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I. STATEMENT OF THE ISSUES ON CERTIORARI APPEAL

A. Did The Administrative Law Judge, The Coastal Zone Management Appellate Panel, The Circuit Court, And The South Carolina Court Of Appeals All Correctly Determine DHEC-OCRM Had Properly Issued The Dock Permit To Mr. Read?

B. Was There Substantial Evidence In The Record Supporting DHEC-OCRM's Decision To Issue The Dock Permit To Mr. Read?

II. STATEMENT OF THE CASE

On *30 March 2005*, the Respondent, South Carolina Department of Health and Environmental Control ("DHEC"), by and 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).**1** This certification authorized Mr. Read to construct a private dock accessing Leadenwah Creek on and across property owned by the Petitioner, Too Tacky Partnership ("Too Tacky").**2** (R.p.1; R.p.16; R.p.22; R.pp.302-308).

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1 Too Tacky prepared and filed the Appendix in this appeal. Too Tacky numbered the pages in the Appendix consecutively, including renumbering the Record On Appeal. Mr. Read and SCDHEC have retained the original numbering scheme from the Record on Appeal in order to indicate the record citations in this brief. This has been done to maintain the continuity in the briefs. Any additional citations will be referenced to the Appendix pages.

2 Too Tacky has been heretofore represented in this case by one of its partners, Lawton Grimball ("Mr. Grimball"). (R.p.198, lines 12-20). Notwithstanding Mr. Grimball's prior representation, after Too Tacky sought certiorari from this Supreme Court, but before it was granted, Too Tacky sold all of its fee interest in the subject property to Kelly J. Albers on 11 January 2011. The sales price was $665,000.00. *See* Title to Real Estate from Too Tacky, A Partnership to Kelly J. Albers dated 6 January 2011, (the "Albers Deed") (A copy of the Albers Deed is attached hereto as an **Appendix** to this Joint Respondents' Brief). The Albers Deed is recorded in the RMC Office for Charleston County in Book 0165 at Page 599. According to the Albers Deed, Too Tacky has not retained any interest in the property and, since this matter involves Too Tacky's personal challenge to Mr. Read's Dock Permit, Too Tacky's 100% divestiture of all of its interest in the property likely has mooted consideration of any of the issues Too Tacky has raised. Absent documentary proof to the contrary, of which none has yet been offered, Too Tacky no longer has standing to attack DHEC-OCRM's grant of the Dock Permit to Mr. Read. Too Tacky no longer has a personal stake in the subject matter of this litigation and, in addition, cannot benefit from any relief granted by this Supreme Court. *See* Rock Hill National Bank v. Honeycutt, 289 S.C. 90, 105, 344 S.E.2d 875, 879 (Ct.App. 1986) (*citing* Duke Power Company v. South Carolina Public Service Commission, 284 S.C. 81, 96, 326 S.E.2d 395, 404 (1985)). *See also* Georgetown County League of Women Voters v. Smith Land Co., Inc., 393 S.C. 350, 358 n.4, 713 S.E.2d 287, 291 n.4 (2011) (Hearn, J, concurring in part, dissenting in part); Powell v. *Ex rel.* Kelley v. Bank of America, 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct.App. 2008).

After DHEC-OCRM issued the Dock Permit to Mr. Read, Too Tacky challenged the permit's validity in a contested case proceeding before the South Carolina Administrative Law Court (the ("ALC").[3] (R.p.16; R.p.22). The Honorable John D. McLeod, Administrative Law Judge, heard the contested case (R.p.16; R.p.71) and affirmed DHEC-OCRM's decision to grant the Dock Permit.[4] (R.pp.1-13; R.pp.15-16; R.p.18; R.p.71). Too Tacky appealed the ALC's decision to the Coastal Zone Management Appellate Panel (the "CZMAP") (R.p.14; R.pp.24-28) which, in turn, unanimously affirmed the ALC. (R.pp.14-15).

On 12 April 2007, Too Tacky filed a Petition for Judicial Review with the Circuit Court. (R.p.16; R.p.30).[5] Too Tacky sought a *de novo* judicial review of the Dock Permit's validity. (R.p.30). Mr. Read responded to the petition by 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 a lack of subject matter jurisdiction. (R.p.38, para. 24). Similarly, DHEC-OCRM responded by denying the material allegations. (R.p.41, paras. 1, 5; R.p.42, paras. 8-9). DHEC-OCRM also asserted the affirmative defenses of lack of subject matter jurisdiction[6] (R.p.42, para. 10), and failure to state a cause

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3 *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).

4 *See generally* Too Tacky Partnership v. South Carolina Department of Health and Environmental Control, 2006 WL 2617201 (S. C. Admin. Law Judge Div., filed 17 August 2006).

5 *See* S.C. Code Ann. § 48-39-180 (Thomson West 2005).

6 *See* Rule 12(b)(1), SCRCP.

of action.[7] (R.pp.42-43, para. 11). The Circuit Court affirmed the CZMAP's decision (R.pp.16-19) and then denied Too Tacky's subsequent motion to alter or amend the decision.[8] (R.pp.21, 63-70).

Too Tacky appealed to the South Carolina Court of Appeals which, by published opinion, affirmed the Circuit Court (and also, by implication, the ALC and CZMAP) in all respects. (App.455-460).[9] Thereafter, Too Tacky filed an unsuccessful Petition for Rehearing with the Court of Appeals (App.445-454) and then filed its Petition for Writ of Certiorari with this Supreme Court. By order dated 1 December 2011, this Supreme Court granted the petition.

III. STATEMENT OF THE FACTS

A. History Of The Parties' Property

Too Tacky and Mr. Read were previously adjacent property owners on Wadmalaw Island in Charleston County.[10] (R.pp.1A-2; R.p.316). On 28 October 1986, their common predecessor-in-title, subdivided some 17.71 acres into four essentially 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 near Leadenwah Creek (the "Wagner Plat"). (R.p.1A, para. 1; R.p.316). The Wagner Plat specifically depicts a 50' wide pathway clearly

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7 *See* Rule 12(b)(6), SCRCP.

8 *See generally* Rule 59(e), SCRCP.

9 *See* Too Tacky Partnership v. South Carolina Department of Health and Environmental Control, 386 S.C. 32, 686 S.E.2d 194 (Ct.App. 2009).

10 As noted previously, Too Tacky sold all of its fee interests in Lot No. 4 on 6 January 2011. *See* Albers Deed, pp.1-3.

labeled "*50' [D]rainage – [E]asement & Creek Access for Lots [Nos.] 1, 2 & 3*" across the rear or landward edge of Lot 4.**11** (R.p.1A, para. 1; R.p.316). Neither Lot No. 2 nor Lot No. 3 has 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).**12** 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 [Wagner] 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**13** (R.pp.1A-2, para. 3, R.pp.322-325) and six years later Mr. Read purchased Lot 3.**14** (R.p.1A-2, para. 3; R.pp.317-321). Mr. Read's parents, I. Mayo Read, Sr., and Ellen P. Read, purchased Lots

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11 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 Wagner Plat. (R.p.16). The Wagner 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).

12 Lot No. 1 has direct deep-water access to the west into a branch of the Leadenwah River.

13 Too Tacky purchased Lot No. 4 from Robert L. McFarland on 7 April 1992. (R.pp.322-325). The deed was recorded in the Charleston County RMC Office the same day in Book L212 at p.207. (R.pp.322-325). As noted, Mr. Grimball represented Too Tacky. (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). Neither Mr. Grimball nor Mrs. Grimball occupy that status at this time since they, as Too Tacky's only partners, sold Lot No. 4 to Mr. Albers over 14 months ago. (Albers Deed, pp.1-4).

14 Mr. Read purchased Lot No. 3 from Daniel R. McFarland on 24 April 1998. (R.pp.317-321). The deed was recorded in the Charleston County RMC Office on 28 April 1992, in Book R301 at p.161. (R.pp.317-321).

Nos. 1 and 2. (R.pp.1A-2, para. 3).**15** The deeds for all four lots, including both Mr. Read's and Too Tacky's deeds, specifically incorporated the Wagner Plat by reference.**16** (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, actually knew or was deemed to have known about the recorded Wagner Plat and the specific language regarding "Creek Access for Lots [Nos.] 1, 2 & 3" set forth on the Wagner Plat.**17** (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 interpreted the language in the Wagner Plat which provided for "Creek Access for Lots [Nos.] 1, 2 & 3" as simply allowing the easement holders to walk down to the Leadenwah Creek (R.p.2, para. 4; R.p.216, line 3 – R.p.217, line 13) or, as he said, the easement allowed "that someone could come down to the creek." (R.p.2, para. 4; R.p.217. lines 14-20). Conversely, Mr. Grimball neither directly communicated with nor advised Mr. Read, Mayo Read, Sr., and/or Mrs. Read that he "disputed the easement language in the [Wagner] Plat" or otherwise considered the easement invalid. (R.p.2, para. 5). Mr. Grimball

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15 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 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.

16 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 [Wagner] plat, ***which [Wagner] plat is incorporated herein by reference.***" (R.pp.1A-2, para. 3 n.2; R.p.322) (Emphasis added). Even the Albers Deed incorporates the Wagner Plat. (Albers Deed, p.1).

17 *See* Spence v. Spence, 368 S.C. 106, 119-120, 628 S.E.2d 869, 876 (2006). *See generally* S.C. Code Ann. § 30-7-10 (Thomson Reuters West 2005); 27 S. C. Jur., Mortgages, § 94 (Thomson Reuters West 2012).

also failed to take any legal or equitable action whatsoever to contest and/or clarify the validity of the Wagner Plat's easement. (R.p.2, para. 5). Moreover, Mr. Grimball conceded 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"

Mayo Read, Sr. testified he and the other owners of Lots Nos. 1-3 have periodically used the easement path shown on the Wagner Plat for recreational walking purposes (R.p.2, para. 5; R.p.192, line 21 – R.p.193, line 21) and, more importantly, to "go look [and see] were the [community] dock [wa]s going to go." (R.p.192, lines 21-25).**18** Even though Mr. Grimball stated he "placed" a chain across the easement to "prevent" trespassers (R.p.191, line 4 – R.p.192, line 20; R.p.199, line 1 – R.p.203, line 8),**19** this "obstructionist" effort was, at best, simply figurative since the easement was 50' wide (R.p.1A, para. 2) and the chain was only 12' long. Mr. Grimball's "blocking" of less than 25% of the easement was merely an inconvenience to Mr. Read and his parents, not a prohibition for entry upon or use of the easement.**20**

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18 Too Tacky, as of the date of the filing hereof, has never pursued any legal and/or equitable action against Mr. Read, or against Mr. Read's parents, or against any others to contest the Wagner 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 actually disputed the validity of the creek access easement language set forth in the Wagner Plat. (R.p.2, para. 5; R.p.197, lines 19-25; R.p.218, lines 8-16).

19 Mayo Read, Sr. stated the chain "has not been [in place] that long." (R.p.193, lines 18-21).

20 *See generally* Ward v. Evans, 387 S.C. 401, 693 S.E.2d 7 (Ct.App. 2010) (entire easement area blocked); Pittman v. Lowther, 363 S.C. 47, 610 S.E.2d 479 (2005) (same).

D. Mr. Read's Permit Application

In late August 2004, Mr. Read filed his *Critical Area Permit Application* (the "Dock Permit Application") with DHEC-OCRM seeking permission to construct a private, joint-use dock which would be serving Lots Nos. 1, 2, and 3. (R.p.2, para. 6; R.p.197, lines 12-18; R.pp.286-291).**21** DHEC-OCRM notified Too Tacky of the Dock 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 Dock 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).**22** Even though there was some dispute regarding whether a copy of the Wagner

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21 Mr. Read's parents, owners of Lots Nos. 1-2, gave him express permission to include them in the Dock Permit Application. (R.pp.2-3, para. 6; R.p.197, lines 12-18; R.p.286; R.p.288).

22 Too Tacky has characterized this affidavit as "admittedly false". (Brief of Petitioner, p.9). The appellate record belies this inaccurate characterization. The Court of Appeals addressed this issue clearly and succinctly:

> . . . Too Tacky argues [Mr.] Read's affidavit was false because he claimed to be the record owner of the property at issue. However, [the record shows Mr.] 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 [Mr.] Read's property interest.

Too Tacky Partnership v. South Carolina Department of Health and Environmental Control, 386 S.C. 32, 39-40, 686 S.E.2d 194, 198.

Plat was actually attached to the Dock Permit Application, DHEC-OCRM's representative, Frederick Mallett ("Mr. Mallett"), explained *DHEC-OCRM certainly had a copy of the Wagner 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). Furthermore, DHEC-OCRM's copy of the Wagner Plat was, in actuality, an oversized copy which Mr. Read had submitted as an accompanying document with the Dock Permit Application. (R.pp.2-4, para. 6; R.p.152, line 15 – R.p.153, line 7).

More importantly, Too Tacky itself conceded in writing as to both Mr. Read's proper submission of the Wagner Plat and the existence of Wagner Plat's creek access easement language. By letter dated 11 January 2005, Too Tacky's legal counsel, Bob J. Conley, Esquire, wrote to DHEC-OCRM objecting to the Dock Permit Application. (R.pp.2-3, para. 6; R.pp.267-270). Attorney Conley stated that Mr. Read:

> . . . has not presented evidence of [real property] title or possession, ***other than [the Wagner] [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 submitted on Too Tacky's behalf. (R.p.146, line 11 – R.p.147, line 6). Mr. Mallet also noted no party to the proceedings had ever claimed the Wagner Plat was either altered, forged, or otherwise inaccurate. (R.p.153).

The Dock Permit authorized Mr. Read to construct a private, joint-use dock entirely below the mean high water mark and, therefore, not actually situated on Too Tacky's property. (R.p.288).**23** Consistent with Too Tacky's (*i.e.*; Mr. Grimball's) "extremely conservative" interpretation of the Wagner 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 be used exclusively by the holders of the easement 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 owned by the State of South Carolina in both *jus privatum* and *jus publicum*. (R.pp.286-291; R.p.316).**24**

E. DHEC-OCRM's Evaluation of the Permit Application

After receiving the Dock Permit Application and prior to issuing Mr. Read the Dock Permit (R.p.142, lines 17-20),**25** DHEC-OCRM, through Mr. Mallett and Curtis Joyner, DHEC-OCRM's Manager of Critical Area Permitting, reviewed and evaluated the required ten factors/general considerations. (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,

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23 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.").

24 *See* 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)).

25 *See* S.C. Code Ann. § 48-39-150(A) (Thomson West 2005); 23A S.C. Code Ann. Reg. § 30-11(B) (Thomson West 2005).

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).**26** DHEC-OCRM correctly 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).

DHEC-OCRM, thereafter, issued Mr. Read the Dock Permit subject to certain special conditions imposed to address some of Too Tacky's concerns.**27** (R.p.150, lines 12-24; R.pp.302-308).**28**

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26 *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.").

27 These concerns included eliminating the requested roof over the pierhead and reducing the size of both the pierhead and the float. (R.p.150, lines 12-24; R.pp.302-308).

28 DHEC-OCRM was concerned the 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). DHEC-OCRM notified the South Carolina Department of Natural Resources ("SCDNR") of the Dock Permit Application since SCDNR has jurisdiction over shellfish beds. (R.p.147, line 23 - R.p.148, line 9). SCDNR did not voice any objection. (R.p.147, line 17 - R.p.149, line 7; R.p.315).

IV. ARGUMENT AND CITATION OF AUTHORITY

Summary of the Argument

DHEC-OCRM correctly and properly issued Mr. Read the Dock Permit. Mr. Read had appropriately and fully demonstrated his requisite legitimate "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, in appeal after appeal after appeal, the CZMAP, the Circuit Court, and the South Carolina Court of Appeals, all found there was substantial supporting evidence in the record and appropriately affirmed DHEC-OCRM's original grant of the Dock Permit.

A. The South Carolina Court Of Appeals, The Circuit Court, The Coastal Zone Management Appellate Panel, And The Administrative Law Judge All Correctly Determined DHEC–OCRM Properly Issued The Dock Permit To Mr. Read.

Too Tacky asserts Mr. Read should not have been given the Dock Permit since the Dock Permit Application was effectively incomplete and/or contained false information. (*Brief of Petitioner*, pp.8-10). Too Tacky's argument is meritless, has heretofore failed at each level of these proceedings, and fails again now.

The record demonstrates the Administrative Law Judge, the Coastal Zone Management Appellate Panel, the Circuit Court, and the Court of Appeals all correctly concluded the Dock 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.**29** There is substantial evidence in the record supporting DHEC-OCRM's decision to grant Mr. Read the Dock Permit. The Court of Appeals' decision must be affirmed in all respects.

1. Mr. Read's Dock Permit Application

Too Tacky asserts the Court of Appeals failed to require Mr. Read to make a *prima facie* showing of his ownership interest. (*Brief of Petitioner*, pp.9-18). Too Tacky arguments again miss the point as Mr. Read clearly proved his legitimate ownership interest via the property easement granted by the Wagner Plat.

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).**30** Axiomatically, DHEC-OCRM is required to uphold the intentions and policies of the *Coastal Zone Management Act* when considering permits for docks within the South Carolina coastline's critical areas.**31** Nevertheless, even though DHEC-OCRM does not have the either authority or

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29 Too Tacky, as the party affirmatively asserting DHEC–OCRM erred in granting the Dock Permit, had the burden of proof. *See* Too Tacky Partnership v. South Carolina Department of Health and Environmental Control, 386 S.C. 32, 37, 686 S.E.2d 194, 197 (*citing* 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). Too Tacky was required to show, by a preponderance of the evidence, 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).

30 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 importantly, the referenced regulations govern the management, development, and protection of South Carolina's critical areas and coastal zone.

31 The "critical areas" are "defined as coastal waters, tidelands, beaches and primary ocean-front sand dunes." Spectre, LLC v. South Carolina Department of Health and Environmental Control, 386 S.C. 357, 364, 688 S.E.2d 844, 847 (2010).

the legal ability to "quiet title" to real property;**32** DHEC-OCRM was required to determine if Mr. Read satisfied the statutory and regulatory requirements for the issuance of the Dock Permit, including the requirement Mr. Read establish *prima facie* authority (*i.e.*; ownership interest) to undertake the proposed project at the proposed location.**33** Specifically, Mr. Read was required to file his Dock 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."**34**

(a) ***Mr. Read's Submitted Plat***

The critical document herein was the Wagner Plat which showed the division of Mrs. Wagner's larger piece of property into four smaller, albeit somewhat equal parcels, which ultimately became known as Lots Nos. 1, 2, 3, and 4. (R.p.1A, para. 1; R.p.316). The Wagner Plat**35** depicts a 50' wide

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32 *See* Too Tacky Partnership v. South Carolina Department of Health and Environmental Control, 386 S.C. 32, 40-41, 686 S.E.2d 194, 198; 23A S.C. Code Ann. Reg. 30-4(E) (Thomson West Supp. 2004); 23A S.C. Code Ann. Reg. 30-2(I) (Thomson West Supp. 2004).

33 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.").

34 *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).

35 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 (Ct.App. 2007) (*citing* State v. Bilbao, 130 Idaho 500, 943 P.2d 926, 928 (1997). *See also* Too Tacky Partnership v. South Carolina Department of Health and Environmental Control, 386 S.C. 32, 40-41, 686 S.E.2d 194, 198 (*citing* Sutcliff v.

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).**36** The deed to Mr. Read's lot (*i.e.*; Lot No. 3)**37** 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 [Wagner] Plat." (R.p.317) (Emphasis added).

Contrary to Too Tacky's assertions (*Brief of Petitioner*, pp.10-11), Mr. Mallett, the DHEC-OCRM project manager who reviewed and approved the Dock Permit, noted a copy of the Wagner 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).**38** In any case, Mr. Mallett stated DHEC-OCRM ***actually*** had possession of a copy of the Wagner Plat ***prior*** to issuing the Dock Permit.

Laney Brothers, 247 S.C. 417, 422, 147 S.E.2d 689, 691 (1966); Hamilton v. CCM, Inc., 247 S.C. 152, 154, 263 S.E.2d 378, 379 (1980)).

36 Ms. Wagner actually signed the Wagner Plat. (R.p.316). The Wagner 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).

37 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, 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).

38 Too Tacky asserts "[e]ven the ALC recognized that an application, without a plat, certified or not, was incomplete . . . ." (Brief of Petitioner, p.11). The ALC reached no such conclusion as to Mr. Read's Dock Permit Application or otherwise. (R.p.3). The ALC simply noted DHEC-OCRM's representative "testified that [permit] applications often are not complete when the application[s] [are] first submitted and that the[OCRM] staff places applications on public notice that are sometimes not complete." (R.p.3). The DHEC representative did not provide the reason or reasons for the "incompleteness" of the applications. (R.p.8).

(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 fact, the ALC concluded "potentially, an oversized copy of the [Wagner] Plat was actually submitted along with the [Dock] Permit Application itself." (R.p.3).

In any case, Too Tacky conceded Mr. Read had submitted the Wagner Plat to DHEC-OCRM and the existence of creek access easement language. By letter dated 11 January 2005, Attorney Conley, representing Too Tacky, wrote Mr. Mallett objecting to the Dock 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*** [the Wagner] [P]lat which show[ed] a '50' Drainage Easement & Creek Access ***for*** Lots [Nos.] 1, 2, & 3'." (R.p.268, para. 1) (Emphasis added). Mr. Mallett confirmed that DHEC-OCRM had received and reviewed Attorney Conley's letter. (R.p.146, line 11 – R.p.147, line 6). He also stated Too Tacky never claimed the Wagner Plat was either altered, forged, or otherwise inaccurate. (R.p.153, lines 1-11).**39**

Furthermore, contrary to Too Tacky's position (*Brief of Petitioner*, pp.12-18), the Wagner Plat constituted an "instrument"**40** satisfying the statutory and/or regulatory provisions requiring Mr. Read to submit a "certified copy of the deed, lease[,] or other instrument under which [Mr. Read] claim[ed] title, possession[,]

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39 Without objection, Mr. Read introduced a certified copy of the Wagner Plat into the ALC hearing. (R.p.75, line 16 - R.p.77, line 3). Neither Too Tacky not DHEC-OCRM offered any evidence to show (or even suggested) that the Wagner Plat deviated, in any way, from the one DHEC-OCRM reviewed with the Dock Permit Application. (R.p.316).

40 *See* Murrells Inlet Corporation v. Ward, 378 S.C. 225, 231, 662 S.E.2d 452, 455-456 (Ct.App. 2008); Hamilton v. CCM, Inc., 274 S.C. 152, 154, 263 S.E.2d 378, 379.

or permission from the owner of the property to carry out the [dock construction] proposal. . . ."**41** 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/or regulatory requirements of ownership demonstration.**42**

Mr. Mallett stated DHEC-OCRM used and, more importantly, relied upon the Wagner 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 specifically remembered reviewing the Wagner 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).**43**

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41 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).

42 Too Tacky incorrectly asserts that the Wagner Plat cannot be viewed in the context or category of an "other instrument" as contemplated in S. C. Code Ann. § 48-39-140(B)(4). (Brief of Petitioner, pp.12-15). Too Tacky's alleged issues are, however, merely "distinctions without a difference". Contrary to Too Tacky's assertions of limitation, it is clear the Legislature used the term or phrase "other instrument" in order not to exclude, but to include, a broad range of documents which could satisfy the ownership, and/or permission requirement. Had the Legislature intended to place a "limitation" on the types and scope of evidence of ownership or permission which complied with S. C. Code Ann. § 48-39-140(B)(4), the Legislature could have used language which directed the reader to specifically designated documents. The Legislature did not, of course, do so indicating a broad range of documents could be considered. *See* Joseph v. State, 351 S.C. 551, 562, 571 S.E.2d 280, 285 (2002), *distinguished on other grounds*, State v. Bryson, 357 S.C. 106, 591 S.E.2d 637 (2003) (Court will not construe statutory language to lead to absurd results which could not have reasonably been intended by the Legislature).

43 As previously noted, Too Tacky conceded, in writing, that Mr. Read had submitted the Wagner Plat to DHEC-OCRM, as well as and the existence of the creek access easement language. (R.p.2-3, para. 6; R.pp.267-270).

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."**44** The deed conveying Lot No. 4 to Too Tacky referenced and incorporated the Wagner Plat. (R.p.322). Mr. Read's deed to Lot No. 3 did the same thing (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).**45** Mrs. Read's deeds simply referenced the Wagner Plat. (R.p.276; R.p.279; R.p.283).

The Administrative Law Judge, the Coastal Zone Management Appellate Panel, the Circuit Court, and the Court of Appeals all correctly found DHEC-OCRM properly concluded the Wagner Plat satisfied Mr. Read's statutory and/or regulatory requirement to demonstrate an indicia of "ownership" of the affected real property. There is substantial evidence in the record supporting DHEC-OCRM's decision and the Court of Appeals' decision should be fully affirmed.

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44 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). Citing to Lancaster v. Smithco, Inc., 246 S.C. 464, 144 S.E.2d 209 (1965), Too Tacky asserts that since a "plat is not an index of encumbrances, . . . the mere description of an easement in a plat will not create an easement outside of a clear intent to do so." (Brief of Petitioner, p.14). Mrs. Wagner clearly intended the Wagner Plat to create an easement since the Wagner Plat depicts a 50' wide pathway appropriately 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). Ms. Wagner signed the Wagner Plat (R.p.316) and it approved by the Clerk for Charleston County Council and recorded in the RMC Office. (R.p.316). *See* Holly Hill Lumber Co. v. Grooms, 198 S.C. 118, 135, 16 S.E.2d 816, 823 (1941).

45 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)).

(b) ***Certified Vs. Uncertified Plat***

Admittedly, DHEC-OCRM's copy of the Wagner Plat was not a certified copy. Too Tacky asserts DHEC-OCRM violated its own regulations by issuing the Dock Permit without first having been provided a certified copy of the Wagner Plat. (*Brief of Petitioner,* pp.9,-12). Too Tacky's arguments are meritless as there is no absolute certification requirement.

South Carolina law required Mr. Read to submit to DHEC-OCRM, among other things, 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 propos[ed] [dock construction]."**46** 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 Wagner Plat.**47**

Additionally, 23A *S.C. Code Ann. Reg.* § 30-2(B) provides, in pertinent part, as follows:

> [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 propos[ed] [activity in the critical area requiring a permit]."**48**

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46 *See* S.C. Code Ann. § 48-39-140(B)(4).

47 DHEC-OCRM has interpreted 23A S.C. Code Ann. Reg. § 30-2(B) so that an applicant's *Affidavit of Ownership or Control* satisfied the "certification" requirement 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). 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.

48 23A S.C. Code Ann. Reg. § 30-2(B)(4) (Emphasis added).

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.**49** The use of the term "ordinarily" indicates the existence to DHEC-OCRM of alternatives to a strict application of the certification requirement. DHEC-OCRM properly utilized such alternatives in this case.

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 for one by DHEC-OCRM. Furthermore, S. C. Code Ann. § 48-39-140(B)(4) does not require submission of either a certified deed, or lease, or other instrument.**50**

Moreover, the evidence showed DHEC-OCRM actually reviewed and analyzed a copy of the Wagner 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 Mr. Read the Dock Permit. Additionally, as Too Tacky conceded (*Brief of Petitioner*, p.11), it never suggested DHEC-OCRM's copy of the Wagner Plat had been altered, forged, or was otherwise different from the

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49 Hudson v. City of Chicago, 228 Ill.2d 462, 889 N.E.2d 210 (2008) (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); State v. Jenkins, 252 Wis.2d 228, 257, 647 N.W.2d 142, 156 (2002) (Abrahamson, C. J., dissenting); Commonwealth of Pennsylvania v. Lambert, 765 A.2d 306, 359 n.21 (Pa.Super. 2000).

50 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 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).

one on file at the Charleston County RMC Office. (R.p.153, lines 1-11).**51** Furthermore, Mr. Read, without objection (R.p.75, line 16 – R.p.77, line 3), introduced a certified copy of the Wagner Plat into the ALC hearing and no party offered evidence or suggested that the Wagner Plat deviated, in any way, from the one DHEC-OCRM reviewed with the Dock Permit Application. (R.p.316).**52**

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."**53** Such deference creates a superior evaluation 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."**54**

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51 Too Tacky makes the spurious, albeit rather circular, argument that "it [wa]s impossible to [assert that the Wagner Plat used by DHEC-OCRM was different than the one in the RMC Office since the certified] document d[id] not exist and thus cannot be examined [for accuracy]." (Brief of Petitioner, p.11). Too Tacky never presented any evidence (testimonial or otherwise) challenging the validity of the Wagner Plat. (R.p.316). Too Tacky could have obtained a certified copy from the RMC Office and presented it to the ALC, but did not do so. Moreover, Too Tacky did not object or assert any challenge when Mr. Read introduced a certified copy of the Wagner Plat into evidence. (R.p.75, line 16 - R.p.77, line 3). Too Tacky cannot now complain.

52 *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).

53 Too Tacky Partnership v. South Carolina Department of Health and Environmental Control, 386 S.C. 32, 39, 686 S.E.2d 194, 197 (*citing* 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)). *See also* Goodman v. City of Columbia, 318 S.C. 488, 491, 458 S.E.2d 531, 532 (1995).

54 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.

There has not been and certainly is no reason to question DHEC-OCRM's interpretation in this case. DHEC-OCRM clearly had the understandable and, moreover, entirely reasonable discretion to accept Mr. Read's "uncertified" copy of the Wagner Plat in light of the fact the that the relevant regulation used the phrase "shall ***ordinarily*** be required"**55** and the applicable statute**56** simply provided that "[e]ach application for a [dock] permit [which was] filed with [DHEC-OCRM] shall include . . . [a] copy of the deed, lease[,] or other instrument under which the applicant claim[ed] title, possession[,] or permission from the owner of the property, to carry out the [work requiring a permit]."**57** Neither the regulation nor the statute mandated that the document, regardless of its character had to be certified.**58**

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)).

55 *See* 23A S.C. Code Ann. Reg. § 30-2(B)(4) (Emphasis added).

56 *See* S. C. Code Ann. § 48-39-140(B)(4).

57 Too Tacky argues that, even if DHEC-OCRM relied upon the Wagner Plat in issuing Mr. Read the Dock Permit, "it would have been improper for [DHEC-]OCRM to consider the [Wagner] Plat as objective, reliable, and substantial evidence of [Mr.] Read's ownership or permission." (Brief of Petitioner, p.14). Too Tacky has apparently confused "ownership and/or permission" with "title". As the Court of Appeals noted herein "[DHEC-]OCRM is neither authorized nor required to make final legal determinations regarding the existence or precise nature of property rights in the permitting process." Too Tacky Partnership v. South Carolina Department of Health and Environmental Control, 386 S.C. 32, 40, 686 S.E.2d 194, 198. The law afforded Too Tacky the opportunity to challenge Mr. Read's claim of "ownership" in Circuit Court, but Too Tacky has never pursued such an independent or ancillary legal and/or equitable challenge. *See* 23A S. C. Code Ann. Regs. § 30-2(I)(3) (Thomson West 2008 Supp.).

58 *See* Lee v. Thermal Engineering Corp., 352 S.C. 81, 94, 572 S.E.2d 298, 305 (Ct.App. 2002). *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)).

The Administrative Law Judge, the Coastal Zone Management Appellate Panel, the Circuit Court, and the Court of Appeals all correctly found DHEC-OCRM properly concluded the Wagner 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 Court of Appeals should be affirmed in all respects.

B. Mr. Read Made A *Prima Facie* Showing To DHEC-OCRM That The Creek Access Easement Existed

Too Tacky asserts that the Court of Appeals incorrectly concluded that Mr. Read had made a prima facie showing to DHEC-OCRM that he had a recognizable and reasonable easement interest sufficient to support his Dock Permit Application under the appropriate regulations. (*Brief of Petitioner*, pp.18-27).

Both Mr. Read's and Too Tacky's ultimate predecessor-in-title, Mrs. Wager, subdivided her land into four lots via the Wagner Plat and specifically included thereon the language, "*50' drainage – [E]asement & Creek Access for Lots [Nos.] 1, 2 & 3.*"**59** As previously noted, all of the deeds to Lots Nos. 1-4, including both Mr. Read's and Too Tacky's, each specifically incorporated, in one

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59 Mrs. Wagner's creation of the 50' easement appears to 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).

form or another, the Wagner Plat by reference. (R.pp.276-285; R.pp.316-325).**60** Mr. Read and his parents, by virtue of their respective ownerships of Lots Nos. 1-3, acquired a special property right in the 50' creek access easement.**61** Stated otherwise, ". . . where a deed describes land as is shown on a certain plat, such plat becomes part of the deed."**62** In fact, the "easement referenced in the plat is dedicated to the use of the owners of the lots, their successors in title, and to the public in general [and] [a]s to the grantor, who conveyed the property with reference to the plat, and the grantee and his successors, the dedication of the easement is complete at the time the conveyance is made."**63**

Moreover, as noted in *Newington Plantation Estates Association v. Newington Plantation Estates*,**64** when a deed references a plat showing an easement, such an easement is created as a matter of law.**65** Therefore, DHEC-

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60 The Wagner Plat was referenced and generally described in the "property description". (R.p.276, R.p.279, R.p.283, R.p.317, R.p.322).

61 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."). *See also* Murrells Inlet Corporation v. Ward, 378 S.C. 225, 233, 662 S.E.2d 452, 455-456 (Ct.App. 2008) (citing cases).

62 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).

63 Murrells Inlet Corporation v. Ward, 378 S.C. 225, 233, 662 S.E.2d 452, 456 (*citing* Newington Plantation Estates Association v. Newington Plantation Estates, 318 S.C. 362, 365, 458 S.E.2d 36, 38 (1995); Immanuel Baptist Church of North Augusta v. Barnes, 274 S.C. 125, 130–131, 264 S.E.2d 142, 145 (1980); Carolina Land, Inc. v. Bland, 265 S.C. 98, 105, 217 S.E.2d 16, 19 (1975); Outlaw v. Moise, 222 S.C. 24, 30, 71 S.E.2d 509, 511 (1952); Pittman v. Lowther, 355 S.C. 536, 542, 586 S.E.2d 149, 152 (Ct.App. 2003)).

64 Newington Plantation Estates Association v. Newington Plantation Estates, 318 S.C. 362, 458 S.E.2d 36.

65 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);

OCRM's conclusion that, by submission of the Wagner 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 Wagner Plat and the deeds in this case.**66**

The Administrative Law Judge, the Coastal Zone Management Appellate Panel, the Circuit Court, and the Court of Appeals correctly found DHEC-OCRM properly concluded Mr. Read satisfied his statutory/regulatory requirement to demonstrate evidence of the easement and, in turn, warranted DHEC-OCRM's issuance of the Dock Permit. There is substantial evidence in the record supporting DHEC-OCRM's decision and the Court of Appeals should be affirmed in all respects.

C. DHEC-OCRM Correctly Approved 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. (*Brief of Petitioner*, pp.27-29). Furthermore,

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Cason v. Gibson, 217 S.C. 500, 61 S.E.2d 58 (1950)). *See also* Murrells Inlet Corporation v. Ward, 378 S.C. 225, 233, 662 S.E.2d 452, 456.

66 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); Monahan v. Hampton Point Association, Inc., 264 A.D.2d 764, 695 N.Y.S.2d 385 (1999); Higgins v. Douglas, 304 A.D.2d 1051, 1055, 758 N.Y.S.2d 702, 706 (3rd. Dept. 2003; 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); In the Matter of Tideland's License, 326 N.J.Super. 209, 740 A.2d 1125 (N.J. 1999); Cartish v. Soper, 157 So.2d 150, 153-154 (Fla. 2nd DCA 1963).

Too Tacky argues DHEC-OCRM's own regulations ***prohibit*** the two dock scenario.**67** (*Brief of Petitioner*, pp.27-29). Too Tacky's position is without merit and the Court of Appeals' decision should be affirmed.

While DHEC-OCRM's current 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"**68** that was not the case at the time when DHEC-OCRM issued Mr. Read the Dock Permit. Too Tacky clearly wishes the regulation were a total prohibition but, Too Tacky must acknowledge that was not the case in March 2005. At the time of the DHEC-OCRM staff decision, the pertinent regulation provided that "[d]ocks and piers shall ***normally*** be limited to one structure per parcel."**69** The presence of the term "normally" demonstrates there existed an ***alternative*** to any perceived total general prohibition and, moreover, that it would be in DHEC-OCRM's discretion to allow more than one dock per parcel. (R.p.137).**70**

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67 *See* 23A S.C. Code Ann. Reg. § 30-12(A)(2)(a) (Thomson West Supp. 2004). This section was re-codified in 2005 as 23A S.C. Code Ann. Reg. § 30-12(A)(1)(a) (Thomson West Supp. 2005).

68 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). Nevertheless, under certain circumstances, such as the one in this case, two docks are permitted on one parcel even under the revised version of the regulation. *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).

69 23A S.C. Code Ann. Reg. § 30-12(A)(2) (Thomson West Supp. 2004) (Emphasis added).

70 *See generally* 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) (discussing deference to agency interpretations). *See also* City of Columbia v. Board of Health and Environmental Control, 292 S.C. 199, 202, 355 S.E.2d 556, 538 (1987); Risinger v. Knight Textiles, 353 S.C. 69, 72-73, 577 S.E.2d 222, 224 (Ct. App. 2002).

Mr. Read was awarded the Dock Permit based upon (a) the creek access easement shown on the Wagner Plat, (b) his ownership of Lot No. 3, and (c) his entitlement to use the creek access easement. The deeds to all four lots, including Mr. Read's and Too Tacky's deeds, specifically incorporated the Wagner 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 a 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."[71] The easement pathway specifically labeled "*50' [D]rainage – [E]asement & Creek Access for Lots [Nos.] 1, 2 & 3*" on the Wagner 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 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).[72] Conversely, even assuming Mr. Read's dock was actually physically located on

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[71] 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.

[72] 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).

Lot No. 4 (*i.e.*; Too Tacky's property), DHEC-OCRM could reasonably consider the (a) creek access easement and (b) 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 Administrative Law Court, in *Crane v. South Carolina Department of Health and Environmental Control*,**73** faced a very similar situation. In *Crane*, 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.**74** After the denial, the petitioner appealed 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).**75** The ALC concluded that "in the plain meaning of the regulation, an easement may constitute a [separate] parcel."**76** Consequently, the ALC found "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 [wa]s [actually] owned by the

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73 Crane v. South Carolina Department of Health and Environmental Control, 2007 WL 756378 (S. C. Admin. Law Judge Div., filed February 20, 2007).

74 Crane v. South Carolina Department of Health and Environmental Control, 2007 WL 756378 *1.

75 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 . . . .' ").

76 Crane v. South Carolina Department of Health and Environmental Control, 2007 WL 756378 *5.

same person [(*i.e.*; the petitioner)].[77] The ALC also 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.[78]

Mr. Mallet, in evaluating the Dock Permit Application, must have had *Crane* 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 the *Crane* rationale, for the purposes of the application of 23A *S.C. Code Ann. Reg.* § 30-12(A)(1)(a), Mrs. Wagner's previously granted 50' creek access easement constitutes one parcel while, on the other hand, 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.[79]

The appellate record demonstrates that DHEC-OCRM staff found special circumstances justifying the issuing the Dock Permit to Mr. Read. (R.pp.135; 179, 181-182). Accordingly, DHEC-OCRM reasonably exercised its discretion to allow two docks on what appears to be, at first glance, one single parcel of land. Too Tacky's assertions to the contrary are without merit.

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[77] Crane v. South Carolina Department of Health and Environmental Control, 2007 WL 756378 *5.

[78] Crane v. South Carolina Department of Health and Environmental Control, 2007 WL 756378 *5.

[79] Crane v. South Carolina Department of Health and Environmental Control, 2007 WL 756378 *5.

The Administrative Law Judge, the Coastal Zone Management Appellate Panel, the Circuit Court, and the Court of Appeals all correctly found DHEC-OCRM properly considered all of the enumerated factors and concluded Mr. Read's proposed dock complied with the regulations warranting issuance of the Dock Permit. There is substantial evidence in the record supporting DHEC-OCRM's decision and the Court of Appeals' decision should be affirmed.

D. DHEC-OCRM Correctly Evaluated Mr. Read's Dock Permit Application Under *S.C. Code Ann.* § 48-39-150

Too Tacky asserts DHEC-OCRM did not properly evaluate Mr. Read's Dock Permit application under the applicable regulatory scheme. (*Brief of Petitioner*, pp.29-30). Too Tacky misinterprets and misreads the appellate record. Too Tacky's position is meritless and must be dismissed.

DHEC-OCRM evaluated Mr. Read's Permit Application in light of the widely known ten (10) required statutory/regulatory factors and/or "general considerations".**80** 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).

Too Tacky appears to focus its attack on one factor - the "impact of the proposed use on adjacent landowners". (*Brief of Petitioner*, pp.29-30). Too Tacky also asserts DHEC-OCRM "did not take into account any effect on [Too Tacky's] property values . . . ." (*Brief of Petitioner*, p.29).

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80 *See* 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). *See also* Olson v. South Carolina Department of Health and Environmental Control, 379 S.C. 57, 66, 663 S.E.2d 497, 502 (Ct.App. 2008).

Firstly, Too Tacky 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. Secondly, Mr. Mallett stated he duly 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).**81** 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).**82**

Too Tacky failed to present any credible or substantiated evidence, either testimonial or documentary, showing the Dock Permit had a detrimental impact on its property – value or otherwise. Mr. Grimball noted the proposed dock was relatively near his house (R.p.205, line 22 – R.p.208, line 11; R.p.316)**83** and he

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81 Mr. Grimball stated the subdivision of Lot No. 3 "to [him] [wa]s the worst case scenario . . . ." (R.p.210, lines 11-14).

82 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 admittedly used his dock in that very same manner. (R.p.211, lines 4-8).

83 When Too Tacky purchased Lot No. 4 Mr. Grimball admittedly knew about the recorded Wagner 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). According to the Albers Deed and the records from the Charleston County Auditor's Office, Too Tacky purchased Lot No. 4 in 1992 for $210,000.00 and sold it in

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). Too Tacky could have, but did not, present any type of expert property evaluation report to show a valve diminution based upon Mr. Read building the proposed dock.

The Administrative Law Judge, the Coastal Zone Management Appellate Panel, the Circuit Court, and the Court of Appeals 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 Court of Appeals should be affirmed in all respects.

E. The Dock Permit Application Was Not Re-Written

Too Tacky asserts the ALC allegedly re-wrote Mr. Read's Dock Permit Application and, in doing so, exceeded its statutory authority. (*Brief of Petitioner*, pp.32-33). Too Tacky's argument is meritless and must be dismissed.

Initially, Too Tacky asserts this position for the first time on appeal and has never made the argument at any previous stage of these proceedings (appellate or otherwise). As this Supreme Court is undoubtedly aware, Too

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2001, for $655,000.00. (A copy of the sales record for Lot No. 4 maintained by the Office of the Charleston County Auditor is contained in the Appendix at the end of this Joint Respondents' Brief). Given the sales price of Lot No. 4, it does not appear Lot No. 4 sustained any undervaluation due to the "second dock" issue. Moreover, given the general real estate economic downturn existing since 2007 or so, it is likely that any property devaluation of Lot No. 4 would have been caused due to the "down" real estate market in general and not otherwise. Regardless, Too Tacky did not present any evidence, other than Mr. Grimball's pure speculation (R.p.211, lines 9-11), that Lot No. 4 maybe devalued due to existence of a second dock.

Tacky cannot now argue this proposition on appeal.**84** Nevertheless, even if Too Tacky had timely made the argument and had the trial level judge rule on the issue, Too Tacky would still fail in its argument.

Too Tacky purchased Lot No. 4 in 1992 (R.pp.1A-2, para. 3, R.pp.322-325) and, in 1998, six years later, Mr. Read purchased Lot 3. (R.p.1A-2, para. 3; R.pp.317-321). Mr. Read's parents, Mayo Read, Sr. and Mrs. Read, purchased Lots Nos. 1 and 2. (R.pp.1A-2, para. 3).

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). Furthermore, 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 participated in the ALC hearing. (R.pp.1A-2, para. 3 n.1; R.p.186, line 18 – R.p.187, line 25).**85** There is no indication in the appellate record that Too Tacky either voiced any verbal objection to or submitted any motion seeking to disqualify Mayo Read Sr. from participating in the permitting process or otherwise asserting Mayo Read Sr. was somehow not the "correct" person to either submit the Dock Permit Application or to ultimately obtain the Dock Permit. In fact, in Too Tacky's Petition for Judicial Review, Too Tacky acknowledged that Mr. Read had sold Lot No. 3 (R.p.32, para. 9), but did

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84 Too Tacky Partnership v. South Carolina Department of Health and Environmental Control, 386 S.C. 32, 40 n.2, 686 S.E.2d 194, 198 n.2 (*citing* In the Interest of Bruce O., 311 S.C. 514, 515 n. 1, 429 S.E.2d 858, 858 n. 1 (Ct.App.1993)). *See also* Powers v. City of Aiken, 255 S.C. 115, 117, 177 S.E.2d 370, 371 (1970).

85 *See* Rule 25(c), SCRCP, in conjunction with Rule 68, SCALDJ.

not acknowledge that he had sold it to his parents. Mayo Read, Sr. pointed this fact out in his response. (R.p.37, para. 9). Nevertheless, Too Tacky did not object to Mayo Read, Sr.'s participation in the dock permit process. (R.p.30, para. 1 – R.p.34, para. 22).

Over and above the fact Too Tacky has heretofore never asserted this position at any prior level of these proceedings and, in turn, is prohibited from doing so now, Too Tack's argument, on the "merits" carries no weight whatsoever and must be dismissed.

V. CONCLUSION

Based upon the foregoing arguments and citation of authority, the Respondents, Mayo Read, Jr., and the South Carolina Department of Health and Environmental Control, respectfully request this Supreme Court to affirm the opinion of the Court of Appeals in all respects.

Respectfully submitted:

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