IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Kristi L. Harrington., Circuit Court Judge

Civil Action No.: 2016-CP-10-5578
Appellate Case No.: 2018-000511

Town of Sullivan's Island, ...Respondent,

v.

Michael Murray, ...Appellant.

BRIEF OF RESPONDENT
TOWN OF SULLIVAN'S ISLAND

G. Trenholm Walker (SC Bar # 5777)
John P. Linton, Jr. (SC Bar # 79130)
Walker Gressette Freeman & Linton, LLC
P.O. Box 22167
Charleston, SC 29413

John J. Dodds, III (SC Bar #1707)
Cisa & Dodds, LLP
858 Lowcountry Blvd., Suite 101
Mt. Pleasant, SC 29464

ATTORNEYS FOR RESPONDENT

November 27, 2018

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Kristi L. Harrington., Circuit Court Judge

Civil Action No.: 2016-CP-10-5578
Appellate Case No.: 2018-000511

Town of Sullivan's Island, ...Respondent,

v.

Michael Murray, ...Appellant.

BRIEF OF RESPONDENT TOWN OF SULLIVAN'S ISLAND

G. Trenholm Walker (SC Bar # 5777)
John P. Linton, Jr. (SC Bar # 79130)
Walker Gressette Freeman & Linton, LLC
P.O. Box 22167
Charleston, SC 29413

John J. Dodds, III (SC Bar #1707)
Cisa & Dodds, LLP
858 Lowcountry Blvd., Suite 101
Mt. Pleasant, SC 29464

ATTORNEYS FOR RESPONDENT

November 27, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

CONSTITUTION

ORDINANCES

STATEMENT OF THE ISSUES ON APPEAL

I. Whether the Circuit Court properly affirmed the municipal court decision that a dock builder who was admittedly aware of a condition in building permit and violated the condition was guilty of violating the town ordinances requiring a building permit for the construction of a dock.

II. Whether Appellant's arguments that were not ruled upon by the Circuit Court are preserved for appellate review.

STATEMENT OF THE CASE

This case involves an appeal from a conviction and a fine of $1,040 for violation of Town of Sullivan's Island's ("Respondent" or the "Town") Ordinances. Appellant Michael Murray ("Appellant" or "Murray") was charged with violation of sections 5-10 and 21-75 of the Town Ordinances for breaching a condition in a building permit. The Town issued an Official Summons and Arrest Record, which charged a violation of section 21-75 and 5-10 of the Town Ordinances. **(R. p. 5).**[1]

The case proceeded to trial in the municipal court against Mr. Murray. **(R. pp. 130-278).** After a full bench trial, Murray was found guilty and fined $1,040. **(R. p. 28).** Murray appealed to the Circuit Court, which affirmed by Form 4 Order dated January 1, 2017, and filed January 11, 2017, stating "[t]he appeal filed by Murray is denied. Based on the record, Murray acknowledged notice of the zoning laws and permit requirements and was found in violation. Murray has failed to demonstrate an error of law." **(R. pp. 3-4); (R. pp. 29-37).** Appellant filed a Motion to Alter or

[1] The Arrest Citation charged Erich Murray with violation of sections 21-75 and 5-10 of the Town Ordinances **(R. p. 5)**. Erich Murray is employed by American Dock and Marine Construction, Inc., which Mr. Murray owns. **(R. p. 138, lines 10-14; R. p. 231, lines 5-18)**. Mr. Murray assumed responsibility for matters underlying the issuance of the Summons and Arrest Record, and the Town proceeded to move forward with its prosecution of the case against Mr. Murray. **(R. p. 133, lines 8-25).**

Amend, which was denied by written Order dated February 23, 2018. **(R. pp. 56-57); (R. pp. 1-2).** This appeal followed. **(Notice of Appeal)**.

FACTS

Respondent is a marine contractor and the owner of American Dock and Marine. **(R. p. 231, lines 5-18)**. His company was hired by C & B Beach House, LLC, the owner of 1102 Osceola Avenue, Sullivan's Island, South Carolina ("the Property"), to construct a dock for the Property. **(R. p. 253, lines 15-22)** (C & B Beach House acquired the Property February 21, 2014); **(R. p. 233, line 25- p. 234, line 12)**.[2]

The Property owner submitted a permit application to the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management ("OCRM"), seeking authorization to construct a dock. See **(R. pp. 86-97)**. On May 15, 2015, OCRM issued a Critical Area Permit & Coastal Zone Consistency Certificate authorizing construction of the requested dock. See **(R. pp. 86-97)**. The permitted dock consisted of a walkway, a covered pierhead, a ramp, a floating dock, and a four-pile boatlift. See **(R. pp. 86-97)**. Among the numerous conditions imposed by OCRM was a special condition that "an as-built survey of the dock must be submitted to the Department [OCRM] within 90 days of the expiration date of the final construction placard." **(R. pp. 86-97)**.

Following the OCRM approval, a prerequisite to applying to the Town for a building permit, the Town received a dock permit application signed by Michael J. Murray, dated June 19, 2014. **(R. p. 172, line 16 - p. 174, line 17); (R. pp. 86-97); (R. p. 192, line 21-p. 193, line 3)** (OCRM permit required prior to applying to the Town for a building permit). The application was

[2] The Property is situated on the western side of Sullivan's Island and is adjacent to a creek known as Cove Creek. **(R. p. 141, line 4 - p. 142, line 1).**

"approved as noted" and an Accessory Structures Permit issued. **(R. pp. 86-97)**. The condition noted on the approval was that the dock "***must not exceed adjacent docks***." **(R. pp. 86-97)** (double emphasis added); See also **(R. p. 217, lines 3-8)** (Building Official Randy Robinson testifying that the building permit issued to Appellant included a notation that the dock could not extend beyond adjacent docks); **(R. p. 217, lines 9-25)**; **(R. p. 175, lines 11-15)** ("we denoted the line that the dock pier head had to be dropped back, too, to the build-to line. And then the building official made a note that you can't go beyond the adjacent docks."). A Certificate of Zoning Compliance was also issued by the Town and included a notation to "move pierhead, floater & Boatlift Landward to not exceed adjacent docks." **(R. pp. 86-97)**; **(R. p. 218, line 14-p. 219, line 5)** (notation on Certificate of Zoning compliance was part of the building permit issued by the Town), see also generally, **(R. p. 176, lines 5-11)** ("the final document that's issued in this permitting process is what . . . our permit technician, issues . . .[a]nd that is a computer-generated building permit, in this case it's an accessory structures permit . . .[a]nd then the applicant signs off once he confirms that he will comply with all of the notes."); **(R. p. 176, lines 12-21)** (explaining that the applicant signs the building permit application and certificate of zoning compliance agreeing that he will comply with the conditions of any permit).

Additionally, as part of the approval, the Town required an as-built survey be submitted at the completion of construction, so the Town could confirm the construction complied with the condition of the permit. See **(R. pp. 86-97)** (permit notation requiring an as-built survey be submitted to the Town upon completion); **(R. 180, line 25-p. 181, line 12)** (Zoning Administrator Henderson discussing the as-built survey was a condition of the permit); **(R. p. 220, lines 8-23)** (Building Official Robinson stating that the Town required an as-built survey from Appellant to ensure that the dock did not extend beyond adjacent docks); **(R. p. 250, lines 8-21)** (Mr. Murray

discussing that it was his responsibility to provide an as-built survey upon completion of the project pursuant to the Town's permit).

The Town Zoning Administrator communicated with the dock building company and the engineer and explained the conditional nature of the approval for the dock construction. **(R. 171, lines 15-24)**; **(R. 174, lines 3-24)** (Zoning Administrator Henderson stating that he and the building official communicated with Appellant and his engineer concerning the special condition to the permit); **(R. p. 203, line 18-p. 204, line 8); (R. p. 212, lines 14-21)** ("Q. . . . did the contractor . . . ever indicate to you that they did not understand the notations that were made on the documents that had been received as part of the building permit application. . . A. No, sir".); **(R. p. 234, lines 4-6); (R. p. 240, line 19-p. 241, line 4); (R. p. 101).**

Most significantly, Appellant testified at trial he agreed that the condition of the permit that the dock not be built seaward of the adjacent docks was part and parcel of the building permit, that a building permit is required, and that the dock that was constructed violated the condition. **(R. p. 243, line 10-p. 244, line 8); (R. p. 244, line 18-p. 245, line 8)** (notations by Town officials part and parcel of the permit authorizing construction); **(R. p. 242, line 24-p. 243, line 4)** (building permit required for dock construction); **(R. p. 244, lines 4-8)** ("Q. And you -- you agree with me that the as-built dock that your company constructed exceeds the adjoining dock, as depicted on the third page of Exhibit F, by some 9.2 feet -- A. That is correct."); **(R. p. 245, lines 13-18).**

It is also undisputed that Appellant did not appeal the permit and instead accepted the permit and constructed the dock. See S.C. Code § 6-29-800 (A)(1) (providing that the board of zoning appeals has the powers "to hear and decide appeals where it is alleged there is error in an order, requirement, decision, or determination made by an administrative official in the enforcement of the zoning ordinance"); **(R. p. 184, line 10-p. 185, line 6)** (Zoning Administrator

Henderson discussing that Appellant could have appealed the permit condition to the board of zoning appeals but instead accepted the permit as issued); **(R. p. 185, lines 3-6)** (no appeal of building permit); **(R. p. 213, lines 2-5)** (". . . after its was issued, we didn't hear from them. For all we knew, they were going to comply with the terms and conditions of the permit."); **(R. p. 220, lines 3-7)** (no appeal of building permit that was issued). He accepted the permit subject to the condition. See **(R. p. 244, line 18-p. 245, line 8).**

Despite the condition to the permit, the dock was constructed approximately nine feet seaward of the longest adjacent dock. See **(R. p. 49)** (as-built survey); **(R. p. 242, lines 1-5)**; **(R. p. 245, lines 13-18)** ("JUDGE CORNELY: Does this dock exceed the adjacent docks to the left and to the right? A. [Mr. Murray:] It exceeds them by -- well, yes, sir, by 9.2 -- to the docks to the right it exceeds them considerably. To the docks to the left, based on the survey that I had done, 9.2 feet, yes, sir."); **(R. pp. 98-100)** (photos of violation); **(R. p. 265, lines 9-14).**

The construction of the dock seaward of the adjacent docks directly violated the express condition of the permit. Compare **(R. pp. 86-97)** (permit documents) with **(R. p. 49)** (as-built survey) and **(R. pp. 98-100);** see also, **(R. p. 229, line 13-p. 230, line 4)**; **(R. p. 242, lines 1-5)**; **(R. p. 245, lines 13-18).** The violation was discovered when a certificate of occupancy was applied for by the homeowner on June 27, 2016, and the Town Zoning Administrator inspected the Property and discovered the violation. See **(R. p. 179, line 12-p. 180, line 1).** The Zoning Administrator then spoke with Appellant about the violation and about Appellant's failure to submit an as-built survey. **(R. p. 180, lines 3-6 & 14-24).**[3] Mr. Henderson also e-mailed

[3] As mentioned above, the Town required an as-built survey at the end of construction to confirm the as built dock confirmed with the condition. The dock was completed in late 2014 but Appellant did not submit an as-built survey at that time. **(R. p. 258, lines 1-4); (R. p. 181 lines 13-15); (R. p. 248, line 18-p. 249, line 11); (R. p. 250, lines 8-21).** On July 19, 2016, Robert L. Frank, a South

Appellant about the violation. **(R. p. 207, lines 17-25)** ("Mr. Murray, I've attached several pictures taken during my inspection of June 27th, and an aerial rendering showing the walkway, pier[-] head, and floating dock at 1102 Osceola. Also attached is a copy of your building permit that shows you agreed to meet the Town's requirements, i.e., that the walkway, pier head, and floating dock must not be constructed any closer to the creek than either of the adjacent docks"); **(R. p. 26).** As explained above, the as-built survey, when submitted in 2016 clearly reflected the violation of the building permit. In fact, it is undisputed that the as-built survey showed the condition had been violated because the seaward extension is approximately eight to ten feet farther out than the adjacent docks. See **(R. pp. 23-25)** (as-built survey); **(App.'t Br., 6).** The Town issued ticket number 5713 for the violation on June 29, 2016, after receiving the as-built survey confirming the violation. **(R. p. 5).**

The case proceeded to trial on October 4, 2016. **(R. pp. 130-278).** Judge Francis J. Cornely found Michael Murray guilty and imposed a fine in the amount of $1,040.00.[4] **(R. p. 52, ¶ 3).** The evidence at trial was entirely undisputed that the permit included a condition that the dock not extend seaward of the adjacent docks and that the as-built survey accurately reflected that the condition had been violated. **(R. pp. 53-55, ¶¶ 7-11).**

On October 20, 2016, Mr. Murray appealed his conviction to the Circuit Court. **(R. pp. 29-37).** Pursuant to South Carolina Code section 14-25-105, the Municipal Court Judge Francis J. Cornely filed a Return to Notice of Intent to Appeal on December 29, 2016. **(R. pp. 52-55).** The Return included a detailed discussion of the undisputed evidence and trial testimony that was

---

Carolina professional land surveyor, completed an "as-built" survey of the dock but the as-built survey was not submitted to the Town. **(R. p. 49).**

[4] The Town prosecuted Jason Tompkins, a member of C&B Beach House, LLC, at the same time as Mr. Murray but Mr. Thompkins was found not guilty by the municipal court. **(R. p. 55, ¶ 13).**

the basis of the municipal court's decision. **(R. pp. 52-55).** The Return included a detailed discussion of the evidence presented at trial, including the following important factual findings regarding the condition of the building permit at issue:

> 7) THAT it is undisputed that:. . .
>
> B) The application permit and building permit were approved with notations by the Town on June 30, 2014.[5]
>
> C) The Certificate of Zoning Compliance was approved with notations by the Town on June 30, 2014.
>
> D) The dock was completed in late 2014 but an as built survey was not submitted to the Town by the Defendant, Michael Murray, until June 28, 2016.
>
> * * *
>
> 8) THAT testifying on behalf of the Town was Joseph Henderson who is the Zoning Administrator for the Town of Sullivan's Island.. . .
>
> B) Mr. Henderson testified that he participated in an email exchange with the engineer about the fact that the dock was conditionally approved but only if the dock did not extend beyond adjacent docks.
>
> * * *
>
> 9) THAT testifying on behalf of the Town was Thomas Robinson who is the Chief Building Inspector for the Town of Sullivan's Island:
>
> A) Mr. Robinson testified that the building permit issued to the Defendant, Michael Murray, had a notation that the dock could not extend beyond adjacent docks.
>
> * * *
>
> 11) THAT the dock builder, Michael Murray, testified:
>
> A) Mr. Murray testified that he acknowledged that he was told not to build the dock any further out than the adjacent docks.

(R. 53-54, ¶¶7B-D; 8B; 9A; 11A).

The municipal court decision was affirmed by the Circuit Court by Form 4 Order dated January 1, 2017, and filed January 11, 2017, which found: "The appeal filed by Murray is denied.

---

[5]**(R. p. 53, ¶7B, n1)** ("The notations on the building permit application and certificate of zoning compliance were: pierhead, floating dock, and boat lift cannot exceed adjacent docks." (sic)").

Based on the record, Murray acknowledged notice of the zoning laws and permit requirements and was found in violation. Murray has failed to demonstrate an error of law." **(R. pp. 3-4).** Appellant filed a Motion to Alter or Amend stating as follows:

> This ruling does not address the primary issue raised by Defendant which is whether the Town of Sullivan's Island can enforce a requirement that has not been promulgated and is merely an interpretation by the Town of its authority and whether such enforcement can be in the form of criminal prosecution.

(R. pp. 56-57). The Motion to Alter or Amend did not raise Appellants other arguments later raised in this appeal. See **(App.'t Br. 15-24)** (arguing issues not raised at the Circuit Court). The Circuit Court issued a written Order denying the Motion to Alter or Amend and memorizing the following additional findings:

1. There is no express requirement in the Town of Sullivan's Island's Ordinances, including Chapter 21-75 which would prohibit docks from extending further than adjacent docks.

2. Chapter 5-10 of the Town of Sullivan's Island's ordinances require an applicant seeking to construct to secure a building permit application.

3. Defendant/Respondent (sic) submitted an application and accepted a building permit from the Town that included provisions that the dock not extend any further into Cove Creek than adjacent docks.

4. It is undisputed that the dock extends further into Cove Creek then the adjacent docks.

(R. pp. 1-2).

This appeal followed. **(Notice of Appeal).**

STANDARD OF REVIEW

"In criminal appeals from a municipal court, the circuit court does not conduct a *de novo review*, rather, it reviews the case for preserved errors raised to it by an appropriate exception." The Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 341, 713 S.E.2d 278, 284 (2011); City of Cayce v. Norfolk S. Ry. Co., 391 S.C. 395, 399, 706 S.E.2d 6, 8 (2011); S.C. Code § 14-25-105

("There shall be no trial de novo on any appeal from a municipal court."). This Court's scope of review is limited to correcting the Circuit Court's order for errors of law. See City of Rock Hill v. Suchenski, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007) Additionally, "[i]n criminal cases, [a South Carolina appellate] court sits to review errors of law only, and [is] bound by the trial judge's factual findings unless they are clearly erroneous. State v. Goodwin, 351 S.C. 105, 110, 567 S.E.2d 912, 914 (Ct. App. 2002).

ARGUMENT

I. The Circuit Court correctly ruled that the municipal court did not commit error of law in deciding that a dock builder who was admittedly aware of a condition in a building permit and violated the condition was guilty of violating the town ordinances requiring a building permit for the construction of a dock.

The municipal court found, and the Circuit Court correctly affirmed, that the evidence showed the condition was included in the permit, Appellant was aware the condition was part of the permit, he admitted the violation of the condition, and took responsibility for the violation. See **(R. p. 55, ¶ 12)** (". . . Mr. Murray was aware of that condition from the building permit. Mr. Murray further did not turn in the as built survey to the Town of Sullivan's Island as is required. Mr. Murray took responsibility for the violation . . . "). **(R. pp. 3-4)** ("The appeal filed by Murray is denied. Based on the record, Murray acknowledged notice of the zoning laws and permit requirements and was found in violation. Murry has failed to demonstrate an error of law."); **(R. pp. 1-2)** (finding that "Defendant/Respondent (sic) submitted an application and accepted a building permit from the Town that included provisions that the dock not extend any further into Cove Creek than adjacent docks" and that "[it] is undisputed that the dock extends further into Cove Creek then the adjacent docks.").

Section 21-75 of the Town Ordinances, governing construction of private docks, providing that no dock will be constructed without "***approval of the Town of Sullivan's Island***, U.S. Corps

of Engineers, the Department of Health and Environmental Control/Office of Ocean and Coastal Resource Management (DHEC/OCRM) and any other governmental or regulatory agency with jurisdiction." **(R. pp. 66-67)** (double emphasis added). Section 21-75 also restricts docks in a number of specific ways, including "No dock shall be permitted to be constructed which extends into the channel *or extends so far as to interfere with navigation.*" **(R. pp. 63-67)** (italics added). Section 5-10, governing building permits generally, provides that an "[a]pplication for a building permit shall be made in writing to the Building Inspector or his designated representative at the Town Hall on a form or forms approved and furnished by said Inspector" and supported with "[p]lans and specifications adequately describing the proposed erection, construction, improvement, alteration or repair. . ." See also **(R. p. 77)** ("It shall be unlawful to erect, construct, improve, alter or repair any building, sign, or other structure or any part thereof or alter any parcel of land in preparation of such erection, construction, improvement or repair without first having obtained from the Building Inspector a written permit for such erection, construction, improvement, alteration, or repair, pursuant to the provisions of this article. . . "); **(R. p. 71).**

At trial, the evidence against Mr. Murray was uncontroverted. Specifically, the testimony from both the Town officials and Mr. Murray was that the Town issued the permit and the permit required no portion of the dock be built seaward of the adjacent docks. See **(R. p. 217, lines 3-8)**; **(R. p. 217, lines 9-25)**; **(R. p. 175, lines 11-15); (R. p. 218, line 14-p. 219, line 5); (R. p. 243, line 10-244, line 8); (R. p. 244, line 18- p. 245, line 8)**; **(R. p. 242, line 24-p. 243, line 4)**; See also, **(R. pp. 86-97).** It was also undisputed at trial that the dock, as constructed by Appellant, violated the condition of the permit and exceeded the authorization by the Town. See **(R. p. 244, lines 4-8)** ("Q. And you -- you agree with me that the as-built dock that your company constructed exceeds the adjoining dock, as depicted on the third page of Exhibit F, by some 9.2 feet – A. That

is correct."); **(R. p. 245, lines 13-18)** ("JUDGE CORNELY: Does this dock exceed the adjacent docks to the left and to the right? A. [Mr. Murray:] It exceeds them by -- well, yes, sir, by 9.2 -- to the docks to the right it exceeds them considerably. To the docks to the left, based on the survey that I had done, 9.2 feet, yes, sir."); See also, **(R. pp. 23-25)** (as-built survey).

Appellant argues that the Town did not have legal authority to issue the citation because, according to Appellant, the Town should have included the condition that the dock not exceed the adjacent docks in its permit because, section 21-75 of the Town Ordinances does not include an express provision limiting docks to the length of adjacent docks. See **(App.'t Br., 9-14).** In other words, Appellant does not assert the condition was not clearly violated.

Appellant's attempt to argue around the condition of the permit and his own acknowledgement of the violation is unpersuasive. Appellant did not appeal the permit. See S.C. Code § 6-29-800 (A)(1) (providing that board of appeals has the powers "to hear and decide appeals where it is alleged there is error in an order, requirement, decision, or determination made by an administrative official in the enforcement of the zoning ordinance"); **(R. p. 184, line 10-p. 185, line 6)**; **(R. p. 185, lines 3-6)**; **(R. p. 213, lines 3-5)**; **(R. p. 220, lines 3-7)**. Instead, he accepted the permit subject to the special condition that the dock not exceed the adjacent docks and constructed the dock in violation of that condition. See **(R. p. 244, line 18-p. 245, line 8).**

Under Appellant's argument, the issuance of a building permit is superfluous to the right to build a structure—the condition in the permit did not preclude construction of the dock in violation of the condition, because according to Appellant, the condition should not have been included. Under this tortured analysis, a contractor need not apply for a permit if he believes no ordinance expressly forbids the proposed construction, or if he should apply for a permit and be denied he could proceed to build the denied structure and later argue that the permit was wrongfully

denied. The argument is contrary to the clear language of the Town Ordinances requiring an application and building permit prior to construction.

Therefore, for the reasons discussed above, this Court should affirm the Circuit Court in full.

Additionally, while the validity of the condition in the permit was binding upon Appellant and is not subject to collateral attack in this proceeding when the building permit was accepted and not appealed, it is worth noting that the condition is well grounded in the ordinance and supported by the sound rational of the Town staff's decision. Section 21-75 provides "[n]o dock shall be permitted to be constructed which extends into the channel *or extends so far as to interfere with navigation.*" **(R. p. 66).** The Town Zoning Administrator testified that ". . . it's a long-standing interpretation of the Town that not extending so far as to interfere with navigation means that no docks subject to a permit can extend beyond adjacent doc[ks]" **(R. p. 190, lines 20-23).** The Town Building Official explained the common sense, safety minded rational for not allowing docks that protrude further seaward than the adjacent docks: ". . .you're in a boat and you're riding down a creek . . . and you're using those docks as a guide to go down the dock . . . [a]nd if one's sticking out there, you run in that dock." **(R. p. 218, lines 6-13).**

Appellant argues that the Town's interpretation was incorrect, citing his own experience with "normal navigation" and a lack of complaints about the illegally built dock. **(App.'t Br., 10-12).**[6] This argument completely ignores the Town's sound rational for the requirement, the dock

[6] Appellant asserts that his conviction violated his due process rights and that the rule of lenity applies such that the ordinances should be strictly constructed against the Town. **(App.'t Br. 12-14).** As explained below, these issues are not preserved and are substantively the same as the issues raised later in Appellant's brief. **(App.'t Br. 16-24).**

builder's decision not to appeal the permit, and that the dock was built in violation of the unappealed condition.

Therefore, the decision of the Circuit Court should be affirmed.

II. Appellant's remaining arguments are not preserved for appellate review because those arguments were never ruled on by the trial judge or the Circuit Court.

For an argument to be preserved for appellate review, the argument must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. See State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). If an error is not presented to and ruled upon by the trial judge, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). A party cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989); see also, State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial.").

An issue is not preserved for review unless *specifically* raised and ruled upon by the lower court. Here, this Court's review is limited to those issues raised and ruled upon by the Circuit Court. See City of Rock Hill v. Suchenski, 374 S.C. 12, 16, 646 S.E.2d 879, 880 (2007) (stating that "[w]e cannot determine error regarding an issue not addressed by the circuit court." See also, Williams v. Williams, 329 S.C. 569, 579, 496 S.E.2d 23, 29 (Ct. App.1998), *rev'd on other grounds,* 335 S.C. 386, 517 S.E.2d 689 (1999) ("The circuit court has the authority to hear motions to alter or amend the judgment when it sits in an appellate capacity, and these motions are required in order to preserve issues for further review by the Court of Appeals or the Supreme Court in cases where the circuit court fails to address an issue raised by a party.").

The Suchenski case involved an appeal from a municipal court trial in which the Defendants was found guilty and appealed asserting that her motion to dismiss should have been granted by the trial court. Id. at 14, 646 S.E.2d at 880. The circuit court agreed and reversed. On appeal, this Court refused to consider one of the City of Rock Hill's arguments because it was not *ruled upon* to the circuit court and was thus unpreserved:

> The City first argues that the circuit court erred by determining the City violated S.C. Code Ann. § 56-5-2953. This issue is not preserved.
>
> Section 56-5-2953 commands the arresting officer to videotape the individual during a DUI arrest. Subsection (A) of the statute outlines the requirements for videotaping at the incident site and at the breath test site. Subsection (B) of the statute provides exceptions that excuse compliance with the statute.1 In this case, both parties agreed that the arresting officer failed to comply with the requirements of subsection (A), but the municipal court denied respondent's motion to dismiss due to an exception in subsection (B).
>
> On appeal to the circuit court, the City reiterated its position that noncompliance was excused pursuant to § 56-5-2953(B). However, the circuit court's order did not address or even mention the exceptions in subsection (B). The circuit court simply concluded, "Here, the legislature has established a procedure that must be followed in the making of a DUI arrest. Here, the procedure was not followed." While the circuit court correctly applied subsection (A) of the statute, it omitted any mention of subsection (B) of § 56-5-2953.
>
> The City did not seek a post-judgment ruling from the circuit court on the potential applicability of § 56-5-2953(B). This precludes our review of the applicability of the subsection (B) exceptions, as we may only review the circuit court's order for errors of law. We cannot determine error regarding an issue not addressed by the circuit court. . . .

Id. at 16, 646 S.E.2d at 880.

Here, only Appellant's first issue on appeal is preserved for review[7] because the remaining issues were not raised and ruled upon by the Circuit Court. See **(R. pp. 29-37)**; **(R. pp. 3-4)**; **(R. pp. 56-57)**; **(R. pp. 1-2)**.[8]

The Circuit Court order stated that "[t]he appeal filed by Murray is denied. Based on the record, Murray acknowledged notice of the zoning laws and permit requirements and was found in violation. Murray has failed to demonstrate an error of law." **(R. pp. 3-4)**. Appellant filed a Motion to Alter or Amend stating that "[t]his ruling does not address the primary issue raised by Defendant which is whether the Town of Sullivan's Island can enforce a requirement that has not been promulgated and is merely an interpretation by the Town of its authority and whether such enforcement can be in the form of criminal prosecution." **(R. pp. 56-57).** The Motion to Alter or Amend did not raise Appellants other arguments on appeal. See **(App.'t Br., 15-24)** (arguing issues not raised at the circuit court). The Circuit Court issued a written order denying the Motion to Alter or Amend and memorizing the following additional findings:

1. There is no express requirement in the Town of Sullivan's Island's ordinances, including Chapter 21-75 which would prohibit docks from extending any further than adjacent docks.

2. Chapter 5-10 of the Town of Sullivan's Island's ordinances require an applicant seeking to construct to secure a building permit application.

3. Defendant/Respondent (sic) submitted an application and accepted a building permit from the Town that included provisions that the dock not extend any further into Cove Creek than adjacent docks.

4. It is undisputed that the dock extends further into Cove Creek then the adjacent docks.

---

[7] In Appellant's discussion of his first issue, Appellant asserts that his conviction violated his due process rights and that the rule of lenity applies such that the ordinances should be strictly constructed against the Town. **(App.'t Br. 16-24).** These issues are not preserved and are substantively the same as the issues raised later in Appellant's brief.

[8] These issues are further unpreserved for the reason that they were not ruled upon by the trial court.

(R. pp. 1-2).

Here, the only argument preserved for appeal is Appellant's first issue on appeal, which was arguably the argument ruled upon by the Circuit Court.

a. Even assuming Appellant's unpreserved arguments were preserved, those arguments fail on their merits.

i. Appellant's conviction for violation of the condition of the building permit does not violate the rule of fair warning or the rule of lenity.

Appellant asserts that his conviction violates the rule of fair warning and/or the rule of lenity. See **(App.'t, Br., 16-19).** These rules are inapposite where, as here, the ordinance clearly requires a building permit for dock construction and the permit was admittedly violated and exceeded.

The rule of fair warning established in McBoyle v. U.S., 283 U.S. 25, 27, 51 S. Ct. 340, 341 (1931) provides that "it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." That cases involved whether theft of an aircraft was covered by the National Motor Vehicle Theft Act, which applied by its terms to "include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails." Id. at 25-26, 51 S. Ct. at 340. The Court in that case determined that the statute did not provide notice that an aircraft was a "motor vehicle." Id.; see also generally, State v. Miles, 421 S.C. 154, 164, 805 S.E.2d 204, 210 (Ct. App. 2017), *reh'g denied* (Oct. 19, 2017) (". . . the idea that those trying to walk the straight and narrow are entitled to know where the line is drawn between innocent conduct and illegality" (citation omitted)).

The rule of lenity provides that penal statutes are to be strictly construed when a criminal statute is ambiguous and requires any doubt about a statute's scope be resolved in the defendant's

favor. See Miles, at 164, 805 S.E.2d at 210 (citing Berry v. State, 381 S.C. 630, 633, 675 S.E.2d 425, 426 (2009). The "rule of lenity is not a device to create ambiguity, nor should a court invoke it before considering the words of the statute in context." Id. (citing State v. Dawkins, 352 S.C. 162, 166–67, 573 S.E.2d 783, 785 (2002); State v. Firemen's Ins. Co. of Newark, N.J., 164 S.C. 313, 162 S.E. 334, 338 (1931) ("The rule that a penal statute must be strictly construed does not prevent the courts from calling to their aid all the other rules of construction and giving each its appropriate scope, and is not violated by giving the words of the statute a reasonable meaning according to the sense in which they were intended, and disregarding ... even the demands of exact grammatical propriety." (citation and internal quotations omitted)); United States v. Bass, 404 U.S. 336, 347, 92 S.Ct. 515 (1971) (citing United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805)).

Here, the rule of fair warning and the rule of lenity are completely inapposite. Appellant does not argue that it was unclear whether he needed a permit to construct a dock or that his construction did not violate the condition in the building permit. He was on notice that unpermitted construction violated the Town Ordinances and makes no argument to the contrary. Simply put, his argument that the condition should not have been included does not implicate the rule of lenity or rule of fair warning.

Therefore, even if this argument is preserved, which it is not, it should be rejected by this Court and the Circuit Court affirmed.

ii. The Town did not unconstitutionally criminalize conduct which was otherwise legal under state law by issuing a citation for construction of the dock in violation of the condition included in the permit because no state law permits construction of a dock irrespective of local permitting requirements.

Under our State Constitution, "all laws concerning local government shall be liberally construed in their favor." S.C. Const. art. VIII, § 17. "A municipal ordinance is a legislative

enactment and is presumed to be constitutional." Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 425, 593 S.E.2d 462, 467 (2004). Furthermore, "[a]s a general rule, 'additional regulation to that of State law does not constitute a conflict therewith.'" Denene, Inc. v. City of Charleston, 352 S.C. 208, 214, 574 S.E.2d 196, 199 (2002); (citation omitted).

A two-step process is used to determine whether a local ordinance is valid. Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002); Bugsy's v. City of Myrtle Beach, 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000). First, the Court must consider whether the municipality had the power to enact the ordinance. If the State has preempted a particular area of legislation, a municipality lacks power to regulate the field, and the ordinance is invalid. Id. If, however, the municipality had the power to enact the ordinance, the Court must then determine whether the ordinance is consistent with the Constitution and the general law of the State. Id.; see also generally, Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 361, 660 S.E.2d 264, 267 (2008).

To preempt an entire field, "an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way." Bugsy's, 340 S.C. at 94, 530 S.E.2d at 893 (citing Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 397 S.E.2d 662 (1990)). Furthermore, "for there to be a conflict between a state statute and a municipal ordinance 'both must contain either express or implied conditions which are inconsistent or irreconcilable with each other.... If either is silent where the other speaks, there can be no conflict between them. Where no conflict exists, both laws stand.'" Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. at 553, 397 S.E.2d at 664 (quoting McAbee v. Southern Rwy., Co., 166 S.C. 166, 169–70, 164 S.E. 444, 445 (1932)).

Appellant argues that OCRM has "occupied the field" of dock permitting and the Town's requirement that Appellant comply with the dock permit is unconstitutional because state law does not include a provision restricting the length of new dock construction to that of adjacent docks. See **(App.'t Br., 19-21).** Appellant's conclusory statement that OCRM has occupied the field of dock permitting is unsupported. Appellant cites only to the South Carolina code of regulations for the proposition that OCRM has "occupied the field" of dock permitting since 1977. Even the regulatory scheme cited by Appellant specifically provides that an OCRM permit does not relieve the holder from responsibility for compliance with ***local permit requirements***. S.C. Reg. § 30-4(E) ("A SCDHEC-OCRM permit in no way relieves the holder from responsibility for compliance with other applicable Federal, State, or local permit requirements.). OCRM specifically recognized the right of local governments to jointly regulate dock permitting—one of the general conditions imposed by the OCRM permit is a condition "[t]hat this permit does not relieve the permittee . . . from the necessity of complying with all applicable local laws, ordinances, and zoning regulations." **(R. pp. 84, 92).** Finally, our Supreme Court has agreed that local governments are authorized to require docks to comply with local ordinances. Rockville Haven, LLC v. Town of Rockville, 394 S.C. 1, 4, 714 S.E.2d 277, 279 (2011) ("We agree with respondents that state law permits local governments to require docks and walkways comply with local laws and regulations, including those which address aesthetic concerns.").

Additionally, it worth noting that nothing in state law legalizes construction of a dock without a permit from the local authority. As explained above, the OCRM regulations specifically require compliance with any local ordinances. For all of these reasons, if this argument were preserved for this Court's review, it should be rejected, and the Circuit Court affirmed.

iii. The Town's actions were not arbitrary and capricious in violation of due process.

Appellant asserts for the first time on appeal that this Court should review the condition included in the permit issued to Appellant as a zoning decision and find that the Town acted arbitrarily and capaciously in imposing the condition in the permit. Specifically, Appellant argues that "the Town abused its discretion in relying on an unwritten and non-codified policy which significantly narrowed application of an unambiguous ordinance restricting dock extensions 'into the channel' and protects from 'interference with navigation.'" **(App.'t Br. 22).** This argument fails for multiple reasons. Appellant ignores that decision of an administrative official interpretation the zoning ordinance can be appealed to the local board of zoning appeals. S.C. Code § 6-29-800 (A)(1). As fully explained above, this argument ignores that Appellant was convicted for violating the condition of the permit about which he was fully aware.[9]

The cases cited by Appellant are a mishmash of zoning cases, none of which involve circumstances analogous to this case. See Peterson Outdoor Advert. v. City of Myrtle Beach, 327 S.C. 230, 237, 489 S.E.2d 630, 634 (1997) (revising a master in equity's order overturning a city council denial of a zoning permit request); Gurganious v. City of Beaufort, 317 S.C. 481, 490, 454 S.E.2d 912, 918 (Ct. App. 1995) (appeal from decision of a Board of Architectural Review); Hodge v. Pollock, 223 S.C. 342, 344, 75 S.E.2d 752, 752 (1953) (appeal from decision of board of

[9] Appellant also argues that the condition, and specifically the build-to line noted by Town staff on the OCRM plan to illustrate the condition, was vague and indefinite. In addition to being unpreserved, this factual argument is unsupported by the record. See State v. Goodwin, 351 S.C. 105, 110, 567 S.E.2d 912, 914 (Ct. App. 2002) ("In criminal cases, [a South Carolina appellate] court sits to review errors of law only, and [is] bound by the trial judge's factual findings unless they are clearly erroneous."). Appellant's testimony was that the condition was part of the building permit and the evidence was clear he understood the condition. See **(R. p. 104, ¶ 11A); (R. p. 242, lines 1-2); (R. p. 243, line 10- p. 244, line 3); (R. p. 244, line 18-p. 245, line 8).**

Adjustment to grant a variance in the application of a zoning regulation of the City of Spartanburg); City of Beaufort v. Baker, 315 S.C. 146, 154, 432 S.E.2d 470, 475, (1993) (holding that ordinance prohibiting "loud and unseemly noises" ordinance was not unconstitutional). Simply put, this is not an appeal of the administrative decision to issue the permit with the condition that the dock not extend pasts the adjacent docks—Appellant chose not to appeal that decision and instead proceeded with construction of the dock in violation of the permit that was issued.

Appellant cast this same argument as a violation of his right to "procedural due process." Appellant cites no case law in support of this due process argument. The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review. See generally, S.C. Const. art. 1, § 22; Stono River Envtl. Protection Ass'n v. S.C. Dep't of Health and Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991). Here, Appellant received a criminal trial, review of that trial by the Circuit Court, and further review by this Court. There is no evidence supporting the due process argument and it should rejected by this Court.

Therefore, for all these reasons, the Court should affirm the decision of the Circuit Court.

CONCLUSION

For the reasons stated above, the Circuit Court's decision and appellant's conviction should be upheld.

Respectfully Submitted,

WALKER GRESSETTE FREEMAN & LINTON, LLC

G. Trenholm Walker (SC Bar #5777)
John P. Linton, Jr. (SC Bar #79130)
PO Box 22167
Charleston, SC 29413
Phone: (843) 727-2200
Walker@wgfllaw.com
Linton@wgfllaw.com

John J. Dodds, III (SC Bar #1707)
858 Lowcountry Blvd., Suite 101
Mt. Pleasant, SC 29464
john@cisadodds.com

November 27, 2018
Charleston, South Carolina

Certificate of Counsel

The undersigned certifies that this Brief complies with Rule 211(b), SCACR.

John P. Linton, Jr.
Attorneys for Respondent

November 27, 2018
Charleston, South Carolina