

**STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS**

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SC Court of Appeals

Appeal from the Court of Common Pleas
For Charleston County
Honorable Kristi L. Harrington, Circuit Court Judge
Civil Action No.: 2016-CP-10-5578
Appellate Case No.: 2018-000511

TOWN OF SULLIVAN'S ISLAND,

Respondent,

v.

MICHAEL MURRAY,

Appellant.

**FINAL BRIEF OF THE
APPELLANT, MICHAEL MURRAY**

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I. STATEMENT OF ISSUES ON APPEAL

- A. Whether The Circuit Court Correctly Determined That Strict Construction Of The Town Of Sullivan's Island Municipal Code, When Enforced Through An Official Summons and Arrest Record, Supported The Appellant's Conviction By The Town Of Sullivan's Island's Municipal Court?

- B. Whether The Town Of Sullivan's Island's Interpretation Of Its Enforcement Authority Violated The "Rule Of Fair Warning" As Established In McBoyle v. U. S., 283 U.S. 25 (1931), And As Applied By South Carolina's Appellate Courts?

- C. Whether The Town Of Sullivan's Island's Interpretation Of Its Enforcement Authority Results In Criminalizing Conduct Which Is Otherwise Legal Under South Carolina Statewide Criminal Statutes?

- D. Whether The Town Of Sullivan's Island's Actions Were Arbitrary And Capricious In Violation Of The Appellant's Due Process Rights?

II. STATEMENT OF THE CASE

This matter is an appeal of an “Order in Response to Defendant/Appellant’s Motion to Alter and Amend in Accordance with SCRPC Rule 59.” (R.pp.1-2). The Circuit Court (Hon. Kristi Harrington, Circuit Court Judge) affirmed the Town of Sullivan’s Island Municipal Court’s (the “TOSI Municipal Court”) conviction of the Appellant, Michael Murray (“Mr. Murray”) for allegedly violating certain municipal ordinances.¹ (R.pp.1-2). On 29 June 2016, the Police Department of the Respondent, Town of Sullivan’s Island (the “Town” or “TOSI”), issued Mr. Murray’s son, Erich Murray, a “Department of Police Official Summons and Arrest Record City of Sullivan’s Island, S.C.” which noted a \$1,040.00 bond requirement. (R.pp.5, 14). The Arrest Citation charged Erich Murray with “*Violation of Z.O. 21-75 Dock Construction*” and also referenced “TOSI Code 5-10.” (R.pp.5, 14). Erich Murray is employed by American Dock and Marine Construction, Inc., which Mr. Murray owns. (R.p.138, lines 10-14; R.p.231, lines 3-15). Mr. Murray voluntarily agreed to assume responsibility for matters underlying the issuance of the Summons and Arrest Record (R.p.133, lines 1-11), and the Town proceeded to move forward with its prosecution of the case solely against Mr. Murray. (R.p.133, lines 1-11).²

The Arrest Citation indicates on its face that Erich Murray was arrested for the alleged offenses. (R.pp.5, 14). A second and separate Arrest Citation was issued that same day to Jason Tompkins (“Mr. Tompkins”) for the same offenses. (R.p.114; R.p.130, line 6).³ Mr.

¹ See Town of Sullivan’s Island Town Code and Ordinances Article III, Sec. 5-10; Town of Sullivan’s Island Zoning Ordinance, Section 21-75. (R.pp.66-67, 77-78).

² It is undisputed that the Town has never reissued the Summons and Arrest Record to Mr. Murray or issued a new Summons and Arrest Record to him.

³ The Town prosecuted Mr. Tompkins at the same time as Mr. Murray. (R.p.1, lines 4-6). Mr. Tompkins was found not guilty (R.pp.83-85, 102-105, 109) and the Town appealed that

Tompkins is a member of the entity “C and B Beach House, LLC” (“C&B Beach House”) which owns property on Sullivan’s Island identified as 1102 Osceola Avenue (“1102 Osceola”). (R.p.138, lines 10-4; R.p.140, lines 2-6; R.p.253, lines 9-24). C&B Beach House hired American Dock and Marine to construct a boating dock at 1102 Osceola (the “C&B Beach House Dock”). (R.p.140, lines 2-17). Both the Arrest Citation, as well as Mr. Murray’s conviction arise out of construction of the C&B Beach House Dock. (R.p.140, lines 2-17).

The Hon. Francis J. Cornley, Municipal Judge, held a bench trial on 4 October 2016, to consider the charges against Mr. Murray. (R.p.133, lines 1-3). Nine days later, on 13 October 2016, the TOSI Municipal Court’s Clerk’s Office sent Mr. Murray’s attorneys written notice that “your client Jason Tompkins was found to be not guilty. (R.p.28). Mr. Michael Murray was convicted of the offense, and the ticket shows a fine of \$1040 due.” (R.p.28).

On October 20, 2016, Mr. Murray appealed his conviction to the Circuit Court.(R.pp.29-51).⁴ The TOSI Municipal Court filed its “Return to Notice of Intent to Appeal.” on 29 December 2016. (R.pp.52-55). The transcript of the TOSI Municipal Court’s proceedings was filed on 3 January 2017. (R.pp.132-278). Three days later, on 6 January 2017, the Circuit Court issued a Form 4 Order⁵, affirming Mr. Murray’s conviction. (R.p.3).⁶

decision to the Circuit Court. (R.pp.83-101). The Circuit Court affirmed the non-guilty determination. (R.p.129).

⁴ See S.C. Code Ann. § 14-25-95 (Thomson Reuters West 2015). See also generally Town of Mount Pleasant. v. Roberts, 393 S.C. 332, 343, 713 S.E.2d 278, 283-284 (2011).

⁵ The Form 4C Order was filed with the Clerk of the Circuit Court on 11 January 2017. (R.pp.3-4).

⁶ The Circuit Court’s form order stated Form 4C Order stated that “[t]he appeal filed by [Mr.] Murray is denied. Based on the record, [Mr.] Murray acknowledged notice of the zoning laws and permit requirements and was found in violation. [Mr.] Murray has failed to demonstrate an error of law.” (R.p.3).

Mr. Murray then moved on 25 January 2017, to alter or amend the judgment or for a new trial. (R.pp.56-59). The Circuit Court denied that motion by order dated 23 February 2018. (R.pp.1-2). This appeal followed.

III. STATEMENT OF THE FACTS

C&B Beach House acquired 1102 Osceola Avenue on 21 February 2014. (R.p.253, lines 19-21). The property is located adjacent to Cove Creek on the western side of Sullivan's Island. (R.p.141, line 4 – R.p.142, line 1). Cove Creek is part of the Atlantic Intercostal Waterway with direct access to the Charleston Harbor and the Atlantic Ocean. (R.p.211, lines 8-18). C&B Beach House submitted a permit application to the South Carolina Department of Health and Environmental Control's Office of Ocean and Coastal Resource Management ("OCRM" or "DHEC-OCRM"), seeking authorization to construct a dock at the 1102 Osceola location. (R.pp.39-45). On 15 May 2015, OCRM issued a Critical Area Permit & Coastal Zone Consistency Certificate to C&B Beach House (the "OCRM Dock Permit") authorizing construction of the requested dock. (R.pp.89-97). The permitted dock consisted of a walkway extending 584 feet leading to a covered pierhead, a ramp, a floating dock, and a four-pile boatlift. (R.p.94). The OCRM Dock Permit included a "Special Condition" that "an as-built survey of the dock must be submitted to the Department [DHEC-OCRM] within 90 days of the expiration date of the final construction placard." (R.p.90, para. 5).

After DHEC-OCRM issued the OCRM Dock Permit, Mr. Murray, on C&B Beach House's behalf, submitted a "Building Permit Application" (the "Application") to the Town of Sullivan's Island. (R.p.172, line 16 – R.p.174, line 17). The Application sought authorization

for “construction of [a] dock.” (R.p.22). The Application, with initials adjacent to “Approvals Building,” indicates that the Application was approved with the following notation:

must not exceed adjacent docks & 10' from extended property lines

(R.pp.22). In addition, the Town provided Mr. Murray (and C&B Beach House) with a Certificate of Zoning Compliance (the “Compliance Certificate”) for the dock construction.

(R.p.21). Within the “Work Description” section of the Compliance Certificate, the Town included a hand written notation:

Move dock (Boat Lift) to 10' [ten feet] from extended property line. Move pierhead, floater & boat lift landward to not exceed adjacent docks.

(R.p.21). Finally, the Town issued an “Accessory Structures Permit” authorizing a scope of construction work described as “Dock Permit.” (R.p.20). All of the documents issued by the Town are dated 14 June 2016. (R.pp.21-22). Finally, the Town then appended the OCRM Dock Permit to the various approvals with hand-written notations that:

an as-built survey be provided to the Town.; “move dock to not exceed adjacent docks,” “must be 10' from extended lines,” “no more than 15' above mean high water,” and “Boatlift ok as drawn.”⁷

(R.p.43).

American Dock and Marine began building the dock at 1102 Osceola pursuant to the OCRM's and the Town's respective governmental approvals. (R.p.232, line 25 – R.p.233, line 23; R.p.240, line 11 – R.p.241, line 23). On 19 July 2016, following the dock's completed construction, Robert L. Frank, a South Carolina professional land surveyor, completed an

⁷ Mr. Murray has consistently maintained, both below and herein, that the Town's efforts to limit a dock's maximum length limitation to the maximum length of any adjacent docks does not constitute an enforceable, albeit “conditional” approval of a dock construction permit. (R.pp.6-13; R.pp.29-36).

“as-built” survey of the dock. (R.pp.23-25, 98-100). The As-Built survey shows (a) the “edge of marsh grass” in relationship to six existing docks on Osceola, including the C&B Beach House Dock, (b) the location of “low water mark” in relationship to the several docks, and (c) the “edge of channel” in “The Cove.” (R.pp.23-25, 98-100).⁸

The As Built Survey shows “The Cove” to be 367 feet wide at the location of the C&B Beach House Dock (R.pp.24, 99) and the C&B Beach House Dock ending approximately 60 feet from the edge of the federal channel. (R.pp.24, 99). The As Built Survey provides that the location of the MLW (mean low water) intersects the center sections of the floating dock and pierhead. (R.pp.25, 100). As for the proximity of the C&B Beach House Dock to neighboring docks, the As Built Survey shows the C&B Beach House’s dock seaward extension is approximately eight to ten feet farther out than the docks on either side. (R.pp.24, 99).

There is a critical difference between the permit drawings and the As Built survey. The approved drawings in the OCRM Dock Permit show that the C&B Beach House Dock is entirely in front of “MLW.” (R.pp.24-25, 93-94). The As Built Survey, however, shows the C&B Beach House Dock has been moved landward and most of the C&B Beach House Dock is located behind the “Low Water Mark”. (R.pp.24-25, 99-100). This shows Mr. Murray sought to comply with the Town’s questionably-imposed conditions reducing the seaward extension of the C&B Beach House Dock to that equating with the adjacent docks. (R.pp.21-22).

⁸ The designation of “edge of channel” refers to the federal channel mapped by the United States Army Corps of Engineers (the “USACE”) as part of its maintenance duties with the Atlantic Intercostal Waterway.

The Town based Mr. Murray's arrest on alleged violations of sections of the TOSI Municipal Code, which provides, in relevant part, as follows:

Application for a building permit shall be made in writing to the Building Inspector or his designated representative at the Town Hall on a form or forms approved and furnished by said Inspector. For the convenience of the public and efficiency in administration, the Zoning Administrator may combine said building permit application form with application forms for zoning, use or other town permits, may provide spaces thereon for endorsement or approval by other town officers or officials, and may require two or more copies of said form to be filed by the applicant.

Plans and specifications adequately describing the proposed erection, construction, improvement, alteration or repair shall be submitted with the application which shall set forth the approximate cost, supported by bids or detailed estimates, if requested by the inspector.⁹

The Town further based Mr. Murray's arrest on alleged violations of TOSI Municipal Zoning Code.¹⁰ Section 21-75 does not, however, contain any prohibition addressing the seaward extension of docks relative to surrounding docks. (R.pp.66-67). Section 21-75 does provide that "[n]o dock shall be permitted to be constructed which extends into the channel or extends so far as to interfere with navigation." (R.p.66).¹¹ As is clearly demonstrated in the As Built Survey, the C&B Beach House Dock does not extend into the channel. (R.pp.24-25, 99-100).¹²

⁹ See TOSI Municipal Code, Article III, § 5-10, Application. (R.pp.77-78).

¹⁰ See TOSI Municipal Zoning Code, § 21-75, Construction of private docks in RC-2 Area District. (R.pp.66-67).

¹¹ See TOSI Municipal Zoning Code, § 21-75 B.(1). (R.p.66).

¹² The As Built Survey notes this as "Edge of Channel." (R.pp.24-25, 99-100).

The Circuit Court acknowledged the TOSI Municipal Code did not contain an express requirement limiting the seaward extension of docks relative to neighboring docks. Nevertheless, the Circuit Court affirmed Mr. Murray's conviction. (R.p.2, para. 3) The TOSI Municipal Code provides:

Wherever in this [TOSI Municipal] Code, or in any ordinance or resolution of the Town, or rule or regulation or order promulgated by any officer or agency of the Town under authority duly vested in him or it, any act is prohibited or is declared to be unlawful or an offense or misdemeanor, or the doing of any act is required, or the failure to do any act is declared to be unlawful or an offense or a misdemeanor, and no specific penalty is provided for the violation thereof, the violation of any such provisions of this [TOSI Municipal] Code, or any such ordinance, resolution, rule, regulation or order shall be punished by a **fine of not more than five hundred dollars or by imprisonment for not more than thirty days**. Each day any violation of this [TOSI Municipal] Code, or any such ordinance resolution, rule, regulation or order shall continue shall constitute, except where otherwise provided, a separate offense.**13**

Mr. Murray asserted to the TOSI Municipal Court, to the Circuit Court, and now in this appeal that the Town lacked legal authority to enforce a building standard which had not been promulgated as a municipal ordinance and/ administrative regulation, particularly in the context of the Arrest Citation the police issued to Erich Murray. (R.pp.6-13; R.pp.29-36).

13 TOSI Municipal Code, § 1-7, General penalty; [2] continuing violations. (Rp.71).

IV. ARGUMENT AND CITATION OF AUTHORITY

Standard of Review

“In criminal appeals from a municipal court, the circuit court does not conduct a *de novo* review, rather, it reviews the case for preserved errors raised to it by an appropriate exception.”¹⁴ Furthermore, this Court of Appeals, in reviewing criminal cases, is permitted to review only errors of law.¹⁵ Additionally, “[i]n criminal cases, [a South Carolina appellate] court sits to review errors of law only, and [is] bound by the trial judge’s factual findings unless they are clearly erroneous.”¹⁶

A. The Town of Sullivan’s Island Did Not Have Legal Authority To Issue A Criminal Arrest Citation On The Basis The C&B Beach House Dock Was Around Eight To Ten Feet Seaward Of The Existing Adjacent Docks.

The Town relies on the *TOSI Municipal Zoning Ordinance* and the *TOSI Municipal Code* in issuing the Arrest Citation. (R.pp.66-67, 77-78). While Section 21-57 of the *TOSI Municipal Zoning Ordinance* contains 16 enumerated standards relative to dock construction with multiple subparts,¹⁷ the provision ***does not*** contain any requirement which prohibits a dock from extending farther into the channel than that of the adjacent docks. (Rpp.66-67). The Town’s Zoning Administrator, Joe Henderson, testified the C&B Beach House Dock, as constructed, did not comply with the “Town’s interpretation [of *TOSI Municipal Zoning Ordinance*, § 21-75], [which construed the provision to mean that] ‘[n]o

¹⁴ *The Town of Mt. Pleasant v. Roberts*, 393 S. C. 332, 341, 713 S. E. 2d 278, 284.

¹⁵ *Rogers v. State*, 358 S.C. 266, 269, 594 S.E.2d 278, 279 (Ct.App. 2004) (citing *City of Landrum v. Sarratt*, 352 S.C. 139, 141, 572 S.E.2d 476, 477 (Ct.App. 2002)).

¹⁶ *State v. Goodwin*, 351 S.C. 105, 110, 567 S.E.2d 912, 914 (Ct.App. 2002) (citing *State v. Wilson*, 345 S.C. 1, 545 S.E.2d 827 (2001)).

¹⁷ *TOSI Municipal Zoning Ordinance*, § 21-75. (R.pp.66-67).

dock [length] may exceed or go beyond [the length of] adjacent docks.’ ” (R.p.174, lines 3-9). Mr. Henderson further stated:

Well, our interpretation of this section of the ordinance [21-75] under B-1 – basically, it’s a ***long-standing interpretation of the Town*** that not extending so far as to interfere with navigation means that no docks subject to a permit can extend beyond adjacent doc[ks].

(R.p.190, lines 15-23) (Emphasis added).

The “B-1” classification referenced in Mr. Henderson’s testimony is the requirement in the zoning ordinances which provided that “[n]o dock shall be permitted to be constructed which extends into the channel or extends so far as to interfere with navigation.” (R.p.66).¹⁸ As is noted above, as well as depicted on both the OCRM Dock Permit drawings and on the As Built Survey, “The Cove,” or Cove Creek, is 367 feet wide at the location of the dock. (R.pp.24, 93-94, 99). Furthermore, the channel boundary is a significant distance from the C&B Beach House Dock. (R.pp.23-25, 93-94, 98-100). Most importantly, as Mr. Murray testified, all of the docks, including the C&B Beach House Dock, are located on a mud flat that is ***dry*** at low tide. (R.p.237, lines 17-22). There is no navigation ability at low tide, but as the tide rises the Cove is sufficiently wide that no single dock, including the C&B Beach House Dock, would cause a navigational hazard and/or obstruction. (R.p.238, line 1 – R.p.239, line 15). Mr. Murray, a licensed captain and marine contractor, testified that he “know[s] the area real well. I’ve lived here all my life and I’ve navigated that channel before.” (R.p.237, lines 3-10).

Normal navigation is the center line of any creek or body of water, that’s normally where you start the navigation. . . . You would try to navigate the center first to find the deepest water preferably because the way the, you know, mud would come off

¹⁸ TOSI Municipal Zoning Ordinance, § 21-75.B.(1). (R.p.66).

of the marsh. So you wouldn't be going up next to somebody's dock. There would be no reason unless you were going to the dock to tie your vessel up.

* * *

And you couldn't, anyway, probably half-tide on either side because there is no water there. Unless you're trimming your motor way up and basically churning mud to get there.

(R.p.238, lines 4-23).

The Cove isn't uniform and its shorelines aren't uniform, consequently every existing dock varies in the distance from the "edge of marshgrass" and "edge of channel" and "Low Water Mark." (R.pp.23-25, 98-100). The dock located immediately west of the C&B Beach House Dock is aligned much more closely to "Low Water Mark," and consequently has more accessibility than the dock to the east of the C&B Beach House Dock. (R.pp.23-25, 98-100). The Town's "interpretation", albeit not codified, has accomplished nothing in terms of protecting navigation. It has, however, created arbitrary limitations on water access which, in turn, have an unequal effect on both the C&B Beach House Dock and the docks to the right and left. (R.pp.23-25, 98-100). Mr. Murray noted the Mean Low Water mark is "considerably far out in front of all of those [other] docks." (R.p.237, lines 17-25).

In building the C&B Beach House Dock, Mr. Murray simply gave his contractor and/or construction crew the Town's and OCRM's authorization:

paperwork and they start building, and six, seven months later on a dock this size they're out in the river and they're lining their barges up the best they can and looking down the docks and those are short and those are long and I guess that's where they're supposed to be. And they build a dock.

* * *

I mean we weren't told to don't go specifically to this point. It was just, 'Don't build any further than the adjacent docks.'

(R.p.241, line 5 – R.p.242, line 2).

The Town did not present any evidence that the C&B Beach House Dock violated the navigation non-interference requirements.¹⁹ Mr. Murray testified he had never been contacted or advised that the C&B Beach House Dock interfered with navigation in the Cove. (R.p.242, lines 15-20). The property owner, Jason Tompkins, also testified he “had zero complaints, whatsoever, about the dock” from his neighbors. (R.p.270, lines 3-13).

The Town’s “interpretation” of Section 21-75 of the TOSI Municipal Zoning Ordinance adds an un-promulgated, non-existent, and non-codified requirement to the Dock Ordinance. (R.p.66-67). Even though unwritten and non-codified, this additional “requirement” is very specific in nature. Moreover, this “requirement” significantly limits the meaning of the codified dock construction requirement designed to protect navigation in the “channel” by prohibiting any navigational interference.²⁰

Since Section 21-75 of the TOSI Municipal Zoning Ordinance is being applied to penalize Mr. Murray, it ***must be*** strictly construed. It is well established that “[c]riminal ordinances are, of course, to be strictly construed and a defendant has a right to know just wherein he is charged with the commission of a crime”²¹ The principle of statutory construction that penal statutes are to be strictly construed against the State would apply to the Town in its issuance of the Arrest Citation to Mr. Murray. (R.p.5). Contrary to the Circuit Court’s decision (R.pp.1-2), the Town cannot sustain a successful criminal prosecution of

¹⁹ TOSI Municipal Zoning Ordinance, § 21-75.B.(1). (R.p.66).

²⁰ TOSI Municipal Zoning Ordinance, § 21-75.B.(1). (R.p.61).

²¹ Town of Conway v. Lee and Drayton, et al. 209 S. C. 11, 18, 38 S. E. 2d 914, 917 (1946). (“When a genuine ambiguity exists as a result of the proposed application of [a penal statute] to a given situation, the rule of lenity requires that the doubt be resolve in the defendant’s favor.”); State v. Blackmon, 304 S. C. 270, 273, 403 S. E 2d 660, 662 (1991). (“[W]hen a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.”). See also State v. Myron Samuels, 403 S. C. 551, 557, 743 S. E. 2d 773, 777 (2013).

Mr. Murray based upon the ostensible violation of the Town's undisputedly and admittedly unwritten and non-codified "interpretation" of Section 21-75 of the TOSI Municipal Zoning Ordinance.

The Arrest Citation was also based on alleged violations of TOSI Municipal Code, Article III, § 5-10. (R.pp.66-67). The provision simply requires that a building permit be issued for all construction and sets out the application procedures and requirements.²² In this case, Mr. Murray applied for and was granted an Accessory Structures Permit, a Certificate of Zoning Compliance, and an approved Building Permit for construction of the C&B Beach House Dock. (R.pp.2-22; R.p.242, line 24 – R.p.243, line 18). The TOSI Municipal Code, in relevant part, provides for criminal penalties for "violation[s] of any [prohibiting] provisions of [the TOSI Municipal Code], or any such ordinance, resolution, rule, regulation or order . . ." (R.p.71).²³

The Circuit Court affirmed Mr. Murray's conviction solely based on the fact Mr. Murray, by accepting the Town's dock construction authorization documentation, impliedly "acknowledged" the Town's unwritten and non-codified "interpretation" of Section 5-26(B)(1) was ostensibly a condition of the building permit. (R.p.242, line 24 – R.p.245, line 8). However, the fact Mr. Murray impliedly "accepted" the unwritten and non-codified additional requirement/condition (R.pp.20-22) and, in turn, attempted to implement it (R.pp.23-25, 98-100), does not convey authority to the Town to enforce the unwritten and non-codified additional requirement/condition.²⁴ The ordinances only contemplate the Town's

²² TOSI Municipal Code, Article III, § 5-10. (R.pp.77-78).

²³ TOSI Municipal Code, § 1-7. (R.p.71).

²⁴ To the extent the Town relies on Mr. Murray's acceptance of the Accessory Structure Permit (R.p.20) and the other dock construction authorizations (R.p.21-22) as a waiver to criminal prosecution, it is clear that waiver is "an intentional relinquishment or abandonment

enforcement of duly promulgated requirements in ordinances or regulations, ***not*** unwritten and non-codified “interpretations” (R.p.190, lines 15-23) imposing additional requirements and/or conditions.

South Carolina law requires the Town to adopt or act in accordance with an ordinance in order to “[p]rovide for a fine or other penalty or establish a rule or regulation in which a fine or other penalty is imposed for violations.”²⁵ Furthermore, when there is a criminal prosecution and/or criminal penalty involved it is a very well-established and long-standing “constitutional principle that procedural due process requires fair notice and proper

of a known right or privilege.” Reed v. Ozmint, 374 S. C. 19, 647 S.E. 2d 209 (2007). This Court of Appeals has recognized that

Waiver is a voluntary and intentional abandonment or relinquishment of a known right. It may be expressed or implied by a party's conduct, and it may be applied to bar a party from relying on a statute of limitations defense. An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable. The party asserting waiver has the burden of proof. Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended.

Spur at Williams Brice Owners Ass’n, Inc. v. Lalla, 415 S. C. 72, 91, 781 S. E. 2d 115, 125 (2016) (Internal citations omitted). Mr. Murray was asked “would you agree that those specific notations became a part and parcel of the building permit that was issued to your company relative to the construction of the dock on Osceola Avenue?” (R.p.245, lines 4-7). Mr. Murray responded – “As far as I know, yes, sir.” (R.p.245, line 8). Mr. Murray had no reason to know that the additional non-codified condition on the Town’s approval for construction of the C&B Beach House Dock related to the seaward extension of the dock was merely an “interpretation” of an unambiguous ordinance and inconsistent with the rules applicable to statutory interpretation. Mr. Murray was not charged with knowledge of the specific statute requiring the Town to properly promulgate an ordinance which includes possible criminal liability. Mr. Murray was not charged with knowledge that the Town’s actions likely violated his constitutional rights to procedural due process. In accepting the Town’s building permit, and attempting to comply with it, Mr. Murray did not, in any way, waive his resistance to the Town’s criminal prosecution.

²⁵ S. C. Code Ann. § 5-7-260(2) (Thomson Reuters West 2015).

standards for adjudication.”**26** Similarly, “[a] penal statute offends due process only when it fails to give fair notice of the conduct it proscribes.”**27**

The “ordinance” at issue is an unwritten and non-codified interpretation (R.p.190, lines 15-23) which significantly narrows the provisions of an existing duly promulgated ordinance. (R.pp.66-67). Mr. Murray’s alleged violation of this “unwritten and non-codified interpretation” resulted in a criminal penalty of \$1,040.00 and a misdemeanor conviction. (R.pp.5, 14, 28).**28**

Clearly, in the absence of a duly-adopted ordinance and/or regulation expressly requiring that docks on Sullivan’s Island be limited in channel-ward extension to the extension of adjacent docks, the Town cannot sustain its heretofore-successful penal action against Mr. Murray. The Circuit Court improperly affirmed Mr. Murray’s conviction in that the Town clearly failed to comply with South Carolina law**29** when imposing a criminal penalty based on a mere unwritten and non-codified “interpretation” of an ordinance.

26 State v. Houey, 375 S.C.106, 113, 651 S.E.2d 314, 318 (2007) (citing Peterson Outdoor Adv. v. City of Myrtle Beach, 327 S.C. 230, 236, 489 S.E.2d 630, 633 (1997)).

27 State v. McKnight, 352 S.C. 635, 650, 576 S.E.2d 168, 176 (2003) (citing State v. Edwards, 302 S.C. 492, 397 S.E.2d 88 (1990); State v. Smith, 275 S.C. 164, 268 S.E.2d 276 (1980)).

28 Upon receipt of the Circuit Court’s final decision, the Town’s prosecuting counsel sent the following email message:

Attached is a certified copy of the Order in Response to Defendant/Appellant’s Motion to Alter and Amend in the above referenced action denying your request that the Judge alter or amend her previous Order dismissing your client’s appeal, as well as the formal Notice form the Clerk’s Office which I received in this afternoon’s mail.

I’ve copied the Clerk of Court for Sullivan’s Island Municipal Court so she’ll be aware that Mr. Murray may stop by and/or mail the monetary fine previously imposed by Judge Cornely.”

(R.p.60) (Emphasis added).

29 S. C. Code Ann. § 5-7-260(2).

B. The Town's Interpretation Of Its Authority Violates The Rule Of Fair Warning Established In *McBoyle v. United States*, 283 U.S. 25 (1931), And As Applied By South Carolina's Appellate Courts.

In *State v. Miles*, this Court of Appeals explained the "rule of lenity" which originated in *McBoyle v. United States*.³⁰ In that vein, this Court of Appeals stated:

We cannot leave this issue without discussing the **important canon of statutory construction that penal statutes are to be strictly construed**. The rule of lenity applies when a criminal statute is ambiguous, and **requires any doubt about a statutes' scope be resolved in the defendant's favor**.³¹

This Court of Appeals further noted that the "rule of lenity [wa]s not a device to create ambiguity, nor should a court invoke it before considering the words of the statute in context."³² Nevertheless, this Court of Appeals recognized that "[o]ne of the foundations of the rule of lenity is the **concept of fair notice** – the idea that those trying to walk the straight and narrow are entitled to know where the line is drawn between innocent conduct and illegality."³³

³⁰ *State v. Miles*, 421 S. C. 154, 164, 805 S.E.2d 204, 210 (2017) (citing *McBoyle v. United States*, 283 U.S. 25, 27 (1931)).

³¹ *State v. Miles*, 421 S. C. 154, 164, 805 S.E.2d 204, 210 (citing *Berry v. State*, 381 S.C. 630, 633, 675 S.E.2d 425, 426 (2009)) (Emphasis added).

³² *State v. Miles*, 421 S. C. 154, 164, 805 S.E.2d 204, 210 (citing *State v. Dawkins*, 352 S.C. 162, 166–167, 573 S.E.2d 783, 785 (2002); *State v. Firemen's Ins. Co. of Newark, N.J.*, 164 S.C. 313, 162 S.E. 334, 338 (1931) ("The rule that a penal statute must be strictly construed does not prevent the courts from calling to their aid all the other rules of construction and giving each its appropriate scope, and is not violated by giving the words of the statute a reasonable meaning according to the sense in which they were intended, and disregarding . . . even the demands of exact grammatical propriety." (citation and internal quotations omitted)). See also *United States v. Bass*, 404 U.S. 336, 347 (1971) (a court should rely on lenity only if, "[a]fter 'seiz[ing] everything from which aid can be derived,' " it is "left with an ambiguous statute" (quoting *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J.)).

³³ *State v. Miles*, 421 S. C. 154, 164, 805 S.E.2d 204, 210 (2017) (quoting *McBoyle v. United States*, 283 U.S. 25, 27) ("[I]t is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain

Another foundation of the rule of lenity is the separation of powers. Our Constitution commits the task of defining criminal offense solely to the Legislative Branch. If the Legislature believes our interpretation expands or is otherwise contrary to the scope it intended . . . [the Legislature] can amend the statute.³⁴

Mr. Murray is the president and owner of American Dock and Marine Construction and has been in the business of building docks for some 27 or so years. (R.p.231, lines 3-7). He has a Marine Specialty Contractors license that allows him to supervise construction valued up to \$1 million dollars. (R.p.231, line 8 – R.p.232, line 7). In addition, Mr. Murray has been a licensed captain for 40-45 years. (R.p.232, lines 8-18). Mr. Murray sits in the position of the innocent defendant for which the concept of fair notice is intended to and should protect. Mr. Murray testified regarding the 8' to 10' channel-ward encroachment of the C&B Beach House Dock:

Q. Was it your intent to disregard the Town's instructions?

A. Absolutely not. I'm not in the business to break the law, I'm not in the business to cause grief or harm to anyone, I'm not out there building illegal structures. I'm a fully licensed, fully insured contractor that's been at this – I've grown up here, I live here, so breaking the law is not what I'm after here. It's not it.

(R.p.242, lines 6-14).

While this Court of Appeals, in State v. Miles, referenced a figurative "line" between legal and illegal conduct, Mr. Murray was trapped by a literal line imposed by the Town's Zoning Administrator and hand drawn across the OCRM Dock Permit drawings. (R.p.93).

line is passed. To make the warning fair, so far as possible the line should be clear.") (Alteration in original).

³⁴ State v. Miles, 421 S. C. 154, 164, 805 S.E.2d 204, 210 (citing United States v. Bass, 404 U.S. 336, 347-348; United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820)).

The line did not contain or reference any bearings, distances, metes, or bounds, and was not drawn to scale. (R.p.197, line 18 – R.p.199, line 2). The Town’s Zoning Administrator acknowledged Mr. Murray would have been required to stand at the terminus of the C&B Beach House Dock walkway and look 89 feet to one side of the C&B Beach House Dock and 55 feet to the other side, within a water-body more than 300 feet wide, in order to allegedly “determine” the location of the Town’s Zoning Administrator’s “build-too” line, before construction of the walkway or pierhead had been completed. (R.p.198, line 9 – R.p.202, line 1). The docks on either side of the C&B Beach House Dock are private property (R.p.200, lines 1-13) and neither Mr. Murray nor his construction crew would have a right of entry on those docks without permission of the adjoining property owners. (R.p.200, lines 14-18).

The C&B Beach House Dock exceeded the hand-drawn “build to” line established by the Town’s Zoning Administrator, but the Town’s Zoning Administrator felt comfortable charging Mr. Murray with a criminal offense and issuing the Arrest Citation because “[w]e thought the contractor here with all his years of experience understood what we were going for here.” (R.p.198, line 18 – R.p.199, line 2). The Town’s actions and expectations are in stark contrast to OCRM’s actions and expectations in issuing permits based on surveys which clearly indicate the precise location of the structure relative to other structures and exact dimensions, as opposed to a hand-drawn representation on a survey that doesn’t tie into the surveyed land marks or points and can’t be measured.

The Town’s failure to promulgate and/or codify its specific, albeit additional unwritten, requirement that docks cannot exceed the channel-ward extension of docks on either side and, in return to require a permittee to interpret a hand-drawn line on a survey clearly violates

the concept of fair notice which underlies the rule of penal statute strict construction. The Circuit Court either ignored or overlooked the Town's clear violation of the concept of fair notice "for those trying to walk the straight and narrow". This is an error of law and which this Court of Appeals should and, indeed, must correct. Clearly, a licensed marine contractor and captain, in business for several decades, and credited for building hundreds of docks, falls into the category of those who "try to walk the straight and narrow", particularly in light of the potential consequences to professional licenses and business reputations for alleged violations of building permits.

C. The Town's "Interpretation" Of Its Authority Is Unconstitutional Since It Criminalizes Conduct Which Is Otherwise Legal Under Statewide Criminal Law.

The South Carolina Constitution provides that "general law provisions applicable to the following matters shall not be set aside: (5) criminal laws and the penalties and sanctions for the transgression thereof."³⁵ In applying Article 8, Section 14 our appellate courts have traditionally determined a state law to be in violation of the South Carolina Constitution "if it prohibits an activity otherwise legal in the state."³⁶

Because a gambling day cruise was a legal activity allowed by the State, Edisto's ordinance is unconstitutional because it makes a legal activity unlawful. Where the General Assembly has occupied the field in a particular area, *i.e.* gambling, by describing what is and what is not proscribed, local governments are not free to alter the standards established by the General Assembly.³⁷

³⁵ South Carolina Constitution, Art. 8, § 14.

³⁶ Palmetto Princess, LLC v. Town of Edisto Beach, 369 S. C. 50, 52, 631 S. E. 2d 76, 77 (2006).

³⁷ Palmetto Princess, LLC v. Town of Edisto Beach, 369 S. C. 50, 52, 631 S. E. 2d 76, 78 (*citing* Connor v. Town of Hilton Head Island, 314 S.C. 251, 442 S.E.2d 608 (1994) (where ordinance proscribed conduct which was not unlawful at the time the ordinance was enacted under state criminal laws governing the same subject, town exceeded its power in enacting

SCDHEC, through OCRM, has “occupied the field” of dock permitting since the inception of the Coastal Tidelands and Wetlands Act in 1977. OCRM’s regulations governing private, recreational docks, embodied in S. C. Code Ann. Reg. 30-12(A), provide detailed and specific standards for dock construction intended to facilitate water access and recreational use without creating navigational conflicts. These standards include separation between docks, accomplished by off-sets from property line extensions, limitations of dock sizes based on creek widths, restrictions on construction docks over smaller, navigable tributaries. In addition, the regulations include a general admonition that docks “shall not restrict the reasonable navigation or public use of State lands and waters.”³⁸ Absent, however, from OCRM’s regulations is any requirement that limits a docks extension to the existing extension of surrounding docks. Instead, “[t]he size and extension of a dock or pier must be limited to that which is reasonable for its intended use.”³⁹

Mr. Murray testified it was unreasonable to require a dock to be located landward of Mean Low Water, which resulted in loss of access for several hours every tidal cycle, particularly on waterbody the size of The Cove which has a federally maintained channel. (R.p.237, line 3 – R.p.238, line 24; R.p.245, line 24 – R.p.246, line 24).

The Town’s actions violates the South Carolina Constitution by criminalizing the construction of docks when such docks extend farther into the waterbody than the length

ordinance); Diamonds v. Greenville County, 325 S.C. 154, 480 S.E.2d 718 (1997) (same)). Cf. Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 530 S.E.2d 369 (2000) (ordinance upheld where there was no relevant state law governing conduct in question).

³⁸ S. C. Code Ann. Reg. 30-12(A)(1)(a) (Thomson Reuters West 2015).

³⁹ S. C. Code Ann. Reg. 30-12(A)(1)(a).

of adjoining docks. OCRM has taken the lead in dock regulation since 1977 and this State's general law is that navigation is protected by means other than requiring all docks to be held to a specific "build-to" line.⁴⁰ The Town's unwritten and non-codified "interpretation" of its zoning ordinance is unconstitutional. This Court of Appeals should reverse Mr. Murray's conviction in all respects.

D. The Town's Actions Are Arbitrary And Capricious In Violation Of Mr. Murray's Constitutional Due Process Rights.

Our appellate courts have regularly reviewed municipal boards' and zoning authorities' decision and declined to uphold those decisions when the entities abuse their discretion.⁴¹ "When exercising discretion, a local board must be guided by standards which are specific in order to prevent the ordinance from being invalid and arbitrary."⁴² Consequently, " [t]he concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." ⁴³

⁴⁰ The Town's Zoning Administrator testified the hand-drawn line he included on the OCRM Permit was a "build-to" line and the limited the dock construction at 1102 Osceola. (R.p.181, line 16 - R.p.183, line 8).

⁴¹ Peterson Outdoor Adv. v. City of Myrtle Beach, 327 S. C. 230, 235, 489 S.E.2d 630, 633 (citing Knowles v. City of Aiken, 305 S.C. 219, 407 S.E.2d 639 (1991) (municipal zoning decision may be successfully attacked as arbitrary); Gurganious v. City of Beaufort, 317 S.C. 481, 454 S.E.2d 912 (Ct.App. 1995) (a zoning board's arbitrarily decision will not be upheld).

⁴² Peterson Outdoor Adv. v. City of Myrtle Beach, 327 S. C. 230, 235, 489 S.E.2d 630, 633 (citing Schloss Poster Adv. Co. v. City of Rock Hill, 190 S.C. 92, 2 S.E.2d 392 (1939) (finding city's denial of permit arbitrary because no objective standards guided the decision; instead, the decision was based on the unfettered will of the city); Hodge v. Pollock, 223 S.C. 342, 348, 75 S.E.2d 752, 755 (1953) (grant of the variance not based on the objective standards of the ordinance). See also City of Beaufort v. Baker, 315 S.C. 146, 152, 432 S.E.2d 470, 472 (1993).

⁴³ Peterson Outdoor Adv. v. City of Myrtle Beach, 327 S. C. 230, 235, 489 S.E.2d 630, 633 (quoting City of Beaufort v. Baker, 315, S. C. 146, 432 S. E. 2d 470, 472).

In accordance with these standards, the Town abused its discretion in relying on an unwritten and non-codified policy which significantly narrowed application of an unambiguous ordinance restricting dock extensions “into the channel” and protects from “interference with navigation.”⁴⁴ The “build to” line enforced by the Town’s Zoning Administrator was, at best, vague and indefinite and its resulting application cannot be said to be valid and non-arbitrary. Mr. Murray’s procedural due process rights were violated by the Town’s actions in charging him with a criminal violation of an un-promulgated unwritten standard, particularly in the absence of any evidence to suggest that the C&B Beach House Dock was, in any way, hindering navigation.

Moreover, “[a] governing body’s decision ‘is arbitrary if it is without a rational basis, is based alone on one’s will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards.’”⁴⁵ The Town’s actions satisfy this test in all respects. There is no factual basis upon which to conclude that the subject dock is interfering with navigation. The “unwritten rule” enforced by the Town fails to take into account the lack of uniformity along a tidal shoreline, as is clearly depicted in aerial photography of Cove Creek at Osceola Avenue. (R.pp.27, 51). For example, the federally maintained (*i.e.*; dredged) channel extends in front of the Osceola properties at an angle. Consequently, the C&B Beach House Dock may possibly extend beyond the end of the dock lying to the east (on the right of the photo) since that dock is closer to the main channel than that of the C&B Beach House

⁴⁴ See TOSI Municipal Code, § 21-75. (R.pp.66-67).

⁴⁵ Pressley v. Lancaster County, 343 S. C. 696, 704, 542 S. E. 2d 366, 370 (2001) (*quoting Deese v. South Carolina State Bd. Of Dentistry*, 286 S. C. 182, 184-185, 332 S. E. 2d 539, 541 (Ct.App. 1985)).

Dock. (R.pp.27, 51, 62, 128). The As Built Survey demonstrated that the "Low Water Mark", running roughly parallel to the "Edge of Marsh Grass", was not uniform and each dock varied in distance from the "Low Water Mark". (R.pp.23-25, 98-100). In fact, the two docks lying to the east, or to the right, of the C&B Beach House Dock were well behind the LWM. (R.pp.23-25, 98-100). Conversely, the dock lying to the west, or to the left, of the C&B Beach House Dock was directly either behind or on the low water mark. (R.pp.23-25, 98-100).

As Mr. Murray testified, the Cove at the location of the C&B Beach House Dock and the surrounding docks was "silting in considerably in the 50-something plus years that I've been navigation around here. ... It's very shallow out there now." (R.p.237, lines 3-22). Due to the ongoing siltation in the channel, there is no navigation where the docks are located. (R.p.237, lines 3-22). There is no navigation at "half-tide on either side because there is no water there." (R.p.237, line 3 – R.p.238, line 24). Mr. Murray noted, "I mean, no one can navigate in here, anyway. I mean it's basically a mud flat [*sic*] until the tide gets considerably high, no one's going to run a boat in here." (R.p.246, lines 12-24). Mr. Murray, in attempting to resolve the issue with the Town, was aware he would be "pushing [Mr. Tompkins' dock] nine feet back up into the mud. So now not only is he not even going to be at the low water mark, he's going to be sitting nine feet from the low water mark." (R.p.247, lines 4-21).

This testimony illustrates the lack of reasoning or judgment supporting the Town's position. The arbitrary and capricious nature of the Town's policy significantly limits water access to waterfront property owners rather than "protecting" maritime navigation. Docks initially located at or beyond the low water mark are now, due to the siltation, located **behind** the low water mark. Consequently, boats can't be launched from these docks until the tide rises and, as a result, these property owners have lost not less than 50% of their access to the water. Unfortunately, they now must wait until mid-tide or later to leave or return to their respective docks.

Instead of arbitrarily limiting dock construction based on pre-existing dock construction, the Town should afford these property owners the opportunity to extend their docks to at least the low water mark or at some close point in front of the low water mark. The Town's insistence that all docks should rest in the mud during half of every tidal cycle does nothing to promote the Town's "justification" for the dock length limitations (*i.e.*; to protect maritime navigation). Instead, the Town's "efforts" have essentially had the opposite effect and arbitrarily limited recreational boating in the area for many, if not all, of the Town's waterfront property owners faced with a situation similar to that of Mr. Murray.

The arbitrary and capricious nature of the Town's non-codified and unwritten standard giving rise to Mr. Murray's Arrest Citation constitutes a procedural due process violation and must be set aside.

V. CONCLUSION

Mr. Murray repeatedly raised the following legal errors in both the Municipal Court and to the Circuit Court:

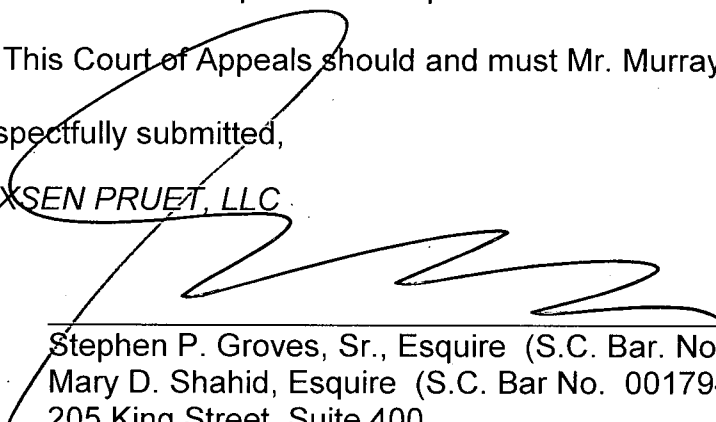
- (1) the Town is required to properly promulgate standards before enforcing them;
- (2) absent a demonstration of navigational interference the Town cannot sustain its challenge that the dock violated 21-75;
- (3) the Town's interpretation is unconstitutional and the Town's actions are arbitrary;
- (4) the Zoning Ordinance authorizes the Town to charge misdemeanor violations but only for violation "of any provision of this Zoning Ordinance; and
- (5) the confusion associated with conflicting requirements between OCRM and the Town, and the Town's recognition of OCRM's primary role in dock permitting through the Town's reliance on the OCRM permit to incorporate the Town's additional restrictions.

Nevertheless, Mr. Murray still stands convicted of violating the Town's ordinances even though fact the conviction was based upon an "interpretation" of an unwritten and un-promulgated standard. This Court of Appeals should and must Mr. Murray's conviction.

Respectfully submitted,

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