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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Catherine E. Heigel, Director

Opinion Number: 2020-UP-030
Appellate Tracking 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.

Petition for Rehearing

February 12, 2020

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

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As authorized by Rule 221 of the *South Carolina Appellate Court Rules*, the Appellant respectfully requests that the Court grant oral argument on this case and amend its January 29, 2020, Opinion because the Court overlooks and misapprehends two important, settled principles of law.

1. THE COURT OVERLOOKS THE EFFECT OF ITS OPINION WHICH DENIES TO ANY APPLICANT THE RIGHT OF JUDICIAL REVIEW WHEN THE AGENCY DENIES A PETITION BROUGHT UNDER REGULATION 30-9(D)

The Court correctly cites, but fails to apply, Article I, § 22, S. C. Const. (and the cases thereunder) to the facts of this case and therefore misapplies the law. The Appellant has no quarrel with either the Court's identification of or reliance upon the pertinent cases cited in Opinion 2020-UP-030. (One exception to this statement is the Court's reliance on *Spence v. Spence* for the proposition that Courts should not allow amendments that it knows would be futile. In *Spence*, the Supreme Court affirmed a dismissal with prejudice because the Appellant failed to demonstrate "any factual allegations or a different theory of recovery that may give rise to a cause of action." That is not the case here where the Appellant, if given an opportunity to be heard, can demonstrate without contradiction that the Agency has permitted in other marinas all five of the Appellant's proposed water-dependent uses. See Record on Appeal page 99.) Likewise, the Appellant has no quarrel with the Court's identification of the pertinent facts, but the Court overlooks how the undisputed facts create a paradoxical procedural circularity from which the Appellant cannot escape. Appellant agrees with the Opinion under review 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 added by the Court))." S. C. Constitution Article I, § 22 The Appellant, however, urges the Court to reconsider its conclusion that the Agency's denial of Appellant's Petition

for Declaration is procedurally equivalent to "final"—or at least a violation of judicial economy as discussed more fully below—and urges the Court to shift the emphasis from its analysis of "*finally*" to an emphasis on "*an opportunity to be heard*," two essential procedural elements the Court overlooks. Just like a case in which the doctrine is mootness is up for debate, the Court's January 29th decision ensures that the Court will face the same legal issues between the same parties later.

The Court's error is that by finding the procedural morass caused by the Agency's refusal to address the Petition for Declaration on its merits, the Court requires additional litigation over the same subject matter and condemns Appellant's Petition for Declaration to a recursive cycle from which there is no escape:

- Appellant is out of compliance because it has identified no water dependent use for the third floor.
- The Agency refuses to define or identify any water dependent use, so Appellant proposes uses the Agency has previously approved as water-dependent uses at other marinas.[1]
- The Agency responds that Appellant has not identified a water-dependent use; therefore, Appellant remains out of compliance.
- And so on in an infinite Gödelian loop.[2]

In other words, the Agency blocks the Appellant's compliance by refusing to identify—or at least define—a water-dependent use for the third floor. Instead of answering the question and providing a path to compliance, the Agency will not entertain the question because the Appellant is

[1] The Appellant filed an action against the Agency for causes of action including violation of equal protection because the agency approved all of Appellant's five proposed water-dependent uses at other marinas. Case no: 2017-CP-10-01892 alleges Regulatory Taking, Denial of Equal Protection, Writ of Mandamus, *etc.* This becomes important when the discussion reaches the *Front Royal* case discussed on page 8.

[2] The earliest and funniest Gödelian loop is found in Zeno. Zeno says: "I met a man who said he was from Crete. The man from Crete told me: 'All Cretans are liars.'"

out of compliance! Unless this Court amends its Opinion, Appellant is trapped in a litigation cycle that taxes the financial ability of the Appellant to seek judicial review and requires inordinate amount of judicial time and effort to untangle something that the Agency is required to provide. The only way to escape the perpetual cycle is to challenge the Agency's decision on the Appellant's Petition for Declaration, which this Court is requiring the Appellant to begin again by applying for a permit. The Court overlooks the fact that the Appellant previously did exactly what the Opinion under review requires, but the Agency refuses to act on the permit application. See Record on Appeal page 238: "I have submitted two applications for permit amendments since June of 2015, which the Department refuses to act on, by refusing to define [which] water dependent uses are allowed, which prompted my application for Declaration in August, 2015." Thus, while the Court may be correct that the decision is not "final" in the sense that the Appellant can always apply for a permit modification; nonetheless, the Court overlooks how its decision condemns Appellant to a cycle of administrative futility, a situation created by the Agency's refusal to perform its duty. The Court also overlooks how many persons are adversely affected because the Agency refuses to supply the necessary definitions or objective criteria so that the interested parties can conform to the Agency's rules. This record requires no further development for this Court to conclude that whether the Appellant applies for a permit or for a declaration, the Agency's answer is the same, and this Court should not reward the Agency for failing to discharge its statutory duties.

At no time in this long process has the Appellant been afforded an opportunity to be heard by the Agency on the merits of its Petition or at the Administrative Law Court even though the Agency reached a decision that materially affects the Appellant's right to own and use his property to its highest and best use. When the Agency gave its "keep guessing" answer: "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 Agency reached a decision to restrict the Appellant's use of its property without giving the Appellant an opportunity to be heard. (Record on Appeal page 18, Department's October 12, 2015, ruling on Appellant's Petition for Declaration.) The only time the Agency communicated with the Appellant at the November 18, 2015, meeting, the Agency informed the Appellant it would review its file and either amend or withdraw the notice of enforcement. See Record on Appeal page 225 and 238. The Agency's responsibility to the Appellant is "to promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment. . ." § 48-39-30, S. C. Code, ann. The General Assembly also requires that the Agency not "adopt a rule or regulation or issue any order that is unduly restrictive . . ." The Opinion overlooks the fact that the Agency's rejection of Appellant's five proposed water-dependent uses, all of which are currently being employed in similarly situated marinas (R.O.A. pages 99-122, list of other marinas with approved uses and photos) is a final decision as to **those** five dependent uses and that applying for a permit for any one of them is futile. The Court's January 29th Opinion leaves Appellant with no remedy to address the Agency's rejection of the five proposed uses—other than to apply for a permit and start the entire, identical process over again, and if the Appellant makes a permit application for any of these proposed water-dependent uses, obviously the Agency will deny the application for the same reasons stated in declaring the five proposed uses not "water-dependent." The Court should not require the Appellant to make a futile and burdensome application for permit when the Agency has already decided, without explanation, that the five proposed water-dependent uses are not "water-dependent." If the Appellant were ever afforded an opportunity to be heard, he could make an evidentiary record and prove that the Agency

has approved the same proposed uses as "water-dependent" at other marinas. The photos of them are in the Record on Appeal at pages 101—122, but Appellant failed to persuade anyone to look at them.

The Agency's decision can only be characterized in one way; a refusal to allow the Appellant use of his own property as to the five proposed uses. A deprivation of property, even if it is temporary, is grounds for relief. *Front Royal and Warren County Indus. Park v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998) *Front Royal* is procedurally like this case. The issue there was an application for sewer, and when the Town refused to extend sewer to the plaintiff's industrial park, Judge Ervin, writing for the Court, commented on the plaintiff's inability to get a ruling on the merits and said: "This case has already passed through procedural purgatory and wended its way to procedural hell. Because we believe it would be fruitless and a waste of further judicial resources at this point to send IPC back again to state court to try its hand at a revived Annexation Court pursuant to Virginia Code § 15.1-1047.2, which is the only avenue open now since the other state law remedies have been foreclosed by the law of the case, an effective dismissal-via-abstention now would deprive IPC of its right to a federal forum." Appellant understands this Court's conclusion that the Agency decision is not "final" because Appellant can apply for a permit, but the Administrative Law Court's dismissal is logically equivalent to a "final" answer as to Appellant's five proposed uses because it is unreasonable, and a waste of judicial resources, to expect the Agency's answer will be any different when Appellant applies for a permit. Moreover, the Opinion under review overlooks the fact that the Appellant previously submitted two permit applications, which the Agency refuses to act on until the Appellant comes into compliance, which he cannot do until the Agency informs him which water-dependent uses are available. See Record on Appeal, page 238. The result of Opinion 2020-UP-30 is to bring the same parties before the same court on the same issue at a later date. This is a fact that the Court's opinion overlooks.

The Appellant concedes the point that the Court reaches in finding that the Agency's decision is not a denial of permit, but this record makes clear that the Appellant's application for a permit will meet the same fate as its application for Declaration, and the record shows that the Appellant made two permit applications that the Agency simply refuses to act upon, and thus the Administrative Law Court erred in drawing an artificial distinction between the denial of a permit on one hand and the denial of a Petition for Declaration on the other. The Court's inaction creates the same "procedural hell" described by Judge Ervin in *Front Royal.* The undisputed evidence is that the Agency refuses to act on Appellant's Application for Permit, and this is a fact the Court overlooks. (R.O.A. p. 238) The courts of this state have never required litigants to engage in useless futility as a condition of seeking judicial remedy. Article I, § 22 makes that clear as does the well-developed body of law in South Carolina law on this issue. In fact, the putative failure to apply for a permit was the same argument O.C.R.M.'s predecessor, Coastal Council, made in *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992). There the Agency asserted the same argument here: urging the Court to dismiss the Petitioner's claim as unripe because the General Assembly amended the *Beachfront Management Act* and Lucas had not applied for a permit under the amended act. The South Carolina Supreme Court agreed and dismissed the claim, relying upon the same principles articulated in Opinion 2020-UP-030, in reaching its decision that Appellant's claim is premature and not "final." The United States Supreme Court disagreed and held that Lucas' claim was not only ripe, but also that the Agency's refusal to grant him a permit was a "regulatory" taking. Likewise, the Agency's denial of Appellant's Petition for Declaration is equivalent to a denial of a permit because it rules out five proposed uses without affording the Appellant an opportunity to be heard on the merits. Had the either the Agency or the Administrative Law Court permitted the Appellant to be heard, he would

have demonstrated that he selected five proposed water-dependent uses based on water-dependent uses approved in similarly situated marinas. (See Record on Appeal, pages 101—122.)

Thus, the denial of the Petition for Declaration predicts a denial of a permit. Under *Lucas*, regulations cannot be so extensive to deprive a property owner of reasonable economic use of his or her property, *Lucas v. S. C. Coastal Council* 505 U.S. 1003 (1992), but that is exactly what happened here as to the five proposed water-dependent uses. There is no doubt that the Agency's decision is "final" because it precludes any successful consideration for a permit. This fact is established by the Record on Appeal at page 238, where Appellant's principal provides his sworn testimony:

> I have submitted two applications for permit amendments since June of 2015, which the Department refuses to act on by refusing to define [which] water dependent [uses] 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.

When Appellant found himself unable to use the third floor of a properly permitted building because the Agency refused to identify a water-dependent use, the Appellant invoked the Agency's statutorily provided administrative remedy provided in Regulation 30-9:

> D. Declaratory Rulings: Interested persons may petition to the Department for declaratory rulings. The Department shall rule on each petition, in writing, within 45 days of receipt.

As the record demonstrates, and these facts are not in dispute, once the Agency ruled on Appellant's Petition for Declaration by denying that any of the proposed five water-dependent uses are "water-dependent," the Appellant appealed in the manner proscribed by law. By holding that the Appellant cannot be heard on the merits until the Agency turns down a permit application, the Court errs in the Opinion under review by: (1) overlooking the fact that the Agency has not permitted the Appellant to be heard on his Petition in violation of Article I, § 22, and (2) refuses to act on the Appellant's permit application in violation of the holding of *Lucas*, and thereby denies the Appellant any possibility of judicial review on the Agency's decision on its Declaration. The Court's Opinion

also has the deleterious effect of giving the Agency a pass to ignore citizens' requests in violation of its statutory duties without being subject to judicial review. The Opinion under review creates a super agency whose decisions can never be reviewed because they are never "final." As the Court correctly holds in Opinion Number 2020-UP-030, a property owner may not be deprived of the use of his or her property without the opportunity to be heard and judicial review, but here the Agency deprives the Appellant of both by adopting the expediency of saying its decision is not "final." Translated into plain language, the Agency says to Appellant: "Keep guessing and we will let you know when you land on the right combination of uses." The Court reaches the heart of the case on page 3 where it writes: "Neither the South Carolina Code nor the South Carolina Code of Regulations provide a manner in which an interested party may appeal a declaration issued by DHEC, and Sunset Cay conceded it has not obtained a final decision in a contested case." This is correct only in a hyper-technical, fact-contorting sense, and overlooks the most important point; to wit, that the only reason Sunset Cay has not obtained a final decision is because the Agency refuses to give one. See affidavit of Frances Clark at R.O.A. page 238.

The Court overlooks that its decision leaves the Appellant caught in a recursive loop, a bureaucratic black hole, from which there is no escape. The common parlance for this is a "Catch 22." The Agency refuses to act on the Appellant's permit applications because he has not submitted a water-dependent use, but the Agency refuses to say what a water-dependent use is other than to direct the Appellant to keep guessing. Thus, the Appellant utilized the statutorily provided procedure to break the Agency's circularity by bringing a petition for Declaration as authorized by law. When the Agency denied his Petition for Declaration, the Appellant followed the normal appeal process. As the Court notes, while there may be no specific provision providing for an appeal from an adverse Declaration ruling, there is, as the Court also noted, the South Carolina Constitution's specific

requirement that prohibits Agency decisions without judicial review, so the lack of a clear process must yield to the Constitution's requirements, and this is the significant point of law that the Opinion under review overlooks.

This record demonstrates that the Agency's inaction is a decision that impairs the *"legal rights, duties, or privileges of a party."* (Opinion at page 2, emphasis in Court's Opinion) Therefore, while the Court cites the correct law on the subject of judicial review of administrative decisions, it overlooks the effect of its decision, which deprives the Appellant of the very judicial review the Court identifies will be available just as soon as the Appellant submits an application for permit and is denied, the argument rejected by the U. S. Supreme Court in *Lucas*. However, a permit application is not a precondition to seeking a Declaratory Ruling under Regulation 30-9, and even if it were, Article I, § 22 compels that the Administrative Law Court grant judicial review. Thus, the Opinion should be amended to remand to the Administrative Law Court to decide, one way or another, whether the Agency's refusal to identify which, if any, of the Appellant's five proposed water-dependent uses are allowed or disallowed, and if disallowed, on what objective basis the Agency denies the Appellant such uses.

2. THE COURT OVERLOOKS THE PRACTICAL EFFECT OF ITS DECISION TO DISMISS AN APPEAL OF THE AGENCY'S "CEASE AND DESIST" LETTER

The analysis here is like the analysis in Argument 1; to wit, that while Appellant has no quarrel with the Court's identification and application of pertinent case law, the Court overlooks two important points, one factual and one legal.

The factual issue overlooked by the Court is the timeline. On August 27, 2015, the Appellant filed a Petition for Declaration as authorized by law. (R.O.A. page 22) While that Petition was pending, the Agency sent Appellant a "Notice of Violation, Admission Letter" dated October 26, 2015. (Throughout this case, the parties have been referring to this letter in the vernacular of a "cease

and desist" letter. The notice is a "Notice of Violation, Admission Letter." R.O.A. page 193. This notice schedules an "enforcement conference" on November 18, 2015, and states: "The scheduled enforcement conference will provide [The Sunset Cay Marina Council of Co-Owners] and DHEC the opportunity to discuss the alleged violations.") (R.O.A. page 193) According to the letter, the Agency was summoning the parties to review the allegations:

> 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.
> R.O.A. page 193

The parties all appeared on the date and at the time and place set by the Agency, after which the Agency informed the parties that it was either withdrawing or reviewing the allegations set forth in its October 26, 2015, "Notice of Violation" letter:

> I attended the meeting on November 18, 201[5] in the Office of O.C.R.M. following receipt of the Department's October 26, 2016, "cease and desist" letter.
>
> 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' behalf. John Romansky attended on my behalf. Ian O'Shea attended on behalf of the Ship's Store, the tenant in Unit 201.
>
> 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 any other person's head, but I am confident that everyone at that meeting thought we were there to review the October 26, 2015 "cease and desist letter.[3]
>
> 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.

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[3] That is what the October 26th letter says. R.O.A. page 193. The record is silent as to when Appellant received the letter, but there is no question that Appellant would have timely responded on November 12, 2015 if a response were required. R.O.A. page 220. Since, there is no requirement to appeal an "enforcement conference," it is illogical to determine that an appeal from the ALC was too early because the Agency's decision is not final while simultaneously concluding that an appeal from the "enforcement conference" is too late because it was not final.

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. representative at this meeting admitted that they had not researched the file and were not sure what I was or was not permitted for. They asked us for additional time to go and research their file. An almost exact quote is: "we are going to research our file and get back to you."

R.O.A. page 236-237, Affidavit of Frances E. Clark

See also the affidavit of William Oglesby:

I retired from the United States Army after 24 years of active service with the rank of Colonel, and so I like to think I know something about institutional organizations and their efficient application of regulations. In this case, it seems that O.C.R.M. lacks that efficiency. This case has been going on for years, and O.C.R.M. has done nothing but promise to "look into it" and "get back to us." The owners are being inconvenienced by O.C.R.M.'s inaction because we want the permit transferred unencumbered into the name of the Council of Co-Owners.

R.O.A. page 226, affidavit of William Oglesby

The Appellant understands that the Administrative Law Court dismisses the appeal because the Court views the endeavor to be an exercise in futility. See Opinion under review at page 3: ". . . indicating that *Spence* found 'an appellate court must find the dismissal was without prejudice and remand for the filing of an amended complaint unless the court concludes any amendment would be clearly futile." First, there is no requirement that Appellant appeal from an "enforcement conference," and if it were, that an amendment would be "futile." Second, there is no statute, regulation, or O.C.R.M. policy that requires an appeal. Third, and most important, as the record demonstrates, O.C.R.M. informed the parties that based on the information Appellant and others provided at the November 18th meeting, O.C.R.M. was going to either withdraw the notice or amend it. (R.O.A. pages 226 and 237)

More importantly, however, no amendment to Appellant's pleadings is necessary, and this is where the Court overlooks important, undisputed facts. If this case were an academic exercise analyzing legal principles in a vacuum, then this Court's January 29, 2020, Opinion might be without error in a vacuum and not require rehearing (in this case a "hearing" since the Court decided the case

without oral argument) or reconsideration. However, Appellant is being harmed by the day and deprived of its property rights , and O.C.R.M.'s conduct in this case has been inconsistent at best, bureaucratic bullying at worst. Apart from Appellant's exponentially growing damages, hundreds of members have been significantly harmed by the unsettled nature of the third floor. See R.O.A. page 226: "This case has been going on for years, and O.C.R.M. has done nothing but promised to 'look into it' and 'get back to us.' The owners are being harmed by O.C.R.M.'s inaction because we want the permit transferred unencumbered into the name of the Council of Co-Owners." To put the delay into perspective, Appellant's principal, Butch Clarke, did not survive this case, and his lawyer barely did. The record demonstrates O.C.R.M. has employed every dilatory tactic at its disposal, and the Court's refusal to decide the case on the merits rewards governmental misconduct and prolongs a dispute that should end without continuing litigation. In the course of consuming five years, all of the issues raised by O.C.R.M. in its original October 26, 2015 "Notice of Violation, Admission Letter" have been resolved **except for the water dependent uses of the third floor**. In fairness to all the parties and in the interest of judicial economy, the Court should afford the Appellant an opportunity to have the Department's decision on his water-dependent uses judicially reviewed so he can escape the recursive loop that O.C.R.M. has constructed.

CONCLUSION

In summary, this Record demonstrates that Appellant attempted to bring an end to the recursive paradox O.C.R.M. caused by refusing to define water-dependent use, and while Appellant agrees with this Court that the Agency has not yet denied a permit, the Agency, in discharging the statutory duty quoted above, is required not to employ dilatory tactics to thwart Appellant's right to use its property to its highest and best use by creating an absurd circular test that Appellant can never

escape. The matter was squarely before the Administrative Law Court, and the ALC erred in refusing to take up the question and provide Appellant with a means to obtain a final decision.

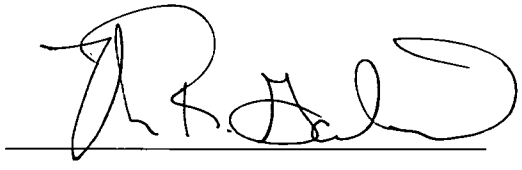
The Opinion under review promotes Appellant's procedural paradox. The Court is, of course, correct that a dismissal in this case does not give rise to a **permanent and total** harm on the Appellant because the Appellant can apply for a permit, which it twice has, and when denied, start the process all over again, but *Lucas* relieves Appellant of this burden. In the meantime, however, the third floor sits vacant only because the Agency will not fulfill its duty. The fact that the Appellant's principal died in the prosecution of this case should serve as a reminder that justice delayed is justice denied. Is it in anyone's best interest that this case makes its way back up the "procedural hell" to reach a "final" resolution? The answer is no because all it does it bring the same issues before the same court, praying for the same answer sought here, and as the well-developed case law holds—even a temporary deprivation of the use of property gives rise to damages. Opinion Number 2020-UP-030 overlooks the fact that O.C.R.M.'s refusal to act on Appellant's permit applications **is** an injury. For over five years, the third floor of the Appellant's marina building has sat vacant for no reason other than officials at O.C.R.M. refuse to act on Appellant's permit amendments, and Appellant has been unable to break through the bureaucratic inertia. This Court would not hesitate to condemn such inaction if it were a refusal to issue a driver's license or a voter registration card even though, under the unamended reasoning in Opinion Number 2020-UP-030, such a person wrongfully denied a license or enrollment through inaction would suffer no injury because she could reapply the next day. And the next day. And the next day. This is exactly what is happening here, and the Appellant is suffering the prolonged death of a thousand delays. In allowing the Administrative Law Court to refuse to take up the merits, this Court overlooks this palpable damage and the fact that the law always provides a remedy for a legally recognized wrong.

Answering such questions is the sole function of the courts: "The province of the Court is, solely, to decide on the rights of individuals, not to inquire how the Executive or Executive officers perform duties in which they have discretion." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) When President Jefferson refused to hand over a commission to Marbury, he brought suit, and the U. S. Supreme Court did not hesitate to protect the rights of the petitioner, who wanted his commission, saying: "But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy." The Appellant did exactly that in this case for reasons articulated by *Marbury*. When O.C.R.M. refused to act on his application for permit amendment, Appellant filed a Petition for Declaration as provided for by law, just like Marbury did when Jefferson's Secretary of State refused to hand over his commission. However, unlike the U. S. Supreme Court, which acted to protect the rights of the individual to his commission over the power of the presidency, this Court's Opinion refuses to "decide on the rights of the [Appellant]" and yields to the "executive's" conduct in which it has discretion, depriving the Appellant of the right to challenge the conduct in violation of Article I, § 22. The U. S. Supreme Court in *Marbury* did not require the petitioner to reapply for his commission because the decision to grant or withhold the commission was not "final." Nothing prevented Marbury from reapplying to the President elect, but the Court did not require that as a condition of petitioner being heard. Likewise, this Court should require the Administrative Law Court to grant Appellant his constitutionally required judicial review and be heard on the merits regarding his Petition for Declaration. This Court's decision to direct the Appellant to start over again jettisons its fundamental responsibility. A failure to protect the rights of the individual against dilatory government conduct fosters not only contempt for government, but also abandons the core responsibility of this Court as laid out in *Marbury v. Madison* and thousands

of cases. "Laws are a dead letter without courts to expound their true meaning and operation." Alexander Hamilton, *The Federalist*, No. 22.

For these reasons, the Court should rehear (or in this case hear in the first instance) this case and remand it either to the Agency to define water dependent uses, or to the Administrative Law Court with instructions to issue a ruling based on the merits of the Appellant's claims, including the undisputed fact that O.C.R.M. has authorized in other marinas the same uses proposed by Appellant.

Respectfully submitted,



February 12, 2020

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
tgoldstein@cobblaw.net
ATTORNEYS FOR THE APPELLANT

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

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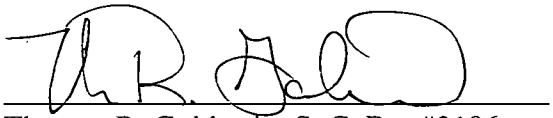
Sunset Cay, L.L.C., ... Appellant,

vs.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true copy of the appellant's brief and reply brief upon respondent by serving a copy upon respondent's counsel of record, Bradley Churdar, General Counsel, Office of Coast Resources Management, 1362 McMillan Avenue, Suite 400, N. Charleston, S. C. 29405-2047, by mailing a copy of each properly addressed with sufficient postage affixed thereto this 12th day of February 2020.



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

BELK, COBB, INFINGER AND GOLDSTEIN, P.A.

Harry C. Belk (1919-2003)
Dale T. Cobb, Jr.

Peggy M. Infinger
pinfinger@cobblaw.net

Thomas R. Goldstein
tgoldstein@cobblaw.net

ATTORNEYS AT LAW
2344 COSGROVE AVENUE
CHARLESTON, SC 29405

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

February 12, 2020

Hon. Jenny Abbott Kitchings
Clerk of Court,
South Carolina Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

Re: Sunset Cay, LLC vs. SCDHEC, Division of OCRM
Appellate Case Number: 2017-000161
Opinion No.: 2020-UP-030

By facsimile and regular mail: 803 734 1839

Dear Ms. Kitchings,

I enclose an original and seven copies of the Appellant's Petition for Rehearing along with our firm's check for the filing fee in the amount of $50.00. I ask that you please file the original with the court and return a filed copy to me in the envelope provided. By copy of this letter to Bradley Churdar, I am serving a copy of the Petition for Rehearing upon opposing counsel. With kind regards, I am

Very truly yours,
BELK, COBB, INFINGER & GOLDSTEIN, P.A.

Thomas R. Goldstein

TRG/
enclosure: Petition for Rehearing, certificate of service, return envelope, check #19051
cc: Bradley Churdar, Esq.