THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

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

On Certiorari to the Court of Appeals of South Carolina
Opinion No. 4616 (S.C. Ct. App. filed September 9, 2009,
withdrawn, substituted and refiled November 24, 2009)

Too Tacky Partnership,.....Petitioner,

v.

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

REPLY BRIEF OF PETITIONER

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The primary flaw in the arguments of the Respondents is that they conflate the consideration of Read's permit application by OCRM with the review of OCRM's decision by the ALC. They continue to cite to evidence that was not considered by OCRM in support of their contention it did not make a mistake in approving Read's dock permit application. Read's application was incomplete, and no amount of legal gymnastics or post-application evidence can erase the fact that OCRM made a mistake in approving it.

I. The Respondents Continue to Confuse the ALC's Review with OCRM's Consideration of the Permit Application

From the beginning, it has been Too Tacky's position that OCRM made its permitting decision on an incomplete permit file. OCRM's file, produced pursuant to subpoena at the April 12, 2006 hearing, did *not* contain any of the deeds repeatedly referenced by the Respondents. (Resp. Brief pp. 15, 18, 23-4, 27; p. 24 n. 60; Appx. p 139). The application file did *not* contain a plat, certified or not.[1] (Pet. Brief p. 11; Appx. p. 125). The application file did *not* contain an "other instrument" as contemplated by statute. (Pet. Brief pp. 12-18; Reply Brief pt. III, *infra*). The application did *not* contain

[1] While OCRM witness Fred Mallet provided testimony that he reviewed the plat called the "Wagner Plat" by the Respondents, no one knows what the plat he reviewed looked like, and no one knows if it was certified. (Pet. Brief pp. 11). The Respondents characterize Too Tacky's argument regarding the missing plat as "spurious, albeit rather circular". (Resp. Brief p. 21 n. 51). However, Too Tacky would point out to this Court that the absence of critical evidence for an opponent to examine undermines our adversary system of justice and is the basis for corrective and punitive legal doctrines such as spoliation of evidence. See Stokes v. Spartanburg Reg'l Med. Ctr., 368 S.C. 515, 520, 629 S.E.2d 675, 678 (Ct. App. 2006) (spoliation of evidence).

written evidence[2] of an easement. (Appx. pp. 138-9). The application file did not contain an assignment of the permit to Mayo Read, Sr. These documents or issues were raised at the hearing before the ALC, which was held *over a year* after OCRM made its decision and issued this permit.

The Respondents seek to blur the line between OCRM's permitting process and the review of this process by the ALC.[3] The practical effect of this blurring is that an applicant with a deficient application may use a hearing before the ALC, which was intended to identify errors in the application process, to supplement and amend an application. (See Pet. Brief pp. 8, 10). Allowing the Respondents (and future critical area permit applicants) to use the Administrative Law Court for such an inappropriate purpose sets a dangerous precedent.

II. Any Reliance on Crane is Misplaced.

The Respondents, just as the courts and tribunals below, are unable to specify any abnormal circumstance that would justify two docks on a parcel. (See Pet. Brief pp. 27-29). Instead, the Respondents cite an unreported[4] ALC opinion: Crane v. S.C. Dep't of Health & Envtl. Control, 05-ALJ-07-049-CC (February 20, 2007). In citing Crane, the

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[2] On the contrary, the file contained GIS printouts that refuted the existence of an easement. (Appx. pp. 138, 266-9).

[3] Respondents' brief also continues to confuse two different alleged 50′ easements. The "Wagner Plat" contains two, separate notations: one is the "50′ right-of-way" located off the road. The existence of a turnabout or cul-de-sac at the end of this area clearly delineates it as a possible road. The second is the "50′ drainage easement & creek access for lots 1, 2, & 3". The former alleged easement is not at issue, while the latter lies at the heart of this dispute. The Respondents' brief conflates these two, creating confusion and obscuring the true issues. (See Resp. Brief pp. 4-6, 8, 18, 24, 27; p. 6 n. 16; p. 23 n. 59).

[4] Crane is not even available on the Administrative Law Court's website (www.scalc.net) as of April 17, 2012. It is available in the proprietary Westlaw database at 2007 WL 756378.

Respondents make the curious claim that "[OCRM employee Fred] Mallet, in evaluating the Dock Permit Application, must have had Crane in mind."[5] (Resp. Brief p. 29). Considering that the permit was issued on March 30, 2005; the hearing before the ALC was held on April 12, 2006; and that the Crane opinion (which does not mention Mallet) was issued on February 20, 2007, this assertion is highly unlikely.[6] What Mallet had in mind, while and if he were evaluating Read's application, was that an easement is *not* a separate parcel for the purposes of 23A S.C. Code Regs. 30-12(A)(2)(a) (Supp. 2004). See Crane, Conclusions of Law, ¶ 6 ("It is the Department's position that Mr. Crane's property constitutes a single "parcel" because he owns the underlying fee of the easement.").

III. Any Reliance on Joseph is Misplaced.

The Respondents, in a footnote, respond to Too Tacky's argument that a plat or affidavit cannot satisfy the "other instrument" requirement. (Resp. Brief. p. 17 n. 42; Pet. Brief pp. 12-18). In responding to Too Tacky's assertion that the ancient canon of *ejusdem generis* excludes these documents, Respondents cite Joseph v. State, which stands for the proposition that "[The Court] will not construe...statutory language such that it leads to an absurd result." 351 S.C. 551, 562, 571 S.E.2d 280, 285 (2002). The "absurd result" of Joseph would have been the dismissal of a murder charge, *to which the defendant pled guilty*, because the indictment omitted the words "feloniously" and "willfully". Id.

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[5] Mallet was not a lawyer. (See Appx. pp. 102, 125-7, 132-3).

[6] The Respondents also advanced this argument in their brief to the Court of Appeals, and this argument was wisely ignored by that court. (Appx. p. 406).

In contrast, Too Tacky's desired result is not "absurd", but instead carefully based on and in conformance with a sound legal principle that has underpinned Anglo-American jurisprudence for centuries. Reversal of the grant of this permit does not allow a murderer to walk free; it merely reinforces the fact, *recognized by OCRM since 2008*,[7] that a political subdivision of this state must obey the laws drafted by its legislature.

IV. The Respondents Provide no Rebuttal to Too Tacky's Major Arguments

While thorough (to the point of attempting to supplement the Appendix), the Respondents' brief does not address or rebut several of Too Tacky's major arguments:

The Affidavit of Mayo Read, Jr. was False
(Pet. Brief pp. 16-17)

Instead of conceding the falsity of Mayo Read, Jr.'s affidavit in the face of the uncontroverted facts in the record (See Pet. Brief pp. 16-17), the Respondents, in a footnote, describe its falsity as an "inaccurate characterization" and re-iterate the faulty analysis of the Court of Appeals. (Resp. Brief. p. 8 n. 22). While the Court of Appeals attempted to minimize Mayo Read, Jr.'s false affidavit (Appx. p. 0442), the record below is abundantly clear that: (1) the affidavit contains statements that are not true (*ergo* they are false), (2) these statements were certified and sworn to by Mayo Read, Jr., (3) the affidavit was part of the application, and (4) OCRM relied on this affidavit. (Appx. p. 0293; Pet. Brief. pp. 16-17).

[7] OCRM now clearly states that strict adherence to application requirements is required. (Pet. Brief p. 9).

The Alleged Creek Access Easement does not Exist as a Matter of Law
(Pet. Brief pp.19-27)

The Respondents, referencing a deed that was not part of the OCRM file, argue that an easement is created "as a matter of law" when a deed references a plat showing an easement. (Resp. Brief p. 24) (emphasis in original). However, the Respondents do not address or refute Too Tacky's arguments that said easement, if it even was created, did not exist as a matter of law at the time of the permit application. (Pet. Brief. pp. 18-27). Even so, the Respondents' request that this Court make a finding as a matter of law that an easement either did or does exist is an acknowledgement of the ability and responsibility of the ALC to make legal determinations regarding property ownership. (Pet. Brief p. 19). The Respondents should have refuted Too Tacky's showing that the alleged easement does not exist and that Respondents never presented a *prima facie* showing of easement.[8] (Pet. Brief pp. 20-27). Their brief does not refute these arguments.

Too Tacky's Arguments were Preserved for Appeal
(Pet. Brief pp. 30-31)

With the exception of Too Tacky's argument that the ALC impermissibly re-wrote the permit and issued it to Mayo Read, Sr. (Pet. Brief pp. 32-33), the Respondents do not appear to contest Too Tacky's argument that all other issues were preserved for appeal (Pet. Brief. pp. 30-31).

The Dock Permit was Issued to Mayo Read, Sr., not Mayo Read, Jr.
(Pet. Brief pp. 4, 32-33)

While the Respondents, in the heading to Part E of their brief, deny that the dock permit in question was re-written to Mayo Read, Sr., the text of their argument does not

[8] The Respondents, accusing Too Tacky of "miss[ing] the point", again present the missing plat from Alma Wagner as the "prima facie showing of ownership or permission" required by the Court of Appeals. (Pet. Brief pp. 12-13; Appx. p. 0459).

provide any support for this assertion. (Resp. Brief. pp.32-34). The record provides no support for this assertion, either. The record below is abundantly clear that the permit in question was issued to Mayo Read, *Jr.*, on March 30, 2005, and it is obvious that on August 17, 2006, the ALC affirmed a grant of the permit to Mayo Read, *Sr.* (Pet. Brief pp. 3-4).

While it is true that Too Tacky has not made this argument in prior courts and tribunals, this argument is based on Kiawah Dev. Partners v. S.C. Dep't of Health & Envtl. Control, Op. No. 27065 (S.C. Sup.Ct. filed November 21, 2011) (Shearouse Adv.Sh. No. 41 at 24), which was decided nearly two years after the Petition for a Writ of *Certiorari* was filed and less than a month before this Court issued its Writ.

CONCLUSION

The Respondents have failed to present this Court any legitimate counter-argument that refutes Too Tacky's arguments that the ALC has:

(1) Violated South Carolina statutes, South Carolina regulations, and the South Carolina Constitution;

(2) Acted in excess of its statutory authority;

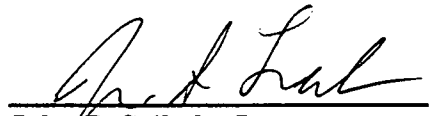
(3) Made decisions upon unlawful procedure;

(4) Committed errors of law;

(5) Made clearly erroneous decisions in view of the reliable, probative and substantial evidence on the whole record; and

(6) Has abused its discretion.

Accordingly, this Court must reverse the decision of the ALC and direct this permit be denied.



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27 April 2012