THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM S. C. DEPARTMENT OF HEALTH & ENVIORN. CONTROL
Office of Coastal Resources

Catherine E. Heigel, Director

Appellate Case Number: 2017-000161
Case No. 2015-RFR-69, Sunset Cay, L.L.C.
DOCKET NO. 15-ALJ-07-0579-CC

Sunset Cay, L.L.C., ... Appellant,

vs.

South Carolina Department of Health and Environmental Control.....Respondent.

Brief of Appellant

November 28, 2017

Thomas R. Goldstein, S. C. Bar #2186
Belk, Cobb, Infinger & Goldstein, P.A.
Attorneys for Appellant
P. O. Box 711121
N. Charleston, South Carolina 29415-1121
(843) 554-4291
(843) 554-5566 (fax)
E-mail: tgoldstein@cobblaw.net

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM S. C. DEPARTMENT OF HEALTH & ENVIORN. CONTROL
Office of Coastal Resources

Catherine E. Heigel, Director

Appellate Case Number: 2017-000161
Case No. 2015-RFR-69, Sunset Cay, L.L.C.
DOCKET NO. 15-ALJ-07-0579-CC

Sunset Cay, L.L.C., ... Appellant,

vs.

South Carolina Department of Health and Environmental Control.....Respondent.

Brief of Appellant

November 28, 2017

Thomas R. Goldstein, S. C. Bar #2186
Belk, Cobb, Infinger & Goldstein, P.A.
Attorneys for Appellant
P. O. Box 711121
N. Charleston, South Carolina 29415-1121
(843) 554-4291
(843) 554-5566 (fax)
E-mail: tgoldstein@cobblaw.net

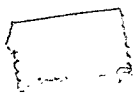

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

STATEMENT OF ISSUE ON APPEAL

DID THE ADMINISTRATIVE LAW COURT ERR IN DISMISSING THE APPELLANT'S APPEAL OF D.H.E.C.'S DECEMBER 2ND REFUSAL TO REVIEW O.C.R.M.'S DECISION TO DENY ALL WATER DEPENDENT USES WITHOUT PREJUDICE ON THE GROUND THAT THE APPELLANT'S APPLICATION WAS PREMATURE?

DID THE ADMINISTRATIVE LAW COURT ERR IN DISMISSING THE APPELLANT'S APPEAL ON O.C.R.M.'S OCTOBER 26TH CEASE AND DESIST LETTER WITH PREJUDICE WITHOUT A HEARING ON THE MERITS?

STATEMENT OF THE CASE

This appeal raises two procedural questions: to wit: (1) whether the Administrative Law Court erred in dismissing appellant's request for the Administrative Law Court to review D.H.E.C.'s refusal to answer appellant's Declaration as premature (the portion of this case addressing the Department's refusal to authorize five water-dependent uses), and (2) the Administrative Law Court's dismissal of appellant's challenge to a cease and desist letter with prejudice (the appeal from an October 26, 2015, cease and desist letter) without a hearing on the merits. The facts are not complex and largely uncontested. This Court is seeing only a sliver of a long relationship between appellant and O.C.R.M. (See statement of O.C.R.M.'s counsel at page 284 of the R.O.A. [transcript page 4, line 9]: "I've described as a fairly extensive history of working with the petitioner on this case to amend its permit application multiple times over the last twelve years.") The controlling legal issues raised by this appeal are procedural.

In 2005, the appellant filed an application with O.C.R.M. to construct a: "39' x 29' building on an existing 50' by 50' pier head. The building will contain bathrooms and a ship's store for the marina for the marina and its tenants." (R.O.A. page 59 [O.C.R.M. permit December 14, 2005, Exhibit A to Appeal to Administrative Law Court]) Sunset Cay Marina is located over the Folly River near the southwest end of Folly Beach on the site of a continuously operating marina since 1947. See. R.O.A. page 61, 241 [permit], 235, [¶ 2, appeal to Administrative Law Court and affidavit of Frances E. Clark,]) The current configuration has 125 boat slips, which belong to individual owners, and transient docks that are available for short-term and emergency mooring. In 2006, the appellant completed construction of the marina building, and the City of Folly Beach issued three certificates of occupancy on September 26, 2006, one for each floor. As part of the permitting process in accordance with O.C.R.M. regulations, the appellant submitted elevation drawings with O.C.R.M. prior to construction, showing the dimensions of the building—the height, width, and depth. These elevation drawings showed the second and third floor connected by an internal spiral stairwell. After the appellant submitted proper elevation drawings in accordance with O.C.R.M.'s policy and secured his building permit, he began construction. Prior to final inspection, O.C.R.M. required the appellant to file the as-built plans. (R.O.A. page 228-234 and 267-274 [Exhibit 3 to appellant's motion for reconsideration]) The only material change from the pre-construction elevation drawings to the as-built drawings was the relocation of the internal spiral stairwell to the exterior of the building due to the Folly Beach building inspector requiring the relocation to the exterior to conform to the fire code. As set forth in the permit, the first floor became the dock master's office, restrooms, and storage for the boat owners who moor their boats at the marina. The second floor became the Ship's Store. Appellant is unable to use the third floor

even though the City of Folly Beach issued a Certificate of Occupancy. However, O.C.R.M. will not authorize or define water dependent use for the third floor.

This controversy surrounds the third floor and revolves around appellant's efforts to get a permit amendment to allow a water dependent use for the third floor. See Regulation 30-1 (52): "Water-dependent – a facility which can demonstrate that dependence on, use of, or access to coastal waters is essential as to the function of its primary activity."

On March 16, 2016, O.C.R.M. issued its first cease and desist letter to the appellant. (R.O.A. page 146.) After discussion, O.C.R.M. issued a revised cease and desist letter on October 26, 2016, (R.O.A. page 149), which set a conference review date of November 18, 2016, to address the allegations in the letter. On November 12, 2016, appellant wrote back to O.C.R.M. and confirmed the meeting date of November 18th, which the appellant, along with representatives of the Council of Co-Owners and the Ship's Store, attended to conduct an administrative review of the O.C.R.M. cease and desist letter. R.O.A. page 220. (For a summary of this meeting, see the affidavit of William Oglesby at R.O.A. page 224.) After the parties met on November 18th, O.C.R.M. officials informed appellant they would check their files and "get back" to the appellant. See affidavit of William Oglesby at R.O.A. page 224. The main issue identified in O.C.R.M.'s October 26th cease and desist letter—the alleged operation of a bar—appears resolved and does not play a part in this action. (See O.C.R.M.'s September 18, 2009, approval of Ship's Store menu at R.O.A. page 126 [Exhibit 8 to appellant's Supplemental Brief.])

O.C.R.M. contends appellant's November 12th letter was insufficient to allow an administrative appeal of its cease and desist letter under §44-1-60: "All department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other

actions of the department which may give rise to a contested case shall be made using the procedures set forth in this section." Essentially, the Administrative Law Court determined that appellant's November 12th letter did not use specific language and did not include a required filing fee thereby waiving any right to challenge. §44-1-60(E): "The staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department by the applicant, permittee, licensee, or affected person."

The Administrative Law Court's decision is controlled by several errors of fact and law. First, a waiver is an affirmative defense that must be both pled and proved: "Estoppel and waiver are protective only, and are to be invoked as shields, and not as offensive weapons. Their operation in all cases should be limited to saving harmless or making whole the party in whose favor they arise and should not, in any case, be made the instruments of gain or profit. [citations omitted] While the doctrine of waive or equitable estoppel may be invoked as affirmative defenses to counterclaims, they may not be asserted in a complaint as offensive weapons." *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384 (1992). See also Rule 8(c), requiring the affirmative pleading of waiver as an affirmative defense. An allegation of an affirmative defense requires proof. *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 433 871 (Ct. App. 1993) Appellant produced evidence that he preempted the October 26th cease and desist by his August 19th Petition for Declaration and further that his November 12th letter is sufficient to trigger an administrative appeal for the reasons set forth here. Finally, it is undisputed that that O.C.R.M. had already scheduled an "enforcement conference" for November 18th, which all the parties attended, and which appellant left believing the October 26th letter was going to be withdrawn or modified. See Affidavit of William Oglesby at R.O.A. page 224. Moreover, as pointed out in the

Order under review, the appellant filed his petition for Declaration on August 27th (R.O.A. page 22), predating the respondent's cease and desist letter by two months and raising the same issues later identified by O.C.R.M. in its October 26th cease and desist letter.

In addition, O.C.R.M. asserts that any dispute over the October 26th cease and deist letter is technical because O.C.R.M. has never issued an administrative Order following the November 18th meeting, and the issue surrounding the Ship's Store has been laid to rest since September 2009, as may be seen by the Department's approval letter. (R.O.A. page 90). See also statement of counsel to the Administrative Law Court: ". . . the cease and desist letter is not a final staff decision. It's part of—it's simply part of the—part of the process to get the permit holder to be using their permit in accordance with the parameter set in the permit." R.O.A. page 286 [transcript page 6, line 4]) Any dispute over the parameters of O.C.R.M.'s September 2009, approval involves only O.C.R.M. and the operator of the Ship's Store.

As demonstrated by the record and argued throughout this brief, the appellant, in a pro-active effort to resolve the impasse over O.C.R.M.'s refusal to issue a permit for a water dependent use for the third floor, led to his filing on August 19, 2015, a Petition for Declaration (R.O.A. page 22) as allowed by Regulation 30-9(D): "D. Declaratory Rulings: Interested persons may petition to the Department for declaratory rulings. The Department shall rule on each petition, in writing, within 45 days of receipt." O.C.R.M. denied each one of appellant's proposed water dependent use even though O.C.R.M. approved each and every proposed use in similarly situated marinas. After O.C.R.M. refused to allow any of the appellant's proposed water dependent uses, appellant asked O.C.R.M. to reconsider its refusal on October 12, 2015. (R.O.A. page 38) O.C.R.M. treated the motion for reconsideration as a request for administrative appeal by the D.H.E.C. Board. The D.H.E.C. Board then notified appellant on December 2, 2015, that it would not reconsider the

administrative denial or grant the appellant a review. (R.O.A. page 20 [D.H.E.C. refusal to grant appeal]) Following this notice, the appellant requested on December 23, 2015, that the Administrative Law Court review the D.H.E.C. Board's refusal to consider any of appellant's proposed five water dependent uses. (R.O.A. page 42 [appeal to Administrative Law Court])

On October 17, 2016, the Administrative Law Court dismissed the appeal from D.H.E.C. Board's refusal to review the Declaration as premature. (R.O.A. page 1[Order]) Both sides moved for reconsideration (R.O.A. page 205 for appellant's November 2, 2016, motion and page 179 for respondent's November 3, 2016, motion) On January 4, 2017, the Administrative Law Court issued an amended Order. (Supplemental R.O.A. page 1)

In the amended Order, the Administrative Law Court dismissed the Declaratory Ruling appeal to the Court without prejudice on the ground that the Administrative Law Court found the appeal to be premature. However, the Administrative Law Court dismissed the appellant's appeal of the cease of desist letter with prejudice on the ground that the appellant failed to request an administrative appeal within the time stated by § 44-1-60, S. C. Code, ann.

This appeal followed on January 14, 2017. (R.O.A. page 278 [Notice of Appeal])

FACTS

Because the legal issues are procedural, the facts are woven in to the Statement of Case. A brief statement of the established facts is that various owners have operated a marina and marina building at appellant's location since 1947. (R.O.A. page 235 [affidavit of Francis E. Clark]) Over the years, the configuration of the building serving the marina has changed in size and location. For over 40 years a larger one-story building existed on appellant's present location, providing food, drinks, including alcohol, pool tables, and gaming machines. (There is a photo of it attached to

Exhibit B attached to the Petition for Declaration at R.O.A. and at pages 35, 67 and 189.) When Folly Beach adopted zoning in the 1970's, the City designated appellant's site, "C-3, Commercial Marine" due to the existence of the marina, which is the zoning classification existing today. The appellant acquired the property in 2001, and the instrument of conveyance included ". . . all the right, title, and interest in a certain wharf extending from the above described tract with a permit given to the Folly River Sea Foods, Inc. by the U. S. District Engineer in February 1947." (R.O.A. page 261 [deed page 2 attached to affidavit of Francis E. Clark.]) As set forth above, the appellant applied for a permit in 2005; O.C.R.M. granted it, and the building has been in continuous use—except for the third floor—since Folly Beach issued the three certificates of occupancy in September, 2006. Prior to obtaining his Certificates of Occupancy, the appellant filed the as-built plans with O.C.R.M. where they have been ever since.

ARGUMENT 1.

THE ADMINISTRATIVE LAW COURT ERRED IN DISMISSING THE APPELLANT'S APPEAL OF D.H.E.C.'S REFUSAL TO ANSWER THE APPELLANT'S PETITION FOR DECLARATION, AND THE DEPARTMENT'S REFUSAL MAKES THE CONTROVERY RIPE FOR JUDICIAL REVIEW.

The source of the present disagreement stems from procedural complexities of bureaucratic regulation. The General Assembly's statement of purpose for O.C.R.M. under the *Coastal Tidelands and Wetlands Act* requires that O.C.R.M. to make sure waterfront property is developed in an environmentally responsible way, but its purpose is not to quash development. See § 48-39-30, Legislative declaration of state policy: "The General Assembly declares the basic state policy in

the implementation of this chapter is to protect the quality of the coastal environment, and to promote the economic and social improvement of the coast zone and of all the people of the State."

Here, the O.C.R.M.'s two deficiency letters assert two deficiencies (the Ship's Store controversy having been resolved between O.C.R.M. and the owner of the Ship's Store—see R.O.A. page 190 [September 18, 2009, letter]):

> 1. Eleven jet docks installed without proper authorization. (Jet docks are drive-on, floating docks installed in slips. They are designed to lift a moored boat completely out of the water to as to preserve the watercraft and the water quality. O.C.R.M. promotes their use for these reasons.)
> 2. No O.C.R.M. authorized water-dependent use for the third floor of the marina building.
>
> (R.O.A. page 149 [October 26, 2015, cease and desist letter])

The frustrating part of this case, which is consuming a wasteful amount of limited judicial resources to resolve, is that the appellant **agrees** with O.C.R.M. The appellant concedes that the owners of eleven slips improperly installed jet docks without obtaining proper prior authorization. Likewise, O.C.R.M. concedes that it will readily grant an after-the-fact permit amendment to allow these jet docks because jet docks promote water quality. Appellant has no explanation as to why the jet docks continue to be an issue in this case other than to identify O.C.R.M.'s maddening Catch-22[1]:

> The marina has eleven jet docks installed without a permit.
>
> The marina must apply for a permit amendment to allow the eleven jet docks.
>
> O.C.R.M. will not entertain an application for permit amendment unless deficiencies are corrected.

[1] In Joseph Heller's book, *Catch-22*, Captain Yossarian sought a medical excuse to avoid flying combat missions, but the Army concluded that anyone applying to stop flying was showing a rational concern for his safety and was, therefore, sane, and must fly. The neologism, Catch-22, entered the lexicon as an irreducible, circular paradox.

Not to put too fine a point on it, O.C.R.M. says: Take out the jet docks; apply for a permit amendment; put the jet docks back in. This is absurd, especially since O.C.R.M. routinely grants after-the-fact permit amendments and has granted permit amendments to this appellant to allow several jet docks to date!

Likewise, O.C.R.M. says the same thing about the third floor, **and the third floor is the core of this case**. Once O.C.R.M. defines what water dependent use can go in the third floor-or at least provides objective criteria—all of this litigation evaporates. See *Weaver v. S. C. Coastal Council*, 309 S.C. 368, 423 S.E.2d 340 (1992): "While the three permits issued during the period immediately preceding respondent's application may have been granted in error, absent a showing in the record that Council had taken appropriate remedial action and given due notice thereof, the respondent was entitled to be treated in the same manner as other applicants." The law requires that, in identifying the allowable water dependent uses for the third floor, O.C.R.M. is required to treat appellant no differently from other similar situated marina buildings. O.C.R.M. tentatively contends—ten years after it issued a permit for construction—that that it never "authorized" a water-dependent use for the third floor. Even though this fact is disputed because appellant's original application for a permit identified the space as "offices," in an effort to show good faith and work to a mutually beneficial resolution, appellant was willing to go through the process with O.C.R.M. to obtain a water-dependent use for the third floor. Like the jet docks, O.C.R.M. is now saying: "Take the third floor down, apply for a permit, put the third floor back." This is, of course, absurd. In an effort to solve a problem, the appellant is willing to apply for a permit amendment to allow a water-dependent use for the third floor, and appellant intended his August 19, 2015, Petition for Declaration (R.O.A. page 22) to identify the water dependent uses O.C.R.M. has approved for similarly situated marinas. Despite approving identical "water-dependent" uses at St. Johns Marina,

Edisto Marina, Fleet Landing, Fripp Island, Anchor Line, 8 Concord Street, Lady's Island marina, and others, O.C.R.M. refuses to identify a water-dependent use for the third floor until the appellant demonstrates a water-dependent use, an obvious circular paradox. Appellant has offered, is offering, and will offer to apply for a permit amendment to allow a water-dependent use for the third floor, which appellant has done, is doing, and will do. However, O.C.R.M. continues to refuse to process the appellant's request or even identify what water dependent use it will allow on the third floor. As discussed in Argument 2 below, the appellant's purpose in filing a Petition for Declaration under Regulation 30-9 (R.O.A. page 22) on August 19, 2015, was to compel O.C.R.M. to disclose what water-dependent use it will allow on the third floor. As discussed below, the appellant tailored his Petition to conform to uses O.C.R.M. approved at similarly situated marinas. As this record demonstrates, O.C.R.M. previously approved uses for: (1) restaurants, (2) bars, (3) condominiums, (4) caretaker's quarters, (5) water-way lounges, (6) office buildings, *etc.* And, as argued below in Argument 2, this petition for Declaration **pre-dated** O.C.R.M.'s October 26th cease and desist letter, making the October 26th cease and desist letter irrelevant.

After O.C.R.M. refused to approve a water-dependent use for the third floor, and refused to supply the objective criteria necessary to formulate an application that would meet the definition, the appellant filed a Declaration under Regulation 30-9 on August 19, 2015, requesting five water dependent uses. (R.O.A. page 22) In making the submission, appellant tailored his request to O.C.R.M. to mirror approved uses at similarly situated marinas in this area. Appellant pointed to:

St. Johns Marina:	waterway lounge
Fleet Landing:	bar and restaurant
Fripp Island:	bar and restaurant
Concord Street:	permanent residences
Edisto Island:	bar and restaurant

Anchor Line Caretaker's quarters

Lady's Island: commercial offices (See R. O. A. pages 99-122 and 235-239 [Exhibits to supplemental brief and affidavit of Butch Clark])

Relying on these similarly situated marinas as models, appellant requested a permit modification for five water-dependent uses on August 19, 2015 as follows:

> 5. The Petitioner's proposed secondary five water-dependent uses, which can be used in conjunction with one another; however, all of which the Department has rejected as not being "water dependent." They are: Ship Store Office and Storage; Yacht Sales Office; Captain and Transient Lounge; Commodore Meeting Room; and Public Waterway Events. Each one meets the definitional test set by the General Assembly in Regulation 30-1(52). (August 19, 2015, Petition for Declaration, R.O.A. page 22; see also affidavit of Francis E. Clark at page 235.)

It is undisputed that similarly situated marinas in the area all have the same uses. When O.C.R.M. refused to grant any of the uses, the appellant filed an administrative appeal with the D.H.E.C. Board in Columbia as required by the regulations. (Technically, the Board treated appellant's Motion for Reconsideration as a request for appeal. See Lisa Lucas Longshore letter, December 2, 2015, at page 20 of R.O.A.) On December 2, 2016, the Board refused to take up the appeal, and on December 23, 2015, the appellant appealed this decision to the Administrative Law Court. The Administrative Law Judge dismissed the appeal—as to the Declaration—as not being ripe, holding:

> As an initial matter, S. C. Code Ann. § 1-23-380 governs judicial review of a final decision in a contested case, and is therefore inapplicable here because a final decision in contested case has not occurred. Supplemental R.O.A. at page 5 [Order at page 5]

The Administrative Law Judge is partly correct: appellant has not obtained a final decision in a contested case, but this is because, and only because, the D.H.E.C. Board refuses to address

appellant's Petition for Declaration. See Order of D.H.E.C. Board dated December 2, 2015, at R.O.A. page 20. Even the Administrative Law Court noted the Board's refusal on page 3 of its Order: "D.H.E.C, on December 2, 2015, informed Petitioner that it 'will not conduct a Final Review Conference on the above-referenced matter.'" Supplemental R.O.A. page 3 [Order at page 3]), but notwithstanding this recognition, still erroneously concluded the matter is not ripe. If the case is not ripe, it is not ripe only to the extent that D.H.E.C. refuses to answer a lawful question that the law requires it answer. The Administrate Law Court had two means of resolving this controversy. First, it could have remanded the matter back to the D.H.E.C. Board with instructions to answer the question. Second, the Administrative Law Court could have declared the allowed uses, or at least the objective criteria by which such uses are evaluated.

The error below is that while the Administrative Law Court correctly noted that the decision was not final as to the definition of water dependent uses, it simultaneously failed to realize that the only reason it is not final is because, as the Court noted, the Board ducked the issue. Since the South Carolina Constitution guarantees every citizen the right to judicial review of administrative decisions, Article I, § 22, S. C. Constitution, the Administrative Law Court's error is in not answering the question or remanding the appellant's Petition for Declaration (R.O.A. page 22) back to the Board with instructions to answer the appellant's question. This, in turn, resolves the October 26, 2016, cease and desist letter. Not only did the Administrative Law Court fail to allow appellant to escape the circular paradox of his situation, but also erred in not using its discretion. As the appellate courts of this state have noted on many occasions, it is just as much an abuse of discretion to refuse to use discretion where it exists as it is to abuse discretion: "A circuit court's failure to exercise discretion is itself an abuse of discretion. *In re Robert M.*, 294 S.C. 69, 71, 362 S.E.2d 639, 640 (1987); *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981); *State v. Mansfield*, 343

S.C. 66, 86, 538 S.E.2d 257, 267 (Ct.App.2000); *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 155, 399 S.E.2d 439, 441 (Ct.App.1990)." *Fields v. Regional Medical Center of Orangeburg*, 354 SC 445, 581 S.E.2d 485 (Ct. App. 2003) "It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly." *Balloon Plantation, Inc. v. Head Balloons, Inc.,* 303 S.C. 152, 399 S.E.2d 439 Ct. App. 1990)

The undisputed facts are that the appellant has proposed five water-dependent uses for the third floor of its marina, all of which O.C.R.M. has approved in similarly situated marinas. When the D.H.E.C. Board refused to take up appellant's petition, his position became that of a batter who stands in the batter's box waiting for a call from the umpire. Until the umpire makes the call, the entire game halts and cannot progress. Here, the appellant cannot move forward because O.C.R.M. refuses to make a call. The appellant does not know what water-dependent use he can put on the third floor, and it is O.C.R.M.'s obligation to tell him. When O.C.R.M. refuses to do so, the proper remedy is for this Court to remand the matter back to the D.H.E.C. Board with instructions to answer the appellant's inquiry. The appellant is entitled to receive an answer. See Article 1 § 22, S. C. Constitution: "No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard." Here, O.C.R.M. made the decision with no participation from the appellant, and the D.H.E.C. Board refused to review O.C.R.M.'s decision. See *Brown v. South Carolina State Bd. Of Educ.*, 301 S.C. 326, 391 S.E.2d 866 (1990).

ARGUMENT 2.

THE ADMINISTRATIVE LAW COURT ERRED IN DISMISSING THE APPELLANT'S APPEAL **WITH PREJUDICE** BECAUSE A COURT CANNOT DISMISS A CASE WITH PREJUDICE WITHOUT AFFORDING A PARTY AN OPPORTUNITY TO PRESENT EVIDENCE.

The second error is the Administrative Law Court's erroneous conclusion that the appellant failed to exercise his right to administrative review regarding O.C.R.M.'s October 26, 2016, cease and desist letter. (R.O.A. page 149) It is undisputed that O.C.R.M. sent the appellant a "cease and desist" letter on October 26, 2015. However, the appellant had already placed the same matter on the docket two months earlier, on August 19, 2015, by filing a Petition for Declaration as the Regulations permit. In other words, the issue was already pending.

Moreover, it is equally undisputed that the appellant responded in writing on November 12, 2015, memorializing the parties' previous telephone conversation—as set forth in the October 26th notice—to appear at a review conference already scheduled on the cease and desist letter on November 18th. See R.O.A. page 149 for O.C.R.M.'s October 26th letter and page 220 for the appellant's November 12th reply. O.C.R.M. mailed the letter on October 26th; appellant replied on November 12th, well within the 15 days allowance for a reply, since appellant's time to respond does not run from mailing date, but from receipt. See Rule 6(e) *South Carolina Rules of Civil Procedure.*) Thus, the appeal hearing was set by the notice itself, and in addition appellant replied and already had the issue pending since August 19th.

As stated above and throughout this brief, the illogical paradox at the heart of this case is that the appellant does not contest the deficiencies outlined in the October 26, 2015, cease and

desist letter. At the meeting on November 18th, O.C.R.M. conceded that there is no restaurant or apartment in use. The issue over O.C.R.M.'s allegation that the Ship's Store is operating unlawfully as a bar appears to be resolved between O.C.R.M. and the owner of the Ship's Store. The owner of the Ship's Store attended the November 18th meeting, and as a result of that meeting, they were able to resolve the controversy. The Ships Store is authorized to sell "light food and snacks" since 2009. (R.O.A. page 166) Once the Ship's Store issue was resolved, the October 26th cease and desist letter called upon the appellant to address two alleged deficiencies, to wit: the necessity for a permit amendment to authorize the eleven jet docks installed without prior approval and an approved water-dependent use for the third floor. If O.C.R.M. (or the D.H.E.C. Board) conformed to its responsibilities under Regulation 30-9, the entire controversy would be over. In other words, call the pitch a ball or a strike. However, in calling a pitch a ball or a strike, the umpire is required to apply objective criteria in calling the pitch—the ball must cross the plate no higher than the letters and no lower than the knees. Here, appellant knows its five proposed water-dependent uses must be approved because O.C.R.M. has approved the identical uses in nearby marinas, and the Supreme Court has made clear that O.C.R.M. must treat water front owners in the same manner. See *Weaver v. S. C. Coastal Council*, 309 S.C.,368, 423 S.E.2d 340 (1992). The Administrative Law Court could have defined what water dependent uses are acceptable for the third floor as authorized by *Weaver*, but chose to take a pass on the ground that appellant has waived his right to make this a controversy. The Administrative Law Court's decision is controlled by errors of fact and law.

The most salient example of an error of fact is the Administrative Law Court's overlooking that the October 26th notice set November 18th as a review hearing. The appellant wrote back on November 12th and confirmed it would be there. All of the parties with an interest

in the marina attended the meeting on November 18th. Appellant thought he was attending a review hearing, and the parties spent the time reviewing every allegation contained in the October 26th cease and deist letter. As a result of the review hearing, O.C.R.M. and the Ship's Store were able to move toward a resolution. The appellant presented his evidence, and O.C.R.M. left the meeting with a pledge to review its position based on the information the attendees provided and "get back to appellant." See affidavit of William Oglesby:

During that meeting, the October 26th the cease and desist letter was covered, word by word, line by line, and at the end of the approximately two-hour meeting, I left there somewhat incredulous because nothing, other than reading the cease and desist letter, occurred. The O.C.R.M. representatives seemed out-of-touch with the marina as well as unaware of the most basic information about our marina. As an example of this was when the O.C.R.M. officers would say in one instance that nothing was permitted on the third floor and then in the next breath that they thought the third floor should house the dock master's office. I paid particular attention to this because, safety issues aside, many of our slip owners are not young, and the idea that O.C.R.M. wants every slip owner to go up two flights of stairs for every communication with the dock master left me feeling that O.C.R.M. had clearly not been prepared for this meeting. Furthermore, since the O.C.R.M. representatives would not answer a question, were not forthcoming with information, nor wanted to discuss any detail of the cease and desist letter, it reinforced for me that the O.C.R.M. representatives appeared to lacked any familiarity with our marina or its operation and or they were unsure of how to apply their own regulations and decision making authority, in essence, they seemed paralyzed by indecision. When I left the meeting, I was under the impression that O.C.R.M. would revisit their October 26th cease and desist letter and either withdraw it or modify it after a review of their file since it was them (O.C.R.M.) who asked for more time to review their file in order to make a decision about their October 26th cease and desist letter. Everyone in attendance at the meeting that I talked to after the meeting left with the impression that O.C.R.M. was going to withdraw or modify that letter. I retired from the United States Army after 24 years of active service with the rank of Colonel and so I like to think I know something about institutional organizations and their efficient application of regulations. In this case it seems that O.C.R. M. lacks that efficiency. This case has been going on for years, and O.C.R.M. has done nothing but promise to "look into it" and "get back to us." The owners are being inconvenienced by O.C.R.M.'s inaction because we want the permit transferred unencumbered into the name of the Council of Co-Owners.

(R.O.A. page 225)

Here is appellant's statement concerning the same meeting:

At that meeting we all agreed that the pending Declaration I filed on August 28, 2015, would resolve the issues, and once the Department spoke on the definition of water dependent uses for Unit 301, we would amend the permit and transfer ownership of the marina to the council of Co-Owners.

During the meeting, O.C.R.M. admitted that it was uninformed about the history of the marina, how long it had been operating, and appeared unsure about what the issues are. O.C.R.M. stated that it would await a clarification of water dependent uses for Unit 301, and either amend or withdraw its October 26, 2015, "cease and desist" letter. O.C.R.M. representatives at this meeting admitted that they had not researched the file and were not sure what I was or was not permitted for. They asked us for additional time to go and research their file. An almost exact quote is "we are going to research our file and bet back to you." R.O.A. page 237 [affidavit of Frances Clark, page 3])

In short, as argued in Section 1, O.C.R.M.'s refusal to identify allowed water-dependent uses—an issue already pending on a separate Petition for Declaration track—unnecessarily prolongs this litigation and wastefully consumes valuable, limited judicial resources. In deciding that the appellant had waived his right to challenge, the Administrative Law Court ignored the undisputed evidence that the appellant did respond in writing within the time period allowed and that the parties all met on November 18th and O.C.R.M. informed the appellant it was going to withdraw or modify its October 26th cease and desist letter. The Administrative Law Court remanded the Declaration question back by holding it was "premature," further evidence that the Administrative Law Court's decision is controlled by errors of fact, because the answer to the Declaration eliminates the cease and desist letter.

As for the error of law, it is beyond dispute that: (1) the Administrative Law Court has the authority to determine the issue (call the pitch) as analyzed above, but (2) even if the Administrative Law Court properly dismissed the action, it can dismiss with prejudice **only** after a hearing on the merits. In essence, the Administrative Law Court made a judicial finding of waiver without giving appellant an opportunity to challenge the evidence. As set forth above, a waiver is an affirmative defense that must be pled and proved. *Janasik v. Fairway Oaks,* 307

S.C. 339, 415 S.E.2d 384 (1992) At a motion to dismiss, the Administrative Law Court has no authority to resolve disputed questions of fact, and the appellant raised a number of disputed questions of fact (and law) discussed above and throughout this brief.

Because O.C.R.M. does not have the authority to disobey South Carolina law, it must answer the appellant's Petition for Declaration. It cannot sidestep its statutory duty by adopting the expedient of issuing a cease and desist letter in lieu of addressing the Declaration. By ignoring appellant's Petition for Declaratory Ruling, the Department creates the circular Catch-22 described above and achieves a judicial result by refusing to act. By dismissing the appellant's claims **with prejudice**, the Court reached a decision on the merits by relying only on O.C.R.M.'s disputed characterizations without affording appellant an opportunity to be heard. On a Motion To Dismiss, the Court is required to accept appellant's allegations as true:

> In considering a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, the circuit court must base its ruling solely upon the allegations set forth on the face of the complaint. *Doe v. Greenville Cnty. Sch. Dist.,* 375 S.C. 63, 66–67, 651 S.E.2d 305, 307 (2007). The motion may not be sustained if the facts alleged in the complaint and the inferences drawn therefrom would entitle the plaintiff to relief under any theory. *Id.* "[P]leadings in a case should be construed liberally and the Court must presume all well pled facts to be true so that substantial justice is done between the parties." *Overcash v. S.C. Elec. & Gas Co.,* 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005) (citing *Stroud v. Riddle,* 260 S.C. 99, 102, 194 S.E.2d 235, 237 (1973)).
>
> *Charleston County School District v. Harrell,* 393 S.C. 552, 713 S.E.2d 604 (2011)

If the facts alleged and inferences deducible therefrom would entitle the plaintiff to any relief, then dismissal for failure to state a claim is improper. *Freemantle v. Preston,* 398 S.C. 186, 728 S.E.2d 40 (2012)

As discussed in the motion for reconsideration (R.O.A. page 205), appellant pointed out to the Administrative Law Court that it improperly adopted O.C.R.M.'s **recitation** of facts even though the facts are disputed. In accepting O.C.R.M.'s version of the facts, the Administrative

Law Court failed to take into account the proper standard, which the Court is obligated to follow when considering a Motion to Dismiss:

The correct standard of review is to restrict the inquiry to the four corners of the pleadings and to deny the motion if the plaintiff has articulated any claim for relief under any recognized legal theory. This Court is required to review the appellant's pleadings and "base its ruling solely upon allegations set forth on the face of the complaint." *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995). The motion may not be sustained if the facts alleged in the complaint and the inferences that can be drawn therefrom would entitle the plaintiff to any relief under any theory." *Id. Doe v. Greenville County School District*, 375 S.C. 63, 651 S.E.2d 305 (2007).

Under Rule 12(b)(6) SCRCP, a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, which is what respondent alleges here. In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint. Even though O.C.R.M. is making the assertion on procedural grounds, O.C.R.M.'s statement of the procedural issue is based on disputed facts as this brief discusses in detail. If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *Gentry v. Yonce*, 337 S.C. 1, 522 S.E.2d. 137 (1999). A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any

theory. *Id.* Furthermore, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987) *Spence v. Spence*, 368 S. C. 106, 628 S.E.2d 869 (2006)

Here, O.C.R.M. asserts a procedural bar based on its reliance on disputed facts that the appellant did not seek review of the Department's October 26th cease and desist letter. This assertion is false for several reasons: First, the appellant's August 27, 2015, Petition for Declaration **preceded** the Department's cease and desist letter, and as argued throughout, once the Department identifies which water dependent uses may be permitted for the third floor, this entire controversy is ended. Thus, the issue was before the Department before it issued its cease and desist letter, and it does not have the authority to hide behind its cease and desist letter to deny the respondent his right to a declaration. Second, the appellant did appeal the cease of desist letter by letter to the Department dated November 12, 2015, on which the Department took up at its scheduled a review hearing on November 18, 2015. (See November 12, 2015, letter at page 186 R.O.A.) Finally, and perhaps most importantly, O.C.R.M. held the review hearing on November 18th and informed the appellant that O.C.R.M. would either withdraw or modify its October 26th letter based on the information provided to O.C.R.M. at the November 18th meeting. These are all facts that the Administrative Law Court erroneously construed against the appellant, which it cannot do on a motion to dismiss.

Thus, the Administrative Law Court improperly dismissed appellant's case based on facts that are not true, and the Administrative Law Court, in ruling on O.C.R.M.'s motion to dismiss is required to view the facts in the light most favorable to appellant, not O.C.R.M., and if it thinks dismissal is proper, it must dismiss without prejudice to avoid denying the appellant due process:

> When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice. The plaintiff in most cases should be given an opportunity to file and serve an amended complaint. See *Forman v. Davis*, 371 U.S. 178, 182 (1962) (rules of civil procedure should be liberally construed to do substantial justice and lower court erred in denying motion to amend complaint where amendment would have stated alternative theory of recovery); *Small v. Mungo*, 254 S.C. 438, 442-44, 175 S.E.2d 802, 804 (1970) (affirming dismissal of complaint for failure to proceed, but finding it should have been dismissed without prejudice); *Dockside Assn., Inc. v. Deytens, Simmons & Carlisle*, 297 S.C. 91, 374 S.E.2d 907 (Ct. App. 1988) (citing Rule 15(a), SCRCP, that plaintiff generally is allowed to amend a complaint to correct deficiencies which resulted in dismissal under provisions of Rule 12(b)); *Davis v. Lunceford*, 279 S.C. 503, 507, 309 S.E.2d 791, 793 (Ct. App. 1983) (trial court properly dismissed action in which plaintiff served summons but failed to timely serve complaint, but dismissal with prejudice was improper because such a dismissal is in nature of discontinuance of action and is not an adjudication on the merits; action should have been dismissed without prejudice); accord *Arkansas Dept. of Environ Quality v. Brighton*, 102 S.W.3d 458, 468 (Ark. 2003) (complaint dismissed for failure to state facts upon which relief can be granted should be dismissed without prejudice in order for plaintiff to decide whether to serve amended complaint or appeal); *Thacker v. Bartlett*, 785 N.E.2d 621, 624 (Ind. App. 2003) (dismissal for failure to state a claim is without prejudice because the complaining party may either file an amended complaint or stand upon complaint and appeal); Giuliani v. Chuck, 620 P.2d 733, 737 (Haw. App. 1980) (complaint is not subject to dismissal with prejudice unless it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of its allegations): James F. Flanagan, *South Carolina Civil Procedure* 95 (2d ed. 1996) (party who loses a motion to dismiss normally is given the right to amend the complaint to cure the defect.)
> *Spence v. Spence*, 368 S. C. 106, 628 S.E.2d 869 (2006).

Thus, the Administrative Law Court erred on granting a motion to dismiss with prejudice by relying on highly contested and unproven facts. A dismissal with prejudice acts as a decision on the merits, which prevents the appellant from ever having his day in court. Even if the Administrative Law Court could dismiss a case on disputed facts on a motion to dismiss, it cannot do so with prejudice.

Conclusion

For the reasons set forth above, the appellant respectfully requests the Court to remand the decision on his August 19, 2015, Petition for Declaration back to the Administrative Board of Directors of D.H.E.C. with instructions to answer the question about water dependent uses posed by the appellant. The appellant requests further that the Court reverse the dismissal of appellant's challenge to the Cease and Desist letter as being based on contested facts that cannot be resolved on a Motion to Dismiss.

Respectfully submitted,

November 28, 2017

Thomas R. Goldstein, S. C. Bar #2186
BELK, COBB, INFINGER & GOLDSTEIN, P.A.
Post Office Box 71121
Charleston, South Carolina 29415-1121
(843) 554-4291
ATTORNEYS FOR THE PLAINTIFF
tgoldstein@cobblaw.net

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM S. C. DEPARTMENT OF HEALTH & ENVIORN. CONTROL
Office of Coastal Resources

Catherine E. Heigel, Director

Appellate Case Number: 2017-000161
Case No. 2015-RFR-69, Sunset Cay, L.L.C.
DOCKET NO. 15-ALJ-07-0579-CC

Sunset Cay, L.L.C., ... Appellant,

vs.

South Carolina Department of Health and Environmental Control.....Respondent.

Certificate of Counsel

I certify that this Final Brief complies with Rule 211(b), South Carolina Appellate Court Rules.

November 28, 2017

Thomas R. Goldstein, S. C. Bar #2186
Belk, Cobb, Infinger & Goldstein, P.A.
Attorneys for Appellant
P. O. Box 711121
N. Charleston, South Carolina 29415-1121
(843) 554-4291
(843) 554-5566 (fax)
E-mail: tgoldstein@cobblaw.net