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

RECEIVED
MAY 22 2020
S.C. SUPREME COURT

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 A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that Petitioner filed a Petition for Rehearing on February 12, 2020, and the Court of Appeals issued a ruling on April 23, 2020.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the Petitioner is not entitled to judicial review upon O.C.R.M.'s denial for relief brought under Regulation 30-9(D), which allows for Declaratory Judgement?
2. Did the Court of Appeals err in dismissing the Petitioner's appeal of O.C.R.M.'s "cease and desist" letter?

STATEMENT OF THE CASE

This controversy involves two disputes over the same subject: (1) O.C.R.M.'s refusal to define a "water dependent" use for the third floor (Unit 301) of the Sunset Cay Marina and (2) a disagreement about whether O.C.R.M.'s scheduled November 18th meeting did or did not constitute a "final review" of its October 26th "cease and desist" letter, which it agreed to modify or withdraw.

The Administrative Law Court (hereinafter abbreviated as "ALC" for convenience) dismissed the first issue because it concluded it lacked subject matter jurisdiction because the question was premature and dismissed the second issue as being untimely. In both instances, the core issue is Petitioner's inability to obtain a permit amendment to allow a water dependent use for the third floor under Regulation 30-1 (52): "Water-dependent – a facility which can demonstrate that dependence on, use of, or access to coastal waters is essential as to the function of its primary activity." To address the issue at hand, it is necessary to understand the evolution of the marina from its 1947 establishment to its present configuration.

Shortly after World War II, in 1947, the Petitioner's predecessor, William G. Dodds, of Charleston applied to the War Department, the forerunner of the Army Corps of Engineers, for the establishment of a commercial "wharf." See Appendix pages 240-259. Since the establishment of the wharf in 1947, the site has been used continuously as a commercial wharf or marina. In 1974, when the City of Folly Beach (hereinafter the "City") adopted zoning, it zoned the property "C-3 Commercial Marine." (App. Page 235-236)

Petitioner acquired the property in 2001 for two million dollars from the O'Rourke's, who operated the site as a marina and as a popular restaurant. (App. Pages 260-266). The Petitioner demolished the O'Rourke's buildings, which had been badly damaged by Hurricane Hugo and constructed a new 120-slip marina with a three-story building that is the subject of this action. The first floor, Unit 101, contains slip owners' (Council of Co-Owners) amenities and the Dockmaster's Office. The second floor, Unit 201, contains the Ships Store. The third floor, Unit 301, is the controversy. It has been and continues to be vacant. (As discussed more fully below, in a meeting with O.C.R.M. officials on November 18, 2015, to answer the Agency's October 26th "cease and

desist" letter, O.C.R.M. agreed the third floor could be used as either the Dockmaster's Office or for storage, but not for any of the Petitioner's proposed "waster dependent" uses.)

The Petitioner applied for and received a permit in 2005 for construction of the Marina as it currently exists. App. Page 71: "The above referenced permit has been amended to authorize the placement of a building containing restrooms and a ships store on the existing 50' x 50' fixed pierhead." As part of the permitting process, O.C.R.M. required the Petitioner to furnish its building plans both before and after construction. Upon completion of the construction, Petitioner submitted the as-built plans to O.C.R.M. See Appendix at pages and 228-234 and 267-274. The City issued three certificates of occupancy, one for each Unit.

After O.C.R.M. issued its original permit for construction of the building in 2005, in 2009, the Petitioner requested and received permission to sell and serve food in the Ships Store. This amendment, or rather, permission, authorized the sale and consumption of "snacks and light food" in Unit 201.

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. (Appendix page 126)

This legal controversy began when the Petitioner sought a permit for a "water dependent" use for the third floor. The Petitioner modeled its request on uses O.C.R.M. previously approved for similarly situated marinas for whom O.C.R.M. had approved identical water dependent uses. However, what Petitioner thought would be a routine application turned into a thicket of bureaucratic circularity. Petitioner attempted to break the impasse by filing a Petition for

Declaration as authorized by Regulation 30-9 on August 27, 2015. App. pages 172-175. On October 12, 2015, O.C.R.M. denied all of Petitioner's proposed uses, and on the same day, Petitioner asked O.C.R.M. to reconsider its decision on various grounds, including, but not limited to, pointing out that O.C.R.M. denied Petitioner's proposed water dependent uses without allowing the Petitioner to be heard. (App. Page 38). After O.C.R.M. informed Petitioner it could not reconsider its decision, on October 23, 2015, the Petitioner timely appealed that decision to the D.H.E.C. Board in Columbia. (App. at page 36) On December 2, 2015, the D.H.E.C. Board in Columbia refused to consider the appeal and directed the Petitioner to take it up with the ALC. See App. at page 84: "S. C. 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 . . . may request a contested case hearing before the Administrative Law Court . . ."

On December 23, 2015, the Petitioner filed an appeal with the Administrative Law Court as directed by O.C.R.M.'s December 2nd Order. (Appendix at page 41) This appeal to the ALC set forth various grounds for relief pertaining to both the Petition for Declaration and to the Agency's October 26, 2015 "cease and desist letter." On October 17, 2016, the Administrative Law Court dismissed the appeal on the ground that it lacked subject matter jurisdiction and the appeal was premature and not ripe for review: "There are no statutory or regulatory laws that grant this Court jurisdiction. 2 S. C. Code Ann. Res 30-9(D) does not provide a manner by which an interested party may appeal Department Declaration. The Department's Declaration does not involve the issuance, denial, suspension or revocation of permits." (App. page 6.) On October 24, 2016, the Administrative Law Court vacated its October 17th Order and reissued an amended Order and then a second amended Order on January 4, 2017, Appendix at pages 336, that reached the same result with the same language, the only difference being that in the Amended and Second Amended

Order, the ALC found that an appeal from O.C.R.M.'s March 3, 2015, and October 26, 2015 "cease and desist" directives must be with prejudice.

The putative "cease and desist" directive offers nothing but confusion. On page 149 of the Appendix is the October 26, 2015 "Cease and Desist Directive," warning Petitioner that O.C.R.M. had detected "non-water dependent" activity and that it could take appropriate enforcement action in Circuit Court, while on page 193 of the Appendix is the October 26, 2015 "Notice of Violation, Admission Letter, advising the Petitioner to be present on Wednesday, November 18, 2015, at 10:00 a.m.to discuss the issues set forth in the letters. As is demonstrated below with citation to the record, it is an undisputed fact that all the parties were before O.C.R.M. as directed, and at that meeting O.C.R.M. informed Petition that the directive was being withdrawn and amended. (See Appendix at page 237 and page 225. ("All the parties" means: O.C.R.M., Sunset Cay Marina, the tenant in Unit 201, and the Council of Co-Owners.)

The Appendix contains two affidavits summarizing the November 18th review hearing:

> 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.
>
> 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. /s/ Francis E. Clark (Appendix page 237)

> During that [November 18th] meeting, the October 26th 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 deist 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. . . . When I left that meeting, I was under the impression that O.C.R.M. would revisit their October 26th cease and desist letter.
>
> /s/ William Ogelsby, Jr. (Appendix page 225)

After the D.H.E.C. Board in Columbia refused to grant Petitioner a hearing, on January 23, 2017, the Petitioner filed a Notice of Appeal. On January 29, 2020, the Court of Appeals issued its unpublished opinion without oral argument, and the Petitioner timely filed for Rehearing on February 12, 2020, and on April 27, 2020, the Court of Appeals denied rehearing.

ARGUMENTS

1. The Court of Appeals erred in overlooking, and thereby failing to address, the fact that by O.C.R.M. refusing to take action on the Petition for Declaration under Regulation 30-9 or allowing the Petitioner to be heard, the Agency denied the Petitioner fundamental due process rights guaranteed to him under Article I § 22 of the South Carolina Constitution.

The appeal to the Court of Appeals raised two procedural questions that have a significant substantive effect: to wit: (1) whether the ALC erred in dismissing petitioner's request as premature for judicial review to address D.H.E.C.'s refusal to answer Petitioner's Declaration (O.C.R.M.'s refusal to authorize five water-dependent uses), and (2) whether the ALC's summary dismissal of Petitioner's challenge to an October 26, 2015, cease and desist letter with prejudice without affording the Petitioner a hearing on the merits was error. Even though these two questions are procedural, the ALC's refusal to address them on the merits has been devastating.

The parties agree that the Petitioner applied for a permit in 2005 to construct a: "39' x 29' building on an existing 50' by 50' pier head: "The building will contain bathrooms and a ship's store for the marina for the marina and its tenants." (Appendix page 71 [O.C.R.M. permit December 14, 2005, Exhibit B to ALC]) As set forth above, the marina site is zoned "C-3 Marine Commercial," and the current marina occupies the same site used as a continuously operating marina since 1947. See. Appendix page 43 [¶ 3 appeal to Administrative Law Court] and pages 235 and 241 [affidavit of Frances E. Clark, page 6]) The current configuration has 125 boat slips, which

belong to individual owners, and transient docks that are available for short-term and emergency mooring. Upon completed construction, the City of Folly Beach issued three certificates of occupancy on September 26, 2006, one for each floor. As part of the permitting and construction process, and in accordance with O.C.R.M. regulations, the Petitioner submitted elevation drawings with O.C.R.M. prior to construction, showing the dimensions of the building—the height, width, and depth. These elevation drawings showed the second and third floor connected by an internal spiral stairwell. However, the City's Building Official required that the internal stairwell be changed to an exterior stairway to provide an emergency exit in accordance with the applicable fire code. Prior to final inspection, O.C.R.M. required the Petitioner to file the as-built plans, which are recorded in O.C.R.M.'s files and found in the Appendix at pages 228-234 and 267-274. As set forth in the O.C.R.M. permit, the first floor became the Dockmaster's Office, restrooms and showers, and storage. (Unit 101). The second floor became the Ships Store (Unit 201). The third floor, Unit 301, remains vacant to this day even though the City issued a Certificate of Occupancy and even though the Petitioner constructed the building in accordance with the plans on file with O.C.R.M, and even though South Carolina law allows any "water-dependent" use in a marina. However, O.C.R.M. has refused and continues to refuse to authorize or define a "water dependent" use for the third floor, although it did agree that the Petitioner could relocate the Dockmaster's Office to the third floor—a proposal rejected by the Council of Co-Owners—or use it for storage.

On March 16, 2015, O.C.R.M. issued its first cease and desist letter to the Petitioner, which it then modified and reissued on October 26, 2016. (Appendix pages 149 and 193) A succinct summary of the allegations is contained in ¶ 14 of its "Notice of Violation":

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, . . . (Appendix page 197)

These notices set a review hearing date of November 18, 2015, to address the allegations in the letters. On November 12, 2015, Petitioner wrote back to O.C.R.M. confirming the hearing date of November 18th as follows:

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,
/s/ Thomas R. Goldstein (Appendix, page 220)

There are two summaries of the November 18th review hearing in the Appendix, one by Butch Clark at page 236, and one by William Oglesby at Appendix page 224-226. As the testimony reveals, following the November 18th hearing, O.C.R.M. officials informed Petitioner they would check their files and "get back" to us. See Appendix page 225.

O.C.R.M. contends, and the Court of Appeals accepted, that Petitioner's November 12th letter was insufficient to trigger a "request for final review" under §44-1-60, ignoring the fact that the review hearing was already set in O.C.R.M.'s notice to Petitioner:

All department decisions 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."

The Administrative Law Court dismissed the Petitioner's application for declaration because:

The Department's Declaration does not involve the issuance, denial, suspension or revocation of permits." Appendix page 334 [Second Amended Order page 6].

At the same time, the Administrative Law Court dismissed the Petitioner's challenge to the cease and desist Order because:

In order for the mechanisms of a Final Review Conference to be available, compliance with S.C. Code Ann. § 44-1-60(A)." Appendix at page 333 [Second Amended Order at page 5]

The Court of Appeals adopted this reason, ignoring that that the record demonstrates that O.C.R.M. scheduled the review hearing in its Notice and that the parties attended the November 18th review hearing as scheduled by O.C.R.M. At that review hearing, O.C.R.M. promised Petitioner that it would review its file and notify Petitioner of its decision:

> When I left that 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 that 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.
>
> Appendix, page 226, affidavit of William Oglesby

Essentially, the ALC determined that Petitioner's November 12th letter did not use specific language and did not include a required filing fee thereby waiving a right to challenge. §44-1-60(E): "The 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." The ALC's conclusion is refuted by the record on both the facts and the law. First, the record establishes that O.C.R.M. has never notified the Petitioner of its "staff decision," as everyone at the November 18th review hearing left with the understanding that O.C.R.M. would notify us at a later date of its decision. A careful review of the record demonstrates the absence of the required "final agency decision." Second, waiver is an affirmative defense that must be both pled and proved: "Estoppel and waiver are protective only, and are to be invoked as shields, and not as offensive weapons. Their operation in all cases should be limited to saving harmless or making whole the party in whose favor they arise and should not, in any case, be made the

instruments of gain or profit. [citations omitted] While the doctrine of waiver or equitable estoppel may be invoked as affirmative defenses to counterclaims, they may not be asserted in a complaint as offensive weapons." *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384 (1992). See also Rule 8(c), requiring the affirmative pleading of waiver as an affirmative defense. An allegation of an affirmative defense requires proof. *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 433 871 (Ct. App. 1993)

Third, the record demonstrates that O.C.R.M. set the review hearing and gave the date and time for the parties to appear on the issues raised in its October 26th notice.

Fourth, the record demonstrates that the Petitioner's August 19, 2015, Petition for Declaration raised the same legal issues prior to the October 26th "cease and desist," which the Agency has to this day refused to answer. The ALC ignored that the cease and desist letter set the date and time for the parties to attend a review hearing or that the Agency has never issued a "final decision": "Please be advised that an enforcement conference has been scheduled for WEDNESDAY, November 18, 2015, at 10:00 A.M." (Appendix at page 193) The parties appeared at the review hearing on the date and time directed by the Agency, and at that hearing, the Agency agreed to review its file and decide whether to withdraw or modify its cease and desist letter. Neither the Administrative Law Court nor the Court of Appeals made any mention of these facts. The failure to address the Agency's shifting position is reversible error at best, promoting sharp practice at worst. See *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004):

> Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding. See *Colleton Reg. Hosp. v. MRS Med. Rev. Systs.*, 866 F.Supp. 896, 900 (D.S.C. 1994). The purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary. See *Hawkins v. Brunon Yacht Sales*, 353 S.C. 31, 42, 577 S.E.2d 202, 208 (2003).

In *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472, 477 (1997), we formally adopted the doctrine of judicial estoppel as it relates to matters of fact, not law. For the following reasons, we reverse the Court of Appeals' application of judicial estoppel.

This Court has not previously explicitly delineated the requirements for the application of judicial estoppel. We now adopt the following elements necessary for the doctrine to apply: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must *216 be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. See *Carrigg v. Cannon*, 347 S.C. 75, 83 552 S.E.2d 767, 772 (Ct. App. 2001).

The record shows that the Petitioner proved he preempted the October 26th cease and desist letter by his August 19th Petition for Declaration and further that his November 12th letter is a sufficient response to O.C.R.M.'s prior scheduling of a review hearing. Since O.C.R.M. set the date, time, and place of its review hearing on November 18th, and since O.C.R.M. never issued a decision following the hearing, Petitioner's November 12th letter is more than sufficient to prevent a summary dismissal without hearing the facts. If Petitioner failed to include a filing fee to the Department, then it was incumbent on the Department to say so at the time. When an appeal arrives at this Court or the Court of Appeals without a filing fee, the Court has never dismissed the appeal. Rather, the Court notifies appellant or petitioner that the deficiency must be corrected. Not only had the Petitioner already put the issue of water-dependent use before the Agency in its August 19th Petition, but also the record also shows that O.C.R.M. scheduled the review hearing for November 18th, which all the parties attended, after which O.C.R.M. told the parties the cease and desist would be modified or withdrawn. See Affidavit of William Oglesby quoted above. To this day, O.C.R.M. has never responded.

In addition, O.C.R.M. asserts contradictorily that any dispute over the October 26th cease and desist letter is merely technical because O.C.R.M. has never issued an administrative Order

following the November 18th meeting. Petitioner agrees, and therefore there has never been a "final decision" by O.C.R.M. Moreover, any issue surrounding the Ships Store has been laid to rest since September 2009, as may be seen by the Department's approval letter. (Appendix page 166.) See also statement of counsel to the ALC: ". . . 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." Appendix page 286 [transcript page 6, line 4]) Therefore, an appeal of the cease and desist letter cannot be with prejudice, especially since any dispute over the parameters of O.C.R.M.'s September 2009, approval and the operation of the Ships Store involves only O.C.R.M. and the operator of the Ships Store, not Petitioner.

The ALC failed to apply Article I, § 22, S. C. Const. (and the numerous statutes and cases thereunder such as *Weaver v. S. C. Coastal Council*, 309 S.C. 368, 423 S.E.2d 340 (1992), *Brown v. South Carolina State Bd. of Educ.*, 301 S.C. 326, 391 S.E.2d 866 (1990), § 1-23-320, S. C. Code, Ann.) to the facts of this case, and thus its decision is controlled by an error of law. The Court of Appeals simply adopted the Administrative Law Judge's reasoning without explanation: "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. . ." Even though this conclusion is wrong under § 1-23-380, S. C. Code, Ann., it is an act of judicial self-abnegation to conclude that Courts cannot act to fashion a remedy where there is a legal wrong. The reason that the judicial branch is the most important branch of the government is because it is to the Courts—and only the Courts—that an aggrieved citizen has direct recourse. Citizens are required to obey the law, but Courts have the power to apply the law justly. Thus, it is a weak argument to assert that the Courts have no power because the legislature failed to provide the path. Since the law requires that a citizen not be stripped of his or her property rights without judicial review, the Court is obligated to

provide that forum. This has been the bedrock of the American judicial system since *Marbury v. Madison.*

Petitioner has no quarrel with either the Court of Appeal's identification of or reliance upon the pertinent cases cited in Opinion 2020-UP-030 with the exception of the Court's erroneous reliance on *Spence v. Spence* for the proposition that Courts should not allow amendments that it knows would be futile.[1] 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." Petitioner's desire for judicial review is not the same category of relief as a complaint that fails to state a cause of action. Here, O.C.R.M. has denied Petitioner all use of the permitted third floor of its marina, which is a regulatory taking under *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992) If Petitioner were ever granted the right to be heard, it can demonstrate without contradiction that the Agency has permitted all five of the Petitioner's proposed water-dependent uses at similarly situated marinas. (Uses are listed in the Appendix at pages 101-122.) Both the ALC and the Court of Appeals turned a blind eye to O.C.R.M.'s creation of a procedural circularity from which there is no escape. The Court of Appeals is correct 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), but completely ignores how O.C.R.M. offered no remedy for Petitioner to be heard, and the agency's refusal to decide is *in itself* is a final decision—but because OCRM failed to put a final decision into writing, the Court allows O.C.R.M. to back the Petitioner into an administrative cul-de-sac from which there is no escape. O.C.R.M.'s refusal to put its decision in writing **is** a final decision. The Court of Appeals put all the weight on the lack of

[1]This Court reversed the identical error in *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 826 S.E.2d 585 (2019): "We begin by stressing the difficulty of determining whether allowing an amendment to a pleading would be futile without examining the proposed amendment.

a final decision while ignoring the procedural trap caused by O.C.R.M.'s refusal to put a decision into writing, thus condemning Petitioner to a Sisyphean task. Sunset Cay can push the boulder all the way to the Courthouse door, but he can never enter.

What the Court of Appeals got wrong is in its failing to recognize that the procedural morass created by O.C.R.M. is tantamount to a "final" decision. The infinitely receding image in opposed mirrors works like this:

- O.C.R.M. determines Petitioner is out of compliance because O.C.R.M refuses to identify water dependent use for the third floor.
- Petitioner proposes five water dependent uses approved in similarly situated marinas: Ships Store office, Yacht Sales Office, Captain and Transient Lounge; Commodore Meeting Room, and Public Waterway Events, (Appendix page 23, Petition for Declaration)
- O.C.R.M. determines none of them qualify because none of them are "absolutely necessary" (Appendix page 19) in a marina setting.[2]
- By refusing to identify an approvable water dependent use, O.C.R.M. determines Petitioner is out of compliance.

The Court of Appeals condemns Petitioner to a litigation cycle that never ends. In addition, the procedural fencing taxes the financial ability of the Petitioner to stay in the game and seek judicial review and consumes an inordinate amount of judicial resources to untangle a procedural mess caused only by O.C.R.M.'s bad faith. The only way to break the bonds of futility is to

[2] O.C.R.M. has approved each one of these and more uses in similarly situated marinas, and subjects Petitioner to a heightened standard of "absolutely" necessary instead of the statutory threshold of "essential." Regulation 30-1(D) 52 Under this section, O.C.R.M. has approved: restaurants, realtor offices, massage services, yoga, pest control, architects, realtors, etc. See Appendix page 122. Petitioner filed a separate action against the O.C.R.M. for violation of equal protection and taking 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 20 and 21.

challenge the Agency's inaction on Petitioner's request for Declaration instead of engaging in never ending loop by applying again for a permit. See Appendix at 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 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.

/s/ Francis E. Clark

The Court of Appeals overlooked the fact that the Petitioner relied on the exact course dictated by O.C.R.M. and is now being penalized. See Appendix page 20:

The South Carolina Board of Health and Environmental Control will not conduct a Final Review Conference on the above referenced matter. . . . an affected person may request a contested hearing before the administrative Law Court (ALC) within thirty days after notice is mailed to the applicant. /s/ Lisa Lucas Longshore.

Neither the ALC nor the Court of Appeals addressed O.C.R.M.'s shifting legal positions, which disadvantage the Petitioner and deny Petitioner constitutionally guaranteed judicial review. Likewise, neither the Administrative Law Court nor the Court of Appeals was troubled by O.C.R.M. making simultaneous mutually exclusive statements. Thus, while the Court may be correct that the decision is not "final," this is only so in an illogical sense. The inability to get a written decision on the merits condemns Petitioner to a cycle of administrative futility, a situation created by O.C.R.M.'s refusal to perform its duty and issue a written decision on the merits condemns Petitioner to a cycle of administrative futility.

Likewise, neither the Administrative Law Court nor the Court of Appeals addressed O.C.R.M.'s refusal to supply Petitioner with further definition or objective criteria on water-dependent uses, which disadvantages Petitioner and prevents his conforming to the Agency's rules. O.C.R.M. creates this legal thicket by refusing to provide the necessary definitions or criteria to allow Petitioner to conform. The need for specificity in licensing is a given in American jurisprudence:

In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license. "One who might have had a license for the asking may . . . call into question the whole scheme of licensing when he is prosecuted for failure to procure it." *Freedman v. Maryland* 380 51 (1965)

At no time in this tortured process has O.C.R.M. provided the necessary written decision to afford the Petitioner an opportunity either to conform to the decision or alter his application for permit amendment to meet the objective criteria of O.C.R.M. The Agency has adopted shifting positions throughout this procedural nightmare, but the record demonstrates that O.C.R.M. provided to Petitioner an administrative hearing on November 18th, which never resulted in a decision. All that resulted was a promise to give an answer at a future date. Likewise, in reviewing the conduct of O.C.R.M., both the Administrative Law Court and the Court of Appeals allowed O.C.R.M.'s failure to provide a written decision to operate as a bar to judicial review. O.C.R.M.'s failure to issue a written decision is a decision that materially affects the Petitioner's right to own and use his property to its highest and best use. See Appendix at page 18:

October 12, 2015

The Department, in several communications, offered options for your client to resolve this matter. Specifically, options present 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.

/s/ Sara Brazemore
Deputy Director

Ms. Brazemore then goes on to explain that the Petitioner has not "demonstrated" that the uses encompass water-dependent uses, which is true because O.C.R.M. has never afforded the Petitioner the opportunity to meet his burden. This is another example of O.C.R.M. making

decisions without allowing the Petitioner to participate. (See Appendix pages 17-19 for the entire correspondence dated October 12, 2015, regarding the Petition for Declaration. The only time O.C.R.M. conducted an administrative hearing was the November 18, 2015, review hearing set by its October 26th notice, where it informed Petitioner it would amend or withdraw the cease and desist. See Appendix pages 225 and 238.

Neither the ALC nor the Court of Appeals applied the General Assembly's directive to O.C.R.M. "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 Court of Appeals overlooked the fact that the Agency's rejection of Petitioner's five proposed water-dependent uses are all currently being employed in similarly situated marinas (See Appendix pages 99-122 for a list of other marinas with the same approved uses and for photos of them.) When O.C.R.M. denied these same uses to Petitioner without giving Petitioner an opportunity to be heard, the agency made a final decision as to **those** five water dependent uses. The Court's January 29, 2020 Opinion leaves Petitioner with no remedy to address the Agency's rejection of these five proposed uses other than the futile act of applying again. Had O.C.R.M. afforded the Petitioner a formal decision, or had the ALC allowed the Petitioner to present its case, then he would have the opportunity either to conform or to submit an application that meets O.C.R.M.'s standards, or at least to make an evidentiary record and prove that the Agency has approved the same proposed uses as "water-dependent" at other comparable marinas. (See photos in the Record on Appeal at pages 101—122).

O.C.R.M.'s decision can only be characterized in one way—a refusal to allow the Petitioner use of his own property as to the five proposed uses. A deprivation of property, even if it is temporary, is grounds for relief. In *Front Royal and Warren County Indus. Park v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998), the Fourth Circuit took up a similar case. The issue in *Front Royal* involved 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. The Court 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." Here, Petitioner understands what the Court of Appeals meant when it concluded O.C.R.M.'s decision is not "final," but that is like calling a cat a bird because there remains a feather in the cat's mouth. Of course Petitioner can re-apply for a permit as the ALC found, but based on this record, it is clear that a reapplication will achieve nothing other than to start this process over again. It is beyond debate that the Petitioner's application will be an act of futility before the same agency. Moreover, the Court of Appeals ignored the fact that Petitioner previously submitted two permit applications, which O.C.R.M. refuses to act on until the Petitioner comes into "compliance," which, of course, he cannot do because O.C.R.M. refuses to inform him what uses are allowed. See Appendix at 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, a perfect circularity.

In short, the Court of Appeals made the same error as the ALC; to wit, drawing a false distinction between O.C.R.M.'s refusal to provide a forum for Petitioner's Declaration, a challenge which the ALC dismissed as "premature" and at the same time, the putative finality of O.C.R.M.'s October 26, 2015, cease and desist letter, which challenge the Court found was too late. This is the judicial equivalent of the square circle. The two legal issues are the same. By refusing to require O.C.R.M. to do its job, the Court of Appeals creates a "procedural hell" described by Judge Ervin in *Front Royal.* The undisputed evidence is that the Agency refuses to act on Petitioner's application for permit amendment, and this is a fact the Court of Appeals ignored. (Appendix page 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 failed to apply for a new permit under the amended act. The South Carolina Supreme Court agreed and dismissed the claim as unripe, relying upon the same reasoning adopted by the Court of Appeals in Opinion 2020-UP-030. The United States Supreme Court disagreed and held that Lucas' claim not only was ripe, but also that the Agency's refusal to grant him a permit was a "regulatory" taking. (As set forth above, the Petition's takings claim is currently pending in the Charleston County Court of Common Pleas.)

Thus, the denial of the Petition for Declaration calculates 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). 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 the Petition for Declaration by concluding in some secret process that Petitioner's proposed five water-dependent uses are "water-dependent," the Petitioner appealed in the manner proscribed by law. By holding that the Petitioner cannot be heard on the merits until the Agency turns down a permit application, the ALC errs in the Opinion under review by: (1) overlooking the fact that the Agency has not permitted Petitioner to be heard on his Petition in violation of Article I, § 22, and (2) refusing to act on any permit application in violation of the holding of *Lucas*, and thereby denies the Petitioner the opportunity to make an evidentiary record or seek judicial review on the Agency's decision. The Opinion under review creates a super agency whose decisions can never be reviewed because they are never "final." As the Court of Appeals correctly held 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.

The Court of Appeals reached the heart of the case on page 3 where it wrote: "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." The illogic in the Court's statement 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.

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) This is the same conclusion the U. S. Supreme Court reached in *Lucas*. The U.S. Supreme Court did not require Lucas to return to Coastal Council and reapply for a permit under the amended Beachfront Management Act; it determined that the Coastal Council's actions constituted a regulatory taking. This is the same conclusion the Fourth Circuit reached in *Front Royal*. Therefore, while the Court of Appeals cites the correct law on the subject of judicial review of administrative decisions, it overlooks the effect of its decision, which deprives the Petitioner of the very judicial review the Court identifies will be available just as soon as the Petitioner submits an application for permit and is denied, the same argument rejected by the Fourth Circuit in *Front Royal* and the U. S. Supreme Court in *Lucas*. South Carolina has a well-developed body of case law excusing litigants from pursuing obvious futile administrative remedies as a condition of judicial review. See *Smith v. S. C. Retirement System*, 336 S.C. 505, 520 S.E.2d 339 (Ct. App. 1999): "A general 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." [citations omitted]

Moreover, 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 ALC 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 Petitioner's five proposed water-dependent uses are allowed or disallowed, and if disallowed, on what objective basis the Agency denies the Appellant such uses and provide Petitioner an opportunity to be heard.

2. The Court of Appeals erred in dismissing the Petitioner's appeal of O.C.R.M.'s letter ruling because O.C.R.M. held a review hearing on November 18, 2015, and informed the parties it was withdrawing or amending its "Cease and Desist" letter.

The analysis here is similar to the analysis in Argument 1; to wit, that while Petitioner has no quarrel with the Court of Appeal's identification of pertinent case law, the Court of Appeals misapplied the cases because it overlooked two important points, one factual and one legal.

A Factual Issue

The Court of Appeals ignored the timeline. On August 27, 2015, the Appellant filed a Petition for Declaration as authorized by law. (Appendix page 22) While that Petition was pending, the Agency mailed Petitioner two letters on the same date. One was a "cease and desist" letter, and one was a "Notice of Violation, Admission Letter." They were both dated Octobers 26, 2015, involving the same parties and the same legal issues. (Throughout this case, the parties have been referring to these two documents in the vernacular of a "cease and desist.") The "Notice of Violation, Admission Letter," Appendix page 193, required the Petitioner to be present in its office on November 18, 2015. The letter states: "The scheduled enforcement conference will provide [The Sunset Cay Marina Council of Co-Owners] and DHEC the opportunity to discuss the alleged violations." (Appendix page 193) The applicable part of the notice says:

> 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.

As directed, all the parties 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. Tommy Goldstein attended on my and 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.

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."

Appendix page 236-237, Affidavit of Frances E. Clark; see also the affidavit of William Oglesby quoted above on page 11.

B Legal Issue—Misapplication of *Spence v. Spence*

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

The Court of Appeals affirmed the dismissal of Petitioner's appeal because the Court concluded 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 support in this record that Petitioner's appeal from the November 18th review hearing is "futile." Futility is something that cannot be assumed—it must be supported by some fact or law. This is the holding of this Court in *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 826 S.E.2d 585 (2019), quoted above, and numerous cases cited therein. The ALC erred when it assumed that an amendment would be futile as a basis for its decision to dismiss and appeal. Second, even if the record supported some finding that O.C.R.M. reached a decision on November 18th, there is no statute, regulation, or O.C.R.M. policy that requires an appeal from an oral ruling, and yet, based on nothing more than argument of counsel, the ALC determined that the Petitioner failed to appeal a staff decision under § 44-1-60(G) of the South Carolina Code because the 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." Appendix page 330 [Second Amended Order page 3] The record demonstrates that O.C.R.M. never provided Petitioner with the triggering "staff decision" because the Notice to Petitioner summoned Petitioner to O.C.R.M. on November 18th to discuss the issues. After listening to the Petitioner, the Council of Co-Owners, and the tenant of Unit 201, O.C.R.M. informed the Petitioner that it was either withdrawing or modifying its October 26th letter based on the pending Petition for Declaration and upon the information provided at the review hearing. (Appendix, pages 226 and 237) O.C.R.M. cannot represent one thing to Petitioner and the opposite to the Court. *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004)

O.C.R.M.'s conduct in this case has been inconsistent at best, bureaucratic bullying at worst. Apart from Petitioner's exponentially growing damages, hundreds of slip owners are significantly harmed by the unsettled nature of the third floor. See Appendix 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." The record demonstrates O.C.R.M. has employed dilatory tactics, and the Court's refusal to decide the case on the premise it lacks subject matter jurisdiction only rewards governmental negligence 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 on a complete record so he can escape the recursive loop that O.C.R.M. has constructed.

CONCLUSION

This Record demonstrates that Petitioner attempted to bring an efficient resolution to the recursive circularity O.C.R.M. creates by refusing to define water-dependent use or afford Petitioner an opportunity to be heard, and while Petitioner agrees with the Court of Appeals that the Agency has not yet denied a permit, this is a double negative that is logically equivalent to a "final decision." Here, O.C.R.M.'s refusal and dilatory tactics constitute plain legal error and violate the Petitioner's rights. This matter was squarely before the Administrative Law Court, and it erred in refusing to take up the question to provide Petitioner with his constitutionally mandated procedure to a final decision.

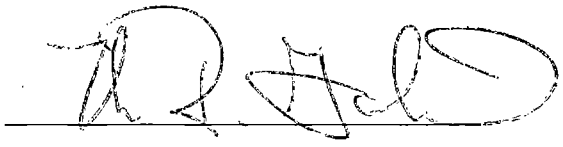
The Opinion under review merely promotes Petitioner's procedural paradox. The Court of Appeals was, of course, correct that a dismissal in this case does not give rise to a **permanent and total** harm on the Appellant because the Appellant can apply for a permit, which it twice has. However, that was the same argument its predecessor, Coastal Council, advanced, which the U. S. Supreme Court rejected in *Lucas*. In the meantime, the third floor sits vacant only because the Agency will not fulfill its duty and issue a permit for the five water-dependent uses it has authorized in other marinas. The fact that the Petitioner's principal died in the prosecution of this case should serve as a reminder that justice delayed is justice denied. It is in no one's interest that this case makes its way back up the "procedural hell" to reach a "final" resolution. Opinion Number 2020-UP-030 overlooks the fact that O.C.R.M.'s refusal either to act on Petitioner's permit applications, or at least provide a forum to be heard, **is** an injury. 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 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. In failing to require the Administrative Law Court to take up the merits of the case, the Court of Appeals overlooked the 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) The Supreme Court said further: "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

Petitioner did exactly that in this case for reasons articulated by *Marbury*. When O.C.R.M. refuses to act on his application for permit amendment, Petitioner 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 [Petitiioner]" and yields to the "executive's" discretionary conduct, depriving the Appellant of the right to challenge government inaction as provided by Article I, § 22. The U. S. Supreme Court in *Marbury* did not require the petitioner to reapply for his commission under the new president 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. Likewise, it was clear error to dismiss an appeal because it came too late when the Agency has never issued a written decision form which the Petitioner can appeal. The Court's decision to direct the Petitioner 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, this Court should grant a writ of certiorari to determine if the Administrative Law Court improperly dismissed the Petitioner's appeal without affording him a chance to be heard on the merits.

Respectfully submitted,



May 19, 2020

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