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**OPINION, SUPREME COURT  
OF NORTH CAROLINA  
(APRIL 28, 2023)**

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IN THE SUPREME COURT OF  
NORTH CAROLINA

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DUKE ENERGY CAROLINAS, LLC

v.

MICHAEL L. KISER, ROBIN S. KISER,  
and SUNSET KEYS, LLC

v.

THOMAS E. SCHMITT and  
KAREN A. SCHMITT, ET AL.

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No. 398PA21

Before: NEWBY, Chief Justice.

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**OPINION OF THE COURT**

NEWBY, Chief Justice.

This case requires us to determine Duke Energy Carolinas, LLC's<sup>1</sup> scope of authority under an easement it acquired in order to create Lake Norman. Specifically, we consider, once the lake is created, whether this easement grants Duke the right to allow third-party

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<sup>1</sup> Duke Energy Carolinas, LLC is a subsidiary of Duke Energy Corporation (formerly Duke Power Company) and is herein referred to as "Duke."

homeowners to build structures over and into the submerged easement property and to use the lake for recreational purposes. To answer this question, we first look to the language of the easement. The plain language of the easement grants Duke “absolute water rights” to “treat [the land] in any manner [it] deem[s] necessary or desirable.” Because the easement’s plain language is clear and unambiguous and Duke’s actions are encompassed within the broad grant of authority, Duke properly allowed third-party homeowners to build structures over and into the submerged property and use the lake in a recreational manner. This expansive scope of authority evidenced by the easement’s plain language is consistent with Duke’s federal licensing obligations over Lake Norman and has been confirmed by the parties in practice. As such, we reverse the decision of the Court of Appeals.

On 4 August 1961, Duke purchased an easement from B. L. and Zula C. Kiser (the Kiser Grandparents) covering a 280.4-acre tract as part of what is now known as Lake Norman. At the time of the conveyance, much of the bed of Lake Norman was dry. Duke acquired the easement, as well as an interest in the surrounding lakebed property, in order to create the lake by constructing a dam pursuant to a federal license. Since 1958, Duke has maintained a license issued by the Federal Energy Regulatory Commission (FERC) to operate a long-term hydroelectric project involving Lake Norman and several surrounding lakes and dams and “to supervise and control the

uses and occupancies [of Lake Norman] for which it grants permission.”<sup>2</sup>

Accordingly, the Kiser Grandparents granted Duke, its successors, and assigns by deed an easement to create a lake with two distinct component parts: a component covering the anticipated lake level and a component covering the area subject to higher water. The first component part of the conveyance includes

a permanent easement of water flowage, absolute water rights, and easement to back, to pond, to raise, to flood and to divert the waters of the Catawba River and its tributaries in, over, upon, through and away from the 280.4 acres, more or less, of land hereinafter described, together with the right to clear, and keep clear from said 280.4 acres, all timber, underbrush, vegetation, buildings and other structures or objects, and to grade and to treat said 280.4 acres, more or less, in any manner deemed necessary or desirable by Duke Power Company.

The first component (the Flowage Easement) references the 280.4 acres of land which would become submerged property resting below an elevation of 760 feet as part of the planned lake level. To cover the area subject to higher water, the Kiser Grandparents granted Duke, its successors, and assigns:

a permanent flood easement, and the right, privilege and easement of backing, ponding,

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<sup>2</sup> FERC initially granted Duke a license for a 50-year term in 1958. Thereafter, the license was renewed annually for seven years. In 2015, FERC relicensed Duke for a 40-year term.

raising, flooding, or diverting the waters of the Catawba River and its tributaries, in, over, upon, through, or away from the land hereinafter described up to an elevation of 770 feet above mean sea level, U.S.G.S. datum, whenever and to whatever extent deemed necessary or desirable by the Power Company in connection with, as a part of, or incident to the construction, operation, maintenance, repair, altering, or replacing of a dam and hydroelectric power plant to be constructed at or near Cowan's Ford on the Catawba River . . . and otherwise use and treat said land up to said 770 feet elevation in any manner deemed necessary or desirable by the Power Company in connection with the construction, reconstruction, maintenance and operation of the dam and power plant above referred . . . and of the reservoir or lake created or to be created by same.<sup>3</sup>

The second component of the easement described in the deed (the Flood Easement) references the land that would rest “up to . . . 770 feet above mean sea level” and thus would remain dry land, but subject to flooding, after the creation of Lake Norman.<sup>4</sup>

About two years later Duke flooded the land at issue. Upon the impoundment of Lake Norman, the Kiser Grandparents retained an area of land that became an island (Kiser Island) surrounded by the

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<sup>3</sup> The language of the easement reflects a filed copy that immaterially differs from the original.

<sup>4</sup> The Flowage and Flood Easements are referred to collectively as “the easement.”

280.4-acre submerged parcel subject to Duke’s easement. Between 1964 and 2015, the Kiser Grandparents subdivided Kiser Island into residential waterfront lots and sold the lots to numerous third-party buyers (the third-party homeowners). The Kiser Grandparents retained at least one lot (the Kiser lot).

After the creation of Lake Norman and Kiser Island, Duke implemented the Shoreline Management Guidelines (the SMG) in accordance with its FERC license. The SMG are a “detailed set of procedures and criteria” that “regulate activities within [Lake Norman] pursuant to [Duke’s] FERC obligation[]” to manage Lake Norman’s shoreline, uses, and occupancies. Specifically, the SMG “regulate the construction and maintenance of lake access facilities” and similar dock structures through “permits or other agreements” that Duke issues. Thus, pursuant to the SMG and with Duke’s permission, the third-party homeowners began building docks, piers, and other shoreline structures as early as 1964 that extend from their waterfront lots over and into the waters of Lake Norman. The Kiser family has also sought and received permission from Duke to build certain shoreline structures.<sup>5</sup> Accordingly, many of the structures built by the Kisers and the third-party

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<sup>5</sup> At oral argument, when asked whether the Kisers have requested a permit from Duke to build a dock or similar structure in the past, counsel for the Kisers responded in the affirmative, stating that Duke has “the authority to grant permission to build” such structures. *See* Oral Argument at 29:58, *Duke Energy Carolinas, LLC v. Kiser* (No. 398PA21) (Feb. 7, 2023), <https://www.youtube.com/watch?v=yh0mHp58byg> (last visited Mar. 16, 2023).

homeowners touch or are anchored to the Kisers' submerged property subject to Duke's easement.

During a drought in 2015, the lake level receded. Michael L. Kiser, a grandson of the Kiser Grandparents, built a seventeen-and-a-half-foot retaining wall extending from the Kiser lot into the once submerged property. Mr. Kiser then backfilled the area behind the wall with dry materials to extend the shoreline and increase the size of the Kiser lot. As a result, the new construction encompassed nearly 2,449 square feet of land covered by Duke's easement which had previously been submerged. Mr. Kiser, however, did not apply for a permit or receive permission from Duke prior to building the retaining wall. In response to Mr. Kiser's actions, Duke issued a Stop-Work Directive, and the North Carolina Department of Environmental Quality (NCDEQ) notified Mr. Kiser that the unauthorized construction would affect the waters of Lake Norman. Despite multiple requests by both Duke and NCDEQ, Mr. Kiser did not remove the retaining wall or any of the fill material from the lakebed within the easement boundary.

On 27 January 2017, Duke filed suit against Mr. Kiser and his wife, Robin S. Kiser, together with their entity Sunset Keys, LLC<sup>6</sup> (the Kisers), alleging trespass and wrongful interference with the easement by building the retaining wall and backfilling the

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<sup>6</sup> Upon the death of Michael Kiser's father in March of 2016, Michael Kiser and his two brothers became the owners of the land at issue. They subsequently conveyed the land to Sunset Keys, LLC, of which Michael Kiser and his two brothers are the members.

lakebed area subject to Duke's easement. Duke sought injunctive relief requiring the Kisers "to remove the retaining wall and fill material from the lake bed" and restore "the disturbed shoreline area." On 13 February 2017, the Kisers responded and asserted counterclaims against Duke. The Kisers challenged Duke's authority under the easement to demand removal of the retaining wall, to issue dock permits to third-party homeowners, and to allow recreational use of the waters. In addition, the Kisers brought trespass claims against the third-party homeowners for building structures on the Kisers' submerged property without their consent, joining the homeowners<sup>7</sup> as third-party defendants.

On 3 August 2018, Duke moved for partial summary judgment regarding its claims for wrongful interference and injunctive relief against the Kisers. The trial court held a hearing on 13 August 2018, heard oral argument from both parties, and considered the pleadings, affidavits, and briefs submitted to the court. On 27 August 2018, the trial court entered an order and judgment granting Duke's motion for partial summary judgment. The trial court found that Duke's rights under the easement entitled it to have the retaining wall cleared from the submerged property. Accordingly, the trial court ordered the Kisers to remove the retaining wall and clear the backfilled area from the lakebed.

On 25 October 2019, Duke moved for summary judgment on its remaining trespass claim and the Kisers' counterclaims. On 28 October 2019, the third-

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<sup>7</sup> Several of the third-party homeowners to this appeal are represented by counsel while others are proceeding unrepresented.



party homeowners moved for summary judgment on the Kisers' third-party trespass claims. After conducting a hearing in which the trial court heard oral argument and considered materials submitted by the parties, the trial court entered an order and judgment on 2 January 2020 granting summary judgment in favor of Duke and the third-party homeowners. The trial court recognized Duke's broad authority under the easement and determined that Duke "acted within the scope of [its] authority" by granting permits for docks and other structures on the submerged property and by allowing recreational use of the water above the submerged property. Furthermore, the trial court quieted title in the waterfront lots, structures, and waters to the third-party homeowners, finding that the Kisers' claims constituted a cloud upon the third-party homeowners' titles to their properties. The Kisers appealed.<sup>8</sup>

On appeal, the Kisers argued that Duke acted outside the scope of its authority under the easement by allowing third parties to use the 280.4 acres of Lake Norman without the Kisers' consent and that the trial court erred by quieting title in the waterfront structures to the third-party homeowners. *Duke Energy Carolinas, LLC v. Kiser*, 280 N.C. App. 1, 6, 867 S.E.2d 1, 7–8 (2021). The Court of Appeals reversed the trial court's 2 January 2020 order granting summary judgment to Duke and the third-party homeowners.

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<sup>8</sup> The Kisers filed and served a notice of appeal for both of the trial court's orders but certified only the 2 January 2020 order for review. Thus, the Court of Appeals limited its review to the 2 January 2020 order. Accordingly, we likewise limit our review to the 2 January 2020 order. The trial court's 27 August 2018 order remains undisturbed.

*Id.* at 16, 867 S.E.2d at 14. First, the Court of Appeals recognized that the plain language of the Flowage Easement is unambiguous and broad enough to “virtually convey a fee simple interest” to Duke. *Id.* at 9, 867 S.E.2d at 9. The Court of Appeals, however, “decline[d] to read [the Flowage Easement] in such a way,” deferring instead to its subjective view of the Kiser Grandparents’ purported intent in retaining the fee title to the submerged property.<sup>9</sup> *Id.* at 9–10, 867 S.E.2d at 9–10.

Next, upon noting Duke’s broad interest in the submerged property, the Court of Appeals considered whether an easement granting “virtually unlimited authority to ‘treat’ property ‘in any manner’ includes the power for the easement holder to permit strangers to the agreement to use the land for their own benefit.” *Id.* at 10, 867 S.E.2d at 10. The Court of Appeals adopted a bright-line principle that

unless an easement explicitly states otherwise, an easement holder may not permit strangers to the easement agreement to make use of the land, other than for the use and benefit of the easement holder, without the consent of the landowner where such

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<sup>9</sup> There are multiple reasons why the Kiser Grandparents may have conveyed an easement to Duke rather than title to the parcel in fee simple. It was error for the Court of Appeals to project its own subjective beliefs in attempting to discern the original parties’ purported intent for granting the easement. When the language of an easement is clear and unambiguous, the court is to infer the intention of the parties from the words of the easement itself. See *State v. Philip Morris USA Inc.*, 359 N.C. 763, 773, 618 S.E.2d 219, 225 (2005).

use would constitute additional burdens upon the servient tenement.

*Id.*; see *Lovin v. Crisp*, 36 N.C. App. 185, 189, 243 S.E.2d 406, 409 (1978) (holding that under the terms of the easement at issue, because the easement holder’s surrounding property was not mentioned in the easement, the nearby land could not benefit from the easement holder’s interest). Therefore, according to the Court of Appeals, because the third-party homeowners here are not mentioned in the easement and did not have a property interest in the land when the easement was created, “Duke exceeded its scope of authority by permitting the [third-party homeowners] to construct and maintain structures over and into the Kisers’ submerged land without the Kisers’ consent.” *Kiser*, 280 N.C. App. at 11, 867 S.E.2d at 10.

Duke filed a petition for discretionary review with this Court on 22 November 2021. On 2 December 2021, the third-party homeowners also filed a petition for discretionary review. This Court allowed the parties’ petitions on 9 February 2022.

This Court reviews an appeal of a summary judgment order de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is proper when “there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a matter of law.” N.C.G.S. § 1A–1, Rule 56(c) (2021). The moving party is entitled to summary judgment “when only a question of law arises based on undisputed facts.” *Usery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 334, 777 S.E.2d 272, 278 (2015). “All facts asserted by the [nonmoving] party are taken as true and . . . viewed in the light most

favorable to that party.” *Id.* (alterations in original) (quoting *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)).

In applying these well-established principles for summary judgment here, we consider whether an easement granted to establish a lake, which provides for “absolute water rights” to “treat” the servient estate “in any manner deemed necessary or desirable,” allows the easement holder to permit third parties to use the land when the easement holder so deems it necessary or desirable. “An easement is an interest in land . . . generally created by deed.” *Borders v. Yarbrough*, 237 N.C. 540, 542, 75 S.E.2d 541, 542 (1953). “An easement deed . . . is, of course, a contract.” *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962). As such, the ordinary rules of contract construction apply to construing an easement. *Id.*

Like contracts, interpreting an easement “requires the court to examine the language of the [easement] itself for indications of the parties’ intent at the moment of execution.” *State v. Philip Morris USA Inc.*, 359 N.C. 763, 773, 618 S.E.2d 219, 225 (2005) (citing *Lane v. Scarborough*, 284 N.C. 407, 409–10, 200 S.E.2d 622, 624 (1973)). In doing so, “[i]t must be presumed the parties intended what the language used clearly expresses, and the [easement] must be construed to mean what on its face it purports to mean.” *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946) (citation omitted). Accordingly, “[i]f the plain language of [the easement] is clear, the intention of the parties is inferred from the words of the [easement],” *Philip Morris USA Inc.*, 359 N.C. at 773, 618 S.E.2d at 225

(quoting *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996)), and the “construction of the [easement] is a matter of law for the court,” *Hagler v. Hagler*, 319 N.C. 287, 294, 354 S.E.2d 228, 234 (1987).

In addressing whether Duke has authority under the easement to allow the third-party homeowners to build shoreline structures over and into the submerged property and use the waters of Lake Norman, we first look to the plain language of the easement. In looking to the plain language, we do bear in mind that the original parties created the easement in order for Duke to form a lake. Here the Flowage Easement expressly provides that the Kiser Grandparents permanently granted Duke “absolute water rights” to “treat said 280.4 acres . . . in any manner [Duke] deem[s] necessary or desirable.” The language of the Flowage Easement is clear, unambiguous, and broad in scope, plainly allowing Duke to treat the submerged property however Duke deems “necessary or desirable.” Significantly, the easement’s text does not limit how Duke may treat the submerged property, confine Duke’s exercise of discretion, set conditions that Duke must satisfy before using the submerged property in a particular manner, or prohibit Duke from allowing third-party uses of the property without the Kisers’ consent.

The Kisers, on the other hand, contend that because the easement is silent with respect to the third-party homeowners, the third parties have no right to use the waters recreationally, build shoreline structures into the submerged easement property, or otherwise benefit from the easement without the Kisers’ consent. The Kisers, however, overlook Duke’s

expansive scope of authority evidenced by the Flowage Easement's broad, unambiguous language. Such an expansive reading is consistent with the original parties' understanding that the purpose of the easement was for Duke to create and maintain a lake. Accordingly, Duke may properly exercise its expansive rights under the Flowage Easement to benefit the third-party homeowners when it is necessary or desirable to Duke. Therefore, Duke acted within the scope of its authority under the Flowage Easement by allowing the third-party homeowners to build docks, piers, and other structures into the submerged property and to use the waters of Lake Norman for recreation.

The Court of Appeals, despite initially recognizing the Flowage Easement's unambiguous language and Duke's broad authority under the easement, deferred instead to the original parties' purported intent in construing the easement. *Kiser*, 280 N.C. App. at 9–10, 867 S.E.2d at 9–10. As a result, the Court of Appeals adopted a bright-line rule from *Lovin*—that easement rights may only benefit the easement holder unless third parties are also expressly named in the easement—which contradicts the Flowage Easement's plain language. *Id.* at 10, 867 S.E.2d at 10. *Lovin*, however, is readily distinguishable from the facts here, is not binding on this Court, and establishes a principle that narrows the Flowage Easement's broad and unambiguous language.

In *Lovin*, a landowner conveyed an easement by deed to his neighbor. *Lovin*, 36 N.C. App. at 188, 243 S.E.2d at 409. The language of the easement permitted the easement holder “to install and maintain a water line” on a specific tract of land. *Id.* Because the easement's language was narrowly confined to benefit one

parcel of land and the surrounding property was not described in the easement, the court held that the easement holder could not install additional water lines to benefit neighboring lands. *Id.* at 189–90, 243 S.E.2d at 409–10. Here, however, unlike the limited easement in *Lovin* confining the use of the easement to a specific tract of land for a narrow purpose, the language of the Flowage Easement is broad and does not constrain how Duke may treat the easement property. There is a vast difference between intending to create and maintain a lake versus allowing a water line to cross a property. As such, under the Flowage Easement’s broad language, Duke may permit third parties to use the easement property when such use is necessary or desirable to Duke. Therefore, because the easement in *Lovin* and the Flowage Easement here serve different purposes and contain material differences, the Court of Appeals erred by relying on *Lovin* and applying a novel principle that contradicts and narrows the Flowage Easement’s clear language.

The Flowage Easement’s unambiguous language granting Duke broad authority over the submerged property is consistent with the purpose of Duke’s federal licensing obligations over Lake Norman and has been confirmed by the parties in practice. When Duke obtained the FERC license in 1958, it likewise needed broad authority over the land at issue in order to flood the entire parcel and comply with its requirements under the license for developing and operating Lake Norman. As such, the Kiser Grandparents conveyed to Duke “permanent” and “absolute water rights” over the Kisers’ parcel, which provided Duke with substantial discretion to manage the

submerged parcel. Duke therefore created a permit plan for homeowners seeking to build lake access facilities in accordance with Duke's obligation to oversee Lake Norman's shoreline, uses, and occupancies. Duke's permit plan is encompassed within Duke's broad grant of authority under the Flowage Easement's plain language and likewise supports the purposes of Duke's FERC license. Ultimately, Duke's broad grant of authority under the Flowage Easement allows Duke to comply with its FERC license requirements.

Additionally, the parties' practices over the past sixty years have consistently confirmed that Duke has authority under the Flowage Easement to allow the third-party homeowners to build shoreline structures into the submerged property. Since the Kisers began subdividing and selling the waterfront lots on Kiser Island, the third-party homeowners have complied with Duke's permit plan and have received authorization from Duke, rather than the Kisers, to build docks, piers, and other shoreline structures on their lots and into the submerged easement property. Notably, the Kiser family has also sought and received permission from Duke to build shoreline structures extending from the Kiser lot and into the submerged property because Duke has "the authority to grant permission to build" such structures. *See* Oral Argument at 29:58, *Duke Energy Carolinas, LLC v. Kiser* (No. 398PA21) (Feb. 7, 2023), <https://www.youtube.com/watch?v=yh0mHp58byg> (last visited Mar. 16, 2023). Thus, not only have the third-party homeowners sought permission from Duke, rather than the Kisers, to build into the submerged land, but the Kisers have also requested and received



similar authorization from Duke. As such, both the named and unnamed parties to the easement have repeatedly acted in a manner consistent with Duke's having authority under the Flowage Easement to permit homeowners to build structures from their waterfront lots over and into the submerged property.

In summary, the plain language of the easement is unambiguous and grants Duke broad authority to treat the submerged easement property in any manner Duke deems necessary or desirable. Therefore, Duke acted within the scope of its broad authority under the easement by allowing the third-party homeowners to build docks, piers, and other structures over and into the submerged land without the Kisers' consent. The easement's plain language is consistent with Duke's federal licensing obligations and has been confirmed by the parties in practice. Accordingly, the decision of the Court of Appeals is reversed.

REVERSED.

**OPINION, COURT OF APPEALS  
OF NORTH CAROLINA  
(OCTOBER 19, 2021)**

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IN THE COURT OF APPEALS  
OF NORTH CAROLINA  
2021-NCCOA-558

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DUKE ENERGY CAROLINAS, LLC,

*Plaintiff,*

v.

MICHAEL L. KISER, ROBIN S. KISER,  
and SUNSET KEYS, LLC,

*Defendants/  
Third-Party Plaintiffs,*

v.

THOMAS E. SCHMITT and  
KAREN A. SCHMITT, ET AL.,

*Third-Party  
Defendants.*

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No. COA20-333

Catawba County, No. 17 CVS 194

Before: WOOD, Judge.

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Appeal by Defendants from orders and judgments entered 27 August 2018 and 2 January 2020 by Judge Nathaniel J. Poovey in Catawba County Superior Court. Heard in the Court of Appeals 24 February 2021.

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WOOD, Judge.

¶ 1 This case concerns the rights of third-party landowners to build and maintain docks and other structures over and into the submerged land belonging to another, such land comprising a portion of the lakebed, subject to the easement of a power company. For reasons outlined below, we reverse and remand.

## **I. Factual and Procedural Background**

¶ 2 From 1946 to 1960, before the construction of Lake Norman, B. L. and Zula Kiser (the “Kiser Grandparents”) acquired the land at issue in fee simple. In 1960, much of the bed of Lake Norman was dry. By 1961, Duke Power Company (“Duke”)<sup>1</sup> intended to flood lands adjacent to the Catawba River, the river that now feeds Lake Norman, with the construction of the Cowan’s Ford Dam. Duke obtained titles and easement rights to those lands that are now submerged under Lake Norman pursuant to the requirements of a Federal Energy Regulatory Commission (“FERC”) license. The majority of the owners of the now submerged land sold their property in fee to Duke, while the Kiser Grandparents chose to grant only

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<sup>1</sup> In the present case, Duke Energy Carolinas, LLC is the controlling subsidiary of Duke Energy Corporation (previously Duke Power Company) and is likewise referenced as “Duke.”

easements to Duke. The Kiser Grandparents granted Duke the following easements:

[A] permanent easement of water flowage, absolute water rights, and easement to back, to pond, to reaise [sic], to flood and to divert the waters of the Catawba River and its tributaries in, over, upon, through and away from the 280.4 acres, more or less, of land hereinafter described, together with the right to clear, and keep clear from said 280.4 acres, all timber, underbrush, vegetation, buildings and other structures or objects, and to grade and to treat said 280.4 acres, more or less, in any manner deemed necessary or desirable by Duke Power Company.

. . . .

And . . . a permanent flood easement, and the right, privilege and easement of backing, ponding, raising, flooding, or diverting the waters of the Catawba River and its tributaries, in, over, upon, through, or away from the land hereinafter described up to an elevation of 770 feet above mean sea level, U.S.G.S. datum, whenever and to whatever extent deemed necessary or desirable by the Power Company in connection with, as a part, of, or incident to the construction, operation, maintenance, repair, altering, or replacing of a dam and hydroelectric power plant to be constructed at or near Cowan's Ford on the Catawba River. . . .<sup>2</sup>

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<sup>2</sup> For purposes of review, the language of the easement here

¶ 3 The first easement (the “Flowage Easement”) references 280.4 acres of land by metes and bounds, which topographically rested below an “elevation 760 feet above mean sea level,” and which would become part of the bed of Lake Norman. The second easement (the “Flood Easement”) references land by metes and bounds which topographically rested between 760 feet and “770 feet above mean sea level,” that would remain dry land, but subject to flooding, after the creation of Lake Norman. The Kiser Grandparents and their successors made no further grants or conveyances of the land to Duke.

¶ 4 In 1963, Duke flooded the lands that today comprise Lake Norman. Of those lands not submerged, the Kiser Grandparents retained an area of land that became an island (the “Kiser Island”). The Kiser Grandparents subsequently subdivided the Kiser Island into residential waterfront lots and conveyed title in fee simple to most of those lots to various buyers (the “Third Parties”) between 1964 and 2015. The Kiser Grandparents retained at least one lot (the “Kiser Lot”) for their continued personal use.

¶ 5 Consistent with its license from the FERC to dam the Catawba River, Duke instituted a project plan that outlined requirements and a permitting process for the construction of shoreline improvements into the waters of Lake Norman. Relying upon Duke’s permitting process, many of the Third Parties on Kiser Island proceeded to construct docks and other structures that extended from the dry land of their lots over and into the waters of Lake Norman, and

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reflects a filed copy that immaterially differs from the original through spelling and grammatical differences.

“that are anchored to or at least touch in some way . . . the submerged tract, the Kiser property that’s beneath Lake Norman.” Some of these structures were built prior to when Duke’s permitting process began and were memorialized as existing when the procedure commenced.

¶ 6 In 2015, M. L. Kiser (“M.L.”), a grandson of the Kiser Grandparents, erected a retaining wall (the “2015 wall”) approximately seventeen and a half feet from the Kiser Lot into Lake Norman and upon the 280.4 acres to which Duke has an easement. M.L. began backfilling the wall to add additional dry surface area to the Kiser Lot, which extended his shoreline. Unlike the Third Parties, M.L. did not originally apply for a permit from Duke to construct the 2015 wall; though, the new construction did encompass land previously submerged and subject to Duke’s Flowage Easement.

¶ 7 In response to this construction, Duke issued a Stop-Work Directive, and the North Carolina Division of Water Resources notified M.L. that the construction of the wall would impact the waters of Lake Norman. A survey conducted on the Kisers’ property by a licensed professional land surveyor in August 2016 revealed that “the total area of the retaining wall and backfill within Lake Norman is approximately 2,449 square feet.”

¶ 8 After the death of M.L.’s father in March 2016, he and his two brothers became the owners of the land at issue. That land was then conveyed to Sunset Keys, LLC (“Sunset Keys”), of which M.L. and his two brothers are the members.

¶ 9 On January 27, 2017, Duke commenced this action against M. L. Kiser, his wife, Robin S. Kiser, and, later, Sunset Keys, LLC (“the Kisers”) alleging trespass and wrongful interference with an easement and requested injunctive relief. The Kisers responded with counterclaims against Duke, challenging Duke’s authority under the easements to demand removal of the 2015 wall, to issue permits to the Third Parties for the construction of docks on their lots, and to open the waters above those lots to recreational use. The Kisers subsequently moved to join the Third Parties as defendants on February 13, 2017.

¶ 10 Duke moved for partial summary judgment regarding its claim for injunctive relief on August 13, 2018. The trial court entered an order and judgment granting partial summary judgment on August 22, 2018 (the “2018 Order”), to have the 2015 retaining wall and the backfilled area cleared.<sup>3</sup> Duke and the Third Parties then moved for summary judgment denying all of the Kisers’ counterclaims and allowing Duke’s remaining trespass claim on October 24, 2019, and October 25, 2019, respectively. On November 15, 2019, the trial court entered an order and judgment enforcing the 2018 Order.

¶ 11 On January 2, 2020, the trial court entered an order and judgment (the “2020 Order”) granting summary judgment in favor of Duke and the Third Parties by quieting title in the lots, improvements, and use of the waters to the Third Parties. The trial court ruled Duke had operated within its “Scope of Authority” when it granted permission for the Third

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<sup>3</sup> For reasons stated below, the 2018 Order to remove the wall and fill material is not reviewed here.

Parties to construct improvements over and into the Kiser's submerged land. The trial court stated, "[T]his Order and Declaratory Judgment does not dispose of all the claims in this action." The Kisers filed and served a notice of appeal for the 2020 Order on January 24, 2020, and later filed and served a notice of appeal for the 2018 Order on February 3, 2020. While the 2020 Order was certified for review pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), the 2018 Order was not.

## II. Discussion

¶ 12 We review a trial court's summary judgment order *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). "Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Reese v. Mecklenburg Cnty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 38 (2009) (citations omitted). We cannot affirm a trial court's summary judgment order if a "genuine issue as to any material fact" remains when viewed in the light most favorable to the non-moving party. *Forbis*, 361 N.C. at 524, 649 S.E.2d at 385 (quoting N.C. R. Civ. P. 56(c)). When reviewing a summary judgment order, "we view the evidence in the light most favorable to the non-movant." *Scott & Jones, Inc. v. Carlston Ins. Agency, Inc.*, 196 N.C. App. 290, 293, 677 S.E.2d 848, 850 (2009) (quoting *Baum v. John R. Poore Builder, Inc.*, 183 N.C. App. 75, 80, 643 S.E.2d 607, 610 (2007) (citation omitted)).

¶ 13 Because not all issues are disposed of in this case, we review this case as an interlocutory appeal. See *Larsen v. Black Diamond French Truffles*,



*Inc.*, 241 N.C. App. 74, 76, 772 S.E.2d 93, 95 (2015). The parties correctly note that a non-certified, interlocutory judgment is not ripe for review when the appellant does not raise the issue in the appellant's principal brief. *Id.* at 79, 772 S.E.2d at 96. This being true of the 2018 Order, we decline to review the 2018 Order and limit our review and analysis to the 2020 Order.

### **A. Third Party Activity upon Easement**

¶ 14 The Kisers first contend Duke did not act within its scope of authority when it permitted the use of the 280.4 acres to the Third Parties without the Kisers' consent and the trial court ultimately erred in quieting title of the lakefront structures to the Third Parties. We agree.

¶ 15 A "cloud upon title" arises when there is a claim or encumbrance that affects the ownership of a property. *See York v. Newman*, 2 N.C. App. 484, 488, 163 S.E.2d 282, 285 (1968) ("A cloud upon title is, in itself, a title or encumbrance, apparently valid, but [is] in fact invalid. It is something which, nothing else being shown, constitutes an encumbrance upon it or a defect in it." (citation omitted)). The elements have been defined by this Court as "(1) the plaintiff must own the land in controversy, . . . and (2) the defendant must assert some claim in the land adverse to plaintiff's title, estate, or interest." *Greene v. Trustee Servs. of Carolina, LLC*, 244 N.C. App. 583, 592, 781 S.E.2d 664, 671 (2016) (citations omitted); *see also York*, 2 N.C. App. at 488, 163 S.E.2d at 285; *Hensley v. Samel*, 163 N.C. App. 303, 307, 593 S.E.2d 411, 414 (2004).

¶ 16 The elements of a “cloud on title” action are the same as those for a “quiet title” claim. *See Greene*, 244 N.C. App. at 591-92, 781 S.E.2d at 670-71; *see also Quinn v. Quinn*, 243 N.C. App. 374, 380, 777 S.E.2d 121, 125 (2015) (citation omitted). The purpose of a quiet title or cloud upon title action is to “free the land of the cloud resting upon it and make its title clear and indisputable.” *Resort Dev. Co. v. Phillips*, 278 N.C. 69, 77, 178 S.E.2d 813, 818 (1971) (citation omitted). Here, the land at issue is owned by the Kisers and subject to easements granted to Duke by the Kiser Grandparents. The Third Parties are not parties to the easement.

¶ 17 “An easement is an incorporeal hereditament, and is an interest in the servient estate. . . . ‘A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner.’ “ *Davis v. Robinson*, 189 N.C. 589, 597-98, 127 S.E. 697, 702 (1925) (citations omitted). More simply, an “easement is a privilege, service, or convenience which one neighbor has of another.” *Id.*

¶ 18 Beginning with the nature of easements generally, “[a]n easement deed, such as the one in the case at bar, is, of course, a contract.” *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962). “A contract which is plain and unambiguous on its face will be interpreted as a matter of law by the court.” *Simmons v. Waddell*, 241 N.C. App. 512, 520, 775 S.E.2d 661, 671 (2015) (quoting *Dept. of Transportation v. Idol*, 114 N.C. App. 98, 100, 440 S.E.2d 863, 864 (1994)).

¶ 19 The interpretation of ambiguous contracts, by contrast, “is for the jury.” *Cleland v. Children’s*

*Home, Inc.*, 64 N.C. App. 153, 156, 306 S.E.2d 587, 589 (1983). Ambiguity exists where the contract may be “fairly and reasonably susceptible to either of the constructions asserted by the parties.” *St. Paul Fire & Marine Ins. Co. v. Freeman-White Associates, Inc.*, 322 N.C. 77, 83, 366 S.E.2d 480, 484 (1988) (quoting *Maddox v. Insurance Co.*, 303 N.C. 648, 650, 280 S.E.2d 907, 908 (1981) (citation omitted)). Though a dispute as to contractual interpretation may lend credence to its ambiguity, *id.* (citation omitted), “ambiguity is not established by the mere fact that one party makes a claim based upon a construction of its language which the other party asserts is not its meaning.” *RME Mgmt., LLC v. Chapel H.O.M. Assocs., LLC*, 251 N.C. App. 562, 568, 795 S.E.2d 641, 645 (2017) (alterations omitted) (quoting *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970)).

¶ 20 “Whenever a court is called upon to interpret a contract[,] its primary purpose is to ascertain the intention of the parties at the moment of its execution.” *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973) (citation omitted). In doing so, “[i]t must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean.” *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946) (citations omitted).

¶ 21 Easements may either be appurtenant or in gross. *Davis*, 189 N.C. at 598, 127 S.E. at 702. While an appurtenant easement “attaches to, passes with[,] and is an incident of ownership of the particular land” referred to as the dominant tenement, *Shear v.*

*Stevens Bldg. Co.*, 107 N.C. App. 154, 161, 418 S.E.2d 841, 846 (1992), an easement in gross “is a mere personal interest in or right to use the land of another” that is not attached to any dominant tenement and “usually ends with the death of the grantee.” *Shingleton v. State*, 260 N.C. 451, 454, 133 S.E.2d 183, 185 (1963) (citation omitted). An easement appurtenant is an easement that benefits one parcel of land, the dominant tenement, to the detriment of another parcel of land, the servient tenement. See *Nelms v. Davis*, 179 N.C. App. 206, 209, 632 S.E.2d 823, 825 (2006) (citations omitted).

¶ 22 In determining whether an easement is appurtenant or in gross, we look to

the nature of the right and the intention of the parties creating it, and [such] must be determined by the fair interpretation of the grant . . . creating the easement, aided if necessary by the situation of the property and the surrounding circumstances. If it appears from such a construction of the grant . . . that the parties intended to create a right in the nature of an easement in the property retained for the benefit of the property granted, . . . such right will be deemed an easement appurtenant and not in gross, regardless of the form in which such intention is expressed. On the other hand, if it appears from such a construction that the parties intended to create a right to be attached to the person to whom it was granted . . . , it will be deemed to be an easement in gross. An easement is appurtenant to land, if it is so in fact, although it

is not declared to be so in the deed or instrument creating it; and an easement, which in its nature is appropriate and a useful adjunct of land owned by the grantee of the easement, will be declared an 'easement appurtenant,' and not 'in gross,' in the absence of a showing that the parties intended it to be a mere personal right. In case of doubt, an easement is presumed to be appurtenant, and not in gross.

*Shingleton*, 260 N.C. at 455, 133 S.E.2d at 186 (internal citations omitted).

¶ 23 We hold the language of the easement at issue is unambiguous on its face, and, though the parties dispute whether Duke may permit third-party activity upon the easement, such dispute solicits an examination of the rights of strangers to an agreement, which is properly a matter of law. While a deed should be considered in its entirety to ascertain the intent of the parties, the Flowage Easement encompasses the land at issue here, and it is the controlling easement.

¶ 24 As to the type of easements in this case, the deed conveying both easements does not indicate on its face whether the easements here are appurtenant or in gross. The record shows that Duke owns submerged land that is adjacent to—in fact, surrounding—the Kiser's submerged 280.4 acres of land. Because of Duke's adjacent land interests and the strong presumption in favor of interpreting easements as appurtenant, we hold that the easement *sub judice* constitutes an appurtenant easement. Here, the dominant tenement is owned by Duke, and the servient

tenement is owned by the Kisers. The Third Parties are not parties to the easement.

### **1. Duke's Scope of Authority under the Easement**

¶ 25 Turning now to the matter at issue, we address whether Duke possesses authority under the Flowage Easement to permit the Third Parties to erect and maintain structures over and into the Kisers' submerged land. We look first to the document itself and note that the Flowage Easement is broad in its scope. In its most liberal reading, the Kiser Grandparents granted "Duke . . . absolute water rights . . . to treat said 280.4 acres, more or less, in any manner deemed necessary or desirable." On its own, this language could easily be read to virtually convey a fee simple interest in the property; however, we decline to read the conveyance here in such a way.

¶ 26 The Kiser Grandparents, unlike some of their neighbors, clearly intended to retain title to the submerged 280.4 acres through the conveyance of an easement to Duke, rather than a conveyance in fee simple, and effect must be given to this decision. Though property held in fee simple cannot be said to be "more sacred" than an easement, *Sweet v. Rechel*, 159 U.S. 380, 395, 16 S. Ct. 43, 47, 40 L. Ed. 188, 195 (1895), a fundamental difference exists between the nature of these two conveyances. We recognize the broad interest conveyed to Duke under the Flowage Easement in light of the nature of easements generally.

¶ 27 The question of whether an easement holder with virtually unlimited authority to "treat" property "in any manner" includes the power for the easement

holder to permit strangers to the agreement to use the land for their own benefit has not been squarely addressed in this State. In *Lovin v. Crisp*, this Court addressed whether an easement holder could utilize water rights in his neighbor's springs to benefit other nearby landowners. 36 N.C. App. 185, 186, 243 S.E.2d 406, 407-08 (1978). Though the easement holder created an agreement with his neighbor to benefit the easement holder's land, the nearby landowners were not parties to the easement agreement. *Id.* at 186, 243 S.E.2d at 408. We concluded "that the deed created an easement appurtenant to the lands conveyed therein and to no others." *Id.* at 189, 243 S.E.2d at 409. While that case is not entirely analogous to the case *sub judice*, we nonetheless adopt the same principles in holding that, unless an easement explicitly states otherwise, an easement holder may not permit strangers to the easement agreement to make use of the land, other than for the use and benefit of the easement holder, without the consent of the landowner where such use would constitute additional burdens upon the servient tenement. *Id.*

¶ 28 This holding is consistent with the sensible principle outlined in the Restatement of Property: that "an appurtenant easement or profit may not be used for the benefit of property other than the dominant estate." Restatement (Third) of Prop.: Servitudes, § 4.11 (Am. L. Inst. 2000). Moreover, other states have adopted this rule. See *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1238 (Colo. 1998) (holding that "an easement holder may not use the easement to benefit property other than the dominant estate." (citation omitted)); *Thornton v. Pandrea*, 161 Idaho 301, 310-11, 385 P.3d 856, 865

(2016) (holding consistent with § 4.11); *Reeves v. Godspeed Props.*, 426 P.3d 845, 850 (Alaska 2018) (quoting Restatement (Third) of Property: Servitudes § 4.11); *Wisconsin Ave. Props., Inc. v. First Church of the Nazarene*, 768 So. 2d 914, 917 (Miss. 2000) (noting that “by granting to one party an easement for its specific use, no rights are acquired by others not a party to the instrument creating the easement. This tenant is so fundamental that Mississippi has never needed to address the issue.” (citation omitted)); *but see Abbott v. Nampa Sch. Dist. No. 131*, 119 Idaho 544, 551, 808 P.2d 1289, 1296 (1991) (holding that “a third party may obtain a license from an easement holder to use the easement without the notice to and consent from the servient estate owner so long as, and expressly provided that, the use of the easement is consistent with and does not unreasonably increase the burden to the servient estate”).

¶ 29 Here, the Third Parties are not mentioned in either the Flowage Easement or elsewhere in the conveyance and are, thus, strangers to the easement agreement. The Third Parties had no property interest in the land at issue when the easement was created between the Kiser Grandparents and Duke. Therefore, absent other considerations, Duke exceeded its scope of authority by permitting the Third Parties to construct and maintain structures over and into the Kisers’ submerged land without the Kisers’ consent.

¶ 30 It may be argued Duke’s deed of easement allows it to *assign* its easement rights to the Third Parties, rather than merely grant permissive use of the land at issue. However, this theory, too, fails. As in *Grimes v. Virginia Electric & Power Co.*, 245 N.C. 583, 96 S.E.2d 713 (1957), no easement right assign-



ment was effectuated here. In *Grimes*, an individual conveyed an easement to a power company so that the company might maintain electric lines above the individual's property. *Grimes*, 245 N.C. at 583, 96 S.E.2d at 713. Later, the power company permitted the City of Washington to affix its own lines to the company's poles upon a theory of assignment. *Id.* at 584, 96 S.E.2d at 714. Our Supreme Court dispelled that theory, holding that the power company had not assigned anything and stating that "[t]wo power companies enjoy an easement over his land. He granted only one." *Id.* Likewise, no assignment of the easement has occurred or is present in this case. Here, Duke continues to exercise its rights under the easements and has not granted or conveyed to the Third Parties its rights under the easements. Duke has allowed the Third Parties to use the land subject to the easements in accordance with permits issued by Duke and without consent from the owner of the servient estate.

## **2. Duke's Scope of Authority under the FERC License**

¶ 31 Duke and the Third Parties assert that, regardless of Duke's authority under the easements, Duke maintains federally pre-empted authority to unilaterally permit third-party construction over and into the submerged 280.4 acres on account of Duke's license with the FERC. While we recognize that this license requires Duke to possess certain authority to manage and control shoreline development of Lake Norman, so as to maintain Duke's license and standing with the Commission, such requirement does not, by itself, beget nor provide delegated authority to overburden or deprive others of their property. Indeed, as we held in *Zagaroli v. Pollock*, the requirements of

a FERC license do “not abolish private proprietary rights.” 94 N.C. App. 46, 54, 379 S.E.2d 653, 657 (1989) (citation omitted). *Zagaroli* is analogous here in that, though the easement in that case was much more limited than the Flowage Easement here, the defendants in that case asserted Duke’s authority under its FERC license in a similar situation. This Court held that

[a]lthough a FERC licensee may exercise the power of eminent domain over lands which will make up the bed of a lake associated with a hydroelectric dam, neither Duke Power nor its predecessor in title took the land in question by eminent domain. . . . [T]he Federal Power Act does not give Duke Power the authority to grant defendants the right to use plaintiff’s property without the assent of the plaintiff. To hold otherwise would in effect authorize the taking of property without just compensation.

*Id.* at 54, 379 S.E.2d at 657-58 (internal citation omitted).

¶ 32 Put another way and as a court in another jurisdiction held,

while the FERC license gives [the licensee] the *authority* to regulate certain uses and occupancies of land in the FERC Project Boundary without prior FERC approval, it does not give [the licensee] the *right* to do so. This is because [the licensee] must still have obtained independent control of land needed to operate and maintain [the] Project.

*Tri-Dam v. Keller*, No. 1:11-cv-1304-AWI-SAB, 2013 WL 2474692, at \*3 (E.D. Cal. June 7, 2013) (unpublished).

¶ 33 The record here indicates that Duke had the authority and opportunity to seize in fee the property of the Kisers' predecessors through eminent domain but, instead, elected to negotiate an easement with the Kiser Grandparents. In so doing, Duke never acquired fee title to the submerged land and cannot now assert its authority under its FERC license as if it possessed the land in fee simple. As a result, Duke is limited to the uses and exercise of dominion over the Kiser Lake Parcel to those expressly granted in the easements. "[A]n easement holder may not increase his use so as to increase the servitude or increase the burden upon the servient tenement." *Hundley v. Michael*, 105 N.C. App. 432, 435, 413 S.E.2d 296, 298 (1992) (citation omitted). "If the easement holder makes an unwarranted use of the land in excess of the easement rights held, such [use] will constitute an excessive use. . . ." *Hundley*, 105 N.C. App. at 435, 413 S.E.2d at 298 (citing *Hales v. Atlantic Coast Line Railroad Co.*, 172 N.C. 104, 107, 90 S.E. 11, 12 (1916)).

¶ 34 The Federal Power Act does not give Duke Power more rights than those it acquired in the easements. Duke does not have the authority to grant the Third Parties the right to permit others to use the Kisers' property without the assent of the Kisers, because doing so would allow the taking of the Kisers' "property without just compensation." *Zagaroli*, 94 N.C. App. at 54, 379 S.E.2d at 658.

### 3. Duke's Inconsistent Permitting Policies

¶ 35 Next, the Kisers argue that Duke should not be allowed to prohibit the Kisers' maintenance of a structure within the 280.4 acre area, while simultaneously permitting the Third Parties' maintenance of structures within the same. The Kisers contend that this inconsistent treatment demonstrates an apparent discrepancy between Duke's actions and its rights under the easement or, alternatively, that the inconsistent treatment is not equitable. To the contrary, however, this argument is premised upon a misinterpretation of the rights and limitations conveyed in the controlling easement.

¶ 36 As noted above, the Kiser Grandparents granted two separate easements in the same conveyance. In relevant parts, the first easement "convey[ed] unto Duke . . . a permanent easement of . . . the right to clear, and keep clear from said 280.4 acres . . . all . . . structures . . . and . . . to treat said 280.4 acres, more or less, in any manner deemed necessary or desirable by Duke. . . ." The second easement conveyed "unto Duke . . . a permanent flood easement . . . in connection with . . . the construction, operation, maintenance, repair, altering, or replacing of a dam" upon described land adjacent to the aforementioned 280.4 acres. While this second easement utilizes limiting language associated with Duke's operation of a dam, the first easement does not contain such limiting language. Rather, a plain reading of the first easement reveals that Duke possesses an unrestricted right, among others, to "clear, and keep clear . . . al . . . structures" upon the land. Though its actions upon the 280.4 acres are limited to those seemingly inexhaustive rights enumerated in the easement, Duke is not re-

quired to show that its use of the 280.4 acres of land is consistent with a greater purpose. Duke may eliminate interferences with its permanent easement rights to the 280.4 acres, consistent with its easement.

## **B. Navigability of Lake Norman**

¶ 37 Irrespective of easements and also arguing that the Third Parties have a common-law right to use the waters of Lake Norman above the Kiser's submerged land for recreational activities and to erect and maintain docks and other such structures that provide access from the Third Parties' lots to the waters of Lake Norman, Duke and the Third Parties assert the public trust doctrine and riparian rights respectively.

¶ 38 Exploring the first claim, the public trust doctrine is a common-law principle recognized by statute that provides for the public use of both public and private lands and resources consistent with certain activities such as “the right to navigate, swim, hunt, fish, and enjoy all recreational activities.” *Nies v. Town of Emerald Isle*, 244 N.C. App. 81, 88, 780 S.E.2d 187, 194 (2015) (citations omitted); N.C. Gen. Stat. § 145.1 (2020). This doctrine applies to navigable waters. *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 527, 369 S.E.2d 825, 828 (1988). When determining whether a body of water is navigable for the purpose of the public trust doctrine, this State has historically adopted several tests over nearly 200 years, that include the “ebb and flow” test, *Wilson v. Forbes*, 13 N.C. 30, 38 (1828), “sea vessel” test, *State v. Glen*, 52 N.C. 321, 333 (1859), and “navigable in fact” test, *State v. Twiford*, 136 N.C. 603, 606, 48 S.E. 586, 588 (1904). Currently, “the test of navigability in

fact controls in North Carolina” and is described as follows:

“If water is navigable for pleasure boating it must be regarded as navigable water, though no craft has ever been put upon it for the purpose of trade or agriculture. The purpose of navigation is not the subject of inquiry, but the fact of the capacity of the water for use in navigation.” . . . In other words, if a body of water in its natural condition can be navigated by watercraft, it is navigable in fact and, therefore, navigable in law, even if it has not been used for such purpose.

*Gwathmey v. State of North Carolina*, 342 N.C. 287, 299, 301, 464 S.E.2d 674, 682 (1995) (quoting *Twiford*, 136 N.C. at 608-09, 48 S.E. at 588). This test applies not only to ocean waters but also to inland rivers and lakes. *State v. Narrows Island Club*, 100 N.C. 477, 481 (1888).

¶ 39 Consistent with the navigable-in-fact test, the “natural condition” element espoused in *Gwathmey* “reflects only upon the manner in which the water flows without diminution or obstruction.” *Fish House, Inc. v. Clarke*, 204 N.C. App. 130, 135, 693 S.E.2d 208, 212 (2010). Thus, even artificial or man-made bodies of water are subject to navigability for the purpose of the public trust doctrine. *Id.* When evaluating the navigability of an artificial lake, however, our sparse caselaw on the matter further suggests that an artificial lake is not navigable in its natural condition merely because boats can navigate its surface. Indeed, a party must “show that the [feeding waterway of the lake] is passable by watercraft over an extended

distance both upstream of, under the surface of, and downstream from the lake.” *Bauman v. Woodlake Partners, LLC*, 199 N.C. App. 441, 453, 681 S.E.2d 819, 827 (2009).

¶ 40 Artificial bodies of water may be navigable only when they arise from or are connected to already natural, navigable-in-fact waters. When positing navigability, though, “the mere fact that a dam has been placed across a navigable stream, without more, [does not] suffice[] to render that stream non-navigable.” *Id.* at 451, 681 S.E.2d at 826.

¶ 41 Exploring the second claim, riparian rights are likewise the product of our common law. “Riparian rights are vested property rights that . . . arise out of ownership of land bounded or traversed by navigable water.” *In re Protest of Mason*, 78 N.C. App. 16, 24-25, 337 S.E.2d 99, 104 (1985) (citation omitted). Irrespective of the ownership of submerged land, riparian owners enjoy “the right of access over an extension of their waterfronts to navigable water, and the right to construct wharfs, piers, or landings.” *Pine Knoll Ass’n v. Cardon*, 126 N.C. App. 155, 159, 484 S.E.2d 446, 448 (1997) (quoting *Bond v. Wool*, 107 N.C. 139, 148, 12 S.E. 281, 284 (1890) (alterations omitted)). As with the public trust doctrine, the existence of riparian rights hinges upon an “identical” navigability test. *Newcomb v. County of Carteret*, 207 N.C. App. 527, 542, 701 S.E.2d 325, 337 (2010). Similarly, then, a riparian owner may possess access rights to an artificial body of water. *Id.*

¶ 42 In the present case, because Duke and the Third Parties assert the public trust doctrine and the existence of riparian rights for the first time on appeal, the trial court was not given the opportunity

to hear arguments for or against the navigability of the Catawba River and consequently Lake Norman and made no findings concerning these issues. To determine if a watercourse is navigable-in-law is to consider if it is navigable-in-fact, “[t]he navigability of a watercourse is therefore largely a question of fact,” *State v. Baum*, 128 N.C. 600, 604, 38 S.E. 900, 901 (1901), and, thus, is a determination that this Court is prohibited from considering.

¶ 43 This Court may only hear issues of law and is barred from making findings of fact. *Weaver v. Dedmon*, 253 N.C. App. 622, 627, 801 S.E.2d 131, 136 (2017). Rather, a jury is entrusted to review “evidence tending to show that the stream in question is passable by watercraft over an extended distance both upstream of, under the surface of, and downstream from the lake.” *Bauman*, 199 N.C. App. at 453, 681 S.E.2d at 827. While a prior opinion of this Court has suggested that the Catawba River may be navigable in its natural state, it has only done so in *dicta*. *Id.* at 451, 681 S.E.2d at 826 (noting that, by considering dams when making navigability decisions, “many of the major rivers in North Carolina, such as the Catawba and the Yadkin, would become non-navigable, which would be a troubling result”). “Language in an opinion not necessary to the decision is *obiter dictum*[,] and later decisions are not bound thereby.” *Trs. of Rowan Technical Coll. v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) (citations omitted); *see also Washburn v. Washburn*, 234 N.C. 370, 373, 67 S.E.2d 264, 266 (1951). Despite Duke’s assertion to the contrary, the record does not show undisputed facts or contentions, which prove the navigability of the



Catawba River consistent with the requirements and considerations above. This absence presents a genuine issue of material fact to be further determined.

### **III. Conclusion**

¶ 44 We hold the trial court erred in granting summary judgment in favor of Duke and the Third-Parties and in granting use rights to the Third-Parties of the docks and other such structures over and into the Kisers' submerged 280.4 acres upon a cloud-upon-title theory. To hold otherwise would authorize the taking of the Kisers' property without just compensation. For the reasons outlined above, we reverse and remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges TYSON and COLLINS concur.

**ORDER AND DECLARATORY JUDGMENT,  
GENERAL COURT OF JUSTICE  
SUPERIOR DIVISION  
(JANUARY 2, 2020)**

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STATE OF NORTH CAROLINA  
COUNTY OF CATAWBA  
IN THE GENERAL COURT OF JUSTICE  
SUPERIOR DIVISION

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DUKE ENERGY CAROLINAS, LLC,

*Plaintiff,*

v.

MICHAEL L. KISER, ROBIN S. KISER,  
and SUNSET KEYS, LLC,

*Defendants/  
Counterclaim Plaintiffs,*

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MICHAEL L. KISER, ROBIN S. KISER,  
and SUNSET KEYS, LLC,

*Third-Party Plaintiffs,*

v.

THOMAS E. SCHMITT and  
KAREN A. SCHMITT, ET AL.,

*Third-Party Defendants/  
Counter claimants.*

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No. 17 CVS 194

Before: Hon. Nathaniel J. POOVEY,  
Superior Court Judge Presiding.

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## **ORDER AND DECLARATORY JUDGMENT**

THIS CAUSE came to be heard on December 6, 2019, before the undersigned Rule 2.1 Judge Presiding, on all pending motions, to wit:

- a. Motion for Summary Judgment by Plaintiff Duke Energy Carolinas, LLC (“DEC” or “Plaintiff”), filed October 25, 2019 (the “DEC Motion”). Through the DEC Motion Plaintiff seeks summary judgment in its favor and against Michael L. Kiser, Robin S. Kiser, and Sunset Keys, LLC (“Defendants”) on
  - DEC’s First Claim for Relief (Trespass), which, following the Court’s entry of its August 22, 2018 Order and Judgment, is the only remaining claim asserted by DEC against Defendants; and
  - All counterclaims asserted by Defendants against DEC.
- b. Motion for Summary Judgment by Third-Party Defendants/Counterclaimants Thomas E. Schmitt and Karen A. Schmitt (the “Schmitts”) and Linda Gail Combs and, her husband, Robert Donald Shepherd (the “Shepherds”) (collectively, the “Schmitt/Shepherd Parties”), filed October 28, 2019 (the “Schmitt/Shepherd Motion”). Through

the Schmitt/Shepherd Motion those moving parties seek summary judgment in their favor upon Defendants' claims for trespass as well as upon certain of the counterclaims filed by the Schmitt/Shepherd Parties against Defendants.

- c. Motion for Summary Judgment by all remaining Third-Party Defendants/Counterclaimants represented by counsel (the "Property Owners"), filed October 25, 2019 (the "Property Owners' Motion"). The specific moving parties are listed in the Property Owners' Motion. Through that Motion, those moving parties seek summary judgment in their favor upon Defendants' claims for trespass as well as upon certain of the counterclaims filed by the Property Owners against Defendants.

Defendants and all moving Parties appeared through counsel. The Court has reviewed and considered the pleadings, the affidavits and other documents which have been filed with or presented to the Court; the briefs and legal authorities submitted by counsel for all parties; and the oral arguments of counsel for all parties. Based upon its review, the Court rules:

First, that there are no genuine issues of material fact, and that, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, Plaintiff is entitled to summary judgment against Defendants upon its remaining claim for trespass.

Second, that there are no genuine issues of material fact, and that, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, Plaintiff is

entitled to summary judgment against Defendants upon the claims asserted in their counterclaims.

Third, that there are no genuine issues of material fact, and that, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, the Schmitt/ Shepherd Parties and the Property Owners are entitled to summary judgment against the Defendants upon the third-party claims asserted against them by the Defendants,

Fourth, pursuant to N.C. Gen. Stat. §§ 1-253 *et seq.* the Court declares that there are no genuine issues of material fact as to the rights, title, and legal relations of the parties insofar as they concern the 280.4 acre tract of land now ordinarily submerged underneath Lake Norman in Catawba County, North Carolina (the “Kiser Submerged Property”), which is the subject of this suit. The Court finds and determines that:

- A. DEC has in all respects acted within the scope of the authority granted to it by Defendants’ predecessor in interest in the easement recorded in Book 655, Pages 223-25 in the Office of the Catawba County Register of Deeds (the “Easement”); and
- B. Defendants claims against the Schmitt/ Shepherd Parties and the Property Owners constitute a cloud upon title to said parties’ properties within the Kiser Island Subdivision (the “Lots”) and the Schmitt/ Shepherd Parties and the Property Owners are entitled to a judgment quieting title as to the Lots and appurtenant structures or improvements as set forth in Ordering Clause 3, below. A

list of the Lots and their respective owners is attached as Exhibit A and incorporated herein by reference.

Fifth, in light of the above rulings (and except as set forth in connection with the Court's declaration of the rights, title, and legal relations of the parties), it is not necessary to rule with respect to the other aspects of the Schmitt/Shepherd Motion or the Property Owners' Motion.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. The DEC Motion is hereby GRANTED, and judgment entered in favor of DEC and against Defendants upon DEC's trespass claim (First Claim for Relief) and upon all counterclaims asserted by Defendants against DEC.

2. The Schmitt/Shepherd Motion and the Property Owners' Motion are GRANTED with regard to the Defendants' third-party claims asserted against the Schmitt/Shepherd Parties and the Property Owners for the reasons that, in granting permits for and otherwise allowing the construction, placement, use, maintenance and occupancy of structures and improvements, including, without limitation, docks, piers, boats slips, pilings, seawalls and rip-rap, above and upon the Kiser Submerged Property and extending thereupon from the Schmitt/Shepherd Parties' and the Property Owners' respective lots or tracts defined upon Exhibit A hereto (each, a "Lot," and collectively, "Lots"), as well as in allowing boating, recreational use, swimming, or other access from the Lots to Lake Norman above, across and upon the Kiser Submerged Tract:

- (a) DEC has in all respects acted within the scope of the authority granted to it by Defendants' predecessor in the Easement ("DEC's Scope of Authority"); and
- (b) The servient estate of Defendants in the Kiser Submerged Property is subject to DEC's Scope of Authority.

3. In consequence of its foregoing rulings, and pursuant to the North Carolina Declaratory Judgment Act, N.C. Gen. Stat. § 1-253, *et seq.*, this Court declares:

- (a) That DEC has in all respects acted within DEC's Scope of Authority.
- (b) The servient estate of Defendants in the Kiser Submerged Property is subject to DEC's Scope of Authority.
- (c) Title in and to (i) each and every identified Lot owned by the Schmitts, Shepherds and the Property Owners' listed in Exhibit A; and (ii) any and all the improvements in existence now or hereafter added, modified, or otherwise placed appurtenant thereto upon or above the Kiser Submerged Property which are permitted by DEC as a part of DEC's Scope of Authority, including, without limitation, docks, piers, boat slips, pilings, seawalls, rip-rap, and other structures and improvements (collectively, the "Appurtenances"), and (iii) the ability of the Schmitts, the Shepherds and the Property Owners, and their respective heirs, successors and assigns, to engage from their respective Lots in boating, recreational use, swimming, or other access to Lake Norman along, across,

above, and upon the Kiser Submerged Tract is hereby quieted in the names of the Schmitts, the Shepherds and the Property Owners, and their respective heirs, successors and assigns.

- (d) Defendants and their successors in interest are ousted from any real property interest or claim or claim of trespass or for rents in the Lots of the Schmitts, Shepherds and the Property Owners and their respective heirs, successors and assigns or the Appurtenances of the Schmitts, Shepherds and the Property Owners, and their respective heirs, successors and assigns permitted by DEC within its Scope of Authority.
- (e) This judgment, in which the quieting of title is hereby declared, shall be regarded as a deed of conveyance pursuant to N.C.G.S. § 1-228 and Rule 70 of the North Carolina Rules of Civil Procedure, and shall be registered in the Catawba County Register of Deeds office under the rules and regulations prescribed for conveyances of similar property executed by the party. A copy of this Order shall be certified by the Catawba County Clerk of Court, under the seal of the Court, and the Register of Deeds shall record both the judgment and certificate.

4. The Court's ruling as hereinabove provided renders unnecessary any further ruling at this time upon the remainder of the Schmitt/Shepherd Motion and the Property Owners' Motion, and such remaining Motions are, therefore, DENIED as moot, without prejudice.



5. Certain of the claims asserted by the Schmitt/Shepherd Parties and the Property Owners were not the subject of their Motions for Summary Judgment, and Defendants' claims against the unrepresented third-party defendants were also not the subject of a motion for summary judgment. Accordingly, while this Order and Declaratory Judgment does not dispose of all the claims in this action, it is nevertheless the Court's final judgment with respect to the claims addressed and disposed of herein, and the Court finds pursuant to Rule 54(b) of the North Carolina Rule of Civil Procedure that there is no just reason for delay in the entry of final judgment with respect to those claims.

So ORDERED, this the 2 day of January, 2020.

/s/ Nathaniel J. Poovey  
Superior Court Judge Presiding

**Exhibit A**  
**to Order and Declaratory Judgement**

**Owner(s)**

Jeannene H. Allen and Jean B. Hughes

**Short Description of Property**

Lot 15, 8.L. Kiser No. 2 + Access Corridor +  
0.061 ac. (PB 13/18). (the “Hughes/Allen Tract”)

**Deed Book/Page**

2922/1467, 2922/1465

**Property Address**

8750 Harbor Circle, Terrell, NC 28682

**Catawba Tax PIN**

461604743007

**Owner(s)**

Terry Attinger and Kara Attinger

**Short Description of Property**

Lot 30, B.L. Kiser No. 3 (PB 13/19)

**Deed Book/Page**

3360/1594

**Property Address**

4683 Kiser Island Road Terrell, NC 28682

**Catawba Tax PIN**

461602563161

**Owner(s)**

Miles Clark Belvin

**Short Description of Property**

Lot 40, B.L. Kiser No. 1 (PB 13/19)

**Deed Book/Page**

3290/1990

**Property Address**

4996 Kiser Island Road Terrell, NC 28632

**Catawba Tax PIN**

461604629866

**Owner(s)**

Jeffrey Lynn Bryant and Barbara Tucker  
Bryant

**Short Description of Property**

Lot 8, B.L. Kiser No. 1 (PB 13/17)

**Deed Book/Page**

3052/0009

**Property Address**

5015 Kiser Island Road Terrell, NC 28682

**Catawba Tax PIN**

461604720415

**Owner(s)**

William L. Bullard and Ann K. Bullard

**Short Description of Property**

Lot 22, B.L. Kiser No. 2 + 0.090 ac. (PB 13/18)

**Deed Book/Page**

3033/0693

**Property Address**

8716 Harbor Circle Terrell, NC 28632

**Catawba Tax PIN**

461604730591

**Owner(s)**

Jeffrey H. Carlisle

**Short Description of Property**

Lot 20, B.L. Kiser No. 2 (PB 13/18)

**Deed Book/Page**

3197/0588

**Property Address**

8728 Harbor Circle Terrell, NC 28682

**Catawba Tax PIN**

461604732557

**Owner(s)**

James Thomas Carroll and Elizabeth L. Carroll

**Short Description of Property**

Lot 5, B.L. Kiser No. 2 (PB 13/18)

**Deed Book/Page**

1287/938

**Property Address**

8802 Harbor Circle Terrell, NC 28682

**Catawba Tax PIN**

461604647071

**Owner(s)**

Laurence W. Carstensen, Trustee of the  
Laurence W. Carstensen Living Trust dated  
April 17, 2012 and Patricia H. Carstensen,  
Trustee of the Patricia H. Carstensen Living  
Trust dated April 17, 2012

**Short Description of Property**

Lot 1, B.L. Kiser No. 1 + 5,368 sf. (PB 13/17)

**Deed Book/Page**

3163/0388

**Property Address**

4985 Kiser Island Road Terrell, NC 28682

**Catawba Tax PIN**

461604625980

**Owner(s)**

Wayne F. Cherry and Connie G. Cherry

**Short Description of Property**

Lot 19, B.L. Kiser No. 2 (PB 13/18)

**Deed Book/Page**

2173/0038

**Property Address**

8730 Harbor Circle Terrell, NC 28632

**Catawba Tax PIN**

461604732697

**Owner(s)**

Combs. Linda Gail and Husband. Robert Donald  
Shepherd

**Short Description of Property**

Lot 26. B.L. Kiser No. 3 (PB 13/19)

**Deed Book/Page**

3426/1058

**Property Address**

8526 Burley Dr. Terrell. NC 28682

**Catawba Tax PIN**

461602560493

**Owner(s)**

Brent Aaron Curtis and Kathryn Rosene Curtis

**Short Description of Property**

Lot 6 and Part of Lot 5, B.L. Kiser No. 1 (PB  
13/17)

**Deed Book/Page**

3082/0546

**Property Address**

5011 Kiser Island Road Terrell, NC 28682

**Catawba Tax PIN**

461604629522

**Owner(s)**

Joseph Paul Ducey and Diane Elizabeth Ducey

**Short Description of Property**

Lot 11, B.L. Kiser No. 2 (PB 13/18)

**Deed Book/Page**

208/1726

**Property Address**

8772 Harbor Circle Terrell, NC 28682

**Catawba Tax PIN**

461604740326

**Owner(s)**

Lester Franklin Eaker, Jr. and Dyra R. Eaker

**Short Description of Property**

Lot 10, B.L. Kiser No. 1 (PB 13/17)

**Deed Book/Page**

3332/1059

**Property Address**

5065 Lee Point Terrell, NC 28682

**Catawba Tax PIN**

461604629166

**Owner(s)**

M. Neil Finger

**Short Description of Property**

Lot 7, B.L. Kiser No. 1 (PB 13/17) M. Neil Finger

**Deed Book/Page**

2439/0334

**Property Address**

5013 Kiser Island Road Terrell, NC 28682

**Catawba Tax PIN**

461604628483

**Owner(s)**

Dennis Fritzler and Tracy Fritzler

**Short Description of Property**

Lot 32, B.L. Kiser No. 3 (PB 13/19)

**Deed Book/Page**

3113/1283

**Property Address**

4703 Kiser Island Road Terrell, NC 28682

**Catawba Tax PIN**

461602553962

**Owner(s)**

David W. Gerard and Barbara A. Gerard,  
Trustees of the David W. Gerard Trust dated  
December 5, 2000 and Barbara A. Gerard and  
David W. Gerard, Trustees of the Barbara A.  
Gerard Trust dated December 5, 2000



**Short Description of Property**

Lot 3, B.L. Kiser No. 2 (PB 13/18)

**Deed Book/Page**

2673/0083

**Property Address**

8822 Harbor Circle Terrell, NC 28682

**Catawba Tax PIN**

461604637788

**Owner(s)**

Joseph H. Glenn, IV and Kimberly Daub Glenn;  
Ann Gardner Glenn and Robert Michael  
Whitnell

**Short Description of Property**

Lot 14, B.L. Kiser No. 2 (PB 13/18)

**Deed Book/Page**

2381/119

**Property Address**

8752 Harbor Circle Terrell, NC 28682

**Catawba Tax PIN**

461604741058

**Owner(s)**

Daniel Gonzales and Tracy Gonzales

**Short Description of Property**

Lot 3 B.L. Kiser No. 3 (PB 13/19)

**Deed Book/Page**

3107/1321

**Property Address**

4691 Kiser Island Road Terrell, NC 28682

**Catawba Tax PIN**

461602563072

**Owner(s)**

Joseph B. Grady and Thomas M. Grady

**Short Description of Property**

Lot 16 + Adjoining. B.L. Kiser No. 2 (PB 13/18)

**Deed Book/Page**

2560/1960, 2560/1953

**Property Address**

8746 Harbor Circle Terrell, NC 23632

**Catawba Tax PIN**

461604733947

**Owner(s)**

Jeanne Hawver

**Short Description of Property**

Lot 13, B.L. Kiser No. 2 (PB 13/18)

**Deed Book/Page**

1207/0381

**Property Address**

8732 Harbor Circle Terrell, NC 23682

**Catawba Tax PIN**

461604733727

**Owner(s)**

Eric C. Haynes and Tonya M. Haynes

**Short Description of Property**

Lot 4 + Strip, B.L. Kiser No. 2 (PB 13/18)

**Deed Book/Page**

3358/694, 2252/1280

**Property Address**

8812 Harbor Circle Terrell, NC 28632

**Catawba Tax PIN**

461604637868

**Owner(s)**

Jerry Lee Hooper and Barbara N. Hooper: Tracy  
Lee Hooper and Jerry Bryan Hooper

**Short Description of Property**

Lot 29, B.L. Kiser No. 1 (PB 13/17)

**Deed Book/Page**

3186/982

**Property Address**

5036 Kiser Island Road Terrell, NC 28682

**Catawba Tax PIN**

461604726452

**Owner(s)**

Scott M. Hopkins and Nancy A. Hopkins

**Short Description of Property**

Lot 2, B.L. Kiser No. 2 (PB 13/18), and Lot 1 +  
Gap Tract, B.L. Kiser No. 2 (PB 13/18)

**Deed Book/Page**

2170/1652, 2924/1319

**Property Address**

8830 Harbor Circle Terrell, NC 23682 (Lot 2)

8700 Harbor Circle Terrell, NC 23632 (Lot 1  
+ Gap Tract)

**Catawba Tax PIN**

461604633711 (Lot 2)

461604638545 (Lot 1 + Gap Tract).

**Owner(s)**

Garland Hughes

**Short Description of Property**

Lot 21+ 0.202 ac., B.L. Kiser No. 2 (PB 13/18)

**Deed Book/Page**

3467/1804

**Property Address**

8724 Harbor Circle Terrell, NC 23632

**Catawba Tax PIN**

461604731572

**Owner(s)**

Island Properties Owners Association, Inc.

**Short Description of Property**

The Island POA Property

**Deed Book/Page**

1303/110

**Property Address**

“Common Area” on that certain map recorded in  
Plat Book 18 at Page 46

**Catawba Tax PIN**

461604640427

**Owner(s)**

Warren Lee Jones, Trustee of the Warren Lee  
Jones Trust established under the Evelyn  
Ballard Jones Living Trust dated 9/21/2006, as  
amended, and Stuart Barry Jones

**Short Description of Property**

Lot 39, B.L. Kiser No. 1 (PB 13/17)

**Deed Book/Page**

3256/1290

**Property Address**

5002 Kiser Island Road Terrell, NC 28632

**Catawba Tax PIN**

461604720860

**Owner(s)**

J. Frederick Littlejohn and Cathy D. Littlejohn

**Short Description of Property**

Lot 25, B.L. Kiser No. 1 (PB 13/17)

**Deed Book/Page**

1781/901

**Property Address**

8780 Bass Drive Terrell, NC 28682

**Catawba Tax PIN**

461604729344

**Owner(s)**

John Martin McCoy and Susan Knight McCoy

**Short Description of Property**

Lot 7, B.L. Kiser No. 2 (PB 13/18)

**Deed Book/Page**

3059/854

**Property Address**

8784 Harbor Circle Terrell. NC 28682

**Catawba Tax PIN**

461604647271

**Owner(s)**

Pamela Robinson McGuire and Johnny Reginald McGuire

**Short Description of Property**

Lot 8, B.L. Kiser No. 2 (PB 13/18)

**Deed Book/Page**

3361/1340, 3208/1718, 3253/421

**Property Address**

8778 Harbor Circle Terrell, NC 28682

**Catawba Tax PIN**

461604647382

**Owner(s)**

David W. Milking and Patricia M. Milkins

**Short Description of Property**

Lot 3, B.L. Kiser No. 1 (PB 13/17)

**Deed Book/Page**

3425/906

**Property Address**

4999 Kiser Island Road Terrell, NC 23682

**Catawba Tax PIN**

461604627669

**Owner(s)**

Brown D. Overcash, Jr. and Ketti W. Overcash

**Short Description of Property**

Lot 34, B.L. Kiser No. 1 (PB 13/17)

**Deed Book/Page**

3056/0657

**Property Address**

5018 Kiser Island Road Terrell, NC 28682

**Catawba Tax PIN**

461604724701

**Owner(s)**

James S. Pope and Betty Jo Pope

**Short Description of Property**

Lot 36, B.L. Kiser No. 1 (PB 13/17)

**Deed Book/Page**

2484/787

**Property Address**

5012 Kiser Island Road Terrell, NC 28682

**Catawba Tax PIN**

461604722786

**Owner(s)**

Thomas E. Schmitt and Karen A. Schmitt

**Short Description of Property**

Lot 25. B.L. Kiser No. 3 (PB 13/19)

**Deed Book/Page**



1640/344

**Property Address**

8527 Burley Dr. Terrell. NC 28682

**Catawba Tax PIN**

461602562419

**Owner(s)**

Rebecca Lee Shell

**Short Description of Property**

Lot 29 + 0.030 ac., BI Kiser No. 3 (PB 13/19)

**Deed Book/Page**

2011/782, 3092/1395

**Property Address**

4673 Kiser Island Road Terrell, NC 28682

**Catawba Tax PIN**

461602563263, 461602562128

**Owner(s)**

Scott Somerville and Renee Somerville

**Short Description of Property**

Lot 10, B.L. Kiser No. 2 (PB 13/18)

**Deed Book/Page**

3127/1022

**Property Address**

8744 Harbor Circle Terrell, NC 28682

**Catawba Tax PIN**

461604649441

**Owner(s)**

David J. Suich and Sherry R. Suich

**Short Description of Property**

Lot 26, B.L. Kiser No. 1 (PB 13/17)

**Deed Book/Page**

2934/528

**Property Address**

8776 Bass Drive Terrell, NC 28682

**Catawba Tax PIN**

461604728440

**Owner(s)**

Sunset Pointe, LLC

**Short Description of Property**

Lot 9 + 0.052 ac., B.L. Kiser No. 1 (PB 13/17)

**Deed Book/Page**

3292/0005

**Property Address**

5061 Lee Point Terrell, NC 28682

**Catawba Tax PIN**

461604629218

**Owner(s)**

Walter A. Trott and Kelley B. Trott

**Short Description of Property**

Lot 30 +Portion of Lot 31, B.L. Kiser No. 1 (PB 13/17)

**Deed Book/Page**

3297/0945

**Property Address**

5032 Kiser Island Road Terrell, NC 28632

**Catawba Tax PIN**

461604726546

**Owner(s)**

Clarence Michael Underwood and Janna H. Underwood

**Short Description of Property**

Lot 12, B.L. Kiser No. 2 (PB 13/18)

**Deed Book/Page**

1433/598

**Property Address**

8768 Harbor Circle Terrell, NC 28682

**Catawba Tax PIN**

461604740246

**Owner(s)**

Jason Albert Walser and Adam Carter Walser

**Short Description of Property**

Lot 34, B.L. Kiser No. 3 (PB 13/19); Lot 35, B.L. Kiser No.3 (PB 13/19); (Lot 36), B.L. Kiser; No. 3 (PB 13/19); and Acreage Below 760' Line

**Deed Book/Page**

Estate of Sue C. 2848/1211, 3424/0215

**Property Address**

4719 Kiser Island Road Terrell, NC 28682 (Lot 35)

4725 Kiser Island Road Terrell, NC 28682 (Lot 36)

**Catawba Tax PIN**

461602552793 (Lot 34)

461602552600 (Lot 35)

461602553526 (Lot 36)

**Owner(s)**

Robert S. Weller and Elizabeth A. Weller

**Short Description of Property**

Lot 32+ Portion of Lot 31, B.L. Kiser No. 1 (PB 13/17)

**Deed Book/Page**

3297/943

**Property Address**

5026 Kiser Island Road Terrell, NC 28682

**Catawba Tax PIN**

461604725626

**Owner(s)**

Garry R. Wilkinson and Sandra S. Wilkinson,  
Trustees under the Garry R. Wilkinson Revo-  
cable Trust Agreement dated April 8, 2016 and  
Sandra S. Wilkinson and Garry R. Wilkinson,  
Trustees under the Sandra S. Wilkinson Revo-  
cable Trust Agreement dated April 8, 2016

**Short Description of Property**

Lot 33, B.L. Kiser No. 3 (PB 13/19)

**Deed Book/Page**

3340/0721

**Property Address**

4713 Kiser Island Road Terrell, NC 28682

**Catawba Tax PIN**

461602553842

**Owner(s)**

Samuel A. Young, Jr. and Kimberly A. Young

**Short Description of Property**

Lot 38, B.L. Kiser No. 1 (PB 13/17)

**Deed Book/Page**

3398/426

**Property Address**

App.69a

5006 Kiser Island Road Terrell, NC 28682

**Catawba Tax PIN**

46160472 1757

**ORDER DENYING PETITION FOR  
REHEARING, SUPREME COURT  
OF NORTH CAROLINA  
(JUNE 20, 2023)**

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SUPREME COURT OF NORTH CAROLINA

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DUKE ENERGY CAROLINAS, LLC,

*Plaintiff,*

v.

MICHAEL L. KISER, ROBIN S. KISER,  
and SUNSET KEYS, LLC,

*Defendants/  
Third-Party Plaintiffs,*

v.

THOMAS E. SCHMITT and  
KAREN A. SCHMITT, ET AL.,

*Third-Party  
Defendants.*

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No. 398PA21

TWENTY-FIVE-B DISTRICT

From N.C. Court of Appeals (20-333)

From Catawba (17CVS195)

Before: ALLEN, Judge.

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**ORDER**

Upon consideration of the petition filed by Defendants' (Sunset Keys, LLC, Michael L. Kiser, and Robin S. Kiser) on the 2nd of June 2023 for rehearing of the decision of this Court pursuant to Rule 31, N. C. Rules of Appellate Procedure, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

“Denied by order of the Court in conference,  
this the 20th of June 2023.”

/s/ Allen, J.

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of June 2023.



/s/ Grant E. Buckner

Clerk, Supreme Court of  
North Carolina

M. C. Hackney

Assistant Clerk, Supreme  
Court Of North Carolina

Copy to:

North Carolina Court of Appeals

Mr. Neel Salil Mehta, For Duke Energy Carolinas, LLC



Mr. Ty K. McTier, Attorney at Law, For Kiser,  
Michael L., et al-(By Email)

Mr. David G. Redding, Attorney at Law, For Kiser,  
Michael L., et al-(By Email)

Ms. Victoria A. Alvarez, Attorney at Law, For Duke  
Energy Carolinas, LLC-(By Email)

Mr. Mark L. Childers, Attorney at Law, For Schmitt,  
Thomas E., et al-(By Email)

Mr. Kevin C. Donaldson, Attorney at Law, For Schmitt,  
Thomas E., et al-(By Email)

Mr. Marshall C. Horsman, III, Attorney at Law, For  
Schmitt, Thomas E., et al

Mr. David P. Parker, Attorney at Law, For Schmitt,  
Thomas E., et al-(By Email)

W. Carey Parker, Attorney at Law, For Schmitt,  
Thomas E., et al-(By Email)

Ms. Val Rhae Claypoole, For Claypoole, William, et al

Mr. William Claypoole, For Claypoole, William, et al

Mr. Theodore H. Corriher, For Corriher, Theodore H.

Mr. Donald Reid Hankins, For Hankins, Donald Reid

Mr. Tommy L. Wallace, For Wallace, Tommy L.

N.C. Supreme Court Clerk-(By Email)

Mr. Christopher G. Browning, Jr., Attorney at Law,  
For Duke Energy Carolinas, LLC-(By Email)

West Publishing-(By Email)

Lexis-Nexis-(By Email)

**PETITION FOR REHEARING  
(JUNE 2, 2023)**

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SUPREME COURT OF NORTH CAROLINA

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DUKE ENERGY CAROLINAS, LLC,

*Plaintiff,*

v.

MICHAEL L. KISER, ROBIN S. KISER,  
and SUNSET KEYS, LLC,

*Defendants/  
Third-Party Plaintiffs,*

v.

THOMAS E. SCHMITT and  
KAREN A. SCHMITT, ET AL.,

*Third-Party Defendants.*

---

No. 398PA21

TWENTY-FIVE-B DISTRICT

From Catawba County

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TO THE HONORABLE SUPREME COURT OF  
NORTH CAROLINA:

NOW COME PETITIONERS, Sunset Keys, LLC,  
Michael L. Kiser and Robin S. Kiser, Petitioner  
/Appellees, by and through their appellate attorneys,

who respectfully petition this Court pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure to rehear this case and reconsider its opinion (the “Opinion”) issued on April 28, 2023 and this Court’s accompanying Mandate issued on May 18, 2023 due to this Court’s misapprehension and misapplication of its own law and overlooking key facts as it relates to this case.

In support of this petition, Petitioners/Appellees submit the following:

**I. By Merely Reversing the Unanimous Court of Appeals Opinion This Court Overlooked the Trial Court’s Order in Upholding the Ouster of Sunset Keys and the Transfer to Third-Parties (1) Without a Deed; (2) Without Stating What Type of Fee Was Transferred in the Flood Easement; (3) Without Permission of the Landowners and (4) Without Consideration.**

As a threshold matter, the Opinion does not state what type of conveyance the Flood Easement constitutes and only sets the table for future litigation. The Opinion of this Honorable Court merely reverses the Court of Appeals opinion and does nothing to state the type of fee that was transferred within the Flood Easement or address the scope of the ouster of the Kiser Lake Parcel.

The crux of this action are various Declaratory Actions involving the Submerged Property. R p 539 – 49. If this Opinion is not modified, then it risks to turn real property law on its head and allow a transfer of fee simple title from an easement requiring merely a dock permit.

The Trial Court's Summary Judgment Order (the "Trial Order") is more than just an order for summary judgment regarding what Duke can do or cannot do, it is a conveyance of real property without consideration. *Id.* It is also an improper ouster from the Kisers to the Third-Parties in fee simple. Further, the Trial Order does not specify metes and bounds and is not sufficient to pass title on its own. For example, does everyone involved in this suit with a dock now own an undivided interest as co-tenants in the 280.4 acres or just the area surrounding their docks? The Opinion leaves more questions than it answers.

Even if this Court grants fee simple title to Duke upon rehearing as it purports to do in its Opinion, title would not be placed in the Third-Parties absent a proper conveyance of real property. As the Court of Appeals pointed out, this has not happened and thus title to all of the 280.4 acres remains as it stood upon the signing of the Flood Easement.

## **II. The Opinion Misapprehended the Law Concerning Deed and Contract Construction Where It Brought in Extraneous Wording and Documents That Are Not Within the Four Corners of the Flood Easement.**

This Court's Opinion not only had to incorporate FERC regulations to justify its holding, but also looked at the parties actions after the Flood Easement was conveyed. By introducing extraneous evidence in the past and the future this Court has impliedly asserted that the Flood Easement is ambiguous and subject to trial.

Without FERC as a backdrop, no private citizen or company without the power of accessing Eminent domain (which Duke's predecessor failed to do) would be given fee simple rights through an easement. *See Zagaroli v. Pollock*, 94 N.C. App. 46, 54, 379 S.E.2d 653, 658 (1989). If it was not necessary to incorporate FERC, unavailed federal regulations would not have been mentioned in the Opinion. Imagine the practical impact of the Opinion: A title searcher now has to monitor the actions of the parties and federal regulations outside the real property books and must look outside the four corners of recorded deeds. This burden is an impossible task.

Had the parties intended the language "necessary or desirable" to be fee-simple words of conveyance, the Flood Easement would have simply been titled General Warranty Deed or merely recite only that Duke can "...treat the property in any manner deemed necessary or desirable" by Duke's predecessor. A simple half page document would suffice where the Flood Easement is a lengthy document typed on a manual typewriter in the 1960s. R p 16-25.

If the parties wished the FERC regulations to be incorporated, they would have included that language or use the process of eminent domain. *See generally State v. Philip Morris USA Inc.*, 359 N.C. 763, 618 S.E.2d 219 (2005) (the trust document under review specifically incorporated the federal guidelines into the document). Appellees are not arguing that Duke could not access the power to take the property in fee, only that Duke did not utilize eminent domain and pay for fee simple rights as the Appellate Division has clearly stated cannot be the case. *Zagaroli* at 54, 379 S.E.2d at 658. By upholding the trial court's

order the Opinion has effectuated a taking of the Appellees' property rights without just compensation in derogation of Appellee's Due Process rights.

### **III. The Opinion Misapplied and Ignored This Court's Prior Precedent Regarding Contract Interpretation.**

The Opinion correctly cites to *Borders v. Yarbrough*, 237 N.C. 540, 75 S.E.2d 541 (1953); *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 127 S.E.2d 539 (1962); *State v. Philip Morris USA Inc.*, 359 N.C. 763, 618 S.E.2d 219 (2005); *Lane v. Scarborough*, 284 N.C. 407, 200 S.E.2d 622 (1973); *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 40 S.E.2d 198 (1946), and *Hagler v. Hagler*, 319 N.C. 287, 354 S.E.2d 228 (1987) for some of their general rules, but fails to apply their reasoning in the Opinion. Unlike transfers of fee simple title, easements do not require any set formulation or particular words. *Borders* at 542, 75 S.E.2d at 543.

Since an easement is a contract, consideration must be given to all of the following: "... the subject-matter of the contract, and the situation of the parties." *Weyerhaeuser* at 719, 127 S.E.2d at 541. To sufficiently review the intention of the parties review must be made "... from the entire instrument *and not from detached portions.*" *Id. emphasis added*; See also *Philip Morris* at 773, 618 S.E.2d at 225, "Intent is derived not from a particular contractual term but *from the contract as a whole*" quoting *Jones v. Casstevens*, 222 N.C. 411, 413-14, 23 S.E.2d 303, 305 (1942) *emphasis added*.

Excerpts from a contract must be "... interpreted in context with the rest of the agreement." *Id.* quoting

*Westinghouse* at 100, 25 S.E.2d at 390. “If one part of the clause is within the primary objective of the grant and supported by the recited consideration, so is the remainder of the clause.” *Weyerhaeuser* at 720, 127 S.E.2d at 542. The meaning of the contract in question cannot include implications that are inconsistent to the expressed wording. *Scarborough* at 410, 200 S.E.2d at 625.

Writing language into an agreement that is not present in fact or implication based upon the intention of the parties is error. *Hartford* at 710, 40 S.E.2d at 201. Further, resorting to extrinsic evidence makes the interpretation one for trial, not summary judgment. *See contra Hagler* at 294, 354 S.E.2d at 234 (discussing that when a written contract is unambiguous, free from extrinsic evidence and does not have disputed facts, then the intention is a question of law for a court to decide its meaning).

Unlike the Opinion, this Court in *Weyerhaeuser* reviewed the easement right to clear and keep clear properly as “. . . entire and indivisible.” *Weyerhaeuser* at 720, 127 S.E.2d at 542. The Opinion hyper focuses on one isolated part of a sentence of a detached portion and ignores the rest of the instrument, which is prohibited by *Weyerhaeuser. Id.*

In the Opinion, the context of the Flood Easement was analyzed without due regard for the context of the remaining portions of the Flood Easement or the intentions of the Kisers at the time water was pooling onto their land in August of 1961. The Opinion also overlooks another fundamental rule of contract construction in that written contracts are construed against the party who drafted it. *See e.g., Chavis v. S. Life Ins. Co.*, 318 N.C. 259, 262, 347 S.E.2d 425,

427 (1986); *Philip Morris* at 753, 618 S.E.2d at 225. Thus, any ambiguities should be resolved in favor of Appellees.

This Court also misapprehends the sentence structure of the “necessary or desirable” language and also how those words are used in another portions of the Flood Easement: “. . . in connection with, as a part of, or incident to the construction, operation, maintenance, repair, altering, or replacing of a dam and hydroelectric power plant.” *Duke Energy Carolinas, LLC v. Kiser*, \_\_\_ N.C. \_\_\_, 886 S.E.2d 99, 101 (N.C. 2023); R p 22. No doubt grading is an essential function when building a dam and Duke needed the right to clear and to keep clear to do this. Placing this right at the very end of the Flowage Easement shows that the intent of the parties were to give Duke the right to clear and keep clear in connection with the maintenance and operation of the dam. “. . . [I]n any way deemed necessary or desirable” is a modifier of the words “[T]o grade and to treat . . .” and must be read conjunctively and in context with the rest of the sentence and instrument as Justice Barringer pointed out during oral argument. *Weyerhaeuser* at 719, 127 S.E.2d at 541. This Court did not look to the four corners of the Flood Easement and give any due regard to the Kiser’s intentions in holding out until the very last minute and thus, by doing so has erased its prior precedent regarding deed and contract interpretation and leaves the parties with more uncertainty and future litigation than after the trial court’s Order.

WHEREFORE, Petitioners/Appellees hereby pray that this Court allow the Petition for Rehearing in this matter.



Respectfully submitted this the 2nd day of June,  
2023.

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**BRIEF OF APPELLANTS MICHAEL L. KISER,  
ROBIN S. KISER AND SUNSET KEYS, LLC  
(JULY 20, 2020)**

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No. 20-333

DISTRICT 25-B

NORTH CAROLINA COURT OF APPEALS

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MICHAEL L. KISER, ROBIN S. KISER,  
and SUNSET KEYS, LLC,

*Petitioners/Appellants,*

v.

DUKE ENERGY CAROLINAS, LLC, THOMAS E.  
SCHMITT AND KAREN A. SCHMITT ET AL.

*Respondents/Appellees.*

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From Catawba County No. 17 CVS 194

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**BRIEF OF APPELLANTS  
MICHAEL L. KISER, ROBIN S. KISER AND  
SUNSET KEYS, LLC**

[TOC, TOA, Omitted]

**ISSUES PRESENTED**

I. Whether Summary Judgment Was Appropriate  
Where Third Parties Openly Admit to Trespass and  
the Easement Contains No Language Allowing Others  
to Construct Improvements on Land Owned by Sunset  
Keys.

II. Whether Lake Norman Is a Navigable Waterway Where Prior Caselaw and Stances of Duke Power Indicate That It Is Not.

III. Whether Duke Should Be Allowed and Rewarded for Taking Inconsistent Positions as to the Nature and Extent of the Easement.

IV. Whether the Trial Court's Grant of Title to the Third-Parties Was Appropriate Where the Easement Contains No Language Allowing Duke or Others the Right to Construct on the Kiser Lake Parcel.

### **STATEMENT OF THE CASE**

Plaintiff commenced this action against Michael L. Kiser ("Mr. Kiser") and Robin Kiser ("Ms. Kiser") by the filing of a complaint and issuance of summons on 27 January, 2017. (R p 2). Defendant answered and then subsequently moved to add third-parties (the "Third-Parties") on 13 February, 2017. (R p 27). During the long pleading phase, Duke moved for Partial Summary Judgment and The Honorable Judge Nathaniel Poovey, Catawba County Superior Court Judge presiding, heard arguments on the partial summary judgment on 13 August, 2018. (R p 216). A judgment and order granting partial summary judgment was entered 22 August, 2018. (R p 216). After the pleadings fully closed, Duke and the Third-Party defendants filed for summary judgment as to all of the Kiser parties remaining claims.

A judgment and order granting summary judgment was entered 2 January, 2020. (R p 526). Plaintiff filed and served two notice of appeals on 27

January, 2020, and 5 February, 2020, respectively<sup>1</sup>. (R pp 541, 545). A transcript of the 13 August, 2018, hearing was ordered on 5 February, 2020, and delivered 10 February, 2020. (R p 587). A transcript of the 6 December, 2019, hearing was ordered on December 30, 2019, and delivered 7 January, 2020. (R p 582). The time to serve the proposed record was extended by the trial division until 2 March, 2020. (R p 590). The record was settled by judicial settlement on 12 May, 2020, filed in the Court of Appeals on 29 May 2020, and docketed 29 May 2020. (R p 597).

### **STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW**

The last paragraph of the Trial Court's 2 January 2020 Order, granting in part Plaintiffs/Appellees' and the Third-Parties' motions for summary judgment, set forth the following declaration:

Accordingly, while this Order and Declaratory Judgment does not dispose of all the claims in this action, it is nevertheless the Court's final judgment with respect to the claims addressed and disposed of herein, and the Court finds pursuant to Rule 54(b) of the North Carolina Rule of Civil Procedure that there is no just reason for delay in the entry of final judgment with respect to those claims.

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<sup>1</sup> Although appellants appealed the 22 August 2018 Order it does not include a Rule 54(b) certification and there remain outstanding issues to be resolved at the trial court level. Therefore Appellants will not address that Order in this Appeal and reserve the right to appeal upon further adjudication at the trial court level.

The Order constitutes a final disposition of the majority of claims in this matter. Other claims remain outstanding, so this appeal is technically interlocutory. It is appropriate, however, to pursue an immediate appeal of the claims at issue because the 2 January 2020 Order contains a Rule 54(b) certification. (R p 556). *See Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (“When the trial court certifies its order for immediate appeal under Rule 54(b), appellate review is mandatory.”). Thus, the appeal of the 2 January 2020 Order is properly before the North Carolina Court of Appeals.

### STATEMENT OF FACTS

This case arose from a dispute between Duke Energy Carolinas, LLC (“Duke”) and Michael Kiser and Robin Kiser (together the “Kisers”) regarding a retaining wall installed by Mr. Kiser in the lakebed of Lake Norman in land owned by Mr. Kiser and his brothers in fee simple. The Kiser lake parcel in question in this litigation (the “Kiser Lake Parcel”) is encumbered by a flood easement (the “Easement”) with Duke.

The property at issue in this case was owned by Mr. Kiser’s grandparents, B. L. Kiser and Zula C. Kiser (the “Kiser Grandparents”) (Def.’s Am. Third-Party Compl. ¶ 61). Prior to the construction of the dam and the impoundment of Lake, the Kiser Grandparents owned a large parcel (the “Original Parcel”) of land covering portions of what is now Lake Norman and Kiser Island. (R p 542). The Kiser Grandparents are now deceased (Def.’s Am. Third-Party Compl. ¶ 62). The ownership of the Kiser Lake Parcel predates the construction of the Cowan’s Ford

Dam (the “Dam”), which impounds the water that forms Lake Norman (the “Lake”) (Def.’s Am. Third-Party Compl. ¶ 63).

Sometime prior to the construction of the Dam, Duke purchased the majority of the land that would eventually form the bed of Lake (the “Lake Bed”) (Def.’s Am. Third-Party Compl. ¶ 64). Unlike the majority of owners who held property in what would become the Lake Bed, the Kiser Grandparents declined to sell their land to Duke in fee simple. Ultimately, they would only agree to grant Duke the limited Easement across the Kiser Lake Parcel. (Def.’s Am. Third-Party Compl. ¶ 65).

The Easement sets the boundary (the “Flood Boundary”) at which Duke’s Easement terminates at the dry property (Def.’s Am. Third-Party Compl. ¶ 67), and specifies each of Duke’s particular rights to enter the Kiser Property. The project along with the Kiser Lake Parcel does not occupy federal land. (Doc. Ex. 437).

After the death of Mr. Kiser’s father in March of 2016, he and his two brothers became the owners of the Original Parcel and the Kiser Lake Parcel. Both parcels were then conveyed to Sunset Keys, LLC (“Sunset Keys”), of which Mr. Kiser and his two brothers are the members. (R p 542).

The Third-Parties installed Structures, ramps and other structures (collectively the “Structures”) that are located on, over and are affixed to the Kiser Lake Parcel. (T p 9 ¶¶ 11-17, 6 December 2019). The Third-Parties originally constructed the Structures pursuant to permits issued by Duke. (T p 66 ¶¶ 13-16, 6 December 2019). Sunset Keys and its predecessors

allowed the Third-Parties to maintain the Structures upon the Kiser Lake Parcel until the filing of the Third-Party complaint in this matter, thereby terminating the Third-Parties' permissive entry upon the Kiser Lake Parcel. (R p 87). The Third-Parties admit that their structures either touch or are over the Kiser Lake Parcel. (T p 9 ¶¶ 1117, 6 December 2019).

### **STANDARD OF REVIEW**

The standard of review from orders granting summary judgment is *de novo* and the reviewing court must also view the evidence "in the light most favorable to the non-movant." *Scott & Jones, Inc. v. Carlston Ins. Agency, Inc.*, 196 N.C.App. 290, 293 (N.C. Ct. App. 2009) (*quoting Baum v. John R. Poore Builder, Inc.*, 183 N.C.App. 75, 80, 643 S.E.2d 607, 610 (2007) (citations and quotation marks omitted).

### **ARGUMENT**

#### **I. The Lower Court Erred in Granting Summary Judgment as to Sunset Key's Claims of Trespass and Breach of Contract Under the Language of the Easement.**

The determinative principle of law that governs this case is simple and long-standing: no landowner can convey more than he owns. *See Yount v. Lowe*, 288 N.C. 90, 95, 215 S.E.2d 563, 566 (1975). The permits to construct the Structures that the Third-Parties obtained from Duke do not create a legal right to maintain the Structures upon the Kiser Lake Parcel without Sunset Keys' consent. *Zagaroli v. Pollock*, 94 N.C.App. 46, 379 S.E.2d 653 (1989) (Holding

that a flood easement does not provide Duke the authority to grant a third-party the exclusive right to use the surface of the lake to operate a marina over someone else's land).

An easement is a contract and “the controlling purpose of the court in construing a contract is to ascertain the intention of the parties as of the time the contract was made, and to do this consideration must be given to the purpose to be accomplished, the subject-matter of the contract, and the situation of the parties.” *Weyerhaeuser Co. v. CP&L*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962). The parties’ intention “is to be gathered from the entire instrument and not from detached portions.” *Lovin v. Crisp*, 36 N.C. App. 185, 189, 243 S.E.2d 406, 409-10 (1978). “Easement holders only have the right to use their property within the easement consistent with the purpose for which the easement was created. Consequently, the owner of the land subject to an easement has the right to use his land in any manner, for any purpose which is not inconsistent with the reasonable use and enjoyment of the existing easement.” *Adams v. Kalmar*, 226 N.C.App. 583, 741 S.E.2d 513 (N.C. Ct. App. 2013).

**A. The Lower Court Erred In Granting Summary Judgment Against Sunset Keys on its Trespass Claims Against the Third-Parties and Breach of Contract Claims Against Duke.**

In *Zagaroli*, the North Carolina Court of Appeals squarely addressed the limits of Duke’s authority to grant usage rights on the surface of impounded lakes. *Zagaroli* at 658. Pursuant to a permit granted



by Duke, the *Zagaroli* defendants operated a marina on and above a portion of lakebed property owned by the *Zagaroli* plaintiff. *Id.* at 654. The defendants claimed (as Duke and the Third-Parties claim here) that the Federal Power Act gave Duke the “exclusive right to determine the use of the lake’s surface waters.” *Zagaroli* at 657. The Court of Appeals disagreed, finding that “while the Federal Power Act vests substantial authority in the power companies who obtain licenses from the Federal Energy Commission (FERC) . . . *the Federal Power act did not abolish private proprietary rights*”. *Zagaroli* at 658 (emphasis added).

Thus, the *Zagaroli* Court ruled, “the Federal Power Act does not give Duke Power the authority to grant defendants the right to use plaintiff’s property without the assent of the plaintiff.” *Id.* Any contrary holding would amount to a taking of property without just compensation. *Id.* *Zagaroli* is precisely on point, involves Duke and is still the law of the land regarding property rights encumbered by a flood easement.

Another case on point is a North Carolina Supreme Court case holding that considers the issue of a floating trespass. *Steele Creek Development Corp. v. Smith*, 300 N.C. 631 (1980). In *Steele Creek* Duke had, as it does in this case, a flood easement over Lake Wylie and the land in question. *Id.* at 632. The *Steele Creek* plaintiff purchased both dry and submerged land and subsequently formed a corporation to hold the property, as is the case here. *Id.*

The *Steele Creek* defendants, as in the current case, built structures over the land owned by plaintiffs and openly admitted to doing so at summary judgment. *Id.* at 637. Because of this admission, summary judg-

ment was granted in *plaintiff's* favor. *Id.* at 631. The defendants appealed and their appeal was dismissed. *Id.* at 631. Ultimately the North Carolina Supreme Court upheld the trial court's grant of summary judgment and remanded the case to determine damage. *Id.*

Like *Zagaroli supra*, *Steele Creek* concerns a flood easement in favor of Duke. Moreover, the disputes in both *Steele Creek* and *Zagaroli* arose from the construction of structures over the real property encumbered by Duke's flood easements. And in both cases, the reviewing courts reached a conclusion contrary to Judge Poovey's order here. *Steele Creek supra*; *Zagaroli supra*. *Steele Creek* is also instructive because its scope was greater than *Zagaroli* in that the defendants were held liable for trespass without having a structure that was physically affixed to the plaintiff's land. *Steele Creek* at 633.

Duke's position in the present case (that it is empowered to permit the construction of Structures on private property that it does not own) is at odds with the holdings in both *Steele Creek* and *Zagaroli*. (T p 24 ¶¶ 1-3, 6 December 2019); (T p 26 ¶¶ 12-15, 6 December 2019). Here, as in *Zagaroli* and *Steele Creek*, while the Third-Parties may hold permits from Duke entitling them to construct and maintain the Structures, that does not empower them to do so absent the current consent of Sunset Keys. Under *Zagaroli*, Duke cannot confer to the Third-Parties a right that itself does not enjoy. *Yount, Supra*. The plain language of the Easement is very specific in only allowing Duke to "treat said land up to said 770 at elevation in any manner deemed necessary or desirable by the Power Company in connection with

the construction, reconstruction, maintenance and operation of the dam and power plant” (emphasis added).

The trial court’s reasoning was that in granting permits to third-parties to enter upon and construct structures on the Kiser Property, Duke has “. . . acted within the scope and authority granted to it by. . . . the Easement (“DEC’s Scope of Authority”).” (R p 554). Thus, the trial court relied solely upon the Easement and not Duke’s delegated authority under its FERC license. By this, the trial court erred as the Easement does not grant Duke the authority to construct Structures over property that it does not own, or to permit the Third-Parties to do so. As a result, the lower court’s grant of summary judgment violates the holdings of both *Zagaroli* and *Steele Creek*. (R p 553).

The Easement’s clear purpose is to facilitate Duke’s generation of power, not to allow for the installation of maritime improvements by adjoining landowners. Therefore, the Third-Parties’ reliance upon Duke’s permits to maintain Structures upon the Kiser Lake Parcel is at diametrical odds with the holdings in *Zagaroli* and *Steele Creek*, the controlling North Carolina cases. This position is fatal to the Third-Parties’ defenses as they rely entirely upon Duke’s Easement authority to justify their trespass upon the Kiser Lake Parcel. In fact, the Third-Parties maintain that Sunset Keys never had the right to give consent to others in order to use their own land. (T p 64 ¶¶ 3-4, 6 December 2019).

Through this litigation it has become clear that Duke does not view its limited Easement interest in the Kiser Lake Parcel any more narrowly than it

would if it owned the entire underlying fee. (T p 21 ¶¶ 11-21, 13 August 2018). Put simply, Duke takes the stance that it owns *all* right, title and interest to the Kiser Lake Parcel. As set out in *Zagaroli* and *Steele Creek*, this cannot be the case.

The language in the Easement is very similar to the language in the easement at issue in *Zagaroli*. Here, the Easement refers to “absolute water rights”. (R pp 18-24). The easement in *Zagaroli* reads “all riparian rights”. “Rights” being the same word, “all” and “absolute” being synonyms and “riparian” simply meaning water, the grant of authority under the *Zagaroli* easement and the Easement here are essentially the same. Moreover, the *Zagaroli* easement provides Duke with the “exclusive right to determine use”, while the Easement states, “treat in any manner”. If anything, the *Zagaroli* easement is broader in scope than the Easement at issue here.

Furthermore, the Third-Parties openly admit that they are on the Kiser Lake Parcel under Duke’s authority. (T p 9 ¶¶ 11-17, 6 December 2019). The same was true with the *Steele Creek* defendants, who the Supreme Court of North Carolina found to have trespassed upon the plaintiff’s submerged property. *Steele Creek* at 642.

In the instant case, counsel for the Third-Parties openly admitted at the summary judgment hearing that his clients “ . . . have shoreline improvements and Structures constructed off their lots that are anchored to or at least touch in some way what we call the submerged tract, the Kiser property that’s beneath Lake Norman”. (T p 9 ¶¶ 11-17, 6 December 2019). Thus, the central question in this case is not whether the Third-Parties have entered upon the Kiser Lake

Parcel without the current consent of Sunset Keys (clearly they have), but whether they are authorized to enter and remain upon Sunset Keys' property solely by the grant of a permit by Duke, an entity that does not own fee simple title to the land.

Upholding the lower court's grant of summary judgment would not only overturn *Zagaroli* and *Steele Creek*, but would turn real property law on its head by giving Duke (and other utilities) absolute power over easements they own throughout the State of North Carolina.

**B. The Lower Court Erred in Granting Summary Judgment as to The Kiser's Claim for Trespass for Recreation Use over the Kiser Lake Parcel.**

Historically, riparian rights attached only to natural (*i.e.*, "by nature") as opposed to artificial watercourses. *Dunlap v. CP&L*, 212 N.C. 814, 195 S.E. 43, 45-46 (1938) (riparian owner had right to use a stream "as it comes upon his land in its natural state" and to use water flowing by his premises "in a natural stream"); *Coastal Plains Utilities, Inc. v. New Hanover County*, 166 N.C. App. 333, 601 S.E.2d 915 (2004) ("[A] riparian proprietor is entitled to the natural flow of a stream running through or along his land in its accustomed channel").

The first step in the establishment of riparian rights is to "show that [one] is a riparian proprietor or that in some way [one] has acquired riparian rights in the [waterbody]." *Coastal Plains, supra*, at 351, 601 S.E.2d at 927; *Young v. City of Asheville*, 241 N.C. 618, 622, 86 S.E.2d 408, 411-12 (1955) (a party claiming riparian rights must show "natural" riparian

rights by contact with a natural stream or rights acquired by grant or prescription).

The well-settled law in a majority of jurisdictions that have considered the question is that riparian rights do not attach to artificial waterbodies. See *Crenshaw v. Graybeal*, 597 So.2d 650, 652 (Miss. 1992) (Like *Steele Creek Dev. Corp. v. Smith*, *Crenshaw* stands for the proposition that absent a covenant to the contrary, the owner of the lakebed has exclusive control over the water over its respective portion); *Clippinger v. Birge*, 547 P.2d 871, 877 (Wash. 1976) (“‘riparian rights’ refer to ownerships abutting on public natural bodies of water.”); *Publix Super Markets, Inc. v. Pearson*, 315 So.2d 98, 99 (Fla. 1975) (“[R]iparian rights do not ordinarily attach to artificial water bodies . . . .”); *Mascolo v. Romaz Properties*, 28 A.D.3d 617 (N.Y. 2006) (The basin in question was artificially created and did not entitle defendant to riparian rights and summary judgment was reversed); *Cummins v. Travis County*, 175 S.W. 3d 34, 45-46 (Tex. 2005) (for riparian rights to exist, the water in question must be “a ‘natural,’ not an ‘artificial,’ body.”); *Nottolini v. LaSalle Nat’l Bank*, 782 N.E.2d 980, 983 (Ill. 2003) (riparian rights “do not extend to artificial bodies of water, such as man-made lakes.”); *Harrell v. Vahlsing, Inc.*, 248 S.W.2d 762, 770-71 (Tex. 1952) (artificial channel did not bring about riparian rights).

Not only does the majority of jurisdictions review navigability of watercourses before impoundment, but the North Carolina Supreme Court in *Gwathmey v. State Through Dep’t of Env’t, Health, & Nat. Res. Through Cobey*, 342 N.C. 287, 300, 464 S.E.2d 674, 682 (1995) also focused on the natural state of the

watercourse in a public trust analysis. The *Gwathmey* Court stated “the public ha[s] the right to [] unobstructed navigation as a public highway for all purposes of pleasure or profit, of all watercourses, whether tidal or inland, *that are in their natural condition capable of such use.*” *Gwathmey*, 342 N.C. at 300, 464 S.E.2d at 682 (*quoting State v. Baum*, 128 N.C. 600, 38 S.E. 900, 901(1901)(emphasis added)).

In *Bauman v. Woodlake Partners, LLC*, 199 N.C.App. 441, 681 S.E.2d 819 (N.C. Ct. App 2009) the issue before the lower court was whether Black Creek was navigable in fact before Black’s Pond was created. *Bauman*. at 454. The *Bauman* Court reviewed navigability under a declaratory action involving an artificial body of water and found that the waters were not navigable based on the condition of Black Creek before Black’s Pond was created. *Id.*

Thus, given the state of the law, Judge Poovey erred by not fully considering the Appellants’ arguments regarding navigability in the summary judgment hearing. Judge Poovey did not allow counsel to argue navigability where it is a threshold issue for whether the public trust doctrine comes into play. *Gwathmey, supra.*

For its part, Duke did not provide the trial court with any evidence that the Catawba River was navigable north of the Dam before the impoundment of the Lake. In fact, prior cases have held that the Catawba River in North Carolina was not navigable. For example, in *Petition of Howser*, 227 F.Supp. 81 (1964), the United States District Court for the Western District of North Carolina found that “. . . to contend that the waters of the Catawba River in

North Carolina are navigable is to state a supposed fact which has little if any merit.”

In the past, Duke itself has taken a position with respect to the navigability of Lake Norman that is inconsistent with its present stance. In *Jones v. Duke Power*, 501 F.Supp. 713 (1980) Duke went to great lengths to prove that Lake Norman was not a navigable waterway. The *Jones* plaintiff had alleged that Duke breached its duty as an employer to provide a seaworthy vessel. *Jones* at 715. In response, Duke asserted that Lake Norman was not a navigable waterway. *Id.* This is the exact opposite position that Duke takes in the present case.

It cannot be disputed that Lake Norman is an artificial, man-made lake. No evidence was produced at summary judgment to show that a navigable waterway existed prior to the impoundment of the Dam. Duke is again relying on its overbroad interpretation of the Easement to allow others to access the Kiser Lake Parcel without Sunset Keys’ permission. Since navigability is the defense proffered by Duke to prevent Sunset Key’s boating/recreational trespass claim<sup>2</sup>, at a minimum, there is an issue of fact as to the navigability of Lake Norman before the impoundment of the Dam.

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<sup>2</sup> To be clear Sunset Keys is only requesting to be compensated fairly for use of the Kiser Lake Parcel. Sunset Keys is not trying to prevent the Third-Parties from recreational boating use of the Kiser Lake Parcel, only to be compensated for the Structures and to be compensated for recreational use by individuals/companies other than the Third-Parties.



## **II. Duke Should Not Be Allowed to Take Inconsistent Positions as to the Scope of the Easement.**

Duke posits that Mr. Kiser's construction of the retaining wall on his land was "...in complete derogation of the absolute water rights that were granted to Duke, and the flowage easement rights that were granted to Duke. . . ." (T p 5 ¶¶ 18-21, 13 August 2018). Yet, in granting summary judgment on Kiser's claims for trespass against the Third-Parties, the trial court has allowed the construction of Structures that also violates Duke's Easement. (R p 553). These two positions cannot be squared.

As a result, Sunset Keys has been denied the reasonable use of its property and Duke has been permitted to assert a level of dominion over the Kiser Lake Parcel that far exceeds the scope of the Easement. At the very least, it is inconsistent for Duke to claim that the Kisers have trespassed upon the Easement by building their wall but the Third-Parties have not trespassed in building their Structures.

## **III. The Trial Court's Grant of Title to the Third-Parties Was Inappropriate Where the Easement Contains No Language Allowing Third-Parties the Right to Construct Structures on the Kiser Lake Parcel.**

"In determining what uses the servient tenement may make of the land within the easement the court should look to the words of the deed or instrument creating the easement." *Hunter v. Michael*, 105 N.C. App. 432 (N.C. Ct. App. 1992) *quoting Hine v. Blumenthal*, 239 N.C. 537, 80 S.E.2d 458 (1954). "One must look at the language of the deed or instrument

rationally and construe the language consistent with reason and common sense. If there is any doubt as to the parties' intentions, an interpretation should be adopted which conforms more to the presumed meaning, one that does not produce an unusual or unjust result." *Id.*

"Absent explicit language to the contrary, the owner of land subject to an easement has the right to continue to use his land in any manner and for any purpose which is not inconsistent with the reasonable use and enjoyment of the easement." *Michael* at 435 quoting *Chesson v. Jordan*, 224 N.C. 289, 29 S.E.2d (1944). "An easement holder may not increase his use so as to increase the servitude or increase the burden upon the servient tenement." *Michael* at 435. "If the easement holder makes an unwarranted use of the land in excess of the easement rights held, such use will constitute an excessive use. . . ." *Michael* at 435 quoting *Hales v. Atlantic Coast Line Railroad Co.*, 172 N.C. 104, 90 S.E. 11 (1916).

In *Michael*, the plaintiff granted defendants an exclusive easement to use a roadway. *Michael* at 434. The *Michael* defendants contended that an "exclusive" easement empowered it to exclude the underlying fee holder from the easement. *Michael* at 434. The *Michael* court held that an easement holder can neither exclude the underlying fee holder nor increase its use of the easement outside of its terms. *Id.*

Here, Duke has far exceeded its permissible use of the Easement by granting the Third-Parties the right to build Structures on the Kiser Lake Parcel for recreational purposes. The Docks, boat ramps and other Structures the Third-Parties constructed on the Kiser Lake Parcel have nothing to do with the

operation of the Dam or the generation of power. But even if they did, the Easement only allows Duke to enter upon the Kiser Lake Parcel. It does not extend that right to the Third-Parties. Upholding the trial court's grant of summary judgment in this matter would render the concept of the grant of a limited easement in real property completely meaningless.

### **CONCLUSION**

For the aforementioned reasons, this Court should reverse and remand the trial court's rulings. The Easement does not allow Duke to license others to construct buildings and Structures on property that it does not own. The Easement does not allow Duke to allow others to use the Kiser Lake Parcel for recreational use. Appellants respectfully request an oral hearing in this Court.

This the 20th day of July, 2020.

REDDING JONES, PLLC

By: /s/ Ty K. McTier

Ty Kimmell McTier

*Attorney for Appellants*

2907 Providence Road, Suite A303

Charlotte, North Carolina 28211

704-200-2054

State Bar No. 49401

tmctier@reddingjones.com

N.C. R. App. P. 33(b) Certification: I  
certify that all of the attorneys  
listed below have authorized me to  
list their names on this document as  
if they had personally signed it.

/s/ David G. Redding

David G. Redding

Attorney for Appellants

2907 Providence Road, Suite A303

Charlotte, North Carolina 28211

704-200-2056

State Bar No. 24476

drredding@reddingjones.com

**FLOOD EASEMENT  
(1961)**

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019 01283

September 22, 1961

RECEIVED

Sep 25, 1961

Surveying & R., W. Dept

Mr. T.F. Newton  
Building

Re: B.L. Kiser and wife, Zula C. Kiser,  
Mountain Creek Township,  
Catawba County, Abstract No. 3554

Dear Mr. Newton:

I am enclosing herewith duly executed deed dated August 4, 1961, from B. L. Kiser and wife, Zula C. Kiser, which has been recorded in the office of the Register of Deeds for Catawba County in Book 655 at page 223 and in the office of the Register of Deeds for Lincoln County in Book 367 at page 482.

I also enclose conformed copy of deed dated July 10, 1961 from Duke Power Company to B. L. Kiser and wife, Zula C. Kiser.

Very truly yours,

/s/ Wendell R. Wilmoth

WRW: lfc

Enclosures

CC: Mr. J. Y. Taylor

App.101a

019 01284

**DUKE POWER COMPANY**

General Office  
Charlotte 1. N.C.

RECEIVED  
Sep 22, 1961  
Surveying & R.,W. Dept

August 17, 1961

Mr. J.W. DeYoung  
Building

Dear Sir:

Enclosed Please find draft stub pertaining to the purchase of water rights on 280.4 acres plus a flood easement to elevation 770 ft. This Property is located in Mountain Creek Township, Catawba County and Catawba Springs Township, Lincoln County and was bought from B. L. Kiser for Cowane Ford Development.

Draft Hereto:

|                      |             |
|----------------------|-------------|
| B-29635              | \$21,625.10 |
| Option fee           | 10.00       |
| Duke power Co. note  | 41,300.00   |
| B-30369 (1102.15)    | 67.10       |
| (Previously Forward) |             |

|            |             |
|------------|-------------|
|            | <hr/>       |
|            | \$59,002.20 |
| Total Cost | \$59,000.00 |

In addition to the above balance paid, Duke Power Co. deeded to Mr. Kiser 2.4 acres valued at \$130.00 from the R. E. Waltner, et al, tract (UNI-197, Tr. 1)

and 6.7 acres valued at \$470.00 from the R. E. Whitener, et al, tract (UNI-197). Revenue Stamps in the amount of \$2.20 are to be placed on this deed and purchased by Mr. Kiser with the like amount as shown above.

Also enclosed is Duke Power Company's note payable to B. L. Kiser in the Amount of \$41,300.00 in two payments of \$20,650.00 each. The grantor is to pay all taxes.

Yours very truly,

George Q. Hall

Supervisor

Misc. Real Estate

GQH:sak

Enclosure

Cc: T.F. Newton  
W.R. Wilmoth  
Building

Copy

UMI -901

**NOTICE OF PURCHASE OF REAL ESTATE**

Duke Power Company

Name of Seller

B. L. Kiser and wife, Zula C. Kiser

By

Same

XX Land

South of Terrell, N.C.

XX For Which Acquired

Cowana Ford Development

\$59,000.00 – 9.1 acres valued at \$600.00

Date of Purchase

August 4, 1961

Purchase Authorized by

C. J. Blades

Examined by:

By:

C.J. Blades B-29635 - \$17,625.10; Option fee - \$10.00; Option fee - \$10.00; note - \$41,300.00; B-30369 - \$67.10

Description of Property:

State of N.C. County of Catawba & Lincoln Township of Mountain Creek, Catawba Springs

Number of Acres

W/R on 280.4 + F/E to Elev. 770ft



Assessed Value

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General Description

Bounded on the east by the Catawba River and on the west by Mt. Creek on the north by the Duke Power Co. property from H.E. Whitener, et al (UMI-199, Tr. 1).

The print of Mtn. Island File No. 805 attached with deed.

Granter is to pay the 1961 taxes.

Signed

W.B. McGuire

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To be filled in by Accounting Department

|      |          |
|------|----------|
| 5683 | 10.00    |
| 3384 | 67.10    |
| 4817 | 17625.10 |
| J514 | 41300.00 |

Land exchange, see UMI 197>199

2233-107-10650-800

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To be filled in by Legal Department

|                       |           |           |
|-----------------------|-----------|-----------|
| 8-10-61               | Cat. 655  | 223       |
| Deed Recorded in Book | Linc. 367 | Page: 482 |
| Deed File Number:     | UMI-901   |           |
| Abstract File Number: | 3554      |           |

019 01286

Project 2327

Project 50212

State of North Carolina )

County of Catawba :

County of Lincoln )

This DEED, Made this 4th day of August, 1961,  
by and between B. L. KISER and Wife, ZULA C.  
KISER.

The County of Catawba and State of North  
Carolina, parties the first part, and DUKE POWER  
COMPANY, a corporation organized under the law of  
the State of New Jersey, party if the second part;

W I T N E S S E T H:

That the said parties of the first part, in  
consideration the sum of Ten (\$10.00) Dollars and  
other good and valuable consideration to them paid  
by the party of the second part, the receipt of which  
hereby acknowledged, have bargained and sold and  
by these presents grant, bargain, sell and convey  
unto the said Duke Power Company, successors and  
assigns, a permanent easement of water flowage,  
absolute water rights, and easement to back, to pond,  
to raise, to flood and to divert the waters of the Catawba  
River and its tributaries in, [ ]er, upon, through  
and away from the 280.4 acres, more or less, of and  
hereinafter described, together with the right to  
clear, and keep clear from said 280.4 acres, all timber,  
underbrush, vegetation, buildings and other structures  
or objects, and to grade and to treat said 280.4 acres,

more or less, in any manner deemed necessary or desirable by Duke Power Company.

The land upon which said rights, easements, and privileges granted is located in Mountain Creek Township, Catawba County, North Carolina and in Catawba Springs Township, Lincoln County, North Carolina, and is more particularly described as follows:

FIRST TRACT: BEGINNING at a stake at the southeasterly corner of the Duke Power Company (formerly Mrs. Hattie L. Cornelius) property and running thence with said property seven courses and distances as follows: (1) N 31-14 W 560.3 ft.; (2) N 70-55 W 355.0 ft.; (3) N 41-35 W 400.0 ft.; (4) 6-55 W 285.0 ft.; (5) S 82-25 W 80.0 ft.; (6) N 6-20 W 80.0 ft.; (7) S 82-25 W 1,259.3 ft. to a point in the center line of Beaver Dam Creek; thence with the center line of Beaver Dam Creek in a northerly direction 2,050 ft., more or less, to the southwest corner of the Duke Power Company (formerly H. E. Whitener, et al) property; thence with the southerly line of said property N 86-25 E 1,065.3 ft. to an iron pipe; thence the following courses and distances with contour at elevation 760 feet above mean sea level, U.S.G.S. datum: S 17-15 E 96.4 ft.; 85-23 E 108.0 ft.; S 63-51 E 106.4 ft.; S 46-45 E 93.5 ft.; 55-25 E 88.8 ft.; S 19-55 E 52.4 ft.; S 68-47 W 133.9 ft.; 22-36 W 75.4 ft.; N 82-52 W 90.4 ft.; S 54-07 W 176.4 ft.; 13-58 W 80.9 ft.; S 12-57 E 149.1 ft.; S 79-44 E 83.6 ft.; 76-16 E 118.3 ft.; S 51-27 E 51.1 ft.; S 8-55 E 102.3 ft.; 5-30 E 143.9 ft.; S 9-50 E 89.9 ft.; S 38-30 W 75.8 ft.; S 4-29 W 146.8 ft.; S 29-45 W 134.7 ft.; S 4-25 E 79.0 ft.; S 86-39 E 164.6 ft.; N 39-57 E 120.0 ft.; N 17-54 E 152.6 ft.; S 84-29 E 77.3 ft. to an iron pipe in the westerly line of the Duke Power Company (formerly

H. E. Whitener, et al) property; thence with the westerly line of said property S 3-00 E 626.3 ft.; thence with the southerly line of the Duke Power Company (formerly H. E. Whitener, et al) property three courses and distances as follows: (1) N 80-55 E 614.8 ft.; (2) N 41-52 E 346.5 ft.; (3) S 88-09 E 638.3 ft. to the intersection of a branch and the Catawba River; thence with the westerly bank of the Catawba River in a southerly direction 3,300 ft., more or less, to the south-easterly corner of the Duke Power Company (formerly J. B. Cornelius) property; thence with the northerly line of said property S 80-55 W 337.4 ft.; thence the following courses and distances with contour at elevation 760 feet above mean sea level, U.S.G.S. datum: N 22-39 W 132.6 ft.; N 31-43 W 120.3 ft.; N 51-53 W 206.1 ft.; N 24-03 W 121.2 ft.; N 37-25 W 94.3 ft.; N 77-38 W 128.6 ft.; N 82-46 W 276.6 ft.; N 87-35 W 104.6 ft.; N 75-40 W 85.7 ft.; N 66-49 W 190.8 ft.; N 40-11 W 112.5 ft.; N 43-56 W 212.7 ft.; N 20-58 W 186.9 ft.; N 18-58 W 198.6 ft.; S 45-12 W 51.2 ft.; N 29-50 W 88.2 ft.; S 58-19 W 102.3 ft.; S 38-20 W 103.8 ft.; S 20-33 W 148.6 ft.; S 34-18 E 83.9 ft.; S 0-15 E 106.7 ft.; S 44-22 E 92.8 ft.; S 57-10 E 198.4 ft.; S 26-59 W 155.8 ft.; S 34-44 E 85.7 ft.; S 69-44 E 80.7 ft.; S 53-23 E 76.6 ft.; S 3-51 E 217.4 ft.; S 12-06 E 131.3 ft.; S 40-23 E 120.4 ft.; S 50-08 E 95.6 ft.; S 29-51 E 195.9 ft.; S 71-35 E 168.3 ft.; to a stake in the westerly line of the Duke Power Company (formerly J. B. Cornelius) property; thence with the westerly line of said property S 12-35 W 295.8 ft.; thence S 64-23 W 751.8 ft.; thence S 14-25 W 337.1 ft.; thence N 79-44 W 664.0 ft.; to a point in the center line of Mountain Creek; thence with the center line of Mountain Creek in a northerly direction 490 ft., more or less, to the northeasterly corner of the Duke

Power Company (formerly Ernest Newton) property; thence with the Duke Power Company (formerly Ernest Newton) property seven courses and distances as follows: (1) S 65-10 W 293.4 ft.; (2) S 88-03 W 783.4 ft.; (3) N 7-30 W 470.2 ft.; (4) N 6-30 W 330.0 ft.; (5) N 38-00 E 288.8 ft.; (6) N 42-00 E 152.6 ft.; (7) N 27-48 E 70.8 ft.; to the intersection of the center lines of Mountain Creek and Beaver Dam Creek; thence with the center line of Beaver Dam Creek in a northerly direction 1,030 ft., more or less, to the southwesterly corner of the Duke Power Company (formerly Mrs. Hattie L. Cornelius) property; thence with the southerly line of said property N 86-00 E 1,936.0 ft. to the BEGINNING, containing 253.0 acres as shown on print dated April 12, 1961, marked Mountain Island File No. 805, copy of which is attached hereto and made a part hereof.

Excepted from this conveyance are the following tracts of land: EXCEPTION A: BEGINNING at a point, said point being N 8256 E 260.4 ft. from the southeasterly corner of the Duke Power Company (formerly Mrs. Hattie L. Cornelius) property and running thence the following courses and distances with contour at elevation 760 feet above mean sea level, U.S.G.S. datum: N 914 W 97.1 ft.; N 5-47 E 211.0 ft.; N 6-01 W 95.1 ft.; N 7-32 E 180.4 ft.; N 38-08 E 159.5 ft.; N 67-57 E 114.2 ft.; N 82-52 E 67.0 ft.; S 41-30 E 74.5 ft.; S 15-32 E 71.4 ft.; S 83-19 E 50.7 ft.; S 41-06 H 81.0 ft.; S 3-35 E 133.6 ft.; S 26-12 E 55.4 ft.; S 54-39 E 87.0 ft.; N 70-56 E 118.3 ft.; S 33-55 E 176.0 ft.; S 8-45 W 169.4 ft.; S 4-43 E 89.8 ft.; 8 18-10 W 226.2 ft.; S 3149 W 87.4 ft.; S 42-47 W 83.6 ft.; S 81-17 W 350.0 ft.; N 51-25 W 123.4 ft.; N 21-48 W 382.1 ft. to the BEGINNING, containing 15.3 acres

as shown on print dated April 12, 1961, marked Mountain Island File No. 805, which plat is attached to this deed and incorporated as a part of same. EXCEPTION B: BEGINNING at a point, said point being S 47-03 E 691.6 ft. from the southwesterly corner of the Duke Power Company (formerly H. E. Whitener, et al) property; thence the following courses and distances with contour at elevation 760 feet above mean sea level, U.S.G.S. datum: N 56-14 E 191.3 ft.; S 67-32 E 43.1 ft.; S 26-04 E 82.2 ft.; S 27-21 W 100.9 ft.; S 6-11 W 116.2 ft.; S 70-11 W 81.8 ft.; N 46-45 W 87.4 ft.; N 25-26 W 98.6 ft.; N 5-55 E 68.3 ft.; to the BEGINNING, containing 1.1 acre as shown on print dated April 12, 1961, marked Mountain Island File No. 805, which plat is attached to this deed and incorporated as a part of same.

SECOND TRACT: BEGINNING at a point in the center line of Mountain Creek at the southwesterly corner of the Duke Power Company (formerly Mrs. Nannie Cornelius, et al) property and running thence with the southerly line of said property N 7719 E 1,441.8 ft. to a stone; thence with the westerly line of the Duke Power Company (formerly J. B. Cornelius) property S 16-30 W 457.0 ft.; thence with the southerly line of said property S 7319 E 587.1 ft. to a stake on the westerly bank of the Catawba River; thence with the westerly bank of the Catawba River in a southerly direction 1,650 ft., more or less, to the center line of the mouth of Mountain Creek; thence with the center line of Mountain Creek in a westerly direction 2,140 ft., more or less, to the southerly corner of the Duke Power Company (formerly J. B. Cornelius) property; thence with the southeasterly line of said property N 31-25 E 829.8 ft.; thence with the northeasterly line

of said property N 44-35 W 495.0 ft.; thence with the northwesterly line of said property S 41-25 W 759.0 ft. to a point in the center line of Mountain Creek; thence with the center line of Mountain Creek in a northerly direction 1,170 ft., more or less, to the BEGINNING, containing 43.4 acres as shown on print dated April 12, 1961, marked Mountain Island File No. 805, which plat is attached to this deed and incorporated as a part of same.

THIRD TRACT: BEGINNING at a stake in the northerly line of the Duke Power Company (formerly J. B. Cornelius) property, said stake being N 80-55 E 24.3 ft. from the northwesterly corner of said property and running thence the following courses and distances with contour at elevation 760 feet above mean sea level, U.S.G.S. datum: N 9-01 E 169.9 ft.; S 49-58 E 211.1 ft. to a stake in the northerly line of the Duke Power Company (formerly J. B. Cornelius) property; thence with the northerly line of said property S 80-55 W 190.9 ft. to the BEGINNING, containing 0.4 acre as shown on print dated April 12, 1961, marked Mountain Island File No. 805, which plat is attached to this deed and incorporated as a part of same.

The three tracts described above containing 280.4 acres are a part of the property conveyed to the parties of the first part by six deeds as follows: (1) from Jesse M. Cornelius, dated June 23, 1960, and recorded in Book of Deeds 621 at page 115 in the office of the Register of Deeds for Catawba County; (2) from Hattie Louise Cornelius, et al, dated February 10, 1959, and recorded in Book of Deeds 500 at page 286 in the office of the Register of Deeds for Catawba County; (3) from J. F. Howard and wife, Annie C. Howard, dated May 12, 1945, and recorded in Book of Deeds 358 at

page 249 in the office of the Register of Deeds for Catawba County; (4) from J. M. Cornelius, dated July 6, 1945, and recorded in Book of Deeds 358 at page 248 in the office of the Register of Deeds for Catawba County; (5) from J. L. Cornelius and wife, Zelma Bland Cornelius, dated August 3, 1960, and recorded in Book of Deeds 621 at page 163 in the office of the Register of Deeds for Catawba County; and, (6) from M. L. Keistler, dated June 27, 1951, and recorded in Book of Deeds 434 at page 451 in the office of the Register of Deeds for Catawba County.

And for the consideration above set out, the parties of the first part do hereby grant unto Duke Power Company, its successors and assigns, a permanent flood easement, and the right, privilege and easement of backing, ponding, raising, flooding, or diverting the waters of the Catawba River and its tributaries, in, over, upon, through, or sway from land hereinafter described up to an elevation of 770 feet above mean sea level, U.S.G.S. datum, whenever and to whatever extent deemed necessary or desirable by the Power Company in connection with, as a part of, or incident to the construction, operation, maintenance, repair, altering, or replacing of a dam and hydro-electric power plant to be constructed at or near Cowan's Ford on the Catawba River, together with the right at any time and from time to time to clear the land hereinafter described up to elevation 770 feet above mean sea level, U.S.G.S. datum, of underbrush, trees, and other growth, and to drain and otherwise use and treat said land up to said 770 feet elevation in any manner deemed necessary or desirable by the Power Company in connection with the construction, reconstruction. maintenance and



operation of the dam and power plant above referred as, and of the reservoir or lake created or to be created by same; provided, however, that the Power Company shall not cut merchantable timber except within a ten-foot strip, measured horizontally, adjoining 760 foot contour, and for the purpose of exercising the rights herein granted, parties of the first part grant unto Duke Power Company the right of ingress and egress over the land hereinafter described, said right to be over such roads as are now or as hereafter may be on said land, and in case there is no road on such land which are suitable for ingress and egress by the Power Company, the Power company will have the right of ingress and egress over the lands hereinafter described to the edge of the water for the purpose of exercising the rights herein granted.

The land upon which the above described right, privileges and easements are granted is located in Mountain Creek Township, Catawba County, and in Catawba Springs Township, Lincoln County. North Carolina, and is more particularly described as follows:

That portion of the 329.5 acres now owned by the parties of the first part in Mountain Creek Township, Catawba County, and in Catawba Springs Township, Lincoln County, North Carolina, excepting 280.4 acres over which is granted to Duke Power Company absolute flowage and water rights by this instrument. The said 329.5 acres are described in six deeds to the parties of the first part as follows: (1) from Jesse M. Cornelius, dated June 23, 1960, and recorded in Book of Deeds 621 at page 115 in the office of the Register of Deeds for Catawba County; (2) from Hattie Louise Cornelius, et al, dated February 10, 1959, and recorded in Book of Deeds 580 at page 286 in the office of the

Register of Deeds for Catawba County; (3) from J. F. Howard and wife, Annie C. Howard, dated May 12, 1945, and recorded in Book of Deeds 358 at page 249 in the office of the Register of Deeds for Catawba County; (4) from J. M. Cornelius, dated July 6, 1945 and recorded in Book of Deeds 35B at page 248 in the office of the Register of Deeds for Catawba County; (5) from J. L. Cornelius and wife, Zelma Bland Cornelius, dated August :3, 1960, and recorded in Book of Deeds 621 at page 163 in the office of the Register of Deeds for Catawba County; and, (6) from M. L. Keistler, dated June 27, 1951, and recorded in Book of Deeds 434 at page 451 in the office of the Register of Deeds for Catawba County. Outline of the property conveyed by this flood easement is shown on print dated April 12, 1961, marked Mountain Island File No. 805, which plat is attached to this deed and incorporated as a part of same.

TO HAVE AND TO HOLD, the aforesaid flood and flowage easements and other rights and privileges herein granted, and all privileges and appurtenances thereto belonging, to the said Duke Power Company, its successors and assigns, to its and their only use and behoof forever.

And the said parties of the first part, for themselves, their heirs, executors and administrators, covenant with the said party of the second part, its successors and assigns, that they have of said premises in fee over which such rights, privileges and easements are granted, and have the right to convey such rights, privileges and easements; that the same is free and clear from all encumbrances, and that they will warrant and defend the said title the said easements, rights, and privileges against the lawful claims all

persons whomsoever, except that this conveyance is made subject to an easement to Cornelius Mutual Corporation dated February 25, 1941 and recorded in Book of Deeds 438 at page 621 of the Catawba registry; and an easement to Cornelius Mutual Corporation, dated February 25, 1941, and recorded in Book of Deeds 438 at page 640 of the Catawba Registry.

IN TESTIMONY WHEREOF. the said parties of the first part these presents have hereunto set their hands and seals, this day and year first above written.

/s/ B.L. Kiser

[Seal]

/s/ Zula C. Kiser

[Seal]

App.115a

019 01294

State of North Carolina )  
County of Catawba :  
County of Lincoln )

I, Rolph W. Heather, a Notary Public in and for the County and State aforesaid, do hereby certify that B.L. Kiser and wife, Zula C. Kiser.

Personally appeared before me this day and acknowledged the die execution of the foregoing (or annexed) instrument.

WITNESS my hand and Notarial Seal, this the 4th day of August, 1961.

/s/ Rolph W. Heather  
Notary Public

Commission Expires:  
April 5, 1963

NORTH CAROLINA - Catawba County  
The foregoing Certificate of Rolph W. Heather  
a Notary Public of Catawba County, State of North Carolina,  
is adjudged to be correct. Let the Instrument, with this  
certificate, be registered.  
Witness my hand and official seal,  
this 9 day of August, 1961.  
Emory W. Brainerd  
Clerk Superior Court

STATE OF NORTH CAROLINA  
Lincoln County  
The foregoing certificate of Rolph W. Heather  
a Notary Public of Lincoln County as  
attested by Rolph W. Heather official seal is adjudged to be  
correct. Let the Instrument, with certificate, be registered.  
Taken the 15 day of August, 1961.  
Emory W. Brainerd  
Clerk Superior Court

