RECEIVED
DEC 29 2009
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Roger Young
Circuit Court Judge

Opinion No. 4616 (S.C. Ct. App. filed September 9, 2009, withdrawn, substituted and refiled November 24, 2009)

Too Tacky Partnership,.....Appellant,

v.

South Carolina Department of Health and Environmental Control and Mayo Read, Jr.,.....Respondents,

of whom Too Tacky Partnership is .....Petitioner.

APPENDIX

John P. Seibels, Jr.
jseibels@seibelsfirm.com
Jason Scott Luck
jluck@seibelsfirm.com
SEIBELS LAW FIRM, P.A.
127 King Street, Suite 100
Charleston, SC 29401
843.722.6777 (phone)
843.722.6781 (telefax)
Attorneys for Appellant Too Tacky Partnership

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Too Tacky Partnership, Appellant,

v.

South Carolina Department of Health and Environmental Control and Mayo Read, Jr., Respondents.

Appeal From Charleston County
Roger Young, Circuit Court Judge

Opinion No. 4616
Submitted June 10, 2009 – Filed September 9, 2009
Withdrawn, Substituted and Refiled November 24, 2009

AFFIRMED

John P. Seibels, Jr. and Jason Scott Luck, both of Charleston, for Appellant.

Carlisle Roberts, Jr., of Columbia; Davis A. Whitfield-Cargile, of North Charleston; and Elizabeth Applegate Dieck, of Charleston, for Respondent South Carolina Department of Health and Environmental Control; Richard L. Tapp, Jr. and Stephen P. Groves, Sr., both of Charleston, for Respondent Mayo Read, Jr.

KONDUROS, J.: Too Tacky Partnership (Too Tacky) appeals the South Carolina Department of Health and Environmental Control's (DHEC) issuance of a permit allowing Mayo Read, Jr. to construct a dock. We affirm.

PROCEDURAL BACKGROUND/FACTS

In 1992, Too Tacky purchased a parcel of land (Lot 4) bordering the Leadenwah River. Lots 1, 2, 3, and 4 are side-by-side with Lot 3 positioned along the western border of Lot 4. The lots all belonged to a common owner at one time and were subdivided and sold to Too Tacky, Mayo Read, Sr. (Lot 1), Ellen Read (Lot 2), and Mayo Read, Jr. (Lot 3).[1] In the early 1990s, Too Tacky built a dock off Lot 4 extending into the Leadenwah River. In 2004, Mayo Read, Jr. sought a critical area permit from DHEC's Office of

Ocean and Coastal Resource Management (OCRM) to construct a dock into the Leadenwah River from a right-of-way running east toward the river on the northern borders of Lots 1, 2, 3, and 4. Read's dock would be constructed off the portion of the right-of-way located on Lot 4.

In applying for the permit, Read submitted a permit application form listing Too Tacky as an adjoining landowner. The application described the location of the project to be on Tacky Point Road at the "end of easement." The application also included an affidavit of ownership or control with preprinted boxes for the applicant to check. Read indicated he was the "record owner" of the property described in the application, which was the "end of right of way" on "Tacky Point Road." Read further affirmed the preprinted language, stating he would get prior approval of all other persons with legal interests in the property and if he was not the record owner, would submit written permission of the owner. Read submitted a drawing of the project and indicated again the dock would be located at the end of a fifty-foot easement for the benefit of Lots 1, 2, and 3. Read further provided an uncertified plat signed by the original owner of the parcel and the purchasers of the subdivided Lots recognizing the fifty-foot easement for drainage and creek access by Lots 1, 2, and 3. From the record, it does not appear the plat was submitted with the application but was submitted prior to the application's approval.

Too Tacky was notified of Read's application and objected via letter from its attorney. In that letter, Too Tacky set forth several bases for its objection. First, Too Tacky contended Read's proposed dock would violate Regulation 30-12(A)(2)(a) of the South Carolina Code (current version at Regulation 30-12(A)(1)(a) (Supp. 2008)), which prohibits the building of two docks on the same parcel of land absent special circumstances and prevents docks from impeding the navigation of the waters upon which they are constructed. Too Tacky further argued Read's application was improper because he was not the record owner of Lot 4, and he did not present sufficient proof of a property interest in Lot 4 that would allow construction of a dock. Finally, Too Tacky cited the negative use-and-enjoyment and financial impacts the construction of Read's dock would have on Too Tacky's property, specifically because the dock would be in close proximity to the residence on Lot 4.

OCRM granted Read's permit application over Too Tacky's objections. Too Tacky appealed the grant of the permit, which the Administrative Law Court (ALC) and the Coastal Zone Management Appellate Panel (Appellate Panel) both affirmed. The circuit court affirmed the issuance of the permit, and this appeal followed.

STANDARD OF REVIEW

An appellate court "may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(5) (Supp. 2008). However, the court may reverse or modify a final agency decision if the agency decision was affected by an error of law, was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or was arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of

discretion. Id. The DHEC Board's findings are presumptively correct, and therefore, the challenging party bears the burden of proving its decision was erroneous in view of the substantial evidence in the record. Leventis v. S.C. Dep't of Health & Envtl. Control, 340 S.C. 118, 136, 530 S.E.2d 643, 653 (Ct. App. 2000).

LAW/ANALYSIS

I. Read's Application and Affidavit

Too Tacky contends OCRM erred in granting Read's permit because Read's application was incomplete, and his affidavit contained false information. We disagree.

Pursuant to statute, applications for permits from OCRM shall include the following:

1) Name and address of the applicant.

(2) A plan or drawing showing the applicant's proposal and the manner or method by which the proposal shall be accomplished.

(3) A plat of the area in which the proposed work will take place.

(4) A copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property, to carry out the proposal.

(5) A list of all adjoining landowners and their addresses or a sworn affidavit that with due diligence such information is not ascertainable.

S.C. Code Ann. § 48-39-140(B) (2008). The companion DHEC regulation, Regulation 30-2(B)(4) of the South Carolina Code (Supp. 2008), states that a certified copy of the deed, lease, or other instrument under which the applicant claims title, possession, or permission shall ordinarily be required to complete the application.

The Appellate Panel concluded Read's affidavit and the copy of the plat submitted by Read constituted an "other instrument" as contemplated by the statute and regulation. The interpretation by an agency of its own regulation is given great deference. Earl v. HTH Assocs., Inc./Ace Usa Ins. Co. of N. Am., 368 S.C. 76, 81, 627 S.E.2d 760, 762 (Ct. App. 2006). In this case, the plat was a document signed by the landowner and purchasers at the time of subdivision. The plat was stamped as approved by Charleston County Council and recorded in the register mesne conveyances' office (RMC). Consequently, the plat appears to have the requisite formality associated with the term instrument. As defined in Black's Law Dictionary, an instrument is a "written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory note, or share certificate." Black's Law Dictionary 869 (9th ed. 2009). In this case, the plat defines the right conveyed by the common grantor to the original grantees of a fifty-foot easement for drainage and creek access to benefit Lots 1, 2, and

3. Furthermore, two other South Carolina cases have found plats to be instruments. See Sutcliffe v. Laney Bros., 247 S.C. 417, 422, 147 S.E.2d 689, 691 (1966) (stating subject property had not been divided by plat or other instrument of record); see also Hamilton v. CCM, Inc., 274 S.C. 152, 154, 263 S.E.2d 378, 379 (1980) ("[T]he outcome of this litigation is largely controlled by the construction given an instrument referred to as the Harbour Town Townhouse Plat.").

Additionally, Too Tacky contends the application was incomplete because the other instrument was not certified. However, the statute does not require the instrument to be certified and the regulation allows for some flexibility in this requirement by employment of the term ordinarily. Furthermore, as DHEC points out, Too Tacky does not dispute the plat submitted to OCRM was not identical to the one on file with RMC. Consequently, Too Tacky was not prejudiced based on the lack of certification of the plat.

Finally, Too Tacky argues Read's affidavit was false because he claimed to be the record owner of the property at issue. However, as discussed in the facts, Read made numerous references to the fact that his proposed dock would be at the end of an easement. He never suggested, other than by checking the pre-printed "record owner" box, that he owned Lot 4. Therefore, any perceived falsity in his affidavit could not have misled OCRM about the nature of Read's property interest.[2]

II. Ownership of Easement

Too Tacky next contends Read failed to sufficiently prove the existence and scope of the easement on Lot 4. We disagree.

OCRM is neither authorized nor required to make final legal determinations regarding the existence or precise nature of property rights in the permitting process. If an adjoining landowner objects to the assertion of the applicant's property interest, then the regulations provide the permitting process will be held in abeyance if litigation to quite title in the property is commenced.

If the alleged adjoining landowner of critical area files a written objection to the permit application within the period prescribed in Section 48-39-140 (15 days for minor and 30 days for major permits) based upon a claim of ownership and indicates an intention to file a court action pursuant to Section 48-39-220, the application will be deemed incomplete and further processing of the permit will not take place until a final judicial decision is rendered by a court of competent jurisdiction. However, written proof of filing a court action pursuant to Section 48-39-220 must be received by the Department within 30 days of the date of the expiration of the comment period. If no such written proof is timely received, the permit will be processed pursuant to law.

S.C. Code Ann. Regs. 30-2(I)(3) (Supp. 2008).

Based on this regulation, neither OCRM nor DHEC has the authority to make ultimate legal findings regarding parties' interests in property. The regulation and permitting process allows adjoining landowners to assert their interest and protect their rights through actions filed with a "court of competent jurisdiction." In the absence of such assertion, OCRM will proceed with its review of the application.

With that in mind, OCRM cannot ignore the objections or concerns of adjoining landowners. A permit applicant must present a cognizable "claim [to] title, possession or permission from the owner of the property to carry out the proposal." § 48-39-140(B)(4) (emphasis added). The ALC concluded this means the applicant must make a prima facie showing of ownership or permission. We agree with that standard and with the conclusion that Read met his burden in this case.

III. One Dock Rule

Too Tacky next argues OCRM violated Regulation 30-12(A)(2)(a) of the South Carolina Code (Supp. 2004) when a dock on Lot 4 already existed.[3] We disagree.

The regulation stated "[d]ocks and piers shall normally be limited to one structure per parcel." (emphasis added). The use of this language necessarily vests OCRM with some discretion to allow more than one dock per parcel. According to Frederick Mallet, project manager for Read's application, the easement providing for creek access constituted a special circumstance to be considered in granting Read's permit. Curtis Joyner, another DHEC employee involved in the permitting process, agreed the easement was an unusual circumstance that would permit more than one dock on Lot 4 as well as the fact that Lots 1, 2, and 3 were owned by one family. Because there was discretion given to OCRM by the plain language of the statute, and Mallet and Joyner could articulate a basis for exercising that discretion, we cannot conclude the circuit court erred in affirming the ALC on this point.

IV. Impact on Adjoining Landowners

Finally, Too Tacky contends OCRM failed to consider how the construction of Read's dock would impact the value and enjoyment of its property, a question that should be considered pursuant to Regulation 30-11(B) of the South Carolina Code (Supp. 2008).[4] We disagree.

Too Tacky maintains Frederick Mallet's testimony on this point is somewhat conflicting. Mallet testified he believed consideration was given to the ten factors during the permitting process; however, he did not think the diminishment in value of Lot 4 had come up. Mallet also testified the original dimensions of the dock were altered to ensure it did not extend beyond the property lines of the easement and the roof was deleted to lessen visual impact. Consequently, the record indicates the impact to the adjoining landowner was considered. Furthermore, Too Tacky did not present any evidence to show how the dock would financially impact the value of its property. In

sum, it cannot be said OCRM erred in granting Read's permit on the basis of this argument.

CONCLUSION

We find there was evidence upon which OCRM could have reasonably relied in awarding the dock permit to Read. We give great deference to an agency's interpretations of its own regulations, and we cannot conclude the circuit court clearly erred in affirming the issuance of the permit because of any alleged irregularities with the application and affidavit themselves. Furthermore, we agree with the circuit court that OCRM is not vested with the authority to make binding legal findings regarding the validity of parties' interest in property. So long as the petitioner presents a prima facie case of ownership of or sufficient interest in the land, OCRM has not clearly erred in granting the permit. We further find OCRM was vested with some discretion in determining whether circumstances warranted the erection of a second dock on Lot 4. Accordingly, the circuit court did not err in finding OCRM did not violate Regulation 30-12(A)(2)(a). Finally, evidence in the record supports the circuit court's finding OCRM considered the impact issuing the permit would have on adjoining landowners. Accordingly, the decision of the circuit court is

AFFIRMED.

HEARN, C.J., and THOMAS, J., concur.

---

[1] Mayo Read, Jr. has since sold Lot 3 to his father, Mayo Read, Sr.

[2] At oral argument, Too Tacky contended the plat at issue could not satisfy the requirements of subsections (3) and (4) of section 48-39-140(B). However, Too Tacky did not raise this issue until oral argument. Therefore, we will not consider it. See In the Interest of Bruce O., 311 S.C. 514, 515 n.1, 429 S.E.2d 858, 858 n.1 (Ct. App. 1993) ("This court will not grant relief on an alleged error asserted for the first time on appeal. Further, an appellant may not use oral argument as a vehicle to argue issues not argued in the appellant's brief.").

[3] This is currently Regulation 30-12(A)(1)(a) of the South Carolina Code (Supp. 2008), and the "normally" language is no longer included.

[4] Reg. 30-11(B) sets forth ten factors OCRM should consider in issuing a permit including "[t]he extent to which the proposed use could affect the value and enjoyment of adjacent owners."

605P-19

RECEIVED SEP 28 2009

COPY

RECEIVED

SEP 24 2009

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Roger Young
Circuit Court Judge

Opinion No. 4616
Heard June 10, 2009 – Filed September 9, 2009

Too Tacky Partnership,.....Appellant,

v.

South Carolina Department of Health
and Environmental Control and
Mayo Read, Jr.,.....Respondents.

PETITION FOR REHEARING

John P. Seibels, Jr.
jseibels@seibelsfirm.com
Jason Scott Luck
jluck@seibelsfirm.com
SEIBELS LAW FIRM, P.A.
127 King Street, Suite 100
Charleston, SC 29401
843.722.6777 (phone)
843.722.6781 (telefax)
Attorneys for Appellant Too Tacky
Partnership

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Appellant hereby petitions this Court to vacate Opinion No. 4616 (the "Opinion"), filed on of September 9, 2009 and to grant a rehearing. The Appellant received notice of the filing of the Opinion on September 9, 2009.

GROUNDS FOR REHEARING

Appellant would respectfully show unto this Court that the Opinion overlooks certain written arguments made Appellant in its briefs, has overlooked the implied rulings made by the tribunals below, and has misapprehended the law in certain instances. Thus, the Appellant believes that this Court should grant a rehearing and overrule the decision of the tribunal below (the Charleston County Circuit Court).

I. Rehearing Should be Granted Because the Opinion Overlooks Appellant's Briefed Arguments for S.C. Code §§ 48-39-140(B)(3) & (4)

The Opinion asserts that Appellant "contended the plat at issue could not satisfy the requirements of subsections (3) and (4) of section 48-39-140(B)" for the first time at oral argument. (Opinion at n.2). The referenced sections are:

> (B) Each application for a permit shall be filed with the department [OCRM] and shall include:
>
> * * *
>
> (3) A plat of the area in which the proposed work will take place.
> (4) A copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property, to carry out the proposal.

S.C. Code § 48-39-140(B). Appellant specifically argues that Respondent Read did not provide a copy of the plat, deed, lease, or other instrument (thus implicating these sections) in its Brief (Part II) and Reply Brief (Parts III & IV).[1] For example:

[1] Appellant specifically cites S.C. Code § 48-39-140(B)(4) on page 7 of its Final Brief.

- "OCRM's file contains only one document where [Respondent] Read claimed a creek access easement: A letter from his attorney." (Final Brief p. 10) (emphasis in original).

- "...OCRM's decision to grant the permit was based upon the Owner's Affidavit. In any event, the plat is not included in OCRM's permit file."(Final Brief p. 11, n. 5) (citations removed).

- "...the four deeds were never submitted by [Respondent Read] when the permit was issued." (Final Brief p. 12).

- "First, OCRM did not rely upon the Plat to satisfy the requirements of S.C. Code § 48-39-140(B)(4) (Supp. 2005) and 23A S.C. Code Regs. 30-2(B)(4) (Supp. 2004). OCRM relied upon the owner's affidavit. Second, the deeds were never seen by OCRM." (Final Reply Brief pp. 6-7) (citations omitted).[2]

- "OCRM did not require [Respondent] Read to submit the Plat...the Plat was not even a part of the permit file." (Final Reply Brief pp. 7-8) (citations omitted).

- "Again, it is undisputed that (1) OCRM never required the Plat and (2) Read never submitted the deeds...[t]he deeds are not part of the permit file." (Final Reply Brief p. 7) (citations omitted).

- "The ALC committed error at his conclusions of law 13, 14, 15 and 16 wherein he determined that 1) ...the Plat and deeds were somehow submitted by [Respondent] Read and therefore constitute satisfaction of Read's *prima facie* burden..." (Final Reply Brief p. 9)

Because the Opinion overlooks the Appellant's briefed arguments that Respondent Read's application lacked a plat, deed, lease, or other instrument, this Court must grant Appellants a new hearing.

II. Rehearing Should be Granted Because The Opinion Overlooks the ALC's Implicit Ruling on, and thus Preservation of, the Appellant's Abnormal Circumstances Argument

The Opinion holds that the order of the ALC (R. pp. 1-13) did not rule on the circumstances by which two docks could be built on the same parcel. (Opinion at Pt. III) (Referring to S.C. Reg. 30-12(A)(2)(a), which normally limits docks and piers to one structure

[2] Appellant specifically cites S.C. Code § 48-39-140(B)(4) twice on page 7 of its Final Reply Brief.

per parcel). This issue, referred to as the "abnormal circumstances" argument,[3] has been implicitly ruled upon by the ALC in its August 17, 2006 order in the following paragraph from the findings of fact:

> 7. Contrary to the Petitioner's assertion, the permitted dock is to be constructed entirely below the mean high water mark and, accordingly, is not located on the Petitioner's property. (*DHEC* Ex. 1). Rather, consistent with the Petitioner's interpretation of the Plat's language, the pathway labeled "Creek Access for Lots 1, 2 & 3" would be used exclusively to walk to and from the dock site. In turn, **the dock would actually be located on the state's land.** (*DHEC* Ex. 1; *Read* Ex. 1).

(R. p. 3). (emphasis added). While it is not crystal clear that the issue of multiple docks has been ruled upon,[4] a fair reading of the language shows that the issue of multiple docks per parcel, *i.e.* the "abnormal circumstances" argument, was considered and decided in the favor of OCRM by ruling the dock would "actually be located on the state's land." Because the issue was preserved, this Court must grant a rehearing so that the issue may be considered.

III. Rehearing Should be Granted Because the Opinion Misapprehends the Standard for a *prima facie* Showing

The Opinion states "OCRM is neither authorized nor required to make *legal findings* regarding the existence or precise nature of property rights in the permitting process." (Opinion, Pt. II) (emphasis added). In the same section, however, the Court concluded the applicant must "make a prima facie showing of easement or permission." Id. (emphasis in original). This holding is internally inconsistent. A *prima facie* showing is, by its definition, a "legal finding". See Black's Law Dictionary 551 (2nd Pocket Ed. 2001) ("Sufficient to establish a fact or raise a presumption unless disproved or rebutted"). Axiomatic in this definition is that each element of the legal principle must be present in the showing. Cf. Johnson v. Atlantic Coast Line R., 116

---

[3] See R. pp. 58-59 for this argument.

[4] The order of the Circuit Court, reviewing the order of CZMAP, states "It is not particularly clear whether the abnormal circumstances argument was ruled upon..." (R. p. 18).

S.C. 135, 107 S.E. 31 (1921) (discussing generally, in dicta, a prima facie showing requires a showing of all elements).

It was Respondent Read's burden to make a *prima facie* showing of easement for the purposes of his application. Thus, he must make a showing of the elements to OCRM of an easement appurtenant, an easement in gross, or an easement in gross for commercial purposes. See State v. Commissioners of Public Works, 312 S.C. 460, 465, 441 S.E.2d 331 (Ct. App. 1994) (laying out the types of easements).

The Opinion does not require this level of granularity, *i.e.* requiring the applicant to submit evidence bearing on the type of easement necessary to possess the right to build. This is improper, as simply a claim of an "easement" no more constitutes a *prima facie* showing of easement than a claim of "negligence" constitutes a *prima facie* showing of negligence that could survive the slightest test of legal sufficiency. This standard is excessively permissive and should not stand.

Because the Opinion appears internally inconsistent, and because the standard set by the Opinion is too permissive, the Opinion misapprehends the law and rehearing should be granted.

IV. Rehearing Should be Granted to Correct a Factual Error Concerning the Location of the Easement Claimed by Respondent Read.

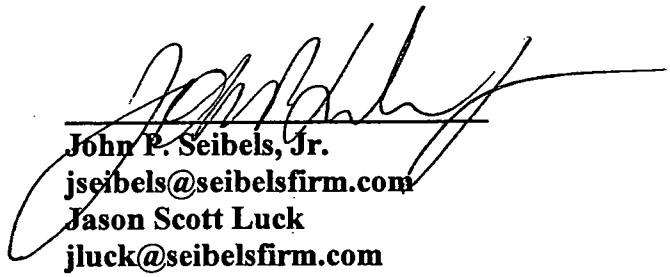
The Opinion states that Respondent Read sought a permit "to construct a dock along the Leadenwah River on an easement running east toward the river *on the northern borders of Lots 1, 2, 3, and 4.*" (Emphasis added). In fact, the easement claimed by Read is wholly within the borders of Lot 4, the property owned by Appellant. (R. 316). Because the location and boundary of the easement claimed by Read may bear on the analysis of whether Read's claimed easement is appurtenant or in gross, this factual error must be corrected on rehearing.

V. Rehearing Should be Granted Because the Opinion Misapprehends the Significance of the Plat to OCRM's Decision to Grant the Permit.

The Opinion goes to great lengths to conclude that a plat is an "instrument" which might satisfy the requirements of S.C. Code Ann. § 48-39-140(B)(4)(2008). That analysis would have been relevant only if OCRM staff had considered the plat as an instrument in the application review process. It remains undisputed that, in fact, OCRM staff considered the Affidavit of Ownership, not the plat, as the "instrument" which was required by statute and regulation. (R. pp. 103-107). Since OCRM did not rely upon the plat as satisfaction of the applicable standard, no purpose is served by an analysis of whether the plat is or is not an instrument. Instead, the question presented is whether the OCRM staff may accept an Owner's Affidavit as an "instrument" satisfying the statute and regulation. Because no South Carolina law supports the proposition that the Affidavit is the required "instrument," which is the very position taken by OCRM when it granted the permit, this Court must find that the agency acted in violation of statutory provisions, in excess of its authority, upon unlawful procedure, and on such other improper bases as would warrant reversal of its decision under S.C. Code Ann. § 1-23-380(A)(6)(2005).

Conclusion

For the arguments set forth above, the Appellant asks this Court to vacate its original opinion, grant a new hearing, and ultimately reverse the permit grant by OCRM.



John P. Seibels, Jr.
jseibels@seibelsfirm.com
Jason Scott Luck
jluck@seibelsfirm.com
SEIBELS LAW FIRM, P.A.
127 King Street, Suite 100
Charleston, SC 29401
843.722.6777 (phone)
843.722.6781 (telefax)
Attorneys for Appellant Too Tacky Partnership

23 September 2009

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Roger Young
Circuit Court Judge

Opinion No. 4616
Heard June 10, 2009 – Filed September 9, 2009

Too Tacky Partnership,.....Appellant,

v.

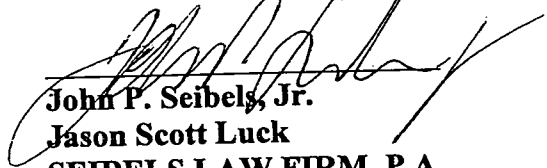
South Carolina Department of Health
and Environmental Control and
Mayo Read, Jr.,,.....Respondents.

CERTIFICATE OF SERVICE

I certify that I have served the Petition for Rehearing on counsel for the Respondents by serving a copy of the same via U.S. Mail, on 23 September 2009, to the following:

Elizabeth Applegate Dieck, Esquire
Chief Counsel, OCRM
1362 McMillan Ave, Suite 400
Charleston, SC 29405
843.953-0200 (phone)
843.953-0201 (telefax)

Richard L. Tapp, Jr., Esquire
NEXSEN PRUET, LLC
205 King St., Suite 400
Charleston, SC 29401
843.720.1726 (phone)
843.720.1777 (telefax)



John P. Seibels, Jr.
Jason Scott Luck
SEIBELS LAW FIRM, P.A.
127 King Street, Suite 100
Charleston, SC 29401
843.722.6777 (phone)
843.722.6781 (telefax)
Attorneys for Appellant Too Tacky Partnership

RECEIVED SEP 14 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Too Tacky Partnership, Appellant,

v.

South Carolina Department of Health and Environmental Control and Mayo Read, Jr., Respondents.

Appeal From Charleston County
Roger Young, Circuit Court Judge

Opinion No. 4616
Heard June 10, 2009 – Filed September 9, 2009

AFFIRMED

John P. Seibels, Jr. and Jason Scott Luck, both of Charleston, for Appellant.

Carlisle Roberts, Jr., of Columbia; Davis A. Whitfield-Cargile, of North Charleston; and Elizabeth Applegate Dieck, of Charleston, for Respondent South Carolina Department of Health and Environmental Control; Richard L. Tapp, Jr. and

Stephen P. Groves, Sr., both of Charleston, for Respondent Mayo Read, Jr.

KONDUROS, J.: Too Tacky Partnership (Too Tacky) appeals the South Carolina Department of Health and Environmental Control's (DHEC) issuance of a permit allowing Mayo Read, Jr. to construct a dock. We affirm.

PROCEDURAL BACKGROUND/FACTS

In 1992, Too Tacky purchased a parcel of land (Lot 4) bordering the Leadenwah River. Lots 1, 2, 3, and 4 are side-by-side with Lot 3 positioned along the western border of Lot 4. The lots all belonged to a common owner at one time and were subdivided and sold to Too Tacky, Mayo Read, Sr. (Lot 1), Ellen Read (Lot 2), and Mayo Read, Jr. (Lot 3).[1] In the early 1990s, Too Tacky built a dock off Lot 4 extending into the Leadenwah River. In 2004, Mayo Read, Jr. sought a critical area permit from DHEC's Office of Ocean and Coastal Resource Management (OCRM) to construct a dock along the Leadenwah River on an easement running east toward the river on the northern borders of Lots 1, 2, 3, and 4.

In applying for the permit, Read submitted a permit application form listing Too Tacky as an adjoining landowner. The application described the location of the project to be on Tacky Point Road at the "end of easement." The application also included an affidavit of ownership or control with preprinted boxes for the applicant to check. Read indicated he was the "record owner" of the property described in the application, which was the "end of right of way" on "Tacky Point Road." Read further affirmed the preprinted language, stating he would get prior approval of all other persons with legal interests in the property and if he was not the record owner, would submit written permission of the owner. Read submitted a drawing of the project and indicated again the dock would be located at the end of a fifty-foot easement for the benefit of Lots 1, 2, and 3. Read further provided an uncertified plat signed by the original owner of the parcel and the purchasers of the subdivided Lots recognizing the fifty-foot easement for drainage and

---

[1] Mayo Read, Jr. has since sold Lot 3 to his father, Mayo Read, Sr.

creek access by Lots 1, 2, and 3. From the record, it does not appear the plat was submitted with the application but was submitted prior to the application's approval.

Too Tacky was notified of Read's application and objected via letter from its attorney. In that letter, Too Tacky set forth several bases for its objection. First, Too Tacky contended Read's proposed dock would violate Regulation 30-12(A)(2)(a) of the South Carolina Code (current version at Regulation 30-12(A)(1)(a) (Supp. 2008)), which prohibits the building of two docks on the same parcel of land absent special circumstances and requires docks not impede navigation of the waters upon which constructed. Too Tacky further argued Read's application was improper because he was not the record owner of Lot 4, and he did not present sufficient proof of a property interest on Lot 4 that would allow construction of a dock. Finally, Too Tacky cited the negative use-and-enjoyment and financial impacts the construction of Read's dock would have on Too Tacky's property, specifically because the dock would be in close proximity to the residence on Lot 4.

OCRM granted Read's permit application over Too Tacky's objections. Too Tacky appealed the grant of the permit, which the Administrative Law Court (ALC) and the Coastal Zone Management Appellate Panel (Appellate Panel) both affirmed. The circuit court affirmed the issuance of the permit, and this appeal followed.

STANDARD OF REVIEW

An appellate court "may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(5) (Supp. 2008). However, the court may reverse or modify a final agency decision if the agency decision was affected by an error of law, was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or was arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion. Id. The DHEC Board's findings are presumptively correct, and therefore, the challenging party bears the burden of proving its decision was erroneous in view of the substantial evidence in the record. Leventis v. S.C. Dep't of

Health & Envtl. Control, 340 S.C. 118, 136, 530 S.E.2d 643, 653 (Ct. App. 2000).

LAW/ANALYSIS

I. Read's Application and Affidavit

Too Tacky contends OCRM erred in granting Read's permit because Read's application was incomplete, and his affidavit contained false information. We disagree.

Pursuant to statute, applications for permits from OCRM shall include the following:

> (1) Name and address of the applicant.
> (2) A plan or drawing showing the applicant's proposal and the manner or method by which the proposal shall be accomplished.
> (3) A plat of the area in which the proposed work will take place.
> (4) A copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property, to carry out the proposal.
> (5) A list of all adjoining landowners and their addresses or a sworn affidavit that with due diligence such information is not ascertainable.

S.C. Code Ann. § 48-39-140(B) (2008). The companion DHEC regulation, Regulation 30-2(B)(4) of the South Carolina Code (Supp. 2008), states that a certified copy of the deed, lease, or other instrument under which the applicant claims title, possession, or permission shall ordinarily be required to complete the application.

The Appellate Panel concluded Read's affidavit and the copy of the plat submitted by Read constituted an "other instrument" as contemplated by the statute and regulation. The interpretation by an agency of its own regulation

is given great deference. Earl v. HTH Assocs., Inc./Ace Usa Ins. Co. of N. Am., 368 S.C. 76, 81, 627 S.E.2d 760, 762 (Ct. App. 2006). In this case, the plat was a document signed by the landowner and purchasers at the time of subdivision. The plat was stamped as approved by Charleston County Council and recorded in the register mesne conveyances' office (RMC). Consequently, the plat appears to have the requisite formality associated with the term instrument. As defined in Black's Law Dictionary, an instrument is a "written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory note, or share certificate." Black's Law Dictionary 869 (9th ed. 2009). In this case, the plat defines the right conveyed by the common grantor to the original grantees of a fifty-foot easement for drainage and creek access to benefit Lots 1, 2, and 3. Furthermore, two other South Carolina cases have found plats to be instruments. See Sutcliffe v. Laney Bros., 247 S.C. 417, 422, 147 S.E.2d 689, 691 (1966) (stating subject property had not been divided by plat or other instrument of record); see also Hamilton v. CCM, Inc., 274 S.C. 152, 154, 263 S.E.2d 378, 379 (1980) ("[T]he outcome of this litigation is largely controlled by the construction given an instrument referred to as the Harbour Town Townhouse Plat.").

Additionally, Too Tacky contends the application was incomplete because the other instrument was not certified. However, the statute does not require the instrument to be certified and the regulation allows for some flexibility in this requirement by employment of the term ordinarily. Furthermore, as DHEC points out, Too Tacky does not dispute the plat submitted to OCRM was not identical to the one on file with RMC. Consequently, Too Tacky was not prejudiced based on the lack of certification of the plat.

Finally, Too Tacky argues Read's affidavit was false because he claimed to be the record owner of the property at issue. However, as discussed in the facts, Read made numerous references to the fact that his proposed dock would be at the end of an easement. He never suggested, other than by checking the pre-printed "record owner" box, that he owned Lot

4. Therefore, any perceived falsity in his affidavit could not have misled OCRM about the nature of Read's property interest.[2]

II. Ownership of Easement

Too Tacky next contends Read failed to sufficiently prove the existence and scope of the easement on Lot 4. We disagree.

OCRM is neither authorized nor required to make legal findings regarding the existence or precise nature of property rights in the permitting process. If an adjoining landowner objects to the assertion of the applicant's property interest, then the regulations provide the permitting process will be held in abeyance if litigation to quite title in the property is commenced.

> If the alleged adjoining landowner of critical area files a written objection to the permit application within the period prescribed in Section 48-39-140 (15 days for minor and 30 days for major permits) based upon a claim of ownership and indicates an intention to file a court action pursuant to Section 48-39-220, the application will be deemed incomplete and further processing of the permit will not take place until a final judicial decision is rendered by a court of competent jurisdiction. However, written proof of filing a court action pursuant to Section 48-39-220 must be received by the Department within 30 days of the date of the expiration of the comment period. If

---

[2] At oral argument, Too Tacky contended the plat at issue could not satisfy the requirements of subsections (3) and (4) of section 48-39-140(B). However, Too Tacky did not raise this issue until oral argument. Therefore, we will not consider it. See In the Interest of Bruce O., 311 S.C. 514, 515 n.1, 429 S.E.2d 858, 858 n.1 (Ct. App. 1993) ("This court will not grant relief on an alleged error asserted for the first time on appeal. Further, an appellant may not use oral argument as a vehicle to argue issues not argued in the appellant's brief.").

> no such written proof is timely received, the permit will be processed pursuant to law.

S.C. Code Ann. Regs. 30-2(I)(3) (Supp. 2008).

Based on this regulation, neither OCRM nor DHEC has the authority to make determinations regarding parties' legal interests in property. The regulation and permitting process allows adjoining landowners to assert their interest and protect their rights through actions filed with a "court of competent jurisdiction." In the absence of such assertion, OCRM will proceed with its review of the application.

With that in mind, OCRM cannot ignore the objections or concerns of adjoining landowners. A permit applicant must present a cognizable "claim [to] title, possession or permission from the owner of the property to carry out the proposal." § 48-39-140(B)(4) (emphasis added). The ALC concluded this means the applicant must make a prima facie showing of ownership or permission. We agree with that standard and with the conclusion that Read met his burden in this case.

III. One Dock Rule

Too Tacky next argues OCRM violated Regulation 30-12(A)(2)(a) of the South Carolina Code (Supp. 2004) when a dock on Lot 4 already existed.[3] The regulation stated "[d]ocks and piers shall normally be limited to one structure per parcel." It appears this issue is not preserved for our review. While Too Tacky raised the issue to the ALC, the ALC did not rule on the matter and Too Tacky did not file a Rule 59(e), SCRCP, motion. See Home Med. Sys., Inc. v. S.C. Dep't of Revenue, 382 S.C. 556, 562-63, 667 S.E.2d 582, 586 (2009) (holding Rule 59(e) motions are proper in appeals from administrative decisions); Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) (stating issues not raised to and ruled upon by the ALC are unpreserved for appellate review).

---

[3] This is currently Regulation 30-12(A)(1)(a) of the South Carolina Code (Supp. 2008), and the "normally" language is no longer included.

IV. Impact on Adjoining Landowners

Finally, Too Tacky contends OCRM failed to consider how the construction of Read's dock would impact the value and enjoyment of its property, a question that should be considered pursuant to Regulation 30-11(B) of the South Carolina Code (Supp. 2008).[4] We disagree.

Too Tacky maintains testimony by OCRM's project manager for the application, Frederick Mallet, is somewhat conflicting. Mallet testified he believed consideration was given to the ten factors during the permitting process; however, he did not think the diminishment in value of Lot 4 had come up. Mallet also testified the original dimensions of the dock were altered to ensure it did not extend beyond the property lines of the easement and the roof was deleted to lessen visual impact. Consequently, the record indicates the impact to the adjoining landowner was considered. Furthermore, Too Tacky did not present any evidence to show how the dock would financially impact the value of its property. In sum, it cannot be said OCRM erred in granting Read's permit on the basis of this argument.

CONCLUSION

We find there was evidence upon which OCRM could have reasonably relied in awarding the dock permit to Read. We give great deference to an agency's interpretations of its own regulations, and we cannot conclude the circuit court clearly erred in affirming the issuance of the permit because of any alleged irregularities with the application and affidavit themselves. Furthermore, we agree with the circuit court that OCRM is not vested with the authority to make binding legal findings regarding the validity of parties' interest in property. So long as the petitioner presents a prima facie case of ownership of or sufficient interest in the land, OCRM has not clearly erred in granting the permit. Finally, evidence in the record supports the circuit court's finding OCRM considered the impact of issuing the permit on adjoining landowners. Accordingly, the decision of the circuit court is

---

[4] Reg. 30-11(B) sets forth ten factors OCRM should consider in issuing a permit including "[t]he extent to which the proposed use could affect the value and enjoyment of adjacent owners."

AFFIRMED.

HEARN, C.J., and THOMAS, J., concur.

16621

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Roger Young
Circuit Court Judge

Case No.: 2007-CP-10-1520

Too Tacky Partnership,.....Appellant,

v.

South Carolina Department of Health
and Environmental Control and
Mayo Read, Jr.,.....Respondents.

RECORD ON APPEAL

Van Whitehead, Esquire
Chief Counsel, OCRM
1362 McMillan Ave, Suite 400
Charleston, SC 29405
Attorneys for Respondent DHEC

Richard L. Tapp, Jr., Esquire
NEXSEN PRUET, LLC
205 King St., Suite 400
Charleston, SC 29401
Attorneys for Respondent Mayo Read, Jr.

John P. Seibels, Jr.
Jason Scott Luck
SEIBELS LAW FIRM, P.A.
165-A King Street
Charleston, SC 29401
843.722.6777 (phone)
843.722.6781 (telefax)
Attorneys for Appellant Too Tacky Partnership

INDEX

Orders

Order of Judge John D. McLeod, dated August 17, 2006 1

Order of the Coastal Zone Management Appellate Panel, dated April 27, 2007 14

Order of Judge Roger Young, dated December 18, 2007 16

Order of Judge Roger Young, dated January 29, 2008 21

Pleadings

ALC

Notice of Request for Contested Case Hearing of Appellant Too Tacky, dated April 28, 2005 ... 22

Notice of Appeal of Final Order and Decision, dated September 18, 2006 24

Circuit Court

Appellant Too Tacky's Petition to Circuit Court, dated April 12, 2007 30

Respondent Mayo Read's Answer to Petition, dated April 26, 2007 36

Respondent DHEC's Answer to Petition, dated April 26, 2007 41

Brief of Appellant Too Tacky to Circuit Court, dated October 30, 2007 45

Motion to Alter or Amend, dated January 14, 2008 63

Transcripts

Transcript of Hearing before Judge John D. McLeod, April 12, 2006 71

Opening Statement of Appellant Too Tacky 77

Opening Statement of Respondent DHEC 85

Opening Statement of Respondent Read 89

Testimony of Frederick Mallett

Direct 90

Cross 145

Cross 152

Redirect 154

Testimony of Curtis Joyner

Direct 159

Cross 175

Redirect 180

Cross 183

Redirect 184

Testimony of Mayo Read

Direct 186

Cross 197

Testimony of Lawton Grimball

Direct 198

Cross 211

Cross 213

Redirect 218

Transcript of Hearing before Judge Roger Young, October 31, 2007 227

Appellant's Exhibits

Summary of Review sheet
(Exhibit 1) 258

GIS Map of Parcel 156-00-00-188; GIS Map of Parcel 156-00-00-187; GIS Map of Parcel 156-00-00-065; GIS Map of Parcel 156-00-00-189
(Exhibit 2) 260

DHEC-OCRM Project Assignment Sheet
(Exhibit 3) 265

Map OCRM-04-297-M
(Exhibit 4) 266

Letter from Bob J. Conley, Esquire of Law Offices of Simons & Keaveny to Mr. Fred Mallett of DHEC-OCRM dated January 11, 2005
(Exhibit 5) 267

Letter from Neil C. Robinson, Jr., Esquire of Nexsen Pruet, LLC to Mr. Fred Mallett of DHEC-OCRM dated February 2, 2005 (Exhibit to this Exhibit - Affidavit of Publication from The Post and Courier dated September 15, 2004)
(Exhibit 6) 271

Title to Real Estate from H. Edward McFarland to Ellen P. Read dated June 20, 1989
(Exhibit 7) 276

Title to Real Estate from Ellen P. Read to I. Mayo Read dated December 5, 2000
(Exhibit 7A) 279

Title to Real Estate from Alma P. Wagner to Ellen P. Read dated December 20, 1991
(Exhibit 8) 283

Respondent DHEC's Exhibits

DHEC-OCRM Critical Area Permit Application
(Exhibit 1) 286

SCDHEC Office of Ocean and Coastal Resource Management Permit Application Public Notice dated December 2, 2004
(Exhibit 2) 292

DHEC-OCRM Certificate of Mailing for Matter No. OCRM-04-297-M dated February 10, 2005
(Exhibit 3) 296

DHEC-OCRM Inter-Office Memorandum from Fred Mallett to Camilla Shuler dated February 10, 2006
(Exhibit 4) 297

Affidavit of Publication sworn to on September 15, 2004
(Exhibit 5) 298

Coastal Zone Critical Area Permitting - Office of Ocean and Coastal Resource Management - SCDHEC (Permit Decision form)
(Exhibit 6) 299

Critical Area Permit & Coastal Zone Consistency Certification (Permit No. OCRM-04-297-M) dated March 30, 2005
(Exhibit 7) 302

Aerial Photograph of property
(Exhibit 8) 309

Aerial Photograph of property
(Exhibit 9) 310

Photograph of property
(Exhibit 10) 311

Photograph of property
(Exhibit 11) 312

Photograph of property
(Exhibit 12) 313

Photograph of property
(Exhibit 13) 314

Letter from Robert E. Duncan of the South Carolina Department of Natural Resources to Mr. Curtis Joyner of SCDHECIOCRM dated December 6, 2004
(Exhibit 14) 315

Respondent Read's Exhibits

"Plat of Division of Lands of Alma E. Wagner" dated October 28, 1986
(Exhibit 1) 316

Title to Real Estate from Daniel R. McFarland to I. Mayo Read, Jr. dated April 24, 1998
(Exhibit 2) 317

Title to Real Estate from Robert L. McFarland to Too Tacky, a partnership, dated April 7, 1992
(Exhibit 3) 322

Certificate of Appellant 326

0058-19
P&I

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Too Tacky Partnership, Petitioner, vs. South Carolina Department of Health and Environmental Control and Mayo Read, Respondents.	DOCKET NO. 05-ALJ-07-0165-CC **FINAL ORDER AND DECISION**

APPEARANCES: John P. Seibels, Jr., Esquire, for the Petitioner
Leslie S. Riley, Esquire, for the Respondent SCDHEC-OCRM
Richard L. Tapp, Jr., Esquire, for the Respondent, Mayo Read

STATEMENT OF THE CASE

The above-captioned case is before this Court pursuant to S.C. Code Ann. § 48-39-150 (Supp. 2004), S.C. Code Ann. § 1-23-600(B) (Supp. 2004), and S.C. Code Ann. § 1-23-310 et seq. (2005) for a contested case hearing.

Petitioner, Too Tacky Partnership (hereinafter "Petitioner" or "Too Tacky"), challenges the decision of Respondent South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management ("OCRM" or "Department"), to issue a permit to Respondent Read for the construction of a private, joint-use dock on Leadenwah Creek in Charleston County, South Carolina. After notice to the parties, a hearing in this matter was held at 10:00 a.m. on April 12, 2006, at the offices of the Administrative Law Court in Columbia, South Carolina.

0001

FILED
AUG 17 2006
SC ADMIN. LAW COURT

purchased Lot 1 and Lot 2.[1] The later deeds for all four lots, including the respective deeds into Respondent Read and the Petitioner, each specifically incorporated the Plat by reference.[2] (*Read* Exs. 1, 2, 3; *Pet.* Exs. 7, 7-A, 8).

4. The Petitioner was aware of the recorded Plat and the language regarding "Creek Access for Lots 1, 2 & 3" contained in the Plat prior to purchasing his property. (Tr. at p. 128, l. 19 – 129, l. 8; Tr. 141, ll. 20-24). The Petitioner explained his interpretation of the Plat's language regarding "Creek Access for Lots 1, 2 & 3" as permitting the easement holders to walk down to the creek or, in his words, "...come down to the creek." Additionally, the Petitioner explained his interpretation that after the easement holders traveled down the easement and arrived at the creek that they could then do, "Whatever they wanted." (Tr. at p. 147, ll. 14-22).

5. The Petitioner has never taken any legal action to contest the language regarding "Creek Access for Lots 1, 2 & 3" contained in the Plat. (Tr. at p. 142, ll. 13-16). Additionally, the Petitioner had never directly communicated to the owners of Lots 1, 2, and 3 that the Petitioner disputed the easement language in the Plat. (Tr. at p. 148, ll. 8-16; Tr. p. 127, ll. 19-25). Conversely, Respondent Read's father explained that he and other owners of Lots 1, 2, and 3 used the path shown on the Plat for recreational walking purposes. (Tr. at p. 122, l. 21 – p. 123, l. 21).

6. On or about August 26, 2004, Respondent Read applied for a private, joint-use dock on behalf of and to serve Lots 1, 2, and 3 with the express permission of the owners of Lots

---

[1] At the time of the hearing, Respondent Read's parents had purchased Lot 3 from Respondent Read. (Tr. at p. 118, ll. 12-14; Tr. at p. 119, ll. 1-4). Respondent Read's father, serving as Respondent Read's agent, was issued the dock permit; signed the dock permit; and attended and participated at the hearing. (*DHEC* Ex. 7). See Rule 25(c) SCRCP, in conjunction with ALC Rule 68.

[2] Indeed, the Petitioner's deed, in describing his own property provides, "Said lot of land containing such size, shape, dimensions, buttings and boundings as shown on said plat, which plat is incorporated herein by reference." (*Read* Ex. 3, p. 1).

As explained herein, I have determined that the Department correctly applied the applicable regulations in the issuance of Respondent Read's permit request and such issuance is affirmed.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the duly noticed hearing conducted on April 12, 2006, and taking into consideration the burden of persuasion and credibility of the witnesses, I make the following findings of fact by a preponderance of evidence:

1. The Petitioner and Respondent Read are adjacent property owners on Wadmalaw Island in Charleston County. On October 28, 1986, both the Petitioner's and Respondent Read's predecessor-in-title subdivided roughly 17.71 acres into four (4) roughly equal lots designated as Lots 1 through 4, via a plat entitled "Plat of Division of Lands of Alma E. Wagner" located at the end of Tacky Point Road on Wadmalaw Island near Leadenwah Creek (hereinafter the "Plat"). (*Read* Ex. 1).

2. The Plat depicts a 50 foot wide pathway labeled "50' drainage – easement & Creek Access for Lots 1, 2 & 3" across the rear or landward edge of Lot 4. The Plat was signed by the then owner of all four lots (Alma E. Wagner); was stamped as approved by the Clerk for Charleston County Council; and was then recorded in the RMC Office in Charleston County at Plat Book BK, Page 145. (*Read* Ex. 1). Lot 2 and Lot 3 do not have direct deep-water access due to the expanse of marsh directly in front of those properties. (*Read* Ex. 1; Tr. at p. 132, l. 16 – p.133, l. 17; Tr. at p. 134, ll. 11-20).

3. Sometime after the 1986 subdivision of the 17.71 acres into four lots, the Petitioner purchased Lot 4; Respondent Read purchased Lot 3; and Respondent Read's parents

0001A

1 and 2 (*i.e.*, his parents). (Tr. at p. 127, ll. 12-18; *DHEC* Ex. 1). The Permit Application was accompanied by supporting documents including an Affidavit of Ownership or Control which expressly related that the dock was at the "end of right of way." (*DHEC* Ex. 1). There was some confusion at the hearing as to whether the Permit Application was accompanied by the Plat, but the Department explained that it certainly possessed the Plat prior to issuing the dock permit and, potentially, an oversized copy of the Plat was actually submitted along with the Permit Application itself. (Tr. at p. 37, ll. 3-13; Tr. at p. 39, ll. 8-11; Tr. at p. 76, l. 21 – p. 77, l. 13; Tr. at p. 82, ll. 15-25). Similarly, the Petitioner's letter objecting to the dock application expressly acknowledged that the Plat had been provided to the Department prior to the issuance of the permit. (*Pet.* Ex. 5, p. 2). Curtis Joyner, Manager of Critical Area Permitting, testified that applications often are not complete when the application is first submitted and that the staff places applications on public notice that are sometimes not complete. (Tr. At p. 107, ll. 21-25, p. 108, ll. 1-25). Moreover, the Department explained that no party had ever claimed that the submitted Plat was altered, forged, or inaccurate. (Tr. at p. 83, ll. 1-11).

7. Contrary to the Petitioner's assertion, the permitted dock is to be constructed entirely below the mean high water mark and, accordingly, is not located on the Petitioner's property. (*DHEC* Ex. 1). Rather, consistent with the Petitioner's interpretation of the Plat's language, the pathway labeled "Creek Access for Lots 1, 2 & 3" would be used exclusively to walk to and from the dock site. In turn, the dock would actually be located on the state's land. (*DHEC* Ex. 1; *Read* Ex. 1).

8. The Petitioner was duly notified of Respondent Read's dock application and submitted a letter, through legal counsel, opposing the issuance of the dock permit. (*Pet.* Ex. 5).

In turn, Respondent Read, through his legal counsel, responded to the Petitioner's opposition. (*Pet.* Ex. 6).

9. In response to the Department's concern that the proposed dock may impact shellfish beds, otherwise considered a "geographic area of particular concern" (a/k/a "GAPC"), the Department notified the S.C. Department of Natural Resources ("SCDNR") of the Respondent's dock application since, as the Department explained, the SCDNR has jurisdiction over shellfish beds. In turn, the SCDNR responded to the Department, via letter dated December 6, 2004, that it did not object to the proposed dock. (*DHEC* Ex. 14; Tr. p. 77, l. 17 – p. 78, l. 9).

10. Consistent with S.C. Code Ann. § 48-39-150(A) and 23A S.C. Code Ann. Regs. 30-11(B), the Department considered the ten factors enumerated before issuing the dock permit. (Tr. at p. 72, ll. 17-20). The Department explained that it determined that Respondent Read had submitted a credible claim to a property right, in this instance an easement, to access the dock site to satisfy the statutory and regulatory requirements. (Tr. at p. 91, ll. 7-12).

11. On March 30, 2005, the Department issued the dock permit subject to certain special conditions such as eliminating the requested roof over the pierhead and reducing the size of both the pierhead and float to address the Petitioner's concerns. (Tr. at p. 80, ll. 12-24; *DHEC* Ex. 7).

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, I conclude the following as a matter of law:

1. The Administrative Law Court has subject matter jurisdiction in this action pursuant to S.C. Code Ann. §§ 1-23-500 et seq. (2005). In the instant case, the Petitioner, as the party affirmatively asserting error in the Department's issuance of the permit, bears the burden of proof. See Leventis v. South Carolina Dept. of Health and Environmental Control, 340 S.C. 118,

530 S.E.2d 643 (Ct. App. 2000). Therefore, the Petitioner must demonstrate by a preponderance of the evidence that the Department's issuance of the permit was in error under the relevant statutory and regulatory criteria pertaining to activities in the critical area. See Anonymous (M-156-90) v. State Bd. of Medical Examiners, 329 S.C. 371, 496 S.E.2d 17 (1998).

2. Respondent Read requested a permit for the construction of a joint-use recreational dock. Such a permit is governed by the South Carolina Coastal Zone Management Act, S.C. Code Ann. §§ 48-39-10 et seq. (Supp. 2005), and the regulations promulgated pursuant to those provisions found at 23A S.C. Code Ann. Regs. 30-1 et seq. (Supp. 2005). Those regulations govern the management, development, and protection of the critical areas and coastal zone in South Carolina. The Department's Office of Ocean and Coastal Resource Management is charged to uphold the policies of the Act when acting on permits for docks within the critical area.

The Dock Permit Application - 23A S.C. Code Ann. Regs. 30-2(D)(4)

3. Neither the Department nor this Court is vested with the authority to quiet title to real property; however, the Department - and in contested matters, this Court - is charged with determining whether an applicant for a critical area dock permit has satisfied the statutory and regulatory requirements for the issuance of that permit, including the requirement that the applicant establish *prima facie* authority to undertake the proposed project at the proposed location. The Department "is required to find that an applicant for a critical area permit has, based upon the submission of credible documentation, made a *prima facie* showing that it owns or has permission to use the property on which the permitted activity is to be located. Once such a showing is made, the Department may grant a critical area permit to that applicant, even if certain underlying property disputes remain unresolved." Moberly v. South Carolina

Department of Health and Environmental Control, Docket No. 04-ALJ-07-0408-CC, 2005 WL 2089815, p. 4 (S.C. Admin. Law Court, August 5, 2005).

4. In other words, the focal statutory provisions require an applicant for a critical area permit to make a *prima facie* showing that it has legitimate possession of, or permission to use, the property to be affected by the permit. Specifically, S.C. Code Ann. § 48-39-140(B)(4) (Supp. 2004) requires that "[e]ach application for a permit shall be filed with the [D]epartment and shall include... [a] copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property, to carry out the proposal." The Department's permit application regulation contains an almost identical provision.

5. In this instance, the focal issue is whether the Department erred in concluding that Respondent Read made a *prima facie* showing of possession of, or permission to use, the property to be affected by the permit. More specifically, the issue is whether Respondent Read made a *prima facie* showing that he owned an easement to travel to and from the proposed dock site.

A Plat is an "Instrument"

6. Respondent Read submitted a Permit Application which was accompanied by supporting documents and was either originally accompanied by a copy of the Plat, or the Plat was later provided. (Tr. at p. 37, ll. 3-13; Tr. at p. 39, ll. 8-11; Tr. at p. 76, l. 21 – p. 77, l. 13; *see Read* Ex. 1). The Plat, in this instance a formal document signed by the landowner, was stamped as approved by Charleston County Council and then recorded in the RMC office. Therefore, the Plat is an "instrument" which satisfies the statutory and regulatory requirement. See Sutcliffe v. Laney Bros., Inc., 247 S.C. 417, 147 S.E.2d 689, 690 (1966) (referring to a "survey or other instrument of record"); Hamilton v. CCM, Inc., 274 S.C. 152, 263 S.E.2d 378,

379 (1980) ("the outcome of this litigation is largely controlled by the construction given an instrument referred to as the Harbour Town Townhouse Plat."). Consistently, the Department's Summary of Review sheet indicates that the Department has historically interpreted a plat to be an "instrument." (*Pet.* Ex. 1 – listing "deed, plat or lease").

Uncertified Copy of the Plat

7. However, the copy of the Plat which the Department reviewed was not itself a certified copy. The Petitioner has gone to some length to suggest that the Department erred in issuing a permit without having a certified copy of the Plat. As an initial matter, pursuant to S.C. Code Ann. § 48-39-140(B)(4), an applicant must submit, among other information, "A copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property, to carry out the proposal." Simply stated, as is evident from the above-quoted language, there is no statutory requirement that a copy of a plat must be a certified copy.[3]

8. Similarly, the focal regulation, 23A S.C. Code Ann. Regs. 30-2(B)(4), provides, as pertinent, that "The following minimum information shall ordinarily be required before a permit application is considered complete:....(4) a certified copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property, to carry out the proposal." (Emphasis added).

9. In this instance, the Department analyzed an uncertified copy of the Plat and explained that:

(a) The Department interprets 23A S.C. Code Ann. Regs. 30-2(B) to mean that the applicant's Affidavit of Ownership or Control may satisfy the certification for other

[3] Contrary to the Petitioner's suggestion, neither the statute nor the regulation requires that an "instrument" also serve as "an index to encumbrances."

0007

documents required by the regulation or, alternatively, serve as a substitute for it; (Tr. at p. 35, ll. 16-19; Tr. at p. 41, ll. 12-15; *see DHEC* Ex. 1);

(b) The Department explained that it actually reviewed a copy of the Plat prior to issuing the permit; (Tr. at p. 37, ll. 3-13; Tr. at p. 39, ll. 8-11; Tr. at p. 49, ll. 20-22; Tr. at p. 76, l. 21 – p. 77, l. 13); and

(c) No party to this dispute has suggested that the submitted Plat was not identical to the one on file at the RMC Office in Charleston County (*i.e.,* not altered, forged, or inaccurate). (Tr. at p. 83, ll. 1-11). Notably, Respondent Read introduced a certified copy of the Plat at the hearing and no party offered evidence or suggested that the Plat deviated, in any way, from the one the Department reviewed with the application. (*Read* Ex. 1).[4]

10. As to the Department's interpretation of the regulation regarding certified copies, "the decision of an administrative agency interpreting its own regulations is given great deference." Earl v. HTH Associates, Inc./Ace Usa Ins. Co. of North America, 368 S.C. 76, 627 S.E.2d 760, 762 (Ct. App. 2006). Such deference creates an elevated threshold of evaluation or presumption since "[c]ourts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ." S.C. Coastal Conservation League v. South Carolina Dept. of Health and Environmental Control, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005). Certainly, given that the applicable regulation uses the phrase "shall *ordinarily* be required," the Department has some discretion to depart from the requirement that the copy of the Plat be a certified copy by virtue of the word "ordinarily." See, e.g., Burns v. Gower, 34 S.C. 160, 13 S.E. 331, 332 (S.C. 1891) ("under the well-settled rule of statutory

[4] For illustration purposes at the hearing, one witness marked on the certified plat. (*Read* Ex. 1) (Tr. at p. 137, ll. 13-19). Other than that, the *Read* Ex. 1 is "certified" as being identical to the one filed with the RMC Office in Charleston County.

0008

construction . . . a court is bound, if possible, to give some place and effect to every word found in a statute . . . .").

11. Alternatively, since no party asserts that the uncertified copy of the Plat upon which the Department relied was somehow altered, forged, or otherwise inaccurate then the reliance on an uncertified copy is a harmless error. See McNeil v. South Carolina Department of Corrections, Docket No. 05-ALJ-04-00230-AP, 2005 WL 2147192 (S.C. Admin. Law Court, August 11, 2005) (recognizing the doctrine of harmless error).

12. Moreover, the Department's interpretation is consistent with prior holdings from this Administrative Law Court that "certified" copies are not always required. See Burgess v. South Carolina Department of Health and Environmental Control, Docket No. 99-ALJ-07-0167-CC, 2000 WL 378877, p.5 (S.C. Admin. Law Judge Div., March 30, 2000) (involving a challenge to an uncertified deed, and finding that the applicant's submission of a contract of sale met the minimum regulatory requirements). The Department's interpretation of the certification requirement is also consistent with the intent of the legislature and consistent with the policies of the Coastal Zone Management Act, which promote and encourage water access.

Prima Facie Showing of an Easement to the Dock Site

13. As related above, the Petitioner's and Respondent's predecessor-in-title subdivided her land into four lots and included on the Plat the language, "50' drainage – easement & Creek Access for Lots 1, 2 & 3."[5] In addition, the respective deeds into Respondent

[5] The creation of a 50 foot easement suggests a desire to preserve the right to later seek to have the county maintain the easement. See Marlow v. Marlow, 284 S.C. 155, 325 S.E.2d 703 (Ct. App. 1985) (50' road is the width required for county maintenance).

0009

Read and the Petitioner each specifically incorporate the Plat by reference.[6] (*Read* Ex. 1; *Pet.* Exs. 7, 7-A, 8; *Read* Exs. 2, 3). In South Carolina, "[w]here land is subdivided, platted into lots, and sold by reference to the plats, the buyers acquire a special property right in the roads shown on the plat..... If the deed references the plat, the grantee acquires a private easement for the use of all streets on the map." Davis v. Epting, 317 S.C. 315, 318, 454 S.E.2d 325, 327 (Ct.App. 1994) (emphasis added). In other words, under South Carolina law, "where a deed describes land as is shown on a certain plat, such plat becomes part of the deed." Blue Ridge Realty Company, Inc. v. Williamson, 247 S.C. 112, 145 S.E.2d 922, 924 (1965); see also S.C. Code Ann. § 30-5-250 (1991).

14. Significantly, when a deed references a plat showing an easement, that easement is created as a matter of law in South Carolina. Newington Plantation Estates Ass'n v. Newington Plantation Estates, 318 S.C. 362, 365, 458 S.E.2d 36, 38 (1995) ("Absent evidence of the seller's intent to the contrary, a conveyance of land that references a map depicting streets conveys to the purchaser, as a matter of law, a private easement by implication with respect to those streets, whether or not there is a dedication to public use. [citations omitted]. As between an owner who has conveyed lots according to a plat and the grantee, the dedication of a private easement is complete when the conveyance is made." (emphasis added)); see Billings v. McDaniel, 217 S.C. 261, 60 S.E.2d 592 (S.C. 1950) (where property sold is described with reference to a plat upon which streets and ways are shown, an easement therein is implied).

---

6 Indeed, the Petitioner's deed, in describing the Petitioner's own property provides, "Said lot of land containing such size, shape, dimensions, buttings and boundings as shown on said plat, which plat is incorporated herein by reference." (*Read* Ex. 3, p. 1).

15. In short, for the analysis of a *prima facie* showing, the Department's interpretation that the Plat is suitable *prima facie* evidence of an easement (and part of all four of the deeds) is consistent with and supported by South Carolina law.[7]

16. Furthermore, the Department's interpretation is consistent with legal interpretations involving easements providing for water "access" similar to the Plat and, correspondingly, the deeds in this instance. Monahan v. Hampton Point Association, Inc., 264 A.D. 2d 764, 695 N.Y.S.2d 385 (1999) ("the subject dock, located at the end of an easement leading to a waterway, was a reasonable and incidental use of the easement. Under the circumstances of this case, the creation of the easement would have been without purpose if not for the dock giving access to the waterway."); Winkler v. Petersilie, 124 Fed. Appx. 925, 932, 2005 WL 450595 (6th Cir. 2005) ("we agree with the district court that these deeds expressly conveyed riparian rights through an easement for free access and use of Watauga Lake."); see In the Matter of Tideland's License, 326 N.J. Super. 209, 740 A.2d 1125 (1999) (easement supported construction of a dock).

17. In summary, the Petitioner has failed to prove that the Department erred in its decision that Respondent Read established a *prima facie* claim to an easement as contemplated by S.C. Code Ann. § 48-39-140(B)(4) and 23A S.C. Code Ann. Regs. 30-2(B).

---

[7] Although beyond the scope of analyzing a *prima facie* showing, the Petitioner did not establish that Respondent Read had abandoned the easement or that the Petitioner had extinguished the easement. State v. Pettis, 7 Rich. 390, 1854 WL 2811 (S.C. App. Law 1854); Walker v. Guignard, 293 S.C. 247, 249, 359 S.E.2d 528, 529 (Ct. App. 1987) ("the mere nonuse of an easement created by deed does not amount to abandonment of that easement."); (Tr. at p. 122, l. 21 – p. 123, l. 21).

S.C. Code Ann. § 48-39-150

18. The Department explained that, consistent with S.C. Code Ann. § 48-39-150(A) and 23A S.C. Code Ann. Regs. 30-11(B), the Department did consider the ten enumerated factors prior to issuing a dock permit. (Tr. at p. 72, ll. 17-20).

19. In response, the Petitioner focused only on the last of the ten enumerated factors - the impact on adjacent landowners. But, the interests of adjacent property owners must be balanced against the interests of the applicant and, presumably, the public. Indeed, this factor is only one of many factors to consider. As to this one factor, the Petitioner submitted no substantiated evidence of detrimental impact from the proposed dock other than it was relatively near his house and the presumed use of the dock might be "noisy." (Tr. at p. 141, ll. 4-11). There was no evidence that the permitted dock impacted the Petitioner's own access to navigable water, nor was there any evidence to suggest that the dock would diminish the Petitioner's property value, such as an appraisal comparing the value with the dock and without.

20. As to the proximity to the Petitioner's house, the Petitioner was aware of the easement's proximity when the Petitioner purchased the property. It seems, therefore, inconsistent to complain of that proximity now. As to potential noise, the Petitioner merely related that he suspected that the dock usage would be noisy, but such criticism was purely speculative.

21. Alternatively, any impact on the Petitioner's view would also not be a compelling reason to deny a permit application. See Hill v. The Beach Co., 279 S.C. 313, 306 S.E.2d 604 (1983) (holding that there is no prescriptive right to an ocean view in South Carolina). In addition, the Department addressed that potential concern when it issued the dock permit subject

to certain special conditions such as eliminating the requested roof over the pierhead and reducing the size of both the pierhead and float. (Tr. at p. 80, ll. 12-24; *DHEC* Ex. 7).

22. Conversely, the Department "has historically looked favorably on the issuance of joint-use docks. [The Department] has made it a policy to encourage community and joint-use dock structures, as these structures reduce the impacts normally associated with docks, such as environmental and navigational impacts." Teseniar v. South Carolina Department of Health and Environmental Control, Docket No. 01-ALJ-07-0224-CC, 2002 WL 385054, p. 4 (S.C. Admin. Law Judge Div., Feb. 12, 2002).

23. In summary, the Petitioner has failed to prove that the Department erred in the Department's analysis of the factors enumerated in S.C. Code Ann. § 48-39-150(A) and 23A S.C. Code Ann. Regs. 30-11(B).

ORDER

Based upon the above findings of fact and conclusions of law, it is hereby **ORDERED** that the Department's decision granting Respondent Read's request for a private, joint-use recreational dock is affirmed.

AND IT IS SO ORDERED.

JOHN D. MCLEOD
Administrative Law Judge

August 17, 2006
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 17th day of August 2006

By: Brigitte B. Ashley
Judicial Law Clerk

0013

6058-19
PHO

STATE OF SOUTH CAROLINA

BEFORE THE COASTAL ZONE MANAGEMENT APPELLATE PANEL

Too Tacky Partnership, Petitioner, vs. S.C. Department of Health and Environmental Control and Mayo Read, Respondents.	Docket No. 05-ALJ-07-0165-CC **FINAL ADMINISTRATIVE ORDER**

Appearances: John P. (Jay) Seibels, Jr., Esq., for Petitioner
Van Whitehead, Esq., for Respondent SCDHEC
Richard L. Tapp, Jr., Esq., for Respondent Read

MK

This matter was before the Panel for oral arguments on March 23, 2007. This appeal arises from the Department's issuance of permit number OCRM-04-297-M, to Mayo Read for a private, joint-use recreational dock on Leadenwah Creek to serve Lots 1, 2 and 3 through an easement at the end of Tacky Point Road on Johns Island, Charleston County. The Administrative Law Judge, the Honorable John D. McLeod, affirmed the Department's decision to issue the permit. The Petitioner appealed.

Our quasi-judicial review of this contested case is governed by the Administrative Procedures Act, S.C. Code Ann. § 1-23-610(D) (2005)[1], which provides that:

> The review of the administrative law judge's order must be confined to the record. The reviewing tribunal may affirm the decision or remand the case for further proceedings or it may reverse or modify the decision if the substantive

[1] The Panel recognizes that Act No. 387 of 2006 has substantially altered the administrative appeal process but this appeal proceeds under the framework existing prior to the Act 387 amendments pursuant to Section 57 of Act 387.

0014

rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

a. in violation of constitutional or statutory provisions;

b. in excess of the statutory authority of the agency;

c. made upon unlawful procedure;

d. affected by other error of law;

e. clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

f. arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

After reviewing the evidence in the record and hearing the arguments of the parties, the Panel concludes that there is substantial evidence in the record to support the Judge's Findings and that there is no error of law.

THEREFORE, it is ORDERED that the Final Order and Decision of the Administrative Law Judge is AFFIRMED. The Panel adopts the Findings of Fact and Conclusions of Law contained therein.

AND BY A UNANIMOUS VOTE, IT IS SO ORDERED.

Keith M. Kinard, Chairman

April 27, 2007

0015

#6

6058-19

PTD

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)	Docket No. 2007-CP-10-1520
Too Tacky Partnership,)	
)	
Petitioner,)	
)	
vs.)	**FINAL ORDER**
)	
South Carolina Department of Health and)	
Environmental Control and Mayo Read, Jr.,)	
)	
Respondents.)	

FILED
2007 DEC 21 PM 12:13
JULIE ARMSTRONG
CLERK OF COURT
BY

This matter came before me as a suit, initiated by Too Tacky Partnership, appealing the Final Administrative Order of the S.C. Coastal Zone Management Appellate Panel. All parties were represented and presented their positions at a hearing before me on October 31, 2007.

STATEMENT OF THE CASE

In August 2004, Mayo Read applied for a dock permit to access Leadenwah Creek in Charleston County, South Carolina. The Department issued permit number OCRM-04-297-M to Mayo Read for a private, joint-use recreational dock to serve Lots 1, 2 and 3 through an easement at the end of Tacky Point Road on Johns Island, Charleston County. Too Tacky Partnership appealed the issuance of the permit to the Administrative Law Court(ALC). On August 17, 2006, Administrative Law Judge John D. McLeod affirmed the Department's decision to issue the permit. On September 18, 2006, the Petitioner appealed to the Coastal Zone Management Appellate Panel(CZMAP) which unanimously affirmed the decision of the ALC. On April 12, 2007, Too Tacky filed a petition for judicial review.

The Administrative Procedures Act, S.C. Code Ann. § 1-23-380(A)(6) (2005), establishes the standard of review which provides that:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or

0016

modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

a. in violation of constitutional or statutory provisions;

b. in excess of the statutory authority of the agency;

c. made upon unlawful procedure;

d. affected by other error of law;

e. clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

f. arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

See also Rose v. Beasley, 327 S.C. 197 (1997), *Guerard v. Whitner*, 276 S.C. 521 (1981), and *McQueen v. S.C. Coastal Council*, 329 S.C. 588, 593 (Ct. App. 1999) (rejecting proposition of *de novo* review under S.C. Code Ann. § 48-39-180).

DISCUSSION

The S.C. Department of Health and Environmental Control is authorized pursuant to the Coastal Tidelands and Wetlands Act, a/k/a Coastal Zone Management Act (CZMA), S.C. Code Ann. § 48-39-10 *et seq.* (1987 & Supp. 2006) to regulate the construction of docks within the "critical area." Mayo Read applied to the Department for a permit to authorize the construction of a joint-use recreational dock. The regulatory standards of the CZMA applicable to the Read permit are set forth in 23A S.C. Code Ann. Regs. 30-1 *et seq.*(Supp. 2005). By way of Complaint and Brief, Too Tacky Partnership sets forth several allegations of error which will be addressed below.

Application was Complete and Provided Prima Facie Permission

First, Too Tacky claims Mayo Read's application was incomplete for a variety of reasons. More specifically, Too Tacky argues that:

1) the permit file did not contain a certified copy of instruments indicating ownership, possession, or permission;

2) an owner's affidavit is not a permissible instrument for proof; and

3) that the owner's affidavit was false.

I find these arguments without merit in light of the substantial evidence in the record and legal analysis set forth in the Conclusions of Law of the ALC's Final Order and Decision, which was adopted by the CZMAP.

The ALC thoroughly discussed the limitations of the Department's requirement that an applicant provide proof of ownership, possession or permission for a specific project site and correctly concluded that an applicant is only required to establish a *prima facie* showing. The record support's the ALC's finding that a plat of the property had been considered by the Department staff in making their permit decision and that it is a sufficient instrument per the statutory and regulatory requirement.

Furthermore, the Department's acceptance of and reliance on the owner's affidavit was reasonable based on the substantial evidence in the record and is a permissible application of the law. Therefore, the decision below that Mayo Read provided acceptable documentation to demonstrate *prima facie* ownership / permission is supported by the substantial evidence in the record and is not affected by any error of law. Finally, as is manifest from the ALC's discussion of this topic, the determinations as to ownership, possession, or permission of the disputed easement within the context of this appeal are not dispositive of the question as a matter of property law but merely of the *prima facie* showing needed for regulatory / administrative actions of the Department.

Number of Docks Per Parcel

Next, Too Tacky proposes that abnormal circumstances are not present that would allow the authorization of a second dock on Too Tacky's parcel. The pertinent regulatory provision, in effect at the time of the staff decision, stated: "Docks and piers shall normally be limited to one structure per parcel." Reg. 30-12(A)(2)(Supp. 2004) (emphasis added). The presence of the term "normally" demonstrates that an alternative to the flat prohibition exists and that it would be within the Department's discretion to allow more than one dock per parcel. As cited in Too Tacky's own brief, the record reflects that Department staff found special circumstances. Although the ALC and CZMAP didn't approach Too Tacky's argument from this angle, it is not particularly clear whether the abnormal circumstances argument was ruled upon making its preservation questionable. Ultimately, the outcome is the same such that the presence of the second dock is not prohibited under this regulation.

Neighbor's Use and Enjoyment Considered

Finally, Too Tacky claims the application "fails to consider the proposed dock's effect on the value and enjoyment" of its land. The record reflects that the Department staff did consider the required ten general considerations of S.C. Code Ann. § 48-39-150(A), including potential impacts to neighbor's use and enjoyment. The ALC clearly found several elements of Too Tacky's use and enjoyment complaints lacking in evidentiary support or otherwise not supported by law. Taken as a whole, the ALC and CZMAP decisions reflecting that Too Tacky failed to prove any error in the Department's analysis of the ten general considerations are soundly supported by the record and reflect no error of law.

CONCLUSION

After reviewing the evidence in the record, reviewing the parties' filings, and hearing the arguments of the parties, I conclude that there is substantial evidence in the record to support the findings of the ALC and adopted by the CZMAP and there is no error of law in the issuance of permit number OCRM-04-297-M to Mayo Read.

IT IS HEREBY ORDERED that decision of the Coastal Zone Management Appellate Panel is AFFIRMED and the issuance of permit number OCRM-04-297-M to Mayo Read is affirmed.

Roger M. Young
Circuit Court Judge

December 18, 2007

Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
Docket No. 2007-CP-10-1520

Too Tacky Partnership,)
)
Petitioner,)
)
vs.)
)
South Carolina Department of Health and)
Environmental Control and Mayo Read, Jr.,)
)
Respondents.)

FILED
2007 DEC 21 PM 12: 13
JULIE J. ARMSTRONG
CLERK OF COURT
BY

CERTIFICATE OF MAILING

I hereby certify that on this day I served a copy of the foregoing proposed Final Order on the following parties by depositing same in the U.S. Mail, postage paid, and addressed as follows:

John P. Seibels, Jr.
Seibels Law Firm, P.A.
165-A King Street
Charleston, SC 29401

Richard L. Tapp, Jr.
Nexsen Pruet Adams Kleemeier, LLC
P. O. Box 486
Charleston, SC 29402

Janet M. Kruger

December 10, 2007

6058-19
1/29

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO. 2007-CP-10-1520
Too Tacky Partnership, Plaintiffs, vs. SCDHEC and Mayo Read, Jr. Defendant.	**ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND**

This matter came before this Court upon Plaintiff's Motion to Alter or Amend its December 18, 2007 Order affirming the decision of the Coastal Zone Management Appellate Panel and issuance of permit number OCRM-04-297-M to Mayo Read. Upon consideration, the Plaintiff's motion is ~~DENIED~~.

AND IT IS SO ORDERED.

Roger M. Young
Presiding Judge

Date: 1/24/08
Charleston, South Carolina

FILED
2008 JAN 31 AM 10:47
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

0021

RECEIVED
APR 2 9 2005
OFFICE OF OCRM
CHARLESTON OFFICE

NOTICE OF REQUEST FOR CONTESTED CASE HEARING OF TOO TACKY PARTNERSHIP

Permit Number: OCRM-04-297-M
Permittee: Mayo Reed
Date of Issuance: March 30, 2005

(1) Name of party requesting hearing and issues for which hearing is requested:

Too Tacky Partnership hereby requests a contested case hearing of the below cited dock permit issued to Mayo Reed. The issue to be raised by Too Tacky Partnership, at the hearing, is that the dock permit allows for construction of a dock on and across property owned by Too Tacky Partnership.

OCRM has issued the subject permit in direct contravention of S.C. Code Ann. § 48-39-10, *et seq.* and S.C. Code of Reg. § 30-1, *et seq.*

(2) Permit number or other information sufficient to identify the decision, order, action or inaction which is the subject of the hearing:

Too Tacky Partnership is contesting dock permit number OCRM-04-297-M issued to Mayo Reed (permittee) on March 30, 2005 for construction of a dock at the location of Lots 1, 2 and 3, end of Tacky Point Rd, Johns Island, Charleston County, South Carolina; Leadenwah Creek.

(3) Relief requested:

Too Tacky Partnership requests that relief be granted to it in the form of revocation of the dock permit described in Section (2) above.

Pursuant to S.C. Code of Reg. § 30-6, this notice is filed with the Department of Health and Environmental Control within 15 days of notification to Too Tacky Partnership of the issuance of the aforesaid permit.

John P. Seibels, Jr.
Kelly J. West
SEIBELS LAW FIRM, P.A.
165-A King Street
Charleston, SC 29401
(843) 722-6777
ATTORNEYS FOR TOO TACKY PARTNERSHIP

CHARLESTON, SC
April 28, 2005

CERTIFICATE OF SERVICE

I, Pat Schneider, of Seibels Law Firm, P.A., hereby certify that on April 28, 2005, a copy of the attached Notice of Request for Contested Case Hearing was placed in an envelope, with first-class postage prepaid, and mailed to:

Office of Ocean and Coastal Resource Management
Department of Health and Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

South Carolina Administrative Law Court
PO Box 11667
Columbia, SC 29211

Mayo Read, Jr.
c/o Cox Marine Contractors
3820 Bohicket Road
Johns Island, SC 29455

Pat Schneider

Pat Schneider

0023

(005F-19 P&D

STATE OF SOUTH CAROLINA
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
COASTAL ZONE MANAGEMENT APPELLATE PANEL

Too Tacky Partnership, Petitioner, vs. South Carolina Department of Health and Environmental Control and Mayo Read, Jr. Respondents.	**NOTICE OF APPEAL OF FINAL ORDER AND DECISION** **Docket No. 05-ALJ-07-0165-CC**

TO: LESLIE S. RILEY, ESQUIRE, FOR THE RESPONDENT SCDHEC-OCRM AND RICHARD L. TAPP, JR., ESQUIRE FOR THE RESPONDENT MAYO READ.

Please take notice that Too Tacky Partnership ("Too Tacky") hereby exercises its right of direct appeal from the decision of the Administrative Law Judge to the Coastal Zone Management Appellate Panel as provided in S.C. Code Ann. 48-39-150(D)(1987 and Supp. 2005) and S.C. Code Ann. §1-23-610(A)(1986 and Supp. 2005), as amended by Act 387 of 2006, §57.

BACKGROUND

OCRM granted Respondent Mayo Read, Jr. a critical area permit for the construction of a private, joint use dock on Leadenwah Creek in Charleston County. In a contested case brought by the landowner (Too Tacky) where the construction is to occur, the ALJ sustained the permit. The dock, as approved, would extend from property owned by Petitioner Too Tacky, which already has a dock. Too Tacky would show that Respondent lacks the requisite ownership or permission to construct a second dock extending from Too Tacky's property, and Respondent otherwise cannot

0024

meet the statutory and regulatory prerequisites to a critical area permit for the construction of a private, joint use dock at the proposed location. Finally, Too Tacky would show that OCRM deviated without justification from the standard that docks shall normally be limited to one structure per parcel.

NOTICE OF APPEAL

Petitioner Too Tacky requests quasi judicial review by the Coastal Zone Management Appellate Panel ("Panel"), and specifically requests the Panel to either remand the case for further proceedings or reverse the decision. Too Tacky's substantive rights have been prejudiced because the decision was either:

(A) In violation of constitutional or statutory provisions;
(B) In excess of the statutory authority of the agency;
(C) Made upon unlawful procedures;
(D) Affected by error of law;
(E) Clearly erroneous in view of the reliable probative and substantive evidence on the whole record; or
(F) Arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. §1-23-610 (1986 and Supp. 2005).

In Brief and at Oral Argument, Too Tacky will show that the ALJ's decision was controlled by one or more of the factors listed in (A) through (E) above in the following respects:

1. The ALJ failed to hold OCRM to its regulatory and statutory duties as follows:

   (a) OCRM made a final decision when the permit application remained incomplete;
   (b) OCRM granted a critical area permit relying solely upon an Owner's Affidavit;
   (c) Even if OCRM could grant a permit based solely upon an Owner's Affidavit, the Owner's Affidavit herein was demonstrated to be false (Respondent claimed to be the owner of Too Tacky's property) prior to OCRM's decision

to grant the permit.;

(d) OCRM and the ALJ never considered the question of whether Too Tacky's property may be diminished in value if a third-party built a dock on it;

(e) OCRM and the ALJ did not take into consideration the proximity of the proposed dock to Too Tacky's existing home, instead treating Too Tacky as if it were a neighboring property owner when in fact it owns and occupies the property on which the dock would be placed;

(f) OCRM and the ALJ failed to consider that the parcel from which the dock is to extend already has a dock, resulting in two docks on a single parcel; and

(g) Such other failures as may be shown in the Record.

2. The ALJ erred by deciding the case based upon material not in OCRM's permit file and ignoring material that was collected by OCRM on the critical issue of whether the applicant had ownership or permission to carry out the proposed activity. Specifically:

(a) The plat showing the alleged easement claimed by Respondent was not in OCRM's file, and even if it were ever reviewed by OCRM, its staff testified that they did not rely on it to decide the issue of ownership or permission;

(b) The deeds which are critical to the Court's analysis were never submitted to OCRM staff, and therefore cannot be considered in an analysis of whether the applicant met his burden of showing ownership or permission to OCRM during the application process; and

(c) The only material actually in OCRM's file which relates to the property claimed by the applicant are the GIS Information Sheets obtained by OCRM, which show no such easement.

3. Even if the plat and subject deeds had been a part of OCRM's application file, the ALJ incorrectly analyzed them under applicable South Carolina law by:

(a) Relying upon the laws of roadway easements, where there is no roadway involved;

(b) Failing to recognize that the easement drawn on the plat was never created as a matter of law since all parcels were owned by the same party when the plat was filed (See Finding of Fact Number 2; An easement cannot exist where both the purported servient and dominant estates are owned by the exact same person. Haseldon vs. Schein 167 S.C. 534, 539, 166 S.E. 2(d) 634, 635

(1932)); and

(c) Failing to apply the first step of every easement analysis by determining if the claimed easement is "appurtenant" or "in gross". Assuming arguendo the creation of an easement by the subject plat, any such easement would necessarily have been one in gross and, therefore, not capable of conveyance to subsequent owners, such as Respondent.

4. The ALJ erred by improperly minimizing the interests of petitioner when it found as a matter of fact at Paragraph 7 that the proposed dock is to be built on State land and not on Petitioner's land. Such a finding ignores the regulatory and statutory requirements that the Applicant have permission from the landowner, that the impact on neighboring landowners must be considered, and that no dock may be constructed within a certain distance of a particular property line as extended seaward. This finding also is clearly erroneous as a matter of fact in that there was no evidence in the record that the dock structure was to be wholly located beyond the mean high water line. To the contrary, the dock was to terminate upon and extend from the Petitioner's property landward of the mean high water line.

5. The ALJ erred by sustaining a critical area permit which deviates from the Departmental Specific Project Standards, legislative and agency guidance, and policy that prohibits two structures on one parcel, where:

(a) OCRM's file did not contain the required finding of abnormal circumstances which would support two docks on Too Tacky's property (See 23(A) S.C. Code Ann. Regs. 30-12.A(2)(A)(Supp. 2004)), and the ALJ decision likewise is silent on this critical regulatory policy issue; and

(b) The proposed joint use dock would benefit three parcels, and be placed on a fourth parcel which already has a dock. Of the three parcels entitled to joint use of the proposed dock, one parcel already has a dock and the other two are waterfront but do not qualify (see finding of fact number 2). As a result, the

proposed "joint use" dock does not decrease but actually increases the density of docks in the area and increases the impacts normally associated with docks, such as environmental and navigational impacts, all contrary to agency policy. Finally, the permit allows a second dock to be built on a parcel whose owner doesn't want a second dock.

6. Too Tacky requests remand or reversal on such other grounds as may appear in the Record.

Respectfully Submitted

John P. Seibels, Jr.
Jason Scott Luck
SEIBELS LAW FIRM, P.A.
165-A King Street
Charleston, SC 29401
(843) 722-6777
ATTORNEYS FOR TOO TACKY PARTNERSHIP

CHARLESTON, SC

9/18, 2006

0028

CERTIFICATE OF SERVICE

I, Sara Patterson, of The Seibels Law Firm, P.A., hereby certify that on this 18 day of September, 2006, a copy of the attached Notice of Appeal of Final Order and Decision was hand delivered to:

Leslie S. Riley, Esquire
Chief Counsel, OCRM
SOUTH CAROLINA DHEC
1362 McMillan Ave, Suite 400
North Charleston, SC 29405

Neil C. Robinson, Jr., Esquire
Richard L. Tapp, Jr., Esquire
NEXSEN PRUET ADAMS KLEEMEIR, LLC
205 King Street, Suite 400
Charleston, SC 29401

Sara Patterson

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
Too Tacky Partnership,	)	DOCKET NUMBER:
	)	2007-CP-10-_____
Petitioner,	)	
	)	
vs.	)	**Petition for Judicial Review**
	)	**Pursuant to S.C. Code**
South Carolina Department of Health and Environmental Control and **Mayo Read, Jr.,**	)	**§48-39-180**
	)	
Respondents.	)	
	)	

FILED
2007 APR 12 PM 3:18
JULIE J. ARMSTRONG
CLERK OF COURT

Petitioner Too Tacky Partnership ("Too Tacky"), pursuant to S.C. Code § 48-39-180, petitions this court for de novo judicial review of the South Carolina Department of Health and Environmental Control's decision to issue a critical area permit allowing a Third-Party to build a dock extending from Too Tacky's property. Petitioner would show to this Honorable Court the following:

1. Petitioner Too Tacky is a South Carolina partnership.

2. Respondent South Carolina Department of Health and Environmental Control ("DHEC" or "Department") is an administrative agency of the State of South Carolina.

3. Respondent Mayo Read, Jr. is upon information and belief a resident of Charleston County, South Carolina.

4. All conditions precedent to filing this notice and petition, including exhaustion of administrative remedies, have been met and the Petitioner as a party adversely affected by Respondent Read's dock permit is entitled to de novo judicial review of DHEC's action under S.C. Code § 48-39-180 (Supp. 2006).

0030

5. Too Tacky is and was at all relevant times the record owner of a 4.4 acre tract along the Leadenwah River identified by Tax Map Number 156-00-00-189 in Charleston County, South Carolina. This property is hereinafter referred to as "Lot 4", as identified on a plat recorded on October 28, 1986 in the Charleston County RMC Office at Book BK, Page 145 ("the Plat").

6. At all times relevant hereto, I. Mayo Read, Sr. has been the record owner of a 4.29 acre tract known by Tax Map Number 156-00-00-187 in Charleston County, South Carolina. This property is hereinafter referred to as "Lot 1" as so identified on the Plat.

7. At all times relevant hereto, Ellen Read has been the record owner of that 4.5 acre tract identified by Tax Map Number 156-00-00-065 in Charleston County, South Carolina. This property is hereinafter referred to as "Lot 2" as so identified on the Plat.

8. As of September 15, 2004, Respondent Mayo Read, Jr. was the owner of a 4.4 acre tract identified by Tax Map Number 156-00-00-188 in Charleston County, South Carolina. This property is hereinafter referred to as "Lot 3" as so identified on the Plat.

9. Respondent Read, Jr. has since sold Lot 3.

10. In the early 1990's Too Tacky obtained a critical area permit and constructed a dock extending from Lot 4 to the Leadenwah River.

11. At an undetermined time in the past, an owner of Lot 1 obtained a critical area permit and constructed a dock extending from Lot 1 to the Leadenwah River.

12. On September 15, 2004, Respondent Mayo Read, Jr. filed an application with the DHEC Office of Ocean and Coastal Resource Management ("OCRM") for a permit to construct a "private recreational community use" dock on Lot 4 in favor of Lots 1, 2, and 3.

0031

13. On March 30, 2005, the DHEC approved Respondent Mayo Read, Jr.'s application and issued a critical area permit.

14. Petitioner appealed DHEC's decision to the Administrative Law Court pursuant to S.C. Code §§ 48-39-150 (Supp. 2004), 1-23-600(B) (Supp. 2004), and 1-23-310 *et seq.* (Supp. 2005).

15. On April 12, 2006 a contested case hearing, docket number 05-ALJ-07-0165-CC, was held before The Honorable Judge John D. McLeod of the Administrative Law Court.

16. On August 17, 2006, Judge McLeod affirmed DHEC's decision.

17. On June 9, 2006, Governor Mark Sanford signed into law S.C. Act No. 387, which, *inter alia*, altered the method by which appeals from administrative matters are handled.

18. The Act did not affect the case at bar, which pursuant to Section 57 of the Act proceeded under the former law, and the Petitioner appealed the decision to the Coastal Zone Management Appellate Panel ("CZMAP") on September 18, 2006 pursuant to S.C. Code §§ 48-39-150(D) (Supp. 2005) and 1-23-610(A) (Supp. 2005).

19. On March 23, 2007, the CZMAP affirmed the decision of Judge McLeod. Petitioner hereby exercises its right to judicial review de novo of the Department's action as provided in S.C. Code §48-39-180.

20. Too Tacky Partnership asserts that OCRM issued the subject permit in direct contravention of S.C. Code Ann. § 48-39-10 *et seq.* and 23(A) S.C. Code of Reg. § 30-1, *et seq.*

21. Petitioner would show that OCRM's decision to grant a permit to Read must be reversed on the basis that the decision was:

a. In violation of constitutional or statutory provisions;

0032

b. In excess of the statutory authority of the agency;

c. Made upon unlawful procedure;

d. Affected by other error of law;

e. Clearly erroneous; and or

f. Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

22. OCRM's errors include but are not limited to the following:

a. OCRM acted upon an incomplete application;

b. OCRM permitted a second dock to be built on Too Tacky's property in the absence of the required "abnormal" circumstances;

c. OCRM failed to take into account the extent to which the proposed used could affect the value and enjoyment of Too Tacky, the owner of the land where the activity is proposed to occur;

d. OCRM granted the permit even though Too Tacky has not given the applicant permission to build a dock extending from its land;

e. OCRM improperly shifted the prima facia burden of demonstrating permission to carry out the acivity from the applicant to Too Tacky, in essence requiring Too Tacky to prove a negative;

f. OCRM improperly concluded that the applicant had a superior property right to Too Tacky, when there was no material in the applicant's file to support that conclusion;

g. OCRM never considered whether the easement claimed by the applicant, if it indeed exists, was appurtenant or in gross, said analysis being essential to a determination of whether the applicant has the required permission to carry out the proposed activity;

h. OCRM failed to take into account that at least one of the parcels which would benefit from the dock already has a dock; and

i. In such other particulars as may be shown in trial.

WHEREFORE, Too Tacky prays that this Honorable Court reverse the Department's decision to grant a critical area a permit to a third party for the purpose of constructing a dock extending from its property, and for such other relief as the Court may deem just and proper.

SEIBELS LAW FIRM, P.A.

By: _____

John P. Seibels, Jr.
jseibels@seibelsfirm.com
Jason Scott Luck
jluck@seibelsfirm.com
165-A King Street
Charleston, SC 29401
843.722.6777 (phone)
843.722.6781 (fax)

ATTORNEYS FOR PETITIONER

Charleston, South Carolina

4/18, 2007

0034

CERTIFICATE OF SERVICE

I, Kathy Bench, of Seibels Law Firm, P.A., do hereby certify that on this day, April 12, 2007, a filed copy of the Summons to Petition for Judicial Review and the Petition for Judicial Review Pursuant to S.C. Code § 48-39-180 was served by hand to counsel of record as follows:

Van Whitehead, Esquire
Chief Counsel, OCRM
1362 McMillan Ave, Suite 400
Charleston, SC 29405

Richard L. Tapp, Jr., Esquire
NEXSEN PRUET, LLC
205 King St., Suite 400
Charleston, SC 29401

Kathy Bench

Kathy Bench

0035

6058-19
PHJ

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS
TOO TACKY PARTNERSHIP, Petitioner, vs. SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, and MAYO READ, JR., Respondents.	Case No. 2007-CP-10-1520 **RESPONDENT MAYO READ'S ANSWER TO PETITIONER'S PETITION FOR JUDICIAL REVIEW** (non-jury)

Respondent, Mayo Read, Sr. (hereinafter "Respondent Read") answering or responding to the Petition for Judicial Review herein would respectfully show unto the Court as follows:

Respondent Read denies each and every allegation not hereinafter specifically admitted and demands strict proof thereof.

1. Upon information and belief, Respondent Read admits the allegations contained in Paragraph 1.

2. Respondent Read admits the allegations contained in Paragraph 2.

3. Respondent Read admits the allegations contained in Paragraph 3.

4. The allegations contained in Paragraph 4 are legal conclusions to which Respondent Read is required to neither admit nor deny. To the extent a response is required, Respondent Read denies the same.

5. Respondent Read admits only so much of the allegations contained in Paragraph 5 as allege that Petitioner owns Lot 4 and has owned Lot 4 for some time. Respondent Read denies that Petitioner has owned Lot 4 "at all relevant times" because the ownership of Petitioner's predecessor-in-title may also be relevant. Any remaining allegations are denied.

0036

6. Respondent Read admits the allegations contained in Paragraph 6.

7. Respondent Read admits the allegations contained in Paragraph 7.

8. Respondent Read admits the allegations contained in Paragraph 8.

9. Respondent Read admits that Mayo Read, Sr. purchased Lot Number 3 and the action was properly continued by Respondent Read in conformity with Rule 25(c) *SCRCP* and Rule 68 *SCALDJ*. Any remaining allegations are denied.

10. Respondent Read lacks sufficient information with which to form a belief as to the allegations concerning the time-frame in which Petitioner constructed a dock on Lot Number 4 and whether or not such dock was permitted. Therefore, such allegations are denied. Respondent Read admits that Petitioner has, at some point in time, constructed a dock on Lot Number 4. Any remaining allegations are denied.

11. Respondent Read admits the allegations contained in Paragraph 11.

12. Respondent Read admits only so much the allegations of Paragraph 12 as allege as Mayo Read, Jr. properly filed an application with DHEC for the construction of a dock and that such Dock Application speaks for itself. Any remaining allegations are denied.

13. Respondent Read admits the allegations contained in Paragraph 13.

14. The allegations contained in Paragraph 14 are legal conclusions to which Respondent Read is required to neither admit nor deny. To the extent a response is required, Respondent Read admits only so much of Paragraph 14 as alleges that Petitioner appealed the dock permit.

15. Respondent Read admits the allegations contained in Paragraph 15.

16. Respondent Read admits the allegations contained in Paragraph 16.

0037

17. Upon information and belief, Respondent Read admits the allegations contained in Paragraph 17.

18. Upon information and belief, Respondent Read admits the allegations contained in Paragraph 18.

19. Respondent Read admits only so much of the allegations contained in Paragraph 19 as alleges that the Coastal Zone Management Appellant Panel affirmed the decision of Judge McLeod. Any remaining allegations are denied.

20. The allegations contained in Paragraph 20 are in the nature of legal conclusions to which Respondent Read is neither required to admit nor deny. To the extent a response is required, the allegations are denied.

21. Respondent Read denies the allegations contained in Paragraph 21 and its subparagraphs.

22. Respondent Read denies the allegations contained in Paragraph 22 and its subparagraphs.

FOR A DEFENSE TO THE PETITION
(Lack of Jurisdiction)

23. The above responses and defenses are incorporated as fully as if stated verbatim herein.

24. Respondent Read reserves the right to contest that the asserted statutory basis for review in this petition is improper and results in a lack of subject matter jurisdiction.

FOR A DEFENSE TO THE PETITION
(Defenses Asserted by Other Respondents)

25. The above responses and defenses are incorporated as fully as if stated verbatim herein.

0038

26. Respondent Read hereby incorporates the defenses of any other respondent, as they may be applicable to Respondent Read.

FOR A DEFENSE TO THE PETITION
(Reserve Right to Add Defenses)

27. The above responses and defenses are incorporated as fully as if stated verbatim herein.

28. Respondent Read reserves the right to allege additional defenses and additional facts and circumstances in support of the defenses as the facts may become available.

WHEREFORE, having answered the Petition for Judicial Review herein, Respondent Read prays that:

1. The Petition for Judicial Review be dismissed with prejudice and Respondent Read be awarded fees and costs associated with this matter; and,

2. Such other and further relief as this Honorable Court may deem proper.

Respectfully submitted.

Richard L. Tapp, Jr.
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
843.577.9440

Attorneys for Respondent Read

April 24, 2007
Charleston, South Carolina

0039

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

TOO TACKY PARTNERSHIP,

Plaintiffs,

vs.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, and MAYO READ, JR..

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO: 2007-CP-10-1520

CERTIFICATE OF SERVICE

This is to certify that Respondent Mayo Read's Answer to Petitioner's Petition for Judicial Review has been served upon Plaintiff's counsel of record by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 27th day of April, 2007.

John P. Seibels, Jr.
Seibels Law Firm, P.A.
165-A King Street
Charleston, SC 29401

Ruthie Parish

Ruthie Parish
NEXSEN PRUET, LLC
205 King Street, Suite 400
P.O. Box 486
Charleston, South Carolina 29401
Telephone: (843) 577-9440

605B-19
PHO

STATE OF SOUTH CAROLINA)) COUNTY OF CHARLESTON)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT Docket No. 2007-CP-10-1520
Too Tacky Partnership,)) Petitioner,)) vs.)) South Carolina Department of Health and) Environmental Control and Mayo Read, Jr.,)) Respondents.)	ANSWER OF THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Respondent South Carolina Department of Health and Environmental Control (SCDHEC), would allege as follows:

FOR A FIRST DEFENSE

1. The Department denies each and every allegation of the Complaint not hereinafter specifically admitted.

2. Upon information and belief, the Department admits paragraph 1 of the Complaint.

3. The Department admits paragraph 2 of the Complaint.

4. Upon information and belief, the Department admits paragraph 3 of the Complaint.

5. The Department denies paragraph 4 of the Complaint in that the Coastal Zone Management Appellate Panel has not issued a written order.

6. Upon information and belief, the Department admits paragraphs 5 - 17 of the Complaint.

0041

7. The Department admits that portion of paragraph 18 of the Complaint following "Petitioner appealed."

8. The Department denies paragraph 19 of the Complaint in that the Coastal Zone Management Appellate Panel has not issued a written order.

8. The Department denies paragraph 20 of the Complaint on the basis that it suggest the permit is in "contravention" of statutory and regulatory provisions.

9. The Department denies paragraphs 21 and 22, including all subparts, of the Complaint

FOR A SECOND DEFENSE

10. Pursuant to Rule 12(b)(1), SCRCP, the Department asserts that this court lacks subject matter jurisdiction to hear this matter in the posture presented by Plaintiff. The request for judicial review is premature in that a final written order of the Coastal Zone Management Appellate Panel, which reviewed this matter below, has not yet been issued. Accordingly, an appeal pursuant to the S.C. Administrative Procedures Act, or other legal theories is premature. Furthermore, by operation of Section 53 of 2006 Act No. 387, the Act was to establish "a uniform procedure for contested cases and appeals from administrative agencies and to the extent that a provision of this act conflicts with an existing statute or regulation, the provisions of this act are controlling." Therefore, Plaintiff's attempt at a mid-stream shift in appeal routes – from that of the traditional appeal pursuant to the APA - would be contrary to the direction of the General Assembly. Finally, a *de novo* review is not available to Plaintiff. See *Rose v. Beasley*, 327 S.C. 197 (1997), *Guerard v. Whitner*, 276 S.C. 521 (1981), and *McQueen v. S.C. Coastal Council*, 329 S.C. 588, 593 (Ct. App. 1999) (rejecting proposition of *de novo* review under S.C. Code Ann. § 48-39-180).

FOR A THIRD DEFENSE

11. Pursuant to Rule 12(b)(6), SCRCP, the Department asserts that Plaintiff has failed to state facts sufficient to constitute a cause of action against the S.C. Department of Health and

Environmental Control and that it should be dismissed as a defendant. The basis is the same as that set forth in paragraph ten above.

WHEREFORE, having fully answered the Complaint, Defendant DHEC would respectfully request that this Court dismiss the S.C. Department of Health and Environmental Control from this suit and grant such other relief as this Court may deem fair and just.

Van Whitehead
Staff Attorney
SC Dept. of Health and Environmental Control
1362 McMillan Avenue, Suite 400
North Charleston, SC 29405
(843) 953-0229
FAX (843) 953-0201
whitehme@dhec.sc.gov
SC Bar #70446

April 26, 2007

0043

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
Docket No. 2007-CP-10-1520

Too Tacky Partnership,

Petitioner,

vs.

South Carolina Department of Health and Environmental Control and Mayo Read, Jr.,

Respondents.

CERTIFICATE OF MAILING

I hereby certify that on this day I served a copy of the foregoing **Answer** on the following parties by depositing same in the U.S. Mail, postage paid, and addressed as follows:

John P. Seibels, Jr.
Seibels Law Firm, P.A.
165-A King Street
Charleston, SC 29401

Richard L. Tapp, Jr.
Nexsen Pruet Adams Kleemeier, LLC
P. O. Box 486
Charleston, SC 29402

Janet M. Kruger

April 26, 2007

0044

60587

THE STATE OF SOUTH CAROLINA

In the Circuit Court

PETITION FOR REVIEW FROM THE COASTAL ZONE MANAGEMENT APPELLATE PANEL

Case No.: 2007-CP-10-1520

FILED
2007 OCT 30 PM 4:53
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Too Tacky Partnership,.....Petitioner,

v.

South Carolina Department of Health and Environmental Control and Mayo Read, Jr.,,.....Respondents.

BRIEF OF PETITIONER

John P. Seibels, Jr.
jseibels@seibelsfirm.com
Jason Scott Luck
jluck@seibelsfirm.com
SEIBELS LAW FIRM, P.A.
165-A King Street
Charleston, SC 29401
843.722.6777 (phone)
843.722.6781 (telefax)
Attorneys for Petitioner Too Tacky Partnership

TABLE OF CONTENTS

ISSUES ON APPEAL 2

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 3

STANDARD OF REVIEW 4

ARGUMENT 6

I. The CZMAP/ALJ, erred in affirming OCRM's grant of Respondent Read's permit based on an incomplete application containing a false affidavit. 6

II. The CZMAP/ALJ erred in affirming OCRM's grant of Respondent Read's permit based on an application that fails to demonstrate the required ownership or permission to carry out the proposed activity. 8

A. The evidence proffered by Respondent Read is insufficient to support a claim of ownership or easement 8

B. The ALJ impermissibly shifted the *prima facie* burden of demonstrating permission from the applicant to the Petitioner. 9

C. Even if the plat of the properties was in the file and relied upon by OCRM, the face of the plat shows such reliance is misplaced 10

D. Even if the plat and subject deeds had been a part of OCRM's application file, the ALJ's analysis was controlled errors of law 11

III. The CZMAP/ALJ erred in affirming OCRM's grant of Respondent Read's permit for multiple docks per parcel in the absence of "abnormal" circumstances 13

IV. The CZMAP/ALJ erred in affirming OCRM's grant of Respondent Read's permit based on an application that fails to consider the proposed dock's effect on the value and enjoyment of the Petitioner's land, where the dock will be constructed. 14

CONCLUSION 15

0046

ISSUES ON APPEAL

I. Did the DHEC Office of Ocean and Coastal Resource Management ("OCRM") err when it acted upon an incomplete application and false affidavit?

II. Did OCRM err when it granted the permit based on an application that fails to demonstrate the required ownership or permission to carry out the proposed activity?

III. Did OCRM err when it permitted a second dock to be built on Petitioner's property in the absence of the required "abnormal" circumstances?

IV. Did OCRM err when it failed to take into account the extent to which the proposed use could affect the value and enjoyment of Petitioner, the owner of the land where the activity is proposed to occur?

The Petitioner does not waive consideration of any other issues contemplated by its Petition for Judicial Review.

STATEMENT OF THE CASE

Petitioner Too Tacky Partnership (Too Tacky) appeals pursuant to S.C. Code § 48-39-180 a decision of the Coastal Zone Management Appellate Panel ("CZMAP"). On September 15, 2004, Respondent Mayo Read, Jr. filed an application with the DHEC Office of Ocean and Coastal Resource Management ("OCRM") for a permit to construct a "private recreational community use" dock. On March 30, 2005, DHEC approved Respondent's application and issued a critical area permit. Petitioner appealed DHEC's decision to the Administrative Law Court pursuant to S.C. Code §§ 48-39-150 (Supp. 2004), 1-23-600(B) (Supp. 2004), and 1-23-310 et seq. (Supp. 2005). On April 12, 2006 the Honorable Judge John D. McLeod of the Administrative Law Court held a contested case hearing, docket number 05-ALJ-07-0165-CC, and on August 17, 2006 Judge McLeod affirmed OCRM's decision. Petitioner appealed the decision to the Coastal Zone Management Appellate Panel on September 18, 2006 pursuant to S.C. Code §§ 48-39-150(D) (Supp. 2005) and 1-23-610(A) (Supp. 2005). On March 23, 2007, the CZMAP conducted a hearing and voted to affirm the decision of Judge McLeod. On April 27, 2007, the CZMAP issued an order affirming Judge McLeod and adopting his findings of fact and conclusions of law as its own. Petitioner filed its Petition for Review by this Honorable Court pursuant to S.C. Code §48-39-180 and any other applicable law.

STATEMENT OF FACTS

OCRM granted Respondent Mayo Read, Jr. a critical area permit for the construction of a private, joint use dock on Leadenwah Creek in Charleston County. The dock would extend from Petitioner Too Tacky's property, for the benefit of the owners of three neighboring parcels. Too Tacky's parcel already has a dock and one of the three neighboring parcels likewise has a dock.

Respondent Mayo Read, Jr. has since sold the parcel for which he intended to build the dock contemplated by the permit.

STANDARD OF REVIEW

There are two possible standards of review. The South Carolina Code provides the standard shall be *de novo*:

> Any applicant whose permit application has been finally denied, revoked, suspended or approved subject to conditions of the department by the Coastal Zone Management Appellate Panel, or any person adversely affected by the permit, may, within twenty days after receiving notice thereof, file a petition in the circuit court having jurisdiction over the affected land **for a review of the department's action "de novo"** or to determine whether the department's action so restricts or otherwise affects the use of the property as to deprive the owner of its existing practical use and is an unreasonable exercise of the State's police power because the action constitutes the equivalent of taking without compensation.

S.C. Code Ann. § 48-39-180 (Supp. 2005) (emphasis added) see also Grant v. South Carolina Coastal Council, 319 S.C. 348, n.2, 461 S.E.2d 388, n.2 (1995).

However, the South Carolina Supreme Court, when examining a previous version of § 48-39-180, held the appropriate standard of review is "substantial evidence" Guerard v. Whitner, 276 S.C. 521, 280 S.E.2d 539 (1981). The Guerard court held the appropriate standard of review is found in S.C. Code Ann. § 1-23-310 *et seq.*:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

0049

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id. at 523, 280 S.E.2d at __. (citing S.C. Code § 1-23-380(g) (1976)) but see Grant, *supra* at n.2 (S.C. Code § 48-39-180 permits *de novo* review). See also S.C. Code Ann. § 1-23-380(A) (1986 and Supp. 2005) which states in part, "This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief or trial *de novo* provided by law."

A court "may not substitute its judgment for that of any agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Tiller v. National Health Care Ctr. of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999) (citation omitted); see also Clade v. Champion Labs., 330 S.C. 8, 496 S.E.2d 856 (1998); Medlin v. Upstate Plaster Serv., 329 S.C. 92, 495 S.E.2d 447 (1998). "Substantial evidence is 'not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action.'" Miller v. State Roofing Co., 312 S.C. 452, 454, 441 S.E.2d 323, 324-25 (1994) (citation omitted); see also Stokes v. First Nat'l Bank, 306 S.C. 46, 410 S.E.2d 248 (1991); Tiller, 334 S.C. at 338, 513 S.E.2d at 845. A court may reverse or modify the Commission's decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are affected by other error of law. Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996); S.C. Code Ann. § 1-23-380(A)(6)(d) (Supp. 2001).

Exercising an abundance of caution, the Petitioner will brief this appeal as if the stricter "substantial evidence" standard is appropriate.

0050

ARGUMENT

I. The CZMAP/ALJ,[1] erred in affirming OCRM's grant of Respondent Read's permit based on an incomplete application containing a false affidavit.

Respondent Read sought a critical area permit to build a dock extending from Too Tacky's property. The dock would be for the joint use of owners of three other parcels, and not for the use of Petitioner Too Tacky. The South Carolina Code requires, "Each application for a permit shall be filed with the department and shall include ... a copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property, to carry out the proposal." S.C. Code Ann. §48-39-140(B)(4) (Supp. 2005). OCRM's permit application regulation contains an almost identical provision, providing that a critical area permit application is not complete unless it contains "A certified copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property to carry out the proposal . . .". See 23A S.C. Code Ann. Regs. 30-2(B)(4) (Supp. 2004). To meet these requirements, OCRM uses a form checklist to assure the applicant submits a fully completed application. (R. 261).

The Application

OCRM collected the required fee and received an Affidavit of Ownership from Respondent Read. However, OCRM did not require Read to submit certified copies of any instruments indicating ownership, possession, or permission to carry out the proposed dock construction on Too Tacky's property. There are no such documents in OCRM's dock application file. (R. p. 142, l.2-p.143, l.7). OCRM ultimately granted a permit relying upon the Owner's Affidavit. (R. p. 138, ll. 22-24; R. p. 145, ll. 10-21; R. p. 167, l. 4 - p.168, l. 25).

[1] The CZMAP adopted the Final Order and Decision of Judge McLeod in its final order.

At the hearing OCRM contended that (1) an Owner's Affidavit constitutes a sufficient "other instrument" to satisfy the statutory and regulatory application requirements, (2) its file is complete with just the Owner's Affidavit, and (3) it can issue a permit based only upon a statement under oath by the applicant. (R. 139, ll. 16-19; R. 145, ll. 12-21). The ALJ agreed, curiously contradicting its own finding of fact number six in which it was determined that the application was incomplete even with the owner's affidavit. (R. 332-333; 337-338). OCRM's position, however, is belied by its own form (called a Summary of Review Sheet) which requires both an Owner's Affidavit and a "Certified Deed, plat or lease." (R. 261). Even though someone checked the box on the form to indicate that a certified deed, plat or lease had in fact been collected from the applicant on September 28, 2004, OCRM conceded at trial that the form is erroneous. No such documents were ever submitted as part of the application. (R. 142, l. 4-R. 143, l. 7). By issuing the permit without obtaining the statutorily required materials, OCRM acted in excess of its statutory authority and upon unlawful procedure, and the ALJ decision must be reversed due to this error of law.

The Affidavit

Even if an Owner's Affidavit legally could take the place of the required certified deed, plat or lease, OCRM arbitrarily relied upon the Affidavit of Read which was shown to be false during the public comment period. Respondent Read claimed in his Owner's Affidavit to be the owner of "all of that said property that is contiguous to and landward of the area in which the work proposed in the permit application is to be conducted." (R. 291). When Too Tacky informed OCRM that it, not Read, owned the property, Read began claiming an easement instead. (R. 275). Yet, OCRM did not require him to submit a new "correct" Affidavit.[2]

[2]Too Tacky contends that Read has no easement over its property. A final determination of Read's property rights, if any, must be reached in another forum.

Quite simply, OCRM abused its discretion, even if one assumes a mere Owner's Affidavit is all that is legally required from an applicant. If Read does in fact have an easement and permission from Too Tacky, he should be required to state so in his affidavit.[3] He wasn't. The agency must not issue permits based upon false affidavits. A permit granted upon an incomplete application must be characterized as arbitrary and capricious, and abusive of the discretion vested in OCRM by the State of South Carolina. The ALJ decision must be reversed because OCRM's decision exceeded its statutory authority. The new owner should submit a new application meeting all requirements.

II. The CZMAP/ALJ erred in affirming OCRM's grant of Respondent Read's permit based on an application that fails to demonstrate the required ownership or permission to carry out the proposed activity.

OCRM concluded that Read demonstrated he had an easement over Too Tacky's property and thus could build a dock extending from it. (R. 167, l. 1-168, l. 25). However, OCRM's file contains only one document where Read claimed an easement: A letter from his attorney (R. 275). Clearly, South Carolina's regulatory scheme does not permit arguments of counsel to take the place of affidavits, plats, deeds, leases or other certified instruments. Yet, OCRM did. (R. 139, ll. 16-21; R. 147, l. 1-152, l. 24).

A. The evidence proffered by Respondent Read is insufficient to support a claim of ownership or easement.

The argument of Read's counsel was presented in response to a letter written by Too Tacky's counsel. (R. 270-273). Too Tacky, in that letter, asserted that (1) Read does not own the property; (2) Read may try to claim an easement; and (3) even if Read had an easement, he still lacks permission from Too Tacky to construct a dock extending from Too Tacky's property.

[3] It must be noted that Respondent Mayo Read, Jr. no longer owns any of the parcels proposed to be served by the dock. On remand, the new owner should be required to submit a new application that meets the requirements of § 48-39-140(B)(4) and 23A S.C. Code Ann. Regs. 30-2(B)(4).

0053

Against these competing arguments, OCRM examined the County's geographic information system (GIS) map, and placed a copy of it in the application file. According to the County GIS map, there is no right-of-way across Too Tacky's property to the Leadenwah Creek. (R. 267).

It is important to recognize the sum total of "easement" materials in OCRM's application file: (1) an argument for an easement by Read's counsel; (2) a statement by Too Tacky's counsel denying the existence of an easement, and more importantly denying the requisite permission; and (3) a County record showing no right-of-way. Based upon this evidence, OCRM exceeded its statutory authority in finding Respondent Read met his statutory burden to show ownership and permission, and the ALJ's decision must be reversed.

B. The ALJ impermissibly shifted the *prima facie* burden of demonstrating permission from the applicant to the Petitioner, and committed errors of fact and law in its assessment of the applicant's materials.

Likewise, the ALJ committed an error of law by deviating from the application file when it decided Read had met his duty to show ownership and permission. Instead of looking at OCRM's application file, the Court made a detailed examination of a plat (R. 319) and four deeds (R. 321-329; R. 279-288) which were not in OCRM's file when it granted the permit.[4] In a review of OCRM's action, the ALJ should never have examined materials that were not submitted to OCRM. When analyzing the question of whether Read met his duty to prove ownership and permission, the Court should confine its inquiry to OCRM's application file. Since the ALJ relied upon material not in the application file to reach its conclusion that Read demonstrated ownership and permission, the ALJ abused its discretion and must be reversed. The only evidence in the file, outside the arguments of counsel, are GIS maps that do not show the easement claimed by Read. (R. 264-267).

[4]Although OCRM staff testified that they reviewed the plat at some point during the process, OCRM's decision to grant the permit was based upon the Owner's Affidavit. (R. 137, l. 20-141, l. 2).

0054

Specifically, the ALJ found as a matter of law in paragraph 11 of the Order that DHEC relied upon the plat in making its decision. That conclusion is not supported in the record. OCRM's decision, according to Fred Mallett, was based upon the affidavit of ownership, only. (R. 1-7, l. 20-141, l. 2).

The ALJ commits an identical error in paragraph 15 of his findings of law, wherein the court judges DHEC's interpretation of the plat and four deeds as not only consistent with South Carolina law but also sufficient to constitute the applicant's *prima facie* showing of ownership or control. That conclusion is completely without foundation; the agency did not rely upon the plat, and the four deeds were never submitted by the applicant when the permit was issued. (R. 341). It is a manifest error of law for the court to consider materials outside of the application when determining whether the applicant met his burden. These errors of fact and law cannot be allowed to stand. Because these findings constitute the basis for the ALJ's decision, and because they are without support in the record, the ALJ must be reversed.

C. Even if the plat of the properties was in the file and relied upon by OCRM, the face of the plat shows such reliance is misplaced.

The plat of the properties (R. 319) was recorded in 1986 and shows a "50' drainage easement & creek access for lots 1, 2 and 3" along, but within, the northern boundary of Too Tacky's property and terminating at the river. The plat bears a prominent stamp stating:

> WARNING! APPROVAL OF THIS PLAT BY THE PLANNING BOARD AND/OR COUNTY COUNCIL DOES NOT INDICATE APPROVAL NOR ADJUDICATE TITLE OF THE ACCESS OR RIGHT-OF-WAY SHOWN HEREON.

(R. 319). Thus, had Read submitted the plat for inclusion in the application file, the WARNING! on the plat renders it unreliable for the purpose for which it would have been submitted: to prove title or a right to use the right-of-way shown thereon or otherwise serve as evidence of

ownership. The ALJ went to great lengths to find as a matter of law that a plat is an "instrument" of a sort, but the ALJ never reached the ultimate issue of whether a plat is an instrument of ownership or permission as those terms are used in the Code and Regulations. To the extent he impliedly made such a finding, that determination is an error of both fact and law. To the extent OCRM may have relied upon the plat, such reliance was misplaced under South Carolina property law and especially in light of the disclaimer warning the reviewer not to rely on it to determine whether a right-of-way exists and who could claim it. Moreover, none of the parties identified as owners on the plat were the actual owners of the land at the time of the application. (R. 156-158).

The plat at best could be deemed to describe a possible state of affairs as they may have existed in October 1986, 18 years before the dock application. Even so, the plat is contradicted by the County's 2004 GIS records in the application file. Other than examining the GIS records, OCRM took no steps to determine whether an easement that may have existed in 1986 still exists in 2004, or to determine its scope. OCRM actually disregarded Too Tacky's statements that it would not allow a second dock on its property. Yet OCRM ultimately granted Read a permit to build a dock extending from Too Tacky's property. (R. 168, ll. 16-23). In the absence of substantial evidence to support a conclusion that Read had ownership or permission, the ALJ's decision must be reversed.

D. Even if the plat and subject deeds had been a part of OCRM's application file, the ALJ's analysis was controlled errors of law.

In its Conclusions of Law, the ALJ relied on Davis v. Epting, 317 S.C. 315, 318, 454 S.E.2d 325, 327 (Ct. App. 1994). Davis is a case determining the right of an owner to a roadway easement, and has no relevance in a case where there is no roadway involved, such as the case at bar.

0056

Furthermore, the ALJ failed to recognize that the easement drawn on the plat was never created as a matter of law since all parcels were owned by the same party when the plat was filed (See Finding of Fact Number 2). An easement cannot exist where both the purported servient and dominant estates are owned by the exact same person. Haseldon vs. Schein 167 S.C. 534, 539, 166 S.E.2d 634, 635 (1932).

The ALJ further failed to determine if the purported easement claimed by Respondent Read is appurtenant or in gross. Assuming, *arguendo*, the creation of an easement by the subject plat, any such easement would necessarily have been one in gross and, therefore, not capable of conveyance to subsequent owners such as Respondent. An easement in gross is a mere personal privilege to use the land of another. An easement in gross cannot be transferred. An appurtenant easement inheres in the land, "concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. It also passes with the dominant estate upon conveyance. Unless an easement has all the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross." Tupper v. Dorchester County, 326 S.C. 318, 325-26, 487 S.E.2d 187, 191 (1997) (citations omitted). Here, the ALJ and anyone else can plainly see that the easement claimed by Read does not terminate on property owned by Read, or on property owned by the other landowners for whose benefit the dock would be constructed. In the absence of even just one element characterizing an appurtenant easement, then the easement must be deemed in gross. Therefore, any creek access easement that might have been created in 1986 did not survive subsequent transfers of lots 1, 2 and 3. As a matter of law, Read could not claim a creek access easement in 2005.

The decision of the ALJ must be reversed because it is clearly erroneous and affected by an error of law with regard to easements in South Carolina.

0057

III. The CZMAP/ALJ erred in affirming OCRM's grant of Respondent Read's permit for multiple docks per parcel in the absence of "abnormal" circumstances.

Critical area permitting regulations prohibit two structures per parcel except under abnormal circumstances. (See 23(A) S.C. Code Ann. Regs. 30-12.A(2)(a) (Supp. 2004)). This particular provision should be given the same weight as any other Specific Project Standard in the regulations. Here, Read seeks to construct a second dock extending from Too Tacky's property, Too Tacky having obtained a critical area permit and constructed a dock extending from its lock in the early 1990s (R. 236, ll. 11-15). Likewise, one of the three parcels for whose benefit the proposed joint use dock is proposed by Read already has a critical area permit and dock. (R. 223, ll. 5-6).

OCRM staff is well aware of the general prohibition against two structures per parcel. OCRM utilizes a Project Assignment Sheet for all new permit applications. (R. 268). The coordinator of incoming permits will review an application to see if it meets submittal requirements and to identify other items of concern which may stand out to her, and she will write those matters directly onto the sheet before assigning it to a project manager. (R. 169, l. 25-171, l. 25). On Read's Project Assignment Sheet, she wrote, "Make sure lots 1, 2 and 3 don't have docks." (R. 268; R. 170, ll. 5-21). It does not appear that anyone at OCRM followed the coordinator's instructions; the permit was issued even though one parcel (lot 1) already had a dock.

Read did not demonstrate, and OCRM did not cite, any abnormal circumstances which should overcome the regulatory and legislative distaste for more than one dock per parcel. Significantly, Too Tacky does not even want a second dock on its property. If this proposed joint use dock were constructed extending from Too Tacky's property, then not only would Too Tacky's parcel have two docks, but another parcel would effectively have two docks, also. This

result is contrary to legislative and agency guidance and policy, and is a deviation from Departmental Special Project Standards. Therefore, multiple docks per parcel must be justified by OCRM in its permit file. By OCRM's admission its file contains nothing on this critical issue. (R. 179, ll. 1-16).

The record reflects no circumstances or conditions which would support a deviation from legislative and agency policy that docks normally should be limited to one structure per parcel. OCRM asserted that the present "single family" ownership of the three nearby parcels for whose joint use the dock is proposed allowed OCRM to make an exception to Specific Project Standards. (R. 215, l. 11-217, l. 17). But, ownership can change, which is evidenced by the fact that Respondent Mayo Read, Jr. no longer has an ownership interest in any of the property for which he sought a permit. A temporal condition is no basis for a permanent dock permit. Since there was no justification to deviate from the Department's Specific Project Standards, the permit should not have been granted, and the ALJ's decision must be reversed on the basis that the permit was issued based upon unlawful procedure.

IV. The CZMAP/ALJ erred in affirming OCRM's grant of Respondent Read's permit based on an application that fails to consider the proposed dock's effect on the value and enjoyment of the Petitioner's land, where the dock will be constructed.

The Code and applicable regulations require OCRM to consider various factors during the application review process. (See S.C. Code §48-39-150(A)). During OCRM's review, it gave no consideration to the question of whether Too Tacky's lot may be diminished in value if a third party built a dock on it. (R. 177, ll. 17-22). OCRM did not take into consideration the proximity of the proposed dock to the existing home on Too Tacky's property. Instead, OCRM treated Too Tacky as if it were a neighboring property owner, when in fact it owns the property where the project is to be undertaken. (R. 177, l. 23-178, l. 19).

0059

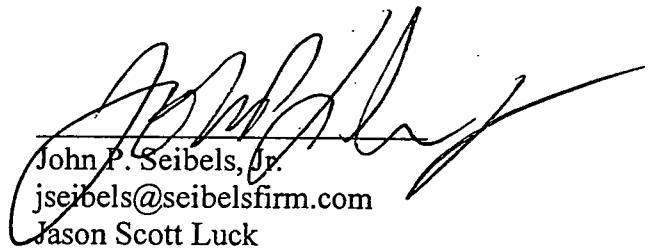
At paragraph 7 of the ALJ's Order, he found, "Contrary to the Petitioner's assertion, the permitted dock is to be constructed entirely below the mean high water mark and, accordingly, is not located on the Petitioner's property." (R. 333). His finding ignores the regulatory and statutory requirements that the applicant have permission from the landowner, that the impact on neighboring landowners must be considered, and that no dock may be constructed within a certain distance of a particular property line as extended seaward. Apparently, the ALJ does not believe that the landowner's views should be given any weight, since the dock is to "be located on the State's land." (R. 333). His bias against the landowner is directly contrary to the Legislature's findings that property owner's and neighbor's circumstances and objections must be considered. Finally, the ALJ's finding is clearly erroneous as a matter of fact in that there was no evidence in the record that the dock structure was to be wholly located beyond the mean high water line. To the contrary, the dock was to terminate upon and extend from Too Tacky's property landward of the mean high water line.

CONCLUSION

For all of the foregoing reasons, and any other reasons as may appear in the Petitioner's petition, the record, and the hearing, Petitioner Too Tacky respectfully requests this Court to reverse the permit grant. Since the Respondent Mayo Read, Jr. no longer owns any of the properties for whose benefit the permit was sought, all matters relating to permit #OCRM-04-297-M should be deemed concluded.

0060

[Signature page follows]



John P. Seibels, Jr.
jseibels@seibelsfirm.com
Jason Scott Luck
jluck@seibelsfirm.com
SEIBELS LAW FIRM, P.A.
165-A King Street
Charleston, SC 29401
843.722.6777 (phone)
843.722.6781 (telefax)
Attorneys for Petitioner Too Tacky Partnership

0061

THE STATE OF SOUTH CAROLINA

In the Circuit Court

PETITION FOR REVIEW FROM THE COASTAL ZONE MANAGEMENT APPELLATE PANEL

Case No.: 2007-CP-10-1520

Too Tacky Partnership,.....Petitioner,

v.

South Carolina Department of Health and Environmental Control and Mayo Read, Jr.,,.....Respondents.

FILED
2007 OCT 30 PM 4:54
JULIE J. ARMSTRONG
CLERK OF COURT
BY

PROOF OF SERVICE

I certify that I have served the Brief of Petitioner on counsel for the Respondents by serving a copy of the same by hand delivery to the following:

Van Whitehead, Esquire
Chief Counsel, OCRM
1362 McMillan Ave, Suite 400
Charleston, SC 29405

Richard L. Tapp, Jr., Esquire
NEXSEN PRUET, LLC
205 King St., Suite 400
Charleston, SC 29401

John P. Seibels, Jr.
jseibels@seibelsfirm.com
Jason Scott Luck
jluck@seibelsfirm.com
SEIBELS LAW FIRM, P.A.
165-A King Street
Charleston, SC 29401
843.722.6777 (phone)
843.722.6781 (telefax)
Attorneys for Petitioner Too Tacky Partnership

6058-19
P&D

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
Too Tacky Partnership,	)	CIVIL ACTION NUMBER: 2007-CP-10-1520
Petitioner,	)	
vs.	)	**Motion to Alter or Amend and Memorandum in Support**
South Carolina Department of Health and Environmental Control and **Mayo Read, Jr.,**	)	
Respondents.	)	

FILED
2008 JAN 14 PM 4:34
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Petitioner hereby moves, pursuant to Rules 52 & 59, SCRCP, the Court to alter or amend its judgment, reconsider matters presented, and make rulings on issues raised by the Petitioner but not specifically ruled upon in its Order dated December 18, 2007.

Introduction

On October 31, 2007, the Court heard the appeal of Petitioner Too Tacky Partnership ("Too Tacky") of the April 27, 2007 Order of the Coastal Zone Management Appellate Panel ("CZMAP"). The CZMAP order affirmed and adopted the findings of an August 17, 2006 Order of the Administrative Law Court in a contested case hearing regarding the issuance of a critical area permit to Respondent Read by the DHEC Office of Ocean and Coastal Resource Management ("OCRM"). Petitioner seeks full adjudication of all of the issues it presented before the Circuit Court.

Argument

"The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). The Court's December 18, 2007 Order,

0063

and the August 17, 2006 Order of the ALC it references,[1] neglects to address a number of issues absolutely vital to a decision on the merits. Petitioner requests the Court issue rulings on the following issues:

I. The Court does not Fully Address Petitioner's Argument That Respondent Failed to Meet His Burden of *prima facie* Showing of Easement

Both statutory and regulatory provisions require an applicant for a critical area permit to make at least a *prima facie* showing that it has legitimate possession of, or permission to use, the property to be affected by the permit. Specifically, S.C. Code Ann. Sec. 48-39-140(B)(4) (Supp. 2005) requires that, "Each application for a permit shall be filed with the department and shall include ... a copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property, to carry out the proposal." OCRM's permit application regulation contains an almost identical provision. (See 23A S.C. Code Ann. Regs. 30-2(B)(4) (Supp. 2004) providing that a critical area permit application is not complete unless it contains "A certified copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property to carry out the proposal . . .").

Read's permit application claims ownership of the land inland from where the proposed dock would begin. During the permit process, it became clear that Too Tacky actually owns the land claimed by Read. In response, and only through counsel, Read claimed an easement across Too Tacky's property. The Court's Order neglects to address several issues raised by the Petitioner regarding Respondent Read's false claim to own Too Tacky's property and his deficient *prima facie* case for an alleged easement across Too Tacky's property.

[1] Hereinafter, "The Court's Order" will refer to both the December 18, 2007 Order and the August 17, 2006 Order it references.

A. The Court's Order, and the ALC Order it References, Omit the Critical First Step of any Alleged Easement Analysis: Is the easement appurtenant or in gross?

The Court's Order failed to determine if the purported easement claimed by Respondent Read is appurtenant or in gross. Assuming, *arguendo*, the creation of an easement by the subject plat relied upon in the ALC decision, any such easement would necessarily have been one in gross and, therefore, not capable of conveyance to subsequent owners such as Respondent. An easement in gross is a mere personal privilege to use the land of another, and cannot be transferred. An appurtenant easement inheres in the land, "concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. It also passes with the dominant estate upon conveyance. Unless an easement has all the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross." Tupper v. Dorchester County, 326 S.C. 318, 325-26, 487 S.E.2d 187, 191 (1997) (citations omitted). Here, it is clear the easement claimed by Respondent Read does not terminate on property owned by Respondent Read, or on property owned by the other landowners for whose benefit the dock would be constructed. In the absence of even just one element characterizing an appurtenant easement, then the easement must be deemed in gross. Therefore, any creek access easement that might have been created in 1986 did not survive subsequent transfers of lots 1, 2 and 3. As a matter of law, Read could not claim a creek access easement in 2005.

B. The ALC, CZMAP and the Circuit Court Erred as a Matter of Law and Fact by Relying on the Plat Allegedly Submitted by Respondent Read

This Court must address Petitioner's argument that the plat is wholly unreliable on the very issue for which it has been considered. The plat of the properties (R. 319) was recorded in 1986 and shows a "50' drainage easement & creek access for lots 1, 2 and 3" along, but within,

the northern boundary of Petitioner Too Tacky's property and terminating at the river. The plat bears a prominent stamp stating:

> WARNING! APPROVAL OF THIS PLAT BY THE PLANNING BOARD AND/OR COUNTY COUNCIL DOES NOT INDICATE APPROVAL NOR ADJUDICATE TITLE OF THE ACCESS OR RIGHT-OF-WAY SHOWN HEREON.

(R. 319). Thus, even assuming Respondent Read submitted the plat for inclusion in the application file, the "WARNING!" on the plat renders it unreliable for the purpose for which he would have submitted it: to prove title or a right to use the right-of-way shown thereon or otherwise serve as the evidence of ownership required by the Code and Regulations.

The ALC went to great lengths to find as a matter of law that a plat is an "instrument" of a sort, but the ultimate issue in this matter is whether a plat is an instrument of ownership or permission as those terms are used in the Code and Regulations. To the extent either the ALC or the Circuit Court impliedly made such a finding, that determination is an error of both fact and law. If OCRM relied upon the plat, such reliance was misplaced under South Carolina property law and especially in light of the disclaimer warning the reviewer not to rely on it to determine whether a right-of-way exists and who could claim it.

Even without the prominent disclaimer, any plat as a matter of law is merely a map drawn to scale which alone neither grants nor limits property rights. South Carolina law is clear on the limited utility of plats, particularly as they relate to the issue presented in this case: A plat is not an index to encumbrances. Lancaster v. Smith Co., Inc., 246 S.C. 464, 144 S.E.2d 209 (1965). Moreover, the record reveals that none of the parties identified as property owners on the plat were the actual owners of the land at the time of the application. (R. 156-158). Finally, the alleged easement is not even identified in the Charleston County's 2004 GIS records which are in the application file. (R. 264-267).

0066

As a matter of both fact and law the plat is an unreliable "instrument" for the purpose of deciding the alleged easement's existence or its scope. The plat is *prima facie* evidence of nothing.

Even if Read could legitimately claim an easement, there is nothing in the record suggesting its legal scope would include the right to construct a dock extending from Too Tacky's property into the river. OCRM actually disregarded Too Tacky's statements that it would not allow a second dock on its property. Yet OCRM ultimately granted Read a permit to build a dock extending from Too Tacky's property. (R. 168, ll. 16-23). In light of these errors of law and in the absence of substantial evidence to support a conclusion that Read had ownership or permission, the ALC and the CZMAP decision cannot be sustained, and this Court must alter or amend its recent Order so that OCRM's permit grant is reversed.

C. The Court did not Address Petitioner's Additional Allegations of Errors of Law

In its Conclusions of Law, the ALC relied on Davis v. Epting, 317 S.C. 315, 318, 454 S.E.2d 325, 327 (Ct. App. 1994). Davis is a case determining the right of an owner to a roadway easement, and has no relevance in a case where there is no roadway involved. The Circuit Court did not examine the propriety of relying on this case.

Furthermore, the ALC failed to recognize that the easement drawn on the plat was never created as a matter of law since all parcels were owned by the same party when the plat was filed (See Finding of Fact Number 2 in the ALC's Order). An easement cannot exist where both the purported servient and dominant estates are owned by the exact same person. Haseldon vs. Schein 167 S.C. 534, 539, 166 S.E.2d 634, 635 (1932). The Circuit Court did not address this critical argument or legal truth.

0067

II. The Court does not Address the Effect of the False Owner's Affidavit

OCRM arbitrarily relied upon the Affidavit of Read which was shown to be false during the public comment period. Respondent Read claimed in his Owner's Affidavit to be the owner of "all of that said property that is contiguous to and landward of the area in which the work proposed in the permit application is to be conducted." (R. 291). When Too Tacky informed OCRM that it, not Read, owned the property, Read through counsel, began claiming an easement instead. (R. 275). However, OCRM did not require him to submit a new, correct, Affidavit.[2]

OCRM abused its discretion, even if one assumes a mere Owner's Affidavit is all that is legally required from an applicant. If Respondent Read does in fact have both an easement and permission to build from it from Petitioner Too Tacky, he should be required to state so in his affidavit.[3] He was not, and thus OCRM issued a permit based on a false affidavit. A permit granted upon an incomplete application must be characterized as arbitrary and capricious, and abusive of the discretion vested in OCRM by the State of South Carolina. This issue has not been addressed by the Circuit Court.

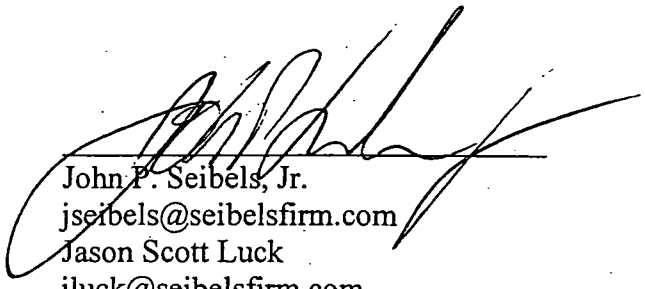
Conclusion

For the reasons stated herein, the Petitioner respectfully requests the Court to alter or amend its December 18, 2007 Order, and also respectfully requests the Court to rule on various issues raised by the parties but not ruled upon in that order.

SIGNATURE PAGE TO FOLLOW

[2] Too Tacky contends that Read has no easement over its property.

[3] It must be noted that Respondent Mayo Read, Jr. no longer owns any of the parcels proposed to be served by the dock. On remand, the new owner should be required to submit a new application that meets the requirements of § 48-39-140(B)(4) and 23A S.C. Code Ann. Regs. 30-2(B)(4).



John P. Seibels, Jr.
jseibels@seibelsfirm.com
Jason Scott Luck
jluck@seibelsfirm.com
SEIBELS LAW FIRM, P.A.
165-A King Street
Charleston, SC 29401
843.722.6777 (phone)
843.722.6781 (telefax)
Attorneys for Petitioner Too Tacky Partnership

Charleston, South Carolina
January 14, 2008

0069

CERTIFICATE OF SERVICE

I, Kathy Bench, of Seibels Law Firm, P.A., do hereby certify that I have this 14th day, January, 2008 mailed, postage prepaid, a true and accurate copy of Motion to Alter or Amend and Memorandum In Support in the foregoing action to counsel of record as follows:

Van Whitehead, Esquire
Chief Counsel, OCRM
SOUTH CAROLINA DHEC
1362 McMillan Ave, Suite 400
Charleston, SC 29405

Richard L. Tapp, Jr., Esquire
NEXSEN PRUET, LLC
205 King St., Suite 400
Charleston, SC 29401

FILED
2008 JAN 14 PM 4:34
JULIE ARMSTRONG
CLERK OF COURT
BY _____

Kathy Bench

Kathy Bench

0070

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT
Docket No. 05-ALJ-07-0165-CC

Too Tacky Partnership,	)
Petitioner,	)
v.	)
SC DHEC and Mayo Read,	)
Respondents.	)

COPY

ADMINISTRATIVE HEARING

****

Wednesday, April 12, 2006
10:00 a.m. - 1:30 p.m.

The hearing before the Honorable John McLeod, was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 12th day of April, 2006 before Christine A. Cortright, Court Reporter and Notary Public in and for the State of South Carolina.

APPEARANCES:

John P. Seibels, Jr., Esquire
THE SEIBELS LAW FIRM
165-A King Street
Charleston, South Carolina 29401
Attorney for the Petitioner

Richard L. Tapp, Jr., Esquire
NEXSEN PRUET ADAMS KLEEMEIER
205 King Street, Suite 400
P.O. Box 486
Charleston, South Carolina 29402
Attorney for the Respondent: Mayo Read

Leslie Riley, Esquire
SCDHEC-OCRM
1362 McMillan Avenue, Suite 400
Charleston, South Carolina 29402
Attorney for the Respondent: SCDHEC/OCRM

INDEX

	PAGE
OPENING STATEMENTS:	
MR. SEIBELS	7
MS. RILEY	15
MR. TAPP	19
FREDERICK MALLETT:	
MR. SEIBELS . . DIRECT EXAMINATION	20
MS. RILEY . . . CROSS EXAMINATION	75
MR. TAPP . . . CROSS EXAMINATION	82
MR. SEIBELS . . REDIRECT EXAMINATION	84
CURTIS JOYNER:	
MR. SEIBELS . . DIRECT EXAMINATION	89
MS. RILEY . . . CROSS EXAMINATION	105
MR. SEIBELS . . REDIRECT EXAMINATION	110
MR. TAPP . . . CROSS EXAMINATION	113
MR. SEIBELS . . REDIRECT EXAMINATION	114
MAYO READ:	
MR. SEIBELS . . DIRECT EXAMINATION	116
MR. TAPP . . . CROSS EXAMINATION	127

LAWTON GRIMBALL:

MR. SEIBELS . . DIRECT EXAMINATION 128
MS. RILEY . . . CROSS EXAMINATION 141
MR. TAPP . . . CROSS EXAMINATION 143
MR. SEIBELS . . REDIRECT EXAMINATION . . . 149
Certificate 156

EXHIBITS

Petitioner's Exhibit Number One 7
(Summary of Review)
Petitioner's Exhibit Number Two 7
(Sketch and Excerpts from County of Charleston Property Information System Website)
Petitioner's Exhibit Number Three 7
(Project Assignment Sheet)
Petitioner's Exhibit Number Four 7
(OCRM Aerial Photo)
Petitioner's Exhibit Number Five 7
(Ltr. to Mallett from Conley 1/11/05)
Petitioner's Exhibit Number Six 7
(Ltr. to Mallett from Robinson w/ attachments 2/2/2005)
Petitioner's Exhibit Number Seven 7
(Title to Real Estate)
Petitioner's Exhibit Number Seven-A 7
(Title to Real Estate)
Petitioner's Exhibit Number Eight 7
(Title to Real Estate)

DHEC Exhibit Number One 6
(Permit Application)
DHEC Exhibit Number Two 6
(Permit Application Public Notice)
DHEC Exhibit Number Three 6
(Extended Comment Certificate of Mailing)
DHEC Exhibit Number Four 6
(Memo to Shuler from Mallett RE: Comment Period)
DHEC Exhibit Number Five 6
(Affidavit of Publication - The Post and Courier)
DHEC Exhibit Number Six 6
(Mayo Read Permit with Conditions)
DHEC Exhibit Number Seven 6
(Critical Area Permit Lots 1, 2 and 3)
DHEC Exhibit Numbers Eight through Thirteen . 6
(Photos)

DHEC Exhibit Number Fourteen 79
(Ltr. from DNR to Mr. Joyner 12/6/04)

Read Exhibit Number One 7
(Plat)
Read Exhibit Number Two 7
(Title to Real Estate)
Read Exhibit Number Three 7
(Title to Real Estate)

STIPULATIONS

It is stipulated and agreed that this hearing is being taken pursuant to the rules of the Administrative Law Court and the South Carolina Rules of Civil Procedure.

THE COURT: Our court reporter this morning is Ms. Christine Cortright, good to see you. My law clerk, Chris Smith. Present for the Petitioner, Mr. Seibels.

MR. SEIBELS: Yes, sir.

THE COURT: Mr. John P. Seibels, Jr. and West is not present?

MR. SEIBELS: Correct, sir.

THE COURT: Ms. Riley for DHEC and Mr. Tapp, Rick Tapp for the Respondents. This is docket number 05-ALJ-07-0165, a contested case, Too Tacky Partnership versus South Carolina DHEC and Mayo Read. Are there any preliminary matters, motions, other introductions into evidence or anything like that we need to take up?

MS. RILEY: Your Honor, we have looked at each other exhibits and we have no objection and what we would like to do, if it pleases the Court, to move all the exhibits in at the beginning to save a lot of time.

THE COURT: That's fine. Proceed, please, ma'am.

MS. RILEY: Okay. Your Honor, Respondent DHEC has One through Thirteen. I'd like to offer those. Fourteen? I only have 13 here.

MR. SEIBELS: My fault. I'm sorry.

THE COURT: They've already been marked?

MS. RILEY: Yes, sir, they have.

MR. TAPP: May it please the Court, Your Honor, on behalf of Respondent Read we have three exhibits that we would like to introduce into evidence.

THE COURT: One through Three for Respondent Mayo Read.

MR. SEIBELS: Your Honor, Jay Seibels for Too Tacky. We have Exhibits One through Seven and then I have Seven A, which is related to Seven, and Exhibit Eight we'd move into evidence at this time.

THE COURT: All right. By ...

MR. TAPP: Excuse me, Your Honor. I'm not sure I've seen Eight.

MR. SEIBELS: Eight? Eight is lot two.

MR. TAPP: That's fine. No objection, Your Honor.

THE COURT: All right. Then by agreement and consent of all counsel, Respondent DHEC's Exhibits One through Thirteen, Respondent Read's Exhibits One through Three, and Petitioner's Too Tacky Exhibits One through Seven, Seven A and Eight all admitted without objection.

(Respondent DHEC's Exhibits One through Thirteen,

Respondent Read's Exhibits One through Three, and Petitioner's Exhibits One through Eight were admitted.)

MR. SEIBELS: That's correct, Your Honor. If I could make you aware of one thing.

THE COURT: Yes, sir.

MR. SEIBELS: Too Tacky's Exhibits One through Six are excerpts of DHEC's original file. They have not been certified true and correct coopies and your pre-trial order requested that all of our exhibits, if they're not originals, be certified. They are not, but I've had a conversation with counsel for DHEC and she's spoken with her client and she has no objection. We just put the ball back in your court. If the parties don't object, we'd ask that you accept these.

THE COURT: If y'all have agreed, I've got problem.

MR. SEIBELS: Very good.

THE COURT: All right. I think probably brief pre-trial statements by counsel would be appropriate and helpful to me.

MR. SEIBELS: Very good, Your Honor.

0077

OPENING STATEMENT - BY MR. SEIBELS:

MR. SEIBELS: Jay Seibels of Charleston for Too

Tacky. My client is with me here, Lawton Grimball, who is a partner in Too Tacky Partnership, the petitioner here. Your Honor, you may recall hearing a summary judgment motion on this case just a few months ago, and we appreciate that. A lot of what you'll hear today is going to be very similar to what you heard then. We're going to resolve the factual issues that concerned you back then. As a reminder, DHEC issued a critical area dock permit to the applicant, Mr. Read, who applied on behalf of his family members who owned three lots next to Too Tacky's lot. And if I may, for purposes of demonstrating to you, refer to this demonstrative exhibit which is a copy of an exhibit that's already in which is Read Exhibit Number One.

THE COURT: Mr. Read's lot would be on the far left and your client's would be the next three; is that right?

MR. SEIBELS: Actually you've got it flipped backwards.

0078

THE COURT: Okay. Excuse me.

MR. SEIBELS: Read is the three lots that Read applied on behalf of are lots one, two and

three.

THE COURT: Your client is on the far right?

MR. SEIBELS: That's correct. Lot four belongs to Too Tacky. And this plat, which is already in evidence, just to get you oriented, the specific application requested the dock to commence on lot four in this area where I'm indicating on the northern boundary where there's a 50-foot drainage easement extending into the Leadenwah River. And that's what we're here to talk about. The issue presented, among many, but the most significant issue presented to OCRM during the permit review process was the fact revealed in the comment as a result of the invitation for comments, revealed by Too Tacky that the easement shown on this plat doesn't exist in law. There is no written easement creating the right alleged by Read in his application to access the river along the drainage area there on the northern boundary of lot four. Read had submitted an affidavit indicating he owned that area which Too Tacky in its comment indicated and showed ...

THE COURT: Owned in fee or owned an easement?

MR. SEIBELS: He checked he owned it in fee. He could have checked he owned an easement, but he didn't, in the application, and the application is already in evidence. And we'll talk about that more in detail. But he checked he owned it in fee, which was wrong, and Too Tacky pointed that out in its comment. Read responded through counsel and said, okay, we don't own it, but we do claim an easement. Too Tacky had already put in its comment letter that it's Too Tacky's position and we're going to show in the evidence that the easement doesn't exist. So what ... it may have at one time, but that isn't before you. We contend it never existed. And so what OCRM had on its plate was competing claims to rights to this land and both the applicable statue and the applicable reg require the applicant to show entitlement either through ownership, possession or permission of the land on which the proposed activity is to be carried out. So the burden is always on the applicant. And DHEC in its role and OCRM in its review role has to determine whether the applicant has made a sufficient showing under the regs to meet

that obligation. We are going to demonstrate to you that DHEC's conclusion that the applicant met its burden was a mistake, and we'll show that through documentary evidence and through DHEC's own file that, number one, OCRM violated its own statutory provision which requires it to obtain the kind of statements necessary from the applicant to meet the standard; that it exceeded its statutory authority by going ahead and issuing the critical area dock construction permit when they hadn't met their statutory and regulatory burden of demonstrating ownership, possession or permission; that in doing so, DHEC or OCRM applied an unlawful procedure and that its decision was clearly erroneous in light of the competing claims to the rights, to the property rights, and that in doing so it abused its discretion when it issued the permit. Now, we all know that you're not going to decide a title claim, nor can DHEC decide a title claim. Its role, though, OCRM's role in reviewing the permit is to see if the applicant has made essentially a prima facie case of ownership, possession or permission. And that's what's in

front of you. And we contend and we'll demonstrate today that DHEC did not hold the applicant to that standard and issued the permit anyway. There are other issues as well with this permit. One is that if this dock is constructed on lot four, then lot four is going to have two docks, and that's prohibited under the regs except under abnormal circumstances. There's nothing that will demonstrate that DHEC made the necessary findings of these abnormal circumstances that it needed to if it's going to allow two docks on one parcel. Interestingly, this lot here which is, ought to be considered the applicant, for lack of a better term, I'm talking about lot one, he already has a dock, too. He already has a dock. Two and three don't have docks but four does. But the application before OCRM was add a second dock to this lot, which is generally prohibited absent a finding of abnormality, abnormal circumstances. Same it true for lot one, it already has a dock. Why should it get ... what are the abnormal circumstances warranting a second dock for the benefit of lot one? And that's not in the permit. There are

other issues as well about whether the Department took into consideration the other necessary guidelines that are statutory in taking into consideration the loss of enjoyment and potential economic loss of, as the Code says interestingly, neighboring property owners. Well, what we have is oddly even of more paramount concern which is we're not talking a neighbor, we're talking about the owner of the land where the proposed dock would be. And so much more, shouldn't consideration be given if the owner of the property where the dock is to be constructed doesn't want it? So much more consideration should be given to his wishes and his loss of enjoyment, potential economic loss and other concerns than, for example, a neighbor, what I like to call a whiny neighbor who just doesn't want a dock and won't have to look at it, they won't have to see it. That isn't what DHEC had in front of it. It didn't have a neighbor saying, gee, it's going to impede my view and I don't want to look at it. We've got the owner saying I don't want that on my property and DHEC, there's nothing, and we'll demonstrate, there's

nothing in the file that suggests they gave that any weight at all. And the Code and the regs require them to. There are a couple more issues that I don't want to belabor now but they'll come up over trial, but they concern DHEC's handling of or whether DHEC considered effects to areas of concern as defined in the Code, oyster beds and things of that nature. Their paperwork indicates that this application and this dock if constructed would have an effect on particular areas of concern as defined by their own regs. And there isn't anything, we contend, in their file to suggest that they gave that any consideration, the statutory and regulatory required consideration. And there's a couple of other items as well that we'll bring up, but all, particularly the one I mentioned to begin with which is the requirement of evidence of the prima facie case that the applicant has the necessary ownership, permission, possession to carry out the activity, that clearly alone, if lacking, warrants a reversal of the permit. And the others, in your discretion, you may decide if it's lacking warrant a reversal of

the permit. And at the end of the day we'll be asking you for all those reasons to reverse the permit. If they can demonstrate a better prima facie case than DHEC held them to in this permit, I would invite them to reapply and we'll have a look at that. But at a minimum what we'd need to review today is whether DHEC held the applicant to the appropriate standard and whether DHEC did what it was supposed to do when faced with competing claims to ownership, possession and permission. What do they need to do to pick the winner of that dispute, because that's what they did. They ultimately decided that one guy's claim was better than the other guy's claim and issued the permit. And did they do that correctly? Were they even entitled to do that? Because we know that don't resolve title claims and nor does this Court. I appreciate your patience while I laid that out.

THE COURT: Thank you. Ms. Riley.

OPENING STATEMENT - MS. RILEY:

MS. RILEY: Thank you, Your Honor. Leslie Riley for the Department. This, as Mr. Seibels set forth, involves a dock permit that was issued

to Respondent Mayo Read and basically the structure consists of a four by nine foot walkway with handrails leading to a ten by ten fixed pierhead and a ten by ten floating dock located on the Leadenwah River. I think I've gotten that pronunciation correct. I'd like to just lay out what our case is going to consist of and I think that Your Honor will find as we go through that the Petitioner has the burden of proof in this hearing to prove that there has been a violation of the regulations or statutes that warrant a reversal of this permit. The Petitioners raised several issues and we will present evidence to refute all of their objections. First of all, the question of whether or not the applicant has satisfied 30-2.A ... 30-2.B(4) which sets forth requirements that an applicant must provide to the Department in order for the Department to properly review the application. And as Mr. Seibels said, you need title, possession or permission. And we, the Department, takes the position that this easement that they hold over lot four does meet that requirement and you will hear testimony from the staff that this is

entirely consistent with similar decisions that they've made in the past. In my closing or if I have an opportunity to brief this, I will be able to cite to you several ALJ decisions that are similar. And so I certainly believe that given the fact that the Department cannot adjudicate issues of real property and quiet title that they have met their burden. If they have an issue with the scope of the easement, circuit court is certainly the correct forum in which to adjudicate that dispute. The other question is does the permit violate 30-12.A(1)(a) which is the one dock per parcel. And I need to clarify to the Court lest one get confused, the regulation in June 2005 changed. In June of 2005, actually that specific provision moved to 30-12.A(1)(a), and basically the change is that it took out the word normally. Prior to June 2005, the language said docks shall normally be limited to one structure per parcel. And that, you will hear from the witnesses, has given us the flexibility up to the point where the regulation changed. And I will also point out that the permit was issued in March of 2005;

and therefore, the controlling regulation is the prior one, that docks shall normally be limited. I just wanted to clarify that for you. The other issues that Mr. Seibels laid out for you, impact on navigation, the evidence will show that this is a very small, short walkway, that the width of the river or creek and the distance from the proposed dock and the petitioner's dock are such that no impacts to navigation will occur and the staff will testify as to their review regarding that. The impact on value and enjoyment, we will testify, the staff will testify that impacts will be minimal and that staff has taken steps in order to reduce at least the visual impacts that the structure would have. And we will also offer evidence to refute the claim that special consideration needs to be given based on the fact that this is, I believe Mr. Seibels was quoting geographic areas of particular concern, a GAPC. A GAPC is a special area that has to be formally designated as such, and you will hear testimony from the staff that this is not in fact one of those areas. And in addition, the permit requires that the dock should avoid

shellfish resources to the extent possible. So I believe at the end of the day you will conclude that the Department properly acted with regard to this permit and we ask that you affirm.

THE COURT: Mr. Tapp.

OPENING STATEMENT - MR. TAPP:

MR. TAPP: May it please the Court, Your Honor, Rick Tapp on behalf of Respondent, Mayo Read. Mr. Read is in the court today sitting right here. Briefly I'd like to talk about this easement issue, Your Honor, if I might. Back in 1986, the landowner, Alma Wagner, who owned all four of these tracts subdivided the tract into these four parcels as evidenced by this plat. This plat was duly recorded in the RMC Office of Charleston County. I hear today that there's some complaints about this easement and this dock creates a hardship on Too Tacky down here. But I point out the fact that this document has been a public record since 1986. Too Tacky's deed incorporates this plat by reference expressly, so they've been aware of this easement since they acquired their tract. What we've done here on behalf of lots one, two and

three is only seek to enforce and use the rights provided in this plat which is incorporated into all these deeds by reference, which provides for creek access. It's our position that without a dock, that creek access is meaningless. It was the intent to create creek access for these three lots. And that's all we're really doing here today, Your Honor, is trying to seek a dock to provide creek access for these three lots. Thank you, Your Honor.

THE COURT: Mr. Seibels.

MR. SEIBELS: Your Honor, at this time we would call OCRM employee, Fred Mallett.

FRED MALLETT, being duly sworn, testifies as follows:

MR. MALLETT - DIRECT EXAMINATION BY MR. SEIBELS:

Q: Mr. Mallett, my name is Jay Seibels. I represent Too Tacky. Do you have the Agency's original file in front of you?

A: I don't, Mr. Seibels.

MR. SEIBELS: Your Honor, may I approach the witness?

THE COURT: Yes, sir.

Q: Mr. Mallett, I'm going to hand you the original file. If you haven't had the opportunity before this moment, would you take a look at

that right now and make sure that's the complete file before we go any further.

A: In looking through it, Mr. Seibels, I would think that this is the complete file.

Q: Does anything jump out at you as being missing for example?

A: Well, there are may be some pages that are missing, but per se, it does appear to be a complete file that the Agency maintains.

Q: What do you think might be missing?

A: I would have to go through it in detail page by page to answer that question.

Q: As we sit here today, is everything you expect to be in that file in there today?

A: Again, I would have to go through page by page in detail.

Q: Were you aware of the subpoena that Too Tacky served requiring the complete file be brought to trial today?

A: Normally that is the procedure.

Q: Did you or your office make every effort to make sure that the complete file was brought here today?

A: I would think that we did.

Q: Okay. So would you ... are you able to say

that you fully expect the complete file to be right there in front of you

A: I do expect the file to be in front of me.

Q: In its complete ... and that it's complete? That's the important thing.

A: Well, again, normally that is the procedure, that we have complete files before us.

Q: Tell us what was your role with regard to Mr. Read's permit application.

A: As the project manager, I process the application upon being received by the Agency, or I should say became the project manager. Once the application met submittal requirements, we placed it on public notice to allow a comment period from the adjoining property owners as well as other interested parties.

Q: And what do you do after that?

A: During that process or prior to rendering a decision on the application, we do a site inspection and we rely upon the information that's in the file as well as additional information gleaned from documents such as GIS review sheet.

Q: What's a GIS review sheet?

A: It's an aerial photograph where we can layer data to assist us in the process.
Q: So you must be familiar with the statutory and regulatory requirements that are placed on OCRM when reviewing a critical area dock construction permit application?
A: Yes, sir.
Q: Very familiar?
A: I would say familiar.
Q: How long you been doing it?
A: I've been doing it for 21 years.
Q: All right. And regs change from time to time ...
A: Yes, sir, they do.
Q: ... and it's your job to know what they are, right?
A: Yes, sir, to try and stay on top of those regs.
Q: And it's your job to know what the statute is as it's applicable, right?
A: With assistance from the staff, yes, sir.
Q: Fair enough.
THE COURT: Mr. Seibels, excuse me.
MR. SEIBELS: Yes, sir.
THE COURT: Don't use acronyms or if you use them, give the full all the words. What's GIS stand

for?

A: Geographic Information Review System. And it's an aerial photograph that we can do on the computer and we can layer additional information on it, Your Honor, to assist us in making a decision during the permitting process.

THE COURT: Thank you.

Q: Who, if one individual, who makes the decision to grant or deny, in this case Mr. Read's application?

A: Well, I wouldn't say it's one individual.

Q: Yes, sir.

A: We try to sit down in permits such as this on a permitting staff level ...

Q: I see.

A: ... and come to a common decision on it and/or issue the permits in accordance with.

Q: As project manager, do you have a role in the decision making process?

A: Yes, sir, I do.

Q: Do you have a role that has a greater weight than maybe other folks on the staff?

A: I don't think I do.

Q: All right. Would you be ... as project

manager, would you be necessary to any meetings that would take under consideration whether to approve or deny an application?

A: It's customary that we meet with sometimes the applicant and sometimes the adjoining property owner. Again, not to formulate a decision but to glean input during the permitting process.

Q: Well, let's fast forward to when you've got all the information and you've decided that you've got all the information you need. Are you involved in the meeting that takes place to make the ultimate decision?

A: From time to time we do sit down on a staff level. Not on every permit but from time to time.

Q: How about on Mr. Read's application?

A: I think we did.

Q: On a staff level, you said?

A: Yes, sir.

Q: Meaning who else would be involved?

A: Probably Mr. Joyner and myself.

Q: So the two of you?

A: Yes, sir.

0095

Q: Anybody else?

A: Ms. Stidham very well may have been involved as

well from the aspect of legal questions.

Q: And that's Ms. Riley who's sitting here?

A: I'm sorry, Ms. Riley. I apologize.

Q: What I want you to do is go to your recollection about in the case of Mr. Read's permit who specifically was involved in making the ultimate decision, beyond gathering all the information?

A: Mr. Joyner and I came to the decision that the permit should be issued and it was left up to me to finalize the necessary paperwork to process approval of the application.

Q: Okay. And do you remember if Ms. Riley was a third party to this decision or was it just you and Mr. Joyner?

A: I'm sure she was brought into that decision making process.

Q: Well, let me just ask you to rely on your memory and not as assumption. Do you recall her involvement?

A: I hesitate to answer that question because I don't want to say whether she was or was not there at the time that we decided to take final action.

Q: Well, then would it be fair to say that the

answer is you can't recall?

A: During the final decision, I cannot recall, but I know that along the way she was brought into the loop.

Q: Okay. In your review process of this particular application, did it become apparent to you that there was a competing claim with regard to ownership, possession and permission?

A: Yes, sir, it did.

Q: And before we get any further, would you agree with me that OCRM doesn't resolve those property disputes?

A: I would agree with that.

Q: Okay. And you're familiar with regulation 30-4.E which that's the language that says that permitting decisions don't convey property rights to any applicant or anyone else having to do with where the permitted activity is supposed to occur? Does that sound familiar to you?

A: It does sound familiar.

Q: Mr. Mallett, are you a lawyer?

A: No, sir, I'm not.

Q: Do you consider yourself to be an expert in South Carolina property law?

A: No, sir.
Q: But you do know the regulatory and statutory requirement that the applicant must submit an instrument under which he claims title, possession or permission to carry out the proposed activity?
A: Instrument or deed or some other legal form of ownership.
Q: You're aware that ... is it your job to hold applicants to that standard?
A: We do rely upon the information submitted by the applicant to process and/or take final action on an application.
Q: And if he doesn't submit that, as you put it, an instrument or other legal indication, you can't process the permit, can you?
A: If that application is not a part of the file, we cannot.
Q: If that ...
A: That information, I'm sorry. Information, correct.
Q: If you know, why is it a requirement that the applicant demonstrate ownership, possession or permission to carry out the proposed activity? It may be common sense but I'd like to hear

your understanding.

A: Well, it's an attempt to make sure that the application or the project for which the applicant is applying is placed within the confines or his or her property boundaries.

Q: Would you agree with me that OCRM would lose credibility if it granted permits to folks who don't demonstrate at least a credible claim to ownership, possession and permission to carry out an activity?

MR. TAPP: Object to the form of the question. It calls for speculation.

THE COURT: You can answer the question.

A: I would think that we would.

Q: And taking that a step further, in your view as a project manager who reviews these applications, would it be a mistake on the part of OCRM to grant a permit to an applicant who has not met that threshold demonstration of ownership, possession or permission?

A: I wouldn't say a mistake because, again, we rely on the information submitted by the applicant and we have that information to review at the time.

0099

Q: Well, for purposes of my question, understand,

if you would, that the applicant hasn't demonstrated the requirement. Would it be a mistake then if the applicant hasn't demonstrated the requirement to go ahead and grant him the permit?

A: If there's concrete documentation that the applicant has not demonstrated that requirement, then I would think so.

Q: Now, don't you understand that the applicant has the burden to make the demonstration?

A: Yes, sir.

Q: And that OCRM is not obligated to give the applicant any special weight or credibility on what he says; is that right?

A: We are not.

Q: In other words, OCRM has its own discretion; you're not a rubber stamp?

A: No, sir, again, rely upon the information submitted.

Q: Now, if it would be a mistake to grant a permit to someone who's not demonstrated the requirement that we've talked about, tell me how OCRM avoids making that mistake? What standard do you hold the applicant to?

A: Well, relying upon the applicant, once again,

if the ownership information is not a part of the file, we correspond with the applicant requesting this information, and if it's not submitted in a timely manner, then the application is not even placed on public notice.

Q: Now, once again, you don't necessarily have to believe what he says, do you?

A: We accept the information on good faith.

Q: But it has to be certified, for example?

A: Yes, sir.

Q: You know that the statute and the reg says that the instrument has to be certified?

A: Yes, sir.

Q: Which what's your understanding about why it would have to be certified?

A: Well, something that could be a binding document.

Q: What did OCRM do in the case of Mr. Read to hold him to that standard?

A: In looking through the file at the review process we ensured that his application was indeed certified.

Q: And is there a particular document that you can point us to?

A: Yes, sir. That would the affidavit of ownership and control, page six of the application process.

Q: The application is DHEC's Exhibit One which I have in my hand. And how many pages did you say it was?

A: Page six.

Q: Okay.

MR. SEIBELS: Your Honor, can I give you a copy of that?

THE COURT: Please.

MR. SEIBELS: Leslie, did you bring a spare? I've got one. Beg the Court's indulgence for a moment, please. Your Honor, may I approach? I'm handing you page six which is what the witness was just discussing. For the record, that is part of Respondent's Exhibit Number One. It just happens to be the third page in the exhibit, but it's page six to the application.

THE COURT: Give me just a minute to look at this.

MR. SEIBELS: Yes, sir.

THE COURT: This was the document you were referring to when you said that Mr. Read indicated he was the record owner?

A: Yes.

THE COURT: Is this the only place that occurs?

A: Yes, sir.

THE COURT: Thank you. Proceed, please.

Q: For the sake of clarity, if you know, what are the first three pages of an application? And the only reason I'm asking, look at the exhibit. It's page four of the application. Are the first three pages instructions?

A: Page one would be the narrative page, which gives the applicant information, a contractor, if applicable, the dimensions of the project, the overall intended use of the project and additional information.

MR. SEIBELS: For purposes of the record, we did not offer that into evidence. We just put into evidence the relevant part of the application, so not the instructions and ...

THE COURT: Thank you.

Q: Okay, sir, we're all looking at page six of the application. Is it your testimony that this is the certified instrument by which, under which Mr. Read claims ownership, possession or permission?

A: This is the affidavit of ownership and control

which was submitted with the application packet.

Q: What about the legal instrument that he's required to demonstrate or submit?

A: There may be some additional information in the file; however, at the time of processing this was the sheet that we relied on.

Q: Which you say processing, does that mean deciding?

A: Processing the application to be placed on public notice.

Q: Now, so that got him to the public notice standpoint?

A: Yes, sir.

Q: Now, what I'm asking is what about the certified deed, plat or lease that's required?

A: I think the statute says a certified copy of a deed, lease, or some other legal instrument.

Q: Yes.

A: Which is what we relied upon this document as a legal instrument.

Q: You just took his owner's affidavit, page six?

A: Unless there's some additional information in the file, yes, sir.

Q: Well, that's what I'm asking you; is there

anything else?

A: Well, there could be. I'm not 100 percent sure at this point.

Q: Well, it's critical today that we decide once and for all what the Agency relied upon in making its decision?

A: Well, we would have to ... I would have to go through the file to make sure.

THE COURT: Take your time and go through the file.

A: Okay. There is an additional document in the file from the Nexsen Pruet Law Firm which addresses the easement and the proper ownership of that or rights to it.

MR. SEIBELS: And for the record, Your Honor, that is Exhibit Six of Too Tacky's exhibits.

Q: Okay. Let's just focus on, let's focus on the certified instrument. Is it the affidavit or it's the affidavit plus something else?

A: Affidavit of ownership.

Q: Anything else?

A: The correspondence from the Nexsen Pruet.

Q: Well, focusing on certified instruments, not letters and correspondence.

A: Well, I think that would be considered a part of because it supports, to an extent, supports

this affidavit.

Q: Well, I'm focusing on the statutory and regulatory requirement found in Title 48, Chapter 39, Section 140(b)(4) and Regulation 30-2.B(4) that requires an instrument. Now, it doesn't require a letter, for example, and I'm not trying to be smart.

A: I understand.

Q: So let's just identify the instrument and we can move on.

A: In looking at the file, then this would be the instrument.

Q: And this being page six ...

A: Yes, sir.

Q: ... the owner's affidavit.

A: The affidavit of ownership.

Q: One moment. Now, the statute says, and this is also the reg, and I'm reading from the reg 30-2.B(4), which Ms. Riley mentioned to you earlier was controlling, "The permit application must contain a certified copy of the deed, lease, or other instrument under which the applicant claims title, possession or permission from the owner of the property to carry out the proposal." We've got the

affidavit and nothing else; is that correct?
A: That's correct.
Q: Read Exhibit Number One is a certified copy of the plat. It's critical that we recognize that this is not in your file; is that true?
A: In looking through the file, this document is not a part of the file.
Q: So certainly OCRM in issuing the permit didn't rely on this?
A: Well, we did.
Q: But you didn't require them to submit it?
A: It's not a part of the file but we did see that particular plat in the past and relied upon it.
Q: All right. But you didn't require the applicant to submit it?
A: No, sir.
Q: And you agree with me the statute requires for you to require the applicant to submit it?
A: In part, a plat or other legal instrument.
Q: All right. Let's look at Petitioner's Exhibit One.
MR. SEIBELS: Your Honor, I'll hand you one of these. This is Petitioner's Exhibit One.
MS. RILEY: What is that?
MR. SEIBELS: Petitioner's One.

0107

MS. RILEY: What is that?

MR. SEIBELS: I'm sorry, it's called the ... yeah, the summary and review sheet.

Q: What is that document?

A: This document is generated by our secretarial staff.

Q: Yes.

A: As, again, a part of the permitting process to ensure that information has been submitted prior to taking final action.

Q: And you see on the application requirement list on the first page the fee is required, see that?

A: Yes, sir.

Q: Affidavit of ownership must be received?

A: Yes, sir.

Q: And the certified deed, plat or lease must be received?

A: Yes, sir.

Q: And that's indicated received on 9/28/04, right?

A: Yes, sir.

Q: But we know it wasn't, right?

A: Not a deed or plat.

Q: Or a lease?

A: Or lease.
Q: So this document itself contains a mistake?
A: It does appear to.
Q: Because we've already established that OCRM did not have the plat on 9/28 and if it ever had the plat, it isn't in the file.
A: Yes, sir.
Q: Now, you're telling me that you relied on the plat anyway even though it's not in the file.
A: I am. We saw that plat during the time of permitting.
Q: But it wasn't important enough to put in your file.
A: Well, it should have been a part of the file.
Q: You agree with me that Read should have been required to submit it?
A: He met submittal requirements with the affidavit of ...
Q: Pardon me?
A: He met submittal requirements with the affidavit of ownership.
Q: But the third requirement down here he didn't meet?
A: According to the summary review sheet he did not.

Q: Well, according to this he did, but according to you he didn't; am I right?
A: Yes.
Q: Do we know ... do you know if the plat that you say you looked at and relied on was certified?
A: It was certified by Charleston County Planning Department.
Q: Okay. Do you know if the document itself had been certified as a true and correct copy of the plat? As required by statute? I'm not trying to trick you.
A: I think it was, again, based on its approval by the County.
Q: So it's your belief that if the County approves it, anybody can photocopy it and it doesn't need to be recertified.
A: It could be photocopied for different reasons and/or yes, there's a possibility that that could be the case.
Q: So all OCRM did to hold Mr. Read to the requirement that he provide a certified instrument is nothing; is that fair to say?
A: I wouldn't say that.
Q: All right. You didn't get it, you did not ask for it from him; is that fair?

0110

A: I honestly can't say that we did not ask for it because I remember seeing that document and it had to be submitted to the Agency in some form.
Q: Wasn't important enough to make it to the file, though?
A: It should have been a part of the file, yes, sir.
Q: But it's not. You'll agree with me it's not.
A: It is not a part of the file.
Q: And the decision was made anyway?
A: We did make a final decision on the permit.
Q: Even though the file is incomplete?
A: I wouldn't say incomplete because, again, according to the affidavit of ownership it met submittal requirements.
Q: I see. But your ... the affidavit of ownership is not in the statute or the regs.
A: That's my testimony that the affidavit ...
Q: Okay.
A: ... the affidavit is a part but the plat is not.
Q: Correct. And would you agree with me that the affidavit is not required by the regs or the statute?
A: Being considered a legal binding document, I

think the statute does say that this can be used.

Q: The statute says, "An instrument under which he claims ownership, possession or permission." You agree with me that the summary review sheet requires a certified deed, plat or lease?

A: There is a space for verification of receipt of that document, any of those documents.

Q: Is that consistent with your statutory and regulatory requirements to collect those documents?

A: Yes, sir.

Q: And your testimony here earlier was that the application wouldn't be processed in the absence of it?

A: No, sir. With this affidavit of ownership the application can be processed.

Q: So OCRM processes incomplete applications?

A: No, sir, this document is a form of a legally binding document, again, used in the processing process.

Q: Right. But we know he didn't submit the certified deed, plat or lease and you processed it anyway.

A: We don't have any of those and we processed.

Q: Well, let's look at page six, the affidavit of ownership. In this he claimed to be the owner of the land where the proposed activity was to occur, correct?

A: Yes, sir.

Q: Now, you learned later during the comment period that's false; fair to say?

A: Well, claim of or discussion of ownership did come out during the process.

Q: Right. And Too Tacky said he doesn't own that land.

A: Yes, sir.

Q: We do.

A: Yes, sir.

Q: And Nexsen Pruet then wrote a letter and said, you know what, we don't own it but we do claim an easement, correct?

A: Yes, sir.

Q: So page six of the affidavit would be shown during the course of the review to be false, correct?

A: As a part of lot one, it could be tied into that easement. So I wouldn't say that that's necessarily false.

Q: Well, he's got a block here where you can check

record easement holder.
A: Yes, sir.
Q: And he didn't, he claimed ownership instead.
A: Correct. That's correct.
Q: Record owner.
A: That's correct.
Q: Okay. We know that's false, right?
A: From the documents in the file, yes.
Q: Even his own lawyer wrote a letter and said, okay, we don't own it, but we do claim an easement.
A: Yes.
Q: They dropped back their position; you with me on this?
A: Yes.
Q: And you agree with me, don't you?
A: According to the documents in the file, yes.
Q: And this is why you have a permit review process.
A: Yes.
Q: To flesh out what's really what, correct?
A: Correct.
Q: So you relied on the affidavit of ownership and control and during the review process you learned that it was false, correct?

A: That should have come up during the process.
Q: Well, all right, let's talk about the process. You get the affidavit of ownership, page six, you relied on it. That got you to the public comment period. So you invite public comment, you acknowledge Too Tacky's comment that as a matter of fact Read does not own what he claims to own. What did you do to resolve that conflict? Did you make him sign a corrected affidavit?
A: We did not.
Q: Did you make him produce a copy of his deed showing the grant of an easement across my client's property?
A: No, sir, we did not.
Q: Did you make him show you a copy of the easement of record that he claims to have?
A: We may have, again, in the submittal of that plat which comes back to in reference the easement.
Q: But you can't tell us you did.
A: I can't.
Q: As we sit here today ...
A: I can't.
Q: ... it's just an I don't know answer?

0115

A: Yes.
Q: And did you consider the reply of his lawyer on the issue?
A: We did.
Q: And do you have that letter handy?
A: I do have.
MR. SEIBELS: As we mentioned before, Your Honor, that letter is already in, Exhibit Too Tacky's Exhibit Six. Your Honor, can I give you a copy of it?
THE COURT: Thank you, yes. Thank you, sir.
Q: Are you looking at what's now marked as Exhibit Six?
A: The pages I have are not marked.
Q: Well, I'm sorry, yeah. Are you looking at the letter from Neil Robinson?
A: Yes.
Q: And you're saying that you did to at least some extent consider the reply of Mr. Read's lawyer?
A: Yes, sir.
Q: Do you see on the second page of that letter, point number three he raises the easement versus ownership?
A: Yes, sir.
Q: Is that the part you were thinking of?

0116

A: Yes, sir.
Q: And he points to the second paragraph under point three, he points to a deed that expressly provides all, do you see this, all of grantor's right, title and interest?
A: Yes, sir.
Q: Did you then go look at the deed to see if the deed really says that?
A: We did not.
Q: Do you feel qualified to take a look at the deed, take a look at the plat and figure out what they're talking about?
A: I do not.
Q: Okay. Then I won't make you do it. Do you have folks on staff like Ms. Riley who on something like this you would go to her and say, if you wanted to ...
A: Yes, sir.
Q: ... you could go to her and say here's what he says, I'm not a lawyer, tell me what he's telling me, explain to me what he's telling me?
A: Yes, we could.
Q: Did you do that in this instance?
A: I think we did.
Q: But you don't know?

0117

A: Not 100 percent sure but I think we did.
Q: Did you seek any other guidance from her through the procedure, review procedure?
A: In the course of the process we probably did sit down with Ms. Riley, again, to discuss the project and/or review.
Q: The letter from Mr. Read's lawyer also cites a case that I'll just call the Vick case in a footnote to that letter. Did you review that case?
A: I did not.
Q: Do you know whether the Vick case says what he says it says?
A: No, sir, I don't.
Q: So if it says something different, if he misquoted it, you wouldn't know?
A: I would not know.
Q: Did you look at the deeds for lots one and two to see if they had anything to do with Too Tacky's property?
A: No, I did not.
Q: Did anyone?
A: I can't offer testimony for anyone else, but to my knowledge, I don't think they did.
Q: When you had the opportunity as you explained

to look at the plat, did you take a close look at it?

A: Yes, sir, we did.

Q: Did the warning at the very top jump out at you?

A: I don't remember seeing a warning at the top.

Q: I hand you Exhibit One.

THE COURT: Ms. Riley, you and Mr. Tapp both got copies of that?

MS. RILEY: Yes, Your Honor.

MR. TAPP: Yes, Your Honor.

Q: And it's in evidence and this one happens to be certified as well. Do you see a warning there?

A: Yes, sir, I do.

Q: Would you read it into the record, please.

A: "Approval of this plat by the planning board and/or county council does not indicate approval nor adjudicate title of the access or right-of-way shown hereon."

Q: When you say what you had in your hands was certified, is that what you're talking about?

A: Yes, sir.

Q: Where it does say approved final plat to the left?

A: Yes, sir.

0119

Q: But you don't know whether it had the certified language on the bottom right that Exhibit One has, do you?

A: The enlarged copy does not have the certified language.

Q: Right. And how about the one that you had during the course of review that you don't have anymore?

A: I'm unsure.

MR. SEIBELS: I'm referring, Your Honor, to the certification language here in Exhibit One.

Q: All right. So the warning, surely the warning jumped out at you when you took a close look at this plat during your review process?

A: Well, we would have made that a part of and considered that as well.

Q: And would you agree with me that it essentially says that approval of this plat by the planning board -- I can't read it now -- and/or county council does not indicate approval nor adjudicate -- this is where it gets important -- title of the access or right-of-way shown hereon.

MS. RILEY: Your Honor, I object to this line of questioning. He's not a lawyer and he doesn't

have the ... he's not qualified to answer legal questions about this document.

THE COURT: I think that particular question is proper where he's asked him about the ... what's there, but as far as any legal opinion on it, I'll agree with that. So in the future, don't ask him for a legal conclusion.

MR. SEIBELS: Fair enough. Thank you, Your Honor.

Q: What does that warning about not adjudicating title to the right-of-way mean to you?

A: To me it could possibly mean that it does not apply solely to one or any parcel of these properties.

Q: In other words, if you want to find out title to the right-of-way, don't rely on this, look somewhere else?

MR. TAPP: Object to the form of the question. Calls for a legal conclusion.

MR. SEIBELS: I'm asking what it meant to him.

THE COURT: Overruled.

A: In part.

Q: Okay. And for example, if you ... this plat is dated 1986, right?

0121

A: Yes, sir.

Q: Let me back up. When you say in part, what do

you mean by that?

A: Well, again, we took several things into account. Number one, it was approved by the county and it was approved with this easement in place which says access for lots one, two and three.

Q: Yes, sir. And the warning says this doesn't adjudicate title or anything ... title of the access or right-of-way; am I correct?

A: Correct.

Q: Okay. So it shows it, but if you want to find out if it's for real, don't rely on this?

A: I would think you would need to do additional research.

Q: Okay. Same with, just to give you an example, it says that William Boyd owns the land to the north; do you see that?

A: Yes, sir.

Q: Now, I know you're not a lawyer so I'm asking this question because you've got experience with the GIS system and the property records, if you really wanted to find out if William Boyd owned that land to the north, would you rely on this or are there other tools at your disposal to give you the real answer?

A: I think you would have to consult the county's tax map records.

Q: And in fact, this could be true in '86, you'd have ... but you wouldn't ... you wouldn't rely on this for proof, would you?

A: If questions arose, we very well might not rely on this for proof.

Q: And in fact, in '04, when the permit was submitted, we know that OCRM had to decide who's entitled to notice and you didn't give notice to Mr. Boyd, did you?

A: We did not. Only the adjoining property owners.

Q: You gave notice to Mr. Lawson who in '04 owned that property?

A: He would have been considered the immediate adjoining property owner.

Q: That's because in '04 Mr. Lawson was no longer the owner and you know that because you checked the real source and didn't rely on this; is that fair to say?

A: We relied upon the information submitted by the applicant.

Q: Correct. Now, if you'd relied on this, you'd have given notice to Mr. Boyd?

A: If we would have relied on the information submitted by the applicant, if Mr. Boyd were listed, then he would have received notice.
Q: Well, what I'm suggesting to you is if you would have used this document as a reliable indicator of what it says, okay, you would have given notice to Mr. Boyd.
A: Yes, sir.
Q: And we know that would have been wrong?
A: Based on this document, yes.
Q: Based on the work that you did, you learned that Mr. Lawson owns the property in '04?
A: Relying upon the information in the file.
Q: Your file contains some property records showing Lawson as the owner?
A: It gives us tax map parcel numbers ...
Q: Yes.
A: ... not owners names and/or addresses, not on that initial review.
Q: Let me show you Petitioner's Exhibit Number Two. I don't have the Lawson one, but looking at the second page of Petitioner's Exhibit Number Two. Is that what you're talking about?
A: Yes, sir.
Q: And it does show the owner on that, doesn't it?

A: It does.

MR. SEIBELS: I'm going to hand you Petitioner's Exhibit Two. We were just looking at the second page.

THE COURT: Ms. Riley, you have this?

MS. RILEY: No objection.

Q: So the property records at your disposal do allow you to determine who owns what?

A: We do have the ability to go to the County's web page to glean that information.

Q: Exhibit Two came right out of your file, correct?

A: I think this is a part of the file, yes, sir.

Q: Just to build on that point. Assuming that the plat were a reliable indicator, even though the warning says it's not, it says it is ... it does not indicate approval or adjudicate title, assume for a moment that it was reliable, wouldn't that mean that this is only the state of affairs as it existed in 1986?

A: Unless informed of another change, yes, sir.

Q: I didn't hear you.

A: Unless informed of a change, yes.

Q: Well, all this if it were reliable, even though the warning says it's not, if it were reliable,

all it tells us is the state of affairs in '86, not the state of affairs in '04?

A: Correct.

Q: So things could change between '86 and '04?

A: They could change.

Q: Mr. Boyd could sell to Mr. Lawson?

A: Yes, sir.

Q: The easement could be, if it existed, if this were a reliable indicator that an easement actually existed, it could be extinguished between '86 and '04?

A: Possibly.

Q: Don't you need to know for purposes of your review the state of affairs in 2004 and not the state of affairs in '86?

A: That information would be helpful.

Q: Yeah. And the standard requires you to have it? Not just helpful, it's a requirement. You're not interested to know what the situation was in '86, are you?

A: From time to time, we do rely upon those records.

Q: Well, that's fair. But your '86, you've got an '86 record, don't you want to know has anything changed? Isn't that a relevant question?

A: Yes, sir.
Q: And the state of affairs in '86 does not meet the applicant's burden in '04 to show ownership, possession or permission, does it?
THE COURT: You know, I think that does require a legal conclusion ...
MR. SEIBELS: Okay.
THE COURT: ... and I don't ...
MR. SEIBELS: Fair enough.
Q: What effort did the Agency, did OCRM make to determine whether anything had changed since '86 to '04?
A: To the best of my knowledge, no additional efforts were made.
Q: What effort did the Agency make to see if any easement, if it existed in '86, had been maintained since '86?
A: I can't think of any.
Q: Now, you're aware that an easement could be extinguished by any number of ways, right?
A: Yes, sir.
Q: Merger, relinquishment ...
MS. RILEY: Objection.
MR. SEIBELS: He said yes.
THE COURT: I'm going to sustain the objection.

MR. SEIBELS: And the objection was to my words merger and relinquishment but not the question and answer.

MS. RILEY: Yes, Your Honor, it ...

THE COURT: The whole thing. Those are legal terms.

MR. SEIBELS: And I don't want to aggravate anybody, but the question as you are aware that an easement can be extinguished in a number of ways and the answer was yes.

THE COURT: And you added ... you were the one that said merger or relinquishment.

MR. SEIBELS: Yes, sir. Where does the record get struck?

THE COURT: I don't think it's really material for the whole scheme of things.

MR. SEIBELS: Fair enough.

Q: What effort, if any, did the Agency make to determine the characteristics of the easement?

A: We relied upon the information shown on the exhibit to determine the aspects and/or characteristics of the easement.

Q: Are you familiar with the legal term easement in gross?

A: No, sir.

Q: Are you familiar with the legal term a

pertinent easement?

A: No, sir.

Q: Did the Agency, to your knowledge, make any effort to determine, assuming an easement existed in '86, whether that easement was a pertinent or in gross?

A: Not knowing the definition of either of them, I can't answer that question.

Q: But you might know ... what I'm asking you is whether the Agency made any effort to try to figure out if an easement existed, what kind of easement ...

THE COURT: He's answered the question.

Q: All right. Well, let's see where we were. With regard to the issue of ownership, possession or permission, we know that Mr. Read doesn't have permission from Too Tacky to build on lot five, in other words the letter said Mr. Read doesn't have our permission. Do you agree with me on that on that record?

A: I think that to be the case.

Q: Okay.

THE COURT: So the record will be clear, which letter are you speaking of?

MR. SEIBELS: That's a great question. This will be

Exhibit Number Five, Too Tacky's Exhibit Number Five, which is a letter written by a lawyer for Too Tacky named Bob Conley, and if I can hand that to you.

THE COURT: Thank you.

MR. SEIBELS: Yes, sir.

Q: Getting back to where we were. What we know is that the owner's affidavit was shown to be false. You agree with me there, don't you?

A: The affidavit was checked as to record owner.

Q: And we know that's not true. No question about that, is there?

A: I don't think there are any questions to that.

Q: And we know that OCRM did not require the owner to submit a corrected affidavit; you've acknowledged that?

A: Yes, I have.

Q: And we know that Mr. Read then made a claim to an easement when it was demonstrated he couldn't make a claim to ownership; is that fair to say? And he did that through his lawyer in Exhibit Six?

A: In this letter it says as conceded by Mr. Conley, the letter ... I'm sorry, the applicant does own an easement, so yes.

0130

Q: Now, let me let you look at Mr. Conley's letter and I wonder if you can find that concession.

A: Again, my file's not marked so if I could have the one that you're referring to.

Q: Sure. Now, you realize that that's Mr. Read's lawyer trying to say another lawyer said something? You realize that, don't you?

A: I do.

Q: Okay. Now, you wouldn't just take his word for it? You'd go see if that lawyer really said it; am I right?

A: Well, not necessarily. We're relying on again the applicant to submit ..

Q: Well, why have a comment period if you don't pay any attention to what the other guys say?

A: Well, we do pay attention to documents which are submitted to the Agency.

Q: Okay. Well, Mr. Read's lawyer is saying that in the comment that Too Tacky's lawyer conceded an easement. You have the comment letter. Did he concede the easement?

A: Can I see the letter?

Q: Yeah, let me get it for you.

THE COURT: Mr. Seibels, doesn't the letter speak for itself?

MR. SEIBELS: Yes, sir.

THE COURT: This is sort of argumentative.

MR. SEIBELS: Well, the letter does speak for itself and maybe it's a lot wiser to let it do that.

THE COURT: Yes, sir. Don't misunderstand me, I'm glad you called my attention to it.

MR. SEIBELS: Yes, sir.

THE COURT: But you don't go back and forth with the witness about it.

MR. SEIBELS: I appreciate that.

Q: Let's do move on then. I won't ask you what that letter says; it does speak for itself. Did you check the records to see whether the easement really existed?

A: I did not do additional research to ensure.

Q: Doesn't the file contain what you referred to as the GIS photographs of the properties?

A: Yes, sir, it does.

Q: Do you agree with me that the GIS drawings do not show the easement?

THE COURT: I don't want to interrupt your train of thought, but are those going in evidence? Is that what you handed me?

MR. SEIBELS: These are part of DHEC's Exhibit Nine, I think, if I'm referring to it correctly?

THE COURT: For the sake of a clean record, let's get the exhibit in his hands and let him testify and reference the exhibit.

Q: I'm going to hand you Exhibit Nine. Is that the GIS document that you had talked about before?

A: Yes, sir, it is.

THE COURT: And it's marked as?

MR. SEIBELS: DHEC Exhibit Nine.

THE COURT: DHEC Exhibit Nine.

MR. SEIBELS: Yes, sir.

A: The easement is not shown on this particular document.

Q: And that document is part of your file? Is that document part of your file?

A: Not this particular document, a similar document which reflects the same area.

Q: And does it reflect any material changes?

A: I don't see any.

Q: All right. Backing up. We've got the lack of an easement in the county records as evidenced in your file; is that fair?

A: Yes, sir.

Q: We've got a lack of any written easement in the file?

A: Yes.
Q: And we also lack copies of any of the relevant deeds in OCRM's file?
A: The file does not contain a relevant deed.
Q: And to your knowledge, nobody ever took a look at the Vick case to see what it really says?
A: I can't answer that question. I'm not sure if Ms. Riley or anyone else did.
Q: And you don't have an understanding of the general characteristics of easements, do you?
A: No, sir.
Q: And to your knowledge, OCRM made no effort to determine whether if an easement existed in '86 it still existed in '04?
A: Not to my knowledge.
Q: And to your knowledge, OCRM made no effort to determine if the easement exists in '04, what is its scope?
A: I don't think we did.
Q: Yet ultimately it was your decision to grant Mr. Read a permit to build on lot four?
A: Based on the ownership information submitted at the time of the permitting process.
Q: That would be the false affidavit?
A: We did consider that document.

0134

Q: Let's talk about the general statement that normally docks are limited to one structure per parcel, and that's regulation 30-12.A(2)(a) which has since been changed, but in the old days, show me in your file, if you would, where abnormal circumstances were cited to grant a second dock on lot four.

MS. RILEY: Objection. Your Honor, he's assuming that abnormal ... he's assuming facts that aren't in evidence with that question, that there must be abnormal circumstances that have to be documented.

THE COURT: I'm going to overrule your objection. I understand what he wants for the file and I think Mr. Mallett can look at it to say whether it's there or not.

A: The circumstance taken into consideration would have been the easement.

Q: Mr. Mallett, do you know whether OCRM made any effort at all to determine whether the alleged easement ever existed?

A: Relying upon this plat, we did.

Q: But on nothing else?

0135

A: Not to my knowledge.

Q: One more moment. I'd like for you to refer to

the intake sheet in your file. Project assignment sheet, which is Petitioner's Exhibit Three; do you see that?

A: I don't have that one before me.

Q: I can show you one. Looking at Too Tacky's Exhibit Three, if you know, whose handwriting is that?

A: I think this is the handwriting of Ms. Tess Rogers.

Q: What does she do?

A: Tess coordinates incoming permits and assigns them to a project manager.

Q: Okay. What is her job, if you know, in filling out the notes section of this form?

A: Upon submittal, she will review an application to see if it meets submittal requirements and/or any other items of concern which may stand out to her would be placed upon that sheet.

Q: And then what happens next?

A: She assigns it to a project manager.

Q: And in this case, it's indicated assigned to you?

0136

A: Yes, sir.

Q: If you know, why did she write, "Make sure lots

one, two and three don't have docks"?

A: That's a good question that she would have to testify to.

Q: That's a fair answer. Let's just talk about you then. Is it significant to you as the coordinator to learn whether lots one and two and three have docks?

A: It is.

Q: And why?

A: Well, again, that information would be handy at the time of permitting and/or in order to apply the regs.

Q: I see. And how do the regs come into play when you're trying to figure out if one, two and three already have a dock?

A: Well, they may or may not be able to receive additional docks.

Q: Under what circumstances could they receive an additional dock?

A: We would take into account again the layout of the property, any circumstances which ... of course, they may have outlined an area specifically designed for a dock, an easement or whatever the case may be and/or frontage, possible land frontage.

0137

Q: Now, we know that lot one does have a dock here where ... that came up during the review, right?
A: Yes, sir.
Q: All right. Of what significance, if any, is the fact that lot one already had a dock and was applying for another one?
A: Well, applying the regs as they normally and/or again relying on the approved plat.
Q: Let's talk about special consideration given ... excuse me. If you know, Mr. Mallett, there's a word scratched out under activity. Do you know what word that is or was?
A: It looks as if it may have been community.
Q: Do you know why it was scratched out?
A: I'm unsure.
Q: Do you know who scratched it out?
A: I would think Ms. Rogers.
Q: Was this application reviewed under the community dock standards?
A: No, sir.
Q: Why not?
A: The narrative portion listed it as a joint use dock.
Q: Narrative portion of what?

A: The application page.
Q: And that, just for the record, application is DHEC's Exhibit One. So let's talk about the requirement that OCRM give special consideration to geographic areas of special concern, and this is reg 30-11.C(3). These geographic areas of special concern are defined in reg 30-1.D(22). Tell us generally speaking what's the significance of OCRM's responsibilities when you're dealing with areas that are geographic areas of special concern.
A: We give considerations to whether a permit cannot be issued and/or authorized, the overall scope of the project, the size, and/or if additional structures may or may not be warranted.
Q: I'd like to hand you DHEC's Exhibit Six, if I haven't handed it to you already. This is in your file. It may be easier for you to look at this one. Here it is. On the second page, section IV-E, there's a question. Would you read that question into the record, please?
A: Does the project impact a GAPC, geographic area of particular concern. If so, describe.
Q: What's the answer to that question on this

control sheet?
A: The answer listed is yes.
Q: All right. And then what comes after that?
A: S-187.
Q: What is S-187?
A: State shellfish beds or leases.
Q: So what does it mean, if you would just give us the longer answer to this question.
A: That there may be shellfish resources in the area that are not leased to a particular individual but under the auspices of the State.
Q: Okay. And the project would impact ... the shellfish areas then must be these geographic areas of particular concern, they're GAPCs?
A: Well, the project may or may not directly impact. Again, whenever you click on this click on this layer, it gives an overview of a wider area.
Q: But the answer was yes, it does impact?
A: According to this document, yes.
Q: Of course. And so doesn't that trigger special review by OCRM?
A: It may warrant additional review.
Q: What additional review was afforded in this case?

A: Well, determine if beds do actually, if live shellfish beds do exist and their location as well as the proximity of any permitted structure to their location.

Q: Where in the file, if there is something in the file, where does it indicate that OCRM took the responsibility to do that which is required under the regs?

A: That is not a part of this file.

Q: Okay. Is it anywhere else?

A: I don't see it.

Q: Would it be reasonable to conclude that OCRM did not discharge the duties that are triggered by the answer yes, the project does impact the GAPC?

A: I wouldn't say reasonable. Again, it alerts you to the possibility of existing shellfish beds.

Q: Well, the answer isn't possible; it's yes. And then the answer ... wouldn't you agree with me that the regs require when a project impacts a GAPC that OCRM is to do a special review?

A: Yes.

Q: Simplest question all day. Did OCRM do that review?

A: We did not.
Q: I'm sure you're intimately familiar with the ten factors in Title 48, Chapter 39, Section 150 and the Regulation 30-11 that are to be undertaken and reviewed by OCRM when it reviews an application. Are you familiar with those? The extent to which the activity requires waterfront location, there's ten, it's kind of a laundry list.
A: Prior to answering that question, if I could see them.
Q: Yes. And I'm just going to hand the witness my copy of the relevant code section. This would refresh your recollection, I'm sure, wouldn't it?
A: Yes, sir.
Q: Did OCRM take those ten factors into consideration?
A: During the permitting process, I think concerns were given to these factors.
Q: Where in the file is that reflected?
A: They're probably not a part of the file.
Q: Are they a part of anything else?
A: Not to my knowledge.
Q: Let's just focus on one, which is ... one of

0142

those, which is actually number ten. The extent to which the proposed use could affect the value and enjoyment of adjacent owners. In your review of Mr. Read's application, did OCRM take into consideration how it might affect the owner, Too Tacky?

A: Consideration was given with the understanding that there are existing docks in the vicinity and it's been our experience that there's a possibility that a dock authorized for a parcel of property could possibly enhance the value of it.

Q: It would certainly enhance the value of lots one, two and three which are Mr. Read's lots, wouldn't it?

A: It could possibly.

Q: Now, was consideration given to the idea that Too Tacky's lot might be diminished in value if somebody else had a dock on it?

A: The question may have come up.

Q: What I need you to tell me is did it?

A: I don't think it did.

Q: Okay. Were you aware that the proposed dock would be in the Grimballs' front yard of their home?

A: It was my understanding that the permitted dock would be confined to the extension of the easement boundaries.

Q: In the letter written by Mr. Conley ... let me have just a moment. Were you part of the site visit?

A: Yes, sir.

Q: Did you observe that the site of the proposed dock would be a small distance from the Grimballs' front door?

A: I wouldn't say a small distance.

Q: Twenty-five steps?

A: Or more possibly.

Q: What consideration, if any, was given to the proximity of the dock to the Grimballs' home?

A: Well, we apply a standard of a minimum of 20 feet from a common extended property line as to allow the dock not to encroach upon, again, the adjoining owner's property.

Q: Yes, sir. If this permit is upheld, you would agree with me that lot four is going to have two docks on it; is that right?

A: Lot four would not have two docks. It would have access to the dock coming off of the easement.

Q: Well, I don't ... let me make sure we're on the same page. Lot four is Too Tacky's lot.

A: I'm sorry, yes.

Q: And Too Tacky's got a dock going back to '92.

A: Yes, sir.

Q: And if this permit is upheld, there would be a second dock coming off of lot four.

A: Off of the easement could be a part of lot four.

Q: And then you agree with me that if the permit is upheld, lot one is going to have two docks as well?

A: They would also have access to the dock.

Q: Is there anything in the file that would suggest or support those special circumstances?

A: Not in the file.

MR. SEIBELS: Your Honor, we would tender this witness to the other parties.

THE COURT: Ms. Riley.

MS. RILEY: Thank you, Your Honor.

MR. MALLETT - CROSS EXAMINATION BY MS. RILEY:

Q: Mr. Mallett, you said that you relied on the plat that Mr. Seibels ... Respondent's Exhibit Number One, correct?

A: Correct.

Q: You said you relied on that?
A: That's correct.
THE COURT: Identify what Exhibit One is, please?
MS. RILEY: Respondent Read Exhibit Number One.
THE COURT: What is it?
MS. RILEY: Oh, it's the plat.
THE COURT: Thank you.
Q: And so at some point during the review process, you reviewed the plat?
A: Yes, ma'am, we did.
Q: Okay. I'm going to show you a copy of ... I show you a copy of Petitioner's Exhibit Number Five which is the Simons and Keaveny January 11th letter. Have you seen this letter before?
A: This letter is a part of the file.
Q: Okay. So you've reviewed it, correct?
A: Yes, ma'am.
Q: Okay. And if you turn to page number two, the first paragraph he quotes 30-2.B, correct?
A: Yes.
Q: Okay. And it says, "However, in this instance, the applicant has not presented evidence of title or possession other than a plat which shows a 50 foot drainage easement and creek access for lots one, two and three."

A: Yes.
Q: Is that correct?
A: That's correct.
Q: So the Petitioner admits that it was submitted to the Department, the plat?
A: Yes.
Q: And, Mr. Mallett, is it unusual for the Department to receive additional information as the application process goes along?
A: It is not unusual.
Q: Okay. And at the time you made your decision, you were aware of the existence of the plat?
A: Yes, ma'am.
Q: And you have not had any legal training, just to be clear, correct?
A: I have not have.
Q: Mr. Seibels asked you about GAPCs and can you tell me in what way is this area a GAPC? What is the special unique value of this area?
A: Well, the combined amount of frontage, the shellfish beds, and/or possibly the water body itself.
Q: What State agency has jurisdiction over shellfish?
A: The Department of Natural Resources.

Q: Do they typically comment on proposed projects?
A: We receive comments from them stating that they reserve the right to comment in the event of ...
Q: Okay.
A: ... concerns arising.
Q: And when they do have concerns, they notify the Agency, correct?
A: They do, yes.
MS. RILEY: Your Honor, I forgot to mark an exhibit.
Q: Let me show you what's been marked as Respondent's Exhibit Fourteen. Ask you if you recognize that document.
A: This document is part of the file.
Q: Who's it from?
A: From the South Carolina Department of Natural Resources.
Q: And is that a typical letter that they send with the proposed project?
A: Yes, it is.
MS. RILEY: Your Honor, at this time I'd like to offer Respondent's Exhibit Fourteen.
MR. SEIBELS: There's no objection.
MR. TAPP: No objection, Your Honor.
THE COURT: Without objection, Respondent DHEC's

0148

Exhibit Number Fourteen admitted into evidence.

(Respondent DHEC's Exhibit Number Fourteen was admitted into evidence.)

Q: And, Mr. Mallett, does this letter indicate that they have any objection to this proposed project?

A: It does not.

Q: I'd like to ask you to take a look at the critical area permit which is in evidence already as Respondent's Exhibit Number Seven. And did you ... you placed conditions on the permit, correct?

A: Yes, ma'am.

Q: Did you condition the permit in any way to address the shellfish?

A: A condition has been placed on the permit that stipulates in the event there are shellfish beds or should shellfish beds be impacted that the applicant notify the Agency and/or relocate the structure.

Q: Okay. Thank you.

THE COURT: Ms. Riley, do the other counsel have copies of that already?

MS. RILEY: They've seen it. I haven't provided them with copies but I'll certainly provide it.

Q: Mr. Mallett, did you consider the impact that this proposed dock would have on the value and enjoyment of adjacent property owners?
A: It may have come up during discussion of final decision. But again, consideration was given that there are existing docks in the immediate vicinity, and/or it's our opinion and/or we've heard in the past that docks generally increase property values.
Q: So you were considering that?
A: Yes, ma'am.
Q: Okay. Did you alter the proposal in any way from what was applied for to what was issued?
A: We did. We reduced the overall square footage of the structure to allow it to be again confined to the extended property lines of the easement.
Q: Was there a roof applied for?
A: There was and that roof was deleted.
Q: Why did you delete that roof?
A: There are no immediate roofs in the vicinity and/or to reduce visual impacts.
Q: To the adjacent property owners?
A: Yes, ma'am.
Q: Okay. To your knowledge or have you personally

0150

ever denied a permit based on concern about visual impact?

A: I don't think we have.

MS. RILEY: Your Honor, I beg the Court's indulgence just for a moment.

THE COURT: That's fine. Take your time.

Q: Mr. Mallett, did you conclude that the easement that is indicated in the plat meets the requirements of 30-12.A(1)(a)? No, I'm sorry, does the easement meet the requirements of 30-2? The application provision? Do you have that in front of you?

A: I don't have.

Q: Okay.

A: I do, but I need to find it.

Q: I'll show you a copy of it.

MR. SEIBELS: Your Honor, while he looks at that reg, I want to interpose an objection to the question. When she refers to the easement, there is no evidence of an easement in the record. In his file ...

THE COURT: Well, of course it's cross examination. But I'll agree that I would want to know what easement you're referring to.

Q: Does the easement depicted on Exhibit Number

Read Number One, does that meet the requirements of 30-2, certified copy of the lease, deed or other ...

A: It does.

Q: Okay. Is it part of your job duties or your job description to interpret easements or deeds in your review?

A: No, it is not.

MS. RILEY: Your Honor, that's all I have at this time. I would reserve the right to call him in my case in chief should other issues arise.

THE COURT: Granted. Thank you. Mr. Tapp.

MR. TAPP: Your Honor, I'll be very brief.

MR. MALLETT - CROSS EXAMINATION BY MR. TAPP:

Q: Mr. Mallett, when you recall seeing what is now a copy of the plat which I think is Read Number One, do you recall whether it was an oversized version?

A: It was a blue lined version, folded blue line version.

Q: Yes, sir. And is it possible that indeed that plat was submitted in this instance by the dock maker as the agent for Mr. Read with the application?

A: That is a possibility.

0152

Q: Thank you. There's been some discussion about whether the document was certified. I note that the certification requirement does not appear in the statute. Has anyone ever claimed that the plat was forged or altered in any form or fashion?

A: No, sir, not to my knowledge.

Q: And certainly not in the letter that's marked as Petitioner's Number Five, the Simons and Keaveny letter, is it?

A: No, sir.

Q: Focusing now on the permit application, page six, I want to talk a little bit about that. There was a box that's checked that talks about the record owner, and as I look at that I see the check. There's been no dispute that the applicant actually was the record owner of one of the parcels, is there?

A: There was no dispute of that.

Q: And if you look halfway down that page number six of this, it actually talks about end of right-of-way; does it not? Do you see that on the left-hand side in handwriting?

A: I do see that.

Q: Has DHEC or OCRM ever issued dock permits to

easement holders in other cases?

A: Yes, sir, we have.

MR. TAPP: Thank you, Your Honor. No further questions but we reserve the right to call Mr. Mallett in our case in chief, Your Honor.

THE COURT: All right. I have this question for you, please, sir. Just a minute if you would.

A: Yes, sir.

THE COURT: Your point was, I think, that your client checked the record ownership meaning record owner of lots one, two and three?

MR. TAPP: That's my belief, Your Honor.

THE COURT: That's the point you were trying to get across?

MR. TAPP: My point being there's been terms of false affidavit. My perception is that there was probably unclear and there's a mistake in it. I don't think he was trying to lie to say I own the easement rights. I think he's clearly trying to say it's at the end of the right-of-way, but I do own the lot that is benefitted by the dock.

THE COURT: Thank you, sir. Redirect?

0154

MR. SEIBELS: Thank you, Your Honor.

MR. MALLETT - REDIRECT EXAMINATION BY MR. SEIBELS:

Q: Looking again at page six, the affidavit, you were asked in an attempt to try to make it seem not false whether it was understood by you that Mr. Read owned one of the three parcels; is that right? Is that what you were asked ...

A: I think that was the question.

Q: Does that mean he doesn't own the other two parcels that he swore he did own?

A: Well, it's my understanding that the other two parcels could be owned by other individuals.

Q: Yet his affidavit says he owns all three?

A: It is checked as the record owner.

Q: And that's contrary to your understanding of the true facts. In fact, he only owns one as counsel just pointed out.

A: He only owns one.

Q: When Ms. Riley was asking you questions, she asked you the easement that's drawn onto the plat meets the requirements of reg 30-2.B(4), I think your answer was yes; is that right?

A: Yes, sir.

Q: But didn't you testify on direct that you don't know the characteristics of easements?

A: Those characteristics could vary and I don't know.

Q: And you don't know if that easement existed in 2004, if it ever ... you don't know if it ever existed?

A: Well, according to this document, it did exist in '86.

Q: I'd have to draw your attention back to the warning that says just because it's on here doesn't mean that it exists, it doesn't adjudicate title of the access or the right-of-way, but your conclusion instead ...

MR. TAPP: I'm going to let him finish the question then I'm going to object, Your Honor.

Q: Are you saying that this warning should be disregarded?

MR. TAPP: Object to the form of the question. I think (a), it calls for a legal conclusion on his part, but (b), I'm not sure those facts are in evidence, the interpretation of that warning may not be where we're going.

MR. SEIBELS: He interpreted it earlier as to mean that what's on here may not be the true state of facts.

THE COURT: For the purposes of his job I think he can place a layman's interpretation on it. I'm going to overrule your objection.

0156

A: That warning would be taken into consideration.
Q: Okay. And then did you conclude that this warning should be disregarded and that this easement meets the reg?
A: No, sir.
Q: Okay. So when you answered her question that yes this easement meets the regs, you meant maybe not?
A: Submittal requirements as a legal deed of ownership or legal instrument of ownership.
Q: But your file doesn't actually contain a copy of the easement, does it?
A: It does not.
Q: And it doesn't contain a copy of this plat either?
A: No, sir.
Q: And it doesn't contain any of the necessary, any of the relevant deeds to the property shown on Exhibit One?
A: It does not.
Q: And you testified that you don't really know the characteristics of deeds and how they come about.
A: That's correct.
Q: And you're not qualified to make determinations

of property rights.

A: No, sir, I am not.

Q: And when I asked you if I showed you the legal descriptions and showed you the plat would you be able to tell me what's what and you said you didn't feel qualified to do that; is that still true?

A: That is true.

Q: And I said all right, I won't make you do it.

A: Uh-huh (affirmative response).

Q: And I still won't make you do it.

MR. SEIBELS: Thank you. I don't have anything else for this witness.

THE COURT: Ms. Riley, anything further?

MS. RILEY: No, Your Honor.

THE COURT: Mr. Tapp?

MR. TAPP: Nothing further, Your Honor.

THE COURT: Thank you. Good to have you with us, Mr. Mallett.

MR. MALLETT: Thank you.

MR. SEIBELS: Ready for me again?

THE COURT: Yes, sir.

MR. SEIBELS: Your Honor, we call Curtis Joyner.

THE COURT: Let's take about a five-minute break.

(Break from 11:50 a.m. until 12:00 p.m.)

CURTIS JOYNER, being duly sworn, testifies as follows:

MR. JOYNER - DIRECT EXAMINATION BY MR. SEIBELS:

Q: Mr. Joyner, my name is Jay Seibels. Thank you for being here. My client is Too Tacky Partnership. You've heard me ask Mr. Mallett a whole bunch of questions about OCRM's duties and investigation into the alleged easement shown on Exhibit One. If you think it's fair, I'd just simply like to ask you do you have anything to add to what Mr. Mallett said about OCRM's discharge of its duties to ascertain whether Mr. Read had the necessary title, possession, permission as to the alleged easement shown on Exhibit One?

A: I think the only thing that I would add that is I think that it's our position that the easement meant something to us, but again, we don't have the, you know, the legal background, I mean, Mr. Mallett and myself in the execution of our positions, to say whether an easement is, you know, beyond the surface level, whether it's a, you know, a valid, you know, whatever the word you used ...

Q: Sure.

0159

A: ... easement.
Q: But that means that you don't even know if this plat which says there's an easement is dispositive at all as to whether there's really an easement there under law?
A: Well, I don't ... I can't agree with that in whole because the easement's shown on a piece of paper. To me that has, I mean, that's some type of evidence. It means something.
Q: Well, you know, what the warning means, don't you?
A: No, I ... again, I'm not a lawyer. I'm not going to try and decipher what that warning means.
Q: Well, would you read it ...
A: Sure.
Q: ... either read it to yourself or out loud.
A: Approval of this plat by the planning board and/or county council does not indicate approval nor adjudicate title of the access or right-of-way shown herein or hereon.
Q: Well, isn't that the question: Does Mr. Read have title to the access shown thereon?
A: Yeah, I think that's ... maybe Charleston County's the group that needs to answer that

question but, again, it's on that plat.

Q: But I'm asking you, isn't that the question for OCRM?

A: No, I don't believe it is. I believe the evidence on this plat shows that there's an easement.

Q: Wait a minute. Isn't the question for OCRM to determine whether Mayo Read has submitted with his application a credible claim to a property right on the property where the proposed activity is going to be carried out?

A: And I believe he's done that.

Q: Wait a minute, just answer the question. Is that the question for OCRM?

A: The question for me is is that an easement. I believe it is.

Q: But you ... you opened your testimony by saying you're not qualified to know anything about easements.

A: But the word on the plat says easement. I mean, it's not a right-of-way.

Q: I'm going to keep asking until I get an answer. Isn't that the question before OCRM as to whether Mr. Read has demonstrated title to the access shown on Exhibit One?

A: I think he has.
Q: Wait a minute.
THE COURT: I understand what you're driving at and I understand his answer.
Q: And in trying to answer that question, you looked at Exhibit One, right?
A: That's correct.
Q: Is that your testimony?
A: We actually do have it in ... we had it in our possession.
Q: But it isn't in the file?
A: Well, I can't explain that.
Q: But you agree with me it's not in the file?
A: Well, again, I can't explain that. But I have seen it before a decision was made. I can say that it's not here today, at least the blue lined copy.
Q: Yeah, and you know that my subpoena required it to be brought, the complete file?
A: I'm sure you did.
Q: All right.
A: I don't see those subpoenas.
Q: But you don't, what you're telling me is that if ... that you had this plat at one time; don't have it anymore.

A: We may still have it.
Q: Okay. You don't have it today?
A: Don't have it today.
Q: Didn't bring it despite the subpoena, right?
A: That's true.
Q: But you want us to believe that you had it and you looked at it and you relied on it?
A: Well, I ... I'm not supposed to lie, so we did have it.
Q: And in determining ... in discharging OCRM's duty to see if Mr. Read has a credible claim to title to the access ...
A: Yes.
Q: ... this is what you looked at?
A: That's correct.
Q: And there's a warning on here that says if you need to know title to the access, don't rely on this; am I right?
MS. RILEY: Objection, he's asked and answered that question.
MR. SEIBELS: I don't think he has. I may have asked it of Mr. Mallett.
THE COURT: I'm going to sustain the objection and, again, I'd say I can understand your point and I understand his answer.

Q: And you yourself are not qualified to know whether those words on that plat have any effect at all about whether an easement has been created?

A: I think I'm qualified enough to say there's an easement in existence. Now, what that easement ... how legal it is, that's either for Charleston County's attorney to answer that question or their witness and of course they're not here.

Q: You're qualified to say that there's an easement in existence when? What's the date on Exhibit One?

A: I understand it's 1986.

Q: Okay. So in making your conclusion you conclude there's an easement in '86. Why is that relevant on a 2004 application?

A: Because I haven't seen any information otherwise.

Q: Mr. Mallett said that the Agency made no effort to see if the easement, it if existed in '86 still existed in '04. Do you have anything to add to that?

A: I don't have any reason to dispute that it hasn't been.

0164

Q: Well, I thought that during the comment period the owner of lot four said it doesn't exist. That doesn't give you reason?

A: But then I've got evidence that shows that it does. I mean ...

Q: You're saying that Exhibit One tells you an easement exists in 2004?

A: No, it tells me that one was created sometime in whatever, '86, and there's no reason ...

Q: That's your conclusion?

MS. RILEY: Your Honor, he needs to be allowed to finish his answer.

A: There's no reason to dispute that it's been abandoned since then.

Q: Why have a comment period if the commentor says it doesn't exist anymore and you find that that is not a reason to believe that it doesn't exist anymore?

A: You know the reason why we have a comment period and it's not to dismiss the public and we don't dismiss the public. We actually do listen to them and I consider this gentleman a part of the public.

Q: But your testimony twice has been that even though the owner of lot four says the easement

... wrote a letter, invited by you to write a letter and said the easement doesn't exist, that you had no reason to believe that the easement doesn't exist?

A: And then we got a letter saying it does exist, so who do you believe?

Q: What effort thereafter did OCRM make to determine the validity of the conflicting claims?

A: I think I've already answered that question and I would add that this part of the file ...

Q: What was the answer?

A: ... the ... we've got ...

Q: What was the answer to the question.

MS. RILEY: Your Honor, please ...

THE COURT: Wait a minute.

MR. SEIBELS: He doesn't get to dodge the question by saying I think I've already answered it.

THE COURT: I understand that but is there an objection?

MS. RILEY: I object based on the fact that he it not being allowed to finish his answers. He's being interrupted and he's being argumentative.

THE COURT: All right. Do let him finish, Mr. Seibels, you're almost to the point of you're

arguing with your own witness.

MR. SEIBELS: Certainly.

A: Could you restate the question?

Q: What effort, if any, did OCRM take to evaluate the competing title claims in your file?

A: The evidence that was existing that we had in our possession at the time which was this easement and this plat, the two letters that we had received. And then what I would add to that is, is that we have to issue a permit within a certain amount of time if all the evidence is in. That is not something that we can, you know, ignore.

Q: But you can deny a permit, too, within a certain ...

A: We can deny a permit, that's true.

Q: And when you say all the evidence is in, to recap, you got evidence that an easement may have existed in '86 and you got evidence that it doesn't exist in '04?

A: And then we've got further evidence that it does.

Q: And that evidence was written by a lawyer who gave you the Vick case. Did you read the Vick case?

A: The name Vick is the first time I've heard that today.
Q: Did you read the letter written by Mr. Read's lawyer?
A: I'm sure I glanced at it.
Q: Okay. And thereafter, it's my understanding, tell me if I'm wrong, that OCRM took no further steps to figure out whether the easement, if it existed in '86, still existed in '04?
A: That's correct.
Q: What about the GIS records in your file that don't show it?
A: We do have GIS or geographic information reviews in our file, but I'm not exactly sure what you're saying they don't show.
Q: I was just wondering if by looking at the GIS records were you trying to see if the easement was depicted?
A: Well, the ... I guess the answer to your question in proper form is that the property line data is not our own. It actually comes form Charleston County, so ...
Q: Same people who said don't rely on this plat if you're trying to figure out the title to access?

A: Right, and again, it might be appropriate to ask them that question.
Q: Did you?
A: I wasn't referring to myself, but no.
Q: Well, isn't it OCRM's job to determine whether the applicant has shown title to the access on the property that he is proposing to construct a dock?
A: I don't want to be argumentative, but I think I've already answered the question. Again, it's the information that's in the file.
Q: Well, now I'm referring to you. Did you ask the question of the County?
A: No, we didn't.
Q: Would you look at Exhibit Nine for me.
A: Sure.
MR. SEIBELS: Your Honor, I'll show it to you.
Q: What is this?
A: This is actually a partial GIS, geographic information system, review. It's only got just a little bit of information on it. The number one thing is the aerial photograph and then the second thing is the Charleston County parcel data, the property lines.
Q: And would you with me that the right-of-way

Q: They're not in the file. Does that suggest that you looked at them or not?
A: I'm certain that I looked at the ownership information that we had in the file.
Q: That would be the affidavit that's been shown to be false, right?
A: Well, I think ... let me back up. The affidavit of ownership has several blocks that you check off, meaning the applicant, and it's our, it's the Department's position that when they check off record owner, they're referring to the lots they own, not some easement ...
Q: Right.
A: ... that he's trying to put a dock on.
Q: But this dock ...
A: We're trying to tie that dock to property and the easement is the mechanism from which he gets from the property to the water.
Q: But the dock is not on any of the properties that he owns.
A: It's on an easement that is referred to.
Q: When you say you looked at the ownership information, you're talking about page six of the application which everybody concedes has mistakes on it?

A: I don't think there was a mistake on it.
Q: Are you talking about Exhibit Six, I mean, page six?
A: I might need to look at it.
Q: Okay. I'm wondering when you say you reviewed all the ownership information, what is all the ownership information?
A: Well, 30-2.B(3) says we're to have a copy of certified deed, lease or other instrument. That gives us an option of the affidavit of ownership and one other piece of information, and it's my remembrance that this is the other piece of information, this plat.
Q: Yes.
A: So the deed, I readily admit we may not have had it.
Q: You're in 30-2.B(4)?
A: Yeah, four.
Q: So when you say you look at the ownership information, what are you referring to in this file? Just limit your answer to what's in the file.
A: B(4) says a copy of the deed, lease or other instrument. This is the other instrument.
Q: That's not in the file. Limit your answer to

what's in the file, please.
A: Okay, it's not in the file. But we've seen it.
Q: When you say you reviewed the ownership information, what did you review?
A: The affidavit of ownership and this plat.
Q: And the plat's not in the file and the affidavit of ownership contains mistakes, fair enough?
A: I can't agree that the affidavit of ownership contains mistakes.
Q: All right.
A: I think it's correct.
Q: So you think he owns lots one, two and three?
A: I think his family owns lots one, two and three.
Q: You think he owns the easement to lot four?
A: Based on the information that we've got, I don't have any reason to dispute it.
Q: All right. So then when you say you don't have any reason, that means you put no weight at all on the public comment letter and you put no weight at all on the GIS map that's in your file, right?
A: I can't say that.
Q: Okay.

0174

A: I mean no weight at all means I didn't think about anything.
Q: Well, you say you had no reason.
A: Well, what if I gave them 50 percent weight.
Q: I think what you're saying is this Exhibit Nine is not accurate and that the statement by the owner is not accurate.
A: I didn't say that.
Q: And that the affidavit submitted by Mr. Read that he owns all those lots and owns the area where the dock is to be constructed is accurate and that this plat which says if you need to know title of the access, don't look at this as reliable in your determination of title to the access, right?
A: As part of my job responsibilities, I have already answered, yes.
MR. SEIBELS: One moment, Your Honor. We would tender this witness, Your Honor.
THE COURT: Before we get to, let me look at Exhibit Number Nine, please. Are you through with him?
MR. SEIBELS: I am, Your Honor.
THE COURT: Ms. Riley.
MS. RILEY: Thank you.
MR. JOYNER - CROSS EXAMINATION BY MS. RILEY:

Q: Mr. Joyner, Mr. Seibels was asking you questions about the 1996 plat and the fact that it's old and the application came in in 2004; you remember that, right?

A: Yes, I do.

Q: Isn't it true that it's the applicant's responsibility to ensure that they give us the most recent information?

A: Yes, I would agree with that.

Q: They're required to list the current adjacent property owners, right?

A: That's correct.

Q: Now, the evidence, Mr. Seibels said ... asked you about the evidence that the Department received that the easement does not exist; do you remember him asking you about that?

A: Yes.

Q: And he references the January 11th, 2005, letter from Bob Conley?

A: Yes, he did.

Q: Have you read that letter?

A: I have seen this letter before.

THE COURT: Has that been marked as an exhibit?

MS. RILEY: Yes, Your Honor, I'm sorry.

THE COURT: What's the number of it, please?

MS. RILEY: It's Petitioner's Exhibit Number Five.

THE COURT: Thank you.

Q: Is there anything in that letter that says affirmatively that the easement does not exist?

MR. SEIBELS: The letter speaks for itself.

THE COURT: Cross examination.

A: Well, the letter states that the existence of the easement is in dispute, but then it goes on to say that if it does exist, the scope and terms of the easement are unclear. For example, an easement for creek access does not expressly or impliedly grant the easement holders the right to have a dock.

Q: Okay. So they dispute the existence of an easement, correct?

A: Yes.

Q: Did they submit anything other than this letter to prove that the easement doesn't exist in the file or anywhere else?

A: I don't believe they did.

Q: Now, in terms of the public notice period, is it necessary to have every bit of information that you have to consider before you put it on public notice?

A: No, it's not necessary. Really the only thing

that we need is the application pages and then the fee, the administrative fee, and nowadays the certified drawings from public notice. And then once we have that, we can put it on ... put it out for comment.

Q: What's the purpose of public notice? Why can you put something on public notice when it's not complete?

A: I think the regulation is talking about what we can do once the file is complete, but it doesn't really say what we can do to put something on public notice. I think it's just a policy that if the drawings are, you know, really good, nowadays we require surveys or whatever to put something on public notice. But the fee is the real ... it's the real, the beginning of the process because it indicates that they're serious about, you know, applying for a permit. The only thing that really goes on public notice is the drawings and a writeup that we do that advertises what the project's about. So the purpose is to get comment.

Q: To get ... to notify people that a proposed project is pending, correct?

A: That's correct.

0178

Q: So in other cases, you don't put the ownership information, the deeds on the website for example?

A: No, we don't.

Q: Now, the regulation 30-12.A(1)(a), normally ... docks shall normally be limited to one structure per parcel. Would you explain how that language gives you discretion in this instance.

A: Well, it did give us discretion in this instance because the word normally I think allows us to take in, you know, other factors in allowing a second dock on a lot or whatever it is.

Q: And what were the factors that you considered in this situation?

A: That the family owned more than one lot is one reason.

Q: And you've already testified that you took into account the fact the existence of the easement.

A: That's correct. The easement gives them access where it otherwise wouldn't.

Q: And this is an enlarged copy of the Respondent Read Number One. Doesn't this, on the easement, doesn't it say creek access for lots

one, two and three?

A: It does.

Q: Is this, and we're talking about prior to the reg change, is this decision consistent with other decisions that you're aware of that we've made?

A: Yes, there have been a few, not many, but probably 20 in the last five years similar to this.

MS. RILEY: That's all I have, Your Honor. Thank you. I reserve my right to recall him if I need to.

THE COURT: All right. Thank you.

MR. TAPP: No questions, Your Honor.

THE COURT: Redirect, Mr. Seibels?

MR. JOYNER - REDIRECT EXAMINATION BY MR. SEIBELS:

Q: Mr. Joyner, you indicated that the consideration to exercise discretion to put more than one dock on lot four was that the Reads' family members owned one, two and three?

A: That's correct.

Q: So in the future if one of them sells out to a third party, what would that do to your consideration?

A: I don't know that it changes, you know, the

access. Somebody would be using the dock. It may not be the Reads, but the easement is still there.

Q: And at that point, the dock would be there?

A: That's correct.

Q: So in that regard, it wouldn't matter if Read and two strangers owned the three lots?

A: No, I think it doesn't necessarily matter. The lots are still ... the lots are still there, one, two and three.

Q: Yet that was your consideration was that the families do own all three?

A: That was a factual consideration, yeah.

Q: To allow you to go beyond ...

A: If they sell the lot, I can't really, you know, I can't really do anything with that.

Q: But that present fact allowed you to go beyond what's normally considered to be one dock per parcel?

A: Yes.

Q: Suppose at the time of the application it was Read and two others who applied. Would that be some type of factual circumstance that would allow you to go beyond what's normal?

MR. TAPP: Object to the form of the question. Calls

for speculation.

THE COURT: I'm going to overrule that. I'm going to allow him to answer that.

A: Well, the fact is that nobody else owned those lots at the time. So I don't think it's fair for me to say that my answer would be, you know, that our permitting answer would be any different because ...

Q: Sure, but I'm talking about the considerations that allowed you to go beyond what's normal under the regs.

A: Yeah, I think we could consider that.

Q: So if it were Read and two strangers, that would be a circumstance that would ... you would in your discretion find to be beyond normal?

A: If he gave permission for them to access a dock through that easement, then yes.

Q: Who?

A: Mr. Read, if he owned one of those lots.

Q: So you think Mr. Read would control all three lots?

A: If he controls the easement, and I think that's again the question that you want answered.

Q: Sure. But it's your belief that Mr. Read

controls the easement?

MR. TAPP: Object to the form of the question. Calls for a legal conclusion.

MR. SEIBELS: I'm just asking his belief. He also believes an easement exists and one could say that's a legal conclusion that I certainly take exception to.

THE COURT: I'm going to overrule the objection.

MR. SEIBELS: Thank you.

Q: It's your belief that Mr. Read controls the easement?

A: That's my belief.

Q: That's based on what?

A: The evidence in the record.

Q: Okay. His affidavit, for example, he says he controls it?

A: That's correct.

MR. TAPP: Your Honor, may I ask one question in follow up to that?

MR. SEIBELS: I'm done, Your Honor. I'm sorry, I should have said that.

THE COURT: Yes, sir.

MR. JOYNER - CROSS EXAMINATION BY MR. TAPP:

Q: Just to clarify, when you say Mr. Read, if you'll look at the plat, would your statement

be more accurate to state that the owners of lots one, two and three control the easement versus Mr. Read?

A: Yes, I had the benefit of an application applied for by the family, so you know, a different question would have garnered a different answer.

Q: Thank you.

MR. TAPP: No further questions.

THE COURT: Anything else?

MR. JOYNER - REDIRECT EXAMINATION BY MR. SEIBELS:

Q: Where in the application does it say that the family owns these lots? His affidavit says he owns all three.

A: I think you're trying to distinguish the difference between him and his family, so he is the family.

Q: He is the family?

A: That's what I'm assuming.

Q: You make that assumption as part of your permitting decision? I'm just wondering how you got family when his affidavit says he owns all three.

A: Well, I guess the best way to answer it is he is a Read. He owns the lots, he owns the lots.

Q: That's what he said in his affidavit. Your testimony is that the other family members own the other lots. Which is it?
A: And they can do that.
Q: But which is it based on the application?
A: Mayo Read, Jr. signed the affidavit of ownership and control.
Q: And what does he say he owned?
A: Lots one, two and three.
Q: Yet you believe other family members own other lots?
A: They may now. I don't know.
Q: I'm asking you your belief at the time of the application?
A: The affidavit of ownership and control says that Mayo Read owns the lots.
Q: Yet you believe that family members own some of the lots. What is that conclusion based on?
A: If I was using the word family, doesn't that mean Mr. Read.
Q: I'm asking you the question. Is that all you meant when you said family, you meant to say Mr. Read?
A: I meant the Read family.
Q: Okay. And where did you get that? Is it in

the app?

A: No, it's not.

Q: Where did you get it?

A: I just said family. I mean, I don't really know that that means anything other than the Reads or Mr. Read.

MR. SEIBELS: Nothing else, Your Honor.

THE COURT: Anything else?

MR. TAPP: No, Your Honor.

MS. RILEY: No, Your Honor.

MR. SEIBELS: This witness can be excused.

THE COURT: Thank you, Mr. Joyner. Good to have you here.

MR. SEIBELS: Your Honor, at this time we call Mayo Read.

MAYO READ, being duly sworn, testifies as follows:

MR. READ - DIRECT EXAMINATION BY MR. SEIBELS:

Q: Mr. Read, are you Mayo Read, Jr.?

A: I am Mayo Read.

Q: Are you the signer of the affidavit that's ...

A: No.

Q: No? Who is?

A: Who signed the affidavit?

Q: Yes.

A: My son.

Q: Okay. Is he the owner of the three lots?
A: No.
Q: Is he the owner of any lots?
A: No.
Q: Okay. So that affidavit would be false?
A: No.
Q: Oh? And how would it be true?
A: He was the owner of one lot.
Q: Would you agree with me that that affidavit says he owns all three? I can show it to you.
MR. TAPP: Go ahead and show it to him.
Q: This is the third page of DHEC Exhibit One. The question is would you agree with me that the affidavit says Mayo Read, Jr. owns all three lots?
A: It's his signature and we did check record owner and there are ... there is a reference to lots one, two and three.
Q: Is any part of that affidavit not true?
A: He does not own ... he did not at the time of this application own lots one and two.
Q: Okay. Is there any other part of that affidavit that's false?
A: I don't think so.
Q: Does that affidavit suggest to you that Mayo

Read, Jr. owns the alleged easement that is shown on Exhibit One as crossing lot four?

A: Give that to me again, please.

Q: Does that affidavit suggest to you that Mayo Read, Jr. claims to own the alleged easement shown on Exhibit One in front of you, the plat?

A: I don't know.

Q: Okay. Is there already a dock on lot one?

A: Yes.

Q: Which lots do you own?

A: I ...

Q: At the time of the application?

A: At the time of this application, I owned lots one and two, my wife and I.

Q: Together?

A: Uh-huh (affirmative response).

Q: Say yes or no if that's what you meant.

A: Excuse me, yes.

Q: She's got to get it.

A: Yes.

Q: Okay. And then lot three was owned by Mayo Read, Jr.?

A: Yes.

Q: What's the state of affairs today?

A: The state of affairs today?

Q: For ownership?
A: I own, my wife and I own lot three also.
Q: Okay.
A: We acquired it from him.
Q: Now, there's already a dock on lot one?
A: Yes.
Q: Have you looked into putting a dock on lot three?
A: Have I looked into it? No.
Q: Has any member of your family looked into it, to your knowledge?
A: My son, Mayo, looked into it.
Q: Do you know whether he decided not to do it, pursue a permit to build a dock off of lot three?
A: He did not pursue it to my knowledge.
Q: Do you know why?
A: Because he decided, I think he wanted to build it at the end of the easement.
Q: Do you know if Mayo Read, Jr. asked any member of Too Tacky, that would be Lawton or Betsy Grimball, for permission to construct a dock on lot four?
A: I don't know if he asked permission. I know that he, he told me that he had communicated

with Lawton, that he was going to pursue that.
Q: Okay. Do you know what Mr. Grimball's response to that was?
A: I think I recall Mr. Grimball's response was go ahead.
Q: Did you hear that or is that what your son told you?
A: No. No, I didn't. No, I did not hear it.
Q: And how did you have the understanding you just gave us of what Mr. Grimball said?
A: Because my son passed that on to me.
Q: I see. Now, who owns, if you know, looking at Exhibit One, who owns all of the land identified as lot four, if you know?
A: Mr. Grimball or Too Tacky.
Q: And does your response include the area that's shown on Exhibit One as a drainage easement?
A: I'm sorry, ask that again.
Q: Does your answer include that Too Tacky owns the land shown on Exhibit One as the 50 foot drainage easement?
A: Yes.
Q: Too Tacky owns that, there's no question about it, right?
A: Right, yes.

Q: Do you or any member of your family pay taxes associated with lot four?
A: No.
Q: Are you aware that, again referring to lot four, and I'll call your attention to the end of the right-of-way, where the right-of-way ends, and I'm indicating on Exhibit One, and where the 50 foot drainage easement begins that there's a chain which would block a vehicle or anything else across that area?
A: There's a chain somewhere.
Q: Do you know where it is?
A: No, not exactly but down ... it used to be here (indicating).
Q: And you're indicating at the beginning of the right-of-way ...
A: Yeah.
Q: ... north of lot three?
A: Right.
Q: All right.
A: Two.
Q: That's lot two?
A: Uh-huh (affirmative response). Mr. Grimball put the chain there and gave me a key to the lock and then sometime relatively recently that

chain was taken down. It was there, the chain was there ... we acquired ours in '89 and the chain, I don't know when he acquired his, but the chain was there for a longer time than it's been here, I think.

Q: Okay. Fair enough. Without ... there's probably no way for you or I to know exactly where that chain is. but is it fair to say that it is across the ... the area indicated here is the 50 foot drainage easement, at or about the end of this driveway, if I can call it a driveway?

A: Probably.

Q: And has it been there, that chain been there as long as Mr. Grimball's been the owner of lot four?

A: No.

Q: Have you ever asked Mr. Grimball to take that chain down?

A: No.

Q: Have you ever used this drainage easement to get to the creek for any purpose?

A: Yes.

Q: Okay. What for?

A: To look at where the dock is going to go.

Q: Fair enough. And how about prior to your decision to pursue a dock permit; did you use this 50-foot drainage easement? Ever walk across it or use it for any purpose?
A: Yes.
Q: What purpose?
A: To take a walk.
Q: Okay. Has any member of your family, to your knowledge, used the 50-foot drainage easement for any purpose?
A: Yes.
Q: What for?
A: What for?
Q: Yes, other than this ...
A: Same purpose.
Q: Other than to sight the dock in?
A: Just to take a walk.
Q: Did you have to step over the chain to do it, or around it?
A: Not at that point. Yes, since it's been there, but it has not been there that long.
Q: Okay. Do you know whether Mr. Grimball has knowledge of you and your family walking across this 50-foot drainage easement, if you know?
A: I think he does. Yes, I think he does.

Q: Did you ever use that drainage easement area shown on Exhibit One to access the creek?
A: You mean actually get into the creek?
Q: Well, use the creek for any purpose, fishing or shrimping, not necessarily ...
A: Never fished, never shrimped, never jumped off into the water, no.
Q: Launch a kayak or a sailboat?
A: No.
Q: Crabbed?
A: No.
Q: Get you or anything else wet?
A: (Shakes head negatively.)
Q: No? Say no if you mean no.
A: No.
Q: Okay. And I want to ask the same question, to your knowledge, about other members of your family, if you know, have they fished, crabbed, launched a boat, kayak?
A: Not to my knowledge.
Q: Swam?
A: Excuse me?
Q: Swam?
A: No.
Q: Shrimped?

A: No.
Q: Are you familiar with the language in the deeds to you and your family members for one, two and three? Have you read them, read the deeds?
A: Yes.
Q: Do the deeds contain language, and I can show them to you to be fair, but they're therein evidence, but do the deeds contain language granting rights across the creek access easement that is drawn on Exhibit One?
A: Yes.
Q: Let me show you, we'll just start with the deed ...
A: Why don't you let me look at it.
Q: I think that's fair.
A: Let me take that answer back until I look at it.
Q: Sure.
A: May I do that?
Q: Yes, sir. I've got in my hand Exhibit Eight which is a grant from Alma Wagner to Ellen Read in 1991 for lot two. Do you remember that transaction?
A: Yes.
Q: I want to give you the opportunity to have a

look at that. And if you remember my question, answer it, and if you don't, I'll ask it again. Is there the language in there that grants the owner of lot two the right to cross lot four to get to the creek?

MR. TAPP: Object to the form of the question to the extent it calls for a legal conclusion. And I would say the document says what it says and it does incorporate by reference the plat.

THE COURT: I'm going to sustain it in this instance. You've got that in the record.

MR. SEIBELS: The deed's already in the record, Your Honor. To the extent it incorporate the plat by reference, we can take that up on summation.

Q: With regard to lot four and the potential ... the concept according to OCRM that adding a dock increases the value of property, if adding the dock increased the value of lot four, who would be responsible for paying the taxes on that increased value? You?

A: Of lot four?

Q: Yes, sir.

A: If it adds to the value of lot four?

Q: Yes, sir, as OCRM suggested.

A: Would I be responsible?

0196

Q: Right.
A: No.
Q: Who would be responsible for the burden created by an increased tax liability from your dock?
A: The owner of lot four.
Q: Which is? Who is?
A: Too Tacky.
MR. SEIBELS: Your Honor, we tender this witness to the other parties. Thank you, Mr. Read.
MR. TAPP: Just briefly, Your Honor.
MR. READ - CROSS EXAMINATION BY MR. TAPP:
Q: Getting back to the application. When your son applied, were you aware he had made an application for a dock permit?
A: Yes.
Q: Did you give him permission to seek a permit on behalf of the two lots you owned at that time?
A: Yes.
Q: In the course of your living here, living out there and walking up and down that 50-foot wide easement, has Mr. Grimball or anyone from Too Tacky ever told you that they were trying to stop you or you were prohibited or they were somehow taking that easement away from you?
A: No.

Q: Thank you.

MR. TAPP: That's all the questions I have.

THE COURT: Redirect?

MR. SEIBELS: None, Your Honor.

THE COURT: Thank you, Mr. Read. You may step down. Good to have you here.

MR. SEIBELS: Your Honor, at this time we call Lawton Grimball, a member of Too Tacky Partnership.

LAWTON GRIMBALL, being duly sworn, testifies as follows:

MR. GRIMBALL - DIRECT EXAMINATION BY MR. SEIBELS:

Q: Mr. Grimball, who owns lot four shown on Exhibit One?

A: My wife and I own it through the partnership, Too Tacky.

Q: Are you authorized to speak on behalf of Too Tacky today?

A: Yes, I am.

Q: When did Too Tacky buy lot four?

A: 1992 I believe.

Q: When the Partnership bought lot four, were you aware of the plat and the drainage easement that's shown on the plat?

A: Yes.

Q: Now, what, if anything, did you do to find out

more about whether there was an easement or creek access easement in favor of lots one, two and three in '92?

A: Well, the only thing at that time that we did was our attorney looked at the deed and the easement and we determined that there was no definition as to what it meant. I mean, that was pretty much all we did.

Q: Now, since you've owned it, has anybody claimed to have an easement across your property until this dock application was submitted?

A: No.

Q: To your knowledge, has anyone ever used that strip of land for creek access?

A: No.

Q: And let's talk about the chain. Describe the chain and where it is. And if you need the plat ...

A: When we first bought the property, I was ... I had to maintain this road in here because it was completely covered with pines and debris and that sort of thing. And so I literally cleared the road up to our property. And when we finally got through and cleared, it was my decision to put a chain here and a small chain

here. The chain here was locked only because I didn't want people coming down this road, and the chain here was just to delineate ... I'm sorry, I'm pointing to the wrong one, the chain here was to delineate the fact that there was an entrance into the property. This was a small chain. I had a lock on it at times; sometimes I didn't. The chain here always had a lock and that's the one Mayo referred to in terms of having a key because obviously his access to this lot, his lot at the time ...

Q: Two.

A: ... number two. And then subsequently the key I guess was given, or maybe I had another one made or whatever to Mayo Jr. for this lot. And so that was pretty much why the chain was here. When I moved it, it was when Mayo started using his lot because he cut a road into his lot and when we moved the chain down there, I moved the big chain, if you will, and then at that point Mr. Read didn't need a ... or either one of them didn't need a key to it anymore.

Q: Now, how long has there been a chain at the entrance to lot four?

A: When we purchased the property I put a post and

a chain up right there.
Q: Is it still there?
A: Yes.
Q: Has the chain been there ...
A: No, there's a different chain there.
Q: Has there been a chain there continuously since you purchased lot four?
A: Yes.
Q: If anyone ever took the position that they're entitled to cross your property for creek access, what's your position?
A: I would say no.
Q: And in fact ... well, has anyone ever had a problem or raised a concern with you about the chain you have at the entrance to lot four?
A: No.
Q: Never?
A: No.
Q: In however many years, has it been 16 years, 14 years, nobody's raised a concern?
A: No.
Q: To your knowledge, has anyone ... anyone ever crossed your property for creek access to the Leadenwah River?
A: Nobody's ever crossed for creek access to my

knowledge.

Q: You've never seen anybody down there ...

A: No.

Q: ... enjoying a walk, somebody on a walk?

A: If people wanted to walk, that was fine with me. I didn't have a problem with people walking around.

Q: What about using the creek, accessing the creek?

A: That's never been done.

Q: Is there a dock on lot four?

A: Yes.

Q: How long has it been there?

A: I think '93. It was one of the first things we built on the property.

Q: Do you know anything about Mr. Read or his son's interest in building a dock off of lot three?

A: Yes.

Q: What do you know about that?

A: Mayo Jr. called and asked if he could build a dock across the marsh ...

Q: Show the judge.

A: I'm sorry. This is all marsh out here and it ... the creek is out here and goes around and

then does this. He wants to build ...

THE COURT: When you say the creek, are you speaking of the Leadenwah?

A: The Lead ... yes, sir. He wanted to build a dock across here across the marsh which would have ... I don't know how many feet it would have been, maybe less than 1,000, but I'm not sure. And what his question was to me was could he cross I guess that imaginary line that goes out to the creek in this direction.

Q: That would be the line ...

THE COURT: The imaginary line between your lots

A: Yes. Yes, sir, his lot and this lot, and it goes straight out all the way to the Leadenwah Creek. I wasn't in favor of that because it would have just ruined the view across that pristine marsh. And when ...

Q: Did you tell him that?

A: I did. And when I said that he said, well, what if we build off of this portion here and I said I'm not in favor of either one.

Q: When you say this portion, you mean that area that's shown as a drainage easement?

A: Yeah, the drainage easement.

Q: What was your response when he asked you about

doing that?

A: I just told him I wasn't in favor of either one.

THE COURT: Just a second.

A: Yes, sir.

THE COURT: Lot three I think shows a drainage easement also. You're referring ..

A: Right here.

THE COURT: Yes.

A: Yes.

THE COURT: You just pointed to what's been shown on the plat as a drainage easement and creek access is where he was proposing to build; isn't that right?

A: Yeah, he had .. he had apparently two choices that he told, that he gave me. He said he could build out this long distance but he would have to cross, according to his communication with the OCRM, he would have to cross this imaginary line.

THE COURT: Yes, sir. Forgive me. I misunderstood you. The reason for my question you were pointing and I just wanted to identify for the record what you were pointing at.

A: To that easement, that drainage.

0204

THE COURT: It's the portion of lot four that is shown as drainage easement and creek access.

A: Right.

THE COURT: Okay. Thank you.

Q: When the Reads asked you for permission to do that, what did you tell him?

A: I told him I wasn't interested in either one in terms of my wanting a dock across the marsh or on my property.

Q: How long after that did you receive notice of the application to build a dock on your property?

A: How long after that?

Q: Yes, sir, after they asked you about doing it.

A: I just got a letter in the mailbox that indicated that the application had been applied for. I don't know how long it was, I mean, it's several months I think.

Q: Okay. And there's no question you didn't give them permission to do that, did you?

A: No.

Q: Let's talk about your view of how the value of your property might be affected if this dock is constructed. First, if you would, orient the judge as to where your house is and where the

proposed dock would be.

A: The house is approximately right in this area.

THE COURT: Let the record show that the witness is pointing to the, what I presume to be sort of the northeasterly quadrant of lot four on the plat which has been marked, what exhibit is it?

MR. SEIBELS: DHEC's Exhibit One ... yeah, sorry, it's Read's Exhibit One.

THE COURT: It's Read Exhibit One. Thank you, sir. Proceed.

Q: Now, you've shown us where the house is. What else do you know about where the proposed dock would be?

A: Right here off of ... I assume it was in the middle of that 50-foot easement area.

Q: As shown on the plat?

A: Right.

Q: If it's true that it would be right in the center of that 50-foot wide drawing, have you looked at how far that would be or tried to measure how far that would be from your house?

A: Well, the line is probably 15 feet from the edge or the corner of the house, and that's just the line.

Q: So your house might be 65 feet from your

property border?

A: Could be about approximately that, yeah.

Q: Okay. Have you tried to pace out or measure from there to where the dock would begin or where the dock would join your land?

A: I have not. The only thing I did was stake a stake here from the line from the 50 foot ... excuse me, from the cornerstone of our lot, which is right there. And I went out 50 feet and stuck a stake in the ground.

Q: Where is your dock?

A: It's down here on the southeast corner.

THE COURT: Before we get too far along, Mr. Seibels, get the marked exhibit itself and have him mark that on it so that a reviewing court will have something to look at without any mistake about what he's talking about.

Q: You understand what he's asking you to do?

A: Yes.

THE COURT: If you will, please, sir, draw a circle and put an X in it for the approximate location of your dwelling.

A: Okay.

MR. SEIBELS: Your Honor, if I may, while he's doing that may I take two minutes outside the

courtroom.

THE COURT: Yes.

A: Excuse me. Shall I do the same for the dock, notify where the dock is?

THE COURT: Yes, designate it by a rectangle and maybe write dock in it.

A: Okay.

Q: Okay. To be clear, we've got an X for your home and a rectangle and the word dock for your dock?

A: Yes.

MR. SEIBELS: And, Your Honor, should we indicate where the proposed construction will be or that may be reflected elsewhere?

THE COURT: Well, if he knows precisely where ... you got any objection to that?

MS. RILEY: I'm sorry, what was the question?

MR. SEIBELS: We're getting a head shake over here.

A: I don't know precisely where the dock ... I didn't read the permit.

THE COURT: Proceed.

MR. SEIBELS: Your Honor, would you like the witness to indicate where the proposed dock would be on his property?

THE COURT: Where Mr. Read's proposed dock, if he

knows, where he believes it to be.

MR. SEIBELS: I think he could mark where ... his testimony I think was it'd be in the center of where the easement is drawn on the exhibit.

THE COURT: All right. If you will mark that, please, sir.

A: It's purely a guess on my part. I did not see the permitting application.

THE COURT: Okay.

Q: Maybe put an R there for Read.

THE COURT: And it's with the understanding it's the witness' approximation of where he thinks it would be.

MR. SEIBELS: Yes, sir.

Q: Mr. Grimball, why do you oppose Mr. Read's proposed dock?

A: Primarily because of the intrusion that it would have certainly now and I think over time. My worst nightmare is that the subdivision of these lots could happen and you would have not only one, two, three, you could have multiple families that would be using that one dock. That would be a big concern.

Q: Now, how do we know that that's even feasible, if you know?

A: I don't know that that's feasible. I only know that these lots could be subdivided under what's called the Wadamalaw Plan, we don't fall under that plan so they could be subdivided into smaller lots. There was one that took place up the creek that was subdivided from three acres to an acre and a half. These lots are four and a half acres each so you can see the possibility exists for this to happen.

Q: Go from three to nine, I suppose?

A: Yeah. I mean, that to me is the worst case scenario. You know, obviously when things were hunky-dory and there was no problem, there was no dock permit, never gave it any thought.

Q: And it had been your understanding since 1992 that there was no creek access easement across your property?

A: I had no idea of what the definition of that ... whatever there was on thing meant. I had no definition.

Q: How did you know that you could put a chain up to prevent people from using it?

A: How did I know?

Q: Yes, sir. What was your ... did you talk to a lawyer? Did you have any facts about putting

a chain up to prohibit ...

A: Our attorney advised that we put a chain up when we closed it.

Q: Do you have any feelings about how that dock would be used in terms of noise, traffic, traipsing coolers, boats, that sort of thing, people, kids, dogs?

A: Only because we use our dock the same way, yes.

Q: And how do you feel about that on your property?

A: Well, I think it would devalue the property.

MR. SEIBELS: We don't have anything else for this witness, Your Honor.

THE COURT: Thank you. Ms. Riley.

MR. GRIMBALL - CROSS EXAMINATION BY MS. RILEY:

Q: Mr. Grimball, I'm Leslie Riley. I represent the Department. I just have a few questions. What do you do for a living?

A: I co-own a flooring company in Charleston.

Q: You testified that you were aware of the easement or the existence of the easement on the plat when you bought the property, correct?

A: I was aware of the existence of the plat that had that on it.

Q: Okay.

0211

A: I'm not aware that it means anything. I'm not a ...
Q: Right, I don't dispute that's what you said. And you discussed it with your attorney and y'all concluded that you didn't know what the easement meant; is that what you testified to?
A: Correct.
Q: Okay. And you know that that's creek access for lots one, two and three?
A: I know that's what's on the ...
Q: That's what it says?
A: ... on the plat.
Q: Right. Okay. Did you take any legal action to contest the easement on the plat or otherwise kind of confirm that there was no easement?
A: No.
Q: But you just put up a chain and just assumed it wasn't a valid easement?
A: Correct, yes.
Q: Now, you have testified that you believe this dock will devalue your property; is that correct?
A: Yes.
Q: Have you consulted with any real estate agents or had any appraisals done?

0212

A: Yes.
Q: Do you have those appraisals with you?
A: I don't.
Q: But you had an appraisal done?
A: Yes.
Q: And what was the result of that?
A: I don't know the numbers. I know that it had some number increasing the value of lots one and two, or excuse me, three and ... two and three and decreasing the value of our lot.
Q: But you don't know by how much or any ... you don't remember the numbers?
A: I don't remember the numbers.
MS. RILEY: That's all I've got.
THE COURT: Mr. Tapp.
MR. TAPP: Very briefly.
MR. GRIMBALL - CROSS EXAMINATION BY MR. TAPP:
Q: Mr. Grimball, before you became an entrepreneur, were you a banker?
A: Yes.
Q: Is it fair to say people pay you for your business skills?
A: Yes.
Q: So you're probably more sophisticated than many people who have come in this courtroom, right?

A: I can't answer that.

MR. TAPP: May I approach the witness, Your Honor?

THE COURT: Yes.

Q: Mr. Grimball, I'm going to hand you a document that's been marked as Read Exhibit Number Three. It's a deed from Robert McFarland to Too Tacky. I'll ask you to take a look at that. Mr. Grimball, you're welcome to read it all but really I want to draw your attention to the first typed in paragraph.

A: Okay.

Q: There's language in there about the third or fourth line from the bottom which refers to the plat which is Read's Exhibit Number One and it goes on to say and I'll quote, "Which plat is incorporated herein by reference." Do you see that language?

A: In the first paragraph?

Q: First typed in paragraph, yes, sir. If you'd look up I'll point to where ...

A: Okay. As, let's see ... dimensions, said lot containing; is that where you are?

Q: Said lot, that's the right ... that's correct. Do you see the language I quoted? "Which plat is incorporated herein by reference."

A: Yes.
Q: See that?
A: Uh-huh (affirmative response).
Q: Did I read it correctly?
A: Yes.
Q: And is it your understanding that that plat is actually what is Read's Exhibit One?
A: This is Exhibit One? This?
Q: Yes, sir.
A: Yes.
Q: And Alma Wagner is who, do you know?
A: Alma Wagner?
Q: Yes.
A: Was one of the owners of the properties.
Q: One of your predecessors in title to your lot number four?
A: No, we bought our lot from somebody named McFarland.
Q: Yes, sir, prior to McFarland. It's not important. I'll withdraw the question.
A: Okay.
Q: Now, when you looked at Read's Exhibit Number One and saw the plat and saw the language "creek access for lots one, two and three", and please take a look at Read's Exhibit Number

One, please.
A: Uh-huh (affirmative response).
Q: The plat. And I understand that you assert that you don't understand what that meant, but is it your position that it has no meaning whatsoever; it's mere surplusage?
A: I had no idea who put it on there and that was the reason why I didn't know what it meant.
Q: Okay. And if we assume that Ms. Wagner put it on here ...
A: Uh-huh (affirmative response).
Q: ... when she signed it in the upper left-hand corner, would that change your interpretation of that language?
A: I'm not in a position to interpret it.
Q: So as you sit here today, is it your interpretation that the language "creek access to lots one, two and three" has no meaning whatsoever?
A: Has no meaning in what sense? I don't know what the definition of creek access means.
Q: How do you interpret that language?
A: Just as I said, it's a drainage easement on which someone put down below creek access, someone penciled that in below the creek

access.

Q: Creek access for lots one, two and three, correct?

A: Uh-huh (affirmative response).

Q: And your position is that does not create any rights for the owners of lots one, two and three?

A: Define the right. I mean, I have no idea what that means.

Q: Let's start with any rights and then we'll get to some rights.

A: Okay. Walking down the easement if I agreed that there was an easement.

Q: Okay. Well, that's what I'm trying to get to. What is your interpretation of what this language means?

A: My interpretation is that someone could come down to the creek.

Q: So they could walk down to the creek?

A: Uh-huh (affirmative response).

Q: When they got to the creek, what could they do?

A: Whatever they wanted.

Q: Okay. Now, you built a dock on lot four at another location; is that correct?

A: Yes.

0217

Q: So I take it that you think and would agree that a dock is kind of an important thing to have?

A: We like it.

Q: Yes, sir. And you can understand why other people like docks, too, can you not?

A: Right.

Q: Did you ever at any time sit down with the owners of lots one, two or three and tell them, folks, I don't care what Read's Exhibit Number One says, I'm here to tell you that you don't have any rights on this easement?

A: No.

Q: Did you ever communicate that in any form or fashion?

A: No.

MR. TAPP: No further questions at this time, Your Honor.

THE COURT: Redirect?

MR. GRIMBALL - REDIRECT EXAMINATION BY MR. SEIBELS:

Q: What were you communicating by putting the chain up across the area shown as a creek access drainage easement?

A: It was just to prevent anybody from going across into the property.

Q: One more, he was asked by Ms. Riley about the appraisal and his response was he didn't remember what the numbers were. If I showed you the appraisal, would that refresh your recollection?

A: Yes.

MR. TAPP: Your Honor, we'd still object to it being hearsay.

MS. RILEY: Same objection.

MR. SEIBELS: I thought that she was the one who asked him what the numbers were. I hadn't moved this in yet so let's just wait and see.

Q: Have a look at it and see if it refreshes your recollection.

A: Yes, I mean it tells me what was in the appraisal.

Q: Could you testify from your recollection now as to what the values were Ms. Riley asked you?

MR. TAPP: Object to the form of the question, Your Honor. I think it calls for him to merely recite hearsay and he is not qualified as an appraiser to insert that number into the record.

MR. SEIBELS: All I asked him is to testify from his recollection and to answer the question he said

he couldn't answer when she asked him.

THE COURT: I'm going to sustain the objection.

MR. SEIBELS: Well, can we put it into the record anyhow?

MS. RILEY: Your Honor, I object to the ... you're talking about his testimony?

MR. SEIBELS: Yes.

MS. RILEY: Okay, that's fine.

MR. SEIBELS: I've never offered the document. She asked him, he said he didn't remember. I said if I showed it to you would you be able to remember. He said yes. Then he says now I remember and then they objected saying he really doesn't remember he's just going to read it.

THE COURT: Well, my ruling would be that you can't do by indirection what you can't do directly. So ...

MR. SEIBELS: And for the record, all I'm saying is that I've refreshed his recollection and I'd ask that he be allowed to testify from his recollection. And we'll proffer it now and your ruling is your ruling.

THE COURT: Yes, sir.

Q: Testify if you would from your recollection

what the appraisal result was.

A: The devaluation would be approximately $150,000.

Q: And earlier you were asked if you had the appraisal, you said no. Who had the appraisal?

A: My attorney.

MR. SEIBELS: I don't have anything else for this witness, Your Honor.

THE COURT: Anything further?

MS. RILEY: No.

MR. TAPP: No, Your Honor.

MR. SEIBELS: Your Honor, we rest at this time.

THE COURT: Thank you. It is about 15 minutes after 1:00. How long would y'all like to break for lunch? How much ...

MS. RILEY: Your Honor, I'm hesitating because if we could just take like five minutes I may not have to call anybody. I don't know ... Rick, do you have any?

MR. TAPP: Actually, Your Honor, ...

MS. RILEY: But can I have five to ten?

THE COURT: Take five minutes. I'm going to take five minutes. I'm going to stay right here, but just be at ease.

(Off the Record)

0221

MS. RILEY: Your Honor, I need some clarification. I'm not sure whether I can talk to these witnesses or not. Are they still, you know, obviously I wouldn't be able to talk to them if they were on the stand testifying right now. Should I ...

THE COURT: I don't think you can go out there and advise them to correct something. What do you say about it, Mr. Seibels?

MR. SEIBELS: Well, my position is that they cannot be questioned about their prior testimony and to be on the safe side, I don't think they should talk about any of it.

MS. RILEY: That's fine. I won't talk to them. I just didn't want to do anything ...

MR. TAPP: Can I talk to him? I think he's been released actually.

MR. SEIBELS: If you're not going to call him.

MR. TAPP: We'll start with that. If I call him, I'll come back and ...

(Off the record)

THE COURT: What I'm going to ask you to do, please, I realize we've got two folks over here and only one here, to submit briefs in the form of proposed orders, but in so doing, I want you to

observe this request, that much of this hearing has turned around Regulation 30-2 and Code Section subsection 48-39-150. I want you to address and I think the Latin term is seriatim that is in order of starting with the code section and to the extent that you've touched on each one of those items in there, do them in order and the same with 30-2. Do you understand what I'm saying?

MR. SEIBELS: Yes, sir.

THE COURT: So when I read them I can compare them easily and I won't have to fish through them, okay? Any questions of me? I've just got a comment or two. This is a tough case. I mean, the real estate aspect of it that I'm not involved in, I presume has something been filed in respect to that? Is that pending in Common Pleas?

MR. SEIBELS: Not yet.

THE COURT: Well, at this point I don't see it as a slam dunk on either side, but I have particular concerns about 30-2(4) of the certified copy of the deed, lease or other instrument. And without reading too much into what I say, I think that the principle of ejusdem generis may

be applicable there and so I want you to address that.

MS. RILEY: Your Honor, I'm going to have to ask you what that means.

THE COURT: That means that when you say one thing of a particular sort or class or ... the things that follow it are the same. Is that a fair definition? Other lawyers are here. You understood what I was talking about?

MR. SEIBELS: No, sir, I am ignorant ...

MR. TAPP: Me, too.

MS. RILEY: So I'm not the only one.

THE COURT: Well, it's a rule of statutory construction. Mr. Simmons you're familiar with it?

MR. SIMMONS: I think so. I'm old enough to understand what you're saying. I grew up when they spoke Latin.

THE COURT: I'd like to give everybody something but I'm not going to be able to. How long do you want to file your brief?

MR. SEIBELS: Your Honor, my answer would be determined on when I can get the copy of the transcript.

COURT REPORTER: And I can get the transcript to them

no later than Wednesday, April 26, which will be two weeks from today.

THE COURT: You'd need at least 30 days after that I'd think. Is that enough after that?

MR. SEIBELS: That's plenty, Your Honor.

MR. TAPP: That's plenty. May 26 or whatever business day is closest to that?

THE COURT: With that, I will thank you for your courtesy to me and each other and I wish you all well.

(There being no further questions, the deposition concluded at 1:30 p.m.)

CERTIFICATE

This is to certify that the within hearing consisting of One Hundred Fifty-Five (155) pages, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on May 10, 2006.

C Cortright

Christine A. Cortright
Court Reporter

Notary Public for South Carolina
My Commission Expires: August 27, 2006

CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	CASE NO.: 2007-CP-10-01520
TOO TACKY PARTNERSHIP,	)	
	)	
PETITIONER,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL AND MAYO READ, JR.,	)	
	)	
RESPONDENTS.	)	
	)	

October 31, 2007

Charleston, South Carolina

B E F O R E:

THE HONORABLE ROGER M. YOUNG, JUDGE.

A P P E A R A N C E S:

JOHN PAGE SEIBELS, JR., ESQ.
Attorney for the Petitioner

RICHARD L. TAPP, JR., ESQ.
Attorney for the Respondent, Mayo Read, Jr.

VAN WHITEHEAD, ESQ.
Attorney for the Respondent, SCDHEC

RONDA T. CUMMINGS
Official Court Reporter
P.O. Box 2082
Walterboro, SC 29488

RECEIVED 3/26/08

INDEX

Judicial Review Hearing 3

Certificate of Reporter 31

EXHIBITS

None.

CLERK: Too Tacky Partnership versus South Carolina Department of Health and Environmental Control.

THE COURT: All right, this is Too Tacky Partnership versus South Carolina Department of Health and Environmental Control, 2007-CP-10-1520. This is a motion -- or this is an appeal review.

So, let's go -- whose motion is this?

MR. SEIBELS: Too Tacky, Your Honor, the Petitioner.

THE COURT: All right. Okay.

All right, let's see. And this is your -- I got a Brief from you this morning; is that right?

MR. SEIBELS: Yes, Your Honor.

THE COURT: Yes.

Okay. I haven't gotten anything from the State?

MR. WHITEHEAD: No, sir, Your Honor.

THE COURT: Okay.

MR. WHITEHEAD: I had written previously in response to a request from Too Tacky and indicated that the Department is comfortable moving forward with the record and the Briefs that were laid out in the record itself.

THE COURT: Well, I don't have a record itself. I have -- I have a Petition for Judicial Review, an Answer, and a -- an Answer by DHEC, and an Answer by -- or Response by Mayo Read. That's what my file consists of at this point.

MR. WHITEHEAD: Your Honor, back in May, the Department mailed in a copy of the record to the Clerk of Court.

THE COURT: I have a very thin file at this point.

CLERK: I'll check downstairs.

MR. TAPP: It is thicker than that, Your Honor. You do not have it.

THE COURT: All right. Well, we'll go ahead and start.

MR. TAPP: Your Honor, if I might, Rick Tapp on behalf of Respondent, Mayo Read. I do have a Brief, if I might approach the bench?

THE COURT: All right.

MR. TAPP: We had not received Appellant's Brief until around 5:00 o'clock yesterday, and this is the first chance we've had to respond.

MR. SEIBELS: And, Your Honor, I would like the record to reflect that Petitioner, Too Tacky, my client, and I'm Jay Seibels, um requested a briefing schedule for this hearing.

THE COURT: Right.

MR. SEIBELS: And to put the hearing off for about four or five weeks, um at the most actually I think the first week in December was the next time. We were agreeable to that, and so we proposed a briefing schedule,

and um Mr. Read objected to it and said they were ready to go today, and um -- Mr. Whitehead, for the State, said he -- he didn't need to prepare any additional Briefs, and that's fine, too.

Um I knew I needed to prepare a Brief, and I knew in doing so, it was going to give everyone some pretty short notice in terms of being able to respond to it. Um I haven't, obviously, read their Brief, and they haven't had a lot of time to read mine, although um ---

THE COURT: Well, we'll just go ahead and hear some arguments today, and I'll see if I need to have additional briefing.

MR. WHITEHEAD: Your Honor, if I may, um Mr. Tapp has the copy that was distributed at the time the Department mailed the record into the Clerk of Court.

THE COURT: Okay.

MR. WHITEHEAD: And he's consented to my handing this up.

MR. TAPP: That's fine. I think you'll -- you'll need it at some point.

THE COURT: Okay. Thank you.

All right. Go ahead.

MR. SEIBELS: Thank you, Your Honor. Again, my name is Jay Seibels. My client is Too Tacky Partnership, which owns a piece of land on Wadmalaw Island where Respondent,

Mayo Read, has petitioned, or I beg your pardon, applied to build a dock.

In 2005, Mayo Read did apply to OCRM for a Critical Area Permit to construct a community dock. And the important thing for you to know is that that dock would begin on my client's property.

He was successful in obtaining a Critical Area Permit from OCRM to construct a dock on the Leadenwah Creek that begins at my client, Too Tacky's, property line. My client has a house on the property. It's not their primary residence. Too Tacky Partnership is a partnership of husband and wife, and the property is titled in the name of the partnership, instead of them individually.

Um OCRM granted Mr. Read a permit to build a dock on my client's property, over my client's objection and -- and public comment. Um the -- my client, Too Tacky, then sought a review of that decision before the ALJ in Columbia, and we did have a hearing on that. And the ALJ did affirm OCRM's decision to grant Mr. Read a permit to build a dock on my client's property.

Um we then, as per statutory procedure, sought a review of that with the Coastal Zone Management Appellate Panel, who adopted the ALJ's findings of fact and law as their own. And then pursuant to statutory appellate rights, we now petition to have you review that decision.

And what -- and an interesting problem, which I think we can overcome, is your standard of review. Um there's a conflict on what your standard of review is.

There's a statute um 48 -- I beg your pardon. There's two cases that govern standard of review and two statutes. 48-39-180 says you have a *de novo* review. And there's a South Carolina Supreme Court case that acknowledges that, and that's in the "Standard of Review" section of my Brief.

There is another South Carolina Supreme Court case that says your standard of review is the substantial evidence rule, or error of law. You um would be entitled to reverse the decision of the ALJ, um if his findings lack substantial evidence, or if his findings were controlled by an error of law.

So, um we're not going to be able to resolve that conflict of your standard of review today. That's for another court to decide, most probably.

I'm going to present an argument to you that um addresses my more difficult burden, which would be the substantial evidence rule and um an error of law. Now, I point out error of law, um if you would find -- you don't really have to concern yourself with the standard of review so much, if you find that the ALJ's decision was controlled by an error of law, that's frankly just as good

as a *de novo* review. So I'm going to highlight some of the errors of law made by the ALJ.

And the reason I keep saying the ALJ is because the Coastal Zone Management Appellate Panel adopted his Order as their own. So what we're really looking at is what he said. There were no new findings made and no new issues decided at the Coastal Zone Management Appellate Panel level.

Um for purposes of getting you oriented as to what um was -- was permitted, I want to refer to a plat, which I think is Read's Exhibit One in the ALJ trial, which shows properties that are relevant here.

May I approach you, Your Honor, and point to a few things?

THE COURT: Uh-huh.

MR. TAPP: May I approach, Your Honor?

THE COURT: Sure.

MR. SEIBELS: What I have is an oversized um copy of the plat. The plat is in the record.

Let me give you the page number. Page Three Hundred and Nineteen in the record.

What the plat shows are four different lots, um and they are numbered One, Two, Three, and Four. Lot Four is my client's property, and you'll see it borders the Leadenwah River.

Um Lot -- I may be -- I may be mistaken, but the Applicant, Mayo Read, no longer owns any of the property that he at the time sought a permit for. And but I think at the time he applied, he owned Lot Three.

Um he applied for a dock, according to his application, to extend from Too Tacky's property, Lot Four, here. And you see a dotted line.

This is north, um on the northern boundary of Too Tacky's property. It's near the northern boundary. It's fifty feet south of the northern boundary. There's a dotted line.

And written on this plat from 1986 it says: Fifty foot drainage easement and-ampersand-and creek access for Lots One, Two, and Three.

Now, relying on this plat, evidently, Mr. Read sought an application, sought a permit, from OCRM to exercise a right of creek access that he thinks he has um to construct a dock within this fifty foot area highlighted on this old -- on this '86 plat um and asserted at the OCRM level first, that he actually owned this land. And then he was forced to correct that, and his lawyer wrote a letter and said: I actually don't own it. I just have an easement.

Um we contested that at the OCRM level as well, whether he had an easement or not. I'll get to that in a

second. He doesn't have an easement.

Um but OCRM went ahead and issued him a permit to build a dock. He hasn't built it yet, because it's um -- there's issues to be decided about property rights.

Those aren't necessarily before you, but what is before you, and um I can withdraw now, what is before you is whether Read met what his burden was at the OCRM level in order to get a permit in the first place. Um I think we all agree on what that burden is, um that an applicant for a Critical Area Permit must demonstrate, must at least state, a prima facia basis of ownership or control of the land upon which the requested permitted activity will be undertaken.

THE COURT: Uh-huh.

MR. SEIBELS: And when I say ownership and control, that's statutory, as found in 48-39-140. Um he has to demonstrate a claim of title, possession, or permission.

And, of course, that makes a lot of sense. We don't need to belabor that. I wouldn't um -- I shouldn't be allowed to build a dock on your property, unless I have your permission.

THE COURT: Uh-huh.

MR. SEIBELS: Um or unless I have some property right. And to -- the question then is at the OCRM level: What must Mayo Read have done to demonstrate his um right

to construct a dock on my client's property?

And the Code and the Reg's say that a Critical Area Permit Application must contain an instrument of ownership, possession, or control, and it gives some choices: A deed, a lease, and this is again in the Code, um -- um that the application needs to contain an instrument that demonstrates the control, the ownership, the permission, or the control.

Now, what did Mr. Read submit? He submitted an Affidavit of Ownership, which is a form, an OCRM form.

On the Affidavit of Ownership you can check a couple of different things. He can check that he owned the land. He can check that he had an easement to the land, or he can check that he had a lease or something else. He checked that he owned the land.

Um when Too Tacky found out about this through the public notice requirement, Too Tacky contacted OCRM, wrote a letter to OCRM, the letter is in the record, saying: Mr. Read does not own the land. We own the land, moreover, he doesn't have our permission to construct anything extending from our land.

Um the -- given these competing pieces of evidence in their file, what we had is an Affidavit of Ownership, which it was demonstrated Read doesn't actually own the land.

THE COURT: He doesn't own the land, and it's contested as to whether or not he has an easement.

MR. SEIBELS: That's right.

THE COURT: Okay.

MR. SEIBELS: OCRM went ahead and issued a permit anyway. And so at the ALJ level, it was contested that OCRM did not have a complete file or enough information to issue a permit. What it had was competing information, um and the competing information was a false affidavit versus Too Tacky's assertion with a deed that says: We own this land.

Um this plat was never submitted by Mr. Read at the application level, although OCRM did see it. They testified that during the permit process, at some point, they saw the plat. It wasn't in their file. It's not in their file, and they acknowledge that this plat is not a part of their file, but they do say: We saw it. We knew about it.

Um then the question becomes: Well, what instrument did you rely upon to issue the permit?

And their answer was: The Owner's Affidavit.

We submit to you, Your Honor, that an Owner's Affidavit, particularly a false one, is not an instrument that demonstrates ownership, possession, or control. They didn't put forward, Mr. Read did not put forward, anything

else to OCRM, except an affidavit that was shown to be false.

Now where the ALJ made its error is he analyzed in his Order the plat, and there was a substantial amount of analysis in his Order about whether the plat is an instrument that might demonstrate ownership or control. Well, the reason why that's an error is the plat was not part of the OCRM file, and OCRM testified on Page One Hundred and Forty of the record that the instrument they relied on was the affidavit. This is what -- this is critical to the ALJ hearing.

ALJ, in his Order, says: Let's analyze the plat as an instrument.

Well, why would he analyze the plat as an instrument when the trial record says that the affidavit was the instrument relied upon by OCRM in issuing the permit?

So the error of law is he looked at the wrong thing, and he focused on something that wasn't in the file. He focused on the plat, which was not in the file, which the um -- which OCRM said it was not the instrument they relied on.

So his whole analysis on the meaning of the plat, the significance of the plat, is misplaced, because OCRM didn't say, "We relied on the plat." If they had said, "We relied on the plat as the instrument upon which Mr.

Read demonstrated permission," then the ALJ would be able to perform the analysis that he performed, but that's not in the record. He misplaced -- it's both an error of fact and law.

And the fact -- and there's -- and this is even under the substantial evidence rule, he's got to find something in the record that says the -- where OCRM said, "The plat is what we relied on as the instrument." But OCRM said the opposite.

There's questions, and this is on Page One Hundred and Forty in the trial record, "Question," and this is before -- the questioner, Mr. Mollett is an OCRM staff member who made the permitting decision, "So let's just identify the instrument, and we can move on."

"Answer: In looking at the file, then this would be the instrument."

"Question: And this being Page Six?"

"Answer: Yes, sir."

"The Owner's Affidavit?"

"Answer: The Affidavit of Ownership."

And then another question, and this is still on Page One Hundred and Forty where the questioner, which was me, Your Honor, recited the statutory requirement for instrument, and then the question became, "We've got the affidavit and nothing else; is that correct?"

"Answer: That's correct."

So why, Your Honor, would the ALJ spend pages of his Order analyzing the plat as an instrument when the record reflects the affidavit was the instrument? So it needs to be -- so that ALJ, on that basis alone, needs to be reversed.

THE COURT: Okay.

MR. SEIBELS: The -- I want to talk about the plat, because to the extent you might decide that the plat is -- is important, I want you to understand what the plat really means. Um ---

THE COURT: Well, the plat showed a drainage easement.

MR. SEIBELS: Yes, sir.

THE COURT: Is what I saw.

MR. SEIBELS: Yes, sir. There, the argument is that this plat alone is sufficient evidence to um establish an easement in favor of the owners of Lots One, Two, and Three, a creek access easement.

THE COURT: Uh-huh.

MR. SEIBELS: Um we submit to you a couple of different things on that issue. First, there's a warning on the plat that says it is not to be relied upon. "Approval of this plat by the Planning Board does not indicate approval," or this is important, "adjudicate

title of the access or right-of-way shown hereon."

It's this plat, by its own stamp, says do not look at this plat for an indication of title of the access of the right-of-way. It just shows it, but it says on its face: Don't rely on this to find out who owns it.

THE COURT: Uh-huh.

MR. SEIBELS: So any reliance on this to say that there is an easement and that it is in favor of One, Two, and Three, is wholly mistaken. And you can just look at the four corners of this instrument that says: Don't look at this to know whether there's an easement.

So how do you figure out -- how do you figure out if there's an easement? You've got to look at the deeds.

THE COURT: Uh-huh.

MR. SEIBELS: Were the deeds before OCRM in the permit application? No. There's no dispute about that.

So the best way, I submit to you legally, Your Honor, is to determine whether an easement exists is to just look at the deeds. And what we have -- and the deeds are part of the record on appeal, because we had to demonstrate that the deeds do not mention any easements.

And what we're looking at is a -- a um easement where there would be a dominant estate and a servient estate, Your Honor. Um we're not looking at roads, for example. We're looking at an easement where my client's property

would be the servient estate, if there were an easement, and Lots One, Two, and Three would be the dominant estates, if there were an easement.

And in order, we know, in order to create that sort of easement, a restriction must be written into the servient estate's deed that says: You get all of this property shown on such-and-such a plat, subject to the easement shown thereon in favor of, fill in the blank, the dominant parcels.

The same is true for Lots One, Two, and Three. The deeds into the owners of Lots One, Two, and Three must say: You get, for Lot One, all that land shown on the plat recorded wherever, plus the access easement also shown on Lot One, plat whatever, for creek access.

Do the deeds for One, Two, and Three say that? No, they do not.

Does the deed into Lot Four, my client's property, say it is servient to One, Two, and Three? No.

And that's in the record. It was presented to the ALJ, and it's presented to you that if there were ever an easement, the deeds into the current owners don't reflect it anymore.

I've got another point of law, Your Honor, about the plat, and this is an error of law, again, that we can see in the ALJ's Order. The error is in -- you can find it in

um I think it's Paragraph Two.

It's findings of fact, I'll find it for you in a second, where he found that um Alma, the owner of Lots One, Two, Three, and Four, in 1986 when the plat was prepared is Alma Wagner. And, Your Honor, it's black letter law, this is a finding of fact that the owners of Lots One, Two, Three, and Four when the plat was filed was Alma Wagner, it's black letter law that one cannot grant an easement to oneself, and that if ever the dominant and servient estates are merged, the easement is extinguished.

And so if he -- to the extent he made a finding of fact, and there's no other basis to find otherwise anyway, was that Alma Jenkins(*sic.*) owned all four of these lots. If that's true, and that's a matter of fact in the record, if that's true, the easement was extinguished at that -- at that time.

Um there can be no -- it's black, as I say, it's black letter law that an easement gets extinguished when the dominant and servient estates are merged. Um ---

THE COURT: Okay, Mr. Seibels, I'm going to -- I have to um speak at a CLE in Columbia at 2:00.

MR. SEIBELS: Okay.

THE COURT: All right, so I'm going to need you to wind up within the next couple minutes so that I can give them an opportunity to go, because I'm going to have to

hit the road here pretty quick.

MR. SEIBELS: And I -- I understand that, and let me just say for record purposes that if I don't ---

THE COURT: I've got your Brief, ---

MR. SEIBELS: Yes, sir.

THE COURT: --- and I -- I am going to not make a decision today, because I fully intend to read it and the record before I make a decision.

MR. SEIBELS: Very good. The -- a final aspect then on the error of law, which as I say makes us not have to worry about the standard of review so much, ---

THE COURT: Uh-huh.

MR. SEIBELS: --- an error of law is an error of law, um is that there has never been an analysis of, again, I'm saying assuming that there is some easement, which I don't think there's even a good basis to believe that, but let's believe it for a second, if you're evaluating an easement, you've got to know -- you have -- it has to be one of two things. It needs to be -- it's either an easement in gross, or it's an appurtenant easement. And the law tells us, and this is in the Brief, that if an easement lacks every element of an appurtenant easement, then it is an in gross easement.

THE COURT: Uh-huh.

MR. SEIBELS: It's one or the other. It's only an

appurtenant easement if it meets every single element of an appurtenant easement, and one element of an appurtenant easement is that it terminates um at the dominant estate, meaning it's attached. It begins or ends, depending on where you start, at the dominant estate. That's one element of an appurtenant easement.

We know from the plat that this easement, if there ever was one, does not attach, does not join Lots One, Two, and Three. It joins a road. This is a dead -- this road dead ends at my client's property. This strip, the fifty foot wide strip, the only land it touches is a roadway, and it's part of my client's property. It is not attached to what they contend is the dominant estate. It's not.

If it is not, it cannot be an appurtenant easement. It must be an easement in gross. Why is that important? Easements in gross cannot be conveyed. They're -- they're privileges. They are privileges unique to a particular party.

Um we -- the record reflects that these lots have been transferred two or three times since the plat was filed. Um and the -- and so the only -- what we could try to decide is that this '86 plat might have indicated an easement existed in '86 in favor of Lots One, Two, and Three, but the moment Lot One was sold, if it had a -- a

right all the way over here, the moment Lot One was sold, that right was lost, because it's an easement in gross and not appurtenant.

So if there were an easement, and there's not, but if there were, it was lost on the very first conveyance by Alma Wagner out. And it's in the record that Lots One, Two, and Three have been sold several times since Alma owned it, since 1986.

Um and the same is true for Lots Two and Three. They -- if there were a creek access right, it could only be a right by privilege, an easement in gross. And if it were, it was extinguished long before 2005 when Mr. Read applied.

These are matters of law. These aren't matters of fact.

It's not the kind of thing that an OCRM witness is going to be testifying to at trial, but it's the kind of thing that OCRM is charged with knowing. They have a lawyer, and they testified at their um trial that they consulted with their legal department before offering -- before issuing the permit.

They've got every right -- and they were asked at trial, "Do you know what an easement in gross is?"

"No."

"Have you ever heard of an easement appurtenant?"

"No."

And I didn't expect a different answer, but the next question is, "Did you have an opportunity to consult with counsel? Do you consult with counsel? Did you consult with counsel in this particular matter?"

"Yes."

So these -- these matters of um -- of what is OCRM's duty in terms of looking at an application is, they are still going to be charged with knowledge of what is properly in existence versus what is merely claimed to be in existence by an applicant.

And the applicant claimed a certain thing, but we know as a matter of law that what he claimed can't be true. We also know his affidavit was false.

But even -- let's say he claims an easement in his affidavit, instead of just ownership. If he claimed an easement, if he backed up, if we did a do-over and he submitted an affidavit and said, "All right, I've got an easement," um we would know, as a matter of law, that that is not so. And we know it by all we have to do is look at this plat and look at the deeds.

That's all you have to do. It's a question of law, not a question of fact.

THE COURT: Okay.

MR. SEIBELS: Thank you, Your Honor.

THE COURT: All right.

MR. TAPP: Your Honor, may it please the Court? Rick Tapp on behalf of Mayo Read.

Your Honor, there's a very good Administrative Law Judge Order in the record. It's fourteen pages, and it cites to both the record and the caselaw, and so that would probably be a good orienting document.

MR. SEIBELS: And Mr. Tapp wrote it, Your Honor.

MR. TAPP: And the judge signed it.

But, Your Honor, again, in 1986, the owner of these four parcels subdivided these parcels and filed it with the RMC Office. It's a recorded plat.

She specifically related that this easement is a fifty foot drainage easement and creek access to Lots One, Two, and Three. Mr. Read now owns all three of these. That was in 1986.

In 1992, the Petitioner bought Parcel Number Four. I -- and his deed expressly incorporates this plat by reference, and the law in South Carolina, as the Court is aware of, is this plat then becomes a part of the deed, including the easement.

When we asked the Petitioner at trial, "Were you aware of this plat?"

He said, "Yes."

"What did that access easement language mean?"

"It meant that the owners of Lots One, Two, and Three could come down to the creek."

"All right, Mr. Petitioner, what does it mean when they get down to the creek? What can they do?"

"They can do whatever they want."

It's quoted in the record, Your Honor. It's quoted in the Order.

In 19, or rather 2004 when Mr. Read's son, now here represented by Mr. Read, who was the purchaser of the lot, filed an application for a dock permit. And he files it, and contrary to what has been suggested is in six different documents that have become part of that application, including schematics, he says, "This is at the end of an easement."

The OCRM record reflects that OCRM knew it was an easement, not a fee simple ownership interest, and it was still permissible. And they analyzed it appropriately and granted a permit.

The issue with the plat, at best, is disingenuous, Your Honor. OCRM, when it came to trial, brought the file with them to trial said, "Listen, we had this at one time. We can't find it right now for trial, but we had it."

They testified that they had it. In the -- in the correspondence in OCRM's file is a letter from the Petitioner where the Petitioner wrote OCRM before the

permit was issued saying, "We know they submitted this. We don't think it's any good, but we know they submitted it."

So, the answer for all of that is just kind of muddying the water. OCRM had this plat.

The question became at trial is whether or not an uncertified copy of this plat counted, and as you'll see from the judge's Order, there is no statutory requirement that this plat be a certified copy. There's a regulatory requirement that ordinarily it should be a certified copy.

The judge addressed that issue and said a number of things. He said: One, you've looked at an uncertified copy. Nobody has suggested that what was submitted was not identical to what was filed with the RMC Office and altered or forged or inaccurate, so I find that harmless error.

The second thing he said is: Y'all have explained to me why you were looking at a non-certified copy, and it's your regulation, and it says "ordinarily" and we give you some deference to your own interpretation.

So he looked at it and said he had the plat. It was uncertified, but the way I read it, it's fine.

The standard on appeal is a violation of a statute, not the violation of a regulation. And, again, Your Honor, the statute never required this to be certified,

only the regulation said ordinarily it should be certified.

I'm not sure it was addressed in oral argument, Your Honor, the -- the Petitioner challenges the Court's analysis of the deeds. During the course of the trial, all four of these deeds got submitted into evidence. All of them incorporate this plat by reference.

The law in South Carolina is that in South Carolina where land is subdivided, platted into lots and sold by reference to the plats, the buyers acquire a special property right to the roads shown on the plat. If the deed references the plat, the grantee acquires a private easement for the use on all streets on the map.

So essentially, Your Honor, this plat became part of all of these people's deeds, and the Petitioner conceded at trial he was aware of the plat, aware of the language of the plat, and his interpretation was that these people could go down to the creek and then do whatever they wanted.

Thank you, Your Honor. I'll answer any questions that you have.

THE COURT: Okay.

MR. WHITEHEAD: Your Honor, Van Whitehead on behalf of the Department. Very briefly, the Department's position is that the appropriate standard of review is the

substantial evidence standard and further utilization of the standards set forth in the APA.

With respect to arguments you've heard today, in my mind they boil down to two things. One is whether or not the Application was complete.

In a perfect world, the Department would receive applications that contain everything that we need. Realistically, we receive applications. We begin working on them and supplement them as that application is evaluated.

So to the extent um someone complains that the original application did not contain all necessary parts, um that's not our view that that's necessarily required as a limitation on the Department in being able to further process an application. In this course, the Department had the necessary information to make its decision and is comfortable with that.

With respect to the um easement issue and the property issue, um the ALJ recognizes, and the Department readily concedes, that we don't decide property disputes. Um as you're aware, I believe, the Department is getting dragged into more and more of these, whether it's a boundary dispute of some fashion, or an easement, or a conservation easement, or restrictive covenant and things of that nature. Um the Department has to make its best

calculation. It may be right. It may be wrong, but it makes an initial determination and moves forward with its regulatory functions.

If ultimately a property challenge between the other parties in this case determines that the easement does not allow this, the Department will respond accordingly. But as far as a final and conclusive determination of the -- the dispute over the easement, the Department's position is that it's not for us to decide, it's not for the ALJ to decide.

You know, as -- as reflected in the Court's Order, we have tried to make a prima facia assessment of: Does this -- does this tip the balance enough to be able to move forward?

And the Court analyzed that and found that there was sufficient information to justify the Department's, essentially, prima facia finding that -- that would allow for Mayo Read to move forward.

Um, accordingly, the Department would ask that you affirm the Coastal Zone Management Appellate Panel's decision. Thank you.

THE COURT: Okay.

MR. SEIBELS: One response, Your Honor?

THE COURT: Uh-huh.

MR. SEIBELS: The analysis of um -- I take it he was

quoting Blue Ridge -- the case of Blue Ridge Realty which says if you take subject to a plat that shows roads, you have a right to use the roads. That analysis ends when the road ends. And, Your Honor, on the plat you see the road ends where my property -- where my client's property begins. And what we're really talking about is a -- a -- not a road but a private, alleged, private easement making my client's property servient and the other three dominant, according to them.

Um and I was struggling. It's finding of fact Number Two that Alma owned all four lots. And the law is that an easement cannot exist where both the servient and dominant estate are owned by the same person, and that law goes back to as far as 1932, Hazelton versus Schein, S-C-H-E-I-N, 166 S.E.2d 634 and 635.

And the deeds, they crave reference to the plat, but they crave reference to the plat for the meets and bounds of the individual lots. That's all they say.

They don't say -- and -- which I think is what's required. They don't grant any additional property rights into my client's property, nor is the deed into my client's property made subject to property rights of others. The deed doesn't say that.

It does certainly reference the plat, and for that reason, everybody is entitled to use the road. It's right

there in front of everybody's property, but the analysis stops where the road stops, and the road stops at my client's property, and then you start getting into easement law, instead of Blue Ridge Realty road law.

THE COURT: Okay. All right.

Well, I will take this under advisement, and I will read the Briefs and this record that y'all have submitted to me. I'll let you know what I decide.

(END OF REQUESTED TRANSCRIPT OF RECORD.)

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

I, RONDA T. CUMMINGS, Official Court Reporter for the Judicial Department of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Charleston County, South Carolina, on the 31st day of October, 2007.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

March 24, 2008

RONDA T. CUMMINGS, Court Reporter

SUMMARY OF REVIEW

Commenting Agencies		Adjoining Property Owners	Agent or Contact
DHEC Intent to Issue		Lawson	Cox Marine
DHEC – 401			3420 Maybank Hwy
SCDNR	LD35		Johns Is. SC 29455
SPA	110135	Tee Tacky Point Partnership -035	
SCDAH			
SCDAA			
Others:			Business Phone: 559-0004
			Fax Number: 559-7002

*NOTE: See list of Interested Persons on Reverse
APO'S Notified? Please initial & Date: CS 12/2/04
Local Government Notified? Please initial & Date: CS 12/2/04

APPLICATION REQUIREMENTS

Please Circle When Complete YES

	Date Received	Letters to Applicant	O & M Manual
Administrative Fee received	9/28/04	1. 12/2/04	
Aff. Of Ownership received	9/28/04	2.	O & M Manual: yes no
Certified Deed, plat or lease	9/28/04	3.	O & M Received:
State Newspaper ad received	9/27/04	4.	O & M Reviewed: yes no
Date Published	9/24/04	5.	O & M Approved: yes no
Which Paper	P&C	6.	
County News ad received	9/27/04	7.	
e Published	9/24/04	8.	
ich Paper	P&C	9.	

PERMIT ACTIVITY: Private Dock

ACTION TAKEN:

PROJECT MANAGERS INITIALS: _____
Please check and date below

Issue (no provisions): _____ Date: _____

Issue with provisions: _____ Date: _____

Deny: _____ Date: _____

List Provisions: _____

PETITIONER'S EXHIBIT _____

PENGAD 800-631-6989

INTERESTED PERSONS

1. _____ 2. _____ 3. _____

4. _____ 5. _____ 6. _____

7. _____ 8. _____ 9. _____

10. _____ 11. _____ 12. _____

13. _____ 14. _____ 15. _____

16. _____ 17. _____ 18. _____

19. _____ 20. _____ 21. _____

22. _____ 23. _____ 24. _____

25. _____ 26. _____ 27. _____

28. _____ 29. _____ 30. _____

31. _____ 32. _____ 33. _____

35. _____ 36. _____ 37. _____

_____ 39. _____ 40. _____

41. _____ 42. _____ 43. _____

4. _____ 45. _____ 46. _____

47. _____ 48. _____ 49. _____

50. _____ 51. _____ 52. _____

_____ 54. _____ 55. _____

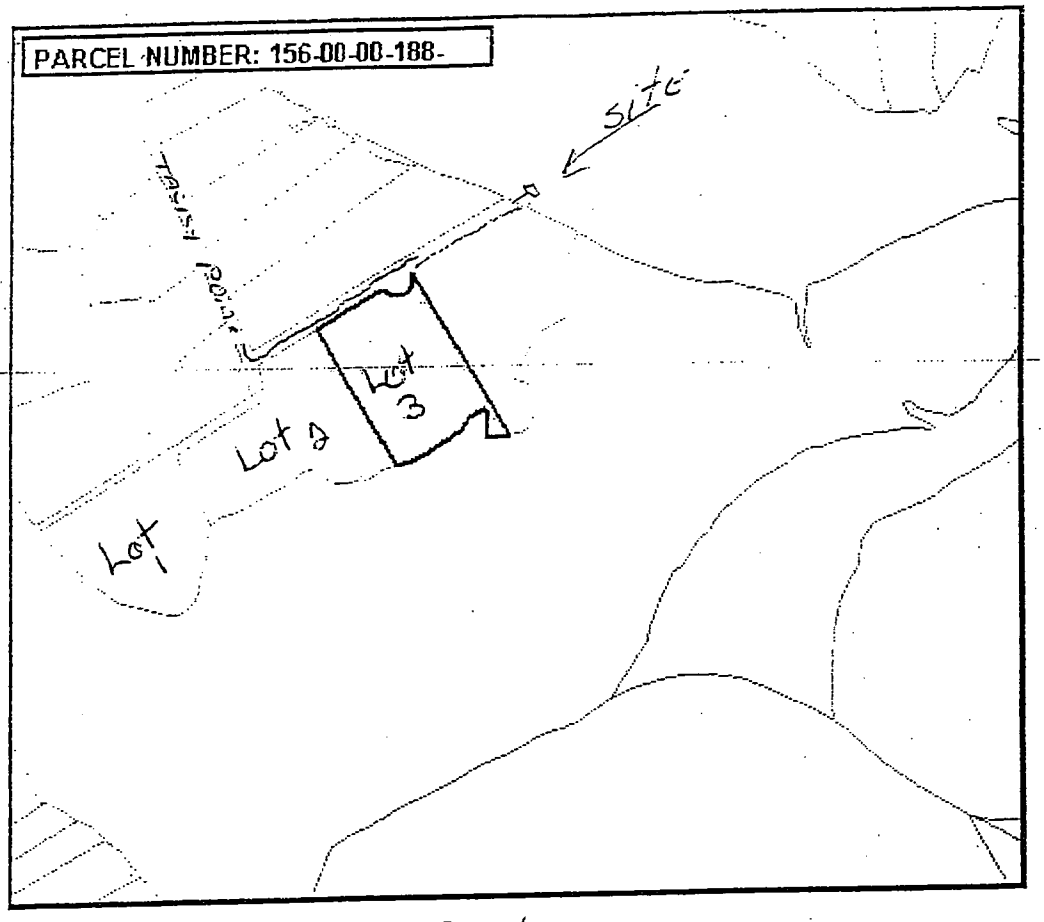
56. _____ 57. _____ 58. _____

_____ 60. _____ 61. _____

_____ 63. _____ 64. _____

65. _____ 66. _____ 67. _____

_____ 69. _____ 70. _____



MAYO REACH
TACKY POINT Rd
WADMALAW ISLAND

Community Dock
For Lots
1 - 2 - 3

PETITIONER'S EXHIBIT 2

PENGAD 800-631-6989

leston County Property Information System - Microsoft Internet Explorer

Edit View Favorites Tools Help

Search Favorites

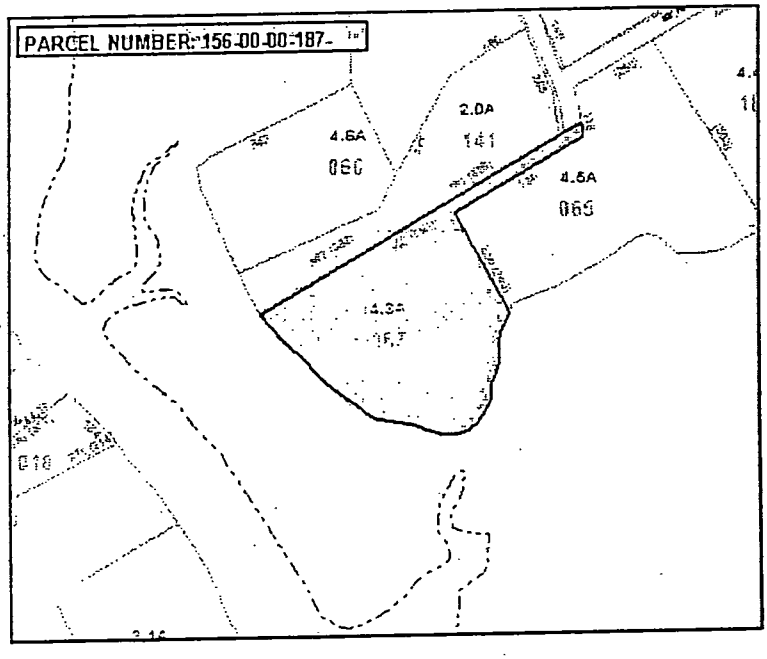
http://gisweb.charlestoncounty.org/ccpa/ccpa.htm

Go Links

Web Search Popups blocked Rank: 26,021

County of Charleston
property information system

owner
address
parcel number
aerial image



PARCEL NUMBER:	156-00-00-187
ADDRESS:	1823 TACKY POINT RD EXT
PROP SITE NM:	
GENERAL USE:	SNGL-FAM-RES
SUBDIVISION:	FARKLIN
LEGAL DESC:	LOT 1
LGL HI ACRS:	4.29
LGL MAR ACRS:	
LGL WATER ACRS:	
LGL SWP ACRS:	
LGL TOT ACRS:	4.29
TAX DISTRICT:	T.D. 5-1 ST JOHNS FD
JURISDICTION:	COUNTY ASSESSR
PLAT DB PAG:	BK-145
OWNER DIST:	READE LEE P READ MAYO
CURRENT OWNER 1ST:	
SALE DATE:	12/05/2000
DEED BOOK:	B360260
TITL WILL CD:	
TITL WILL DT:	
CO NAME:	
MAILING	1823 TACKY POINT RD WADMALAW

Send all questions and comments concerning this web site to: webmastergis@charlestoncounty.org
updated on August 31, 2004. Data reflects deed and plats processed by the Auditor and Assessor as of that date. © Copyright 2000-2004, Charleston County Government. All rights reserved.

Internet

leston County Property Information System - Microsoft Internet Explorer

dit View Favorites Tools Help

Search Favorites

http://gisweb.charlestoncounty.org/ccpa/ccpa.htm

Web Search Popups blocked Rank: 26,021

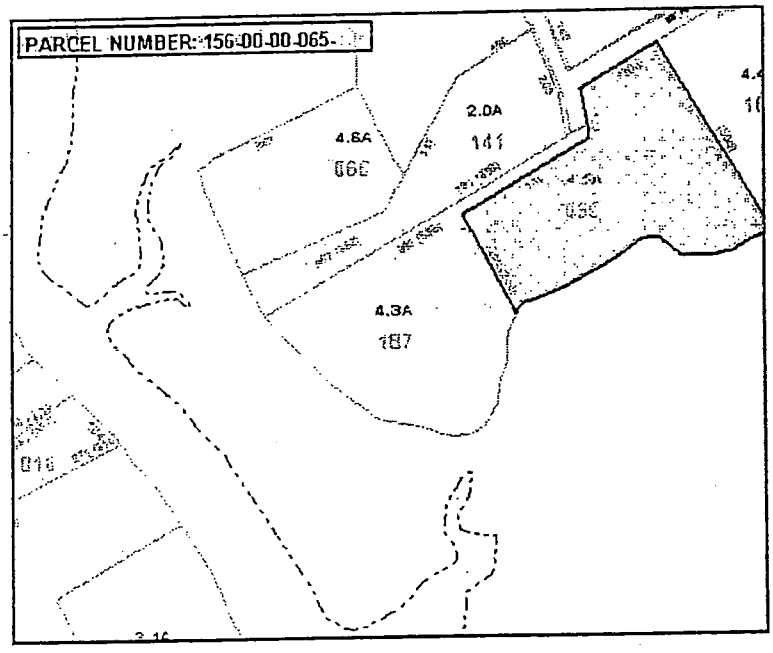
County of Charleston
property information system

owner

address

parcel number

aerial image



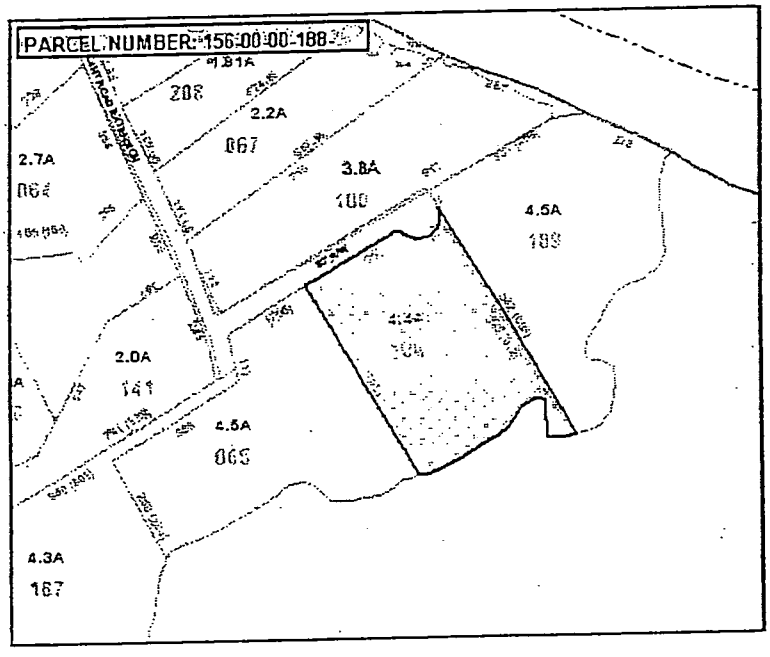
PARCEL NUMBER:	156-00-00-065
ADDRESS:	1818 TACKY POINT RD EXT
PROP SITE NM:	
GENERAL USE:	VACANT-RES
SUBDIVISION:	TARKLEN
LEGAL DESC:	LOT 2
LGL HI ACRS:	4.6
LGL MAR ACRS:	
LGL WATER ACRS:	
LGL SWP ACRS:	
LGL TOT ACRS:	4.6
TAX DISTRICT:	T.D. 5-1 ST JOHNS-FD
JURISDTN CDE:	CNTY ASSESSR
PLAT DB PAG:	UNREC R
OWNER DN 1ST:	READ ELLEN P
CURRENT OWNER 1ST:	
SALE DATE:	12/20/1991
DEED BOOK:	A209328
TITL WILL CD:	
TITL WILL DT:	
CO NAME:	
MAILING	1823 TACKY POINT RD WADMALAW

send all questions and comments concerning this web site to: webmastergis@charlestoncounty.org
dated on August 31, 2004. Data reflects deed and plats processed by the Auditor and Assessor as of that date. © Copyright 2000-2004, Charleston County Government. All rights reserved.

Internet

eston County Property Information System - Microsoft Internet Explorer
Edit View Favorites Tools Help
Search Favorites
http://gisweb.charlestoncounty.org/ccpa/ccpa.htm
Web Search Popups blocked Rank: 26,021

County of Charleston
property information system



owner
address
parcel number
aerial image

PARCEL NUMBER:	156-00-00-188
ADDRESS:	TACKY POINT RD EXT
PROP SITE NM:	
GENERAL USE:	VACANT-RES
SUBDIVISION:	TARKUN
LEGAL DESC:	LOT 3
LGL HI ACRS:	4.4
LGL MAR ACRS:	
LGL WATER ACRS:	
LGL SWP ACRS:	
LGL TOT ACRS:	4.3
TAX DISTRICT:	T.D. 5-1 ST JOHNS-FD
JURISDTN COD:	CNTY ASSESSR
PLAT DB PAG:	BK-146
OWNER DU 1ST:	READ MAYO JR
CURRENT OWNER 1ST:	
SALE DATE:	04/24/1998
DEED BOOK:	R301 161
TITL WILL CD:	
TITL WILL DT:	
CO NAME:	MAYO READ SR
MAILING	1823 TACKY POINT RD WADMALAW

se send all questions and comments concerning this web site to: webmastergis@charlestoncounty.org
updated on August 31, 2004. Data reflects deed and plats processed by the Auditor and Assessor as of that date. © Copyright 2000-2004, Charleston County Government. All rights reserved.
Internet

eston County Property Information System - Microsoft Internet Explorer

t View Favorites Tools Help

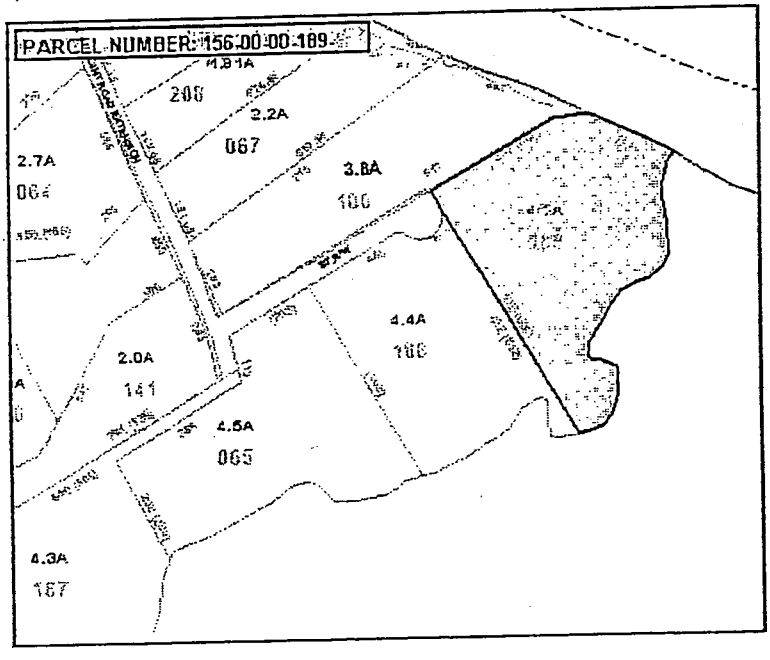
Search Favorites

http://gisweb.charlestoncounty.org/ccpa/ccpa.htm

Web Search Popups blocked Rank: 26,031

Go Links

County of Charleston
property information system



PARCEL NUMBER:	156 00 00 189
ADDRESS:	1814 TACKY POINT RD EXT
PROP SITE NM:	
GENERAL USE:	VACANT-RES
SUBDIVISION:	TARKUN
LEGAL DESC:	LOT 4
LGL HI ACRS:	4.48
LGL MAR ACRS:	
LGL WATER ACRS:	
LGL SWP ACRS:	
LGL TOT ACRS:	4.48
TAX DISTRICT:	T.D. 5-1 ST-JOHNS-FD
JURISDTN COD:	CNTY-ASSESSR
PLAT DB PAG:	BK-146
OWNER ON 1ST:	TOD TACKY CA PARTNERSHIP
CURRENT OWNER 1ST:	
SALE DATE:	
DEED BOOK:	
TITLE WILL CD:	
TITL WILL DT:	
C/O NAME:	
MAILING	1814 TACKY POINT ROAD EXT

wner
ddress
arcel number
erial image

end all questions and comments concerning this web site to: webmastergis@charlestoncounty.org
lated on August 31, 2004. Data reflects deed and plats processed by the Auditor and Assessor as of that date. © Copyright 2000-2004, Charleston County Government. All rights reserved.

Internet

Novell GroupWi... Epix - Environ... Microsoft Excel ... Charleston Cou... 10:00 AM

2004

Project Assignment Sheet 9.14

Applicant: Mayo Read Jr.

Location: easement @ end of TACICY POINT ROAD

Waterbody: Leadenwah River

Activity: [redacted] dock → only 3 lots / family

Assigned to: [redacted] Fred

Requirements:

Correct fee amount needed: 1000 needed, not inc.

Affidavit of ownership:

Survey required:

Notes:

RC - issues; see me + I'll fill you in!

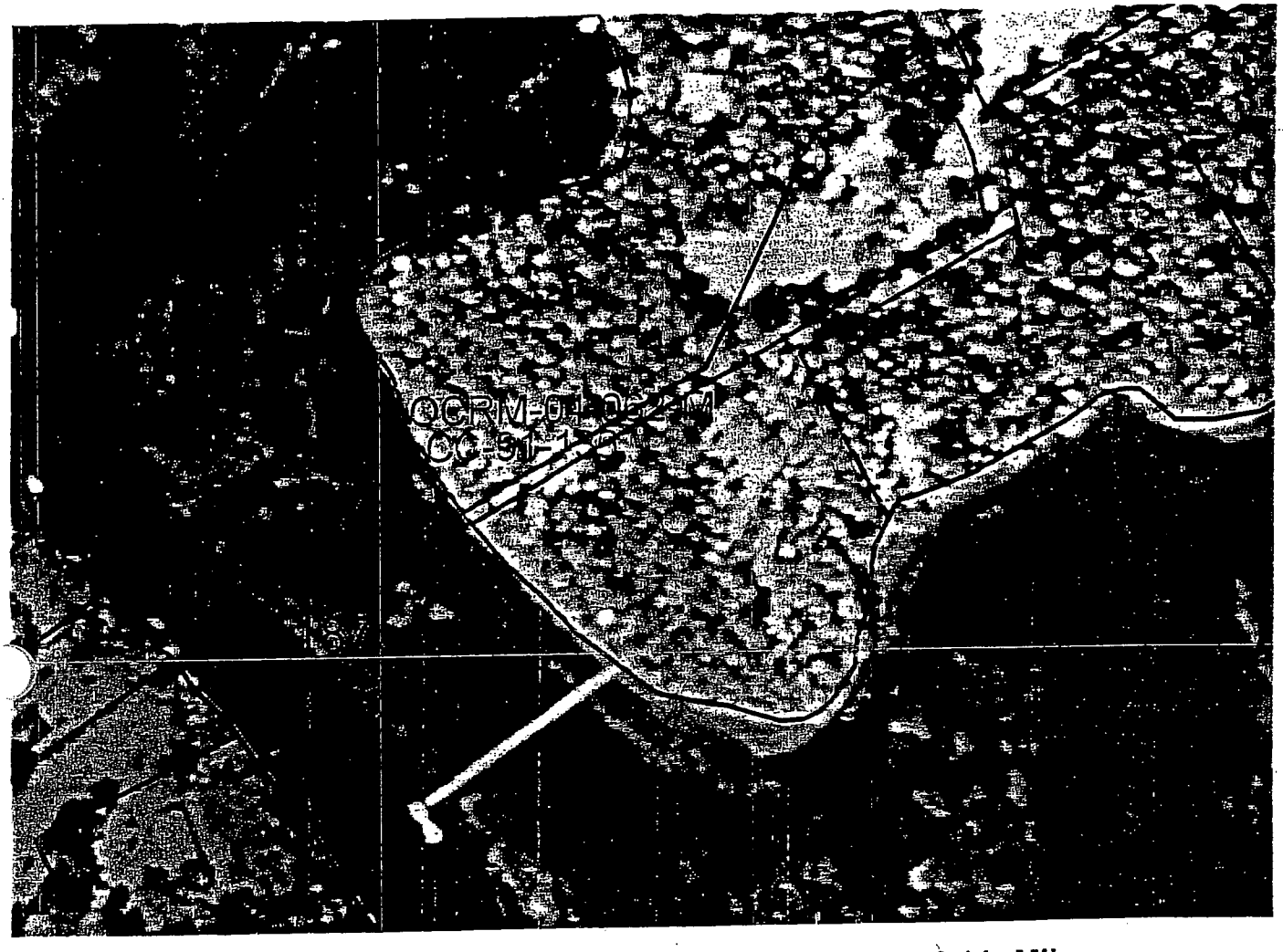
easement holder? Marg.

make sure lots 1, 2 & 3 don't have docks.

PETITIONER'S EXHIBIT 3

PENGAD 800-631-6989

OCRM-04-297-M



0.07 0 0.07 0.14 Miles

- Permits - 2004 to P
- Permits - 2002 to Present
- 2001 Permits
- 2000 Permits
- 1998-99 Permits
- 1992-97 Permits
- 1989-91 Permits
- 1980-88 Permits
- 2004 Certifications (Digitally Submitted)
- Wetland Certifications-2003 to Present
- 2001-03 Certifications
- 2000 Certifications
- 1997-99 Certifications
- 1994-96 Certifications
- 1994 Certifications
- 1993-94 Certifications
- 1991-92 Certifications
- 1989-90 Certifications
- National Register-Listed Areas
- Dock Master Plans
- Aerial Photo Index
- Claimed Marsh
- South Charleston Parcels (2001)

N W E S

0266

PENGAD 800-631-6989

PETITIONER'S EXHIBIT 4

LAW OFFICES OF

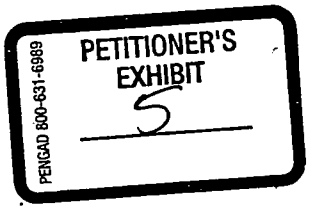
SIMONS & KEAVENY

147 WAPPOO CREEK DRIVE • SUITE 604 • CHARLESTON, SC 29412
TELEPHONE: (843) 762-9132 • FACSIMILE: (843) 406-9913

KEATING L. SIMONS, III — klsimons@charlestonattorneys.net
THOMAS J. KEAVENY, II — tjkeaveny@charlestonattorneys.net
DEREK FARRELL DEAN — dfdean@charlestonattorneys.net
BOB J. CONLEY — bjconley@charlestonattorneys.net

January 11, 2005

VIA FACSIMILE 744-5847 & U.S. MAIL
Mr. Fred Mallett
Project Manager, Critical Area Section
Office of Ocean and Coastal Resource Management
Charleston Office
1362 McMillan Avenue, Suite 400
Charleston, SC 29405



RE: P/N # OCRM-04-297-M

Dear Mr. Mallett:

Thank you for meeting with me last Thursday, January 6, 2005, regarding the above-referenced dock permit application. As you are aware, I represent Too Tacky, a partnership, which is the sole owner of the property upon which Mr. Mayo Read, Jr., the applicant, is proposing to construct a dock on Leadenwah Creek in Charleston County. Too Tacky is owned by Lawton and Elizabeth Grimball. The Grimballs utilize the property and associated home on a regular basis for their private use. We oppose the construction of the proposed dock for numerous reasons which are fully set forth in detail throughout the remainder of this letter.

The standards established by R.30-12.A(2)(a) express the critical, fundamental policies for the construction of docks and piers in the coastal waters and tidelands of South Carolina. However, the applicant's permit application fails to meet the standards of R.30-12.A(2)(a) which states docks and piers "shall normally be limited to one structure per parcel and shall not impede navigation or restrict the reasonable public use of State lands and waters."

An approved dock was previously built on the property by the fee-simple owner, Too Tacky. Therefore, the burden is on the applicant to articulate why a second dock should be allowed on the property under the existing circumstances. However, the applicant neither addresses this crucial issue nor mentions that a dock already exists on the property in the permit application; this is an important, fundamental flaw in the permit application. Additionally, as discussed more fully below, the size and location of the proposed dock will impede navigation in Leadenwah Creek and, as a result, restrict and impede the public use of Leadenwah Creek. Thus, the permit application should be denied based upon R.30-12.A(2)(a) alone.

Further, the applicant seeks to construct the dock within the extended lines of a claimed easement over Too Tacky's property. Although the permit application forms utilized by OCRM for piers and docks make reference to various property interests, including easements, the applicable regulations do not make reference to easements. R 30-2.B(4) requires the applicant to provide a "certified copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property to carry out the proposal." However, in this instance, the applicant has not presented evidence of title or possession, other than a plat which shows a "50' Drainage Easement & Creek Access for Lots 1, 2 & 3." Additionally, the applicant has not obtained permission from Too Tacky to construct the dock.

The applicable statutes and regulations clearly require that the applicant provide proof of a sufficient property interest before the proposed activity is considered for a permit. In this instance, the applicant has not established a sufficient property interest. For example, although the applicant submitted a plat which purportedly establishes a "creek access" easement, the deeds to the owner(s) the three lots who seek the proposed dock do not appear to mention any such easement. Thus, the existence of the easement is in dispute. Further, even if an easement exists, the scope and terms of the easement are unclear. For example, an easement for "creek access" does not expressly or impliedly grant the easement holders the right to construct a dock in the easement.

Also, *S. C. Code Ann.* § 48-39-150 mandates that OCRM consider, among other items, the extent to which the proposed activity will "affect the value and enjoyment of adjacent owners." In this instance, Too Tacky has a superior interest to that of an adjacent landowner; it is the landowner. The proposed dock and its proposed location on Too Tacky's property will significantly impact the value and enjoyment of the property. For instance, a house is located very near the claimed easement and proposed dock location. The Grimballs often utilize the home. The construction of a dock in close proximity to the residence will both significantly affect the property value and diminish their ability to fully enjoy the property.

The applicant's permit application fails to fully disclose material facts pertaining to the proposed dock and fails to provide sufficient information in the following respects:

1. The applicant's Affidavit of Ownership or Control indicates that he is the "Record Owner" of the property upon which he proposes to construct the dock. However, as noted above, the applicant is not the "Record Owner" of the property; Too Tacky is the sole owner of the property. At best, the applicant may claim to be a "Record Easement Holder";

2. The Affidavit of Ownership also certifies that as "record easement holder" he has the approval and/or permission of "all other persons with a legal interest in said property to conduct the work proposed in the permit

application." However, the applicant has neither sought nor obtained our permission to construct the proposed dock. Further, in addition to our legal interests in the property, we believe that the County of Charleston may claim a legal interest in the property because the applicant proposes to construct the dock in a "Drainage Easement" noted on a subdivision plat approved by the County. OCRM's permit record does not indicate that the County was sent a notification of the permit application;

3. Throughout the permit application, the applicant identifies the project as a "community" dock. However, the applicant's permit is for a private, joint-use dock. As proposed, the dock does not meet the definition of a "community dock" pursuant to R 30-1.D(13);

4. As depicted on the applicant's drawings of the proposed dock, the dock, including the walkway, pierhead, ramp and floating dock, will extend 45 linear feet into Leadenwah Creek. First, the size and siting of the structure, as proposed, would present a significant impediment to navigation of Leadenwah Creek pursuant to R 30-12.A(a). Second, as proposed, the size and location of the dock are not consistent with similar docks along this portion of Leadenwah Creek and will significantly impair the view of others along Leadenwah Creek pursuant to R 30-12.A(r). Third, the drawings do not adequately depict or illustrate the precise dimensions and shape of the roof over the pierhead pursuant to R 30-12.A(r). Fourth, the proposed pierhead and floating dock together total 600 square feet which greatly exceeds the 160 square foot threshold established under R 30-12.A(q)(iii). Finally, the drawings show two extended property lines. However, only one extended line is a property line, the other is an extended easement line;

5. The permit application indicates that the dock will extend within 10 linear feet of the extended "property" lines. First, as noted above, the applicant actually proposes to construct the dock within an extended easement line and an extended property line. Second, the proposed location does not comply with R 30-12.A(p) which requires at least 20 linear feet between the structure and the extended property lines;

6. The permit application fails to note that a residential home is located directly adjacent to the applicant's claimed easement and proposed dock. The construction of the proposed dock, as noted above, will significantly and negatively impact the value of Too Tacky's property. It will also impact the use and enjoyment of the property; and

7. OCRM's permit application file does not indicate that the applicant has complied with R-30-2.B(7)(a) which requires proof that a public notice was published in the appropriate newspapers.

Based upon, but not limited to, the above noted items, OCRM should deny the permit application. Although there are a number of noted defects and deficiencies in the application, each of which, standing alone, is a sufficient basis for denying the permit, the cumulative number of defects and deficiencies clearly requires a denial of the permit application.

I have a number of photographs of the area at issue in this matter and I will provide those to you if you desire. However, although the pictures may assist your review of this permit application, I strongly encourage you, and anyone else involved, to personally inspect the property and the proposed dock location. If you desire, an on-site inspection will be arranged at your convenience.

Please contact me if you have any questions, concerns or you wish to discuss this permit application in any detail. I do request that you copy me on any future correspondence regarding the permit application. Additionally, please inform me of any amendments, changes or modifications to the permit application and any final decision OCRM may issue.

With kind regards, I am

Very truly yours,

SIMONS & KEAVENY

Bob J. Conley

BJC/emt
cc: Mr. and Mrs. Lawton Grimball *(via U.S. mail)*
John P. Seibels, Jr., Esquire *(via facsimile & U.S. mail)*

NEXSEN|PRUET

Neil C. Robinson, Jr.
Member

February 2, 2005

RECEIVED
FEB 0 4 2005
SEC-OCRM
CHARLESTON OFFICE

VIA FACSIMILE AND 1st CLASS MAIL

Mr. Fred Mallett
Office of Ocean and Coastal Resource Management
1362 McMillan Avenue, Ste. 400
Charleston, SC 29405

Re: OCRM-04-297-M

Dear Mr. Mallett:

This Firm represents Mayo Read, Jr. (hereinafter the "Applicant") in this dock permitting matter. Consistent with your letter of January 12, 2005, directed to Cox Marine Contractors, please permit this letter to serve as the Applicant's response to Bob Conley's letter of concern (on behalf of Lawton Grimball) dated January 11, 2005.

I will attempt to address Mr. Conley's concerns in the sequence in which they are listed. However, Mr. Conley has numbered certain concerns while not numbering others and has occasionally repeated the same concerns. Accordingly, our numbers do not precisely coincide with Mr. Conley's numbering.

1. One Dock Per Parcel. Contrary to Mr. Conley's suggestion, the proposed dock will serve at least one, separate parcel (TM# 156-00-00-187) and, in actuality, more than one parcel: Lots 1, 2, & 3 (TM#'s TM156-00-00-187; 156-00-00-65; and 156-00-00-188). Accordingly, Regulation 30-12.A(2)(a) regarding one dock per parcel is satisfied.[1]

[1] Apparently, Mr. Conley's unsupported assertion is that the Grimball's dock already fulfills the one dock per parcel limit. When taken to extremes, this argument would lend itself to the assertion that all of South Carolina would today be limited to one dock if it that dock was constructed prior to South Carolina being subdivided.

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach

205 King Street
Suite 400 (29401)
PO Box 486
Charleston, SC 29402
www.nexsenpruet.com

F 843.720.1777
Nexsen Pruet Adams Kleemeier, LLC
Attorneys and Counselors at Law

PENGAD 800-631-6989
PETITIONER'S EXHIBIT
6

2. Navigational Impact. The proposed dock's total length is 45 feet. The width of Ledenwah Creek at that location is 182 feet (from marsh to marsh). Accordingly, the proposed dock neither impedes navigation nor the public use.

3. Easement versus Ownership. As conceded by Mr. Conley's letter, the Applicant does own an easement. However, contrary to Mr. Conley's letter suggesting that an "ownership interest" is required for the dock permit, both the focal statute and regulation contemplate interests other than ownership interests when they specifically refer to applicants who have "possession or permission" of or to the land. *S.C. Code Ann. §* 49-39-140(B)(4); R. 30-2(B)(4). Obviously an easement satisfies either classification. In short, the Applicant's easement is sufficient.

Furthermore, contrary to Mr. Conley's statement regarding an alleged absence of easement language in the Applicant's deed, the deed expressly provides, "All of Grantor's right, title and interest in and to that certain tract of land lying north of and adjacent to Lot 3 described above and shown as a 50' right-of-way on the Plat...." *See* Title to Real Estate filed in Book R 301, Page 161 on April 28, 1998.

Additionally or alternatively, even if the deed was silent, it would not alter the Applicant's entitlement to the dock permit since South Carolina law does not require that easement language be contained in a deed in order to create an easement. Rather, the law is that when property is subdivided and sold according to a plat showing roads or other easements, the grantees acquire a private easement in those roads or easements.[2] Consequently, since the recorded plat also reflects the easement, the plat serves as an alternative basis for the Applicant's entitlement.

4. Impact on Grimball's Lot. We recognize that *S.C. Code Ann §* 48-39-150(A)(10) does provide, as the last of ten separate factors, for the impact on adjacent landowners. In this instance however, the Grimballs purchased their lot (with the house on it) with full and complete knowledge of the access easement specifically benefiting the other lots. Consequently, the Grimballs' purchase price for their lot implicitly reflected the proximity of the easement and, resultantly, they will suffer no economic harm.

5. Community Dock. Mr. Conley states that the Applicant's dock is misinterpreted as a "community dock" rather than "private, joint use dock" in the

---

[2] *See, e.g., Vick v. South Carolina Dept. of Transp.* 347 S.C. 470, 478-479, 556 S.E.2d 693, 698 (S.C.App. 2001).

application. While I think that is a distinction without import in this instance, please consider the application as a private, joint-use dock.

6. Dock Dimensions. As related above, Ledenwah Creek is 182 feet in width at the proposed location (from marsh to marsh). Consequently, consistent with R. 30-12(A)(q)(iv), the proposed dock's square footage of 600 feet (a dimension conceded by Mr. Conley) fully complies with the regulatory limits. To the extent that your office requires more detail regarding the appearance of the roof, we will provide such detail.

7. Proximity to Extended Property Lines. The focal regulation concerning proximity to extended property lines provides that OCRM may permit a dock to be constructed closer than 20 feet to an extended line where there is a common dock shared by adjoining property owners or where there is no material harm to the policies of the act. R 30-12(A)(p). In this instance, since the proposed dock: serves 3 parcels (an environmental efficiency); only minimally extends closer than 20 feet; and presents no material harm to the policies of the Act, it should be considered an exception as specifically contemplated by the regulation.

8. Publication Notice. Contrary to Mr. Conley's letter, the Applicant did publish notice on September 14, 2004, as established by the attached Affidavit of Publication from *The Post and Courier* (which is incorporated herein be reference).

In summary, the Applicant satisfies the statutory requirements for the issuance of the requested dock permit.

Please let us know of any requested additional information.

With kind regards, I am

Sincerely,

Neil C. Robinson, Jr. per ltr

NCR,Jr

Exhibits

1. Affidavit of Publication from *The Post and Courier*, dated September 15, 2004.

FFIDAVIT OF PUBLICATION

The Post and Courier

tate of South Carolina

nty of Charleston

ersonally appeared before me the undersigned advertising
k of the above indicated newspaper published in the
of Charleston, County and State aforesaid, who, being
ly sworn, says that the advertisement of

(Copy attached)

peared in the issues of said newspaper on the following
:

/2004

PUBLIC NOTICE

MAYO READ, JR. c/o Cox Marine has applied of the Office of SCDHEC BUREAU OF OCEAN AND COASTAL RESOURCE MANAGEMENT for a permit to construct a 4' x 9' walkway; 10' x 30' float, 3' x 20' ramp, 10' x 30' covered fixed head, candelever benches, handrails for private community use Lots 1, 2, 3 use al 50 easement end of Tacky Point Road for Lots 1, 2, 3, Wadmalaw Island, Charlesion County in Leadenwah River. Comments will be received by SCDHEC OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT at 1362 MCMILLAN AVE. SUITE 400; CHARLESTON, SC 29405.. by September 24, 2004.

st of $ 44.25

ount# C0018036

C220QC1X

er: read jr

scribed and sworn to before

15th day

September

2004

Advertising Clerk

TARY PUBLIC, SC

ommission expires

Commission Expires 10/10/13

0275

BK Y186PG516 89-105

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

TITLE TO REAL ESTATE

KNOW ALL MEN BY THESE PRESENTS, THAT H. EDWARD McFARLAND ("Grantor") in the State aforesaid in consideration of the sum of NINETY THOUSAND AND NO/100 ($90,000.00) DOLLARS, to the said Grantor in hand paid at and before the sealing of these presents by ELLEN P. READ ("Grantee") in the State aforesaid, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said ELLEN P. READ the following described property:

ALL that piece, parcel, lot or tract of land with the buildings and improvements thereon, situate, lying and being in Charleston County, South Carolina, and being shown and designated as "Lot 1, 4.29 Acres" on a plat by Robert Frank & Associates dated November 1, 1984 entitled in part "Wadmalaw Island, Charleston County, S.C. Plat Of A Division Of Lands Of Alma E. Wagner" and recorded at Plat Book BK, Page 145, RMC Office for Charleston County, South Carolina, and having such size, shape, buttings, boundings, dimensions and location as will appear by reference to said plat which is incorporated herein by reference, be all the dimensions and measurements shown thereon a little more or less.

The above described property having been conveyed to Grantor herein by Deed of Alma E. Wagner dated January 12, 1987 and recorded January 12, 1987 at Book D-161, Page 426, RMC Office for Charleston County, South Carolina.

For reference see TMS No: 156-00-00-187

Grantee's Address: 103 Tradd Street
Charleston, SC 29401

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned unto the said Grantee, the Grantee's Heirs, Successors and Assigns forever.

AND the said Grantor does hereby bind Grantor and Grantor's Heirs, Executors and Administrators, to warrant and forever defend, all and singular, the said Premises unto the said Grantee, the Grantee's Heirs, Successors and Assigns, against Grantor and Grantor's Heirs, Successors and Assigns and against all persons whomsoever lawfully claiming, or to claim the same or any part thereof.

0276

PETITIONER'S EXHIBIT 7

PENGAD 800-631-6989

WITNESS Grantor's Hand and Seal, this 20 day of June in the year of our Lord one thousand nine hundred and eighty-nine and in the two hundred and thirteenth year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

Richard Hubbard

H. Edward McFarland (L.S.)
H. EDWARD McFARLAND

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named H. Edward McFarland sign, seal, and as his act and deed, deliver the within written Deed, and that (s)he with the other witness named above witnessed the execution thereof.

Richard Hubbard
(signature of witness)

SWORN to before me, this 20th day of June, 1989

(SEAL)
Notary Public for South Carolina
My Commission Expires: 5-17-90

YOUNG, CLEMENT, RIVERS & TISDALE

BK Y186PG518

4.00
198.00
99.00
301.00

Jo I
V.W

TMS [illegible]
BAC 235
DTD 8.23.89

FILED, INDEXED & RECORDED
Y186-516
89 AUG 21 PM 4:46
REGISTER MESNE CONVEYANCE
CHARLESTON COUNTY, S.C.

Recorded this 21 day of August 19 89
On Film [illegible] Card

Pauline S. Hagen
Auditor Charleston County

CERTIFIED
TRUE COPY
CHARLIE LYBRAND
REGISTER MESNE CONVEYANCE
CHARLESTON COUNTY, SC
DATE: 4-11-06
BY: Charlie Lybrand
BJ-CB

STATE OF SOUTH CAROLINA)
) TITLE TO REAL ESTATE
COUNTY OF CHARLESTON)

KNOW ALL MEN BY THESE PRESENTS, that ELLEN P. READ, in the State aforesaid for and in consideration of Five Dollars ($5.00) and Love and Affection, this being the full, complete and true consideration to her in hand paid at and before the sealing of these presents by I. MAYO READ, the receipt whereof is hereby acknowledged, has granted, bargained, sold and released, and by these Presents does grant, bargain, sell and release unto the said I. MAYO READ, his Heirs and Assigns, a one-half undivided interest in and to the following described property, to wit:

ALL that piece, parcel, lot or tract of land with the buildings and improvements thereon, situate, lying and being in Charleston County, South Carolina, and being shown and designated as "Lot 1, 4.29 Acres" on a plat by Robert Frank & Associates dated November 1, 1984 entitled in part "Wadmalaw Island, Charleston County, S.C. Plat of a Division of Lands of Alma E. Wagner" and recorded at Plat Book BK, Page 145, RMC Office for Charleston County, South Carolina, and having such size, shape, buttings, boundings, dimensions and location as will appear by reference to said plat which is incorporated herein by reference, be all the dimensions and measurements shown thereon a little more or less.

The above described property having been conveyed to Grantor herein by Deed of H. Edward McFarland dated June 20, 1989 and recorded in the RMC Office for Charleston County on August 21, 1989 in Book Y-186 at Page 516.

TMS#: 156-00-00-187

Grantee's Address: 1823 Tacky Point Road
Wadmalaw, SC 29487

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, a one-half undivided interest in and to the said Premises before mentioned unto the said I. MAYO READ, his Heirs and Assigns forever.

I do bind myself and my Heirs, Executors and Administrators, to warrant and forever defend, all and singular, the said Premises unto the said I. MAYO READ, his Heirs and Assigns, against me and my Heirs, and all persons whomsoever lawfully claiming, or to claim the same or any part thereof.

CERTIFIED
TRUE COPY
CHARLIE LYBRAND
REGISTER MESNE CONVEYANCE
CHARLESTON COUNTY, SC
DATE: 4-11-06
BY: Charlie Lybrand
By: GB

PETITIONER'S EXHIBIT 7-A

PENGAD 800-631-6989

BKB 360PG261

WITNESS our Hands and Seals this 5 day of December in the year of our Lord two thousand and in the two hundred and twenty-fifth year of the Sovereignty and Independence of the United States of America.

Ellen P. Read
ELLEN P. READ

Signed, sealed and delivered
in the presence of:

Witness

Witness

STATE OF SOUTH CAROLINA)
) PROBATE
COUNTY OF CHARLESTON)

The within instrument was acknowledged before me by its maker.

SWORN to before me, this 5
day of Dec., 2000.

(L.S.)
Notary Public for South Carolina
My Commission Expires: 11/8/10

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

AFFIDAVIT

Date of Transfer of Title
December 5, 2000

PERSONALLY appeared before me the undersigned, who, being duly sworn, deposes and says:

1. I have read the information on this Affidavit, and I understand such information.

2. The property is being transferred by ELLEN P. READ to I. MAYO READ on December 5, 2000. (ONE HALF UNDIVIDED INTEREST TO SPOUSE)

The transaction was (Check one):

3. Check one of the following: The Deed is:
(a)_ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
(b)_ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as distribution to a trust beneficiary.
(c) X exempt from the deed recording fee because Exemption # 1 Transfer to Family Member/No Consideration

4. Check one of the following if either item 3(a) or item 3(b) above has been checked.
(a)___ The fee is computed on the consideration paid or to be paid in money of money's worth in the amount of $_____
(b)___ The fee is computed on the fair market value of the realty which is $_____.
(c) ___ The fee is computed on the fair market value of the realty as established for property tax purposes which is $_____.

5. Check Yes __ No X__ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "YES" the amount of the outstanding balance of this lien or encumbrance is $_____.

6. The DEED Recording Fee is computed as follows:
(a) _____ the amount listed in Item 4 above.
(b) _____ the amount listed in Item 5 above (no amount, -0-)
(c) _____ Subtract Line 6(b) from Line 6(a) and place the result.

7. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: the legal representative.

8. I further understand that a person required to furnish this affidavit who wilfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

LEGAL REPRESENTATIVE connected with this transaction

SWORN to before me this 5th day of December, 2000.

Notary Public for South Carolina
My Commission Expires: 10/26/08

HARFORD W. IGLEHEART, ESQ.

Hartford W. Igleheart

JOHN GRIG W. IGLEHEART
ATTORNEY AT LAW
P.O. BOX 129
CHARLESTON, SC 29402

BKB 360PG263

10.00

EXEMPT

FILED

B360-260
2000 DEC 11 PM 12:45

CHARLIE LYBRAND
REGISTER
CHARLESTON COUNTY SC

10.00

RECEIVED FROM RMC

DEC 13 2000

PEGGY A. MOSELEY
CHARLESTON COUNTY AUDITOR

TMS VERIFIED
BAC DTE
BTD 12/13/00

91-209

BK A209PG328

91-209

STATE OF SOUTH CAROLINA)
) TITLE TO REAL ESTATE
COUNTY OF CHARLESTON)

KNOW ALL MEN BY THESE PRESENTS, THAT ALMA E. WAGNER ("Grantor") in the State aforesaid in consideration of the sum of EIGHTY-SEVEN THOUSAND FIVE HUNDRED AND N0/100 ($87,500.00) DOLLARS, to the said Grantor in hand paid at and before the sealing of these presents by ELLEN P. READ ("Grantee") in the State aforesaid, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said ELLEN P. READ the following described property:

ALL that piece, parcel, lot or tract of land, with the buildings and improvements thereon, situate, lying and being in Charleston County, South Carolina, and being shown and designated as "Lot 2, 4.50 Acres" on a plat by Robert Frank & Associates dated November 1, 1984 entitled in pat "Wadmalaw Island, Charleston County, S.C. Plat Of A Division Of Lands of Alma E. Wagner" and recorded at Plat Book BK, Page 145, RMC Office for Charleston County, South Carolina, and having such size, shape, buttings, boundings, dimensions and location as will appear by reference to said plat which is incorporated herein by reference, be all the dimensions and measurements shown thereon a little more or less.

The above described property having been conveyed to Grantor herein by Will of Charles V. Wagner filed at File 900, No. 67, Charleston County Probate Court.

For reference see TMS No. 156-00-00-065

Grantee's Address: 103 Trall St.
Charleston SC 29401

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned unto the said Grantee, the Grantee's Heirs, Successors and Assigns forever.

AND the said Grantor does hereby bind Grantor and Grantor's Heirs, Executors and Administrators, to warrant and forever defend, all and singular, the said Premises unto the said Grantee, the Grantee's Heirs, Successors and Assigns, against Grantor and Grantor's Heirs, Successors and Assigns and against all persons whomsoever lawfully claiming, or to claim the same or any part thereof.

PENGAD 800-631-6989
PETITIONER'S EXHIBIT 8

WITNESS Grantor's Hand and Seal, this 20th day of December in the year of our Lord one thousand nine hundred and ninety-one and in the two hundred and sixteenth year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

Marilyn S. Starks

Alma E. Wagner by H. Edw. M. Fairbanks Her Atty in Fact (SEAL)
ALMA E. WAGNER

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named ALMA E. WAGNER sign, seal, and as her act and deed, deliver the within written Deed, and that (s)he with the other witness named above witnessed the execution thereof.
(by her Atty in Fact)

Marilyn S. Starks
(signature of witness)

SWORN to before me this 20 day of December, 1991.

(SEAL)
Notary Public for South Carolina
My Commission Expires: 3/1/2000

STATE OF SOUTH CAROLINA
SOUTH CAROLINA TAX COMMISSION
DOCUMENTARY STAMP TAX 92.50

COUNTY TAX
DEC 20 '91
96.2

BK A209PG330

YOUNG, CLEMENT, RIVERS & TISDALE

E+I
NUV

FILED
A209-328
91 DEC 20 PM 12:56

ROBERT N. KING
REGISTER
CHARLESTON COUNTY SC

10.00
192.50
96.25
298.75 B

Recorded this 20 day of Dec - 91
On Property Record Card

Pauline A. Koger

Auditor Charleston County

TMS VERIFIED
BAC ABS
DTD 12-23-91

CERTIFIED
TRUE COPY
CHARLIE LYBRAND
REGISTER MESNE CONVEYANCE
CHARLESTON COUNTY, SC
DATE: 4-11-06
BY: Charlie Lybrand
By ifs

OCRM-04-292-M

D H E C
MOTE PROTECT PROSPER

PERMIT APPLICATION

S. C. Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management
Charleston 744-5838 744-5847(fax)
Beaufort 524-6885 524-4839(fax)
Myrtle Beach 626-7217 626-2381(fax)

RECEIVED
SEP 2004
Office of OCRM
CHARLESTON OFFICE

NAME AND MAILING ADDRESS OF APPLICANT:

Mayo Read JR C/O
3420 Maybank Hy
Johns Island
SC 29455

PHONE #: (Bus.) _____
(Home) 559-0004
(Fax) _____

NAME AND MAILING ADDRESS OF AUTHORIZED AGENT: (If an agent is listed, all correspondence will be sent to the agent.)

COX MARINE
3420 MAYBANK
JOHNS ISLAND
SC 29455

PHONE #: (Bus.) 559-0004
(Home) 559-0408
(Fax) 559-7002

DESCRIBE THE DIMENSIONS, GENERAL SPECIFICATIONS, AND PURPOSE OF THE PROJECT:

4'x9' Walkway - 10'x30' Float
3x20 Ramp - 10'x30 covered Fixed head
Candelever Benches Haodrail
Private Recreational Community Use Lots 1-2-3

RESPONDENT'S EXHIBIT
DHEC

NAMES AND COMPLETE MAILING ADDRESSES OF ADJOINING PROPERTY OWNERS: (If the applicant owns adjoining property, give name and address for nearest property not owned by applicant.)

Thomas Lawson
1780 Tacky Point Rd
Wadmalaw Island
SC 29487-6942

Too Tacky Point Partnership
1814 Tacky Point Rd
Wadmalaw Island
SC 29487-6941

(Attach additional sheet of paper if necessary.)

0286

LOCATION OF THE PROJECT (Address and directions to the site):

Hwy 17 South Left Main Rd Johns Island Left Maybank to Wadmalaw Island - Bear Right onto Bears Bluff Road Follow Bears Bluff Rd take Left onto Tacky Point Rd Follow to end take Left to end of Easement. See MAP

COUNTY: Charleston.

TAX MAP NUMBER (Required on all applications): 156-00-00-188. 156-00-00-187 - 156-00-00-065

LOCAL GOVERNING BODY WITH JURISDICTION OVER SITE: Charleston.

NAME OF WATERWAY: Leadenwah River

9/28/04 payment Accepted per Rick Chin.

South Carolina

DHEC

Department of Health and Environmental Control

PERMIT APPLICATION

Office of Ocean and Coastal Resource Management
4130 Faber Place, Suite 300
Charleston, South Carolina 29405
(803) 744-5838 (803) 744-5847 (fax)

IS ANY PORTION OF ACTIVITY FOR WHICH AUTHORIZATION IS SOUGHT NOW COMPLETE? YES ☐ NO ☒

IF "YES", GIVE REASONS, INCLUDING THE MONTH AND YEAR ACTIVITY WAS COMPLETED. INDICATE EXISTING WORK ON DRAWINGS.

ADDITIONAL REMARKS:

APPLICATION IS HEREBY MADE FOR A PERMIT OR PERMITS TO AUTHORIZE THE ACTIVITIES DESCRIBED HEREIN. I CERTIFY THAT I AM FAMILIAR WITH THE INFORMATION CONTAINED IN THIS APPLICATION, AND THAT TO THE BEST OF MY KNOWLEDGE AND BELIEF SUCH INFORMATION IS TRUE, COMPLETE, AND ACCURATE. I FURTHER CERTIFY THAT I POSSESS THE AUTHORITY TO UNDERTAKE THE PROPOSED ACTIVITIES OR I AM ACTING AS THE DULY AUTHORIZED AGENT OF THE APPLICANT.

X J Mg. Reed Jr. — Signature of Applicant — Date: 8/26/04

Lawton Coy — Signature of Agent (if agent has been listed) — Date: 8/26/04

IMPORTANT!! THE APPLICATION MUST BE SIGNED BY THE APPLICANT AND THE AUTHORIZED AGENT (IF AN AGENT HAS BEEN LISTED ON PAGE ONE OF THIS APPLICATION).

The applicant shall permit the SCDHEC Office of Ocean and Coastal Resource Management, the District Engineer, the State Law Enforcement Division, South Carolina Department of Natural Resources, and other State permit inspection agencies, or their representative(s) to make periodic inspection at any time deemed necessary in order to assure that the activity being performed is in accordance with the terms and conditions prescribed herein.

0287

CERTIFIED TRUE AND CORRECT COPY.
ATTEST: .....

AFFIDAVIT OF OWNERSHIP OR CONTROL

S. C. Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management

Charleston	Beaufort	Myrtle Beach
744-5838	846-9400	626-7217
744-5847(fax)	846-9810(fax)	626-2381(fax)

I hereby certify that I am the (check one):

- [X] Record Owner
- [ ] Lessee
- [ ] Record Easement Holder
- [ ] Applicant To Record Owner For Easement
- [ ] Contract To Purchase Property

of the below described property situated in Chas. County, South Carolina; and that said property is all of that said property that is contiguous to and landward of the area in which the work proposed in the permit application is to be conducted. Furthermore, I certify that as record owner, lessee, or record easement holder, I have, or will have prior to undertaking the work, necessary approvals or permission from all other persons with a legal interest in said property to conduct the work proposed in the permit application.

WRITE LEGAL DESCRIPTION OF HIGHLAND (as described in deed, lease, etc.) BELOW OR OR WRITE "SEE ATTACHED" (in large bold letters) AND ATTACH A COPY OF THE DEED, LEASE, EASEMENT, OR MOST RECENT CERTIFIED PLAT OF THE PROPERTY. IF YOU ARE NOT THE RECORD OWNER, LESSEE OR EASEMENT HOLDER, YOU MUST ALSO SUBMIT WRITTEN PERMISSION FROM THE OWNER OF THE PROPERTY TO CARRY OUT THE PROPOSED ACTIVITY.

End of SC Right of Way TACKY Point Rd - For Lots 1-2-3.

1818

Lot 1 156-00-00-187
Lot 2 156-00-00-065
Lot 3 156-00-00-188

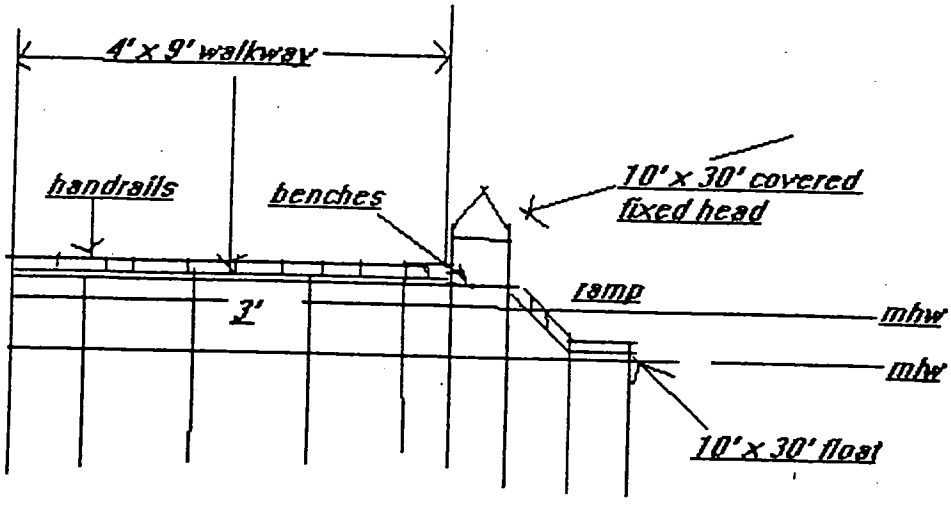
I also certify that the project as proposed does not cross any wetlands or areas below mean high water which is in the ownership of other private persons or public or private entities and that there is no disputed claim to the wetlands or areas below mean high water by private person or other entities due to a Kings Grant, State Grant, easement or conveyance or other legal document evidencing ownership of these areas.

X D. Mac Read, Jr.
Signature of Record Holder or Lessee

Sworn to and subscribed before me at Charleston, Charleston County, South Carolina, this 28 day of August, 2004.

Notary Public

My commission expires: June 15, 2011

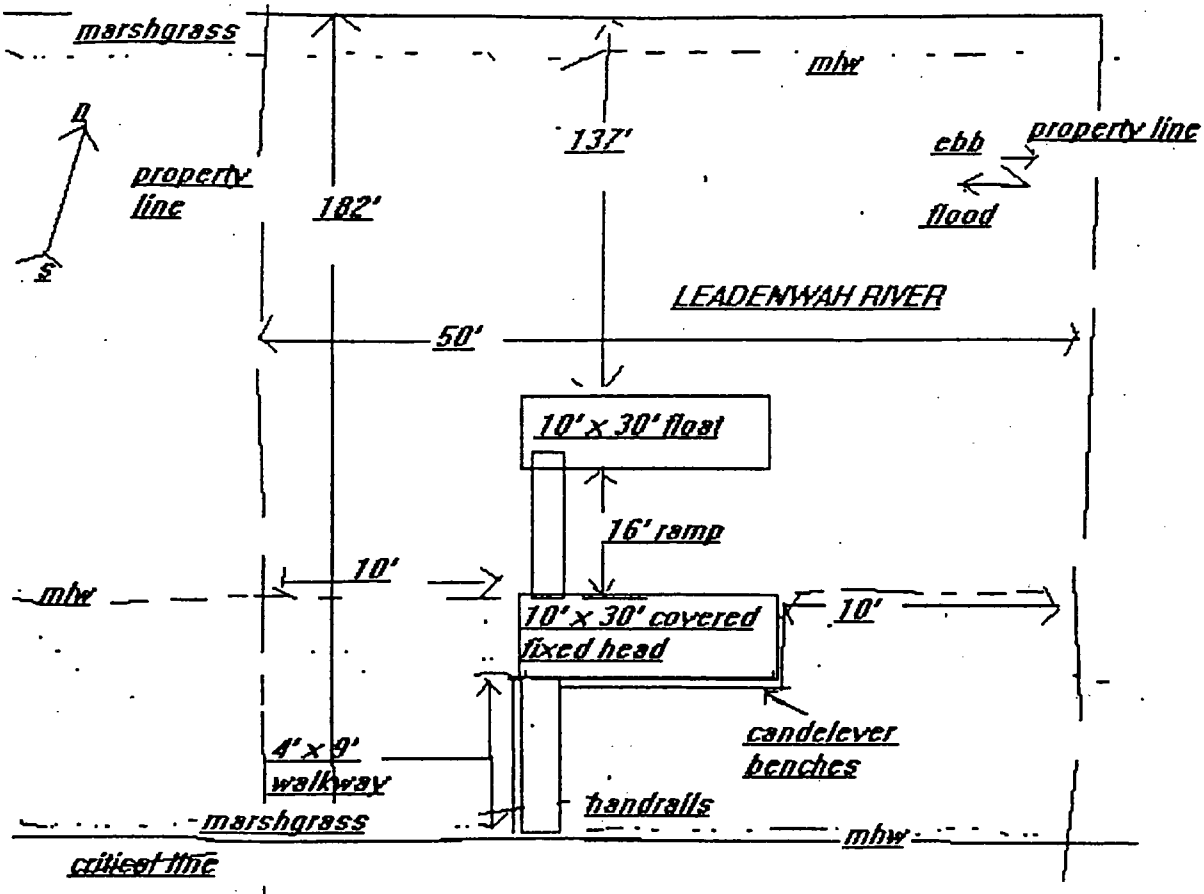


MAYO READ JR'
END OF TACKY POINT ROAD
50' EASEMENT FOR LOTS 1 - 2 - 3
WADMALAW ISLAND
CHARLESTON COUNTY
IN LEADENWAH RIVER

ADJACENT PROPERTY
OWNERS
1- TOO TACKY PARTENSHIP
1-THOMAS LAWSON

NTS

OCRM-04-297-M



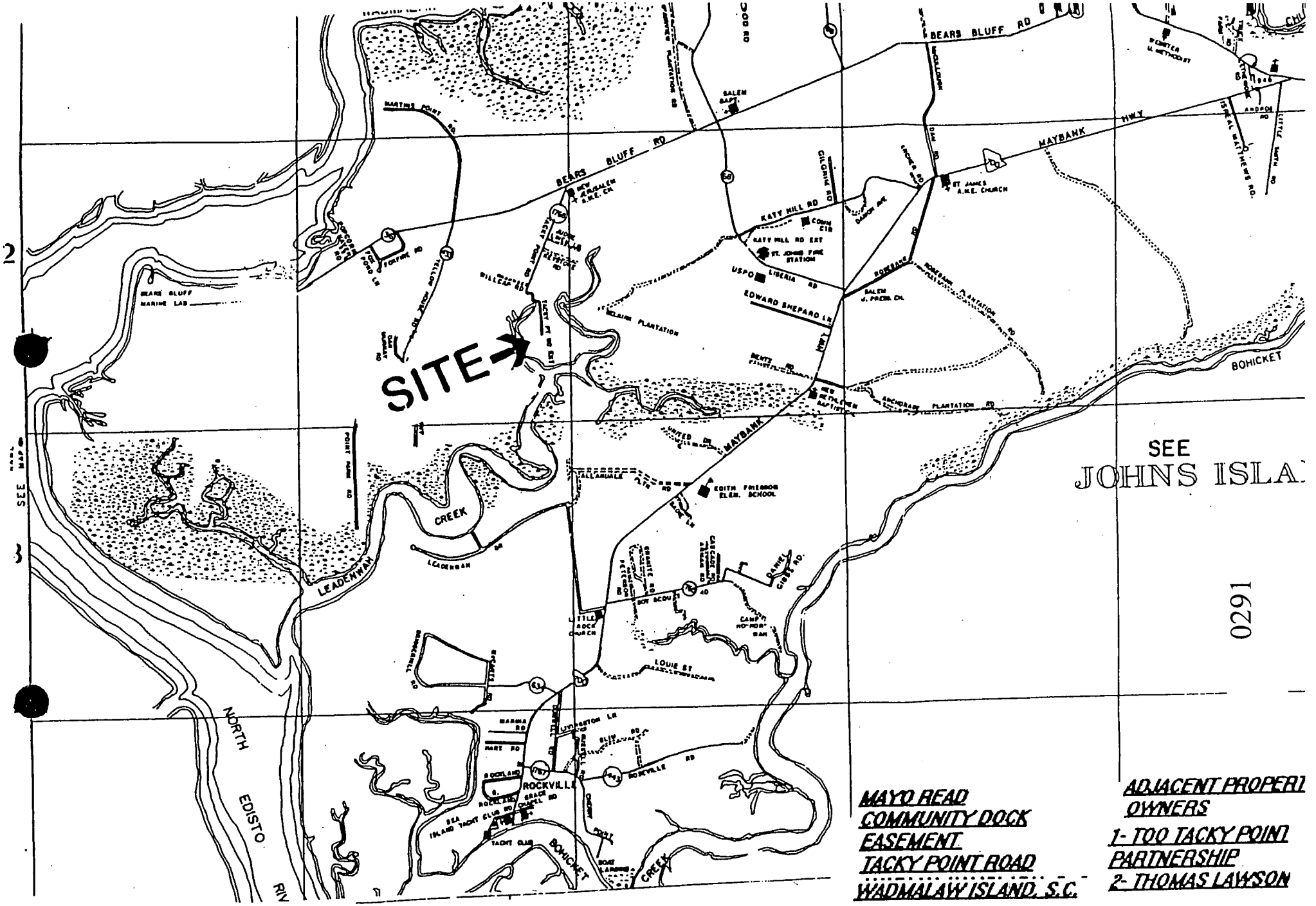
MAYO READ
COMMUNITY DOCK
EASEMENT
TACKY POINT ROAD
WADMALAW ISLAND, S.C.

FOR LOTS 1 - 2 - 3

ADJACENT PROPERTY OWNERS
1- TOO TACKY POINT PARTNERSHIP
2- THOMAS LAWSON

NTS

OCRM-04-297-M



MAYO READ
COMMUNITY DOCK
EASEMENT
TACKY POINT ROAD
WADMALAW ISLAND, S.C.

FOR LOTS 1-2-3

ADJACENT PROPERTY
OWNERS
1- TOO TACKY POINT
PARTNERSHIP
2- THOMAS LAWSON

OCRM-P-L-297.

SCDHEC OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
PERMIT APPLICATION PUBLIC NOTICE

December 2, 2004

Permit Number: OCRM-04-297-M
Permit ID: 50858

The SCDHEC Office of Ocean and Coastal Resource Management has received an application for a permit for the alteration of a critical area. This application was submitted pursuant to the Coastal Zone Management Act (Act 123) of the 1977 South Carolina General Assembly. The application, in brief, is described as follows:

APPLICANT: Mayo Read, Jr.
C/O Cox Marine Contractors
3820 Bohicket Road
Johns Island, SC 29455

LOCATION: On and adjacent to Leadenwah Creek at Lots 1, 2 & 3 at the end of Tacky Point Road, Wadmalaw Island, Charleston County, South Carolina.
TMS#s: 156-00-00-187, 156-00-00-065 & 156-00-00-188.

WORK: The work, as proposed and shown on the attached plans consists of constructing a dock. The applicant seeks to build a 4' by 9' walkway with handrails leading to a 10' by 30' covered fixed pierhead with handrails and cantilevered benches. Channelward of the pierhead a ramp will lead to a 10' by 30' floating dock. The purpose of the proposed activity is for the joint use for the owners of the three lots.

This public notice is being distributed to all known interested persons and agencies to assist in developing facts on which a decision by OCRM can be based. Comments concerning the proposed work should be submitted in writing, setting forth sufficient detail to furnish a clear understanding of the reasons for support or opposition.

The decision to issue or deny a permit will be based on the individual merits of the application, the policies specified in the South Carolina Coastal Zone Management Act, and the considerations outlined in the State of South Carolina Coastal Zone Management Program. Interested parties who wish to be notified of final permit action must notify OCRM in writing of this request.

To assure review by OCRM, comments regarding this application must be received by OCRM on or before January 1, 2005. For further information please contact the project manager for this activity, Fred Mallett at 843-747-4323 ext. 119.

PLEASE REPLY TO:

SCDHEC OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
1362 McMillan Avenue, Suite 400
Charleston, South Carolina 29405

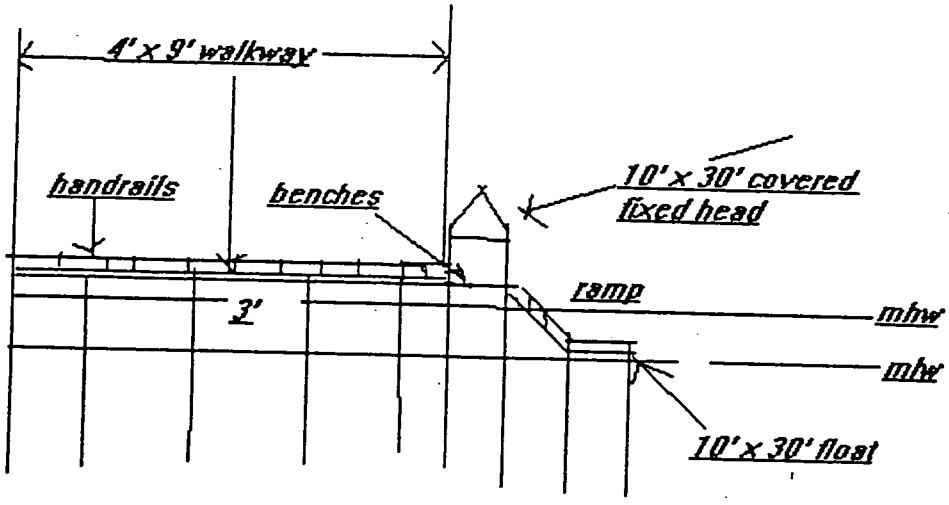
RESPONDENT'S EXHIBIT 2 DHEC

Please refer to P/N# OCRM-04-297-M

Tess Rodgers, Critical Area Permitting Coordinator

0292

M CERTIFIED A TRUE AND CORRECT COPY.
ATTEST:

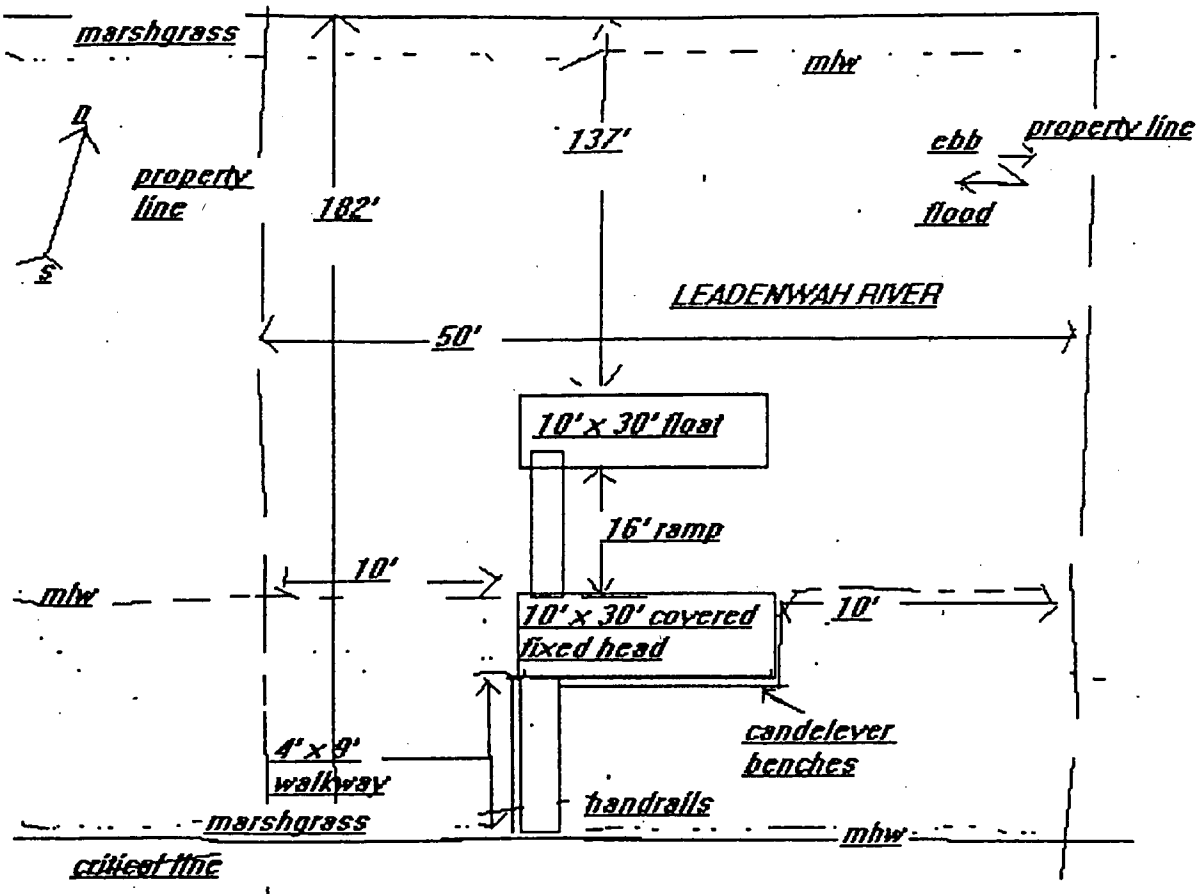


MAYO READ JR'
END OF TACKY POINT ROAD
50' EASEMENT FOR LOTS 1 - 2 - 3
WADMALAW ISLAND
CHARLESTON COUNTY
IN LEADENWAH RIVER

ADJACENT PROPERTY
OWNERS
1- TOO TACKY PARTENSHIP
1-THOMAS LAWSON

NTS

OCRM-04-297-M



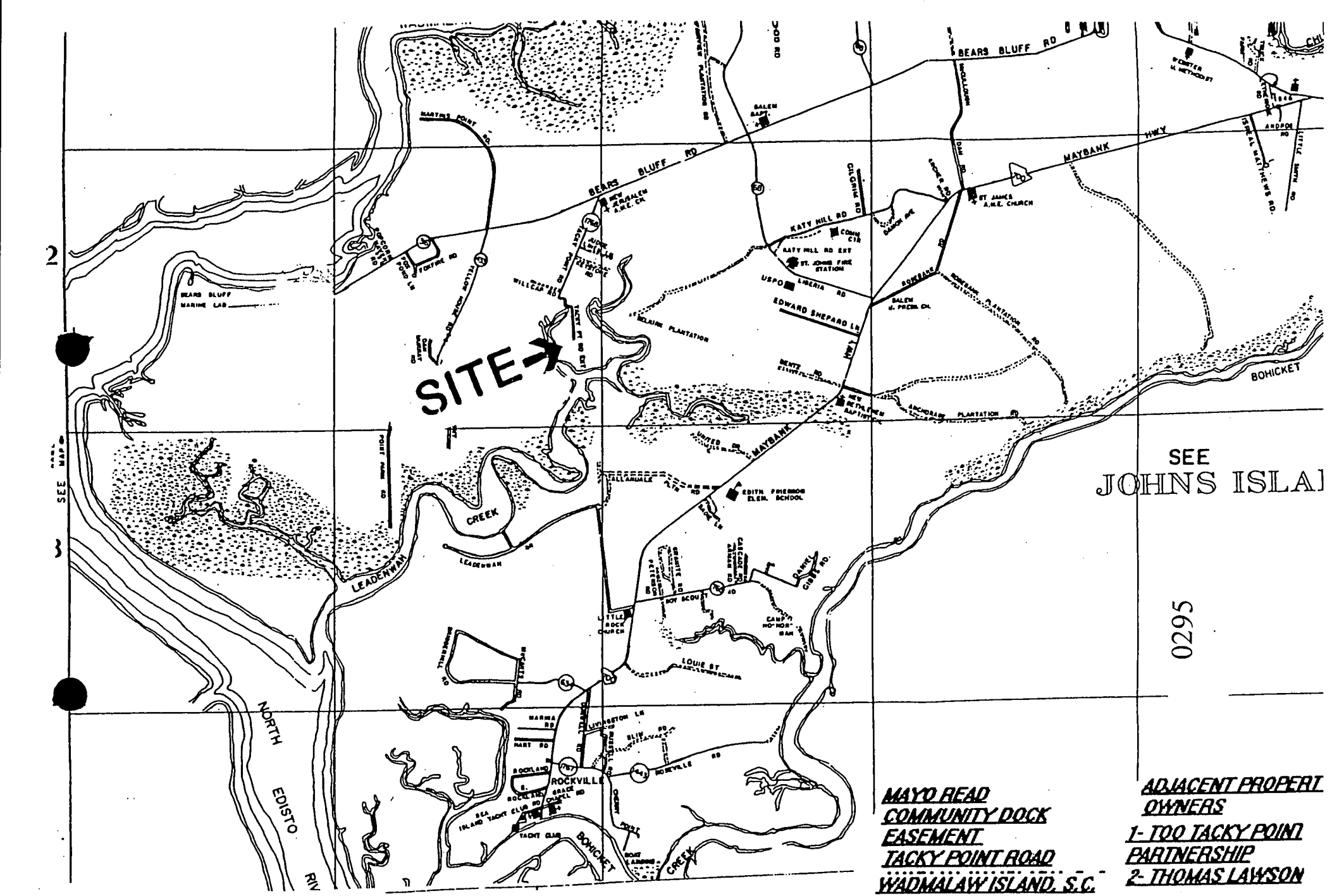
MAYO READ
COMMUNITY DOCK
EASEMENT
TACKY POINT ROAD
WADMALAW ISLAND, S.C.

FOR LOTS 1 - 2 - 3

ADJACENT PROPERTY OWNERS
1- TOO TACKY POINT PARTNERSHIP
2- THOMAS LAWSON

NTS

OCRM-04-297-M



MAYO READ COMMUNITY DOCK EASEMENT
TACKY POINT ROAD
WADMALAW ISLAND, S.C.

FOR LOTS 1 - 2 - 3

ADJACENT PROPERTY OWNERS
1- TOO TACKY POINT PARTNERSHIP
2- THOMAS LAWSON

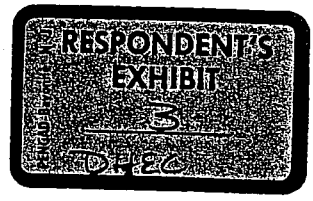
OCRM-04-297-

Certificate of Mailing

Re: **OCRM-04-297-M**
Permittee: **Mayo Read**

I, Camellia Shuler, as an employee of DHEC-OCRM certify that I have, this day mailed the following **Extended Comment** with postage affixed thereto, to the following.

Chuck Jarmin
Charleston Co. Public Works
4045 Bridge View Dr.
N Charleston, SC 29405



WAS THE PRESS LIST INCLUDED IN THIS MAILING? **Y** **N**

Date: **February 10, 2005**

Camellia Shuler

Camellia Shuler
DHEC-OCRM Employee
Charleston, South Carolina

CERTIFIED A TRUE AND CORRECT COPY.
ATTEST:.....

D H E C

PROMOTE PROTECT PROSPER

Office of Ocean and Coastal Resource Management
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

(843) 744-5838 FAX (843) 744-5847

Memorandum

To: Camille Shuler

From: Fred Mallett

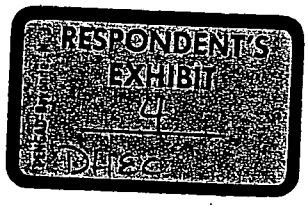
Date: February 10, 2005

Subject: P/N OCRM-04-297-M

Camille, please notify the partie listed below and allow them a 15 day comment period.

Chas. County Public Works Dept.
4045 Bridge View Drive
N. Charleston, SC 29405
C/O Mr. Chuck Jarmin

Please see me should you have any questions.



CERTIFIED A TRUE AND CORRECT COPY.
ATTEST:.....

RECEIVED

SEP 17 2004

DHEC-OCRM
CHARLESTON OFFICE

AFFILIATED MARINE PERMITTING
3420 MAYBANK HWY
Johns Island SC 29455

OCRM-04-297-M
N - 12/2/04

Number of Copies: 1

AFFIDAVIT OF PUBLICATION

The Post and Courier

RESPONDENT'S EXHIBIT 5 DHEC

ate of South Carolina
ounty of Charleston

rsonally appeared before me the undersigned advertising erk of the above indicated newspaper published in the Charleston, County and State aforesaid, who, being worn, says that the advertisement of

(Copy attached)

peared in the issues of said newspaper on the following y(s):

/14/2004

PUBLIC NOTICE

MAYO READ, JR. c/o Cox Marine has applied of the Office of SCDHEC BUREAU OF OCEAN AND COASTAL RESOURCE MANAGEMENT for a permit co construct a 4' x 9' walkway, 10' x 30' float, 3' x 20' ramp, 10' x 30' covered fixed head, candelever benches, handrails for private community use Lots 1, 2, 3 use at 50 easement end of Tacky Point Road for Lots 1, 2, 3, Wadmalaw Island, Charleston County in Leadenwah River. Comments will be received by SCDHEC OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT at 1362 MCMILLAN AVE., SUITE 400; CHARLESTON, SC 29405 by September 24, 2004.

a cost of $ 44.25
count# C0018036
der# C220QC1X
). Number: read jr
bscribed and sworn to before this 15th day September). 2004

Keisha Eddings
Advertising Clerk

0298

CERTIFIED TRUE AND CORRECT COPY.
ATTEST:

)TARY PUBLIC, SC
Commission expires
My Commission Expires 10/10/15

Coastal Zone Critical Area Permitting
Office of Ocean and Coastal Resource Management - SCDHEC

Permit Name: Read, Mayo
Decision:

Permit: _____
Permit with Conditions: ←
Deny: _____

I. Background Information — Data Base ID# 51858

Permit Number: OCRM-04-297-M
P/N Date: 12-02-04 Date Received: 09-28-04

Permit Type: _____ Permit Agency: OCRM
County: Charleston Water Body: Leadenwah Creek

Location Description:
Lots 1, 2 & 3 at the end of Tacky Point Road, Wadmalaw Island

II. Brief Project Description:
Constructing of a joint use dock. The proposed structure will have a 4' by 9' walkway with handrails leading to a 10' by 30' covered fixed pierhead. Channelward of the pierhead a ramp will lead to a 10' by 30' floating dock.

III. Summary of Public and Agency Comments (List by name, date & comment summary if none, so indicate):

Federal Agencies: - None

State Agencies: 1. DNR – 12-06-04 No submitted comments 2. SC Ports Authority 12-14-04 No objection

Adjoining Property Owners: 1. Lawson – No written comment 2. Two Tacky Partnership – Letter of objection

Others: Letters from Attorneys

RESPONDENT'S EXHIBIT

0299

A. (Commentor) (Date of comment) (Comment summary)

CERTIFIED TRUE AND CORRECT COPY.
ATTEST:.....

IV. Environmental and Policy Assessment:

A. Describe the coastal resources (i.e., vegetation, habitat, etc.), which will be impacted:

Unvegetated shoreline

B. Stated purpose of Activity:

Joint use dock

C. Name and approximate width of water body:

This section of Leadenwah Creek has a given distance of 182' as measured from the shoreline to marsh vegetation.

D. GIS Review

1) Previous Permits –

2) Previous Enforcements - No

3) Dock Master Plans - Yes

4) Other OCRM Approvals- Previous permit P/N No.:
OCRM-04-062-M, CC-91-136 State Shellfish S-187

E. Does the project impact a GAPC (if so, describe)? ~~No~~ Yes, S-187

F. Applicable Regulations

1)General Guidelines

2)Further Guidelines

3)Specific Project Standards

R.30-12(A)(2) b,c,d,f,m,(p) (vii)(r) ii

G. Has the project been modified to minimize impacts (if so, describe)?

No

H. Is mitigation required and, if so, does it meet CZM policy (describe)?

0300

No

Does the project contravene any coastal zone regulations? Yes No

(If No, skip to section VI; if Yes, complete Section VI.)

V. Modifications for bringing the project into compliance with regulations:

reducing the size of the dock to meet the 20' offset requirement and deleting roof since no roofs existin area.

VI. Field assessment by:

Fred Mallett 01-19-05
(Name) (Date)

VII: Reviewed By:

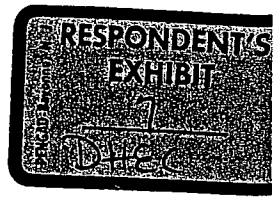
1. Project Manager: Fred Allen 12-02-04
(signature/date)

2. Staff Biologist Fred Allen 03-30-05
(signature/date)

XI. Notes: This application is being finalized with applicable Special Conditions as taken from current Rules And Regulations For Permitting In The Critical Areas Of The Coastal Zone along with a Water Quality Certification.

South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management

CRITICAL AREA PERMIT & COASTAL ZONE CONSISTENCY CERTIFICATION



SEE SPECIAL CONDITION(S)

Permittee(s):	**Mayo Reed**
Permit Number(s):	**OCRM-04-297-M**
Date of Issuance:	**March 30, 2005**
Expiration Date:	**March 30, 2010**
Location:	**Lots 1, 2 & 3 End Of Tacky Point Rd Johns Island, Charleston County, South Carolina Leadenwah Creek**

This permit is issued under the provisions of S. C. Code Ann. Section 48-39-10, *et seq.*, and 23A S.C. Code Ann. Regs. 30-1 through 30-18 (Supp. 2003). Please carefully read the project description and any special conditions that may appear on this permit/certification as they will affect the work that is allowed. If there are no special conditions, then the work is authorized as described in the project description and as modified by the general conditions. The general conditions are also a part of this permit/certification and should be read in their entirety. The S. C. Contractor's Licensing Act of 1999, enacted as S.C. Code Ann. Section 40-11-5 through 430, requires that all construction with a total cost of $5,000 or more be performed by a licensed contractor with a valid contractor's license for marine class construction, except for construction performed by a private landowner for strictly private purposes. Your signature on and acceptance of this permit denotes your understanding of the stated law regarding use of licensed contractors. **All listed special and general conditions will remain in effect for the life of the project, if work commences during the life of the permit. This applies to permittee, future property owners, or permit assignees.**

DESCRIPTION OF THE PROJECT, AS PROPOSED

This permit has been issued authorizing the structures as requested with minor changes. Specifically, the dock will have a 4' by 9' walkway with handrails leading to a 10' by 10' covered fixed pierhead. Channelward of the pierhead a ramp will lead to a 10' by 10' floating dock. The purpose of the permitted activity is for the joint use of the owners of three lots.

0302

SPECIAL CONDITIONS

1. Provided all portions of the dock are constructed as to remain a minimum of 20' from both adjoining extended property lines. Therefore, both the fixed pierhead and the floating dock are reduced to the dimensions of 10' x 12' to meet the offset requirement.

2. Provided that the handrails must not exceed 36'' above the walkway and/or decking.

3. Provided the benches are constructed within the footprint of the permitted fixed pierhead.

CERTIFIED A TRUE AND CORRECT COPY
ATTEST:

4. Provided the roof is deleted.

5. Provided that the dock should be located in a manner so as to minimize disturbance to shellfish resources or in an area void of shellfish resources. If this requires the relocation of this dock, notification to OCRM is required and written approval for the relocation must be relieved from OCRM prior to construction.

6. Provided that if archaeological or paleontological remains are encountered prior to or during construction, we request that work stop and the State Historic Preservation Office be notified at 803-734-8615. If these materials include any underwater archaeological or paleontological remains the permittee should also notify the SC Institute of Archaeology and Anthropology at 803-777-8170 pursuant to S.C. Code of Laws Ann. Sections 54-7-400, *et seq.* Archaeological remains consist of any materials made or altered by man which remain from past historic or prehistoric times (i.e., older than 50 years). Examples include old pottery fragments, metal, wood, arrowheads, stone implements or tools, human burials, historic docks, structures or nonrecent (i.e., older than 100 years) vessels ruins. Paleontological remains consist of old animal remains, original or fossilized, such as teeth, tusks, bone or entire skeletons.

PERMITTEE'S ATTENTION IS DIRECTED TO GENERAL CONDITIONS NUMBERS FOUR (4) AND FIVE (5). BY ACCEPTANCE OF THIS PERMIT, PERMITTEE IS PLACED ON NOTICE THAT THE STATE OF SOUTH CAROLINA, BY ISSUING THIS PERMIT, DOES NOT WAIVE ITS RIGHTS TO REQUIRE PAYMENT OF A REASONABLE FEE FOR USE OF STATE LANDS AT A FUTURE DATE IF SO DIRECTED BY STATUTE.

THE PERMITTEE, BY ACCEPTANCE OF THIS PERMIT AGREES TO ABIDE BY THE TERMS AND CONDITIONS CONTAINED HEREIN AND TO PERFORM THE WORK IN STRICT ACCORDANCE WITH THE PLANS AND SPECIFICATIONS ATTACHED HERETO AND MADE A PART HEREOF. ANY DEVIATION FROM THESE CONDITIONS, TERMS, PLANS AND SPECIFICATIONS SHALL BE GROUNDS FOR REVOCATION, SUSPENSION OR MODIFICATION OF THIS PERMIT AND THE INSTITUTION OF SUCH LEGAL PROCEEDINGS AS THE DEPARTMENT MAY CONSIDER APPROPRIATE.

CAUTION: Any person adversely affected by the issuance of this permit may appeal the decision by filing a written Notice of Intent to Appeal within 30 days after notification of the permit's issuance pursuant to 23A S.C. Code Ann. Regs. 30-6 (Supp 2003). In the event of an appeal, the Department reserves the right to order a stay of any use or activity authorized herein pending a final decision, when, in the judgement of the Department, the interests of the public would be best served. Pursuant to the Rules of the Administrative Law Court, the Court requires a $250.00 filing fee to be submitted with a written request for an appeal of a final staff decision. The written request for an appeal must be filed with OCRM and a copy of the request, with the $250.00 fee, sent directly to the Administrative Law Court at P.O. Box 11667, Columbia, SC, 29211. The Administrative Law Court will not process the appeal unless the fee is submitted to them.

Permit Number: **OCRM-04-297-M**

0303

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.

Mayo Reed, Atty in Fact — 4/14/05

(PERMITTEE(S)) (DATE)

Mayo Reed

This permit becomes effective when the State official, designated to act for the Office of Ocean and Coastal Resource Management, has signed below.

[signature] — 4/15/05

(MANAGER, CRITICAL AREA PERMITTING) (DATE)

Curtis M. Joyner

Or his Designee

Other Authorized State Official

0304

GENERAL CONDITION

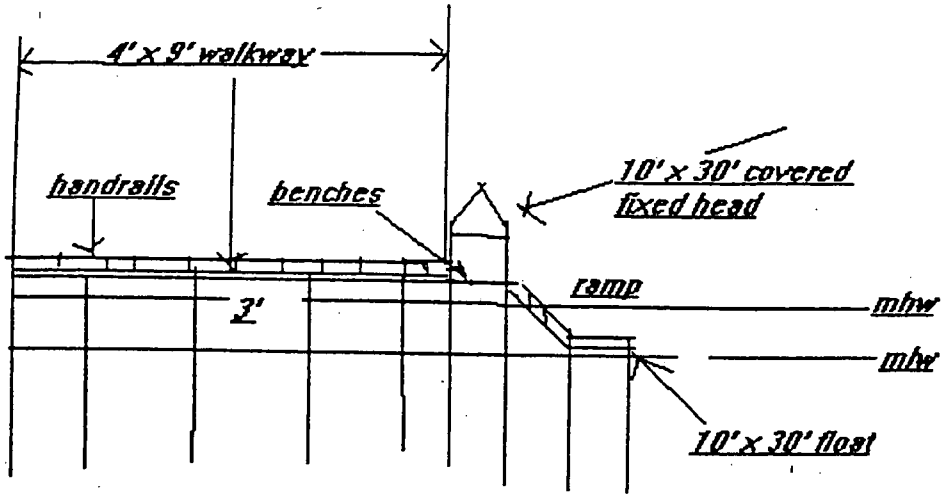
SEE SPECIAL CONDITIONS(S)

This construction and use permit is expressly contingent upon the following conditions which are binding on the permittee:

1. That the permittee, in accepting this permit, covenants and agrees to comply with and abide by the provisions and conditions herein and assumes all responsibility and liability and agrees to save the South Carolina Coastal OCRM and the State of South Carolina, its employees or representatives, harmless from all claims of damage arising out of operations conducted pursuant to this permit.
2. That if the activity authorized herein is not constructed or completed within five years of the date of issuance, this permit shall automatically expire. A request, in writing, for an extension of time shall be made not less than sixty days prior to the expiration date.
3. That all authorized work shall be conducted in a manner that minimizes any adverse impact on fish, wildlife and water quality.
4. That this permit does not relieve the permittee from the requirements of obtaining a permit from the U. S. Army Corps of Engineers or any other applicable federal agency, nor from the necessity of complying with all applicable local laws, ordinances, and zoning regulations. This permit is granted subject to the rights of the State of South Carolina in the navigable waters and shall be subject, further to all rights held by the State of South Carolina under the public trust doctrine as well as any other right the State may have in the waters and submerged lands of the coast.
5. That this permit does not convey, expressly or impliedly, any property rights in real estate or material nor any exclusive privileges; nor does it authorize the permittee to alienate, diminish, infringe upon or otherwise restrict the property rights of any other person or the public; nor shall this permit be interpreted as appropriating public properties for private use.
6. That the permittee shall permit the OCRM or its authorized agents or representatives to make periodic inspections at any time deemed necessary in order to ensure that the activity being performed is in accordance with the terms and conditions of this permit.
7. That any abandonment of the permitted activity will require restoration of the area to a satisfactory condition as determined by the OCRM.
8. That this permit may not be transferred to a third party without prior written notice to the OCRM, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferred subscribing to this permit and thereby agreeing to comply.
9. That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and special signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.
10. That the permit placard or a copy of the placard shall be posted in a conspicuous place at the project site during the entire period of work.
11. That the structure or work authorized herein shall be in accordance with the plans and drawing attached hereto, and shall be maintained in good condition. Failure to build in accordance with the plans and drawings attached hereto, or failure to maintain the structure in good condition shall result in the revocation of this permit.
12. That the authorization for activities or structures herein constitutes a revocable license. The OCRM may require the permittee to modify activities or remove structures authorized herein if it is determined by the OCRM that such activity or structures violates the public's health, safety, or welfare, or if any activity is inconsistent with the public trust doctrine. Modification or removal under this condition shall be ordered only after reasonable notice stating the reasons therefore and provision to the permittee of the opportunity to respond in writing. When the Permittee is notified that OCRM intends to revoke the permit, Permittee agrees to immediately stop work pending resolution of the revocation.
13. That the OCRM shall have the right to revoke, suspend, or modify this permit in the event it is determined the permitted structure (1) significantly impacts the public health, safety and welfare, and/or is violation of Section 48-39-150, (2) adversely impacts public rights, (3) that the information and data which the permittee or any other party have provided in connection with the permit application is either false, incomplete or inaccurate, or (4) that the work is not in compliance with the drawings submitted by the applicant. That the permittee, upon receipt of the Coastal OCRM's written intent to revoke, suspend, or modify the permit has the right to a hearing. Prior to revocation, suspension, or modification of this permit, the OCRM shall provide written notification of intent to revoke to the permittee, and permittee can respond with a written explanation to the OCRM. (South Carolina Code Section 1-023-370 shall govern the procedure for revocation, suspension or modification herein described).
14. That any modification, suspension or revocation of this permit shall not be the basis of any claim for damages against the OCRM or the State of South Carolina or any employee, agent, or representative of the Coastal OCRM or the State of South Carolina.
15. That all activities authorized herein shall, if they involve a discharge or deposit into navigable waters or ocean waters, be at all times consistent with all applicable water quality standards, effluent limitations and standards of performance, prohibitions, and pretreatment standards established pursuant to applicable federal, state and local laws.
16. That extreme care shall be exercised to prevent any adverse or undesirable effects from this work on the property of others. This permit authorizes no invasion of adjacent or private property, and OCRM assumes no responsibility or liability from any claims of damage arising out of any operations conducted by the permittee pursuant to this permit.

0305

SEE SPECIAL CONDITIONS(S)



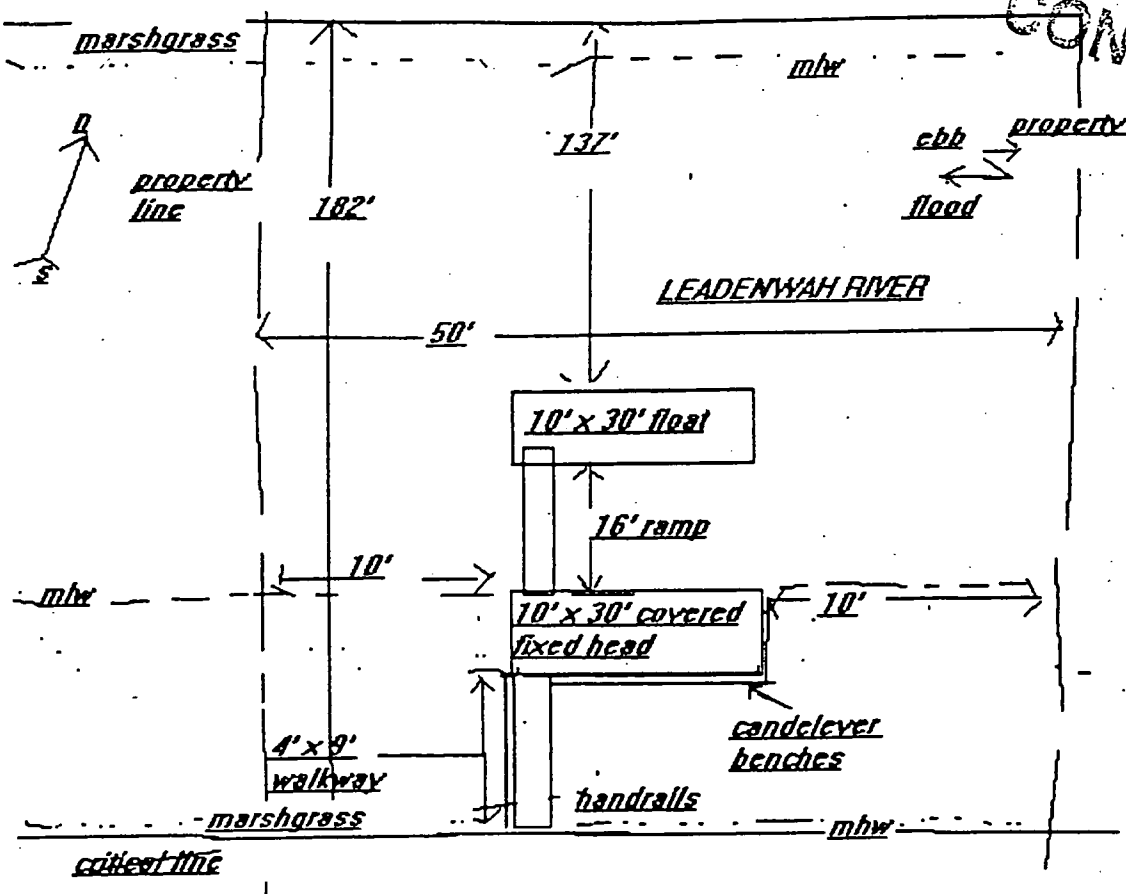
MAYO READ JR'
END OF TACKY POINT ROAD
50' EASEMENT FOR LOTS 1 - 2 - 3
WADMALAW ISLAND
CHARLESTON COUNTY
IN LEADENWAH RIVER

ADJACENT PROPERTY OWNERS
1- TOO TACKY PARTENSHIP
1-THOMAS LAWSON

NTS

OCRM-04-297-M

SEE SPECIAL CONDITIONS(S)



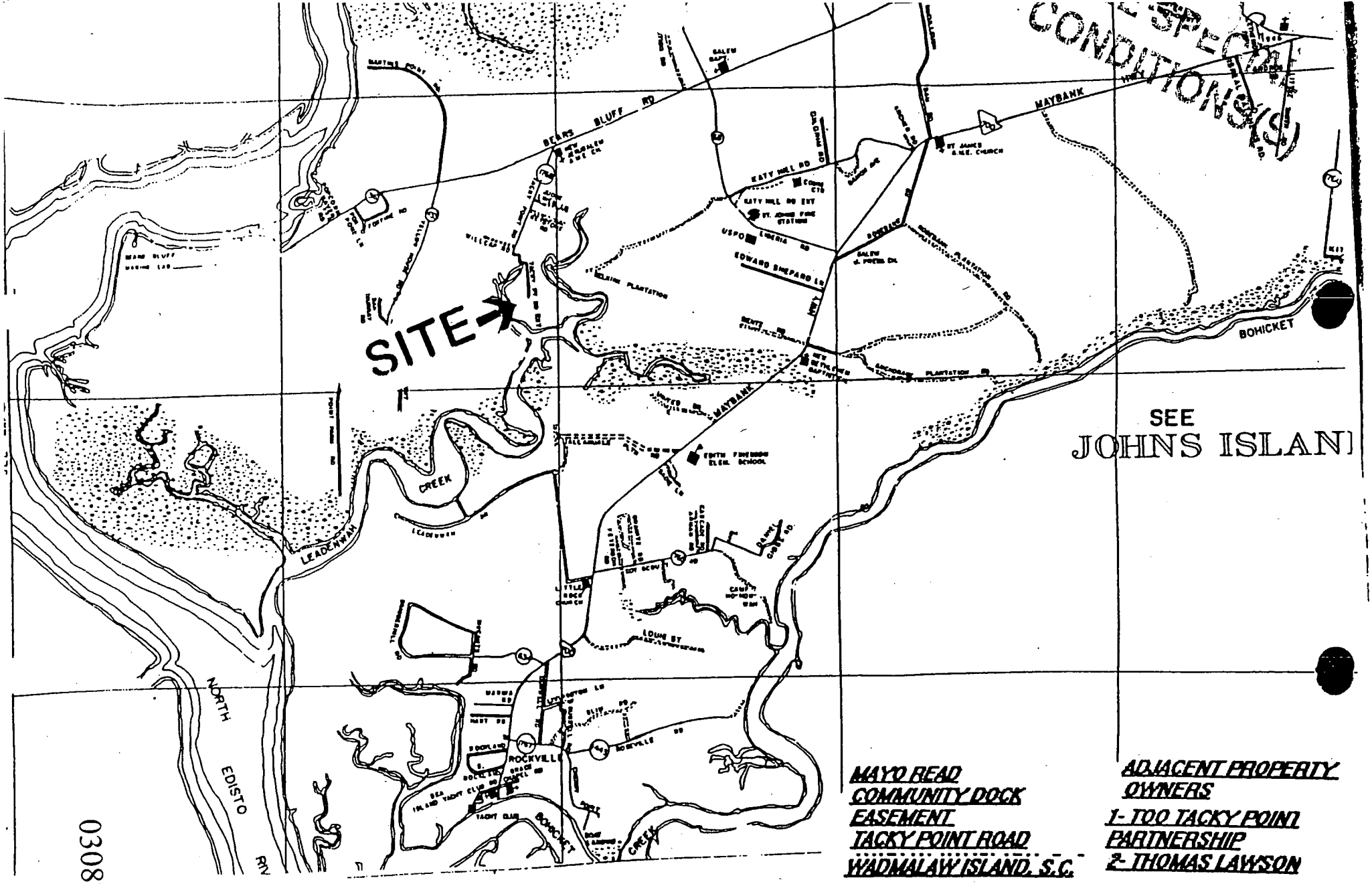
MAYO READ
COMMUNITY DOCK
EASEMENT
TACKY POINT ROAD
WADMALAW ISLAND, S.C.

FOR LOTS 1-2-3

ADJACENT PROPERTY OWNERS
1- TOO TACKY POINT PARTNERSHIP
2- THOMAS LAWSON

NTS

OCRM-04-297-M

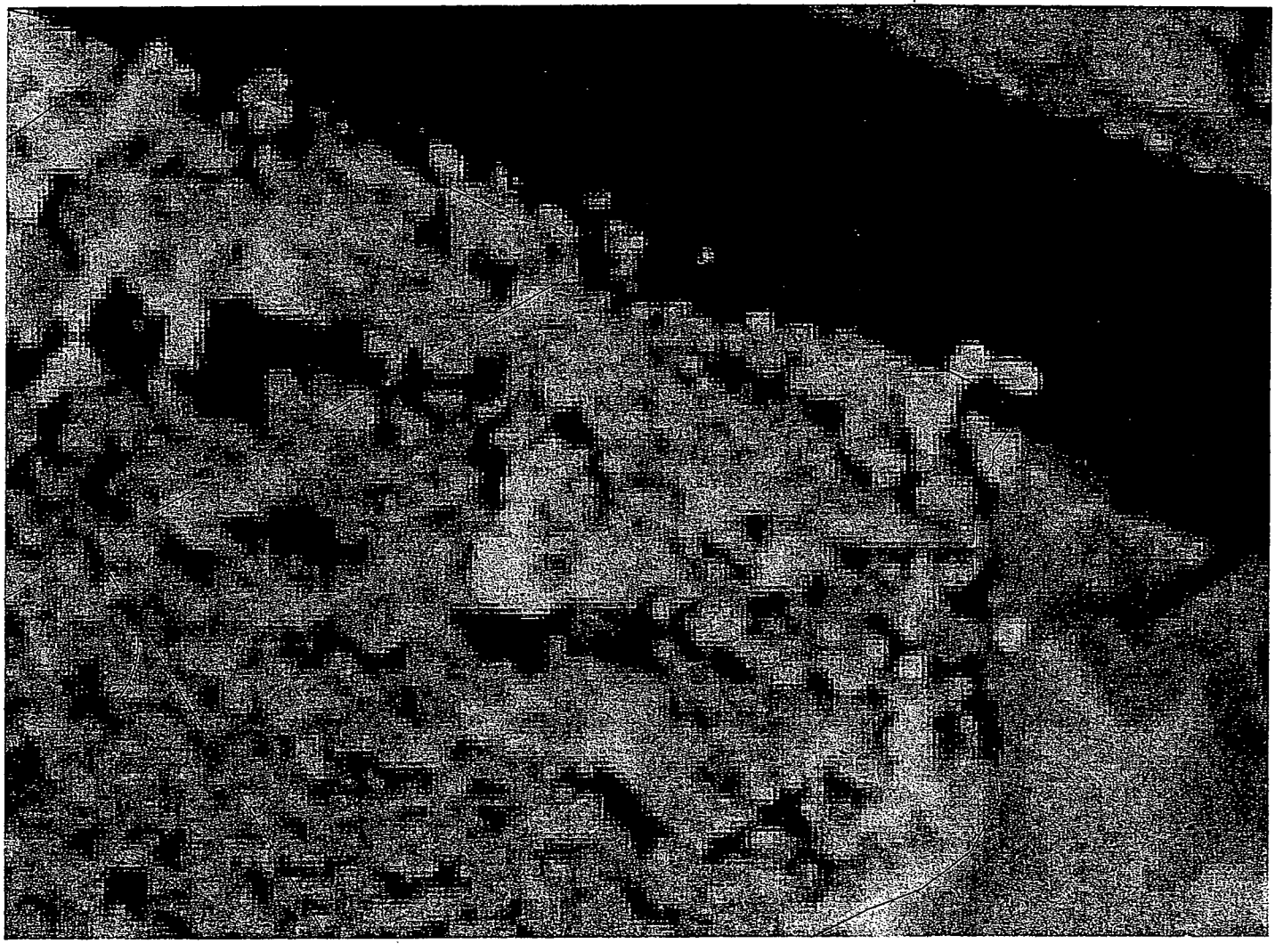


SPECIAL CONDITIONS (S)

0308

OCRM-04-297-M

RESPONDENT'S EXHIBIT



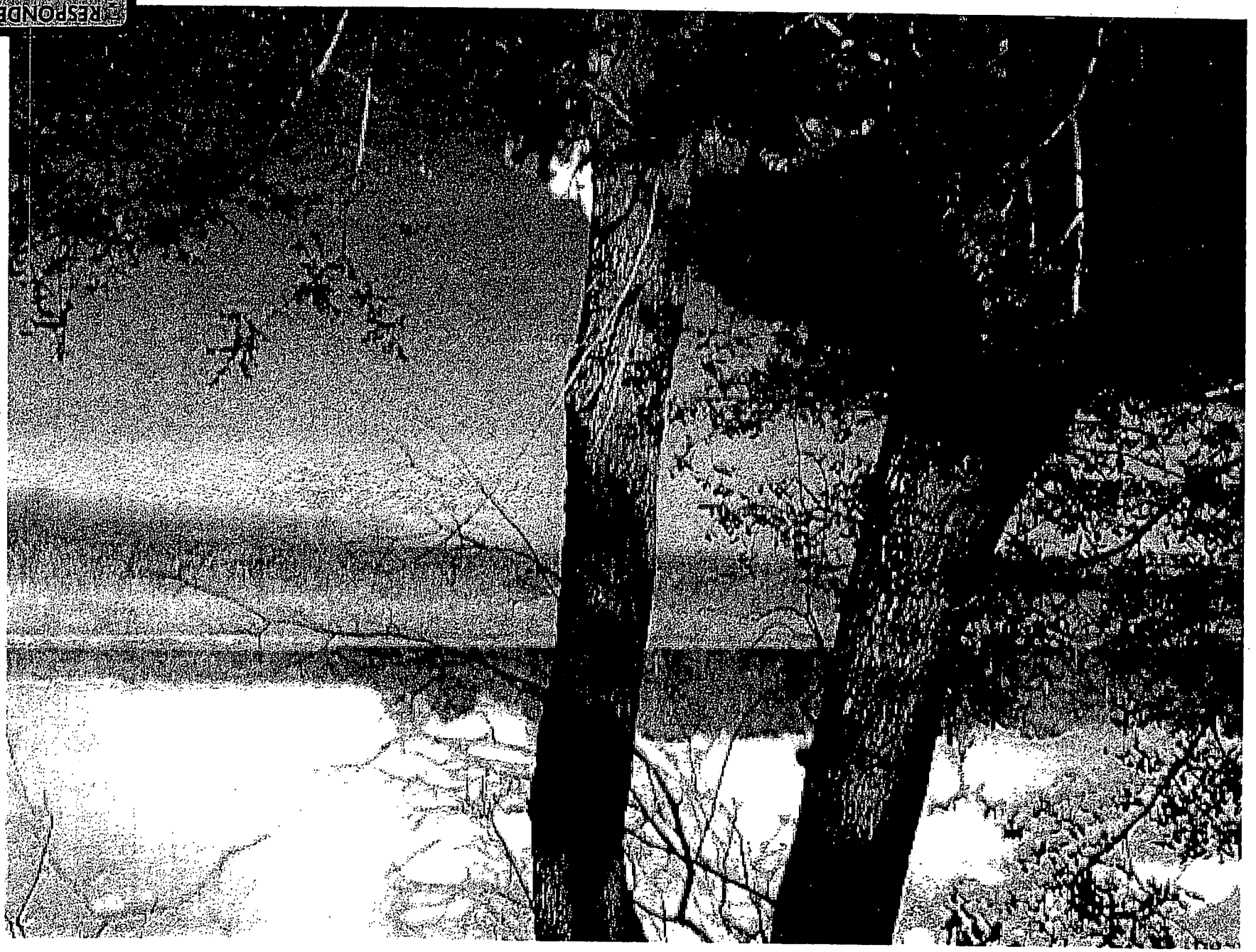
0.03 0 0.03 0.06 Miles

- Critical Area Permits 06
- Critical Area Permits 04-05
- Stormwater 06
- Stormwater 04-05
- Enforcements
- SRFAC Sites
- SCORE Sites
- Charleston County Parcels

N
W E
S

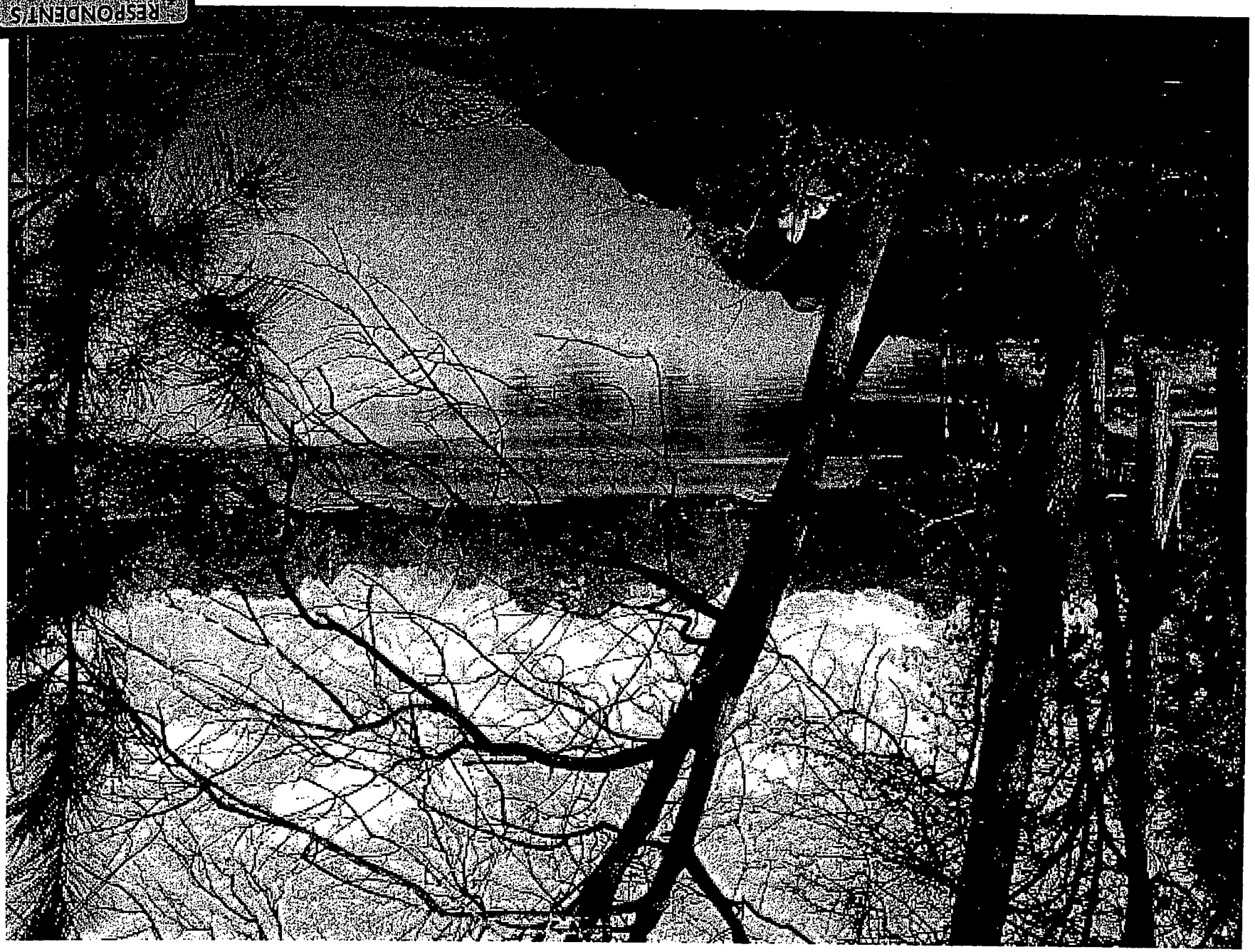
0310

RESPONDENT'S EXHIBIT 9



RESPONDENT'S EXHIBIT

RESPONDENT'S EXHIBIT



0314

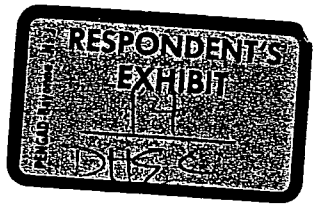
RESPONDENT'S EXHIBIT 13

South Carolina Department of
Natural Resources

John E. Frampton
Director
John V. Miglarese
Deputy Director for
Marine Resources

December 6, 2004

Mr. Curtis Joyner
SCDHEC/OCRM
1362 McMillan Ave., Suite 400
Charleston, SC 29405



RECEIVED
DEC 9 2004
CHARLESTON OFFICE

REF: OCRM-04-297-M, Mayo Read, Jr.
OCRM-04-349-E, Thomas Robinson
OCRM-04-351-R, Judi Gajewski
OCRM-04-352-R, Leonard Park
OCRM-04-353-E, Michael Safdi
OCRM-04-354-R, James Carter
OCRM-04-355-E, Susan Grant
OCRM-04-356-M, Ronald Cox
OCRM-04-357-M, Richard Albenesius
OCRM-04-359-M, Charlotte Harrell
OCRM-04-563, Bill McKown
OCRM-04-938, Louis Golub
OCRM-04-939, J.R. Hester
OCRM-04-940, Janice Maran
OCRM-04-941, William Ryan

Dear Mr. Joyner:

The South Carolina Department of Natural Resources has received the above referenced public notices of permit applications to conduct various activities that are subject to the jurisdiction of your agency. Due to staffing limitations and associated workload priorities, our department has elected to not conduct an investigation of the proposed projects nor provide any comments on the proposed activities.

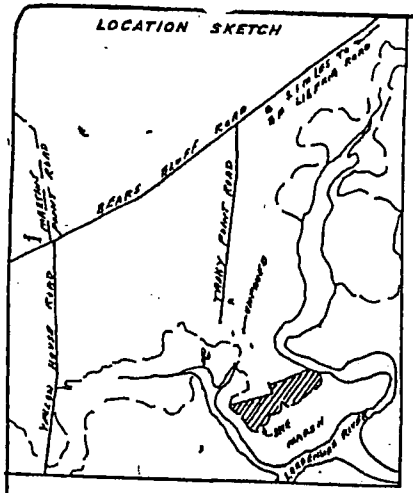
Sincerely,

Ed Duncan

Robert E. Duncan
Environmental Programs Director

0315

~11182



NOTES
1 IRONS SET AT ALL CORNERS
2 AREA BY D.M.D
3 TMS # 156-00-00-65
4 REF PLAT AT J PB 174 & AY PB 84
5 TOTAL AREA 17.71 ACRES
6 EACH LOT TO BE 4.4 ACRES ±
7 DESIGNED DIRECTION OF DRAINAGE →
8 B.M. 10-143 LOCATED 400' ± NO EAST OF TACKY POINT RD WAS USED IT IS 22.85' MSL
9 TBM SET IN 30 PINE AT END OF TACKY POINT ROAD EXTENSION 13.13 MSL

We hereby dedicate the ingress-egress easement over my property for the private use of the property owners, and we, my heirs and assigns, guarantee maintenance of said ingress-egress easement, which may be changed, either in size or location, without the express written consent of County Council. Approval of this plat in no way obligates the County of Charleston to accept this ingress-egress easement for continued maintenance.

Alma E Wagner

BK V158 PG 491

WADMALAW ISLAND
CHARLESTON COUNTY S C

PLAT OF
A DIVISION OF LANDS OF ALMA E WAGNER

1" =100'

NOV 1 1984

0 50 100 200

APPROVED FINAL PLAT
CHAS. CHARLESTON COUNTY COUNCIL
DIRECTOR OF PLANNING
CHARLESTON COUNTY PLANNING BOARD
DATE SEPTEMBER 2, 1986
#11182-A

WARNING!
APPROVAL OF THIS PLAT BY THE PLANNING BOARD AND/OR COUNTY COUNCIL DOES NOT INDICATE APPROVAL OR ADJUDICATE TITLE OF THE ACCESS OR RIGHT-OF-WAY SHOWN HEREON

This approval in no way obligates the County of Charleston to maintain this right of way until it has been constructed to County standards

AGUSTUS CAPERS
CLELIA McCLARD ESTATE
WILLIAM C BOYD
LEADENWAH RIVER
EBB
ROCK
MARSHLANDS
MARSHLANDS
CRITICAL LINE
50' RIGHT-OF-WAY
50' DRAINAGE-EASEMENT & CREEK AISLES FOR LOTS 1,2 & 3
LOT 1
4.29 ACRES
LOT 2
4.50 ACRES
LOT 3
4.44 ACRES
LOT 4
4.48 ACRES

Charleston, South Carolina
Office of Register Mesne Conveyance
Plat recorded this 28 day of Oct - 1986 at 12:26 o'clock in Plat Book BA Page 145 and tracing cloth copy filed in File 84 Drawer 3 Folder 44a, Drawing No. 44 Original plat (a 44"x33" print) delivered to Robert Frank

Robert N King
Register Mesne Conveyance

The tideland crit col area line is based on data established as of 9/1/84 by the S.C. Coastal Council. This line may be subject to change over a period of years

Robt L Frank

CERTIFIED
TRUE COPY
CHARLIE LYBRAND
REGISTER MESNE CONVEYANCE
CHARLESTON COUNTY, SC

DATE: 4-3-06

BY: Charlie Lybrand
By: LFB

RESPONDENT'S EXHIBIT

SOUTH CAROLINA REGISTERED RG 4177 LAND SURVEYOR ROBERT L. FRANK

I, Robert L. Frank a Registered surveyor #4177 of the state of South Carolina do hereby certify that I have surveyed the property shown hereon that this plat shows the true dimensions of the property and that all necessary markers have been installed, and that the precision is 1 IN 9,727

Robt L Frank

ROBERT FRANK & ASSOCIATES - WESTFOLLY ROAD - CHARLESTON, SC

0316

BK R 301 PG 161

STATE OF SOUTH CAROLINA)
) TITLE TO REAL ESTATE
COUNTY OF CHARLESTON)

KNOW ALL MEN BY THESE PRESENTS, THAT, I, DANIEL R. MCFARLAND in the State aforesaid and in consideration of ONE HUNDRED TEN THOUSAND AND NO/100 DOLLARS ($110,000.00), to me in hand paid at and before the sealing of these presents by I. MAYO READ, JR. in the State aforesaid, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said I. MAYO READ, JR., his Heirs and Assigns forever, the following described property, to-wit:

ALL that land located in Charleston County on Wadmalaw Island known as Tacky Point Farm which is a portion of Tar Kiln Plantation and designated as Lot 3, containing 4.44 Acres as shown on a plat by Robert L. Frank and recorded in the RMC Office of Charleston County, South Carolina on October 28, 1986 in Plat Book BK at page 145 ("Plat"), reference to the Plat is craved for a more complete description.

ALSO

All of Grantor's right, title and interest in and to that certain tract of land lying north of and adjacent to Lot 3 described above and shown as a 50' right-of-way on the Plat. The conveyance of the Grantor's interest in the 50' right-of-way is subject to the private use by the owner of Lots 1, 2, and 4, as set out in the dedication which appears on the Plat.

BEING the same property conveyed to Daniel R. McFarland by Deed of Alma E. Wagner dated January 12, 1987 and recorded on January 12, 1987 in Book D-161 at page 418 in the RMC Office of Charleston County, South Carolina.

TMS No. 156-00-00-188

Grantee's Address: 79 Cornwall Gardens SW 74AZ
London, England

0317

BK R 301 PG 162

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned unto the said I. MAYO READ, JR., his Heirs and Assigns forever.

AND I do hereby bind myself and my Heirs, Executors and Administrators, to warrant and forever defend, all and singular, the said premises unto the said I. MAYO READ, JR., his Heirs and Assigns, against me and my Heirs and all persons whomsoever lawfully claiming or to claim the same, or any part thereof.

WITNESS my Hand and Seal, this 24th day of April, in the year of our Lord one thousand nine hundred and ninety-eight and in the two hundred and twenty-second year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Nancy Kolb
Witness Clerk

Daniel R. McFarland
DANIEL R. MCFARLAND

BK R 301 PG 163

STATE OF GEORGIA)
)
COUNTY OF)

THE FOREGOING instrument was acknowledged before me this 24 day of April, 1998, by Daniel R McFarland.

Notary Public of Georgia Notary Public, Paulding County, Georgia
My Commission Expires: My Commission Expires April 10, 1999
[SEAL]

STATE OF SOUTH CAROLINA)
) AFFIDAVIT
COUNTY OF CHARLESTON)

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this Affidavit and I understand such information.
2. The property is being transferred by Daniel R. McFarland to I. Mayo Read, Jr. on April 21, 1998.
3. Check one of the following: The DEED is
   (a) X subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
   (b) ___ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as distribution to a trust beneficiary.
   (c) ___ EXEMPT from the deed recording fee because (exemption #_____) Explanation, if required_____

   (If exempt, please skip items 4-6 and go to item 7 of this affidavit)
4. Check one of the following if either item 3(a) or item 3(b) above has been checked.
   (a) X The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of $110,000.00.
   (b) ___ The fee is computed on the fair market value of the realty which is $_____.
   (c) ___ The fee is computed on the fair market value of the realty as established for property tax purposes which is $_____.
5. Check YES___ or NO X to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "YES", the amount of the outstanding balance of this lien or encumbrance is $_____.
6. The DEED Recording Fee is computed as follows:
   (a) $110,000.00 the amount listed in item 4 above.
   (b) -0- the amount listed in item 5 above (if no amount, place zero).
   (c) $110,000.00 Subtract Line 6(b) from Line 6(a) and place the result.
7. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as Legal Representative.
8. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

Robert Wilson, III
Grantor, Grantee or Legal Representative Connected with this transaction

Robert Wilson, III
Print or Type Name Here

SWORN to before me this 28 day of April, 1998.

Notary Public for South Carolina
My Commission Expires: 3/30/2008

SINKLER & BOYD
PROFESSIONAL ASSOCIATION
P.O. BOX 340
CHARLESTON, S.C. 29402

BK R 301 PG 165

FILED
R301-161
98 APR 28 PM 3:53
CHARLIE LYBRAND
REGISTER
CHARLESTON COUNTY SC

Recording Fee	10.00
State Fee	286.00
County Fee	121.00
Postage	
TOTAL	417.00

A

Recorded this 28 day of Apr Year 98
On Property Record Card
Peggy A Mosley
Auditor Charleston County

PID VERIFIED
ASSR MCM
DTD 4/29/98

CERTIFIED
TRUE COPY
CHARLIE LYBRAND
REGISTER MESNE CONVEYANCE
CHARLESTON COUNTY, SC
DATE: 4-3-06
BY: Charlie Lybrand
By: CFB

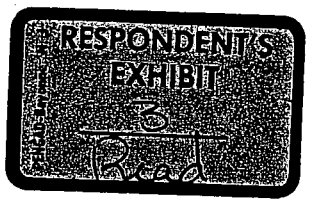
Form 10—Title to Real Estate Revised 1979

State of South Carolina,

PREPARED BY: Ben W. Macmillan, Esq.

COUNTY OF CHARLESTON

BK L 212PG207



KNOW ALL MEN BY THESE PRESENTS, THAT

I, ROBERT L. McFARLAND,

in the State aforesaid for and in consideration of the sum of TWO HUNDRED TEN THOUSAND and NO/100 ($210,000.00)----------DOLLARS, to me in hand paid at and before the sealing of these presents by TOO TACKY, a Partnership in the State aforesaid County aforesaid the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said TOO TACKY, a Partnership, it successors or assigns, forever, the following described property, to-wit:

ALL that land located in Charleston County on Wadmalaw Island, known as Tacky Point Farm which is a portion of Tar Kiln Plantation and designated as Lot 4, containing 4.48 acres as shown on a plat by Robert L. Frank, and recorded in the RMC Office for Charleston County on October 28, 1986, in Plat Book BK, Page 145. Said lot of land containing such size, shape, dimensions, buttings and boundings as shown on said plat, which plat is incorporated herein by reference. Also, all that fifty (50') foot ingress-egress right of way as shown on the said recorded plat leading from Lot 4 to the Tacky Point Road Extension on line generally North of Lots 2 and 3.
*

BEING the same premises conveyed by Alma E. Wagner to Robert L. McFarland by deed dated January 12, 1987, recorded on January 12, 1987, in Book D-161, Page 422 in the R.M.C. Office for Charleston County.

ALSO BEING the same premises conveyed by Louis E. Condon, as Master-in-Equity for Charleston County to Robert L. McFarland, dated April 3, 1992, and being recorded simultaneously herewith in the R.M.C. Office for Charleston County.

TMS#156-00-00-189

0322

GRANTOR'S ADDRESS: 138 Chadwick Drive
Charleston, SC 29407

*Together with any right, title or interest I may have in or to any property lying between the South Carolina Coastal Counsel Critical Line lot boundaries of the above described parcel and the mean low water mark of the Leadenwah River and lying between the line

(Continued)

which would be formed by extending out to the said mean low water mark the line separating the above described property from Lot 3 on the above described plat and the line which would be formed by extending out to the said mean low water mark the line separating this property from property shown on the above described plat as owned by William C. Boyd. The general warranty set forth hereinbelow shall not apply to any portion of this property lying below the mean high water mark of the Leademvah River and as to any such property lying below the mean high water mark of the Leademvah River, I do hereby bind myself and my heirs, assigns, executors and administrators to warrant and defend all and singular the said portion of the premises unto the said Too Tacky, a Partnership, its successors and assigns, against me and my heirs lawfully claiming or to claim the same or any part thereof.

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned unto the said TOO TACKY, a Partnership, its successors ~~Heirs~~ and Assigns forever.

Executors and Administrators to warrant and forever defend all and singular the said Premises unto the said TOO TACKY, a Partnership, its Successors and Assigns against me and my Heirs, and all persons whomsoever may be lawfully claiming, or to claim the same or any part thereof.

WITNESS my Hand and Seal, this 7th day of April in the year of our Lord one thousand nine hundred and ninety-two and in the two hundred and sixteenth year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF

Robert L. McFarland (L. S.)

(L. S.)

309950

STATE OF SOUTH CAROLINA
SOUTH CAROLINA TAX COMMISSION
DOCUMENTARY STAMP TAX
APR-7'92 P.B. 10897 462.00

The State of South Carolina,

Charleston County.

PERSONALLY appeared before me the undersigned witness and made oath that a/he saw the within named ROBERT L. McFARLAND sign, seal, and as his act and deed, deliver the within written Deed, and that s/he with the other witness witnessed the execution thereof.

SWORN to before me, this 7th day of April A.D. 19 92

Notary Public of South Carolina (SEAL)
My Commission Expires: Jan. 23, 2000

CHARLESTON COUNTY 183013

SOUTH CAROLINA COUNTY DOCUMENTARY TAX
APR-7'92 P.B. 1080 231.00

State of South Carolina,

ROBERT L. McFARLAND

TO

TOO TACKY, a Partnership

TITLE TO REAL ESTATE

Filed _____ day

of _____ A.D. 19____

at _____ o'clock _____ M.

and recorded in Book _____

Page _____, Fee, $_____

R. M. C. or Clerk Court C.P. & G. S.

_____ County, S.C.

Recorded this 7 day

of Apr, 19 92

in Book _____ Page _____

Fee, $ ON PROPERTY RECORD CARD

Auditor Pauline S. Rogers _____ County, S. C.

Ben W. MacMillan, Esq.
56 Broad Street
Charleston, SC 29

TMS VERIFIED
BAC 1936
DTD 4-8-92

BK L 212 PG 210
FILED
4-7-1992
92 APR -7 AM 11:30
ROBERT N. KING
REGISTER
CHARLESTON COUNTY SC

CERTIFIED
TRUE COPY
CHARLIE LYBRAND
REGISTER MESNE CONVEYANCE
CHARLESTON COUNTY, SC
DATE: 4-3-06
BY: Charlie Lybrand
By: [illegible]

0325

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

John P. Seibels, Jr.
jseibels@seibelsfirm.com
Jason Scott Luck
jluck@seibelsfirm.com
SEIBELS LAW FIRM, P.A.
165-A King Street
Charleston, SC 29401
843.722.6777 (phone)
843.722.6781 (telefax)
Attorneys for Petitioner Too Tacky Partnership

24 September 2008

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Roger Young
Circuit Court Judge

Case No.: 2007-CP-10-1520

Too Tacky Partnership,.....Appellant,

v.

South Carolina Department of Health
and Environmental Control and
Mayo Read, Jr.,.....Respondents.

FINAL BRIEF OF APPELLANT

John P. Seibels, Jr.
jseibels@seibelsfirm.com
Jason Scott Luck
jluck@seibelsfirm.com
SEIBELS LAW FIRM, P.A.
165-A King Street
Charleston, SC 29401
843.722.6777 (phone)
843.722.6781 (telefax)
Attorneys for Appellant Too Tacky
Partnership

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

STANDARD OF REVIEW 6

ARGUMENT 7

I. The CZMAP/ALJ/Circuit Court erred by affirming OCRM's grant of Respondent Read's permit based on an incomplete application containing a false affidavit 7

II. The CZMAP/ALJ/Circuit Court erred by affirming OCRM's grant of Respondent Read's permit based on an application that fails to demonstrate the required ownership or permission to build at Too Tacky's property. 9

A. OCRM's application file is void of any objective evidence supporting Read's claim of ownership or permission. 10

B. The ALJ impermissibly shifted the *prima facie* burden of demonstrating permission from the applicant to the Petitioner, and committed errors of fact and law in its assessment of the applicant's materials. 11

C. Even if the Plat were in OCRM's file and relied upon by OCRM, the face of the Plat shows such reliance is misplaced. 12

D. Even if the Plat and subject deeds had been a part of OCRM's application file, OCRM's and ALJ's analysis was controlled errors of law. 14

1. South Carolina Law does not provide a basis for Read's claim to an implied easement. 14

2. OCRM and the ALJ failed to recognize that any easement over Lot 4 was extinguished by the doctrine of merger. 17

3. OCRM and the ALJ failed to recognize that the easement claimed by Read was in gross, not appurtenant. 17

III. The CZMAP/ALJ/Circuit Court erred by affirming OCRM's grant of Respondent Read's permit for multiple docks per parcel in the absence of "abnormal" circumstances. 19

IV. The CZMAP/ALJ/Circuit Court erred by affirming OCRM's grant of Respondent Read's permit based on an application that fails to consider the proposed dock's effect on the value and enjoyment of the Petitioner's land, where the dock will be constructed. 21

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Blue Ridge Realty Co. v. Williamson, 247 S.C. 112, 145 S.E.2d 922 (1965) 15

Cason v. Gibson, 217 S.C. 500, 61 S.E. 2d 58 (1950) 16

Davis v. Epting, 317 S.C. 315, 454 S.E.2d 325 (Ct. App. 1994) 15

Haselden vs. Schein 167 S.C. 534, 166 S.E.2d 634 (1932) 17

Hodge v. Manning, 241 S.C. 142, 127 S.E. 2d 341 (1962) 16

Inlet Harbour v. S.C. Department of Parks, Recreation and Tourism, Op. No. 26459 (S.C. Sup. Ct. filed March 17, 2008) 14, 16

Lancaster v. Smith Co., Inc., 246 S.C. 464, 144 S.E.2d 209 (1965) 13

Neal v. Brown, 374 S.C. 641, 649 S.E.2d 164 (Ct. App. 2007) 6

Pearce v. McClenaghan, 39 S.C.L. (5 Rich.) 178 (Ct. App. L. 1851) 17

State v. Commisioners of Public Works, 312 S.C. 460, 441 S.E.2d 331 (Ct. App. 1994) 17

Steele v. Williams, 204 S.C. 124, 28 S.E.2d 644 (1944) 17, 18

Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997) 17

Statutes

S.C. Code § 1-23-310 (Supp. 2005) 3, 6

S.C. Code § 1-23-600 (Supp. 2004) 2

S.C. Code § 48-39-140 (Supp. 2005) 2

S.C. Code § 48-39-150 (Supp. 2004) 2, 21

S.C. Code § 48-39-180 (Supp. 2007) 3

Treatises

28A C.J.S. *Easements* § 61 (1996) 14

Regulations

23A S.C. Code Ann. Regs. 30-12 (Supp. 2004) 19

23A S.C. Code Ann. Regs. 30-2 (Supp. 2004) 2, 7

ISSUES ON APPEAL

I. Did the Circuit Court err in affirming the courts and tribunals below, when they affirmed the grant of a permit that was based on an incomplete application and a false affidavit, in violation of South Carolina statute and regulation?

II. Did the Circuit Court err in affirming the courts, tribunals, and agency below, when the Respondent failed to make a legally necessary showing of ownership or permission when the record clearly shows the necessary ownership or permission cannot be proven?

III. Did the Circuit Court err in affirming the courts, tribunals, and agency below, when there is no showing of "abnormal" circumstances to warrant a second dock, in violation of agency policy?

IV. Did the Circuit Court err in affirming the courts, tribunals, and agency below, when there is no consideration of the proposed dock's effect on the value and enjoyment of the neighbor's property, in violation of South Carolina regulations?

STATEMENT OF THE CASE

Appellant Too Tacky Partnership ("Too Tacky") challenges Respondent DHEC Office of Ocean and Coastal Resource Management's ("OCRM") decision granting Respondent Mayo Read, Jr. a critical area permit (permit or dock permit) to construct a dock extending from Too Tacky's land on Wadmalaw Island into the Leadenwah River. At the time of his application, Mayo Read, Jr. was the owner of a nearby parcel. During the course of these proceedings, Mayo Read, Jr. conveyed his parcel to his father Mayo Read, Sr.[1] For purposes of this and any subsequent briefs, Respondent Mayo Read, Jr. shall be hereinafter identified as "Read."

An applicant is not eligible for a dock permit unless he demonstrates a property interest sufficient to allow for the construction of the dock. Thus, to obtain a permit to build from Too Tacky's land, Read had to assert a superior property interest. Then Read had the burden of demonstrating to OCRM that he had the necessary ownership or permission to build a dock extending from the waterfront of Too Tacky's property. S.C. Code § 48-39-140(B)(4) (Supp. 2005); 23A S.C. Code Ann. Regs. 30-2(B)(4) (Supp. 2004). As a threshold issue, OCRM is charged with the duty of evaluating the validity of the claimed property interest and, if that interest is legally insufficient, OCRM must not grant a dock permit.

OCRM issued the permit to Read, over Too Tacky's objection, on March 30, 2005. Too Tacky challenged OCRM's decision in the Administrative Law Court pursuant to S.C. Code §§ 48-39-150 (Supp. 2004), 1-23-600(B) (Supp. 2004), and 1-23-

[1] Read Sr. has not been substituted for Read, Jr.

310 *et seq.* (Supp. 2005). Following a contested case hearing, Administrative Law Judge McLeod issued an Order affirming OCRM's permitting decision on August 17, 2006.

Too Tacky exercised its right to *quasi-judicial* review by the Coastal Zone Management Appellate Panel ("CZMAP") pursuant to S.C. Code §§ 48-39-150(D) (Supp. 2005) and 1-23-610(A) (Supp. 2005). Following a hearing, the CZMAP voted to affirm the decision of Judge McLeod and issued its Order on April 27, 2007. The CZMAP adopted Judge McLeod's findings of fact and conclusions of law as its own.

Too Tacky then exercised its right to judicial review by the Charleston County Court of Common Pleas pursuant to S.C. Code § 48-39-180. The Honorable Roger Young affirmed the CZMAP opinion by written Order dated December 18, 2007. Too Tacky filed a timely Motion to Alter or Amend the Circuit Court's Order pursuant to Rules 52 and 59, SCRCP on January 14, 2008. That Motion was denied by Order dated January 29, 2008. Too Tacky's Notice of Appeal was served on February 28, 2008.

STATEMENT OF FACTS

Read sought and obtained a critical area permit from OCRM based upon false pretenses. In his permit application, he submitted an Affidavit of Ownership claiming to be the record owner of "all of that said property that is contiguous to and landward of the area in which the work proposed in the permit application is to be conducted." The Affidavit goes on to state, "Furthermore, I certify that as record owner, lessee, or record easement holder, I have, or will have prior to undertaking the work, necessary approvals or permission from all other persons with a legal interest in said property to conduct the work proposed in the Permit Application." (R. p. 288).

In fact, Too Tacky, not Read, is and was at all relevant times the record owner of the property from which the dock would extend. (R. pp. 322-325). Moreover, Too Tacky has refused and continues to refuse to grant its approval or permission to Read for construction of a dock extending from Too Tacky's property, a 4.4 acre tract along the Leadenwah River.

Too Tacky's property may be hereinafter referred to as "Lot 4", as identified on a plat (hereinafter "the Plat") recorded on October 28, 1986 in the Charleston County RMC Office at Book BK, Page 145. (R. p. 316). In the early 1990's, Too Tacky obtained a critical area permit and constructed a dock extending from Lot 4 to the Leadenwah River. (R. p. 202).

Read's proposed dock would be for the benefit of the owners of Lots 1, 2, and 3 as identified on the Plat, and not for the benefit of Too Tacky. Sometime ago, an owner of Lot 1 obtained a critical area permit and constructed a dock extending from Lot 1 to the Leadenwah River. (R. p. 189).

At the time of the application, I. Mayo Read, Sr. was the owner of Lot 1. (R. pp. 279-282). Ellen Read was the record owner of Lot 2. (R. pp. 283-285). Respondent Mayo Read, Jr. was the record owner of Lot 3. (R. pp. 317-321). By the time of the contested case trial, Respondent Mayo Read, Jr. had sold Lot 3. (R. p. 187). He did not testify.

From the time Too Tacky purchased Lot 4 in 1992 until the time of the dock application, no one claimed to have an easement across Lot 4. (R. pp. 199, 322-325). From the time Mayo Read, Ellen Read, and Mayo Read, Jr. purchased Lots 1, 2, and 3 (1989, 1991, and 1998) neither they, nor any other members of their family, ever crossed

Lot 4 to get to the Leadenwah to access the creek for any purpose including but not limited to fishing, shrimping, swimming, kayaking, sailing, or crabbing. (R. pp. 194-195, 276-285, 317-321).

In 1992, Too Tacky erected a post and a chain at its property line where, according to the Read, his alleged easement begins. Too Tacky has maintained a chain at that location continuously. (R. pp. 200-201). It has never been asked to take the chain down. (R. p. 192). In fact, when Mayo Read, Sr., owner of Lot 1, entered Too Tacky's land to see where the proposed dock would be constructed, he had to walk around or step over the chain. (R. pp. 192-193).

STANDARD OF REVIEW

The Administrative Procedures Act establishes the appropriate standard of review for this action:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional or statutory provisions; [2]
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> S.C. Code § 1-23-380(A)(6)(2005)

[2] Respondent Mayo Read, Jr., has previously argued that "The standard on appeal is a violation of statute, not the violation of a regulation." (R. pp. 251-252). This is incorrect, as the violation of a regulation is equivalent to the violation of a statute. See Neal v. Brown, 374 S.C. 641, 649 S.E.2d 164 (Ct. App. 2007) (violation of DHEC dock regulation).

ARGUMENT

I. The CZMAP/ALJ/Circuit Court[3] erred by affirming OCRM's grant of Respondent Read's permit based on an incomplete application containing a false affidavit.

The South Carolina Code applicable to critical area permits provides, "Each application for a permit shall be filed with the department and shall include ... a copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property, to carry out the proposal." S.C. Code §48-39-140(B)(4) (Supp. 2005). OCRM's permit application regulation contains an almost identical provision, providing that a critical area permit application is not complete unless it contains "A certified copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property to carry out the proposal . . .". 23A S.C. Code Ann. Regs. 30-2(B)(4) (Supp. 2004). To meet these requirements, OCRM uses a form checklist to assure the applicant submits a fully completed application. (R. p. 258).

The Application

OCRM collected the required fee and received an Affidavit of Ownership from Respondent Read. However, OCRM did not require Read to submit certified copies of any instruments indicating ownership, possession, or permission to carry out the proposed dock construction on Too Tacky's property. There are no such documents in OCRM's dock application file. (R. pp. 108-109). OCRM ultimately granted a permit relying upon the Owner's Affidavit. (R. pp. 104, 111, 133-134).

[3] The CZMAP adopted the Final Order and Decision of Judge McLeod in its final order. The Circuit Court affirmed.

At the contested case hearing OCRM contended that (1) an Owner's Affidavit constitutes a sufficient "other instrument" to satisfy the statutory and regulatory application requirements, (2) its file is complete with just the Owner's Affidavit, and (3) it can issue a permit based only upon a statement under oath by the applicant. (R. pp. 105, 111). The ALJ agreed, curiously contradicting its own finding of fact number six in which it was determined that the application was incomplete even with the owner's affidavit. (R. pp. 2-3, 7-8).

OCRM's position, however, is belied by its own form called a Summary of Review Sheet which requires both an Owner's Affidavit and a "Certified Deed, plat or lease." (R. p. 258). Even though someone checked the box on the form to indicate that a certified deed, plat or lease had in fact been collected from the applicant on September 28, 2004, OCRM conceded at trial that the form is erroneous. No such documents, certified or not, were ever submitted as part of the application. (R. pp. 108-109). By issuing the permit without obtaining the statutorily required materials, OCRM acted in excess of its statutory authority and upon unlawful procedure, and the decisions below must be reversed due to this error of law.

The Affidavit

Even if an Owner's Affidavit legally could take the place of the required certified deed, plat or lease, OCRM arbitrarily relied upon the Affidavit of Read which was shown to be false during the public comment period. Respondent Read claimed in his Owner's Affidavit to be the owner of "all of that said property that is contiguous to and landward of the area in which the work proposed in the permit application is to be conducted." (R. p. 288). When Too Tacky informed OCRM that it, not Read, owned the property, Read

began claiming a creek access easement instead. (R. pp. 271-273). Yet, OCRM did not require him to submit a new truthful Affidavit.[4]

Quite simply, OCRM abused its discretion, even if one assumes a mere Owner's Affidavit is all that is legally required from an applicant. If Read does in fact have an easement to access the creek and permission from Too Tacky to build a dock, he should be required to state so in his affidavit. He wasn't. The agency must not issue permits based upon false affidavits. A permit granted upon an incomplete application must be characterized as arbitrary and capricious, and abusive of the discretion vested in OCRM by the State of South Carolina. The decisions below must be reversed because OCRM exceeded its statutory authority.

II. The CZMAP/ALJ/Circuit Court erred by affirming OCRM's grant of Respondent Read's permit based on an application that fails to demonstrate the required ownership or permission to build at Too Tacky's property.

The underlying issue in this dispute lies in the contest over the existence and scope of any implied creek access easement burdening Too Tacky's property in favor of Lots 1, 2 and 3. Yet, neither OCRM nor this Court can resolve that dispute for the parties. This case will not decide the existence or scope of any implied creek access easement. This Court must, however, address and resolve the question of whether Read satisfied the statutory and regulatory requirement to demonstrate legitimate possession of, or permission to use, the property on which the dock is to be constructed (his *prima facie* burden).

[4]Too Tacky contends that Read has no easement over its property. A final determination of Read's property rights, if any, must be reached in another forum.

A. OCRM's application file is void of any objective evidence supporting Read's claim of ownership or permission.

OCRM concluded that Read sufficiently demonstrated he owned an implied easement over Too Tacky's property and thus needed no further permission from Too Tacky to build a dock extending from it. (R. pp. 133-134). However, OCRM's file contains only one document where Read claimed a creek access easement: A letter from his attorney. (R. pp. 271-273). Significantly, the letter contradicts Read's Affidavit. Clearly, South Carolina's regulatory scheme does not permit arguments of counsel to take the place of affidavits, plats, deeds, leases or other certified instruments. Yet, OCRM accepted counsel's argument. (R. pp. 105, 113-118).

The letter of Read's counsel was presented in response to a letter written by Too Tacky's counsel. (R. pp. 267-270). Too Tacky, in that letter, asserted that (1) Read does not own the property where the dock was proposed; (2) Read may try to claim an implied easement; and (3) even if Read had an implied easement to get to the creek, he still lacks permission from Too Tacky to construct a dock extending from Too Tacky's property.

Against these competing arguments, OCRM examined the County's geographic information system (GIS) map, and placed a copy of it in the application file. According to the County GIS map, there is no right-of-way across Too Tacky's property to the Leadenwah. (R. p. 264).

It is important to recognize the sum total of "easement" materials in OCRM's application file: (1) an argument for an easement by Read's counsel; (2) a statement by Too Tacky's counsel denying the existence of an easement, and more importantly denying the requisite permission to build; and (3) a County record showing no right-of-way. Based upon this evidence, OCRM exceeded its statutory authority in finding

Respondent Read met his statutory burden to show ownership or permission, and the decisions below must be reversed.

B. The ALJ impermissibly shifted the *prima facie* burden of demonstrating permission from the applicant to the Petitioner, and committed errors of fact and law in its assessment of the applicant's materials.

The ALJ committed an error of law by deviating from the application file to support its conclusion that Read had met his duty to show ownership and permission. Instead of restricting its review to OCRM's application file, the Court made a detailed examination of the Plat (R. p. 316) and four deeds (R. pp. 276-278, 283-285, 317-325) which were not in OCRM's file when it granted the permit.[5] In a review of OCRM's action, the ALJ should never have examined materials that were not submitted to OCRM. When analyzing the question of whether Read met his duty to prove ownership and permission, the Court should confine its inquiry to OCRM's application file. Since the ALJ relied upon material not in the application file to reach its conclusion that Read demonstrated ownership and permission, the ALJ abused its discretion and must be reversed. The only evidence in the file, outside the arguments of counsel, are GIS maps that do not show the easement claimed by Read. (R. pp. 260-264).

Specifically, the ALJ found as a matter of law in paragraph 11 of the Order that DHEC relied upon the Plat in making its decision. That conclusion is not supported in the record. OCRM's decision, according to OCRM's Fred Mallett, was based upon the false affidavit of ownership, only. (R. pp. 103-107).

[5] Although OCRM staff testified that they reviewed the plat at some point during the process, OCRM's decision to grant the permit was based upon the Owner's Affidavit. (R. pp. 103-107). In any event, the plat is not included in OCRM's permit file. (R. pp. 108-109, 112).

The ALJ commits an identical error in paragraph 15 of his findings of law, wherein the court judges DHEC's interpretation of the Plat and four deeds as not only consistent with South Carolina law but also sufficient to constitute the applicant's *prima facie* showing of ownership or control. That conclusion is completely without foundation; the agency did not rely upon the Plat, and the four deeds were never submitted by the applicant when the permit was issued. (R. p. 11). It is a manifest error of law for the court to consider materials outside of the application when determining whether the applicant met his burden. These errors of fact and law cannot be allowed to stand. Because these findings constitute the basis for the ALJ's decision, and because they are without support in the record, the ALJ must be reversed.

C. Even if the Plat were in OCRM's file and relied upon by OCRM, the face of the Plat shows such reliance is misplaced.

The Plat of the properties (R. p. 316) was recorded in 1986 and shows a "50' drainage easement & creek access for Lots 1, 2 and 3" along, but within, the northern boundary of Too Tacky's property and terminating at the river. The Plat bears a prominent stamp stating:

> WARNING! APPROVAL OF THIS PLAT BY THE PLANNING BOARD AND/OR COUNTY COUNCIL DOES NOT INDICATE APPROVAL NOR ADJUDICATE TITLE OF THE ACCESS OR RIGHT-OF-WAY SHOWN HEREON.

(Ibid). Thus, had Read submitted the Plat for inclusion in the application file, the WARNING! on the Plat renders it unreliable for the purpose for which it would have been submitted: to prove title or a right to use the right-of-way shown thereon or otherwise serve as evidence of ownership. The ALJ went to great lengths to find as a

matter of law that a plat is an "instrument" of a sort, but the ALJ never reached the ultimate issue of whether a plat is an instrument of ownership or permission as those terms are used in the Code and Regulations. To the extent he impliedly made such a finding, that determination is an error of both fact and law. To the extent OCRM may have relied upon the Plat, such reliance was misplaced under South Carolina property law and especially in light of the disclaimer warning the reviewer not to rely on it to determine whether a right-of-way exists and who could claim it.

The law is clear on this point. The permit regulation and statute specifically identify deeds and leases as acceptable forms of indicia of ownership, possession and permission. Each is a written binding agreement of conveyance between parties concerning their respective rights in specified real property. Like deeds and leases, written and recorded easements are characterized by the conveyance of some property right. Plats on the other hand are merely maps drawn to scale which alone neither grant nor limit property rights. A plat is not an index to encumbrances.[6] Lancaster v. Smith Co., Inc., 246 S.C. 464, 144 S.E.2d 209 (1965). If, by contrast, Read had presented an express written and recorded easement executed by the parties or their predecessors in title, burdening Lot 4 in favor of Lots 1, 2, and 3 for purposes of dock construction, this Court would be compelled to find that Respondent had submitted the required evidence. Plainly, the Plat is not an accurate indicator of property rights.

The Plat at best could be deemed to describe a possible state of affairs as they may have existed in October 1986, 18 years before the dock application. Even so, the

---

[6]The subject plat is not even an accurate indicator of ownership. According to the plat, an adjoining property owner is Boyd. Relying on county records, OCRM quickly determined that the correct adjoining property owner is Lawson. (R. pp. 122-125).

Plat is contradicted by the County's 2004 GIS records in the application file. Other than examining the GIS records, OCRM took no steps to determine whether a creek access easement which may have existed in 1986 still existed in 2004, or to determine its scope. OCRM actually disregarded Too Tacky's statements that it would not allow a second dock on its property. OCRM ultimately granted Read a permit to build a second dock extending from Too Tacky's property. (R. p. 134). In the absence of substantial evidence to support a conclusion that Read had ownership or permission, the ALJ's decision must be reversed.

D. Even if the Plat and subject deeds had been a part of OCRM's application file, OCRM's and ALJ's analysis was controlled errors of law.

OCRM was faced with competing positions: Read claimed an implied easement and Too Tacky denied it. Failure by OCRM's staff, including its legal staff, to evaluate the competing claims constitutes an abuse of discretion. A proper analysis, applying the correct legal principles, reveals that Read could not sustain a *prima facie* case of permission to build.

1. South Carolina Law does not provide a basis for Read's claim to an implied easement.

Easements exist by express creation or by implication. Inlet Harbour v. S.C. Department of Parks, Recreation and Tourism, Op. No. 26459 (S.C. Sup. Ct. filed March 17, 2008). The letter from Read's counsel asserted an implied easement. No express easement is claimed. Implied easements are not favored because they conflict with the general rule that a written instrument speaks for itself. Id., citing 28A C.J.S. *Easements* § 61 (1996).

In its Conclusions of Law, the ALJ mistakenly relied on Davis v. Epting, 317 S.C. 315, 318, 454 S.E.2d 325, 327 (Ct. App. 1994) to find that Read submitted sufficient evidence that he was entitled to use Too Tacky's property. (R. p. 10). This is error for several reasons.

First, Davis is a case determining the implied rights among two homeowners to use a subdivision road that abuts each party's lot.. Id. at 316. The road, Virginia Lane, was reserved in fee simple by the original developer and was identified as a right of way access road on the development plat referenced in each party's deed. Epting obtained a deed to a portion of Virginia Lane, built an improvement that encroached into the road and otherwise blocked or impeded its use by others. Relying upon Blue Ridge Realty Co. v. Williamson, 247 S.C. 112, 145 S.E.2d 922 (1965), this Court stated "Where land is subdivided, platted into lots, and sold by reference to the plats, the buyers acquire a special property rights in the roads shown on the plat." Id. at 318 (emphasis added). The Court held that both parties received implied easements over Virginia Lane at the time of their purchases from the original developer. Epting's subsequent acquisition of a portion of Virginia Lane did not alter the easement, since the grantor could not convey greater property rights than it had. Id.

The ALJ's emphasis on platted roadways is misplaced. If these parties were arguing over each's right to use the 50' right of way shown on the Plat to the north of Lots 2 and 3, then the Blue Ridge Realty line of cases would apply to assure each owner the implied right to use that road to reach their lots. But, the easement claimed by Read is not a roadway. The area is wooded and had been blocked by Too Tacky with a chain since 1992. (R. pp. 200-201). In fact, when Mayo Read, Sr., owner of Lot 1, entered Lot

4 to see where the proposed dock would be constructed, he had to walk around or step over the chain. (R. pp. 192-193).

The Blue Ridge Realty line of cases should not be extended to create implied easements on property other than road ways shown on this or any other plat. The policy and justification for the Blue Ridge Realty rule was restated by the Supreme Court in Inlet Harbour: "When a grantor conveys land abutting a street, he is estopped from denying the street's existence and the right of the grantee to its use." citing Cason v. Gibson, 217 S.C. 500, 61 S.E. 2d 58 (1950)[7]. Because the creek access claimed by Read is not a road, the line of case law suggested by Read's counsel and relied upon by the ALJ to sustain the permit is inapplicable.

Second, it is undisputed that the subject deeds were never submitted as part of the permit application. (R. pp. 108-109, 112). How, then, could OCRM have applied the Blue Ridge Realty analysis?

In the absence of an implied easement under Blue Ridge Realty, OCRM and the ALJ should have looked for an express grant. Again, the applicant was allowed to rest on a letter from his attorney instead of producing evidence (in the form of the statutorily required deeds) to support his burden. The deeds, had they been submitted, would have revealed to OCRM (and its legal staff) that the grants into the owners of Lots 1, 2 and 3 do not include a conveyance of an easement, and the deed into Too Tacky is in fee simple absolute. The Plat, had it been carefully reviewed by OCRM, would have revealed that the area claimed by Read is not a roadway. Therefore, Read could not meet his burden even if he had submitted the materials required by the code and regulations.

[7] Even implied easements to use roadways shown on plats referenced in deeds can be abandoned or extinguished. See Hodge v. Manning, 241 S.C. 142, 127 S.E. 2d 341 (1962).

2. OCRM and the ALJ failed to recognize that any easement over Lot 4 was extinguished by the doctrine of merger.

Neither the ALJ nor OCRM recognized the legal significance that, at the time the Plat was filed, all parcels shown thereon were owned by the same party. (R. p. 1A). An easement cannot exist where both the purported servient and dominant estates are owned by the exact same person. Haselden vs. Schein 167 S.C. 534, 539, 166 S.E.2d 634, 635 (1932). "The essential ingredient of a right-of-way would be wanting; it would not be a right-of-way over another's land, but over his own land." Id., citing Pearce v. McClenaghan, 39 S.C.L. (5 Rich.) 178 (Ct. App. L. 1851). Thus, the alleged easement either never existed as a matter of law, or was extinguished by the doctrine of merger.

3. OCRM and the ALJ failed to recognize that the easement claimed by Read was in gross, not appurtenant.

An easement is characterized as either appurtenant, in gross or in gross for commercial purposes. State v. Commissioners of Public Works, 312 S.C. 460, 465, 441 S.E.2d 331 (Ct. App. 1994). The distinction is critical to whether Read met his burden because the easement claimed by Read must be appurtenant. OCRM apparently never examined the issue. (R. pp. 128-129).

An appurtenant easement inheres in the land, "concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. It also passes with the dominant estate upon conveyance. Unless an easement has all the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross." Tupper v. Dorchester County, 326 S.C. 318, 325-26, 487 S.E.2d 187, 191 (1997) (citations omitted). In Steele v. Williams, 204 S.C. 124, 28 S.E.2d 644 (1944), the South Carolina Supreme Court was faced with an

appellant that claimed an easement appurtenant for use of an alleyway/driveway. However, neither terminus of the alleyway/driveway was upon the property of the appellant – one terminus was on a public street, while the other terminated on a lot adjoining the Respondent's property. Id. at 131, 28 S.E.2d at __. Despite express language in the deeds where the alleyway/driveway was created stating "[the easement] being reserved for the joint use of the grantor and grantee, their heirs and assigns forever", the court held:

> If the elements of an easement appurtenant are wanting, as we have indicated was the case, then it follows that the easement created was one in gross, and could not be assigned or inherited. It, therefore, follows that use of the words above quoted could not and did not affect the easement created, and could not enlarge it from one in gross to one appurtenant to land.

Id.

Assuming, *arguendo*, the creation of an implied easement by some means, any such easement would necessarily have been one in gross and, therefore, not capable of conveyance to subsequent owners such as Respondent. An easement in gross is a mere personal privilege to use the land of another. An easement in gross cannot be transferred. Id. at 131, 28 S.E.2d at 645.

A cursory examination of the Plat reveals that the easement claimed by Read does not terminate on property owned by Read, or on property owned by the other landowners for whose benefit the dock would be constructed; therefore, one of the required elements of an easement appurtenant is not met. In the absence of even just one element characterizing an appurtenant easement, the easement must be deemed in gross. Id. Any creek access easement that might have been created in 1986 did not survive subsequent transfers of Lots 1, 2 and 3. As a matter of law, Read cannot make a *prima facie* showing

of an easement appurtenant in 2004.

OCRM's permit decision and those of the reviewing courts must be reversed because they are clearly erroneous and affected by an error of law with regard to easements in South Carolina.

III. The CZMAP/ALJ/Circuit Court erred by affirming OCRM's grant of Respondent Read's permit for multiple docks per parcel in the absence of "abnormal" circumstances.

Critical area permitting regulations prohibit two structures per parcel except under abnormal circumstances. See 23A S.C. Code Ann. Regs. 30-12.A(2)(a) (Supp. 2004). This particular provision should be given the same weight as any other Specific Project Standard in the regulations. Here, Read seeks to construct a second dock extending from Too Tacky's property, Too Tacky having obtained a critical area permit and constructed a dock extending from its lock in the early 1990s (R. p. 202). Likewise, one of the three parcels for whose benefit the proposed joint use dock is proposed by Read already has a critical area permit and dock. (R. p. 189).

OCRM staff is well aware of the general prohibition against two structures per parcel. OCRM utilizes a Project Assignment Sheet for all new permit applications. (R. p. 265). The coordinator of incoming permits will review an application to see if it meets submittal requirements and to identify other items of concern which may stand out to her, and she will write those matters directly onto the sheet before assigning it to a project manager. (R. pp. 135-137). On Read's Project Assignment Sheet, she wrote, "Make sure lots 1, 2 and 3 don't have docks." (R. pp. 136-137, 265). It does not appear that anyone at OCRM followed the coordinator's instructions; the permit was issued even though one parcel (Lot 1) already had a dock.

Read did not demonstrate, and OCRM did not cite, any abnormal circumstances which should overcome the regulatory and legislative distaste for more than one dock per parcel. Significantly, Too Tacky does not even want a second dock on its property. If this proposed joint use dock were constructed extending from Too Tacky's property, then not only would Too Tacky's parcel have two docks, but another parcel would effectively have two docks, also. This result is contrary to legislative and agency guidance and policy, and is a deviation from Departmental Special Project Standards. Therefore, multiple docks per parcel must be justified by OCRM in its permit file. By OCRM's admission its file contains nothing on this critical issue. (R. p. 145).

The record reflects no circumstances or conditions which would support a deviation from legislative and agency policy that docks normally should be limited to one structure per parcel. OCRM asserted that the present "single family" ownership of the three nearby parcels for whose joint use the dock is proposed allowed OCRM to make an exception to Specific Project Standards. (R. pp. 181-183). But, ownership can change, which is evidenced by the fact that Respondent Mayo Read, Jr. no longer has an ownership interest in any of the property for which he sought a permit. A temporal condition is no basis for a permanent dock permit. Since there was no justification to deviate from the Department's Specific Project Standards, the permit should not have been granted, and the ALJ's decision must be reversed on the basis that the permit was issued upon unlawful procedure.

IV. The CZMAP/ALJ/Circuit Court erred by affirming OCRM's grant of Respondent Read's permit based on an application that fails to consider the proposed dock's effect on the value and enjoyment of the Petitioner's land, where the dock will be constructed.

The Code and applicable regulations require OCRM to consider various factors during the application review process. See S.C. Code § 48-39-150(A) (Supp. 2005). During OCRM's review, it gave no consideration to the question of whether Too Tacky's lot may be diminished in value if a third party built a dock on it. (R. p. 143). OCRM did not take into consideration the proximity of the proposed dock to the existing home on Too Tacky's property. Instead, OCRM treated Too Tacky as if it were a neighboring property owner, when in fact it owns the property where the project is to be undertaken. (Ibid).

At paragraph 7 of the ALJ's Order, he found, "Contrary to the Petitioner's assertion, the permitted dock is to be constructed entirely below the mean high water mark and, accordingly, is not located on the Petitioner's property." (R. p. 3). His finding ignores the regulatory and statutory requirements that the applicant have permission from the landowner, that the impact on neighboring landowners must be considered, and that no dock may be constructed within a certain distance of a particular property line as extended seaward. The ALJ erred by giving no weight to the landowner's views, as evidenced by his finding that the dock is to "be located on the State's land." (Ibid.). The Court's bias against the landowner is directly contrary to the Legislature's findings that property owner's and neighbor's circumstances and objections must be considered. Finally, the ALJ's finding is clearly erroneous as a matter of fact in that there was no evidence in the record that the dock structure was to be wholly located beyond the mean

high water line. To the contrary, the dock was to terminate upon and extend from Too Tacky's property landward of the mean high water line.

CONCLUSION

For all of the foregoing reasons, and any other reasons as may appear in the Record, Too Tacky respectfully requests this Court to reverse the permit grant.

John P. Seibels, Jr.
jseibels@seibelsfirm.com
Jason Scott Luck
jluck@seibelsfirm.com
SEIBELS LAW FIRM, P.A.
165-A King Street
Charleston, SC 29401
843.722.6777 (phone)
843.722.6781 (telefax)
Attorneys for Appellant Too Tacky Partnership

14 October 2008

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

I. STATEMENT OF THE ISSUES ON APPEAL 1

A. Did The Administrative Law Judge, The Coastal Zone Management Appellate Panel, And The Circuit Court Correctly Determine DHEC-OCRM Had Properly Issued The Dock Permit To Mr. Read? 1

B. Was There Substantial Evidence Supporting The Administrative Law Judge's Decision That DHEC-OCRM Had Properly Issued The Dock Permit To Mr. Read? 1

II. STATEMENT OF THE CASE 2

III. STATEMENT OF THE FACTS 4

A. History of the Parties' Properties 4

B. Creek Access Easement Language 6

C. Creek Access Easement "Usage" 7

D. Mr. Read's Permit Application 8

E. DHEC-OCRM's Evaluation of the Permit Application 11

IV. ARGUMENT AND CITATION OF AUTHORITY 12

Standard of Review 13

A. The ALJ, The CZM Appellate Panel, And The Circuit Court Correctly Determined DHEC–OCRM Had Properly Issued The Dock Permit To Mr. Read 14

1. Mr. Read's Dock Permit Application.....15

(a) *Mr. Read's Submitted Plat*.....17

(b) *Certified Vs. Uncertified Plat*.....21

(c) *Mr. Read's Prima Facie Showing Of The Creek Access Easement*.....25

(d) *DHEC-OCRM's Evaluation Of Mr. Read's Permit Application Pursuant To S.C. Code Ann. § 48-39-150*.....27

(e) *DHEC-OCRM's Approval Of Multiple Docks On One Parcel*.....33

V. CONCLUSION.....39

TABLE OF AUTHORITIES

Case Decisions

Abbs v. Town of Syracuse, 686 N.E.2d 928 (Ind.App. 1997) 26

Abbs v. Town of Syracuse, 655 N.E.2d 114 (Ind.App. 1995) 26

Anderson v. South Carolina Department of Health and Environmental Control, 2002 WL 1979082 (S.C. Admin. Law Judge Div., August 13, 2002) 30

Anonymous (M-156-90) v. State Board of Medical Examiners, 329 S.C. 371, 496 S.E.2d 17 (1998) 14

Blue Ridge Realty Company, Inc. v. Williamson, 247 S.C. 112, 145 S.E.2d 922 (1965) 25

Brown v. Neal, 2002 WL 31423789 (S. C. Admin. Law Judge Div., September 19, 2002) 30

Brown v. South Carolina Department of Health & Environmental Control, 348 S.C. 507, 560 S.E.2d 410 (2002) 13, 24

Burgess v. South Carolina Department of Health and Environmental Control, 2000 WL 378877 (S. C. Admin. Law. Judge Div., March 30, 2000) 22-23

Burns v. Gower, 34 S.C. 160, 13 S.E. 331 (1891) 24

Byerly Hospital v. Health and Human Services Finance Commission, 319 S.C. 225, 460 S.E.2d 383 (1995) 24

Carolina Land Co., Inc. v. Bland, 265 S.C. 98, 217 S.E.2d 16 (1975) 20

Cartish v. Soper, 157 So.2d 150 (Fla. 2nd DCA 1963) 27

Cason v. Gibson, 217 S.C. 500, 61 S.E.2d 58 (1950) 26

Commonwealth of Pennsylvania v. Lambert, 765 A.2d 306 (Pa.Super. 2000) 22

Crane v. South Carolina Department of Health and Environmental Control, 2007 WL 756378 (S.C. Admin. Law Judge Div., February 20, 2007) 33, 35, 36, 37

Davis v. Epting, 317 S.C. 315, 454 S.E.2d 325 (Ct.App. 1994) 25

Dorman v. South Carolina Department of Health and Environmental Control, 350 S.C. 159, 565 S.E.2d 119 (Ct.App. 2005) 33

DuRant v. South Carolina Department of Health & Environmental Control, 361 S.C. 416, 604 S.E.2d 704 (Ct.App. 2004) 14, 30

Earl v. HTH Associates, Inc./Ace Usa Insurance Co. of North America, 368 S.C. 76, 627 S.E.2d 760(Ct.App. 2006) 23

Embry v. South Carolina Department of Health and Environmental Control, 2001 WL 1574201 (S.C. Admin. Law Judge Div., November 16, 2001) 30-31

Frierson v. Watson, 371 S.C. 60,
636 S.E.2d 872 (Ct.App. 2006) 20

Goodman v. City of Columbia, 318 S.C. 488,
458 S.E.2d 531 (1995) 23

Hamilton v. CCM, Inc., 274 S.C. 152,
263 S.E.2d 378 (1980) 18

Higgins v. Douglas, 304 A.D.2d 1051,
758 N.Y.S.2d 702 (A.D. 3rd. Dept. 2003) 26-27

Hobonny Club, Inc. v. McEachern, 272 S.C. 392,
252 S.E.2d 133 (1979) 20

Hudson v. City of Chicago, 228 Ill.2d 462,
889 N.E.2d 210 (2008) 22

In the Matter of Tideland's License,
326 N.J.Super. 209,
740 A.2d 1125 (N.J. 1999) 27

Joseph v. South Carolina Department of
Health and Environmental Control,
2002 WL 385176 (S.C. Admin. Law
Judge Div., February 26, 2002) 30

Jowers v., Hornsby, 292 S.C. 549,
357 S.E.2d 710 (1987) 25

Lee v. Thermal Engineering Corp., 352 S.C. 81,
572 S.E.2d 298 (Ct.App. 2002) 24

Leventis v. South Carolina Department of Health
and Environmental Control, 340 S.C. 118,
530 S.E.2d 643 (Ct.App. 2000) 14

LoPresti v. Burry, 364 S.C. 271,
612 S.E.2d 730 (Ct.App. 2005) 20

Lynch v. Lynch, 236 S.C. 612,
115 S.E.2d 301 (1960) 20

McAllister v. Smiley, 301 S.C. 10,
389 S.E.2d 857 (1990) 26

McDonald v. Welborn, 220 S.C. 10,
66 S.E.2d 327 (1951) 20

McNeil v. South Carolina Department of
Corrections, 2005 WL 2147192
(S. C. Admin. Law Judge Div.,
August 11, 2005) 23

McQueen v. South Carolina Coastal Council,
354 S.C. 142, 580 S.E.2d 116 (2003) 10, 35

Marlow v. Marlow, 284 S.C. 155,
325 S.E.2d 703 (Ct.App. 1985) 25

Merrill v. West Virginia Department of Health
and Human Resources, 219 W.Va. 151,
632 S.E.2d 307 (2006) 22

Metcalf v. Houk, 644 N.E.2d 597 (Ind.App. 1994) 26

Moberly v. South Carolina Department of Health
and Environmental Control,
2005 WL 2089815
(S.C. Admin. Law. Judge Div., August 5, 2005) 16

Monahan v. Hampton Point Association, Inc.,
264 A.D.2d 764,
695 N.Y.S.2d 385 (1999) 26

Murrells Inlet Corporation v. Ward, 378 S.C. 225,
662 S.E.2d 452 (Ct.App. 2008) 18, 26

Neal v. Brown, 374 S.C. 641,
649 S.E.2d 164 (Ct.App. 2007) 13, 14, 17, 30

Newington Plantation Estates Association v.
Newington Plantation Estates, 318 S.C. 362,
458 S.E.2d 36 (1995) 26

Olson v. South Carolina Department of Health
and Environmental Control, 379 S.C. 57,
663 S.E.2d 497 (Ct.App. 2008) 27, 29

Rice Hope Plantation v. South Carolina Public
Service Authority, 216 S.C. 500,
59 S.E.2d 132 (1950) 10, 35

Ross v. Medical University of South Carolina,
328 S.C. 51, 492 S.E.2d 62 (1997) 23

Sanders v. Coastal Capital Ventures,
296 S.C. 132,
370 S.E.2d 903 (Ct.App. 1988) 10, 35

Shore Village Property Owners' Association, Inc.
v. Department of Environmental Protection,
824 So.2d 208 (Fla. 4th DCA 2002) 27

South Carolina Coastal Conservation League v.
South Carolina Department of Health and
Environmental Control, 363 S.C. 67,
610 S.E.2d 482 (2005) 11, 24

State v. Bilbao, 130 Idaho 500,
943 P.2d 926 (1997) 17

State v. Jenkins, 252 Wis.2d 228,
647 N.W.2d 142 (2002) 23

TNS Mills, Inc. v. South Carolina Department
of Revenue, 331 S.C. 611,
503 S.E.2d 471 (1998) 24

Too Tacky Partnership v. South Carolina
Department of Health and
Environmental Control,
2006 WL 2617201, filed August 17, 2006)
(S. C. Admin. Law Judge Div.) 2

Winkler v. Petersilie, 124 Fed.Appx. 925
(6th Cir. 2005) (2005 WL 450595) 27

Young. v. South Carolina Department of Health
and Environmental Control,
2006 WL 2617229 (S.C. Admin. Law
Judge Div., August 21, 2006) 30

Statutes, Administrative, Regulations, and Court Rules

S.C. Code Ann. §§ 1-23-310, *et seq.*
(Thomson West 2005) 2

S.C. Code Ann. § 1-23-600(B)
(Thomson West 2005) 2

S.C. Code Ann. § 1-23-610(C)
(Thomson West 2005) 14

S.C. Code Ann. § 30-5-250
(Thomson West 2005) 26

S.C. Code Ann. §§ 48-39-10, *et seq.*
(Thomson/West Supp. 2005) 15

S.C. Code Ann. § 48-39-20
(Thomson West 2005) 30

S.C. Code Ann. § 48-39-30
(Thomson West 2005) 30

S.C. Code Ann. § 48-39-140(B)(4)
(Thomson West Supp. 2004) 16, 19, 22, 23

S.C. Code Ann. § 48-39-150
(Thomson West Supp. 2005) 2, 12

S.C. Code Ann. § 48-39-150(A)
(Thomson West 2005) 11, 28, 29

S.C. Code Ann. § 48-39-150(A)(1)
(Thomson/West 2005) 11

S.C. Code Ann. § 48-39-150(A)(2)
(Thomson/West 2005) 11

S.C. Code Ann. § 48-39-150(A)(3)
(Thomson/West 2005) 11

S.C. Code Ann. § 48-39-150(A)(4)
(Thomson/West 2005) 11

S.C. Code Ann. § 48-39-150(A)(5)
(Thomson/West 2005) 11

S.C. Code Ann. § 48-39-150(A)(6)
(Thomson/West 2005) 11

S.C. Code Ann. § 48-39-150(A)(7)
(Thomson/West 2005) 11

S.C. Code Ann. § 48-39-150(A)(8)
(Thomson/West 2005) 11

S.C. Code Ann. § 48-39-150(A)(9)
(Thomson/West 2005) 11

S.C. Code Ann. § 48-39-150(A)(10)
(Thomson/West 2005) 11, 30

S.C. Code Ann. § 48-39-180
(Thomson West 2005) 3

S.C. Code Ann. § 48-39-220
(Thomson West Supp . 2004) 16

23A S.C. Code Ann. Reg. §§ 30-1, *et seq.*
(Thomson/West Supp. 2005) 15

23A S.C. Code Ann. Reg. § 30-2(B)
Thomson/Reuters West 2008) 16, 22

23A S.C. Code Ann. Reg. § 30-2(B)(4)
(Thomson/Reuters West 2008) 19, 22, 23, 24

23A S.C. Code Ann. Reg. § 30-2(I)
(Thomson West Supp. 2004) 16

23A S.C. Code Ann. Reg. § 30-4(E)
(Thomson West Supp. 2004) 16

23A S.C. Code Ann. Reg. § 30-11(B)
(Thomson West 2005) 11, 28, 29

23A S.C. Code Ann. Reg. § 30-11(B)(10)
(Thomson West 2005) 30

23A S.C. Code Ann. Reg. § 30-12.A(1)(a)
(Thomson West 2005) 33, 34, 35, 36, 37-38

23A S.C. Code Ann. Reg. § 30-12.A(2)(a) (Thomson/West 2004) 9

Rule 68, SCALDJ 6

Rule 12(b)(1), SCRCP 3

Rule 12(b)(6), SCRCP 3

Rule 25(c), SCRCP 6

Books, Encyclopedias, and Learned Treatises

Black's Law Dictionary 1151 (6th ed. 1990) 17

I. STATEMENT OF THE ISSUES ON APPEAL

A. Did The Administrative Law Judge, The Coastal Zone Management Appellate Panel, And The Circuit Court Correctly Determine DHEC-OCRM Had Properly Issued The Dock Permit To Mr. Read?

B. Was There Substantial Evidence Supporting The Administrative Law Judge's Decision That DHEC-OCRM Had Properly Issued The Dock Permit To Mr. Read?

II. STATEMENT OF THE CASE

On March 30, 2005, the Respondent, South Carolina Department of Health and Environmental Control ("DHEC"), through its Office of Ocean and Coastal Resource Management ("OCRM"), issued a *Critical Area Permit & Coastal Zone Consistency Certification* (the "Dock Permit") to the Respondent, Mayo Read, Jr. ("Mr. Read"). (R.p.1; R.p.16; R.pp.302-308). This certification authorized Mr. Read to build a private dock accessing Leadenwah Creek on and across property owned by the Appellant, Too Tacky Partnership ("Too Tacky"). (R.p.1; R.p.16; R.p.22; R.pp.302-308).

On May 19, 2005, Too Tacky challenged the Dock Permit's validity through a contested case proceeding in the South Carolina Administrative Law Court (the "ALC").[1] (R.p.16; R.p.22). The Honorable John D. McLeod, Administrative Law Judge, heard the contested case on April 12, 2006. (R.p.16; R.p.71). Judge McLeod affirmed DHEC's decision to grant the Dock Permit.[2] (R.pp.1-13; R.p.15; R.p.18). By notice dated September 18, 2006, Too Tacky directly appealed Judge McLoed's decision to the Coastal

---

1 *See generally* S.C. Code Ann. §§ 1-23-310, *et seq.* (Thomson West 2005); 1-23-600(B)) (Thomson West 2005); and 48-39-150 (Thomson West Supp. 2005).

2 *See* Too Tacky Partnership v. South Carolina Department of Health and Environmental Control, 2006 WL 2617201) (S. C. Admin. Law Judge Div., filed August 17, 2006).

Zone Management Appellate Panel (the "CZM Appellate Panel"). (R.p.14; R.pp.24-28). The CZM Appellate Panel heard Too Tacky's appeal on March 23, 2007, and unanimously affirmed Judge McLeod's decision. (R.pp.14-15).

On April 12, 2007, Too Tacky filed a Petition for Judicial Review with the Circuit Court. (R.p.16; R.p.30).[3] Too Tacky sought a *de novo* judicial review of the Dock Permit's validity. (R.p.30). Mr. Read responded to the petition denying the material allegations (R.p.36, paras. 4-5; R.p.37, paras. 9-10, 12, 14; R.pp.38, paras. 19-22) and asserting various defenses (R.p.39, paras. 26, 28), including lack of subject matter jurisdiction. (R.p.38, para. 24). DHEC-OCRM responded also denying the material allegations (R.p.41, paras. 1, 5; R.p.42, paras. 8-9) and asserting the affirmative defenses of lack of subject matter jurisdiction[4] (R.p.42, para. 10), and failure to state a cause of action.[5] (R.pp.42-43, para. 11).

---

3 *See* S.C. Code Ann. § 48-39-180 (Thomson West 2005).

4 *See* Rule 12(b)(1), SCRCP.

5 *See* Rule 12(b)(6), SCRCP.

The Honorable Roger M. Young, Circuit Court Judge, heard Too Tacky's appeal on October 31, 2007. (R.p.16). Judge Young affirmed the CZM Appellate Panel's decision. (R.pp.16-19). Too Tacky moved to alter or amend the decision. (R.pp.63-70). Judge Young denied the motion. (R.p.21).

This appeal followed.

III. STATEMENT OF THE FACTS

A. History Of The Parties' Property

Too Tacky and Mr. Read are adjacent property owners on Wadmalaw Island in Charleston County. (R.pp.1A-2; R.p.316). On October 28, 1986, their common predecessor-in-title, subdivided some 17.71 acres into four approximately equal sized lots designated as Lots Nos. 1 through 4, via a plat entitled "*Plat of Division of Lands of Alma E. Wagner*" located at the end of Tacky Point Road on Wadmalaw Island near Leadenwah Creek (the "Plat"). (R.p.1A, para. 1; R.p.316). The Plat depicts a 50' wide pathway labeled "*50' [D]rainage – [E]asement & Creek Access for Lots [Nos.] 1, 2 & 3*" across the rear or landward edge of Lot 4. (R.p.1A, para. 1; R.p.316).[6]

---

[6] Lot No. 4 is bordered by marshlands and the Leadenwah River *nee* creek. (R.p.16). Ms. Alma E. Wagner - the then owner of all four lots signed the Plat. (R.p.16). The Plat was also stamped as approved by the Clerk for Charleston County Council and subsequently recorded in the RMC Office in Charleston County at Plat Book BK, Page 145. (R.p.16). Too Tacky purchased Lot No. 4 from Robert L. McFarland on April 7,

Neither Lot No. 2 nor Lot No. 3[7] have direct access to deep water due to the large expanse of marsh directly in front of both of those properties. (R.p.1A, para. 2; R.p.202, line 16 – R.p.203, line 17; R.p.204, lines 11-20; R.p.316).[8] The deed to Lot No. 3 specifically stated the "conveyance of the Grantor's interest in the 50' right-of-way [wa]s subject to the private use by the owner of Lots [Nos.] 1, 2, and 4, as set out in the dedication which appears on the Plat." (R.p.317).

Six years after Mrs. Wagner's 1986 subdivision of the 17.71 acres into four lots, Too Tacky purchased Lot No. 4 (R.pp.1A-2, para. 3, R.pp.322-325)[9] and six years later on Mr. Read purchased Lot 3. (R.p.1A-2, para. 3; R.pp.317-321). Mr. Read's parents, I. Mayo Read, Sr., and Ellen P. Read, purchased Lots Nos. 1 and 2. (R.pp.1A-2, para. 3).[10] The

---

1992. (R.pp.322-325). The deed was recorded in the Charleston County RMC Office in April 7, 1992, in Book L212 at p.207. (R.pp.322-325).

7 Mr. Read purchased Lot No. 3 from Daniel R. McFarland on April 24, 1998. (R.pp.317-321). The deed was recorded in the Charleston County RMC Office in April 28, 1992, in Book R301 at p.161. (R.pp.317-321).

8 Lot No. 1 has direct deep-water access to the west into a branch of the Leadenwah River.

9 Too Tacky was represented by one of its partners, Lawton Grimball (:Mr. Grimball"). (R.p.198, lines 12-20). Mr. Grimball explained that he and his wife owned Lot No. 4 via the Too Tacky partnership. (R.p.198, lines 12-15).

10 At the time of the ALC hearing, Mr. Read's parents had purchased Lot No. 3 from him. (R.pp.1A-2, para. 3 n.1; R.p.187, lines 1 - R.p.189, lines 1-4). Mayo Read, Sr., serving as Mr. Read's agent, was issued the Dock Permit and signed the Dock Permit. (R.pp.1A-2, para. 3 n.1; R.pp.302-308). Mayo Read, Sr. attended and actively

deeds for all four lots, including Mr. Read's and Too Tacky's deeds, specifically incorporated the Plat by reference.**11** (R.pp.1A-2, para. 3; R.pp.276-285; R.pp.316-325).

B. Creek Access Easement Language

Too Tacky, prior to purchasing Lot No. 4, knew about the recorded Plat and the specific language regarding "Creek Access for Lots [Nos.] 1, 2 & 3" set forth on the Plat. (R.p.2, para. 4; R.p.198, line 19 – R.p.199, line 8; R.p.211, line 20 – R.p.212, line 16). Mr. Grimball, Too Tacky's representative, explained his interpretation of the Plat's language regarding "Creek Access for Lots [Nos.] 1, 2 & 3" as simply permitting the easement holders to walk down to the creek (R.p.2, para. 4; R.p.216, line 3 – R.p.217, line 13) or, in his very own words, the easement allowed "that someone could come down to the creek." (R.p.2, para. 4; R.p.217. lines 14-20). Mr. Grimball, however, did not believe it was a valid easement (R.p.198, line 21 – R.p.199, line 15; R.p.211, line 20 – R.p.212, line 19) and placed a chain across the easement to prevent trespassers. (R.p.191, line 4 – R.p.192,

---

participated in the ALC hearing. (R.pp.1A-2, para. 3 n.1; R.p.186, line 18 - R.p.187, line 25). *See* Rule 25(c), SCRCP, in conjunction with Rule 68, SCALDJ.

11 The Too Tacky deed, in describing the property provides that "[s]aid lot of land containing such size, shape, dimensions, buttings and boundings as shown on said plat, ***which plat is incorporated herein by reference.***" (R.pp.1A-2, para. 3 n.2; R.p.322) (Emphasis added).

line 20; R.p.199, line 1 – R.p.203, line 8).[12] Nevertheless, Mr. Grimbali interpreted the language to mean that once the easement holders had traveled down the easement and arrived at Leadenwah Creek they could then do "[w]hatever they wanted." (R.p.2, para. 4; R.p.217, lines 14-22).

C. Creek Access Easement "Usage"

Too Tacky admittedly never pursued any legal action against Mr. Read, or against Mr. Read's parents, or against others to contest the Plat's language authorizing "Creek Access for Lots [Nos.] 1, 2 & 3". (R.p.2, para. 5; R.p.212, lines 13-16). Furthermore, Too Tacky never directly communicated to either Mr. Read or his parents that Too Tacky disputed the creek access easement language in the Plat. (R.p.2, para. 5; R.p.197, lines 19-25; R.p.218, lines 8-16). Mayo Read, Sr. testified he and other owners of Lots Nos. 1-3 periodically used the path shown on the Plat for recreational walking purposes (R.p.2, para. 5; R.p.192, line 21 – R.p.193, line 21) and to "go look were the dock [wa]s going to go." (R.p.192, lines 21-25).

---

12 Mayo Read, Sr. testified the chain "has not been [in place] that long." (R.p.193, lines 18-21).

D. Mr. Read's Permit Application

On or about August 26, 2004, Mr. Read filed his DHEC OCRM Permit Application (the "Permit Application") with DHEC-OCRM seeking permission to construct the private, joint-use dock serving Lots Nos. 1-3. (R.p.2, para. 6; R.p.197, lines 12-18; R.pp.286-291). Mr. Read's parents, owners of Lots Nos. 1-2, gave him express permission to include them in the Permit Application. (R.pp.2-3, para. 6; R.p.197, lines 12-18; R.p.286; R.p.288).

DHEC-OCRM duly notified Too Tacky of Mr. Read's Permit Application. (R.pp.3-4, para. 8; R.p.92, lines 8-17; R.p.292; R.p.298). In response, Too Tacky submitted a letter, through legal counsel, opposing the issuance of the dock permit. (R.pp.3-4, para. 8; R.pp.257-270). Mr. Read, also through legal counsel, responded to Too Tacky's opposition. (R.pp.3-4, para. 8; R.pp.271-275).

The Permit Application was supported by, among other things, an *Affidavit of Ownership or Control* which stated the dock was at the "[e]nd of right of way Tacky Point R[oa]d – For Lots [Nos.] 1-2-3." (R.p.3, para. 6; R.p.288). Even though there was some dispute regarding whether a copy of the Plat was actually attached to the Permit Application, DHEC-OCRM's representative, Frederick Mallett ("Mr. Mallett"), explained DHEC-OCRM

certainly had a copy of the Plat prior to issuing the Dock Permit. (R.pp.2-3, para. 6; R.p.107, lines 3-13; R.p.109, lines 8-11; R.p.146, line 8 – R.p.147, line 13; R.p.162, line 5 – R.p.163, line 15). DHEC-OCRM's copy of the Plat was, in actuality, an oversized copy which had been actually submitted as an accompanying document with the Permit Application. (R.pp.2-4, para. 6; R.p.152, line 15 – R.p.153, line 7).

In any case, Too Tacky effectively conceded the submission of the Plat and the existence of creek access easement language. By letter dated January 11, 2005, Too Tacky's prior attorney, Bob J. Conley, Esquire, wrote a letter to DHEC-OCRM objecting to the Permit Application. (R.pp.2-3, para. 6; R.pp.267-270). Attorney Conley, in discussing regulatory[13] property ownership requirements, specifically stated Mr. Read "has not presented evidence of [real property] title or possession, ***other than a [P]lat which shows a '50' Drainage Easement & Creek Access for Lots [Nos.] 1, 2, & 3'***." (R.p.268, para. 1) (Emphasis added). Mr. Mallett confirmed DHEC-OCRM's receipt and review of Attorney Conley's letter. (R.p.146, line 11 – R.p.147, line 6). Moreover, Mr. Mallet noted no party to the proceeding had ever claimed the Plat was either altered, forged, or inaccurate. (R.p.153).

While Too Tacky maintained otherwise, the Dock Permit authorized Mr. Read to construct the private, joint-use dock entirely below the mean high water mark and, therefore, not actually situated on Too Tacky's property. (R.p.288).[14] Consistent with Mr. Grimball's interpretation of the Plat's easement-granting language (R.p.216, line 3 – R.p.217, line 20), the pathway specifically labeled "Creek Access for Lots 1, 2 & 3" could, in fact, be used exclusively by the easement holders to walk to and from the dock site. (R.p.216, line 3 – R.p.217, line 20). In turn, the actual dock would be physically located below the mean high-water mark (R.p.288) and, therefore, on property presumed, as a matter of law, to be owned by the State of South Carolina in both *jus privatum* and *jus publicum*. (R.pp.286-291; R.p.316).[15]

---

13 23A S.C. Code Ann. Reg. § 30-12.A(2)(a) (Thomson West 2004).

14 McQueen v. South Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119 (2003) ("State holds presumptive title to land below the high water mark."); Sanders v. Coastal Capital Ventures, 296 S.C. 132, 126, 370 S.E.2d 903, 906 (Ct.App. 1988) (*citing* Rice Hope Plantation v. South Carolina Public Service Authority, 216 S.C. 500, 59 S.E.2d 132 (1950) (same)).

15 McQueen v. South Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119; Sanders v. Coastal Capital Ventures, 296 S.C. 132, 126, 370 S.E.2d 903, 906 (*citing* Rice Hope Plantation v. South Carolina Public Service Authority, 216 S.C. 500, 59 S.E.2d 132).

E. DHEC-OCRM's Evaluation of the Permit Application

Most importantly, once receiving the Permit Application and consistent with the law,[16] DHEC-OCRM undertook a review/evaluation of the mandated ten factors/general considerations through Mr. Mallett and Curtis Joyner, DHEC-OCRM's Manager of Critical Area Permitting. (R.pp.2-3, para. 6; R.p.92, line 18 – R.p.93, line 20; R.p.94, line 2 – R.p.95, line 23; R.p.96, lines 4-12; Rp.97, lines 5–21; R.p.98, line 2 – R.p.102, line 7; R.p.102, line 23 – R.p.127, line 21; R.p.128, line 17 – R.p.145, line 16; R.p.145, line 22 – R.p.152, line 8; R.p.152, line 15 – R.p.154, line 2; R.p.159, line 4 – R.p.175, line 17; R.p.176, line 1 – R.p.186, line 6).[17] This was, of course, done prior to DHEC-OCRM issuing Mr. Read the Dock Permit. (R.p.142, lines 17-20). DHEC-OCRM determined Mr. Read had submitted a credible claim to a property right, namely the designated creek ingress and egress easement, authorizing access to the dock site sufficient to satisfy the statutory and regulatory requirements. (R.p.161, line 7 - R.p.163, line 15).

---

16 *See* S.C. Code Ann. § 48-39-150(A) (Thomson West 2005); 23A S.C. Code Ann. Reg. § 30-11(B) (Thomson West 2005).

17 *See* S.C. Code Ann. §§ 48-39-150(A)(1)-(10) (Thomson West 2005). See *generally* South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control, 363 S.C. 67, 73, 610 S.E.2d 482, 485 (2005) (noting S.C. Code Ann. § 48-39-150 "lists general considerations for OCRM to consider when deciding whether to grant a [critical area] permit.").

On March 30, 2005, DHEC-OCRM issued Mr. Read the Dock Permit subject to certain special conditions such as eliminating the requested roof over the pierhead and reducing the size of both the pierhead and float to address some of Too Tacky's concerns. (R.p.150, lines 12-24; R.pp.302-308).[18]

IV. ARGUMENT AND CITATION OF AUTHORITY

The ALJ properly issued the Dock Permit to Mr. Read as he correctly showed the requisite property interest in the affected property. Moreover, DHEC-OCRM using the balancing test, correctly concluded Too Tacky's objections were insufficient to deny Mr. Read the Dock Permit. In turn, the CZM Appellate Panel and the Circuit Court, finding substantial supporting evidence, appropriately affirmed DHEC-OCRM's grant of the Dock Permit.

---

18 DHEC-OCRM was concerned Mr. Read's proposed dock could impact nearby shellfish beds, otherwise considered to be a "geographic area of particular concern" ("GAPC"). (R.p.139, line 2 - R.p.14, line 1). In turn, DHEC-OCRM notified the South Carolina Department of Natural Resources ("SCDNR") of the Permit Application since, as Mr. Mallett, explained, the SCDNR has jurisdiction over shellfish beds. (R.p.147, line 23 - R.p.148, line 9). The SCDNR subsequently responded to DHEC-OCRM, via letter dated December 6, 2004 (R.p.148, lines 11-20; R.p.315), indicating SCDNR did not object to the proposed dock. (R.p.147, line 17 - R.p.149, line 7; R.p.315).

Standard Of Review

The ALC is the finder of fact in contested permitting cases.[19] Review of an ALJ's order is confined to the record and this Court of Appeals (1) may affirm the decision or (2) remand the case for further proceedings, or (3) may reverse or modify the decision if the petitioner's substantive rights were prejudiced because the findings, conclusions, and/or decision:

(a) violated constitutional or statutory provisions;
(b) exceeded the agency's statutory authority;
(c) was made through unlawful procedure;
(d) was affected by other error of law;
(e) was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(f) was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.[20]

Consequently, this Court of Appeals may reverse the ALJ if the findings (1) are affected by error of law, (2) are not supported by substantial evidence, or (3) are characterized by abuse of discretion or clearly unwarranted exercise of discretion.[21] Importantly, an ALJ's findings are supported by

---

19 *See* Neal v. Brown, 374 S.C. 641, 648, 649 S.E.2d 164, 167 (Ct.App. 2007); Brown v. South Carolina Department of Health & Environmental Control, 348 S.C. 507, 520, 560 S.E.2d 410, 417 (2002).

20 *See generally* S.C. Code Ann. § 1-23-610(C) (Thomson West Supp. 2007).

21 Neal v. Brown, 374 S.C. 641, 648, 649 S.E.2d 146, 167.

substantial evidence when, looking at the whole record, there is evidence from which reasonable minds could reach the same conclusion the agency reached.[22]

A. The ALJ, The CZM Appellate Panel, And The Circuit Court Correctly Determined DHEC–OCRM Had Properly Issued The Dock Permit To Mr. Read.

Too Tacky has asserted Mr. Read should not have been given the Dock Permit since the Permit Application was incomplete and/or contained false information. (*Appellant's Brief*, pp.7-9). Too Tacky's argument has failed at each level of these proceedings and should fail again now.

The record demonstrates the ALJ, the CZM Appellate Panel, and the Circuit Court all correctly concluded the Permit Application complied with the applicable regulations governing DHEC-OCRM's issuance of dock permits. Too Tacky simply failed to meet its burden of proof.[23] There is

---

22 Neal v. Brown, 374 S.C. 641, 648, 649 S.E.2d 146, 167. Nevertheless, the mere prospect that two inconsistent conclusions may be drawn from the evidence does not prevent a finding from being supported by substantial evidence. DuRant v. South Carolina Department of Health & Environmental Control, 361 S.C. 416, 420, 604 S.E.2d 704, 707 (Ct.App. 2004).

23 Too Tacky, as the party affirmatively asserting DHEC - OCRM has erred in granting the Dock Permit, had the burden of proof. *See* Leventis v. South Carolina Department of Health and Environmental Control, 340 S.C. 118, 132-133, 530 S.E.2d 643, 651 (Ct.App. 2000). Consequently, Too Tacky was required to show by a preponderance of the evidence that DHEC-OCRM erred in issuing the Dock Permit under the applicable statutory and regulatory criteria. *See* Anonymous (M-156-90) v. State Board of Medical Examiners, 329 S.C. 371, 375-376, 496 S.E.2d 17, 19 (1998).

substantial evidence in the record supporting DHEC-OCRM's decision to grant Mr. Read the Dock Permit. The Circuit Court's decision should and must be affirmed in all respects.

1. Mr. Read's Dock Permit Application

Mr. Read requested DHEC–OCRM to grant him a permit to construct a joint-use recreational dock on the Leadenwah River *nee* creek. (R.p.197, lines 12-18; R.pp.286-291).[24] As this Court of Appeals is aware, while DHEC-OCRM must uphold the intentions and policies of the *Coastal Zone Management Act* when considering permits for docks within the critical area.

On the other hand, while DHEC-OCRM does not have the authority of legal ability to "quiet title" to real property;[25] DHEC-OCRM was required to determine if Mr. Read satisfied the statutory and regulatory requirements

---

24 The South Carolina Coastal Zone Management Act, codified in S.C. Code Ann. §§ 48-39-10, *et seq.* (Thomson/West Supp. 2005), and the regulations found at 23A S.C. Code Ann. Reg. 30-1, *et seq.* (Thomson/West Supp. 2005) govern this type of permit More important, the referenced regulations govern the management, development, and protection of South Carolina's critical areas and coastal zone.

25 *See generally* 23A S.C. Code Ann. Reg. 30-4(E) (Thomson West Supp. 2004) ("No permit shall convey, nor be interpreted to convey, a property right in the land or water in which the permitted activity is located. . . [and] [n]o permit shall be construed as alienating public property for private use or as alienating private property for public use."). *cf.* 23A S.C. Code Ann. Reg. 30-2(I) (Thomson West Supp. 2004) (DHEC-OCRM must suspend consideration of a critical area permit if a dispute over the ownership of the critical area at issue is pending before the circuit court under S.C. Code Ann. § 48-39-220 (Thomson West Supp . 2004)).

for the issuance of the Dock Permit, including the requirement Mr. Read establish *prima facie* authority to undertake the proposed project at the proposed location.**26** Specifically, Mr. Read was required to file his Permit Application with DHEC-OCRM and include a "copy of the deed, lease[,] or other instrument under which [Mr. Read] claims title, possession[,] or permission from the owner of the property, to carry out the proposal."**27**

Too Tacky has continuously asserted that the main issue in this matter is whether DHEC-OCRM improperly concluded Mr. Read made a *prima facie* showing of possession of, or permission to use, the real property affected by the Dock Permit. Stated otherwise, this Court of Appeals must decide whether the ALJ, the CZM Appellate Panel, and Judge Young correctly determined Mr. Read made a *prima facie* showing he owned an easement to travel to and from the proposed dock site.

---

26 Moberly v. South Carolina Department of Health and Environmental Control, 2005 WL 2089815, *4 (S.C. Admin. Law. Judge Div., filed August 5, 2005). (DHEC-OCRM "is required to find that [Mr. Read] for a critical area permit has, based upon the submission of credible documentation, made a *prima facie* showing that [he] owns or has permission to use the property on which the permitted activity is to be located. Once such a showing is made, [DHEC-OCRM] may grant a critical area permit to [Mr. Read], even if certain underlying property disputes remain unresolved.").

27 *See* S.C. Code Ann. § 48-39-140(B)(4) (Thomson West Supp. 2004). The requirements of DHEC-OCRM's permitting regulation are almost identical. *See* 23A S.C. Code Ann. Reg. § 30-2(B)(Thomson/Reuters West 2008).

(a) ***Mr. Read's Submitted Plat***

The critical document in this matter was the 1986 Plat which showed the division of Mrs. Wagner's larger piece of property into for smaller, albeit somewhat equal parcels, which became known as Lots Nos. 1, 2, 3, and 4. (R.p.1A, para. 1; R.p.316). The Plat[28] depicts a 50' wide pathway labeled "*50' [D]rainage – [E]asement & Creek Access for Lots [Nos.] 1, 2 & 3*" across the rear or landward edge of Lot 4. (R.p.1A, para. 1; R.p.316).[29] The deed to Mr. Read's lot (*i.e.*; Lot No. 3)[30] noted the "conveyance of the Grantor's interest in the 50' right-of-way [wa]s subject to the private use by the owner of Lots [Nos.] 1, 2, and 4, as set out in the dedication which appears on the Plat." (R.p.317).

---

28 This Court of Appeals has noted that a "plat" is a map of a piece of property or an area of land subdivided into lots. Neal v. Brown, 374 S.C. 641, 651, 649 S.E.2d 164, 169 (*citing* State v. Bilbao, 130 Idaho 500, 943 P.2d 926, 928 (1997) (noting that the recording of a subdivision plat is intended to partition property). Additionally, a plat "is generally a map of a piece of property or a plan of more than one piece of property as laid out in a subdivision and with reference to lots, streets, and block numbers." Neal v. Brown, 374 S.C. 641, 651, 649 S.E.2d 164, 169 (*citing* Black's Law Dictionary 1151 (6th ed. 1990)) (defining "plat" as a "map of a specific land area such as a town, section, or subdivision showing the location and boundaries of individual parcels of land subdivided into lots, with streets, alleys, easements, etc., usually drawn to scale").

29 Ms. Wagner actually signed the Plat. (R.p.316). The Plat was also stamped as approved by the Clerk for Charleston County Council and subsequently recorded in the RMC Office in Charleston County. (R.p.316).

30 At the time of the ALC hearing, Mr. Read's parents had purchased Lot No. 3 from him. (R.p.1A-2, para. 3 n.1; R.p.187, lines 1 - R.p.189, lines 1-4). Mayo Read,

Mr. Mallett, the DHEC-OCRM project manager who reviewed and approved the Dock Permit, testified a copy of the Plat dividing Mrs. Wagner's property into Lots Nos. 1, 2, 3, and 4 either initially accompanied Mr. Read's Permit Application or was subsequently submitted. (R.p.2-3, para. 6; R.p.107, lines 3-13; R.p.109, lines 8-11; R.p.146, line 8 – R.p.147, line 13; R.p.162, line 5 – R.p.163, line 15). In any case. Mr. Mallett stated DHEC-OCRM had a copy of the Plat ***prior*** to issuing the Dock Permit. (R.p.2-3, para. 6; R.p.107, lines 3-13; R.p.109, lines 8-11; R.p.146, line 8 – R.p.147, line 13; R.p.162, line 5 – R.p.163, line 15). As noted before, DHEC-OCRM's copy of the Plat was an oversized copy which had been submitted as an accompanying document with the Permit Application. (R.pp.2-4, para. 6; R.p.152, line 15 – R.p.153, line 7).

The Plat, a formal document signed by Ms. Wagner, was stamped as approved by Charleston County Council and then recorded in the RMC office. (R.p.316). Consequently, the Plat constitutes an "instrument"[31]

Sr., serving as Mr. Read's agent, was issued the Dock Permit and signed the Dock Permit. (R.p.1A-2, para. 3 n.1; R.p.304).

31 *See* Murrells Inlet Corporation v. Ward, 378 S.C. 225, 231, 662 S.E.2d 452, 455-456 (Ct.App. 2008) ("Where land is subdivided, platted into lots, and sold by reference to the plats, the buyers acquire a special property right in the roads shown on the plat.") (Internal case citations omitted); Hamilton v. CCM, Inc., 274 S.C. 152, 154, 263 S.E.2d 378, 379 (1980) (Emphasis added) (". . . the outcome of this litigation is largely controlled by the construction given an ***instrument*** referred to as the Harbour Town Townhouse Plat.").

which, in turn, satisfied the statutory and regulatory requirement providing that Mr. Read submit a "certified copy of the deed, lease[,] or other instrument under which [Mr. Read] claim[ed] title, possession[,] or permission from the owner of the property to carry out the [dock construction] proposal. . . ."**32** Moreover, DHEC-OCRM's Summary of Review sheet indicates DHEC-OCRM has historically interpreted either a "[c]ertified [d]eed, ***plat***, or lease" (R.p.258) (Emphasis added) as an "instrument" in terms of the statutory and regulatory requirements of ownership demonstration.

Mr. Mallett stated DHEC-OCRM both used and relied upon the Plat in making its determination to issue Mr. Read the Dock Permit. (R.p.107, lines 3-13; R.p.135, lines 19-22; R.p.146, line 8 – R.p.147, line 13; R.p.152, lines 15-25; R.p.316). In fact, Mr. Mallett was sure he had reviewed the Plat before issuing the Dock Permit. (R.p.109, lines 8-11; R.p.110, line 24 – R.p.111, line 3; R.p.146, line 8 – R.p.147, line 13; R.p.152, lines 15-25).**33**

---

32 S. C. Code Ann. § 48-39-140(B)(4) (Thomson/Reuters West 2008); 23A S.C. Code Ann. Reg. § 30-2(B)(4) (Thomson/Reuters West 2008).

33 Regardless, Too Tacky effectively conceded the prior submission of the Plat and the existence of creek access easement language. By letter dated January 11, 2005, Attorney Conley wrote Mr. Mallett objecting to the Permit Application. (R.p.2-3, para. 6; R.pp.267-270). Attorney Conley stated Mr. Read "has not presented evidence of [real property] title or possession, ***other than*** a [P]lat which shows a '50' Drainage Easement & Creek Access for Lots [Nos.] 1, 2, & 3'." (R.p.268, para. 1) (Emphasis added). Mr. Mallett confirmed DHEC-OCRM's receipt and review of Attorney

Moreover, as here, "[w]here a deed describes land as it is shown on a certain plat, ***such plat becomes part of the deed*** for the purpose of showing the boundaries, metes, courses[,] and distances of the property conveyed."**34** The deed conveying Lot No. 4 to Too Tacky referenced and incorporated the Plat. (R.p.322). Mr. Read's deed to Lot No. 3 did the same (R.p.317), as did Mrs. Read's deeds to Lot Nos. 1 and 2. (R.p.276; R.p.279; R.p.283). Both Too Tacky's and Mr. Read's deeds referenced and described the 50' right-of-way ingress and egress easement. (R.p.317; R.p.322).**35** Mrs. Read's deeds simply referenced the Plat. (R.p.276; R.p.279; R.p.283).

Conley's letter. (R.p.146, line 11 - R.p.147, line 6). He also stated no one ever claimed the Plat was either altered, forged, or otherwise inaccurate. (R.p.153, lines 1-11).

34 Hobonny Club, Inc. v. McEachern, 272 S.C. 392, 397, 252 S.E.2d 133, 136 (1979) (*citing* Carolina Land Co., Inc. v. Bland, 265 S.C. 98, 217 S.E.2d 16 (1975); Lynch v. Lynch, 236 S.C. 612, 115 S.E.2d 301 (1960)) (Emphasis added).

35 Frierson v. Watson, 371 S.C. 60, 67-68, 636 S.E.2d 872, 876 (Ct.App. 2006) (*citing* McDonald v. Welborn, 220 S.C. 10, 16, 66 S.E.2d 327, 330 (1951); LoPresti v. Burry, 364 S.C. 271, 276, 612 S.E.2d 730, 732-733 (Ct.App. 2005)) ("The law imputes to a purchaser of real property notice of the recitals contained in the written instruments forming the purchaser's chain of title and charges him with the duty of making such reasonable inquiry and investigation as is suggested by the recitals and references therein contained.").

The ALJ, the CZM Appellate Panel, and the Circuit Court correctly found DHEC-OCRM properly concluded the Plat satisfied Mr. Read's statutory/regulatory requirement to demonstrate ownership of the affected real property. There is substantial evidence in the record supporting DHEC-OCRM's decision and the Circuit Court should be affirmed.

(b) ***Certified Vs. Uncertified Plat***

It is undisputed that the copy of the Plat which DHEC-OCRM reviewed was not a certified copy. Too Tacky argues DHEC-OCRM violated its own regulations by issuing the Dock Permit without first having a certified copy of the Plat. (*Appellant's Brief*, pp.7-8). Too Tacky's arguments are meritless as there is no absolute certification requirement.

Mr. Read had to submit to DHEC-OCRM, *inter alia*, a "copy of the deed, lease[,] or other instrument under which [Mr. Read] claim[ed] title, possession[,] or permission from the owner of the property, to carry out the proposal."[36] Based upon the plain language of S. C. Code Ann. § 48-39-140(B)(4), there is no statutory requirement Mr. Read provide DHEC-OCRM with a certified copy of the Plat.[37]

---

36 S.C. Code Ann. § 48-39-140(B)(4).

37 DHEC-OCRM interpreted 23A S.C. Code Ann. Reg. § 30-2(B) so that an applicant's Affidavit of Ownership or Control satisfied the "certification" requirement

Additionally, 23A S.C. Code Ann. Reg. § 30-2(B) provides, in pertinent part, that the "following minimum information shall **ordinarily** be required [from a permit applicant] before a permit application is considered complete: . . .a ***certified*** copy of the deed, lease[,] or other instrument under which the applicant claims title, possession[,] or permission from the owner of the property, to carry out the proposal."**38** The term "ordinarily" is commonly known to mean "usually", "generally", "commonly", "customarily", and/or "typically". Conversely, ordinarily does not mean always or on each and every occasion.**39**

Even though it appears 23A S.C. Code Ann. Reg. § 30-2(B)(4) calls for a certified plat, there is no such actual requirement, merely a preference by DHEC-OCRM. Furthermore, S. C. Code Ann. § 48-39-140(B)(4) does not require submission of a certified deed, lease, or other instrument.**40**

---

or, alternatively, could serve as a substitute for the certified deed, lease, or other instrument. (Tr.35, lines 16-19; Tr.41, lines 12-15; DHEC Exh. 1).

38 23A S.C. Code Ann. Reg. § 30-2(B)(4) (Emphasis added).

39 Hudson v. City of Chicago, 228 Ill.2d 462, 889 N.E.2d 210 (2008) (Ordinarily does not mean always) (Kilbride, J., dissenting); Merrill v. West Virginia Department of Health and Human Resources, 219 W.Va. 151, 164, 632 S.E.2d 307, 320 (2006) (same); State v. Jenkins, 252 Wis.2d 228, 257, 647 N.W.2d 142, 156 (2002) (Abrahamson, C. J., dissenting) (same); Commonwealth of Pennsylvania v. Lambert, 765 A.2d 306, 359 n.21 (Pa.Super. 2000) ("Ordinarily does not mean always . . . .").

40 DHEC-OCRM's interpretation of 23A S.C. Code Ann. Reg. § 30-2(B)(4) in conjunction with S. C. Code Ann. § 48-39-140(B)(4) is entirely consistent with prior ALC holdings that "certified" copies are not always required. *See e.g.* Burgess v. South

In any case, the evidence is undisputed that DHEC-OCRM reviewed and analyzed a copy of the Plat, albeit "uncertified" (R.p.107, lines 3-13; R.p.135, lines 19-22; R.p.146, line 8 – R.p.147, line 13; R.p.152, lines 15-25; R.p.316), prior to issuing the Dock Permit. Additionally, Too Tacky never suggested DHEC-OCRM's copy of the Plat had been altered and/or forged or was otherwise different from the one on file at the Charleston County RMC Office. (R.p.153, lines 1-11).[41]

DHEC-OCRM correctly concluded Mr. Read had met the alleged "certification" requirement and that decision has been and should be appropriately affirmed. As is the normal case, "the decision of an administrative agency interpreting its own regulations [should be and] is given great deference."[42] Such deference creates a superior evaluation

---

Carolina Department of Health and Environmental Control, 2000 WL 378877, *5 (S. C. Admin. Law. Judge Div., filed March 30, 2000) (Challenge to uncertified deed denied).

41 Mr. Read, without objection (R.p.75, line 16 - R.p.77, line 3), introduced a certified copy of the Plat into the ALC hearing and no party offered evidence or suggested that the Plat deviated, in any way, from the one DHEC-OCRM reviewed with the Permit Application. (R.p.316). *See* McNeil v. South Carolina Department of Corrections, 2005 WL 2147192 *1 (S. C. Admin. Law. Judge Div., filed August 11, 2005) (acknowledging the doctrine of harmless error in administrative proceedings). *See also* Ross v. Medical University of South Carolina, 328 S.C. 51, 70, 492 S.E.2d 62, 72 (1997) (harmless error analysis used).

42 Earl v. HTH Associates, Inc./Ace USA Insurance Co. of North America, 368 S.C. 76, 81, 627 S.E.2d 760, 762 (Ct.App. 2006) (*citing* Goodman v. City of Columbia, 318 S.C. 488, 491, 458 S.E.2d 531, 532 (1995)).

threshold or presumption of correctness since "[c]ourts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ."[43]

There has not been and certainly is no reason to question DHEC-OCRM's interpretation in this case. DHEC-OCRM clearly had discretion to accept Mr. Read's uncertified Plat given that 23A S.C. Code Ann. Reg. § 30-2(B)(4) uses the phrase "shall ***ordinarily*** be required" and S. C. Code Ann. § 48-39-140(B)(4) does not mandate certification.[44]

The ALJ, the CZM Appellate Panel, and the Circuit Court correctly found DHEC-OCRM properly concluded the Plat, while uncertified, satisfied Mr. Read's statutory/regulatory requirement to demonstrate ownership of the affected real property. There is substantial evidence in the record supporting DHEC-OCRM's decision and, in turn, the Circuit Court should be affirmed in all respects.

---

43 South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005) (*citing* Brown v. Department of Health and Environmental Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002); Byerly Hospital v. Health and Human Services Finance Commission, 319 S.C. 225, 229, 460 S.E.2d 383, 386 (1995)).

44 *See* Lee v. Thermal Engineering Corp., 352 S.C. 81, 94, 572 S.E.2d 298, 305 (Ct.App. 2002) (Appellate courts "presume that the [L]egislature did not insert idle verbiage or superfluous language in [a] statute."). *See also* TNS Mills, Inc. v. South Carolina Department of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998); Burns v. Gower, 34 S.C. 160, 162, 13 S.E. 331, 332 (1891)).

(c) ***Mr. Read's Prima Facie Showing Of The Creek Access Easement***

Mrs. Wagner, as Mr. Read's and Too Tacky's predecessor-in-title, subdivided her land into four lots via the Plat and specifically included the language, "50' drainage – [E]asement & Creek Access for Lots [Nos.] 1, 2 & 3."**45** As previously noted, all of the deeds to Lots Nos. 1-4, including Mr. Read's and Too Tacky's, each specifically incorporate the Plat by reference. (R.pp.276-285; R.pp.316-325). Mr. Read and his parents, by virtue of their ownership of Lots Nos. 1-3, acquired a special property right in the 50' creek access easement.**46** Stated otherwise, ". . . where a deed describes land as is shown on a certain plat, such plat becomes part of the deed."**47**

---

45 As an interesting aside, Mrs. Wagner's creation of the 50' easement indicates here intent to preserve the right to later seek to have Charleston County maintain the easement. *See generally* Marlow v. Marlow, 284 S.C. 155, 158, 325 S.E.2d 703, 705 (Ct.App. 1985) (50' road is the width required for county maintenance), *disapproved by on other grounds,* Jowers v., Hornsby, 292 S.C. 549, 357 S.E.2d 710 (1987).

46 Davis v. Epting, 317 S.C. 315, 318, 454 S.E.2d 325, 327 (Ct.App. 1994) ("Where land is subdivided, platted into lots, and sold by reference to the plats, the buyers acquire a special property right in the roads shown on the plat. . . . . If the deed references the plat, the grantee acquires a private easement for the use of all streets on the map.").

47 Blue Ridge Realty Company, Inc. v. Williamson, 247 S.C. 112, 118, 145 S.E.2d 922, 924 (1965). *See also* S.C. Code Ann. § 30-5-250 (Thomson West 2005).

Moreover, as this Court of Appeals held in *Newington Plantation Estates Association v. Newington Plantation Estates*,[48] when a deed references a plat showing an easement, such an easement is created as a matter of law.[49] Therefore, DHEC-OCRM's conclusion that, by submission of the Plat, Mr. Read had suitably presented *prima facie* evidence of an easement was warranted and justified. Additionally, this conclusion is consistent with legal interpretations involving easements providing for water "access" similar to the one created by the Plat and the deeds in this case.[50]

---

48 Newington Plantation Estates Association v. Newington Plantation Estates, 318 S.C. 362, 458 S.E.2d 36 (1995).

49 Newington Plantation Estates Association v. Newington Plantation Estates, 318 S.C. 362, 365, 458 S.E.2d 36, 38 (*citing* McAllister v. Smiley, 301 S.C. 10, 389 S.E.2d 857 (1990); Cason v. Gibson, 217 S.C. 500, 61 S.E.2d 58 (1950)) ("Absent evidence of the seller's intent to the contrary, a conveyance of land that references a map depicting streets conveys to the purchaser, as a matter of law, a private easement by implication with respect to those streets, whether or not there is a dedication to public use."). *See also* Murrells Inlet Corporation v. Ward, 378 S.C. 225, 233, 662 S.E.2d 452, 456 (Ct.App. 2008)

50 Abbs v. Town of Syracuse, 686 N.E.2d 928, 931 (Ind.App. 1997) (*citing* Abbs v. Town of Syracuse, 655 N.E.2d 114, 115 (Ind.App. 1995) (*citing* Metcalf v. Houk, 644 N.E.2d 597 (Ind.App. 1994) (access to water is generally sought for particular purposes beyond merely just reaching the water's edge); Monahan v. Hampton Point Association, Inc., 264 A.D.2d 764, 695 N.Y.S.2d 385 (1999) ("... the subject dock, located at the end of an easement leading to a waterway, was a reasonable and incidental use of the easement. [In fact,] the creation of the easement would have been without purpose if not for the dock giving access to the waterway."); Higgins v. Douglas, 304 A.D.2d 1051, 1055, 758 N.Y.S.2d 702, 706 (3rd. Dept. 2003 ("The description of the easement necessarily leads to the conclusion that the grantor intended to convey to [the land-locked property owner] a means of accessing the lake, presumably for recreational purposes. In our view, the installation of a dock at the end of such an easement to facilitate access to the lake and enhance the enjoyment of the same . . . is a reasonable

The ALJ, the CZM Appellate Panel, and the Circuit Court correctly found DHEC-OCRM properly concluded that, by the Plat, Mr. Read satisfied his statutory/regulatory requirement to demonstrate evidence of the easement and, in turn, warranting DHEC-OCRM's issuance of the Dock Permit. There is substantial evidence in the record supporting DHEC-OCRM's decision and the Circuit Court should be affirmed in all respects.

(d) ***DHEC-OCRM's Evaluation Of Mr. Read's Permit Application Pursuant To S.C. Code Ann. § 48-39-150***

DHEC-OCRM was required to evaluate Mr. Read's Permit Application in light of the ten (10) factors and/or "general considerations" contained in S.C. Code Ann. § 48-39-150(A) and 23A S.C. Code Ann. Reg. § 30-11(B).**51** Those ten factors are as follows:

> (1) The extent to which the activity requires a waterfront location or is economically enhanced by its proximity to the water.

---

use incidental to the purpose of the easement."); Winkler v. Petersilie, 124 Fed.Appx. 925, 932 (6th Cir. 2005) (2005 WL 450595); Shore Village Property Owners' Association, Inc. v. Department of Environmental Protection, 824 So.2d 208, 209 (Fla. 4th DCA 2002) (Easement granting river access incorporated "riparian rights include[ing] the building of a dock to have access to navigable waters."); In the Matter of Tideland's License, 326 N.J.Super. 209, 740 A.2d 1125 (N.J. 1999) (easement supported construction of a dock); Cartish v. Soper, 157 So.2d 150, 153-154 (Fla. 2nd DCA 1963) (". . . . it is clear that such riparian rights necessary and incidental to access and egress from the Bay were implicit in the reservation of the Parkway [and] . . . a necessary implication of the reservation [was] the right to build a dock to facilitate access to the waters . . . .").

51 *See* Olson v. South Carolina Department of Health and Environmental Control, 379 S.C. 57, 66, 663 S.E.2d 497, 502 (Ct.App. 2008).

(2) The extent to which the activity would harmfully obstruct the natural flow of navigable water. If the proposed project is in one or more of the State's harbors or in a waterway used for commercial navigation and shipping or in an area set aside for port development in an approved management plan, then a certificate from the South Carolina State Ports Authority declaring the proposed project or activity would not unreasonably interfere with commercial navigation and shipping must be obtained by the department prior to issuing a permit.

(3) The extent to which the applicant's completed project would affect the production of fish, shrimp, oysters, crabs or clams or any marine life or wildlife or other natural resources in a particular area including but not limited to water and oxygen supply.

(4) The extent to which the activity could cause erosion, shoaling of channels or creation of stagnant water.

(5) The extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources.

(6) The extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable historic and archeological sites of South Carolina's coastal zone.

(7) The extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state.

(8) The extent of any adverse environmental impact which cannot be avoided by reasonable safeguards.

(9) The extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project. [and]

(10) The extent to which the proposed use could affect the value and enjoyment of adjacent owners.**52**

The undisputed evidence demonstrated DHEC-OCRM considered all of the ten enumerated factors and/or general considerations prior to issuing Mr. Read the Dock Permit. (R.p.142, line 17-20).

Instead of addressing each of the considerations, Too Tacky focused its attack solely upon the final factor - the impact of the proposed use on adjacent landowners. (*Appellant's Brief*, pp.21-22). As noted by this Court of Appeals, in *Olsen v. South Carolina Department of Health and Environmental Control*,**53**

> In determining whether to approve or deny a permit application [DHEC-OCRM is to base its decision on the individual merits of each application, the policies specified in [*S.C. Code Ann.* §§] 48-39-20 and 48-39-30 [(Thomson West 2004)], and specified statutory general considerations, including '[t]he extent to which

---

52 S.C. Code Ann. § 48-39-150(A) (Thomson/Reuters West 2007); 23A S.C. Code Ann. Reg. § 30-11(B) (Thomson/Reuters West 2007).

53 Olsen v. South Carolina Department of Health and Environmental Control, 379 S.C. 57, 663 S.E.2d 497.

> the proposed use could affect the value and enjoyment of adjacent owners' [as found in S.C. Code Ann. §] 48-39-150(A)(10).**54**

Similarly, this statute's regulatory counterpart, 23A S.C. Code Ann. Reg. § 30-11(B)(10), "requires general consideration by [DHEC-]OCRM of how any project would potentially affect the value and enjoyment by neighboring property owners in a critical area."**55**

Too Tacky plainly ignored the reasonable and well-settled proposition that DHEC-OCRM must balance the interests of adjacent property owners (*i.e.*; Too Tacky) against the interests of the applicant (*i.e.*; Mr. Read) and, to some degree, the public in general.**56** Mr. Mallett stated he duly

---

54 Olsen v. South Carolina Department of Health and Environmental Control, 379 S.C. 57, 66, 663 S.E.2d 497, 502. *See also generally* 23A S.C. Code Ann. Reg. § 30-11(B)(10); DuRant v. South Carolina Department of Health and Environmental Control, 361 S.C. 416, 421, 604 S.E.2d 704, 707 (Ct.App. 2004).

55 Neal v. Brown, 374 S.C. 641, 647 n.4, 649 S.E.2d 164, 167 n.4 (Ct.App. 2007).

56 *See generally* Young. v. South Carolina Department of Health and Environmental Control, 2006 WL 2617229 *4 (S.C. Admin. Law Judge Div., filed August 21, 2006) (". . . "the potential disruption to Petitioner's view caused by Respondents' proposed boatlift is not significant enough to warrant the denial of the permit or the elimination of the boatlift from the permit."); Brown v. Neal, 2002 WL 31423789 *8 (S. C. Admin. Law Judge Div., filed September 19, 2002) (Emphasis added) (While "[DHEC-]OCRM must consider the extent to which the adjacent property owners' value and enjoyment of their property is affected by a proposed structure[,] [DHEC-]OCRM must[, nevertheless,] ***balance the interests*** of adjacent property owners against the interests of the applicant."); Anderson v. South Carolina Department of Health and Environmental Control, 2002 WL 1979082 **6-8 (S.C. Admin. Law Judge Div., filed August 13, 2002); Joseph v. South Carolina Department of Health and Environmental Control, 2002 WL 385176 *5 (S.C. Admin. Law Judge Div., filed February 26, 2002) (acknowledging balancing of respective interests test); Embry v. South Carolina

considered how Mr. Read's proposed use would affect the value of Too Tacky's property as well as Too Tacky's enjoyment of the property. (R.p.142, line 17 – R.p.145, line 16). Too Tacky's aesthetic objection to the Dock Permit was Mr. Grimball's unsupported fear Mr. Read would subdivide Lot No. 3 into several lots and, in turn, multiple families would be using the dock. (R.p.209, line 15 – R.p.210, line 14).**57** Furthermore, albeit without any ***quantification and/or substantiation***, Mr. Grimball opined Mr. Read's permitted joint-use private dock might devalue [Too Tacky's] property." (R.p.211, lines 9-11).**58**

Too Tacky failed to present any substantiated evidence showing the Dock Permit had a detrimental impact on its property. Mr. Grimball simply noted the proposed dock was relatively near his house (R.p.205, line 22 –

Department of Health and Environmental Control, 2001 WL 1574201 *4 (S.C. Admin. Law Judge Div., filed November 16, 2001) (Emphasis added) ("The regulations plainly impose a duty to consider the project's impact to the enjoyment of all adjacent owners. In determining the impact on adjacent owners, *a balancing of the competing concerns of those owners must be made with the proposed use of the applicant and such balancing must be made in a fair and reasonable manner*.").

57 Mr. Grimball stated the subdivision of Lot No. 3 "to [him] [wa]s the worst case scenario . . . ." (R.p.210, lines 11-14).

58 Mr. Grimball based the "devaluation" on the noise, traffic, traipsing coolers, boats, kids, dogs, *etc.* on the new dock. (R.p.211, lines 4-8). Mr. Grimball was concerned about those factors since he used his dock in that manner. (R.p.211, lines 4-8).

R.p.208, line 11; R.p.316)[59] and, as previously mentioned, Mr. Grimball presumed some, very speculative at best, "noisy" use of the dock, as extrapolated from his and his family's own behavior on Too Tacky's dock. (R.p.211, lines 4-11). On the other hand, Too Tacky failed to present any evidence Mr. Read's dock would have any negative impact on Too Tack's access to Leadenwah River *nee* creek.

The ALJ, the CZM Appellate Panel, and the Circuit Court correctly found DHEC-OCRM properly considered the ten enumerated factors and concluded Mr. Read's proposed dock did not negatively affect Too Tacky's property and/or the general public's land/interests thus warranting DHEC-OCRM's issuance of the Dock Permit. There is substantial evidence in the record supporting DHEC-OCRM's decision and the Circuit Court should be affirmed in all respects.

---

59 When Too Tacky purchased Lot No. 4 Mr. Grimball admittedly knew about the recorded Plat and the specific language regarding "Creek Access for Lots [Nos.] 1, 2 & 3" set forth on the Plat. (R.p.1A-2, para. 4; R.p.198, line 19 - R.p.199, line 8; R.p.211, line 20 - R.p.212, line 16). Mr. Grimball explained his believed the "easement" simply permitted the easement holders to walk down to the creek (R.pp1A-2, para. 4; R.p.216, line 3 - R.p.217, line 13) or, stated otherwise, the easement allowed "that someone could come down to the creek." (R.pp.1A-2, para. 4; R.p.217. lines 14-20).

(e) ***DHEC-OCRM's Approval Of Multiple Docks On A Single Property Parcel***

Too Tacky argues DHEC-OCRM improperly awarded the Dock Permit to Mr. Read when to do so necessarily imposed another dock on Too Tacky's property which already had one dock. (*Appellant's Brief*, pp.20-21). Furthermore, Too Tacky argues DHEC-OCRM's own regulations prohibit the two dock scenario.**60** (*Appellant's Brief*, 20-21). Too Tacky's position is without merit and must be dismissed.

DHEC-OCRM's regulations provide that "[d]ocks and piers shall be limited to one structure per parcel and shall not restrict the reasonable navigation or public use of State lands and waters."**61** Nevertheless, under certain circumstances, such as the one in this case, two docks are permitted on one parcel.**62**

---

60 *See* 23A S.C. Code Ann. Reg. § 30-12.A(1)(a) (Thomson West Supp. 2004).

61 23A S.C. Code Ann. Reg. § 30-12.A(1)(a). *See also* Dorman v. South Carolina Department of Health and Environmental Control, 350 S.C. 159, 166, 565 S.E.2d 119, 123 (Ct.App. 2005).

62 *See generally* Crane v. South Carolina Department of Health and Environmental Control, 2007 WL 756378 **4-5 (S. C. Admin. Law Judge Div., filed February 20, 2007) (Two docks allowed on one parcel where one dock had already been permitted via a community dock easement even though petition seeking second dock owned the land over which the easement ran).

Mr. Read, as this Court of Appeals is aware, was awarded the Dock Permit based on the creek access easement shown on the Plat, his ownership of Lot No. 3, and his entitlement to use the creek access easement. The deeds for all four lots, including Mr. Read's and Too Tacky's deeds, specifically incorporated the Plat by reference. (R.pp.1A-2, para. 3; R.pp.276-285; R.pp.316-325).

The Dock Permit authorized Mr. Read to construct the private, joint-use dock entirely below the mean high water mark at the Leadenwah River nee creek which, interestingly, was not actually situated on Too Tacky's property (R.p.288) since the State of South Carolina "holds presumptive title to land below the high water mark."**63** The pathway specifically labeled "*50' [D]rainage – [E]asement & Creek Access for Lots [Nos.] 1, 2 & 3*" on the Plat could, as Mr. Grimball opined (R.pp.1A-2, para. 4; R.p.216, line 3 – R.p.217, line 13), simply be used exclusively by the easement holders to walk to and from the dock site. (R.p.216, line 3 – R.p.217, line 20) In turn, the actual dock would be physically located below the mean high-water

---

63 McQueen v. South Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119; Sanders v. Coastal Capital Ventures, 296 S.C. 132, 126, 370 S.E.2d 903, 906 (citing Rice Hope Plantation v. South Carolina Public Service Authority, 216 S.C. 500, 59 S.E.2d 132.

mark (R.p.288) and, therefore, on property presumed, as a matter of law, to be owned by the State of South Carolina in both *jus privatum* and *jus publicum*. (R.pp.286-291; R.p.316).[64]

Conversely, even assuming Mr. Read's dock was actually located on Lot No. 4, DHEC-OCRM could reasonably consider the creek access easement and Lot No. 1 as two "separate" parcels for purposes of applying the "no more than one dock per parcel" limitation in 23A *S.C. Code Ann. Reg.* § 30-12.A(1)(a).

The ALC, in *Crane v. South Carolina Department of Health and Environmental Control*,[65] faced a very similar situation. In *Crane v. South Carolina Department of Health and Environmental Control*, DHEC-OCRM denied the petitioner's application for a private dock permit on the basis that there was already a dock permitted for his parcel pursuant to an easement to the subdivision's Homeowners' Association for a community dock.[66] After DHEC-OCRM denied the application the petitioner appealed

---

64 McQueen v. South Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119; Sanders v. Coastal Capital Ventures, 296 S.C. 132, 126, 370 S.E.2d 903, 906 (*citing* Rice Hope Plantation v. South Carolina Public Service Authority, 216 S.C. 500, 59 S.E.2d 132).

65 Crane v. South Carolina Department of Health and Environmental Control, 2007 WL 756378 (S. C. Admin. Law Judge Div., filed February 20, 2007).

66 Crane v. South Carolina Department of Health and Environmental Control, 2007 WL 756378 *1.

to the ALC. On appeal, the ALC reversed DHEC-OCRM and granted the dock permit, in part, based upon the language of 23A S.C. Code Ann. Reg. § 30-12(A)(1)(a).[67] The ALC concluded that "in the plain meaning of the regulation, an easement may constitute a [separate] parcel."[68] The ALC further stated:

> Application of the definition of the word also confirms this finding: According to Black's Legal Dictionary, 6th Edition, Parcel is defined as "A part or portion of land. A part of an estate." There is no case law, either in the Administrative or the Civil arena, that defines "parcel". No judicial holdings in this State appear to show that a parcel must be treated as a single entity if it is contiguous.[69]

Consequently, the ALC concluded "that the easement held and controlled by the Homeowner's Association [wa]s a separate parcel [from that of the petitioner], even if the underlying fee of both is owned by the same person

---

67 Crane v. South Carolina Department of Health and Environmental Control, 2007 WL 756378 *5 (*quoting* 23A S.C. Code Ann. Reg. § 30-12(A)(1)(a)) (" 'Docks and piers shall be limited to one structure per parcel . . . .' ").

68 Crane v. South Carolina Department of Health and Environmental Control, 2007 WL 756378 *5.

69 Crane v. South Carolina Department of Health and Environmental Control, 2007 WL 756378 *5.

[(*i.e.*; the petitioner)].[70] The ALC found there were two separate "parcels" of land involved even though in actuality there would be, as a practical matter, two docks on the same property.

Mr. Mallet, in evaluating the Permit Application, must have had *Crane v. South Carolina Department of Health and Environmental Control* in mind. When questioned as to the issue of two docks on one parcel, Mr. Mallett questioned Too Tacky's position that there would be two docks on one parcel since Mr. Read's Dock Permit would be coming off of the easement (R.p.144, lines 20-25) and Too Tacky's dock was originating from Lot No. 4. (R.p.145, lines 1-16). Under *Crane v. South Carolina Department of Health and Environmental Control*, for the purposes of the application of 23A *S.C. Code Ann. Reg.* § 30-12(A)(1)(a), the creek access easement constitutes one parcel and Too Tacky's property (*i.e.*; Lot No. 1) constitutes a separate and distinct parcel. The fact the underlying fee of both may be owned by the same entity (*i.e.*; Too Tacky) is immaterial.[71]

---

70 Crane v. South Carolina Department of Health and Environmental Control, 2007 WL 756378 *5.

71 Crane v. South Carolina Department of Health and Environmental Control, 2007 WL 756378 *5.

The ALJ, the CZM Appellate Panel, and the Circuit Court correctly found DHEC-OCRM properly considered the ten enumerated factors and concluded Mr. Read's proposed dock did not violate the regulations warranting DHEC-OCRM's issuance of the Dock Permit. There is substantial evidence in the record supporting DHEC-OCRM's decision and the Circuit Court should be affirmed in all respects.

V. CONCLUSION

Based upon the aforementioned arguments and citation of authority, the Respondent, Mayo Read, Jr., respectfully requests this Court of Appeals to affirm the Circuit Court's decisions in all respects.

Respectfully submitted:

NEXSEN PRUET, LLC

By: _____

Stephen P. Groves, Sr., Esquire
Richard L. Tapp, Jr., Esquire
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.577.9440
Telecopier: 843.720.1777
E-Mail: SGroves@nexsenpruet.com

Attorneys for the Respondent,
Mayo Read, Jr.

Charleston, South Carolina

October 7, 2008

NPCHAR1:425619.1-TBF-(SPG) 035563-00001

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger Young, Circuit Court Judge

Case No. 2007-CP-10-1520

Too Tacky Partnership, ...Appellant,

v.

South Carolina Department of Health and Environmental Control, and
Mayo Read, Jr., ...Respondents.

FINAL BRIEF OF RESPONDENT SCDHEC

Carlisle Roberts, Jr., General Counsel
South Carolina Department of Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29202
(803) 898-3350

Elizabeth Applegate Dieck, Chief Counsel
Davis A. Whitfield-Cargile, Staff Attorney
South Carolina Department of Health and Environmental Control
1362 McMillan Avenue, Suite 400
North Charleston, SC 29405
(843) 953-0200
(843) 953-0201(fax)

Attorneys for Respondent SCDHEC

STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court correctly affirmed the Coastal Zone Management Appellate Panel Decision (CZMAP) in concluding that the permit file was administratively complete and did not contain false information?

II. Did the circuit court properly affirm the CZMAP's utilization of the *prima facie* test for demonstrating ownership or control and does the evidence support issuing the permit under that standard?

III. Is Appellant's argument as to Regulation 30-12(A)(2)(a) preserved and, even if it is, did the circuit court properly affirm the Department's application of that provision?

IV. Did the circuit court properly affirm the Department's permit decision when concluding that the Department's decision did take into account impacts on the value and enjoyment of adjacent owners?

STATEMENT OF THE CASE

In August 2004, Mayo Read applied for a dock permit to access Leadenwah Creek in Charleston County, South Carolina. The Department issued permit number OCRM-04-297-M to Mayo Read for a private, joint-use recreational dock to serve Lots 1, 2 and 3 through an easement at the end of Tacky Point Road on Johns Island, Charleston County. Too Tacky Partnership appealed the issuance of the permit to the Administrative Law Court (ALC). On August 17, 2006, Administrative Law Judge John D. McLeod affirmed the Department's decision to issue the permit. On September 18, 2006, the Petitioner appealed to the Coastal Zone Management Appellate Panel (CZMAP) which unanimously affirmed the decision of the ALC. On April 12, 2007, Too Tacky filed a petition for judicial review. The Honorable Roger Young issued a Final Order affirming the decision of the CZMAP and the order was filed on December 21, 2007. On January 14, 2008, Too Tacky filed a Motion to Alter or Amend and the motion was denied on January 31, 2008. Too Tacky served a Notice of Appeal on February 28, 2008.

FACTS

Appellant and Mayo Read are adjacent property owners on Wadmalaw Island in Charleston County. Both property owners hold title to land that was formerly part of a single tract of approximately 17.7 acres that was subdivided into four lots in 1986 as reflected on a plat entitled "Plat of Division of Lands of Alma E. Wagner." (R.pp. 1A & 316). The plat was recorded in the RMC Office in Charleston County at Plat Book BK and Page 145 and Lawton Grimball, testifying as a partner of Too Tacky, admitted he was aware of the plat prior to his purchase of the property. (R.pp. 1A; 2; 198, l. 19 to

p.199, l. 8; p. 211, ll. 20-24; & 316). Appellant owns Lot four and the Reads own Lots one, two and three. (R.pp. 1A; 2; 276-85 & 316-25). The plat depicts a fifty-foot wide pathway labeled "50' drainage – easement & Creek Access for Lots 1,2 & 3" crossing the edge of Appellant's Lot four. (R.pp. 1A; & 316).

In August 2004, Read applied for a private, joint-use dock on behalf of and to serve Lots one, two and three. (R.pp. 3-4; 197, ll. 12-18; & 286-91). On the application form that Read submitted to the Department, the location of the project is described, in part, to be at "end of easement." (R.p. 286). Additionally, Read submitted to the Department as part of the critical area permit application an Affidavit of Ownership or Control, which notes "end of 50 right of way Tacky Point Rd. – For Lots 1-2-3." (R.p. 3-4 & 288). Department staff testified and the ALC found that DHEC had the 1986 plat in its possession at the time the permit decision was made. (R.pp. 3-4; p. 107, ll. 3-13; p. 109, ll. 8-11; p. 146, l. 21 to p. 147, l. 13; p. 152, ll. 15-25; & 267-70). Additionally, prior to the Department's issuance of the permit in March of 2005, counsel for Appellant wrote to the Department that "the applicant has not presented evidence of title or possession, other than a plat which shows a '50' Drainage Easement & Creek Access for Lots 1, 2 & 3'" and "the applicant submitted a plat which purportedly establishes a 'creek access' easement" (R.pp. 267-70). The ALC found the Department properly considered the ten general considerations for critical area permits set forth in S.C. Code Ann. § 48-39-150(A)(2008) and 23A S.C. Code Ann. Regs. 30-11(B)(Supp. 2004). (R.pp. 4 & 142, ll. 17-20). Furthermore, the ALC found the Department "determined that Respondent Read had submitted a credible claim to a property right, in this instance an easement, to access the dock site to satisfy the statutory and regulatory requirements." (R.pp. 4 &

161, ll. 7-12). Finally, the Department issued the dock permit, subject to numerous conditions, on March 30, 2005. (R.pp. 4; 150, ll. 12-24; & 302-08).

ARGUMENTS

I. The circuit court correctly affirmed the Coastal Zone Management Appellate Panel Decision (CZMAP) in concluding that the permit file was administratively complete and did not contain false information.

The Appellant's first assertion of error challenges the Department's construction of the application requirements as set forth in S.C. Code Ann. § 48-39-140(B)(4) and 23A S.C. Code Ann. Regs. 30-2(B)(4) (Supp. 2004). The statute provides that an application will include a "copy of a deed, lease, or other instrument under which the applicant claims title, possession or permission from the owner of the property to carry out the proposal. S.C. Code Ann. § 48-39-140(B)(4). The sister provision in the regulation states, "The following minimum information shall ordinarily be required before a permit application is considered complete: ... (4) A certified copy of the deed, lease, or other instrument under which the applicant claims title, possession or permission from the owner of the property to carry out the proposal." 23A S.C. Code Ann. Regs. 30-2(B)(4) (Supp. 2004)(emphasis added).

Appellant argues the permit could not be issued because the Department did not obtain certified copies of instruments indicating ownership, possession, or permission to carry out the proposed activity. Associated with Appellant's argument on this topic is the assertion that the Affidavit of ownership cannot be treated as the "other instrument." As explained by the ALC, CZMAP, circuit court and herein, this assertion is without merit.

First, both the statute and regulation allow an applicant to provide an "other instrument" to demonstrate its basis for title, possession or permission. Although the ALC did not fully address whether the Affidavit of ownership alone is an "other instrument," such a determination is not necessary in this case. As is quite clear from the record and the ALC findings of fact, the Department was also provided with a copy of the 1986 plat prior to rendering a permit decision. (R.pp. 3-4; 107, ll. 3-13; 109, ll. 8-11; 146, l. 21 to p. 147, l. 13; 152, ll. 15-25; & 267-70). The recorded plat is properly recognized as a legal instrument that satisfied the "other instrument" requirement of the statue and regulations. *See Hamilton v. CCM, Inc.*, 274 S.C. 152 (1980) and *Sutcliffe v. Laney Bros.*, Inc. 247 S.C. 417 (1966). The subsequent misplacement of that plat does not counter Read's satisfaction of that application requirement.

Second, the statute does not set forth a requirement for a certified copy and the regulation notes that such is merely among items that "ordinarily" will be required. In affirming the Department's acceptance of non-certified documents, the circuit court recognized the flexibility in the regulations based on the presence of the term "ordinarily" and properly construed the statute as being controlling over the regulation. The ALC recognized that the Department's interpretation as to allowing some flexibility on an applicant providing certified copies has been consistently applied by both the Department and the Administrative Law Court in at least one prior case. (R.p. 9). Appellant's counsel acknowledged the plat was in the Department's possession in the January 11, 2005 letter. (R.pp. 267-70). Similarly, counsel for Read sent the Department a letter on February 2, 2005 further referencing the 1986 plat and the filing location (Book R 301, Page 161 on April 28, 1998) of the deed for Lot three. Finally, Read provided the ALC

with a certified copy of the 1986 plat. (R.p. 316). All parties had the benefit of viewing and challenging a certified copy of the 1986 plat at trial. (R.p. 316). In its thorough analysis of Appellant's assertion of a technical application error, the ALC concluded that no party had suggested that the plat provided to the Department differed in any way from the plat recorded at the RMC. (R.pp. 8-9). Therefore, even if staff's use of a non-certified plat was in error, it was clearly harmless and would not warrant reversal. *See Fields v. J. Haynes Waters Builders, Inc., et al.* 376 S.C. 545, 557 (2008) ("to warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice").

Appellant goes on in arguing this general point, and throughout its brief, to assert that the Affidavit of ownership was false. The Department does not agree with this characterization. The Affidavit of ownership indicated that the Reads are the owners of Lots one, two and three and provides the associated TMS numbers and also makes reference to the right-of-way serving those lots. (R.p. 288). On its face, the document is not erroneous. Furthermore, when considered in the context of the 1986 plat and letters provided by Appellant and Read's counsel while the application was pending, any ambiguity in the Affidavit of ownership was resolved. (R.pp. 3-4; 107, ll. 3-13; 109, ll. 8-11; 146, l. 21 to p. 147, l. 13; 152, ll. 15-25; & 267-75).

Based on the foregoing, the Department asserts that the Appellant's claims of error are without merit and that the Department acted lawfully and reasonably in granting the Read permit utilizing the information provided, which constituted an administratively complete application that was not false or misleading.

II. The circuit court properly affirmed the CZMAP's utilization of the *prima facie* test for demonstrating ownership or control and the evidence supports issuing the permit under that standard.

Although the Appellant concedes that "the underlying issue in this dispute lies in the contest over the existence and scope" of an easement and that "neither OCRM nor this Court can resolve that dispute for the parties," it proceeds to assert error below on the basis that those very issues were not thoroughly adjudicated in favor of Appellant. (Appellant's Final Brief p. 9). Stated another way, the ALC and the Department are not authorized by law to adjudicate a real property dispute and, likewise, any court reviewing challenged administrative actions would not have the real property dispute before it. *See generally* S.C. Code Ann. Regs. 30-4(E); *accord* S.C. Code Ann. §§ 48-39-190 and –220. Therefore, Appellant's attacks on the circuit court's use of the *prima facie* test articulated by the ALC are without merit.

The origin of the debate on this point again invokes the statutory provisions discussed above. *See* S.C. Code Ann. § 48-39-140(B)(4) and 23A S.C. Code Ann. Regs. 30-2(B)(4). The operative portion of both the statute and the regulation simply reflects that the applicant needs to provide documentation manifesting how it "claims title, possession or permission from the owner of the property to carry out the proposal." (emphasis added). *Id.* Starting with the plain language of the statute and regulation, the applicant is required to show the basis for a "claim." A claim is defined as "the assertion of an existing right" and "[a] demand for money, property, or a legal remedy to which one asserts a right." Black's Law Dictionary (8th ed. 2004). Based on the 1986 plat being in Appellant's and the Reads chain of title and referenced in their deeds, Read has asserted a right as to the '50' Drainage Easement & Creek Access for Lots 1, 2 & 3'."

(R.pp. 276-85 & 316-25). By providing the Department with the Affidavit of Ownership and the 1986 plat, Read provided the Department with documents supporting his claim of title, possession or permission to carry out the proposal. Despite Read's satisfaction of this standard for showing his "claim," the Appellant is trying to recast the test to require an applicant to "show ownership or permission." (Appellant's Final Br. p. 11). The law simply does not support that proposition.

The Department's position expressed above is further supported by a broader view. First, it is helpful to keep in mind that the requirement is an element of the regulatory program of the Department's Office of Ocean and Coastal Resource Management. As a creature of statute, the Department only has those powers expressly granted to it and those which are reasonably implied. *See, e.g., City of Rock Hill v. S.C. Dep't of Health and Envt'l Control,* 302 S.C. 161, 165 (1990). There is nothing in the Coastal Tidelands and Wetlands Act itself that even hints that the Department is to decide real property disputes. Actually, there are provisions that support the Department's position that it cannot decide real property disputes. *See generally* S.C. Code Ann. §§ 48-39-190 and –220. Exploring this point further, the Department regulations rather clearly disavow any determination of real property disputes. S.C. Code Ann. Regs. 30-4(E) ("No permit shall convey, nor be interpreted to convey, a property right in the land or water in which the permitted activity is located.") Therefore, there are both statutory and regulatory limitations that naturally constrain the level of inquiry the Department can make into real property disputes. Taken in the proper context, the requirement that an applicant show the basis for its claim of title, possession or permission is obviously a lower standard. It logically follows that once an applicant has satisfied the *prima facie*

test, subsequent challenges to that showing cannot undermine the satisfaction of that test. The reason the test must operate in this fashion is demonstrated in this case.

Looking now to Appellant's arguments and sub-arguments, the Department offers this brief rebuttal. First, Appellant presents the Court with a highly distorted view of evidence supporting Read's claim of title, possession or permission. (Appellant's Final Br. p. 10). The record reflects the letters of both Appellant and Read's counsel were informative in the Department's permit decision but not decisive. (R.pp. 113-16). *See generally Marshall v. Thomason*, 241 S.C. 84 (1962) (statement by an agent, during the course of his duties and within the scope of his authority, relative to business contemplated by the agency in which he is then engaged are admissible in evidence against the principle); *Motley v. Williams*, 374 S.C. 107, 112 (Ct. App. 2007)("Acts of an attorney are directly attributable to and binding upon the client"). With respect to the GIS maps contained in the Department file, those identify the location of the TMS parcels referenced in Read's Affidavit of ownership and provide approximations of the boundaries of those parcels. (R.pp. 260-64). There is no reason to expect those images to reflect private easements since they are simple tax maps that approximate parcel boundaries.

Second, the Appellant claims the ALC "impermissibly shifted the *prima facie* burden" from Read to the Appellant. This assertion has no merit. As discussed above, the ALC's *prima facie* test affirmed by the circuit court is a low threshold that is not subject to the rebuttal that Appellant attempts. Therefore, there was no legal error and there was no error in the ALC's consideration of 1986 plat and deed for the four lots. The Department staff testified and the ALC found the 1986 plat had been provided to the

Department and considered in rendering its permit decision. (R.pp. 3-4 & 107). There is no error or harm in the ALC admitting or utilizing another copy of the same plat. *See Fields*, 376 S.C. at 557. With respect to the deeds, there too is no harm in the ALC's consideration of those. As public records that may be reproduced reliably, the ALC could have taken judicial notice of the plat and the deeds even if not admitted as evidence. *See generally Moss v. Aetna Life Ins. Co.,* 267 S.C. 370(1976); and *Masters v. Rodgers Dev. Group,* 283 S.C. 251(Ct.App.1984). In the end, Appellant wanted to challenge the Department's acceptance of Read's claim of title, possession and permission. However, in seeking truth to evaluate that narrow question, the ALC took a slightly broader view as invited by Appellant, who introduced three deeds not contained in the permit file. (R.pp. 276-85). Keep in mind that neither the Department nor the ALC consider the deeds to even be necessary for the application to be complete.

Third, contrary to Appellant's allegation that the Department's decision was solely based on the Affidavit of ownership, the record reflects that the Department had the 1986 plat in its possession while the application was pending and relied upon the plat. (R.pp. 107; 109 & 162-63). In testifying about the 1986 plat, Mr. Fred Mallett, Critical Area Permitting Project Manager, explained that although the Department did not have a copy of the plat in the file at trial, "we did see that particular plat in the past and relied upon it" in issuing the challenged permit. (R.p. 107, ll. 3-13). Along the same lines, to the extent the ALC determined the four deeds supported his conclusion, that does not displace his proper finding and conclusion that Read satisfied the prima facie showing of a claim of title, possession or permission.

Fourth, Appellant attempts to argue that the 1986 plat does not support Read's claim of having an easement to access the creek. In making this argument, Appellant points to a warning disclaiming that the planning board or county council is not making a determination of title. (Appellant's Final Br. p. 12-13). The disclaimer by the county is similar to the position the Department is taking here – it simply said the county's approval of the plat "does not indicate approval nor adjudicate title." (R.p. 316). Although it may not advance Read's claim of an easement, that warning does not undermine Read's claim of an easement. Arguably, the Appellant has conceded that the 1986 plat supports Read's claim for the easement when it stated in its brief, "The plat at best could be deemed to describe a possible state of affairs as they may have exited in October 1986." (Appellant's Final Br. p. 14). The Appellant makes no effort to prove that the easement has not carried forward to Read's title. Along these same lines, the Appellant attempts to refute the effect of the plat with the TMS parcels reflected on the GIS maps, but a TMS parcel map would never control over a recorded plat.

Based on the foregoing, the circuit court properly affirmed the CZMAP's utilization of the *prima facie* test for demonstrating ownership or control and the evidence supports issuing the permit under that standard.

III. Appellant's complaints as to Regulation 30-12(A)(2)(a)(Supp. 2004) are without merit.

A. Appellant's argument as to Regulation 30-12(A)(2)(a) is not preserved because the Administrative Law Court did not rule on the issue.

A threshold matter with respect to Appellant's arguments concerning Regulation 30-12(A)(2)(a) is whether the argument is even preserved. In *Brown v. S.C. Dept. of Health*

and Envt'l Control, et al., the S.C. Supreme Court affirmed that "issues not raised to and ruled on by the agency are not preserved for judicial consideration" and "issues not raised to and ruled on by the ALJ are not preserved for appellate consideration." 348 S.C. 507, 519 (2002)(emphasis added). The ALC's Final Order and Decision does not reflect a ruling on this topic and the CZMAP's Final Administrative Order affirmed the ALC's decision by adopting it in full. (R.pp. 1-15 & 1A). Accordingly, Appellant has not preserved any claims of error with respect to Regulation 30-12(A)(2)(a) through its failure to obtain a ruling from the ALC and CZMAP on the issue.

B. Even if Appellant's argument as to Regulation 30-12(A)(2)(a) is preserved, the Department reasonably exercised its discretion.

The Appellant contends that the Department should not have issued the disputed permit because doing so is contrary to Regulation 30-12(A)(2)(a)[1]. It is apparent in Appellant's brief that the Appellant wishes the regulation were a total prohibition but Appellant clearly acknowledges that is not the case. Regardless of the Appellant's beliefs, the pertinent regulatory provision, in effect at the time of the staff decision, stated: "Docks and piers shall normally be limited to one structure per parcel." Reg. 30-12(A)(2)(Supp. 2004) (emphasis added). The presence of the term "normally" demonstrates that an alternative to a general prohibition exists and that it would be within the Department's discretion to allow more than one dock per parcel. (R.p. 137). *See generally City of Columbia v. Board of Health and Envt'll Control*, 292 S.C. 199, 202

[1] Please note that subsequent to the issuance of the permit in March of 2005, the substantive provision of Regulation 30-12(A)(2)(a)(Supp. 2004) was amended and relocated to 30-12(A)(1)(a)(Supp. 2005). Although some of DHEC counsel's references in the record are inadvertently to 30-12(A)(1)(a), the context reflects the substantive provision of 30-12(A)(2)(a)(Supp. 2004) is being discussed. (R.pp. 87 & 179).

(1987)(discussing deference to agency interpretations); and *Risinger v. Knight Textiles*, 353 S.C. 69, 72-73 (Ct. App. 2002). The record reflects that Department staff found special circumstances justifying the issuance of this permit. (R.pp. 135; 179 & 181-82). Accordingly, the Department reasonably exercised its discretion and the Appellant's assertion of error is without merit.

IV. The circuit court did not err in affirming the Department's permit decision when the Department's decision did take into account impacts on the value and enjoyment of adjacent owners.

Finally, Appellant claims the circuit court erred in affirming the permit because of a failure to consider the impact the dock would have on value and enjoyment of the Appellant. The basis for Appellant's assertion is S.C. Code Ann. § 48-39-150(A), which lists what are commonly called the "ten general considerations." The last of these general considerations for critical area permit decisions instructs the Department to consider "[t]he extent to which the proposed use could affect the value and enjoyment of adjacent owners." S.C. Code Ann. § 48-39-150(A)(10). In affirming the issuance of the permit, the circuit court noted that ALC concluded the Department did consider all of the ten general considerations. (R.pp. 12; 19; 142 & 150). The record supports the ALC's conclusion. (R.pp. 12; 142 & 150). Additionally, both the circuit court and the ALC noted that the Appellant had failed to substantiate its claims of being negatively impacted. (R.pp. 12 & 19). Taken together, the Appellant failed on both fronts to show any error in the Department's consideration of the ten general considerations. Consequently, the ALC, CZMAP and circuit court have not erred in affirming the issuance of the permit as conditioned.

CONCLUSION

Based on the foregoing arguments, the Department respectfully asks that this Court affirm the issuance of permit number OCRM-04-297-M to Mayo Read as conditioned by the Department.

Respectfully submitted,

October 10, 2008

Elizabeth Applegate Dieck
Chief Counsel, OCRM

Evander Whitehead
Staff Attorney

South Carolina Department of Health and
Environmental Control
1362 McMillan Avenue, Suite 400
North Charleston, SC 29405

(843) 953-0200
(843) 953-0201(fax)
dieckea@dhec.sc.gov
whitehme@dhec.sc.gov

Attorneys for Respondent SCDHEC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger Young, Circuit Court Judge

Case No. 2007-CP-10-1520

Too Tacky Partnership, ...Appellant,

v.

South Carolina Department of Health and Environmental Control, and
Mayo Read, Jr., ...Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this *Final Brief of Respondent SCDHEC* complies with Rule 211(b), SCACR.

October 10, 2008

Evander Whitehead
Staff Attorney

South Carolina Department of Health and
Environmental Control
1362 McMillan Avenue, Suite 400
North Charleston, SC 29405
(843) 953-0229
FAX (843) 953-0201
whitehme@dhec.sc.gov
SC Bar #70446

Attorney for Respondent SCDHEC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger Young, Circuit Court Judge

Case No. 2007-CP-10-1520

Too Tacky Partnership, ...Appellant,

v.

South Carolina Department of Health and Environmental Control, and
Mayo Read, Jr., ...Respondents.

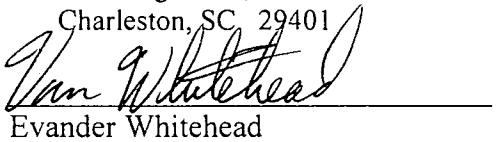
PROOF OF SERVICE

I certify that I, on behalf of Respondent SCDHEC, have served the *Final Brief of Respondent SCDHEC* on all counsel of record by depositing a copy of it in the United States Mail, postage prepaid, addressed as follows:

John P. Seibels, Jr. &
Jason S. Luck
Seibels Law Firm, P.A.
165-A King Street
Charleston, SC 29401

Richard L. Tapp, Jr.
Stephen Groves
Nexsen Pruet, LLC
205 King Street, Suite 400
Charleston, SC 29401

October 10, 2008



Evander Whitehead
Staff Attorney
South Carolina Department of Health and
Environmental Control
1362 McMillan Avenue, Suite 400
North Charleston, SC 29405
(843) 953-0229
FAX (843) 953-0201
whitehme@dhec.sc.gov
SC Bar #70446
Attorney for Respondent SCDHEC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Roger Young
Circuit Court Judge

Case No.: 2007-CP-10-1520

Too Tacky Partnership,.....Appellant,

v.

South Carolina Department of Health
and Environmental Control and
Mayo Read, Jr.,.....Respondents.

FINAL REPLY BRIEF OF APPELLANT

John P. Seibels, Jr.
jseibels@seibelsfirm.com
Jason Scott Luck
jluck@seibelsfirm.com
SEIBELS LAW FIRM, P.A.
165-A King Street
Charleston, SC 29401
843.722.6777 (phone)
843.722.6781 (telefax)
Attorneys for Appellant Too Tacky
Partnership

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. Respondents Mischaracterize Too Tacky's Arguments Concerning The Plat..... 1

II. OCRM Confused The 50' Right-Of-Way Shown On The Plat To The North Of Lots 2 And 3 With The "50' Drainage Easement" Drawn On The Plat Inside The Northern Boundary Of Lot 4. 2

III. No Judicial Analysis Of OCRM's Decision To Grant The Permit Should Include An Analysis Of The Plat. 6

IV. No Judicial Analysis Of Read's Prima Facie Presentation To OCRM Should Include An Analysis Of The Deeds. 8

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Haselden vs. Schein 167 S.C. 534, 166 S.E.2d 634 (1932) 3

Inlet Harbour v.S.C. Dep't of Parks, Recreation and Tourism, 377 S.C. 86, 659 S.E.2d 151 (2008) (Shearouse Adv. Sh. No. 11 at 15, 21) 4

McAllister v. Smiley, 301 S.C. 10, 389 S.E. 2d 857 (1990) 4

Steele v. Williams, 204 S.C. 124, 28 S.E.2d 644 (1944) 5

Statutes

S.C. Code § 48-39-140 (Supp. 2005) 5

S.C. Code §1-23-380 (Supp. 2005) 3, 6

Regulations

23A S.C. Code Ann. Regs. 30-2 (Supp. 2004) 5, 6

ARGUMENT

Certain errors of OCRM and the Court/ALC (hereinafter ALC) are distinct from one another. OCRM erred by granting a permit based upon an incomplete application, a false affidavit, and in violation of certain regulations. (Brief of Appellant, Sections I, III and IV). The ALC erred by disregarding (1) these facts, (2) the actual application file and (3) OCRM's testimony concerning the basis for its decision to grant the permit. (Brief of Appellant at Section II) The ALC instead invented a new, fanciful basis for OCRM's decision, relying upon deeds OCRM never had and then inexplicably and erroneously ruling that OCRM's interpretation was correct. (R. p. 11). In evaluating OCRM's decision, the ALC should not have analyzed materials (the Plat and deeds) that OCRM never analyzed. That error was compounded further, though, when the ALC made numerous errors of law in its examination of the Plat and deeds to ultimately find that Read's application met his *prima facie* burden of showing ownership and control of the land where the dock would begin.

I. Respondents Mischaracterize Too Tacky's Arguments Concerning The Plat.

Assuming the Plat was actually submitted, the question of whether OCRM reviewed a certified copy of it is a red herring that has been over emphasized by the Respondents. Too Tacky's argument does not concern whether the Plat was certified. Instead, Too Tacky argues that OCRM's failure to make the Plat a part of the application package and its decision to rely upon the owner's affidavit as the legally required "instrument" demonstrating ownership or control reveals that the Plat was irrelevant to the agency's decision. As a result, the Plat, certified or not, should have been irrelevant

to the ALC's consideration. Making matters worse, the ALC undertook an analysis of the Plat that resulted in the findings at paragraphs 6-15, which are not supported by the record and constitute errors of law mandating reversal.

II. OCRM Confused The 50′ Right-Of-Way Shown On The Plat To The North Of Lots 2 And 3 With The "50′ Drainage Easement" Drawn On The Plat Inside The Northern Boundary Of Lot 4.

Too Tacky does not dispute that Read has rights in the 50′ right-of-way shown on the plat to the north of Lots 2 and 3. In fact, the owners of Lots 1-4 have the right to use that way for ingress and egress to Tacky Point Road, the nearest public roadway. Those rights may be implied under law, but even if they are not, those rights are found in the public record. (R. pp. 317-321).

The 50′ right-of-way shown on the plat to the north of Lots 2 and 3 is not where the dock is proposed to be built. OCRM's confusion on this issue must be recognized because it bears on 1) the falsity of the owner's affidavit submitted by Read and relied upon by the agency and 2) how the agency should have evaluated Read's claim of ownership and permission to build had OCRM acted on a complete application.

First, the agency argues in Section I of its brief that Read's Owner's Affidavit is not false, and may only be "ambiguous." The Owner's Affidavit is used by OCRM to assist it in determining whether the applicant can demonstrate the necessary ownership or control of the property affected by the permit. (R. pp. 103-104). In it, Read claimed to be the record owner of "all of that said property that is contiguous to and landward of the area in which the work proposed in the permit application is to be conducted." (R. p. 288). Read also swore that he has the "necessary approvals or permission from all other persons with a legal interest in said property to conduct the work proposed in the permit

application." (Ibid.) The record is clear that Too Tacky in fact is the fee simple owner of the land where the dock would begin. (R. p. 190). The record is likewise clear that Read never sought or obtained Too Tacky's permission to build a dock extending from Too Tacky's property. (R. pp. 203-204).

OCRM's suggestion that the false affidavit is merely ambiguous reveals the arbitrary nature of OCRM's decision to grant the permit. It appears that OCRM continues to believe Read owns the land where the dock is proposed, even though Read admitted at trial that he does not. (R. pp. 187-188). OCRM's refusal to acknowledge the recorded rights in the property where the dock is to be constructed caused OCRM to issue the permit arbitrarily. The ALC should have reversed the agency's decision on the basis that it acted arbitrarily, in violation of statute, in excess of its statutory authority, and upon unlawful procedure. Moreover, the agency's acceptance that Read, and not Too Tacky, owns the property landward of the dock site is both an error of law and a conclusion of fact which is clearly erroneous, leading to a decision which is arbitrary. As a result, the ALC should have reversed the permit, and this Court must reverse the ALC. S.C. Code §1-23-380(A)(6)(2005).

Second, the 50′ right-of-way is distinct from all of the lots shown on the Plat. Read's brief quotes from the deed to Read's lot (Lot 3) where it references the 50′ right-of-way to the north of Lots 2 and 3. (Brief of Read, Section IV(A)(1)(a)). The deed states that the 50′ right-of-way is subject "to the private use by the owner of Lots 1, 2 and 4, as set out in the dedication which appears on the Plat." (R. pp. 317-321).

By contrast, the deed into Lot 4 contains no similar language making it servient to the rights of the owner of Lots 1, 2, and 3. A plain reading of the deed into Too Tacky of

Lot 4 reveals that the grantor gave fee simple interest to Too Tacky. There is no reference to a creek access easement subject to anyone's private use. Likewise the deeds into Lots 1, 2, and 3 are silent as to any creek access easement across Lot 4. In the absence of any such deed restriction, an easement if it ever existed has been extinguished. Haselden vs. Schein 167 S.C. 534, 166 S.E.2d 634 (1932) (See also Petitioner's Brief at Section II (D)(2)).[1]

Read's arguments concerning the four deeds' reference to the Plat, and the conclusions drawn by the ALC, are belied by Read's own deed to Lot 3. While it is true that the deeds for all four lots specifically incorporate the Plat by reference, that reference is for the purposes of the "size, shape, buttings, boundings, dimensions, and location"[2] of each lot, or in the case of Lot 3, "for a more complete description." (R. pp. 279-285, 322-325). The deeds to each lot therefore reference the Plat solely for the purposes of determining the boundaries of the land conveyed therein.

The deed to Lot 3 references the Plat for something more. (R. pp. 317-322). It expressly states the rights of all four lot owners to use 50′ right-of-way. If the parties' predecessors in title had intended to create or preserve another private easement for creek access across Lot 4, one would expect to see those rights stated and preserved in the title histories as well. The title histories do not create another private easement across Too Tacky's lot.

Given these title histories, which were never reviewed by OCRM, one can see that the record owners of Lots 1, 2, 3, and 4 have preserved their rights to use the private

[1] Contrary to OCRM's argument contained on page 11 of its Initial Brief, Too Tacky presented evidence to the ALC that OCRM never considered whether Read's easement was appurtenant or in gross. (R. pp. 128-129). The easement claimed by Read, to the extent it ever existed, was in gross. See Appellant's Brief at Section II(D)(3).

[2] See deeds to Lot 1, Lot 2, and Lot 4, (R. pp. 279-285, 322-325).

50' easement to the north of Lots 2 and 3. That right-of-way does not extend to the creek. These facts are corroborated by the Geographic Information Sheets (GIS) which OCRM collected, reviewed and placed in its file. (R. pp. 133, 310). The ingress and egress easement is depicted thereon, but no "creek access" easement is shown on the GIS sheets. Quite simply, Too Tacky's property is not burdened by the rights of others because its deed is in fee simple, and there are no easements of record indicating otherwise.

Although the Plats and deeds were presented to the ALC (and each succeeding tribunal) no one performed the necessary analyses to determine the intention of the parties or whether the claimed easement was in gross. Instead the ALC applied the Blue Ridge Realty line of cases which are only properly applied to easements for roadways. "The rule applied in Blue Ridge is nothing more than a presumption that when a grantor conveys property with reference to a plat showing streets or other ways of passage, the grantor intends to allow the grantee the use of the delineated streets and ways of passage." McAllister v. Smiley, 301 S.C. 10, 11-12, 389 S.E. 2d 857, 858 (1990). The presumption is founded on the reasonableness of the proposition that that when an owner conveys property that has been subdivided for residential purposes, the grantor presumably intends for grantees to have access to the abutting subdivision streets for normal residential purposes. Inlet Harbour v. S.C. Dep't of Parks, Recreation and Tourism, Op.No. 26459, 377 S.C. 86, 659 S.E.2d 151 (2008) (Shearouse Adv. Sh. No. 11 at 15, 21). See also Appellant's Brief at II(D)(1).

Instead of applying Blue Ridge Realty, the ALC should have recognized that the easement claimed by Read was not found in the title histories or the GIS maps. In

addition, due to the fact that any such easement had to be in gross as a matter of law, it could not be conveyed to subsequent grantees and was extinguished long before Read applied for a dock permit. Steele v. Williams, 204 S.C. 124, 28 S.E.2d 644 (1944).

Had OCRM required Read to submit a complete application (which Read's brief concedes would require the deeds and the Plat), OCRM would have been in a position to see that Read could not satisfy his *prima facie* obligation to demonstrate ownership and control. In that case, the law would have required the agency to deny the application.

III. No Judicial Analysis Of OCRM's Decision To Grant The Permit Should Include An Analysis Of The Plat.

Read's arguments to this Court are based upon his analysis of the Plat and four deeds. By focusing on these materials, and even identifying the Plat as "The critical document in this matter," (Respondent Read's Brief at Section IV(A)1(a)), Read actually has clarified to the Court the primary reason why it must reverse the ALC and subsequent reviewing tribunals, and reverse the permit granted by OCRM.

Respondent Read argues that the Plat and the deeds to the four lots shown thereon constitute a sufficient basis for OCRM to have issued the permit, and likewise satisfy his obligation to present a *prima facie* basis of ownership or control of the land where the dock would be situated. These are the findings of the ALC at Paragraphs 6-17. (R. pp. 6-11).

Read's argument and the ALC's ruling have two gaping holes. First, OCRM did not rely upon the Plat to satisfy the requirements of S.C. Code § 48-39-140(B)(4) (Supp. 2005) and 23A S.C. Code Ann. Regs. 30-2(B)(4) (Supp. 2004). OCRM relied upon the

owner's affidavit. (R. pp. 103-107). Second, the deeds were never seen by OCRM. (R. pp. 107-108, 157, 171-173).

From Too Tacky's perspective, the only reason why the Plat might be "the critical document in this matter" is because the ALC erred in paragraphs 6-12 of the Order by finding that the Plat was relied upon by OCRM as the basis under applicable statute and regulation to grant Read a permit. As a matter of law, OCRM must base its decision upon "A certified copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property to carry out the proposal . . .". 23A S.C. Code Ann. Regs. 30-2(B)(4) (Supp. 2004). See also S.C. Code §48-39-140(B)(4) (Supp. 2005) which requires the agency to rely upon "a copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property, to carry out the proposal."

As a matter of undisputed fact, OCRM considered the affidavit of ownership, not the Plat, as the "instrument" which was required by statute and regulation. (R. pp. 103-107). Since OCRM did not rely upon the Plat as satisfaction of the applicable standard, then the ALC should never have analyzed the Plat to determine whether it is an "instrument" that must be the basis of an applicant's *prima facie* case of ownership or control. Instead, the Affidavit, which was demonstrated to be false, should have been the focus of the Court's review when determining if the agency acted in violation of statutory provisions, in excess of its authority, upon unlawful procedure or on such other improper basis as set for in S.C. Code § 1-23-380(A)(6)(2005).

Read's argument that the Plat is of paramount importance is undermined by OCRM's own file. OCRM did not require Read to submit the Plat. (R. p. 107). Even

though it was reviewed at some point, the Plat was not even a part of the permit file. (Ibid.). If the Plat were so important, why is it not in the application file?

Too Tacky contends that OCRM acted improperly by basing its decision solely upon the false owner's affidavit, and that the ALC erred by focusing instead upon the Plat. (See Appellant's Brief at Section I.) Read seeks to perpetuate the error committed by the ALC at paragraphs 6-12 and 15 of the Order by having this Court perform an analysis of the Plat, where no such analysis is warranted. The agency did not rely upon the Plat, and it was error for the ALC to hold otherwise.

IV. No Judicial Analysis Of Read's Prima Facie Presentation To OCRM Should Include An Analysis Of The Deeds.

Read actually argues that the Plat is meaningless for establishing his *prima facie* case on the essential element of ownership or control unless one also analyzes the deeds to the four lots shown on the Plat. (Brief of Read A.1.a, A.1.c). The ALC's order at Paragraphs 13-17 likewise illustrates some need to analyze the deeds before one can understand the Plat. (R. pp. 9-11). Again, it is undisputed that (1) OCRM never required the Plat and (2) Read never submitted the deeds. (R. pp. 107-108, 157, 171-173). Stated another way, Read did not submit to OCRM the very materials he argues are essential to his *prima facie* case. The deeds are not part of the permit file. The deeds were never reviewed by the agency before it decided to grant a permit for Read to build a dock extending from Too Tacky's property. Yet in paragraph 15, the ALC actually found that OCRM properly interpreted the Plat (which is not in the file) and the deeds (which were never provided to it), to support a finding that Read meet his *prima facie* burden (R. p. 11).

Of course, OCRM performed no such analysis. The ALC committed error at his conclusions of law 13, 14, 15 and 16 wherein he determined that 1) that the Plat and deeds were somehow submitted by Read and therefore constitute satisfaction of Read's *prima facie* burden; and 2) the agency's "interpretation" of the Plat and the deeds justified the permit. These findings lack evidence in the record and are clearly erroneous, and therefore the ALC and OCRM's permit decision must be reversed. S.C. Code § 1-23-380(A)(6)(2005) (permitting reversal when administrative findings, inferences, conclusions or decisions are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record).

~ remainder of page intentionally left blank ~

CONCLUSION

For all of the foregoing reasons, and any other reasons as may appear in the Record, Too Tacky respectfully requests this Court to reverse the permit grant.

John P. Seibels, Jr.
jseibels@seibelsfirm.com
Jason Scott Luck
jluck@seibelsfirm.com
SEIBELS LAW FIRM, P.A.
165-A King Street
Charleston, SC 29401
843.722.6777 (phone)
843.722.6781 (telefax)
Attorneys for Appellant Too Tacky Partnership

14 October 2008