THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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

Catherine E. Heigl, 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.

Reply Brief of Appellant

November 28, 2017

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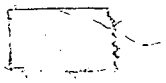

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REPLY ARGUMENTS

Reply Argument 1.

THE APPELLANT AGREED THAT THE ADMINISTRATIVE LAW COURT LACKS JURISDICTION TO HEAR CLAIMS FOR DAMAGES

O.C.R.M. spends two pages, pages 9 and 10, addressing an issue that is not before this Court. Respondent argues that the appellant waived the right to challenge the Administrative Law Court's dismissal of appellant's damages claims. Appellant never challenged this decision and agreed voluntarily "on the record" with the Administrative Law Court that it does not have jurisdiction to adjudicate constitutional or tort claims for damages. Appellant agreed with O.C.R.M. that the Administrative Law Court lacks authority to invalidate a state statute on Constitutional grounds. It does, however, have jurisdiction to "rule on whether a party's constitutional rights have been violated." *Ward v. State of South Carolina*, 343 S.C. 14, 538 S.E.2d 245 (2000). The record lacks a transcript verifying this agreement because on December 14, 2016, when the parties appeared before the Administrative Law Court on cross motions for reconsideration, the Court was recovering from a catastrophic plumbing failure that shut down most of the Court. As a result, the Court moved the parties to a makeshift hearing room that did not include a court reporter. With or without a transcript, the point is that the appellant agreed with O.C.R.M. that the appellant cannot sue O.C.R.M. for damages in the Administrative Law Court and stipulated that the Administrative Law Court lacked jurisdiction to try appellant's damage claims. Thus, that legal issue plays no part in the disposition of this case and there is no need to reply to Respondent's argument on this issue.

REPLY ARGUMENT 2

A TRIAL COURT CANNOT DISMISS A CASE WITH PREJUDICE ON A PRELIMINARY MOTION TO DISMISS WHEN THERE ARE DISPUTED AND CONTESTED FACTS.

The overarching legal principal that reaches and controls almost every issue on appeal is that South Carolina law does not permit a trial court to dismiss a case with prejudice at a preliminary motion to dismiss stage of the proceedings when there are highly disputed questions of fact. Here, the Administrative Law Court dismissed the appellant's case with prejudice because it accepted the Department's challenged assertion that appellant did not timely request an administrative review of the O.C.R.M. October 26, 2013, "cease and desist" letter. In evaluating a motion to dismiss, the Administrative Law Court must accept appellant's evidence, and appellant's evidence demonstrated:

1. The appellant's August 27, 2015, Petition for Declaration preceded the O.C.R.M.'s October 26, 2015, cease and desist letter by two months thus putting the salient legal issue before the Department months before O.C.R.M.'s "cease and desist" letter. (See Record on Appeal, page 22 for Declaration.) O.C.R.M.'s Regulation 30-9(D) authorizes any "interested persons . . . to petition to the Department for declaratory rulings. The Department shall rule on each petition in writing within 45 days of receipt." Because this petition for declaratory ruling predated O.C.R.M.'s "cease and desist" letter by two months, and because it raised the salient issues identified by O.C.R.M. in its later "cease and desist" letter, the Department cannot refuse to address appellant's question especially where an answer to the question resolves the later "cease and desist" letter. The appellant's Petition for Declaration preempts O.C.R.M.'s "cease and desist" letter, and the Administrative Law Court erred in ignoring it. The Administrative Law Court's only treatment of the appellant's Petition for Declaration was to conclude that it was not yet "ripe" for judicial determination because appellant had not applied for a permit. This conclusion embraces O.C.R.M.'s circular reasoning and ignores

the fact that the appellant has applied for a permit and cannot make a meaningful permit application without O.C.R.M. providing the necessary objective criteria for water dependent uses. To date, O.C.R.M. has adopted shifting criteria, applying different sets of standards to similarly situated property owners as forbidden by the Supreme Court in *Weaver v. S. C. Coastal Council*, 309 S.C.,368, 423 S.E.2d 340 (1992).

This is obvious error, for it calls for reasons as discussed in appellant's brief and throughout this reply brief. First the ruling is circular. Second, a ruling on the issue brought to O.C.R.M. in appellant's Petition for Declaration eliminates the alleged deficiency asserted by O.C.R.M. two months later in its "cease and desist" letter. (As discussed more fully below, appellant's pre-emption is like filing a pleading in the wrong court, which is never grounds for dismissal. See Rule 82(b) *South Carolina Rules of Civil Procedure* and Rule 204(b) *South Carolina Appellate Court Rules.* Even if the Administrative Law Court were correct, it would still have to treat appellant's Petition for Declaration as something. As set forth in rules Rule 82(a) Rule 204(b), when a party files in the wrong court, the receiving court is obligated to transfer the filing to the correct court: "When an action is brought in the wrong county or in the wrong court, the court shall not dismiss the action but shall transfer it to any proper county or court in which it could have been brought"; "In the event that the notice of appeal is filed in the wrong appellate court, the appellate court in which the matter is filed shall issue an order transferring the case to the appropriate appellate court." These rules codify the well-developed and long established legal principle that justice requires legal disputes be disposed of on their merits and not on technicalities. The Administrative Law Court's error is in its ignoring the appellant's Petition for Declaration entirely. It is inconsistent to conclude that it is not "ripe" for judicial review, when the record shows O.C.R.M. ignored appellant's Petition. The Administrative Law Court compounds O.C.R.M.'s error by ignoring the Petition entirely, for, like a pleading filed in

the wrong court as contemplated by Rules 82 and 204, the fact that the Administrative Law Court concluded it was not ripe either ignores or overlooks the fact that it put the same issue raised by the "cease and desist" letter before the Board to be determined, and that the answer to the Petition solves the putative "cease and desist" letter.

In a similar set of circumstances, circuit court refused to rename parties in an underwriting dispute, and the Court of Appeals said, in in *Graham v. Lloyd's of London*, 296 S.C. 249, 371 S.E.2d 801 (1988): "These are questions on the merits which are more appropriately resolved on a motion for summary judgment or a trial on the merits. On a preliminary motion attacking jurisdiction, the plaintiff need only make a *prima facie* showing that the defendant is subject to the jurisdiction of the court." Here, the appellant made much more than a "*prima facie*" case, but the Administrative Law Court erred in construing all the appellant's facts against him and deprived appellant of its right to have O.C.R.M. delineate the water-dependent uses it will approve for the third floor.

2. After receiving the October 26, 2015, "cease and desist" letter, the appellant wrote O.C.R.M. on November 12, 2015, and confirmed the date and time for the scheduled review hearing. The appellant's November 12th letter is in the Record on Appeal at page 186, and appellant mailed it within 17 days after the O.C.R.M. mailed its October 26th "cease and desist" letter. ("Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, . . . five days shall be added to the prescribed period." Rule 6(e), Time, *South Carolina Rules of Civil Procedure*) Thus, there is at least a question of fact as to whether the appellant did or did not properly appeal the "cease and desist" letter.

3. On November 15, 2014, the appellant attended the "cease and desist" review hearing at O.C.R.M.'s office. Present for the meeting were:

Butch Clark (principal of Sunset Cay)

John Oliver (operator of the Ship's Store)

William Oglesby (Chief Officer of the Council of Co-Owners)

Thomas Goldstein (attorney for Sunset Cay)

John Romanosky (attorney for Council of Co-Owners)

Ian O'Shea (attorney for Ship's Store)

In addition to the interested parties, there were three O.C.R.M. officials present, Adam Page, the author of the "cease and desist" letter, Josh Hoke, and O.C.R.M.'s general counsel, Bradley Churdar. As argued below, appellant identifies § 48-39-150(D) and (E) as the applicable appeal section, but even if O.C.R.M. is correct that § 44-1-160 controls, the three members O.C.R.M. produced constitute the three members required by § 44-1-160 to conduct an administrative review.

At the November 15th review hearing, the parties reviewed the October 26, 2015, "cease and desist" letter line by line and paragraph by paragraph. Adam Page read the letter aloud, and the parties discussed every issue contained in the letter, including the fact that the main issue—the allowed water dependent use for the third floor—**was already pending by way of appellant's Petition for Declaration under Regulation 30-9**. The other concerns identified by the "cease and desist" letter—the 11 jet docks and the operation of the Ship's Store—are non-issues. As for the jet docks, O.C.R.M. promotes the use of jet docks to protect water quality and routinely grants permits for their installation. Applying for permission to install a jet dock is like asking for permission to use cleaner fuel. O.C.R.M., as discussed throughout appellant's brief and here, permitted the Ship's Store in 2009, even approving its menu. (R.O.A. page 126) After the meeting, O.C.R.M. informed all those present that they were going to review their files based on the information provided on November 15th and either withdraw the "cease and desist" letter or modify it. See affidavit of William Oglesby in the

Record on Appeal at pages 224-226 (whose testimony is quoted more fully on page 19 of appellant's Initial Brief):

> 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.
>
> The Administrative Law Court gave this evidence no weight, which is an error of law.

4. The issue around appellant's Petition for Declaration was very much alive at the November 15th review hearing. Two weeks prior to the review hearing, on October 12, 2015, O.C.R.M. refused to answer appellant's August 27th Petition for Declaration under Regulation 30-9. (See Sara Brazemore October 12, 2015, letter in the Record on appeal at page 75.) Ms. Brazemore's October 12th denial is Kafkaesque[1]: "The Department, in several communications, offered options for your client to resolve this matter. Specifically, options presented were 1) come into compliance with the permit or 2) **apply for an after-the-fact permit for the third floor demonstrating water dependent uses**. (Emphasis added). Like the poor dentist trying to renew his driver's license, the Department never granted appellant a hearing on his Petition for Declaration so Ms. Brazemore may not be aware of the absurdist circularity of her letter: Come into compliance by applying for a permit, but you cannot apply for a permit because you are not in compliance! Moreover, again because the Department has never afforded appellant a hearing, Ms. Brazemore's statement lacks evidentiary support. The whole purpose of the Petition for Declaration is to force O.C.R.M. to tell the appellant what water-dependent uses it will allow in Unit 103 so he can apply for a permit to come into

[1]Citizens' frustrations with government bureaucracy are universal. When the consequences are minimal, they can be humorous such as when a local dentist went to the D.M.V. to renew his driver's license. The clerk told him to read "line 3" in the stereoscope. He informed the clerk that there was a line 1 and a line 2, but no "line 3." Instead of checking the machine to see whether it was or was not operating correctly, the clerk refused to process his application renewal and demanded he leave and obtain an ophthalmologist's verification as to his visual acuity.

compliance. Why does something so simple require the Court of Appeals to answer? It is undisputed that the appellant **is** in compliance with the permit except for the 11 jet docks—which the appellant has offered to correct many times via a permit amendment—a permit amendment O.C.R.M. routinely grants because it promotes jet docks to protect water quality. The impasse with O.C.R.M. is not over the structure—the structure is already permitted. The impasse with O.C.R.M. is a disagreement over uses because that is the limit of O.C.R.M.'s jurisdiction. Regarding water-dependent uses, O.C.R.M.'s legal position is for the appellant to keep guessing until he hits the right one, and ignore all the similarly situated marinas[2] with approved uses for each of appellant's proposals. This is absurd and a failure of government.

As set forth in appellant's brief, and has demonstrated by the record—see elevation drawings and as-built plans attached to the affidavit of William Clark at pages 227-234 and 267-274 of the record on appeal, prior to construction in 2005, appellant submitted elevation drawings to O.C.R.M. showing the **proposed** building. It is undisputed that there has been some kind of a marina building on this site since 1947! The original 1947 permit is included throughout the record; for example, as exhibit one to affidavit of Frances Clarke. (R.O.A. page 240) After O.C.R.M. issued its permit in 2005, the City of Folly Beach then issued the necessary permits for construction. O.C.R.M. issues a critical line permit, and Folly Beach issues a building permit. In 2006, after construction, but before obtaining Certificates of Occupancy, appellant submitted as-built plans to O.C.R.M. As set forth in appellant's brief, and as demonstrated by the record, O.C.R.M. issued permission for construction in 2005, which appellant completed in 2006. Since that time the third floor has remained vacant. O.C.R.M. does not regulate building permits; it regulates activities—uses—past the critical line. Whether the building were one-story or forty-stories, the impact on the critical line is the same.

[2] The Supreme Court has already instructed O.C.R.M. to treat similarly situated property owners in the same manner. *Weaver v. S. C. Coastal Council*, 309 S.C.,368, 423 S.E.2d 340 (1992)

O.C.R.M. willfully refuses to distinguish physical structure from use, and willfully refuses to acknowledge that the building on the site matches the building in the pre-construction drawings and the as-built drawings. (The City of Folly Beach did require some changes to conform to the applicable building code.)

After Ms. Brazemore refused to answer the question (or grant appellant the right to address her), on October 23, 2015, appellant appealed to the Board of Directors for the Department of Health and Environmental Control (R.O.A. page 36). However, the Board made less effort that Ms. Brazemore because by letter dated December 2, 2015, (R.O.A. page 20), the Board refused to take up the appeal with **no** discussion of the issues and **no** finding that the appellant waived his right to appeal by failing to file a timely appeal. (See Record on Appeal page 20 for Lisa L. Longshore's December 2, 2015 letter denying appeal.) After the Board refused to hear the appeal, the matter became ripe for the Administrative Law Court.

However, the Administrative Law Court upheld O.C.R.M.'s refusal to address the Petition for Declaration **without prejudice** because the matter was not ripe for determination: "Here, Petitioner would not be 'finally bound' by the Declaration. There are no rights that are affected by DHEC's Declaration, as Petitioner can pursue an application for an amendment to its Permit, including an assertion that the five uses for which the amendment is sought are water dependent, which after a final agency decision by DHEC, would give jurisdiction to this Court. See S C. Code Ann. § 44-1-60." October 17, 2016, Administrative Law Court Order, page 7 at page 15 R.O.A and page 7 of Supplemental Record on Appeal, Second Amended Order. On one level, the Administrative Law Court is correct, if, and only if, one looks at this case in a vacuum. However, by failing to realize that until O.C.R.M. defines what water dependent uses it will authorize, the Administrative Law Court falls into the same circularity trapping the appellant. In addition, the Administrative Law Court's

conclusion conflicts with its own correctly stated legal principle that it is the Administrative Law Court's reasonability "as specifically guaranteeing persons the right to notice and an opportunity to be heard by and administrative agency, even when a contested case under the APA is not involved." Order at page 6, page 14, R.O.A. and page 6 in Supplemental R.O.A., Second Amended Order. This record demonstrates that O.C.R.M. has done nothing to answer appellant's Petition, and only by ignoring it, is O.C.R.M. able to assert its putative "cease and desist" letter.

Even though the Administrative Law Court dismissed appellant's Petition without prejudice, it dismissed the subject matter of the same Declaration with prejudice. In conflict with this decision, and even though there is a well-developed body of law prohibiting dismissals with prejudice on motions to dismiss, the Administrative Law Court dismissed any appeal of the October 26th "cease and desist" letter with prejudice even though the subject matter is identical to the subject matter of the Petition for Declaration, and even though appellant timely notified O.C.R.M. it would be present on the November 15th review hearing: "As you are aware, everyone with an interest in Sunset Cay Marina will be in your offices on Wednesday, November 18, 2015 as a result of your notice dated October 26, 2015." R.O.A. page 220 [November 12, 2016, letter] Thus there is a significant body of disputed facts on whether appellant did or did not timely request a review hearing, and as set forth in the appellant's brief, the decision to dismiss with prejudice is controlled by a palpable error of law, not only because South Carolina case law does not allow it—see any of the 17 cases, and learned treatise, James F. Flanagan, *South Carolina Civil Procedure*, cited by appellant at pages 21-24 of its brief, but also in its brief, Respondent never addresses this established legal principle. Instead, it argues that the facts support the Administrative Law Court's decision, missing the point that: 1) the facts are in dispute, and 2) a court cannot dismiss a case with prejudice when the facts are in dispute: "[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 (2001). The Administrative Law Court did the opposite and inverted the review standard on its head. In 1997, the Court of Appeals reversed the circuit court when it entered summary judgment against a plaintiff under similar grounds. There, the Court dismissed the plaintiff with prejudice on the ground of *res judicata* for a similar procedure as involved here. In finding that *res judicata* did not apply when a court dismisses a party with prejudice at a preliminary stage of litigation, the Court of Appeals explained why courts should not dismiss with prejudice until a party has had an opportunity to be heard on the merits:

> It is generally recognized that a dismissal with prejudice indicates an adjudication on the merits and precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication. *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 75 S. Ct. 865, 99 L. Ed. 1122 (1955); *Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 345 S.E.2d 740 (Ct.App.1986). Where an action has been dismissed with prejudice, the judgment operates in subsequent litigation to the same extent as if the action had been tried to a final adjudication. *Id.*; see *Collins v. Sigmon*, 299 S.C. 464, 467, 385 S.E.2d 835, 837 (1989) *Jones v. City of Folly Beach*, 326 S.C. 360, 483 S.E.2d 770 (1997)

Even though the Court of Appeals found that a dismissal with prejudice does not bar subsequent litigation on the same issue because the dismissed party never had an opportunity to be heard, the point is, why does O.C.R.M., who has a statutory duty to assist appellant, chose to erect circular, wasteful, bureaucratic obstacles in appellant's path? It is a waste of precious judicial resources to burden courts with having to compel state agencies to do what they should be doing as part of their statutory mission.

Moreover, in support of this well-developed body of law in South Carolina is the public policy established by the General Assembly's requirement that O.C.R.M. promote judicial economic development of the coastline. To circle back to the story of the recalcitrant D.M.V. clerk above, the

persons staffing government agencies are there to assist citizens, not use their positions of authority to thwart common transactions of ordinary business. The General Assembly established public policy years ago to preserve the coastline for all citizens, and took steps to prevent access to waterways being locked up by the privilege of a few wealthy landowners. As a result, the General Assembly prescribed regulations for O.C.R.M., such as marina regulations, to promote the widest public access to public waters. Sunset Cay provides access to the water to those who otherwise could not afford to sit on its deck and enjoy the sunset or watch porpoises feeding or fish off its pier. The regulation issues raised in this case are routine, uncontroversial matters that O.C.R.M. should resolve without controversy in an orderly, cost-efficient manner instead of adopting a policy of erecting impenetrable procedural barriers to appellant. There is nothing in this record to support O.C.R.M.'s insistence that appellant "waived" his right to challenge the October 26, 2015, "cease and desist letter," and the Administrative Law Court erred in dismissing the appellant's challenge with prejudice.

In short, this case arrives at the Court of Appeals because—and only because—of O.C.R.M.'s refusal to address a routine permit amendment. Instead of processing the appellant's application to authorize a water-dependent use, O.C.R.M. erects a thicket of circular obstructions to avoid processing a routine application. O.C.R.M. says to appellant: You must amend your permit to come in compliance, and you cannot apply for a permit amendment because you are not in compliance. Here, the record demonstrates that whether the appellant did or did not timely challenge the October 26th "cease and desist" letter is a highly disputed question of fact. Instead of applying the correct standard in such cases, the Administrate Law Court stood the Motion To Dismiss standard on its head and construed all the facts and inferences in the light most favorable to O.C.R.M., dismissing appellant with prejudice without affording him an opportunity to be heard on the merits. This is an

error of law. As the record demonstrates, O.C.R.M. lacks awareness of the procedural circularity it has created:

MR. CHURDAR: Well, I'm not sure if that [October 26, 2015 cease and desist directive] would be considered to be agency action or not. It may have very well be, but the point is the—Mr. Goldstein or Sunset Cay will have an opportunity to challenge the end result which is what Your Honor has seen many times before, I'm sure—and that is either a consent order or the admis—I don't think it would be a consent order that would get challenged because it would be agreeing to it, but an Administrative Order would be an action upon which the Sunset Cay could challenge by filing a request for final review conference to the DHEC Board and then they—

. . .

This is not co- -- 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 either permit in accordance with the parameters set in the permit.

R.O.A. pages 285-286 [June 26, 2016 transcript, page 5, line 7 - page 6, line 8]

In short, Judge McCleod threw the appellant out of court because he found that the Petition for Declaration matter was not yet ripe. He found further, relying only on O.C.R.M.'s challenged assertions and on an incomplete record that appellant did not challenge the "cease and desist" letter. At the same time, O.C.R.M.'s unwaveringly asserted that its "cease and desist" letter is not a final agency action, which makes the circularity triangular. Of course, if, as O.C.R.M. told the Administrative Law Court, its "cease and desist" letter is not a final administrative action that can be appealed, then that is more evidence that appellant's challenge of it cannot be with prejudice. In fact, O.C.R.M.'s legal position expressed to the Administrative Law Court is consistent with the appellant's legal position. As the affidavits of William Clarke and William Oglesby makes clear, the parties left the November 15th review hearing with the understanding that O.C.R.M. was either going to withdraw or modify its October 26, 2015, cease and desist letter. Even if the appellant were prepared to accept a loss without prejudice and move on to other avenues for resolution, the evidence here does not support the Administrative Law Court's contradictory conclusions. The best case for

O.C.R.M. is that it changed its legal position after the Order came down and then, for the first time, asserted—in conflict with its stated legal position before the Administrative Law Court that the matter is not ripe—that the appellant waived his rights. On O.C.R.M.'s motion for reconsideration, O.C.R.M. argued with prejudice for the first time and persuaded the Administrative Law Court to err in switching the dismissal from "without prejudice" to "with prejudice." This is of, or course, the controlling legal error because a court cannot dismiss a party with prejudice when the underlying facts are disputed—especially where, as here, appellant's Petition for Declaration pre-dated O.C.R.M.'s "cease and desist" letter by two months and where appellant's November 12th letter confirming the parties' intent to attend the already scheduled review hearing was timely. This salient legal error controls every other issue before the Court, and it is a simple matter for this Court to apply black letter, settled law and amend the Administrative Law Court's dismissal to one of without prejudice and remand the case back to the Administrative Law Court with directions to answer the appellant's Petition for Declaration for water-dependent uses.

REPLY ARGUMENT 3

THE ADMINSTRATIVE LAW COURT HAS SUBJECT MATTER JURISDICTION TO DIRECT THE D.H.E.C. BOARD TO ADDRESS APPELLANT'S APPEAL OF THE PETITION FOR DECLARATORY RULING UNDER REGULATION 30-9.

The Department's arguments on pages 11 – 14 of its brief crystallizes appellant's frustration with O.C.R.M.'s dysfunction. First, O.C.R.M.' asserts a spurious argument that because appellant fails to "identify any document as required by Rule 208," the appellant has misled the Court by saying the Ship's Store issue is laid to rest. Because no one has given the appellant an opportunity to be heard on the merits, O.C.R.M. can mischaracterize the record. However, this Court need look no further in this record than O.C.R.M.'s own submission to the Court. On page 12 (R.O.A. page 190

[exhibit D]) of its Motion to Dismiss, O.C.R.M. includes its September 18, 2009, Ship's Store approval letter to Sunset Cay:

September 18, 2009

> The staff of SCDHEC/Ocean & Coastal Resource Management has reviewed the above referenced letter. Specifically, your request is to ask of the serving of snacks and light food items as part of the existing ships store is consistent with your permit. OCRM offers no objection to inclusion of food items a as component of the ships store and does not require any modification of the permit provide the store is not converted into a restaurant. Any conversion of the ships store to another use will be considered a "change of use" and would require a modification of the existing permit.
>
> /s/ David J. Thompson
> Senior Wetland Project.
> cc: Mr. Blair Williams

Leaving aside the observation that all marinas serve food and drink, at the November 15, 2015, review hearing, O.C.R.M. was unaware of its approval six years previously and unaware that it approved appellant's specific menu. Because of this and other deficiencies, O.C.R.M. asked for more time to review its files, and appellant left the November 15th review hearing believing the matter was resolved and that O.C.R.M. issued its October 26th "cease and desist" letter in error. See affidavits of Butch Clark and William Oglesby at pages 223 and 235 R.O.A.:

The marina as it currently exists is the latest manifestation of the marina that has operated at this site continuously since just after World War II.

. . .

Since February 1947, the site has been used continuously as a marina.

. . .

O.C.R.M. approved the Ship's Store's menu in 2005, stating that it did not require a permit amendment.

I attended the meeting on November 18, 2016, in the Office of O.C.R.M. following receipt of the Department's October 26, 2016, "cease and desist" letter.

• • •

After going over the October 26, 2015, "cease and deist" letter, we had a long conversation with O.C.R.M. officials. I know I thought we were there to address the October 26, 2015, "cease and desist letter. I cannot speak to what thoughts are in other person's heads, but I am confident that everyone at that meeting thought we were there to review the October 26, 2015, "cease and desist letter."

At that meeting we all agreed that the pending Declaration I filed on August 28, 2015, would resolve the issues, and once th 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 uniformed 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 get back to you."

R.O.A. pages 235 -237 [November 17, 2016, affidavit Frances E. Clarke]

Even more perplexing is O.C.R.M.'s assertion that the appellant failed to identify any evidence in the record regarding the unchallenged operation of the Ship's Store. O.C.R.M. makes

two erroneous assertions in one sentence. First, it is undisputed that the Ship's Store is operating, so O.C.R.M. confuses its burden of production to demonstrate that the Ship's Store is not operating. Second, O.C.R.M. overlooks the impossibility of any party proving a negative. If O.C.R.M. believes the appellant has a duty to prove that the Ship's Store is not closed, it does not understand burdens of proof and ignores its own evidence. Finally, O.C.R.M.'s own submissions demonstrate that it approved the Ship's Store in 2009. (R.O.A. page 190) More importantly, this appeal arrives in this Court on an appeal from a dismissal, not a trial on the merits. Neither O.C.R.M. nor the Administrative Law Court allowed appellant to be heard on the merits, and because the appellant is the party resisting a motion to dismiss, appellant receives the benefit of all the well-pleaded facts as well as the inferences deducible from them.

The rest of O.C.R.M.'s "Argument 1" is the same circular absurdity that characterizes this entire dispute. Regulation 30-4, which O.C.R.M. quotes on page 12 of its brief, represents the quintessential Catch-22 made famous by Joseph Heller. The same irreducible paradox exists here. O.C.R.M. argues that appellant is out of compliance with his permit and cannot apply for an amendment to cure the deficiency because he is out of compliance. It does not help that O.C.R.M. creates the alleged noncompliance by refusing to answer appellant's Petition. Here, O.C.R.M. asserts Regulation 30-4 as the basis for the same irreducible paradox: Appellant is out of compliance and cannot get a permit to come into compliance until he is complying. Zeno of Elea is smiling. O.C.R.M.'s assertion would be funny were it not causing so much harm and were it not in direct conflict with its statutory mission: "to promote economic and social improvement of the citizens of this state and to encourage development of coastal resources in order to achieve such improvement with due consideration for the endowment . . ." Sunset Cay Marina has existed on its present site—in one form or another—for over 70 years. O.C.R.M. disputes even this fact, arguing, that many years

ago, Sunset Cay was not a "marina" because it was a "commercial fish dock." Comedy Central pays writers for such material. Such sophism might be of interest to a comedy writer, but this case involves a real person receiving a real injury because of the paralysis of a dysfunctional state agency, and this Court should not allow O.C.R.M. delay the appellant one day further. This Court should remand the case back to the Administrative Law Court with instructions to answer appellant's Petition for Declaration and require O.C.R.M. to furnish objective criteria, or at least, explain why the appellant's proposed water-dependent uses are not permitted. O.C.R.M.'s statutory mission requires it to provide written, objective criteria so appellant or any riparian owner can tailor the use of his or her property to conform to reasonable regulation.

REPLY ARGUMENT 4

THE ADMINSTRATIVE LAW COURT ERRED IN DISMISING APPELLANT'S APPEAL OF THE CEASE AND DEIST LETTER WITH PREJUDICE.

The reply to O.C.R.M.'s argument is necessarily identical to the Reply Argument made above at pages 5 – 9, and there is no point in repeating the same arguments here. Respondent's footnote 15 is but one example of O.C.R.M.'s institutional blindness. It is, however, elegantly representative of O.C.R.M.'s desire to have its cake and eat it too. In footnote 15, O.C.R.M. points out that the appellant's pending appeal of the Declaration to the D.H.E.C. Board proves appellant knows O.C.R.M.'s administrative appeal procedure and thus failed to avail himself of it. In other words, O.C.R.M. is arguing a waiver even though the record does not support its assertion. First, waiver is an affirmative defense that must be pled and proved. Rule 8(c) *South Carolina Rules of Civil Procedure*. See *Janasik v. Fairway Oaks Villa*, 307 S.C. 389, 415 S.E.2d 384 (1992):

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. See *Herring v. Volume Merchandise, Inc.*, 252 N.C. 450, 113 S.E.2d 814 (1960); 28 Am.Jur.2d Estoppel and Waiver § 33 (1966). See also *Ott v. Ott*, 182 S.C. 135, 188 S.E. 789 (1936). While the doctrine of waiver or equitable estoppel may be invoked as affirmative defenses to counterclaims, they may not be asserted in a complaint as offensive weapons.

As argued above and throughout, O.C.R.M. deployed the waiver argument as an offensive weapon to deny the appellant the right to be heard. The Administrative Law Court accepted O.C.R.M.'s version of the facts and dismissed appellant with prejudice on a Motion to Dismiss, but never gave appellant a hearing on the merits to challenge O.C.R.M.'s assertions. There is no evidence supporting O.C.R.M.'s assertion other than its unchallenged assertion. If O.C.R.M. is correct, and appellant utilized the correct appeal administrative procedure regarding his Petition for Declaration, then, as the appellant demonstrates above at pages 5 – 9, the record shows the main issue identified by the "cease and desist" letter—the water dependent use of the third floor—was already pending at the time of O.C.R.M.'s "cease and desist" letter on October 26th.

In addition to the undisputed fact that appellant's Petition for Declaration preceded O.C.R.M.'s "cease and desist" letter by two months, there is at least a question of fact as to whether appellant's November 12th letter invoked appellant's administrative appeal rights. As argued above, O.C.R.M.'s assertion that appellant's November 12th letter was legally insufficient to constitute an appeal is based on nothing more than its unsupported assertion. The parties thought there was an appeal because O.C.R.M. had already notified appellant of the scheduled review hearing, and appellant timely replied confirming it would be there with all interested parties. (See R.O.A. page 186 [November 12, 2016, letter].) O.C.R.M. thought there was an appeal because it showed up with general counsel and two staff members to review the letter line by line. Most importantly, the record shows that O.C.R.M. informed the appellant at the conclusion of the November 15th meeting that it would either withdraw or modify its October 26th "cease and desist" letter. The Administrative Law

Court erred in failing to apprehend these facts, let alone construe them in appellant's favor. Whether the appellant did or did not timely invoke an administrative appeal is a highly disputed question of fact, and O.C.R.M. does not get to declare the facts or have them construed in its favor because the legal standard is exactly the opposite. When O.C.R.M. says on page 17 "This November 12, 2015, letter could not reasonably be construed as a Request for Final Review as contemplated by S.C. Code Ann. § 44-1-60(E)(2)," it substitutes its right to make a legal argument for the Court's obligation to apply the correct standard of review to disputed facts. O.C.R.M. can argue the November 12th letter is insufficient, but it does not get to make the call and it does not get to call the appellant in, tell him it is withdrawing or modifying the letter and then recant. The Administrative Law Court had the duty to make the call, and it erred when it allowed O.C.R.M. to elevate legal argument to the status of fact. Moreover, O.C.R.M.'s reliance on § 44-1-60(E)(2) is misplaced. It is § 48-39-150(D) and (E) that determines who makes the call:

> (D) An application having a permit denied or a person adversely affected by the granting of the permit has the right of direct appeal from the decision of the administrative law judge pursuant to section 1-23-610. An applicant having a permit denied may challenge the validity of any or all reasons for the denial.
>
> (E) Any permit may be revoked for noncompliance with or violation of its terms after written notice of intention to do so has been given the holder, **and the holder given an opportunity to present an explanation the department.**
> (emphasis added)

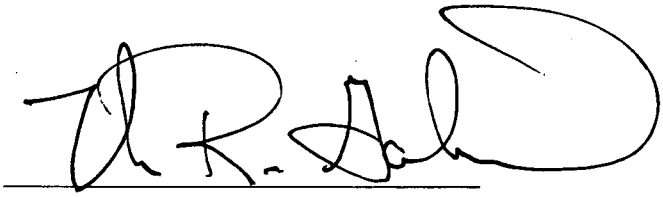
This section is the reason the Administrative Law Court though the matter was not yet ripe for Administrative Law Court, but as may be seen by the affidavits of Clarke and Oglesby, the appellant thought the October 26th "cease and desist" letter was resolved in whole or in part based on O.C.R.M.'s representations. As argued in its brief and throughout this brief, the error is that the Administrative Law Court failed to construe the facts in accordance with the correct legal standard and overlooked the circularity of O.C.R.M.'s argument. The Administrative Law Court failed to

realize that the D.H.E.C. Board's refusal to define water-dependent uses is the *sine-qua-non* of this conflict. O.C.R.M. ignores the difference between a trial and a preliminary motion hearing. O.C.R.M. as the party moving to dismiss the case is not entitled to have the facts and inferences drawn in its favor, and yet that is the error committed below. The Administrative Law Court construed all the inferences against appellant to deprive appellant of its day in Court. This is an error of law that must be reversed.

Conclusion

For the reasons set forth in appellant's brief and above in this reply brief, 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,



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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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

Catherine E. Heigl, 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 Reply Brief complies with Rule 211(b), *South Carolina Appellate Court Rules.*

November 28, 2017

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