

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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

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S.C. Supreme Court

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withdrawn, substituted and refiled November 24, 2009)

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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.

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**BRIEF OF PETITIONER**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

QUESTIONS PRESENTED..... 1

STATEMENT OF THE CASE..... 2

STANDARD OF REVIEW ..... 6

ARGUMENT..... 7

    I.    THE COURT OF APPEALS ERRED BY AFFIRMING OCRM’S GRANT OF  
RESPONDENT READ’S PERMIT, WHICH WAS ISSUED DESPITE AN  
INCOMPLETE APPLICATION AND A FALSE AFFIDAVIT. .... 8

        A. The “Plat of the Area” Requirement was Never Satisfied (S.C. Code § 48-39-  
140(B)(3)). ..... 10

        B. The “deed, lease or other instrument under which the applicant claims title,  
possession or permission” requirement was never satisfied (S.C. Code § 48-39-  
140(B)(4)). ..... 12

            1. A Plat or Affidavit Cannot Satisfy the “Other Instrument” Requirement ..... 12

            2. A Plat (Certified or not) with a False Affidavit Cannot Satisfy the “Other  
Instrument” Requirement..... 15

    II.    THE COURT OF APPEALS ERRED BY AFFIRMING THAT READ MADE  
ANY SHOWING OF A VALID EASEMENT. .... 18

        A. A Full Review of the Record shows the Claimed Easement does not Exist as a  
Matter of Law..... 20

            1. South Carolina law does not provide a basis for Read’s claim to an implied  
easement..... 21

            2. OCRM and the ALC failed to recognize that any easement over Lot 4 was  
extinguished by the doctrine of merger. .... 23

            3. OCRM and the ALC failed to recognize that the easement claimed by Read  
was in gross, not appurtenant..... 24

        B.    The Court of Appeals erred by Misapprehending the Nature of a *prima facie*  
showing of a legal principle ..... 26

III. THE COURT OF APPEALS ERRED BY AFFIRMING OCRM’S GRANT OF RESPONDENT READ’S PERMIT FOR MULTIPLE DOCKS PER PARCEL IN THE ABSENCE OF “ABNORMAL” CIRCUMSTANCES. .... 27

IV. THE COURT OF APPEALS ERRED BY HOLDING OCRM CONSIDERED THE PROPOSED DOCK’S EFFECT OF THE ENJOYMENT AND VALUE OF THE PETITIONER’S LAND WHERE THE DOCK WILL BE CONSTRUCTED. .... 29

V. THE COURT OF APPEALS ERRED IN HOLDING THAT CERTAIN ARGUMENTS OF PETITIONER WERE NOT PRESERVED FOR APPEAL ..... 30

VI. THE ALC RE-WROTE THE PERMIT GRANTED TO READ, THUS EXCEEDING ITS STATUTORY AUTHORITY. .... 32

CONCLUSION..... 33

## TABLE OF AUTHORITIES

### Cases

<u>Andrews v. S.C. Dep’t of Health &amp; Env’tl. Control</u> , 01-ALJ-07-0043-CC (June 18, 2001) .....	19
<u>Blue Ridge Realty Co. v. Williamson</u> , 247 S.C. 112, 145 S.E.2d 922 (1965) .....	21, 22
<u>Brown v. S.C. Dep’t of Health &amp; Env’tl. Control</u> , 348 S.C. 507, 560 S.E.2d 410 (2002)	10
<u>Buist v. Huggins</u> , 367 S.C. 268, 625 S.E.2d 636 (2006) .....	27
<u>Cason v. Gibson</u> , 217 S.C. 500, 61 S.E. 2d 58 (1950).....	22
<u>Cotty v. Yartzeff</u> , 309 S.C. 259, 422 S.E.2d 100 (1992) .....	27
<u>Davis v. Epting</u> , 317 S.C. 315, 454 S.E.2d 325 (Ct. App. 1994).....	21
<u>Dorman v. S.C. Dep’t of Health &amp; Env’tl. Control</u> , 350 S.C. 159, 565 S.E.2d 119, (Ct. App. 2002) .....	10
<u>Hamilton v. CCM, Inc.</u> , 274 S.C. 152, 263 S.E.2d 378 (1980) .....	13
<u>Haselden vs. Schein</u> 167 S.C. 534, 166 S.E.2d 634 (1932).....	24
<u>Hodge v. Manning</u> , 241 S.C. 142, 127 S.E. 2d 341 (1962) .....	22
<u>Inlet Harbour v. S.C. Dep’t of Parks, Recreation and Tourism</u> , 377 S.C. 86, 659 S.E.2d 151 (2008).....	21
<u>Johnson v. Atlantic Coast Line R.</u> , 116 S.C. 135, 107 S.E. 31 (1921) .....	26
<u>Keane/Sherratt Partnership v. Hodge</u> , 292 S.C. 459, 357 S.E.2d 193 (Ct. App. 1987).....	7
<u>Kelo v. City of New London</u> , 545 U.S. 469 (2005).....	7
<u>Kiawah Dev. Partners v. S.C. Dep’t of Health &amp; Env’tl. Control</u> , Op. No. 27065 (S.C. Sup.Ct. filed November 21, 2011) .....	32
<u>Lancaster v. Smith Co., Inc.</u> , 246 S.C. 464, 144 S.E.2d 209 (1965) .....	14
<u>Masters v. Rodgers Dev. Group</u> , 283 S.C. 251, 321 S.E.2d 194 (Ct. App. 1984).....	3
<u>Moberly v. S.C. Dep’t of Health &amp; Env’tl. Control</u> , 04-ALJ-07-0408-CC (August 5, 2005) .....	19
<u>Neal v. Brown</u> , 383 S.C. 619, 682 S.E.2d 268 (2009).....	6
<u>Neil v. Bynum</u> , 288 S.C. 472, 343 S.E.2d 615 (1986).....	7
<u>Pearce v. McClenaghan</u> , 39 S.C.L. (5 Rich.) 178 (Ct. App. L. 1851) .....	24
<u>Sosebee v. Leeke</u> , 293 S.C. 531, 362 S.E.2d 22 (1987) .....	20
<u>State v. Comm’rs of Public Works</u> , 312 S.C. 460, 441 S.E.2d 331 (Ct. App. 1994) .....	26
<u>Steele v. Williams</u> , 204 S.C. 124, 28 S.E.2d 644 (1944).....	25
<u>Stuckey v. State Budget &amp; Control Bd.</u> , 339 S.C. 397, 529 S.E.2d 706 (2000).....	27

<u>Sutcliffe v. Laney Bros.</u> , 247 S.C. 417, 147 S.E.2d 689 (1966).....	13
<u>Too Tacky P’ship v. S.C. Dep’t of Health &amp; Env’tl. Control</u> , 386 S.C. 32, 686 S.E.2d 194 (Ct. App. 2009).....	passim
<u>Too Tacky P’ship v. S.C. Dep’t of Health &amp; Env’tl. Control</u> , Op. No. 4616, (S.C. Ct. App. filed September 9, 2009).....	4
<u>Tupper v. Dorchester County</u> , 326 S.C. 318, 487 S.E.2d 187 (1997) .....	25
<b>Statutes</b>	
Act No. 387, 2006 S.C. Acts 387.....	2
S.C. Code § 1-23-310 (Supp. 2005).....	3, 6
S.C. Code § 1-23-600 (Supp. 2004).....	3
S.C. Code § 1-23-610 (Supp. 2005).....	4
S.C. Code § 14-1-50 (Supp. 2010).....	7
S.C. Code § 48-39-140 (2008).....	passim
S.C. Code § 48-39-150 (Supp. 2004).....	3, 29
S.C. Code § 48-39-150 (Supp. 2005).....	4
S.C. Code § 48-39-180 (Supp. 2007).....	4
S.C. Code § 48-39-220 (Supp. 2010).....	18
<b>Other Authorities</b>	
Lewis Carroll, <u>Through the Looking-Glass, and What Alice Found There</u> (MacMillian & Co. 1872).....	15
<u>Magna Carta Libertatum</u> .....	7
<u>Public Notice, Wetland Section Re: SCDHEC-OCRM Critical Area Permit Applications</u> (undated) .....	9, 11, 15
<b>Rules</b>	
Rule 52, SCRCP.....	4
Rule 59, SCRCP.....	4
<b>Treatises</b>	
28A C.J.S. <u>Easements</u> § 61 (1996) .....	21
<u>Black’s Law Dictionary</u> (8th Ed. 2001).....	19, 26
<b>Regulations</b>	
23A S.C. Code Regs. 30-1 (Supp. 2010).....	18
23A S.C. Code Regs. 30-11 (Supp. 2004).....	29
23A S.C. Code Regs. 30-12 (Supp. 2004).....	27
23A S.C. Code Regs. 30-2 (Supp. 2004).....	passim

23A S.C. Code Regs. 30-6 (Supp. 2004) ..... 10

**Constitutional Provisions**

U.S. Const. amend. V ..... 7

U.S. Const. amend. XIV ..... 7

## QUESTIONS PRESENTED

- I. Did the Court of Appeals err when it affirmed the grant of a permit from an application that did not include the submissions required by statute and regulation, included uncertified documents, and was further supported by an affidavit that was false upon its face?
- II. Did the Court of Appeals err in affirming the grant of a permit from an application where the *prima facie* showing of ownership or permission was missing or rebutted?
- III. Did the Court of Appeals err in affirming the grant of a permit from an application that contains no showing of “abnormal” circumstances to warrant a second dock?
- IV. Did the Court of Appeals err in affirming the grant of a permit from an application that contains no evidence that the agency below considered the proposed dock’s effect on the value and enjoyment of the owners of the property upon which it would be built?
- V. Did the Court of Appeals err in refusing to consider the Petitioner’s properly preserved arguments regarding the Plat’s failure to meet statutory requirements?
- VI. Did the ALC err by re-writing and amending the permit issued by OCRM, in violation of the ALC’s statutory authority?

## STATEMENT OF THE CASE

This is an administrative appeal under the *Ancien Régime* abolished by Act No. 387, 2006 S.C. Acts 387. Petitioner Too Tacky Partnership (“Too Tacky”) challenges of the grant of a critical area permit (*i.e.* a dock permit) (the “Permit”) by the Office of Ocean and Coastal Resource Management’s (“OCRM”) to Respondent Mayo Read, Jr. (“Read”) to construct a second dock<sup>1</sup> burdening the Petitioner’s property for the benefit of three nearby landowners.

This appeal concerns four parcels located on Wadmalaw Island, bordered by the Leadenwah River, which are identified in a plat (hereinafter “the Plat”) recorded on October 28, 1986 in the Charleston County RMC Office at Book BK, Page 145. (Appx. 0321).<sup>2</sup> At the time of the application (August 28, 2004), Mayo Read, Sr. and Ellen Read were the owners of Lot 1.<sup>3</sup> (Appx. 0193, 0284-7). Mayo Read, Sr. and Ellen Read were also the record owners of Lot 2. (Appx. 0193, 0288-90). Respondent Mayo Read, Jr. was the record owner of Lot 3. (Appx. 0193, 0322-5). Petitioner Too Tacky was the record owner of Lot 4. (Appx. 0327-30).

On August 28, 2004, Read, claiming to be the record owner of Lots 1, 2, and 3, applied for a community dock permit for these three lots. (Appx. 0291-0293). The “legal description of highland” in the application was listed as “End of 50 [foot] Right of Way

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<sup>1</sup> In the early 1990's, Too Tacky obtained a critical area permit and constructed a dock extending from its parcel to the Leadenwah River. (Appx. 0207).

<sup>2</sup> This copy of the Plat contains handwritten notations showing the location of Too Tacky’s house and dock on Lot 4 and the approximate location of the proposed dock. (Appx. 0212-4).

<sup>3</sup> At the time of the OCRM’s permitting decision, Lot 1 had a critical area permit and a dock extending to the Leadenwah River, where it has deep-water access. (Appx. 0143, 0271, 0374 n. 8).

Tacky Point Rd – For Lots 1-2-3”. (Appx. 0288). While Read submitted plans for the proposed dock (Appx. 0289-90), he submitted no plats or deeds. (Appx. 0096-7, 0113-4). During the period of public notice (Appx. 0296-8), the Petitioner objected to the issuance of the Permit through a letter from its attorney dated January 11, 2005 noting that Read’s Affidavit of Ownership or Control in the application (Appx. 0293) (the “Affidavit”) incorrectly lists Read as a “record owner” of the property where the dock is to be built, and pointing out other deficiencies with the application. (Appx. 0272-5). Read, through his attorney, responded via letter dated February 2, 2005, most notably making the assertion that Read claimed the right to construct the dock by virtue of an easement, not ownership. (Appx. 0271-5).

Ultimately, OCRM granted Read the Permit with certain conditions and modifications on March 30, 2005. (Appx. 0307-13). On April 28, 2005, the Petitioner requested a contested case hearing before the Administrative Law Court to appeal the permit, pursuant to S.C. Code § 48-39-150 (Supp. 2004), 1-23-600(B) (Supp. 2004), and 1-23-310 *et seq.* (Supp. 2005). (Appx. 0027).

Mayo Read, Sr. and Ellen Read purchased Lot 3 at a foreclosure sale, and on January 3, 2006 the Master-in-Equity conveyed the lot to them via a Master’s Deed.<sup>4</sup>

The contested case hearing was held before Judge John D. McLeod on April 12, 2006. (Appx. 0076-0262). Read did not appear at the hearing, though his father, Mayo Read, Sr. did appear with counsel and testify. (Appx. 0094-5, 0191-203). On August 17,

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<sup>4</sup> This deed can be found in Charleston County Deed Book E568, Page 541. Too Tacky asks this Court to take judicial notice of this indisputable fact. See Masters v. Rodgers Dev. Group, 283 S.C. 251, 256-7, 321 S.E.2d 194, 197 (Ct. App. 1984) (Bell, J.) (An appellate court may take judicial notice of indisputable facts.).

2006, Judge McLeod issued a Final Order and Decision (Appx. 0006-0018) which appears to have affirmed the grant of the Permit to *Mayo Read, Sr.* (Appx. 0007, n.1).

The Petitioner, pursuant to S.C. Code § 48-39-150(D) (Supp. 2005) and 1-23-610(A) (Supp. 2005), appealed the decision of Judge McLeod to the Coastal Zone Management Appellate Panel (“CZMAP”), who affirmed Judge McLeod’s decision on March 23, 2007.<sup>5</sup> (Appx. 0037).

On April 12, 2007, Petitioner exercised its right to Circuit Court review of the permitting decision pursuant to S.C. Code § 48-39-180 (Supp. 2005). (Appx. 0029-40). After an October 31, 2007 hearing, Judge Roger Young affirmed the grant of the Permit by Final Order dated December 18, 2007. (Appx. 0021-4) Too Tacky timely filed a Motion to Alter or Amend the Circuit Court’s Order pursuant to Rules 52 and 59, SCRCP, on January 14, 2008. (Appx. 0068-74). That Motion was denied by Order dated January 29, 2008. (Appx. 0021). Too Tacky’s Notice of Appeal to the Court of Appeals was served on February 28, 2008, and oral arguments were held on June 10, 2009. (Appx. 0338, 0439).

The Court of Appeals affirmed the grant of the Permit. Too Tacky P’ship v. S.C. Dep’t of Health & Env’tl. Control, Op. No. 4616, (S.C. Ct. App. filed September 9, 2009). (Appx. 0439-44). Petitioner filed a Petition for Rehearing on September 24, 2009. (Appx. 0445-0452). The Court of Appeals denied this Petition on November 24, 2009 (Appx. 0453-4), but also withdrew its original opinion and substituted it with a new opinion dated November 24, 2009. Too Tacky P’ship v. S.C. Dep’t of Health & Env’tl. Control, 386 S.C. 32, 686 S.E.2d 194 (Ct. App. 2009) (Appx. 0455-60) (hereinafter “Too Tacky”).

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<sup>5</sup> The final order, however, was not signed until April 27, 2007. (Appx. 0020).

Petitioner filed its Petition for *Certiorari* on or about December 28, 2009, and this Court granted a Writ of *Certiorari* on December 1, 2011.

## 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;<sup>6</sup>
- (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)(Supp. 2005)

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<sup>6</sup> Read has previously argued that “The standard on appeal is a violation of statute, not the violation of a regulation.” (Appx. 0256-7). This is incorrect, as the violation of a regulation is equivalent to the violation of a statute. See Neal v. Brown, 383 S.C. 619, 682 S.E.2d 268 (2009) (violation of DHEC dock regulation).

## ARGUMENT

The ALC's decision provides official sanction to OCRM's imposition of the full detriment<sup>7</sup> of a deepwater dock on private property with absolutely no corresponding benefit to the landowner. According to the ALC's decision, neither a complete application, nor adherence to OCRM's statutes, regulations, and guidelines are necessary for OCRM to grant to a private landowner the right to subvert the property rights of another for generations – not by necessity, but for leisure and recreation.

“Property rights have long been regarded as fundamental in Western civilization.” Keane/Sherratt Partnership v. Hodge, 292 S.C. 459, n. 3, 357 S.E.2d 193, n. 3 (Ct. App. 1987) (Sanders, C.J.). The state must be circumspect when it chooses to exercise its power to undermine a citizen's property rights in favor of another. See generally Kelo v. City of New London, 545 U.S. 469 (2005); U.S. Const. amends. V & XIV; S.C. Code § 14-1-50 (Supp. 2010) (common law of England continues with full force and effect); Magna Carta Libertatum arts. 28, 30, & 31. *available at* <http://www.usconstitution.net/magna.html> (last visited 22 March 2010).

Read will come before this Court with the temerity to ask that it bless the permitting and construction of a dock on property that he does not own and that benefits him and two other property owners to the exclusion of the Petitioner.<sup>8</sup> This is an

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<sup>7</sup> Too Tacky will be responsible for the taxes on any increased tax liability. (Appx. 0202). Additionally, the liability created by persons crossing over the Too Tacky's property to the dock would be Too Tacky's. See generally Neil v. Bynum, 288 S.C. 472, 473, 343 S.E.2d 615, 616 (1986) (Explaining duties of landowner to licensee.).

<sup>8</sup> At the contested case hearing, OCRM testified that Too Tacky would also have access to the dock. (Appx. 0150). OCRM's witness was mistaken – the Permit is for the benefit of Lots 1, 2, and 3 only. (Appx. 0293, 0307).

extraordinary request that demands extraordinary proof, and the evidence in the record below is thin gruel that will not sustain OCRM's decision.

While OCRM, the grantor of the permit in question, is vested with some discretion in permitting matters, it is not allowed unlimited discretion. While the ALC is allowed a *de novo* review of the permitting decision, it is still a *review*, and not an opportunity for OCRM to supplement its deficient file *nunc pro tunc*. Affirmation of the ALC's decision herein expands the limits of its authority to a level where "abuse of discretion" becomes meaningless, and the Court of Appeals (and ultimately OCRM) must be reversed.

**I. THE COURT OF APPEALS ERRED BY AFFIRMING OCRM'S GRANT OF RESPONDENT READ'S PERMIT, WHICH WAS ISSUED DESPITE AN INCOMPLETE APPLICATION AND A FALSE AFFIDAVIT.**

OCRM's initial error is straightforward: the agency made its permitting decision on an application that was incomplete and did not comply with applicable law and statute. In its review of the application, the ALC failed to acknowledge these violations of law and wrongfully affirmed the grant of the Permit.

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 § 48-39-140(B) (Supp. 2005). The companion DHEC regulation is as follows:

...Section 48-39-140(B) directs that certain information be included in the permit application submitted to the Department. The following minimum information shall ordinarily be required before a permit application is considered complete:

- (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 or a copy of a plat of the area in which the proposed work will take place;
- (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;
- (5) A list of all adjoining landowners and their addresses or a sworn affidavit that with due diligence such information is not ascertainable. When considered appropriate by the Department, additional information may be required concerning affected landowners;
- (6) A brief description of the proposed alteration, its purpose and intended use, including a drawing of the type of structure, a description of the method of construction, and identification of materials and equipment to be used. In some instances, a registered survey may be required as part of the application package, particularly those involving docks in excess of 900 feet in length.
- (7) A copy of the newspaper public notice...
- (8) When considered appropriate by the Department, additional information may be required...
- (9) The administrative fees for permit applications are included in R.61-30.G(13).

23A S.C. Code Regs. 30-2(B). (Supp. 2004). OCRM's application checklist requires a "Certified Deed, plat or lease". (Appx. 0263). As of September 22, 2008, OCRM requires strict adherence to the application requirements. Public Notice, Wetland Section Re: SCDHEC-OCRM Critical Area Permit Applications (undated) *available at* [http://www.scdhec.gov/environment/ocrm/docs/cap/Wetland\\_Process.pdf](http://www.scdhec.gov/environment/ocrm/docs/cap/Wetland_Process.pdf) (last visited December 28, 2011) (hereinafter "OCRM Application Notice").

The Court of Appeals held that the (admittedly false) Affidavit of Ownership and an uncertified copy of a plat which may have been submitted but never made its way into OCRM's file met the requirements of South Carolina statute and regulation. Too Tacky at

38-40, 686 S.E.2d at 197-8. This holding is incorrect; an examination of the record by this Court will reveal excesses of discretion and errors of law sufficient to reverse the decision of the Court of Appeals (and thus the ALC): the ALC impermissibly allowed OCRM to act on an incomplete application, and the ALC impermissibly affirmed OCRM's grant of a permit based on an admittedly false affidavit.

The fact that the ALC considered evidence and testimony presented at a contested case hearing does not alleviate the requirement that OCRM comply with statute and regulation in its permitting decision. The ALC was vested with the power to conduct a *de novo* appeal hearing, with the presentation of evidence and testimony to determine if OCRM had violated the relevant law. Dorman v. S.C. Dep't of Health & Env'tl. Control, 350 S.C. 159, 164, 565 S.E.2d 119, 122 (Ct. App. 2002) (citing Brown v. S.C. Dep't of Health & Env'tl. Control, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002)). Nonetheless, this hearing was an *appeal*, not a *re-opening* of the application. 23A S.C. Code Regs. 30-6 (Supp. 2004). ("A Department decision involving the issuance...of a permit or certification may be *appealed*...") (emphasis added). Evidence presented at contested case hearing may be used to support or refute the Petitioner's argument that OCRM erred, but it cannot be used to back-fill an application that never met the statutory and regulatory requirements prior to issuance. Id.; Accord 23A S.C. Code Regs. 30-2(E) (Supp. 2004) (comments received 30 days after public notice are not considered by OCRM).

**A. The "Plat of the Area" Requirement was Never Satisfied (S.C. Code § 48-39-140(B)(3)).**

A permit application without a certified plat is incomplete, as a matter of law, and OCRM granted the Permit on such an incomplete application. The ALC's affirmance of

this violation of the law was clear and reversible error. It is the policy of OCRM and the explicit requirement of the law that a plat be submitted with a permit application: See S.C. Code § 48-39-140(B)(3) (Supp. 2008) (“A plat of the area in which the proposed work will take place.”); 23A S.C. Code Regs. 30-2(B)(3) (Supp. 2004) (“A plat or a copy of a plat of the area in which the proposed work will take place”); see also Appx. 0263 (“Certified Deed, plat or lease”) and Appx. 0293 (“ATTACH A COPY OF THE...MOST RECENT CERTIFIED PLAT OF THE PROPERTY”). Even the ALC recognized that an application, without a plat, certified or not, was incomplete (though it still affirmed the grant of the Permit). (Appx. 0008).

OCRMs application file at the hearing contained no plat, certified or not, even though its custodian, Fred Mallett, was under subpoena to produce the “entire file” for the hearing. (Appx. 0095-7) While Mallett testified in the subsequent contested case hearing he saw a plat, he could not testify that he examined a certified copy, and he could not recall a conspicuous warning<sup>9</sup> on the Plat. (Appx. 0115-6, 0118-20). Regardless, Mallett testified that OCRM processed the application in the absence of the Plat (Appx. 0117).

The non-existence of a plat is not “harmless error”, as the ALC and Respondents would contend.<sup>10</sup> (Appx. 0014). While it is true that no party has alleged the plat Mallett claims to have examined was altered, forged, or otherwise inaccurate, it is impossible to make such allegations when the document does not exist and thus cannot be examined. The application requirements created by law are just that: requirements. It is not in the

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<sup>9</sup> This warning unequivocally states that the Plat “DOES NOT...ADJUDICATE TITLE OF THE ACCESS OR RIGHT-OF-WAY SHOWN HEREON”. (Appx. 0321). See Part I.B.1, *infra*.

<sup>10</sup> The assertion that this is “harmless error” by the ALC is belied by the fact that on September 22, 2008, OCRM began requiring strict adherence to the requirements of 23A S.C. Code Regs. 30-2(B). OCRMs Application Notice, *supra*.

power of OCRM, the ALC, or the CZMAP to make them optional, and thus the grant of the Permit should be reversed as arbitrary because the application was incomplete.

**B. The “deed, lease or other instrument under which the applicant claims title, possession or permission” requirement was never satisfied (S.C. Code § 48-39-140(B)(4)).**

The tribunals below have incorrectly held that either the (missing) plat or the false Affidavit, or a combination of both, constitute a certified “instrument” that satisfies statutory requirements. This conclusion is clearly erroneous. Instead, Read should have been required to submit the deeds to Lots 1, 2, and 3, along with the Plat. An examination of these materials reveals that Read could not make a legally cognizable claim to title or possession of the property where the dock was proposed to be built. See Section II, *infra*.

**1. A Plat or Affidavit Cannot Satisfy the “Other Instrument” Requirement**

The Court of Appeals correctly held that a permit applicant must “present a cognizable ‘claim [to] title, possession or permission from the owner of the property to carry out the proposal’” Too Tacky at 41, at 198-99 (citing § 48-39-140(B)(4)(2008)) (emphasis removed). However, the evidence of this “cognizable claim” must, by statute, be presented by “deed, lease or other instrument”. § 48-39-140(B)(4). As a threshold matter, it is plain from the text of the subsection that plats are not enumerated as an “instrument” to present as proof of ownership or permission. This stands in stark contrast to the preceding subsection, which requires “[a] *plat* of the area...” (emphasis added). If a plat was intended to be appropriate proof for section 48-39-140(B)(4), the legislature would have explicitly included it in the subsection, *as it did in the preceding subsection*.

The Court of Appeals went to great lengths to conclude that a plat is an “instrument” which might satisfy the requirements of section 48-39-140(B)(4)<sup>11</sup> That analysis would have been relevant only if OCRM staff had presented a plat at the contested case hearing and relied upon it as the required “instrument” in the application review process. It remains undisputed that, in fact, OCRM staff considered the Affidavit, not a plat, as the “instrument” which was required by statute and regulation. (Appx. 0108-14, 0116-7, 0123, 0138-9). Since OCRM did not rely upon a plat as satisfaction of the applicable standard, no purpose is served by the Court of Appeals’ analysis of whether a plat is or is not an instrument. The Court of Appeals must be reversed to the extent its holding stands on the conclusion that the applicant met his burden.

Even if this Court chooses to examine the Plat which was admitted into evidence at the contested case hearing but which is not a part of the OCRM permit file, it will find that a plat was and is not sufficient under the applicable statute. Applying the long-settled canon of *ejusdem generis*,<sup>12</sup> it is clear that neither plats nor affidavits are of the same “type” as deeds or leases, and are thus excluded from the more general language of “other

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<sup>11</sup> The Court of Appeals cites dicta in two cases to support its holding that a plat is an “instrument” under section 48-39-140(B)(4): Sutcliffe v. Laney Bros., 247 S.C. 417, 147 S.E.2d 689 (1966) and Hamilton v. CCM, Inc., 274 S.C. 152, 263 S.E.2d 378 (1980). Neither provide any support for the Court of Appeals’ contention that the legislature intended a plat to be an “other instrument” under section 48-39-140(B)(4).

<sup>12</sup> Black’s defines this canon as:

A canon of construction that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed. • For example, in the phrase *horses, cattle, sheep, pigs, goats, or any other farm animal* – despite its seeming breadth – would probably be held to include only four-legged, hooved mammals typically found on farms, and thus would exclude chickens.

Black’s Law Dictionary 556 (8th Ed. 2001). While the ALC appears to have recognized the significance of this canon, it committed an error of law in not applying it correctly. (Appx. 0011, 0228-9).

instruments”. The permit regulation and statute specifically identify deeds and leases as acceptable forms of indicia of ownership, possession and permission. Each of these instruments 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 between specified parties. 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, and the mere description of an easement in a plat will not create an easement outside of a clear intent to do so.<sup>13</sup> Lancaster v. Smith Co., Inc., 246 S.C. 464, 144 S.E.2d 209 (1965). Additionally, no South Carolina law supports the proposition that an affidavit is an “instrument” as contemplated by section 48-39-140(B)(4).

To the extent that a plat is an “other instrument” as contemplated by section 48-39-140(B)(4), and to the extent one believes OCRM relied upon it despite the Staff’s testimony to the contrary, it would have been improper for OCRM to consider the Plat as objective, reliable, probative, and substantial evidence of Read’s ownership or permission. 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.

(Appx. 0321). Thus, even if the Plat been a part of the application file, the very nature of a plat (which cannot grant or limit property rights), combined with the clear warning on

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<sup>13</sup>The 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. (Appx. 0126-0130).

the face of the Plat, renders it completely unreliable to serve as evidence of title or right-of-way.<sup>14</sup>

2. A Plat (Certified or not) with a False Affidavit Cannot Satisfy the “Other Instrument” Requirement

The ALC bootstrapped an “other instrument” out of the Plat by combining it with Read’s Affidavit of Ownership, arguing the Affidavit has somehow certified the absent Plat. (Appx. 0012-13). See also Too Tacky at 39, 686 S.E.2d at 197 (“[CZMAP] concluded Read’s affidavit and the copy of the plat submitted by Read constituted an ‘other instrument’...”). While the interpretation by an agency of its own regulation is indeed given great deference, Id., an agency is not given the carte blanche to engage in Lewis-Carroll-esque naming games.<sup>15</sup> There is no authority for the agency or ALC to re-define “instrument” as “uncertified plat and false affidavit”, and OCRM’s current policy, which requires strict adherence to the applicable regulations, is at odds with this unsupported, expansive definition of “instrument”. See OCRM Application Notice, *supra*.

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<sup>14</sup> 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, the requirements of this subsection would be met.

<sup>15</sup> “I don’t know what you mean by ‘glory,’” Alice said.  
Humpty Dumpty smiled contemptuously. “Of course you don’t -- till I tell you. I meant ‘there’s a nice knock-down argument for you!’”  
“But ‘glory’ doesn’t mean ‘a nice knock-down argument,’” Alice objected.  
“When *I* use a word,” Humpty Dumpty said in a rather scornful tone, “it means just what I choose it to mean -- neither more nor less.”

Lewis Carroll, Through the Looking-Glass, and What Alice Found There, Ch. 6 (MacMillan & Co. 1872) *available at* <http://www.victorianweb.org/authors/carroll/zrd/6.htm> (last visited December 25, 2011).

The ALC's use of the Affidavit to certify the Plat is especially befuddling in light of the fact that *the Affidavit makes no mention whatsoever of the Plat.* (Appx. 0293). The Affidavit does make a number of other representations, most of which were and are patently false:

Read was record owner of Lot #1.

This statement was and is unequivocally false. Mayo Read, Sr. and Ellen Read were the record owners of Lot #1 at the time of application, and evidence refuting the Affidavit's representation that Read was the record owner of Lot #1 can be found in OCRM's file. (Appx. 0193, 0266). At the contested case hearing, OCRM conceded that this representation was false, and Mayo Read, Sr. testified this representation was false. (Appx. 0160, 0192).

Read was record owner of Lot #2.

This statement was and is unequivocally false. Mayo Read, Sr. and Ellen Read were the record owners of Lot #2 at the time of application, and evidence refuting the Affidavit's representation that Read was the record owner of Lot #2 can be found in OCRM's file. (Appx. 0193, 0267). At the contested case hearing, OCRM conceded that this representation was false, and Mayo Read, Sr. testified this representation was false. (Appx. 0160, 0192).

Read was record owner of Lot #3.

This was true at the time of the execution of the Affidavit. However, by January of 2006 (before the contested case hearing), Mayo Read, Sr. and Ellen Read had purchased the property at a foreclosure sale. At the hearing, Mayo Read Sr. testified that he and his wife "acquired [Lot 3] from [Mayo Read, Jr.]" (Appx. 0194; see also Appx.

0374-5 n. 10, 0386-7 n. 30). It is uncontestable that Read had no ownership or permission necessary under the law to build the proposed dock by the time of the contested case hearing.

Read had the “permission from all other persons with a legal interest in said property to conduct the work proposed in the permit application.”

This was and is false. Lawton Grimbball, one of the principals of Too Tacky, told Read prior to the submission of the application Read did not have Too Tacky’s permission to build the proposed dock. (Appx. 0210). OCRM’s file also contained a letter from Petitioner’s counsel specifically objecting to the construction of the dock. (Appx. 0272-5).<sup>16</sup>

Read was 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.”

This was and is false. The true owner of the property from the critical area to the right-of-way accessing the county road is the Petitioner. (Appx. 0203, 0269, 0315, 0327-30). At the contested case hearing, OCRM conceded that this representation was false. (Appx. 0118).

In spite of the patent and material falsehoods in the Affidavit, OCRM stated that it granted the Permit based on its representations. (Appx. 0108-14, 0116-7, 0123, 0138-9). While the Court of Appeals attempted to minimize the effect of these false representations as simply checking a box, it was still a representation made under oath, and Read never appeared at the contested case hearing to clarify or amend his representations. The Affidavit cannot be considered objective, reliable, probative, and

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<sup>16</sup> While Mayo Read, Sr. testified at the contested case hearing that Grimbball had given Mayo Read, Jr. permission to build, this testimony is hearsay within hearsay and cannot be given any probative weight. (Appx. 0195).

substantial evidence of anything, and affirming the grant of a Permit in reliance upon the Affidavit it is reversible error. Moreover, as is illustrated in Section II, *infra*, if Read had submitted deeds as required by statute, the permit cannot issue because Read lacks the required title, possession or permission.

## **II. THE COURT OF APPEALS ERRED BY AFFIRMING THAT READ MADE ANY SHOWING OF A VALID EASEMENT.**

The Court of Appeals holds that it is not the place of the ALC to make “final legal determinations regarding the existence or precise nature of property rights in the permitting process.” Too Tacky at 40, S.E.2d at 198. The Court of Appeals then immediately proceeds to affirm findings of legal property rights found in the ALC’s “Final Order and Decision”, which include the determination that an easement exists on the property “as a matter of law”. (Appx. 0015) (emphasis in original). All parties agree that the ALC and OCRM are not vested with the power to quiet title.<sup>17</sup> However, the ALC must make conclusions of law in conjunction with its opinion, and if it is empowered to declare an easement exists as a matter of law for the limited purposes of a permit application, it also has the authority to declare an easement does not exist for the same limited purpose. Judge Geathers has very clearly set out the powers and limitations of the Administrative Law Court during the review of an OCRM permitting decision:

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<sup>17</sup> The Court of Appeals’ contention that 23A S.C. Code Regs. 30-2(I)(3) (Supp. 2008) somehow provides Too Tacky a means to contest the existence of the easement is incorrect. Regulation 30-2(I)(3) is narrowly drafted to apply only to quiet title actions under S.C. Code § 48-39-220 (Supp. 2010). Quiet title actions under this section are to determine the ownership of *critical areas*. The easement claimed by Read does not fall within what is defined by regulation as a “critical area”. See 23A S.C. Code Regs. 30-1(D)(15) (Supp. 2010) (“Critical Areas - any of the following: (1) coastal waters, (2) tidelands, (3) beach/dune systems and (4) beaches.”).

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 its authority to undertake the proposed project at the proposed location.

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[The provisions of S.C. Code Ann. § 48-39-140(B)(4) (Supp. 2004) and 23A S.C. Code Ann. Regs. 30-2(B)(4) (Supp. 2004) do not] require the Department to resolve property disputes or to determine title to real estate...**Nevertheless, the Department cannot simply ignore questions of property ownership or rely upon patently incredible or absurd claims of ownership when granting critical area permits.** Notwithstanding the disclaimers of Regulation 30-4(E), **the credibility of the state's regulatory scheme would be sharply called into question were the Department to grant a dock permit to a person with no cognizable interest, or plausible claim of an interest, in the property on which the dock is to be constructed.** Rather, under Section [48-39-140(B)(4)] and Regulation 30-2(B)(4), OCRM 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. S.C. Dep't of Health & Env'tl. Control, 04-ALJ-07-0408-CC (August 5, 2005) *available at* <http://www.scalc.net/decisions.aspx?q=4&id=1536> (last visited December 20, 2011) (emphasis added). While Judge Geathers affirmed the permitting decision in Moberly, he did so by making the legal determination that a non-party had stated a claim to ownership under the doctrine of adverse possession, and the petitioner (who opposed the proposed permit) had not "adequately rebutted" that showing. *Id.* See also Andrews v. S.C. Dep't of Health & Env'tl. Control, 01-ALJ-07-0043-CC (June 18, 2001) *available at* <http://www.scalc.net/decisions.aspx?q=4&id=4886> (last visited December 22, 2011) (ALC made legal determination regarding trespass on property); Black's Law Dictionary

1228 (8th Ed. 2001) (A *prima facie* showing is “[s]ufficient to establish a fact or raise a presumption unless disproved or *rebutted*”) (emphasis added).

Read’s attorney stated in a letter that Read held an easement<sup>18</sup> and referenced the deed from the prior owner to Read. (Appx. 0277, 0322). However, this deed references the Plat purpose of defining the boundaries of the lot and conveying an ingress-egress right-of-way to the county road.<sup>19</sup> The referenced “50’ right-of-way” lies “north of and adjacent to Lot 3...and shown as a 50’ right-of-way on the Plat.” This is *not* the alleged “creek access” easement, which allegedly lies northeast of Lot 3 and is not identified in any way, shape, or form as a “right-of-way”. (Appx. 0321). Additionally, a printout from the Charleston County geographic information system (“GIS”), which was a part of OCRM’s file, showed no right-of-way other than the “50’ right-of-way” directly north of Lot 3. (Appx. 0174-5, 0268, 0315).

**A. A Full Review of the Record shows the Claimed Easement does not Exist as a Matter of Law.**

In its final order, the ALC ruled as a matter of law an easement had been created on the Petitioner’s property. (Appx. 0015). If the ALC is so empowered to review the record and make such a determination, it also has the concomitant authority to review the record for any evidence that extinguishes such an easement as a matter of law. The evidence contained in the record before the ALC could not sustain a cognizable claim to easement by Read, and the ALC’s decision was thus clear error.

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<sup>18</sup> While it is well-settled that arguments of counsel should not be taken as evidence, *e.g.* Sosebee v. Leeke, 293 S.C. 531, 362 S.E.2d 22 (1987), OCRM considered this letter in its decision to grant Read’s permit, despite the fact that counsel for Too Tacky denied, via letter in OCRM’s file, the existence of this easement. (Appx. 0110-1, 0118-23, 0182, 0272-5).

<sup>19</sup> The deed to Too Tacky references the same ingress-egress right-of-way. (Appx. 0327).

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. Dep't of Parks, Recreation and Tourism, 377 S.C. 86, 659 S.E.2d 151 (2008). The letter from Read's counsel, the *only* document in OCRM's file that specifically mentioned the claimed easement, asserted an implied easement. (Appx. 0277). No express easement is claimed, and the existence of the implied easement is denied by other documents in the file. (Appx. 0182, 0269, 0273). 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 ALC 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. (Appx. 0015). 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 implied easement, since the grantor could not convey greater property rights than it had. Id.

The ALC's emphasis on platted roadways is misplaced. If these parties were disputing each other'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 right-of-way (road) to reach their lots. The deed to Read explicitly and quite properly references the 50' right-of-way that exists for the benefit of Lots 1, 2, 3, and 4, (Appx. 0322), and the Petitioner cannot dispute the lot owners' right to use *this* right-of-way. However, the easement claimed by Read is not this right-of-way – his claim is to an easement not referenced in his deed. The area is wooded and had been blocked by the Petitioner with a chain since 1992. (Appx. 0205-6). When Mayo Read, Sr. entered Lot 4 to see the location of the proposed dock, he had to walk around or step over this chain. (Appx. 0197-8).

The Blue Ridge Realty line of cases should not be extended to create implied easements on property other than roadways shown on a plat. The policy and justification for the Blue Ridge Realty rule was restated by this 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." Inlet Harbour at 93, 659 S.E.2d at 155 *citing* Cason v. Gibson, 217 S.C. 500, 507 61 S.E. 2d 58, 61 (1950).<sup>20</sup> Because the creek access claimed by Read is not a street and does not abut Read's land, the line of case law relied

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<sup>20</sup> 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).

upon by the ALC to sustain the permit is inapplicable.

Second, it is undisputed that the subject deeds were never submitted as part of the permit application. (Appx. 0113-4, 0117). OCRM did not have the deeds, so it was unable to perform any analysis on them, correct or not.<sup>21</sup> Furthermore, OCRM has stated “neither the Department nor the ALC consider the deeds to even be necessary for the application to be complete.” (Appx. 0419). Petitioner disagrees.

In the absence of an implied easement under Blue Ridge Realty, OCRM and the ALC should have looked for an express grant. Again, Read’s argument was supported by a letter from his attorney instead of reliable, probative, and substantial evidence (in the form of the statutorily required deeds or other such instruments) 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 a “creek access” easement, and the deed into the Petitioner is in fee simple absolute. The Plat, had it been carefully reviewed, retained and relied upon by OCRM, would have revealed that the area claimed by Read is not a roadway. Therefore, Read could not meet his burden if he had submitted the materials required by law.

2. OCRM and the ALC failed to recognize that any easement over Lot 4 was extinguished by the doctrine of merger.

Neither the ALC nor OCRM recognized the legal significance that, at the time the Plat was filed, all parcels shown thereon were owned by the same person. (Appx. 0006A). Alma Wagner, the original owner of the four Lots, filed the Plat with the RMC on October 28, 1986, but she remained the owner of all four of the Lots until January 20,

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<sup>21</sup> While these deeds were part of the record before the ALC, they were submitted in an attempt to rebut Too Tacky’s arguments that OCRM had violated the law. They cannot be part of OCRM’s file, as OCRM’s decision had been made and the Permit issued.

1987, when she conveyed Lots 1, 3, and 4. (Appx. 0281, 0321-2, 0327). Therefore, during the latter months of 1986 the dominant estates (Lots 1, 2, and 3) and the servient estate (Lot 4) of the “creek access” easement were all owned by Wagner. An easement cannot exist where both the purported servient and dominant estates are owned by the 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 “creek access” easement never existed as a matter of law, as it was extinguished by the doctrine of merger during the unified ownership of Alma Wagner in 1986.

3. OCRM and the ALC 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, and the ALC did not address the issue, despite having found that an implied easement existed as a matter of law. (Appx. 0015-6, 0133-4).

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), this Court was faced with an appellant that claimed an easement appurtenant for use of an alleyway/driveway. However, neither terminus 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 645. Despite express language in the deeds 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. The Steele court continued with a holding that is germane to the facts before this Court: “To hold that said alley was appurtenant to appellant’s land would be to disregard well established rules of law, and condemn land owned solely by respondent to the perpetual use of others. Under no theory of law or justice could this, or should this, be done.” Id. at 132, 28 S.E.2d at 647.

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 “creek access” 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 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 were created for the benefit of the first purchasers from Alma Wagner, and no subsequent purchasers. As a matter of law, Read cannot make a *prima facie* showing of an easement appurtenant in 2004, the year of the application.

**B. The Court of Appeals erred by Misapprehending the Nature of a *prima facie* showing of a legal principle**

A *prima facie* showing is not an “ultimate” or “final” legal finding (as the Court of Appeals contends in Part II of its Opinion), but instead a relatively simple threshold requirement that the elements of the legal principle are present. See Black’s Law Dictionary 1228 (8th Ed. 2001) (“Sufficient to establish a fact or raise a presumption unless disproved or rebutted”).

The applicant’s burden cannot be met by simply claiming an “easement” no more than a *prima facie* case of negligence can be made by claiming “negligence”. A *prima facie* showing requires a showing of all the elements of the principle. Cf. Johnson v. Atlantic Coast Line R., 116 S.C. 135, 107 S.E. 31 (1921) (dicta).

It was Read’s burden to make a *prima facie* showing of easement in his application. Thus, he must make a showing to OCRM of the elements of an *easement appurtenant*, an *easement in gross*, or an *easement in gross for commercial purposes*. See Comm’rs of Public Works, supra. (setting forth the elements of these easements). OCRM and every tribunal erred in not requiring a showing of the elements of the claimed easement (a *prima facie* showing). Determining if all the requisite elements were present would be a routine task for OCRM’s general counsel, as would it be for the ALC. However, neither body took the step to examine the evidence and see if all requisite

elements were present. If either had, one would have discovered that the claimed easement simply did not exist and that Read could not meet his burden. This is not only reversible error, but an excellent example of why OCRM should not allow an applicant's affidavit to take the place of instruments such as deeds and leases.

### **III. THE COURT OF APPEALS 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 Regs. 30-12(A)(2)(a) (Supp. 2004) ("[d]ocks and piers shall normally be limited to one structure per parcel." Multiple docks on a single parcel were and are so disfavored that this regulation has now been modified to flatly prohibit such a scenario. 23A S.C. Code Regs. 30-12(A)(1)(a) (Supp. 2008) ("Docks and piers shall be limited to one structure per parcel or lot"); see also Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (noting that a subsequent statutory amendment may be interpreted as clarifying statutory intent); Stuckey v. State Budget & Control Bd., 339 S.C. 397, 401, 529 S.E.2d 706, 708 (2000) ("A subsequent statutory amendment may be interpreted as clarifying original legislative intent."); Cotty v. Yartzeff, 309 S.C. 259, 262 n. 1, 422 S.E.2d 100, 102 n. 1 (1992) (noting that the court's interpretation of the statute was supported by subsequent amendments to the statute which clarified the legislative intent).

Read seeks to construct a second dock extending from Petitioner's property, despite the fact that Petitioner's property has had a critical area permit and dock since the early 1990s. (Appx. 0207). Likewise, one of the three parcels Read claimed (falsely) to own in the Affidavit already has a critical area permit and dock. (Appx. 0194). OCRM

staff is well aware of the (at the time of permitting) disfavor of two structures per parcel. OCRM utilized a Project Assignment Sheet for all new permit applications. (Appx. 0270). The coordinator of incoming permits would 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 would write those matters directly onto the sheet before assigning it to a project manager. (Appx. 0140-2). On Read's Project Assignment Sheet, the coordinator wrote, "Make sure lots 1, 2 and 3 don't have docks." (Appx. 0141-2, 0270). It does not appear that OCRM followed the coordinator's instructions; the permit was issued even though one parcel (Lot 1) already had a dock. Furthermore, OCRM witness Fred Mallett testified the application file contained no evidence indicating why Lot 1 and Lot 4 should have access to two docks, particularly where the owner of Lot 4 did not want a second dock. (Appx. 0150).

According to the Court of Appeals, the only abnormal circumstances justifying the grant of the Permit are the easement providing for creek access and the ownership of Lots 1, 2, & 3 by one family.<sup>22</sup> Too Tacky at 41-2, 686 S.E.2d at 199; (Appx. 0184). This is in spite of the testimony of Fred Mallett that there was nothing in the file supporting such deliberations, and nothing limiting the permit to be valid only so long as "one family" owns Lots 1, 2, and 3. (Appx. 0150). In fact, there is nothing abnormal about a dock existing at the end of an easement; OCRM has issued dock permits to easement holders in other permitting cases. (Appx. 0158-9). Petitioner would also submit that common sense dictates there is nothing unusual about family members owning

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<sup>22</sup> These "abnormalities" bootstrap the erroneous conclusion that an easement actually exists, which compounds the reversible error. Moreover, if the common family ownership were truly the basis for issuing the permit, one would expect the permit to be conditional on the ownership of Lots 1, 2, and 3 remaining in the Read family.

adjoining lots. Considering that OCRM disfavored multiple docks so much that it subsequently amended its regulations prohibit them in all circumstances, it is obvious that only a factual scenario outside of the ordinary could have justified multiple docks in 2005. Multiple docks on a single parcel were so unusual that an average of four were issued in each of the five preceding years. (Appx. 0185). The circumstance presented by Read to OCRM and the ALC is simply insufficient to justify a second dock on Lot 4 under the most tortured view of the record, and the grant of the Permit is reversible error.

**IV. THE COURT OF APPEALS ERRED BY HOLDING OCRM CONSIDERED THE PROPOSED DOCK'S EFFECT OF THE ENJOYMENT AND VALUE 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); 23A S.C. Code Regs. 30-11(B) (Supp. 2004). 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. (Appx. 0148). OCRM did, however take into account the effect a dock would have on the value and enjoyment an *adjacent* property owner. (Appx. 155). Too Tacky is not an adjacent property owner, but the owner of the lot that will shoulder the burden of the additional dock (the fact the dock will be built on state land just outside the Petitioner's property line is a distinction without a difference).

The Court of Appeals erred in describing Frederick Mallet's testimony as "conflicting". Mallet's testimony clearly states that OCRM did not take into account any effect on Petitioner's property values, and that OCRM only analyzed the effect of the proposed dock on *adjoining* property owners. Even the Court of Appeals agrees that

OCRM considered the “impact to the *adjoining* landowner”. Too Tacky at 42, 686 S.E.2d at 199 (emphasis added).

Because the Court of Appeals affirmed OCRM’s grant of permit, a decision that did not take into account the effect on the value and enjoyment of the Petitioner, *the landowner who would be burdened with the dock with no corresponding benefit*, its decision should be reversed.

**V. THE COURT OF APPEALS ERRED IN HOLDING THAT CERTAIN ARGUMENTS OF PETITIONER WERE NOT PRESERVED FOR APPEAL**

The Court of Appeals held that Petitioner “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. Too Tacky at n.2. Section 40-39-140(B)(3) requires the applicant to submit a plat of the area in which the proposed work will take place and section 40-39-140(B)(4) requires the applicant to provide a copy of the instrument under which he claims title, possession, or permission from Too Tacky to build the dock. Both of these issues were argued before the Court of Appeals, and were also argued and ruled upon at each of the preceding tribunals. (e.g. Appx. 0010-6, 0020, 0022-3, 0030-1, 0038-9, 0056-8, 0060-1, 0070-2).

The primary reasons the Plat could not satisfy the statutory requirements are *the Plat was neither (1) made a part of the OCRM file, nor (2) relied upon by OCRM as the instrument that satisfied the Section 40-39-140(4) requirement*. The Petitioner has argued these points explicitly in Part II of its Brief to the Court of Appeals and Parts III & IV of its Reply Brief (Appx. 0344-54, 0434-7). Read responds to these arguments in his Brief to the Court of Appeals, as does DHEC (Appx. 0386-93, 0413-5). Additionally,

Petitioner cited section 40-39-140(B)(4) in its Brief, and twice in its Reply Brief; Read cited the same subsection four times in his Brief, and DHEC three (Appx. 0337, 0385, 0388, 0391, 0393, 0413, 0416, 0434-5).

Most significantly, the Court of Appeals discusses whether "...Read's affidavit and the copy of the plat submitted by Read [sic] constituted an 'other instrument' as contemplated by the statute and regulation." Too Tacky at 39, 686 S.E.2d at 197. This directly and unequivocally implicates section 40-39-140(B)(4), and the Court of Appeals' assertion that this argument was not preserved is internally inconsistent with the remainder of its opinion.

The Petitioner specifically argued that Read did not provide a certified copy of the plat in its Brief and Reply Brief to the Court of Appeals; Read and DHEC provide responses to this argument. (Appx. 0346-47, 0390-3, 0413-5, 0434-7). While this argument does not mention section 48-39-140(B)(3) explicitly, it makes the argument that an uncertified plat is insufficient, and references directly paragraph 11 of the ALC's order, which held the use of an uncertified plat was harmless error. (Appx. 0014, 0346-47). This holding clearly implicates 23A S.C. Code Regs. 30-2(B)(4). The statutes and regulations regarding the permitting process do not exist independently of each other, and their provisions must be read together. Cf. 23A S.C. Code Regs. 30-2(B) (Section 48-39-140(B) is directly cited in the body of the regulation).

Ultimately, the record reveals that the above arguments were argued and ruled upon by the tribunals below. They are properly before this Court and the Petitioner respectfully requests this Court consider them.

**VI. THE ALC RE-WROTE THE PERMIT GRANTED TO READ, THUS EXCEEDING ITS STATUTORY AUTHORITY.**


The ALC has misunderstood and misapplied the relevant statutes, regulations, and public policies, creating the ultimate result of an erroneous re-writing of the Permit. The permit that resulted from the contested case hearing is not the same as the Permit (Appx. 0307-13), and was never approved by OCRM. The ALC never had authority to issue this permit. The application for the critical area permit was made in the name of Mayo Read, Jr. (Appx. 0291). OCRM issued public notice that the applicant was Mayo Read, Jr. and internally referred to the application as Mayo Read, Jr.'s application. (Appx. 0270, 0297, 0303, 0320). Mayo Read, Jr.'s attorneys refer to the application as Mayo Read, Jr.'s. (Appx. 0276). While OCRM internal memoranda sometimes refer to the application of "Mayo Read", they *never* refer to the application of "Mayo Read, Sr." (Appx. 0265, 0295-6, 0299-301, 0304). Ultimately, OCRM submitted the Dock Permit to "Mayo Read", though it is clear the permit was issued to Mayo Read, Jr.: "Mayo Read, Atty in fact" signed the permit (this must be Mayo Read, Sr., as Mayo Read, Jr. could have signed under his own authority), and other portions of the permit explicitly reference "Mayo Read, Jr." and never "Mayo Read, Sr." (Appx. 0311).

The ALC, under the mistaken belief that the Permit was issued to Mayo Read, Sr. (Appx. 0002, n. 1), affirmed the grant of a permit to Mayo Read, Sr. The ALC, in effect, re-wrote the critical use permit, issuing it to Mayo Read, Sr. instead of Mayo Read, Jr. This is impermissible, as OCRM retains the exclusive authority to issue critical use permits, and this Court has recently held that an ALC exceeds its statutory authority when it re-writes a permit issued by OCRM. Kiawah Dev. Partners v. S.C. Dep't of Health & Env'tl. Control, Op. No. 27065 (S.C. Sup.Ct. filed November 21, 2011)

(Shearouse Adv.Sh. No. 41 at 24). Mayo Read, Sr. was not the party requesting the Permit; he did not submit any information to OCRM, and, most importantly, he was not subject to its scrutiny during the permitting process. It thus violates the statutory authority of the ALC for it to re-write the Permit to substitute Mayo Read, Sr. for Mayo Read, Jr.<sup>23</sup> Under Kiawah Dev. Partners, this is reversible error.

### CONCLUSION

Petitioner asks this Court to reverse the decision of the Court of Appeals and hold that the ALC has acted outside of the scope of its discretion, in violation of the law and public policy of this state in its grant of the Permit and to direct that the Permit be denied.



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**31 January 2012**

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<sup>23</sup> Too Tacky acknowledges that this argument was not originally contained in the Petition for a Writ of *Certiorari*, but the Kiawah Dev. Partners decision upon which this argument is based was not decided until November 21, 2011, nearly two years after the Petition was filed and less than a month before this Court issued its Writ.

**THE STATE OF SOUTH CAROLINA  
In the Supreme Court**

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

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**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)**

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**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.**

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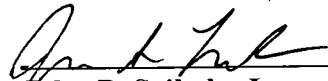
**CERTIFICATE OF SERVICE**

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I certify that I have served the Brief of Petitioner on counsel for the Respondents by serving copies of the same via U.S. Mail on 31 January 2012 to the following:

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