

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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

Catherine E. Heigel, Director

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Opinion Number: 2020-UP-030  
Appellate Tracking Number: 2017-000161  
Case No. 2015-RFR-69, Sunset Cay, L.L.C.  
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S.C. SUPREME COURT

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

vs.

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

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REPLY TO RESPONDENT'S RETURN FOR A WRIT OF CERTIORARI

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**REPLY TO RESPONDENT’S COUNTER STATEMENT OF THE CASE**

Rule 242(g) of the *South Carolina Appellate Court Rules* permits replies to returns, and as authorized by this Rule, the petitioner offers this brief reply.

The Respondent’s Return shines a light on the petitioner’s frustration in addressing decisions reached on an incomplete record. Whenever a court is required to assess the facts of a case on a motion to dismiss, the process is more efficient if the reviewing court can examine evidence as opposed to adversarial posturing and dueling affidavits, which it improperly construed against the Petitioner.

For example, the Respondent says on page 1 that it issued a permit “with the limitation that no food or beverage service . . . are allowed on or across this marina facility.” This statement is not supported by the record because the Record on Appeal at page 166 contains a copy of David J. Thompson, Senior Wetland Project Manger’s September 18, 2009, letter which states in applicable part: “Specifically, your request is to ask if the serving of snacks and light food items as a part of the existing ships store is consistent with your permit. OCRM offers no objection to inclusion of

food items as a component of the ships store and does not require any modification of the permit provided the store is not converted into a restaurant. Any conversion of the ships store to another use will be considered a 'change of use' and would require a modification of the existing permit." The Record on Appeal also contains a copy of the O.C.R.M. approved food service menu at page 164. Likewise, Respondent's allegations recited in the remainder of its Statement of Case are just that: allegations. The issue before this Court is a question of jurisdiction, and Respondent's numerous allegations have nothing to do with the jurisdictional issue and the Respondent's duties under Regulation 30-9.

### **Reply to Argument 1**

The same frustration with O.C.R.M.'s misdirection and unnecessary complication continues throughout its Return to its arguments. At least the parties reach some common ground. As Respondent says on page 7: "In order to properly invoke the ALC's jurisdiction regarding the October 26, 2015 Cease and Desist Directive, Sunset Cay was required to first obtain a final agency decision and exhaust its administrative remedies." As stated above, because the ALC accepted O.C.R.M.'s unproven allegations, refuted by the Petitioner's affidavits, the record is a jumble of dueling affidavits, and it is impossible to establish the truth because the ALC deprived petitioner of an opportunity to be heard on the merits. O.C.R.M. continuously ignores the fact that its Cease and Desist directive contained within it the appointed date and time for the Petitioner to appear and contest the Agency's action. The Petitioner did just that. It appeared at the date and time directed by O.C.R.M., and at that review hearing, as attested throughout the Record on Appeal in the affidavits of Edward Clark and William Oglesby, the parties met at the O.C.R.M. office, reviewed the cease and desist letter, at which time the O.C.R.M. officials stated they were withdrawing the cease and desist, at least for the time being, and the parties agreed that Petitioner's Petition for

Declaration would dissolve the impasse. The point is that O.C.R.M. wants it both ways: on the one hand, it wants to ignore the administrative review it scheduled and conducted on November 18, 2015 as if it never happened, while on the other hand claiming the Petitioner waived its rights by attending the administrative hearing O.C.R.M. conducted on November 18<sup>th</sup> because it was the wrong kind of administrative hearing. See Record on Appeal page 220: “As you are aware, everyone with an interest in Sunset Cay will be in your offices on Wednesday, November 18, 2015 as a result of your notice dated October 26, 2015.” Thus, this becomes a “textbook case of failing to invoke the ALC’s jurisdiction” (Return at page 9) if, and only if, this Court places its imprimatur upon the Agency’s deliberate sleight of hand in drawing an artificial distinction between an “Enforcement Conference” and a “Final Review Conference,” which is like this Court refusing to take jurisdiction of an appeal because a litigant called her brief a “written argument” instead of a “brief.” Important legal disputes are not decided on such meaningless technicalities. The record clearly establishes that O.C.R.M. seeks to prevail because of its hyper technical distinction between an “enforcement conference” and a “final review conference,” a distinction so subtle that no one recognizes it except O.C.R.M. Whatever it was, the record demonstrates that O.C.R.M. agreed to withdraw or modify its Cease and Desist (R.O.A. pages 225 and 237), and the ALC never considered this fact because it applied the rules of inference in the wrong direction. Once again, the legal issue is a matter of whether the Petitioner should be or should not be afforded an opportunity to be heard on a full record instead of thrown out of Court on a motion to dismiss when the ALC reversed the standard of review on a motion to dismiss.

The Respondent, in one of its numerous footnotes, this time footnote 9, on page 7, asserts that the Petitioner is not entitled to further judicial review because this appeal does not raise any of the five enumerated factors for consideration. Only a bureaucratic agency can fail to appreciate the

“substantial constitutional issues” implicated either by being deprived of the use of property or the right to be heard on the merits do not rise to the level of “substantial constitutional issues.” O.C.R.M. has a history with this argument, having advanced the identical lack of “substantial constitutional issue” in *Lucas v. Coastal Council*, 505 U.S. 1003 (1992). That decision, and the 8000+ cases citing it, leaves no doubt that being deprived of the full use of property is a “substantial constitutional issue.” (Remember: O.C.R.M. in *Lucas* argued that he suffered no harm because there were lots of things he could do with his property other than building two houses and that he had failed to exhaust his administrative remedies because he had not reapplied for a permit.)

### **Reply to Argument 2**

Once again, O.C.R.M. overlooks the circularity of its legal position. It argues that the Petitioner waived his right to challenge the ALC’s dismissal without prejudice because a dismissal without prejudice does not give rise to a cognizable claim. In its Argument 1, O.C.R.M. asserts that the petitioner has not identified a “substantial constitutional issue, footnote 9, page 7—despite being deprived of the full use of its property and despite being prevented from being heard on the merits. Just a few pages later, O.C.R.M. asserts that a violation of the South Carolina Constitution does not give rise to any claim! As Respondent correctly notes, the ALC did conclude a Department’s Declaration under Regulation 30-9 is “similar to an Attorney General’s opinion” (Respondent’s Return page 11), but this is palpable error. The ALC Court did, in fact, conclude this, but this conclusion is a shocking error that is grounded upon a false equivalency between an advisory opinion and a judicial determination of property rights. The Attorney General of South Carolina has no authority to issue a declaratory judgment or to issue a permit delineating the parameters for a citizen’s use of her property. O.C.R.M. sure does. It is the agency charged with the duty to accept, process, and grant permits to riparian owners determining what they can do with their property.

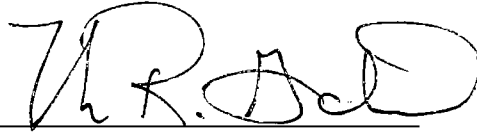
Regulation 30-9 says: “Declaratory Rulings: Interested persons may petition to the Department for declaratory rulings. **The Department shall rule on each petition in writing within 45 days of receipt.**” (emphasis added) Such rulings are hardly the stuff of “advisory opinions,” and if a government agency were capable of feeling shame, this is where the department would feel it because O.C.R.M.’s rulings determine what a citizen can and cannot do with her property, and the Department’s refusal to approve the Petitioner’s proposed water dependent uses was a decision that prevents the Petitioner from using its property to its highest and best use, a right guaranteed by the South Carolina and United States Constitutions. The only way O.C.R.M. can justify its legal position to harm the Petitioner by withholding its Declaration is to advance the same argument it made in *Lucas*, an argument soundly rejected.

### **Conclusion**

The Respondent’s Return is a variation of the “Meet the new boss, same as the old boss” theme. It steadfastly refuses to engage the Petitioner on either the facts or the issues. Instead it seeks safe harbor in bureaucratic sophistries and self-refuting doublespeak. Meanwhile, the property sits fallow, and the Petitioner’s principal, Butch Clark, who began this case in perfect health did not survive it. While O.C.R.M. has successfully tortured the procedure, the fundamental issues remain the same, and the ALC did Mr. Clarke a serious disserve when it committed legal error by refusing to take up this appeal on its merits. The Petitioner respectfully prays that this Court will take up the two straightforward jurisdictional legal issues and put an end to this bureaucratic manipulation before this case claims another casualty.

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,



July 23, 2020

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