

# Dockominiums: Will They Float in South Carolina?

*Sherod Hampton Eadon III*

## **I. Introduction**

The laws of economics tell us that the increasing demand of a finite supply will result in a more expensive product. What is the result when the sale of this product infringes upon rights of public use? This scenario outlines the crux of the issue of dockominiums. A dockominium is a concept in which an owner may exercise exclusive control of the water within their boat space.<sup>1</sup> This concept has become common practice in the last twenty-five years as recreational boating has evolved and people have begun looking for more permanent places to keep their boats and yachts. Marinas sell or long-term lease dock slips<sup>2</sup> to individuals for their private and exclusive use. Marinas in both Charleston<sup>3</sup> and Hilton Head openly advertise the sale of dockominiums without fear of judicial intervention but an examination into this principle will show that these businesses in South Carolina may be advised to exercise some caution in this practice. There are no documented cases questioning the legality of this practice in South Carolina, so one must take an in-depth look to the over-arching national principles of law as well as specific state property and regulatory law to determine how a South Carolina court would likely rule in cases involving the permitting of dockominiums.

---

<sup>1</sup> Ries, *Dockominiums*, in CONFERENCE ON GULF & SOUTH ATLANTIC FISHERIES: LAW & POLICY 179, 180 (1987) (published proceedings of a conference held in New Orleans on March 18-20, 1987) [hereinafter Reis, NEW ORLEANS CONFERENCE].

<sup>2</sup> "Slip spaces" or "slips" refer generally to spaces, at docks or piers, used by boats for mooring purposes. This is analogous to parking spaces for automobiles. Mark Cheung, Note, Dockominiums: An Expansion of Riparian Rights That Violates the Public Trust Doctrine, 16 B.C. ENVTL.AFF.L.REV. 821, 825 (1989)

<sup>3</sup> Bohicket Marina: Seabrook Island, SC Dockominiums for sale at <http://bohicket.com/docknumbers.php>

## II. Property Law Layer of Dockominiums

### A. Public Trust Doctrine

This practice of using dockominiums as a front to sell an individual the right to the exclusive use of water seems to run counter to the well established property laws illustrated in Public Trust Doctrine and common law riparian rights. Finding its roots in the “Institutes of Justinian”, from Roman civil law that was collected by the Roman Emperor Justinian’s top legal scholars in 530 A.D., the public trust doctrine still finds widespread applications in current issues.<sup>4</sup> It was adopted in English law, where waters and shores were recognized as being public in nature. This idea then evolved into the concept that the shores were property owned by the King who held this land in trust for the public. Black’s Law Dictionary defines the public trust doctrine as a doctrine which, “Provides that submerged and submersible lands are preserved for public use in navigation, fishing, and recreation and the state, as trustee for the people, bears responsibility of preserving and protecting the rights of the public to the use of these lands and the waters above them for those purposes.”<sup>5</sup>

The Public Trust Doctrine was first recognized in the United States, “as settled law that claimed that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original State possess within their respective borders”.<sup>6</sup> Only one year later, the Court held that Illinois had title to the land underneath the navigable waters of Lake Michigan and this title was held in trust

---

<sup>4</sup> Black’s Law Dictionary 682 (Bryan A. Gardner ed., 7<sup>th</sup> ed., West 1990).

<sup>5</sup> *Id at* 683

<sup>6</sup> Knight v. United States Land Assoc., 142 U.S. 161, 185 (US 1891)- This case involved a dispute over land that was below the ordinary high-water mark during the date of the conquest of California from Mexico, thus giving the State of California title to land.

for the public's use.<sup>7</sup> The scope of the public trust doctrine which was established by these early cases has recently been expanded by the United States Supreme Court in their holding that the doctrine applied to all water influenced by the ocean's tide, regardless of whether it was navigable or part of a navigable body of water.<sup>8</sup> Given the recent case law, it is settled that the public trust doctrine is alive and well today.

Under the public trust doctrine, states have given the power to their legislatures to create statutes and ordinances in order to regulate and control these submerged lands underlying tidal and navigable waters.<sup>9</sup> Each state is given the authority and ability to determine the scope of the public trust doctrine as it applies in their respective state. Because of the state-specific scope of the public trust doctrine, it will be essential to look at the cases which have established and dealt with this doctrine in South Carolina courts.

The first case dealing with public trust in South Carolina was State v. Pacific Guano Co., 22 S.C. 50 (1883).<sup>10</sup> In recognizing the public trust doctrine for the first time in South Carolina,

---

<sup>7</sup> Illinois Central Railroad v. Illinois, 146 U.S. 387 (U.S. 1892). The Court did not allow the state of Illinois convey land if the effect would be to destroy the public's right of navigation and fishing. However, the Court did not completely bar conveyance of land by the state but required that the overall effect of the conveyance was to improve the public's ability to exercise its trust rights.

<sup>8</sup> Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988) This case involved a dispute over forty-two acres of tidal wetlands between Phillips Petroleum and the state of Mississippi. Phillips Petroleum could trace back their title in the property to pre-statehood Spanish land grants. Mississippi argued that upon their entry to the Union, they were given ownership to all tidelands regardless of navigability. The Mississippi Supreme Court held that their version of the public trust doctrine applied to all property subject to the ebb and flow of the tide (regardless of navigability). The U.S. Supreme Court affirmed this issue on appeal.

<sup>9</sup> State v. Korrer, 127 Minn. 60 at 66 (1912). This case established the notion that states have the power to decide who holds title to the beds of a waterway and to what extent this title will be.

<sup>10</sup> State v. Pacific Guano Co. 22 S.C. 50 (1883)- This case dealt with a claim by a private landowner who asserted that they gained ownership of property (creek beds) through adverse possession, claiming that the creek beds were included in a grant from the state to their predecessors in title. In

the S.C. Supreme Court stated:

The state had in the beds of these tidal channels not only title as property, the *jus privatum*, but something more, the *jus publicum*, consisting of the rights, powers, and privileges derived from the British crown, and belonging to the governing head, which she held in a fiduciary capacity for general and public use; in trust for the benefit of all the citizens of the state, and in respect to which she had trust duties to perform. The absolute rule heretofore referred to, limiting land owners bounded by such streams to the high water mark, unless altered by law or modified by custom, accords with the view that the beds of such channels below low water mark are not held by the state simply as vacant lands, subject to grant to settlers in the usual way, through the land office.<sup>11</sup>

A later South Carolina case reaffirmed the idea that our public trust doctrine includes land below the high water mark of tidal, navigable streams.<sup>12</sup> This Cape Romain Land & Improvement Co. v. Georgia Carolina Canning Co., 148 S.C. 428, 438, 146 S.E. 434, 438 (1928) case created a presumption that has lasted to this day, which provides, as stated by the South Carolina Supreme Court, “the title to land below the high-water mark on tidal navigable streams, under the well-settled rule, is in the State, not for the purpose of sale, but to be held in trust for public purposes.”<sup>13</sup> South Carolina’s strict construction of determining whether the state is actually granting title to lands located below the high water mark in tidelands can be a key issue if a case involving dockominiums was to be heard in this state. The 1972 State v. Hardee<sup>14</sup> case

---

rejecting this claim, the Supreme Court of South Carolina first addresses South Carolina’s version of the Public Trust Doctrine.

<sup>11</sup> *Id* at p.83-84 (Citations omitted)

<sup>12</sup> Cape Romain Land & Improvement Co. v. Georgia Carolina Canning Co., 148 S.C. 428, 438, 146 S.E. 434, 438 (1928)- In this case, the Cape Romain Land sued the defendants seeking to restrain them from coming onto the plaintiff’s lands and also to seek damages for prior trespasses. The Canning Company defended on the fact that they were operating under a lease from the State Board of Fisheries which allowed them to cultivate oysters between the low and high water marks in the streams in question.

<sup>13</sup> *Id* at 438- This was the determination of the court after adopting a very strict interpretation in viewing grants from the state to private individuals concerning property below the high water mark in navigable streams.

<sup>14</sup> State v. Hardee 193 S.E.2d 497 (S.C. 1972)- This case involves the State bringing a suit to enjoin the defendant from building, filling in or

further gives insight into the way South Carolina courts will likely treat disputes over the property rights of tidelands below the high water mark. The Court reiterates the strength of their opinion in the *Cape Romain* case and their strict interpretation of grants of title to tidelands by stating:

The [language] of the Cape Romain case purporting to establish a trust in [tidal property] has been criticized as being dicta only and should not be read to prevent private persons from obtaining title to tidelands. The State, through its attorney general, has consistently expressed the view that the statement is a part of the holding of the case and precludes sale of tidelands except by an act of the legislature. 15

Another South Carolina case which has furthered our state's development of the public trust doctrine as we know it today is State v. Fain, in which the petitioners asserted title to the tidelands in dispute and demanded that the State's claim to title be extinguished.<sup>16</sup> The Court further notes that:

In the case of a tidal navigable stream the boundary line is the high water mark, in the absence of more specific language showing that it was intended to go below the high water mark, and the portion between the high and low water mark remains in the State in trust for the benefit of the public.<sup>17</sup>

The presumption of title in favor of the State that has developed from this line of cases is well settled and was summarized as, "the State comes into court with a presumption of title, and if an individual is to prevail, he must recover upon the strength of his own title, of which he must

---

altering the tidelands in question. The Court, using the public trust doctrine, looks to the construction of the grant in finding in favor of the State

<sup>15</sup> See *Supra* text note 13 at p.500

<sup>16</sup> State v. Fain 273 S.C. 748- The property in question is a dike which is located on the Combahee River, twenty six miles upstream from the point where the river becomes the inter-coastal waterway. In determining what type of land is at issue, the court held that "it is undisputed that the land in question is covered by water at each high tide, and that the Combahee River is a tidal, navigable stream." S.C. Code Ann § 48-39-220 gives a claimant the right to bring a suit against the state in disputes over tidelands.

<sup>17</sup> *Id.* at p. 752

make proof.”<sup>18</sup> For a private party to establish private ownership of tidelands, the claimant must show that he, or the person from whom he acquired title, possessed a grant from either the State or the British crown.<sup>19</sup> This presumption in favor of the state creates an extremely high bar to overcome by any private party’s attempt to establish title to this land superior to the ownership of the state. Finally, a two part test for establishing fee simple title was enunciated in a 1978 case that provided a claimant must prove their predecessors possessed a valid grant and the grant was sufficient to convey land below the high water mark.<sup>20</sup> This two part test was applied in a more recent 2001 decision which allowed a land trust to claim title to the land and prevented an upland land owner from constructing a sixty foot dock over their land to obtain access to a navigable waterway. <sup>21</sup>

Another South Carolina Court has adopted the public trust doctrine in a recent decision. In State v. Singletary Head, the South Carolina Court of Appeals has expressly adopted the public trust doctrine.<sup>22</sup> The Court reversed the criminal conviction of the appellant holding as follows:

---

<sup>18</sup> State v. Hardee, 259 S.C. 535, at 539, 193 S.E.(2d) 497, 501 (1972); State v. Pinckney, 22 S.C. 484 (1884).

<sup>19</sup> See *Supra text note 10* at 74.

<sup>20</sup> State v. Holston Land Co. 272 S.C. 65, 66, 248 S.E.2d 922, 924 (1978) developed the two part test in determining fee simple title to tidelands. 1) Its predecessors in title possessed a valid grant and; 2) the grant’s language was sufficient to convey the land below the high water mark.

<sup>21</sup> Low Country Land Trust v. State 347 S.C. 96, 111, 552 S.E.2d 778, 786 (S.C. Ct. App. 2001)- This case dealt with a land trust who had nearly 450 acres donated to it, successfully proved their title to the land. Using this title to the land, the Court disallowed an upland land owner to build a sixty foot dock over this land to reach a navigable waterway. This case will be later discussed in the riparian rights section later in this essay.

<sup>22</sup> State v. Singletary Head No. 2732 1997 WL 785540 (S.C. Ct. App. Dec. 19, 1997) The case involves the reversal of a criminal conviction of fishing without a license. This case involves the defendant who was caught numerous times fishing without a license on a private pond which was made by a damming the water of Black Creek. The aggrieved land owner made arguments before both the magistrate and circuit court that he owned the land under his private pond, by virtue of his predecessors in title damming of the creek and his payment of taxes on the land. The South Carolina Appellate Court held that since Black Creek was listed as navigable water by the South Carolina Water Resources Commission and Head gained access of the waterway legally, he could not be convicted of fishing without a license on this pond, as he has a

Navigable watercourses subject to a public trust, and the state's ownership of public trust resources is generally not alienable . . . . Obviously, in most cases where a watercourse is navigable, a person who legally accesses the watercourse, and fishes from within a boat on the watercourse, cannot be convicted of violating Section 50-1-90 23, as such a person has a constitutional 24 and statutory right to be there. 25

This decision gives significant power to public citizens in furthering the basic assumption that a private land owner may not exclude members of the public from entering and using lands that are deemed to be public trust lands. This decision may be used as a predicate to extend the public trust doctrine further in other circumstances in later disputes heard by South Carolina courts.

Thus, the contractual sale of a dockominium to a slip owner may be legal but if the State decides that the public's interest in the property which it owns outweighs this grant of title, then the State may reclaim title in the tideland area. The implications of any single case in South Carolina involving dockominiums being decided in favor of the state on similar grounds would be extremely dangerous to those parties trying to construct and sell dockominiums.

### **B. SC Horizontal Property Act**

In S.C. Code Ann. § 27-31-10, the South Carolina Legislature created our state's version of the Horizontal Property Act. The requirements of any deed or lease created under this Act are set out in S.C. Code Ann. § 27-31-100 and require, under subsection (a), "The description of the land whether leased or in fee simple, and the building or buildings in existence or to be

---

Constitutional and Statutory right to be there.

23 S.C. Code Ann. § 50-1-90: This statute deals with any person, at any time hunting or fishing without the consent of the land owner. A person found guilty will be charged with a misdemeanor and fined no more than two hundred dollars or imprisoned for not more than thirty days.

24 S.C. Const. Art. XIV, § 4 ("All navigable waters shall forever remain public highways free to the citizens of the State and the United States without tax, impost or toll imposed; and no tax, toll, impost or wharfage shall be imposed . . . unless the same be authorized by the General Assembly.")

25 See *Supra* note 22 at p.2

constructed, if applicable, expressing their respective areas".<sup>26</sup> The conversion of rental units into condominiums is dealt with under S.C. Code Ann. § 27-31-410 (2005)<sup>27</sup> Condominium owners are required to comply with the horizontal property regime that is established by the landlord. The conversion of rental units into a condominium plan essentially gives outright ownership to the individual pursuant to the requirements of the regime established by the landlord. This granting of outright ownership runs counter to the well established doctrine of public trust doctrine as established in South Carolina. This requirement may be especially troublesome in the creation of a dockominium complex, whereby the owner is purporting to own the property under the boat slip itself. Another problem arises under Section 27-31-270, which outlines the assessment and collection of taxes based upon the ownership of an apartment or condominium. The question again arises, how may an owner be taxed on the property which he purports to own when laws such as the public trust doctrine expressly limit their exclusive ownership of such lands? The *McQueen* case, discussed earlier, does not provide protections to those who pay taxes on land that is later deemed to be that which falls under the public trust doctrine and is actually owned by the state. This decision undermines an argument that a dockominium owner may make with respect to proving ownership on the basis of paying taxes on the land they purport to own.

### **C. Riparian Rights**

---

<sup>26</sup> S.C. Code Ann. § 27-31-100- Deals with the requirements of the master deed or lease in creating and establishing a horizontal property regime.

<sup>27</sup> S.C. Code Ann. § 27-31-410 (2005) provides "As used in this chapter, "conversion of rental units to condominium ownership" means the establishment of a horizontal property regime encompassing a preexisting building which, at anytime prior to the recording of the master deed or master lease, was wholly or partially occupied by persons as their residence on a permanent or at least a continuing basis other than persons who, at the time of such recording, had contractual rights to acquire condominium ownership within the building."

Riparian property rights are derived from the common law. The owner of property adjacent to a stream or other body of water has the right to the use of the water in that stream or body of water. Although riparian rights do not convey a property interest in the water itself, they do give the waterfront property owner the right to reasonably use the shoreline as well as the water adjacent to the shoreline for activities such as swimming, boating, and wharfing.<sup>28</sup> This puts the responsibility on the upstream users to acknowledge this right while affording the downstream owners private rights in streams and lakes on which they own property. The dockminium concept purports to give outright title to private individuals. This title is arguably given to land which is entrusted to the public under the public trust doctrine. The South Carolina Court of Appeals decision in State v. Singletary Head, stands for the proposition that a private owner should not be allowed to exclude the public. The exclusion of the public use runs counter to the riparian rights of all others who legally claim rights of use of the water as well and will not be tolerated.

Riparian rights have been a part of the common law since the beginning of this country, but an early case established that these riparian rights are not absolute.<sup>29</sup> More recent cases have broken down riparian rights of water use into two categories based upon their purpose; natural

---

<sup>28</sup> Bino v. City of Hurley, 273 Wis. 10, 16, 76 N.W.2d 571, 575 (1956)- The appellate court reversed the decision of the trial court and declared an ordinance unconstitutional because it prohibited the people living on the lake from using the lake for swimming, boating, bathing. This violated these people's riparian rights.

<sup>29</sup> Parker v. West Coast Packing Co., 17 Or. 510 at 515 (1889)- This is a case dealing with the limited riparian rights of an owner of land bounded by navigable waterways. The court held, an owner "has the privilege of building a wharf out to such a depth of water as will enable ships or vessels to touch thereat or receive or discharge freight, and may apply such frontage to any use not inconsistent with the rights of the public.

and artificial.<sup>30</sup> Natural rights are those associated with household uses such as drinking water. These rights have preferred status over artificial rights.<sup>31</sup> Artificial rights are those such as commercial and recreational uses and must pass a reasonableness standard in order to sustain a claim against the upstream property owner.<sup>32</sup>

The riparian rights of the dockominium owners are essential in the concept of a workable dockominium. In each dockominium concept, each owner will theoretically be able to exercise his or her riparian rights over the boat slip that he or she bought or leased. The boat slip owners will maintain that they have exclusive ownership and should be able to exercise dominion and control over the area which they have purchased. The dockominium owners will feel as if they have a stake in the property below the water where their dock is located. This assertion of ownership runs counter to the public trust doctrine and creates the potential for legal conflict. The dockominium owners' exclusive claim to their property as a dock upon public waters may run counter to the well-established public trust doctrine. Their claim of exclusive ownership may also violate the riparian rights of downstream property owners and the public at large. The *Head* decision in the South Carolina Court of Appeals, as discussed earlier, has expressly provided that private owners may not exclude members of the public who are legally operating on navigable waterways. This decision undermines the arguments that dockominium owners are likely to

---

<sup>30</sup> Thompson v. Enz, 379 Mich. 667 at 686., 154 N.W.2d 473 (1967)- This dispute involves two land owners arguing about the riparian rights of excavating and dredging a waterway. The Court held that "riparian uses are divided generally into two classes. The first of these is for natural purposes. These uses encompass all those absolutely necessary for the existence of the riparian proprietor and his family, such as to quench thirst and for household purposes...The second of these is a use for artificial purposes. Artificial uses are those which merely increase one's comfort and prosperity and do not rank as essential to his existence, such as commercial profit and recreation.

<sup>31</sup> *Id.* at p.686

<sup>32</sup> *Id.* at p.687

advance whether they consider their ownership of the dockominium to be a stake in the water or a stake in the land under their dock.

Creation of dockominium units is facilitated in most jurisdictions by state condominium law. In those states that adopted flexible condominium statutes, the statutory language can be construed to allow for the creation of the dockominium concept.<sup>33</sup> The problem arises when these riparian rights of the dockominium owners conflict with the public trust doctrine and the public's right to use the water. One such example of when the rights of a landowner are compromised by the permit of another upland landowner to construct a pier over their land to gain access to a navigable waterway.<sup>34</sup> This decision provides extreme limitations to those upland landowners attempting to gain access to a navigable waterway at the expense of another landowner.

### **III. Governmental Regulation of Property**

#### **A. Federal Regulations**

As earlier discussed, another very important layer of property law is the regulation that the federal government may exercise over tidelands and other "critical areas". Congress saw the need in regulating construction of projects on navigable waterways. Congress promulgated the Rivers and Harbors Appropriations Act of 1899, which provides in Article 10, that the Army Corps of Engineers has the authority to regulate docks and other structures being built on the

---

<sup>33</sup> Mark Cheung, *Dockominiums: An Expansion of Riparian Rights That Violates the Public Trust Doctrine*, 16 B.C. ENVTL.AFF.L.REV. 821, 828 (1989)

<sup>34</sup> *Low Country Land Trust v. State* 347 S.C. 96, 111, 552 S.E.2d 778, 786 (S.C. Ct. App. 2001)- This case dealt with a land trust who had nearly 450 acres donated to it, successfully proved their title to the land. Using this title to the land, the Court disallowed an upland land owner to build a sixty foot dock over this land to reach a navigable waterway. The Court cited regulatory language from 23A S.C. Ann. Regs. R.30-2(I)(4) (Supp. 2000), that "if ownership vests in private hands, an adjacent landowner desiring to build on tidelands must obtain the express consent of the fee simple owner. As evidenced by the claim by LCLT, their consent for this dock was never given

nation's navigable waterways. The Army Corps of Engineers was given the authority to exercise control over interstate commerce, a very broad power, with respect to obstructions in navigable waterways.<sup>35</sup>

The Corps has set forth the requirements to obtain a permit to build in a navigable waterway at 33 C.F.R. 320.4. Section one of this regulation requires the Corps to make a public interest review of the effects of granting such a permit. Section 2 of this code sets forth the three factors to be considered in making a determination on the issuance of a permit.<sup>36</sup> The Corps must make a determination of the public versus private need for the structure and weigh this need against the environmental effects on the wetlands upon which the structure will be permitted as noted in 33 C.F.R. (3)(b). The most important portion of 33 C.F.R. 320.4 (5) is section (g) which deals with the consideration of property ownership.<sup>37</sup> If a permit is allowed which bestows a private party property ownership to the detriment and injury of the public, it will likely be ruled invalid under this statute. Regulation 33 C.F.R. 320.4. (5)(g) provides a six factor test which identify the property interests to be weighed in the determination of whether or not to issue a permit, especially with respect to riparian rights of other landowners.<sup>38</sup> If the

---

and thus the permit was not allowed.

<sup>35</sup> 33 C.F.R 322.3- This statute provides a general description for which activities the Army Corps of Engineers may permit.

<sup>36</sup> 33 C.F.R. 320.4 (2): The following general criteria will be considered in the evaluation of every application: i) the relative extent of the public and private need for the proposed structure or work; ii) where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and iii) the extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited.

<sup>37</sup> 33 C.F.R. 320.4 (5)(g)- This subsection deals with the consideration of property ownership. It claims that the authorization of work or structures by DA does not convey a property right, nor authorize any injury to property or invasion of other rights.

<sup>38</sup> 33 C.F.R. 320.4(5)(g)(3) A riparian landowner's general right of access to navigable waters of the United States is subject to the similar rights of access held by nearby riparian landowners and to the general public's right of navigation on the water surface. In the case of proposals

riparian rights of other landowners or the public in general is found to be interfered with, in respect to the access to navigable waterways, then a permit will be denied pursuant to subsection (g)(3).

## **B. State Regulations**

In 1977, South Carolina's legislature passed the South Carolina Coastal Tidelands and Wetlands Act, which gave South Carolina's Coastal Council the duty "to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone."<sup>39</sup> In 1994, South Carolina's legislature enacted a statute including the South Carolina Coastal Council as part of the Coastal Division of the Department of Health and Environmental Control.<sup>40</sup> Since that time, the South Carolina Coastal Council has become known as the Department of Health and Environmental Control's Office of Ocean and Coastal Resource Management.<sup>41</sup> Many of DHEC-OCRM's permitting duties in coastal zones may be found at S.C. Code Ann. § 48-39-10, *et seq.* Although it is never explicitly stated, the OCRM is implicitly charged with balancing the public's use of natural resources in public trust areas, such as tidelands and coastal waterways, while protecting the environmental quality of these areas. The most relevant duty of the OCRM, in regards to dockominiums, is their power to permit and regulate the construction of docks and other developments in critical areas.<sup>42</sup> There will be a

---

which create undue interference with access to, or use of, navigable waters, the authorization will generally be denied.

<sup>39</sup> S.C. Code Ann. § 48-39-30(a)- This statute sets forward the legislative policy behind authorizing state action in regulating coastal zones.

<sup>40</sup> S.C. Code Ann. § 1-30-45: This statute deals with the incorporation of South Carolina Coastal Council to be transferred an incorporated in and shall be administered as part of the Department of Health and Environmental Control, to be included under the coastal division.

<sup>41</sup> South Carolina's Coastal Council is now known as SCDHEC-Office of Ocean and Coastal Resource Management and will be referred to from this point as OCRM, even if the referenced event occurred before the name change.

discussion of two more relevant South Carolina cases that deal with the public trust doctrine in the regulatory property rights section as they have more applicability in a regulatory sense.

In South Carolina's regulatory law, DHEC's Office of Ocean and Coastal Resource Management, as mentioned above, is given power to regulate the construction of docks and other developments of a critical area, as defined in S.C. Code Ann. § 48-39-10. This regulatory power, outlined in 23A S.C. Code Ann. Regs. R 30-12 (1976) was at issue in a recent South Carolina case, Sierra Club v. Kiawah Resort Associates et al. 318 S.C. 119 (1995). This case involved the request for an initial permit to build seventy-eight docks in the Rhett's Bluff area of Kiawah Island near Charleston.<sup>43</sup> Because of the magnitude of the plans, Kiawah Resort Associates were met with strong objections from South Carolina Wildlife and Marine Resources Department, the United States Fish and Wildlife Service, the National Marine Fisheries Services, private groups, and members of the general public.<sup>44</sup> The Kiawah Resort Associates withdrew this initial application for a permit of seventy-eight docks and filed a new application asking for the permits to build thirty-six docks. In deciding whether or not to allow the permitting of construction of a dock<sup>45</sup> the Office of Ocean and Coastal Resource Management must look to

---

<sup>42</sup> S.C. Code Ann. § 48 39-10(j): This statute defines critical areas as 1)coastal waters; 2)tidelands; 3)beaches; or 4)beach/dune systems which is the area from the mean high-water mark to the setback line as determined in S.C. Code Ann. § 48-39-280.

<sup>43</sup> Sierra Club v. Kiawah Resort Associates et al. 318 S.C. 119 (1995)

<sup>44</sup> *Id.* at p.122

<sup>45</sup> 23 A S.C. Code Ann. Regs R. 30-12 (1976). 1) A dock or pier is a structure built over and/or floating on water and is generally used for the mooring of boats. Docks and piers are the most popular method of gaining access to deep water. Although they are least objectionable from an ecological point of view, docks and piers sometimes pose navigational problems, restrict public use of the water and, under certain circumstances, possess potential for creating environmental problems. 2) The following standards are applicable for construction of docks and piers: a) Docks and piers shall not impede navigation or restrict the reasonable public use of State lands and waters;... j)Where docks and piers are to be constructed over tidelands utilized for

regulations to insure that such permits do not contravene the general purposes of protecting the environment in the Coastal Zone Management Program as enunciated in S.C. Code Ann. § 48-39-80 (2005). The power to regulate whether or not to permit the construction of a dock in a critical area is given to the OCRM.<sup>46</sup> The Court expresses the Office of Ocean and Coastal Resource Management's implicit power of determining whether or not to approve the initial permit by stating:

In South Carolina, the state owns the property below the high water mark of a navigable stream. This property is part of the Public Trust. The legislation creating the Coastal Council and defining its duties, while not explicit, implicitly charges the Coastal Council with administering the Public Trust lands in connection with coastal waterways.<sup>47</sup>

The question in the *Kiawah Resort Associates* case was the impact of the thirty-six proposed docks upon the environment, namely harming of the oyster population and the public's right of access to the area. As stated earlier, under the South Carolina Coastal Management Act, the State through the Coastal Council maintains control over the public trust lands.<sup>48</sup> In the instant case, the Court found that the public interest in the public trust lands and waters was not substantially impaired by the issuance of the permits to build the docks. The permits were allowed and the docks were ultimately built.

In analyzing the preceding case, one will see that the Office of Ocean and Coastal

---

shellfish culture or other mariculture activity, the Council will consider rights of the lessee and the public prior to approval.

<sup>46</sup> S.C. Code Ann. § 48-39-130- This statute requires that "no person shall utilize a critical area for a use other than the use the critical area was devoted to on such date unless he has first obtained a permit from the department."

<sup>47</sup> See *Supra* note 43 at 402

<sup>48</sup> "The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining" as stated in Illinois Central R. Co. v. Illinois, 146 U.S. 387, 453, 13 S.Ct. 110, 118 (1892).

Resource Managements' Regulations specifically state that no permit shall convey, nor be interpreted to convey, a property right in the land or water in which the permitted activity is located.<sup>49</sup> This language is extremely important when taken in the context of the permitting of dockminiums. If a marina's requests for permits are accepted for the construction of docks, there is explicit statutory language that this permit, in no way, conveys a property right in the land or water. As discussed earlier, this statutory language would be extremely detrimental to an owner of a dockminium attempting to prove exclusive ownership of the property of his or her boat slip.

If there is an issue that is contested regarding the issuance of a permit, the ultimate finder of fact is the Administrative Law Court who may make its own findings adverse to those of the hearing officer in a suit involving the initial issuance or denial of a permit.<sup>50</sup> The Administrative

---

<sup>49</sup> 24 A S.C. Code Ann. Reg. R.30-4 (E)- "No permit shall convey, nor be interpreted to convey, a property right in the land or water in which the permitted activity is located. No permit shall be construed as alienating public property for private use or as alienating private property for public use.

<sup>50</sup> Brown v. SCDHEC, Office of Ocean and Coastal Resource Management, 348 S.C. 507, 560 S.E.2d 410 (2002)- This case dealt with a storm water permit which was required from the DHEC-OCRM before constructing a motor speedway. Brown first applied for a permit from the OCRM and one was issued. Hadstate (a citizen) appealed and sought a contested case hearing before an Administrative Law Judge (ALJ). The ALJ issued a final decision upholding OCRM's issuance of the stormwater permit (S.C. Code Ann § 1-23-380(A)(6)(Supp. 2001). Hadstate appealed the ALJ's decision to the DHEC board, which reversed the ALJ, and denied the stormwater permit. The SC Supreme Court held that the DHEC Board exceeded it's authority to act as a fact finder and was held to the facts discovered in the ALJ decision. Since the ALJ's order lacked sufficient information to determine whether or not there had been a consistency review (as required by. § 1-23-610(D)), the Board should have remanded to the ALJ for a determination on this matter. The importance of this case is to show that the ALJ has the authority to be a fact finder in contested permit situations, not the DHEC Board. The circuit court will sit as the appellate court after a decision is rendered by the ALJ.

Ross v. American Red Cross, 298 S.C. 490, 381 S.E. 2d 728 (1989)- This was a workers compensation case which is included in this essay to show that judicial review for such agencies (as well as DHEC-OCRM) are made by an Administrative Law Judge, whose decision is viewed with respect to the "substantial evidence" provision of the Administrative Procedures Act.

Procedures Act (APA) provides that the ALJ may generally serve in three different capacities in presiding over cases; as a true appellate tribunal, as a finder of fact, or in holding hearings as to a proposed regulation.<sup>51</sup> However, in the South Carolina Code and recent case law provides that the Administrative Law Judge will preside as the finder in fact in all contested environmental permitting cases.<sup>52</sup> If the petitioner has exhausted all administrative remedies and truly feels as if he has been obviously wronged, then he may appeal a ruling to a court for a determination of whether the ruling of an agency is supported by substantial evidence.<sup>53</sup>

A recent South Carolina case has also held that the government may deny requests for permits to build bulkheads and backfill lots on property located in public trust lands without having to compensate the land owner for a regulatory taking.<sup>54</sup> This South Carolina case may,

---

<sup>51</sup> S.C. Code Ann. § 1-23-10 *et seq.* (1986 & Supp. 2001) - The ALJ may act as an appellate tribunal, as the ultimate fact-finder (as in the Brown v. DHEC case), or in holding hearing on proposed regulations in other cases.

<sup>52</sup> S.C. Code Ann. § 1-23-600(B) and Marlboro Park Hospital v. South Carolina Department of Health and Environmental Control 358 S.C. 573, 595 S.E.2d 851 (S.C. App. 2004)- Both provide that in contested permitting cases of the Department of Health and Environmental Control (DHEC), the ALJ serves as the finder of fact.

<sup>53</sup> "Substantial evidence is, considering the record as a whole, evidence which would allow reasonable minds to reach the conclusion that the administrative agency reached." Carter v. South Carolina Coastal Council, 281 S.C. 201, 314 S.E. 2d. 327 (1984). Furthermore, Lark v. Bi-Lo, 276 S.C. 130, 276. S.E. 2d. 304 (1981), stands for the proposition that a South Carolina agency's decision may be reviewed by an appellate court if there has been a manifest or gross error of law by the administrative agency. The decision under appeal must be found to be "clearly erroneous" in view of the substantial evidence on the whole record for reversal. This standard gives great weight to administrative agencies and creates a high bar for an unsuccessful applicant to prove in order for relief.

<sup>54</sup> McQueen v. South Carolina Coastal Council 354 S.C. 142, 580 S.E.2d 116 (2003)- This case deals with a landowners claim of compensation for a regulatory taking by the state government. This unique situation came about when the landowner bought this land in the early 1960's and waited until 1993 to request a permit from SCDHEC's Office of Ocean and Coastal Resource Management allowing him to backfill his lots and build bulkheads. Unfortunately for Mr. McQueen, the land he owned had turned into tidelands from continuous erosion and fell under the state's public trust lands. The OCRM denied his requests for permits and found that his property was located in critical area wetlands. After a final decision by the courts upholding these denials for permits, Mr. McQueen initiated this action for compensation on the basis of a regulatory taking. The Master-in-equity found that a regulatory taking had occurred and effectively denied McQueen of all

in practice, increase the risk for developers of dockominiums. Once the developer purchases the land for the project and invests in other aspects of the project, he will not be able to claim compensation for a taking if the permit for the dockominium is denied.

#### **IV. Case law from other jurisdictions dealing with Dockominiums**

The first case law offered for examination is one which is nearly twenty-five years old but is very relevant to the issue at hand, as it takes place in our neighboring state of Georgia. In 1983, in Matthews v. United States, 713 F.2d. 677 (M.D. Ga. 1983), the appellate court held that an already existing and fully functioning dockominium complex be closed down. This United States District Court for the Middle District of Georgia found that an injunction, prayed for by the plaintiff was proper in this case because the dockominium complex violated the requirement that projects be operated as public facilities.<sup>55</sup> As discussed earlier, the Army Corps of Engineers was given very broad regulatory power in permitting the construction of waterways to maintain interstate commerce and other important rights. The Army Corps of Engineers also has the power to manage and protect the shorelines of all lakes under its jurisdiction with a balance between private ownership interests and maximum benefits of public use.<sup>56</sup>

---

economically useful use of the land, and ordered the State to pay \$50,000 per lot as just compensation. The OCRM appealed to the South Carolina Court of Appeals. The Court of Appeals majority determined "the definitive issue is what rights McQueen possessed when he purchased the lots and . . . the right to add a bulkhead and fill were McQueen's at the time of purchase." McQueen v. South Carolina Coastal Council, 329 S.C. 588, 595, 496 S.E.2d 643, 647 (Ct. App. 1998). This Court refused to decide the amount of compensation McQueen should be afforded. OCRM appealed to the S.C. Supreme Court, which granted certiorari. As noted, the Supreme Court reversed the SC Court of Appeals in deciding that a complete regulatory taking had taken place, however, since the public trust lands on which his land is located is essentially owned by the public, he was owed no compensation for the denial of construction that he is not able to do anyway because of the public trust doctrine.

<sup>55</sup> 16 U.S.C.S. § 460(d)- The statute states that the chief of engineers is authorized to operate public recreational facilities, provided that: the water areas of all such projects shall be opened to public use generally for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such areas along the shores of such projects shall be maintained for general public use.

<sup>56</sup> C.F.R. § 327.30(d)(1) (1982), regarding lakeshore management at

In the instant case, the petitioner claimed that the existence of a condominium-style boat dock at a commercial marina on Lake Hartwell obstructed her view and caused a diminution in the value of her adjacent land. Since the United States owns Lake Hartwell, it is authorized to be under the administration of the Army Corps of Engineers. In November of 1977, Harbor Light Marina got permit permission from the Corps of Engineers authorizing Dock F's (the dockominium) location, construction, and operation on a condominium basis with the eleven individuals in the Dock F Association as owners. The dockominium served no public purpose to anyone other than the eleven owners who were essentially given exclusive title to the dock and boat slips.<sup>57</sup> The lower court held in favor of the petitioner and ruled that the dockominium's legal ownership be returned to the marina, while they would still be allowed to rent the dock slips as before producing no substantial change in circumstance.<sup>58</sup> The appellate court ruled that the dock should not be allowed in the vicinity as it was a private dock, serving no public purpose, which was built in an area that had been permitted as a public recreation area. The court essentially held that the comprehensive plan advanced under this proposed dockominium site on a government owned lake operated to advance the private exclusive use of public property to the detriment of rights of the public, and was therefore invalid. The court held that as the rights of

---

government owned lakes, provides: Policy. (1) It is the policy of the Chief of Engineers to manage and protect the shorelines of all lakes under its jurisdiction to promote the safe and healthful use of these shorelines for recreational purposes by all of the American people. It is the objective of Corps of Engineers to manage private exclusive use of public property to the degree necessary to gain maximum benefits to the general public.

<sup>57</sup> Matthews v. United States, 713 F.2d. 677, at 680 (USDC-M.D.Ga. 1983) - The only public access to Dock F was by boat, or by walking along the public shoreline. "Private property" or signs containing similar messages, were posted on or around Dock F until protests by Corps officials caused their removal. Dock F was used exclusively by the eleven individual defendants or their invitees. The Court found that no public services or facilities such as boat ramps, restrooms, food, fuel pumps, or other such services are associated with Dock F.

<sup>58</sup> *Id* at 680

petitioner were violated by this dockominium complex, Dock F would have to be removed. The result in this case should alert developers and even purchasers of the dangers associated with this concept. While it is unlikely that any developer would be so foolish to build without a permit, this is an example of a court ordering the demolition of a structure that violated the existing regulations.

The Army Corps of Engineers are not the only agency that dockominium owners and developers have to fear. State legislatures vary in how they treat this issue. Wisconsin has actually passed legislation which has been interpreted to make dockominiums *per se* violations of the public trust doctrine. The idea of dockominiums being a *per se* violation of the public trust doctrine is advanced by Justice Bablitch in the concurring opinion of ABKA Limited Partnership v. Wisconsin Department of Natural Resources, 2002 WI 106 (Wis. 2002), and will be discussed later. If such legislation passed in South Carolina, the Attorney General's office could bring suits, as a representative of the public, to challenge dockominium owners' title as being inferior to that of the state in these public trust areas. Although unique to Massachusetts and Maine, where the public trust doctrine only applies to the public's limited uses of fishing, fowling and navigation, a Massachusetts court heard a case dealing with waterfront rights in Boston Waterfront Development Corp. v. Commonwealth 378 Mass. 629, 392 N.E.2d. 356 (1979). After the outcome of this case and the rise of dockominium developments, the Massachusetts legislature revised its regulations to explicitly prohibit dockominiums. Existing dockominium developments were then grandfathered. Expressing her opinion of the ownership facet of the dockominium concept, Sharon Pelosi, program chief of waterways for the Massachusetts Department of Environmental Protection described the concept as being "analogous to a private

owner putting up a house in a state park, they are public lands.”<sup>59</sup>

Despite this strong state opposition in stopping the growth of dockominiums, developers have found loopholes in the new legislation and have continued the practice of dockominiums, though less cavalier in their approach. Two dockominium styles have emerged which seem to have contravened the legislature’s intent for the time being. The first style of dockominium ownership is known as the club-style membership. The developers promise dock space for a lifetime as one of the privileges of being a member.<sup>60</sup> Some dockominium developments provide a 99 year lease of a boat slip in exchange for membership in their complex.<sup>61</sup> The other style of boat slip ownership which has succeeded in contravening rules prohibiting dockominiums is the locker-style ownership. These locker-style dockominiums sell small lockers on the waterfront; the owners of each locker have lifetime access to a corresponding boat slip.<sup>62</sup>

Recently, a case in Wisconsin has dealt with the issue of the public trust doctrine and riparian rights and how these property doctrines conflict with the concept of dockominiums. ABKA Limited Partnership v. Wisconsin Department of Natural Resources, 2002 WI 106 (Wis. 2002). As explained earlier, many dockominium developers have turned away from the more obvious, traditional methods of selling dockominiums in favor of either the club-style regime or the lock-box style regime of property ownership. The instant case deals with the lock-box style of dockominiums at a Wisconsin marina on a public lake. The limited partnership filed a condominium declaration to convert its four hundred and seven boat slips into a condominium

---

<sup>59</sup> Crowley, Cathlene F. Lifetime dock privileges, for a price, May 19, 2002. at [http://www.eagletribune.com/news/stories/20020519/FF\\_002.htm](http://www.eagletribune.com/news/stories/20020519/FF_002.htm)

<sup>60</sup> *Id* at p.2

<sup>61</sup> *Id* at p.2. Referring to the ownership rights at the Newburyport Yacht Club on the Merrimack River

<sup>62</sup> *Id* at p.2

having four hundred and seven units.<sup>63</sup> The Wisconsin Court of Appeals gave a clear indication of what characterizes a dockminium community. The Court of Appeals defined a dockminium community to be a "dockside community of privately owned boats moored in slips that are purchased for year-round living or [a] slip in such a community."<sup>64</sup>

A look at the procedural posture of the instant case will be helpful in understanding the final analysis held by the Wisconsin Supreme Court. The initial claim was heard by an administrative law judge that allowed the limited partnership to continue with the construction of the dockminium. An appeal was filed and a circuit court order upheld this earlier determination by the administrative law judge. The Wisconsin Court of Appeals concluded that the conversion of a marina to a dockminium form of ownership as proposed by ABKA and the Abbey Harbor Condominium Association violated the public trust doctrine because the permits allow transfers in ownership of public waters to private individuals.<sup>65</sup> The Wisconsin Supreme Court affirmed the order of the Wisconsin Court of Appeals but for different reasons. The Supreme Court claimed that the dockminium form of ownership proposed by ABKA and the Abbey Harbor Condominium Association violated the public trust doctrine "because it attempted to convey condominium property contrary to the state statute<sup>66</sup> which prohibited certain transfers of

---

<sup>63</sup> *ABKA Ltd. P'ship v. Department of Natural Resources.*, 247 Wis. 2d 793, 635 N.W.2d 168 at 43

<sup>64</sup> *ABKA Ltd. P'ship v. Dept of Natural Resources*, 2001 WI App 223

<sup>65</sup> *ABKA Ltd. P'ship v. Dept of Natural Resources*, 648 N.W.2d 854 at 857

<sup>66</sup> Wis. Stat. § 30.133 (1995-96) which provides for "a prohibition against conveyance of riparian rights. (1) Beginning on April 9, 1994, no owner of riparian land that abuts a navigable water may convey, by easement or by a similar conveyance, any riparian right in the land to another person, except for the right to cross the land in order to have access to the navigable water. This right to cross the land may not include the right to place any structure or material in the navigable water."

riparian rights”.<sup>67</sup> Wisconsin statute expressly gives the Department of Natural Resources the power to bring an enforcement action when it learns of possible violations of the public trust doctrine.<sup>68</sup> The Court takes a very in-depth look into the Wisconsin condominium statute<sup>69</sup> to see if these proposed dockominiums can meet the statutory requirements. The Court strongly stated:

Any assertion that the four-by-five-by-six inch cubicles are intended for any type of independent use is belied by ABKA's marketing materials for the dockominiums. Marketing materials used by ABKA do not feature or even describe the lock boxes. Rather, they refer to "slip ownership" and include a brochure promoting "a place on the lake . . . to call your own . . . ." The brochure prominently features a definition of "dockominium" as "individual ownership of the right to use the waterway bordered by a pier and catwalks held in joint dominion"<sup>70</sup>

Any court wishing to use legal precedent to expose the inadequacy of the lock-box style dockominium concept will likely turn to this powerful and recent court decision in support of claims against the dockominium owners or developers. In the Administrative Law Court proceeding, the ALJ observed, “to some degree the dockominium concept involves a legal

---

<sup>67</sup> See *Supra* note 63 at 493.

<sup>68</sup> Wis. Stat. § 30.03 (4)(a)(2006)- This statute allows the district attorney for the county to bring actions if “the department learns of a possible violation of the statutes relating to navigable waters or a possible infringement of the public's rights relating to navigable waters..., the department may proceed...and may order a hearing under ch.227 concerning the possible violation or infringement, and may request the hearing examiner to issue an order directing the responsible parties to perform or restrain from performing acts in order to fully protect the interests of the public in the navigable waters.

<sup>69</sup> The Court examines the Wis. Stat. § 703.02(15) requirement that “the unit must be intended for any type of independent use” in conjunction with Wis. Stat. §§ 703.05 and 703.09(1) providing that a unit owner is entitled to the exclusive ownership and possession of his or her unit and that a condominium declaration shall contain: statement of the purposes for which the building and each of its units are intended and restricted as to use.

<sup>70</sup> See *Supra* note 63 at 511.

fiction: that ABKA is selling the lock-box condominium units, rather than pier slips, for nearly \$50,000.”<sup>71</sup> The Wisconsin Supreme Court’s majority determination that their state’s public trust doctrine was violated because of the state statutes which prohibit the conveyance of certain riparian rights may not apply unilaterally to all jurisdictions. The concurring opinion in this case, advances by Justice Bablitch, goes even further in declaring “I would prefer the holding of the court of appeals: dockominiums are a *per se* violation of the public trust doctrine.”<sup>72</sup> Justice Bablitch justifies this reasoning by claiming, “allowing one riparian owner to divide the owner’s riparian zone and separately convey legal interest in the resulting “lots” will have significant detrimental effect on the public waters of this state.”<sup>73</sup> This recent state court holding creates a strong presumption that the dockominium concept can easily be attacked by those who are opposed to these developments on both statutory and common law grounds.

## **V. Conclusion**

Given the above discussion of dockominiums, who really is affected by this practice? It can be deduced that if the practice of selling dockominiums becomes widespread, every single person who sets out to enjoy navigable waterways will be affected. Those who can afford to spend \$20,000 or \$40,000 to buy a boat slip with exclusive property rights may obtain rights which will infringe upon the well settled recreational rights of others. Where do the rights of the public prohibit the exercise of capitalism? Can a developer buy an acre of waterfront land and build a two-hundred foot dock just to build ninety boat slips? Should he be allowed to do so even if the dock restricts the use of the waterway by the public?

The South Carolina Legislature has recognized the conflict between the public trust and private ownership of property which borders a waterway. The Legislature has authorized the

---

<sup>71</sup> See *Supra* note 63 at 515

<sup>72</sup> *Id* at p. 519

<sup>73</sup> *Id* at p. 519-520

OCRM to grant permits for the development of docks which would include dock minimums. Developers must prove that their project does not violate the public trust. Those objecting to a specific project have the opportunity to appear before and show how and why the project interferes with public use or is environmentally unwise. After the administrative process is complete a decision will be made by OCRM whether to grant a permit. Appeals will likely follow and it is at this time that the legal concepts of public use, riparian rights and governmental regulation come into play.

South Carolina courts have clearly stated a desire to protect the public's interest in the use of its waterways. However, our courts have not hesitated to allow development when proven to fit within the regulations promulgated by the OCRM. There is and always will be a conflict between private owners claiming riparian rights and the use of waterways by the public. It appears that South Carolina has solved this conflict by allowing a process for the permitting of dock minimums when there is an acceptable restriction on the public's use of the waterway involved. Developers should, on the other hand, not expect approval of dock minimum projects which create an unreasonable interference with public use or have unacceptable environmental impact.





