15.45 acres of high ground land. No presumption of ownership of high ground lands exists in this State. Taking Appellants' position to its extreme results in the untenable proposition that every parcel of high ground property in South Carolina rests in the possession of the State and the State may at anytime, even after 143 years, assert its ownership. If the property owner cannot find a grant out of the State or other

sovereign then the property owner may be divested of his property. Clearly, this is contrary to any cognizable interpretation of §15-3-380, established property rights law, or common sense.

3. Respondent is not required to exhaust administrative remedies related to her permit application for a private recreational dock, prior to seeking an adjudication of her title to Little Jack Rowe Island.

At the time Respondent initiated the civil action, on February 27, 2007, her permit application had been pending since October 12, 2005, or for 16 months. The Department had refused to process the permit application based on its position that Respondent had failed to provide a Sovereign's Grant. Even after filing the civil action, Respondent obtained no administrative finality on her pending permit application. It wasn't until March 28, 2008, or two and a half years from the time Respondent submitted her permit application, that the Department issued a decision on the permit application. (R. pp. 529-534; R. pp. 456-458.) And, this decision was the result of the lower court's order and not a voluntary effort on the part of Appellants. On March 7, 2008, the lower court issued its "Order Granting, in part, and denying in part, Plaintiff's Motion for Summary Judgment and Denying Defendant State of South Carolina's Motion for Summary Judgment." In that Order the lower court held as follows:

> Regarding Plaintiff's claim number 2, Plaintiff claims that she has met the requirements for an application. The State claims that she has not exhausted administrative remedies in that OCRM has not made a determination regarding the application. Although this Court does not decide Plaintiff's claim number 2, *supra*, it has determined that OCRM shall make a determination regarding Plaintiff's application. Therefore, Defendant OCRM shall process Plaintiff's permit application to conclusion." (R. p. 48.)

Appellants renewed their claims regarding Respondent's alleged "failure" to exhaust administrative remedies in challenging the lower court's findings and conclusions that "Plaintiff has satisfied the requirements of demonstrating ownership of Little Jack Rowe Island" as set forth in S. C. Code Sec. 15-3-380 and 48-39-140(B)(4) and S. C. Code Ann. Reg. 30-2(B)(4).

(R. p. 23.) According to the State, "the permitting issues were not before the Court when Respondent had not exhausted her administrative remedies." (The State's Brief p. 17.) According to the Department "The Master's inclusion of findings of fact and conclusions of law relating to the requirements for obtaining a dock were wholly inappropriate and unnecessary, especially given the proceedings pending before the Administrative Law Court regarding Respondent's permit application." (The Department's Brief p. 2.)

Appellants overlook the fact that the Department simply refused to take any action on Plaintiff's permit application which would afford her the avenue of administrative relief. Appellants foreclosed administrative review on the issue of ownership by their failure to act on the pending permit application, not Respondent. Moreover, the lower court was careful to separate its review of the title issues from those matters before the ALC. As the lower court noted, in explaining the basis for certain factual finding in its fn 8, "At the time the case was filed the permit application was held in abeyance pending resolution of the ownership issue. Therefore the actions of Defendants relative to Plaintiff's permit application are relevant as background information to this case." (R. p. 7.) The lower court also found that "[t]his Court cannot separate the State's assertion of title with the dock permit application process as the two are factually and legally connected. But this Court's legal discussion, findings, and conclusions below are not intended as a review of the Defendant's decision to deny Plaintiff's permit … Instead, any discussions, findings, and conclusions regarding the permit application process and permit decision as set forth herein is only for purposes of evaluating the State's assertion of title to Little Jack Rowe Island." (R. pp. 8-9.)

Therefore, it is unclear why Appellants are complaining. There is still a case pending before the ALC, and with the disclaimers provided by the lower court the ALC should not be

constrained by the lower court's findings regarding the permit process. But, there is absolutely no dispute that Respondent provided a deed to the Department in compliance with S. C. Code Sec. 48-39-140 and R. 30-2(B)(4) and the Department refused to process Respondent's permit application because it considered the deed an insufficient demonstration of title. Respondent at that point did not have the luxury of an administrative remedy. She had to seek relief before Master in Equity/Court of Common Pleas to have the sufficiency of her title determined. It is before the lower court, and not the ALC, that Respondent demonstrates her title, commencing with the federal tax certificate, seeking a finding that she has demonstrated fee simple title to Little Jack Rowe Island free and clear of record defects. This finding, which the ALC cannot make, becomes critical should this Court conclude that Coburg I and Coburg II are applicable to Little Jack Rowe Island. Therefore, depending on the outcome of this appeal, the ALC may be in a position of relying on this Court to render finality on the issue of the sufficiency of Respondent's deed and chain of title as evidence of a sovereign's grant.

"The doctrine of exhaustion of administrative remedies is generally considered a rule of policy, convenience, and discretion, rather than one of law. … The doctrine is not jurisdictional. …The general rule is that administrative remedies must be exhausted absent circumstances that support and exception to the general rule. … When an adequate administrative remedy is available to determine a question of fact, one must seek the administrative remedy or be precluded from pursuing relief in the courts. One does not have to exhaust administrative remedies when it would be futile to do so." Stinney v. Sumter School District 17, 382 S.C. 352, 675 S.E.2d 760 (2009). Here, the lower court found Plaintiff had satisfied the ownership requirements for purposes of S.C. Code Ann. §48-39-140(B)(4) and S.C. Code Ann. Reg. 30-2(B)(4). Appellants argue these findings are inappropriate given Respondent's failure to exhaust

administrative remedies. Clearly, this case would present an exception to the general rule. Respondent could not exhaust her remedies because the Department failed to act on the pending permit application. By the time the Department finally did act on April 21, 2008, and only after being ordered to do so by the lower court, Respondent was only days from her scheduled hearing before the lower court. Further, there is no adequate administrative remedy to review the question of fact of sufficiency of Respondent's deed. That remedy can only be obtained from the Court of Common Pleas. Finally, it would have been futile to abandon the hearing before the lower court and pursue relief before the ALC, because the ALC does not determine title disputes. (See Too Tacky Partnership v. SCDHEC and Mayo Reed, Docket No. 05-ALJ-07-0165-CC "Neither the Department nor this Court is vested with the authority to quiet title to real property.")

4. The South Carolina Department of Health and Environmental Control's requirement that a permit applicant who is seeking access to a coastal island must demonstrate a sovereign's grant is unlawful regulation.

The Department's position that a permit applicant seeking access to a coastal island must produce a sovereign grant is unlawful regulation in its most basic and egregious form. SCDHEC is charged with the statutory duty of "promulgat[ing] necessary rules and regulations to carry out the provision of this chapter. The Department went to the Board of Health and Environmental Control, at the commencement of the promulgation process, proposing amendments to R. 30-12(N) and R. 30-2 to address access to coastal islands and sought authority to include the requirement that an applicant must provide a sovereign's grant. (R. p. 463.) The Department recognized at the outset that imposing new ownership requirements on permit applicants, in addition to the requirements already in statute and regulation, required legislative review. But, when the regulation reached the General Assembly, the sovereign's grant requirements were

omitted. (R. p. 263, lines 7-20.) On June 23, 2006, the amendments to R. 30-12(N) – Access to Coastal Island regulations, became law. There is no requirement in R. 30-12(N) for an applicant to provide a sovereign's grant. Respondent believes the Department realized the controversial nature of the requirement and, rather than risk public debate and/or having the legislature strike the requirement, the Department chose to skirt legislative review and public comment on this requirement. Consequently, this requirement is applied as "policy." (R. p. 269, line 1-p. 270, line 7; R. p. 270, lines 20-24; R. pp. 536-537; R. pp. 494-507.)

In accordance with S.C. Code Ann. §1-23-10(4) " '[r]egulation' means each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency. Policy or guidance issued by an agency other than in regulation does not have the force and effect of law. The term 'regulation' includes general licensing criteria and conditions and the amendment or repeal of a prior regulation ... ." (emphasis added)

Here the Department added substantive licensing criteria but deprived the citizenry of the notice, process, and opportunity for comment afforded in accordance with S.C. Code Ann. §§ 1-23-110, 1-23-111, 1-23-115, and 1-23-120. And, even worse, the Department fooled those stakeholders with a personal or political interest in the access to coastal island regulations into believing that the sovereign's grant requirement has been abandoned by the Department. The Department has also done a disservice to those individuals and groups who support the position of the AG since the Department's conduct– which has gone unchecked and unrestrained for at least five (5) years - may have led those groups and individuals to mistakenly conclude that the Department lawfully possesses the authority to require this information.

The South Carolina Supreme Court, in Captain's Quarters Motor Inn, Inc. v. South Carolina Coastal Council, 306 S.C. 488, 413 S.E.2d 13, 14-15, (1991) considered whether the

S.C. Coastal Council, predecessor agency to SCDHEC's Office of Ocean and Coastal Resource Management ("OCRM"), could regulate by way of an unpromulgated test and concluded as follows:

> As a creature of statute, a regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged. City of Rock Hill v. South Carolina Department of Health and Environmental Control, 302 S.C. 161, 394 S.E.2d 327 (1990); City of Columbia v. South Carolina Department of Health and Environmental Control, 292 S.C. 199, 355 S.E.2d 536 (1987). By statute, Coastal Council must promulgate regulations for evaluating permit applications:
>
> "(B) Within sixty days of July 1, 1977, the Council shall publish and make available the interim rules and regulations it will follow in evaluating permit applications. These interim rules and regulations shall be used in evaluating and granting or denying all permit applications until such time as the final rules and regulations are adopted .... The Council shall ... publish final rules and regulations." S.C.Code Ann. § 48-39-130(B) (1987).
>
> Thus, the legislature has expressly mandated Coastal Council promulgate regulations to govern the evaluation of permit applications. Coastal Council's damage assessment test has been critical to the evaluation of permit applications to rebuild seawalls. We hold Coastal Council overstepped its statutory authority in formulating and applying this test for purposes of permit evaluations without formalizing it by regulation. See Charleston Television, Inc. v. South Carolina Budget and Control Bd., 301 S.C. 468, 392 S.E.2d 671 (1990) (failure to promulgate regulations for competitive bidding as mandated by statute rendered agency's lease approval invalid).

More recently, the S. C. Supreme Court considered an earlier version of S. C. Code Ann. Reg. 30-12(N), known then as the "small island regulation," in S.C. Coastal Conservation League v. South Carolina Dept. of Health and Environmental Control, 363 S.C. 67, 74-75, 610 S.E.2d 482 (2005) and determined that the regulation failed for vagueness in that it did not define what constituted a small island. The Court concluded:

> Allowing OCRM to exercise unrestrained discretion is inconsistent with the statute requiring the agency to evaluate permit applications pursuant to regulation. FN11 See Captain's Quarters Motor Inn, Inc., 306 S.C. at 490-91, 413 S.E.2d at 14 (invalidating a test used by OCRM's predecessor in evaluating permit applications because it was not promulgated by regulation); see also Edisto Aquaculture Corp. v. S.C. Wildlife and Marine Res. Dep't, 311 S.C. 37, 40, 426 S.E.2d 753, 755 (1993) (distinguishing mandatory agency enabling statutes from permissive ones).

The Department has developed a "Permit Application Packet For Activities in the South Carolina Critical Area." (R. pp. 494-507.) The Packet is available on the SCDHEC-OCRM's website and includes application forms and instructions. The Packet includes the following "Additional Submittal Requirements for Projects Involving Coastal Islands":

> Pursuant to an opinion from Attorney General Henry McMaster, DHEC-OCRM will require additional information. This additional information will be required for those applications proposing work on all coastal islands:
>
> - A copy of the document upon which you rely for the original grant of the marsh island from the State or predecessor sovereign (e.g. a King's grant or Lord Proprietor's grant)
> - An attorney's title opinion
> - The accompanying abstract of title
>
> DHEC-OCRM will forward this submitted information to the South Carolina Attorney General's office for their appropriate review of title claim. DHEC-OCRM will place your application on public notice, but will not process your application to a conclusion until we have received the title opinion from the Attorney General.
>
> (R. p. 500.)

The Department's reliance on the AG is without legal basis. "An attorney general's opinion is generally entitled to substantial weight and respectful consideration, but has no controlling authority upon the state of the law discussed in it and, standing alone, will not be regarded as

legal precedent or authority of such character as judicial decisions." 74 C.J.S. Attorney General Sec. 38.

In Sloan v. South Carolina Bd. of Physical Therapy Examiners, 370 S.C. 452, 475-476, 636 S.E.2d 598 (2006) the Supreme Court considered whether reliance on an Attorney General's opinion regarding interpretation of a statute by the Board of Physical Therapy Examiners constituted a "binding norm."

> The Board's pronouncement did not implement or prescribe the law or practice requirements for physical therapists in more detail than set forth by statute; the pronouncement simply adopted an interpretation of the statute which the Board intended to begin enforcing. To hold otherwise would lead to the absurd result that, before an agency may enforce a statute, it would have to enact a regulation explaining its interpretation and application of the statute in detail and its intention of enforcing it. The agency would be required to return to the Legislature seeking approval of a regulation which interpreted the legislative pronouncement and permission to enforce it. Neither the APA's rule-making provisions for regulations nor our precedent requires such a step.
>
> Appellants' reliance on the "binding norm" test discussed in Home Health Service, Inc. v. South Carolina Tax Commission, 312 S.C. 324, 440 S.E.2d 375 (1994) is misplaced because there clearly is no binding norm contained in the Board's pronouncement. In Home Health Service, the Tax Commission relied on an internal memorandum which interpreted bingo statutes to prohibit a bingo operator's employees from marking cards for a player while the player was temporarily absent from a game. The memorandum had been circulated among Tax Commission offices, but had not been published in the form of a regulation. We explained that "[w]hether a particular agency proceeding announces a rule or a general policy statement depends upon whether the agency action establishes a binding norm.... In our view, the document issued was similar to a policy statement as opposed to a binding norm given that the document was not issued by the commissioners and thus, no final agency approval had been given. Therefore, we do not find that the APA was violated in this instance. We caution respondent that when there is a close question whether a pronouncement is a policy statement or regulation, the commission should promulgate the ruling as a regulation in compliance with the APA."

> Id. at 328-29, 440 S.E.2d at 378 (citation omitted).
>
> Under the line of federal cases we relied on in Home Health Service, courts have held that whether an agency's action or statement amounts to a rule-which must be formally enacted as a regulation-or a general policy statement-which does not have to be enacted as a regulation-depends on whether the action or statement establishes a "binding norm." When the action or statement "so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion," then it is a binding norm which should be enacted as a regulation. But if the agency remains free to follow or not follow the policy in an individual case, the agency has not established a binding norm. Ryder Truck Lines, Inc. v. U.S., 716 F.2d 1369, 1377-78 (11th Cir.1983) (citing cases).

Here, the Attorney General did more than interpret a statutory requirement. The Attorney General opined that an additional demonstration was necessary in order to qualify for a critical area permit to access coastal islands. There is nothing inherently wrong in the AG's answering a question posed by a member of the Legislature and providing his legal opinion, even if Respondent disagrees with the AG's legal opinion. There is something wrong, however, and illegal, in the Department's treatment of the AG's opinion as if it were regulatory or statutory authority for the imposition of additional permit requirements. And, SCDHEC's own statements in the Permit Application Packet (R. pp. 494-507) and its Public Notices (R. pp. 536-537) demonstrate the AG's opinion is being applied as a "binding norm." In accordance with the analysis in Sloan v. South Carolina Bd. of Physical Therapy Examiners, above, it is clear that the Department categorically requires demonstration of a sovereign's grant without the exercise of any discretion. (See R. p. 500: "This additional information will be required for those applications proposing work on all coastal islands." (emphasis added) and R. pp. 536-537: "DHEC-OCRM will require the following information in order to process all permit applications

for structures proposed on or to any undeveloped island with the critical areas of the State. (emphasis added))

CONCLUSION

The AG's Opinion extends the rulings in Coburg I and Coburg II to situations that are not factually similar to the Coburg cases. In particular, the AG overlooked the significance of the fact that in Coburg I and Coburg II, and in McCullough, the islands (and fishing rocks) claimed were dependent on adjoining lands for a determination and adjudication of title. Little Jack Rowe Island, on the other hand, is titled independent of the ownership of adjoining lands. When the rule of law in Coburg I and Coburg II and in McCullough is extended to islands that have a history of marketable title, the result is chaos. Clearly, the Supreme Court did not intend, in its resolution of the Coburg cases, to alienate thousands of coastal islands from private ownership and cloud title to hundreds of millions of dollars of coastal property. But there is nothing inherently objectionable in the AG providing his opinion, even if the legal analysis within the opinion may be flawed. It is objectionable, however, when the Department treats the AG's opinion as authorization to impose additional requirements on permit applicants, without the benefit of notice, public comment, and legislative review.

For the reasons set forth herein the Respondent asks that the lower court's Orders be affirmed.

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Respectfully submitted,

By:_____
Mary D. Shahid
R. Cody Lenhardt, Jr.
McNAIR LAW FIRM, P.A.
100 CALHOUN ST.
Charleston, South Carolina 29401
(843) 723-7831

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Charleston, South Carolina

Attorneys for Respondent
Patricia S. Tenney