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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
ADMINISTRATIVE LAW COURT

Hon. John D. McLeod

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SC Court of Appeals

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.

Record on Appeal

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Sunset Cay, LLC, Petitioner, vs. South Carolina Department of Health and Environmental Control, Respondent.	)	Docket No. 15-ALJ-07-0579-CC **ORDER OF DISMISSAL**

STATEMENT OF THE CASE

This matter comes before the South Carolina Administrative Law Court ("ALC" or "Court") on the South Carolina Department of Health and Environmental Control's (Department" or "DHEC") motion to dismiss the portion of Sunset Cay, LLC's ("Sunset Cay" or "Petitioner") case relating to two Cease and Desist directives upon the ground that Petitioner failed to timely comply with procedural rules in respect thereto.

Further, Respondent seeks a ruling that the remaining portion of Petitioner's case involving DHEC's Declaration under Regulation 30-9 ("Declaration") is not ripe for determination.

For the reasons set forth below, the Court finds that Respondent is correct in respect to the Cease and Desist issue and grants the partial motion to dismiss of Petitioner's claim.

In considering the ripeness issue, the Court has found that it is without jurisdiction and dismisses the remaining portion of the case, without prejudice.

FACTUAL BACKGROUND

On April 9, 2003, DHEC issued Permit number 2002-1H-190-P ("Permit") to Petitioner authorizing a marina on the Folly River at Folly Beach, South Carolina.[1] On December 14, 2005, the Department amended the Permit authorizing the placement of a 30'x29' building on an existing 50'x50' pierhead. The 30'x29' building contains restrooms on the first floor and a ship's store on the second floor.

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[1] The marina has been in continuous use since 1947.

On January 13, 2015, DHEC met with Petitioner's representative, Mr. Clark, to discuss an amendment to the Permit to allow a restaurant on the second floor.[2] On January 15, 2015, DHEC conducted a compliance inspection of the marina and found an unauthorized restaurant under construction on the second floor, an unauthorized apartment on the third floor, and a number of unauthorized jet docks. After discussions with Petitioner regarding the unauthorized restaurant and apartment, DHEC emailed a Cease and Desist directive to Mr. Clark on March 13, 2015, to stop all operations of the restaurant and apartment. The Department served Mr. Clark with the Cease and Desist directive on March 16, 2015. Petitioner never sent a request for a Final Review Conference to DHEC on this Cease and Desist directive.

DHEC sent Petitioner another Cease and Desist directive on October 26, 2015 via certified mail. Again, Petitioner never submitted a request for a Final Review Conference to DHEC to contest this Cease and Desist directive.

On June 1, 2015, DHEC met with Petitioner to discuss a plan for the uses of each floor of the building to ensure compliance with regulations prior to submitting an amendment to the Permit. On July 6, 2015, Petitioner submitted proposed plans for each floor of the building. DHEC responded on August 4, 2015, concluding that the "[u]se of the third floor as a ship's store office and yacht sales office cannot be authorized by the Department."

On August 27, 2015, Sunset Cay filed a "Petition for Declaration under Regulation 30-9", requesting that DHEC declare that certain secondary uses "are all water dependent uses in conformity with the statutory definition contained in Regulation 30-1(52)."[3] Petitioner additionally requested the Department "to provide a written list of all the proposed water dependent uses the Department concedes are 'water dependent' based on controlling definition of Regulation 30-1[.]"

The Department issued its Declaration on October 12, 2015, proclaiming that none of the secondary uses proposed by Petitioner were water dependent. Additionally, the Department responded to Petitioner's request for a list of water dependent uses. DHEC stated, "the regulations require the Department to determine what is water dependent based on a demonstration that the dependence on, use of, or access to coastal waters is essential to the facility's primary activity."

On October 12, 2015, Petitioner filed a Motion for Reconsideration of the Department's

[2] DHEC, on September 18, 2009, determined that Petitioner's request to serve snacks and light food items as part of the existing ship's store was consistent with the Permit.

[3] "Ship Store Office and Storage; Yacht Sales Office; Captain and Transient Lounge; Commodore Meeting Room; and Public Waterway Events."

Declaration. The Department construed the Motion for Reconsideration as a written request for final review. DHEC, on December 2, 2015, informed Petitioner that it "will not conduct a Final Review Conference on the above-referenced matter."

After receipt of DHEC's denial for a Final Review Conference, Petitioner filed a Request for a Contested Case Hearing before the ALC on December 23, 2015. In its "Notice of Appeal," included in the Request for a Contested Case Hearing, Petitioner states that this Court has jurisdiction "under the *South Carolina Constitution*, Article I, § 22, the *Administrative Procedures Act*, § 1-23-380, S. C. Code, and Rule 33 of the *Administrative Law Court Rules of Procedure*." (emphasis in original).

DISCUSSION

Sunset Cay failed to exhaust administrative remedies as to the Cease and Desist directives.

Sunset Cay failed to properly invoke this Court's jurisdiction over its request to compel DHEC to withdraw the Cease and Desist directives dated March 3, 2015, and October 26, 2015. In accord with S.C. Code Ann. § 44-1-60(G) (Supp. 2015), Sunset Cay may file a request with the ALC for a contested case within thirty days after:

> (1) notice is mailed to the applicant, permittee, licensee, and affected persons that the board declined to hold a final review conference; or
> (2) the sixty calendar day deadline to hold the final review conference lapses and no conference has been held; or
> (3) the final agency decision resulting from the final review conference is received by the parties.

A staff decision of DHEC becomes a final agency decision fifteen days "after notice of the staff decision has been mailed to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department[.]" S.C. Code Ann. § 44-1-60(E)(2) (Supp. 2015). The statutory fifteen day deadline to file a request for final review for the March 16, 2015, Cease and Desist directive was April 2, 2015, and the statutory fifteen day deadline to file a request for review for the October 26, 2015, Cease and Desist directive was November 20, 2015.

Petitioner has never filed a request for Final Review Conference for either Cease and Desist directive issued by the Department. Accordingly, Petitioner has failed to exhaust administrative remedies prior to filing a request for a contested case on those issues. Petitioner has not satisfied the statutory prerequisites which would allow it to pursue this matter in this Court. Because Sunset Cay did not file a request for a Final Review Conference on either Cease and Desist directive, the

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Department never declined to hold a Final Review Conference, nor did the Department allow sixty days to lapse after a request for a Final Review Conference was submitted, nor did DHEC issue a final agency decision as a result of the Final Review Conference. Thus, this Court dismisses the claims raised by Petitioner regarding the two Cease and Desist directives for failure to exhaust administrative remedies. Hyde v. S.C. Dep't of Mental Health, 314 S.C. 207, 442 S.E.2d 582 (1994).

This Court lacks subject matter jurisdiction over the Petitioner's claim that arose from DHEC's Declaration.

The ALC can only exercise those powers which have been conferred upon it by the South Carolina General Assembly. Triska v. Dep't of Health & Envtl. Control, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987). "Administrative Law Judges...must follow the laws as written." Ward v. State, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000).

"The lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised sua sponte by the court." Town of Hilton Head Island v. Godwin, 370 S.C. 221, 223, 634 S.E.2d 59, 60–61 (Ct. App. 2006). "Lack of jurisdiction of the subject matter cannot be waived even by consent and therefore such lack can and should be taken notice of by this Court *Ex mero motu*." Harden v. S.C. State Highway Dep't, 266 S.C. 119, 124, 221 S.E.2d 851, 853 (1976).

Under the Administrative Procedures Act ("APA"), "persons aggrieved by an agency decision are entitled to seek review of the decision by means of a contested case hearing before the ALC. The ALC sits as the adjudicatory body in all contested cases involving DHEC." Berry v. S.C. Dep't of Health & Envtl. Control, 402 S.C. 358, 364, 742 S.E.2d 2, 5 (2013). S.C. Code Ann. § 1-23-600(A) (Supp. 2015) in part provides:

> An administrative law judge shall preside over all hearings of contested cases as defined in Section 1-23-505 or Article I, Section 22, Constitution of the State of South Carolina, 1895, involving the departments of the executive branch of government as defined in Section 1-30-10 in which a single hearing officer, or an administrative law judge, is authorized or permitted by law or regulation to hear and decide these cases...

Therefore, in order for this Court to have jurisdiction over this matter, the issue must fall under the requirement of a contested case as defined in S.C. Code Ann. 1-23-505(3) or under the requirements of S.C. Const. art. I, § 22.

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S.C. Code Ann § 1-23-505(3) (Supp. 2015) defines "Contested Case" as:

> a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law or by Article I, Section 22, Constitution of the State of South Carolina, 1895, to be determined by an agency or the Administrative Law Court after an opportunity for hearing.

Sunset Cay, in its Request for a Contested Case, cites S.C. Const. art. I, § 22, S.C. Code Ann. § 1-23-380 (Supp. 2015), and SCALC Rule 33 as granting jurisdiction to the ALC to hear this matter. As an initial matter, S.C. Code Ann. § 1-23-380 governs judicial review of a final decision in a contested case, and is therefore inapplicable here because a final decision in a contested case has not occurred. Further, SCALC Rule 33 also does not confer jurisdiction because if this matter were to be heard, it would be heard as a contested case and not under this Court's appellate jurisdiction. See Berry, 402 S.C. at 364, 742 S.E.2d at 5. The determination of jurisdiction under S.C. Const. art. I, § 22 will be discussed below.

Petitioner is contesting DHEC's Declaration. Pursuant to 2 S.C. Code Ann. Regs. 30-9(D) (2011), "Interested persons may petition to the Department for declaratory rulings. The Department shall rule on each petition, in writing, within 45 days of receipt." After receiving the Department's Declaration, Petitioner filed a Motion for Reconsideration. The Department construed the Motion for Reconsideration as a request for a Final Review Conference. The Department then proceeded to deny Sunset Cay's request for a Final Review Conference. The Department's decision to entertain what it considered a request for a Final Review Conference was incorrect because DHEC authority to accept or deny a Request for a Final Review Conference is found in S.C. Code Ann. § 44-1-60(F) (Supp. 2015). In order for the mechanisms of a Final Review Conference to be available, compliance with S.C. Code Ann. § 44-1-60(A) (Supp. 2015) is a prerequisite.

S.C. Code Ann. § 44-1-60(A) states "[a]ll department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, license, or other actions of the department which may give rise to a contested case shall be made using the procedures set forth in this section." The "Petition for Declaration under Regulation 30-9" asked two questions: 1) whether certain uses qualified as water dependent; and 2) what uses in general qualify as water dependent. Neither of these two questions involve the issuance, denial, renewal, suspension, or revocation of a permit or license. Therefore, it was improper for the Department to follow the procedure outlined

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in S.C. Code Ann. § 44-1-60(F) in denying Petitioner's request for a Final Review Conference. Further, as will be discussed below, neither question gives rise to a contested case.

There are no statutory or regulatory laws that grant this Court jurisdiction. 2 S.C. Code Ann. Regs. 30-9(D) does not provide a manner by which an interested party may appeal a Department Declaration. The Department's Declaration does not involve the issuance, denial, suspension or revocation of permits. It is telling that 2 S.C. Code Ann. Regs. 30-9(D) allows the request and requires a written response within 45 days but pointedly fails to include a procedural mechanism making the process an adversarial one that would be followed by an appeal or a contested case. Instead it is similar to an Attorney General's opinion. Additionally, the catch-all provision of S.C. Code Ann. § 44-1-60(A), "other actions of the department which may give rise to a contested case" is also not applicable here because, as discussed below, the Department's Declaration does not fall under the definition of a contested case under S.C. Code Ann. § 1-23-505(3), nor does the South Carolina State Constitution require notice and an opportunity to be heard on DHEC's Declaration because Petitioner is not "finally bound" by a decision affecting any private rights.

A contested case requires the ALC to determine the "legal rights, duties, or privileges of a party...after an opportunity for hearing." S.C. Code Ann. § 1-23-505(3). Here, there are no legal rights, duties, or privileges that would be infringed if Petitioner was not provided with a contested case. Sunset Cay's Petition for Declaration under Regulation 30-9 does not affect the legal rights, duties, or privileges of Petitioner. The Department's Declaration is nothing more than an advisory opinion from DHEC.

This Court also does not have jurisdiction under S.C. Const. art. I, § 22. The South Carolina Supreme Court has interpreted S.C. Const. art. I, § 22 "as specifically guaranteeing persons the right to notice and an opportunity to be heard by an administrative agency, even when a contested case under the APA is not involved." Ross v. Med. Univ. of S.C., 328 S.C. 51, 68, 492 S.E.2d 62, 71 (1997); see also Stono River Envtl. Prot. Ass'n v. S.C. Dep't of Health & Envtl. Control, 305 S.C. 90, 93-94, 406 S.E.2d 340, 342 (1991); League of Women Voters of Georgetown Cty. v. Litchfield-by-the-Sea, 305 S.C. 424, 409 S.E.2d 378 (1991) (overruled on other grounds by Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 560 S.E.2d 410 (2002)).

S.C. Const. art. I, § 22 reads:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

"In recognition of the increasing number of governmental powers delegated to administrative agencies, [S.C. Const. art. I, § 22] was added to the 1895 Constitution in 1970 'as a safeguard for the protection of liberty and property of citizens.'" Ross, 328 S.C. at 68, 492 S.E.2d at 71 (quoting Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, p. 21 (1969)). South Carolina courts have interpreted the protections provided by S.C. Const. art. I, § 22 as "equivalent of those afforded by the Due Process Clause of our state and federal Constitutions." S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n, 389 S.C. 380, 391, 699 S.E.2d 146, 152 (2010).

Pointedly, S.C. Const. art. I, § 22, states that "no person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard[.]" (emphasis supplied). 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.

Because there is no statutory or regulatory law, and no requirement for an opportunity to be heard under S.C. Const. art. I, § 22 that grants this Court jurisdiction over DHEC's Declaration, this Court must dismiss this matter for lack of subject matter jurisdiction.

ORDER

IT IS THEREFORE ORDERED that this matter is **DISMISSED**, without prejudice.

AND IT IS SO ORDERED.

October 17, 2016
Columbia, S.C.

John D. McLeod, Judge
South Carolina Administrative Law Court

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CERTIFICATE OF SERVICE

I, Anthony R. Goldman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

October 17, 2016
Columbia, S.C.

Anthony R. Goldman
Judicial Law Clerk

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Sunset Cay, LLC, Petitioner, vs. South Carolina Department of Health and Environmental Control, Respondent.	)	Docket No. 15-ALJ-07-0579-CC **ORDER VACATING PREVIOUS ORDER AND AMENDED ORDER OF DISMISSAL**

This Amended Order of Dismissal is being issued to correct the previous Order of Dismissal, dated October 17, 2016, that was erroneously dismissed 'without prejudice', when it should have been dismissed 'with prejudice', as to the matter of the cease and desist directives, and 'without prejudice' as to the declaration.

STATEMENT OF THE CASE

This matter comes before the South Carolina Administrative Law Court ("ALC" or "Court") on the South Carolina Department of Health and Environmental Control's (Department" or "DHEC") motion to dismiss the portion of Sunset Cay, LLC's ("Sunset Cay" or "Petitioner") case relating to two Cease and Desist directives upon the ground that Petitioner failed to timely comply with procedural rules in respect thereto.

Further, Respondent seeks a ruling that the remaining portion of Petitioner's case involving DHEC's Declaration under Regulation 30-9 ("Declaration") is not ripe for determination.

For the reasons set forth below, the Court finds that Respondent is correct in respect to the Cease and Desist issue and grants the partial motion to dismiss of Petitioner's claim.

In considering the ripeness issue, the Court has found that it is without jurisdiction and dismisses the remaining portion of the case, without prejudice.

FACTUAL BACKGROUND

On April 9, 2003, DHEC issued Permit number 2002-1H-190-P ("Permit") to Petitioner authorizing a marina on the Folly River at Folly Beach, South Carolina.[1] On December 14, 2005,

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the Department amended the Permit authorizing the placement of a 30'x29' building on an existing 50'x50' pierhead. The 30'x29' building contains restrooms on the first floor and a ship's store on the second floor.

On January 13, 2015, DHEC met with Petitioner's representative, Mr. Clark, to discuss an amendment to the Permit to allow a restaurant on the second floor.[2] On January 15, 2015, DHEC conducted a compliance inspection of the marina and found an unauthorized restaurant under construction on the second floor, an unauthorized apartment on the third floor, and a number of unauthorized jet docks. After discussions with Petitioner regarding the unauthorized restaurant and apartment, DHEC emailed a Cease and Desist directive to Mr. Clark on March 13, 2015, to stop all operations of the restaurant and apartment. The Department served Mr. Clark with the Cease and Desist directive on March 16, 2015. Petitioner never sent a request for a Final Review Conference to DHEC on this Cease and Desist directive.

DHEC sent Petitioner another Cease and Desist directive on October 26, 2015 via certified mail. Again, Petitioner never submitted a request for a Final Review Conference to DHEC to contest this Cease and Desist directive.

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On August 27, 2015, Sunset Cay filed a "Petition for Declaration under Regulation 30-9", requesting that DHEC declare that certain secondary uses "are all water dependent uses in conformity with the statutory definition contained in Regulation 30-1(52)."[3] Petitioner additionally requested the Department "to provide a written list of all the proposed water dependent uses the Department concedes are 'water dependent' based on controlling definition of Regulation 30-1[.]"

The Department issued its Declaration on October 12, 2015, proclaiming that none of the secondary uses proposed by Petitioner were water dependent. Additionally, the Department responded to Petitioner's request for a list of water dependent uses. DHEC stated, "the regulations

[2] DHEC, on September 18, 2009, determined that Petitioner's request to serve snacks and light food items as part of the existing ship's store was consistent with the Permit.

[3] "Ship Store Office and Storage; Yacht Sales Office; Captain and Transient Lounge; Commodore Meeting Room; and Public Waterway Events."

require the Department to determine what is water dependent based on a demonstration that the dependence on, use of, or access to coastal waters is essential to the facility's primary activity."

On October 12, 2015, Petitioner filed a Motion for Reconsideration of the Department's Declaration. The Department construed the Motion for Reconsideration as a written request for final review. DHEC, on December 2, 2015, informed Petitioner that it "will not conduct a Final Review Conference on the above-referenced matter."

After receipt of DHEC's denial for a Final Review Conference, Petitioner filed a Request for a Contested Case Hearing before the ALC on December 23, 2015. In its "Notice of Appeal," included in the Request for a Contested Case Hearing, Petitioner states that this Court has jurisdiction "under the *South Carolina Constitution*, Article I, § 22, the *Administrative Procedures Act*, § 1-23-380, S. C. Code, and Rule 33 of the *Administrative Law Court Rules of Procedure*." (emphasis in original).

DISCUSSION

Sunset Cay failed to exhaust administrative remedies as to the Cease and Desist directives.

Sunset Cay failed to properly invoke this Court's jurisdiction over its request to compel DHEC to withdraw the Cease and Desist directives dated March 3, 2015, and October 26, 2015. In accord with S.C. Code Ann. § 44-1-60(G) (Supp. 2015), Sunset Cay may file a request with the ALC for a contested case within thirty days after:

> (1) notice is mailed to the applicant, permittee, licensee, and affected persons that the board declined to hold a final review conference; or
> (2) the sixty calendar day deadline to hold the final review conference lapses and no conference has been held; or
> (3) the final agency decision resulting from the final review conference is received by the parties.

A staff decision of DHEC becomes a final agency decision fifteen days "after notice of the staff decision has been mailed to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department[.]" S.C. Code Ann. § 44-1-60(E)(2) (Supp. 2015). The statutory fifteen day deadline to file a request for final review for the March 16, 2015, Cease and Desist directive was April 2, 2015, and the statutory fifteen day deadline to file a request for review for the October 26, 2015, Cease and Desist directive was November 20, 2015.

Petitioner has never filed a request for Final Review Conference for either Cease and Desist directive issued by the Department. Accordingly, Petitioner has failed to exhaust administrative remedies prior to filing a request for a contested case on those issues. Petitioner has not satisfied

the statutory prerequisites which would allow it to pursue this matter in this Court. Because Sunset Cay did not file a request for a Final Review Conference on either Cease and Desist directive, the Department never declined to hold a Final Review Conference, nor did the Department allow sixty days to lapse after a request for a Final Review Conference was submitted, nor did DHEC issue a final agency decision as a result of the Final Review Conference. Thus, this Court dismisses the claims raised by Petitioner regarding the two Cease and Desist directives for failure to exhaust administrative remedies. Hyde v. S.C. Dep't of Mental Health, 314 S.C. 207, 442 S.E.2d 582 (1994).

This Court lacks subject matter jurisdiction over the Petitioner's claim that arose from DHEC's Declaration.

The ALC can only exercise those powers which have been conferred upon it by the South Carolina General Assembly. Triska v. Dep't of Health & Envtl. Control, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987). "Administrative Law Judges...must follow the laws as written." Ward v. State, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000).

"The lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised sua sponte by the court." Town of Hilton Head Island v. Godwin, 370 S.C. 221, 223, 634 S.E.2d 59, 60–61 (Ct. App. 2006). "Lack of jurisdiction of the subject matter cannot be waived even by consent and therefore such lack can and should be taken notice of by this Court *Ex mero motu*." Harden v. S.C. State Highway Dep't, 266 S.C. 119, 124, 221 S.E.2d 851, 853 (1976).

Under the Administrative Procedures Act ("APA"), "persons aggrieved by an agency decision are entitled to seek review of the decision by means of a contested case hearing before the ALC. The ALC sits as the adjudicatory body in all contested cases involving DHEC." Berry v. S.C. Dep't of Health & Envtl. Control, 402 S.C. 358, 364, 742 S.E.2d 2, 5 (2013). S.C. Code Ann. § 1-23-600(A) (Supp. 2015) in part provides:

> An administrative law judge shall preside over all hearings of contested cases as defined in Section 1-23-505 or Article I, Section 22, Constitution of the State of South Carolina, 1895, involving the departments of the executive branch of government as defined in Section 1-30-10 in which a single hearing officer, or an administrative law judge, is authorized or permitted by law or regulation to hear and decide these cases...

Therefore, in order for this Court to have jurisdiction over this matter, the issue must fall under the requirement of a contested case as defined in S.C. Code Ann. 1-23-505(3) or under the

requirements of S.C. Const. art. I, § 22.

S.C. Code Ann § 1-23-505(3) (Supp. 2015) defines "Contested Case" as:

> a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law or by Article I, Section 22, Constitution of the State of South Carolina, 1895, to be determined by an agency or the Administrative Law Court after an opportunity for hearing.

Sunset Cay, in its Request for a Contested Case, cites S.C. Const. art. I, § 22, S.C. Code Ann. § 1-23-380 (Supp. 2015), and SCALC Rule 33 as granting jurisdiction to the ALC to hear this matter. As an initial matter, S.C. Code Ann. § 1-23-380 governs judicial review of a final decision in a contested case, and is therefore inapplicable here because a final decision in a contested case has not occurred. Further, SCALC Rule 33 also does not confer jurisdiction because if this matter were to be heard, it would be heard as a contested case and not under this Court's appellate jurisdiction. See Berry, 402 S.C. at 364, 742 S.E.2d at 5. The determination of jurisdiction under S.C. Const. art. I, § 22 will be discussed below.

Petitioner is contesting DHEC's Declaration. Pursuant to 2 S.C. Code Ann. Regs. 30-9(D) (2011), "Interested persons may petition to the Department for declaratory rulings. The Department shall rule on each petition, in writing, within 45 days of receipt." After receiving the Department's Declaration, Petitioner filed a Motion for Reconsideration. The Department construed the Motion for Reconsideration as a request for a Final Review Conference. The Department then proceeded to deny Sunset Cay's request for a Final Review Conference. The Department's decision to entertain what it considered a request for a Final Review Conference was incorrect because DHEC authority to accept or deny a Request for a Final Review Conference is found in S.C. Code Ann. § 44-1-60(F) (Supp. 2015). In order for the mechanisms of a Final Review Conference to be available, compliance with S.C. Code Ann. § 44-1-60(A) (Supp. 2015) is a prerequisite.

S.C. Code Ann. § 44-1-60(A) states "[a]ll department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, license, or other actions of the department which may give rise to a contested case shall be made using the procedures set forth in this section." The "Petition for Declaration under Regulation 30-9" asked two questions: 1) whether certain uses qualified as water dependent; and 2) what uses in general qualify as water dependent. Neither of these two questions involve the issuance, denial, renewal, suspension, or revocation of

a permit or license. Therefore, it was improper for the Department to follow the procedure outlined in S.C. Code Ann. § 44-1-60(F) in denying Petitioner's request for a Final Review Conference. Further, as will be discussed below, neither question gives rise to a contested case.

There are no statutory or regulatory laws that grant this Court jurisdiction. 2 S.C. Code Ann. Regs. 30-9(D) does not provide a manner by which an interested party may appeal a Department Declaration. The Department's Declaration does not involve the issuance, denial, suspension or revocation of permits. It is telling that 2 S.C. Code Ann. Regs. 30-9(D) allows the request and requires a written response within 45 days but pointedly fails to include a procedural mechanism making the process an adversarial one that would be followed by an appeal or a contested case. Instead it is similar to an Attorney General's opinion. Additionally, the catch-all provision of S.C. Code Ann. § 44-1-60(A), "other actions of the department which may give rise to a contested case" is also not applicable here because, as discussed below, the Department's Declaration does not fall under the definition of a contested case under S.C. Code Ann. § 1-23-505(3), nor does the South Carolina State Constitution require notice and an opportunity to be heard on DHEC's Declaration because Petitioner is not "finally bound" by a decision affecting any private rights.

A contested case requires the ALC to determine the "legal rights, duties, or privileges of a party...after an opportunity for hearing." S.C. Code Ann. § 1-23-505(3). Here, there are no legal rights, duties, or privileges that would be infringed if Petitioner was not provided with a contested case. Sunset Cay's Petition for Declaration under Regulation 30-9 does not affect the legal rights, duties, or privileges of Petitioner. The Department's Declaration is nothing more than an advisory opinion from DHEC.

This Court also does not have jurisdiction under S.C. Const. art. I, § 22. The South Carolina Supreme Court has interpreted S.C. Const. art. I, § 22 "as specifically guaranteeing persons the right to notice and an opportunity to be heard by an administrative agency, even when a contested case under the APA is not involved." Ross v. Med. Univ. of S.C., 328 S.C. 51, 68, 492 S.E.2d 62, 71 (1997); see also Stono River Envtl. Prot. Ass'n v. S.C. Dep't of Health & Envtl. Control, 305 S.C. 90, 93-94, 406 S.E.2d 340, 342 (1991); League of Women Voters of Georgetown Cty. v. Litchfield-by-the-Sea, 305 S.C. 424, 409 S.E.2d 378 (1991) (overruled on other grounds by Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 560 S.E.2d 410 (2002)).

S.C. Const. art. I, § 22 reads:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

"In recognition of the increasing number of governmental powers delegated to administrative agencies, [S.C. Const. art. I, § 22] was added to the 1895 Constitution in 1970 'as a safeguard for the protection of liberty and property of citizens.'" Ross, 328 S.C. at 68, 492 S.E.2d at 71 (quoting Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, p. 21 (1969)). South Carolina courts have interpreted the protections provided by S.C. Const. art. I, § 22 as "equivalent of those afforded by the Due Process Clause of our state and federal Constitutions." S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n, 389 S.C. 380, 391, 699 S.E.2d 146, 152 (2010).

Pointedly, S.C. Const. art. I, § 22, states that "no person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard[.]" (emphasis supplied). 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.

Because there is no statutory or regulatory law, and no requirement for an opportunity to be heard under S.C. Const. art. I, § 22 that grants this Court jurisdiction over DHEC's Declaration, this Court must dismiss this matter for lack of subject matter jurisdiction.

ORDER

IT IS THEREFORE ORDERED that this matter is **DISMISSED WITHOUT PREJUDICE** as to the declaration.

IT IS FURTHER ORDERED that his matter is **DISMISSED WITH PREJUDICE** as to the cease and desist directives.

AND IT IS SO ORDERED.

October 21, 2016
Columbia, S.C.

John D. McLeod, Judge
South Carolina Administrative Law Court

CERTIFICATE OF SERVICE

I, Anthony R. Goldman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



October 24, 2016
Columbia, S.C.

Anthony R. Goldman
Judicial Law Clerk

D H E C
PROMOTE PROTECT PROSPER
Catherine E. Heigel, Director
Promoting and protecting the health of the public and the environment

October 12, 2015

Mr. Thomas Goldstein
Belk, Cobb, Infinger and Goldstein, P.A.
2344 Cosgrove Avenue
Charleston, SC 29405

Re: Petition for Declaratory Ruling; P/N 2002-1H-190-P; Sunset Cay, L.L.C
Folly Beach, SC

Dear Mr. Goldstein,

This letter is the Department's response to your request for a Declaratory Ruling under Regulation 30-9 regarding proposed "secondary uses" for unit 301 at the Sunset Cay Marina. Specifically, you requested the Department to make a declaration that the five "secondary uses" that your client has identified for Unit 301 are in conformance with the regulatory definition of water-dependent, Regulation 30-1(52). You further specify the five secondary uses as:

A. Ship's store office and storage;
B. Yacht sales office;
C. Captain and transient lounge;
D. Commodore meeting room;
E. Public waterway events.

As background, Sunset Cay Marina was originally permitted by the Department on April 9, 2003, for the primary purpose of temporary and permanent docking space and fueling. The permit was amended on December 14, 2005, to allow for the construction of a two-story building on the pierhead and associated water dependent uses (bathrooms and a ship store). Specifically, the Department received a request to amend the 2003 permit by constructing a 30' x 29' "restroom and commercial facility on the existing 50' x 50' pierhead" with two floors. The request further stated:

> The first floor will be restroom facilities; one will be for Women and one for Men. The first floor will also have storage for Oil Boom absorbent pads and emergency equipment along with other items necessary for safe operation of the Marina. The second floor will be a "Ship Store" and an office for the "Dock Master" and Marina personnel along with the Operations Manual.

The affidavit of newspaper publication and submitted permit drawings, also, support your client's request for only two floors. In the December 14, 2005, amendment letter, the Department specifically stated:

> The above referenced permit has been amended to authorize the placement of a building containing restrooms and a ships store on the existing 50' by 50' fixed pierhead. The building will be 30' by 29' where the first floor will contain the bathrooms and the second floor will contain the ship's store. This work has been authorized, as the proposed uses of the building are water dependent. Non-water dependent uses are not allowed.

This amendment did not authorize a third floor. Neither the permit amendment request nor the affidavit of newspaper publication nor the issued permit amendment reference a third floor.

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. To date, no demonstration has been provided to the Department that the additional proposed uses for the third floor are water dependent. Therefore, the Department determined these proposed uses to be non-water dependent in two separate letters to Mr. Clark dated June 29, 2015 and August 4, 2015, respectively. The Department offers the following response to your petition for a Declaratory Ruling.

Regulation 30-1(D)(52), defines water dependent as "a **facility** which can **demonstrate** that dependence on, use of, or access to coastal waters **is essential to the functioning of its primary activity**. (emphasis added)" The Department previously determined the initially proposed dock master's office, ships store, storage space and restrooms were water dependent uses essential to the functioning of the marina's primary activity of providing temporary and permanent docking space and fuel sales to its customers . The marina regulations support this position. Specifically, Regulation 30-12(E)(3)(b)(x) states "**one** reasonably sized dock master's office may be constructed within a permitted marina. This **office will be limited to water dependent uses such as fuel sales.** Restroom facilities may be placed in this office; however, food and beverage services, clothing sales and other non-water dependent uses are prohibited." The regulation limits the number of offices to **one** and identifies water dependent uses such as fuel sales. The Department does not have the authority to authorize more than one office. Use of unit 301, or any other portion of this marina facility, for additional offices, Yacht Sales office, Commodore meeting room, and space for Lounges and Public Waterway events are not water dependent and cannot be authorized by the Department. The ship store on the second floor is approximately 1,185 square feet in addition to the storage area on the first floor. Considering the sparse inventory in this store (as observed by the Department during multiple site inspections), this facility, currently has adequate storage space.

Furthermore, your client has not **demonstrated** to the Department that the additional proposed uses above meet the regulatory definition of water dependent. Specifically, your client (applicant) bears the burden of demonstrating that dependence on, use of, or access to coastal waters is ***essential*** to the functioning of its primary activity of providing fuel sales and temporary and

permanent docking space to its customers. While an additional ship store office and storage, Yacht Sales office, Commodore meeting room, and space for Lounges and Public Waterway events may be, in the broadest sense, generally associated with the water, such a general association does not satisfy the regulatory standard. Regulation 30-1(D)(52) requires your client to demonstrate that their proposed uses are essential to providing temporary and permanent dock space and fuel sales. The dictionary defines "essential" as "absolutely necessary" or "indispensable". The Department takes the position that your client's additional above-referenced proposed uses are not *absolutely necessary* to provide temporary and permanent dock space and fuel sales. Your client can continue the primary activity of providing temporary and permanent docking space and fuel sales without a Yacht Sales office, a Captain and transient lounge, a Commodore meeting room or a Public waterway events room. These proposed secondary uses are not essential to the primary activity of a marina and therefore are not water dependent in accordance with the regulatory definition.

In your petition, you request the Department to provide a list of water dependent uses. While no such list exists, the marina regulations identify some water dependent uses such as fuel sales. The regulations further specify certain non-water dependent uses such as restaurants, motels, laundries, food and beverage services, and clothing sales. Again, the regulations require the Department to determine what is water dependent based on a demonstration that the dependence on, use of, or access to coastal waters is essential to the facility's primary activity.

Please allow this letter to serve as the Department's Declaratory Ruling for the matters presented by you regarding Sunset Cay, L.L.C. permit number 2002-1H-190-P. Please call Blair N. William, Manager, Wetland Permitting Section, at 843-953-0232 or email him at williabn@dhec.sc.gov if you need further clarification or have questions.

Respectfully,

Sara P. Bazemore

Sara P. Bazemore
Deputy Director
Office of Ocean and Coastal Resource Management

CC: Blair N. Williams, Manager, DHEC Wetland Permitting and Certification Section

BOARD:
Allen Amsler
Chairman

Mark S. Lutz
Vice Chairman

B. Kirol, DDS
Secretary

D H E C
PROMOTE PROTECT PROSPER

Catherine E. Heigel, Director
Promoting and protecting the health of the public and the environment
South Carolina Board of Health and Environmental Control
2600 Bull Street, Columbia, South Carolina 29201 · Telephone: (803) 898-3309 · Facsimile: (803) 898-3393 · lisa.longshore@dhec.sc.gov

BOARD:
R. Kenyon Wells
Charles M. Joye II, P.E.
L. Clarence Batts, Jr.
John O. Hutto, Sr., MD
William Lee Hewitt, III

December 2, 2015

U.S. Mail – Certified – Return Receipt
9214 8969 0099 9790 1403 0410 00
Thomas R. Goldstein, Esquire
Belk, Cobb, Infinger and Goldstein, P.A.
Post Office Box 71121
Charleston, SC 29415

Via Electronic Mail Delivery
Brad Churdar, Esquire
SCDHEC – Office of General Counsel
1362 McMillan Avenue
Charleston, SC 29405

RE: ***Docket No. 15-RFR-69, Sunset Cay, LLC*** *– Response to Petition for Declaratory Ruling; P/N 2002-1H-190-P*

Dear Counsel of Record:

The South Carolina Board of Health and Environmental Control will not conduct a Final Review Conference on the above-referenced matter.

CONTESTED CASE GUIDANCE

S.C. Code Section 44-1-60 provides that if the Board declines in writing to schedule a final review conference, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court (ALC) within thirty calendar days after notice is mailed to the applicant,

permittee, licensee, and affected person that the Board declined to hold a final review conference. A request for a contested case hearing before the Administrative Law Court must be filed within the time allowed and in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

Clerk's Office
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: http://www.scalc.net. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,

Lisa Lucas Longshore

Lisa Lucas Longshore
Clerk

The above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy; parties before the ALC are responsible for complying with all applicable requirements of the Court.

STATE OF SOUTH CAROLINA
BEFORE THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
OFFICE OF COASTAL RESOURCE AND MANAGEMENT
COASTAL DIVISION

Edward "Butch" Clark.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	PETITION FOR DECLARATION
Petitioner,	)	UNDER REGULATION 30-9
	)	
O.C.R.M.,	)	
	)	
Respondent.	)	
	)	

Comes now the Petitioner, Edward "Butch" Clark, and prays for a declaration of the South Carolina Department of Health and Environmental Control, Coastal Division, and shows:

1. The Petitioner is the holder of an amendment to the marina permit, permit No. #2002-1H-190-P, as amended, issued December 14, 2005. (The permit is attached here as Exhibit A and incorporated by this reference.) The permit authorizes construction of a three-story building within the 50-foot permissible pier-head footprint and thus not further altering the critical area. The Department previously authorized primary water-dependent uses in Unit 101 and 201, but has rejected all of Petitioner's proposed water-dependent uses for Unit 301.

2. After receiving a permit, the petitioner constructed a marina building in conformity with the size limitations of the permit, and the current building has been in continuous operation since 2006. (The site has been actively used as a marina since 1947.)

3. The Sunset Cay marina location has been in continuous operation by different owners and under different names since 1947 when the Army Corps of Engineers permitted the first marina authorizing the construction of a building extending 150' out, over and into the

navigable waterway known as the Folly River. (A copy of the 1947 permit is attached hereto and incorporated by this reference.) Each transfer of the property included the right to operate under the Army Corps of Engineers' 1947 permit.

4. The third floor of the marina is currently vacant because on August 4, 2015, the Department rejected all of the petitioner's proposed uses on the following grounds: "Your . . . submittal fails to adequately outline or demonstrate water-dependency for the proposed uses of the third floor." /s/ Alan Page for Josh Hoke. The Office of Coastal Resource Management does not provide reasoning as to why proposed uses, such as sales of boats, are not "water-dependent." Without explanation and relying entirely on unsupported conclusions, the Coastal Division rejected the petitioner's proposed secondary uses as being "water-dependent" uses. All of petitioners are proposed secondary uses are "water-dependent" as required by Regulation 30-1(52). Regulation 30-1(52) defines "water-dependent" as:

> A facility which can demonstrate that dependence on, use of, or access to coastal waters is essential to the function of its primary activity.
> § R30-1(52)

5. The Petitioner's proposed secondary five water-dependent uses, which can be used in conjunction with one another; however, all of which the Department has rejected as not being "water dependent." They are: Ship Store Office and Storage; Yacht Sales Office; Captain and Transient Lounge; Commodore Meeting Room; and Public Waterway Events. Each one meets the definitional test set by the General Assembly in Regulation 30-1(52).

6. The Petitioner seeks a declaration under Regulation 30-9 that the structure (Unit 301) is used for secondary water-dependent uses. The Declaration must be made solely on the

evidence of the primary activity to which the structure is dedicated. In this case, Unit 301 has proposed five water-dependent uses secondary to the primary purpose of the structure, which in this case is a 125 slip marina. (The Department has previously approved the primary uses of Dock master's office (Unit 101) and a Ship's Store (Unit 201).

7. The agency's refusal to adhere to the definition provided by the General Assembly in Regulation 30-1 and the rejection of the petitioner's proposed uses without explanation or reason is arbitrary and capricious and not rationally related to the words "water-dependent" as those words are used in the ordinary course and as defined by § R. 30-1. The Department is refusing to apply the words of the regulation utilizing their plain and ordinary meaning.

8. In applying the words "water-dependent" to the Petitioner, as those words are defined by Regulation 30-1(52), the Department is required to apply the ordinary meaning of the words used as they are commonly understood.

9. The petitioner prays for a declaration that the proposed secondary uses: Ship's Store Office and Storage, Yacht Sales Office; Captain and Transient Lounge, Commodore Meeting Room, and Public Waterway Events are all water dependent uses in conformity with the statutory definition contained in Regulation 30-1(52). In the alternative, if the Department believes the Petitioner's proposed uses are not "water dependent," then Petitioner prays for a declaration furnishing the Department's written explanation and reasoning for the Department's conclusions and a statement of which uses do meet the definition of "water-dependent."

10. The petitioner prays further for a declaration from O.C.R.M. in accordance with Regulation 30-9 as to provide a written list of all the proposed water dependent uses the

Department concedes are "water dependent" based on controlling definition of Regulation 30-1, S. C. Regulations.

Wherefore, having fully set forth the grounds for a declaration as provided by Regulation 30-9, the petitioner prays for a declaration from the Department to assist the Petitioner's goal to meet and satisfy the reasonable conditions of the Department's regulations for water dependent uses.

Respectfully submitted,

August 27, 2015

Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein, #2186
P. O. Box 71121
N. Charleston, S. C. 29415-1121
(843) 554-4291
(843) 554-5566 (fax)
tgoldstein@cobblaw.net

EXHIBIT A

PERMIT P/N# 2002-1H-190-P

D H E C

PROMOTE PROTECT PROSPER

C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment.

December 14, 2005

Mr. Butch Clark
P. O. Box 1590
Folly Beach, S. C., 29439

Permit granted

Re: P/N# 2002-1H-190-P

Dear Mr. Clark:

The above referenced permit has been amended to authorize the placement of a building containing restrooms and a ships store on the existing 50' by 50' fixed pierhead. The building will be 30' by 29' where the first floor will contain the bathrooms and the second floor will contain the ship's store. This work has been authorized, as the proposed uses of the building are water dependent. Non-water dependent uses are not allowed. This authorization is granted provided the permittee submits to this Department a copy of the DHEC-Trident Health District approval for the Waste Disposal System associated with these bathrooms, when received.

This amendment is made a part of your permit and is subject to the full terms of the permit as issued.

This letter does not relieve you of the responsibility of acquiring any other applicable federal or local permits that may be required. Any person adversely affected by this action has the right to appeal to within 30 days of notification.

A new construction placard, if you don't have a current one, must be posted conspicuously on site during authorized activities. Please notify OCRM prior to construction to obtain a construction placard.

Please sign the attached copy of this letter indicating your acceptance of these terms and return the signed copy to this Office.

Sincerely,

Curtis M. Joyner
Manager, Critical Area Permitting

enclosure
cc: Mr. Steve Brooks

EXHIBIT B

ARMY CORPS OF ENGINEER'S 1947 PERMIT

WAR DEPARTMENT

NOTE.—It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State, or local laws or regulations, nor does it obviate the necessity of obtaining *State assent* to the work authorized. IT MERELY EXPRESSES THE ASSENT OF THE FEDERAL GOVERNMENT SO FAR AS CONCERNS THE PUBLIC RIGHTS OF NAVIGATION. (See *Cummings* v. *Chicago*, 188 U. S., 410.) 16—13168

SADGW-1 - 800.6 Folly River (Chas RAH) Folly River Sea Foods, Inc. PERMIT

United States Engineer Office.
Division Engineer, South Atlantic Division
Atlanta, Georgia, 11 February ——, 1947.

Completed 4-24-47
Reported to OCE 4-29-47

Folly River Sea Foods, Inc.
11 Gibbes St.
Charleston, S. C.

Gentlemen:

Referring to written request dated 28 January 1947,

I have to inform you that, upon the recommendation of the Chief of Engineers, and under the provisions of Section 10 of the Act of Congress approved March 3, 1899, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," you are hereby authorized by the Secretary of War,

to construct a wharf,
(Here describe the proposed structure or work.)

in Folly River, northerly shore,
(Here to be named the river, harbor, or waterway concerned.)

xx about 1.3 miles west of the Highway Bridge, (S.C. Highway No. 615), between
(Here to be named the nearest well-known locality—preferably a town or city—and the distance in miles and tenths from some definite point in the same, stating whether above or below or giving direction by points of compass.)
Charleston and Folly Island, S. C.,

in accordance with the plans shown on the drawing attached hereto, marked, "Proposed Wharf on Folly River at Folly Island, S. C., Application by: Folly River Sea Foods, Inc. Jan. 28, 1947,"
(Or drawing; give file number or other definite identification marks.)

subject to the following conditions:

0574

(a) That the work shall be subject to the supervision and approval of the District Engineer, Engineer Department at Large, in charge of the locality, who may temporarily suspend the work at any time, if in his judgment, the interests of navigation so require.

(b) That any material dredged in the prosecution of the work herein authorized shall be removed evenly, and no large refuse piles, ridges across the bed of the waterway, or deep holes that may have a tendency to cause injury to navigable channels or to the banks of the waterway shall be left. If any pipe, wire, or cable hereby authorized is laid in a trench, the formation of permanent ridges across the bed of the waterway shall be avoided and the back filling shall be so done as not to increase the cost of future dredging for navigation. Any material to be deposited or dumped under this authorization, either in the waterway or on shore above high-water mark, shall be deposited or dumped at the locality shown on the drawing hereto attached, and, if so prescribed thereon, within or behind a good and substantial bulkhead or bulkheads, such as will prevent escape of the material into the waterway. If the material is to be deposited in the harbor of New York, or in its adjacent or tributary waters, or in Long Island Sound, a permit therefor must be previously obtained from the Supervisor of New York Harbor, Army Building, New York City.

(c) That there shall be no unreasonable interference with navigation by the work herein authorized.

(d) That if inspections or any other operations by the United States are necessary in the interests of navigation, all expenses connected therewith shall be borne by the permittee.

(e) That no attempt shall be made by the permittee or the owner to forbid the full and free use by the public of all navigable waters at or adjacent to the work or structure.

(f) That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of War, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required, upon due notice from the Secretary of War, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonably free, easy, and unobstructed; and if, upon the expiration or revocation of this permit, the structure, fill, excavation, or other modification of the watercourse hereby authorized shall not be completed, the owners shall, without expense to the United States, and to such extent and in such time and manner as the Secretary of War may require, remove all or any portion of the uncompleted structure or fill and restore to its former condition the navigable capacity of the watercourse. No claim shall be made against the United States on account of any such removal or alteration.

(g) That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage.

(h) That if the display of lights and signals on any work hereby authorized is not otherwise provided for by law, such lights and signals as may be prescribed by the U. S. Coast Guard, shall be installed and maintained by and at the expense of the owner.

(i) That the permittee shall notify the said district engineer at what time the work will be commenced, and as far in advance of the time of commencement as the said district engineer may specify, and shall also notify him promptly, in writing, of the commencement of work, suspension of work, if for a period of more than one week, resumption of work, and its completion.

(j) That if the structure or work herein authorized is not completed on or before the 31st day of December, 50, this permit, if not previously revoked or specifically extended, shall cease and be null and void.

0575

By authority of the Secretary of War:

D. E. Clas.

PERMIT REQUESTED IN 1ST IND. OF 2/7/47, FOR DISTRIBUTION

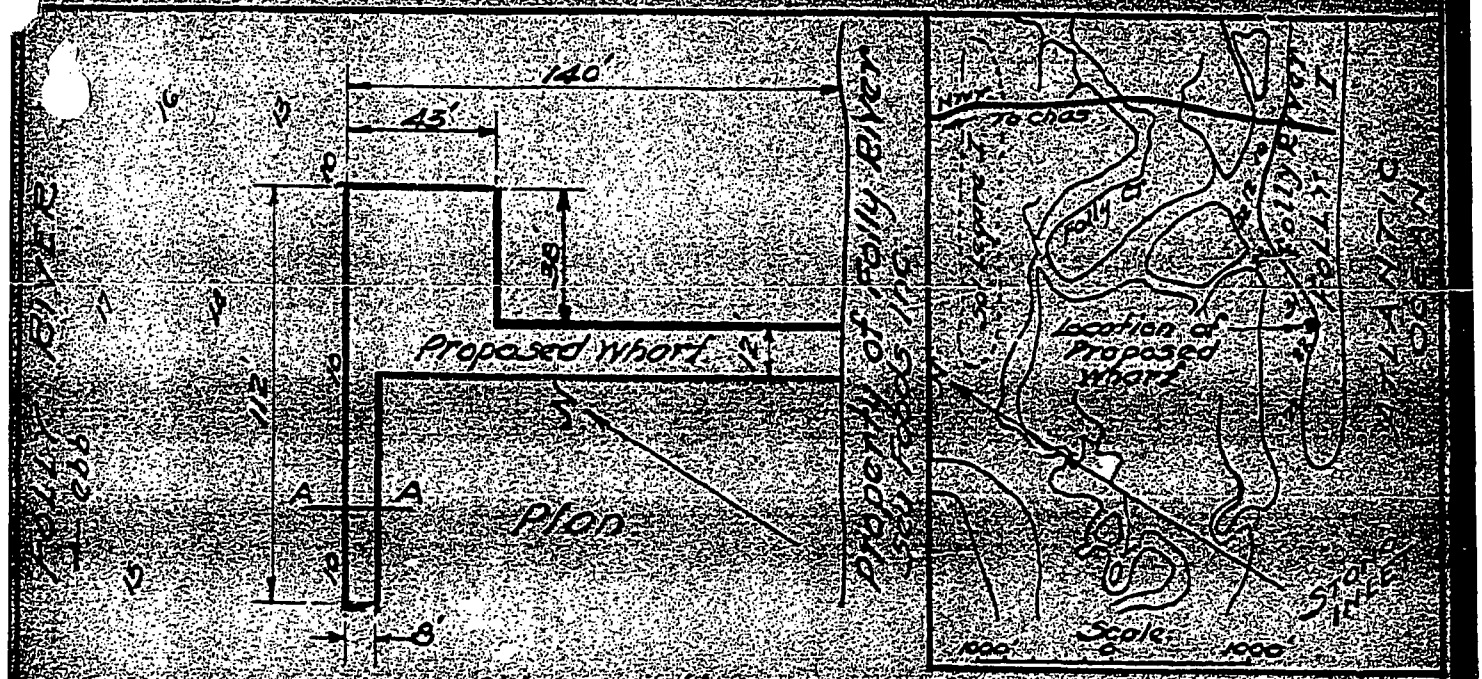
G. W. GILLETTE
Colonel, Corps of Engineers
Division Engineer

WAR DEPARTMENT
O. C. of E.
Form No. 96
Revised Jan. 17, 1940

16-12168

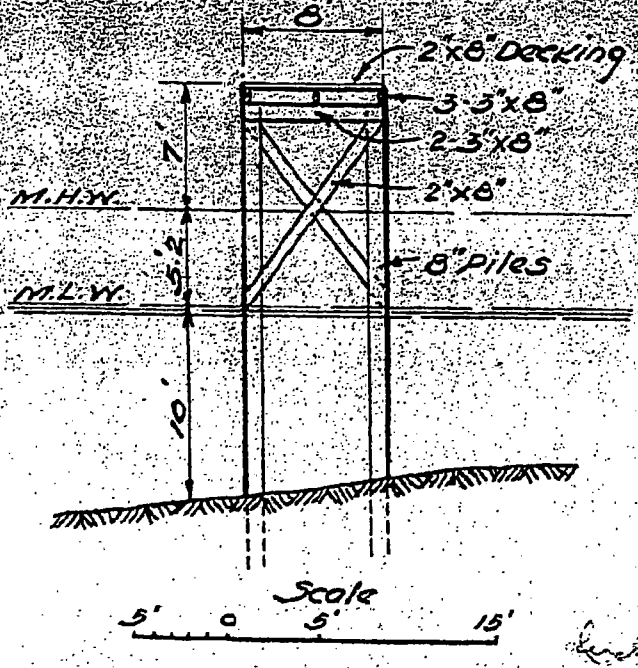
Mobile Engineer District—8-26-46—1500

A COPY OF THIS INSTRUMENT WAS MAILED TO THE CHIEF OF ENGINEERS, U. S. ARMY, WASHINGTON, D. C., ON THE DATE IT WAS ISSUED.





Enlarged Section A-A



Soundings are in feet and refer to M.L.W.
No harbor lines established.

PROPOSED WHARF
on Folly River
at Folly Island, S.C.
Application by: Folly River Sea Foods Inc.

0576

Jan. 28, 1947.

SHRR

21 February 1947

800.6 - Folly River Sea Foods, Inc. (Constr. Wharf) Folly River S.C.

Folly River Sea Foods, Inc.,
11 Gibbes Street
Charleston, S.C.

Gentlemen:

Reference is made to your letter dated 28 January 1947, making application to this department for a permit to construct a wharf in Folly River, S.C., on the northerly shore about 1.3 miles west of the Highway Bridge between Charleston and Folly Island, S.C., there is enclosed a permit for this work issued by the Division Engineer dated 11 February 1947.

If any material changes in location or plans of the work are found necessary on account of unforeseen or altered conditions or otherwise, revised plans should be submitted promptly to the District Engineer to the end that these revised plans, if found unobjectionable from a standpoint of navigation, may receive the approval required by law before work thereon is begun.

Attention is invited to the requirements to which this permit is subject, particularly to paragraph (4) providing that the District Engineer shall be notified in writing of the commencement of work, suspension of work, if for a period of more than one week, resumption of work and its completion.

Very truly yours,

JOHN B. HUGHES
Colonel, Corps of Engineers
District Engineer

1 Inclosure:
Permit w/print attached.

FEB 24 1947

0577

P U B L I C N O T I C E

WAR DEPARTMENT
CHARLESTON DISTRICT, CORPS OF ENGINEERS
CUSTOM HOUSE
CHARLESTON, S. C.

SANRR

3 February 1947

Application has been made to the War Department by

WILLIAM G. DODDS
FOLLY RIVER SEA FOODS, INC.
11 GIBBES STREET
CHARLESTON, S. C.

for a permit to construct a wharf on

FOLLY RIVER

along the northerly shore of Folly Island, S. C., approximately 1.3 miles west of the Highway Bridge (Route No. 615) between Charleston and Folly Island, S. C.

In order to give all interested parties an opportunity to express their views

N O T I C E

is hereby given that written statements regarding the proposed work will be received at this office until

12 O' CLOCK NOON, FRIDAY, 7 FEBRUARY 1947

from those interested in the navigation of these waters, particularly navigation interests and the officials of any county, town or local association whose interests may be affected by the proposed work.

The plans, which may be seen at this office, show the proposed wharf to be of pile and timber construction. The wharf is to be T-shaped with a marginal face 112' long. The upstream end will be 43 feet wide and the downstream end 8 feet wide which will be connected to the highland by a walkway 97 feet long and 12 feet wide. There will be a depth of approximately 10 feet at mean low water at the face of the wharf which will extend about 50 feet channelward of the low water line. The deck of the wharf will be 12.2 feet above mean low water. Folly River is 1,600 feet wide at the site of the proposed structure. The applicant states that he owns the land from which the proposed wharf will extend. There are no harbor lines established in the vicinity.

For accuracy and completeness of record, all important facts and arguments bearing on navigation should be submitted in writing at or before the time named above.

0578

JOHN B. HUGHES
Colonel, Corps of Engineers
District Engineer

Folly River Sea Foods, Inc.
Charleston, S. C.
28 Jan. 1947

Sec. 6 - Folly River Sea Foods, Inc.
(Comm. Wharf) Folly River
on Folly Island, S. C.

The District Engineer
33 Customhouse
Charleston, S. C.

Dear Sir,

Permission is requested to construct a wharf, as shown on the attached plans, to be located on the west end of Folly Island approximately 1.25 miles west of the Highway Bridge to Folly Island.

The land in front of which the wharf is to be built is owned by Folly River Sea Foods, Inc. and is within the corporate limits of Folly Beach.

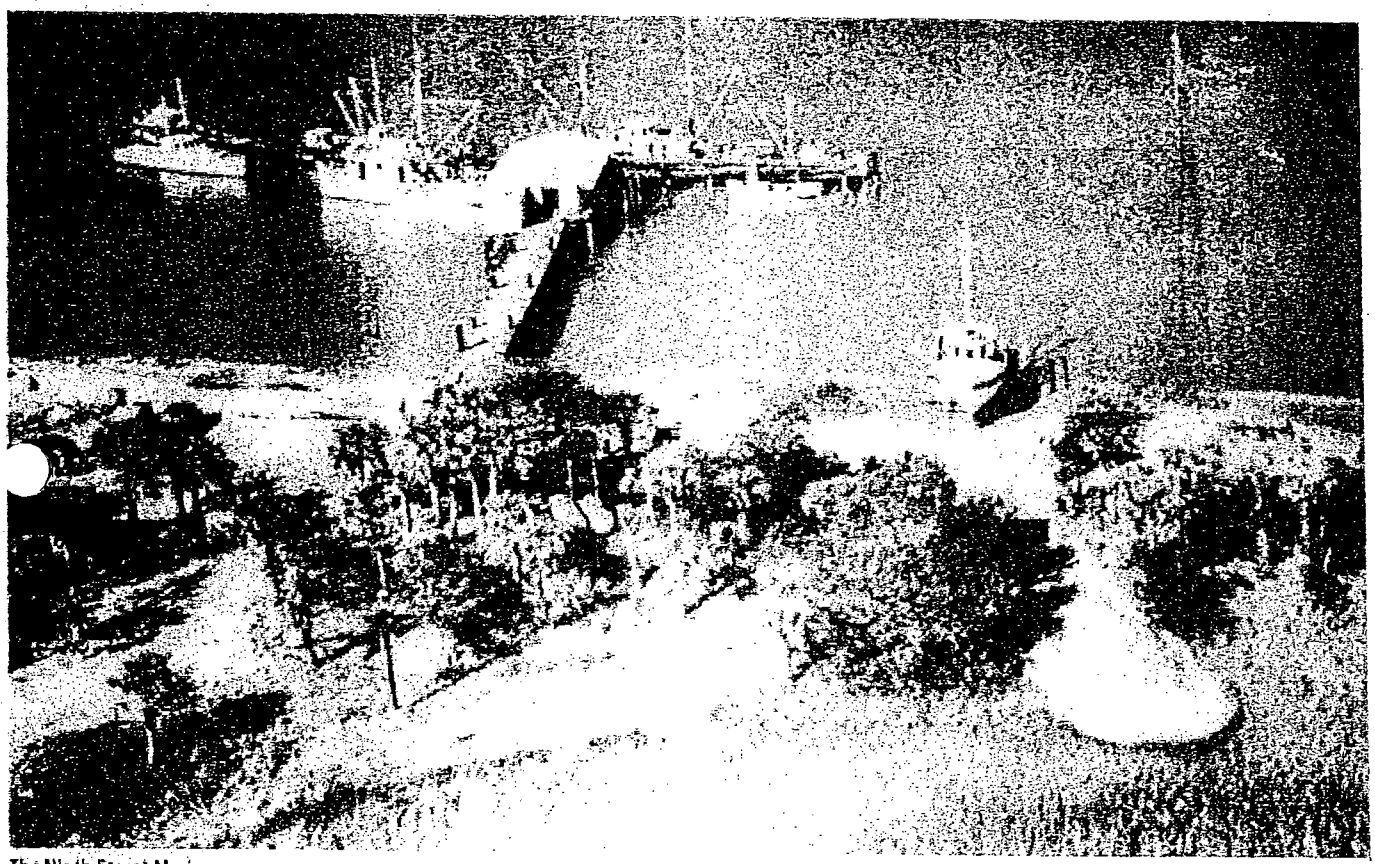
Very Truly Yours,

s/ Wm. G. DODDS
Wm. G. DODDS
President

COPY

0579

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Fc
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The Ninth Street Marina

Photo provided by Marinetek, Inc., King Street

BELK, COBB, INFINGER AND GOLDSTEIN, P.A.
ATTORNEYS AT LAW
2344 COSGROVE AVENUE
CHARLESTON, SC 29405

Harry C. Belk (1919-2003)

Dale T. Cobb, Jr.
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tgoldstein@cobblaw.net

Mailing Address:
P.O. Box 71121
Charleston, SC
zip 29415-1121
Ph: (843) 554-4291
Fax: (843) 554-5566

October 23, 2015

RECEIVED
OCT 26 2015
Clerk, Board of Health
and Environmental Control

Ms. Lisa Lucas,
Clerk of the Board
S. C. Dept. of Health and Environ. Control
O.C.R.M.
2600 Bull Street
Columbia, S. C. 29201

RE: Sunset Cay, L.L.C.
Permit: P/N# 2002-1H-190-P

Dear Ms. Lucas,

Please accept this letter as a formal request for appeal of the administrative decision of Sara Brazemore, dated October 12, 2015. As part of the grounds for appeal, I enclose a copy of my letter, dated October 12, 2015, by which I asked Director Brazemore to reconsider her decision of that same date. I am now informed by counsel that Ms. Brazemore lacks statutory authority to reconsider her decision and that I must file a direct appeal with your Board, along with a filing fee of $100.00, which I enclose. Prior to filing this appeal with your office, I mailed the enclosed letter to Ms. Brazemore. I am including it here because it contains a summary of most of the grounds for appeal. In addition to the grounds set forth in my October 12th letter, we also believe that the Director's decision is controlled by an error of law and the decision is not supported by the substantial evidence. I understand that pursuant to § 44-1-60, S. C. Code, that the Department is required to conduct an appeal hearing ("final review conference") within sixty (60) days of our appeal. For that reason, please let me know if the Department wishes to receive written briefing on the issues, and if so, what the Department's time requirements are for written briefing. By copy of this letter, I am providing a copy of this request for administrative appeal along with another copy of my October 12, 2015, letter to Mr. Williams and Mr. Churdar. Would you be so kind as to file this appeal and return a clocked copy mark filed in the enclosed envelope? I thank you in advance for your attention to this request. With kind regards, I am

Very truly yours,

Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein

enclosure: October 12, 2015, correspondence, *Weaver v. Coastal Council*, 309 S.C. 368, 423 S.E.2d 340 (1992), check #17005, return envelope
cc:
Bradley Churdar, Esq.
Blair N. Williams, Manager

CERTIFICATE OF SERVICE

I certify that I served a true and conformed copy of the foregoing Request of Appeal of Administrative Decision on opposing counsels by placing a copy properly addressed with sufficient postage thereon in the United States mail this 23rd day of October, 2015, to the following address:

Lisa Lucas, General Counsel, 2600 Bull Street, Columbia, SC 29201
Blair Williams, Manager, 1362 McMillan, Suite #400, North Charleston, SC 29405-2047
Brandley Churdar, Esq., 1362 McMillan, Suite #400, North Charleston, SC 29405-2047

October 23, 2015

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

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Fax: (843) 554-5566

October 12, 2015

Ms. Sara P. Brazemore,
Deputy Director
S. C. Dept. of Health and Environ. Control
O.C.R.M.
2600 Bull Street
Columbia, S. C. 29201

RE: Sunset Cay, L.L.C.
Permit: P/N# 2002-1H-190-P

Dear Ms. Brazemore,

I am in receipt of your correspondence of today's date. Despite multiple readings, I remain in the dark as to O.C.R.M.'s position. I will try to spell these out as best I can so that this letter may serve as the equivalent of a motion for reconsideration:

1. Motion for Reconsideration and Due Process

I am in the dark as to the manner in which O.C.R.M. reached a decision on our August 27, 2015, application for declaration without out participation. Your agency must provide some mechanism for an applicant's participation. Even routine applications provide a mechanism to speak to someone. In 1992, the Supreme Court pointed out that the Department must furnish applicants an opportunity to develop a record. See *Weaver v. S. C. Coastal Council*, 309 S.C. 368, 423 S.E.2d 340 (1992). While you make reference to two earlier letters, the ambiguity and confusion of those letters are precisely what prompted our August 27, 2015, application for a declaration under O.C.R.M.'s regulations. I am assuming there is a mechanism to ask for reconsideration or to communicate with the Department in some way, especially where your office reached a decision that did not provide us an opportunity to participate or be heard. Unless you will allow this letter to serve as a request for reconsideration, we have no choice but to appeal this decision the Administrative Law Court. However, we prefer to work out a mutually agreeable solution with the Department, especially where a potential interpretation of your decision could be financially ruinous to my client. I feel reasonably certain that the Administrative Law Court will remand the matter back to O.C.R.M. in order to allow us to participate in the decision making process. As a result, if you will suspend the effect of your October 12th decision in order to afford us an opportunity to participate, perhaps we can resolve the controversy in the entirety in a manner that benefits both sides.

2. Definition of "Essential"

Your October 12, 2015, decision informs us that the applicant has not provided a proposed use that the Department views as "essential" to the operation of the marina. First, Regulation § 30-1(d)(52) does not place a burden on an applicant to prove a use is "essential." The burden is on O.C.R.M. to provide objective criteria in order that an applicant can design a project with some idea of what is and is not allowed. Moreover, this marina has been in uninterrupted use since 1947, at which time the Army Corps of Engineers permitted a wharf constructed extending into the Folly River in the same location as the present building. This marina remained in almost continuous use primarily as a marina, bar, and poolroom. Second, because the Department does not define "essential"—and neither do the regulations—"essential" remains subjective criteria that are not discoverable. Because it is not defined anywhere in the regulations, the definition of "essential" remains subject to the unbridled and unreviewable discretion of the Administrator. All of the applicant's proposed uses are related to promoting the public's access to the water and should be, therefore, "essential" under any definition adopted by the Department.

In issuing permits, you are aware that O.C.R.M. must treat similarly situated property owners in a like manner. The Supreme Court instructed O.C.R.M. (formerly known as Coastal Council) in the case, *Weaver v. S. C. Coastal Council*, 309 S.C. 368, 423 S.E.2d 340 (1992), cited above, a copy of which is included with this letter. "The record reflects, when viewed as a whole and in the proper posture, that there is substantial evidence that the circumstances surrounding the application of the respondent and the other three individuals granted permits are similar, and that the existence of respondent's dock would create no effect distinguishable from that occasioned by the other three existing docks." It is arbitrary to allow similarly situated businesses to operate while denying any of the seven proposed uses here under identical circumstances.

3. Use of Unit 301

As to O.C.R.M.'s assertion that it did not authorize any uses for the third floor, I am grateful to you for your letter of October 12, 2015, because, for the first time, I think I now understand the Department's position. My client has submitted seven proposed water-dependent uses for Unit 301. However, the Department rejects each one without explaining why the proposed use is not water dependent. As set forth above, it is the Department who has the burden to provide the objective criteria, and my client should not be forced to guess what uses the Department will authorize. The Department's position is like imposing restrictive covenants without disclosing what they are. Therefore, the applicant is left to grope in the dark as to what criteria he must meet to submit the after the fact permit application that you are requiring. If the Department will furnish the necessary definitions, we will submit an after the fact application for whatever an authorized use approved by the Department. Therefore, if you can make either you or Mr. Williams available to discuss this, I am confident we can resolve this

entire controversy. In light of your letter of October 12th, I respectfully request permission to be given an opportunity to discuss this with you or with Mr. Williams. I am also respectfully asking if you will answer the following three questions:

1. Will you allow this letter to serve as a motion for reconsideration, thereby tolling the time for filing an appeal with the Administrative Law Court?

2. If you will allow this letter to serve as a motion for reconsideration, thereby tolling the time for filing an appeal, will you allow the applicant to participate in the decision by providing an opportunity to be heard by discussing this issue with you or Mr. Williams?

3. Will you identify a list of uses that the Department agrees are authorized water dependent uses?

Under South Carolina law, a motion for reconsideration must be made within ten days from the date of the decision, which deadline we easily meet. However, since there is no statutory or procedural mechanism for a motion for reconsideration on a Declaration, I need an agreement from the Department that its October 12th declaration is not final until such time as the Department as made a ruling on the issues identified in this letter. If the Department is unwilling or unable to grant a rehearing, then we will seek further relief in the Administrative Law Court. I look forward to hearing from you. With kind regards, I am

Very truly yours,

Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein

enclosure: *Weaver v. Coastal Council*, 309 S.C. 368, 423 S.E.2d 340 (1992)

cc:
Blair N. Williams, Manager
1362 McMillian Avenue
Suite 400
N. Charleston, S. C. 29405
Butch Clark (with enclosure)

BELK, COBB, INFINGER AND GOLDSTEIN, P.A.
ATTORNEYS AT LAW
2344 COSGROVE AVENUE
CHARLESTON, SC 29405

Harry C. Belk (1919-2003)

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Fax: (843) 554-5566

December 23, 2015

Hon. Jana E. Cox Shealy
Clerk of Court
Administrative Law Court
1205 Pendleton Street
Suite 224
Columbia, S. C. 29201

RE: Sunset Cay, L.L.C.
Permit: P/N# 2002-1H-190-P
Enforcement File #15C-005P

Dear Ms. Shealy,

I enclose an original and an extra copy of the petitioner's application for judicial review. I also enclose a certificate of service and a notice of appearance along with our firm's check in the amount of $500.00 as the filing fee. Would you be so kind as to file the original and return a clocked copy in the envelope provided? By copy of this letter, I am serving a copy on Bradley Churdar, General Counsel for OCRM. Please let me know if you require anything further to process this appeal. I thank you in advance for your attention to this request. With kind regards, I am

Very truly yours,

Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein

enclosure: Appeal, cover sheet, notice of appearance, cert. of service, check #

cc:
Mr. Bradley Churdar,
General Counsel
S. C. Dept. of Health and Environ. Control
Office of Coast Resources Management
1362 McMillian Avenue
Suite 400
N. Charleston, S. C. 29405-2047

THE STATE OF SOUTH CAROLINA
In The Administrative Law Court

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

Catherine E. Heigel, Director

Case No. 2015-RFR-69, Sunset Cay, L.L.C.

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

vs.

S. C. Dept. of Health and Enviorn. Control, Division of O.C.R.M., ... Respondent.

Notice of Appeal

December 23, 2015

Thomas R. Goldstein, S. C. Bar #2186
Belk, Cobb, Infinger & Goldstein, P.A.
Attorneys for Appellant
P. O. Box 711121
N. Charleston, South Carolina 29415-1121
(843) 554-4291
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The appellant moves for an Order Court compelling the Department of Health and Environmental Control, Division of Ocean and Coastal Resource Management (hereinafter referred to as "OCRM" throughout for convenience) to withdraw "Cease and Desist Letters" dated March 3, 2015, and October 26, 2015, and to approve the appellant's proposed five water dependent uses as well as to provide objective criteria for primary and secondary water dependent uses as that term will be applied by OCRM to evaluate water-dependent uses in conformity with its regulations. This appeal is based on the following grounds:

1. The appellant holds a permit for a marina known as Sunset Cay Marina, which is comprised of 125 boat slips, a transient dock, and a three-story building that contains the dock master's office, members' restrooms and storage on the first floor (Unit 101), a ship's store and storage on the second floor (Unit 201), and a vacant third floor (unit 301).

2. The marina is located near the South end of Folly Island (West 9th Street) in Charleston County over the navigable waters of the Folly River.

3. The marina has operated in its present position under different owners since 1947. (See original 1947 permit attached hereto as EXHIBIT A, to the appellant's August 27, 2015, Petition for Declaration, incorporated by this reference.)

4. Since 1947, the marina has been in continuous use, and, as set forth in more detail below (and on the attached Petition for Declaration), the current marina is a smaller version of previously existing marinas.

5. In 2005, the appellant applied to OCRM to construct an updated marina at the subject location.

6. On December 14, 2005, respondent, OCRM, granted the appellant a permit to construct a marina. This 2005 permit is attached hereto as EXHIBIT B and incorporated by this reference

7. On or about September 26, 2006, following completion of the project, the Town of Folly Beach issued three certificates of occupancy for the marina, the second floor, and the third floor. The marina has been in constant operation since that date.

8. From time to time, the respondent, OCRM, amended the permit. The only amendment that is material to this lawsuit is that on September 18, 2009, OCRM approved the Ship's Store menu for serving of light food. This approval is attached here as EXHIBIT C and incorporated by this reference. EXHIBIT C reads as follows:

> The staff of SCDHEC/Ocean & Coastal Resource Management has reviewed the above referenced letter. Specifically, your request is to ask if 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 as a component of the ships store and does not require any modification of the permit provided 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 Manager

9. Following the issuance of OCRM's two cease and desist letters dated March 3, 2015, and October 26, 2015, the appellant proposed five "water dependent" uses for the third floor on July 1 and July 6, 2015. OCRM rejected them all. The proposed five uses are: Ship Store Office and Storage; Yacht Sales Office; Captain and Transient Lounge; Commodore Meeting Room; and Public Waterway Events.

10. OCRM does not furnish written or objective criteria for the definition of "water dependent." The closest that the respondent comes to a definition is Regulation 30-1 (52), which states as follows:

Regulation 30-1(52)as:

> A facility which can demonstrate that dependence on, use of, or access to coastal waters is essential to the function of its primary activity.
> § R30-1(52)

11. Following OCRM's August 4, 2015, rejection of the entire appellant's proposed "water dependent" uses, the appellant filed a Declaration on August 12, 2015, under OCRM Regulation 30-9, which allows an applicant to receive a written declaration of policy. The Declaration is attached here as EXHIBIT A, and incorporated by this reference. (OCRM's August 4, 2015, rejection of all proposed water dependent uses is attached as part of EXHIBIT A, the declaration, and contains such illogical reasoning as:

> Use of the third floor as a ship's store office and yacht sales office cannot be authorized by the Department. In addition, a yacht sales office and lounge as proposed for "yacht sales, water way and Stono Inlet navigational training aids, along with being used as a meeting area for special waterway events" are not water-dependent uses and therefore cannot be authorized by the Department.
> /s/ Josh D. Hoke,
> Compliance Project Manager

12. On October 12, 2015, OCRM responded to the appellant's request for Declaration by denying all of appellant's proposed uses as water-dependent. A copy of this denial is attached her as EXHIBIT D and incorporated by this reference.

13. On October 23, 2015, the appellant requested Board review. A copy of this request is attached here as EXHIBIT E and incorporated by this reference.

14. On December 2, 2015, the Board denied the appellant an administrative review. A copy of this denial is attached here as EXHIBIT F and incorporated by this reference. This denial of administrative review acts a final determination affecting the rights of the appellant and makes the matter ripe for appeal to the Administrative Law Court under the *South Carolina*

Constitution, Article I, § 22, the *Administrative Procedures Act*, § 1-23-380, S. C. Code, and Rule 33 of the *Administrative Law Court Rules of Procedure*.

FOR A FIRST CAUSE OF ACTION
DECLARATORY JUDGMENT/APPEAL

15. The appellant repeats the above allegations as if set forth here *verbatim*.

16. The Respondent's denial of any proposed water dependent use is irrational, arbitrary, not supported by law and is in direct conflict with the statutory mission of OCRM. The respondent's denial is controlled by errors of law in the following particulars:

- The respondent furnishes no objective criteria or definition of "water dependent use," and the definition is a subjective criteria locked away in the undiscoverable consciousness of staff administrators who will not or cannot furnish objective criteria;
- The respondent's criteria for approving a water dependent use are subject to the unbridled discretion of OCRM officials;
- The respondent has denied the appellant equal protection of the laws by declaring all of the appellant's proposed uses as non-water dependent while simultaneously authorizing other similarly situated properties such uses as restaurants, bars, pest control businesses, insurance agencies, *etc.*;
- The respondent has prevented the appellant from receiving procedural due process by making all of these decisions without affording the appellant an opportunity to be present and be heard about the decision or providing the appellant the right to challenge staff's decision to the Board, thereby depriving the appellant of any opportunity for administrative review;

- The respondent has denied substantive due process by refusing to publish objective criteria so that the appellant, or any person, can tailor an application to the published criteria;
- The respondent makes no distinction between primary water dependent and secondary water dependent uses;
- The respondent adopts shifting, subjective criteria, which it applies differently to similar situated property owners;
- OCRM officials conspired with a third party to deny the appellant fundamental property rights under color of law;
- In furtherance of its conspiracy with a third person, the respondent has published demonstrably false information and disseminated false information to the building officials at the City of Folly Beach in an effort to deprive the appellant of use of constitutionally protected property interests and to cause special damage to the appellant.

17. The respondent's acts have been without substantial justification, are arbitrary and capricious, which have caused the appellant to incur special damages.

18. The respondent's acts are in conflict with OCRM's statutory mission statement which states in applicable part: "The South Carolina Coastal Management Program was established under the guidelines of the national Coastal Zone Management Act (1972) as a state-federal partnership to comprehensively manage coastal resources. It was authorized in 1977 under SC's Coastal Tidelands and Wetlands Act (CTWA) with the goal of achieving balance between the

appropriate use, development, and conservation of coastal resources in the best interest of all citizens of the state."

19. The respondent prays for an Order of the Court declaring the appellant's proposed water dependent uses as permissible under OCRM regulations and for an Order of the Court vacating OCRM's cease and desist letters and enjoining the respondent from harassing the appellant about the existence of a validly issued permit.

20. The appellant is entitled to an award of attorney's fees as allowed by Title 42 § 1988 and by § 15-77-300, South Carolina Code of Laws because the agency's actions have been without justification.

FOR A SECOND CAUSE OF ACTION
§ 1983 Violation of Substantive and Procedural Due Process Under Color of Law

21. The appellant repeats the above allegations as if set forth here *verbatim*.

22. As set forth above, the respondent has denied the appellant any use of a portion of his property and unjustifiably restrained the use of the property without substantial justification.

23. The respondent's efforts to countermand a properly issued permit, which has been in effect for over nine years is arbitrary, irrational, and without substantial justification and motivated by an unlawful animus for appellant and in furtherance of a conspiracy with a third party to damage the appellant.

24. The appellant is entitled to a judgment against the respondent for the actual damages as calculated by the trier of fact including loss of rents and attorney's fees incurred as a result of the respondent's refusal to allow any water dependent uses.

25. The appellant is entitled to an award of attorney's fees under § 42, 1988, U. S. Code, ann. and/or South Carolina Code 15-77-300, *et. seq.*

FOR A THIRD CAUSE OF ACTION
§ 1983 Violation of Procedural Due Process Under Color of Law

26. The appellant repeats the above allegations as if set forth here *verbatim.*

27. The respondent has refused the appellant any opportunity to participate in any meaningful manner with its decision to issue cease and desist letters, including depriving the appellant of the right to administrative review.

28. The appellant is entitled to a judgment against the respondent for the actual damages as calculated by the trier of fact including loss of rents and attorney's fees incurred as a result of the respondent's refusal to allow any water dependent uses and the refusal to allow the appellant to participate in the respondent's decision. The respondent has refused the appellant any opportunity to be present or be heard, and these acts are without substantial justification.

29. The appellant is entitled to an award of attorney's fees under § 42, 1988, U. S. Code, ann. and/or South Carolina Code 15-77-300, *et. seq.*

FOR A FOURTH CAUSE OF ACTION
Denial of Equal Protection

30. The appellant repeats the above allegations as if set forth here *verbatim.*

31. The respondent has refused the appellant any opportunity to use his property in accordance with the regulations governing such uses.

32. The respondent has previously authorized other structures governed by the Act such as restaurants, bars, insurance agencies, pest control companies, construction companies, *etc.* finding all such uses to be water dependent while simultaneously refusing or unreasonably restricting the appellant's use of his property. The appellant is similarly situated to other waterfront buildings and is entitled to be treated in a like manner by the respondent.

33. By singling the appellant out for disparate and unique treatment, the appellant is entitled to a judgment against the respondent for the actual damages as calculated by the trier of fact including loss of rents and attorney's fees incurred as a result of the respondent's unreasonable and arbitrary restriction of the appellant's use of his property and by OCRM's refusal to allow any water dependent uses.

34. The appellant is entitled to an award of attorney's fees under § 42, 1988, U. S. Code, ann. and/or South Carolina Code 15-77-300, *et. seq.*

WHEREFORE,

Having fully set forth his appeal and complaint, the appellant prays for:

A) An order of the Court requiring the respondent to issue a permit for any of the proposed water dependent uses provided by appellant;

B) To publish and disseminate objective criteria defining water dependent uses;

C) To vacate the previously issued cease and desist letters and enjoin the respondent from further threatened punitive measures or penalties arising out of the use of the second floor as a ship's store and the third floor as any of the proposed water dependent uses;

D) For a judgment for actual damages found to be due by the trier of fact for the loss of rent caused by the respondent's improper issuance of cease and desist letters;

E) For an award of attorney's fees in an amount to be determined by the Court in accordance with Title 42 1988 and/or 15077-300, et. seq. South Carolina Code of Laws;

F) For such other and further relief as the Court finds just and proper.

Respectfully submitted

December 23, 2015

Thomas R. Goldstein, S. C. Bar #2186
Belk, Cobb, Infinger & Goldstein, P.A.
P. O. Box 71121
N. Charleston, S. C. 29405
(843) 554-4291
(843) 554-5566 (fax)
tgoldstein@cobblaw.net

INDEX OF EXHIBITS

EXHIBIT A	Appellant's Petition for Declaration, including original 1947 permit and current permits
EXHIBIT B	Appellant's December 14, 2005 permit
EXHIBIT C	OCRM's September 18, 2009, approval of Ship's Store menu
EXHIBIT D	OCRM's October 12, 2015, rejection of Petition for Declaration
EXHIBIT E	Appellant's October 12, August 12, 2015, Petition for Review of Declaration
EXHIBIT F	OCRM's December 2, 2015, denial of Board Review

EXHIBIT A

STATE OF SOUTH CAROLINA
BEFORE THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
OFFICE OF COASTAL RESOURCE AND MANAGEMENT
COASTAL DIVISION

Edward "Butch" Clark.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	PETITION FOR DECLARATION
Petitioner,	)	UNDER REGULATION 30-9
	)	
O.C.R.M.,	)	
	)	
Respondent.	)	
	)	

Comes now the Petitioner, Edward "Butch" Clark, and prays for a declaration of the South Carolina Department of Health and Environmental Control, Coastal Division, and shows:

1. The Petitioner is the holder of an amendment to the marina permit, permit No. #2002-1H-190-P, as amended, issued December 14, 2005. (The permit is attached here as Exhibit A and incorporated by this reference.) The permit authorizes construction of a three-story building within the 50-foot permissible pier-head footprint and thus not further altering the critical area. The Department previously authorized primary water-dependent uses in Unit 101 and 201, but has rejected all of Petitioner's proposed water-dependent uses for Unit 301.

2. After receiving a permit, the petitioner constructed a marina building in conformity with the size limitations of the permit, and the current building has been in continuous operation since 2006. (The site has been actively used as a marina since 1947.)

3. The Sunset Cay marina location has been in continuous operation by different owners and under different names since 1947 when the Army Corps of Engineers permitted the first marina authorizing the construction of a building extending 150' out, over and into the

navigable waterway known as the Folly River. (A copy of the 1947 permit is attached hereto and incorporated by this reference.) Each transfer of the property included the right to operate under the Army Corps of Engineers' 1947 permit.

4. The third floor of the marina is currently vacant because on August 4, 2015, the Department rejected all of the petitioner's proposed uses on the following grounds: "Your . . . submittal fails to adequately outline or demonstrate water-dependency for the proposed uses of the third floor." /s/ Alan Page for Josh Hoke. The Office of Coastal Resource Management does not provide reasoning as to why proposed uses, such as sales of boats, are not "water-dependent." Without explanation and relying entirely on unsupported conclusions, the Coastal Division rejected the petitioner's proposed secondary uses as being "water-dependent" uses. All of petitioners are proposed secondary uses are "water-dependent" as required by Regulation 30-1(52). Regulation 30-1(52) defines "water-dependent" as:

> A facility which can demonstrate that dependence on, use of, or access to coastal waters is essential to the function of its primary activity.
> § R30-1(52)

5. The Petitioner's proposed secondary five water-dependent uses, which can be used in conjunction with one another; however, all of which the Department has rejected as not being "water dependent." They are: Ship Store Office and Storage; Yacht Sales Office; Captain and Transient Lounge; Commodore Meeting Room; and Public Waterway Events. Each one meets the definitional test set by the General Assembly in Regulation 30-1(52).

6. The Petitioner seeks a declaration under Regulation 30-9 that the structure (Unit 301) is used for secondary water-dependent uses. The Declaration must be made solely on the

evidence of the primary activity to which the structure is dedicated. In this case, Unit 301 has proposed five water-dependent uses secondary to the primary purpose of the structure, which in this case is a 125 slip marina. (The Department has previously approved the primary uses of Dock master's office (Unit 101) and a Ship's Store (Unit 201).

7. The agency's refusal to adhere to the definition provided by the General Assembly in Regulation 30-1 and the rejection of the petitioner's proposed uses without explanation or reason is arbitrary and capricious and not rationally related to the words "water-dependent" as those words are used in the ordinary course and as defined by § R. 30-1. The Department is refusing to apply the words of the regulation utilizing their plain and ordinary meaning.

8. In applying the words "water-dependent" to the Petitioner, as those words are defined by Regulation 30-1(52), the Department is required to apply the ordinary meaning of the words used as they are commonly understood.

9. The petitioner prays for a declaration that the proposed secondary uses: Ship's Store Office and Storage, Yacht Sales Office; Captain and Transient Lounge, Commodore Meeting Room, and Public Waterway Events are all water dependent uses in conformity with the statutory definition contained in Regulation 30-1(52). In the alternative, if the Department believes the Petitioner's proposed uses are not "water dependent," then Petitioner prays for a declaration furnishing the Department's written explanation and reasoning for the Department's conclusions and a statement of which uses do meet the definition of "water-dependent."

10. The petitioner prays further for a declaration from O.C.R.M. in accordance with Regulation 30-9 as to provide a written list of all the proposed water dependent uses the

Department concedes are "water dependent" based on controlling definition of Regulation 30-1, S. C. Regulations.

Wherefore, having fully set forth the grounds for a declaration as provided by Regulation 30-9, the petitioner prays for a declaration from the Department to assist the Petitioner's goal to meet and satisfy the reasonable conditions of the Department's regulations for water dependent uses.

Respectfully submitted,

August 27, 2015

Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein, #2186
P. O. Box 71121
N. Charleston, S. C. 29415-1121
(843) 554-4291
(843) 554-5566 (fax)
tgoldstein@cobblaw.net

EXHIBIT A

PERMIT P/N# 2002-1H-190-P

D H E C

PROMOTE PROTECT PROSPER

December 14, 2005

Mr. Butch Clark
P. O. Box 1590
Folly Beach, S. C., 29439

Re: P/N# 2002-111-190-P

Dear Mr. Clark:

The above referenced permit has been amended to authorize the placement of a building containing restrooms and a ships store on the existing 50' by 50' fixed pierhead. The building will be 30' by 29' where the first floor will contain the bathrooms and the second floor will contain the ship's store. This work has been authorized, as the proposed uses of the building are water dependent. Non-water dependent uses are not allowed. This authorization is granted provided the permittee submits to this Department a copy of the DHEC-Trident Health District approval for the Waste Disposal System associated with these bathrooms, when received.

This amendment is made a part of your permit and is subject to the full terms of the permit as issued.

This letter does not relieve you of the responsibility of acquiring any other applicable federal or local permits that may be required. Any person adversely affected by this action has the right to appeal to within 30 days of notification.

A new construction placard, if you don't have a current one, must be posted conspicuously on site during authorized activities. Please notify OCRM prior to construction to obtain a construction placard.

Please sign the attached copy of this letter indicating your acceptance of these terms and return the signed copy to this Office.

Sincerely,

Curtis M. Joyner
Manager, Critical Area Permitting

enclosure
cc: Mr. Steve Brooks

EXHIBIT B

ARMY CORPS OF ENGINEER'S 1947 PERMIT

WAR DEPARTMENT

NOTE.—It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State, or local laws or regulations, nor does it obviate the necessity of obtaining State assent to the work authorized. IT MERELY EXPRESSES THE ASSENT OF THE FEDERAL GOVERNMENT SO FAR AS CONCERNS THE PUBLIC RIGHTS OF NAVIGATION. (See *Cummings v. Chicago*, 188 U. S., 410.) 17-21.44

SADGE-1 - 500.6 Folly River (Chas PAH) Folly River Sea Foods, Inc.

PERMIT

United States Engineer Office.
Division Engineer, South Atlantic Division
Atlanta, Georgia, 11 February ——, 1947.

Completed 4-24-47
Reported to OCE 4-29-47

Folly River Sea Foods, Inc.
11 Gibbes St.
Charleston, S. C.

Gentlemen:

Referring to written request dated 28 January 1947,

I have to inform you that, upon the recommendation of the Chief of Engineers, and under the provisions of Section 10 of the Act of Congress approved March 3, 1899, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," you are hereby authorized by the Secretary of War,

to construct a wharf,
(Here describe the proposed structure or work)

in Folly River, northerly shore,
(Here to be named the river, harbor, or waterway concerned)

xx about 1.3 miles west of the Highway Bridge, (S.C. Highway No. 615), between
(Here to be named the nearest well-known locality—preferably a town or city—and the distance in miles and tenths from some definite point in the locality, stating whether above or below or giving direction by points of compass.)
Charleston and Folly Island, S. C.,

in accordance with the plans shown on the drawing attached hereto, marked, "Proposed Wharf on Folly River at Folly Island, S. C., Application by: Folly River Sea Foods, Inc. Jan. 28, 1947."
(Or description by the number or other definite identification mark.)

subject to the following conditions: 0574

(e) That the work shall be subject to the supervision and approval of the District Engineer, Engineer Department at Large, in charge of the locality, who may temporarily suspend the work at any time, if in his judgment, the interests of navigation so require.

(b) That any material dredged in the prosecution of the work herein authorized shall be removed evenly, and no large refuse piles, ridges across the bed of the waterway, or deep holes that may have a tendency to cause injury to navigable channels or to the banks of the waterway shall be left. If any pipe, wire, or cable hereby authorized is laid in a trench, the formation of permanent ridges across the bed of the waterway shall be avoided and the back filling shall be so done as not to increase the cost of future dredging for navigation. Any material to be deposited or dumped under this authorization, either in the waterway or on shore above high-water mark, shall be deposited or dumped at the locality shown on the drawing hereto attached, and, if so prescribed thereon, within or behind a good and substantial bulkhead or bulkheads, such as will prevent escape of the material into the waterway. If the material is to be deposited in the harbor of New York, or in its adjacent or tributary waters, or in Long Island Sound, a permit therefor must be previously obtained from the Supervisor of New York Harbor, Army Building, New York City.

(c) That there shall be no unreasonable interference with navigation by the work herein authorized.

(d) That if inspections or any other operations by the United States are necessary in the interests of navigation, all expenses connected therewith shall be borne by the permittee.

(e) That no attempt shall be made by the permittee or the owner to forbid the full and free use by the public of all navigable waters at or adjacent to the work or structure.

(f) That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of War, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required, upon due notice from the Secretary of War, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonably free, easy, and unobstructed; and if, upon the expiration or revocation of this permit, the structure, fill, excavation, or other modification of the watercourse hereby authorized shall not be completed, the owners shall, without expense to the United States, and to such extent and in such time and manner as the Secretary of War may require, remove all or any portion of the uncompleted structure or fill and restore to its former condition the navigable capacity of the watercourse. No claim shall be made against the United States on account of any such removal or alteration.

(g) That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage.

(h) That if the display of lights and signals on any work hereby authorized is not otherwise provided for by law, such lights and signals as may be prescribed by the U. S. Coast Guard, shall be installed and maintained by and at the expense of the owner.

(i) That the permittee shall notify the said district engineer at what time the work will be commenced, and as far in advance of the time of commencement as the said district engineer may specify, and shall also notify him promptly, in writing, of the commencement of work, suspension of work, if for a period of more than one week, resumption of work, and its completion.

(j) That if the structure or work herein authorized is not completed on or before Feb 21st, 1947 day of December, 19 50, this permit, if not previously revoked or specifically extended, shall cease and be null and void.

0575

By authority of the Secretary of War:

U. E. Case.

PERMIT REQUESTED IN 1ST IND. OF 2/7/47, FOR DISTRIBUTION

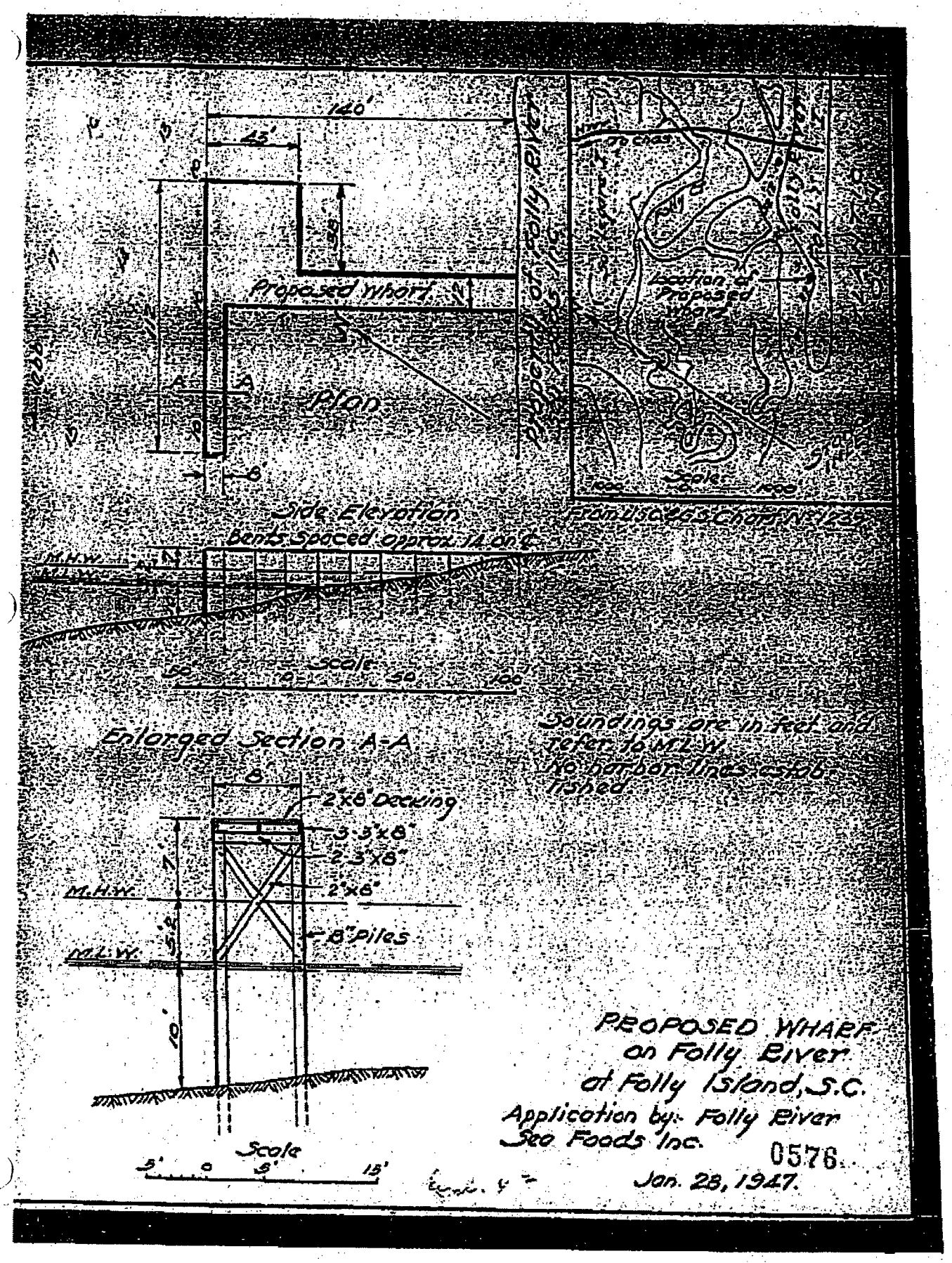
G. W. GILLETTE
Colonel, Corps of Engineers
District Engineer

WAR DEPARTMENT
O. C. of E.
Form No. 96
Revised Jan. 17, 1944

11-12576

Mobile Engineer District—8-25-46—1500

A COPY OF THIS INSTRUMENT WAS FURNISHED THE CHIEF OF ENGINEERS, U. S. ARMY, WASHINGTON, D. C., ON THE DATE IT WAS ISSUED.


140'
45'
50'
Proposed Wharf
Plan
A
A
8'
Folly River
Location of Proposed Wharf
Scale
From U.S.C.&G.S. Chart No. 1239
Side Elevation
Bents Spaced Approx. 14 on ℄
M.H.W.
M.L.W.
Scale
50
0
50
100
Enlarged Section A-A
8'
2"x8" Decking
3"x8"
3"x8"
2"x8"
8" piles
M.H.W.
M.L.W.
5.2'
10'
Scale
5'
0
5'
15'
Soundings are in feet and refer to M.L.W.
No harbor lines established
PROPOSED WHARF
on Folly River
at Folly Island, S.C.
Application by:- Folly River Sea Foods Inc.
0576.
Jan. 28, 1947.

SPAR

21 February 1947

800.6 - Folly River Sea Foods, Inc. (Constr. Wharf) Folly River S.C.

Folly River Sea Foods, Inc.,
11 Gibbes Street
Charleston, S.C.

Gentlemen:

Reference is made to your letter dated 25 January 1947, making application to this department for a permit to construct a wharf in Folly River, S.C., on the northerly shore about 1.5 miles west of the Highway Bridge between Charleston and Folly Island, S.C., there is enclosed a permit for this work issued by the Division Engineer dated 11 February 1947.

If any material changes in location or plans of the work are found necessary on account of unforeseen or altered conditions or otherwise, revised plans should be submitted promptly to the District Engineer to the end that these revised plans, if found unobjectionable from a standpoint of navigation, may receive the approval required by law before work thereon is begun.

Attention is invited to the requirements to which this permit is subject, particularly to paragraph (1) providing that the District Engineer shall be notified in writing of the commencement of work, suspension of work, if for a period of more than one week, resumption of work and its completion.

Very truly yours,

JOHN B. HUGHES
Colonel, Corps of Engineers
District Engineer

1 Inclosure;
Permit w/print attached.

0577

P U B L I C N O T I C E

WAR DEPARTMENT
CHARLESTON DISTRICT, CORPS OF ENGINEERS
CUSTOM HOUSE
CHARLESTON, S. C.

SAWRP

3 February 1947

Application has been made to the War Department by

WILLIAM G. DODDS
FOLLY RIVER SEA FOODS, INC.
11 GIBBES STREET
CHARLESTON, S. C.

for a permit to construct a wharf on

FOLLY RIVER

along the northerly shore of Folly Island, S. C., approximately 1.3 miles west of the Highway Bridge (Route No. 615) between Charleston and Folly Island, S. C.

In order to give all interested parties an opportunity to express their views

N O T I C E

is hereby given that written statements regarding the proposed work will be received at this office until

12 O' CLOCK NOON, FRIDAY, 7 FEBRUARY 1947

from those interested in the navigation of these waters, particularly navigation interests and the officials of any county, town or local association whose interests may be affected by the proposed work.

The plans, which may be seen at this office, show the proposed wharf to be of pile and timber construction. The wharf is to be T-shaped with a marginal face 112' long. The upstream end will be 45 feet wide and the downstream end 8 feet wide which will be connected to the highland by a walkway 97 feet long and 12 feet wide. There will be a depth of approximately 10 feet at mean low water at the face of the wharf which will extend about 50 feet channelward of the low water line. The deck of the wharf will be 12.2 feet above mean low water. Folly River is 1,600 feet wide at the site of the proposed structure. The applicant states that he owns the land from which the proposed wharf will extend. There are no harbor lines established in the vicinity.

For accuracy and completeness of record, all important facts and arguments bearing on navigation should be submitted in writing at or before the time named above.

0578

JOHN P. HUGHES
Colonel, Corps of Engineers
District Engineer

Folly River Sea Foods, Inc.
Charleston, S. C.
[illegible] 1947

Subj. - Folly River Sea Foods, Inc.
(Constr. Wharf) Folly River
at Folly Beach, S. C.

The District Engineer
83 Customhouse
Charleston, S. C.

Dear Sir,

Permission is requested to construct a wharf, as shown on the attached plans, to be located on the west end of Folly Island approximately 1.25 miles west of the Highway Bridge to Folly Island.

The land in front of which the wharf is to be built is owned by Folly River Sea Foods, Inc. and is within the corporate limits of Folly Beach.

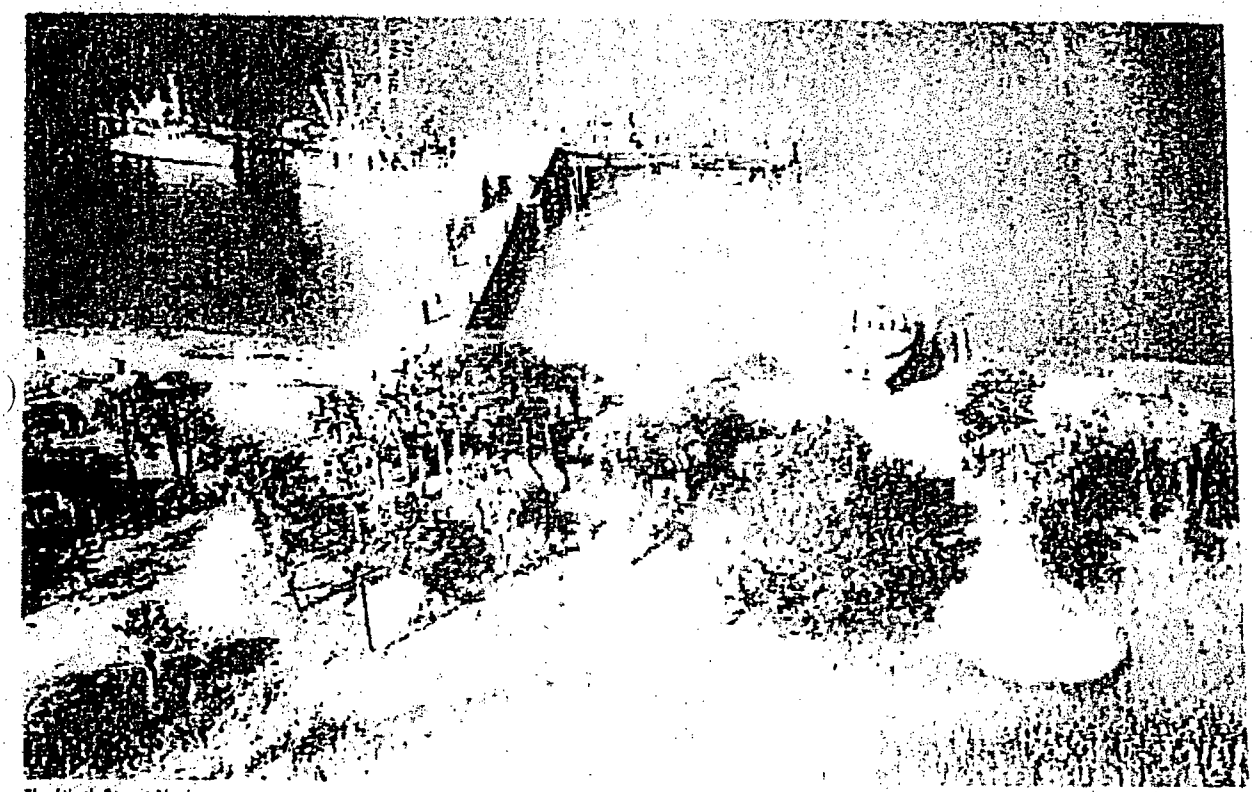
Very Truly Yours,

s/ Wm. G. DODDS
Wm. G. DODDS
President

COPY

0579

H
W
Fo
[illegible]
[illegible]



The Ninth Street Marina

D H E C

Catherine E. Heigel, Director

Promoting and protecting the health of the public and the environment

August 4, 2015

Sunset Cay, LLC
c/o Edward Clark
P.O. Box 1590
Folly Beach, SC 29439

Re: **Sunset Cay Marina**
Sunset Cay, LLC Permit# 2002-1H-190-P (Permit)
Charleston County

Mr. Clark,

The Department received your submittal dated July 6, 2015, proposing plans for each floor of the existing Sunset Cay commercial building including floor plans. The Department requested detailed plans for the activities that will utilize the space on each floor as well as floor plans that support the proposed activities in order to determine water-dependency.[1] The Department has already addressed similarly proposed uses of the second and third floors of the commercial building by way of letter dated June 29, 2015. Your July 6, 2015, submittal again fails to adequately outline or demonstrate water-dependency for the proposed uses of the third floor.

With respect to the second floor, the floor plans submitted appear to support the proposed activity of the permitted ship store and, therefore, are acceptable. The dock master's office located on the first floor is also acceptable. However, it is clear in the most recent submittal that the proposed use of the third floor, among other things, is also for office space. S.C. Code Ann. Regs. 30-12(E)(3)(b)(x) states:

> One reasonable sized dock master's office may be constructed within a permitted marina. This office will be limited to water dependent uses only such as fuel sales. Restroom facilities may be placed in the office, however, food and beverage services, clothing sales and other non-water dependent uses are prohibited.

Use of the third floor as a ship's store office and yacht sales office cannot be authorized by the Department. In addition, a yacht sales office and lounge as proposed for "yacht sales, water way and Stono Inlet navigational training aids, along with being used as a meeting area for special waterway events" are not water-dependent uses and therefore cannot be authorized by the Department.

Failure to adequately address the water-dependency of the activities proposed on the third floor may result in the Department initiating an enforcement action which can include the assessment of civil penalties of up to $1,000.00 per day of violation. Please make the necessary revisions to your plans

[1] S.C. Code Ann. Regs. 30-1(52) defines water-dependent as a facility which can demonstrate that dependence on, use of, or access to coastal waters is ***essential*** to the functioning of its primary activity (emphasis added).

and resubmit them to the Department for review. Keep in mind that S.C. Code Ann. Regs. 30-12(E)(1)(l) requires the size and extension of a marina must be limited to that which is reasonable for the intended use.

Respectfully,

for

Josh D. Hoke
Compliance Project Manager

cc: Incident File # 201500264

ec: Sean M. Briggs, Manager, Compliance and Enforcement Section
Blair N. Williams, Manager, Wetland Permitting Section
Bill Oglesby, Commodore, Sunset Cay Marina Council of Co-Owners, Inc.
Jack Walker

EXHIBIT B

D H E C

PROMOTE PROTECT PROSPER

C. Earl Hunter, Commissioner

Protecting and promoting the health of the public and the environment

December 14, 2005

Mr. Butch Clark
P. O. Box 1590
Folly Beach, S. C., 29439

Re: P/N# 2002-111-190-P

Dear Mr. Clark:

The above referenced permit has been amended to authorize the placement of a building containing restrooms and a ships store on the existing 50' by 50' fixed pierhead. The building will be 30' by 29' where the first floor will contain the bathrooms and the second floor will contain the ship's store. This work has been authorized, as the proposed uses of the building are water dependent. Non-water dependent uses are not allowed. This authorization is granted provided the permittee submits to this Department a copy of the DHEC-Trident Health District approval for the Waste Disposal System associated with these bathrooms, when received.

This amendment is made a part of your permit and is subject to the full terms of the permit as issued.

This letter does not relieve you of the responsibility of acquiring any other applicable federal or local permits that may be required. Any person adversely affected by this action has the right to appeal to within 30 days of notification.

A new construction placard, if you don't have a current one, must be posted conspicuously on site during authorized activities. Please notify OCRM prior to construction to obtain a construction placard.

Please sign the attached copy of this letter indicating your acceptance of these terms and return the signed copy to this Office.

Sincerely,

Curtis M. Joyner
Manager, Critical Area Permitting

enclosure
cc: Mr. Steve Brooks

EXHIBIT C

D H E C

PROMOTE PROTECT PROSPER

C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment.

September 18, 2009

Mr. Butch Clark
Sunset Cay Marina
P.O. Box 1590
Folly Beach, South Carolina 29439

Re: Sunset Cay Marina, PN 2002-1H-190-P, Letter of August 31, 2009.

Dear Mr. Clark:

The staff of SCDHEC/Ocean & Coastal Resource Management has reviewed the above referenced letter. Specifically, your request is to ask if the serving of snacks and light food items as a part of the existing ships store is consistent with your permit. OCRM offers no objection to inclusion of food items as a component of the ships store and does not require any modification of the permit provided 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.

Please let me know if you have any questions or concerns.

Sincerely,

D. J. Thompson

David J. Thompson
Senior Wetland Project Manager

CC: Mr. Blair Williams

EXHIBIT D

D H E C

PROMOTE PROTECT PROSPER

Catherine F. Heigel, Director
Promoting and protecting the health of the public and the environment

October 12, 2015

Mr. Thomas Goldstein
Belk, Cobb, Infinger and Goldstein, P.A.
2344 Cosgrove Avenue
Charleston, SC 29405

Re: Petition for Declaratory Ruling; P/N 2002-1H-190-P; Sunset Cay, L.L.C
Folly Beach, SC

Dear Mr. Goldstein,

This letter is the Department's response to your request for a Declaratory Ruling under Regulation 30-9 regarding proposed "secondary uses" for unit 301 at the Sunset Cay Marina. Specifically, you requested the Department to make a declaration that the five "secondary uses" that your client has identified for Unit 301 are in conformance with the regulatory definition of water-dependent, Regulation 30-1(52). You further specify the five secondary uses as:

A. Ship's store office and storage;
B. Yacht sales office;
C. Captain and transient lounge;
D. Commodore meeting room;
E. Public waterway events.

As background, Sunset Cay Marina was originally permitted by the Department on April 9, 2003, for the primary purpose of temporary and permanent docking space and fueling. The permit was amended on December 14, 2005, to allow for the construction of a two-story building on the pierhead and associated water dependent uses (bathrooms and a ship store). Specifically, the Department received a request to amend the 2003 permit by constructing a 30' x 29' "restroom and commercial facility on the existing 50' x 50' pierhead" with two floors. The request further stated:

> The first floor will be restroom facilities; one will be for Women and one for Men. The first floor will also have storage for Oil Boom absorbent pads and emergency equipment along with other items necessary for safe operation of the Marina. The second floor will be a "Ship Store" and an office for the "Dock Master" and Marina personnel along with the Operations Manual.

The affidavit of newspaper publication and submitted permit drawings, also, support your client's request for only two floors. In the December 14, 2005, amendment letter, the Department specifically stated:

> The above referenced permit has been amended to authorize the placement of a building containing restrooms and a ships store on the existing 50' by 50' fixed pierhead. The building will be 30' by 29' where the first floor will contain the bathrooms and the second floor will contain the ship's store. This work has been authorized, as the proposed uses of the building are water dependent. Non-water dependent uses are not allowed.

This amendment did not authorize a third floor. Neither the permit amendment request nor the affidavit of newspaper publication nor the issued permit amendment reference a third floor.

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. To date, no demonstration has been provided to the Department that the additional proposed uses for the third floor are water dependent. Therefore, the Department determined these proposed uses to be non-water dependent in two separate letters to Mr. Clark dated June 29, 2015 and August 4, 2015, respectively. The Department offers the following response to your petition for a Declaratory Ruling.

Regulation 30-1(D)(52), defines water dependent as "a facility which can demonstrate that dependence on, use of, or access to coastal waters is essential to the functioning of its primary activity. (emphasis added)" The Department previously determined the initially proposed dock master's office, ships store, storage space and restrooms were water dependent uses essential to the functioning of the marina's primary activity of providing temporary and permanent docking space and fuel sales to its customers . The marina regulations support this position. Specifically, Regulation 30-12(E)(3)(b)(x) states "one reasonably sized dock master's office may be constructed within a permitted marina. This office will be limited to water dependent uses such as fuel sales. Restroom facilities may be placed in this office; however, food and beverage services, clothing sales and other non-water dependent uses are prohibited." The regulation limits the number of offices to one and identifies water dependent uses such as fuel sales. The Department does not have the authority to authorize more than one office. Use of unit 301, or any other portion of this marina facility, for additional offices, Yacht Sales office, Commodore meeting room, and space for Lounges and Public Waterway events are not water dependent and cannot be authorized by the Department. The ship store on the second floor is approximately 1,185 square feet in addition to the storage area on the first floor. Considering the sparse inventory in this store (as observed by the Department during multiple site inspections), this facility, currently has adequate storage space.

Furthermore, your client has not demonstrated to the Department that the additional proposed uses above meet the regulatory definition of water dependent. Specifically, your client (applicant) bears the burden of demonstrating that dependence on, use of, or access to coastal waters is *essential* to the functioning of its primary activity of providing fuel sales and temporary and

permanent docking space to its customers. While an additional ship store office and storage, Yacht Sales office, Commodore meeting room, and space for Lounges and Public Waterway events may be, in the broadest sense, generally associated with the water, such a general association does not satisfy the regulatory standard. Regulation 30-1(D)(52) requires your client to demonstrate that their proposed uses are essential to providing temporary and permanent dock space and fuel sales. The dictionary defines "essential" as "absolutely necessary" or "indispensable". The Department takes the position that your client's additional above-referenced proposed uses are not *absolutely necessary* to provide temporary and permanent dock space and fuel sales. Your client can continue the primary activity of providing temporary and permanent docking space and fuel sales without a Yacht Sales office, a Captain and transient lounge, a Commodore meeting room or a Public waterway events room. These proposed secondary uses are not essential to the primary activity of a marina and therefore are not water dependent in accordance with the regulatory definition.

In your petition, you request the Department to provide a list of water dependent uses. While no such list exists, the marina regulations identify some water dependent uses such as fuel sales. The regulations further specify certain non-water dependent uses such as restaurants, motels, laundries, food and beverage services, and clothing sales. Again, the regulations require the Department to determine what is water dependent based on a demonstration that the dependence on, use of, or access to coastal waters is essential to the facility's primary activity.

Please allow this letter to serve as the Department's Declaratory Ruling for the matters presented by you regarding Sunset Cay, L.L.C. permit number 2002-1H-190-P. Please call Blair N. William, Manager, Wetland Permitting Section, at 843-953-0232 or email him at williabn@dhec.sc.gov if you need further clarification or have questions.

Respectfully,

Sara P. Bazemore

Sara P. Bazemore
Deputy Director
Office of Ocean and Coastal Resource Management

CC: Blair N. Williams, Manager, DHEC Wetland Permitting and Certification Section

EXHIBIT E

BELK, COBB, INFINGER AND GOLDSTEIN, P.A.
ATTORNEYS AT LAW
2344 COSGROVE AVENUE
CHARLESTON, SC 29405

Harry C. Belk (1919-2093)

Dale T. Cobb, Jr
dtcobblaw@hotmail.com

Peggy M. Infinger
pinfinger@cobblaw.net

Thomas R. Goldstein
tgoldstein@cobblaw.net

Mailing Address
PO Box 71121
Charleston, SC
zip 29415-1121
Ph (843) 554-4291
Fax (843) 554-5566

October 12, 2015

Ms. Sara P. Brazemore,
Deputy Director
S. C. Dept. of Health and Environ. Control
O.C.R.M.
2600 Bull Street
Columbia, S. C. 29201

RE: Sunset Cay, L.L.C.
Permit: P/N# 2002-1H-190-P

Dear Ms. Brazemore,

I am in receipt of your correspondence of today's date. Despite multiple readings, I remain in the dark as to O.C.R.M.'s position. I will try to spell these out as best I can so that this letter may serve as the equivalent of a motion for reconsideration:

1. Motion for Reconsideration and Due Process

I am in the dark as to the manner in which O.C.R.M. reached a decision on our August 27, 2015, application for declaration without out participation. Your agency must provide some mechanism for an applicant's participation. Even routine applications provide a mechanism to speak to someone. In 1992, the Supreme Court pointed out that the Department must furnish applicants an opportunity to develop a record. See *Weaver v. S. C. Coastal Council*, 309 S.C. 368, 423 S.E.2d 340 (1992). While you make reference to two earlier letters, the ambiguity and confusion of those letters are precisely what prompted our August 27, 2015, application for a declaration under O.C.R.M.'s regulations. I am assuming there is a mechanism to ask for reconsideration or to communicate with the Department in some way, especially where your office reached a decision that did not provide us an opportunity to participate or be heard. Unless you will allow this letter to serve as a request for reconsideration, we have no choice but to appeal this decision the Administrative Law Court. However, we prefer to work out a mutually agreeable solution with the Department, especially where a potential interpretation of your decision could be financially ruinous to my client. I feel reasonably certain that the Administrative Law Court will remand the matter back to O.C.R.M. in order to allow us to participate in the decision making process. As a result, if you will suspend the effect of your October 12th decision in order to afford us an opportunity to participate, perhaps we can resolve the controversy in the entirety in a manner that benefits both sides.

2. Definition of "Essential"

Your October 12, 2015, decision informs us that the applicant has not provided a proposed use that the Department views as "essential" to the operation of the marina. First, Regulation § 30-1(d)(52) does not place a burden on an applicant to prove a use is "essential." The burden is on O.C.R.M. to provide objective criteria in order that an applicant can design a project with some idea of what is and is not allowed. Moreover, this marina has been in uninterrupted use since 1947, at which time the Army Corps of Engineers permitted a wharf constructed extending into the Folly River in the same location as the present building. This marina remained in almost continuous use primarily as a marina, bar, and poolroom. Second, because the Department does not define "essential"—and neither do the regulations—"essential" remains subjective criteria that are not discoverable. Because it is not defined anywhere in the regulations, the definition of "essential" remains subject to the unbridled and unreviewable discretion of the Administrator. All of the applicant's proposed uses are related to promoting the public's access to the water and should be, therefore, "essential" under any definition adopted by the Department.

In issuing permits, you are aware that O.C.R.M. must treat similarly situated property owners in a like manner. The Supreme Court instructed O.C.R.M. (formerly known as Coastal Council) in the case, *Weaver v. S. C. Coastal Council*, 309 S.C. 368, 423 S.E.2d 340 (1992), cited above, a copy of which is included with this letter. "The record reflects, when viewed as a whole and in the proper posture, that there is substantial evidence that the circumstances surrounding the application of the respondent and the other three individuals granted permits are similar, and that the existence of respondent's dock would create no effect distingulshable from that occasioned by the other three existing docks." It is arbitrary to allow similarly situated businesses to operate while denying any of the seven proposed uses here under identical circumstances.

3. Use of Unit 301

As to O.C.R.M.'s assertion that it did not authorize any uses for the third floor, I am grateful to you for your letter of October 12, 2015, because, for the first time, I think I now understand the Department's position. My client has submitted seven proposed water-dependent uses for Unit 301. However, the Department rejects each one without explaining why the proposed use is not water dependent. As set forth above, it is the Department who has the burden to provide the objective criteria, and my client should not be forced to guess what uses the Department will authorize. The Department's position is like imposing restrictive covenants without disclosing what they are. Therefore, the applicant is left to grope in the dark as to what criteria he must meet to submit the after the fact permit application that you are requiring. If the Department will furnish the necessary definitions, we will submit an after the fact application for whatever an authorized use approved by the Department. Therefore, if you can make either you or Mr. Williams available to discuss this, I am confident we can resolve this

entire controversy. In light of your letter of October 12th, I respectfully request permission to be given an opportunity to discuss this with you or with Mr. Williams. I am also respectfully asking if you will answer the following three questions:

1. Will you allow this letter to serve as a motion for reconsideration, thereby tolling the time for filing an appeal with the Administrative Law Court?

2. If you will allow this letter to serve as a motion for reconsideration, thereby tolling the time for filing an appeal, will you allow the applicant to participate in the decision by providing an opportunity to be heard by discussing this issue with you or Mr. Williams?

3. Will you identify a list of uses that the Department agrees are authorized water dependent uses?

Under South Carolina law, a motion for reconsideration must be made within ten days from the date of the decision, which deadline we easily meet. However, since there is no statutory or procedural mechanism for a motion for reconsideration on a Declaration, I need an agreement from the Department that its October 12th declaration is not final until such time as the Department as made a ruling on the issues identified in this letter. If the Department is unwilling or unable to grant a rehearing, then we will seek further relief in the Administrative Law Court. I look forward to hearing from you. With kind regards, I am

Very truly yours,

Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein

enclosure: *Weaver v. Coastal Council*, 309 S.C. 368, 423 S.E.2d 340 (1992)

cc:
Blair N. Williams, Manager
1362 McMillian Avenue
Suite 400
N. Charleston, S. C. 29405
Butch Clark (with enclosure)

Mr. Bradley D. Churdar, Esq.
1362 McMillian Avenue
Suite 400
N. Charleston, S. C. 29405-2047

Mr. Blair N. Williams, Manager
1362 McMillian Avenue
Suite 400
N. Charleston, S. C. 29405-2047

Butch Clark (with enclosure)

EXHIBIT F

BOARD:
Allen Amsler
Chairman

Mark S. Lutz
Vice Chairman

Ann B. Kirol, DDS
Secretary

D H E C
PROMOTE PROTECT PROSPER

Catherine E. Heigel, Director
Promoting and protecting the health of the public and the environment
South Carolina Board of Health and Environmental Control
2600 Bull Street, Columbia, South Carolina 29201 · Telephone: (803) 898-3309 · Facsimile: (803) 898-3393 · lisa.longshore@dhec.sc.gov

BOARD:
R. Kenyan Wells
Charles M. Jaye II, P.E.
L. Clarence Batts, Jr.
John O. Hutto, Sr., MD
William Lee Hewitt, III

December 2, 2015

U.S. Mail – Certified – Return Receipt
9214 8969 0099 9790 1403 0410 00
Thomas R. Goldstein, Esquire
Belk, Cobb, Infinger and Goldstein, P.A.
Post Office Box 71121
Charleston, SC 29415

Via Electronic Mail Delivery
Brad Churdar, Esquire
SCDHEC – Office of General Counsel
1362 McMillan Avenue
Charleston, SC 29405

RE: ***Docket No. 15-RFR-69, Sunset Cay, LLC – Response to Petition for Declaratory Ruling; P/N 2002-1H-190-P***

Dear Counsel of Record:

The South Carolina Board of Health and Environmental Control will not conduct a Final Review Conference on the above-referenced matter.

CONTESTED CASE GUIDANCE

S.C. Code Section 44-1-60 provides that if the Board declines in writing to schedule a final review conference, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court (ALC) within thirty calendar days after notice is mailed to the applicant,

permittee, licensee, and affected person that the Board declined to hold a final review conference. A request for a contested case hearing before the Administrative Law Court must be filed within the time allowed and in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

Clerk's Office
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: http://www.scalc.net. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,

Lisa Lucas Longshore
Clerk

The above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy; parties before the ALC are responsible for complying with all applicable requirements of the Court.

THE STATE OF SOUTH CAROLINA
In The Administrative Law Court

APPEAL FROM S. C. DEPARTMENT OF HEALTH & ENVIORN. CONTROL
Office of Coastal Resources
Catherine E. Heigel, Director

Case No. 2015-RFR-69, Sunset Cay, L.L.C.

Sunset Cay, L.L.C., ...Petitioner/Appellant,

vs.

S. C. Dept. of Health and Enviorn. Control, Division of O.C.R.M., ...Respondent.

Certificate of Mailing

I certify that I served a true and conformed copy of the foregoing Notice of Appeal on the respondent by placing a copy properly addressed, with sufficient postage thereon, in the United States mail this 23rd day of December 2015, to the following address:

Brandley Churdar, Esq.
General Counsel
O.C.R.M.
1362 McMillan Avenue
Suite #400
North Charleston, SC 29405-2047

December 23, 2015

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THE STATE OF SOUTH CAROLINA
In The Administrative Law Court

APPEAL FROM S. C. DEPARTMENT OF HEALTH & ENVIORN. CONTROL
Office of Coastal Resources
Catherine E. Heigel, Director

Case No. 2015-RFR-69, Sunset Cay, L.L.C.

Sunset Cay, L.L.C., ...Petitioner/Appellant,

vs.

S. C. Dept. of Health and Enviorn. Control, Division of O.C.R.M., ...Respondent.

Pre-Hearing Brief

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1. The nature of this proceeding.

This is an appeal from an administrative cease and desist letters dated March 3, 2015, and October 26, 2015. The overarching issue before the Administrative Law Court is whether the Respondent is or is not being arbitrary in failing to define or authorize any water dependent use for Unit 103 of the Sunset Cay Marina. The properly-permitted Sunset Cay Marina has 125 boat slips, and a three story building, which has always been shown on the submitted elevation drawings submitted to O.C.R.M. as part of the original permit application. The first floor is commonly referred to as Unit 101—the Dockmaster's Office, members' restrooms, and storage. The second floor is called Unit 102—the Ship's Store, and the third floor is called Unit 103,

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SC ADMIN. LAW COURT

which has remained vacant. The main issues in this case involve O.C.R.M.'s failure to permit or identify uses. The other overarching principle is that O.C.R.M. is treating the petitioner differently from other similarly situated businesses. The timeline best summarizes the salient points of the case and highlights the disagreement between petitioner and O.C.R.M. In short, the dispute arises out of an overly aggressive prosecution of the petitioner that is arbitrary, capricious and confiscatory.

Timeline

2003

April 9, 2003	Permit 2002-1H-190-P Sunset Cay Permit. This permit (as amended thereafter allows construction of a 125 slip marina with a building (as later amended), commonly referred to as Unit 101 (the Dockmaster' s office, storage area, and members' restrooms), Unit 102 (the Ship's Store), and Unit 103 (currently vacant). The uses for Units 102 and 103 are the source of the controversy now before the Court.

2005

November, 2005 length	Amendment to Permit allows construction of a building 30 x 29 feet within an approved pier head foot print of 50 x 50. The Permit limits and width but does not limit height or number of stories and approves construction in conformity to submitted elevation plans.
December 14, 2005	O.C.R.M. issues an Amendment of Permit to allow Ship's Store (Petitioner omits a delineation of previous amendments because they are technical, minor, and have no impact on the issue now before the Court.)

2006

September 25, 2006	Construction is completed, and building is in compliance with the limitations of the permit. After inspection, Folly Beach issues three certificates of occupancy, one for "marina," one for "commercial," and one for "residential."

2009

September 18, 2009	O.C.R.M. approves Menu for Ship's Store (Unit 102)

2015

August 28, 2015	Petitioner files Request for Declaration for definition and/or list of water dependent uses under O.C.R.M. Regulation § 30-9
October 12, 2015	Board denies Declaration under Regulation 30-9
October 23, 2015	Request for Administrative Review
October 26, 2015	O.C.R.M. issues Cease and Desist Directive
November 12, 2015	Acknowledgement of Administrative Review
December2, 2015	O.C.R.M. denies Petitioner Administrative Review
December 23, 2015	Petitioner files for Review with Administrative Law Court

2. The statutory provisions conferring subject matter jurisdiction to the Administrative Law Court and other applicate statutes and regulations.

S. C. Constitution, Article I, § 22

S. C. Code, § 1-23-380: This statute authorizes judicial review after an agency makes a final determination.

O.C.R.M. Regulation § 30-9: this provision allows an applicant to request a written ruling from O.C.R.M. In this case, the petitioner requested that O.C.R.M. approve petitioner's proposed water dependent uses.

§ 48-39-180, S. C. Code, Ann., Judicial review of permit determinations.

3. The issues to be presented for determination, including any claims or defenses expected to be raised;

A) **Equal Protection**. The overarching legal issue in this case is one of selective enforcement. A enforcement officer for O.C.R.M. has exceeded his authority as a field inspector and has singled the petitioner out for disparate treatment. O.C.R.M. has been aware of the petitioner's marina for over 10 years when it first permitted it. It specifically approved the uses for Unit 101 (Dockmaster' s office, storage, and members' restrooms) and for Unit 102 (Ship's Store). O.C.R.M. asserts that it has never approved a "water-dependent" use for Unit 103, which is true, but is true only because an enforcement officer for O.C.R.M. has singled the petitioner out for disparate treatment and prevented O.C.R.M. from approving **any** use for Unit 103. O.C.R.M.'s explanations for this vary from day-to-day. Sometimes O.C.R.M. says it cannot permit any use for Unit 103, while other times O.C.R.M. says Unit 103 can be used as a Dockmaster' s office or storage, which is a contradiction of its other position. No one believes it is in the best interest of the slip owners to locate a Dockmaster' s office on a third floor against the will of the owners of the slips. In case of an emergency, the Dockmaster cannot be expected to respond quickly from a third floor location. O.C.R.M.'s refusal to allow any use of Unit 103 and very limited uses of 102 is arbitrary, capricious, and treats the petitioner differently from other similarly situated marinas. This legal issue has already been decided adversely to the

respondent by the Supreme Court in *Weaver v. Coastal Council*, 309 S.C. 368, 423 S.E.2d 340 (1992). (copy attached)

B) **Due Process**

1. **PROCEDURAL** The petitioner shows that it has been deprived of due process. O.C.R.M.'s regulations specifically authorize a petitioner to obtain a written ruling from the agency, which O.C.R.M. provided. Thereafter, as required by state statutes, petitioner appealed that decision to the Administrative Board in Columbia. The Board refused to consider the petition.

2. SUBSTANTIVE The petitioner shows that the current controversy is the result of an overzealous enforcement officer who has singled petitioner out for arbitrary and capricious treatment. The enforcement officer has relied on mostly anonymous and false claims to harass the petitioner and has consistently threatened the petitioner with financial loss and civil penalties. As an example of this unwarranted and overzealous prosecution, the O.C.R.M. undertook an investigation of the petitioner when it received an anonymous photograph of an Australian bar and used the existence of the photograph as grounds for threatening the petitioner. Respondent has attempted to induce the City of Folly Beach to delay and/or retract its business licensee for the occupant of Unit 102. Respondent has induced D.H.E.C. to withdraw its "A" rating of the Ship's Store. The Respondent has leveled a steady stream of threats, all because it claims that petitioner's proposed uses are not "water dependent." The respondent is attempting to deprive the petitioner of fundamental property rights by misusing its institutional powers and deprive the respondent of rights under color of law.

7. A list of proposed witness and exhibits

WITNESSES

Butch Clarke
P. O. Box 1590
Folly Beach, S. C.

William Ogelsby

Folly Beach, S.C. 29436

John Oliver
c/o Ian O'Shea
544 Trapier Drive
Charleston, S. C. 29412
843 442-5385

Mike Yount
Dockmaster
66 West Ninth Street
Folly Beach, S. C. 29439
843 588-0051

Tammi Byrd

Folly Beach, S. C. 29439

Will Irvin
1230 Folly Road
Charleston, S. C. 29412

Steve Tumbleston
Street
Ravenel, S. C. 294

Tommy Hall
Highway 34
Chappells, S. C. 294

John Romanosky
P. O. Box 603
Charleston, S. C. 29402

843 724-1054

Sean Briggs
O.C.R.M.

Adam Page
O.C.R.M.

Josh Hoke
O.C.R.M.

Curtis Joyner
O.C.R.M.

Jeff Thompson
O.C.R.M.

EXHIBITS

Photo of 1947 marina

Application for amendment of permit for ship's store /s/ Butch Clarke October 12, 2005

Elevation submittals to O.C.R.M. November 3, 2005

O.C.R.M. approval of Ship's store /s/ Curtis M. Joyner December 14, 2005

Certificates of Occupancy (3) September 7, and 25, 2006

Arcadis floor plans Master Deed Attachment August 30, 2007

Second Amendment to Master Deed October 5, 2007

Floor plans

Application for approval of menu ships store /s/ Butch Clark with menu August 31, 2009

O.C.R.M. approval of Ship's Store /s/ David J. Thompson September 18, 2009

Sean Briggs e-mails from May 13, 2015—May 15, 2015

Assignment of Leases Fleet Landing March 21, 2014

Anonymous Letter September 9, 2015

Letter conveying Fraudulent Photograph of Australian Bar September 14, 2015

5 photographs of St. Johns Marina

Photos of Lady's Island Marina

8. A statement regarding the necessity for discovery, if any;

Petitioner anticipates at least one set of Interrogatories and Request for Production and Request for admission. Petitioner desires to take at least three depositions. Petitioner requests six months to complete all discovery.

9. Whether the party deems it necessary by the undersigned Judge to conduct a Pre-hearing Scheduling Conference or issue an order regarding motions, discovery, etc;

Petitioner believes that a pre-hearing scheduling conference could assist the parties in resolving the case in its entirety.

10. The estimated time required for the hearing.

Three days

11. A range of proposed hearing dates for which all of the parties are available for hearing on the merits of this case.

Petitioner's counsel has no unavailable dates known at this time other than Opening Day at Turner Field (April 4th-5th) and plans to take two weeks of vacation in August.

12. An e-mail address that the Court can use for e-mail correspondence.

tgoldstein@cobblaw.net
rtoppin@cobblaw.net

I certify that I served a true and conformed copy of the foregoing Pre Hearing Brief on the respondent by placing a copy properly addressed, with sufficient postage thereon, in the United States mail this 26th day of February 2016, to the following address:

Brandley Churdar, Esq.
General Counsel
O.C.R.M.
1362 McMillan Avenue
Suite #400
North Charleston, SC 29405-2047

February 26, 2016

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THE STATE OF SOUTH CAROLINA
In The Administrative Law Court

APPEAL FROM S. C. DEPARTMENT OF HEALTH & ENVIORN. CONTROL
Office of Coastal Resources
Catherine E. Heigel, Director

Case No. 2015-RFR-69, Sunset Cay, L.L.C.

Sunset Cay, L.L.C., ...Petitioner/Appellant,

vs.

S. C. Dept. of Health and Enviorn. Control, Division of O.C.R.M., ...Respondent.

Supplemental Brief

Jurisdictional Issue.

In the July 29, 2016, Supplemental Brief, the Department argues that "Postponing a jurisdictional decision regarding these two directives will require the parties to unnecessarily expend even more pretrial preparation time and will expand the time required to try this case." The appellant agrees. Where the parties disagree is in the Department's myopic view of the circular nature of its position. The Department makes much of the fact that "The Petitioner has never filed an RFR challenging either of these Cease and Desist directives." (Brief at page 2). As the Court has already observed, this is simply not true.

On August 28, 2015, the appellant filed a petition for Declaration as allowed by Regulation 30-9. This petition for declaration asked the Department to allow any of five proposed water dependent uses for Unit 301. Two months later, on October 26, 2015, the Department issued its alleged "Cease and Desist" Directive, and this is where the parties part company.

The Department contends that in failing to request an administrative review of the October 26, 2015, Cease and Desist letter, the appellant has waived something. The appellant is not sure what, as even the Department's brief does not identify what since the Department says over and over it has not taken any "administrative action" on the October 26, 2015, cease and desist letter.[1] More importantly—and this is where the Department's arguments become even more Kafkaesque—the appellant agrees with the Department's October 26th cease and desist letter. The October 26th cease and desist letter identifies two deficiencies:

1) Eleven dive-on docks installed without a permit amendment.

2) No proposed water dependent use for Unit 301.

The appellant agrees that the eleven drive-on docks are improperly installed. Likewise, the Department agrees that after-the-fact permits for drive-on docks are routinely granted because most people do not realize a permit amendment is required, and drive-on docks promote

[1] The Department's arguments really are Kafkaesque. The Department keeps saying the appellant "waived" his rights by not asking for an administrative review within 15 days of the cease and desist letter. Then in the next breath, it says: "The Petitioner would have the opportunity to challenge the Department's Administrative Order in accordance with the requirements of S.C. Code Ann. § 44-1-60 and S. C. Code Ann. § 1-23-380." (Brief at page 3) This mind-numbing circularity ignores that appellant's Petition pre-dated the cease and desist letter by two months. The reason the Department has taken no action against appellant is perhaps the greatest evidence of its lack of confidence in its legal position. It is a tough row to hoe to assert the Ship's Store is the only marina in the State that cannot serve alcohol! See *Weaver v. Coastal Council*, 309 S.C. 368, 423 S.E.2d 340 (1992). The point is—and here the parties agree—the only hold up to an application to amend permit is the refusal of the Department to identify allowable "water dependent" uses " for Unit 301.

water quality because they lift the vessel completely out of the water, thus reducing degradation of water quality. The Department has informed the appellant numerous times that it will approve the drive-on docks as a matter of routine.

This brings us back to the proposed water dependent use for Unit 301, which is the issue before this Court. The appellant **agrees** with the Department that the appellant must amend the permit to secure a "water dependent" use for Unit 301. When the Department refused to define water dependent use, the appellant filed on August 26, 2015, a petition for declaration because the Department refuses to authorize appellant's five requested water dependent uses. The Department has been less than candid with appellant about this process, first informing appellant that he must apply for a "use" for 301, and recently in sworn testimony amending that position to assert, for the first time, that appellant must apply for a permit to "construct" Unit 301. This is a novel and demonstrably false assertion mentioned for the first time on appeal after appellant filed this appeal. There are no construction issues raised in the October 26, 2015, "cease and desist" letter. More troublesome is the Department's witness's sworn testimony that they were not aware of Unit 301's existence even though the material supplied by O.C.R.M. in discovery clearly shows the building, both in proposed elevation submissions and in "as-built" building plans. The only possible conclusion is that the witnesses either gave untruthful testimony or do not know what is in their own files.

The point is that the appellant's petition for declaration preceded the cease and desist letter by two months. Thus for the Department to say the appellant failed to do something is preposterous. As this Court has already noted, the determination of "water dependent" uses is a condition precedent to amending the permit. The Catch-22 is that the appellant cannot amend the permit until he knows what water dependent uses the Department will allow, and the

Department refuses to tell the appellant what water dependent uses it will allow—a perfect bureaucratic circle. Interestingly, the Department has approved the following water dependent uses for other buildings past the critical line:

Edisto Marina:	restaurant and bar
St. Johns Marina:	convenience store
St. Johns Marina:	members lounge
St. Johns Marina:	waterway event room, transient lounge, pool table
The Sand Castle :	restaurant and bar
The Sand Castle:	caretaker's quarters
Fleet Landing:	restaurant and bar
2 Concord Street:	Condominiums
Fripp Island Marian	Restaurant & Bar
Lady's Island Marina:	Pest Control Company
Lady's Island Marina:	Real Estate Company

(see attached photos)

The Department's brief alleging "the Declaratory Ruling Request has no bearing on the department's two Cease and Desist directives which require the Petitioner to (1) 'immediately cease and desist construction, operation, and/or utilization of the restaurant and apartment at the site,' and (2) 'immediately cease and desist operation and/or utilization of the facility providing beverage service at the Site'" (Brief at page 3) is utter nonsense, something akin to the old joke about the question: "When did you stop beating your wife"? There is no "apartment" at the site, and there is no "restaurant" at the site. It is an undisputable fact that Unit 301 is vacant and has never been occupied by anyone as an apartment since the City of Folly Beach issued a certificate

of occupancy for all three floors in September 2006. It is an undisputable fact that Unit 201 is the O.C.R.M. approved "Ship's Store." And it is likewise an undisputable fact that on September 18, 2009, O.C.R.M. approved the food service at the Ship's Store, including approving the Ship's Store menu. (See Exhibit 8 attached here.) And if O.C.R.M. asserts that a "restaurant," is not a "water-dependent" use, then this Court should use its inherent contempt powers to sanction O.C.R.M. for something that is so obviously and materially untrue. Fleet Landing, one of Charleston's premier restaurants, including full bar—it's called **Fleet Landing Restaurant and Bar** (see attached menu)—opened and operated **before it applied for an O.C.R.M. permit**, and when it did apply, O.C.R.M. routinely granted it! In light of these undisputed facts, the Department's conduct in this case is nothing short of shocking.

Conclusion

As this Court has already noted, the definition of "water dependent" uses is the linchpin on which every issue raised in this case resolves. The Court therefore, since the Department agrees the Declaratory Ruling appeal is properly before this Court, should examine the five proposed water dependent uses and declare that all five are water dependent uses and can be utilized by the appellant in accordance with South Carolina law.

August 8, 2016

Thomas R. Goldstein, S. C. Bar #2186
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CERTIFICATE OF SERVICE
This is to certify that I have served counsel for all parties in the foregoing matter with a copy of this pleading by:
☐ depositing in the U. S. Mail a copy of same in a properly addressed envelope with adequate postage thereon
☐ handing counsel a copy thereof
☐ by facsimile and depositing in the U. S. Mail a copy of same in a properly addressed envelope with adequate postage thereon.
This 12th day of August, 2016
BY

EXHIBIT 1

Edisto Marina

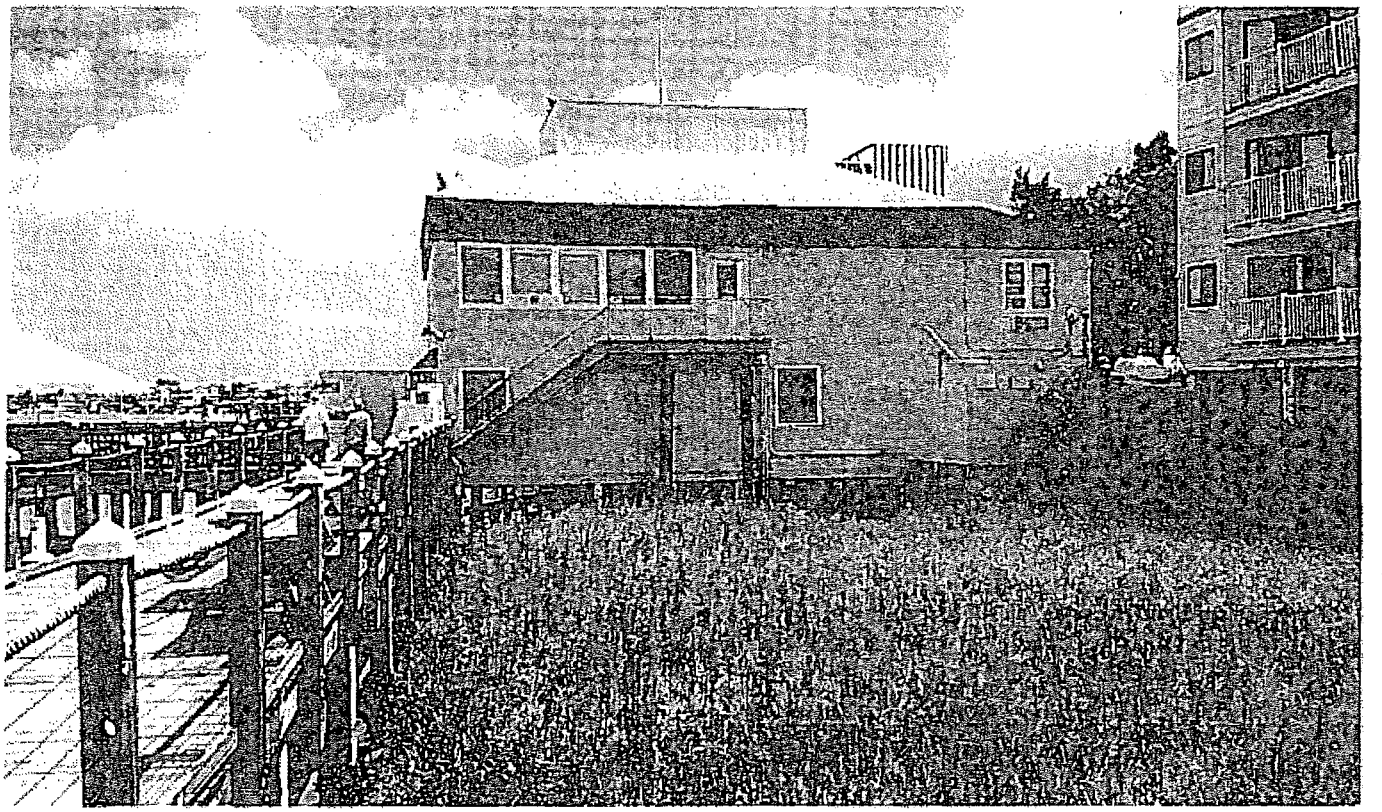
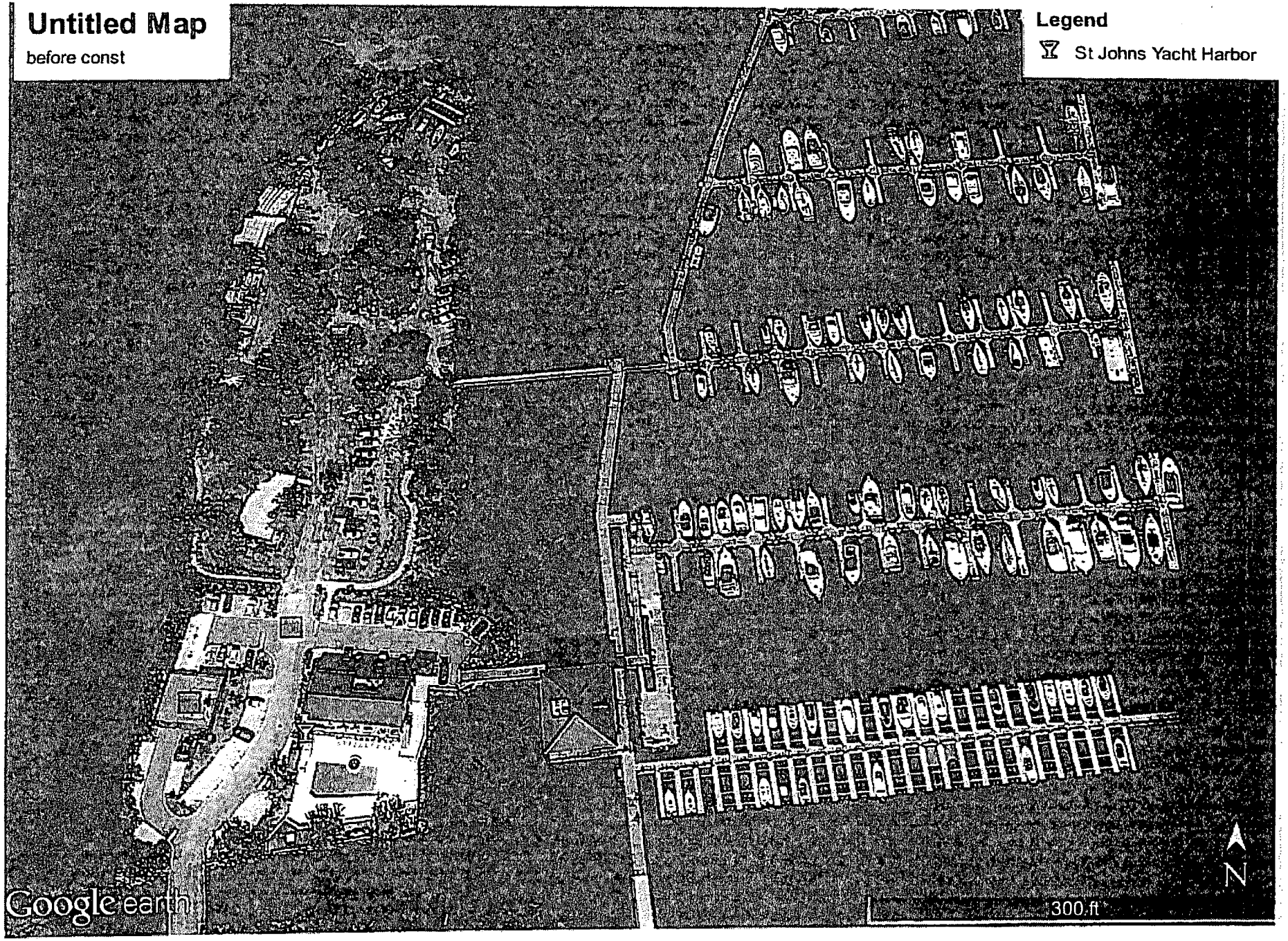
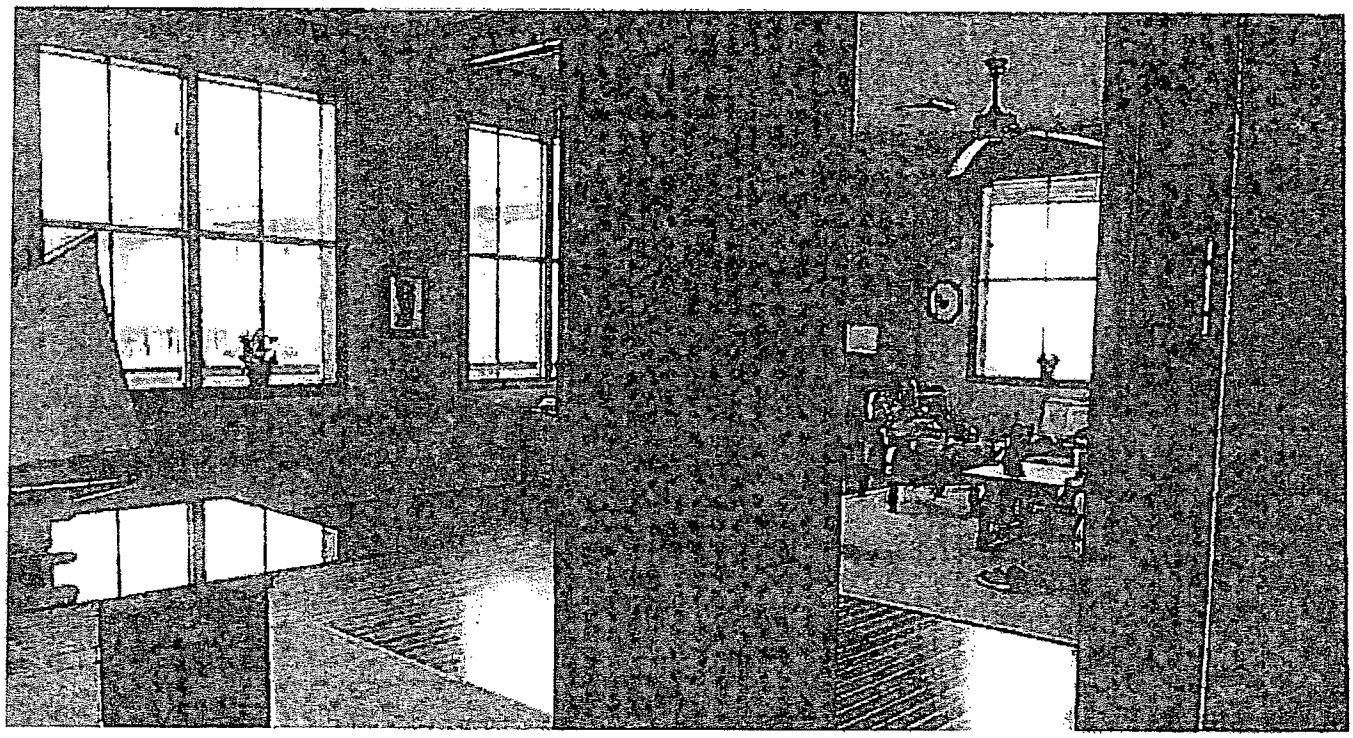
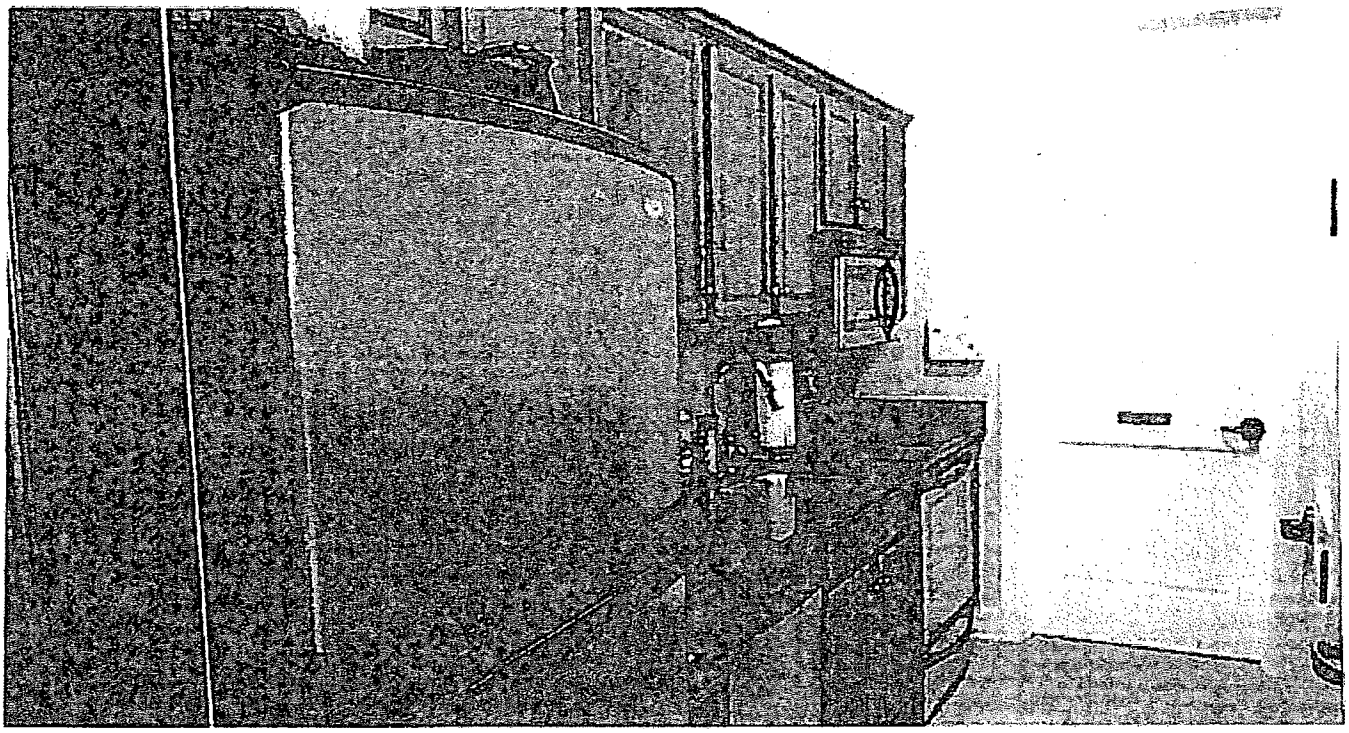


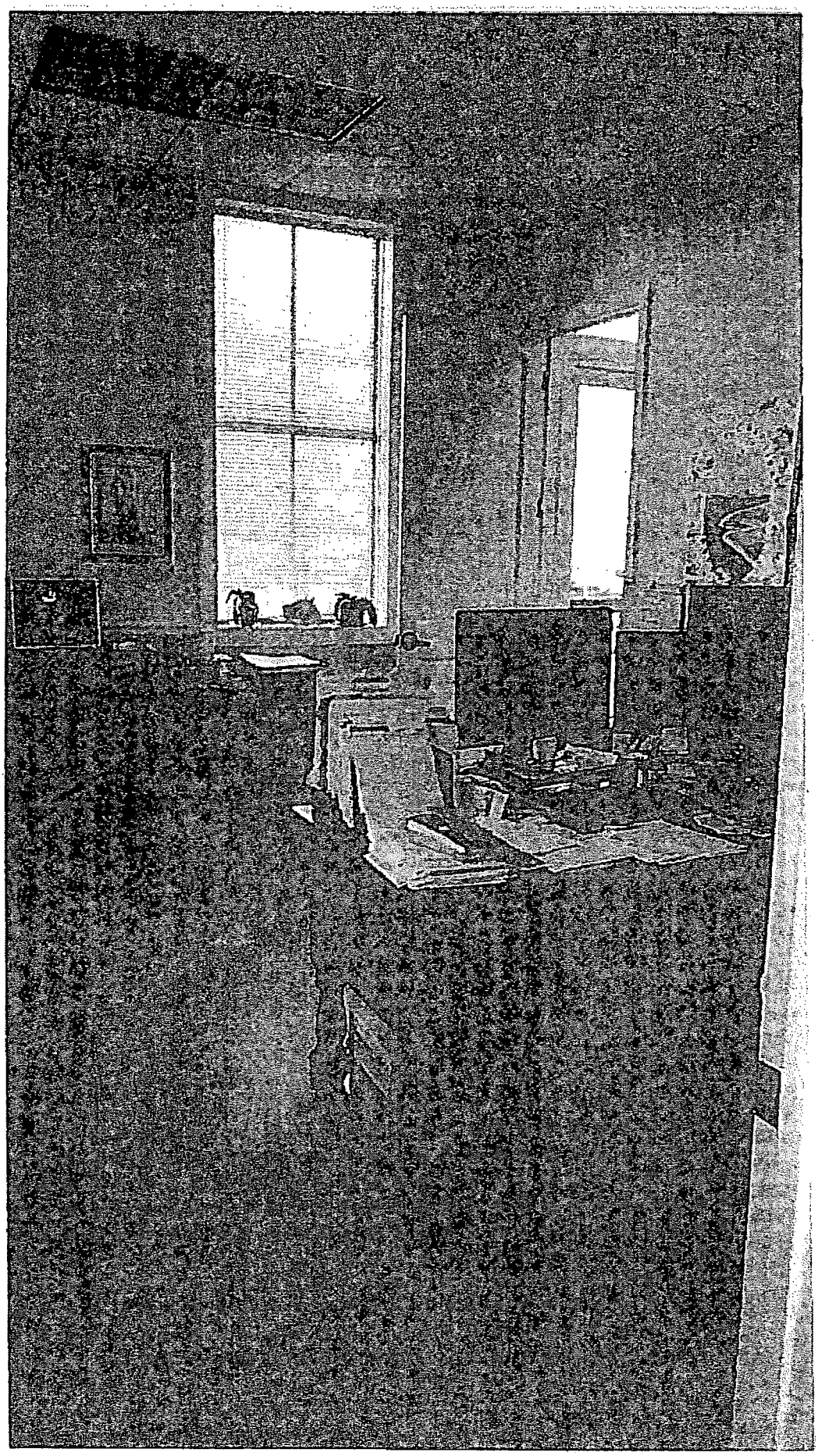
EXHIBIT 2

St. Johns Marina


Untitled Map
before const
Legend
St Johns Yacht Harbor
Google earth
300 ft
N







St. Johns Yacht Harbor

As of Mon, 5:14 AM ET
Fair
64°F - Wind chill 64°F
Wind: N at 0mph

Forecast for Mon, 28 Dec 2015
Thunderstorms
High: 77°F - Low: 68°F
Details

BOAT SLIPS
AMENITIES
SERVICES
EVENTS
THE STONO BREEZE
TRANSIENT

St. Johns Yacht Harbor
2108 Maybank Highway
John's Island, SC 29455
843-557-1027

Get Directions





Captain's Retreat

St. Johns Yacht Harbor offers an exquisitely decorated over-water retreat for exclusive use by our members or special event bookings. The Captains Retreat includes a complete kitchen, 50" plasma TV, pool table and unparalleled furnishings and artwork. Members of SJYH can enjoy the 270 degree views of the Stono River from the Captains Retreat year round. This expansive room can easily accommodate a variety of special functions, from an intimate cocktail party to a corporate meeting, or elegant wedding reception.

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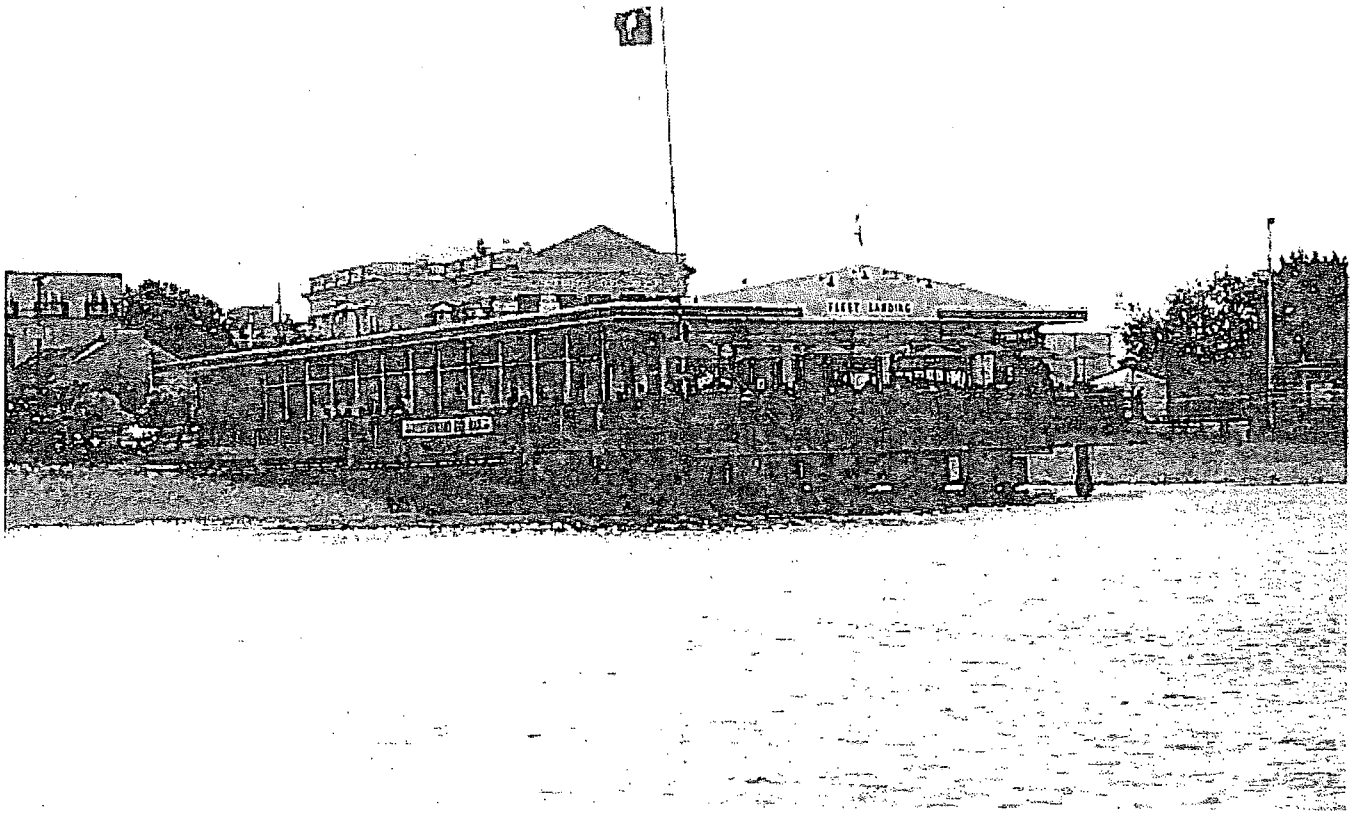
EXHIBIT 3

Sand Castle


Selma
Castle

EXHIBIT 4

Fleet Landing


FLEET LANDING

LEET LANDIN
RESTAURANT & BAR

EXHIBIT 5

Concord Street Residences

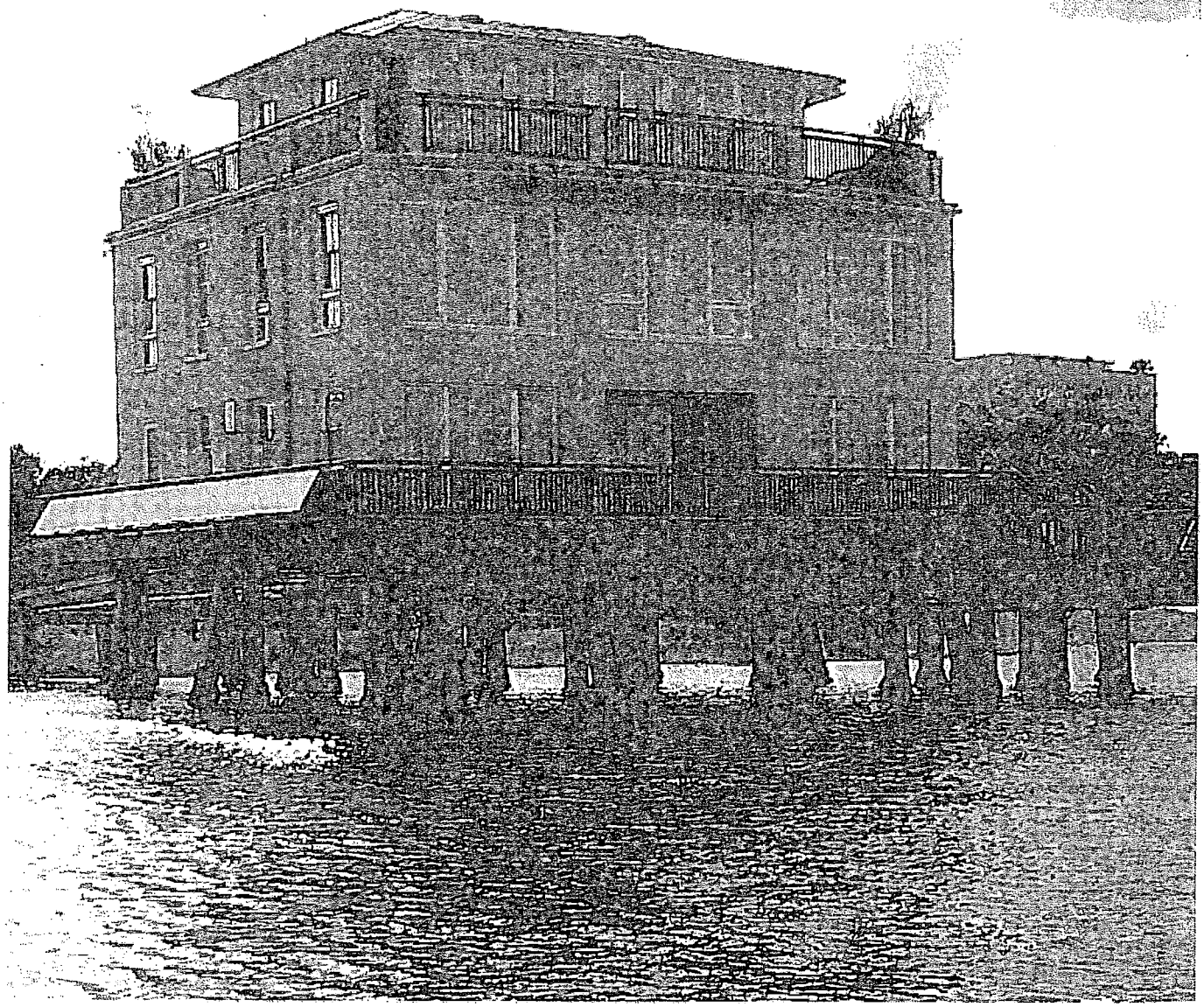
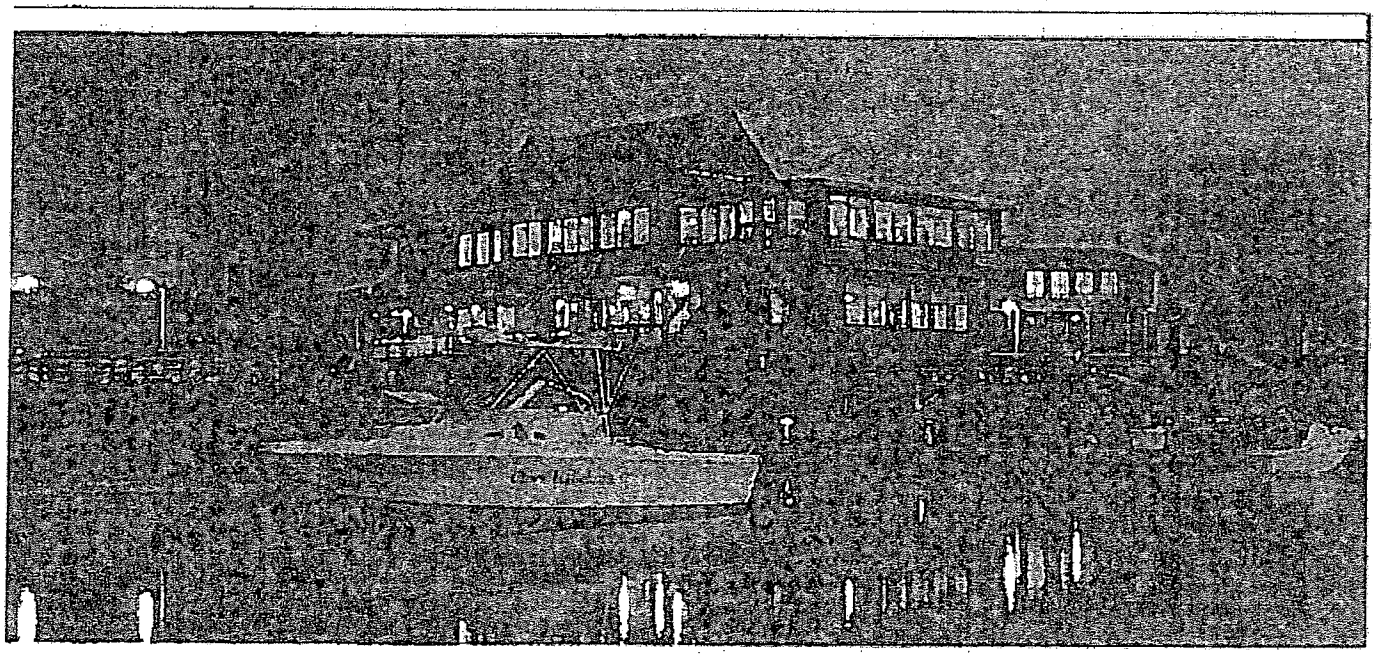
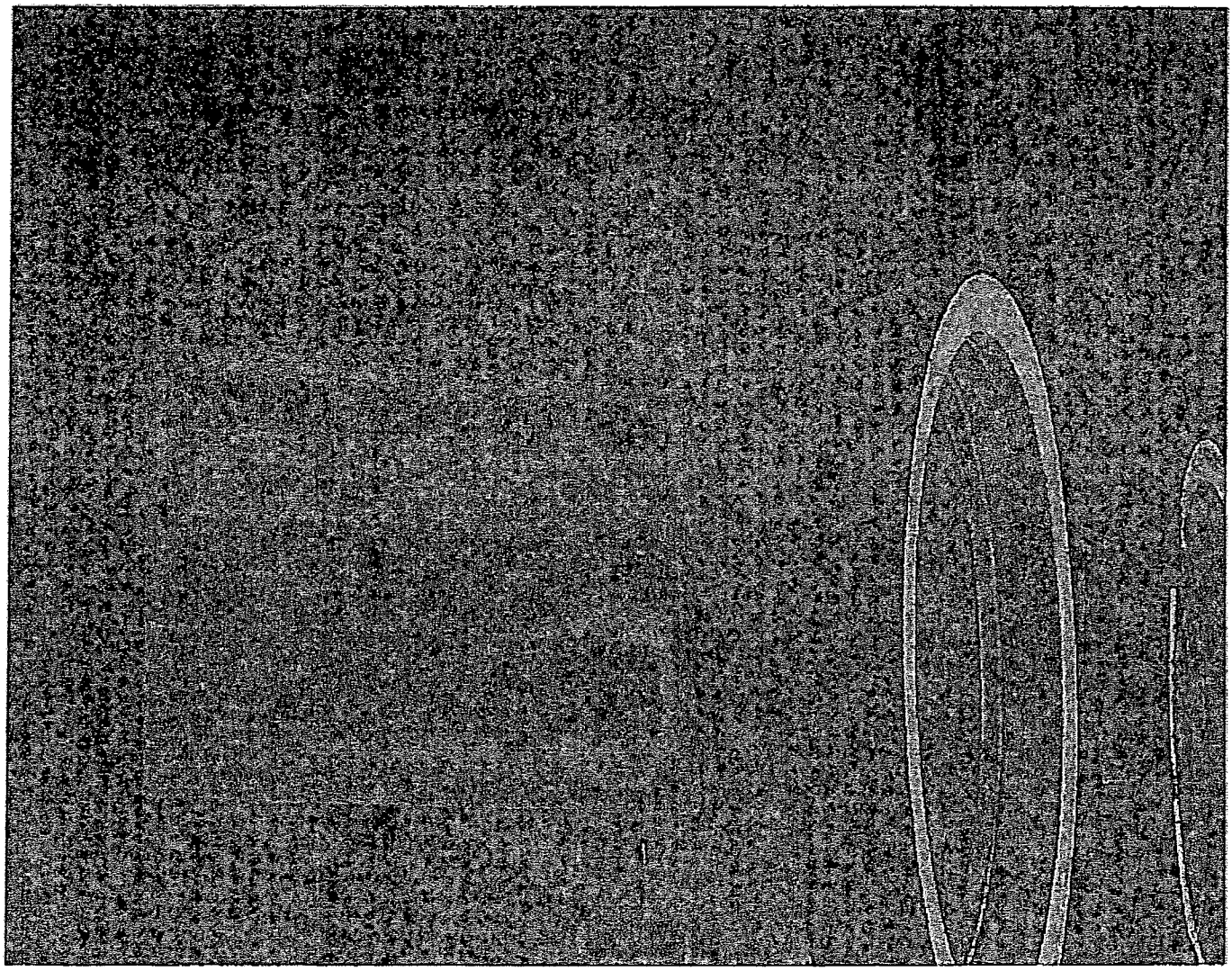


EXHIBIT 6

Fripp Island Marina





CUSTOM BOATHOUSE COCKTAILS

THE NOR'EASTER
Maker's Mark Bourbon, Lime Juice, Maple Syrup, Ginger Beer 8.95

WHITE CHOCOLATE MARTINI
Stoli Vanilla Vodka, Godiva White Chocolate Liqueur, Splash of Frangelico and Cream 9.95

THE MIDWINTER WARMER
Licor 43, Tequila, Lemon Juice, Orange Juice, Dash of Bitters 8.95

CARAMEL APPLE MARTINI
Fireball Cinnamon Whiskey, Apple Cider, Licor 43, Caramel Sauce 9.95

CAROLINA COSMO
Stoli O Vodka, Triple Sec with a Splash of Cranberry and a Squeeze of Fresh Lime 8.95

MOSCOW MULE
Smirnoff Vodka, Ginger Beer with a Squeeze of Fresh Lime Juice 8.95

SPECIALTY COFFEE DRINKS

SNOW CAP
...Vanilla, Frangelico, Hot ... Whipped Cream 8.95

SWEET HONEY BROWN
...Honey Bourbon, Brown Sugar Simple, Whipped Cream 8.95

GINGERBREAD IRISH COFFEE
...an Cream, Jameson's Irish Whiskey, ...e Pumpkin Pie Spice Whipped Cream 8.95

BOATHOUSE BLIZZARD
Jim Beam, Frangelico Hazelnut Liqueur, Baileys Irish Cream, Coffee and Whipped Cream 9.95

DOMESTIC, CRAFT, & IMPORTED BEERS

Domestic 3.75 Craft/Imported 4.75

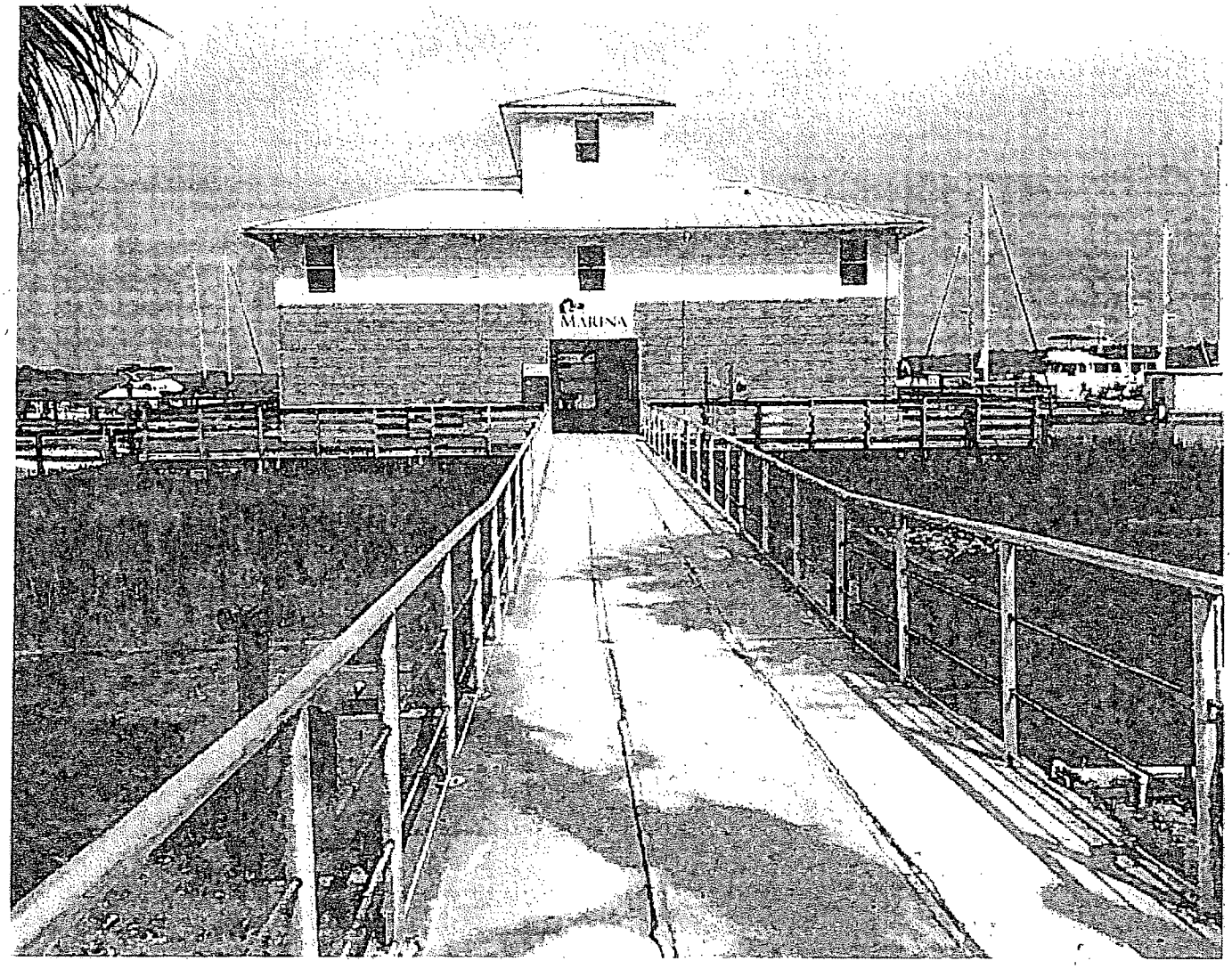
BUDWEISER	NEWCASTLE BROWN ALE	LAKEFRONT IPA
BUD LIGHT	GUINNESS	SIERRA NEVADA
MILLER LITE	CORONA LIGHT	PALMETTO LAGER
COORS LIGHT	HEINEKEN	ANGRY ORCHARD
MICHELOB ULTRA	AMSTEL LIGHT	YUENGLING

PLEASE ASK YOUR SERVER FOR TONIGHT'S FROSTY DRAFT BEER SELECTION

Coca-Cola, Diet Coke, Sprite, Barq's Root Beer, Fanta Orange, ...onade, Sweet or Un-Sweet Iced Tea, Coffee, Decaffeinated Coffee, Milk, Chocolate Milk 2.25

EXHIBIT 7

Lady's Island Marina


MARINA

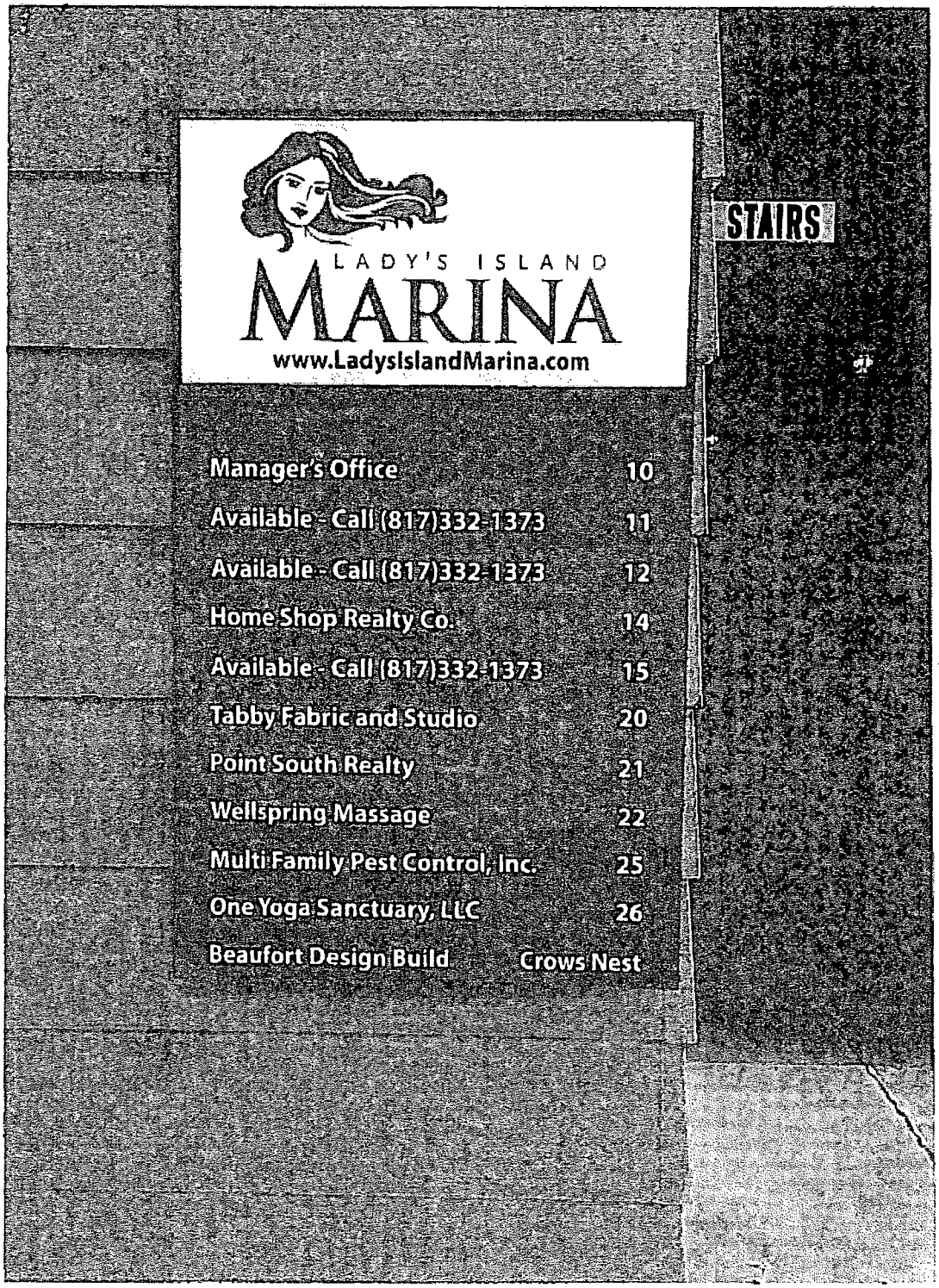

LADY'S ISLAND
MARINA
www.LadysIslandMarina.com
STAIRS
Manager's Office 10
Available - Call (817)332-1373 11
Available - Call (817)332-1373 12
Home Shop Realty Co. 14
Available - Call (817)332-1373 15
Tabby Fabric and Studio 20
Point South Realty 21
Wellspring Massage 22
Multi Family Pest Control, Inc. 25
One Yoga Sanctuary, LLC 26
Beaufort Design Build Crows Nest

EXHIBIT 8

O.C.R.M. Approved Ship's Store Menu

August 31, 2009

Mr. Jeff Thompson
South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management
1362 McMillan Avenue, Suite 400
North Charleston, South Carolina, 29405

Re: Permit No. 2002-IH-190-P
Sunset Cay Marina
Folly Beach, S.C. 29439

Dear Mr. Thompson,

Sunset Cay Marina presently operates a marina ships store at our folly River facility. Recently we have received requests from a number of our patrons asking that we offer some form of snacks/light foods at our ship store. We have received our SCDHEC-OCRM permit and are aware of nothing with regard to this request that would violate the conditions of our permit. Please note that we intend to incorporate the sale of snacks/light food items in the ship store and ask that you notify us with any specific questions regarding our intentions. For your information and review we have attached a copy of the minor list of proposed food items we hope to offer in the near future.

We appreciate your assistance with regard to this matter and ask that you please contact us if any additional information is needed. I can be reached at 843-819-7877.

Sincerely,

Butch Clark

Sunset Cay Yacht Club



Soups & Salads

Soup of the Day $3.00

House Salad- lettuce, tomato, cucumbers, red onion, (cheese add.50) $4.50

Chef Salad-lettuce, tomato, cucumber, egg, ham, turkey, cheese and red onion $6.00

Tuna Salad-homemade tuna salad served over lettuce, tomato, cucumber and red onion $5.00

Greek Spinach Salad-with tomatoes, black olives, egg, red onion and feta cheese with balsamic vinaigrette $6.00

Relish Tray with Dill-Shallot Mayonnaise $6.00

Sandwiches & Hot Dogs

Ham & Cheese- thin sliced baked ham topped with your choice of cheese $4.50

Turkey & Cheese- fresh sliced turkey breast topped with your choice of cheese $4.50

Tuna Sandwich- fresh made tuna salad with lettuce and tomato on white or wheat $4.50

Egg Salad Sandwich- homemade egg salad with lettuce and tomato on white or wheat $4.50

Folly Club- three layers with choice of ham, turkey or roast beef, bacon, lettuce, tomato and your choice of cheese. Served on white or wheat $5.50

Chicken and Mushroom Quesadilla $5.00

All American Hot Dog with catsup, mustard and relish $1.00 (add chili .50)

Sub Sandwiches

All subs fixed with lettuce, tomato, onion and your choice of cheese
Meats- Baked Ham, Turkey, Salami, Roast Beef, Pepperoni, Bacon
Cheeses- American, Swiss, Pepper Jack, Cheddar, Provolone, Mozzarella
Additional Toppings-jalapeño peppers, black olives, green peppers, banana peppers, mushrooms, salt & pepper, oregano, oil & vinegar,

1 Meat $5.00
2 Meats $6.00
3 Meats $7.00

D H E C

PROMOTE PROTECT PROSPER

C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

September 18, 2009

Mr. Butch Clark
Sunset Cay Marina
P.O. Box 1590
Folly Beach, South Carolina 29439

Re: Sunset Cay Marina, PN 2002-1H-190-P, Letter of August 31, 2009.

Dear Mr. Clark:

The staff of SCDHEC/Ocean & Coastal Resource Management has reviewed the above referenced letter. Specifically, your request is to ask if the serving of snacks and light food items as a part of the existing ships store is consistent with your permit. OCRM offers no objection to inclusion of food items as a component of the ships store and does not require any modification of the permit provided 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.

Please let me know if you have any questions or concerns.

Sincerely,

D. J. Thompson

David J. Thompson
Senior Wetland Project Manager

CC: Mr. Blair Williams

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Sunset Cay, LLC, Petitioner, vs. South Carolina Department of Health and Environmental Control, Respondent.	)	Docket No. 15-ALJ-07-0579-CC PARTIAL MOTION TO DISMISS FOR LACK OF JURISDICTION AND LACK OF RIPENESS

Respondent, the South Carolina Department of Health and Environmental Control ("the Department" or "DHEC"), hereby moves this Honorable Court for a partial dismissal against Petitioner Sunset Cay, LLC pursuant to Rule 19 of the Administrative Law Court and Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. The basis for DHEC's Motion is as follows: (1) the Petitioner failed to properly invoke this Court's jurisdiction regarding the Cease and Desist Directives issued by DHEC; (2) the "fee shifting statute" (S.C. Code Ann. § 15-77-300) is inapplicable to this matter; (3) 42 U.S.C. § 1988(b) is inapplicable to this matter; (4) this Court lacks jurisdiction to award damages to the Petitioner; (5) Petitioner's proposed remedy regarding the water-dependency issue (i.e., ALC orders DHEC to issue a permit amendment allowing the requested uses) is not ripe for adjudication.

BACKGROUND

Before addressing the specific allegations in the Petitioner's Request for Contested Case ("RCC"), it is important to bear in mind that the Department has an extensive history of working with the Petitioner to amend its permit multiple times over the last twelve years. The following timeline bears this out.

On April 9, 2003, the Department issued Permit# 2002-1H-190-P to Petitioner authorizing a marina.

On January 15, 2004 the Department amended Permit# 2002-1H-190-P to authorize changing dredged spoiling method from rapid dewatering to open spoiling in two temporary spoil basins.

On June 24, 2004 the Department amended Permit# 2002-1H-190-P authorizing the partial relocation channelward and enlargement of the scope of the authorized marina.

On August 25, 2004, the Department amended Permit# 2002-1H-190-P authorizing the enlargement of each slip from 35' to 40' wide and increasing each finger from 4' to 6' wide.

On October 14, 2004, the Department amended Permit# 2002-1H-190-P authorizing the relocation of the main access walkway from the middle to the landward section of the marina.

On April 7, 2005, the Department amended Permit# 2002-1H-190-P to authorize moving the marina 20' channelward from its original position.

On December 14, 2005, the Department amended Permit# 2002-1H-190-P authorizing the placement of a 30'x29' building containing restrooms and ships store on an existing 50'x50' pierhead. Bathrooms were authorized on the first floor and a ships store was authorized on the second floor.

On November 28, 2006, the Department amended Permit# 2002-1H-190-P authorizing three jet docks.

On January 13, 2015 DHEC employees Mr. Jeff Thompson and Mr. Josh Hoke met with Mr. Butch Clark (Petitioner's representative), because he (Mr. Clark) expressed a desire to amend permit# 2002-1H-190-P to allow a restaurant to operate on the second floor. Mr. Thompson told Mr. Clark that the second floor could not be utilized as a restaurant. Mr.

Thompson also told Mr. Clark that before any changes to the permit were made, Mr. Hoke would do an inspection of the marina to ensure that it was in compliance with the permit.

On January 15, 2015 Mr. Hoke conducted a compliance inspection of the marina and found the following: (1) an unauthorized restaurant under construction on the second floor of the building; (2) an unauthorized apartment on the third floor of the building; and (3) a number of unauthorized jet docks.

On February 3, 2015 Mr. Hoke and Mr. Sean Briggs (Manager of the Compliance and Enforcement Section at DHEC-OCRM) met with Mr. Jack Walker and Mr. Clark regarding the unauthorized restaurant and unauthorized apartment. Mr. Hoke and Mr. Briggs instructed Mr. Walker and Mr. Clark to stop these unpermitted uses. Regarding the unpermitted jet docks, Mr. Hoke and Mr. Briggs further told them they would need to submit after-the-fact permit amendments if they wanted to keep them (the unpermitted jet docks). At this meeting Mr. Walker and Mr. Clark said they wanted to transfer the original permit to the Council of Co-owners. Mr. Briggs told them that they should apply for a permit transfer and then the after-the-fact amendment for the jet docks.

On March 3, 2015 Mr. Hoke, Mr. Briggs and Mr. Blair Williams (Manager of the Wetlands Permitting Section at DHEC-OCRM) met with Mr. Walker and Mr. Clark to discuss their desire to transfer the original permit to the Council of Co-owners. Mr. Williams told Mr. Walker and Mr. Clark that in order to transfer the permit, the original permit holder would need to show that in accordance with S.C. Code Ann. Regs. 30-12(E)(1)(f), they owned 150 linear feet of upland waterfront property adjacent to the marina.

On March 13, 2015 Mr. Hoke emailed a Cease and Desist directive to Mr. Clark to stop all operations of the restaurant and apartment. A copy was also sent to Eric Lutz of the City of

Folly Beach to notify them of the Cease and Desist order.

On March 16, 2015 Mr. Hoke served Mr. Clark with the Cease and Desist directive.

On March 27, 2015 Mr. Briggs met with Mr. Walker and Mr. Clark to discuss the Cease and Desist directive.

On April 1, 2015 Mr. Williams informed Mr. Walker and Mr. Clark that DHEC-OCRM had determined that since the permit holder had previously sold a substantial portion of its upland property and no longer owned the required 150 feet of upland waterfront property adjacent to the marina, the permit could not be transferred.

On June 1, 2015 DHEC-OCRM Staff (Mr. Briggs, Mr. Williams, Mr. Hoke and Ms. Rheta DiNovo [Director, Regulatory Programs Division]) met with Mr. Clark, Mr. Bill Oglesby (Commodore, Sunset Cay Marina Council of Co-Owners, Inc.), and Mr. Walker to discuss a plan for the uses of each floor of the building and to ensure that such plans are in compliance with the regulations prior to submitting a permit amendment.

On June 11, 2015 DHEC-OCRM staff received the first set of proposed plans for the marina building from Mr. Clark.

On July 1, 2015 DHEC-OCRM staff received revised proposed plans for the marina building from Mr. Clark.

On August 18, 2015 Mr. Hoke conducted a site inspection of the marina building and took the attached photos of the renovated ship store and bar area. (Exhibits 1 thru 8).

On October 26, 2015 the Department sent a Cease and Desist directive, Notice of Violation and Admission Letter (NOV/AL), including proposed Findings of Fact, via certified mail to Sunset Cay LLC, Sunset Cay Social Club, and the Sunset Cay Marina Council of Co-Owners, Inc. This letter scheduled an enforcement conference on November 18, 2015.

On November 18, 2015 Mr. Adam Page (DHEC-OCRM Enforcement Project Manager) and the undersigned counsel met with representatives of Sunset Cay LLC, Sunset Cay Social Club, and the Sunset Cay Marina Council of Co-Owners, Inc. along with their attorneys for an enforcement conference. At that meeting, Mr. Page explained the administrative enforcement process as well as the assessment of civil penalties.

On December 19, 2015 Mr. Briggs conducted a site inspection and confirmed that the Sunset Cay Social Club was continuing to provide alcoholic beverage service.

ARGUMENT

I. *The Petitioner did not properly invoke this Court's jurisdiction over its request to compel DHEC to withdraw the two Cease and Desist Directives dated March 3, 2015, and October 26, 2015.*

The Petitioner has asked this Court for an Order "compelling the Department ... to withdraw 'Cease and Desist Letters' dated March 3, 2015, and October 26, 2015." (Request for Contested Case, page 1). However, in order to properly invoke this Court's jurisdiction regarding these two Cease and Desist directives, the Petitioner is required to first obtain a final agency decision and exhaust its administrative remedies.

S.C. Code Ann. § 1-23-380 states that "[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article and Article 1." In the matter before this Court, S.C. Code Ann. § 44-1-60 establishes the procedures the Petitioner must follow in order to exhaust its administrative remedies and obtain a final agency decision. Section (E)(1) of this statute states in pertinent part that "[n]otice of a department decision must be sent by certified mail, returned receipt requested to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified." Section (E)(2) of this statute states that "[t]he staff

decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department by the applicant, permittee, licensee, or affected person."

In this case, the two Cease and Desist directives Petitioner objects to were mailed to Sunset Cay, LLC on March 16, 2015 and October 26, 2015.[1] (See Exhibits 9 and 10). In accordance with S.C. Code Ann. § 44-1-60(E)(2), before the Petitioner could properly invoke this Court's jurisdiction over these two directives, it (Sunset Cay, LLC) should have filed a request for final review ("RFR") to the DHEC Board. The statutory fifteen day deadline to file an RFR for the March 16, 2015 Cease and Desist directive was April 2, 2015 and the statutory fifteen day deadline to file an RFR to the DHEC Board for the October 26, 2015 Cease and Desist directive was November 20, 2015. The Petitioner has *never* filed an RFR challenging either of these Cease and Desist directives. As such, in bypassing this statutorily-required final review process by the DHEC Board, the Petitioner (a) has failed to exhaust its administrative remedies, (b) has failed to obtain a final agency decision and (c) has not invoked this Court's jurisdiction regarding these two Cease and Desist directives.

---

[1] S.C. Code Ann. Regs. 30-8B addresses Cease and Desist Directives. This regulation states that

> "[w]hen any person is ... in violation of the terms and/or conditions of a permit, the Department may issue a cease and desist directive. This directive shall inform the person that he is in violation of the Act and shall cease the unauthorized activity... If the person responsible for the unauthorized activity refuses to comply with the Department directive, the Department may then file suit in the appropriate circuit court as outlined in Section 48-39-160."

As this regulation makes plain, Cease and Desist directives are merely one step in the enforcement process to bring a permit holder into compliance with the terms of its permit. The permit holder still has the opportunity to challenge the Department's Administrative Order before the ALC or challenge any circuit court action the Department may file to enforce the terms of the Administrative Order.

II. *This Court lacks jurisdiction to adjudicate the Petitioner's request for attorney's fees per S.C. Code Ann. § 15-77-300.*

The Petitioner has asked this Court for an Order awarding attorney's fees in accordance with S.C. Code Ann. § 15-77-300(A). This statute states that "[i]n any civil action brought by the State ... the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if" certain conditions are met. Judge Ralph K. Anderson, III has addressed the applicability of S.C. Code Ann. § 15-77-300 in the ALC as follows:

> "S.C. Code Ann. § 15-77-300 (Supp. 1998) provides that in any 'civil action' contesting an action by the State, the Court may award reasonable attorney's fees to the 'prevailing party.' Therefore, the threshold requirement for an award of attorney fees is that the lawsuit must be a 'civil action.' The question, then, is whether a proceeding before the Administrative Law Judge Division constitutes a 'civil action' for purposes of §15-77-300.
>
> Rule 3 of the South Carolina Rules of Civil Procedure provides that a 'civil action' is commenced by the filing and service of a summons and complaint, while proceedings before the Division do not require a summons and complaint. See ALJD Rules 11 and 12 (contested cases initiated by filing a request for hearing with the affected agency, which sends a transmittal form to the Division); ALJD Rule 33 (appeals initiated by filing a notice of appeal). See also Northwest Pipeline Corp. v. State Dep't of Employment, 129 Idaho 548, 928 P.2d 898 (1996) (appeal from administrative ruling by Industrial Commission was not 'civil action' for purposes of statute providing for attorney fees for prevailing party in civil action; appeal was not commenced by filing a complaint with the court pursuant to applicable civil rule). Furthermore, in McDowell v. S.C. Dep't of Social Services, 304 S.C. 539, 405 S.E. 2d 830 (1991), a case which predated the establishment of the Division, the Supreme Court held that an action in *Circuit Court* for judicial review of an agency decision was a 'civil action' for purposes of § 15-77-300." South Carolina Department of Revenue v. Edwin S. Alewine, D/B/A Steve's Treasureland Inc., and Great Games, Inc., 98-ALJ-17-0441-CC, at 1-2 (June 11, 1999). (Emphasis added).

Using the language from the above-referenced Alewine Final Order as guidance, S.C. Code Ann. § 15-77-300 only contemplates awarding attorney's fees for a "civil action". Since the filing of a Summons and Complaint is required for a "civil action", the Petitioner did not initiate such an

action when it filed a Request for Contested Case before this Court. Accordingly, the Petitioner is not entitled to recover attorney's fees under S.C. Code Ann. § 15-77-300.

III. *This Court lacks jurisdiction to adjudicate the Petitioner's request for attorney's fees per 42 U.S.C. § 1988(b).*

The Petitioner has asked this Court for an Order awarding attorney's fees in accordance with 42 U.S.C. § 1988(b). This statute only contemplates awarding attorney's fees for the following:

> an "action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.], or section 13981 of this title ..." 42 U.S.C. § 1988(b).

Petitioner's Request for Contested Case does not seek relief from this Court under any of the above-referenced statutory provisions.

Furthermore, 42 U.S.C. § 1988(b) is located in Chapter 21 of Title 42 which contemplates awarding attorney's fees for civil rights litigation (i.e., Chapter 21 is titled "Civil Rights"). The issues mentioned in Petitioner's RCC are not civil rights issues. Accordingly, the Petitioner is not entitled to recover attorney's fees under 42 U.S.C. § 1988(b).

IV. *This Court lacks jurisdiction to award damages as Petitioner has requested.*

Petitioner seeks "actual damages" in its RCC to include "loss of rents and attorney's fees incurred as a result of the respondent's refusal to allow any water dependent uses and the refusal to allow the appellant to participate in the respondent's decision."

In a previous matter before the ALC, your Honor addressed the issue of awarding damages. In that case (Anthony Walker v. South Carolina Budget and Control Board, South Carolina Retirement Systems), this Court held that "the ALC '**has no authority to decide civil**

matters nor to award monetary damages in cases.' Stephen P. Bates, 'The Contested Case Before the ALJD,' *in* South Carolina Administrative Practice & Procedure 169 (Randolph R. Lowell & Stephen P. Bates, eds. SC Bar 2004) (emphasis added). Accordingly, I find that this Court lacks jurisdiction to hear this matter." Anthony Walker v. South Carolina Budget and Control Board, South Carolina Retirement Systems, 07-ALJ-30-0408-CC, 2008 WL 2045864, at *2 (Apr. 14, 2008). In view of that Final Order, the Petitioner's claim for damages should be dismissed.

V. *Petitioner's proposed remedy regarding the water-dependency issue is not ripe for adjudication.*

Petitioner asks this Court to issue a Final Order directing DHEC to approve its five proposed water dependent uses. Unlike the seven prior amendments Petitioner previously sought and obtained from OCRM for this same permit (Permit# 2002-1H-190-P), the Petitioner has not applied for a permit amendment to include the uses referenced in either its RCC or Declaratory Ruling request. Accordingly, this matter is not ripe for adjudication. Eagle Container Co., LLC v. County of Newberry, 622 S.E.2d 733, 744-45 (Ct. App. 2005) (*quoting* 2 Am. Jur. 2d Admin. Law 485), *reh'g denied* (Dec. 15, 2005), *cert. granted* (Jan. 31, 2007) ("'[T]he basic rationale of the doctrine of ripeness is to prevent courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by challenging parties'").

In Waters v. South Carolina Land Resources Conservation Comm'n, 321 S.C. 219, 467 S.E.2d 913 (1996) the Supreme Court applied the following two-factor test for determining ripeness: (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. In that case, the J.M. Huber Corporation applied for a permit to

mine kaolin (a type of clay with various industrial uses) in Lexington County. Waters, 467 S.E.2d at 914 & n.1. The application was governed by the South Carolina Mining Act.[2] Huber's application for a mining permit under the Act was granted by one agency—the South Carolina Land Resources Conservation Commission—and the Commission's decision was affirmed by a second agency—the South Carolina Mining Council. Waters, 467 S.E.2d at 914. Some people who lived close to Huber's proposed mining site filed objections to the permit with both agencies and, after the permit was granted, sued the agencies and Huber. Id. at 914-915. The plaintiffs in Waters claimed that the Mining Act's scheme for modification of mining permits violated their procedural due process rights because the Act did not guarantee they would get notice if Huber applied for a modification to expand its mining operations.[3] Id. at 917.

In determining this claim was not ripe for judicial review, the Waters Court emphasized the contingent nature of both the legal issue that plaintiffs sought to present and the injury that they claimed.[4] The Court observed that Huber had not applied for a modification to the mining permit and if he chose this action in the future, the mere act of Huber's filing an application to modify its permit would not violate plaintiffs' constitutional rights. Id. at 918. The Waters Court concluded, "[i]t is not enough that a threat of possible injury currently exists; the mere threat of potential injury is too contingent or remote to support present adjudication." Id. at 918 (quoting Thrifty Rent-A-Car Sys., Inc. v. Thrifty Auto Sales of Charleston, Inc., 849 F. Supp. 1083, 1086 (D.S.C. 1991)). In short, future contingencies prevented the legal issues in Waters

[2] S.C. Code Ann. §§ 48-20-10 through -310 (Supp. 1994).

[3] Similarly, after the Petitioner presumably applies for a permit amendment allowing for the five proposed water dependent uses, a public notice will go out and the possibility exists that third parties will object to the issuance of such an amendment. The point being that the permitting process is not simply a pro forma "rubber stamp" of the Petitioner's application.

[4] A court "should not decide a controversy grounded in uncertain and contingent events that may not occur as anticipated or may not occur at all." Id. at 918 (quoting Thrifty Rent-A-Car Sys., Inc. v. Thrifty Auto Sales of Charleston, Inc., 849 F.Supp. 1083, 1085-86 (D.S.C.1991)).

from being "fit" or ripe for review and the injury to plaintiff's rights to be too speculative to amount to significant present hardship. Applying the Waters analysis to the facts in the present case, until such time as the Petitioner applies for a permit amendment for its five proposed water dependent uses, the matter of amending the permit is also not yet "fit" or ripe for adjudication and is grounded in the kind of contingent event contemplated by Thrifty Rent-A-Car.

CONCLUSION

For the reasons set forth above, the Department respectfully requests the Court to issue an Order for Partial Dismissal.

Respectfully Submitted,

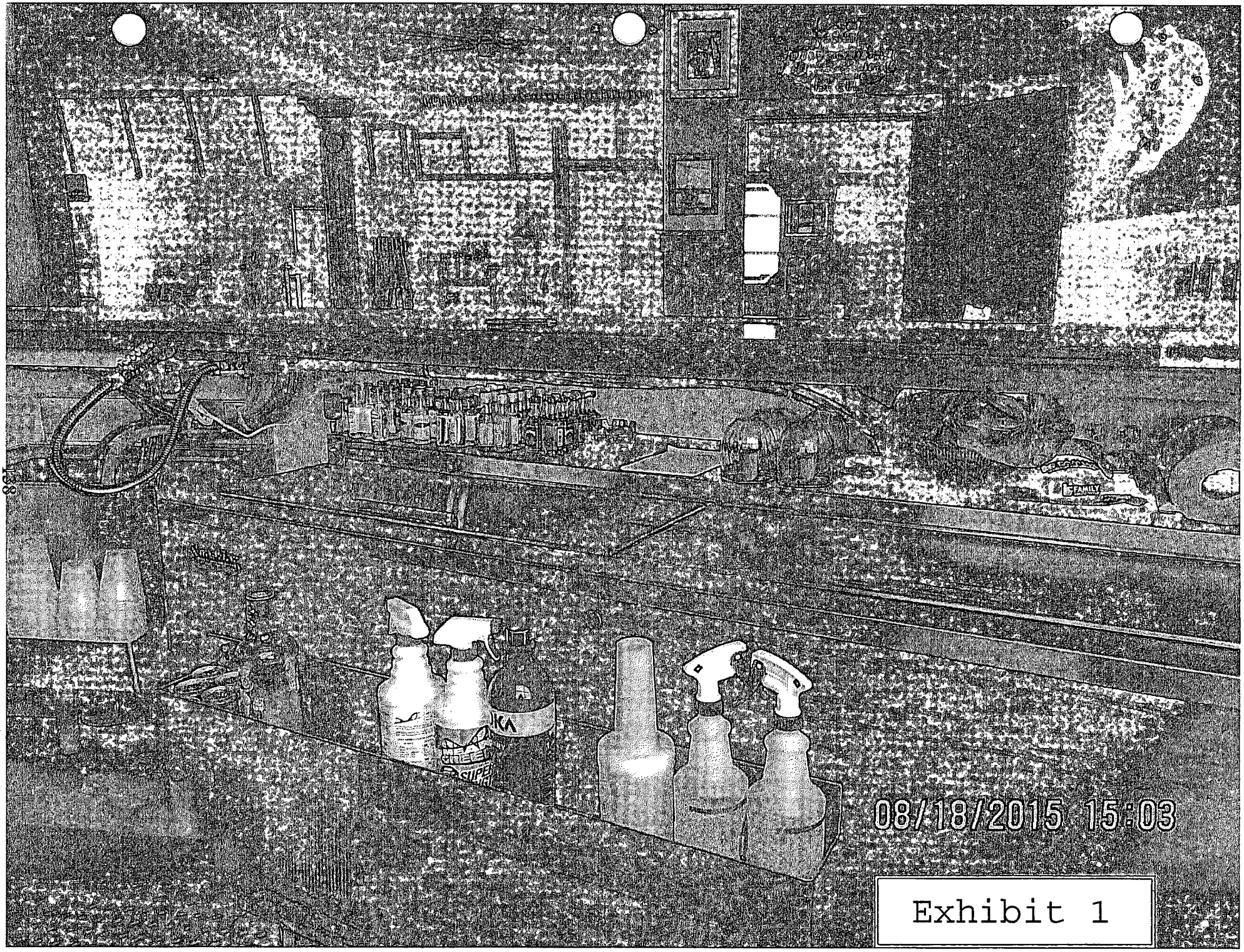
Bradley D. Churdar, S.C. Bar # 12829
Associate General Counsel
SC Dept. of Health and Environmental Control
1362 McMillan Ave., Suite 400
North Charleston, SC 29405
(843) 953-0213
(843) 953-0201 (fax)
churdabd@dhec.sc.gov
crawfomd@dhec.sc.gov

June 1, 2016
Charleston, South Carolina

The undersigned hereby certifies that on this day he has served all parties in the above-captioned action with a copy of Department's ***PARTIAL MOTION TO DISMISS FOR LACK OF JURISDICTION AND LACK OF RIPENESS*** by mailing a copy of the same to Tommy Goldstein, Esquire at P.O. Box 71121, Charleston, SC 29405 and via email.

By:

Date: June 1, 2016


08/18/2015 15:03
Exhibit 1

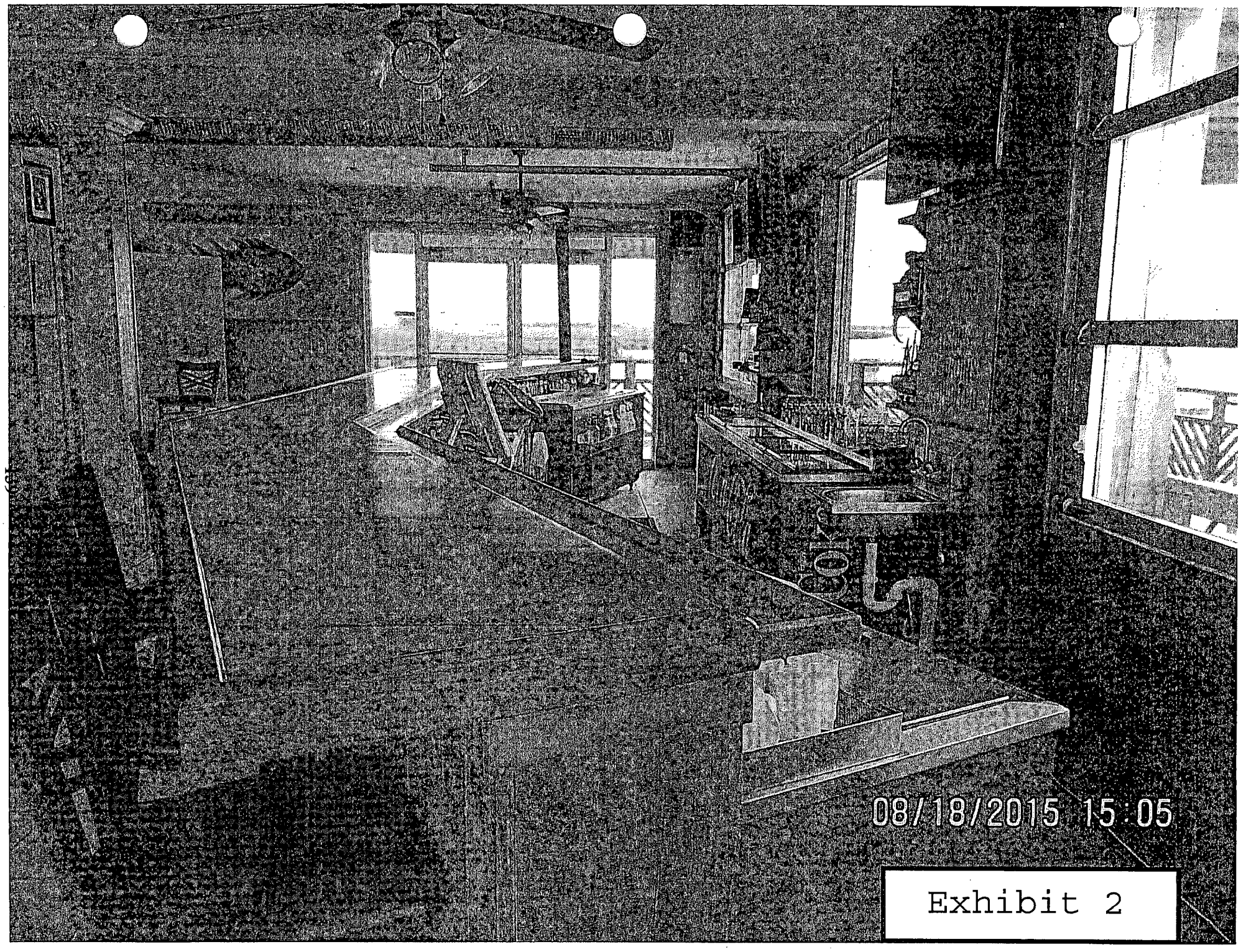
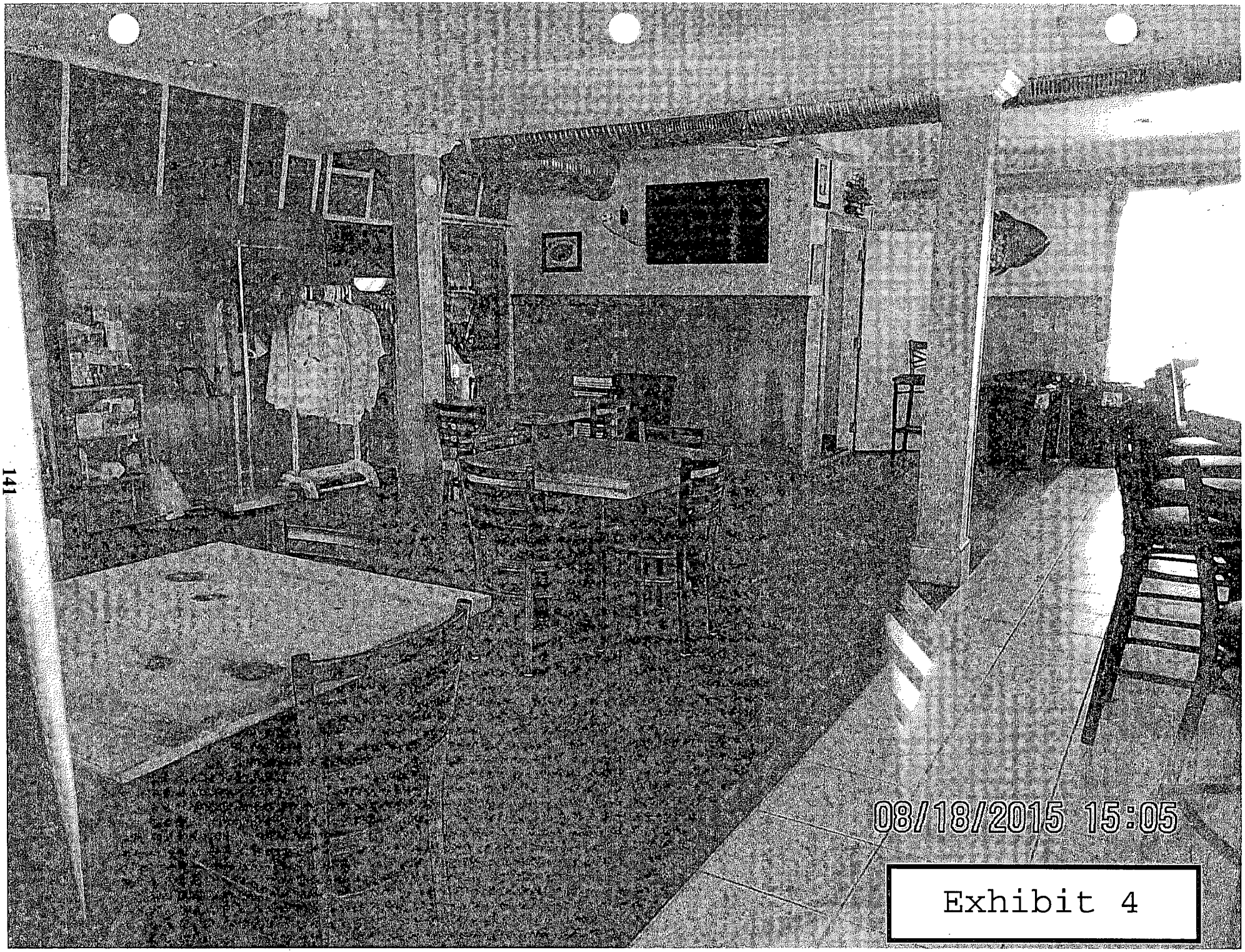


Exhibit 2



Exhibit 3


08/18/2015 15:05
Exhibit 4

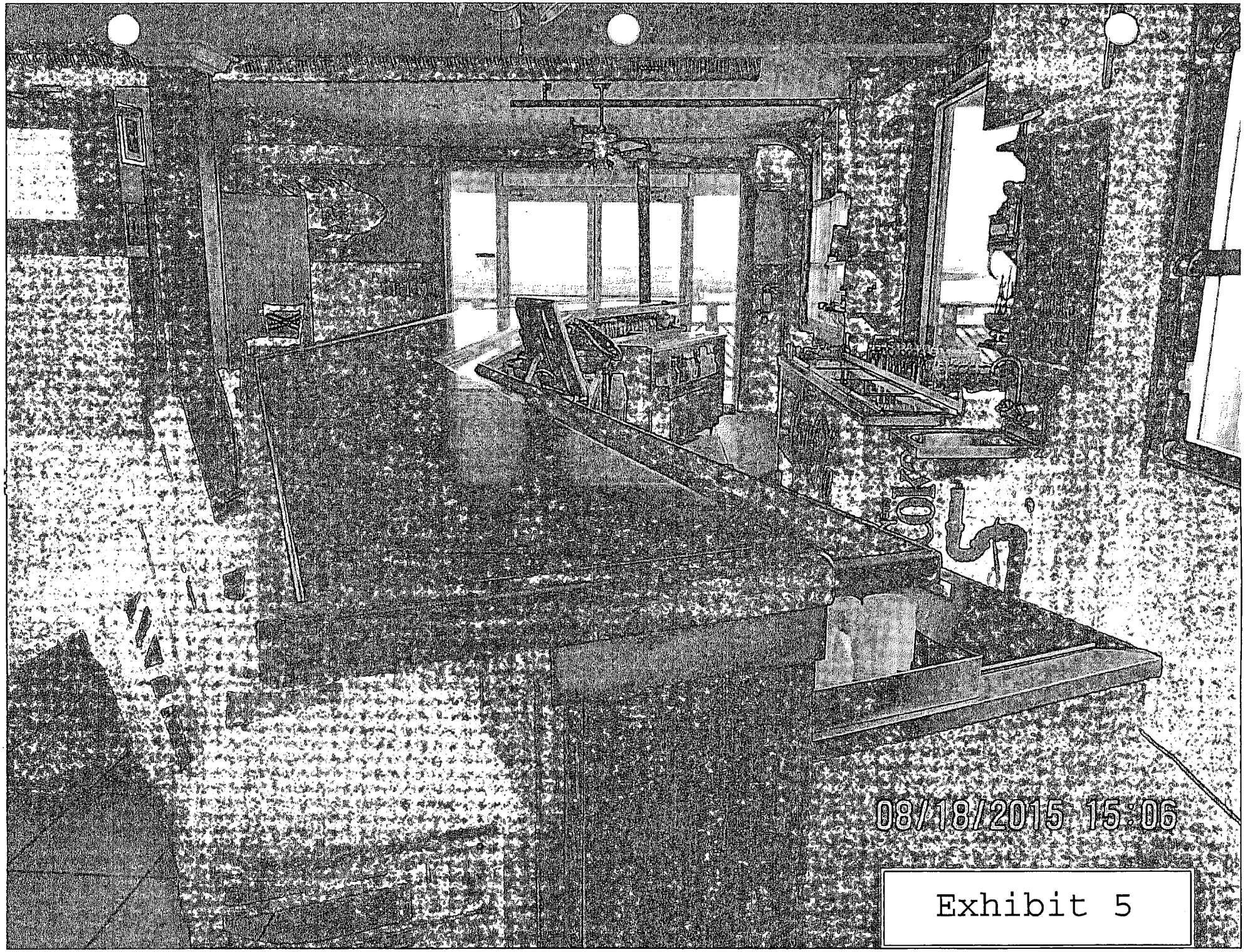


Exhibit 5

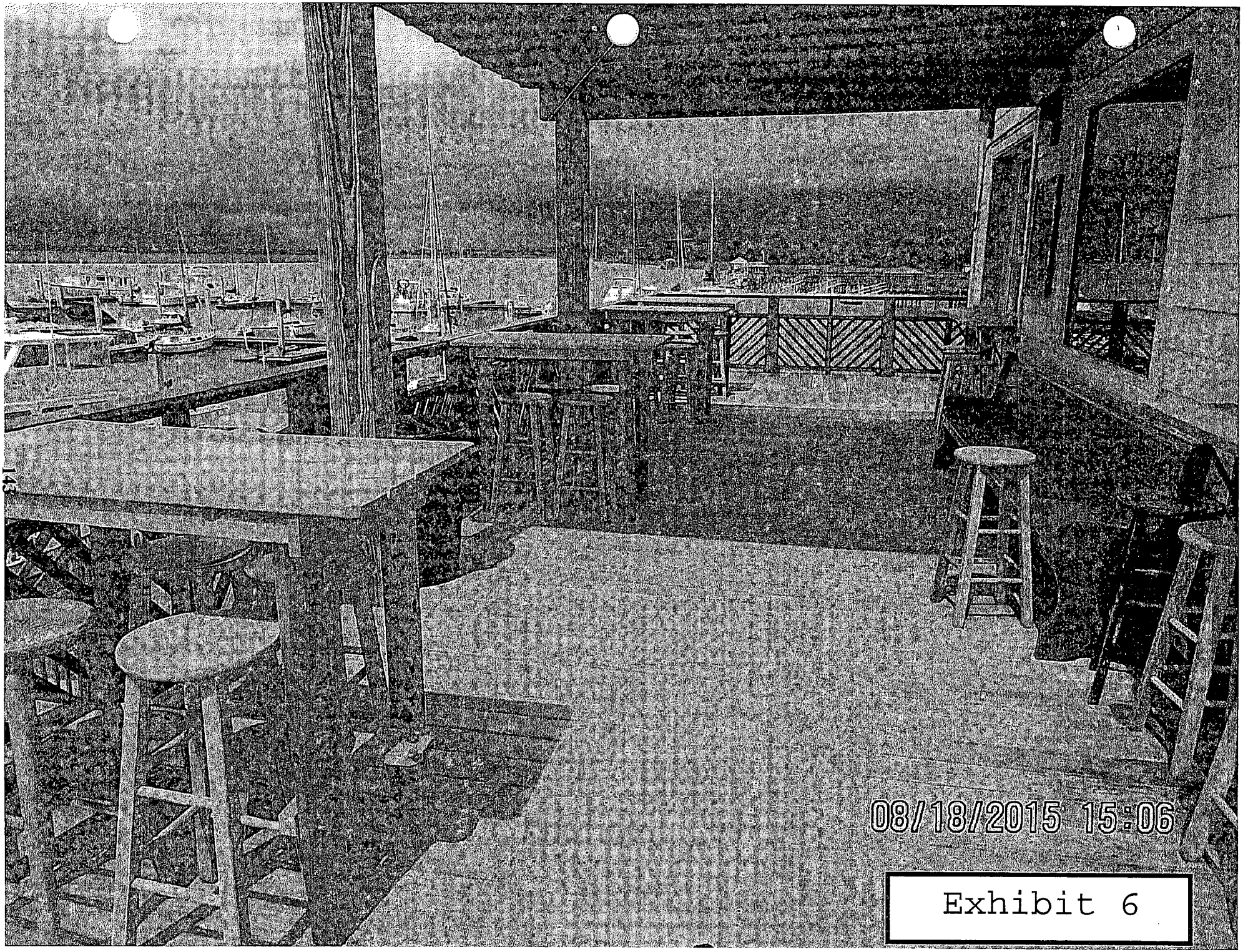


Exhibit 6

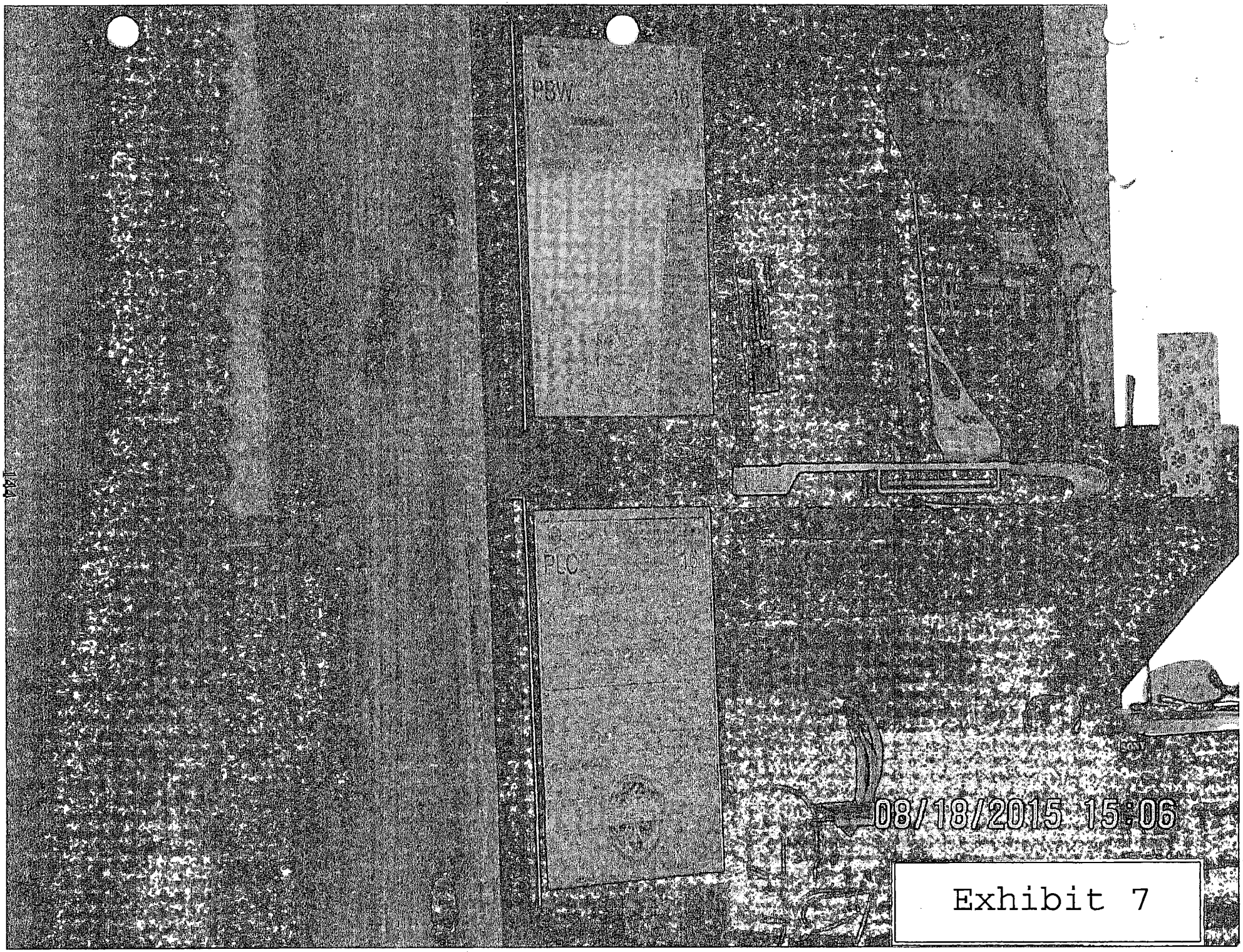
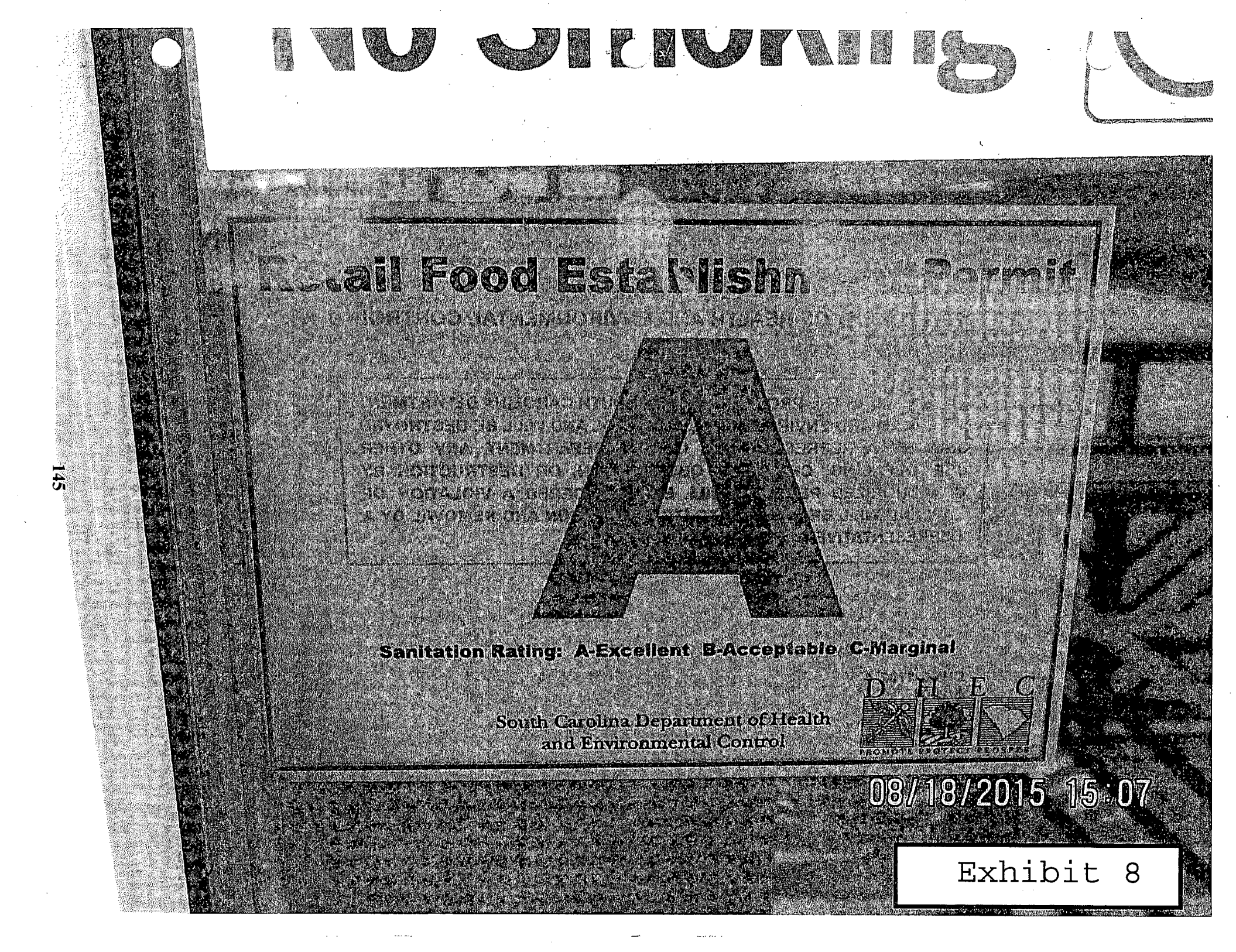


Exhibit 7


No Smoking
Retail Food Establishn Permit
A
Sanitation Rating: A-Excellent B-Acceptable C-Marginal
South Carolina Department of Health
and Environmental Control
D H E C
08/18/2015 15:07
Exhibit 8

D H E C

PROMOTE PROTECT PROSPER

W. Marshall Taylor Jr., Acting Director

Promoting and protecting the health of the public and the environment

CEASE AND DESIST DIRECTIVE

CERTIFIED MAIL ARTICLE NO.: 9171 9690 0935 0086 9331 90

March 16, 2015

Sunset Cay, LLC
c/o Charles M. Huff
65 Gadsden Street
Charleston, SC 29401

RE: Restaurant and apartment over the coastal waters critical area

Mr. Huff

On January 16, 2015, Department of Health and Environmental Control's Division of Ocean and Coastal Resource Management (DHEC) staff observed nonwater-dependent structures constructed over the coastal waters critical area.[1] A restaurant was under construction for renovations and an apartment had been constructed over the coastal waters critical area of the Folly River at the Sunset Cay Marina, 66 West 9th Street Extension, Folly Beach 29439 (Site).

Such activity is a violation of Critical Area/Water Quality Certification Permit #2002-1H-190-P, *as amended* (Permit). Additionally, this activity is in violation of the South Carolina Coastal Zone Management Act (Act) and Critical Area Permitting Regulations (Regs) which require that any utilization/alteration of the critical area be permitted or otherwise legally authorized by the Department prior to performing the activity but specifically prohibit the construction or placement of nonwater-dependent structures in or over the coastal waters critical area.[2] As a result, DHEC is required to take appropriate corrective action and may assess civil penalties.

You are hereby directed to immediately cease and desist construction, operation, and/or utilization of the restaurant and apartment at the Site. This activity is in violation of the Act and Regs. DHEC is issuing this directive as authorized by 23AS.C. Code Ann. Reg. 30-8(B), *as amended*. If you do not comply with this request, please be advised that DHEC, pursuant to S.C. Code Ann. §48-39-160, may seek relief in the appropriate Circuit Court.

This office continues to determine the appropriateness of your February 18, 2015 request to transfer the Permit with respect to upland waterfront property ownership as well as the permissibility of the addition of 11 floating boat storage structures. Please contact me at (843) 953-0269 or hokejd@dhec.sc.gov should you have any questions.

[1] 23A S.C. Code Ann Regs. 30-1(D)(35) defines "Nonwater-dependent" as a facility which cannot demonstrate that dependence on, use of, or access to coastal waters is essential to the functioning of its primary activity.
[2] 23A S.C. Code Ann. Regs. 30-12(M)(2), S.C. Code Ann. §48-39-130(A) & 23A S.C. Code Ann. Regs. 30-2(B)

Respectfully,

Josh Hoke
Compliance Project Manager
Ocean and Coastal Resource Management

cc: Incident File # 201500264

ec: Jeff Thompson, Wetland Project Manager
Blair N. Williams, Manager, Wetland Permitting Section
Sean Briggs, Manager, Compliance and Enforcement Section
Eric Lutz, City of Folly Beach
Jack Walker, Marcol Dredging Co.

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148

Tracking Number: 9171969009350086933190

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Updated Delivery Day: Wednesday, March 18, 2015

Product & Tracking Information

Postal Product:

Features:
Certified Mail™

DATE & TIME	STATUS OF ITEM	LOCATION
March 25, 2015 , 1:17 pm	Delivered	NORTH CHARLESTON, SC 29405

Your item was delivered at 1:17 pm on March 25, 2015 in NORTH CHARLESTON, SC 29405.

Available Actions

D H E C
PROMOTE PROTECT PROSPER
Catherine E. Heigel, Director
Promoting and protecting the health of the public and the environment

CEASE AND DESIST DIRECTIVE

CERTIFIED MAIL ARTICLE NO.: 9171 9690 0935 0096 6221 14

October 26, 2015

Sunset Cay, LLC
c/o Edward Clark
P.O. Box 1590
Folly Beach, SC 29439

RE: Bar providing beverage service over the coastal waters critical area

Mr. Clark,

On August 18, 2015, Department of Health and Environmental Control's Office of Ocean and Coastal Resource Management (DHEC) staff observed nonwater-dependent activity over the coastal waters critical area.[1] Specifically, staff observed numerous mini-bottles of liquor and other items indicative of beverage service as well as S.C. Department of Revenue Alcohol Beverage Licenses posted on a wall in the second floor of the commercial building over the coastal waters critical area of the Folly River at the Sunset Cay Marina, 66 West 9th Street Extension, Folly Beach 29439 (Site).

Such activity is a violation of Critical Area/Water Quality Certification Permit #2002-1H-190-P, *as amended* (Permit), which requires that all parts of the marina are used for water dependent purposes only, and the Critical Area Permitting Regulations (Regulations) which prohibit food and beverage service and other non-water dependent uses within a permitted marina.[2] As a result, DHEC is required to take appropriate corrective action and may assess civil penalties.

You are hereby directed to immediately cease and desist operation and/or utilization of the facility providing beverage service at the Site and any other activity in violation of the S.C. Coastal Zone Management Act, Permit and/or Regulations. Additionally you were previously directed on March 16, 2015 to immediately cease and desist construction, operation, and/or utilization of the restaurant and apartment at the Site. DHEC is issuing this directive as authorized by 23AS.C. Code Ann. Reg. 30-8(B), *as amended*. If you do not comply with this request, please be advised that DHEC, pursuant to S.C. Code Ann. §48-39-160, may seek relief in the appropriate Circuit Court.

[1] 23A S.C. Code Ann Regs. 30-1(D)(35) defines "Nonwater-dependent" as a facility which cannot demonstrate that dependence on, use of, or access to coastal waters is essential to the functioning of its primary activity.
[2] 23A S.C. Code Ann. Regs. 30-12(E)(3)(b)(x)

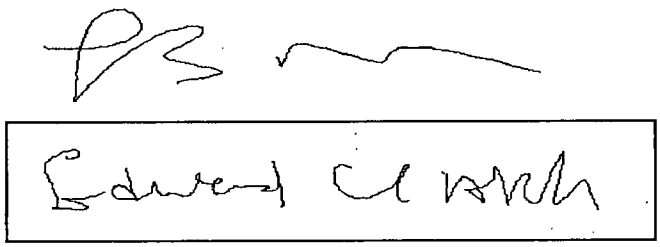
UNITED STATES POSTAL SERVICE.

Date: May 26, 2016

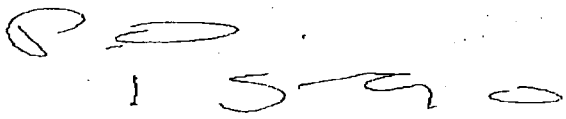
BRADLEY CHURDAR:

The following is in response to your May 26, 2016 request for delivery information on your Certified Mail™ item number 9171969009350096622114. The delivery record shows that this item was delivered on November 5, 2015 at 10:16 am in FOLLY BEACH, SC 29439. The scanned image of the recipient information is provided below.

Signature of Recipient :



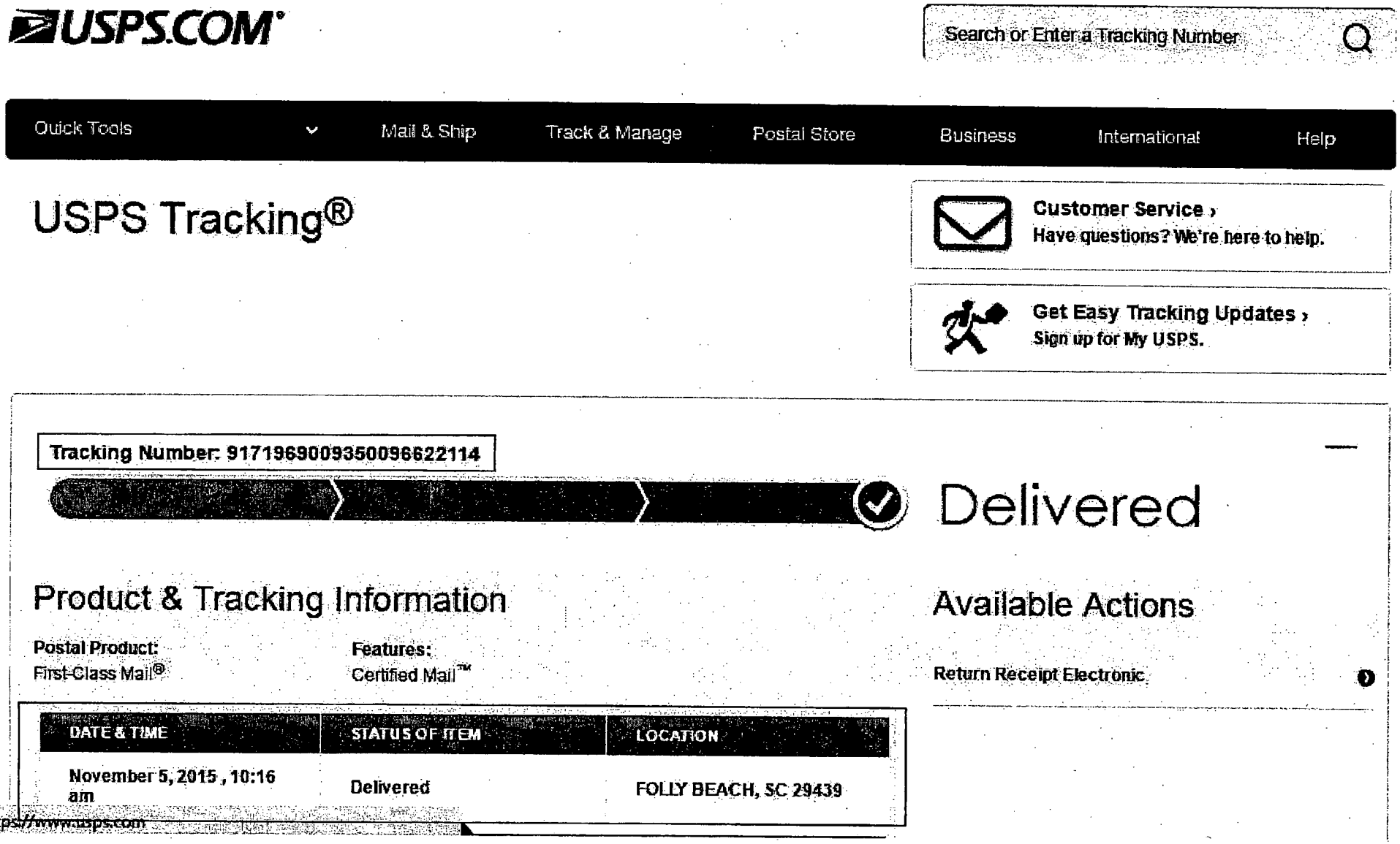
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Customer Service ›
Have questions? We're here to help.
Get Easy Tracking Updates ›
Sign up for My USPS.
Tracking Number: 9171969009350096622114
Delivered
Product & Tracking Information
Postal Product:
First-Class Mail®
Features:
Certified Mail™
DATE & TIME
STATUS OF ITEM
LOCATION
November 5, 2015 , 10:16 am
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FOLLY BEACH, SC 29439
Available Actions
Return Receipt Electronic
https://www.usps.com

151

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Sunset Cay, LLC, Petitioner, vs. South Carolina Department of Health and Environmental Control, Respondent.	)	DOCKET NO. 15-ALJ-07-0579-CC RETURN TO MOTION TO DISMISS

TO: Bradley D. Churdar, Attorney for South Carolina Department of Health and Environmental Control, O.C.R.M.:

Introduction

The Department seeks a dismissal of the petitioner's application for relief on the ground that this Court lacks subject matter jurisdiction. The Department begins its motion with an accurate timeline of events in order to support its claim that "the Department has an extensive history of working with the Petitioner to amend its permit multiple times over the last twelve years." (Motion at Page 1.) The timeline is accurate with regard to the dates recited therein, but much of the commentary contains inaccurate coloring. The Department is correct that the petitioner does have an "extensive history of working with" the Department, and that the current controversy occurred only because a new hire at the Department is singling petitioner out for arbitrary and punitive treatment. On page 3 of its well-written memorandum, the Department says: "On February 3, 2015, Mr. Hoke and Mr. Sean Briggs . . . met with Mr. Jack Walker and Mr. Clark regarding the unauthorized restaurant and unauthorized apartment." The date of the meeting is correct, but the characterization of the meeting is incorrect. The Department misleads

the Court—and in misleading the Court illustrates the core issue raised by this case—by creating a false impression there was an "unauthorized" restaurant or apartment. The evidence will show that O.C.R.M. authorized the service of "light foods and snacks" on the second floor of the commercial building since 2009. The evidence shows that the Department responded to the petitioner's August 31, 2009, inquiry about food service, **which included a copy of the Ship's Store menu** (Exhibit 1), by replying on September 18th, by **approving the menu and informing petitioner he did not require a modification to his permit.** See correspondence Butch Clarke to O.C.R.M. dated August 31, 2009, **with attached menu** (Exhibit 1) and David J. Thompson's, September 18, 2009, reply (Exhibit 2) where O.C.R.M. approved the Ship's Store Menu:

> The staff of SCDHEC/Ocean & Coastal Resource Management has reviewed the above referenced letter. Specifically, your request is to ask if 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 as a component of the ships store and does not require any modification of the permit provided 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. Thomason (Exhibit 2)

Even the Department's "cease and desist" letter of October 26, 2015 concedes that the Ship's Store can sell food, which is hardly surprising since there is hardly a marina in existence that does not:

> 11. On December 14, 2005, DHEC amend the Permit to authorize the placement of a commercial building containing restrooms and a ships store on the existing 50' x 50' fixed pierhead. The first floor was authorized to contain the restrooms and the second floor to contain the ships store. This work was authorized as the proposed uses of the building were water-dependent. This amendment stated that "non-water dependent uses

are not allowed."
O.C.R.M. October 26, 2105, cease and deist letter

A trial on the merits will demonstrate how inaccurate the Department's characterization of the facts is, but for purposes of a Motion To Dismiss, the State must concede these are disputed assertions, and at a Motion to Dismiss, the Court is required to accept petitioner's allegations as true:

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

Not to put too fine a point on it, just as the Department says in its memorandum, petitioner has a long and collaborative relationship with the Department for many years. The Department issued the original marina permit in 2003, and the original building permit in 2005 (although it was amended several times thereafter), and the marina as it sits today conforms to every geometrical limitation imposed by the permit. O.C.R.M. regulates the depth, width, and height of such construction, and the Department's voluminous regulations govern the operation of marinas in South Carolina. The purpose of the Department is to facilitate sound development and utilization of marine resources, not embroil property owners in shifting, contradictory,

illogical, and capricious government fiats:

> **§48-39-30 Legislative declaration of state policy.**
>
> (A) The General Assembly declares the basic state policy in the implementation of this chapter is to protect the quality of the coastal environmental and to promote the economic and social improvement of the coastal zone and of all the people of the State.
>
> (B) Specific state policies to be followed in the implementation of this chapter are:
>
> (1) To promote economic and social improvement of the citizens of the State and to encourage development of coast resources in order to achieve such improvement with due consideration for the environment and within the framework of a coast planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone.
>
> . . .
>
> (C) In the implementation of the chapter, no government agency shall adopt a rule or regulation or issue any order that is unduly restrictive so as to constitute a taking of property without the payment of just compensation in violation of the Constitution of this State or of the United States.

Here, there are no disputes that the Department issued an original building permit in 2005, that the petitioner completed the building in 2006, or that a marina has been in continuous operation at this location since just after World War II. Rather, this entire controversy arises solely because one code enforcement officer has singled out petitioner for disparate and unequal treatment and is attempting to persuade the Department to reverse course on everything it has done prior to his employment and institute a campaign of harassment on long settled issues, which cannot be challenged now. Since the issue of food and beverage sales were settled in 2009, the Department is statutorily barred from alleging violations over this issue six years later. See § 48-39-170(C). The evidence will show that a single code enforcement officer is misusing his authority to attack the petitioner on shifting, contradictory and arbitrary grounds on issues settled by O.C.R.M. in 2009. The evidence here will show that the petitioner's building

has been properly permitted and in continuous operation since the City of Folly Beach issued the certificates of occupancy in 2006. Code Enforcement Officer, Sean Briggs, instead of using independent judgment to evaluate whether there is or is not a violation, deferring to the previous decisions of O.C.R.M. has, for unknown reasons, reached unsupported conclusions without consulting O.C.R.M.'s own file and has misused his authority to question every facet of the marina, including its right to exist. The evidence of arbitrary and capricious government action is shocking. In short, the evidence in this case will show that Sean Briggs misuses his authority as a code enforcement officer to harass and intimidate the petitioner to support a theory not justified by the facts or the law.

In an effort to resolve the entire controversy—because the **only** controversy that exists in this entire case is what use is permitted on the third floor—the petitioner asked the Department for a "Declaration" as authorized by the Department's regulations. The Department refused to issue a declaration and generally sidestepped the entire question by furnishing an answer so vague as to be no answer at all:

> While an additional ship store office and storage, Yacht Sales office, Commodore meeting room, and space for Lounge and Public Waterway events may be, in the broadest sense, generally associated with the water, such a general association does not satisfy the regulatory standard.
> /s/ Sara P. Brazemore, Deputy Director, Office of Ocean and Coastal Resource Management (Exhibit 3)

After receiving this non-answer, the petitioner asked for review by the Board in Columbia. The Appellate Panel (Board) refused the petitioner's request without comment or explanation. Following the Board's refusal, the petitioner brought the matter before this Court as he is entitled to do under the *Administrative Procedures Act* and Article I, § 22 of the South Carolina Constitution. Thus the case is property before the Court and ripe for a decision.

REPLY TO ARGUMENTS 1 and 5
The Administrative Law Court Has Jurisdiction
The Petitioner has Exhausted Administrative Remedies,
And the Issues Are Ripe for Review.

The Department ignores its own timeline and its own statutory procedure to advance a spurious argument. On page 5 of its memorandum, the Department informs the Court that all the parties met at the O.C.R.M. office on November 18, 2015, to discuss the resolution of the October 26, 2015, Cease & Desist Letter. This is true, and the witnesses at this meeting will testify that the meeting went nowhere, ultimately ending in the Department's pledge to research the matter further and "get back to you." The petitioner will offer clear and cogent evidence about this meeting at the time of trial, but for purposes of this reply, even the Department will concede that the meeting was unproductive. Petitioner's witnesses will characterize the meeting as being equivalent to standing in quicksand. The undisputed evidence is that the petitioner met with the Department in good faith to identify the issue in order to resolve it, but the Department adopts shifting explanations and is not willing even to identify the issue(s) in dispute. The clearest expression of what the issue is and why it is properly before this Court comes from an examination of the timeline, which reveals that the only unresolved issue is what use is permitted on the third floor of the "commercial building" and why the Department refuses to identify approved uses.

The Department omits from its timeline the critical date of August 28, 2015, which is the date the Petitioner sent to O.C.R.M. a Petition for Declaration under Regulation 30-9. (A copy is attached here as Exhibit 4.) It is undisputed that the Department refused to issue a Declaration (see correspondence of Sara Brazemore dated October 12, 2015, attached here as Exhibit 3).

Following the Department's refusal to issue a declaration, petitioner asked the Board in Columbia to review this decision, which it refused to do by denial dated December 2, 2015 (Exhibit 4), and the petitioner filed this December 23, 2015.

It is true that the petitioner's request preceded the Department's October 26, 2015, cease and desist letter, but this does not make the case unripe for judicial determination. The O.C.R.M. regulations set forth the statutory procedure for seeking a declaration, and the fact is that the Department has refused to answer the petitioner's request for declaration, and the appellate Board in Columbia refused to hear the case, and a resolution of that issue is also a resolution of the Department's October 26, 2016, cease and desist letter. Thus, the petitioner is properly before the Court. The petitioner is required to file petition within thirty days after the "party receives the final decision." See § 1-23-610, S. C. Code. According to this statutory provision, the Administrative Law Court "may reverse or modify the decision if the substantive rights of the petitioner has [*sic.*] been prejudiced.

The Department argues that the case is not yet ripe for judicial review because the Department has not determined a final outcome on its October 26, 2015, cease and desist letter. However, the Department fails to recognize that by withholding uses from the petitioner for the third floor of his building, it is, in fact confiscating the space without compensation. As the Court of Appeals said in *Tracy v. Tracy*, there are two elements the Court must consider to determine if a case is ripe for judicial review, the fitness of the issues for decision and the hardship to the petitioner requesting judicial review:

> "Before any action can be maintained, a justiciable controversy must be present." *Sloan v. Greenville County*, 356 S.C. 531, 546, 590 S.E.2d 338 (Ct. App. 2003). "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial

determination, as distinguished from a contingent, hypothetical or abstract dispute." *Pee Dee Elec. Co-op, Inc. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983); see also *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995) (holding a justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights, and a positive legal duty which is denied by the adverse party). "The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing." *Sloan*, 356 S.C. at 547, 590 S.E.2d at 346. "In determining a ripeness issue under the 'case or controversy' requirement of Article III of the United States Constitution, federal courts use a two-factor test: (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration." *Waters v. S. C. Land Res. Conservation Comm'n.*, 321 S.C. 219, 227-28, 467 S.E.2d 913, 918 (1996).

Tracy v. Tracy, 384 S.C. 91, 682 S.E.2d 14 (2009)

In light of the fact that the petitioner's property has remained vacant because the Department will not act on his request for declaration or identify authorized water dependent uses, the Department cannot deny petitioner is suffering a severe hardship, a taking. And since the Department denied petitioner access to its own procedural mechanism to define the uses for the third floor, the Department cannot deny that the issues are "fit" for judicial determination.

REPLY TO ARGUMENTS 2 and 3
The Petitioner is entitled to Attorney's Fees, and the Court Is Authorized to Award Them.

The Department burdens the Court with an unnecessary discussion. In the first place, the parties do not reach the issue of attorney's fees until the case is resolved on its merits, and it is premature to argue about the Court's ability to award attorney's fees at such an early juncture. Second, when the matter is resolved on the merits, the General Assembly has provided the Administrative Law Court with the same powers as that of a circuit court judge:

§ 1-23-630. Powers of law judges.

(A) Each administrative law judge of the division has the same power at chambers or in open hearing as do circuit court judges and to issue those remedial writs as are necessary to give effect to its jurisdiction.

Whether this Court ultimately addresses the issue of attorney's fees, it is irrelevant whether the Court considers them under §15-77-300, S. C. Code, or 42 §1988, U.S.C.A., since the purposes of the state and federal provisions are identical. At the appropriate time, the petitioner will submit an application for fees and brief the issue fully. At this juncture, the Department cannot prevent the petitioner from pleading entitlement since § 1-23-630 gives the Administrative Law Court the same powers as a circuit court judge.

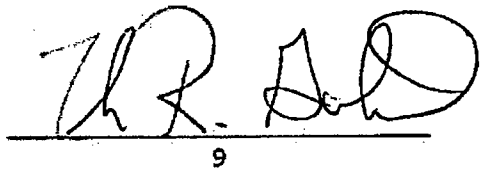
REPLY TO ARGUMENT 4
The Petitioner is Agreeable to Suing the Department in Common Pleas for Damages

The Department's Fourth argument is that this Court lacks jurisdiction to award money damages. This proposition is at variance with the General Assembly's decision to vest the Administrative Law Court with the same powers as the circuit court (§ 1-23-630), but if the Department stipulates that petitioner's claim for money damages must be brought in circuit court, petitioner is satisfied with that stipulation and will seek money damages in the Court of Common Pleas.

Conclusion

For the foregoing reasons, petitioner prays that the Department's motion to dismiss be denied.

Respectfully submitted,



June 21, 2016

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

The undersigned hereby certified that a true copy of the foregoing pleading has been served upon, Bradley Churdar, counsel for the Defendant, by mailing a copy properly addressed with sufficient postage affixed thereto this 21st day of June, 2016.

By: _____

EXHIBIT 1

August 31, 2009

Mr. Jeff Thompson
South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management
1362 McMillan Avenue, Suite 400
North Charleston, South Carolina, 29405

Re: Permit No. 2002-IH-190-P
Sunset Cay Marina
Folly Beach, S.C. 29439

Dear Mr. Thompson,

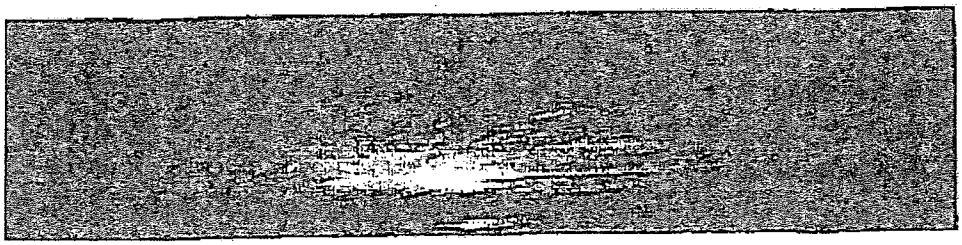
Sunset Cay Marina presently operates a marina ships store at our folly River facility. Recently we have received requests from a number of our patrons asking that we offer some form of snacks/light foods at our ship store. We have received our SCDHEC-OCRM permit and are aware of nothing with regard to this request that would violate the conditions of our permit. Please note that we intend to incorporate the sale of snacks/light food items in the ship store and ask that you notify us with any specific questions regarding our intentions. For your information and review we have attached a copy of the minor list of proposed food items we hope to offer in the near future.

We appreciate your assistance with regard to this matter and ask that you please contact us if any additional information is needed. I can be reached at 843-819-7877.

Sincerely,

Butch Clark

Sunset Cay Yacht Club



Soups & Salads

Soup of the Day $3.00

House Salad- lettuce, tomato, cucumbers, red onion, (cheese add.50) $4.50

Chef Salad-lettuce, tomato, cucumber, egg, ham, turkey, cheese and red onion $6.00

Tuna Salad-homemade tuna salad served over lettuce, tomato, cucumber and red onion $5.00

Greek Spinach Salad-with tomatoes, black olives, egg, red onion and feta cheese with balsamic vinaigrette $6.00

Relish Tray with Dill-Shallot Mayonnaise $6.00

Sandwiches & Hot Dogs

Ham & Cheese- thin sliced baked ham topped with your choice of cheese $4.50

Turkey & Cheese- fresh sliced turkey breast topped with your choice of cheese $4.50

Tuna Sandwich- fresh made tuna salad with lettuce and tomato on white or wheat $4.50

Egg Salad Sandwich- homemade egg salad with lettuce and tomato on white or wheat $4.50

Folly Club- three layers with choice of ham, turkey or roast beef, bacon, lettuce, tomato and your choice of cheese. Served on white or wheat $5.50

Chicken and Mushroom Quesadilla $5.00

All American Hot Dog with catsup, mustard and relish $1.00 (add chili .50)

Sub Sandwiches

All subs fixed with lettuce, tomato, onion and your choice of cheese
Meats- Baked Ham, Turkey, Salami, Roast Beef, Pepperoni, Bacon
Cheeses- American, Swiss, Pepper Jack, Cheddar, Provolone, Mozzarella
Additional Toppings-jalapeño peppers, black olives, green peppers, banana peppers, mushrooms, salt & pepper, oregano, oil & vinegar,

1 Meat $5.00
2 Meats $6.00
3 Meats $7.00

EXHIBIT 2

D H E C

PROMOTE PROTECT PROSPER

C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment.

September 18, 2009

Mr. Butch Clark
Sunset Cay Marina
P.O. Box 1590
Folly Beach, South Carolina 29439

Re: Sunset Cay Marina, PN 2002-1H-190-P, Letter of August 31, 2009.

Dear Mr. Clark:

The staff of SCDHEC/Ocean & Coastal Resource Management has reviewed the above referenced letter. Specifically, your request is to ask if the serving of snacks and light food items as a part of the existing ships store is consistent with your permit. OCRM offers no objection to inclusion of food items as a component of the ships store and does not require any modification of the permit provided 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.

Please let me know if you have any questions or concerns.

Sincerely,

D. J. Thompson

David J. Thompson
Senior Wetland Project Manager

CC: Mr. Blair Williams

EXHIBIT 3

D H E C
PROMOTE PROTECT PROSPER
Catherine E. Heigel, Director
Promoting and protecting the health of the public and the environment

October 12, 2015

Mr. Thomas Goldstein
Belk, Cobb, Infinger and Goldstein, P.A.
2344 Cosgrove Avenue
Charleston, SC 29405

Re: Petition for Declaratory Ruling; P/N 2002-1H-190-P; Sunset Cay, L.L.C
Folly Beach, SC

Dear Mr. Goldstein,

This letter is the Department's response to your request for a Declaratory Ruling under Regulation 30-9 regarding proposed "secondary uses" for unit 301 at the Sunset Cay Marina. Specifically, you requested the Department to make a declaration that the five "secondary uses" that your client has identified for Unit 301 are in conformance with the regulatory definition of water-dependent, Regulation 30-1(52). You further specify the five secondary uses as:

A. Ship's store office and storage;
B. Yacht sales office;
C. Captain and transient lounge;
D. Commodore meeting room;
E. Public waterway events.

As background, Sunset Cay Marina was originally permitted by the Department on April 9, 2003, for the primary purpose of temporary and permanent docking space and fueling. The permit was amended on December 14, 2005, to allow for the construction of a two-story building on the pierhead and associated water dependent uses (bathrooms and a ship store). Specifically, the Department received a request to amend the 2003 permit by constructing a 30' x 29' "restroom and commercial facility on the existing 50' x 50' pierhead" with two floors. The request further stated:

> The first floor will be restroom facilities; one will be for Women and one for Men. The first floor will also have storage for Oil Boom absorbent pads and emergency equipment along with other items necessary for safe operation of the Marina. The second floor will be a "Ship Store" and an office for the "Dock Master" and Marina personnel along with the Operations Manual.

The affidavit of newspaper publication and submitted permit drawings, also, support your client's request for only two floors. In the December 14, 2005, amendment letter, the Department specifically stated:

> The above referenced permit has been amended to authorize the placement of a building containing restrooms and a ships store on the existing 50' by 50' fixed pierhead. The building will be 30' by 29' where the first floor will contain the bathrooms and the second floor will contain the ship's store. This work has been authorized, as the proposed uses of the building are water dependent. Non-water dependent uses are not allowed.

This amendment did not authorize a third floor. Neither the permit amendment request nor the affidavit of newspaper publication nor the issued permit amendment reference a third floor.

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. To date, no demonstration has been provided to the Department that the additional proposed uses for the third floor are water dependent. Therefore, the Department determined these proposed uses to be non-water dependent in two separate letters to Mr. Clark dated June 29, 2015 and August 4, 2015, respectively. The Department offers the following response to your petition for a Declaratory Ruling.

Regulation 30-1(D)(52), defines water dependent as "a **facility** which can **demonstrate** that dependence on, use of, or access to coastal waters **is essential to the functioning of its primary activity**. (emphasis added)" The Department previously determined the initially proposed dock master's office, ships store, storage space and restrooms were water dependent uses essential to the functioning of the marina's primary activity of providing temporary and permanent docking space and fuel sales to its customers . The marina regulations support this position. Specifically, Regulation 30-12(E)(3)(b)(x) states "**one** reasonably sized dock master's office may be constructed within a permitted marina. This **office will be limited to water dependent uses such as fuel sales.** Restroom facilities may be placed in this office; however, food and beverage services, clothing sales and other non-water dependent uses are prohibited." The regulation limits the number of offices to **one** and identifies water dependent uses such as fuel sales. The Department does not have the authority to authorize more than one office. Use of unit 301, or any other portion of this marina facility, for additional offices, Yacht Sales office, Commodore meeting room, and space for Lounges and Public Waterway events are not water dependent and cannot be authorized by the Department. The ship store on the second floor is approximately 1,185 square feet in addition to the storage area on the first floor. Considering the sparse inventory in this store (as observed by the Department during multiple site inspections), this facility, currently has adequate storage space.

Furthermore, your client has not **demonstrated** to the Department that the additional proposed uses above meet the regulatory definition of water dependent. Specifically, your client (applicant) bears the burden of demonstrating that dependence on, use of, or access to coastal waters is ***essential*** to the functioning of its primary activity of providing fuel sales and temporary and

permanent docking space to its customers. While an additional ship store office and storage, Yacht Sales office, Commodore meeting room, and space for Lounges and Public Waterway events may be, in the broadest sense, generally associated with the water, such a general association does not satisfy the regulatory standard. Regulation 30-1(D)(52) requires your client to demonstrate that their proposed uses are essential to providing temporary and permanent dock space and fuel sales. The dictionary defines "essential" as "absolutely necessary" or "indispensable". The Department takes the position that your client's additional above-referenced proposed uses are not *absolutely necessary* to provide temporary and permanent dock space and fuel sales. Your client can continue the primary activity of providing temporary and permanent docking space and fuel sales without a Yacht Sales office, a Captain and transient lounge, a Commodore meeting room or a Public waterway events room. These proposed secondary uses are not essential to the primary activity of a marina and therefore are not water dependent in accordance with the regulatory definition.

In your petition, you request the Department to provide a list of water dependent uses. While no such list exists, the marina regulations identify some water dependent uses such as fuel sales. The regulations further specify certain non-water dependent uses such as restaurants, motels, laundries, food and beverage services, and clothing sales. Again, the regulations require the Department to determine what is water dependent based on a demonstration that the dependence on, use of, or access to coastal waters is essential to the facility's primary activity.

Please allow this letter to serve as the Department's Declaratory Ruling for the matters presented by you regarding Sunset Cay, L.L.C. permit number 2002-1H-190-P. Please call Blair N. William, Manager, Wetland Permitting Section, at 843-953-0232 or email him at williabn@dhec.sc.gov if you need further clarification or have questions.

Respectfully,

Sara P. Bazemore

Sara P. Bazemore
Deputy Director
Office of Ocean and Coastal Resource Management

CC: Blair N. Williams, Manager, DHEC Wetland Permitting and Certification Section

EXHIBIT 4

STATE OF SOUTH CAROLINA
BEFORE THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
OFFICE OF COASTAL RESOURCE AND MANAGEMENT
COASTAL DIVISION

Edward "Butch" Clark.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	PETITION FOR DECLARATION
Petitioner,	)	UNDER REGULATION 30-9
	)	
O.C.R.M.,	)	
	)	
Respondent.	)	
	)	

Comes now the Petitioner, Edward "Butch" Clark, and prays for a declaration of the South Carolina Department of Health and Environmental Control, Coastal Division, and shows:

1. The Petitioner is the holder of an amendment to the marina permit, permit No. #2002-1H-190-P, as amended, issued December 14, 2005. (The permit is attached here as Exhibit A and incorporated by this reference.) The permit authorizes construction of a three-story building within the 50-foot permissible pier-head footprint and thus not further altering the critical area. The Department previously authorized primary water-dependent uses in Unit 101 and 201, but has rejected all of Petitioner's proposed water-dependent uses for Unit 301.

2. After receiving a permit, the petitioner constructed a marina building in conformity with the size limitations of the permit, and the current building has been in continuous operation since 2006. (The site has been actively used as a marina since 1947.)

3. The Sunset Cay marina location has been in continuous operation by different owners and under different names since 1947 when the Army Corps of Engineers permitted the first marina authorizing the construction of a building extending 150' out, over and into the

navigable waterway known as the Folly River. (A copy of the 1947 permit is attached hereto and incorporated by this reference.) Each transfer of the property included the right to operate under the Army Corps of Engineers' 1947 permit.

4. The third floor of the marina is currently vacant because on August 4, 2015, the Department rejected all of the petitioner's proposed uses on the following grounds: "Your . . . submittal fails to adequately outline or demonstrate water-dependency for the proposed uses of the third floor." /s/ Alan Page for Josh Hoke. The Office of Coastal Resource Management does not provide reasoning as to why proposed uses, such as sales of boats, are not "water-dependent." Without explanation and relying entirely on unsupported conclusions, the Coastal Division rejected the petitioner's proposed secondary uses as being "water-dependent" uses. All of petitioners are proposed secondary uses are "water-dependent" as required by Regulation 30-1(52). Regulation 30-1(52) defines "water-dependent" as:

> A facility which can demonstrate that dependence on, use of, or access to coastal waters is essential to the function of its primary activity.
> § R30-1(52)

5. The Petitioner's proposed secondary five water-dependent uses, which can be used in conjunction with one another; however, all of which the Department has rejected as not being "water dependent." They are: Ship Store Office and Storage; Yacht Sales Office; Captain and Transient Lounge; Commodore Meeting Room; and Public Waterway Events. Each one meets the definitional test set by the General Assembly in Regulation 30-1(52).

6. The Petitioner seeks a declaration under Regulation 30-9 that the structure (Unit 301) is used for secondary water-dependent uses. The Declaration must be made solely on the

evidence of the primary activity to which the structure is dedicated. In this case, Unit 301 has proposed five water-dependent uses secondary to the primary purpose of the structure, which in this case is a 125 slip marina. (The Department has previously approved the primary uses of Dock master's office (Unit 101) and a Ship's Store (Unit 201).

7. The agency's refusal to adhere to the definition provided by the General Assembly in Regulation 30-1 and the rejection of the petitioner's proposed uses without explanation or reason is arbitrary and capricious and not rationally related to the words "water-dependent" as those words are used in the ordinary course and as defined by § R. 30-1. The Department is refusing to apply the words of the regulation utilizing their plain and ordinary meaning.

8. In applying the words "water-dependent" to the Petitioner, as those words are defined by Regulation 30-1(52), the Department is required to apply the ordinary meaning of the words used as they are commonly understood.

9. The petitioner prays for a declaration that the proposed secondary uses: Ship's Store Office and Storage, Yacht Sales Office; Captain and Transient Lounge, Commodore Meeting Room, and Public Waterway Events are all water dependent uses in conformity with the statutory definition contained in Regulation 30-1(52). In the alternative, if the Department believes the Petitioner's proposed uses are not "water dependent," then Petitioner prays for a declaration furnishing the Department's written explanation and reasoning for the Department's conclusions and a statement of which uses do meet the definition of "water-dependent."

10. The petitioner prays further for a declaration from O.C.R.M. in accordance with Regulation 30-9 as to provide a written list of all the proposed water dependent uses the

Department concedes are "water dependent" based on controlling definition of Regulation 30-1, S. C. Regulations.

Wherefore, having fully set forth the grounds for a declaration as provided by Regulation 30-9, the petitioner prays for a declaration from the Department to assist the Petitioner's goal to meet and satisfy the reasonable conditions of the Department's regulations for water dependent uses.

Respectfully submitted,

August 27, 2015

Belk, Cobb, Infinger & Goldstein, P.A.
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P. O. Box 71121
N. Charleston, S. C. 29415-1121
(843) 554-4291
(843) 554-5566 (fax)
tgoldstein@cobblaw.net

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Sunset Cay, LLC, Petitioner, vs. South Carolina Department of Health and Environmental Control, Respondent.	)	Docket No. 15-ALJ-07-0579-CC DEPARTMENT'S REPLY TO SUNSET CAY'S SUPPLEMENTAL BRIEF REGARDING PARTIAL MOTION TO DISMISS

In response to Sunset Cay's August 8th Supplemental Reply Brief, the South Carolina Department of Health and Environmental Control ("the Department" or "DHEC") submits Sunset Cay's October 23, 2015 Request for Final Review (hereafter "RFR"). (Exhibit 1). This is the only RFR Sunset Cay submitted. According to S.C. Code Ann. § 1-23-380, this RFR established the issues about which Sunset Cay "has exhausted all administrative remedies available within the agency" and can properly bring before this Court. In failing to file an RFR challenging either the March 16, 2015 Cease and Desist directive or the October 26, 2015 Cease and Desist directive, the "something"[1] Sunset Cay waived was this Court's jurisdiction over these two directives. As is plain to see, Sunset Cay did not mention any issues from the Department's two Cease and Desist directives anywhere in its October 23, 2015 RFR.[2] Contrary

[1] On page 2 of Sunset Cay's August 8th Reply Brief, opposing counsel asserts that "[t]he Department contends that in failing to request an administrative review of the October 26, 2015, Cease and Desist letter, the appellant has waived *something*. The appellant is not sure what, as even the Department's brief does not identify what since the Department says over and over it has not taken any 'administrative action' on the October 26, 2015, cease and desist letter." (Emphasis added).

[2] The March 16, 2015 Cease and Desist directive requires the Petitioner to "immediately cease and desist construction, operation, and/or utilization of the restaurant and apartment at the Site." The October 26, 2015 Cease and Desist directive requires the Petitioner to "immediately cease and desist operation and/or utilization of the facility providing beverage service at the Site."

to Sunset Cay's inference on page 3 of its August 8th Reply Brief, the fact that it submitted a Declaratory Ruling Request about two months before the Department issued its October 26, 2015 Cease and Desist directive does not satisfy the "exhaustion of administrative remedies" requirement of S.C. Code Ann. § 1-23-380 for either of these two directives.

In a roundabout way, opposing counsel alleges disparate treatment of Sunset Cay by the Department compared to a number of other marinas, restaurants and bars along the South Carolina coast. Mr. Goldstein then asks this Court to "use its inherent contempt powers to sanction O.C.R.M" because, according to him, "the Department's conduct in this case is nothing short of shocking." This allegation and request for sanctions is far beyond the scope of the Department's previously-filed Motion for Partial Dismissal. Thus, while the Department fundamentally disagrees that its treatment of Sunset Cay amounts to an equal protection violation, counsel does not believe that a "rational basis" analysis[3] is even possible without first taking evidence. Accordingly, unless the Court desires that the Department brief this issue, counsel asserts that the parties' basic disagreement should not be resolved until such testimonial evidence and documentary evidence is properly before the Court.

CONCLUSION

For the reasons set forth above, the Department respectfully requests the Court issue an Order for Partial Dismissal in accordance with the previously-filed Motion.

[Signature page follows]

[3] According to Talley v. S.C. Higher Educ. Tuition Grants Committee, the "rational basis" equal protection test applies where no suspect classification is involved. Id., 289 S.C. 483, 485-86, 347 S.E. 2d 99, 100 (Sup. Ct. 1986).

Respectfully Submitted,

Brad Churdar

Bradley D. Churdar, S.C. Bar # 12829
Associate General Counsel
SC Dept. of Health and Environmental Control
1362 McMillan Ave., Suite 400
North Charleston, SC 29405
(843) 953-0213
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churdabd@dhec.sc.gov
crawfomd@dhec.sc.gov

August 31, 2016
Charleston, South Carolina

The undersigned hereby certifies that on this day he has served all parties in the above-captioned action with a copy of ***Department's Reply To Sunset Cay's Supplemental Brief Regarding Partial Motion To Dismiss*** by emailing a copy of the same to Tommy Goldstein, Esquire on August 31, 2016 and mailing a copy to P.O. Box 71121, Charleston, SC 29405 on September 1, 2016.

By: Brad Churdar

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Sunset Cay, LLC, Petitioner, vs. South Carolina Department of Health and Environmental Control, Respondent.	)	Docket No. 15-ALJ-07-0579-CC MOTION TO AMEND ORDER VACATING PREVIOUS ORDER AND AMENDED ORDER OF DISMISSAL

To: Tommy Goldstein, Esq., Counsel for Petitioner and the Court:

PLEASE TAKE NOTICE that the Respondent Department of Health and Environmental Control (DHEC, or "the Department") hereby submits this Motion to Amend in accordance with Rule 59(e), SCRCP and respectfully requests this Court grant the relief requested.

This contested case hearing arose from the Petitioner's appeal of the Department's October 12, 2015 Declaratory Ruling. Thereafter, this Court dismissed the Petitioner's challenges to the Department's two Cease and Desist directives *with* prejudice and dismissed the Petitioner's challenge to the Department's Declaratory Ruling *without* prejudice.

The Department is not challenging this Court's above-referenced dismissal. However, the Department is requesting that the Court amend three erroneous and/or incomplete factual findings.

1. *"The marina has been in continuous use since 1947."*

Footnote 1 in the Order says that "[t]he marina has been in continuous use since 1947."[1]

[1] Presumably, "*the* marina" this Court is referring to is the currently-existing marina.

Upon information and belief, this factual finding was based on the following: (1) counsel for Sunset Cay asserts on page 4 of his June 21, 2016 *Reply to the Department's Partial Motion to Dismiss* that "a marina has been in continuous operation at this location since just after World War II;" and (2) at the June 27, 2016 motion hearing, counsel for Sunset Cay made reference to a 1947 permit from the U.S. Army Corps of Engineers. Other than his assertion of continuous use on page 4 of his June 21, 2016 *Reply*, opposing counsel offered no witness testimony or other evidence that the marina that exists today has been in continuous use from 1947 to the present. The question of whether or not the existing marina has been in *continuous use* since 1947 is not an issue this Court is required to address for two reasons. First, on April 9, 2003, the Department issued permit number 2002-1H-190-P to Sunset Cay authorizing the existing marina. Counsel for both parties and this Court all acknowledge this fact, so there is no question that the Sunset Cay Marina in existence today did not exist in 1947 and more importantly, did not exist in 1977 when the Coastal Tidelands and Wetlands Act became law. Second, the answer to this question of the existing marina being in *continuous use* since 1947 is irrelevant to the basis for the *Department's Motion for Partial Dismissal*.[2] Because the purpose of the June 27, 2016 motion hearing was to address this Court's jurisdiction, (not the merits of Sunset Cay's Request for Contested Case), the Department asserts that the Court's October 21, 2016 Dismissal Order does not need to include this factual finding.

[2] The basis for the *Department's Motion for Partial Dismissal* was fivefold:

(1) the Petitioner failed to properly invoke this Court's jurisdiction regarding the Cease and Desist Directives issued by DHEC;
(2) the "fee shifting statute" (S.C. Code Ann. § 15-77-300) is inapplicable to this matter;
(3) 42 U.S.C. § 1988(b) is inapplicable to this matter;
(4) this Court lacks jurisdiction to award damages to the Petitioner;
(5) Petitioner's proposed remedy regarding the water-dependency issue (i.e., ALC orders DHEC to issue a permit amendment allowing the requested uses) is not ripe for adjudication, because the Petitioner has not applied for a permit amendment to include these uses.

The problem created by this erroneous footnote arises when Sunset Cay pursues its equal protection challenge against the Department alleging disparate treatment of Sunset Cay Marina compared to the other marinas referenced on page 4 of Sunset Cay's August 8, 2016 Supplemental Brief (i.e., Edisto Marina; St. Johns Marina; The Sand Castle; Fleet Landing; 2 Concord Street; Fripp Island Marina; and Lady's Island Marina). Significantly, Sunset Cay Marina is not a "grandfathered" structure and thus not similarly situated to the other marinas referenced in opposing counsel's August 8, 2016 Supplemental Brief. As mentioned above, the Sunset Cay Marina permit was issued on April 9, 2003 and according to opposing counsel, the marina was constructed in 2006. (Exhibit A – November 12, 2015 letter from Tommy Goldstein). The currently-existing structure is not the same marina that existed in 1977 when the Coastal Tidelands and Wetlands Act went into effect. In the context of future equal protection litigation, counsel for the Department cannot over-emphasize the importance of the distinction between the above-referenced "grandfathered" marinas (i.e., Edisto Marina; St. Johns Marina, etc.) and the "non-grandfathered" status of the currently-existing Sunset Cay Marina.[3] Exhibit B is very helpful in showing aerial imagery of the Sunset Cay Marina as it now exists compared to what existed in 1977. These are plainly two different structures.

In response to opposing counsel's August 8th Brief regarding this issue, on August 31, 2016 the Department said

> "opposing counsel alleges disparate treatment of Sunset Cay by the Department compared to a number of other marinas, restaurants and bars along the South Carolina coast... This allegation ... is far beyond the scope of the Department's previously-filed Motion for Partial Dismissal. Thus, while the Department fundamentally disagrees that its treatment of Sunset Cay amounts to an equal protection violation, counsel does not believe that a 'rational basis' analysis is even possible without first taking evidence. Accordingly, unless the Court desires

[3] Proving the "grandfathered" status of these other marinas would obviously require another hearing to introduce evidence showing that these structures did exist in 1977.

> that the Department brief this issue, counsel asserts that the parties' basic disagreement should not be resolved until such testimonial evidence and documentary evidence is properly before the Court." (*Department's Reply to Sunset Cay's Supplemental Brief Regarding Partial Motion to Dismiss*, page 2).

Accordingly, the Department requests that the statement in footnote 1 that "[t]he marina has been in continuous use since 1947" be deleted from the Order. In the alternative, if the Court believes this issue *should* be addressed in the Dismissal Order, then the Department requests a hearing to present testimony and evidence.

2. *The Court erroneously stated that "DHEC, on September 18, 2009, determined that Petitioner's request to serve snacks and light food items as part of the existing ship's store was consistent with the Permit."*

Footnote 2 in the Order says that "DHEC, on September 18, 2009, determined that Petitioner's request to *serve* snacks and light food items as part of the existing ship's store was consistent with the Permit." (Emphasis added). While Mr. Clark's August 31, 2009 letter included a menu, he never asked for permission from the Department to "serve" food. Specifically, he said that "we have received requests from a number of our patrons asking that we *offer* some form of snacks/light foods at our ship store." Then Mr. Clark stated further in that letter that "we intend to *incorporate* the sale of snacks/light food items in the ship store ..." (Exhibit C). In response, Jeff Thompson's September 18, 2009 letter did not say that the Department would allow food "*service*", but rather that "OCRM offers no objection to inclusion of food items as a component of the ships store and does not require any modification of the permit provided the store is not converted into a restaurant." (Exhibit D – September 18, 2009 letter). As indicated by the attached Affidavit (Exhibit E), Mr. Thompson categorically denies that he ever told Mr. Clark or any other representative of Sunset Cay that they could "*serve*" food in the Ship's Store. Mr. Thompson is available to testify as to his conversations with Mr. Clark that were contemporaneous with his September 18, 2009 letter. Furthermore, footnote 2 is

erroneous, because as indicated on the attached page from Sunset Cay's April 9, 2003 marina permit (Exhibit F), Special Condition # 25 specifically states that "[n]o food or beverage *service*, vending machines, T-shirt sales, concessions, etc. are allowed on or across this marina facility." (Emphasis added). Accordingly, the Department requests that footnote 2 be deleted from the Dismissal Order.

3. *Third Floor Was Never Permitted*

The first full paragraph on page 2 of the Dismissal Order states the following:

> "On January 13, 2015, DHEC met with Petitioner's representative, Mr. Clark, to discuss an amendment to the Permit to allow a restaurant on the second floor. On January 15, 2015, DHEC conducted a compliance inspection of the marina and found an unauthorized restaurant under construction on the second floor, an *unauthorized apartment on the third floor*, and a number of unauthorized jet docks. After discussions with Petitioner regarding the unauthorized restaurant and apartment, DHEC emailed a Cease and Desist directive to Mr. Clark on March 13, 2015, to stop all operations of the restaurant and apartment. The Department served Mr. Clark with the Cease and Desist directive on March 16, 2015. Petitioner never sent a request for a Final Review Conference to DHEC on this Cease and Desist directive." (Emphasis added).

While the Court's above statement is true, the Department asserts that this statement is incomplete in one important respect. Specifically, the Court's October 21, 2016 Dismissal Order only acknowledges that the Department found an unauthorized apartment on the third floor. However, as indicated on page 6 of the attached October 26, 2015 Notice of Violation, Admission Letter (NOVAL), the Department determined that "Sunset Cay [is] ... responsible for the construction of a third floor on the commercial building ... in and over the coastal waters critical area at the Site *without authorization from the Department*." (Emphasis added) (Exhibit G). So the Department not only objects to the *use* of the third floor, but also to the very *existence* of the third floor without a permit. Despite all arguments to the contrary by opposing counsel, on December 14, 2005 the Department issued a permit amendment allowing Sunset Cay Marina

to construct a building with *two* floors, not *three* floors (Exhibit H).[4] As indicated by Exhibit H, on March 1, 2006 Mr. Clark accepted the terms of the permit amendment including this two floor limitation. Accordingly, the Department requests that the Court amend the October 21, 2016 Dismissal Order to include reference to the December 14, 2005 permit amendment allowing construction of only two floors. The Department further requests that the Court amend the October 21, 2016 Dismissal Order to include reference to the October 26, 2015 NOVAL determination that Sunset Cay is responsible for the construction of a third floor on the commercial building in and over the coastal waters critical area at the Site *without authorization from the Department*.

CONCLUSION

For the reasons set forth above, the Department respectfully requests the Court to issue a Second Amended Order of Dismissal consistent with this Rule 59(e) Motion.

Respectfully Submitted,

Bradley D. Churdar, S.C. Bar # 12829
Associate General Counsel
SC Dept. of Health and Environmental Control
1362 McMillan Ave., Suite 400
North Charleston, SC 29405
(843) 953-0213
(843) 953-0201 (fax)
churdabd@dhec.sc.gov
crawfomd@dhec.sc.gov

November 3, 2016
Charleston, South Carolina

[4] This permit amendment is consistent with the attached Public Notice that also referenced the construction of two floors, not three floors. (Exhibit I). If Mr. Clark thought the Department misunderstood his permit amendment request to include three floors instead of two floors. he should have seen this "mistake" with the Public Notice. But even if he failed to look at the Public Notice, he was certainly on notice that he could only build two floors when he accepted the permit amendment on March 1, 2006.

The undersigned hereby certifies that on this day he has served all parties in the above-captioned action with a copy of Department's **Motion To Amend Order Vacating Previous Order and Amended Order of Dismissal** by mailing a copy of the same to Tommy Goldstein, Esquire at P.O. Box 71121, Charleston, SC 29405 and via email.

By: Brad Chunda

Date: November 3, 2016

BELK, COBB, INFINGER AND GOLDSTEIN, P.A.
ATTORNEYS AT LAW
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P.O. Box 71121
Charleston, SC
zip 29415-1121
Ph: (843) 554-4291
Fax: (843) 554-5566

November 12, 2015

Mr. Bradley Churdar,
General Counsel
S. C. Dept. of Health and Environ. Control
Office of Coast Resources Management
1362 McMillian Avenue
Suite 400
N. Charleston, S. C. 29405-2047

RECEIVED
NOV 17 2015
LEGAL

RE: Sunset Cay, L.L.C.
Permit: P/N# 2002-1H-190-P
Enforcement File #15C-005P

Dear Bradley,

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. (And when I say "your" notice, I recognize that Adam Page signed it.) I think our meeting in your offices on the 18th is not only our best, but also perhaps the last opportunity to lay to rest the controversy surrounding Sunset Cay.

As you are aware, Edward C. "Butch" Clark built the marina in 2006. (I am trying to keep this letter as non-technical as possible, so please forgive me for speaking casually—we all know that the developer of the marina is Sunset Cay, L.L.C.) O.C.R.M. permitted the construction in the South Carolina "critical zone," and the City of Folly Beach controlled the actual construction through the application and enforcement of its normal building code ordinances. We all agree that O.C.R.M.'s mission is to promote the use of public waterways in a responsible manner. Your mission statement displayed on your web page is "Promote, Protect, Prosper." Your letterhead defines your mission as "Promoting and protecting the health of the public and the environment." In essence, O.C.R.M. exists to make the public waters of South Carolina as accessible to as many people as possible, or as the Legislative declaration of state policy says it: "The General Assembly declares the basic state policy in the implementation of this chapter is to protect the quality of the coastal environment and to promote the economic and social improvement of the coast zone and of all the people of the State." § 48-39-30, S. C. Code, ann.

Sunset Cay has existed in various forms for over 50 years. The current version has existed without controversy since 2006. Recently, Butch and a member of the marina, Art Barber, developed a conflict over the operation of the marina. This conflict erupted into a lawsuit now pending in the Court of Common Pleas. Mr. Barber has involved your office in this conflict, and I have recently reviewed a number of e-mails exchanged between Mr. Barber and Mr. Briggs of your office that do not seem well calibrated to solve a problem if one exists. Certainly, one can make the case that O.C.R.M. has "taken sides" in a pending civil suit rather

EXHIBIT A

than fulfilling its duties in an impartial manner. This conflict now seems poised to erupt into additional claims involving additional parties. In short, it seems great for lawyers, not so great for everyone else.

Therefore, I plan on attending your November 18th meeting with an open mind, hopeful that every person involved in this will have a full and fair opportunity to state his or her concerns. If we can identify each interested person's concerns, I am optimistic, that as professionals dealing with one another in good faith, we can derive and implement a plan to meet everyone's concerns. To the extent I can function as an unpaid, volunteer mediator with absolutely no authority, I am happy to play that role. To the extent that I am there looking out for the interests of Butch, the marina, the Board of Directors, or all three, I am coming with an open mind of the view that we can all work together and fashion a solution that meets the needs of all interested parties. With kind regards, I am

Very truly yours,

Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein

cc:
Blair N. Williams, Manager
1362 McMillian Avenue
Suite 400
N. Charleston, S. C. 29405-2047

Mr. Ian R. O'Shea, Esq.
1120 Folly Road
Charleston, S. C. 29412
ioshea@theoshealawfirm.com

Mr. John Romanosky, Esq.
P. O. Box 603
Charleston, S. C. 29402
john@romanlaw.com

Mr. Michael Timbes, Esq.
Thurmond, Kirchner
15 Mid-Atlantic Wharf
Suite 101
Charleston, S. C. 29401
mtimbes@tktylawfirm.com

Mr. Bill Oglesby,
Director
Sunset Cay Marina
whojo@bellsouth.net

Ms. Tammy Byrd,
Director
tbyrd@hps-sc.com

Mr. Harry Pecorellie,
Director
harry.pecorelli@stantec.com

Mr. Mike Smith,
Director
smitmic@musc.edu





EXHIBIT B

D H E C
S Environmental Conservation
Protecting and preserving the health of people in South Carolina

September 18, 2009

Mr. Butch Clark
Sunset Cay Marina
P.O. Box 1590
Folly Beach, South Carolina 29439

Re: Sunset Cay Marina, PN 2002-111-190-P, Letter of August 31, 2009.

Dear Mr. Clark:

The staff of SCDHEC/Ocean & Coastal Resource Management has reviewed the above referenced letter. Specifically, your request is to ask if the serving of snacks and light food items as a part of the existing ships store is consistent with your permit. OCRM offers no objection to inclusion of food items as a component of the ships store and does not require any modification of the permit provided 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

Please let me know if you have any questions or concerns.

Sincerely,

D. J. Thompson

David J. Thompson
Senior Wetland Project Manager

CC: Mr. Blair Williams

EXHIBIT D

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Sunset Cay, LLC, Petitioner, vs. South Carolina Department of Health and Environmental Control, Respondent.	)	Docket No. 15-ALJ-07-0579-CC AFFIDAVIT OF JEFF THOMPSON

My name is Jeff Thompson and I am a Regulatory Project Manager at SCDHEC-OCRM. I have been employed with OCRM and previously with Coastal Council for 29 years.

I am familiar with the Sunset Cay marina. In my September 18, 2009 letter to Butch Clark, I told him that "OCRM offers no objection to inclusion of food items as a component of the ships store and does not require any modification of the permit provided the store is not converted into a restaurant." I am well aware of Special Condition # 25 in Sunset Cay's marina permit prohibiting food or beverage *service*, because this special condition is included in every marina permit. In the conversations Mr. Clark and I had that were contemporaneous with my September 18, 2009 letter, I *never* told him that the Sunset Cay ship's store could *serve* food items. I was very clear in my conversations with Mr. Clark that the food items I referred to as being a "component" of the ships store were self-service food items, such as from a rack or cooler.

FURTHER, THE AFFIANT saith not.

D. J. Thompson
JEFF THOMPSON

SWORN TO AND SUBSCRIBED before me this
2nd day of November, 2016.

Notary Public for South Carolina
My Commission Expires: 4/12/2026

EXHIBIT E

21. Provided a complete copy of the marina permit, including any required marina report, the Operations and Maintenance Manual, all conditions or requirements placed on the permit and copies of all water quality monitoring reports required pursuant to the permit, shall be readily available at the marina.

22. Provided the marina shall prominently display and distribute material pertaining to the maintenance of water quality standards at the marina and report violations of such standards to the proper authorities.

23. Provided the applicant must develop a spill prevention and clean up plan for this project. The plan should contain the names of appropriate officials to contact in case of a reportable spill and outline measures to be taken. Clean-up materials, such as absorbent pads and booms, must be kept at the project site for small spills. This plan must be submitted to the Department for review and approval prior to initiation of the project. In most cases, this will be a part of the Operations and Maintenance Manual.

24. Provided any lease agreement used to rent dock space shall include a statement prohibiting the discharge of oil and gas, paint, litter, debris and wastewater, or other deleterious substances into the waters of the marina. It will also stress the need to maintain good water quality within the marina.

25. Provided all parts of the marina are used for water dependent purposes only. No food or beverage service, vending machines, T-shirt sales, concessions, etc. are allowed on or across this marina facility.

26. Provided that if dock boxes are allowed at the marina then they should be of a type that is leak-proof so that any material that spills or leaks inside the box will not leak out onto the marina docks and into the waters of the marina.

27. Provided that nonwater dependent structures, including buildings, houses, or offices that float, shall be prohibited at the marina unless specifically authorized by OCRM. OCRM shall at its discretion determine on a case-by-case basis whether or not a floating structure is a boat and thus exempt from the ACT or in a fact is a nonwater dependent structure. This shall be based upon the primary function of the floating structure. The mere fact that a structure is registered as a vessel or capable of being propelled does not mean it is exempt from the Department regulations.

28. Provided that if archaeological or paleontological remains are encountered prior to or during construction, we request that work stop and the State Historic Preservation Office be notified at 803-734-8615. If these materials include any underwater archaeological or paleontological remains the permittee should also notify the SC Institute of Archeology and Anthropology at 803-777-8170 pursuant to SC Code of laws 54-7-400, et seq. Archaeological remains consist of any materials made or altered by man, which remain from past historic or prehistoric times (i.e. older than 50 years). Examples include old pottery fragments, metal, wood, arrowheads, stone implements or tools, human burials, historic docks, structures or nonrecent (i.e., older than 100 years) vessels ruins. Paleontological remains consist of old animal's remains, original or fossilized, such as teeth, tusks, bone or entire skeletons.

WATER QUALITY SPECIAL CONDITIONS

29. Provided the applicant must construct the facility to moor no more than 80 boats. This facility must be constructed as proposed in the plans dated April 4, 2002, and not expand beyond the existing marina footprint.

EXHIBIT F

D H E C

Catherine E. Heigel, Director

Promoting and protecting the health of the public and the environment

October 26, 2015

CERTIFIED MAIL ARTICLE NO. 9171 9690 0935 0096 6220 91

The Sunset Cay Marina Council of Co-Owners, Inc.
c/o Tammi O. Byrd, Secretary
1648 Oak Island Drive
Charleston, SC 29412

Re: **NOTICE OF VIOLATION, ADMISSION LETTER**
The Sunset Cay Marina Council of Co-Owners, Inc.
Charleston County

Ms. Byrd:

Enclosed, please find a Notice of Violation and Admission Letter. Please be advised that an enforcement conference has been scheduled for **WEDNESDAY, November 18, 2015 at 10:00 A.M.** at the Department of Health and Environmental Control's Division of Ocean and Coastal Resource Management (DHEC) located at 1362 McMillan Avenue, Suite 400, Charleston, SC 29405.

The scheduled enforcement conference will provide the named party and DHEC the opportunity to discuss the alleged violations. Please plan to attend the conference or ensure that a representative authorized to speak on behalf of you attends. If you have any questions regarding this matter, please contact me at (843) 953-2009.

Respectfully,

Adam C. Page
Enforcement Project Manager
Ocean and Coastal Resource Management

cc: Enforcement File #15C-005P

ec: Sean M. Briggs, Manager, DHEC Compliance and Enforcement Section
Blair N. Williams, Manager, DHEC Wetland Permitting and Certification Section
Jeff Thompson, DHEC, Wetland Project Manager
Eric Lutz, City of Folly Beach

STATE OF SOUTH CAROLINA
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT

IN RE: SUNSET CAY, LLC;
SUNSET CAY SOCIAL CLUB, A NONPROFIT CORPORATION;
THE SUNSET CAY MARINA COUNCIL OF CO-OWNERS, INC.;
and
EDWARD CLARK
PERMIT # 2002-1H-190-P, AS AMEMNDED
CHARLESTON COUNTY

NOTICE OF VIOLATION/ADMISSION LETTER
15C-005P

SUNSET CAY, LLC, SUNSET CAY SOCIAL CLUB, A NONPROFIT CORPORATION, THE SUNSET CAY MARINA COUNCIL OF CO-OWNERS, INC., and EDWARD CLARK are HEREBY NOTIFIED that an enforcement conference has been scheduled for Wednesday, November 18, 2015 at 10:00 a.m., at the offices of the South Carolina Department of Health and Environmental Control's Office of Ocean and Coastal Resource Management, 1362 McMillan Avenue, Suite 400, Charleston, South Carolina. Representatives of Sunset Cay, LLC, Sunset Cay Social Club, A Nonprofit Corporation, The Sunset Cay Marina Council of Co-Owners, Inc. and Edward Clark have the opportunity to be present at this conference to discuss alleged violations of the South Carolina Coastal Zone Management Act (Act), S.C. Code Ann. §48-39-10, *et seq.*, *as amended*, cited herein.

Sunset Cay, LLC, Sunset Cay Social Club, A Nonprofit Corporation, The Sunset Cay Marina Council of Co-Owners, Inc. and Edward Clark may be accompanied at the conference by legal and/or technical counsel. The possibility of a Consent Order may be discussed.

This Notice is based upon the following findings of the South Carolina Department of Health and Environmental Control's Office of Ocean and Coastal Resource Management (DHEC or the Department):

1. Sunset Cay, LLC (Sunset Cay) is the permitee of a marina situated in and over tidelands and coastal waters critical areas regulated by DHEC including a multi-level commercial building constructed on a 50' x 50' fixed pierhead. The marina is located over the Folly River at 66 W. 9th Street Ext., Folly Beach, Charleston County, South Carolina (TMS# 325-15-00-064) (Site). As such, Sunset Cay is responsible for the unauthorized activity described herein.

2. Sunset Cay Social Club, a Nonprofit Corporation (Social Club), as the entity providing beverage service at the Site, is partially responsible for the unauthorized activities described herein.

3. The Sunset Cay Marina Council of Co-Owners, Inc. (Council) is the representative entity of individual "unit" owners responsible for the common elements of the marina in and over the tidelands and coastal waters critical areas and is the current owner/operator of the marina at the Site. As such, the Council is responsible for the unauthorized activities described herein.

4. Edward Clark is listed by Charleston County[1] as the owner of three "units" identified as TMS#'s 325-15-00-229, 325-15-00-230, and 325-15-00-231 located in the commercial building constructed on the 50' x 50' fixed pierhead at the Site over coastal waters critical area, and as such, is responsible for the unauthorized activities described herein.

5. On April 9, 2003, DHEC issued Critical Area/Water Quality Certification Permit # 2002-1H-190-P (Sunset Cay's Permit) to Sunset Cay, for the construction of a new marina at the Site. The Permit was accepted and agreed to as issued by signature of Mr. Clark on April 23, 2003. The Operation and Maintenance Manual, submitted by Sunset Cay and made a part of this permit by Special Condition #7. identified the "landside facilities" as "a marina store, above ground fuel tanks, bath houses to include 3 toilets, 2 laboratories[*sic*] for women and 2 toilets, 2 urinals and 2 laboratories[*sic*]

[1] <http://sc-charleston-county.governmax.com/svc/>

for men." The upland property associated with this permit was subdivided and sold by Sunset Cay to other individuals and entities; with the last parcel being sold on March 28, 2006.

6. On January 15, 2004, DHEC amended the Permit to authorize changing the dredge spoiling method from the Rapid Dewatering System to open spoiling in two temporary spoil basins.

7. On June 24, 2004, DHEC amended the Permit to authorize the relocation and enlargement of the scope of the marina. Specifically, the marina would be relocated partially channelward.

8. On August 25. 2004, DHEC amended the Permit to authorize the enlargement of each slip area from 35' in width to 40' and increase each finger pier width from 4' to 6'.

9. On October 14, 2004, DHEC amended the Permit to authorize the relocation of the main access walkway from the middle section of the marina to the landward section of the marina.

10. On April 7, 2005, DHEC amended the Permit to authorize moving the marina another 20' channelward from its original permitted position.

11. On December 14, 2005, DHEC amended the Permit to authorize the placement of a commercial building containing restrooms and a ships store on the existing 50' x 50' fixed pierhead. The first floor was authorized to contain the restrooms and the second floor to contain the ships store. This work was authorized as the proposed uses of the building were water-dependent. This amendment stated that "non-water dependent uses are not allowed."

12. On November 28. 2006. DHEC amended the Permit to authorize the installation of three jet-docks at slips A-27, D-9, and E-23.

13. On January 13, 2015, Joshua D. Hoke, DHEC Compliance Project Manager, and Jeff Thompson, DHEC Wetland Project Manager, met with Mr. Clark, at the Department's office in Charleston. Mr. Clark stated that he would like to amend the Permit to allow a restaurant to operate on the second floor of the commercial building. Mr. Thompson stated that the second floor could not be utilized as a restaurant. Mr. Thompson also stated that before any changes were made, an inspection of the marina would be conducted to ensure compliance with the Permit.

14. On January 15, 2015, Mr. Hoke conducted an inspection at the Site and observed an unauthorized restaurant under construction on the second floor and an unauthorized third floor on the commercial building containing an apartment with utilities. In addition, Mr. Hoke observed eleven unauthorized boat storage structures in slips B-9, B-5, D-6, D-8, D-11, D-21, D-27, two in D-20, one between slips A-28 and B-4, and one between slips D-25 and E-14. Photographs were taken during this inspection.

15. On February 3, 2015, Mr. Hoke and Sean M. Briggs, Manager, DHEC Compliance and Enforcement Section, met with Mr. Clark and Jack Walker, agent for Sunset Cay, at the Department's office in Charleston. DHEC staff stated that the restaurant and apartment were out of compliance with the Permit and operation of each needed to stop. DHEC staff also informed Mr. Clark and Mr. Walker that the unauthorized boat storage structures needed to be approved through an after-the-fact amendment to the Permit. Mr. Clark and Mr. Walker stated that they wanted to transfer the Permit from Sunset Cay to the current owner/operator, the Council. Mr. Briggs stated that a formal request to transfer the Permit would be required prior to any application for an after-the-fact amendment to the Permit.

16. On March 13, 2015, the Department issued a Cease and Desist Directive via electronic mail to Mr. Clark. This directed Sunset Cay to immediately cease and desist construction, operation, and/or utilization of the restaurant and apartment at the Site.

17. On March 16, 2015, Mr. Hoke served Mr. Clark the Cease and Desist Directive at the Department's office in Charleston.

18. Between March and June, 2015, Department staff met, had phone conversations, and corresponded with representatives of Sunset Cay, the Council, the Social Club and Mr. Clark to discuss the unauthorized activities described herein in order to return the marina to compliance with applicable regulations; including the requirement for 150 linear feet of frontage at the marsh edge.

19. On June 1, 2015, Department staff met with representatives of Sunset Cay and the Council at the Department's office in Charleston. Blair N. Williams, Manager, Wetland Permitting Section, discussed the requirements of transferring Sunset Cay's Permit to the Council. Mr. Williams then discussed a path forward to resolve the unauthorized activities described herein. The Department proposed two options: 1) comply with Sunset Cay's Permit, or 2) submit an after-the-fact permit application to authorize the third floor of the commercial building including water-dependent uses for each floor and the floating boat storage structures. Department staff explained that any after-the-fact application should include floor plans and detailed descriptions of the water-dependent uses for each floor of the building. In an effort to ensure any changes to Sunset Cay's Permit would be consistent with applicable regulations, the Department requested that detailed floor plans as well as proposed uses for each floor of the commercial building be submitted for review prior to a formal application for an after-the-fact amendment. Lastly, Mr. Williams stated that if any changes are proposed in the future, then the permitee would need to demonstrate ownership of 150 feet of frontage at the marsh edge at the Site prior to issuance of a permit amendment. Mr. Walker stated that he would discuss the options with Mr. Clark and respond to the Department.

20. Between June and August, 2015, Department staff corresponded with representatives of Sunset Cay and reviewed proposed activities and floor plans in order to determine water-dependency.

21. On August 18, 2015, Mr. Hoke conducted an inspection at the Site and observed that renovations to the second floor had been completed. Additionally, Mr. Hoke observed numerous mini-bottles of liquor and other items indicative of beverage service. Mr. Hoke observed S.C. Department of Revenue (SCDOR) Alcohol Beverage Licenses posted on a wall. A search of the SCDOR online licensing database shows the Social Club holds a license (#320679976) for "NON-PROFIT PRIVATE CLUB LBD" and "ON PREMISES BEER AND WINE."[2] Photographs were taken during this inspection.

22. On August 20, 2015, Mr. Hoke referred this case for further enforcement action after the above described compliance efforts failed to resolve the violations at the Site and after observing the willful, intentional and knowing violations during the August 18, 2015 inspection.

23. On September 28, 2015, the Department received a letter from Dan M. David, legal counsel for Mr. John Oliver (the Social Club), stating that his client sells mini-bottles of liquor and beer from a cooler to customers through a non-profit private club at the Site.

Based on the above findings, it appears that Sunset Cay, LLC, The Sunset Cay Marina Council of Co-Owners, Inc. and Edward Clark have violated:

1. **The South Carolina Coastal Zone Management Act, S.C. Code Ann. §48-39-130(A) and 23A S.C. Code Ann. Regs. 30-2(B).** *as amended*, which require that any utilization/alteration of any critical area be permitted by DHEC. Specifically, Sunset Cay, the Council and Mr. Clark are responsible for the construction of a third floor on the commercial building and the placement of eleven floating boat storage structures in and over the coastal waters critical area at the Site without authorization from the Department.

[2] < https://dor.sc.gov/Content/ABL/ABL.swf>

2. **23A S.C. Code Ann. Regs. 30-12(M)**, *as amended*, which prohibits the construction of nonwater-dependent structures over coastal waters critical areas where feasible alternatives exist. **23A S.C. Code Ann. Regs. 30-1(D)(52)** defines nonwater-dependent as, "a facility which cannot demonstrate that dependence on, use of, or access to coastal waters is essential to the functioning of its primary activity." Specifically, Sunset Cay, the Council and Mr. Clark are responsible for construction of an apartment, a nonwater-dependent facility, on the third floor of the commercial building at the Site over the coastal waters critical area.

Additionally, based on the above findings, it appears that Sunset Cay, LLC, The Sunset Cay Marina Council of Co-Owners, Inc., Edward Clark and the Sunset Cay Social Club, a Nonprofit Corporation, have violated:

1. **23A S.C. Code Ann. Regs. 30-12(E)(3)(b)(x)**, *as amended*, which allows for one reasonably sized dock master's office constructed within a permitted marina. This office will be limited to water-dependent uses only such as fuel sales. Restroom facilities may be placed in this office, however, food and beverage service, clothing sales and other nonwater-dependent uses are prohibited. And, **Critical Area/Water Quality Certification Permit # 2002-1H-190-P. Special Condition #25.** which requires that all parts of the marina are used for water-dependent purposes only. No food or beverage service, vending machines, T-shirt sales, concessions, etc. are allowed on or across this marina facility. Specifically, Sunset Cay, the Council, Mr. Clark and the Social Club are responsible for operation of a facility providing beverage service on the second floor of the commercial building.

Be advised that:

S.C. Code Ann. §48-39-50(I), ***as amended,*** provides the Department the power to enforce the provisions of this chapter and all rules and regulations promulgated by the Department and institute or cause to be instituted in courts of competent jurisdiction of*[sic]* legal proceedings to compel compliance with the provisions of this chapter.

S.C. Code Ann. §48-39-170(A) provides that whenever DHEC finds that a person is in violation of any permit, regulation, standard, or requirement under this chapter, DHEC may issue an order requiring the person to comply with the permit, regulation, standard, or requirement, including an order requiring restoration when deemed environmentally appropriate by DHEC. In addition, §48-39-170 provides that DHEC may bring a civil enforcement action under this section as well as seek appropriate injunctive relief under §48-39-160.

S.C. Code Ann. §48-39-170(C) provides that any person determined to be in violation shall be liable for, and may be assessed a civil penalty of not less than one hundred dollars nor more than one thousand dollars per day of violation.

23A S.C. Code Ann. Reg. 30-8(F) mandates DHEC to issue an Admission Letter setting forth all facts and grounds for violation and further allows the responsible party to send DHEC their version of the facts within fifteen (15) days from receipt of the Admission Letter.

YOU ARE NOTIFIED that this Notice of Violation and Admission Letter is being issued, along with the enclosed Findings of Fact, which have been drafted after an investigation by DHEC staff. 23A S.C. Code Ann. Reg. 30-8(F)(2) provides that the responsible party must either admit these facts or send DHEC their version of the facts. **Any additional facts that you deem pertinent may be submitted in writing to Adam C. Page, Enforcement Project Manager, at 1362 McMillan Ave, Suite 400 Charleston, SC 29405 within fifteen (15) days of receipt of this Notice of Violation and Admission Letter.** A failure to respond will result in a conclusion by DHEC that you admit the truth of these facts.

YOU ARE FURTHER NOTIFIED that your failure to attend the scheduled conference will likely result in the issuance of an Administrative Order without your consent. Such an Order may contain the above findings as findings of fact and will likely impose monetary penalties.

This Notice of Violation and Admission Letter is made pursuant to S.C. Code Ann. §48-39-170, *as amended*, and 23A S.C. Code Ann. Reg. 30-8, *as amended*, which authorize DHEC to issue orders and assess civil penalties.

October 26, 2015

Adam C. Page
Enforcement Project Manager
Ocean and Coastal Resource Management

D H E C

PROMOTE PROTECT PROSPER

C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the env

Give to CS to put in efis after you fax

December 14, 2005

Mr. Butch Clark
P. O. Box 1590
Folly Beach, S. C., 29439

Re: P/N# 2002-1H-190-P

Dear Mr. Clark:

The above referenced permit has been amended to authorize the placement of a building containing restrooms and a ships store on the existing 50' by 50' fixed pierhead. The building will be 30' by 29' where the first floor will contain the bathrooms and the second floor will contain the ship's store. This work has been authorized, as the proposed uses of the building are water dependent. Non-water dependent uses are not allowed. This authorization is granted provided the permittee submits to this Department a copy of the DHEC-Trident Health District approval for the Waste Disposal System associated with these bathrooms, when received.

This amendment is made a part of your permit and is subject to the full terms of the permit as issued.

This letter does not relieve you of the responsibility of acquiring any other applicable federal or local permits that may be required. Any person adversely affected by this action has the right to appeal to within 30 days of notification.

A new construction placard, if you don't have a current one, must be posted conspicuously on site during authorized activities. Please notify OCRM prior to construction to obtain a construction placard.

Please sign the attached copy of this letter indicating your acceptance of these terms and return the signed copy to this Office.

Accepted this 1 day of March, 2006

Edward Clark
Permittee

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Ocean and Coastal Resource Management
Charleston Office · 1362 McMillan Avenue, Suite 400 · Charleston, SC 29405
Phone: 843-744-5838 · Fax: 843-744-5847 · www.scdhec.gov

EXHIBIT H

D H E C

PROMOTE PROTECT PROSPER

C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

PUBLIC NOTICE
AMENDMENT

The permittee for **P/N# 2002-1H-190-P, Sunset Caye, LLC** has requested an amendment to that issued permit. The permittee seeks an amendment to place a building for the restrooms and ship store on the permitted fixed pierhead. The building will be 30' 8 1/2" x 29' 11". The first floor will include emergency equipment and supplies as well as the restrooms. The second floor will be for a ship store and Dock Master's office. The proposed amendment is for alterations to a marina on and adjacent to the Folly River at West 9th Street Ext., Folly Marina. Folly Beach, Charleston County, South Carolina.

Comments will be received on this amendment request until November 25, 2005. For further information please contact the project manager for this activity, Denise Sanger at 747-4323, ext. 114.

November 10, 2005

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Ocean and Coastal Resource Management
Charleston Office • 1362 McMillan Avenue • Suite 400 • Charleston, SC 29405
Phone: (843) 744-5838 • Fax: (843) 744-5847 • www.scdhec.gov

EXHIBIT I

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Sunset Cay, LLC, Petitioner, vs. South Carolina Department of Health and Environmental Control, Respondent.	)	DOCKET NO. 15-ALJ-07-0579-CC MOTION FOR RECONSIDERATION

TO: Bradley D. Churdar, Attorney for South Carolina Department of Health and Environmental Control, O.C.R.M.:

Please take notice that the appellant will move ten days after notice hereof, or as soon thereafter as counsel may be heard, for an Order of the Court amending, altering, and/or reconsidering its Order filed October 17, 2016, and thereafter as amended on October 24, 2016. This Order is based on Rule 29(D) ("Any party may move for reconsideration of a final decision of an administrative law judge in a contested case to alter or amend the final decision, subject to the grounds for relief set forth in Rule 59 *SCRCP*") of the *Rules of the Administrative Law Court* and upon the following grounds:

1. The Court employed the wrong standard of review

The Department of Ocean and Coastal Resource Management has done a masterful job of weaving a false narrative and diverting the Court's attention from the central issue raised by this case, which is the Department's refusal to explain, define, justify, or allow the appellant a "water-dependent" use for the third floor of the marina. That is the sole issue upon which every

other issue is determined. The Department has prevented this Court from reaching this sole issue by asserting a false narrative, taking the Court far outside of the pleadings to make a determination on the case based on nothing more than the Department's arguments instead of the facts. If the facts alleged and inferences deducible therefrom would entitle the plaintiff to any relief, then dismissal for failure to state a claim is improper. Freemantle v. Preston, 398 S.C. 186, 728 S.E.2d 40 (2012)

A.

Appellant sent a written appeal dated November 12, 2015

In its order of October 17th, as amended on October 24th, the Court relies entirely on O.C.R.M.'s **recitation** of facts even though the facts are disputed. In accepting O.C.R.M.'s version of the facts, the Court fails to take into account the proper standard, which the Court is obligated to follow when considering a Motion to Dismiss. The correct standard of review is to restrict the inquiry to the four corners of the pleadings and to deny the motion if the plaintiff has articulated any claim for relief under any recognized legal theory. This Court is required to review the appellant's pleadings and "base its ruling solely upon allegations set forth on the face of the complaint." Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995). The motion may not be sustained if the facts alleged in the complaint and the inferences that can be drawn therefrom would entitle the plaintiff to any relief under any theory." *Id.* Doe v. Greenville County School District, 375 S.C. 63, 651 S.E.2d 305 (2007).

Under Rule 12(b)(6) SCRCP, a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, which is essentially what O.C.R.M. is alleging here. In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint. Even though O.C.R.M. is making the assertion on

procedural grounds, O.C.R.M.'s statement of the procedural issue is based on disputed facts as this brief discusses in detail. If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d. 137 (1999). A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory. Id. Furthermore, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987). Spence v. Spence, 368 S. C. 106, 628 S.E.2d 869 (2006)

Here, O.C.R.M. asserts a procedural bar based on its false assertion that the appellant did not seek review of the Department's October 26th cease and desist letter. This assertion is false for two reasons: First, the appellant's August 27, 2015, petition for declaration preceded the Department's cease and desist letter. Thus the issue was before the Department, and it does not have the authority to duck the petition by adopting the expedient of issuing a subsequent cease and desist letter. Second, the appellant did appeal the cease of desist letter by letter to the Department dated November 12, 2015, on which the Department scheduled a review hearing on November 18, 2015. (See letter attached here as Exhibit 1.) Thus the Order is based on facts that are not true, and the Court, in ruling on O.C.R.M.'s motion to dismiss is required to view the facts in the light most favorable to appellant, not O.C.R.M. From the beginning of this case, O.C.R.M. has argued that the

appellant never appealed the October 26, 2015, cease and desist letter. This is not true. The appellant did appeal the cease in desist letter, both by phone and in writing. On November 12, 2015, the appellant wrote to O.C.R.M., challenging the findings in its October 26, 2015, cease and desisit letter. See attached November 12, 2015, letter. In response to the appellant's November 12, 2015, letter, O.C.R.M. scheduled a review hearing and summoned all of the interested parties to its office to address its October 26, 2015, cease and desist letter. There were three representatives of O.C.R.M. present at this meeting: Josh Hoke, Adam Page, and Bradley Churdar. At no time during the November 18th meeting with O.C.R.M. did any member of O.C.R.M. identify any deficiencies of the November 12th appeal letter or demand that appellant pay a filing fee. The end result of this meeting was that O.C.R.M. pledged to all the parties present that it would revisit its cease and desist letter and "investigate" its own file to determine if the appellant's grounds for appeal were or were not well supported. The parties left the meeting under the impression that O.C.R.M. was withdrawing, or at least modifying its October 26, 2015, letter based on the review hearing held in its office because that is what O.C.R.M. said it was doing. (See affidavit of Willie Oglesby attached here as Exhibit 2.) At no time did O.C.R.M. object to any portion of the appellant's November 12th letter or identify it as deficient. As may be seen by the attached affidavit, all the parties left the meeting that O.C.R.M. was either going to withdraw or amend its October 26, 2016, cease and desist letter based on the information provided at the November 18, 2015, meeting. Thus, the Court's conclusion on page 3 of its Order that Petitioner has never filed a request for Final Review Conference for either Cease and Desist directive issued by the Department," (Order page 3) is an incorrect conclusion based on O.C.R.M.'s misrepresentation of the facts.

B.

§ 44-1-60, S. C. Code, does not govern the issues raised in this case

§ 44-1-60, S. C. Code says "All department decision involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of the department which may give rise to a contested case shall be made using the procedures set forth in this section." Thus, by its express terms, the Department's "cease and desist letter" is not a revocation of a permit. The cease and desist letter warns the appellant of the possibility of a revocation if he does not comply with the terms of the letter. (Throughout this case O.C.R.M. has taken every appearance before this Court as an opportunity to assert that the cease and desist letter is not meaningful because the Department has not taken any steps to secure an "administrative order" based on the allegations set forth in that letter. To be fair to the Department, its position comports with the letter and spirit of Rule 29(B): "In matters involving the assessment of civil penalties, the imposition of sanctions, or the enforcement of administrative orders, the agency shall have the burden of proof.") It is at this point in the analysis that the parties enter a governmental Catch-22. The Department refuses to acknowledge the paradox it created. On the one hand, it asserts appellant "waived" his right to appeal, and then on the other hand, it asserts the cease and desist letter is not "final" because the Department has not sought "administrative relief." The cease of desist letter identifies two significant deficiencies:

(1) Eleven floating docks installed without a permit, and

(2) No water dependent use permitted for the third floor.

As to the eleven floating docks installed without a permit, the parties are in agreement! Appellant agrees with the Department that eleven slip owners installed floating docks without notifying anyone, and appellant has been—and remains—ready, willing and able to correct this

deficiency. The appellant has submitted multiple applications for a permit application to correct this deficiency. The Department refuses to act on this application. More perplexing, it is undisputed that O.C.R.M. promotes the use of floating docks because they promote water quality by lifting vessels completely out of the water when moored. It is also undisputed that O.C.R.M. routinely grants such after-the-fact permits as they are minor and promote water quality. However, O.C.R.M. refuses to act on the application for reasons that are undefined and shifting.

C.
The Third Floor

The real issue in this case is the third floor. It is the *sine qua non* of the entire legal dispute in this case. Once the issue of the third floor is solved, all the other issues fall away. The appellant made a request to the Department under Regulation 30-9 for a Declaration: "Declaratory Rulings. Interested persons may petition to the Department for declaratory rulings. The Department shall rule on each petition, in writing, within 45 days of receipt." In seeking a declaratory ruling, the appellant proposed five water dependent uses for the third floor, all of which are employed by other similarly situated marinas. See *Weaver v. S. C. Coastal Council*, 309 S.C. 368, 423 S.E.2d 340 (1992): "While the three permits issued during the period immediately preceding respondent's application may have been granted in error, absent a showing in the record that Council had taken appropriate remedial action and given due notice thereof, the respondent was entitled to be treated in the same manner as other applicants." Regulation 30-9 does not permit the Department to ignore an applicant, and yet that is exactly what has happened in this case, and by dismissing the case without a full record, this Court is preventing the appellant from obtaining the judicial review guaranteed to him by the South Carolina Constitution, Article I, § 22. When this Court concludes:

"The Department's Declaration does not involve the issuance, denial, suspension or revocation of permits" (Order at page 6), it is reaching that conclusion by relying on O.C.R.M.'s unsupported and incorrect assertions without affording the appellant an opportunity to make a full record. Appellant alleges that the Department's Declaration does involve the issuance, denial, suspension or revocation of permits because the Department hides behind its silence in holding up appellant's applications for permit amendments. This is the Catch-22. By not answering the appellant's petition for declaratory ruling, the Department is achieving a judicial result by default, which it is achieving by denying appellant the right to be heard. In other words, the Court is reaching a decision on the merits by relying on O.C.R.M.'s inaccurate characterizations without affording appellant an opportunity to make a record. On a Motion To Dismiss, the Court is required to accept appellant's allegations as true:

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

See ¶ 16 of appellant's appeal for a summary of appellant's allegations. Despite these allegations, which the Court must take as true, on page 7 of the Order under review, the Court determines that the issue is not ripe because the appellant is not "finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard[.]" (Order at page 7, emphasis in original.) Part of this finding is correct. The Court's conclusion, set forth on page 7, represents common ground shared by the

parties and the Court. The Court is correct that appellant is not "finally bound" because there are unresolved permit amendments that have not been decided. However, the Court errs because it makes the same mistake the appellant initially made; to wit, by assuming that the Department will act consistently and render a timely decision on appellant's application for permit amendment. However, the Department has consistently demonstrated that it will not act in good faith and that it will not act on appellant's application for permit amendment,[1] and that it will continue to ensnare the appellant in an inescapable procedural morass that cannot be solved. In short, it is an inescapable paradox. (In Anne Marie O'Connor's *The Woman In Gold*, she describes the legal morass that a Los Angeles holocaust survivor, Maria Altmann, found herself in when she hired a lawyer and sued for the return of property stolen from her family during W.W.II. The Austrian government refused to return the property, mostly paintings, because Ms. Altmann could not produce the documentation locked up in the bowels of the Austrian state museum. Ms. Altmann ultimately prevailed, but only after she turned her back on the legal system that abandoned her and agreed to binding arbitration, which went her way. The appellant here is an analogous situation. Here, the Department weaves an inaccurate narrative even though the documents refuting the narrative are in its own files. See footnote #1 above.)

This procedural morass plays more than a passing resemblance to government inaction that gave rise to the concept of judicial review in the first place. After Thomas Jefferson defeated John Adams and became the third president of the United States, he attempted to prevent his predecessors' lame duck appointments by withholding delivery of President Adams' commissions. The new president instructed his new secretary of state, James Madison, to

[1] In his deposition, Briggs testified that O.C.R.M. never permitted the third floor in spite of the fact that the pre-construction **and** as-built plans are in the O.C.R.M. files. Mr. Briggs either lied or he does not know what

withhold the judicial commission from William Marbury, thereby preventing him from taking his seat. This is similar to O.C.R.M. in this case refusing to answer appellant's properly posed question because once the Department defines what "water dependent" use is allowed in the third floor, all the other issues are solved. When Marbury brought a law suit to compel the government to hand over the commission—like the appellant here suing the Department to answer his question—the Supreme Court held that Jefferson's withholding the commission was illegal, and in the process the court invented "judicial review": "The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion." *Marbury v. Madison,* 1 Cranch 137, 2 L.Ed. 60 (1803). (The interesting footnote to this case is the fact that the Court refused to grant Marbury a writ of mandamus because he brought the case in the Court's original jurisdiction.) Here, through the use of procedural delay and a refusal to act, the Department is preventing the appellant from having his rights decided and keeping him from the use of his property.

2. The Court cannot dismiss with prejudice at the motion stage (Amended Order)

A. There is a question of fact as to whether appellant sought administrative review

On October 24, 2016, the Court amended its order to change the dismissal of the cease and desist challenge to being with prejudice. As set forth above, the record is not developed on the issue of the appeal, mostly because the appellant tried unsuccessfully to avoid being sucked into this rabbit hole and to steer the issue to the essential issue before the Court, which has been,

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documents are in the O.C.R.M. files. The as-built plans are attached to this brief as Exhibit 3.

is, and will be the dispute over the Department's refusal to define the allowed water dependent uses for the third floor. There is a well-developed body of law in South Carolina that prohibits a court from dismissing any case with prejudice at the motion to dismiss stage.

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

Here, the Court assumes the appellant never appealed the cease and desist letter when this is a disputed question of fact as may be seen by reference to the appellant's November 12, 2015, letter (Exhibit 1) to the Department, appealing the October 26, 2015, cease and desist letter. Moreover, it is an undisputed fact that the Department convened a review hearing on November 18, 2015, attended by all interested parties and three representatives of O.C.R.M. See affidavit of

Willie Oglesby, Exhibit 2. Thus, there is a disputed question of fact on whether the appellant did or did not appeal the October 26, 2016, cease and desist letter, and this disputed fact cannot be decided against the appellant at the motion stage.

B.
Administrative Law Courts may excuse petitioners from doing futile acts

Even if there were no question about whether appellant did or did not seek administrative review, South Carolina law allows an Administrative Law Court to take up issues in the absence of an administrative review where the appellant's constitutional rights have been violated and when seeking administrative review would be futile. This record shows overwhelmingly that any appeal to O.C.R.M. is a futile act. In *Ward v. State of South Carolina*, 343 S.C. 14, 538 S.E.2d 245 (2000), a group of retirees challenged the State's imposed taxation of benefits. Just as in this case, "The State filed a motion to dismiss on the ground the circuit court lacked subject matter jurisdiction because the federal Retirees failed to exhaust their administrative remedies under the *South Carolina Review Procedures Act*, S. C. Code Ann. §§ 12-60-10 *et. seq.*" That is the same argument O.C.R.M. makes here. The Supreme Court reversed, holding:

> Generally, the legislature will not require a futile act. Thus, a generally recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of them would be a vain or futile act. *Moore v. Sumter County Council*, 300 S.C. 270, 387 S.E.2d 455 (1990). More importantly, we will not construe a statute to do that which is unconstitutional. *Mitchell v. Owens*, 304 S.C. 23, 402 S.E.2d 888 (1991) (statutes are presumed to be constitutional and will be construed so as to render them valid.) Requiring a party to go before an agency or ALJ who cannot rule on the constitutionality of a statue would be a futile act. Thus, as applied in this case, § 12-60-3390 would violate the separation of powers as espoused in Video Gaming. Interpreting the statute as not being applicable to declaratory judgment actions seeking to determine whether a statute is constitutional does not mandate a futile act and does not violate the separation of powers doctrine.
>
> As stated in *Video Gaming*, "if the sole issue posed in a particular case is the constitutionality of a statute, a court may decide the case without waiting for an administrative

ruling. . . Requiring a party to raise an issue which cannot be ruled upon by an ALJ makes little sense" and certain is not effective or appropriate. Here, declaratory relief should not be refused as there is no other effective appropriate remedy under the circumstances. The agency and the ALJ cannot rule on the constitutionality issue. In fact, requiring the agency or ALJ to rule on the constitutionality of Act 189 would violate the separation of power doctrine. Thus, the statute does not apply in cases where the sole issue is whether a statue or other legislative action is constitutional.

Here, the questions raised by the appellant derive from the Department's refusal to answer appellant's question about water dependent uses. This is the central question on which all other issues rise or fall. The Department cannot explain why it will not answer the question or provide the definition for water dependent with enough specificity so that the appellant can figure out what he can do with his property. As the Supreme Court said in *Ward, ibid*:

> In *Video Gaming*, we held agencies and ALJs could not rule on the validity of a statute. However, an agency or ALJ can still rule on whether a party's constitutional rights have been violated. Thus, contrary to the State's argument, merely asserting an alleged constitutional violation will not allow a party to avoid an administrative ruling.
>
> . . .
>
> The general rule is that while there are several exceptions that may be applied to the judicially-imposed exhaustion requirement, those that apply to a statutory requirement are few. *Id.*

The *Ward* card explained further: "This issue does not involve subject matter jurisdiction. 'The doctrine of exhaustion of administrative remedies is generally considered a rule of 'policy, convenience and discretion, rather than one of law, and is not jurisdictional.'" The Order under review throws the appellant out of court with prejudice on what is essentially a finding that the Administrative Law Court lacks subject matter jurisdiction. However, as the *Ward* court held the Administrative Law Court not only has the power to determine when a citizen is being denied fundamental rights, but also may consider such issues even if administrative review is not exhausted. There is no doubt that here, O.C.R.M. is not going to provide the appellant with any

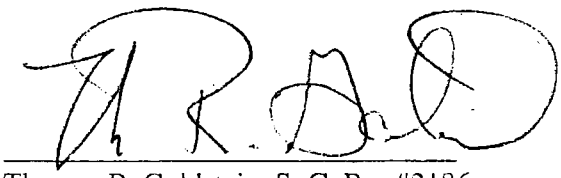
meaningful administration, especially where one of its officers testifies under oath that the appellant never applied for a third floor at all when the records show otherwise. The appellant respectfully requests that the Court not slam shut the door to the courthouse and to allow the Department to get away with shoddy, contradictory, and arbitrary decisions, which prevent the appellant from the right to use his own property. If the Court declines to amend the substance of its Order, then the appellant respectfully prays for an amendment that such dismissal is without prejudice.

Conclusion

For the reasons set forth above, the appellant respectfully requests the Court to set aside, alter, or amend its Order dated October 17, 2016, as amended on October 24th. The appellant does not quarrel with the Court's conclusion that the case is not ripe **provided** the Court alters its Order in such a manner as to remand the entire case back to O.C.R.M. with directions to compel the Department to act in a timely manner on the appellant's numerous applications for permit amendments, his request for list of approved water dependent uses, their definitions, or both. The main issue before the Court is the Department's continuous stonewalling and unwillingness or inability to act on appellant's applications. In other words, the appellant is willing to accept his loss, return to the Department and renew his request for Declaration through the already pending applications for permit amendment, on which the Department refuses to act. What the appellant desperately seeks to avoid is continued entrapment in the procedural morass in which he finds himself in which the Department will not speak to him in short, declarative sentences providing clear instruction on what he must do in order to induce the Department to act on his permit application to amend the permit to allow the eleven improperly installed floating docks

and to utilize the third floor for a "water-dependent" use consistent with uses permitted at other marinas.

Respectfully submitted,

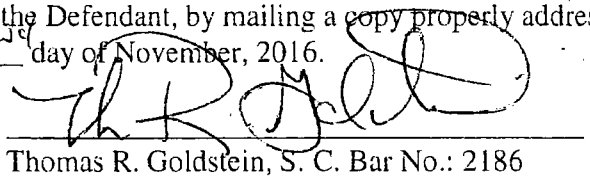


November 2, 2016

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CERTIFICATE OF SERVICE

The undersigned hereby certified that a true copy of the foregoing pleading has been served upon, Bradley Churdar, counsel for the Defendant, by mailing a copy properly addressed with sufficient postage affixed thereto this 2nd day of November, 2016.



Thomas R. Goldstein, S. C. Bar No.: 2186

EXHIBIT 1

NOVEMBER 12, 2015, APPEAL LETTER TO O.C.R.M.

BELK, COBB, INFINGER AND GOLDSTEIN, P.A.
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November 12, 2015

Mr. Bradley Churdar,
General Counsel
S. C. Dept. of Health and Environ. Control
Office of Coast Resources Management
1362 McMillian Avenue
Suite 400
N. Charleston, S. C. 29405-2047

RE: Sunset Cay, L.L.C.
Permit: P/N# 2002-1H-190-P
Enforcement File #15C-005P

Dear Bradley,

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. (And when I say "your" notice, I recognize that Adam Page signed it.) I think our meeting in your offices on the 18th is not only our best, but also perhaps the last opportunity to lay to rest the controversy surrounding Sunset Cay.

As you are aware, Edward C. "Butch" Clark built the marina in 2006. (I am trying to keep this letter as non-technical as possible, so please forgive me for speaking casually—we all know that the developer of the marina is Sunset Cay, L.L.C.) O.C.R.M. permitted the construction in the South Carolina "critical zone," and the City of Folly Beach controlled the actual construction through the application and enforcement of its normal building code ordinances. We all agree that O.C.R.M.'s mission is to promote the use of public waterways in a responsible manner. Your mission statement displayed on your web page is "Promote, Protect, Prosper." Your letterhead defines your mission as "Promoting and protecting the health of the public and the environment." In essence, O.C.R.M. exists to make the public waters of South Carolina as accessible to as many people as possible, or as the Legislative declaration of state policy says it: "The General Assembly declares the basic state policy in the implementation of this chapter is to protect the quality of the coastal environment and to promote the economic and social improvement of the coast zone and of all the people of the State." § 48-39-30, S. C. Code, ann.

Sunset Cay has existed in various forms for over 50 years. The current version has existed without controversy since 2006. Recently, Butch and a member of the marina, Art Barber, developed a conflict over the operation of the marina. This conflict erupted into a lawsuit now pending in the Court of Common Pleas. Mr. Barber has involved your office in this conflict, and I have recently reviewed a number of e-mails exchanged between Mr. Barber and Mr. Briggs of your office that do not seem well calibrated to solve a problem if one exists. Certainly, one can make the case that O.C.R.M. has "taken sides" in a pending civil suit rather

than fulfilling its duties in an impartial manner. This conflict now seems poised to erupt into additional claims involving additional parties. In short, it seems great for lawyers, not so great for everyone else.

Therefore, I plan on attending your November 18th meeting with an open mind, hopeful that every person involved in this will have a full and fair opportunity to state his or her concerns. If we can identify each interested person's concerns, I am optimistic, that as professionals dealing with one another in good faith, we can derive and implement a plan to meet everyone's concerns. To the extent I can function as an unpaid, volunteer mediator with absolutely no authority, I am happy to play that role. To the extent that I am there looking out for the interests of Butch, the marina, the Board of Directors, or all three, I am coming with an open mind of the view that we can all work together and fashion a solution that meets the needs of all interested parties. With kind regards, I am

Very truly yours,

Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein

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Mr. Mike Smith,
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EXHIBIT 2

AFFIDAVIT OF W. OGELSBY.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Sunset Cay, LLC, Petitioner, vs. South Carolina Department of Health and Environmental Control, Respondent.	)	DOCKET NO. 15-ALJ-07-0579-CC AFFIDAVIT OF WILLIE H. OGLESBY,JR.

Personally appeared before me, Willie H. (Bill) Oglesby Jr., who being duly sworn, does depose and say:

I am a resident of Folly Beach, South Carolina, and I serve on the Board of Directors for the Sunset Cay Marina Council of Co-Owners. In addition, I serve as the current "Commodore" who oversees the day-to-day operation of the marina. On behalf of the 125 co-owners of marina slips, I (and the other directors) have tried to monitor the progress of this case because we want the permit to be transferred from the current holder to the council of co-owners. Since Butch Clark is the developer, I and the entire Board of Directors, believe that it is his responsibility to get the permit transferred to us without any incumbencies attached and I do not want our slip owners to incur any attorney's fees in what should have been a simple transfer. We are keenly aware of the O.C.R.M.'s October 26, 2015, cease and desist letter because that letter has a direct impact on the 125 slip owners. We are also aware that Butch Clarke appealed that cease and desist letter because every member of the Board of Directors got a copy of the November 12th 2015 letter stating that fact. Subsequently, I was informed that O.C.R.M. scheduled a review meeting in their offices and I attended said meeting. As I remember, also attending that meeting were Tommy Goldstein, Butch Clark, John Romanosky, John Oliver, and Ian O'Shea; O.C.R.M. was represented by Bradley

Churdar, Adam Page, and Josh Hoke.

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

that O.C.R. M. lacks that efficiency. This case has been going on for years, and O.C.R.M. has done nothing but promise to "look into it" and "get back to us." The owners are being inconvenienced by O.C.R.M.'s inaction because we want the permit transferred unencumbered into the name of the Council of Co-Owners.

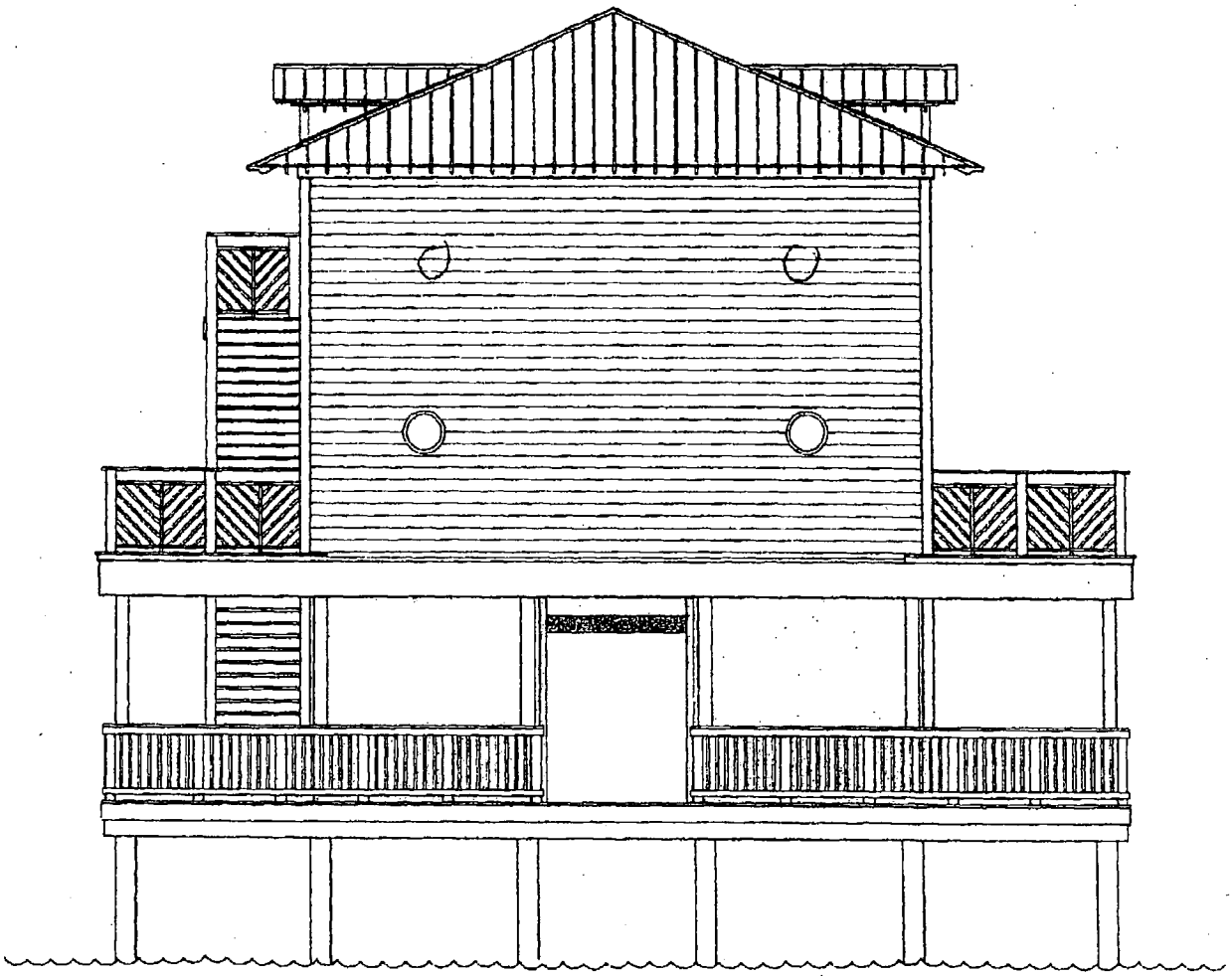
Willie H. Oglesby, Jr

SWORN to before me this
2nd day of ~~October~~ November, 2016

Notary Public for South Carolina
My Commission expires: April 16, 2020

EXHIBIT 3

AS BUILT PLANS FROM O.C.R.M. FILE



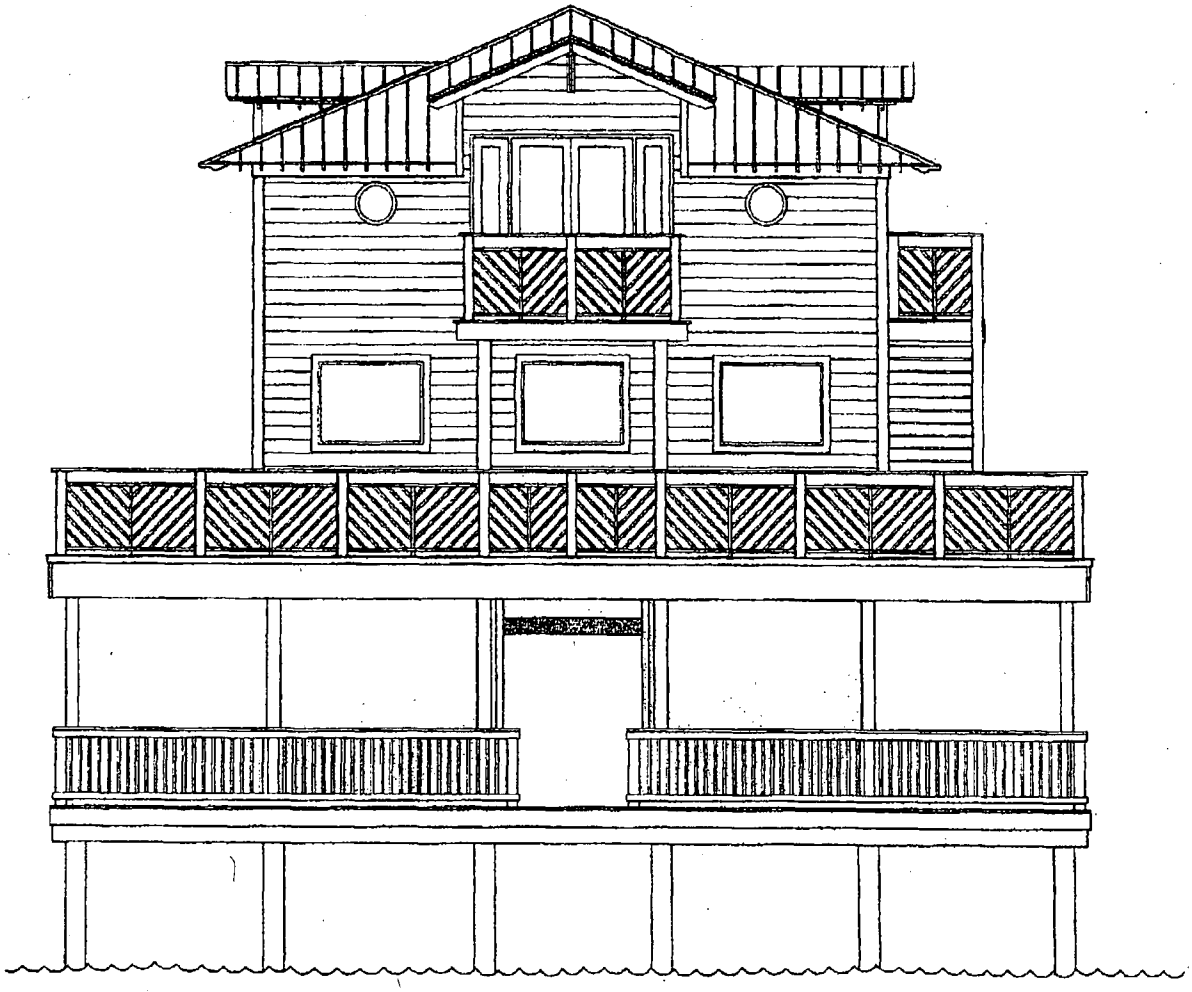
:: EAST ELEVATION (shore view)

Sunset Cay

West 9th Street Extension

City of Folly Beach :: Charleston County, SC

Commercial Unit & Restroom Facility
Sunset Cay Marina



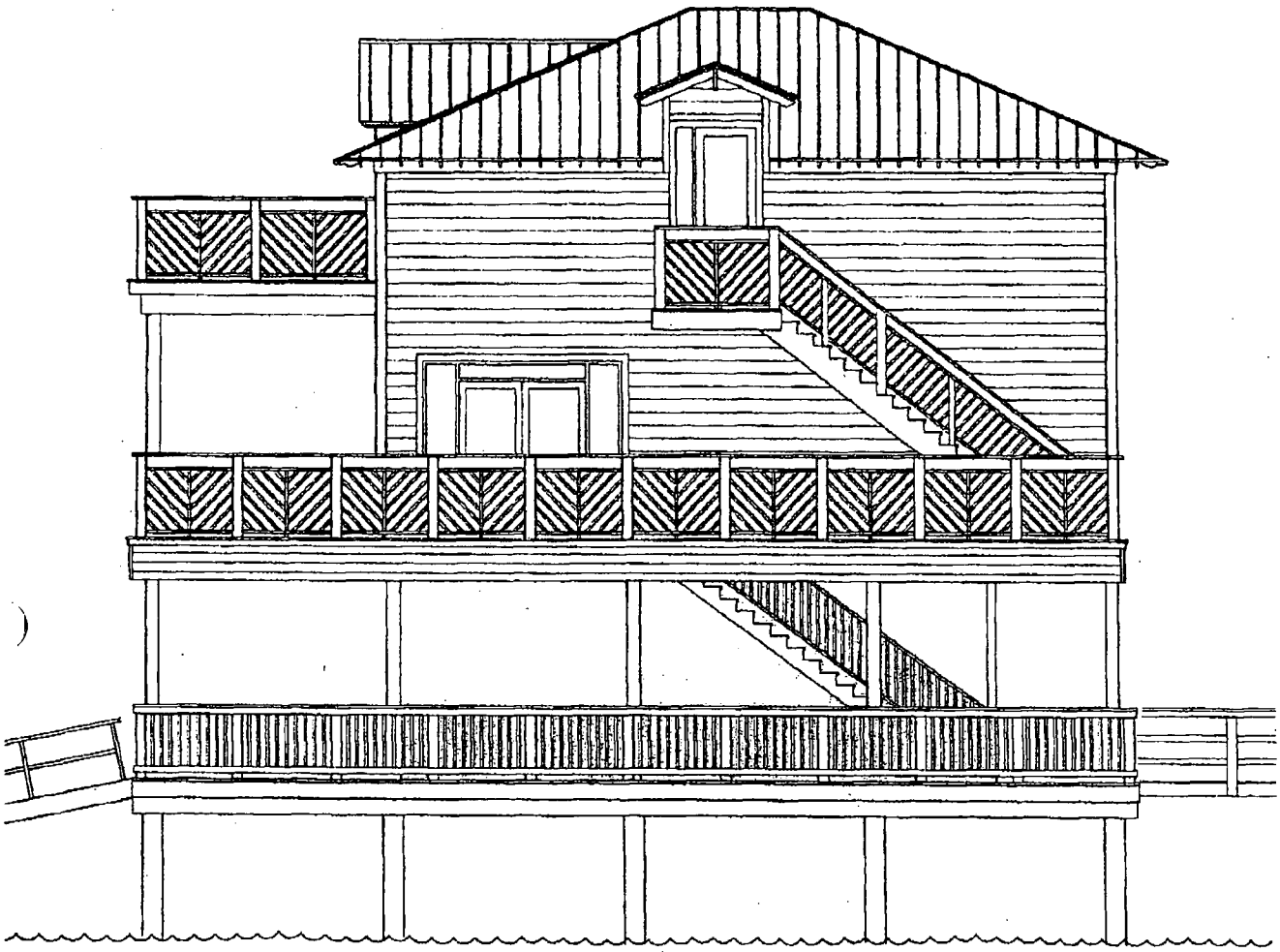
:: WEST ELEVATION (river view)

Sunset Cay

West 9th Street Extension

City of Folly Beach :: Charleston County, SC

Commercial Unit & Restroom Facility
Sunset Cay Marina



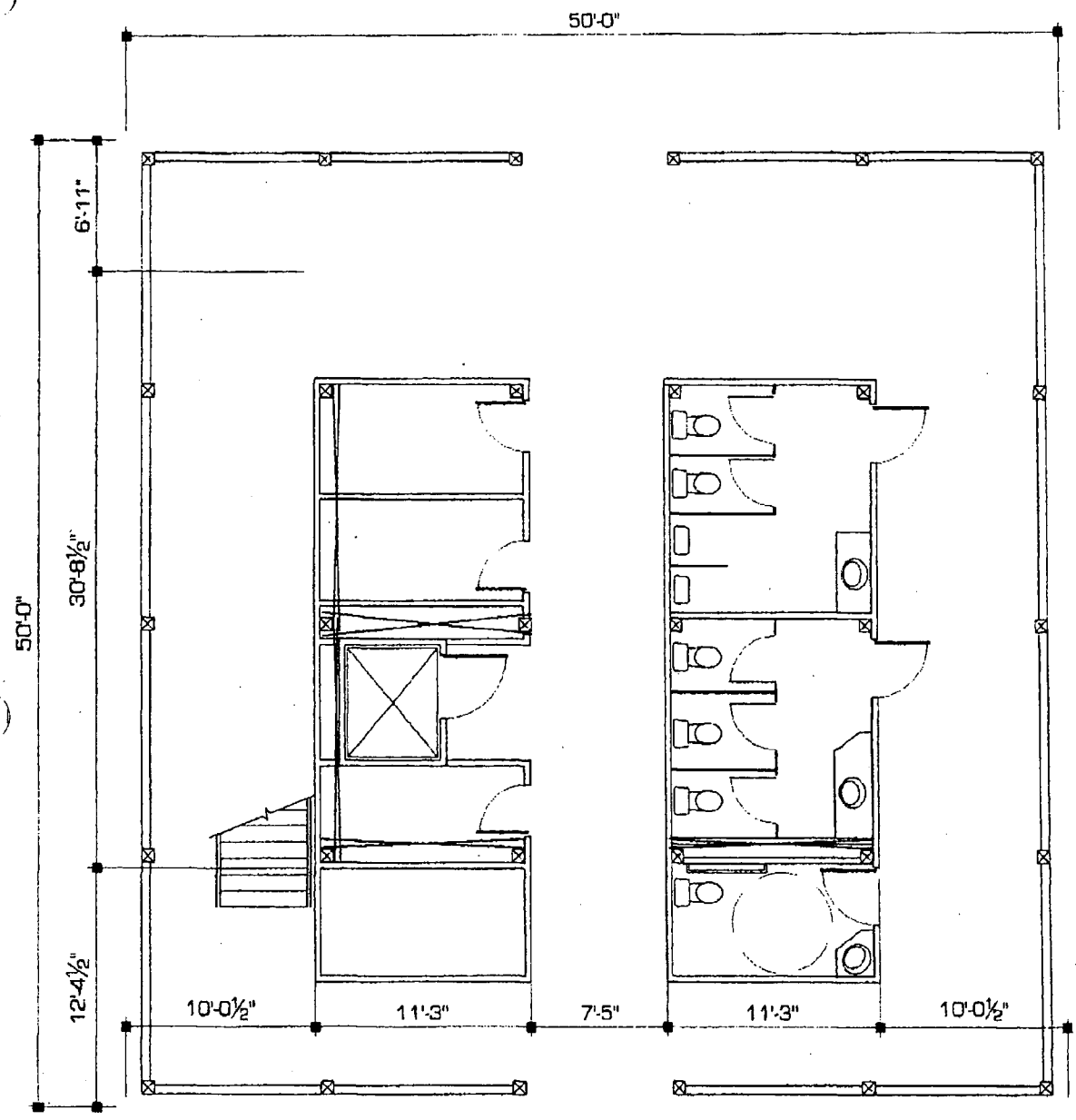
:: SOUTH ELEVATION

Sunset Cay

West 9th Street Extension

City of Folly Beach :: Charleston County, SC

Commercial Unit & Restroom Facility
Sunset Cay Marina



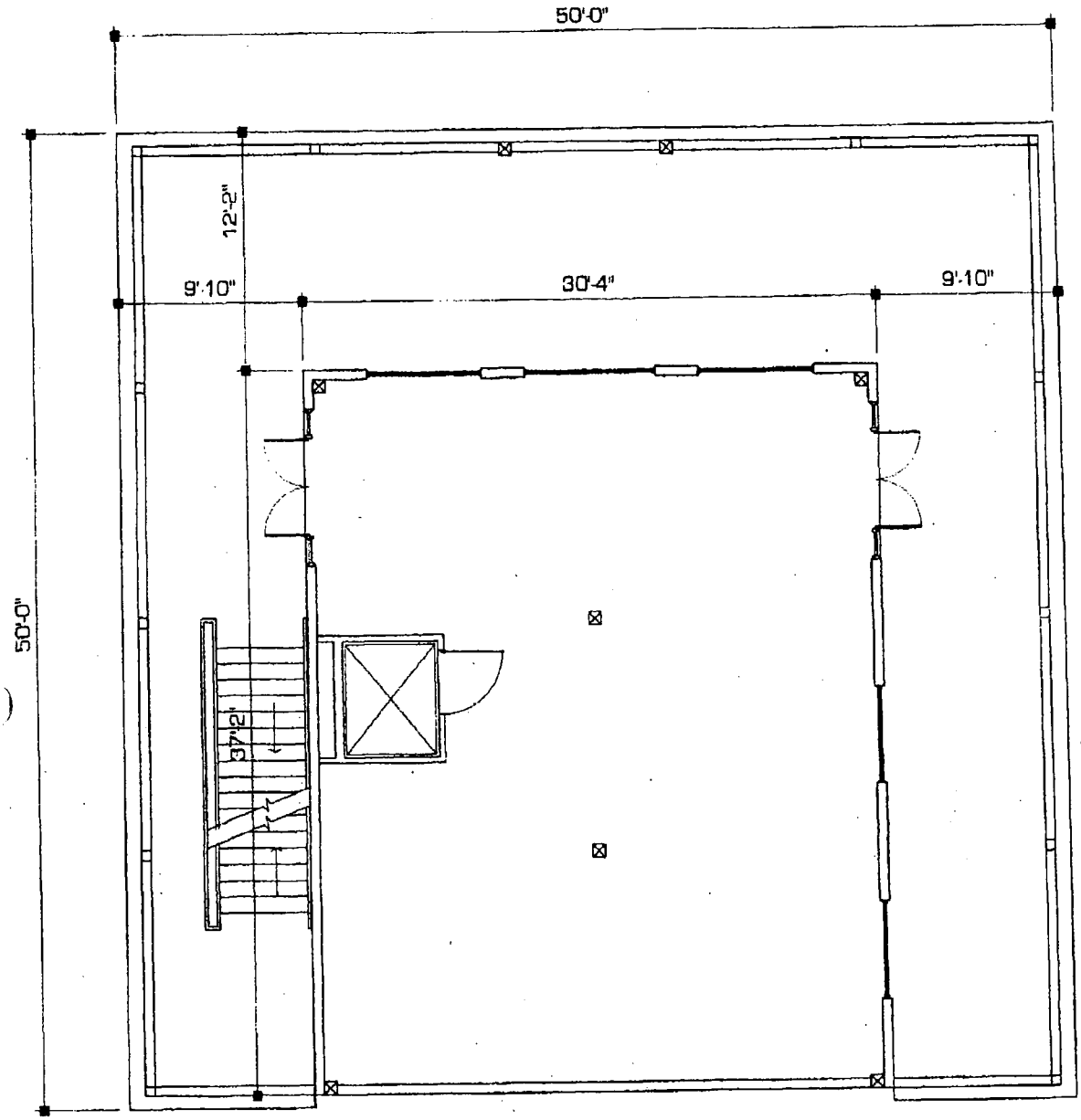
1st Floor Plan

Sunset Cay

West 9th Street Extension

City of Folly Beach :: Charleston County, SC

Commercial Unit & Restroom Facility
Sunset Cay Marina



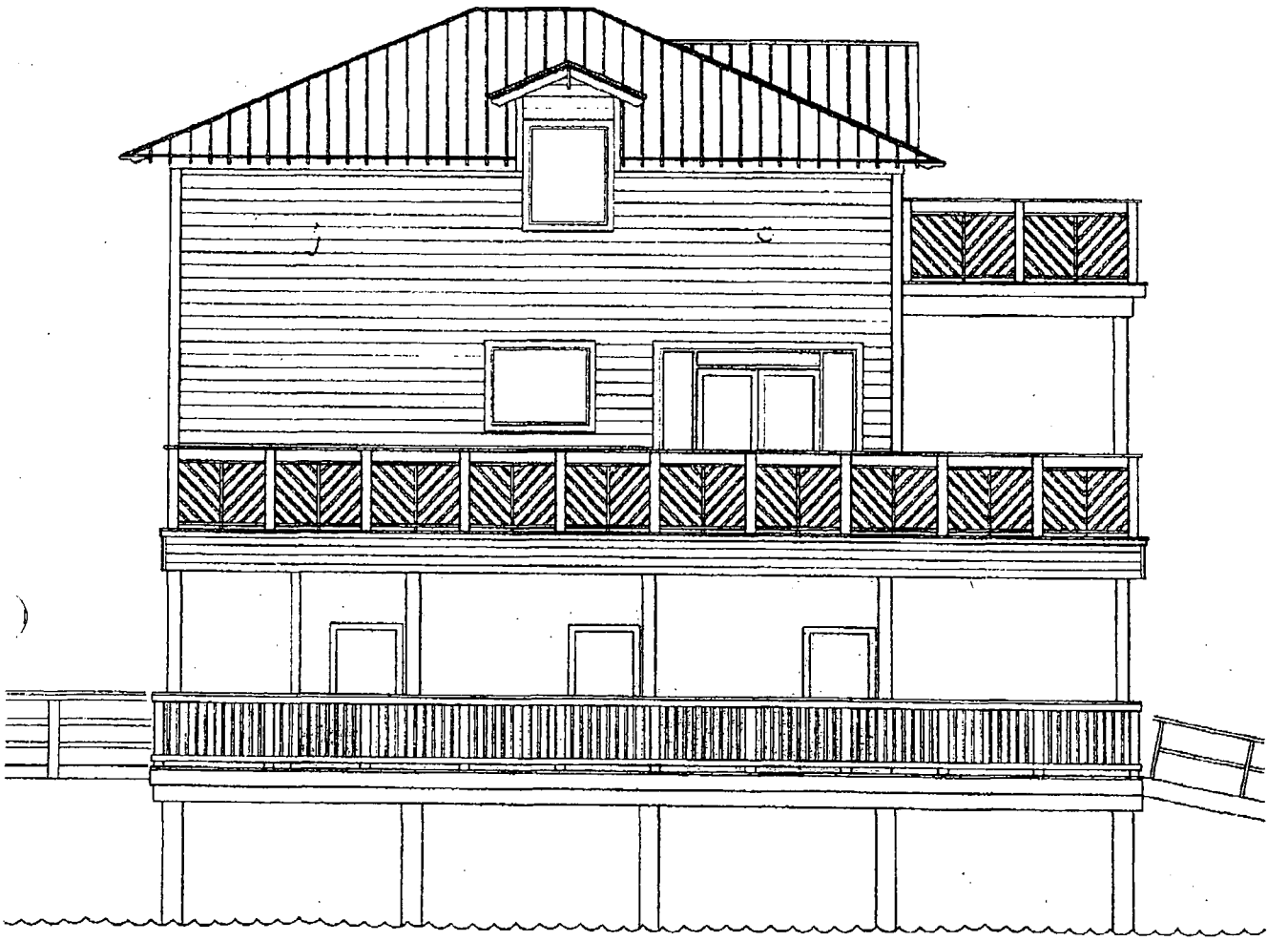
2nd Floor Plan

Sunset Cay

West 9th Street Extension

City of Folly Beach :: Charleston County, SC

Commercial Unit & Restroom Facility
Sunset Cay Marina



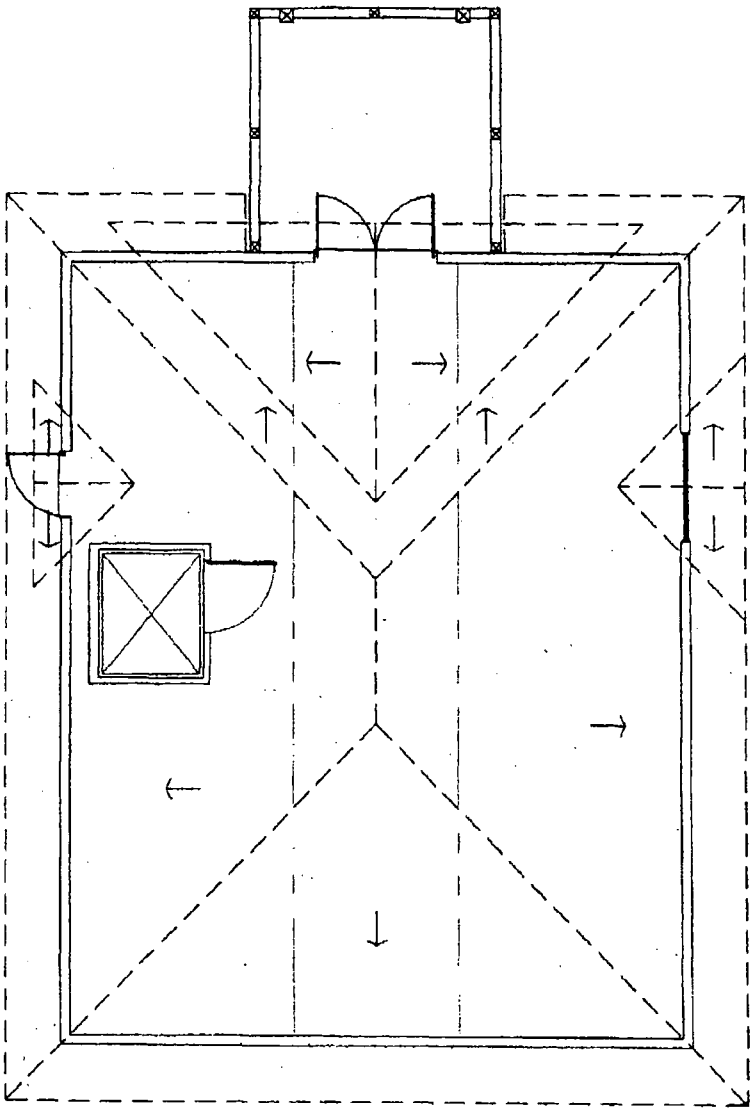
:: North Elevation

Sunset Cay

West 9th Street Extension

City of Folly Beach :: Charleston County, SC

Commercial Unit & Restroom Facility
Sunset Cay Marina



Loft Plan

Sunset Cay

West 9th Street Extension

City of Folly Beach :: Charleston County, SC

Commercial Unit & Restroom Facility
Sunset Cay Marina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Sunset Cay, LLC, Petitioner, vs. South Carolina Department of Health and Environmental Control, Respondent.	)	DOCKET NO. 15-ALJ-07-0579-CC AFFIDAVIT OF FRANCIS E. CLARK

COPY

Personally appeared before me, Francis E. Clark, who being duly sworn does depose and say:

I am a member of Sunset Cay Commercial, L.L.C., and I have been involved in the construction and operation of this marina since 2001. As such I am familiar with the continuation of the marina as it presently exists, and I offer this sworn statement to correct the misstatement of facts sated by O.C.R.M. in its November 3, 2016, Motion to Amend Order. I limit the statements here to statements of undisputable fact.

1. 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.

2. The United States War Department (forerunner of the current Army Corps of Engineers) issued a permit for the creation of a marina ("wharf") on February 7, 1947. This original permit is attached to this affidavit.

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

4. Folly Beach adopted zoning sometime around 1974. In 1974, the City classified the marina

FILED
NOV 22 2016
SC ADMIN. LAW COURT

as "C-3 Commercial Marine."

5. Sunset Cay purchased the marina property in 2001 from Daniel O'Rourke for two million dollars. (The deed is attached to this affidavit.)

6. The O'Rourke's operated a marina and full service restaurant. In 1989, Hurricane Hugo did significant damage to the marina. See attached photo.

7. The O'Rourke's rebuilt the marina and continued to operate until our group purchased it from them in 2001.

8. Prior to constructing the present building, I submitted elevations to O.C.R.M., showing the proposed building. These elevations show what height, width, and depth of the building.

9. I constructed the marina in accordance with O.C.R.M.'s construction permit, as amended from time to time.

10. After construction, but prior to obtaining certificates of occupancy, I submitted as built drawings to O.C.R.M. These as built drawings are attached to this affidavit.

11. At the time of the original application, O.C.R.M. submitted the application to the United States Army Corps. Of Engineers for review. After the review, the Army informed O.C.R.M. and us that it was not putting the project out on notice for public comment because the proposed construction was within the original permitted footprint.

12. The City of Folly Beach issued three certificates of occupancy for the marina building in 2005.

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

14. 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.

15. Apart from the representatives of O.C.R.M., I attended on behalf of Sunset Cay Commercial, L.L.C. Bill Oglesby attended on behalf of the Council of Co-Owners. Tommy Goldstein attended on my and the Council of Co-Owners' behalf. John Romanosky attended on my behalf. Ian O'Shea attended on behalf of the Ship's Store, the tenant in Unit 201. Finally, John Oliver attended on behalf of the Ship's Store, the tenant in Unit 201.

16. After going over the October 26, 2015, "cease and desist" 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 persons' heads, but I am confident that everyone at that meeting thought we were there to review the October 26, 2015, "cease and desist" letter.

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

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

19. When I left the November 18, 2015, meeting, I left with the impression that the October 26, 2015, "cease and desist" letter had been resolved.

20. The October 26, 2015, "cease and desist" letter raises two deficiencies: (1) eleven floating docks installed by eleven slip owners without permission from O.C.R.M., and (2) no permitted water dependent use for Unit 301. At the meeting on November 18, 2015, at O.C.R.M. headquarters, we explained to O.C.R.M. that we agreed with these deficiencies and that we would apply for a permit amendment to address them as soon as the Department provided guidance on what a water dependent use is—that is, the Declaration I filed on August 28, 2015.

21. Unit 301 is vacant and has been vacant since the City of Folly Beach issued a certificate of occupancy for it in 2006. No one has used it as an apartment, and since Unit 201 has been approved since 2009, for sale of light food and beverages, I have never understood why O.C.R.M. issued the cease and desist letter in the first place.

22. I have submitted two applications for permit amendments since June of 2015, which the Department refuses to act on, by refusing to define water dependent are allowed, which is what prompted my application for Declaration in August, 2015. There is one pending now that the Department refuses to act on.

Further your deponent says not.

F. E. Clark

Francis E. Clark

SWORN TO BEFORE ME THIS
17th DAY OF NOVEMBER, 2016.

Notary Public for South Carolina
My Commission expires: April 16, 2020

COPY

CERTIFICATE OF SERVICE

The undersigned hereby certified that a true copy of the foregoing pleading has been served upon, Bradley Churdar, counsel for the Defendant, by mailing a copy properly addressed with sufficient postage affixed thereto this 22nd day of November, 2016.

Thomas R. Goldstein, S. C. Bar No.: 2186

FILED
NOV 22 2016
SC ADMIN. LAW COURT

Exhibit 1.

Original Permit

WAR DEPARTMENT

NOTE.—It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State, or local laws or regulations, nor does it obviate the necessity of obtaining *State assent* to the work authorized. IT MERELY EXPRESSES THE ASSENT OF THE FEDERAL GOVERNMENT SO FAR AS CONCERNS THE PUBLIC RIGHTS OF NAVIGATION. (See *Cummings* v. *Chicago*, 188 U. S., 410.) 16—13198

SADGN-1 - 800.6 Folly River (Chas Bar) Folly River Sea Foods, Inc.

PERMIT

United States Engineer Office.
Division Engineer, South Atlantic Division
Atlanta, Georgia, 11 February ——, 1947.

Completed 4-24-47
Reported to OCE 4-29-47

Folly River Sea Foods, Inc.
11 Gibbes St.
Charleston, S. C.

Gentlemen:

Referring to written request dated 28 January 1947,

I have to inform you that, upon the recommendation of the Chief of Engineers, and under the provisions of Section 10 of the Act of Congress approved March 3, 1899, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," you are hereby authorized by the Secretary of War,

to construct a wharf,
(Here describe the proposed structure or work.)

in Folly River, northerly shore,
(Here to be named the river, harbor, or waterway concerned.)

xx about 1.3 miles west of the Highway Bridge, (S.C. Highway No. 615), between
(Here to be named the nearest well-known locality—preferably a town or city—and the distance in miles and tenths from some definite point in the same, stating whether above or below or giving direction by points of compass.)
Charleston and Folly Island, S. C.,

in accordance with the plans shown on the drawing attached hereto, marked, "Proposed Wharf on Folly River at Folly Island, S. C., Application by: Folly River Sea Foods, Inc. Jan. 28, 1947."
(Or drawings; give file number or other definite identification marks.)

subject to the following conditions:

0574

(a) That the work shall be subject to such supervision and approval of the District Engineer, Corps of Engineers, Department of the Army, in charge of the locality, who may be temporarily assigned the work at any time, as the Secretary of the Army may deem from time to time to be necessary in the interests of navigation so require.

(b) That any material dredged in the prosecution of the work herein authorized shall be removed evenly, and no large refuse piles, ridges across the bed of the waterway, or deep holes that may have a tendency to cause injury to navigable channels or to the banks of the waterway shall be left. If any pipe, wire, or cable hereby authorized is laid in a trench, the formation of permanent ridges across the bed of the waterway shall be avoided and the back filling shall be so done as not to increase the cost of future dredging for navigation. Any material to be deposited or dumped under this authorization, either in the waterway or on shore above high-water mark, shall be deposited or dumped at the locality shown on the drawing hereto attached, and, if so prescribed thereon, within or behind a good and substantial bulkhead or bulkheads, such as will prevent escape of the material into the waterway. If the material is to be deposited in the harbor of New York, or in its adjacent or tributary waters, or in Long Island Sound, a permit therefor must be previously obtained from the Supervisor of New York Harbor, Army Building, New York City.

(c) That there shall be no unreasonable interference with navigation by the work herein authorized.

(d) That if inspections or any other operations by the United States are necessary in the interests of navigation, all expenses connected therewith shall be borne by the permittee.

(e) That no attempt shall be made by the permittee or the owner to forbid the full and free use by the public of all navigable waters at or adjacent to the work or structure.

(f) That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of War, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required, upon due notice from the Secretary of War, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonably free, easy, and unobstructed; and if, upon the expiration or revocation of this permit, the structure, fill, excavation, or other modification of the watercourse hereby authorized shall not be completed, the owners shall, without expense to the United States, and to such extent and in such time and manner as the Secretary of War may require, remove all or any portion of the uncompleted structure or fill and restore to its former condition the navigable capacity of the watercourse. No claim shall be made against the United States on account of any such removal or alteration.

(g) That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage.

(h) That if the display of lights and signals on any work hereby authorized is not otherwise provided for by law, such lights and signals as may be prescribed by the U. S. Coast Guard, shall be installed and maintained by and at the expense of the owner.

(i) That the permittee shall notify the said district engineer at what time the work will be commenced, and as far in advance of the time of commencement as the said district engineer may specify, and shall also notify him promptly, in writing, of the commencement of work, suspension of work, if for a period of more than one week, resumption of work, and its completion.

(j) That if the structure or work herein authorized is not completed on or before the 31st day of December, 1948, this permit, if not previously revoked or specifically extended, shall cease and be null and void.

0575

By authority of the Secretary of War:

L. E. Chas.

PERMIT REQUESTED IN 1ST IND. OF 2/7/47, FOR DISTRIBUTION

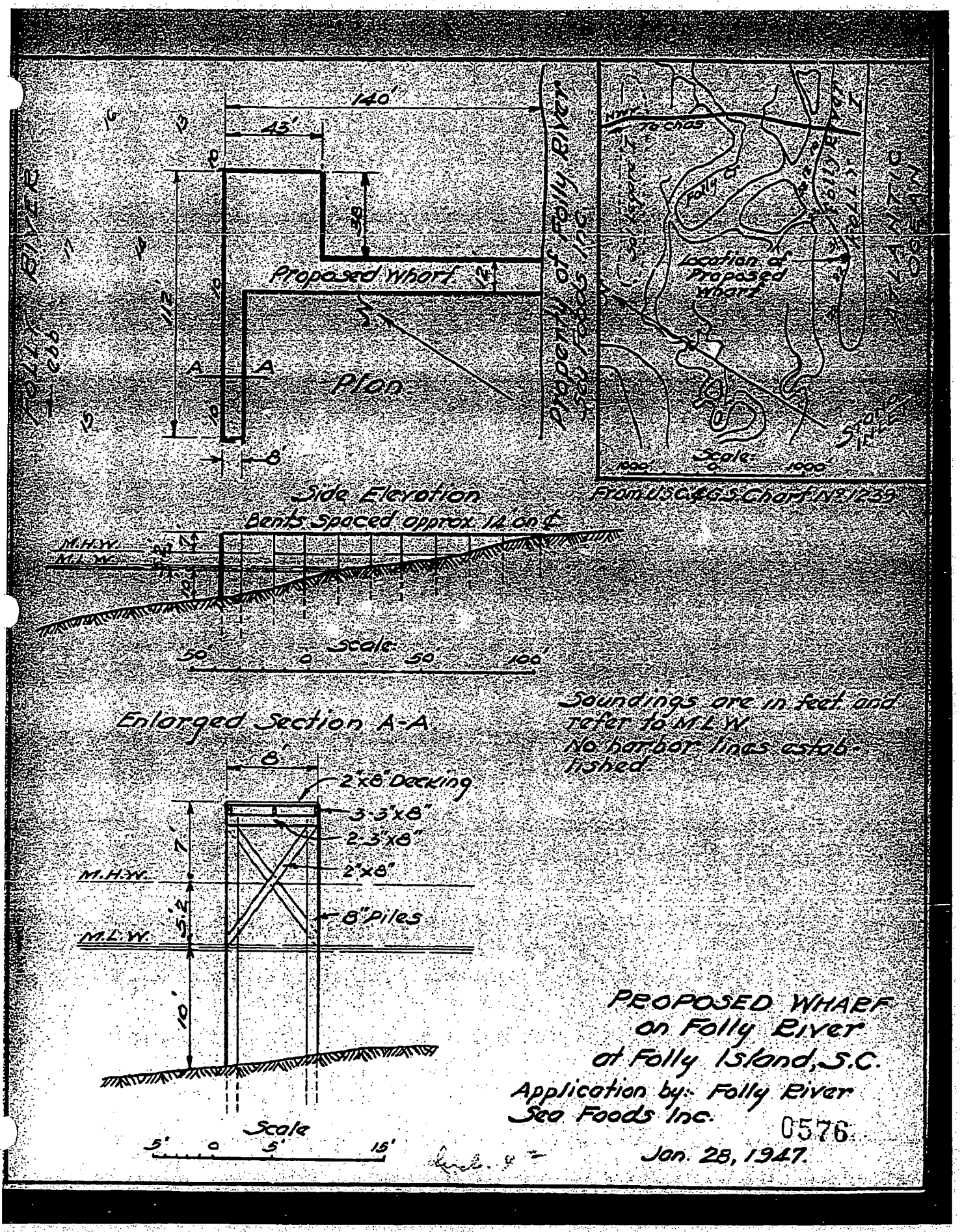
C. N. GILLETTE
Colonel, Corps of Engineers
Division Engineer

WAR DEPARTMENT
O. C. of E.
Form No. 96
Revised Jan. 17, 1940

16--13168

Mobile Engineer District—8-26-46—1500

A COPY OF THIS INSTRUMENT WAS MAILED TO THE CHIEF OF ENGINEERS, U. S. ARMY, WASHINGTON, D. C., ON THE DATE IT WAS ISSUED.


140'
43'
38'
Proposed Wharf
12'
Property of Folly River Seafoods Inc.
A
A
Plan
8'
Location of Proposed Wharf
Folly Island
Scale
1000'
0
1000'
From USC&GS Chart No. 1239
Side Elevation
Bents Spaced approx. 14' on ℄
M.H.W.
M.L.W.
Scale: 50' 0 50' 100'
Enlarged Section A-A
8'
2"x8" Decking
3-3"x8"
2-3"x8"
2"x8"
8" Piles
M.H.W.
M.L.W.
Scale
5' 0 5' 15'
Soundings are in feet and refer to M.L.W.
No harbor lines established.
PROPOSED WHARF
on Folly River
at Folly Island, S.C.
Application by: Folly River Sea Foods Inc.
0576
Jan. 28, 1947.

SHRR

21 February 1947

800.6 - Folly River Sea Foods, Inc. (Constr. Wharf) Folly River S.C.

Folly River Sea Foods, Inc.,
11 Gibbes Street
Charleston, S.C.

Gentlemen:

Reference is made to your letter dated 28 January 1947, making application to this department for a permit to construct a wharf in Folly River, S.C., on the northerly shore about 1.3 miles west of the Highway bridge between Charleston and Folly Island, S.C., there is enclosed a permit for this work issued by the Division Engineer dated 11 February 1947.

If any material changes in location or plans of the work are found necessary on account of unforeseen or altered conditions or otherwise, revised plans should be submitted promptly to the District Engineer to the end that these revised plans, if found unobjectionable from a standpoint of navigation, may receive the approval required by law before work thereon is begun.

Attention is invited to the requirements to which this permit is subject, particularly to paragraph (1) providing that the District Engineer shall be notified in writing of the commencement of work, suspension of work, if for a period of more than one week, resumption of work and its completion.

Very truly yours,

JOHN B. HUGHES
Colonel, Corps of Engineers
District Engineer

1 Inclosure:
Permit w/print attached.

FEB 21 1947

0577

P U B L I C N O T I C E

WAR DEPARTMENT
CHARLESTON DISTRICT, CORPS OF ENGINEERS
CUSTOM HOUSE
CHARLESTON, S. C.

SANRR 3 February 1947

Application has been made to the War Department by

WILLIAM G. DODDS
FOLLY RIVER SEA FOODS, INC.
11 GIBBES STREET
CHARLESTON, S. C.

for a permit to construct a wharf on

FOLLY RIVER

along the northerly shore of Folly Island, S. C., approximately 1.3 miles west of the Highway Bridge (Route No. 615) between Charleston and Folly Island, S. C.

In order to give all interested parties an opportunity to express their views

N O T I C E

is hereby given that written statements regarding the proposed work will be received at this office until

12 O'CLOCK NOON, FRIDAY, 7 FEBRUARY 1947

from those interested in the navigation of these waters, particularly navigation interests and the officials of any county, town or local association whose interests may be affected by the proposed work.

The plans, which may be seen at this office, show the proposed wharf to be of pile and timber construction. The wharf is to be T-shaped with a marginal face 112' long. The upstream end will be 43 feet wide and the downstream end 8 feet wide which will be connected to the highland by a walkway 97 feet long and 12 feet wide. There will be a depth of approximately 10 feet at mean low water at the face of the wharf which will extend about 50 feet channelward of the low water line. The deck of the wharf will be 12.2 feet above mean low water. Folly River is 1,600 feet wide at the site of the proposed structure. The applicant states that he owns the land from which the proposed wharf will extend. There are no harbor lines established in the vicinity.

For accuracy and completeness of record, all important facts and arguments bearing on navigation should be submitted in writing at or before the time named above.

0578

JOHN B. HUGHES
Colonel, Corps of Engineers
District Engineer

Folly River Sea Foods, Inc.
Charleston, S. C.
28 Jan. 1947

Sec. 6 - Folly River Sea Foods, Inc.
(Contr. wharf) Folly River
on Folly Island, S. C.

The District Engineer
33 Customhouse
Charleston, S. C.

Dear Sir,

Permission is requested to construct a wharf, as shown on the attached plans, to be located on the west end of Folly Island approximately 1.25 miles west of the Highway Bridge to Folly Island.

The land in front of which the wharf is to be built is owned by Folly River Sea Foods, Inc. and is within the corporate limits of Folly Beach.

Very Truly Yours,

s/ Wm. G. DODDS
Wm. G. DODDS
President

COPY

0579

H
W
Lc
WC
A Tg

LIST OF PARTIES

To whom notices were sent 3 February 1947 advertising the proposed construction of a wharf on Folly River along the northerly shore of Folly Island, S. C., approximately 1.3 miles west of the Highway Bridge (Route No. 615) between Charleston & Folly Island, S. C.

Chief of Engineers, U. S. Army, War Department Bldg., 21st Street & Virginia Ave., N. W.	Washington, D. C.
The Division Engineer, South Atlantic Division, P. O. Box 4114	Atlanta 2, Ga.
Commandant, U. S. Navy Yard	Charleston, S. C.
The Director, Fish and Wildlife Service, Department of the Interior, Merchandise Mart	Chicago, Ill.
Hon. E. E. Wehman, Jr., Mayor, City Hall	Charleston, S. C.
City Engineer, City Hall	Charleston, S. C.
Sanitary and Drainage Commission	Charleston, S. C.
Harbor Master, Adgers Wharf	Charleston, S. C.
Pilots' Association, Adgers Wharf	Charleston, S. C.
Charleston Lighterage & Transportation Company	Charleston, S. C.
Captain Gibbs	Mt. Pleasant, S. C.
Stevens Line	Yonges Island, S. C.
Merritt Dredging Company, Berkeley Court Apts.	Charleston, S. C.
Chamber of Commerce, 50 Broad Street	Charleston, S. C.
The News and Courier, 134 Meeting Street	Charleston, S. C.
The Evening Post, 134 Meeting Street	Charleston, S. C.
Postmaster	Charleston, S. C.
Postmaster	Folly Beach, S. C.
Elmore's Fishing Pier	Folly Beach, S. C.
[redacted]	Charleston, S. C.
[redacted]	James Island, S. C.
[redacted]	Folly Beach, S. C.
Seabrook & Karow, 56 Broad Street	Folly Beach, S. C.
[redacted]	Charleston, S. C.
[redacted]	Charleston, S. C.
Mr. C. K. McMillan, Engineer, State Highway Department	Charleston, S. C.
[redacted]	Charleston, S. C.
[redacted]	Columbia, S. C.
Captain of the Port, Foot of Tradd Street	Edisto Island, S. C.
Adams Boat Yard	Charleston, S. C.
	Folly Beach, S. C.
	Charleston, S. C.
	Folly Beach, S. C.

0530

FOLLY RIVER SEA FOODS, INC.
P. O. BOX 432
CHARLESTON, S. C.

WM. G. DODDS, PRES.
WM. E. HUTSON, JR., VICE PRES.
T. P. FARROW, SEC. AND TREAS.

February 25, 1947.

800.6- Folly River Sea Foods, Inc.
(Constr. Wharf) Folly River
S.C.

United States Engineer Office,
Room 29, Custom House,
Charleston, South Carolina.

Gentlemen:

With reference to your letter of the 21 February 1947 and paragraph (i) of permit enclosed therewith, please be advised that construction of our wharf will commence on Saturday, 1 March 1947.

Yours very truly,

FOLLY RIVER SEA FOODS, INC.,

By: W. G. Dodds.
President

RECEIVED
27 Feb 1947
U. S. Engr. Office
Charleston, S. C.

WGD-w

0585

We
acctn
JGS

CANRR 29 April 1947

SUBJECT: Permit Completion Report - Construction of a wharf in Folly River, S.C. about 1.3 miles west of the highway bridge between Charleston and Folly Island, S.C.

TO: The Chief of Engineers
U.S. Army
Building T-7
Washington, D.C.

COPY TO: The Division Engineer
South Atlantic Division
P.O. Box 4114
Atlanta, Georgia

DE
CAD
COD
CED
CSR
DIS
EXPE
CKD

1. In compliance with instructions contained in paragraph 5236.22b, Orders and Regulations, Corps of Engineers, U.S. Army, the following information is submitted on completion of work authorized by War Department Permit:

Permit Issued by: The Division Engineer
South Atlantic Division
Atlanta, Georgia
11 February 1947

Permittee: Folly River Sea Foods, Inc.
11 Gibbes St.,
Charleston, S.C.

Waterway: Folly River, S.C.

Description of work: The Construction of a wharf on the northerly shore of Folly River about 1.3 miles west of the Highway Bridge between Charleston and Folly Island, S.C.

Date Completed: 24 April 1947.

2. An inspection made on 28 April 1947, showed that the work was completed in accordance with the approved plans.

FOR THE ACTING DISTRICT ENGINEER:

0586
WORTH HENDRICK
Chief, Engineering Division

APR 29 1947
CHARLESTON

WAR DEPARTMENT

NOTE.—It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State, or local laws or regulations, nor does it obviate the necessity of obtaining *State assent* to the work authorized. IT MERELY EXPRESSES THE ASSENT OF THE FEDERAL GOVERNMENT SO FAR AS CONCERNS THE PUBLIC RIGHTS OF NAVIGATION. (See *Cummings* v. *Chicago*, 188 U. S., 410.) 16—13168

SADGW-1 - 800.6 Folly River
Chas-C&H

PERMIT

United States Engineer Office.
Division Engineer, South Atlantic Div.,
Atlanta, Georgia, March 29, 1948.

Mr. Carl L. Ott
17 Seminole Ave.
Naval Base, S. C.

Dear Sir:

Referring to written request dated March 8, 1948,

I have to inform you that, upon the recommendation of the Chief of Engineers, and under the provisions of Section 10 of the Act of Congress approved March 3, 1899, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," you are hereby authorized by the Secretary of War,

to construct a wharf,
(Here describe the proposed structure or work.)

in Folly River, S. C., on the northerly shore of Folly Island, S. C.
(Here to be named the river, harbor, or waterway concerned.)

at approximately 1.2 miles west of the Highway Bridge (S.C. Route No. 615)
(Here to be named the nearest well-known locality—preferably a town or city—and the distance in miles and tenths from some definite point in the same, stating whether above or below or giving direction by points of compass.)

between Charleston and Folly Island, S. C.,

in accordance with the plans shown on the drawing attached hereto, marked:
(Or drawings; give file number or other definite identification marks.)

"Proposed Wharf on Folly River at Folly Island, S. C. Application by: C. L. Ott, 17 Seminole Ave., Naval Base, S. C."

subject to the following conditions:

0025

(a) That the work shall be subject to the supervision and approval of the District Engineer, Engineer Department at Large, in charge of the locality, who may temporarily suspend the work at any time, if in his judgment, the interests of navigation so require.

(b) That any material dredged in the prosecution of the work herein authorized shall be removed evenly, and no large refuse piles, ridges across the bed of the waterway, or deep holes that may have a tendency to cause injury to navigable channels or to the banks of the waterway shall be left. If any pipe, wire, or cable hereby authorized is laid in a trench, the formation of permanent ridges across the bed of the waterway shall be avoided and the back filling shall be so done as not to increase the cost of future dredging for navigation. Any material to be deposited or dumped under this authorization, either in the waterway or on shore above high-water mark, shall be deposited or dumped at the locality shown on the drawing hereto attached, and, if so prescribed thereon, within or behind a good and substantial bulkhead or bulkheads, such as will prevent escape of the material into the waterway. If the material is to be deposited in the harbor of New York, or in its adjacent or tributary waters, or in Long Island Sound, a permit therefor must be previously obtained from the Supervisor of New York Harbor, Army Building, New York City.

(c) That there shall be no unreasonable interference with navigation by the work herein authorized.

(d) That if inspections or any other operations by the United States are necessary in the interests of navigation, all expenses connected therewith shall be borne by the permittee.

(e) That no attempt shall be made by the permittee or the owner to forbid the full and free use by the public of all navigable waters at or adjacent to the work or structure.

(f) That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of War, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required, upon due notice from the Secretary of War, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonably free, easy, and unobstructed; and if, upon the expiration or revocation of this permit, the structure, fill, excavation, or other modification of the watercourse hereby authorized shall not be completed, the owners shall, without expense to the United States, and to such extent and in such time and manner as the Secretary of War may require, remove all or any portion of the uncompleted structure or fill and restore to its former condition the navigable capacity of the watercourse. No claim shall be made against the United States on account of any such removal or alteration.

(g) That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage.

(h) That if the display of lights and signals on any work hereby authorized is not otherwise provided for by law, such lights and signals as may be prescribed by the U. S. Coast Guard, shall be installed and maintained by and at the expense of the owner.

(i) That the permittee shall notify the said district engineer at what time the work will be commenced, and as far in advance of the time of commencement as the said district engineer may specify, and shall also notify him promptly, in writing, of the commencement of work, suspension of work, if for a period of more than one week, resumption of work, and its completion.

(j) That if the structure or work herein authorized is not completed on or before the 31st day of ~~December~~, 19 51, this permit, if not previously revoked or specifically extended, shall cease and be null and void.

NOTE: The terms "War Department" and "Secretary of War" as used in this instrument shall mean "Department of the Army" and "Secretary of the Army," respectively. (Sec. 205 of the National Security Act of 1947 approved July 26, 1947, Public Law 253 - 80th Congress.)

By authority of the Secretary of War:

N. E. Chase

PERMIT REQUESTED IN 1ST IND. OF
3/15/48 FOR DISTRIBUTION

M.G.Y.

MASON S. YOUNG
Colonel, Corps of Engineers
Division Engineer

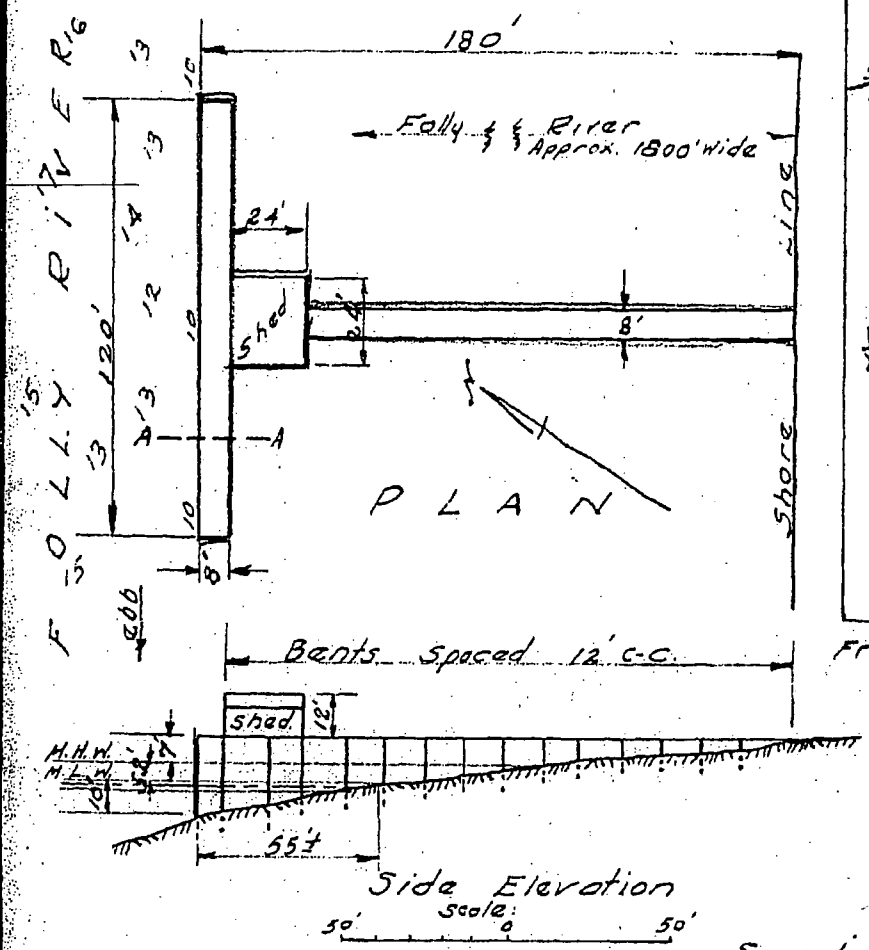
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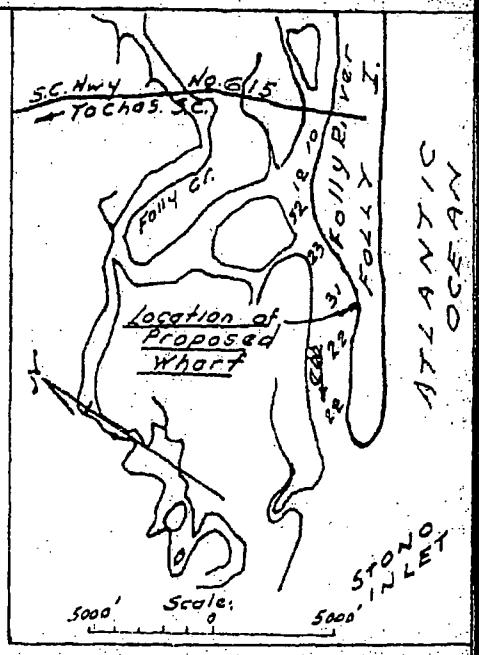
WAR DEPARTMENT
O. C. of E.
Form No. 96
Revised Jan. 17, 1940

16-13168

A COPY OF THIS INSTRUMENT WAS MAILED TO THE CHIEF OF ENGINEERS, DEPARTMENT OF THE ARMY, WASHINGTON, D.C., ON THE DATE IT WAS ISSUED.

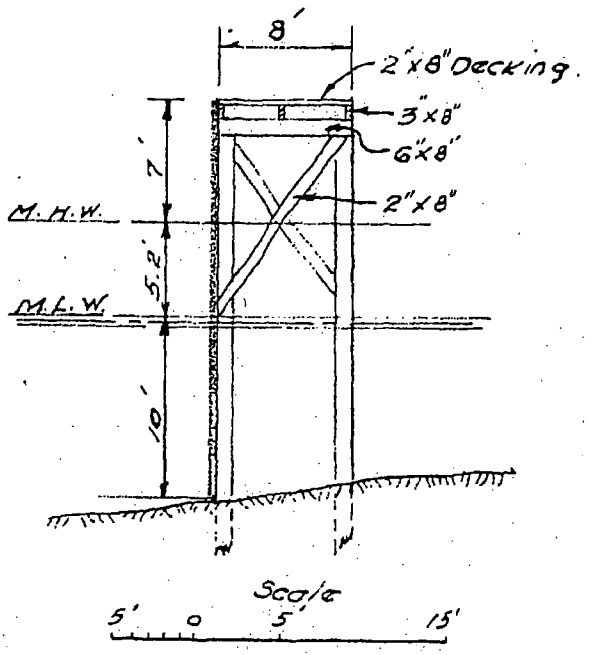
Mobile Engineer District - 8-26-46 1500





From U.S.C.+G.S. Chart №1239.

Enlarged Section A-A.



Soundings are in feet and refer to M.L.W.
No harbor lines established.

0830

PROPOSED WHARF
on Folly River
at Folly Island, S.C.

Application by: C. L. OTT
17 Seminole Ave.
Naval Base S.C.

8 March 1948

SAEHR

1 April 1948

900.6 - Ott, Carl L. (Constr. Wharf) (at Folly R. (Route S 15 between Charleston & Folly Island, S.C.)

Mr. Carl L. Ott
17 Seminole Ave.,
Naval Base, S.C.

Dear Sir:

Reference is made to your letter dated 8 March 1948, making application to this department for a permit to construct a wharf in Folly River, S.C., on the northerly shore of Folly Island, S.C., approximately 1.2 miles west of the Highway Bridge (S.C. Route No. 515) between Charleston and Folly Island, S.C.

There is enclosed a permit for the proposed work issued by the Division Engineer, South Atlantic Division, Atlanta, Georgia, dated 29 March 1948. If any material changes in location or plans of the work are found necessary on account of unforeseen or altered conditions or otherwise, revised plans should be submitted promptly to the District Engineer to the end that these revised plans, if found unobjectionable from a standpoint of navigation, may receive the approval required by law before work thereon is begun.

Attention is invited to the requirements to which this permit is subject, particularly to paragraph (1) providing that the District Engineer shall be notified in writing of the commencement of work, suspension of work if for a period of more than one week, resumption of work and its completion.

Very truly yours,

2 Inclosure:
Permit w/print attached. ✓

EDWARD G. DALY
Colonel, Corps of Engineers
District Engineer

CHARLESTON

APR 1 1947

DISPATCHED

0631

PUBLIC NOTICE

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS
CHARLESTON DISTRICT
CUSTOMHOUSE
CHARLESTON, S.C.

SANRR 8 March 1948

Application has been made to the Department of the Army by

MR. CARL L. OTT
17 SEMINOLE AVE.,
NAVAL BASE, S.C.,

for a permit to construct a wharf in

FOLLY RIVER

on the northerly shore of Folly Island, S.C., approximately 1.2 miles west of the Highway Bridge (S.C. Route No. 615) between Charleston and Folly Island, S.C.

In order to give all interested parties an opportunity to express their views

NOTICE

is hereby given that written statements regarding the proposed work will be received at this office until

12 O'CLOCK NOON, MONDAY 15 MARCH 1948,

from those interested in the navigation of these waters, particularly navigation interests and the officials of any county, town or local association whose interests may be affected by the proposed work.

The plans, which may be seen at this office, show the proposed wharf to be of pile and timber construction. The wharf will be "T"-shaped with a marginal face 120' long and 8' wide, connected to the highland by a walkway 8' wide and 172' long. A shed 24' square will be built over the walkway at the landward side of the head of the wharf. There will be a depth of approximately 10.0' of water at the face of the wharf which will extend about 55' channelward of the low water line. The deck of the wharf will be 12.2' above low water. Folly River is approximately 1800' wide at the site of the proposed construction. The applicant states that he owns the property in front of which the proposed wharf will be built.

For accuracy and completeness of record, all important facts and arguments bearing on navigation should be submitted in writing at or before the time named above.

Edward G. Daly

EDWARD G. DALY
Colonel, Corps of Engineers
District Engineer.

0632

17 Seminole Ave.,
Naval Base, S.C.
6 March 1948

800.6 Ott, Carl L. (Construct Wharf) on Northerly shore of Folly Island, S.C. (Hwy No. 615) across Folly R.

The District Engineer
Custom House
Charleston, S.C.

Dear Sir:

I request a permit for the construction of a wharf, as shown on the attached plans, to be constructed in Folly River on the northerly shore of Folly Island, S.C., about 1.2 miles west of the bridge on South Carolina Highway No. 615, across Folly River. I own the land in front of which this wharf will be built.

Very truly yours,

Inclosures:
1. Tracing
2. Print (in quin.)

CARL L. OTT

0633

SADEN SUBJECT: Application by Mr. Carl L. Ott, 17 Seminole Ave., Naval Base, S.C., for a permit to construct a wharf in Folly River on the northerly shore of Folly Island, S.C.

1st Ind.

Charleston District, Corps of Engineers, Department of the Army, Charleston, S.C., 15 March 1948.

TO: The Division Engineer, South Atlantic Division, Corps of Engineers, Department of the Army, P.O. Box 1889, Atlanta 1, Ga.

1. Name of applicant: Mr. Carl L. Ott, 17 Seminole Ave., Naval Base, S.C.

2. Location of proposed work: In Folly River, S.C., on the northerly shore of Folly Island, S.C., approximately 1.2 miles west of the Highway Bridge (S.C. Route No. 615) between Charleston and Folly Island, S.C.

3. Has the necessary State or other primary authority been obtained: None required.

4. Character of proposed work: The proposed work consists of constructing a pile and timber wharf. The wharf will be "T"-shaped with a marginal face 120' long and 6' wide, connected to the highland by a walkway 8' wide and 172' long. A shed 24' square will be built over the walkway at the landward side of the head of the wharf. There will be a depth of approximately 10.0' of water (m.l.w.) at the face of the wharf which will extend about 55' channelward of the low water line. The deck of the wharf will be 12.2' above low water.

5. Attitude of local authorities: No complaints were received from local authorities.

6. Date of sending information to other interested parties, and summary of objections offered at public hearings or otherwise, with comments thereon: A notice of the proposed work was issued 8 March 1948, to all parties thought to be interested. There were no objections received.

7. Views of District Engineer concerning probable effect on:

(a) Navigation, present or prospective with reasons: As Folly River is about 1,800' wide at the site of the proposed structure which will extend only 55' channelward of the low water line, there should be no adverse effect on present or prospective navigation.

0635

SAENR SUBJECT: Application by Mr. Carl L. Ott, 17 Seminole Ave., Naval Base, S.C., for a permit to construct a wharf in Folly River on the northerly shore of Folly Island, S.C.

Paragraph 7 - continued.

(b) Harbor lines: There are no harbor lines established in the vicinity of the proposed work.

(c) Flood heights and drift: As the proposed structure is to be of open construction, there should be no detrimental effect on flood heights or drift.

8. Remarks: The applicant states that he owns the land in front of which the proposed wharf will be built.

9. Recommendations:

General: It is recommended that the permit be issued.

Special conditions for inclusion in permit: None.

FOR THE DISTRICT ENGINEER:

WORTH CANDRICK
Chief, Engineering Division

4 Inclosures:
1. Tracing ✓
2. Prints (in quin.) ✓
3. Public Notice (in tripl.) ✓
4. List of interested parties (in tripl.) ✓

CHARLESTON

MAR 15 1948

DISPATCHED

0836

- 2 -

800.6 – Utt, Carl L. (Wharf) in Folly R.

SAMRP

8 March 1949

SUBJECT: Permit Completion Report - Construction of a wharf in Folly River, S.C., by Mr. Carl L. Utt, Naval Base, S.C.

TO: The Chief of Engineers
Corps of Engineers
Department of the Army
Building T-7
Washington 25, D.C.

COPY TO: The Division Engineer
South Atlantic Division
Corps of Engineers
Department of the Army
P.O. Box 1889
Atlanta 1, Georgia

1. In compliance with instructions contained in paragraph 6235.22b, Orders and Regulations, Corps of Engineers, Department of the Army, the following information is submitted on completion of work authorized by Department of the Army Permit:

Permit issued by:	The Division Engineer South Atlantic Division Atlanta, Ga. 29 March 1948.
Permittee:	Mr. Carl L. Utt 17 Seminole Avenue Naval Base, S.C.
Waterway:	Folly River, S.C.
Description of work:	Construction of a wharf on the northerly shore of Folly Island, S.C., approximately 1.2 miles west of the highway bridge on S.C. Route No. 615.
Date Completed:	January 1949.

0637

SUBJECT: Permit Completion Report - Construction of a wharf in Folly River, S.C., by Mr. Carl L. Ott, Naval Base, S.C.

2. An inspection made on 7 February 1949, showed that the work was completed in accordance with the approved plans.

EDWARD C. DALY
Colonel, Corps of Engineers
District Engineer

CHARLESTON

MAR 8 1949

R

DISPATCHED

0638

2

Exhibit 2.

DEED

BKE 383PG677

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

TITLE TO REAL ESTATE

KNOW ALL MEN BY THESE PRESENTS that I, **DANIEL G. O'ROURK,** in the State aforesaid, for and in consideration of the sum of TWO MILLION AND 00/100 DOLLARS ($2,000,000.00) to me in hand paid at and before the sealing of these presents **SUNSET CAY, LLC,** in the state aforesaid, for which the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the presents **SUNSET CAY, LLC,** is successors and assigns forever, the following described real property, to wit:

ALL that tract of land on Folly River at the western end of Folly Island, Charleston County, SC containing 1.76 acres, more or less of highland which highland is described and contained within the solid black lines of the plat made by The John McCrady Company date January 1947, a blue print of which is attached to deed of conveyance from Edward M. Seabrook to Folly River Sea Foods, Inc. dated January 31, 1947 and recorded on February 15, 1947 in the RMC Office for Charleston County in Book N47 at page 87, together with any interest in the marsh or low land lying between the northern boundary of said highland and Folly River. (Also see plat recorded in Plat Book G at page 8-A)

ALSO

THE right to use for ingress and egress in common with Grantor and the owners of adjoining property and the public in general a right-of-way 60' wide, the same being 30' on either side of the line marked center line of proposed road right-of-way as shown on the above described plat of The John McCrady Company above mentioned.

ALSO

THE right to use for ingress and egress in common with Grantor and owners of adjoining property and the public in general a right-of-way 60' wide formed by the extension in a westerly direction of the highway or street known as Ashley Avenue as shown on a map of Jefferson Construction Company, recorded in the

RMC Office for Charleston County, SC in Plat book C at pages 157-158, from Ninth Street on said plat to the right-of-way shown on the plat of McCrady above mentioned so that the Grantee herein and the Grantor and other owners and the public may have access to the property herein granted over said Ashley Avenue and its extension and the right-of-way herein granted, with the right to use the "road now in use" as referred to in said plat until Ashley Avenue as extended be open to traffic.

ALSO

There is included in this conveyance all the right, title and interest in a certain wharf extending from the above described tract with a permit given to the Folly River Sea Foods, Inc. by the U.S. District Engineer in February 1947.

BEING the same property conveyed to Daniel G. O'Rourk by deed of William F. Thompson and Betty S. Thompson dated August 4, 1987, recorded on August 5, 1987 in Book O-167, Page 639.

TMS #325-15-00-011

ALSO

ALL that certain piece, parcel or tract of land, situate, lying and being in the Town of Folly Beach, Charleston County, South Carolina, being shown and designated as "TRACT Y, 6.58 AC. TOTAL" on a "PLAT OF GENERAL SURVEY OF A TRACT OF LAND IN THE TOWN OF FOLLY BEACH, T.M.S. 325-15-00-30. OWNED BY EDWARD M. SEABROOK, REF. PLAT BOOK AW, PAGE 56, AND PLAT BOOK Q, PAGE 47, TRACT-Y TO BE CONVEYED TO DANIEL G. O'ROURK" dated November 2, 1992, made by W. L. Gaillard, which said plat has been recorded in the RMC Office for Charleston County in Plat Book CL, page 77. Said Tract Y has such size shape, metes, bounds, location and dimensions as are shown on said plat and is described more particularly as follows: Beginning at an Old Iron (I.O.) on the northern side of 9th Street Extension at the termination of 9th street and the intersection of a 50' R/W (Not Open), the POINT OF BEGINNING, and continuing along the northern side of 9th Street Extension S80 00'00"W a distance of 40.00' to an I.O.; thence S51°45'00"W a distance of 690.00' to an I.O.; thence N89°00'00"W a distance of 100.00' to a New Iron (I.N.); thence N57°30'10"W a distance of 20' to the point where highland meets marshland and continuing thence along the boundary of marshland with other highland of the Grantee along the Critical Line as established by the South Carolina coastal Council, the following courses and distances: N57°30'10"W a distance of 20'; thence N09°30'00"W a distance of 100.03'; thence N28°50'05"E a distance of 225.10'; thence N37°30'11"E a distance of 100.00'; thence N21°05'00"E a distance of 80.20'; thence N52°00'00"E a distance of 48.00'; thence N18°00'00"E a distance of 40.00'; thence N48°00'00"E a

distance of 100.00'; thence N37°00'00"E a distance of 80.00"; thence N63°30'00"E a distance of 50.00'; thence S77°30'00"W a distance of 115.00'; thence N37°25'20"E a distance of 170.13'; thence along property now or formerly of Clay W. Evatt, Jr. S64°30'00"E 225' to an I.O.; thence continuing along property now or formerly of Clay W. Evatt, Jr. S23°10'56"W a distance of 76.56' to the center line of a canal; thence continuing down the center line of said canal S78°55'00"E a distance of 230.00' to an I.O. on the boundary of a 50' R/W (Not Open); thence along the westerly side of a 50' R/W (Not Open) S25°00'00"W a distance of 175.00 to an I.O., the POINT OF BEGINNING.

SAVE AND EXCEPTING THEREFROM:
All that certain piece parcel or tract of land, situate, lying and being in the Town of Folly Beach, Charleston County, South Carolina being shown and designated on that certain Plat by George A.Z. Johnson, Jr., Inc. dated March 10, 1999, and entitled "PLAT SHOWING A 1.643 ACRE TRACT OF LAND A PORTION OF TRACT Y, LOCATED AT THE INTERSECTION OF CLAM DRIVE AND WEST 9TH STREET EXTENSION PROPERTY OF DANIEL G. O'ROURK LOCATED IN THE CITY OF FOLLY BEACH CHARLESTON COUNTY, SOUTH CAROLINA", which Plat is recorded in the RMC Office for Charleston County in Plat ED, Page 478.

THE property above described is conveyed subject to the following: (1) the rights of the State of South Carolina, if any, in any land lying below the level of mean high water; (2) any easement that may exist for the maintenance of the canals shown on the property above described.

BEING the same property conveyed to Daniel G. O'Rourk by deed of Edward M. Seabrook dated March 31, 1993, recorded on April 1, 1993 in Book G225, Page 155, Charleston County RMC Office.

TMS #325-15-00-064

TOGETHER with all right, title and interest of the Grantor herein in and to any docks, wharves, piers, floating docks or pilings located on or extending from the property described above, and any other equipment associated therewith.

Grantee's mailing address: c/o Charles Huff
216 Calhoun Street
Charleston, SC 29401

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned, unto the said presents **SUNSET CAY, LLC,** its successors and assigns forever.

AND I do hereby bind myself and my heirs and assigns, to warrant and forever defend, all and singular, the said Premises unto the presents **SUNSET CAY, LLC,** its successors and assigns, against my heirs and assigns, and all persons whomsoever lawfully claiming, or to claim the same or any part thereof.

WITNESS my Hand and Seal this 25th day of September in the year of our Lord two thousand one and in the two hundred and twenty-sixth year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Daniel G. O'Rourk

STATE OF SOUTH CAROLINA)
) ACKNOWLEDGEMENT
COUNTY OF CHARLESTON)

The foregoing instrument was acknowledged before me this 25th day of September, 2001 by Daniel G. O'Rourk.

Notary Public for South Carolina
My Commission Expires: 10/12/10

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

AFFIDAVIT

BKE 383PG681

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this Affidavit and I understand such information.

2. The property is being transferred BY Daniel G. O'Rourk TO Sunset Cay, LLC ON September 25, 2001.

3. Check on of the following: The DEED is

(a) x subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.

(b)___ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as distribution to a trust beneficiary.

(c)___ EXEMPT from the deed recording fee because _____ .

4. Check one of the following if either item 3(a) or item 3(b) above has been checked.

(a) x The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of $ 2,000,000.00

(b)___The fee is computed on the fair market value of the realty which is $_____.

(c)___The fee is computed on the fair market value of the realty as established for property tax purposes which is $_____.

5. Check YES_____ or NO x___ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "YES", the amount of the outstanding balance of this lien or encumbrance is $_____.

6. The DEED Recording Fee is computed as follows:

(a)$2,000,000.00 the amount listed in item 4 above.

(b) 0.00 the amount listed in item 5 above (if no amount, place zero).

(c)$2,000,000.00 Subtract Line 6(b) from Line 6(a) and place the result.

7. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: legal representative

8. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

Grantor, Grantee or Legal Representative
connected with this transaction
David M. Swanson
Print or Type Name Here

Sworn to before me this 25
day of September, 2001

Notary Public for South Carolina
My Commission Expires: 2/20/2008

BE 383PG682

RECORDER'S PAGE
This page MUST remain with the original document.

Recording Fee 11.00

State Fee 5200.00

County Fee 2200.00

Postage

TOTAL 7411.00

A

HAYNSWORTH SINKLER BOYD, P.A.
P.O. BOX 340
CHARLESTON, SC 29402

RECEIVED FROM RMC
SEP 28 2001
PEGGY A. MOSELEY
CHARLESTON COUNTY AUDITOR

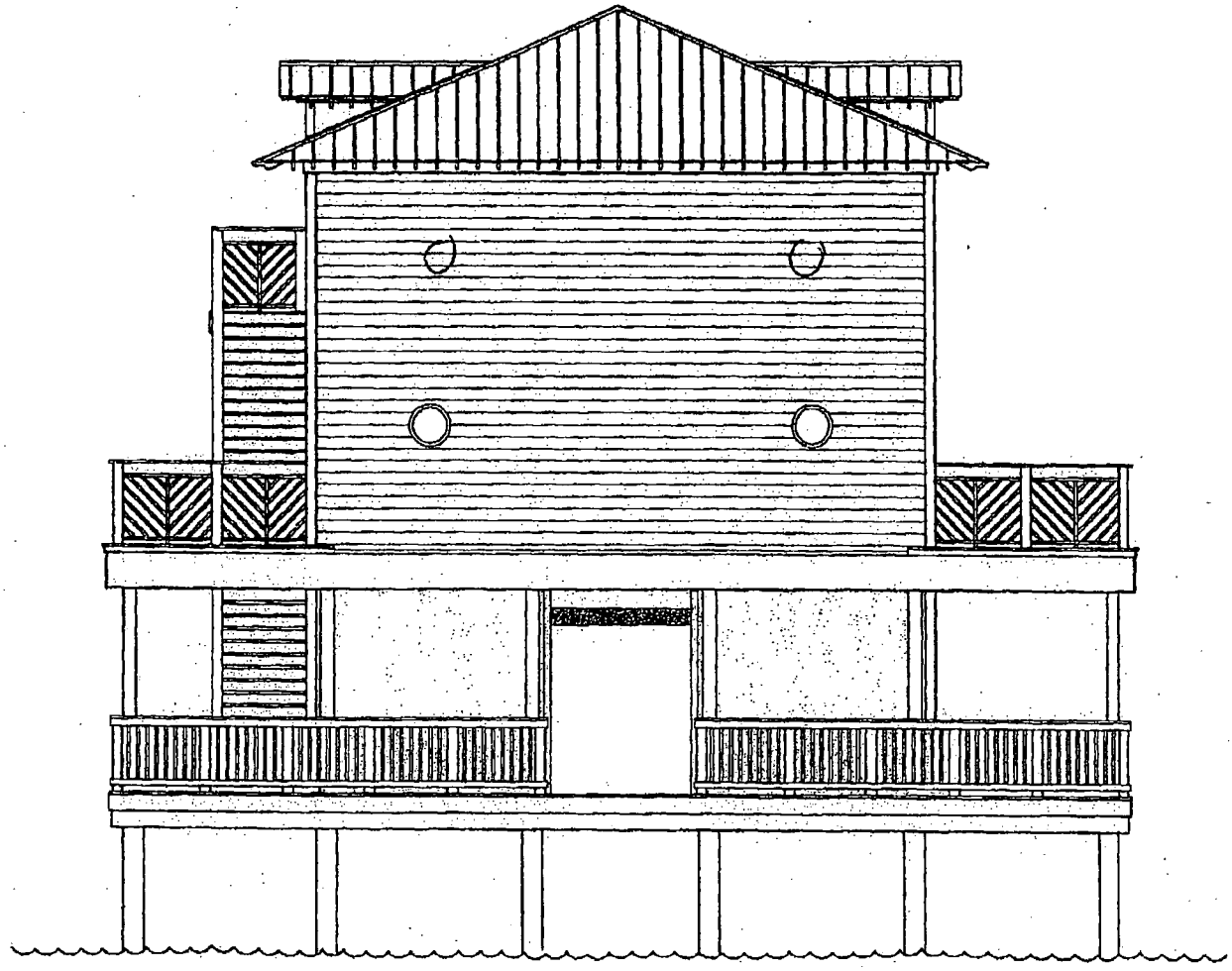
FIELD VERIFIED
ASSR. LMCC
DTD 9-28-01

FILED
E 383-677
2001 SEP 26 AM 10:21
CHARLIE LYBRAND
REGISTER
CHARLESTON COUNTY SC

(843) 958-4800 2 Courthouse Square Charleston, SC 29401

Exhibit 3.

As-built Plans



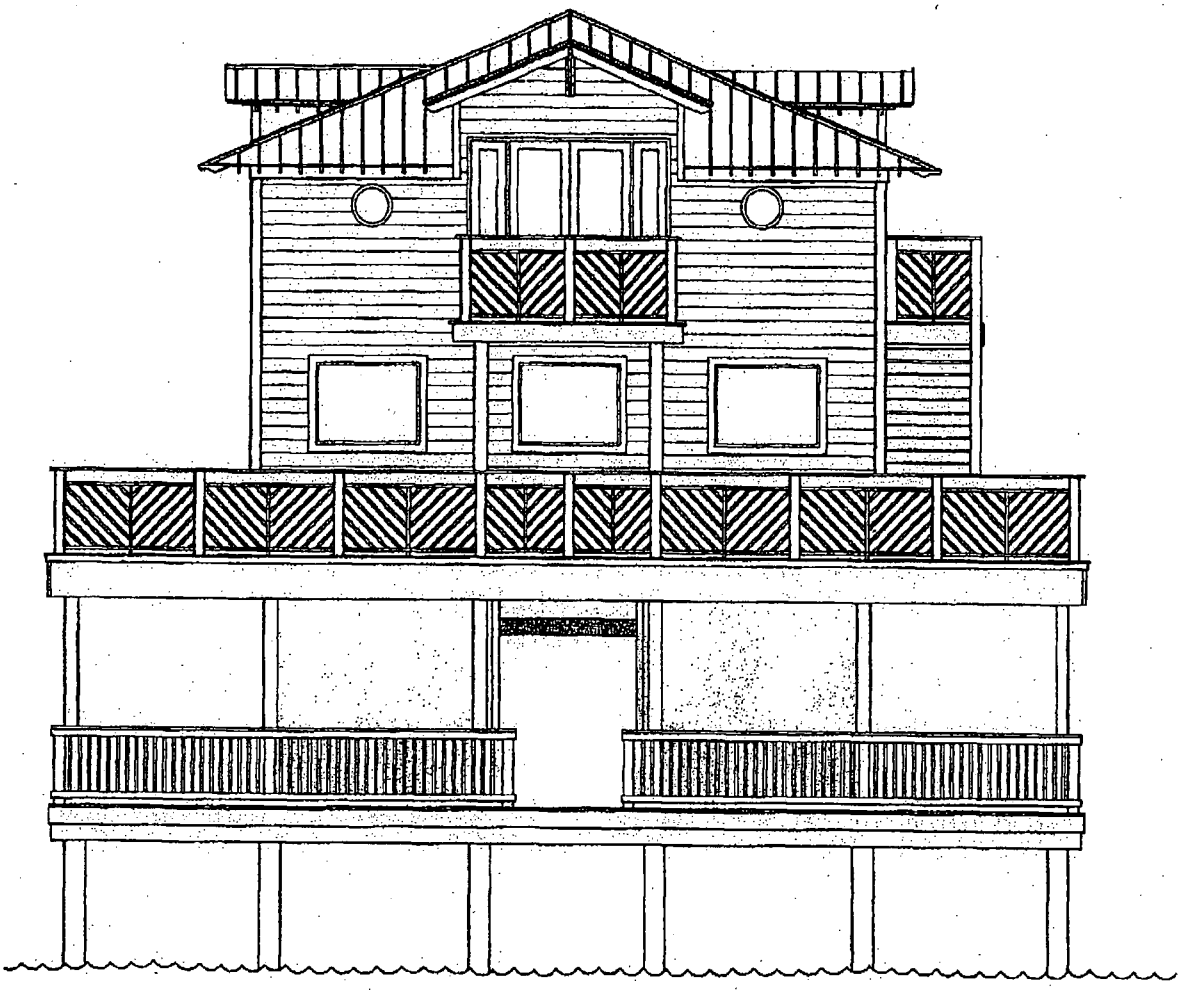
:: EAST ELEVATION (shore view)

Sunset Cay

West 9th Street Extension

City of Folly Beach :: Charleston County, SC

Commercial Unit & Restroom Facility
Sunset Cay Marina



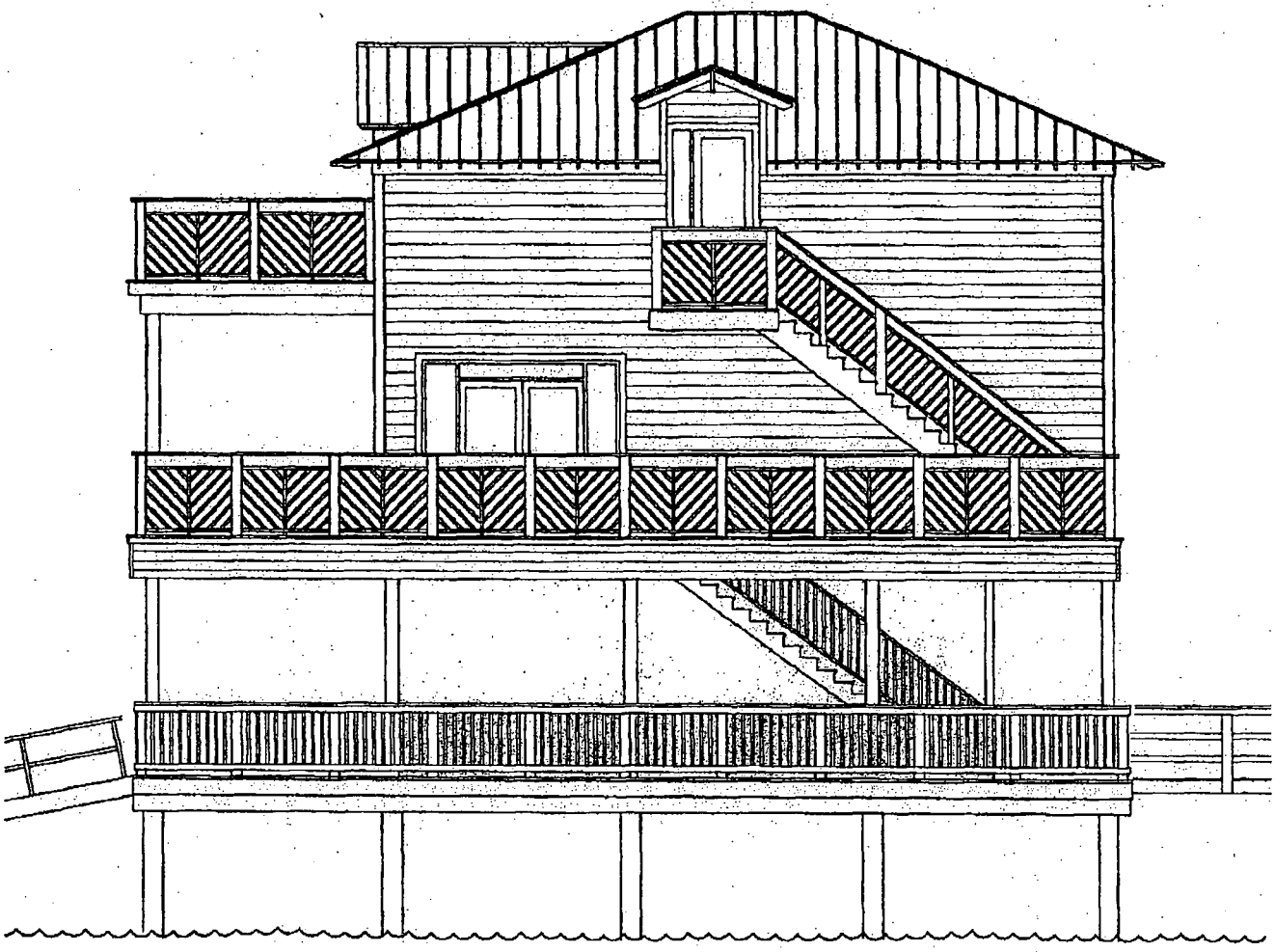
:: WEST ELEVATION (river view)

Sunset Cay

West 9th Street Extension

City of Folly Beach :: Charleston County, SC

Commercial Unit & Restroom Facility
Sunset Cay Marina



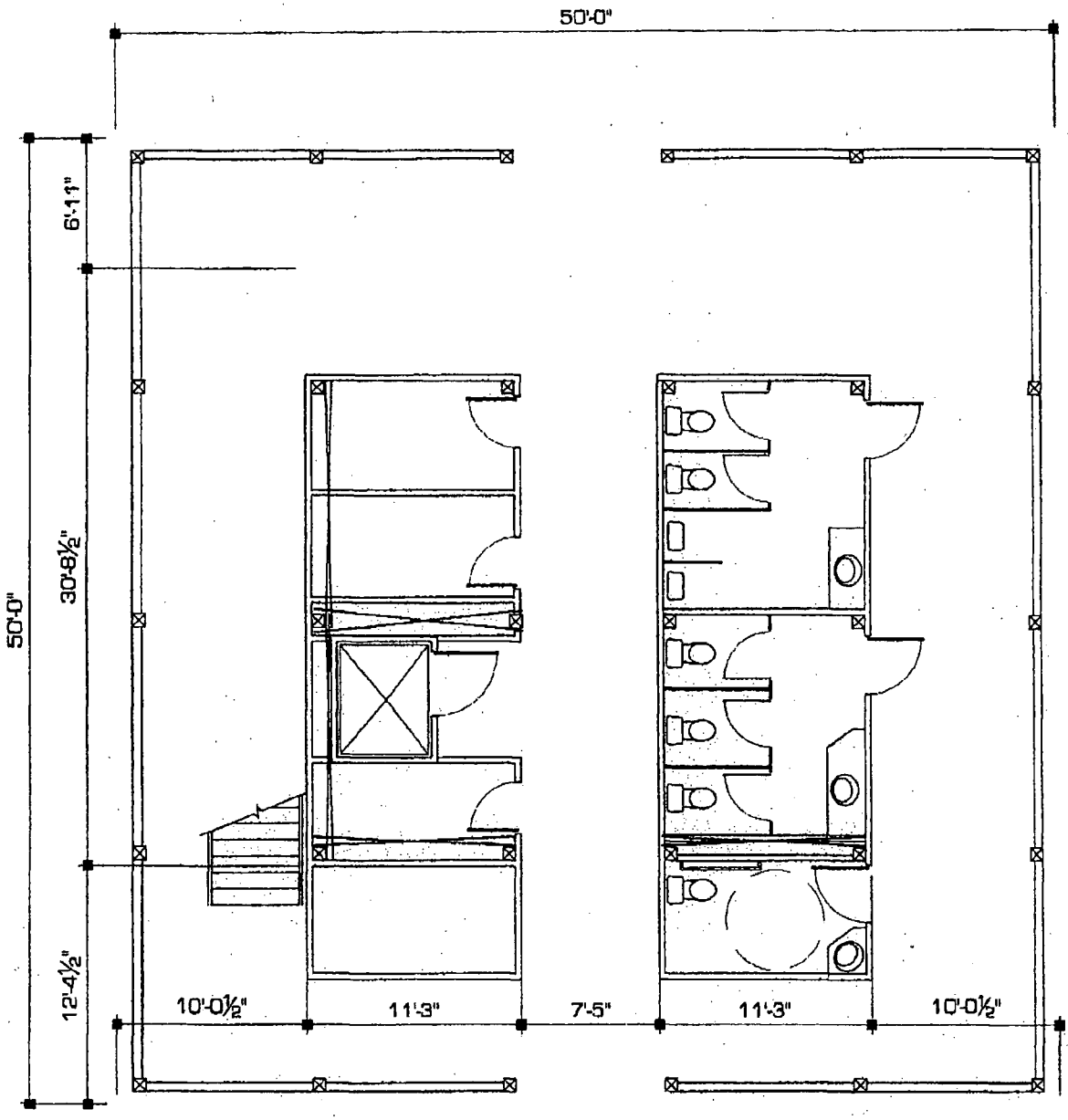
:: SOUTH ELEVATION

Sunset Cay

West 9th Street Extension

City of Folly Beach :: Charleston County, SC

Commercial Unit & Restroom Facility
Sunset Cay Marina



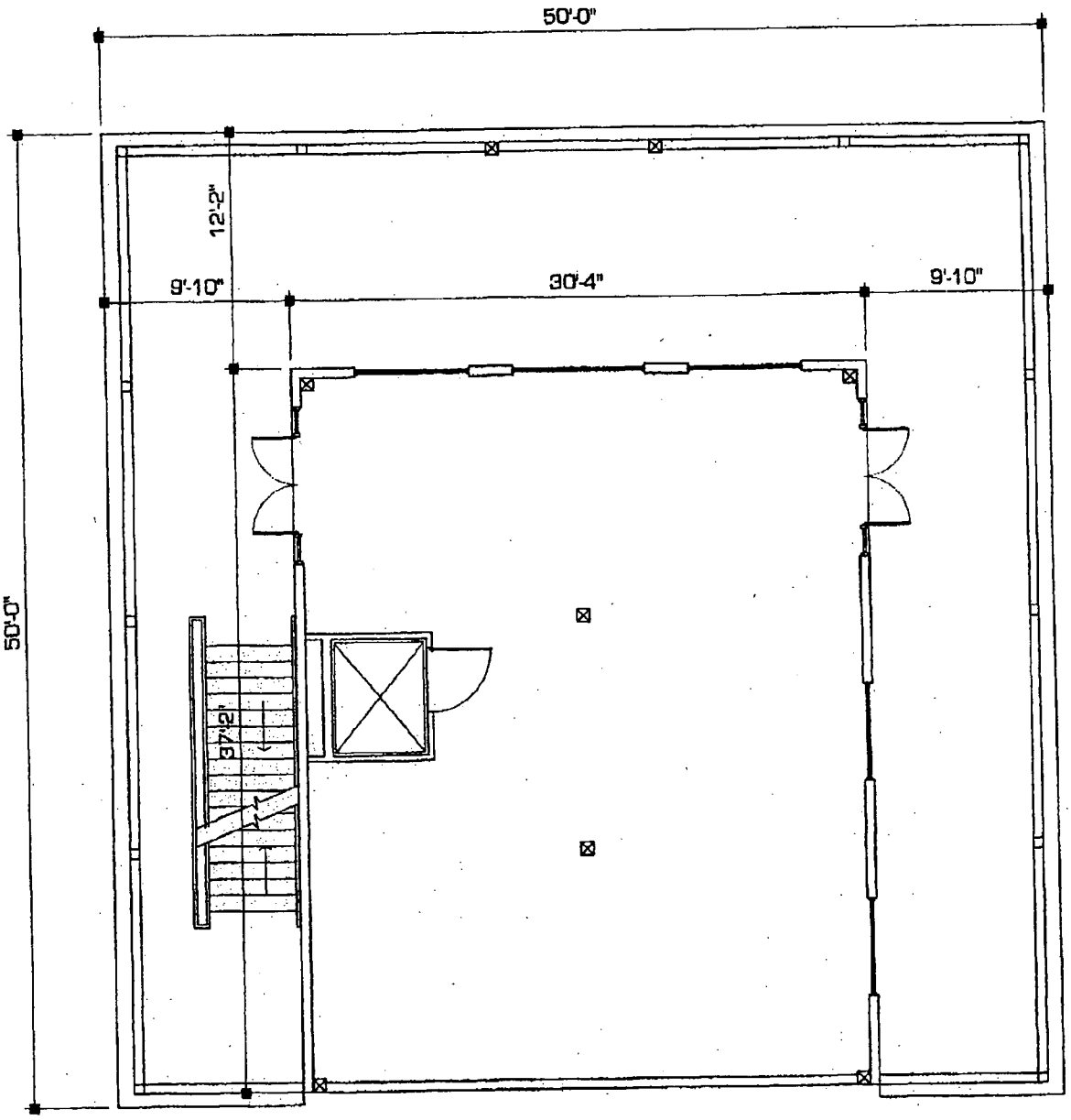
1st Floor Plan

Sunset Cay

West 9th Street Extension

City of Folly Beach :: Charleston County, SC

Commercial Unit & Restroom Facility
Sunset Cay Marina



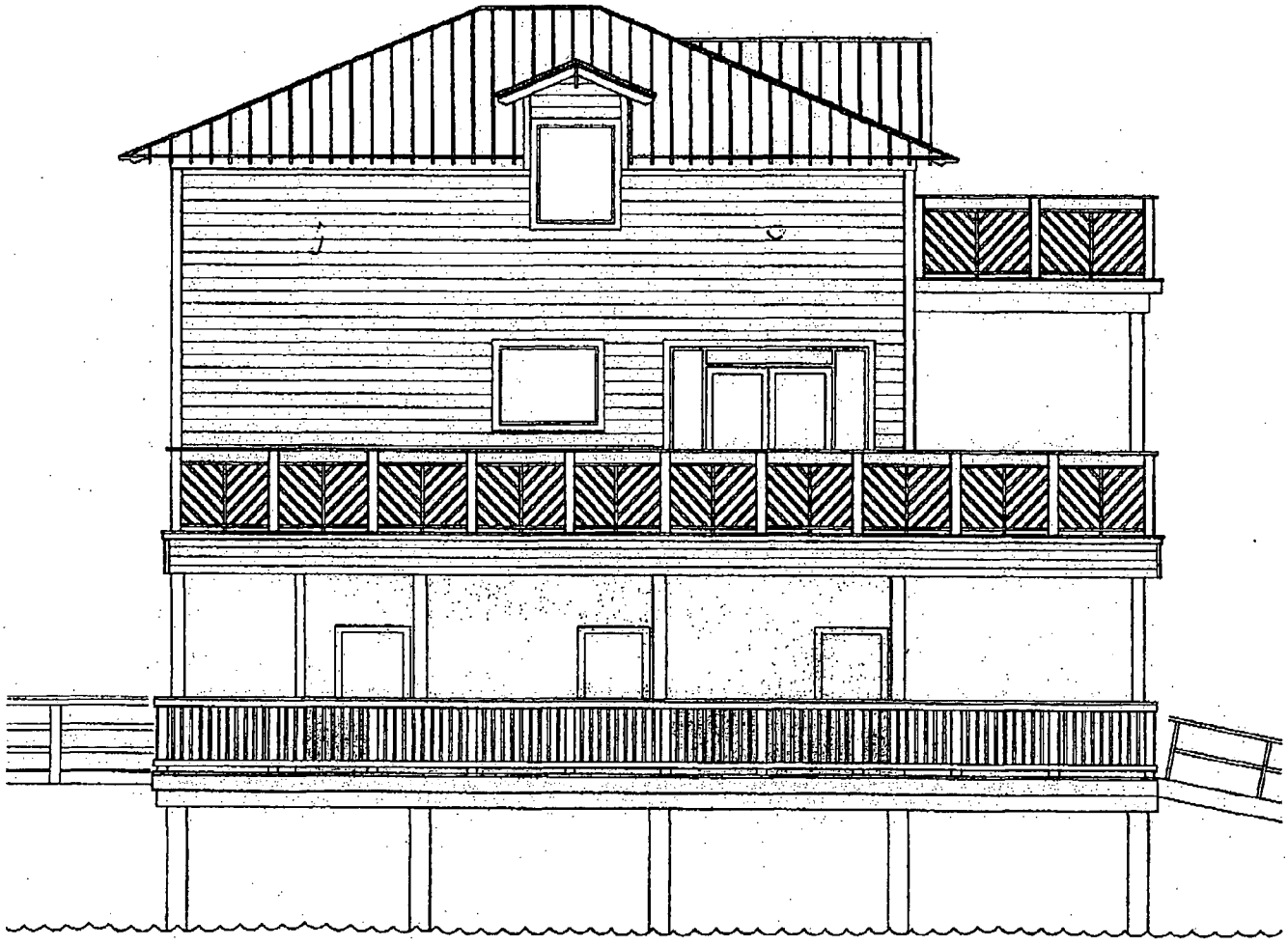
2nd Floor Plan

Sunset Cay

West 9th Street Extension

City of Folly Beach :: Charleston County, SC

Commercial Unit & Restroom Facility
Sunset Cay Marina



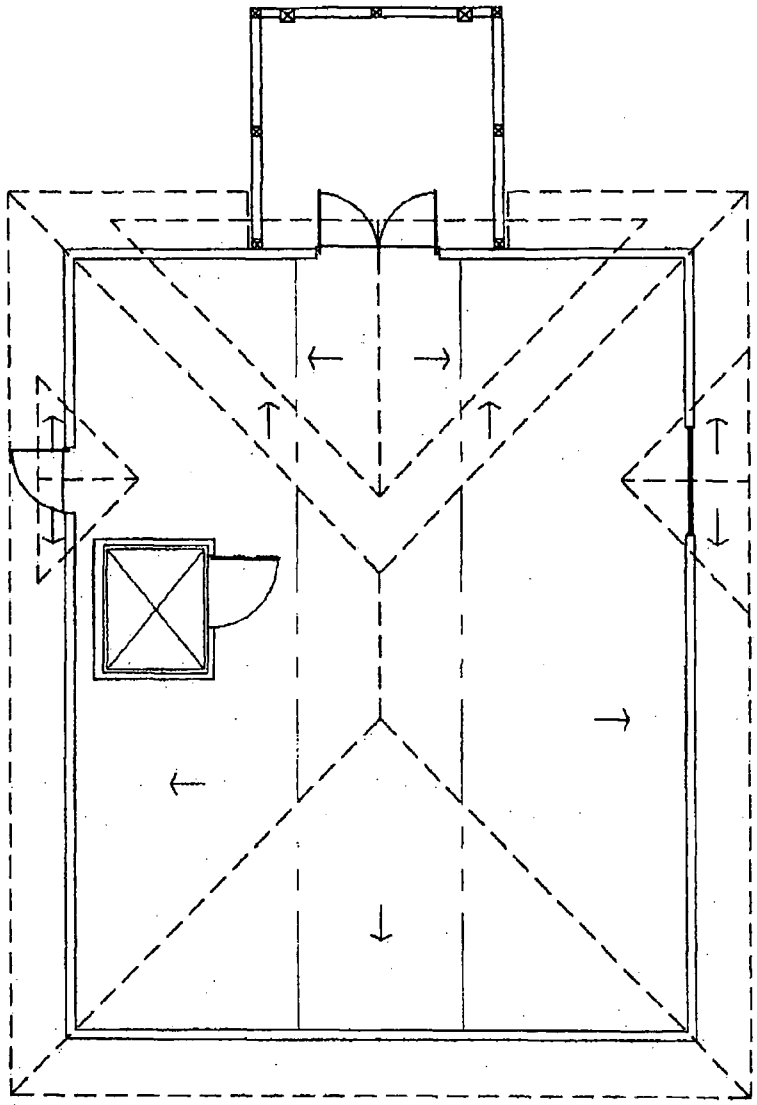
:: North Elevation

Sunset Cay

West 9th Street Extension

City of Folly Beach :: Charleston County, SC

Commercial Unit & Restroom Facility
Sunset Cay Marina



Loft Plan

Sunset Cay

West 9th Street Extension

City of Folly Beach :: Charleston County, SC

Commercial Unit & Restroom Facility
Sunset Cay Marina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Sunset Cay, LLC, Petitioner, vs. South Carolina Department of Health and Environmental Control, Respondent.	Docket No. 15-ALJ-07-0579-CC AFFIDAVIT OF ADAM PAGE

My name is Adam Page and I am an Enforcement Project Manager at SCDHEC-OCRM. Specifically, I am the Enforcement Project Manager for the enforcement action associated with the matter currently before this Court. I have been employed with OCRM for almost five years.

In response to Mr. Butch Clark's November 17, 2016 Affidavit, I offer the following:

On October 26, 2015, I mailed the Department Notice of Violation and Admission Letter (NOV/AL), including proposed Findings of Fact, via certified mail to Sunset Cay, the Social Club, the Council of Co-owners and Mr. Clark. An enforcement conference was scheduled for November 18, 2015 to allow the parties to discuss the alleged violations which were discovered by Department staff. The purpose of this conference is to provide Sunset Cay with an opportunity to present any extenuating information which may mitigate the Department's findings.

On November 18, 2015, an enforcement conference was held at the Department's office in Charleston. Bradley D. Churdar (Department counsel) and I were in attendance representing the Department. Also in attendance were Edward Clark, John Oliver, Bill Oglesby, Thomas Rose, counsel for Art Barber, John Romanosky, counsel for Mr. Clark, Tommy Goldstein,

counsel for Sunset Cay, LLC, and Ian O'Shea, counsel for Mr. Oliver. I confirmed that each party previously received a copy of the October 26, 2015 NOV/AL. At the enforcement conference, I read through the proposed Findings of Fact. I also stated that the additional proposed uses submitted to the Department did not satisfy the regulatory definition of water-dependency. I asked Sunset Cay why there were drink mixers and other items indicative of beverage service at the Site. Mr. O'Shea stated that these items were left over from the previous occupant. I explained the critical area violations in detail, including the unauthorized eleven floating boat storage structures and the unauthorized construction of the third floor on the commercial building; the nonwater-dependent facility on the third floor; and the operation of a facility providing beverage service on the second floor. I explained the administrative enforcement process as well as the assessment of civil penalties. I also mentioned the possibility of resolving the violations at the site via a consent order. Contrary to paragraph 18 of Mr. Clark's Affidavit, I did not tell him and the other attendees that I was "uninformed about the history of the marina, [or] how long it had been operating ...", nor did I tell him and the other attendees that I "had not researched the file and w[as] not sure what [Mr. Clark] was or was not permitted for." I simply stated that the Department would review the information presented during the conference and consider it in deciding how to proceed with this enforcement action. But I reiterated to Mr. Clark and the other attendees that the Department's position is still reflected in the violations listed in the NOV/AL. Contrary to the impression Mr. Clark had when he left that meeting (see paragraph 19 of his Affidavit), I did not tell him or the other attendees that the "'cease and desist' letter had been resolved."

In paragraph 17 of Mr. Clark's Affidavit he stated that "[a]t that meeting we all agreed that the pending Declaration I filed on August 28, 2015, would resolve the issues, and once the

Department spoke on the definition of water dependent uses for Unit 301, we would amend the permit and transfer ownership of the marina to the Council of Co-Owners." The Department made no such agreement to "amend the permit and transfer ownership to the Council of Co-Owners."

Finally, in paragraph 22 of Mr. Clark's Affidavit, he states that he has "submitted two applications for permit amendments since June of 2015, which the Department refuses to act on, by refusing to define water dependent are allowed [sic], which is what prompted my application for Declaration in August, 2015. There is one pending now that the Department refuses to act on." Contrary to Mr. Clark's impression, the Department is not *refusing* to act. Rather, S.C. Code Ann. Regs. § 30-4(I)(3) prohibits the Department from considering an after-the-fact permit application when unresolved violations exist.[1]

FURTHER, THE AFFIANT saith not.

ADAM PAGE

SWORN TO AND SUBSCRIBED before me this
13th day of December, 2016.

Notary Public for South Carolina

My Commission Expires: April 12, 2026

[1] S.C. Code Ann. Regs. § 30-4(I)(3) states that "[t]he staff does not have authority to consider an after-the-fact application unless (1) All fines are paid before application; (2) The permit would legitimize an activity that in the opinion of the Department appears to be a routine permitting matter that would meet all rules and regulations; (3) *Any portion of the activity or structure that is in violation of the Act or rules and regulations is corrected prior to the application*; [and] (4) An after-the-fact application cannot be made until conclusion of the administrative appeal, if taken." (Emphasis added).

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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JAN 30 2017
SC Court of Appeals

APPEAL FROM THE ADMINSTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 15-ALJ-07-0579-CC

Sunset Cay, L.L.C. Appellant,

COPY

v.

South Carolina Department of Health and Environmental Control, Respondent.

NOTICE OF APPEAL

Sunset Cay, L.L.C. appeals the decisions of the Honorable John D. McLeod, dated January 4, 2017 and October 17, 2016. Appellant received the Final Order dated January 4, 2017 on January 4, 2017.

January 23, 2017

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FILED
FEB 02 2017
SC ADMIN. LAW COURT

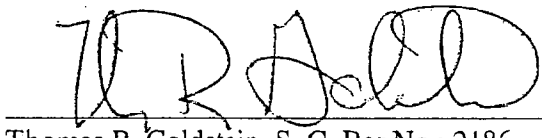
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JAN 30 2017

SC Court of Appeals

CERTIFICATE OF SERVICE

The undersigned hereby certified that a true copy of the foregoing pleading has been served upon, counsel for the Respondent, by mailing a copy properly addressed with sufficient postage affixed thereto this 25th day of January, 2017, to its counsel of record Bradley D. Churdar, General Counsel, S. C. Dept. of Health and Environ. Control, Office of Coast Resources Management, 1362 McMillan Avenue, Suite 400 N. Charleston, S. C. 29405-2047.



Thomas R. Goldstein, S. C. Bar No.: 2186

CERTIFICATE OF SERVICE

COPY

The undersigned hereby certified that a true copy of the foregoing pleading has been served upon, The Clerk of Court for the South Carolina Administrative Law Court, by mailing a copy properly addressed with sufficient postage affixed thereto this 2nd day of February, 2017, to its address: South Carolina Administrative Law Court, 1205 Pendleton Street, Suite 224, Columbia, SC 29201.

Thomas R. Goldstein, S. C. Bar No.: 2186

FILED

FEB 02 2017

SC ADMIN. LAW COURT

1

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 16-ALJ-07-0082-CC

Sunset Cay, LLC,

Petitioner,

v.

South Carolina Department of Health and Environmental Control,

Respondent.

COPY

ADMINISTRATIVE HEARING

****

Monday, June 27, 2016
10:01 a.m. - 11:17 a.m.

The hearing before the Honorable John D. McLeod, was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 27th day of June, 2016 before M. Sean Cary, Court Reporter and Notary Public in and for the State of South Carolina.

CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

APPEARANCES

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EXHIBITS

(No exhibits were marked during this hearing.)

STIPULATIONS

It is stipulated and agreed that this hearing is being taken pursuant to the rules of the Administrative Law Court and the South Carolina Rules of Civil Procedure.

THE COURT: This is docket number 15-ALJ-07-0579-CC. Sunset Cay, LLC, Petitioner, versus South Carolina Department of Health and Environmental Control, Respondent. Gentlemen, I'm going to ask that you both go across the hall to the attorney's room for ten minutes and try to settle this. It seems to me that there's a practical solution to this matter. I've read both your briefs and I hadn't researched it extensively because I avoid that to avoid any pre-conception about the matter until I hear your argument. But the time is what, 10:02, come back at 10:12 and give it a real-feel deliberation.

MR. GOLDSTEIN: Yes, sir.

MR. CHURDAR: Yes, sir. Thank you, Your Honor.

(Off the Record)

THE COURT: All right, this is to both of you. I want some explanation of your opinion about what occurs after the cease and desist letter procedurally, as well as what occurs after a request of declarations. I'm certainly unclear about that and I want to know what -- what you say about it. And you say it's not right for judicial review because the Department has not

determined the final outcome on the cease and desist letter. I want to know what the procedure would be to obtain that. Your motion, Mr. Churdar, you will proceed please.

RESPONDENT ARGUMENT

MR. CHURDAR: Yes, sir. Your Honor, may it please the Court. I think that a little bit of -- of background would be helpful. I have -- have mentioned in my motion the -- what I've described as a fairly extensive history of working with the petitioner on this case to amend it's permit application multiple times over the last twelve years. I am not going to repeat all of those things because it's in my motion, but this is -- that is simply to help the Court assist in putting in context what has transpired. The -- there are essentially two tracks that are involved in this case if you -- maybe that's not the right description, but we've talked about both the two cease and desist directives as well as the declaratory ruling request. The cease and desist directives are part of an enforcement process. It is not the end of the -- end of the road, it is simply something that is issued by the

Department to say, we are aware of this activity happening at Sunset Cay Marina that is beyond the scope of what is involved in the permit and you need to stop.

THE COURT: Where is the cease and desist directive appealed to? To the ...

MR. CHURDAR: Well, I'm not sure if that would be considered to be agency action or not. It may ~~have very well be, but the point~~ is th- -- 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 adminis- -- 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 ---

THE COURT: But what -- wouldn't there have to be some action by accounts to move it up from the cease and desist to the administrative audit, wouldn't there have to be an appeal step in that?

MR. CHURDAR: Well, I mean -- this is -- I'm not sure if I understand. This is not a -- 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 their permit in accordance with the parameter set in the permit.

THE COURT: But if they don't agree with it, what do they do?

MR. CHURDAR: Well, then the process occurs where the Department would go from a -- at some point from compliance and assistance in to an enforcement process. And eventually, if there wasn't agreement, that would culminate in an Administrative Order being issued by the Department and ---

THE COURT: Well you're talking about an agreement, but I'm talking about a hostile order.

MR. CHURDAR: Right. If there's no agreement -- in other words, after the cease and desist directive is issued and there is no agreement -- in other words, Sunset Cay says no, we're not going to -- we're not going to do what you're telling us to do, we don't believe that

the -- that the permit requires that. Then it goes to an Administrative Order from the Department -- they're saying you do this, and at that point the -- under 44-160 and 123 you know 380 as far as exhausting administrative remedies, that's a trigger for Sunset Cay to file a request for final review conference by the DHEC board in order to exhaust their administrative remedies. And wha- -- my point with regard to the cease and desist directives is that they have not exhausted their administrative remedies. I mean the -- the staff decision under 44-160(E)(2), staff decision becomes a final agency decision fifteen days after notice of the staff decision has been mailed to the applicant unless, a written request for final review accompanied by a filing fee is filed with the Department by the applicant permitting licensee or affected person. So if -- I don't know if a cease and desist directive -- because it's -- I -- in talking to Mr. Goldstein I described it as -- it's like, a cake is in -- in the middle of being baked and you know he's ch- -- he is challenging something that's in the middle of

the process. I mean it is possible based on the enforcement and compliance process that the Department could come together and end up not having an Administrative Order. But my point is, if that's considered a staff decision -- if the to cease and desist directives are considered a staff decision then that clock started under 44-160 when it was -- when it was mailed, he had fifteen days to file an RFR request for final review to the board and if he doesn't then what the -- what this Court has jurisdiction over is only what he did file, a timely request for final review to the -- to the DHEC board for. And what he did file a request for a final review conference to the DHEC board in a timely manner was that apartments determination about his -- about interpreting the water dependancy issue. In other words, what can or cannot be done -- what activities can or cannot take place at the marina based on the Department's interpretation of water dependancy. He did challenge that in a timely manner, I'm -- that's why I filed a motion for partial dismissal. I don't think that there is any problem with this Court

adjudicating that issue. And that issue being ---

THE COURT: The water dependancy issue.

MR. CHURDAR: The Department's response, did we get it wrong or right on interpreting what it -- how the water dependancy regulation should be applied. That, I believe, is properly before this Court -- and because he filed that in a timely manner. He has never filed a request for a final review conference for either one of those cease and desist directives. So to file an RF- ---

THE COURT: And your position is it's too late for him to do so now.

MR. CHURDAR: Well, it's too late, but the -- but the -- it, you know, less the Court feel like that's inequitable and I don't know if that's where Your Honor leans or not, but I mean the enforcement and compliance process is -- well it's not completed right now it's just on hold pending on you know, what -- getting clarification from the Court on the cease and desist issues, on the cease and desist letters. But what I'm saying is, once that comes to completion, and let's assume just for the sake

of answering your question that it results in an Administrative Order being issued by the Department, the clock under 44-160(E)(2) starts. So, what has gone on ---

THE COURT: And that's a fifteen day trial.

MR. CHURDAR: Yes, sir. So -- so you know he could challenge or I mean the Sunset Cay could challenge the Administrative Order before the DHEC board and the issues that are involved in the compliance and enforcement process could be preserved. But what I'm saying is at this point, I think he jumped the gun. And he jumped the gun by filing the request for contested case to include to cease and desist directives that the Court simply doesn't have jurisdiction over cause he never filed and RFR on either one those.

THE COURT: Well just one brief comment and I'll let you return to your argument.

MR. CHURDAR: Yes, sir.

THE COURT: I dis- -- dislike slamming the door on all this, but anyway proceed. I know I got you off track, to answer some of my questions, but ---

MR. CHURDAR: Well ---

THE COURT: Proceed with your argument.

MR. CHURDAR: --- and Your Honor, I would say I don't believe that the door is being slammed shut on Mr. Goldstein or Sunset Cay. The Court -- they can hear, that -- this Court can hear if they so choose to challenge an Administrative Order. What's involved in the cease and desist directives would be encompassed by the Administrative Order. So I don't believe that the door is being shut. I'm just saying when -- when you jump in -- when he has jumped in and challenged the to cease and desist directives -- I'm not offering the Court my opinion about whether that's a staff decision or not. But I'm just saying that if the Court finds that it is -- well then, the fifteen day clock started back in March of 2015 on the first one and it expired fifteen days later. And then the clock on the second cease and desist directive started when that was issued in October and it stopped fifteen days later. Sunset Cay did -- never filed a request for final review on either one. And so -- so they have not exhausted their administrative remedies, they ---

THE COURT: But they -- you've answered one question -- the next step after the cease and desist was a request for final review.

MR. CHURDAR: Yes, sir.

THE COURT: Is that correct?

MR. CHURDAR: Yes, sir.

THE COURT: Okay.

MR. CHURDAR: Wha- -- I'm sorry, say your question again.

THE COURT: In sequential order, the next step after the cease and desist directive is a request for final review.

MR. CHURDAR: Well I'm not so sure that a cease and desist directive is that -- is the kind of staff decision or agency action that is -- that is contemplated. I"m not -- I'm not saying it's not, but to answer your question, yes, sir. The s- -- the next step if it is considered an agency action that's appealable would be to file the request for final review conference. And I only s- -- I only say that about the cease and desist because it -- it's not the end of the road, it's not the end of the process, the Administrative Order is. It's you know -- I suppose it's like challenging a

coastal zone consistency certification decision before the -- it's accompanying like a 401 or something like that. It's -- it would be the equivalent of challenging that before the 401 is even issued. It's -- you understand what I'm saying, so -- but my point is I don't believe that this jurisdiction of this Court has been evoked on the to cease and desist directives. Now, to answer your second question, what occurs after the declaratory ruling, that is -- I mean that would be up to Your Honor as to how the mechanics of it, but essentially you would be telling OCRM, yes, you have applied the water dependancy regulation properly in which case that would be the end of that unless you know, Mr. Goldstein appeared that on behalf of Sunset Cay or if you said no, you didn't, I would imagine that the Court might remand it back to staff to make -- to you know -- if, well --there needs to be a permit application upon which the Court could apply -- excuse me, the Department could apply you Honor's order. But assuming that's the case and based on what Your Honor orders, I would imagine that what would happen is, is we would

have a an application from Sunset Cay that would pretty much pair it. What your final order says, I find that these things you know, the Department has gotten wrong the -- the water dependancy issue and these things and then an application would apply and we would have guidance from the Court saying no, you got it wrong -- if the Court ruled that way, but otherwise, if the -- if Your Honor rules on the declaratory ruling response that you've applied the law correctly, then it's up to Mr. Goldstein as to what he would do with that, appealing it or just letting that lie. So that -- does that answer your questions?

THE COURT: Well, I'm still in a little bit of a haze but proceed with the argument. I'll sift through all this later.

MR. CHURDAR: Okay, Your Honor. Well I believe that I have -- my first argument was that the petitioner has failed to properly invoke this Court's jurisdiction regarding the to cease and desist directives. I think I've covered that ground pretty well just in answering to your questions that fee- shifting statutes the -- Mr. Goldstein has filed the request for

attorney's fees both under Federal and State law and I mentioned the Alewine final order from Judge Anderson when this issue of -- under 15-77-300 has been brought up in the past, and I believe that's instructive, you know, he has -- his analysis was that that's not the rule three of the South Carolina Rules of Civil Procedure defines or provides the parameters for what a civil action is and because it's commenced by summons and complaint, Judge Anderson's conclusion and the Alewine final order was a request for contested case is not a summons and complaint. These are two different animals so this is not a civil action for purposes of the fee-shifting statute and the request for fees under 42-USC-1988 I've provided the language, but that is -- contemplates awarding attorney's fees for civil rights action and while Mr. Goldstein said you know, we don't need to get to these issues until whether -- until there's a determination that Sunset Cay has prevailed or not generally, I think is true when you've got a -- you're invoking a statute that actually gives the Court jurisdiction to determine that I

would concur with him, but my point is neither of these statutes are invoking this Court's jurisdiction to award attorney's fees. If, according to Judge Anderson's interpretation, this isn't a civil action under rule three then 15-77-300 wouldn't apply and it certainly is not -- there's no civil right that is being invoked under 42-USC-1988 that would make that statute give this Court's jurisdiction to award attorney's fees under either one of those. The thing that he -- that we have concurred on is that this Court -- well I'm not sure if we can-- -- we've concurred on it but Mr. Goldstein is -- has agreed to withdraw his request for damages. I would -- I would -- I'm grateful for that, I believe the Court doesn't have jurisdiction to award damages in front of the administrative -- in the administrative law Court but I won't make that argument because he's agreed to withdraw that. And the final thing is that I have mentioned in my petit- -- in my request for a partial dismissal is that I -- the water dependancy issue is not right for adjudication because he has -- or I shouldn't say he, but Sunset Cay has filed

seven requests to amend their permit. And the Department has amended that permit for this marina sever- -- seven different times. I mean that's the process that they've gone through. What we have here is Sunset Cay is asking this Court to allow them to amend the -- to use those -- to use the marina for those uses without the -- applying for it. I mean in other words, I think the -- I think that before the -- the issue that would be covered by the adjudication of the department's declaratory ruling response would give the guidance if -- if the -- Your Honor were to say, OCRM you got it wrong, that would give the guidance for the Department to make a permitting decision but the permit application has to be in front of the Department before -- yes, sir.

THE COURT: Say you got it wrong by failing to give the declaration?

MR. CHURDAR: Well -- well I mean I think what the -- I mean the declaratory ruling request challenge is sort of an unusual one in the sense that it's not someth- -- I mean typically it's tied to a particular action and not you

know a -- an interpretation of a regulation or statute and so what I envision is that when we come before the Court on that particular issue you would say you know, OCRM you got it right or OCRM you got it wrong. Your interpretation of what water dependancy is and means -- you know got right or wrong, and then that would be you know how it would move forward. Either if you said I'm -- I'm repeating myself but if your -- if the Court concluded that the Department interpreted the regulation correctly then it would just be up to Sunset Cay to seek appellate review. If the Court said you got it wrong then we would -- well, the Department would either have the option obviously of saying we think we did get it right and get appellate review or if the Department you know said ok we choose to not appeal that, then that would become the context in which a permit application decision would be made. So you know this is a -- what I believe is -- is properly before the Court is only the declaratory ruling response challenge. The reason that I have filed this motion is really just to for lack of better way to put it, to

clean up and streamline what I think the Court should be deciding on the merits at the -- at the trial. And also, my intent is to give clarification all -- to both of us. Mr. Goldstein has noticed the deposition of three OCRM staff members that are in the enforcement and compliant section. Those three had nothing to do with drafting the response to the request for declaratory ruling. So, if Your Honor says the cease and desist issues are not before the Court -- the Court didn't have jurisdiction cause you didn't file your RFR in a timely manner, then my hope and desire is that we can -- we can stay focused. I mean that's one of the things is to -- that we can stay focused on why we're in front of the Court and we don't try another case through discovery that really belongs with the challenge that Mr. Goldstein could make in a timely manner when the Administrative Order is issued. Let me see if there's anything else. Your Honor, I believe that I've covered everything.

THE COURT: Thank you. Goldstein.

PETITIONER'S ARGUMENT

MR. GOLDSTEIN: Thank you, Your Honor. May I please

the Court, my name is Tommy Goldstein. I represent the petitioner in this case and I would like to answer Your Honor's questions and simplify this case. This case is very, very simple. The cease and desist letters, completely red-herrings. The have very little relevance to this case, let me tell you why. The cease and desist letter in March and then there was one in October. They both were directed at two topics, and only two topics. One, they told the applicant, the operator, my client, stop using the third floor as an apartment. Stop using the second floor as a restaurant. That's what the cease and desist letters say. In conformity with the -- first of all, the third floor is completely vacant, nothing is happening up there. It's completely vacant, not used by anyone for anything. It's an unused, empty space.

THE COURT: But that's not an issue here.

MR. GOLDSTEIN: It's not a cease and desist because there's -- there's nothing to cease and desist from. It's empty. The case before the Court is -- and this is where we got out ahead of the cease and desist letters, we said -- and by the

way, before I forget, Judge, in conformity with the department's policy, let me tell you, Your Honor, Mr. Churdar and I have open, honest and full conversation. There is no bar to our communication, we communicate with each other very well. If it were up to us, the two of us, we could settle this case in fifteen minutes but I have a client to represent and he's got a staff to represent so that tends to make it a little less manageable hence, that's why we have courts. But we met with the Department on November the 18th. All the parties were there, it was a room full of people. Mr. Churdar and his staff people, and by the way when he says Judge, I don't know why he's taking these people's depositions they're just enforcement officers, they're the witnesses disclosed in this case to us as being their witnesses, that's why I'm deposing them. But we met with them on November the 18th. I was there, my client was there, the counsel of co-owners was there, their lawyer was there, the operator of the ships store was there, their lawyer was there. We had a room full of people. And at that meeting on November 18th -- and this will

come out in testimony if we try this case, it'll come from the sworn testimony from that witness chair or it -- by affidavit, or both. Where we left that meeting, OCRM's answer to us was we're going to research this and get back to you. That's how we left it. Now let me go back to my declaratory -- petition for declaration. My petition for declaration was to avoid all of this controversy. My petition for declaration simply says to the Department as allowed under the regulations, tell us what you will allow us to do on the third floor. It's like this Your Honor, and I'm an English major so I intend to think in metaphors. That may not be a good trait for a lawyer but that's just how my mind works. It's like you went to renew your driver's license and they tell you we can't renew your driver's license and you say why not. Well, because you haven't met the qualifications. Well, what are they? Well, you petition for your renewal and we'll tell you if you got it right or not. Well that's just a ridiculous scenario, but that's the exact scenario that we're faced with in this case.

THE COURT: And that's what you were trying to find

out with your request for declaration.

MR. GOLDSTEIN: Exactly. And that's solved, and if they'll answer that question, everything else evaporates.

THE COURT: Well let's just stop right here just a minute. I know this is irregular, but Mr. Churdar, why didn't the Department answer that question?

MR. CHURDAR: Well, they did. And that's -- this is where the rub is and th- ---

THE COURT: Well, I'd like you to answer and you -- some sort of response was made and what is satisfactory to Mr.

MR. CHURDAR: Well ---

THE COURT: Continue Mr. Goldstein.

MR. GOLDSTEIN: Okay.

MR. CHURDAR: Can I follow up and give you more detail afterwards?

THE COURT: After your rebuttal, yes.

MR. CHURDAR: Yes, sir. Thank you.

MR. GOLDSTEIN: They gave us an answer on October the 12th by Susan -- Susan Breismore.

MR. CHURDAR: Sarah Bazemore.

MR. GOLDSTEIN: Sarah Breismore, stand corrected.

THE COURT: Bazemore, isn't it?

MR. CHURDAR: Yes, sir, correct.

MR. GOLDSTEIN: Bazemore. And that's an ax to our complaint and that's attached to our memo. And that answer is no answer at all. And I will be glad to get it out and it read it to Your Honor, I don't think that's necessary. It's not an answer. If you read her October 12th response she's saying to us, you keep guessing, when you hit the right one we'll tell you. That's what her answer says. Now I -- that sounds a little flippant and again, bad trade in a lawyer to sound flippant, but that's what her answer says. We are lawyers, you're a judge, we deal in words, words have meanings. If you read her October 12th letter it -- when you finish reading it you have no fur- -- you're mind set is not any further along. It's just emptiness. And so I said to the people in Columbia I want you to review this. This is no answer, I want an answer. And the people in Columbia wrote back and said your application for final review by the board is denied. That put the matter before Your Honor. So the matter is properly before you and the answer to that question, what water dependant uses are allowed in the third floor answers every

question and every issue and resolves this case in its entirety. I'll be glad to answer any questions.

THE COURT: No, sir. That was completely lucid.

MR. GOLDSTEIN: Thank you, Your Honor.

MR. CHURDAR: Your Honor, the -- just a couple of responses to Mr. Goldstein. He made mention of the fact that you know he has -- he has -- this is a collateral matter, but I hope to get resolution of the -- these three depositions next week which I'm not asking your -- the Court to do, but Mr. Goldstein said you know these are witnesses that we have put in our own discovery responses, which is true -- what I am hoping is that this Court will find that the cease and desist directives are part of the enforcement process and the Administrative Order and you can challenge that later. If that's what the Court decides, there's no reason for the Department to name Shawn Briggs and Josh Hogan, Adam Page. These are the three witnesses that he wants to depose next week. I mean, in other words as long as that's in play the cease and desist, which I don't believe the Court has jurisdiction over -- well

of course we're going to name the enforcement and compliance staff. I mean those are the people that are doing that, but if the -- if the ---

THE COURT: Well, let me have him depose this.

MR. CHURDAR: Yes, sir.

THE COURT: And just -- I'm going to ask Mr. Goldstein, when you conclude, to answer this. He's told me that cease and desist orders really don't matter, but you say in some way that it does. And Mr. Goldstein, I want you to respond to that in a moment. Now, go ahead.

MR. CHURDAR: You're -- I'm sorry, you're saying that I have said the cease and desist -- you said he ---

THE COURT: Mr. Goldstein says that they are really irrelevant to this matter. You have -- you just told me that they do have some relevance to ...

MR. CHURDAR: Well I believe that they -- I believe that the cease and desist is irrelevant, but until the Court agrees that it's irrelevant and the Court says no, that's not before the Court then I've named the people that's -- that are responsive to his request for contested case.

I mean that ---

THE COURT: Well it seems to me and I may be way off the track here, but if he says they are irrelevant and you say that they are irrelevant, depending what the Court may say about it, it seems like that you are on the same track there.

MR. CHURDAR: Well, if he says they are irrelevant then I guess we would have no problem dismissing the challenges to the to cease and desist directives with prejudice. I mean, I ---

THE COURT: Well, I will give him a chance to respond to ---

MR. CHURDAR: Okay.

THE COURT: Continue with your reply.

MR. CHURDAR: Well I just wanted to clarify that lest it sound like I'm -- I'm being sort of an idiot, you know, naming witnesses and then I'm trying to get them to -- you know, not depose them. The -- I'm just explaining the reason that I named ---

THE COURT: That's -- that's really not before me.

MR. CHURDAR: That's not. That was ---

THE COURT: Let's move on from that.

MR. CHURDAR: Okay. The other -- the other issue that he has -- he has mentioned, and this is what is truly before the Court. The heart of the department's response to the declaratory ruling request on water dependancy. Now Mr. Goldstein has said you read the department's answer and you won't have any clue. Well let me explain that a little bit, and this is really getting more to the merits but I'm addressing it since he mentioned it. South Carolina Regulation 30-(1)(D)(52) which -- this is in the departments's declaratory ruling response defines water dependant as a facility which can demonstrate that dependance on use of or access to coastal waters is essential to the functioning of it's primary activity. And what I have explained to Mr. Goldstein and what has been explained to his client is the legislature did not establish a laundry list of ten -- the following ten items are under you know just inherently water dependant. What they have done is they have tied water dependancy to a decision that is made based on the again, essential to the functioning of it's primary activity. The primary activity of a particular

permitee is defined in their permit application, well ultimately in the permit as well you know, but I mean the Department would permit or not permit them based on what they have applied for. So that defines the world, that defines the scope of what can or cannot be water dependancy. And in this case as a marina, it's fuel sales and dockage. Those are -- those are the two primary activities that have been named as the -- in the permit application. That's primarily what Sunset Cay Marina is going to do, we're going to provide re-fueling for boats and we're going to provide dockage. It is in that world that 30-(1)(D)(52) looks at, not only that regulat- -- I mean not only that permit application itself to define what is the scope of water dependancy, but other regulatory definitions like 30-(12)(E)(3)(B)(10) says one reasonably sized dock masters office may be constructed within the permitted marina, this office will be limited to water dependant uses such as fuel sales. I mean there are some things that also define the scope of water dependancy in addition to the permit application, but my

point is the Department has explained this -- that it's not -- it's not a laundry list of just boom, boom, boom, boom, these ten things are water dependant. It depends on what you have applied to do with -- as your primary activity -- essential to the functioning of its primary activity. So, while the Department in its answer did not make a list of these things or the things that you can do or not do -- that these ten things -- it's just saying the things that you've asked us to do based on what you Sunset Cay have applied for, as we apply the regulations and we look at the essential functioning of the activity you want to do, the things that you're saying you want to do are not water dependant based on that sphere, that world.

THE COURT: But how do you account for -- and I'm not sure you'd be familiar with it but I am. In the Marina at Edisto Beach, they have the ships throw water and then they have the rest of them upstairs.

MR. CHURDAR: Well I don't know when -- you know it's like what I've told Mr. Goldstein, my first question when there is a question about

another marina that appears to be treated differently is, what is the -- when was the marina built and when was the regulation that you think is -- is being misapplied or applied differently down there, when did it go into affect. I mean, I don't -- I don't know the answer ---

THE COURT: I understand.

MR. CHURDAR: I don't know the answer to that.

THE COURT: I understand.

MR. CHURDAR: So -- but I think I've answered everything. I think I'm done.

THE COURT: I'll give you one more chance to answer that, Mr Goldstein.

MR. GOLDSTEIN: Thank you, Your Honor. I'll be very brief, before I get back to the cease and desist your question about other marinas being similarly situated when we try this case, this record is going to be about this thick of other marinas that are being treated in a manner far more fairly than our client, and we're going to explain why our client has been singled out for this harsh treatment. You know, one of my favorite judges I used to love, although he always scared me, made me work hard, was Judge

Bristow. Bristow said, you know, government's got to feed everybody from the same spoon. I always thought that's exactly right. And I'm not going to bore you with the details of how my client has come under this strict scrutiny by OCRM but we're going to have an interesting trial on that issue. But to answer you question, when Ms. Bazemore answered my question, my Petition for Declaration she wrote back, I told you I wasn't going to read it to you now I'm going to read it to you. While an additional ship store office and storage, yacht sales office, commodore meeting room and space for lounges in public waterway events may be, in the broadest sense, generally associated with water, such general association does not satisfy the regulatory standard. Where is this regulatory standard? It's locked away in the consciousness of staff members at OCRM. She says the Department takes the position that your client's additional above-referenced proposed uses are not, and then she highlights, this is her emphasis not mine, absolutely necessary to provide temporary and temporary dock space and fuel sales. Now that's their --

that's the decision we're appealing. That's not a standard. We're a country of laws not a law of men. You don't -- as Judge Bristow you used to say, you got to feed everybody with the same spoon, and that's all we're asking. Now let me answer your question about the cease and desist. This is why it's irrelevant and then I'll be quiet, because I think I'm being repetitive at this point. The cease and desist is a warning. That's what it is; it's a warning: stop doing that. If I'm misbehaving and I get a cease and desist from disciplinary counsel, knock on wood that's never happened, but, you know, if I got a cease and desist letter, disciplinary counsel said to me, what you're doing is bad, stop doing it. I'd say okay, all right, I'm going to stop. They sent a cease and desist letter to my client. They said stop using the third floor as an apartment, stop using the second floor as a restaurant. The third floor has never been an apartment. It's vacant, unoccupied space. The second floor is not a restaurant, it's a properly permitted ship's store. As you just pointed out, you could go to Edisto ro any of

a 100 other marinas in the State of South Carolina and upstairs there is a. quote, restaurant. These restaurants were permitted after 1985. The newest one is Fleet Landing, right in downtown Charleston. I don't make enough money to have lunch at Fleet Landing. I haven't been in there but I bet it's expensive. It just got permitted, it's over the water. They got a after-the-fact permit. Why are they being given a different standard than my client? We're entitled to be treated under the same standard. We're entitled to be fed from the same spoon. So maybe irrelevant is not the right word, maybe the right word is moot, but we're in full compliance with those cease and desist letters. The second floor is not a restaurant, and the third floor is completely vacant. It's not being used as an apartment. Finally, we did meet with them on November 18th on the cease and desist letters, and I can produce six witnesses that say the way we left it with them is they were going to do some research and get back to us. Once again, and I know I'm being repetitive now, the answer to the question in my Petition for a

Declaratory Ruling answers all of these questions. Thank you.

THE COURT: All right. Parting shots.

MR. CHURDAR: Okay. And I will be brief as well Your Honor. Mr. Goldstein read from Ms. Bazemore's declaratory ruling response, and I think one sentence that would help put in context what he just read would be helpful. She says, regulation 30-1(D)(52) requires your client to demonstrate that their proposed uses are essential to providing and temporary and permanent dock space and fuel sales. The dictionary defines essential as absolutely necessary or indispensable, which, as Your Honor knows, if there is not a regulatory definition then you go to the plain meaning of the word. And the Courts often use dictionary definitions to make a decision on how to apply language that is not otherwise defined by statute or regulation; and the word essential is not defined as much. So, since the dictionary defines essential, which is your -- as I mentioned just a moment ago, the water dependancy is defined as a facility which can demonstrate that dependance on use or access to

coastal water is essential to the functioning of its primary activity. So that's what Ms. Base more is doing when she says the dictionary defines essential as absolutely necessary or indispensable. The Department takes the position that your client's additional above-referenced uses are not using that definition, absolutely necessary to provide temporary and permanent dock space. But, Your Honor, this is getting to really the cart before the horse. This is what the trial is supposed to be about. You know, did the Department, in their Declaratory Ruling Response, make the wrong call. I'm not contending that Mr. Goldstein doesn't -- this Court does not have jurisdiction over that challenge. I believe that the Court does. I believe that he made a timely request for final review conference. But the -- two more points very briefly. He said the cease and -- the issues involved in the cease and desist directives are moot, and I would just simply say, Your Honor, if in the process of the enforcement action the Department says okay, that's no longer an issue, then that would not become something

that is the result of the Administrative Order. I mean that would not -- if it's not an issue it's not going to be in the Administrative Order. I'm not saying it's not, I'm just saying if -- if it's -- if something is truly not an issue, the Department's not going to issue an Order saying you need to do such and such. And somebody's saying, well, I'm already doing that, or I've already complied, or whatever. So to the extent that the cease and -- that they are in compliance or not, I can't tell you what the final Administrative Order would be, but my only point is whatever it is, that would be something that would be a challengeable issue if he chose to challenge the Administrative Order. Mr. Goldstein mentioned a November 18th meeting with OCRM ---

THE COURT: An array of interested parties. I remember that.

MR. CHURDAR: Right. And Mr. Page, Mr. Adam Page was there, I was there, Mr. Goldstein was there. November 18th. The cease and desist directive was issued October 26th. 44-160 requi- -- it's a 15 day clock that he has, a very short window, to apply for a request for

final review conference. And my point was, whatever implication he may be making or outright just saying as to we'll get back to you, has no bearing on the 15 days. That had already expired by the time that November 18th meeting had occurred. Just like in March, neither one of those cease and desist directives were -- request for final review conference was not requested in either one. So, hence the no exhaustion of administrative remedies, the invocation of -- of jurisdiction in this Court is improper on those two issues.

THE COURT: I'm going to ask Mr. Goldstein to reply to that 15 day lapse.

MR. GOLDSTEIN: The 15 day -- I have to go back and check my correspondence and see if there was a request from one of the lawyers for a conference. Honestly, I don't remember. I know that we did all get together on November the 18th at OCRM. The council of co-owners was present with counsel. The ship's store was present with counsel. My client was present with me. Mr. Churdar was present with his enforcement people. And we talked about the cease and desist letter. There's no transcript

of that meeting.

THE COURT: I know, but he says the 15 days had already expired by the time of that meeting.

MR. GOLDSTEIN: Oh, I think that's probably true. I think that's absolutely correct.

THE COURT: Well what do you say about whether or not that cut you off from further debate about those?

MR. GOLDSTEIN: Well, there's two reasons why it doesn't cut me off from debate. Because number one, there were only two points in the cease and desist letter, both of which we were in compliance with. That's why there's been no administrative action taken on it. The third floor is completely vacant and has been completely vacant since the certificate of occupancy was issued. Hence, the Petition for Declaration: to ask for permission, what can we use the third floor for. The second item in the cease and desist letter was to stop using the se3cond floor as a restaurant. Now that wasn't directed to my client, that was directed toward the tenant who operates the ship's store. And all that has been resolved, as far asa I know, to OCRM's satisfaction, so.

THE COURT: Okay. I assume you have nothing further?

MR. GOLDSTEIN: No, sir.

THE COURT: All right. Well, I'll take the matter under advisement. We'll go off the record.

(There being nothing further, the hearing concluded at 11:17 a.m.)

CERTIFICATE

This is to certify that the within hearing consisting of forty (40) pages, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on March 15, 2017.

M. Sean Cary
Court Reporter

Notary Public for South Carolina
My Commission Expires: January 29, 2023

15-0579, Sunset Cay (Motion Hearing)

Churdar, Bradley

Tue 12/13/2016 5:15 PM

To:Anthony Goldman <agoldman@scalc.net>; Thomas Goldstein <tgoldstein@COBBLAW.NET>;

2 attachments (674 KB)

2016-12-13 - Adam Page Affidavit.pdf; 2016-09-27 - Email to Tommy Goldstein [follow up to 9-26 conf. call regarding Butch Clark & Jack Walker letters].pdf;

Anthony and Tommy:

In anticipation of the motion hearing tomorrow, attached please find an Affidavit from Adam Page as well as 9/27/16 email correspondence I sent Tommy.

Thanks,
Brad

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From: Anthony Goldman <agoldman@scalc.net>
Sent: Friday, December 9, 2016 1:26 PM
To: Churdar, Bradley; Thomas Goldstein
Subject: 15-0579, Sunset Cay (Notice of Hearing - Motion)

Gentlemen,

For your records, please find attached to this email a copy of the Notice of Motion Hearing that was signed by Judge McLeod,

Have a nice weekend! Hope you two are feeling better!

Anthony R. Goldman, Esquire
Judicial Law Clerk to
The Honorable John D. McLeod
S.C. Administrative Law Court

Any views or opinions expressed in this email are those of the author and do not necessarily represent those of the SC Administrative Law Court.

Sunset Cay - follow up to 9/26 conf. call [re: Butch Clark & Jack Walker letters]

Churdar, Bradley

Tue 9/27/2016 4:24 PM

To:Thomas Goldstein <tgoldstein@COBBLAW.NET>;

1 attachments (73 KB)

2016-07-07 - OCRM's Supplemental Discovery Request.pdf;

Tommy:

As a follow up to our conversation yesterday, I wanted to memorialize my comments to you regarding the September 15, 2016 letter from Butch to Blair and the September 16, 2016 letter from Jack to Blair.

First, since the December 14, 2005 permit amendment, (accepted by Butch on March 1, 2006) authorized/permitted only two floors, the third floor is unpermitted. As such, S.C. Code Ann. Regs. § 30-4(l) applies to the September 15th letter from Butch since this request would be considered an after-the-fact permit application to keep the third floor. This regulation states that

> "staff does not have authority to consider an after-the-fact application unless: (1) all fines are paid before application; (2) the permit would legitimize an activity that in the opinion of the Department appears to be a routine permitting matter that would meet all rules and regulations; (3) any portion of the activity or structure that is in violation of the Act or rules and regulations is corrected prior to the application; (4) an after-the-fact application cannot be made until conclusion of the administrative appeal, if taken."

Regarding your client's after-the-fact permit request to use the third floor (1) as a yacht sales office, (2) for waterway events and (3) as a captain's lounge, these requests are virtually identical to your prior Declaratory Ruling Request for five secondary uses (i.e., [a] Ship's store office and storage; [b] Yacht sales office; [c] Captain and transient lounge; [d] Commodore meeting room; and [e] Public waterway events). If the slight variance in language is intended to signify a request for a different use, please clarify. Otherwise, the Department's determination of non-water-dependency regarding all five of the above-referenced uses is already before the Administrative Law Court. Anthony Goldman told us via email on September 15th that Judge McLeod has asked both of us to "put a hold on your efforts on this case." So I am assuming he (Judge McLeod) is going to either give us a decision on my Motion for Partial Dismissal or other instructions sometime in the near future.

As I mentioned, until your challenge to the Cease and Desist directives before the ALC is resolved, the enforcement action is on hold (i.e., [1] eleven unpermitted floating boat storage structures in and over the coastal waters critical area; [2] construction of the third floor when only two floors were permitted; and [3] beverage service on the second floor). Per S.C. Code Ann. Regs. § 30-4(l)(3), these unresolved violations of the Act must be resolved before an after-the-fact permit application can be considered. Resolution of these violations can occur in the enforcement process by either a Consent Order or an Administrative Order.

One question I would appreciate clarification on is what "other water dependent uses" Butch was referring to in his September 15th letter. As I mentioned at one of the recent depositions you took, if Butch has some uses he has not discussed previously with staff that he believes satisfy the regulatory definition of water dependency (i.e., "can demonstrate that dependence on, use of, or access to coastal waters is essential to the functioning of its primary activity"), I would invite him to share those proposed uses with staff. However, at this point, I'm not sure what "other" uses he was referring to in his letter.

Regarding Butches' desire to "continue the sale of light food and beverages," is this some activity beyond what the Sunset Social Club contemplated in their recent Declaratory Ruling Request? The Department has consistently maintained that the *sale* of self-service, pre-packaged food and the *sale* of self-service, pre-packaged beverages is acceptable. The operation of a bar is considered beverage *service* prohibited by Special Condition # 25 in the permit and would constitute such a change in use as referenced in the Department's September 18, 2009 letter that Butch attached to his letter.

Finally, regarding Jack Walker's request for an after-the-fact permit for the eleven unpermitted floating boat storage structures, the requirements of S.C. Code Ann. Regs. § 30-4(l) would also apply. While such an after-the-fact permit would be considered a "routine permitting matter" per S.C. Code Ann. Regs. § 30-4(l)(2), these unpermitted floating boat storage structures are part of the same enforcement action (unpermitted third floor and beverage service on the second floor) that appears, at this point, to be irresolvable between the parties without litigation. If/when the other two above-referenced enforcement issues can be resolved, then I don't anticipate any issue with an after-the-fact permit for the eleven floating boat storage structures.

As an unrelated matter, on July 7th I sent the attached email asking you to please supplement your March 23, 2016 discovery responses to include the large stack of documents you had with you during the deposition. I mentioned the request for supplemental discovery to you again in an email on August 23rd. I've never gotten the impression that you were refusing to provide these documents, so I'm assuming this is just an oversight because you are busy. I would be grateful if you would either provide those documents or provide a response if you think the documents are not discoverable.

Please feel free to call me if you have any further questions or comments.

Thanks,
Brad

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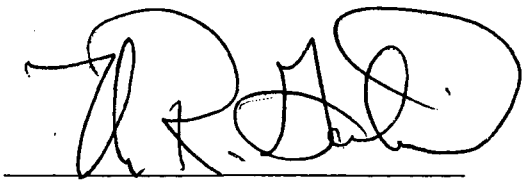
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CERTIFICATE OF COUNSEL

I certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

October 5, 2017



Thomas R. Goldstein, S. C. Bar #2186

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