

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

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ARGUMENT AND CITATION OF AUTHORITY

A. Mr. Murray's Acceptance Of A Conditional Building Permit Does Not Prevent Mr. Murray From Defending Against The Town of Sullivan's Island's Criminal Prosecution When The Prosecution Violated Mr. Murray's Constitutional Rights To Due Process.

The Appellant, Michael Murray, understood the building permit included a condition that the dock not exceed adjacent docks. Moreover, Mr. Murray testified he constructed the dock in accordance with this condition. (R.p.241, line 5 – R.p.242, line 2). This is also shown by comparing the OCRM Dock Permit and the As-Built Survey. (R.pp.23-25, 39-45, 98-100). The OCRM Dock Permit authorizes installation of the pierhead, floater, and boatlift channel-ward of Mean Low Water. (R.pp.39-45). The As-Built Survey indicates that the pierhead, floater, and boatlift were located, essentially, on Mean Low Water with approximately one-half of the float and pierhead behind the Mean Low Water line and the other half in front of the Mean Low Water line. (R.pp.23-25, 98-100).

The As-Built Survey (R.pp.23-25, 98-100) and Mr. Murray's testimony (R.pp.230, line 17 – R.p.251, line 13) unambiguously demonstrate Mr. Murray's conscientious efforts to comply with the Town of Sullivan's Island's conditional building permit. The Town of Sullivan's Island Municipal Code states:

It shall be unlawful to erect, construct, improve, alter or repair any building, sign, or other structure or any part thereof or alter any parcel of land in preparation of such erection, construction, improvement or repair without first having obtained from the Building Inspector a written permit for such erection, construction, improvement, alteration, or repair, pursuant to the provisions of this article. Additionally, no permit shall be issued unless the property meets all requirements contained in Chapter 25-1 through 25-55. It shall likewise be unlawful to maintain any erection, construction, improvement, alteration, or repair of any building, structure, or part thereof or alter any parcel of land in

preparation of such erection, construction, improvement or repair without first having obtained the written permit here required. (9-18-07).¹

Mr. Murray adhered to Town of Sullivan's Island Municipal Zoning Ordinance Section 5.9 and obtained a Building Permit prior to construction of the dock. (R.p.22). The Building Permit (as issued) appended the OCRM Dock Permit and included a hand-drawn line with a handwritten notation "Move dock to not exceed adjacent docks." (R.p.22). The Certificate of Zoning Compliance included the following information for "Description of Work" - "Move pierhead, floats & Boat Lift landward to not exceed adjacent docks" (R.p.21), however under the heading "Specific Conditions of Approval" - ". . . meet the conditions of Zoning Ordinance Section 21-75" (R.p.21) (Emphasis in original).

Mr. Murray was directed to locate the dock based on a hand-drawn line with no bearings or distances, no metes or bounds, and no recoverable coordinates. Mr. Murray followed these directions and located the dock landward of the location authorized in the OCRM Dock Permit. (R.pp.27, 51, 128). Moreover, he complied with the "Specific Conditions of Approval" set forth in Town of Sullivan's Island Municipal Zoning Ordinance § 21-75. The as-built dock does not extend into the channel, the boundary of which is depicted on the OCRM Dock Permit and is a considerable distance from the seaward edge of the dock. (R.pp.27, 51, 128). Furthermore, there is no evidence or testimony to support an assertion that the dock interferes with navigation in "The Cove."

¹ See Town of Sullivan's Island Municipal Zoning Code, Article III, § 5.9. (R.p.77).

The Municipal Court and the Circuit Court based their respective findings and conclusions on the fact Mr. Murray acknowledged a legal responsibility to comply with the Building Permit. (R.p.240, line 11 – R.p.242, line 20; R.p.250, line 22 – R.p.251, line 16). That acknowledgement, however, does not render Mr. Murray’s legal arguments against a **criminal prosecution** invalid. The Municipal Court and the Circuit Court committed errors of law by refusing to consider the due process violations arising from criminal penalties imposed by the Town of Sullivan’s Island upon Mr. Murray pursuant to clearly unwritten and uncodified standards.

It is clear from the Town of Sullivan’s Island’s brief that criminal liability arises from Mr. Murray’s failure to adhere to the Town of Sullivan’s Island’s interpretation of Town of Sullivan’s Island Municipal Zoning Ordinance § 21-75.2 It is well-established that:

The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. The primary issues involved are whether the provisions of a penal statute are sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise Judge and jury of standards for the determination of guilt.³

Here, when the Town of Sullivan’s Island seeks a **criminal prosecution** for violations of a non-codified condition imposed in a Building Permit which is, in turn, a result of the Town’s unilateral legal interpretation of its own Municipal Ordinance. In this case, interpretation was unnecessary and there was no confusion as to what Section 21-75 of

² See Town of Sullivan’s Island’s Brief, p.12 (“ . . . it is worth noting that the condition is well-grounded in the ordinance and is supported by the sound rationale of the Town staff’s decision.”)

³ City of Beaufort v. Baker, 315 S.C. 146, 152, 432 S.E.2d 470, 473 (1993) (quoting State v. Albert, 257 S.C. 131, 134, 184 S.E.2d 605, 606 (1971)).

the TOSI Municipal Ordinance required. Consequently, the Town's actions clearly violated Mr. Murray's rights to procedural due process. The Town's actions were and remain unconstitutional. This Court of Appeals should and, indeed, must reverse the decision of the Circuit Court in all respects.

B. Mr. Murray Preserved All Of His Appellate Issues.

Mr. Murray set forth four issues on appeal in his Initial Brief which supported reversal of the Circuit Court. The Town of Sullivan's Island asserts that Mr. Murray failed to preserve three of those four issues (*i.e.*; Issues B, C, and D).

As relates to Issue B, Mr. Murray has consistently argued that the Town of Sullivan's Island's actions violated Mr. Murray's constitutional right to procedural due process. Unfortunately, both forums – the Municipal Court and the Circuit Court – adopted the Town's position Mr. Murray had accepted a building permit that contained a condition limiting the dock's channel-ward encroachment. Moreover, Mr. Murray testified he was aware of the limiting condition and specifically attempted to satisfy the condition. Based on Mr. Murray's acknowledgement of the condition and the need to comply with it, the Circuit Court denied Mr. Murray's appeal. Importantly, the Circuit Court never reached Mr. Murray's arguments and issues because the Circuit Court, like the Municipal Court, was unwilling to look past Mr. Murray's acceptance of the permit condition.

Mr. Murray strenuously argued the due process issue to the Municipal Court during the pre-trial hearing on his *Motion to Dismiss* conducted before the trial on the merits. (R.pp.9-12). The transcript of that pre-trial proceeding was part of the record before the Circuit Court. (R.pp.52-53). In that vein, Mr. Murray, during the Municipal Court's consideration of the dismissal motion, argued:

- “I’m just very concerned about a reputable dock builder and a reputable member of the – member of the community and homeowner on Sullivan’s Island being charged with a criminal offense for violation of a regulation that doesn’t say anything about [the fact] you can’t go any further out than the existing docks.” (R.pp.143, lines 9-15).
- “If you’re going to charge – ticket somebody and charge them with a criminal violation, you need to have – you need to not have staff policy and interpretation of something, but you need to have an ordinance that says, “We’ve got this line and you can’t go past it.” (R.p.154, lines 3-9).
- “So I’m just very – I’m very upset that these people are facing criminal liability, misdemeanor liability, whatever it is. These are very reputable people, they tried to work with the Town, they tried to do what was needed, and I think this is a really onerous restriction for the Town to be allowed to interpret it this way.” (R.p.155, lines 13-19).
- “Well, really, Your Honor, my contention is -- ... -- if you’re going to charge somebody with a criminal offense, the offense needs to be a properly promulgated ordinance, and not an interpretation of what your power is.” (R.p.161, lines 7-13).

The Municipal Court reserved ruling on any matters raised in the *Motion to Dismiss* and moved forward with conducting the criminal prosecution hearing. (R.pp.160, line 16 – R.p.161, line 17). The Municipal Court then issued its decision (R.p.28), later embodied in its *Return to the Circuit Court* (R.pp.52-55), finding that Mr. Murray recognized the Building Permit required that the dock go no farther than adjacent docks and Mr. Murray made a construction mistake when the dock was installed. (R.p.55, paras. 12-13).

Mr. Murray raised this issue of unconstitutionality again when he filed his appeal to the Circuit Court. (R.pp.34-36). Specifically, Mr. Murray asserted the Town of Sullivan’s Island’s actions were arbitrary, violated procedural due process, and that the

Circuit Court should apply the doctrine of strict construction to the Town of Sullivan Island's Municipal Ordinances when a party, such as Mr. Murray, was charged criminally when allegedly violating those TOSI Municipal Ordinances. (R.pp.34-36).

Nevertheless, the Circuit Court's decision simply mirrored the Municipal Court's conclusions. (R.p.3). The Circuit Court's initial form order included the statement that "Murray acknowledged notice of zoning laws and permit requirements and was found in violation. Murray failed to demonstrate an error of law." (R.p.3). In response, Mr. Murray move to alter or amend the judgment. (R.pp.56-59). Mr. Murray argued that the Circuit Court had failed to address the issues raised as to whether the Town can prosecute Appellant for a requirement that hasn't been promulgated and isn't contained in the Town's ordinances. (R.pp.56-59). The Circuit Court's order responding to the post-trial motion included findings that the Town of Sullivan's Island's ordinances lacked an express requirement that the dock be no farther channel-ward than adjacent docks (R.p.2, para. 1), but, notwithstanding that infirmity, Mr. Murray had accepted a conditional building permit and then failed to comply with the condition. (R.p.6, paras. 2-3).

Mr. Murray's arguments in his brief addressing the concept of fair notice (B), and the arbitrary nature of the Town's actions (D), were clearly raised and argued before the Circuit Court. In its final order, the Circuit Court denied the appeal since Mr. Murray had accepted the conditional Building Permit and then had failed to adhere to the imposed condition. (R.pp.1-2). Nevertheless, the Circuit Court specifically recognized that TOSI Municipal Zoning Ordinance § 21-75 failed to contain any notice of the Town's distance limiting requirement for constructed docks. (R.p.2, para. 1).

Mr. Murray also raised issues related to the inherent problems associated with conflicting legal requirements for dock construction, specifically as relates to navigational issues (Issue C)⁴. However, as with Mr. Murray's other arguments, both the Municipal Court and the Circuit Court simply concluded that Mr. Murray's recognition of the limiting condition imposed on the building permit and of the necessity for constructing the dock in accordance with the building permit was pivotal for case determination. Neither the Municipal Court nor the Circuit Court were concerned with any mitigating and/or vindicating issue once both forums settled on Mr. Murray's acknowledgement of responsibility.

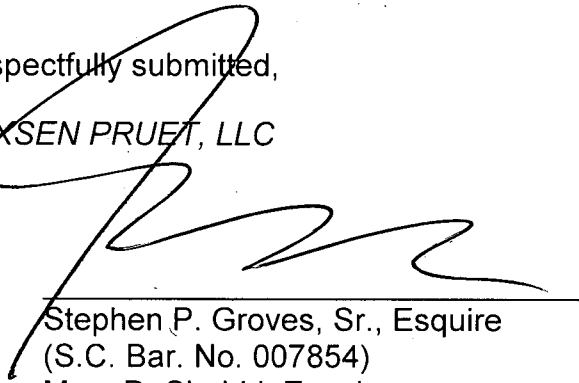
CONCLUSION

Mr. Murray consistently raised and preserved issues related to the inherent problem of the Town's criminal enforcement of an un-promulgated and un-adopted distance limiting requirement. Both the Municipal Court and the Circuit Court believed Mr. Murray's acknowledgement of responsibility rendered any other arguments meaningless. The Circuit Court's conclusion that Mr. Murray's acknowledgment completely determined the outcome must be reversed.

⁴ Mr. Murray's "Notice of Appeal" filed with the Circuit Court provided an extensive factual argument addressing the Town of Sullivan's Island's efforts to address, albeit illegitimately, navigational concerns." (R.pp.29-36).

Respectfully submitted,
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