THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHALESTON COUNTY
In the Court of Common Pleas for the Ninth Judicial Circuit
The Honorable Bentley Price, Circuit Court Judge

Appellate Case No. 2022-000038

Clam Farm Partnership, LLC……...Respondent,

v.

The South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, Charleston County and The City of Folly Beach……..Defendants

Of which The South Carolina Department of Health and Environmental Control Office of Ocean and Coastal Resource Management and The City of Folly Beach are the …….Appellants

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FINAL BRIEF OF RESPONDENT CLAM FARM PARTNERSHIP, LLC

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TABLE OF CONTENTS

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 5

STANDARD OF REVIEW 10

ARGUMENT 11

I. THE TRIAL COURT CORRECTLY HELD THAT OCRM HAD NO AUTHORITY TO ALTER THE FIVE-YEAR CRITICAL LINE ESTABLISHED ON SEPTEMBER 29, 2016 IN OCRM PLAT AND IMPROPERLY ISSUED CEASE AND DESIST ORDERS PRECLUDING SITE WORK LANDWARD OF THE 2016 CRITICAL LINE. 11

A. S.C. Code Ann. § 48-39-210(C) unambiguously provides that the critical line certification expires only after five years, a time frame which provides a floor rather than a ceiling for the legal effect of the critical line. 12

B. OCRM's arguments regarding its historical interpretation of S.C. Code § 48-38-210 were not preserved for appeal and are nevertheless irrelevant because the statute is unambiguous. 14

1. OCRM did not preserve its arguments regarding historical interpretation of S.C. Code § 48-38-210 for appeal. 14

2. S.C. Code § 48-38-210(C) is unambiguous, and therefore OCRM's traditional, and wrong, interpretation of that statute is irrelevant. 15

C. OCRM's arguments regarding waiver were not preserved for appeal and, in the alternative, there is no evidence to support the waiver argument. 15

1. OCRM did not preserve its arguments regarding waiver. 15

2. In the alternative, there is no evidence to support OCRM's assertion that Respondent waived its right to challenge OCRM's cease and desist directives. 16

D. OCRM's arguments regarding applicability of the exceptions set forth in S.C. Code § 48-38-210(D) were not preserved for appeal and, alternatively, there is no evidence that those exceptions apply. 17

1. OCRM did not preserve its arguments regarding the exceptions set forth in S.C. Code § 48-38-210(D). 17

2. In the alternative, there is no evidence that legally-cognizable manmade alterations changed the critical line. 17

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN HOLDING THAT RESPONDENT IS ENTITLED TO AN INJUNCTION PRECLUDING THE EXPIRATION OF THE FIVE YEAR CRITICAL LINE CERTIFICATION PRIOR TO COMPLETION OF SITE WORK. 18

A. The trial court correctly held that Respondent is at risk of irreparable harm if the 2016 Critical Line were allowed to expire on September 29, 2021. 19

B. The trial court correctly had that Respondent is likely to succeed on the merits. 19
C. The trial court correctly held that Respondent does not have an adequate remedy at law. 20
III. THE TRIAL COURT CORRECTLY HELD THAT THE VESTED RIGHTS ACT PRECLUDES THE CITY FROM ALTERING THE MARSH BUFFER ON THE FINAL PLAT UNTIL THIS LAWSUIT IS COMPLETED. 21
A. The Respondent received vested rights to develop the Subject Property in accordance with the terms of the Subdivision Plat, regardless of whether the City's marsh buffer ordinance was amended. 22
B. The trial court correctly held that the City's marsh buffer ordinance may not be applied at various stages of development so as to defeat the purpose of the Vested Rights Act. 24
C. The trial court properly defined the vested right afforded the Respondent. 25
CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Auto Owners Ins. Co. v. Rollison,
378 S.C. 600 663 S.E.2d 484 (2008) 13

Branche Builders, Inc. v. Coggins,
386 S.C. 43 686 S.E.2d 200 (Ct. App. 2009) 15

Brown v. Bi-Lo, Inc.,
354 S.C. 436 581 S.E.2d 836 (2003) 15

Connor v. Town of Hilton Head Island,
442 S.E.2d 608 314 S.C. 251 (1994) 19

Dixon v. Dixon,
362 S.C. 388 608 S.E.2d 849 (2005) 15, 17

Frady v. Student Loan Servicing Ctr.,
313 S.C. 561 443 S.E.2d 580 (Ct. App. 1994) 19

Giannini v. S.C. DOT,
378 S.C. 573 664 S.E.2d 450 (2008) 21

Gore v. Skipper,
255 S.C. 18 176 S.E.2d 569 (1970) 20

Kiawah Prop. Owners Grp. v. Public Serv. Comm'n.,
359 S.C. 105 597 S.E.2d 145 (2004) 15

Kirk v. Clark,
191 S.C. 205 4 S.E.2d 13 (1939) 20

Lanham v. Blue Cross & Blue Shield of S.C., Inc.,
349 S.C. 356 563 S.E.2d 331 (2002) 10

Ledford v. Pennsylvania Life Ins. Co.,
267 S.C. 671 230 S.E.2d 900 (1976) 11

Metts v. Wenberg,
158 S.C. 411 155 S.E. 734 (1930) 11

Milliken & Co. v. Morin,
386 S.C. 1 685 S.E.2d 828 (Ct. App. 2009) 20

State v. Sweat,
379 S.C. 367 665 S.E.2d 645 (Ct. App. 2008) 13

Staubes v. City of Folly Beach,
339 S.C. 406 529 S.E.2d 543 (2000) 15, 17

Town of Hollywood v. Floyd,
403 S.C. 466 744 S.E.2d 161 (2013) 11

Statutes

Folly Beach Code § 160.10 22
Folly Beach Code § 162.03-02 24
Folly Beach Code § 162.03-06 24
Folly Beach Code § 162.03-07 25
Folly Beach Code § 166.04-02 ..... 24, 25
Folly Beach Code § 166.04-03 ..... 6, 21, 23
S.C. Code § 48-38-210 ..... 14, 15, 17, 19, 20
S.C. Code § 6-29-1540 22
S.C. Code § 6-29-1550 22
S.C. Code Ann. § 15-78-120 21
S.C. Code Ann. § 15-78-60 21
S.C. Code Ann. § 48-39-210 ..... 4, 11, 12, 13, 14, 17
S.C. Code Ann. § 6-29-1530 22
S.C. Code Ann. § 6-29-1560 ..... 22, 24

Rules

Rule 59, SCRCP 4, 10, 17

STATEMENT OF ISSUES ON APPEAL

I. Did the trial court properly grant summary declaratory judgment by holding that OCRM had no authority to alter the five-year critical line certified on September 29, 2016 and that OCRM improperly issued cease and desist orders precluding site grading work landward of the 2016 Critical Line?

II. Did the trial court properly exercise its discretion in holding that Respondent is entitled to a preliminary injunction precluding the expiration of the five-year critical line certification until this lawsuit and site grading work are completed?

III. Did the trial court correctly hold that the Respondent obtained vested rights in the Subdivision Plat under the Vested Rights Act?

STATEMENT OF THE CASE

This matter involves development of 13 undeveloped lots located within the Folly Beach city limits, designated Charleston County TMS Numbers 331-00-00-336 through 331-00-00-349 (the "***Subject Property***"), which form a portion of a larger development located in The Preserve at Clam Farm (the "***Development***"). Appellant South Carolina Department of Health and Environmental Control Office of Ocean and Coastal Resource Management ("***OCRM***") approved a plat delineating the OCRM critical line for the Development ("***OCRM Plat***"). OCRM stamped the plat with a statutory five-year critical line certification. That OCRM Plat was subsequently recorded in the Charleston County Register of Deeds Office on September 29, 2016, such that the critical line certification was set to expire on September 29, 2021. In reliance on the OCRM Plat and critical line certification, Respondent obtained approval of a subdivision plat ("***Subdivision Plat***") from the Appellant City of Folly Beach ("***City***"). This Subdivision Plat set forth certain setbacks, including a 15' marsh buffer applied landward of the OCRM-approved critical line. The Subdivision Plat effectively defined the developable area of the Subject Property.

Respondent relied on the City-approved Subdivision Plat to enter into a contract for sale of the Property that was contingent on delivery of the lots on the Subject Property in buildable condition. Respondent then expended significant resources to install and modify utilities and conduct lot grading work on the Subject Property. Importantly, Respondent needed to complete site grading work prior to February 14, 2021, the expiration of the then-existing land disturbance permit ("***NPDES Permit***") issued by the South Carolina Department of Health and Environmental Control ("***SCDHEC***") and covering the Subject Property.

During the Fall of 2020, apparently in response to unusual King Tides, and during the grading work for the Subject Property which altered the existing grades, OCRM flagged a

proposed revision to the critical line in a landward direction, instructed contractors on site to cease work, and issued cease work directives to the Respondent. This precluded additional site work in anticipation of the February 14, 2021 expiration of the NPDES Permit. SCDHEC subsequently extended the land disturbance permit for five additional years, but included qualifiers which precluded additional site work within the new proposed critical line.[1]

The City then instructed Defendant Charleston County not to issue individual lot grading permits on the Subject Property and indicated that the City would require application of the 15' marsh buffer to the new proposed critical line in any future permit applications on the Subject Property. That determination would render the lots on the Subject Property unbuildable.

On February 5, 2021, Respondent filed a Complaint against OCRM, the City and Charleston County.[2] Respondent alleged numerous causes of action, including a claim seeking a declaratory order as to the invalidity of OCRM's cease and desist orders and a claims for injunction to preclude the expiration of the five year critical line certification on September 29, 2021. Respondent also sought a declaratory order against the City to establish that the Respondent had a vested right to develop the Subject Property in compliance with the Subdivision Plat pursuant to the Vested Rights Act.

[1] Although not directly implicated in this appeal, Respondent filed an action in the Administrative Law Court seeking a determination that SCDHEC lacked authority to place limitations on the extension of the land disturbance permit related to the newly-flagged critical line. After a contested case hearing, the Administrative Law Judge issued an order finding that no changes to the critical line occurred prior the extension of the permit, and that all limitations on the land disturbance permit were removed. *Clam Farm Partnership, LLC v. South Carolina Department of Health and Environmental Control,* Docket No. 21-ALJ-07-0145-CC, Amended Final Order (S.C. Adm. Law Ct. Apr. 20, 2022) https://www.scalc.net/search.aspx (search results). That order was not appealed.

[2] The claims against Charleston County have not yet been adjudicated and are not before the Court on appeal.

On June 17, 2021, Respondent filed a Motion for Partial Summary Judgment, seeking an order of summary judgment as to its declaratory judgment and preliminary injunction causes of action against OCRM and seeking an order of summary judgment as to its declaratory judgment cause of action against the City. Following a hearing, the trial court granted Respondent's motion by order dated November 18, 2021 ("***Summary Judgment Order***"). In that Summary Judgment Order, the trial court granted the following declaratory relief against OCRM:

1. That the 2016 Critical Line did not expire until September 29, 2021;
2. That OCRM violated S.C. Code Ann. § 48-39-210 and improperly precluded site grading on the Subject Property by issuing cease and desist notices prior to September 29, 2021; and
3. That OCRM may not prohibit or impede Plaintiff's site grading activities landward of the 2016 Critical Line, including enforcement of any provisions in the NPDES Permit Extension related to the new critical line.

The trial court also issued an injunction "precluding the expiration of the 2016 Critical Line and precluding OCRM from enforcing any restrictions related to the newly proposed critical line in the NPDES Permit Extension until the conclusion of this litigation or completion of final lot grading on the Subject Property, whichever is later." As to the claims against the City, the trial court granted the following declaratory relief:

> Plaintiff has a vested right to complete site grading and to construct buildings on the Subject Property, so long as those buildings are within the buildable footprint outlined in the Subdivision Plat and such buildings conform in all other respects to the applicable requirements for obtaining a building permit.

On November 29, 2021, OCRM and the City filed motions for reconsideration of the Summary Judgment Order pursuant to Rule 59(e), SCRCP. On December 14, 2021, the trial court issued separate orders denying the motion to reconsider filed by OCRM and the City. OCRM and

the City now appeal the trial court's November 18, 2021 Summary Judgment Order and December 14, 2021 orders denying the motions to reconsider.

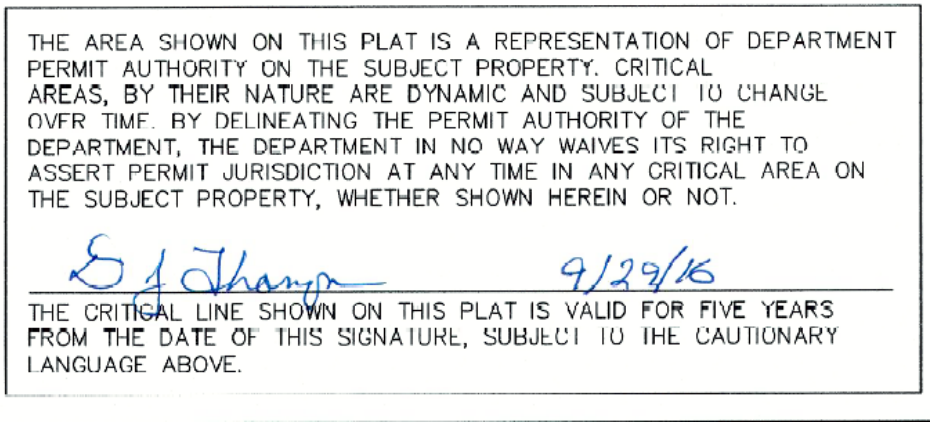
STATEMENT OF FACTS

The Subject Property consists of 13 lots in the City of Folly Beach - Charleston County TMS Numbers 331-00-00-336 through 331-00-00-348. Those lots abut open marsh, and not a stream bank. (R. p. 106)

In 2006, Respondent received permit coverage for site work on the Development under the NPDES General Permit for Stormwater Discharges from Large and Small Construction Activities, commonly referred to as a "Land Disturbance Authorization" and identified as "S/W Permit Number 10-06-01-08" – the NPDES Permit - from OCRM. (R. pp. 109-111). Shortly thereafter, the subprime mortgage crisis signaled the beginning of the Recession of 2008, the effects of which were pervasive for several years. Because of the economic conditions created by the Recession, there was no market for the Development and Respondent significantly slowed its development schedule and efforts. In 2009, the South Carolina Legislature adopted a "Joint Resolution to Extend Certain Government Approvals Affecting the Development of Real Property Within the State." This Joint Resolution is applicable to Land Disturbance Authorizations. In or around 2013 the South Carolina Legislature adopted a second Joint Resolution, identical to the first. The aggregate effect of both Joint Resolutions was to extend the NPDES Permit, such that it expired on February 14, 2021. (R. pp. 123-126). The NPDES Permit, which is issued by SCDHEC, is necessary for the Respondent to conduct site grading work on the Subject Property.

Respondent restarted efforts to develop the Development Tract in 2012. On September 29, 2016, OCRM approved the OCRM Plat, which was subsequently recorded in the Charleston County Register of Deeds Office. (R. p. 128). The plat is entitled "OCRM Critical Line Drawing

Clam Farm." The OCRM Plat includes a signature of OCRM employee D. J. Thompson and a date of September 29, 2016. Thompson's signature block includes the following language:

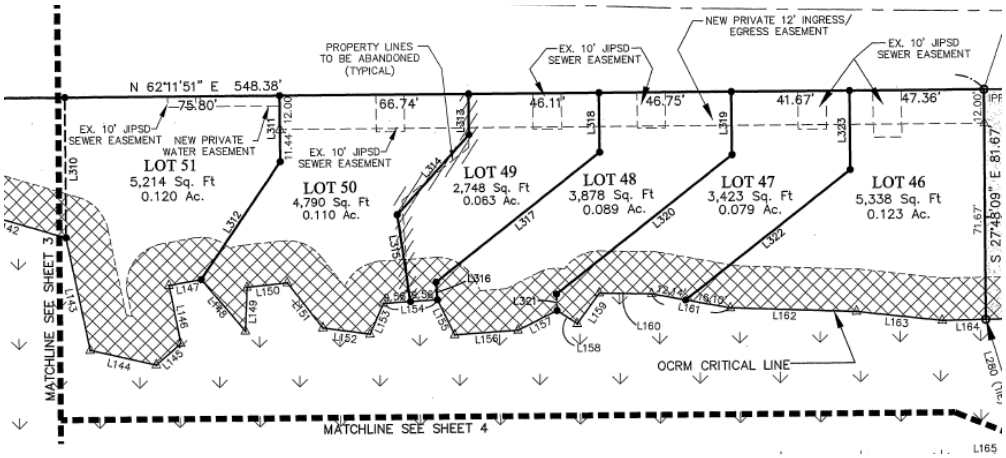

THE AREA SHOWN ON THIS PLAT IS A REPRESENTATION OF DEPARTMENT PERMIT AUTHORITY ON THE SUBJECT PROPERTY. CRITICAL AREAS, BY THEIR NATURE ARE DYNAMIC AND SUBJECT TO CHANGE OVER TIME. BY DELINEATING THE PERMIT AUTHORITY OF THE DEPARTMENT, THE DEPARTMENT IN NO WAY WAIVES ITS RIGHT TO ASSERT PERMIT JURISDICTION AT ANY TIME IN ANY CRITICAL AREA ON THE SUBJECT PROPERTY, WHETHER SHOWN HEREIN OR NOT.

D J Thompson 9/29/16

THE CRITICAL LINE SHOWN ON THIS PLAT IS VALID FOR FIVE YEARS FROM THE DATE OF THIS SIGNATURE, SUBJECT TO THE CAUTIONARY LANGUAGE ABOVE.

The Plat established the operative critical line as of September 29, 2016 ("***2016 Critical Line***").

Following certification of the 2016 Critical Line by OCRM for five years, Respondent began preparing development plans for the Subject Property for submittal to the City for approval. On April 9, 2019, the City passed Amended Ordinance 05-19, which, among other things, amended Folly Beach Code § 166.04-03, "Marsh Buffers," to require a 15-foot buffer landward of the OCRM critical line. *See* Folly Beach Code § 166.04-03. On December 7, 2019, the City informed representatives of Respondent that they would not need lot-specific grading permits, but could instead could rely on the NPDES Permit for finish grading on the Subject Property. (R. pp. 130-132). Respondent's engineers then platted, on the Subdivision Plat, the Development Tract, including the Subject Property, to conform with the required 15' marsh buffer landward of the 2016 Critical Line. The Subdivision Plat showing the marsh buffer landward of the 2016 OCRM critical line was approved by the City on July 10, 2020, and recorded in the Office of the Register of Deeds at Plat Book L20 Page 0259. (R. pp. 134-135). The Subdivision Plat shows the OCRM critical line, marsh buffers, easements, and developable area of the Subject Property, as demonstrated in the below excerpt from the Subdivision Plat showing Lots 46-51:



(R. pp. 134-135).

Respondent entered into a purchase and sale agreement with Stanley Martin Homes in the amount of $4,038,000.00**.** (R. pp. 137-169). Respondent's obligation under the terms of the purchase and sale agreement was to deliver 26 buildable residential lots (including the Subject Property) to Stanley Martin Homes. (R. pp. 138-139).

Respondent then commenced preparing the property for sale to Stanley Martin Homes by grading the lots for construction and installing or adjusting utility lines. (R. pp. 173-174). Respondent spent 6 months and $298,402.89 on engineering and site work for the development of the site. (R. p. 174). Of this, Respondent has spent approximately $68,730.24 on the 13 lots that comprise the Subject Property since the Subdivision Plat was recorded on July 10, 2020. (R. p. 174). As with all site work activities, Respondent's site work changed the contours of the Subject Property in accordance with the NPDES Permit. Specifically, Respondent removed and modified certain water lines and sewer lines which had been previously installed. (R. pp. 173-174). Also, the construction activities included changes to grade and the development of building pads for vertical construction purposes, and additional water lines for fire hydrants were also being installed for the Subject Property. (R. pp. 173-174).

On October 20, 2020, Aaron Pope, City Administrator for Folly Beach, transmitted an email to a representative of Stanley Martin Homes expressing concern about king tides in the area. The email reads:

> I'm not sure how much time you guys have spent at that site lately but the high tides have generated a lot of interest. In particular, this one lot seems to go under pretty frequently. I wanted to see if there was any possibility that you guys would be interested in donating this particular plot to the folly beach nature Conservancy for preservation?"

(R. pp. 198-199). On October 23, 2020, with no notice to Respondent, OCRM entered the Subject Property, an active construction site with the resulting land disturbances, to conduct an inspection of the Subject Property. (R. p. 207). That same day, the City informed representatives of Respondent, for the first time, that lot-specific permits would be required to obtain building permits on the Subject Property. (R. p. 201).

On November 2, 2020, Respondent received a "Notice to Comply" from OCRM disclosing the October 23, 2020 inspection and advising that the critical line on the Subject Properties must be re-established, despite the fact that the Subject Property had been substantially disturbed by Respondent's lawful site work activities pursuant to the NPDES Permit. (R. p. 207). Despite assuring representatives of Respondent that any further inspections would be conducted in the presence of Respondent and that OCRM was unavailable for a meeting with Respondent on the Subject Property, OCRM again visited the Subject Property on November 9, 2020, without Respondent being present. (R. p. 174). During this site visit, OCRM staked and flagged a proposed revision to the critical line, adjusting it landward. (R. pp. 209-211).

Also on November 9, 2020, Morgan Flake, the Manager for the Compliance and Enforcement Section of OCRM, verbally instructed contractors to cease work and transmitted an email to Respondent and its consultants directing that Respondent cease work on the site. (R. p.

213). By letter dated November 24, 2020, Respondent responded to OCRM's Notice to Comply, stating that Respondent acted in reliance on the NPDES Permit, informing OCRM that the site was heavily disturbed, and that it would be difficult to re-create the critical line as it existed on the date the alterations occurred. (R. pp. 228-230). Respondent further advised that it intended to continue site prep work before expiration of the NPDES Permit on February 14, 2021. (R. pp. 228-230). On November 25, 2020, Respondent received notification from OCRM that any further work in areas that OCRM believed to be critical areas would result in additional enforcement. (R. pp. 232-233).

On December 10, 2020, the City advised Respondent that it had asked Charleston County to "put on hold" any lot specific permits due to the issues with the newly-flagged critical line, despite the fact that Respondent had been told it would not need lot specific permits. (R. p. 237). On January 6, 2021, Respondent informed OCRM that it would like to attempt to resolve the matter. (R. pp. 240-242). Upon learning that Respondent sought to resolve this matter with OCRM, City advised that it would impose a 15' buffer adjacent to the proposed critical line flagged by OCRM, thereby invalidating the marsh buffer delineated on the Subdivision Plat. (R. p. 245).

On January 8, 2020, Morgan Flake of OCRM sent a letter to Respondent in which OCRM demands, among other things, that Respondent remove silt fencing in the newly-flagged critical area, remove fill in the newly flagged critical area, and discontinue plans for utilities and access points on lots 55 and 56. (R. pp. 209-211). On February 24, 2021, SCDHEC issued an "up to five-year" extension to the NPDES Permit on February 21, 2021 ("***NPDES Permit Extension***"). (R. pp. 248-250). However, the NPDES Permit Extension contained certain qualifiers which effectively preclude further site work to prepare the lots for building pursuant to the Subdivision Plat, including a requirement that Respondent provide an updated critical line plat evidencing the

area flagged by OCRM and requiring plan updates which are "likely major in nature and subject to review and approval." (R. pp. 248-250).[3] On April 8, 2021, OCRM issued a cease and desist letter which instructed Respondent to cease and desist all work in the newly-flagged critical area. (R. p. 264).

Therefore, at present, the Appellants in this matter have Respondent in a catch-22. In order to obtain building permits for the Subject Property, Respondent must complete site work and obtain lot specific permits from Charleston County. However, OCRM has issued a cease and desist letter, the City has instructed Charleston County to put on hold the lot specific permits, and the City has indicated that it will apply the 15-foot marsh buffer to the revised critical line. In sum, the Appellants' actions have rendered the Subject Property undevelopable. (R. p. 266).

STANDARD OF REVIEW

"An appellate court reviews a grant of summary judgment under the same standard applied by the [circuit] court pursuant to Rule 56, SCRCP." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that . . . no genuine issue [exists] as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. Even though courts are required to view the facts in the light most favorable to the nonmoving party, to survive a motion for summary judgment, "it is not sufficient for a party to create an inference that is not reasonable

[3] As set forth herein, these qualifiers were removed by unappealed order of the Administrative Law Court. *Clam Farm Partnership, LLC v. South Carolina Department of Health and Environmental Control,* Docket No. 21-ALJ-07-0145-CC, Amended Final Order (S.C. Adm. Law Ct. Apr. 20, 2022) https://www.scalc.net/search.aspx (search results). However, OCRM's cease and desist orders continue to preclude further site work on the Subject Property.

or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

The decision whether to grant or deny an injunction is ordinarily left to the sound discretion of the trial court. *Metts v. Wenberg*, 158 S.C. 411, 417, 155 S.E. 734, 736 (1930). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. *Ledford v. Pennsylvania Life Ins. Co.*, 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976).

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT OCRM HAD NO AUTHORITY TO ALTER THE FIVE-YEAR CRITICAL LINE ESTABLISHED ON SEPTEMBER 29, 2016 IN OCRM PLAT AND IMPROPERLY ISSUED CEASE AND DESIST ORDERS PRECLUDING SITE WORK LANDWARD OF THE 2016 CRITICAL LINE.

The controlling statute - S.C. Code Ann. § 48-39-210(C) – very clearly provides that "notwithstanding any other provisions in this chapter", a certified critical line does not expire for five years. There are only two statutory exceptions to this legislative mandate, neither of which OCRM argued and neither of which apply. It does not matter that OCRM is the only agency with jurisdiction to define critical areas, that critical areas are dynamic and subject to change, that OCRM has "traditionally" ignored this statute and changed critical lines at any time they pleased, or that Respondent did not build a bulkhead on its property to prevent the critical line from changing, despite the fact that it was in possession of a five-year critical line certification. The simple fact is that the controlling statute unambiguously provides for a certification that only expires after five years. The trial court correctly recognized this law in its Summary Judgment Order, and its' ruling must be affirmed.

A. S.C. Code Ann. § 48-39-210(C) unambiguously provides that the critical line certification expires only after five years, a time frame which provides a floor rather than a ceiling for the legal effect of the critical line.

OCRM certified the operative critical line plat on September 16, 2016. (R. p. 128). The effect of that certification is clear under South Carolina law, as under S.C. Code Ann. § 48-39-210, the certification is operative for five years:

> **(A)** The department is the only state agency with authority to permit or deny any alteration or utilization within the critical area except for the exemptions granted under Section 48-39-130(D) and the application for a permit must be acted upon within the time prescribed by this chapter.
>
> **(B)** A critical area delineation for coastal waters or tidelands established by the department is valid only if the line is depicted on a survey performed by a professional surveyor, the line is reviewed by the department, the department validates the location of the boundaries of the coastal waters or tidelands critical area on the survey by affixing a stamp and date to the survey, and the survey contains clearly on its face in bold type the following statement: "The area shown on this plat is a representation of department permit authority on the subject property. Critical areas by their nature are dynamic and subject to change over time. By delineating the permit authority of the department, the department in no way waives its right to assert permit jurisdiction at any time in any critical area on the subject property, whether shown hereon or not."
>
> ***(C) Notwithstanding any other provision of this chapter, a critical area line established pursuant to subsection (B) expires after five years from the department date on the survey described in subsection (B).***
>
> **(D)** Exceptions to subsection (C) are eroding coastal saltwater stream banks where it can be expected that the line will move due to the meandering of the stream before the expiration of the five-year time limit and where manmade alterations change the critical area line.

Despite the fact that the 2016 Critical Line did not expire until September 29, 2021, OCRM entered the Subject Property in November of 2020, flagged a proposed new critical line that was significantly landward of the 2016 Critical Line, and then instructed Respondent to cease and desist any work in the area seaward of the proposed new critical line. (R. p. 207)*;* (R. p. 264). OCRM's actions effectively ceased Respondent's work on the site starting on November 9, 2020, such that the Respondent could not complete its site grading work, and still is not able to do so. (R. pp. 172-

176). The effect of the cease and desist order is that Respondent has been unable to complete site work to obtain additional permitting from the City (including building permits) to build on the Subject Property.

The trial court correctly held that S.C. Code Ann. § 48-39-210(C) does exactly what it states - it provides that a certified critical line does not expire for 5 years such that a party may rely on that certification conducting development decisions. Indeed, "[c]lear and unambiguous statutes require no statutory construction and must be applied according to the literal meaning of their terminology." *State v. Sweat*, 379 S.C. 367, 375, 665 S.E.2d 645, 650 (Ct. App. 2008). Words in the statute should be given their plain and ordinary meaning without resulting to forced or subtle construction. *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 609, 663 S.E.2d 484, 488 (2008). OCRM's attempts to confuse the issue and inject irrelevant evidence and statutory citations into the interpretation of this unambiguous statute must be rejected. It does not matter that OCRM is tasked with protecting critical areas, that certain statutes call critical areas "dynamic," or that S.C. Code Ann. § 48-39-210(B) provides that critical areas are subject to change over time. Subsection (C) provides that **"[n]otwithstanding any other provisions of this chapter**, a critical area line established pursuant to subsection (B) expires after five years from the department date on the survey described in subsection (B)." Further, there would be no purpose for the two specific exceptions to the five-year certification set forth in subsection (D) if OCRM could just revise the critical line at any time, as it suggests:

> **(D)** Exceptions to subsection (C) are eroding coastal saltwater stream banks where it can be expected that the line will move due to the meandering of the stream before the expiration of the five-year time limit and where manmade alterations change the critical area line.

Simply put, S.C. Code Ann. § 48-39-210(C) does not establish a five-year critical line certification ceiling, as OCRM suggests. If so, the statute would plainly provide that a critical line

certification is effective "for up to five years." Rather, by stating that the critical line "expires after five years," it establishes a floor. The statute could not be more clear, and the language could not be more literal.

Therefore, the trial court correctly held that OCRM had no authority to issue cease and desist orders to the Respondent, and those orders are invalid. As such, the trial court correctly issued the Summary Judgment Order and issued a declaratory order[4] that:

1. That the 2016 Critical Line did not expire until September 29, 2021;
2. That OCRM violated S.C. Code Ann. § 48-39-210 and improperly precluded site grading on the Subject Property issuing cease and desist notices prior to September 29, 2021; and
3. That OCRM may not prohibit or impede Plaintiff's site grading activities landward of the 2016 Critical Line, including enforcement of any provisions in the NPDES Permit Extension related to the new critical line.

B. OCRM's arguments regarding its historical interpretation of S.C. Code § 48-38-210 were not preserved for appeal and are nevertheless irrelevant because the statute is unambiguous.

1. OCRM did not preserve its arguments regarding historical interpretation of S.C. Code § 48-38-210 for appeal.

In its brief, OCRM cites only an exhibit to its Motion for Reconsideration as support for its argument that its traditional interpretation of S.C. Code § 48-38-210 should be given deference. OCRM never raised this argument to the trial court prior to its motion for reconsideration. A party

[4] Of note, the Administrative Law Court, in its unappealed decision, came to the same conclusion when interpreting S.C. Code Ann. § 48-39-210. *See Clam Farm Partnership, LLC v. South Carolina Department of Health and Environmental Control,* Docket No. 21-ALJ-07-0145-CC, Amended Final Order (S.C. Adm. Law Ct. Apr. 20, 2022) https://www.scalc.net/search.aspx (results) ("The evidence offered by Clam Farm at the merits hearing is sufficient to satisfy its burden of proving by a preponderance of the evidence that OCRM exceeded its authority in attempting to redraw the critical line for the Subject Property in November 2020, and that the Department's cease and desist directives which were based on the flagged critical area line were similarly improper.").

cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not. *Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (finding issue raised for first time in Rule 59, SCRCP, motion is not preserved for review); *Kiawah Prop. Owners Grp. v. Public Serv. Comm'n.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (stating an issue raised for first time in petition for rehearing not preserved). Therefore, this argument is not preserved for appellate review.

2. S.C. Code § 48-38-210(C) is unambiguous, and therefore OCRM's traditional, and wrong, interpretation of that statute is irrelevant.

As set forth herein, S.C. Code § 48-38-210(C) is unambiguous. OCRM may alter a certified critical line within five years only if one of two exceptions – neither of which are applicable here – apply. The fact that OCRM has historically interpreted this statute in a manner that contradicts its plain meaning is irrelevant and cannot provide a basis for reversing the trial court's Summary Judgment Order. *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("Nevertheless, where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation.") (citations omitted).

C. OCRM's arguments regarding waiver were not preserved for appeal and, in the alternative, there is no evidence to support the waiver argument.

1. OCRM did not preserve its arguments regarding waiver.

In its brief, OCRM argues that Respondent somehow engaged in conduct which waived its right to challenge OCRM's cease work directives. First, OCRM did not plead waiver as a defense in its answer. (R. pp. 74-84). It therefore waived this defense. *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 n.4 (Ct. App. 2009) ("The failure to plead an affirmative defense is deemed a waiver of the right to assert it."). Second, OCRM did not raise this argument to the trial court, and it is therefore not preserved for appellate review. *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("[A]n issue cannot be raised for the first

time on appeal, but must have been raised to and ruled upon by the [circuit] court to be preserved for appellate review.").

2. In the alternative, there is no evidence to support OCRM's assertion that Respondent waived its right to challenge OCRM's cease and desist directives.

OCRM argues that Respondent somehow waived its right to challenge OCRM's action by failing to construct a bulkhead on the Subject Property to prevent saltwater intrusion and by sending a letter to OCRM in an effort to resolve the financial quagmire caused by OCRM's illegal actions. Neither is evidence of an intentional relinquishment of Respondent's right to challenge OCRM's cease and desist directives.

First, the Respondent did not build a bulkhead on the Subject Property because it did not need to do so – it was operating under OCRM's five-year critical line certification. OCRM's argument is nonsensical – Respondent waived its right to challenge the movement of the five-year critical line certification because it did not nothing to protect against movement of the critical line within the five years. This can hardly be seen as evidence of the intentional relinquishment of a known right.

In addition, OCRM partially cites a letter from counsel for Respondent for the ridiculous proposition that Respondent accepted OCRM's authority to issue cease and desist directives on some, but not all lots. The actual wording of the letter belies that assertion:

> [Respondent] is ***conditionally accepting*** the critical line as flagged by OCRM and as depicted in the attached plat as it relates to Lots 46 through 51 as well as Lots 53-55 to the extent such acceptance shall allow the developer to continue, without delay, its permitted construction activities as long as such activities are performed landward of the newly identified critical line. These lots are located adjacent to and immediately south of Bowens Island Road.

(R. p. 241). This letter was a cry for help to an agency using heavy-handed tactics. It was not an acceptance of OCRM's actions, and was certainly not an intentional relinquishment of the right to challenge those actions.

D. OCRM's arguments regarding applicability of the exceptions set forth in S.C. Code § 48-38-210(D) were not preserved for appeal and, alternatively, there is no evidence that those exceptions apply.

1. OCRM did not preserve its arguments regarding the exceptions set forth in S.C. Code § 48-38-210(D).

OCRM never actually argued that the exceptions set forth in subsection 48-38-210(D) applied in this matter. There is no such argument in OCRM's opposition brief to the motion for summary judgment, in the Rule 59 motion, or in the hearing transcript. Since OCRM did not raise this argument to the trial court, it is therefore not preserved for appellate review. *Staubes,* 339 S.C. at 412, 529 S.E.2d at 546 ("[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit] court to be preserved for appellate review."). Even if the Court were to agree with OCRM's contention that this argument was made through evidence submitted as an affidavit exhibit to OCRM's motion for reconsideration, that argument is also not preserved for appellate review. *Dixon*, 362 S.C. at 399, 608 S.E.2d at 854 (finding issue raised for first time in Rule 59, SCRCP, motion is not preserved for review.).

2. In the alternative, there is no evidence that legally-cognizable manmade alterations changed the critical line.

S.C. Code Ann. § 48-39-210(D) provides the only two exceptions to the five-year critical line certification: (1) eroding coastal saltwater stream banks where it can be expected that the line will move due to the meandering of the stream before the expiration of the five-year time limit and (2) where manmade alterations change the critical area line. S.C. Code Ann. § 48-39-210(D). OCRM argues, for the first time, that an exception to § 48-39-210(D) applies to the Subject Property. OCRM argues: (1) there is a scintilla of evidence that the change to the critical line was the result of eroding coastal saltwater stream banks and (2) the change to the critical line was necessitated by Respondent's manmade alterations. That argument, when placed in context, is absurd.

There is no question that Respondent conducted site work pursuant to the NPDES Permit issued by SCDHEC – the same agency that approved the OCRM Plat and subsequently issued the cease and desist orders. (R. pp. 109-121). The NPDES Permit itself is referred to as "Land Disturbance Authorization" permitting work that changes the topography of the relevant piece of land. OCRM's attempts to circularly argue that work approved and authorized pursuant to a SCDHEC-issued permit would in turn qualify as manmade alterations allowing OCRM to change the critical line and thereafter preclude additional work on the property are disingenuous, at best. It is hard to imagine that they would even make that argument. The SCDHEC permitted alternations to the Subject Property cannot, and do not, create a scintilla of evidence as to the statutory exception for manmade alterations. Therefore, the trial court's summary judgment order was correctly decided and must be affirmed.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN HOLDING THAT RESPONDENT IS ENTITLED TO AN INJUNCTION PRECLUDING THE EXPIRATION OF THE FIVE-YEAR CRITICAL LINE CERTIFICATION PRIOR TO COMPLETION OF SITE WORK.

As set forth herein, Respondent was working to complete site work and preparation of the lots in the Subject Property as of November 9, 2020 – the day on which OCRM first notified the Respondent that it must cease and desist site work within the proposed new critical line. (R. pp. 173-174)*;* (R. p. 213). OCRM's cease work directives effectively ceased all work on site, and precluded Respondent from seeking building permits to construct homes in each of the lots on the Subject Property. (R. p. 175). OCRM cannot be allowed to use its own malfeasance to now run out the clock on the five-year critical line certification that expired on September 29, 2021.

Indeed, as the trial court held, OCRM should not be permitted to halt development in violation of their own statutory authority until the five-year certification expires. For that reason, the trial court did not abuse its discretion in precluding expiration of the 2016 Critical Line until

the lawsuit is complete and Respondent has had the opportunity to complete grading and site work on the Subject Property. *Connor v. Town of Hilton Head Island*, 442 S.E.2d 608, 610, 314 S.C. 251, 254 (1994) (enjoining enforcement of statute); *Frady v. Student Loan Servicing Ctr.*, 313 S.C. 561, 564, 443 S.E.2d 580, 582 (Ct. App. 1994) ("Although one may not generally enjoin a state agency from the performance of duties imposed by valid statutes, where one is threatened with irreparable damage and does not have an adequate remedy at law, she may enjoin state officials who are acting in an illegal manner.").

A. The trial court correctly held that Respondent is at risk of irreparable harm if the 2016 Critical Line were allowed to expire on September 29, 2021.

As set forth herein, OCRM's actions delayed work on the Subject Property starting in November of 2020. The trial court ruled that OCRM's cease work directives were unlawful. However, OCRM appealed the Summary Judgment order in this proceeding, issued the extension to the NPDES Permit with qualifications which prevented sitework and filed a Petition for Supersedeas to prevent further work on the Subject Property. (R. p. 384). This had the effect of preventing Respondent from completing site grading work prior to the September 29, 2021 expiration of the 2016 Critical Line. In sum, Respondent cannot complete development on the Subject Property because OCRM violated S.C. Code § 48-38-210 and that development would not be possible if the critical line certification were to expire on September 29, 2021. That is the definition of irreparable harm.

B. The trial court correctly had that Respondent is likely to succeed on the merits.

By virtue of the Summary Judgment Order, Respondent has already succeeded on the merits.

C. The trial court correctly held that Respondent does not have an adequate remedy at law.

OCRM predictably argues that Respondent has an adequate remedy at law because it may seek money damages from OCRM. This is a convenient argument which, if accepted, would ensure that OCRM is never challenged on its illegal application of S.C. Code § 48-38-210. OCRM would simply alter the critical line designation, issue cease work directives, then appeal any adverse decision and wait on the legal five-year certification to expire before arguing the issue is moot. That is not consistent with the equitable principles supporting injunctive relief. *Gore v. Skipper*, 255 S.C. 18, 24, 176 S.E.2d 569, 571-572 (1970) ("We have held that an action for injunctive relief is equitable").

Further, the trial court did not commit an error of law when determining that there is no adequate remedy at law available to Respondent. "An adequate remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity." *Milliken & Co. v. Morin*, 386 S.C. 1, 8, 685 S.E.2d 828, 832 (Ct. App. 2009). "[W]hether a wrong is irreparable, in the sense that equity may intervene, and whether there is an adequate remedy at law for a wrong, are questions that are not decided by narrow and artificial rules." *Kirk v. Clark*, 191 S.C. 205, 211-212, 4 S.E.2d 13, 16 (1939). First, the mere availability of damages is not an adequate remedy at law:

> The Courts proceed realistically if the threatened wrong involves actual damage; the mere uncertainty of fixing the measure of such damage to the injured party may itself be sufficient to justify the exercise of equitable jurisdiction; and if the available legal remedy in a given case reduces itself to a matter of words, rather than to a matter of efficacy, because of its impracticability, or because the threatened acts may continue during the progress of an action at law, or because successive actions at law would be necessary to protect the plaintiff's rights, equity will hold that the existence of the legal remedy is not an obstacle to the exertion of the equitable power.

Id. Second, all of the Defendants benefit from well-known exceptions to the waiver of sovereign immunity. *See* S.C. Code Ann. § 15-78-60. Third, S.C. Code Ann. § 15-78-120(a)(1) limits an individual's recovery against a government agency to $ 300,000 for a loss arising from a single occurrence. *Giannini v. S.C. DOT*, 378 S.C. 573, 587, 664 S.E.2d 450, 457 (2008). Fourth and finally, any number of hurdles to development remain, including: (1) the expiration of the 2016 Critical Line (if not enjoined); and (2) the City and County's approval of individual lot grading permits and building permits. These additional impediments will be used as defenses by the Appellants and will impact Respondent's ability to prevail on a damages claim. Therefore, the trial court correctly held that Respondent is entitled to an injunction precluding OCRM from altering the 2016 Critical Line and enforcing any restrictions related to the newly proposed critical line in the NPDES Permit Extension until the conclusion of this litigation or completion of final lot grading on the Subject Property, whichever is later.

III. THE TRIAL COURT CORRECTLY HELD THAT THE VESTED RIGHTS ACT PRECLUDES THE CITY FROM ALTERING THE MARSH BUFFER ON THE FINAL PLAT UNTIL THIS LAWSUIT IS COMPLETED.

The City takes the position that Folly Beach Code § 166.04-03 entitles it to apply the marsh buffer to the effective critical line at numerous stages of development, at its sole discretion, without regard to expenditures made in reliance on prior applications, so long as the marsh buffer ordinance does not change. That position contradicts the Code itself as well as the Vested Rights Act. The trial court correctly held that Respondent obtained vested rights in the Subdivision Plat; those rights cannot be altered by the City's creative interpretation of the applicable codes and statues.

A. The Respondent received vested rights to develop the Subject Property in accordance with the terms of the Subdivision Plat, regardless of whether the City's marsh buffer ordinance was amended.

The Vested Rights Act provides:[5]

> (A) If a local governing body does not have land development ordinances or regulations or fails to adopt an amendment to its land development ordinances or regulations as required by this section, ***a landowner has a vested right to proceed in accordance with an approved site specific development plan for a period of two years from the approval*** . . . For purposes of this section, the landowner's rights are considered vested in the types of land use and density or intensity of uses defined in the development plan and the vesting is not affected by later amendment to a zoning ordinance or land-use or development regulation if the landowner:
>
> > (1) obtains, or is the beneficiary of, a significant affirmative government act that remains in effect allowing development of a specific project;
> > (2) relies in good faith on the significant affirmative government act; and
> > (3) incurs significant obligations and expenses in diligent pursuit of the specific project in reliance on the significant affirmative government act.

S.C. Code Ann. § 6-29-1560(A). Among the "significant affirmative governmental acts" enumerated in the Vested Rights Act is:

> (6) the local governing body or its designated agent has approved a preliminary subdivision plat, site plan, or plan of phased development for the landowner's property and the applicant diligently pursues approval of the final plat or plan within a reasonable period of time under the circumstances; or
>
> (7) the local governing body or its designated agent has approved a final subdivision plat, site plan, or plan of phased development for the landowner's property.

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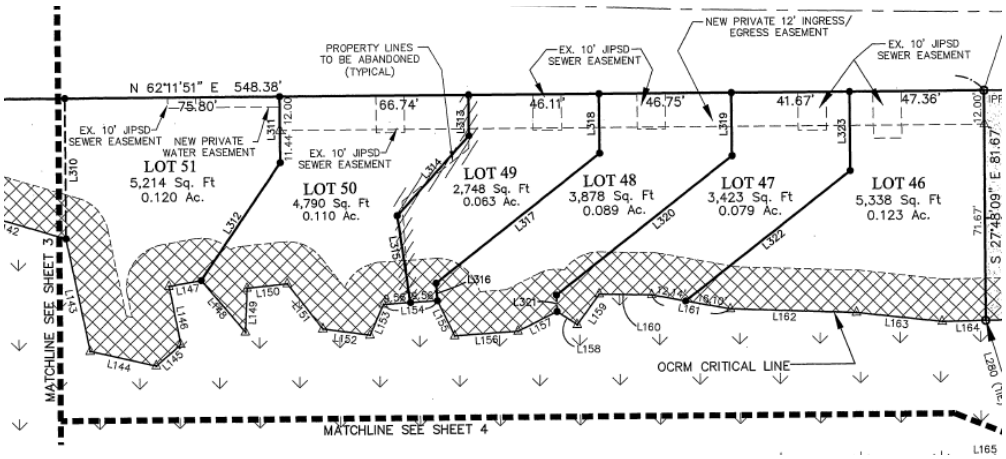
[5] The Vested Rights Act provides that "[a] vested right is established for two years upon the approval of a site specific development plan." S.C. Code Ann. § 6-29-1530(A)(1). It also requires that a municipality provide for "the establishment of a two-year vested right in an approved site specific development plan." S.C. Code Ann. § 6-29-1530(A)(2)(a). The City's vested rights ordinance contains no specific provisions providing for vested rights, or what constitutes a site specific development plan. The Folly Beach Code simply references the Vested Rights Act:

> Vested rights for site-specific development plans may only be established under the conditions and limitations set out in S.C. Code §§ 6-29-1540 and 6-29-1550, as enacted by Act 287 of 2004, and hereby incorporated by reference into this ZDO.

Folly Beach Code § 160.10. Therefore, the vesting of Plaintiff's rights is controlled by S.C. Code Ann. § 6-29-1560(A)

S.C. Code Ann. § 6-29-1560(B). Therefore, by its plain and unambiguous terms, the Vested Rights Act provides that a landowner who obtains an approved subdivision plat and relies on that plat to incur obligations, obtains vested rights that are "not affected by later amendment to a zoning ordinance or land-use or development regulation." As the trial court correctly held, that is exactly what happened in this case.

The City approved the Subdivision Plat on July 10, 2020. (R. pp. 134-135). The Subdvision Plat was, without question, an "approved site specific development plan." It sets forth lot lines, setback, easements, and, importantly, the 15' marsh buffer required by Folly Beach Code § 166.04-03, as applied to the 2016 Critical Line. In other words, it delineates the developable portion of each lot:



The City appears to argue that the trial court erred by applying the Vested Rights Act because the City's marsh buffer ordinance had not changed after the Respondent incurred significant financial obligations. In support, the City cites several cases, none of which turn on limiting the vested rights doctrine to subsequent amendments of the regulation at issue. Indeed, the Vested Rights Act provides that the rights conferred by the Subdivision Plat are "considered vested in the types of land use and density or intensity of uses defined in the development plan and the vesting is not affected by later amendment to a zoning ordinance or land-use or development

regulation . . .." S.C. Code Ann. § 6-29-1560(A). The statute, by its terms, provides for vesting of rights as defined in the Subdivision Plat and those vested rights are not impacted by a later amendment to a regulation. Therefore, the trial court was correct in holding that Respondent has vested rights in the Subdivision Plat (whether or not there are subsequent regulation changes) and those vested rights are not affected by a later regulatory action (such as OCRM's premature alteration to the 2016 Critical Line).

B. The trial court correctly held that the City's marsh buffer ordinance may not be applied at various stages of development so as to defeat the purpose of the Vested Rights Act.

The City argues that the Respondent has no vested rights in the Subdivision Plat because Folly Beach Code § 166.04-02 permits it to review for compliance with the marsh buffer standards "at the time of site plan, § 162.03-06; zoning permit, § 162.03-13; planned development master plan, § 162.03-02; or subdivision preliminary plat, § 162.03-07(D), ***as appropriate***." Folly Beach Code § 166.04-02 (emphasis added). This reading of the Folly Beach Code runs afoul of its own plain language and, as the trial court correctly held, the Vested Rights Act.

First, the plain language of the Folly Beach Code provides that review for compliance can be done at one of many occasions, but not on multiple occasions. The Code plainly provides that review can occur "at the time of the site plan . . . **or** subdivision preliminary plat." There is nothing mysterious or ambiguous about the word "or." The word "or" is "used as a function word to indicate an alternative," such that the marsh buffer review may be conducted at one of several occasions in the alternative. "or." *Merriam-Webster.com*. 2022. https://www.merriam-webster.com/dictionary/or (12 July 2022). Further, not every project has a planned development master plan or a subdivision plat (see single family homes), so it is nonsensical for the four regulations cited to be linked as if they occur on every project. Had the City intended to apply marsh buffer standards at numerous phases of development, and projected to developers that that

was the intention, the Code section would read "review can occur "at the time of the site plan . . . **and** subdivision preliminary plat . . . as appropriate." The City is engaging in a strained reading of its own Code to further its own purposes, but the law does not permit that. "Or" means "or," whether or not it benefits the City's legal argument.

Further, as the trial court noted, "such a reading of [Folly Beach Code § 166.04-02] flies in the face of the Vested Rights Act, which is designed to provide landowners with certainty when spending money in reliance on approved development plans, including subdivision plats." (R. p. 12). Indeed, the Vested Rights Act provides for a "vested right to proceed in accordance with an approved site specific development plan for a period of two years from the approval." The City cannot simply sidestep that statutory right by arguing that it its ordinance provides a right to alter the Subdivision Plat at any time. That argument is absurd, and it was rightfully rejected by the trial court.

C. The trial court properly defined the vested right afforded the Respondent.

The trial court issued a declaratory order finding:

> Respondent has a vested right to complete site grading and to construct buildings on the Subject Property, so long as those buildings are within the buildable footprint outlined in the Subdivision Plat and such buildings conform in all other respects to the applicable requirements for obtaining a building permit.

(R. p. 13). The City argues that the Summary Judgment Order entitles Respondent to develop the Subject Property in any manner it desires, regardless of whether such was defined, envisioned or depicted in such plan." That is not what the trial court ordered. The Subdivision Plat must address 20 different property-related issues, including easements, setbacks and utilities, and must comply with all of the subdivision standards found in the Folly Beach Code. Folly Beach Code § 162.03-07 Subdivision (citing § Chapter 167- Subdivision Standards). As such, it defines the developable area of the lot, including the portion that may not be developed due to the marsh buffer. It is a

precursor to obtaining a building permit. Therefore, the trial court ordered that Respondent was vested with the rights conferred by the Subdivision Plat – the right to grade the property and develop it within the development footprint on the plat. In so holding the trial court recognized that the lots would be built upon so long as the Respondent complied with the requirements for a building permit. This was not error, it was simply a statement of the benefits conferred by the Subdivision Plat.

CONCLUSION

For the reasons set forth above, the Court should uphold the trial court's grant of partial summary judgement and injunctive relief.

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September 14, 2022
Charleston, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHALESTON COUNTY
In the Court of Common Pleas for the Ninth Judicial Circuit
The Honorable Bentley Price, Circuit Court Judge

Appellate Case No. 2022-000038

Clam Farm Partnership, LLC……...Respondent,

v.

The South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, Charleston County and The City of Folly Beach……..Defendants

Of which The South Carolina Department of Health and Environmental Control Office of Ocean and Coastal Resource Management and The City of Folly Beach are the …….Appellants

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CERTIFICATE OF COUNSEL

The undersigned certifies that this FINAL BRIEF OF RESPONDENT CLAM FARM PARTNERSHIP, LLC complies with Rule 211(b), SCACR.

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