

Mountains & Marshes

South Carolina Environmental Law Project • P. O. Box 1380 • Pawleys Island, S. C. 29585 • 843 927-4078

December 1999

Cherry Grove Case Tests Progress of State's Coastal Management System

The Cherry Grove area of North Myrtle Beach is the site of what is probably the most altered salt marsh estuary in South Carolina. Between the 1940s and early 1970s, an inlet was filled in and closed off to gain easier access to a barrier island; the salt marsh was dredged to create a series of canals and finger canals; and the marsh was filled to create several hundred lots for a residential housing development.

The South Carolina Attorney General sued the developer of Cherry Grove in the mid-1960s, and got a temporary injunction to stop the dredging and filling. But the trial judge ruled against the State, saying that the developer owned the marsh and some creek beds. Then while the case was on appeal, the State Budget and Control Board voted to settle the case by an exchange of quit-claim deeds. A plat was prepared showing the entire area, and a straight boundary line was drawn dividing the remaining marsh and creeks roughly in half. As Chairman of the Board, the Governor signed the State's quit-claim deed on December 30, 1969.

On the same day the quit-claim deeds were recorded, the developer finalized a subdivision plan for the area given up by the State. The plan called for dredging and filling the marsh and creeks to create 8 more finger canals and about 200 more lots. The development was named Heritage Shores.

Between 1969 and the early

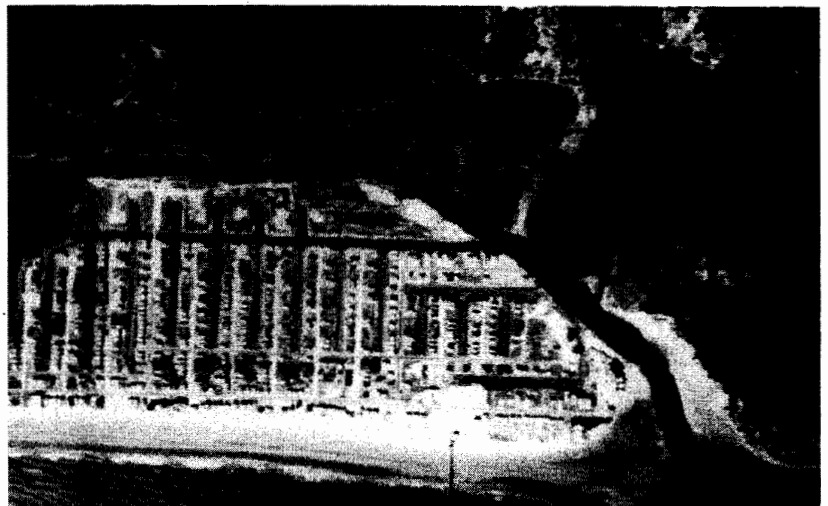
to mid-1970s, 6 finger canals were dredged and a number of new high ground lots were created at Heritage Shores, but the development plan was never completed. A controversy arose over the developer's actions in selling and mortgaging "lots" which were

still salt marsh. Although no one was ever prosecuted, the controversy apparently served to cut off the developer's ability to secure the money needed to complete the work. No roads or houses have been built in this area, and there are no utility

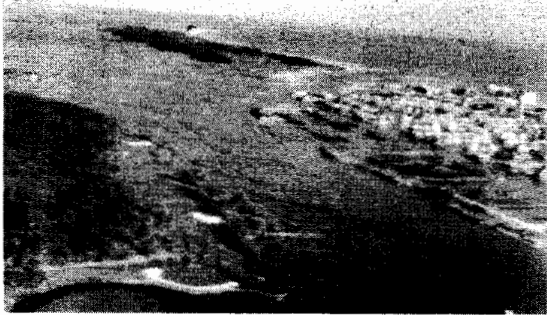
Cherry
Grove,
1952



Cherry
Grove,
1979



Cherry Grove (continued from front page)



Another view of Cherry Grove - Heritage Shores is the undeveloped center-right area; Little River inlet, Waites Island and Hog Inlet are in the background.

lines. Individual lots have never been surveyed to establish lot lines on the ground. Much of the original fill has eroded away and reverted to salt marsh or creek.

All of the dredging and filling was done before the South Carolina Coastal Zone Management Act was passed in 1977. From the time the SC Coastal Council was created through 1996, no one had applied for any permits necessary to complete the development of the property.

Wayne Beam, who was the Executive Director of the South Carolina Coastal Council from 1977 through 1996 but who is now a development consultant, filed an application on behalf of Dominion Trust, LLC, to fill salt marsh and construct bridges, roads and utility lines to develop the previously-filled areas. In March, 1999, Beam's former agency, now known as OCRM, granted him the permit.

Former Congressman, John Jenrette, who was part of the original development company claims ownership of most of the lots in Heritage Shores. Jenrette is a 25% owner in Dominion Trust LLC, to which he has granted an option to purchase his interest in the lots.

SCELP represents a group of Cherry Grove property owners, along with the SC Coastal Conser-

vation League and Sierra Club, who are appealing the OCRM permit as well as a water quality certification issued by DHEC. The appeal was heard by Administrative Law Judge John Geathers on November 15-17, 1999.

At the hearing before Judge Geathers, SCELP presented five witnesses, including expert witnesses in geology, engineering, and marine biology. The witnesses estab-

lished that the Heritage Shores area was virtually all salt marsh prior to the dredge and fill operation, and that much of Heritage Shores remains salt marsh today. The experts demonstrated that DHEC and OCRM failed to consider all of the potential negative environmental impacts of the proposed development; that storm water management would be a serious problem for the development; that a significant amount of bulkheading of the property is a foreseeable cumulative impact; that feasible alternatives to the filling of wetlands and construction of a bridge exist; that the Heritage Shores area has significant value to the environmental productivity of the estuary; and that there would be significant degradation of the environment if the development goes forward as proposed. SCELP also presented numerous exhibits including aerial photographs, maps, plats, and deeds relating to ownership of the area.

One of the issues SCELP has raised is whether Jenrette and Dominion Trust have any valid claim to ownership of Heritage Shores. Their claim of ownership is dependent on the validity of the 1969 quit-claim

deed given by the Governor. SCELP believes that the quit-claim deed is invalid because the Governor and the State Budget and Control Board lacked legal authority to transfer ownership of tidelands which are subject to the Public Trust Doctrine.

In response to SCELP's evidence, DHEC, OCRM and Dominion Trust presented four witnesses. The first of their witnesses, a DHEC water quality manager, admitted that he did not consider the cumulative impacts of development at Heritage Shores, despite express requirements in the DHEC regulations. He also admitted that he never visited the site and simply accepted at face value everything submitted by the developer's consultant. Two OCRM witnesses testified that the impacts would be minor and that the wetland fill and bridge are legal under the agency's transportation policies. They did not address other applicable regulations which require demonstrations of public need, lack of feasible alternatives, stormwater plans and development plans.

Woody Safrit, president of Dominion Trust, testified that the development plan was hatched over a drink with John Jenrette. He said that he "ran the numbers" and concluded that the plan was financially feasible. He claimed

The DHEC water quality manager admitted that he did not consider the cumulative impacts of development at Heritage Shores, despite express requirements in the DHEC regulations, and also admitted that he had never visited the site.

Cherry Grove (continued from page 2)

that he could not afford to build bridges instead of filling wetlands at three roadway sites, but was unable to provide any specific financial justification for this claim.

Judge Geathers has given the parties until January 15, 2000, to submit written arguments, after which he will render his decision. Judge Geathers' decision can be appealed to the Coastal Zone Management Appellate Panel, and from there to the state courts.

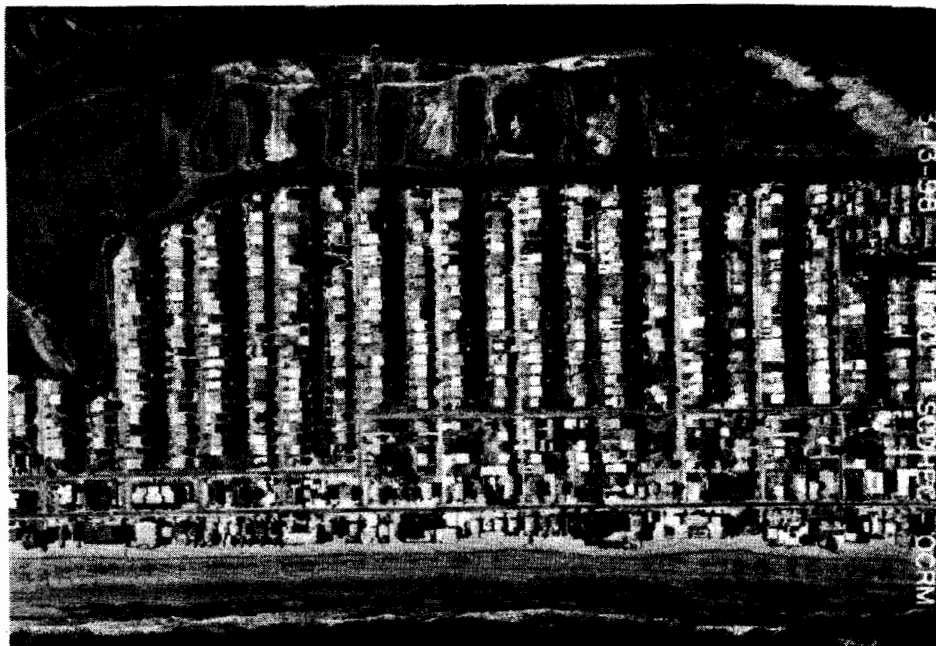
As our photographs show, Cherry Grove has suffered tremendous alterations and could be a "poster boy" for the need for coastal management. Unfortunately, the evidence so far indicates that the staffs of DHEC and OCRM have not properly assessed this project. The outcome of SCEL P's appeal may tell us a lot about whether our coastal managers have learned from the state's past mistakes.

Software Gift Assists SCEL P With Photo Exhibits

"This could not have come at a better time" SCEL P Director, Jimmy Chandler, said as he opened the box containing Adobe Photoshop and Adobe Image Ready software. This software proved crucial to preparations for the Cherry Grove Heritage Shores trial. Adobe Photoshop enabled SCEL P to easily crop, re-size, rotate, and print scanned aerial photographs from the Cherry Grove area (see cover page). The inclusion of these photos as exhibits at trial enabled SCEL P to show the court how the owners of this property have manipulated the natural layout over the years.

Adobe Photoshop is recognized as the finest software available for computer management and production of photographic images. With a combined retail value of \$1,095.00, SCEL P is sure to find many uses for this valuable software in future litigation as well as in management of SCEL P's upcoming web site.

SCEL P thanks Adobe Systems, Inc., and Gifts in Kind International for this contribution to protect South Carolina's natural resources.



Cherry Grove in 1998. Heritage Shores is the undeveloped area in the upper portion of this photograph.

Nuclear Laundry Appeal Results in More Stringent Permit Conditions

Plutonium and other radioactive materials in a residential area near downtown Columbia? Unfortunately, one of SCEL P's cases involves just that.

A company called Interstate Nuclear Services (INS) operates a "nuclear laundry" in the Rosewood residential area of Columbia. For nearly 20 years, the facility has quietly provided a valuable service of laundering clothing and other items that have become contaminated with radioactivity.

In December of 1996, DHEC issued a renewal permit to INS, but with more stringent conditions than prior permits - after an outcry once the community became aware of the radioactivity at the facility. The company appealed the special conditions, so the citizens and Sierra Club appealed the permit.

Earlier this year, Administrative Law Judge Alison Lee upheld the permit and the special conditions and imposed a cou-

ple of new conditions. But she also ruled that Sierra Club and some of the citizens did not have standing in the case.

All parties appealed to the DHEC Board: The Board heard the case in October 1999. Columbia attorney Bob Guild, who assists SCEL P in numerous cases, handled the arguments for both the citizens and Sierra Club. The Board upheld the permit and the special conditions, and overturned Judge Lee's ruling on standing -- the Board said that Sierra Club and all of the citizens involved had standing.

The new permit and the Board's ruling will provide better protection for the Rosewood neighborhood.

INS attorney Jim Potter indicated that the company will appeal and will seek an injunction against the special permit conditions. I don't think the company has much chance of winning, but it looks like our work is not over, yet.

Focus On Laidlaw

SCELP Clean Water Case Heard by U.S. Supreme Court

In October, the United States Supreme Court heard arguments in one of SCELP's Clean Water Act citizens suits. This case involves a suit filed by Friends of the Earth, Sierra Club and CLEAN seeking an end to mercury discharge violations, along with penalties for past violations. Laidlaw/TOC had committed hundreds of violations of its wastewater discharge permit, dumping excess amounts of mercury and other pollutants into the North Tyger River in Spartanburg County.

In 1997, Federal Judge Joe Anderson ruled in our favor, fining Laidlaw/TOC \$405,000. We had filed suit in 1992 and by the time he finally ruled, Laidlaw/TOC had come into compliance with the discharge permit. Judge Anderson also ruled that Laidlaw/TOC would have to pay our attorneys fees.

But in 1998 the federal appeals court in Richmond, Virginia, overturned Judge Anderson's ruling. The appeals court ruled that because Laidlaw/TOC had begun complying with the permit, the whole case was moot and should be dismissed; the appeals court also said that Laidlaw did not have to pay either the fine or our fees.

The US Supreme Court accepted our appeal, and heard the case on October 12. Many environmental lawyers were worried that the Supreme Court had agreed to hear this case in order to use it to place severe limits on citizens suits, or to rule that citizens suits were simply unconstitutional. Supreme Court Justice Antonin Scalia has been taking the Supreme Court in the direction of limiting citizens' ability to take environmental cases to court, and recent rulings of the

Supreme Court had been almost uniformly adverse to our position.

The arguments on Tuesday, however, appeared to indicate that Scalia will not prevail in this case. Washington, DC, attorney Bruce Terris, of the firm Terris, Pravlik & Millian argued the case for our side. He did an excellent job. It is always difficult to predict the outcome of a case by the questions asked by the justices during oral arguments, but I was encouraged by what I heard.

The US Department of Justice made a special appearance in the case and argued in our favor.

A decision from the Court could take several months. This case was the first time I've observed the US Supreme Court. Particularly because the arguments appeared to go well, it was a wonderful experience.

Hazardous Waste Landfill Case Heard by State Court of Appeals

Legal proceedings over the Laidlaw hazardous waste landfill, located near Pinewood on the shores of Lake Marion, have been pending for over 14 years. The current battle over the permit for this dump has been active since 1989.

This landfill was issued its first permit in 1977. The South Carolina Department of Health and Environmental Control issued an industrial waste landfill permit without providing any public notice or conducting a public hearing, and with almost no technical review. By 1985, some DHEC officials realized the folly of this permit, when a DHEC report was issued calling for establishment of a \$100 million cleanup fund. Fourteen years later, the cleanup fund has only \$14 million. The first public hearing on the landfill permit was held in 1989. In 1989 and in 1992, DHEC reaffirmed the need for a \$100 million cleanup fund, due to serious defects in the early landfill cells.

But DHEC has also had a con-

tinuing inability to follow through with forcing Laidlaw to either provide proper cleanup funding or even properly operate the site. After the 1985 call for a \$100 million cleanup fund, DHEC cut a deal allowing the company to provide a flawed \$33 million insurance policy instead. Then after more studies reaffirmed the need for the \$100 million cleanup fund, and after DHEC's official decisions imposed this requirement, in 1992 DHEC again made a deal with Laidlaw allowing the company to simply promise to pay for a cleanup when the landfill begins leaking.

By 1985, some DHEC officials realized the folly of this permit, when a DHEC report was issued calling for establishment of a \$100 million cleanup fund. Fourteen years later, the cleanup fund has only \$14 million.

The DHEC Board threw out the 1992 deal in 1994 and ordered Laidlaw to establish a \$133 million cash trust fund for cleanup. But less than a year later, in January 1995, the DHEC Board suddenly reversed itself and allowed Laidlaw to again simply give a mere promise to pay.

The Court of Appeals is considering Sierra Club's challenge to the landfill permit as well as the legality of new DHEC regulations which allow Laidlaw to give a promise instead of paying cash into a trust fund. We have been joined in our appeal by Santee Cooper, the SC Department of Natural Resources, CASE, Sumter County, Energy Research Foundation, and Senator Phil Leventis. The arguments before the Court of Appeals went very well. The judges were obviously well prepared on the issues and asked a lot of very good questions. I am optimistic about our chances of success. The decision from the Court of Appeals could be issued any day.

Quick Case Updates

DeBordieu Canal Dredging Case: In 1998, we obtained a favorable decision from both an Administrative Law Judge and the Coastal Zone Management Appellate Panel, severely limiting the amount of dredging which would be allowed in the DeBordieu canals. Although we could have gone to court to seek an order prohibiting all dredging, we elected to accept the limited permit.

After the state proceeding ended, DeBordieu still faced the need to obtain a federal permit from the U.S. Army Corps of Engineers. For over a year, DeBordieu has been negotiating with the Corps, the Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service over the terms of a Corps permit. To date, the negotiations have resulted in additional limits on the scope of the proposed dredging, but as of this writing, no final permit decision has been made.

Wetlands Restored in Ricefields case: In August 1998, we obtained a favorable decision in the South Carolina Court of Appeals, overturning a Coastal Zone Consistency Certification issued by OCRM to allow filing of a wetland area for residential development. While the case was on appeal, the developer had unfortunately filled the wetland. After several months of negotiations, SCEL P resolved the case by accepting the developer's offer to restore a portion of the destroyed wetland, and to create an additional new wetland area. A conservation easement now protects the wetland area in perpetuity.

Big Landing Case Tests Dock Rules: Where a developer has obtained a permit for a large community dock on the condition that no individual docks will be allowed, should OCRM later amend the permit to allow individual private docks? This issue is presented in a pending SCEL P case involving the Big Landing development in Little River. SCEL P represents the S. C. Coastal Conservation League and several property owners within and near the development. The case will be heard by an Administrative Law Judge in December.

State Ports Authority Daniel Island Terminal: SCEL P will be assisting the Town of Mt. Pleasant and possibly others in contesting the significant envi-

ronmental impacts of the proposed new State Ports Authority facility at Daniel Island. The new port project would result in substantial wetlands destruction and other impacts. Permit applications are pending before the Corps of Engineers, DHEC and OCRM.

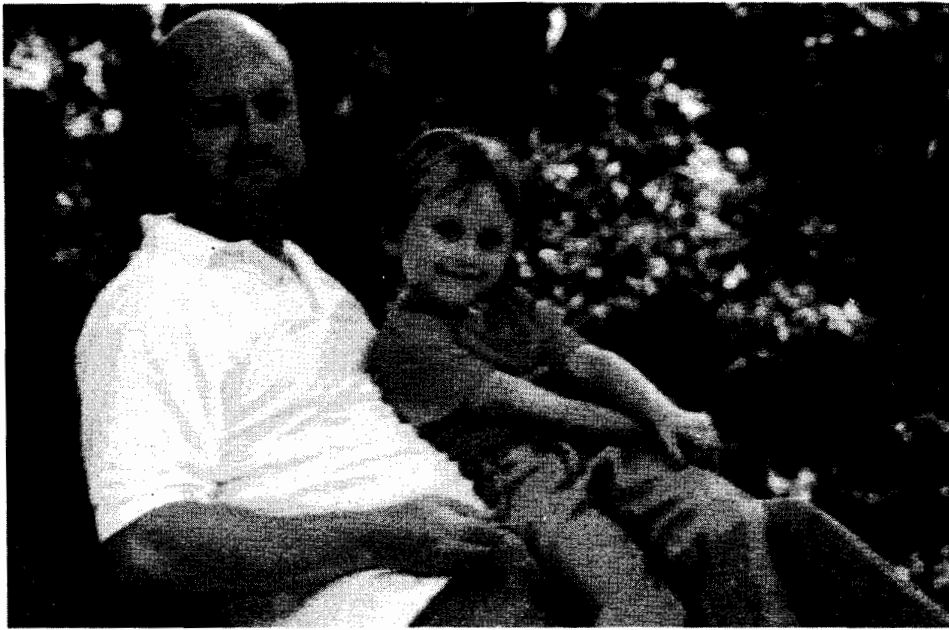
Palm Island Bridges: Where a developer obtains approval for an island residential development based on proposed access by boat, should the developer be allowed to later claim that a bridge over public trust tidelands should be permitted? The developers of two small islands in Beaufort County were recently denied bridge permits by OCRM, but the denial has been appealed. SCEL P represents a group of nearby residents and the S. C. Coastal Conservation League, who have intervened to help the agency defeat the developer's appeal.



Hilton Head Island Groins case: Are groins allowed under the S. C. Beachfront Management Act? This issue is presented in SCEL P's challenge to a permit issued to Port Royal Plantation on Hilton Head Island. SCEL P lost this case before an Administrative Law Judge and before the Coastal Zone Management Appellate Panel, but an appeal is pending in state court in Beaufort County.

League of Women Voters Hosts "An Evening with Doug Marlette"

The Georgetown County League of Women Voters truly outdid themselves this year hosting their annual fundraiser for SCEL P. "An Evening with Doug Marlette" was held on Thursday, October 21, 1999 at the Winyah Indigo Society Hall downtown Georgetown. For those of you who have been residing on another planet, Doug Marlette is a Pulitzer Prize-winning editorial cartoonist possibly better known for his comic strip "Kudzu". Marlette's presentation included a fascinating slide show accompanied by his witty commentary. SCEL P wishes to thank the League and Doug Marlette for a wonderful and memorable evening.



SCELP Staff Updates

The summer of '99 brought some needed help to SCELP Director, Jimmy Chandler. Amy Armstrong and Matthew Penn joined SCELP as summer law clerks from the University of South Carolina Law School. Amy and Matt worked on the Cherry Grove and Palm Island cases, and both helped with the recent Cherry Grove trial. Brian Kohm, an undergraduate from Hamilton College, also spent the summer assisting with SCELP's work. Van Whitehead, a recent Davidson College graduate, worked as a part-time volunteer on a wetlands permitting project.

Thanks to a grant from the Turner Foundation, Kathy Thomas

What It's About

As I hope this newsletter shows, we stay busy at SCELP, working hard to protect this State's environment. For the past 5 years, however, I must admit to spending fewer hours at the office than I once did. I now try to spend as much time as I can with my five-year-old, Leigh, shown here with me in one of our live oaks.

One of the great things about directing SCELP is that I can head home each evening knowing I've spent my day doing what I can to protect the natural resources of our beautiful state, so that one day all our children can enjoy them as well.

-Jimmy Chandler

joined SCELP in August as Assistant to the Director. Kathy is an experienced legal secretary and paralegal who is adapting quickly to non-profit environmental law. Kathy looks forward to a rewarding long-term position with SCELP and prays daily she never has to return to a general practice firm.

South Carolina Environmental Law Project, Inc.

The South Carolina Environmental Law Project, Inc. (SCELP) is a non-profit corporation organized under the laws of South Carolina and approved by the IRS as a 501(c)(3) tax exempt organization. SCELP's mission is to protect the natural environment of South Carolina by providing legal services and advice to environmental organizations and concerned citizens and by improving the state's system of environmental regulation.

SCELP was created in 1987 as part of Energy Research Foundation and became a separate entity in 1995. SCELP's cases have saved wetlands, improved water quality, reduced hazardous waste risks, protected other natural resources, and helped enforce penalties against those who have violated our environmental laws. SCELP's clients have included the Sierra Club, South Carolina Wildlife Federation, League of Women Voters, South Carolina Coastal Conservation League, Natural Resources Defense Council, Friends of the Earth, and many local groups throughout South Carolina. In addition to legal advocacy, SCELP promotes environmental law education through publications and seminars, and is a source of continuing legal advice to the state's environmental leaders.

James S. (Jimmy) Chandler, Jr., is president and general counsel of SCELP. Kathy Thomas is the Assistant to the President. The members of the Board of Directors of SCELP are:

Dana Beach, Charleston
Jimmy Chandler, Pawleys Island

Frances Close, Columbia
Harry Dalton, Rock Hill

Daryl Hawkins, Columbia
Trish Jerman, Columbia

Office Address:
707-C Front Street
Georgetown, S. C. 29440

Mailing Address:
Post Office Box 1380
Pawleys Island, S.C. 29585

Telephone: (843) 527-0078
FAX: (843) 527-0540
E-Mail: jchanpi@sccoast.net