IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Peter Demetre Charleston Harbor Marina Corporation, Plaintiff, v. United States of America, United States Army Corps of Engineers, John McHugh, Secretary of the Army, Lt. Gen. Robert L. Van Antwerp, Chief of Engineers and Commanding General, United States Army Corps of Engineers, Lt. Colonel Jason A. Kirk, United States Army Corps of Engineers, Charleston District, City of Charleston, and Eastwood Residents Association, Defendants.	Civil Action No. 2:10-3081-SB **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This matter came before the Court for a non-jury trial on May 23 and 24, 2012, at which trial the Court admitted numerous documents into evidence and heard the testimony of Milton Peter Demetre, Ross Eastwood, Steven Daniel Livingston, Matthew Keith Compton, and Jon Guerry Taylor.[1]

Now, having thoroughly reviewed the record, considered the evidence, and studied the relevant law, the Court makes the following findings of fact and conclusions of law

[1] The Court regrets the delay in issuing its findings of fact and conclusions of law in this complicated and important matter, and the Court wishes to commend counsel for their patience and for representing their clients zealously and without unnecessary contention. Cain Denny, John Hughes Cooper, and John Townsend Cooper represented the Plaintiff; John H Douglas represented the federal Defendants; Robin Lilley Jackson and Stephanie P. McDonald represented the City of Charleston; and Bruce E. Miller represented the Eastwood Residents Association.

pursuant to Rule 52 of the Federal Rules of Civil Procedure.[2]

FINDINGS OF FACT

1. This action involves approximately five acres of filled-marsh property located on James Island between the Eastwood neighborhood and the James Island Yacht Club.

2. Milton Peter Demetre ("Demetre") acquired the property between 1967 and 1970, and he spent years hauling fill to the property in a dump truck. (Entry 33 ¶¶ 14, 18.)

3. In 1970, Demetre applied to the United States Army Corps of Engineers ("the Corps") for a permit to continue filling the marshland and to construct a rock bulkhead.

4. In 1974, the Corps denied Demetre's permit application on the basis that it failed to specify the final intended use of the proposed fill, and the Corps ordered Demetre to restore the property. The Corps took the position that the only use of the property that would justify the public's loss of the marshland would be a use limited solely to public boating purposes.

5. Thereafter, Demetre filed a lawsuit against the Secretary of the Army and others in this Court. See Civil Action No. 74-0553.

6. At a hearing on May 7, 1975, the Undersigned instructed the parties to confer again based on Demetre's willingness to limit the use of the property to public boating purposes, and after a meeting in Washington on May 28, 1975, Demetre and the Corps reached an agreement regarding a revised permit application.

7. On November 13, 1975, the Charleston District Corps of Engineers issued

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[2] To the extent that the Court has made "findings of fact" that are better expressed as "conclusions of law," and vice versa, each category is expressly incorporated into the other.

a "Notice of Public Hearing" for Demetre's revised permit application, stating in part:

> The purpose of this work is to construct a commercial boating facility. General public use of the proposed facility, should a permit be issued, is guaranteed by the "Restrictions, Covenants and Limitations" which are attached to and a part thereof of this application.

(Pl.'s Ex. 21 at 2.)

8. The "Restrictions, Covenants and Limitations" ("the restrictions") placed on the property were recorded in the Charleston County Register Mesne Conveyance ("RMC") Office in Book X 110 at page 207, dated November 15, 1976.

9. The restrictions limit the use of the property to public boating purposes and prohibit the transfer of any legal interest or control in the property to any private club or association. Specifically, the restrictions provide:

> 2. **That the above said property shall be used only as a Recreational Boating Facility and Marina or other boating purposes that are deemed to be in the public interest**, for the benefit, enjoyment and use of the general public at large as specifically shown, stated and described on above said U.S. Department of the Army, Corps of Engineers Permit to Milton P. Demetre, No. 75-2A-262, Revised, Dated November 15, 1976, and Titled "PROPOSED BULKHEAD AND FILL WITH RELATED BOATING FACILITY", or any subsequent approved U.S. Department of the Army, Corps of Engineers (or other proper designated government Agency) amendments, revisions, or revalidation to the above said Corps of Engineers Permit.
>
> 3. That the above said property shall not be conveyed to, given legal interest in, leased, rented, owned or operated in part or whole or in conjunction with a private Club such as a Yacht Club or Boating Club, Fraternal or Social Club, Society, Association or any other such Club, Special Interest Group or Organization. **The specific intent and true meaning of this Restriction, Covenant, and Limitation is to forbid, prohibit, prevent, and make illegal the ownership, legal interest, rent, lease, control, operation or exclusive use of this property by any such Club, Society, Association, Special Interest Group or Organization, either public or private**; and furthermore, any such ownership, legal interest in, rent, lease, control, operation or exclusive

> use of this property in part or in whole by any type of Club, Society, Association, Special Interest Group or Organization will tend to limit, minimize, restrict or exclude the general public use and enjoyment of this property to the benefit, enjoyment and exclusive use by a few privileged individuals which shall be strictly against the spirit, specific intent and overall meaning and interpretation of these Restrictions, Covenants and Limitations. However any such Club, Society, Association, Special Interest Group or Organization or any of their members may use and enjoy this Boating Facility described herein, equally, and in the same way, manner and capacity as any individual or individuals of the general public at large may use and enjoy said property, if their use does not limit, minimize, restrict or exclude in any way the use, benefit and enjoyment of the general public at large; and furthermore, this does not construe, state, or otherwise imply that any ownership, lease, rent, control, operation, or legal interest may be given at any time into said property to any such Club, Society, Association, Special Interest Group or Organization.
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> . . .
>
> 7. If a party hereto or his heirs, successors, and assigns or any person or persons claiming legal interest, shall violate or attempt to violate any of these Restrictions, Covenants and Limitations herein, it shall be lawful for any other person, to include the United States of America and the State of South Carolina, it agencies and political subdivisions, to prosecute any proceeding at law or in equity against the person or persons violating or attempting to violate any such Restrictions, Covenants and Limitations herein, and to prevent and cause him or her or them to cease and desist from doing so and to recover full damages or impose dues, penalties or fines for any such violation.

(Pl's. Ex. 13, also Entry 54-3, at 2-4 (emphasis added).)

10. Over the objections of area residents and James Island Yacht Club members, on November 15, 1976, the Chief of Engineers of the U.S. Army Corps of Engineers authorized the Charleston District of the U.S. Army Corps of Engineers to issue permit number 75-2A-262 (Revised), thereby allowing Demetre to "construct a bulkhead, place fill and build a related boating facility to construct a commercial boating facility." (Pl's. Ex. 19 at 1.)

11. Permit 75-2A-262 (Revised) allowed approximately 30,000 square feet of dock surface space, including: (a) a dry-dock storage facility for approximately 500 boats; (b) a 295-foot-long dock with over 25,000 square feet of surface space projecting into the Charleston Harbor from the west side of the property; (c) a more than 400-foot-long dock for recreational fishing projecting from the east side of the property; (d) an approximately 9,000 square-foot boat launch ramp; (e) facilities for boat maintenance and food sales, a bait-and-tackle shop, and offices; and (f) approximately 100,000 additional square feet of space for parking and boat storage.

12. In 1977, Demetre conveyed the property to Plaintiff Peter Demetre Charleston Harbor Marina Corporation ("the Plaintiff") according to a deed dated August 8, 1977, recorded in Book G 113, at page 407 in the Charleston County RMC office. (Pl.'s Ex. 9, also Entry 54-7, at 3.)

13. In 1986, the Eastwood neighborhood, seeking to stop the construction of a public boating facility, filed suit in this Court against the Plaintiff, seeking a declaratory judgment that the property was subject to the neighborhood's restrictions. On August 7, 1986, however, the Honorable Falcon B. Hawkins granted summary judgment against the neighborhood, holding that the property was not subject to the Eastwood neighborhood's restrictions. See Civil Action No. 2:85-1927-1.

14. In February of 1990, Demetre, as President of Peter Demetre Charleston Harbor Marina Corporation, sold the property to the City of Charleston ("the City") for $500,000, reflecting a charitable contribution in the amount of approximately $1,625,000.00. (Pl.'s Ex. 9 at 1.)

15. The Plaintiff reserved a reversionary interest in the property pursuant to the

1990 deed, which provides in pertinent part:

> **The above described property is subject to the Restrictions, Covenants and Limitations** contained in and part of the above described Department of the Army, Corps of Engineers Permit, recorded in the R.M.C. Office for Charleston County, South Carolina in Book X 110, a page 207, as ordered by the Honorable Sol Blatt, Jr. in the United States District Court for the District of South Carolina, Charleston Division, Civil Action No. 74-553, dated May 7, 1975.
>
> The above described property is subject to the terms and conditions specified in the above described US Department of the Army, Corps of Engineers Permit No. 75-2A-262 (Revised), dated November 15, 1976, recorded in the RMC Office for Charleston County in Book X 110, at page 207.
>
> . . .
>
> THIS CONVEYANCE is made subject to the following agreements:
>
> 1. All property as described above is restricted to the sole use as a public park. The Transferee shall operate a public park upon the property within ten (10) years from the date of this deed. Should the Transferee fail to operate or should it abandon the public park for a period of one (1) year, then in any of such events, all property as described above shall revert to PETER DEMETRE CHARLESTON HARBOR MARINA CORPORATION, its successors and assigns, unless Transferee re-opens the park within three (3) years from the date of notice from PETER DEMETRE CHARLESTON HARBOR MARINA CORPORATION, its successors or assigns (such notice to be mailed separately to the Mayor of Charleston and the Clerk of Council of the City of Charleston at City Hall, return receipt requested) that the property will revert unless the park is re-opened; PROVIDED, HOWEVER, the reversion will not occur (i) if the Transferee reopens the park within three (3) years of such notice, or (ii) if, because of a natural disaster, other act of God, or circumstances beyond the control of the Transferee, the park cannot reasonably be reopened within three (3) years and the Transferee commences reconstruction within the (2) years and thereafter diligently continues the work until the park is re-opened.
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> 2. In the event the property ever reverts to the Transferor, its successors or assigns, Transferee agrees that it will reassign all permits from the US Army Corps of Engineers, if any, as amended.

3. **Transferee agrees to construct public parking facilities and, as a minimum, to have a dock constructed within ten (10) years of the date hereof to allow for the recreational enjoyment of the waters of Charleston Harbor. The size and location of the parking lot and dock shall be at the sole discretion of Transferee. Transferee may seek to have the above-referenced permit amended to allow for a smaller dock.**

4. **As a courtesy, during the initial design of the park, Transferee should seek the advice of MILTON PETER DEMETRE concerning the design; however, he shall have no approval authority over the design of the park.**

5. The park shall not be named after any person or persons (the only exception being MILTON PETER DEMETRE, if authorized by Charleston City Council).

6. An appropriate sign or monument shall be placed in the park acknowledging the generous contribution of MILTON PETER DEMETRE and his efforts in making this park available to the public.

(Pl.'s Ex. 9 at 3-4 (emphasis added).)

16. Demetre also transferred permit number 75-2A-262 (Revised) to the City with the property. The permit was valid until 1991 based on previous extensions the Plaintiff had received from the Corps, and the City obtained an additional one-year extension giving it until 1992 to complete the work. In 1992, however, the City allowed the permit to expire without having completed the work.

17. On July 25, 1994, the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management ("OCRM") issued permit number CC-94-179 to the City of Charleston, describing the project as "maintaining and making additions to an existing rip-rap revetment" by "filling large holes in the revetment with additional rip-rap, limestone surge and constructing an 8' wide concrete step leading from highground to the low tide beach." (Pl.'s Ex. 10 at 1.)

18. In 1994, the City applied for a permit from the Corps to change the use of the property to a passive park. On December 9, 1994, a joint public notice was issued, stating:

> The proposed change consists of utilizing the property as a passive park. A permit issued in 1976, contained conditions that the property was only to be used as a commercial boating facility unless the permit was modified to allow other uses. In 1991, the City of Charleston obtained the property and was granted a time extension to complete the work until December of 1992. The City decided not to place any additional fill in the waters of the United States and now seeks permission to use the facility as a passive park instead of a boating facility. The City earlier obtained a South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management permit to repair the existing rip-rap and construct an 8 foot wide step leading from highground to the low tide beach. The pier shown (on sheet 2 of 4) on the attached drawing is for planning purposes only and is not part of this permit request. If the applicant decides to proceed with the pier it will require new State and Federal permits.

(Pl.s' Ex. 30 at 1.)

19. On January 12, 1995, the Corps granted the City permit number 75-1A-262 "[t]o change the use of a structure previously authorized to utilize the property as a passive park in accordance with the attached drawings entitled: City of Charleston Department of Parks, Public Park on James Island, South Carolina." (Pl.'s Ex. 25 at 1.) The attached drawings provided for the removal of exposed metal, the filling of voids in the rip-rap with limestone surge, and the construction of concrete steps.

20. The City allowed permit number CC-94-179 and permit number 75-1A-262 to expire without completing all of the work outlined in those permits.

21. On July 24, 1995, the City showed Demetre a copy of its July 1994 Master Plan. (See Pl.'s Ex. 1 at 2 and Pl.'s Ex. 3.)

22. In 1999, the City applied for a dock permit from OCRM, and on May 4, 2000, the City obtained permit number 99-1W-512-P from OCRM ("the 2000 OCRM permit").

23. The 2000 OCRM permit provides:

> The proposed work consists of construction of a recreational timber pier consisting of **an 8' by 140' walkway leading to a 20' by 50' pierhead with a 4' by 25' ramp leading to a 10' by 40' floating dock as shown on the attached drawings**. The purpose of the proposed activity is for recreational use as a public use pier.

(Pl.'s Ex. 2 at 1 (emphasis added).)

24. The drawings attached to the 2000 OCRM permit indicate two phases of the project, with phase one including an 8- by 140-foot pier and a 20- by 20-foot pierhead at an elevation of 10 feet and phase two including a 20- by 30-foot addition to the pierhead (at an elevation of 10 feet), a 10- by 40-foot floating dock, and a 4- by 15-foot ramp. (See id. at 7-8.)

25. The City applied to the Corps for approval of the 2000 OCRM permit.

26. On January 24, 2000, Steven D. Shapiro ("Shapiro") of the Eastwood Residents Association submitted a letter to the Charleston District Corps of Engineers requesting a public meeting and objecting to a dock being built on the property. (Pl.'s Ex. 28 at 1.)

27. On February 28, 2000, in an attempt to meet the requirements of the 1990 deed, the City opened the property to the public and, without a proper permit, placed an approximately 8- by 8-foot square floating dock in the water.

28. OCRM fined the City and required it to remove the illegal dock.

29. Also, in 2000, the Plaintiff filed a lawsuit against the City in the Charleston Court of Common Pleas, asserting that the City had failed to satisfy certain conditions of the deed. Peter Demetre Harbor Marina Corporation v. City of Charleston, Civil Action No. 00-CP-10-918.

30. On January 23, 2002, Civil Action No. 00-CP-10-918 was stricken from the docket by a consent order under South Carolina Rule of Civil Procedure 40(j).[3]

31. On April 18, 2006, Jeffrey B. Rowe ("Rowe") of Collins Engineers Inc. sent a letter to Curtis M. Joyner at OCRM, stating:

> In January of this year, we sent to you a request for modification of the original Sunrise Park Pier permit to include the pier head, floating docks, and stairs that were proposed for the site. Your response indicated that no modification was required for the proposed adjustments. Due to some confusion with the permit we had and the final approved permit, we wish to clarify the length of the pier and ensure that it meets the provisions of the permit, as we are preparing to finalize the design.
>
> As previously indicated, the pier head will be only 20 ft by 20 ft, rather than 50 ft by 20 ft, as originally proposed. Therefore, the overall length of the pier will be 190 ft, as shown on the attached drawing.

(Pl.'s Ex. 33 at 1.)

32. On November 1, 2006, Civil Action No. 00-CP-10-918 was restored to the docket as Civil Action No. 06-CP-10-4306.

33. In January of 2008, the Honorable Doyet A. Early denied the City's motion for summary judgment in Civil Action No. 06-CP-10-4306 and ruled that the City took the

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[3] Rule 40(j) provides:

> A party may strike its complaint, counterclaim, cross-claim or third party claim from any docket one time as a matter of right, provided that all parties adverse to that claim, counterclaim, cross-claim or third party claim agree in writing that it may be stricken, and all further agree that if the claim is restored upon motion made within 1 year of the date stricken, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored. . . .

S.C. R. Civ. P. 40(j).

property by a defeasible fee deed subject to the Plaintiff's reversionary interest.

34. Thereafter, on January 25, 2008, the City entered into a stipulation and settlement agreement with the Plaintiff resolving Civil Action No. 06-CP-10-4306 ("the 2008 settlement agreement").

35. The 2008 settlement agreement provides the following:

> Plaintiff and Defendant agree that the above action is settled upon the following terms and conditions:
>
> 1) **The subject February 28, 1990 deed shall remain in full force and effect;**
> 2) The park shall **henceforth** be named "Milton Peter Demetre park" and no other name;
> 3) **By December 31, 2008 the City of Charleston ("City") shall complete and thereafter maintain the following:**
> **(a) A dock in the location and as shown in the City's May 12, 2000 dock permit No. 99-1W-512-P issued by the Office of Ocean and Coastal Resource Management ("OCRM");**
> **(b) At a prominent location in the Northeast harbor-side of the park, facing Southeast, in the middle of the pathway, a granite stone monument at least four feet high. The City shall not be required to spend over $10,000.00 to complete the monument. Milton P. Demetre shall have final approval of the monument.** . . .
>
> 4) By January 11, 2011, the City of Charleston shall complete and thereafter maintain the following:
> **(a) The requirements of the six numbered conditions in the February 28, 1990 Deed;**
> (b) Removal of metal and other debris from the rip-rap and solidification of the rip-rap around the perimeter of the park as described in Permit Number CC-94-179 issued by OCRM on July 25, 1994;
> (c) Construction of the features in the City's July 1994 Master Plan presented to Mr. Demetre on July 24, 1995 **as shown therein**, except that the shelter may remain in its current location, including the following: a crushed gravel pathway around the perimeter of the park; bollards with chains around the perimeter of the park; steps to the beach and steps and a platform to the pond; an interpretive plaza; a parking lot; park benches; and a shelter.

(d) Installation of public restroom facilities and a water fountain, but the restrooms will not be required to be opened at night;
(e) Grading and maintenance of the park;

5) The City shall pay Plaintiff $10,000 (ten-thousand dollars) for partial reiumbursement of attorneys fees and costs;

6) In the event of breach of any terms of this settlement agreement, **Plaintiff shall be entitled to attorneys fees and costs for the enforcement of this settlement agreement;** and

. . .

(Pl's. Ex. 1, also Entry 54-16, at 1-2 (emphasis added).)

36. On February 7, 2008, Demetre wrote a letter to Steven D. Livingston ("Livingston"), the Director of the City of Charleston's Department of Parks, stating: "Since we last met, I reviewed the April 18, 2006 letter you gave me from Collins Engineers Inc. to OCRM for modification of the original dock permit dated May 12, 2000. The May 12, 2000 permit is the one that is referenced and required in our settlement agreement." (Pl.'s Ex. 51 at 1.) After suggesting additional changes the City could make in exchange for reducing the size of the pierhead, Demetre stated:

> During our on site meeting Friday, I would like to discuss with you adding the above amenities to the park and dock and if the City will agree to widen the floating dock to 13 ft. If this can be accomplished, I am in agreement with the pierhead modification of the OCRM dock permit PN #99-IW-512P dated May 12, 2000 as set forth in the Collins Engineers letter dated April 18, 2006 and to include the stairs.
>
> Any changes to the 1994 Park Master Plan and the OCRM May 12, 2000 Dock Permit that differ from which was agreed to in the January 25, 2008 Settlement Agreement, should at an appropriate time before the park completion deadline of January 11, 2011 be formalized by written agreement between me and the City.

(Id. at 2.)

37. On April 21, 2008, Livingston sent a letter to the Corps, addressing the January 24, 2000 letter submitted to the Corps by Shapiro (on behalf of the Eastwood

Residents Association) and stating in pertinent part:

> The City recently entered into a Settlement Agreement with the previous owner Mr. Milton P. Demetre in which we agreed to certain conditions that will ensure this property remain a public park. **One of the requirements is that the City construct and maintain a dock in accordance with the 2000 dock permit issued by OCRM.** If the City does not fulfill this obligation the property potentially reverts to Mr. Demetre.

(Pl.'s Ex. 34 at 1 (emphasis added).)

38. On August 13, 2008, Demetre wrote a letter to Matthew Compton ("Compton") and Ross Eastwood ("Eastwood"), project managers with the City of Charleston's Department of Parks, pointing out that the settlement agreement referenced the 2000 OCRM permit and not the modified version of the permit described in the April 18, 2006 Collins Engineers letter. In his letter, Demetre stated:

> However, as stated in my letter to Steve on February 7, 2008, I would be agreeable to the modifications described in the Collins Engineers letter as I set forth in my letter of February 7, 2008.
>
> As Steve retired recently, the City has not yet responded to discuss my letter with me and get my approval to any modifications to the original OCRM May 12, Permit No 99-1W-512-P.
>
> I would like to remind the City that until the design and implementation of the work is completed by January 11, 2011, the Settlement Agreement along with my 1990 Deed to the City requires the City to consult with me and seek my approval on any changes that does not comply with the Settlement Agreement.

(Pl.'s Ex. 40 at 1.)

39. Thereafter, Demetre wrote another letter to Eastwood, expressing concern over the reduction in the proposed pier's height from 10 feet to 9.17 feet. In addition, Demetre expressed concern about the City's negotiations with the Eastwood neighborhood and the James Island Yacht Club. Demetre stated:

> The City must comply with Agreement No. 3 of the Corps of Engineer restrictions filed in the Charleston Court, RMC Office in Book X110, Page 207 which compliance is required by my 1990 Deed to the City and the January 25, 2008 Settlement Agreement.
>
> That is, the City must never negotiate with the adjacent Yacht Club or Subdivision or it[ ]s association to diminish the use of the park or it[ ]s pier for the general public's recreation and boating enjoyment. I believe the subdivision may have recently attempted to diminish the general public's use of the park by objecting to the Permit to install a pier for the General Public's use of the park.

(Pl.'s Ex. 41 at 1.)

40. At trial, Demetre testified that the City did not respond to his offer to agree to a modification of the settlement agreement and that the City never received his final approval to build a pier of a reduced height and with a smaller pierhead than agreed to in the 2008 settlement agreement. (May 23, 2012 Tr. at 45-46.)

41. On August 19, 2008, the City signed an agreement with members of the Eastwood Residents Association. ("the association agreement"). The association agreement provides, in pertinent part:

> D. WHEREAS, the City has requested that the Property Owners approve the plans and specifications for the Park Improvements attached to this Agreement as Exhibit A (the "Plains and Specifications") and have agreed to enter into this Agreement to address certain lingering concerns of the Property Owners; and
>
> E. WHEREAS, the Parties have signed this Agreement of their own free will and volition, with full recognition and understanding of their rights and obligations hereunder, and the legal effects of this Agreement.
>
> **COVENANTS**
>
> NOW, THEREFORE, for an in consideration of the following covenants and agreements, and other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties do mutually covenant and agree as follows:

1. Approval: The Property Owners hereby approve the Plans and Specifications for the Park Improvements and withdraw any prior objections of the Property Owners on their own behalf and on behalf of the Association to the construction of the Park Improvements, including those relating to the City's application to the Department of the Army Corps of Engineers and SC OCRM for a dock permit. . . .

2. City Covenants: The City covenants as follows:

a) The Park Improvements will be constructed in accordance with the Plans and Specifications and the height of the pier in the Park will be no higher than the current height of the pier at the James Island Yacht Club.

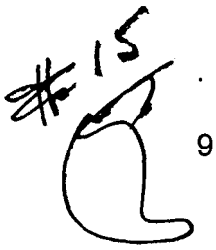
. . .

f) The City will not increase the size of the parking area in the Park.

. . .

i) The City shall cause the Parks Department to consult with the Property Owners to determine the scope, location and appearance of the public restroom to be constructed in the Park subject to the requirements for the public restroom to be constructed in the Park more fully set forth in the Consent Order filed in the case of Milton P. Demetre, et al v. City of Charleston, et al, Civil Action No.: 06-CP-10-4306 in the Court of Common Pleas for Charleston County marked as Exhibit B, attached hereto and incorporated by reference herein.

3. Binding Effect; Assignment: This Agreement shall be binding upon and inure to the benefit of the Parties hereto, their respective heirs, representatives, administrators, successors and assigns. Notwithstanding the foregoing, the Property Owners may assign their rights and obligations under this Agreement to their successors in title and/or the Association, as it may be modified or reorganized from time to time.



. . .

9. Attorneys' Fees: If any Party requires services of an attorney to enforce obligations under this Agreement, the prevailing Party in such enforcement proceeding shall be due reasonable attorneys' fees from the defaulting Party.

(Pl.'s Ex. 4, also Entries 12-3 and 54-20, at 1-3.)

42. On September 1, 2008, the City faxed "the stamped set of plans for the Pier and the Eastwood Residents Agreement with the City of Charleston" to Demetre. (Pl.'s Ex.

42.)

43. According to the affidavit of Compton, a City of Charleston project manager, the 2008 settlement agreement between the City and Demetre "required the City to complete and maintain a dock in [the] location and as shown in a May 12, 2000 permit issued by [OCRM]." (Entry 64-1 ¶ 5.) However, "[b]efore the Corps would approve the final permit necessary to construct the dock at the park, they were adamant that the City reach an agreement with the Eastwood Residents Association." (Id. ¶ 6.) In his affidavit Compton asserts that he "felt it was unlikely [the City] would get the permit without this agreement," a sentiment he reiterated at trial. (Id. ¶ 7; May 24, 2012 Tr. at 35.)

44. At trial, Livingston testified that the Colonel told him that the City would not get a permit without an agreement from the Eastwood Residents Association. (May 24, 2012 Tr. at 17.)

45. On October 14, 2008, Don Brown, on behalf of the City of Charleston, signed Corps permit number 1999-13101-2ID, which described the property as "the construction of a recreational dock for the recreational use of the public . . . ." (Pl.'s Ex. 23, also Entry 52-1, at 1, 3.)

46. On October 15, 2008, Tina B. Hadden, Chief of the Regulatory Division, signed permit number 1999-13101-2ID on behalf of the Secretary of the Army. (Id. at 3.)

47. Permit number 1999-13101-2ID includes the following special condition (special condition d):

> d. That the permittee recognizes that its commitment to perform and implement the Agreement between the Eastwood Property Owners Association and the City of Charleston, dated August 19, 2008, was a deciding factor towards the favorable and timely decision on this permit and that the permittee recognizes that a failure on its part to

> both actively pursue and implement this Agreement may be grounds for modification, suspension or revocation of this Department of the Army authorization.

(Id. at 4.)

48. On March 2, 2009, the Plaintiff filed another suit against the City in the Charleston County Court of Common Pleas, Civil Action 2009-CP-10-1217, seeking enforcement of the 2008 settlement agreement and alleging other causes of action.

49. During discovery in Civil Action 2009-CP-10-1217, the Plaintiff learned of special condition d in permit 1999-13101-21D and thereafter filed the instant case in this Court to obtain jurisdiction over the federal Defendants. The parties agreed to stay Civil Action 2009-CP-10-1217 pending the outcome of this case.

50. On May 17, 2011, the Plaintiff filed an amended complaint in this case seeking a declaratory judgment that:

> (a) the City of Charleston's August 21, 2008 agreement with members of the Eastwood Residents Association violates the Restrictions and is void and (b) the condition of U.S. Army Corps of Engineers Permit No. 1999-13101-21D which requires adherence to the Association Agreement violates the Restrictions and is void and (c) the Corps' allowing the City to use the filled marshland without a boating facility permit for the fill violates the Restrictions; a Permanent Injunction to enforce and Specific Performance of the January 25, 2008 Settlement Agreement with the City of Charleston regarding (a) the dock's pier dimensions of fifty-feet by twenty-feet and height of ten feet, (b) removal of metal and other debris from and solidification of the rip-rap, (c) completion of a crushed gravel pathway around the perimeter of the property, (d) completion of installation of bollards with chains around the perimeter of the property, (e) construction of the interpretive plaza, (f) operating and accessible restrooms, (g) grading of the property, and (h) consultation requirement; and an award of attorneys fees incurred to enforce the Settlement Agreement against the City of Charleston; a declaratory judgment that the City's obtaining a dock permit per the Settlement Agreement was not impossible, because the United States Army Corps of Engineers' denial of any dock with lesser dimensions than those in the November 15, 1976 Permit No. 75-2A-262-Revised would have been arbitrary and capricious; and a permanent injunction requiring the city to

> construct facilities on the property and obtain boating facility permits for the property sufficient to fulfill the Restrictions' requirement that the property be used for boating purposes.

(Entry 33 at 24-26.)

51. In this action, the City of Charleston asserts that it has substantially complied with the requirements of the 2008 settlement agreement, or, in the alternative, that it is impossible for the City to comply with the settlement agreement due to federal permitting requirements.

52. Next, the federal Defendants contend that the Plaintiff is not entitled to: (1) an injunction against them; (2) a declaration that special condition d is void; (3) a declaration that their allowing the City to use the property without a boating facility permit violates the restrictions; or (4) a declaration that their denial of a permit with lesser dimensions than those specified in the November 17, 1976 permit number 75-2A-262 (Revised) would have been arbitrary and capricious.

53. Jon Guerry Taylor, the City of Charleston's expert in this case, testified at trial that the Corps can issue a permit despite objections to the permit. (May 24, 2012 Tr. at 71.) He also testified that he had never seen a written denial from the Corps for a permit allowing the dock shown in the 2000 OCRM permit. (Id. at 72.)

CONCLUSIONS OF LAW

1. In this action, the Court is charged with interpreting a contract, specifically, the 2008 settlement agreement between the Plaintiff and the City, in accordance with South Carolina law. See Lister v. NationsBank of Delaware, N.A., 329 S.C. 133, 144, 494 S.E.2d 449, 455 (Ct. App. 1997) (quoting Livingston v. Atl. R. R., 176 S.C. 385, 391, 180 S.E. 343, 345 (1935), and providing that under South Carolina choice-of-law rules, the law

of the state where the contract was made applies).

2. In South Carolina, "[t]he cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009).

3. "If practical, documents will be interpreted to give effect to all of their provisions." M & M Group, Inc. v. Holmes, 379 S.C. 468, 476, 666 S.E.2d 262, 266 (Ct. App. 2008) (citing Ecclesiastes Prod. Ministries v. Outparcel Assocs., L.L.C., 374 S.C. 483, 498, 649 S.E.2d 494, 502 (Ct. App. 2007); and Brady v. Brady, 222 S.C. 242, 246-47, 72 S.E.2d 193, 195 (1952)).

4. "Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." Id. at 185, 672 S.E.2d at 574.

5. "A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation." South Carolina Dept. of Natural Resources v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) (citations omitted). In addition, "[i]t is a question of law for the court whether the language of a contract is ambiguous. Id. at 623, 550 S.E.2d at 302-03.

6. If a contract is ambiguous, "the fact finder must ascertain the parties' intentions from the evidence presented," and parol and extrinsic evidence will be admitted to determine the parties' intent. Duncan v. Little, 384 S.C. 420, 425,682 S.E.2d 788, 790 (2009) (citing Charles v. B & B Theatres, Inc., 234 S.C. 15, 18, 106 S.E.2d 455, 456 (1959)). "The courts, in attempting to ascertain this intention, will endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered into." Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 89, 232 S.E.2d

20, 25 (1977) (citation omitted).

7. After consideration, the Court finds that the 2008 settlement agreement between Demetre and the City is ambiguous.

8. The 2008 settlement agreement states that the "February 28, 1990 deed shall remain in full force and effect." (Pl.'s Ex. 1 at 1.) In addition, the 2008 settlement agreement provides that "the City of Charleston shall complete and thereafter maintain . . . [t]he requirements of the six numbered conditions in the February 28, 1990 deed." (Id. at 2.) Two of those six required conditions in the 1990 deed provides as follows:

> 3. Transferee agrees to construct public parking facilities and, as a minimum, to have a dock constructed within ten (10) years of the date hereof to allow for the recreational enjoyment of the waters of Charleston Harbor. **The size and location of the parking lot and dock shall be at the sole discretion of Transferee. Transferee may seek to have the above-referenced permit amended to allow for a smaller dock.**
>
> 4. **As a courtesy, during the initial design of the park, Transferee should seek the advice of MILTON PETER DEMETRE concerning the design; however, he shall have no approval authority over the design of the park.**

(Pl.'s Ex. 9, also Entry 54-7, at 4.) Thus, according to the deed, the "size and location of the . . . dock" is at the sole discretion of the City, and Demetre has "no approval authority over the design of the park." (Id.)

9. Next, however, despite stating that the 1990 deed remains in effect and specifically incorporating the six numbered conditions in the 1990 deed, the 2008 settlement agreement then states the following:

> 3) By December 31, 2008 the City of Charleston ("City") shall complete and thereafter maintain the following:
> (a) A dock **in the location and as shown in the City's May 12,**

2000 dock permit No. 99-1W-512-P issued by the Office of Ocean and Coastal Resource Management ("OCRM");

(b) At a prominent location in the Northeast harbor-side of the park, facing Southeast, in the middle of the pathway, a granite stone monument at least four feet high. The City shall not be required to spend over $10,000.00 to complete the monument. **Milton P. Demetre shall have final approval authority regarding the design and location of the monument**. . . .

4) By January 11, 2011, the City of Charleston shall complete and thereafter maintain the following:

. . .

(b) Removal of metal and other debris from the rip-rap and solidification of the rip-rap around the perimeter of the park **as described in Permit Number CC-94-179 issued by OCRM on July 25, 1994**;

(c) Construction of the features in the City's July 1994 Master Plan presented to Mr. Demetre on July 24, 1995 **as shown therein**, except that the shelter may remain in its current location, including the following: a crushed gravel pathway around the perimeter of the park; bollards with chains around the perimeter of the park; steps to the beach and steps and a platform to the pond; an interpretive plaza; a parking lot; park benches; and a shelter.

(d) Installation of public restroom facilities and a water fountain, but the restrooms will not be required to be opened at night;

(e) Grading and maintenance of the park;

(Pl.'s Ex. 1 at 1-2 (emphasis added).) In effect, the 2008 settlement agreement provides, on the one hand, that the design of the park and the size of the dock is in the City's discretion, with Demetre having no approval authority, and then, on the other hand, that the City will, *inter alia*: build a *particular* dock as shown in a *particular dock permit*; give Demetre final approval authority of the monument; complete certain other work *as described in* a particular permit; and construct certain features *as shown in* the master plan.[4] (Id.)

[4] When asked counsel for the City about this conundrum at trial, the following discussion between the Court and counsel ensued:

The Court: Well, do you have the right when you agree to something in a contract to minimally change it, does that, what [e]ffect does that have on the contract, or the intent of the parties[?]

Ms. Jackson: Well, Your Honor, because this contract incorporates the deed, I think that they have to be read as a whole, they have to be taken together, and together, Mr. Demetre knew and was aware that design and control and size and location were totally the discretion of the city. [ ]

The Court: Well, wasn't everything under the deed in discretion of the city?

Ms. Jackson: Yes, Your Honor.

The Court: So when they signed this – when they made the deed according to you, when they made the deed a part, really this contract was sort of a joke, because the full control, I mean, you wrote these things down and I guess you said you paid $10,000 attorneys fees, as I recall, and you got revert in there, but you say since the deed controlled and even you could have put anything in, you could have, if your argument, I'm not saying it's wrong, I'm just talking, I've got to determine where a deed is ambiguous what the intent of the parties was, under your argument it wouldn't have made any difference what you put in here[,] any kind of exception, any kind of agreement, you could have made any kind of agreements about the size of the dock, how far it was going to go, how small it was going to be, how big it was going to be, you could have made any agreement in here because you hadn't, because you had in here that the deed, that the deed was in full force and effect, which gives you final authority, so let's say that he had wanted a 5 hundred foot dock, and that was way out of what line of what you could put there, what the city wanted, you could have agreed to 5 hundred feet, and then because the deed was in there, you could have gone back and put, it was 190 did you say.

Ms. Jackson: Yes, sir.

The Court: You could have gone back to the 190. I can't understand what, what Mr. Demetre, what your position is, as to what he got, because he got just hat you wanted to give him, you didn't give him anything, according to your argument.

Ms. Jackson: Well, Your Honor, he got a number of things.

The Court: I mean, but that was by your generosity.

Ms. Jackson: But he received all of the things that are listed under B, C and D of 4, it was just designed by the city. We didn't eliminate them in design, they were listed, they are incorporated into the design.

The Court: I know, but I mean.

Ms. Jackson: And the same thing with the dock, it was always the city's intention to build the dock under that 1999 permit. They applied for that permit with the intent of building that dock. They weren't given the permit. And in order to meet the demands of the settlement agreement and try to get the dock built by December 31 of 2008, the city did what they thought they were supposed to do under the spirit of the agreement, which was get this dock built, and the pier head changed slightly, the elevation changed slightly, but it didn't change the use of the dock. It didn't change the dock. And of course the city would not have gone out and signed an agreement with the Eastwood residents association if they could have gotten this permit and just moved forward.

The Court: What, but how is the city bound to do anything under this agreement, other than to, I think you had attorney's fees and maybe something else, but.

Ms. Jackson: A lot of this is a ratification or a giving a specific deadlines to items that were already in the course of happening.

The Court: But how is the city bound under this stipulation to do anything, I mean, you did a lot, I agree with you, you gave a lot, but were you bound to do that or did you do that out of the goodness of your heart, if you insist that the deed was the primary object.

Ms. Jackson: Well, Your Honor, these things were done and like I said, this is basically a recitation of things that were already in the process of being done, and merely this just gives a new deadline for these things to be accomplished. The January 11, 2011 deadline for the items under number 4 to be accomplished, again states it's subject to the design of the city, it doesn't say that the city doesn't have to do this by this deadline, or it reinforces the right to move forward.

The December 31 deadline was the deadline that they were trying to meet to get the things that were already in the process of being done, done. They could not move forward with the permit while the case, this 2006 and 2000 case were pending because they had a cloud on the title. And so therefore, the city was had its hands tied and couldn't do anything until that was resolved.

10. In attempting to ascertain the parties' intentions at the time they entered the 2008 settlement agreement, the Court has considered the evidence in the record as well as the general circumstances existing at the time the parties entered into the 2008 settlement agreement. As previously mentioned, the settlement agreement resolved a pending lawsuit–a lawsuit in which Judge Early had just ruled that the City took the property by a defeasible fee deed subject to the Plaintiff's reversionary interest.

11. Ultimately, the Court is not convinced by the City's argument that the 2008 settlement agreement's references to the 1990 deed somehow trump or eviscerate the 2008 settlement agreement's other, more specific terms. Stated differently, and more simply perhaps, the Court is unwilling to find that Demetre gained nothing that he did not previously have when he agreed to enter the 2008 settlement agreement with the City. Thus, although the City retained complete discretion with respect to the size and location of the dock pursuant to the 1990 deed, in the 2008 settlement agreement, the City relinquished some of that discretion when it agreed with Demetre to build by December 31, 2008, "**[a] dock in the location and as shown in** the City's May 12, 2000 dock permit No. 99-1W-512-P." (Pl.'s Ex. 1 at 1, also Entry 54-16, at 1 (emphasis added).) Likewise, although the City had no legal obligation under the 1990 deed to consult with Demetre

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> Once that was resolved through this settlement agreement, the city was moving forward, these were already the plans to move forward, and this just kind of put it out on paper with deadlines. And then these items have all been completed, the only issue is that the dock is three quarters of a foot lower and has a 360 square foot smaller pier head. Which has no effect on the use of the park.
>
> The Court: Okay. Thank you.

(May 24, 2012 Tr. at 98-102.)

during the design process (as the 1990 deed only stated that the City "should," not "shall" consult with Demetre), and although Demetre had "no approval authority over the design of the park" pursuant to the 1990 deed, the City agreed to more specific terms in the 2008 settlement agreement; for example, the City agreed to remove debris from and solidify the rip-rap "**as described in** Permit Number CC-94-179" and to construct "the features in the City's July 24, 1994 Master Plan presented to Mr. Demetre on July 24, 1995 **as shown therein** . . . ." (Id. at 2, also Entry 54-16, at 2 (emphasis added).) Once the City agreed to these more specific terms in the 2008 settlement agreement, it could no longer fall back on the contrary, more general terms of the 1990 deed when it appeared to the City that accomplishing the specific terms of the 2008 settlement agreement would be difficult.

12. Moreover, the Court finds that the parties intended the 2008 settlement agreement's reference to the 1990 deed to reflect their understanding that the deed remained a defeasible fee deed subject to the Plaintiff's reversionary interest.

13. In further support of the Court's finding that the parties intended to agree to the specific terms of paragraph (3)(a) of the 2008 settlement agreement, the Court notes that Compton, a City of Charleston project manager, admitted in his affidavit and in his testimony that the 2008 settlement agreement between the City and Demetre "required the City to complete and maintain a dock in [the] location and as shown in a May 12, 2000 permit issued by [OCRM]." (Entry 64-1 ¶ 5.) In addition, Livingston, the former Director of the City of Charleston's Department of the Parks, sent a letter to the Corps noting that "[o]ne of the requirements [of the 2008 settlement agreement] is that the City construct and maintain a dock in accordance with the 2000 dock permit issued by OCRM." (Pl.'s Ex. 34

at 1 (emphasis added).) Thus, it appears clear that at some point prior to this lawsuit, the City was well aware of the specific provisions to which it had agreed in the 2008 settlement agreement, despite its subsequent arguments to the contrary.

14. Next, the Court finds that the City breached the terms of the 2008 settlement agreement when it: (1) failed to remove the Sunrise Park sign from the park for eighteen months following the settlement agreement[5]; (2) failed to complete the dock in the time required by the settlement agreement as well as in the location and "as shown in" the 2000 OCRM permit; (3) failed to remove the metal and other debris from the rip-rap, and solidify the rip-rap, as described in permit number CC-94-179 issued by OCRM on July 25, 1994; (4) failed to construct the pedestrian entrance portion of the crushed gravel pathway; and (5) failed to complete the bollards and chains around the perimeter of the park.[6]

15. In addition, the Court finds that the City lacked the authority to reach the agreement it entered with the Eastwood Residents Association. Although it is understandable that the City would need to explain the project to the neighborhood as well as to consider the neighborhood's concerns, prior to entering the agreement with the

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[5] The 2008 settlement agreement required that the property "**henceforth** be named 'Milton Peter Demetre Park.'" (Pl.'s Ex. 1, also Entry 54-16, at 1 (emphasis added).) Black's Law Dictionary defines "henceforth" to mean "from now on." Black's Law Dictionary, 320 (Second Pocket Ed. 2001).

[6] At trial, Demetre admitted that the City completed the monument in the park outlined in paragraph (3)(b) of the 2008 settlement agreement, and he testified that he is satisfied with the City's construction of an interpretive plaza. (May 23, 2012 Tr. at 40, 65.) With respect to the City's remaining obligations outlined in the 2008 settlement agreement, the Court finds that the record contains insufficient evidence to determine whether the City has properly graded the property or constructed appropriate steps to the beach and steps and a platform to the pond. Therefore, the Court makes no particular findings about these aspects of the property.

Eastwood Residents Association, the City had already reached an agreement with Demetre to perform certain specific obligations, and the City's agreement with the association in no way altered the City's specific obligations to Demetre.

16. In addition, the restrictions attached to the property specifically prohibit the "control" of the property by any club, society, association, special interest group, or organization. (Pl's Ex. 13 at 3.) Thus, when the City asked the association to "approve the plans and specifications" for the property; when the City altered the plans based on the association's objections; when the City covenanted to construct the park in accordance with the altered plans; and when the City purported to give the association legal rights to enforce the association agreement, the Court believes that the City overstepped its bounds.

17. Turning now to the City's defenses, the Court first must consider whether it was impossible for the City to comply with the terms of the 2008 settlement agreement.

18. Under South Carolina law:

> A party to a contract must perform its obligations under the contract unless its performance is rendered impossible by an act of God, the law, or by a third party. Impossibility must be real and not a mere inconvenience. A party to a contract cannot be excused from performance on the theory of impossibility of performance unless it is made to appear that the thing to be done cannot by any means be accomplished, for if it is only improbable or out of the power of the obligor, it is not deemed in law impossible. A party claiming impossibility of performance has the burden of proving the defense.

Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 593, 493 S.E.2d 875, 879 (Ct. App. 1997) (internal quotations and citations omitted).

19. The City argues that it was impossible for it to build the dock as shown in the 2000 OCRM permit because the Corps would not issue a permit without the City reaching

an agreement with the Eastwood Residents Association to mollify their objections. The City also argues that it could not solidify the rip-rap in accordance with permit number CC-94-179 issued by OCRM because limestone surge is no longer used to solidify rip-rap. The City does not appear to argue, however, that it was impossible for it to (1) timely change the name of the park. (2) construct the pedestrian entrance portion of the crushed gravel pathway, or (3) complete the bollards and chains around the perimeter of the park.

20. As set forth in the facts, although city employees testified that it was "unlikely" that the Corps would issue the permit over the Eastwood neighborhood's objections, and that someone at the Corps told the City that the Corps would not issue a permit without the City resolving the issues with the Eastwood Residents Association,[7] there is no evidence that the Corps directed the City to reach any particular agreement with the association.[8]

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[7] When the Court asked Compton whether "someone from the Corps or engineers said emphatically that unless this neighborhood association is satisfied, they would definitely not grant a permit," Compton replied:

> I was in the meeting, that was not the language that was used . . . .
>
> My understanding that we were butting up against the deadline, this is July of 2008, we've got to be completed by December 31, 2008, um, it was, it was clear to the city representatives in the room, you know, through the course of that meeting that if we did not reach a settlement agreement of some fashion, if we did not get the Eastwood residents association to withdraw their objections to our permit, we would not be able to get our permit issued in time to complete the pier in time to meet our, to meet the deadline that was in our stipulation agreement.

(May 24, 2012 Tr. at 48-49.)

[8] To the contrary, Livingston testified:

> No, sir, they did not fashion, what they did outline what the neighborhood's objections were, they said that they were–they objected to the, to the massive scale of the pier and the dock, they objected to the restroom

Moreover, everyone seems to agree that the Corps can approve a permit even when faced with objections. (See, e.g., Entry 51-6 at 17-18; May 24, 2012 Tr. at 71.)

21. In addition, when the City approached the Eastwood Residents Association, it was armed with the knowledge that it had agreed to build a *particular* dock, and it also knew that the restrictions attached to the property forbade it from giving the association any legal interest in or control over the property. Therefore, in consulting with the Eastwood Residents Association, the City could have offered to make changes–of its own accord and without giving the association the right to approve or enforce those changes–so long as

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> facilities, they objected.
>
> . . .
>
> They didn't say how, no, sir, and if I could elaborate on your question, . . .
>
> . . .
>
> Okay, we with all of the issues that the Eastwood neighborhood association shared with us, we did not do anything that we felt was detrimental to the park. We–the few inches we lowered the pier, we don't feel like it did anything detrimental to the pier. But it did do something good for the neighborhood because it–it was in their–it was in their sight line of the harbor and a few inches to me was a very reasonable compromise to give the neighborhood, you know, for their view to the harbor from their home.
> The restrooms, it was a choice of putting restrooms in there, or them having to observe people going into the bushes and taking care of their business. So that, we felt was reasonable.
> The other issues they had were about the numbers of people and events, and we felt like they weren't as legitimate as the other two, we felt like we should be able to have weddings there, we should be able to have organized picnics and events, and we certainly don't want to overrun a park, but we like there should be plenty of opportunity for people to use the park. Even people outside the neighborhoods, so we didn't get into 100 percent to everything, in fact, the issue was first position was we don't want a dock at all, and then we compromised by reducing the height a few inches.

(May 24, 2012 Tr. at 26-28.)

those changes did not conflict with specific obligations the City had already agreed to in the 2008 settlement agreement.

22. In sum, then, the record contains no final, written permit denial from the Corps, and the record contains no evidence that the Corps forced the City to reduce the size and height of the pier to accommodate the Eastwood Residents Association. Based on the foregoing, the Court does not believe the City has met its burden to show that the thing to be done–constructing a dock in accordance with the 2000 OCRM permit–could not by any means be accomplished.[9]

23. In addition, because the City has not argued that it was impossible for it to (1) timely change the name of the park, (2) construct the pedestrian entrance, or (3) complete the bollards and chains around the perimeter, the Court does not find that the theory of impossibility excuses these breaches.

24. Finally, however, the Court believes that the City has presented sufficient evidence to show that it completed as much of the rip-rap solidification contemplated under number CC-94-179 issued by OCRM as it was allowed to do by the regulatory agencies. (See, e.g., May 24, 2012 Tr. at 65-69.) Accordingly, the Court finds that the theory of impossibility does excuse the City's failure to comply with the literal terms of paragraph (4)(b) of the 2008 settlement agreement.

#30

[9] Moreover, the Court notes that the parties to the 2008 settlement agreement could have made compliance contingent upon the receipt of an Army Corps permit, but for whatever reason, they chose not to do so. In addition, when it appeared that the construction of the dock as shown in the 2000 OCRM permit would be quite difficult over the Eastwood Residents Association's objections, the City could have approached Demetre and attempted to work out a modification to the 2008 settlement agreement, something Demetre actually proposed to the City in his letters. For whatever reason, the City chose not to work out any modifications to the settlement agreement with Demetre.

25. In addition to arguing that its compliance with the 2008 settlement agreement was impossible, the City also argues that it substantially performed the 2008 settlement agreement.

26. "The doctrine of substantial performance was conceived for the case where a plaintiff's partial performance has already given to a defendant substantially all that he bargained for and is one of such a nature that it cannot be returned." Diamond Swimming Pool Co. v. Broome, 252 S.C. 379, 384, 166 S.E.2d 308, 311 (1969).

27. The Court readily admits that the question of substantial performance under these circumstances is a more difficult one than the question of impossibility. Although the Court believes the City failed to honor many of the *literal* terms of the 2008 settlement agreement, the Court believes that the City honored a large portion of the agreement, at least *in spirit*. In other words, when faced with numerous moving players, including a former owner of the property, a federal regulatory agency, and an outspoken neighborhood association, the City worked to complete the public park that exists today. A pier now stands in the harbor where none used to exist, and although the pier is 9.17-feet tall rather than 10-feet tall, with a pier head of 20- by 20-feet rather than 20- by 50-feet, it would be difficult to say that Demetre has not received much of what he bargained for in that regard. That being said, however, the Court believes that the City should not have entered agreements with Demetre (both the 1990 deed and the 2008 settlement agreement) to perform specific obligations that it either had reason to know would be difficult to perform (and, at least with respect to the 2008 settlement agreement, obligations that, without the proper permit(s), it did not have the authority at the time to perform), or that it perhaps had no intention of performing. Stated simply, the Court believes that the City's pattern of

dilatory behavior and almost-but-not-quite compliance justifies some relief to the Plaintiff.

28. The Court must fashion an appropriate remedy under the circumstances, and "[a]n action for specific performance is one in equity." Campbell v. Carr, 361 S.C. 258, 262-63, 603 S.E.2d 625-627 (Ct. App. 2004).

29. After much consideration, the Court believes it would be a waste of valuable resources to require the City to tear down a perfectly useful pier on the basis that it was built slightly shorter and smaller than the 2008 settlement agreement contemplated. Nevertheless, as previously stated, the Court believes that the circumstances warrant some relief to the Plaintiff. The Court, therefore, in its equitable powers, declines to order the destruction of the current pier, and, instead, the Court orders the City to apply to the necessary regulatory agency or agencies for a permit to extend the current pierhead from 20- by 20-feet to the agreed-upon 20- by 50-feet.[10] The Court notes that this change will violate the City's agreement with the Eastwood Residents Association; however, as previously set forth, the City had no authority to reach that agreement or to give the association any legal interest or control over the property, and the Court finds, therefore, that the agreement does not confer any enforceable rights upon the Eastwood Residents Association, which chose to take no legal action in this lawsuit.[11]

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[10] If it is not possible for the City to obtain the necessary permit(s), then the City's failure to extend the pierhead to 20- by 50-feet will be justified. From a practical standpoint, however, the Court notes that the drawings submitted by the City to OCRM in connection with the 2000 OCRM permit (permit 99-1W-512-P) indicate that phase one of the project would include a pierhead of 20- by 20-feet while phase two would include an addition to the pierhead of 20- by 30-feet.

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[11] In coordination with its request for an entry of default against the Eastwood Residents Association, the Plaintiff provided the Court with a letter from Bruce Miller ("Miller"), a member of the Eastwood Board of Directors, wherein Miller states:

30. Next, the Court orders the City to complete the crushed gravel pedestrian entrance and to complete the bollards and chains around the perimeter as shown in the City's July 1994 Master Plan.[12]

31. The Court also finds that paragraph (6) of the 2008 settlement agreement–which provides for attorney's fees and costs "[i]n the event of breach of **any** terms of this settlement agreement"–entitles the Plaintiff to an award of reasonable attorney's fees and costs in connection with this action. (Pl.s' Ex. 1, also Entry 54-16 at 2 (emphasis added).) The parties shall submit briefs on this issue within sixty days of the date of this order, and the Court will schedule a hearing on the matter assuming the parties are unable to reach an agreement on this issue.

32. Finally, the Court is faced with the Plaintiff's claims against the federal Defendants. First, the Plaintiff asks the Court to declare void special condition d of permit number 1999-13101-21D, which provides that the City's agreement with the Eastwood Residents Association "was a deciding factor towards the favorable and timely decision on the permit" and that "a failure on [the City's] part to both actively pursue and implement this agreement **may be** grounds for modification, suspension or revocation" of the permit. (Pl.'s

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> This letter is to advise that the Board of Directors (of which I am a member) of defendant Eastwood Residents Association ("Eastwood") has voted for Eastwood not to take any action in this lawsuit. Eastwood has no assets, no dues, and therefore, no budget to retain legal counsel to represent it. Plaintiff is not seeking any money damages against Eastwood; he seeks equitable relief only. We trust that the court will be fair."

#33

(Entry 21-3.)

[12] As the name of the park has now been changed to Milton Peter Demetre Park, the Court grants no relief with respect to the City's failure to timely remove the Sunset Park signs.

Ex. 23 (emphasis added).)

33. The Court has already found that the City lacked the authority to give the Eastwood Residents Association any control over the property, and that the association agreement does not confer any legal rights on the association. Moreover, and perhaps more importantly, however, the Court notes that special condition d merely states that the association agreement was "a" deciding factor towards the issuance of the permit, and that a violation of the agreement "may be" grounds for modification. Because the condition does not include any mandatory language, it does not appear to affect the validity of the permit, and ultimately, the Court believes it is unnecessary to reach the question of whether this condition is void.

34. Next, the Plaintiff asks the Court to declare that the Corps' allowing the City to use the filled marshland without a boating facility permit violates the restrictions. After review, the Court finds that the record was not fully developed on this issue and that insufficient evidence exists to grant the Plaintiff's request.

35. Finally, the Court declines to hold that the Corps' denial of any dock with lesser dimensions than those in permit No. 75-2A-262 (Revised) would have been arbitrary and capricious. Stated simply, this Court is not faced with the Corps' final denial of any dock with lesser dimensions than those in permit No. 75-2A-262 (Revised), and the Court declines to give an advisory opinion.

CONCLUSION

For the reasons set forth herein, it is hereby **ORDERED** that:

(1) the City shall apply to the necessary regulatory agency or agencies for a permit

to extend the pierhead to the agreed-upon 20- by 50-feet;

(2) the City shall complete the crushed gravel pedestrian entrance as shown in the City's July 1994 Master Plan;

(3) the City shall complete the bollards and chains around the perimeter as shown in the City's July 1994 Master Plan;

(4) the City's agreement with the Eastwood Residents Association does not confer any enforceable legal rights upon the association;

(5) the Plaintiff is not entitled to the specific relief he seeks against the Corps;

(6) the Plaintiff is entitled to an award of reasonable attorney's fees and costs pursuant to paragraph (6) of the 2008 settlement agreement; and

(7) the Plaintiff and the City shall brief the Court within sixty days of the date of this order on the issue of attorney's fees and costs (assuming the parties cannot reach an agreement on this issue), and the Court will schedule a hearing if necessary.

AND IT IS SO ORDERED.

Sol Blatt, Jr.
Senior United States District Judge

January 28, 2013
Charleston, South Carolina