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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON 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 APPELLANT THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT

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A. **Did the trial court err in granting Clam Farm partial summary judgment on its declaratory judgment claim where the governing statute and the 2020 Critical Area Line plat grant OCRM authority to exercise jurisdiction "at any time in any critical area?**

SUGGESTED ANSWER: *Yes.*

B. **Did the trial court err in granting Clam Farm partial summary judgment on its declaratory judgment claim where there was evidence that Clam Farm accepted the 2020 Critical Area Line as to some of the Subject Properties?**

SUGGESTED ANSWER: *Yes.*

C. **Did the trial court err in granting Clam Farm partial summary judgment on its declaratory judgment claim where there was evidence that this case falls within one of the exceptions in S.C. Code § 48-39-130(D) because the change to the critical area line was the result of "eroding coastal saltwater stream banks"?**

SUGGESTED ANSWER: *Yes.*

D. **Did the trial court err in granting Clam Farm partial summary judgment on its declaratory judgment claim where there was evidence that this case falls within one of the exceptions in S.C. Code § 48-39-130(D) because the change to the critical area line was the result of "manmade alterations"?**

SUGGESTED ANSWER: *Yes.*

E. **Did the trial court err in granting Clam Farm preliminary injunctive relief for the reasons set forth above?**

SUGGESTED ANSWER: *Yes.*

F. **Did the trial court err in granting Clam Farm preliminary injunctive relief where Clam Farm failed to proffer evidence of irreparable harm or a lack of an adequate legal remedy?**

SUGGESTED ANSWER: *Yes.*

STATEMENT OF THE CASE

A. Factual Background

In this lawsuit, Respondent Clam Farm Partnership, LLC ("Clam Farm") has sued three Defendants: (a) Appellant The South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management ("DHEC" or "OCRM"), Appellant The City of Folly Beach ("City") and Charleston County ("County"), which is not a party to this appeal.

1. The 2016 Critical Area Line

Respondent's claims in this case concern 13 parcels of property — Charleston County TMS Numbers 331-00-00-336 through 331-00-00-348 — located on Bowens Island Road in the City of Folly Beach ("Subject Properties" or "Subject Property"). (*See* R. p. 24). Clam Farm alleges that the Subject Properties are part of a larger development located in The Preserve at Clam Farm ("Development"). (*See id.*). Claim Farm alleges that, in 2006, it purchased the Development, including the Subject Properties, for $5,500.000.00 for purposes of development into residential housing. (*See* R. p. 27 ¶ 13).

On September 29, 2006, DHEC received a Notice of Intent (NOI) for the Development from Clam Farm. On February 15, 2007, DHEC sent a letter to Clam Farm granting permit coverage for the Development to Clam Farm under an NPDES Construction General Permit:

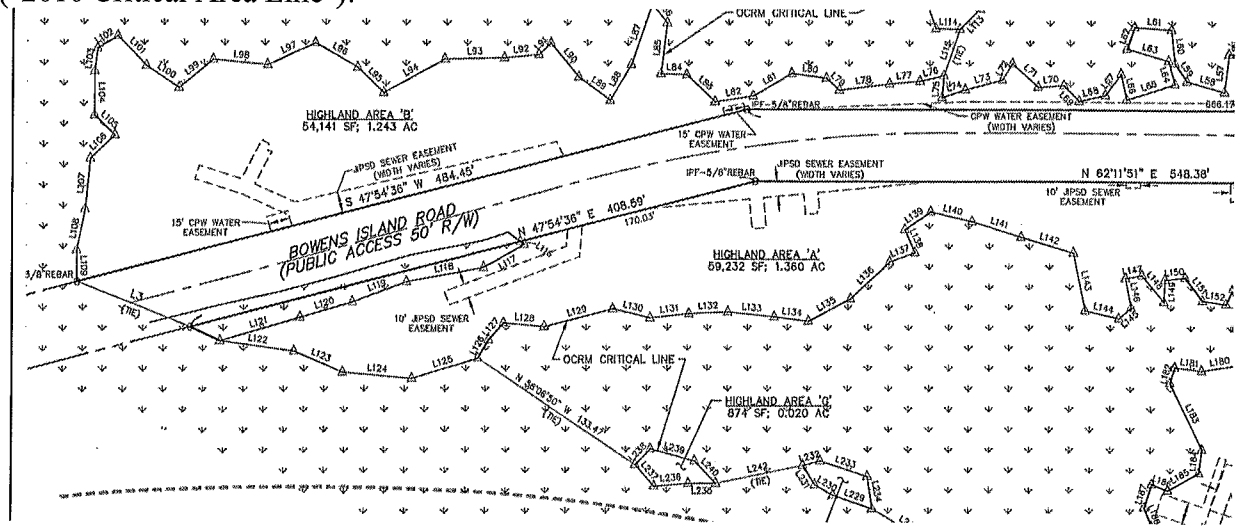
> Based on your submission of the Notice of Intent (NOI) and in accordance with the NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities SCR100000 (2006 CGP), this project has been granted coverage under the 2006 CGP. This project's general permit coverage number is SCR10E234. The total disturbed area for this site is 3.9 acres. This NPDES coverage expires on 02/15/2012, 5 years from the date of issuance.

(*See* R. p. 109). Legislative resolution extended that coverage through February 14, 2021. (*See* R. p. 125 § 3 ("A governmental entity that issued a building permit that has expired and has not been renewed by the governmental entity for one year, shall issue the building permit at no additional cost; however, the building permit must comply with existing rules and regulations in effect at the time the building permit is reissued.")).

The South Carolina Coastal Tidelands and Wetlands Act ("Act") defines critical areas as coastal waters, tidelands, and beaches. *See* S.C. Code § 48-39-10(J). Such critical areas are dynamic and subject to change over time. *See* S.C. Code § 48-39-210; S.C. Code Regs. § 30-1. The Legislature has authorized OCRM to oversee the state's critical areas. With regard to defining tidelands, "until such time as the geographic extent of this definition can be scientifically determined, the department shall have the authority to designate its approximate geographic extent." *See* S.C. Code § 48-39-10(G).

OCRM "is the only state agency with authority to permit or deny any alteration or utilization within the critical area." S.C. Code Ann. § 48-39-210(A). DHEC has direct permitting authority over the critical areas pursuant to S.C. Code §§ 48-39-10, *et. seq.*, and DHEC's Critical Area Regulations, S.C. Code Reg. §§ 30-1, *et. seq.* Any person wishing to alter a critical area must receive a permit from DHEC; such alterations include building docks, bulkheads, boat ramps or other activities such as filling or dredging. A "critical area line" is the upland or inland boundary of the critical area.

On August 24, 2016, Clam Farm asked OCRM to delineate and certify a critical area line for the Development site. On September 29, 2016, OCRM approved an updated critical area line ("2016 Critical Area Line"):



(*See* R. p. 128). The plat setting forth the 2016 Critical Area Line contains 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.

E J Thayer 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.

(*See id.*).

2. The 2020 Critical Area Line

The 2016 Critical Area Line forms the underpinning for Clam Farm's claims against OCRM. In particular, Clam Farm alleges in this lawsuit that it "obtained vested rights to develop the Subject Properties through the issuance of an approved and recorded site plan by the City on July 10, 2020. The City relied on a five-year critical line determination issued by OCRM on September 29, 2016." (*See* R. p. 24).

On November 2, 2020, OCRM compliance staff issued Clam Farm a Notice to Comply ("Notice to Comply"). The Notice to Comply recounted the on October 23, 2020, OCRM staff conducted an inspection of Clam Farm's Subject Properties located on and adjacent to King Flats Creek on Bowens Island Road. (*See* R. p. 207). OCRM's staff observed "[p]ortions of silt fencing" in "the tidelands critical area without authorization from [OCRM]." (*See id.*). At that inspection, OCRM "staff observed that silt fencing had been installed in the tidelands critical area along portions of the development's perimeter. The Department did not re-stake or flag the critical line at that time." (*See* R. pp. 209-11).

The Notice to Comply noted that South Carolina law "require[s] that any utilization/alteration of the critical area be permitted or otherwise legally authorized by the

Department prior to performing the activity." (*See* R. p. 207). OCRM further noted the changing nature of critical areas and recommended that a new critical line be determined:

> Tidelands critical areas are dynamic environments and they are often subject to change over time. The Department recommends that Clam Farm Partnership, LLC requests to have a new critical area line set for the Sites in order to determine the current location of the critical area lines for the properties at The Preserve at Clam Farm (please see included form D-3902).

(*See id.*).

On November 9, 2020, OCRM Critical Area permitting staff determined and flagged the critical line at the site ("2020 Critical Area Line").[1] (*See* R. pp. 209-11). As OCRM argued to the trial judge:

> OCRM flagged the 2020 critical area line based on the established saline vegetation in existence at each lot. Again, the presence of saline vegetation on the subject property indicates that the tidelands have continuously encroached on the Plaintiff's property since the 2016 critical line was set, and the topography of the property was altered in such a way that saline vegetation was allowed to grow over time. The Plaintiff failed to take reasonable measures to prevent the expansion of the critical area and now seeks to restrict OCRM's authority to designate its geographic extent.

(*See* R. p. 303). Furthermore, Blair Williams, Manager of the Critical Area Permitting Section at OCRM, testified in his November 29, 2021 Affidavit that Clam Farm's site prep/clearing activity from 2006 to 2009[2] along with the natural coastal processes likely contributed to the changed critical area line (including changes to the critical area line from September 29, 2016 to November 2020 when OCRM flagged the critical area). Thus, for various reasons, the critical line for the area of the Development had changed since 2016, moving inland. A plat attached to Clam Farm's

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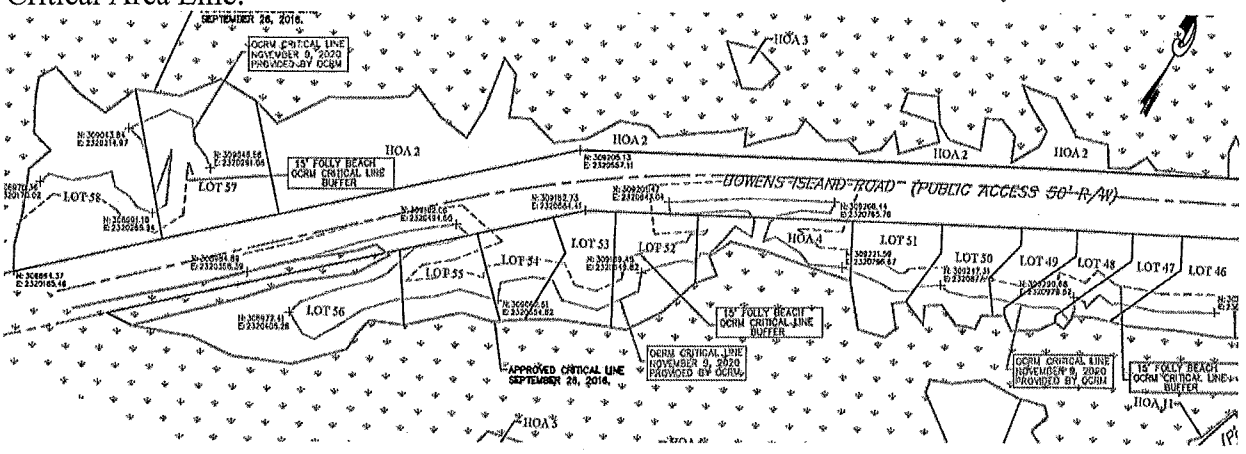
[1] On November 9, 2020, OCRM also directed Clam Farm to "cease and desist any activities that are adjacent to/near the silt fencing since these are the specific areas to be evaluated by the Department." (*See* Clam Farm's June 17, 2021 Mot. for Partial Summ. J. and Prelim. Inj. Ex. 14).

[2] The critical area changes Mr. Williams testified to that are partially due to the site prep/clearing activity from 2006 to 2009 is addressed in S.C. Code § 48-39-210(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.*" (emphasis added)).

Motion for Partial Summary Judgment and Preliminary Injunction purports to illustrate the 2020 Critical Area Line:



(*See* R. p. 266). In this image, the 2016 Critical Area Line is in green, while the 2020 Critical Area Line is in red; the Subject Properties are Lots 46-58.

On November 24, 2020, Clam Farm's counsel responded to the Notice to Comply, stating in part:

> We believe there is no reliable way to re-create the critical line once heavy equipment has impacted the property. In addition, while we understand OCRM's discretionary authority under S. C. Code Ann. Sec. 48-39-210(B), we consider it an abuse of discretion to enter an active construction site, stop construction, and require a new critical line when the critical line as approved in 2016 is still valid. There were multiple opportunities in the past five years for OCRM to inspect the property for construction suitability, based on HLA's ongoing efforts and contact with OCRM to preserve and confirm the viability of permits.

(*See* R. p. 229).

In partial response to this letter, on November 25, 2020, OCRM informed Clam Farm that "critical area exists landward of portions of the installed silt fencing and that continued impacts in these areas are not authorized by OCRM." (*See* R. pp. 232-33). OCRM further advised Clam Farm that any additional impact to the critical area from continued land disturbance activities would be deemed a willful violation of the law and could "result in the initiation of an enforcement action." (*See id.*).

On January 6, 2021, Clam Farm's counsel sent OCRM a letter concerning the critical area line. Clam Farm accepted OCRM's November 9, 2020 critical area line flagging (*i.e.*, the 2020 Critical Area Line) for nine of the thirteen Subject Properties:

> The developer 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.

(*See* R. p. 241).

On January 22, 2021, DHEC's Bureau of Water staff received an email from Clam Farm seeking an extension of permit coverage under the NPDES Construction General Permit for the Development. (*See* R. p. 248). On February 24, 2021, DHEC's Bureau of Water staff granted Clam Farm's "S/W Permit Authorization #10-06-01-08" permit extension request for a period of five years. (*See* R. pp. 248-50). The approval letter recognized that there had been some changes from 2016 to the 2020 Critical Area Line: "a modification to the previously-approved design and construction plans may be necessary to address differing site conditions (S.C. Reg. 72-312.G) before construction activity can continue in certain areas of the site." (*See* R. p. 248).

> Per the attached plat (see Attachment A) provided to OCRM staff by your client's legal counsel, it appears that site conditions have changed with respect to the critical area line location in several areas based upon the critical area line flagged by OCRM staff on October 23, 2020. The permit coverage was originally issued on February 15, 2007 (see Attachment B) and was based upon site conditions provided to stormwater permitting staff prior to the aforementioned date of issuance.

(*See id.*).

On April 8, 2021 (more than two months after Clam Farm filed this lawsuit), OCRM issued a Cease and Desist Directive to Clam Farm for critical area impacts that are unrelated to OCRM's November 2, 2020 Notice to Comply. That Cease and Desist Directive states in relevant part:

> On April 6, 2021, the Department of Health and Environmental Control's Office of Ocean and Coastal Resource Management (Department) staff conducted an inspection at your property located adjacent to Bowens Island Rd, Charleston, SC (PIN 3310000002) (Site). As a result of this inspection, Department staff observed that critical area vegetation adjacent to the terminus of Studdingsail Lane and near

> PINs 3310000337 through 3310000345 has been cut/mowed without authorization from the Department.
>
> Such activity is a violation of the South Carolina Coastal Zone Management Act (Act) and Coastal Division Regulations (Regulations) which require that any utilization/alteration of the critical area be permitted or otherwise legally authorized by the Department prior to performing the activity. As a result, the Department is required to take appropriate corrective action and may assess civil penalties.

(*See* R. p. 264). This April 8, 2021 Cease and Desist Directive is irrelevant to the issues in this lawsuit.

B. Procedural History

On February 5, 2021, Clam Farm filed this lawsuit against OCRM, Charleston County and the City of Folly Beach, seeking, *inter alia*, to invalidate OCRM's delineation of the 2020 Critical Area Line. (*See generally* R. pp. 23-51). Clam Farm's Complaint asserts causes of action against OCRM sounding in: (a) declaratory judgment; (b) violation of due process rights under Section 1983; (c) injunctive relief; (d) gross negligence; (e) inverse condemnation; (f) civil conspiracy; and (g) attorneys' fees. On April 26, 2021, OCRM filed its answer. (*See* R. pp. 74-84).

The crux of Clam Farm's declaratory judgment cause of action is that the 2020 critical area line is improper because "the certification of a critical line by OCRM may be relied upon for five years unless the critical line delineates the boundary of an eroding saltwater stream bank where is can be expected that the line will move due to changes in the stream." (*See* R. p. 35 ¶ 42). Clam Farm continues:

> The Subject Property is adjacent to a large expanse of marsh flats and not a coastal stream bank. [Citation omitted.] Therefore, the exception to the five-year critical line certification set forth in S. C. Code Ann. § 48-39-210(D) does not apply. As provided in S.C. Code Ann. § 48-39-210(C), the September 2016 critical line certification did not expire until September 29, 2021, and may not be revised until that date.

(*See* R. p. 35 ¶ 43).

In its injunction cause of action, Clam Farm seeks the following elements of equitable relief with regard to OCRM:

a. Preventing OCRM from enforcing the Notice to Comply and from certifying a new critical line prior to September 29, 2021;

b. Preventing the City from amending or changing the Final Plat and requiring additional governmental approvals related to the site work on the Subject Property; and

c. Preventing the County from requiring MS4 review and approval, individual lot permits or any other governmental approvals related to site work on the Subject Property.

(*See* R. p. 41 ¶ 79).

C. <u>The Subject Motion</u>

On June 17, 2021, Clam Farm filed its Motion for Partial Summary Judgment and for Preliminary Injunction. In that Motion, Clam Farm sought partial summary judgment as to its declaratory judgment cause of action. As to OCRM, Clam Farm requested that the Court declare that OCRM cannot alter the five-year critical line established on September 29, 2016 or preclude Clam Farm from conducting site work activities landward of the 2016 Critical Line.

Clam Farm also requested a preliminary 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." (*See* R. p. 104).

D. The Orders From Which OCRM Appeals

On November 18, 2021, the Court entered an Order Granting Plaintiff's Motion for Partial Summary Judgment and for Preliminary Injunction ("Order"). (*See generally* R. pp. 1-16).

In granting partial summary judgment for Clam Farm as to its declaratory judgment claim against OCRM, the Order states:

> S.C. Code Ann. § 48-39-210(C) unambiguously provides that a certified critical line does not expire for 5 years. Therefore, OCRM had no authority to establish a new critical line before September 29, 2021, and no authority to preclude activities in the area landward of the 2016 critical line prior to that date. For that reason, the Court hereby grants Plaintiff's motion for summary judgment on its declaratory judgment cause of action, and holds as follows:
>
> 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.

(*See* R. pp. 10-11).

Additionally, the Order grants Clam Farm a preliminary "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." (*See* R. p. 15).

The Court denied OCRM's motion asking for reconsideration of the Order on December 14, 2021. (*See* R. pp. 17-19).

On or about January 6, 2022, OCRM timely served its Notice of Appeal from the Order and the order denying reconsideration of the Order. (*See* R. pp. 341-61).[3] For the reasons that

[3] On or about January 11, 2022, Defendant City of Folly Beach filed its own Notice of Appeal, seeking review of portions of the Order relating to it. The Court of Appeals noted that it received the City's Notice of Appeal before it received OCRM's. As a result, the City is "the

follow, the Court should reverse the trial judge's Order with regard to OCRM (Sections 1 and 3 thereof).

primary appellant and shall be responsible for performing all duties required of the appellant under Rules 207 and 210." *See* S.C.R. App. P. 206.

ARGUMENT

A. Standard of Review

1. Summary Judgment

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." See Rule 56(a), SCRCP. Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See Rule 56(c), SCRCP.

"Summary judgment should be granted when plain, palpable, and undisputable facts exist on which reasonable minds cannot differ." *NationsBank v. Scott Farm*, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995); *accord Moore v. Barony House Restaurant, LLC*, 382 S.C. 35, 40, 674 S.E.2d 500, 503 (Ct. App. 2009) (*quoting Rife v. Hitachi Constr. Mach. Ltd.*, 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005)). "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *See Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005). "If triable issues exist, those issues must go to the jury." *Id.* Similarly, "[o]n appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Id.*

"On summary judgment, the court's task is not to try issues of fact but to determine if genuine issues of material fact exist." *Murphy v. Tyndall*, 681 S.E.2d 28, 30 (Ct. App. 2009). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *Blumenthal Mills*, 365 S.C. at 220, 616 S.E.2d at 730. Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues." *Id.* "In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of

evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

For the reasons that follow, this Court should reverse the trial court's grant of partial summary judgment to Clam Farm.

2. Preliminary Injunctive Relief

Similarly, the standard of review governing the grant of a preliminary injunction is well-settled in South Carolina:

> The grant of an injunction is reviewed for abuse of discretion. *Strategic Resources Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). "An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law." *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 454, 626 S.E.2d 34, 36 (Ct. App. 2005).

See Hook Point, LLC v. Branch Banking & Tr. Co., 397 S.C. 507, 510-11, 725 S.E.2d 681, 683 (2012).

For the reasons that follow, this Court should reverse the trial court's grant of a preliminary injunction judgment to Clam Farm.

B. The Trial Court Improperly Granted Summary Judgment Because It Misapplied S.C. Code § 48-39-210.

The trial court's Order concludes that — notwithstanding the dynamic nature of critical areas and the changing environment — "a certified critical line does not expire for 5 years"; as a result, the Court held that "OCRM had no authority to establish a new critical line before September 29, 2021, and no authority to preclude activities in the area landward of the 2016 critical line prior to that date." (*See* R. p. 10). The trial court essentially concluded that a critical area line that OCRM certifies can only expire after five years and that — prior to the expiration of the 2016 Critical Area Line — OCRM was *only* permitted to deny alterations or utilizations based on that critical area line (until the expiration of five years). For the reasons that follow, the trial court erred in granting summary judgment to Clam Farm.

1. The South Carolina Coastal Tidelands and Wetlands Act and Regulations Allowed OCRM to Delineate the 2020 Critical Area Line

a. The Trial Court Erroneously Disregarded The Act's Language Allowing OCRM to Assert Permit Jurisdiction "At Any Time in Any Critical Area" on the Subject Properties.

With regard to its declaratory judgment claim, Clam Farm bears the burden of proving all of the elements necessary to support its request for relief:

> The plaintiff seeks affirmative relief under the declaratory judgment act, and of course the burden of proof rests upon her in this action, as well as in other actions, to prove the material allegations of her complaint by the greater weight or preponderance of the testimony. Our attention has not been called to any authority where the burden of proof in an action under the declaratory judgment act rests any less heavily upon the shoulders of the plaintiff than in the ordinary civil action.

See Martin v. Cantrell, 225 S.C. 140, 144, 81 S.E.2d 37, 38-39 (1954); *accord Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 411 S.C. 506, 520, 769 S.E.2d 453, 460 (Ct. App. 2015) ("The burden of proof in a declaratory judgment action rests on the plaintiff."); *Menne v. Keowee Key Prop. Owners' Ass'n*, 368 S.C. 557, 564, 629 S.E.2d 690, 694 (Ct. App. 2006) ("The party bringing the action bears the burden of proof by the preponderance of the evidence."). For the reasons that follow, Clam Farm failed to carry its burden of showing entitlement to summary judgment. Therefore, this Court should reverse the trial court's entry of summary judgment against OCRM.

Under the Act, the legislature tasked OCRM with creating a comprehensive coastal management program that will, *inter alia,* "[p]rovide a regulatory system which the department shall use in providing for the orderly and beneficial use of the critical areas." *See* S.C. Code § 48-39-80(A); *accord* S.C. Code of Regs. § 30-1(B)(1) ("Tidelands and coastal waters are identified as 'critical areas' . . . ."). The South Carolina Coastal Management Act defines "critical areas" as coastal waters, tidelands, beaches, and the beach/dune system (the area from the mean high-water mark to the setback line). *See* S.C. Code § 48-39-10(J). The Act further defines "tidelands" as:

> all areas which are at or below mean high tide and coastal wetlands, mudflats, and similar areas that are contiguous or adjacent to coastal waters and are an integral part of the estuarine systems involved. Coastal wetlands include marshes, mudflats,

> and shallows and means those areas *periodically inundated by saline waters* whether or not the saline waters reach the area naturally or through artificial water courses and *those areas that are normally characterized by the prevalence of saline water vegetation capable of growth and reproduction.* Provided, however, nothing in this definition shall apply to wetland areas that are not an integral part of an estuarine system. Further, *until such time as the exact geographic extent of this definition can be scientifically determined, the department shall have the authority to designate its approximate geographic extent.*

See S.C. Code § 48-39-10(G) (emphasis added).

"Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter." *See* S.C. Code § 48-39-30(D). "The critical areas are of vital importance to the State, and there is strong and growing pressure for the development of these areas." *See* S.C. Code of Regs. § 30-11(A). As a result, OCRM's regulations were promulgated "in an effort to reduce the irreversible loss of productive tidelands, coastal waters, beaches, and dunes while meeting long-range State development needs." *See id.*

The law recognizes that "[c]ritical areas by their nature are dynamic and subject to change over time." *See* S.C. Code § 48-39-210(B)[4]; S.C. Code Regs. 30-1(B)(1) ("The tidelands and coastal waters of the South Carolina coast are a very dynamic ecosystem . . . . The tides regularly ebb and flood through the coastal inlets, bays and marshes which constitute a fragile area,

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[4] South Carolina Code § 48-39-210(B) provides, at length, for numerous requirements with regard to the delineation of a critical area:

> 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."

vulnerable to the impacts of many human activities."). The South Carolina legislature acknowledged this dynamic nature and granted OCRM exclusive authority to oversee conduct in critical areas. OCRM "is the only state agency with authority to permit or deny any alteration or utilization within the critical area." S.C. Code Ann. § 48-39-210(A).

In granting Clam Farm partial summary judgment, the trial court relied heavily on South Carolina Code § 48-39-210(C), which provides that "[n]otwithstanding 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)." However, the legislature created several exceptions to this rule:

> 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.

See S.C. Code § 48-39-210(D).

As discussed above, South Carolina Code § 48-39-210(C) provides that "[n]otwithstanding 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." The trial court granted Clam Farm partial summary judgment on its declaratory judgment claim, based heavily on its conclusion that "S.C. Code Ann. § 48-39-210(C) unambiguously provides that a certified critical line does not expire for 5 years." (*See* R. p. 10). This conclusion was erroneous because the trial court ignored the plain language of the Act. OCRM did not violate any statutory duties; it merely — consistent with the Act-mandated language in the 2016 Critical Area Line plat — revised the delineation of the dynamic critical area line to reflect changes that had occurred over time (because of Clam Farm's conduct and/or the course of nature).

The trial court's interpretation of the law undermines the Act by interfering with OCRM's exclusive statutory authority to "assert permit jurisdiction" by delineating a new critical area line "at any time in any critical area on the subject property" in light of the ever-changing nature of the tidelands. S.C. Code Ann. § 48-39-210(B). The trial court's Order directly conflicts with the

legislature's purpose in the Act and its explicit recognition that critical areas are dynamic and subject to change. Specifically, the trial court disregarded the fact that OCRM is the appropriate entity to delineate critical areas. The Act provides that OCRM "is the only state agency with authority to permit or deny any alteration or utilization within the critical area." S.C. Code § 48-39-210(A). The Act further provides that OCRM has the authority to designate tidelands, which comprise critical areas: "until such time as the exact geographic extent of this definition can be scientifically determined, the department shall have the authority to designate its approximate geographic extent." *See* S.C. Code § 48-39-10(G). The Act contains no provisions limiting OCRM's authority to regulate and determine the boundaries of dynamic critical areas. The Act does not restrict OCRM's power to adjust critical area lines if circumstances warrant such an adjustment.

Moreover, the Act requires that any survey depicting a critical area delineation *must* contain language that "[b]y delineating the permit authority of the department, the department [*i.e.*, OCRM] *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." *See* S.C. Code § 48-39-210(B) (emphasis added). Such a survey must also recite that "[c]ritical areas by their nature are *dynamic and subject to change* over time." *See id.* (emphasis added). The plat setting forth the 2016 Critical Area Line contained the language the Act requires. The plat further notes that — although the critical area delineated therein would be valid for five years — this duration would be "SUBJECT TO THE CAUTIONARY LANGUAGE ABOVE" concerning the dynamic nature of the critical area and OCRM's reserved right to exercise jurisdiction over that area "at any time":

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.

E J Thayer 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.

(*See* R. p. 128). There is no evidence that Clam Farm ever objected to the language on the 2016 Critical Area Line plat that such line was "dynamic and subject to change." The trial judge erred in granting Clam Farm partial summary judgment on its declaratory judgment claim because the plain language of the Act permits OCRM to modify a critical area line at any time. As set forth above, Section 48-39-210(C) provides that "[n]otwithstanding any other provision of this chapter, a critical area line established . . . expires after five years."

The unambiguous language of this statute clearly establishes that OCRM has the right to assert its authority over critical areas "at any time." The five-year time in Section 48-39-210(C) is a ceiling for the maximum duration of a critical area line; a critical area line cannot be effective for more than five years under any circumstances. However, nothing in Section 48-39-210(C) suggests or supports that Clam Farm had some statutorily-enforceable five-year property interest in the 2016 Critical Area Line. The Act does not create an "entitlement" to an existing critical area line for five years. To the contrary, the Act and the plat make clear that critical areas are "dynamic" and that "[b]y delineating the permit authority of the department, the department [*i.e.,* OCRM] *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." *See* S.C. Code § 48-39-210(B) (emphasis added). OCRM has express (and exclusive) statutory authority to exercise jurisdiction *at any time* in a critical area. This statutory authority allows OCRM to adjust or re-delineate critical area lines

when circumstances require. If OCRM does not have such authority, these reservations on the plat would be meaningless.

The Order construes the Act as permitting OCRM to exercise this authority to change critical area lines prior to the expiration of five years *only* when one of the exceptions in Section 48-39-210(D) applies.[5] If the legislature intended for these to be the *only* circumstances in which OCRM could reestablish a dynamic critical area line, it would have said so. In fact, elsewhere in the Act, the legislature did precisely that:

> The department, in the discharge of its duties may administer oaths and affirmations, take depositions and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda and other records deemed necessary in connection with the work of the department. *The only exception* shall be, that information considered proprietary by the applicant.

See S.C. Code § 48-39-70(B). The trial court did not set forth any reasons to support a conclusion that Section 48-39-210(D) represents the *only* exceptions to the five year rule, particularly given the policies and purposes underlying the Act. Clam Farm presented no evidence to support such a conclusion. To the contrary, the statutory language OCRM cited above makes clear that the Act provided OCRM broad (and exclusive) authority to regulate and determine critical area lines at any time to further the policies of the Act.

The trial court's (and Clam Farm's) approach to the Act is inconsistent with OCRM's traditional interpretation of the Act to which (as set forth below) the Court should give deference. OCRM construed the Act to grant it jurisdiction to change "dynamic" critical area lines to reflect changing conditions on the ground. This is consistent with the policies underlying the Act. Clam Farm has presented no evidence that this construction of the Act is inappropriate or that there are

---

5 *See* S.C. Code § 48-39-210(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."). As discussed, *infra*, even if OCRM was limited to these exceptions, the trial court erred because there is evidence supporting OCRM's contention that one of those exceptions applies.

reasons that the Court should disregard OCRM's construction of the statute it is empowered to administer.

In further support of this, OCRM submitted evidence to the trial court supporting its interpretation of the Act:

> Because the critical area line is a foundational tool that OCRM uses to establish its permitting jurisdiction in its efforts to comply with the Legislature's mandate to "protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations," *OCRM has never applied or interpreted S.C. Code Ann. § 48-39-210(D) as the only two instances where OCRM can recognize a new critical area line prior to the five year expiration date* articulated in S.C. Code Ann. § 48-39-210(C) (i.e., when a coastal saltwater stream bank is eroding or when manmade alterations change the critical area line). To the contrary, because the Department's ability to establish its permitting jurisdiction is so crucial to a functional regulatory scheme, since the statute was amended in 1993, OCRM has interpreted the broad language of S.C. Code Ann. § 48-39-21O(B) ("at any time in any critical area") to mean that *OCRM can modify any critical area line at any time prior to the five-year expiration date* per S.C. Code Ann. § 48-39-210(C).

(*See* R. pp. 326-27 (emphasis added)). In light of OCRM's interpretation and historical application of the Act, the trial court's Order erroneously limited OCRM's exclusive jurisdiction to delineate critical area lines and to regulate alterations to critical areas.

In addition to the foregoing, even if the Act did not unambiguously permit OCRM to delineate the 2020 Critical Area Line, the trial court erred in granting partial summary judgment to Clam Farm on its declaratory judgment claim, because — without any discussion or exploration of the substantive reasons why — it rejected OCRM's agency interpretation of the very statute it administers. South Carolina courts must give deference to the interpretations that agencies, such as OCRM, give to statutes that they implement:

> Interpreting and applying statutes and regulations administered by an agency is a two-step process. First , a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation. [Citations omitted.] . . . [Where] the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." If the statute or regulation "is silent or ambiguous with respect to the specific issue," the court then must give deference to

> the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference.

See Kiawah Dev. Partners, II v. South Carolina Dep't of Health & Env'tal Ctrl., 411 S.C. 16, 32-33, 766 S.E.2d 707, 717 (2014).

"'The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.'" *See Brown v. South Carolina Dep't of Health & Env'tal. Ctrl.*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002). That is "both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations." *Kiawah Dev. Partners, II*, 411 S.C. at 34, 766 S.E.2d at 707. This Court should "defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *See id.*, 411 S.C. at 34-35, 766 S.E.2d at 718; *accord Nucor Corp. v. South Carolina Public Serv. Comm'n*, 310 S.C. 539, 543, 426 S.E.2d 319, 321 (1992) ("Where an agency is charged with the execution of a statute, the agency's interpretation should not be overruled without cogent reason.").

"Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language." *City of Camden v. Brassell*, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997). South Carolina law recognizes numerous rules governing statutory interpretation:

> The Court should give words "their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Sloan v. S.C. Bd. of Physical Therapy Exam'rs,* 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992). In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Bennett v. Sullivan's Island Bd. of Adjustment*, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct. App. 1993).

> Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention. *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000). *"A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous."* *In re Decker,* 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (citation omitted).

See State v. Sweat, 386 S.C. 339, 350-51, 688 S.E.2d 569, 575 (2010) (emphasis added).

OCRM has made clear that its interpretation of the Act is that it has the authority to revise critical area lines at any time to reflect the ever-changing tidelands and the scope of its permitting jurisdiction. S.C. Code Ann. § 48-39-210(B). This is based on language of the Act and is communicated to developers at the time a critical area line is set. It is undisputed that critical area lines are dynamic; the Act recognizes this. It would undermine the Act's policies to tie OCRM's hands for five years, when valid reasons might — in OCRM's view as the agency administering the Act — exist to adjust a critical area delineation. The trial judge did not undertake an analysis of why it should disregard OCRM's construction of the statute.

The legislature has spelled out the policy ends that OCRM should pursue in administering the Act. These policy goals include:

> (1) [T]o encourage development of coastal resources in order to achieve such improvement with *due consideration for the environment* and within the framework of a coastal planning program that is *designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards* with respect to the construction of facilities in the critical areas of the coastal zone;
>
> (2) To *protect* and, where possible, to restore *or enhance the resources of the State's coastal zone* for this and succeeding generations;
>
> (3) To formulate a comprehensive tidelands protection program; . . .
>
> (5) To encourage and assist state agencies, counties, municipalities and regional agencies to exercise their responsibilities and powers in the coastal zone through the development and implementation of comprehensive programs to achieve *wise use of coastal resources giving full consideration to ecological, cultural and historic values* as well as to the needs for economic and social development and resources conservation.

See S.C. Code § 48-39-30(B) (emphasis added). OCRM's adjustment of the critical area line would further the state's interest in protecting its fragile resources by ensuring that critical area lines are as accurate as possible. On the other hand, Clam Farm's construction of the Act, which inhibits OCRM's ability to regulate our state's fragile resources, would not further these policies. These policy goals would be best advanced by allowing OCRM flexibility to adjust critical area lines where changed circumstances warrant.

Clam Farm also argued to the trial judge that OCRM should not have adjusted the 2016 Critical Area Line, because any changes were transient and caused, in part, by King Tides:

> During the Fall of 2020, the Plaintiff installed utilities and conducted extensive grading work on the Subject Property, all within the silt fencing that had been installed along the 2016 Critical Line. This work caused temporary changes to the contours of the Subject Property. During this same time period, the Charleston area experienced unusual King Tides.

(*See* R. p. 86). However, it offers no evidence to support that the changes to the Subject Properties were transient or so limited. To the contrary, OCRM flagged the 2020 Critical Area Line based on the location of *established saline vegetation* at each lot, not merely because of transient King Tides:

> A critical area of delineation is vegetation. It's, it's where saline plants and vegetation grow and it's not something like a mushroom that happens overnight. It's something that occurs over a period of time and the King Tides are one thing. I have King Tides in my yard but the Charleston grass is still growing.
>
> So, a periodic inundation by saltwater does not, in and of itself, change a critical line. Vegetation does and there's, there's no question that OCRM is vested with the power by the Legislature to grant such permits as we have in this case.

(*See* R. p. 415:4-14). Clam Farm, which bears the burden of proof as Plaintiff, has presented no evidence disputing established saline vegetation further inland than the 2016 Critical Area Line. Such vegetation indicates that the tides *regularly* encroached on the Subject Properties beyond the 2016 Critical Area Line to an extent sufficient to foster the growth of saline vegetation. From this (and resolving all inferences in favor of OCRM), it can be inferred that the topography or other characteristics of the Subject Properties must have substantially changed to allow saline vegetation

to grow further inland over time. OCRM submits that the Order impermissibly restricts its exclusive statutory authority to delineate critical areas in violation of the plain language of the Act.

Clam Farm failed to take reasonable measures to prevent those changes to the dynamic critical area by, for example, more promptly developing its Subject Properties or installing a bulkhead in the upland (outside of OCRM's permitting jurisdiction) to stop the continuous encroachment of the tidelands. Any changes to the critical area lines on the Subject Properties was a consequence of Clam Farm's action (or, more accurately, inaction). On September 26, 2016, OCRM approved the 2016 Critical Area Line plat for the Subject Properties. However, it did not perform site work on the Subject Properties for nearly four years, until the autumn of 2020. There is at least a scintilla of evidence that (at least in part because of its own delays), by the time Clam Farm started grading the Subject Properties for construction and installing or adjusting utility lines in 2020, the 2016 Critical Area Line no longer accurately reflected the critical area. Clam Farm does not dispute that the topography of the Subject Properties had changed since 2016 — though it is unclear whether that change was a result of nature, Clam Farm's actions, or a combination thereof. Nevertheless, there is evidence that the Subject Properties were in an altered state long enough for saline water vegetation to grow. Clam Farm did not protect the Subject Properties from the encroaching tidelands and did not promptly and diligently develop the Subject Properties. If it would have done so, it could have avoided the risk that saline vegetation might grow further inland on the Subject Properties, changing the dynamic critical area.

For all of these reasons, the trial judge erred in granting Clam Farm summary judgment as to its declaratory judgment claim regarding OCRM's establishment of the 2020 Critical Area Line.

b. <u>The Trial Court Erroneously Disregarded Clam Farm's Conduct That Preclude It From Challenging the 2020 Critical Area Line.</u>

In addition to the foregoing, even if the Court rejects OCRM's prior arguments, the trial court's Order is nevertheless flawed because it did not address the impact of Clam Farm's own conduct. Clam Farm's conduct following the delineation of the 2020 Critical Area Line is inconsistent with its claims in this case (and the conclusion of the trial court in the Order).

"Waiver is the voluntary and intentional relinquishment of a known right." *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 928 (Ct. App. 1994). "A simple voluntary relinquishment of a right with knowledge of all the facts — an expression of intention not to demand a certain thing is sufficient to constitute a waiver." *See South Carolina Tax Comm'n v. Metropolitan Life Ins. Co.*, 266 S.C. 34, 40, 221 S.E.2d 522, 524 (1975).

Notably, Clam Farm did not challenge OCRM's authority to delineate critical areas for all lots on the property. In fact, in a letter to OCRM, Clam Farm accepted the establishment of the newly delineated 2020 Critical Area Line as to nine of the Subject Properties: "The developer 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 . . . " (*See* R. pp. 239-43). Even though Clam Farm accepted (without any challenge to OCRM's authority) OCRM's new 2020 Critical Area Line for most of the Subject Properties, it now asserts as to *some of those Subject Properties* that OCRM did not have the authority to set a new critical line before September 29, 2021. The Court should not allow Clam Farm to accept OCRM's authority in some instances, but dispute it in others. The legislature plainly and expressly granted OCRM broad and *exclusive* authority over critical areas, including the authority to delineate critical areas. Clam Farm's acceptance in part of the 2020 Critical Area Line constitutes at least a scintilla of evidence that Clam Farm waived any right to challenge OCRM's right to create the 2020 Critical Area Line.

For the foregoing reasons, the Act makes plain that OCRM has exclusive jurisdiction and authority to adjust and delineate critical area lines *at any time*. Nothing in the Act restricts OCRM's authority. Therefore, the trial judge erred in granting Clam Farm partial summary judgment as to its declaratory judgment claim.

2. The Trial Court Erroneously Disregarded That This Case Might Fall Within One of the Exceptions to the Five-Year Duration of Critical Area Lines.

Alternatively, even if this Court rejects OCRM's interpretation of the plain language of the Act, the trial court nevertheless erred in granting summary judgment because there is evidence that one of the exceptions of Section 49-39-210(D) applied. There is, at the very least,[6] an issue warranting a full trial on the merits as to whether any of those exceptions apply. Therefore, the Court should reverse the trial court's grant of partial summary judgment to Clam Farm as to its declaratory judgment claim.

Under Section § 48-39-130(C) of the Act, "[n]otwithstanding any other provision of this chapter, a critical area line . . . expires after five years from the department date on the survey described." *See* S.C. Code § 48-39-130(C). "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." *See* S.C. Code § 48-39-130(D). There is at least a scintilla of evidence sufficient to create a genuine issue of material fact as to whether one of these exceptions applied here.

a. There Was At Lease a Scintilla of Evidence That the Change to the Critical Area Line Was the Result of Eroding Coastal Saltwater Stream Banks.

First, the trial court should have denied partial summary judgment because Clam Farm failed to show that the changes that caused OCRM to delineate the 2020 Critical Area Line were not the result of "eroding coastal saltwater stream banks where it can be expected that the line will move due to the meandering of the stream." See S.C. Code § 48-39-130(D).

Clam Farm argued in the trial court that "[t]here is no dispute that the Subject Property is not adjacent to a meandering stream bank." (*See* R. pp. 97 & 016-07). The only evidence cited for this proposition is an alleged overhead image of the Subject Properties:

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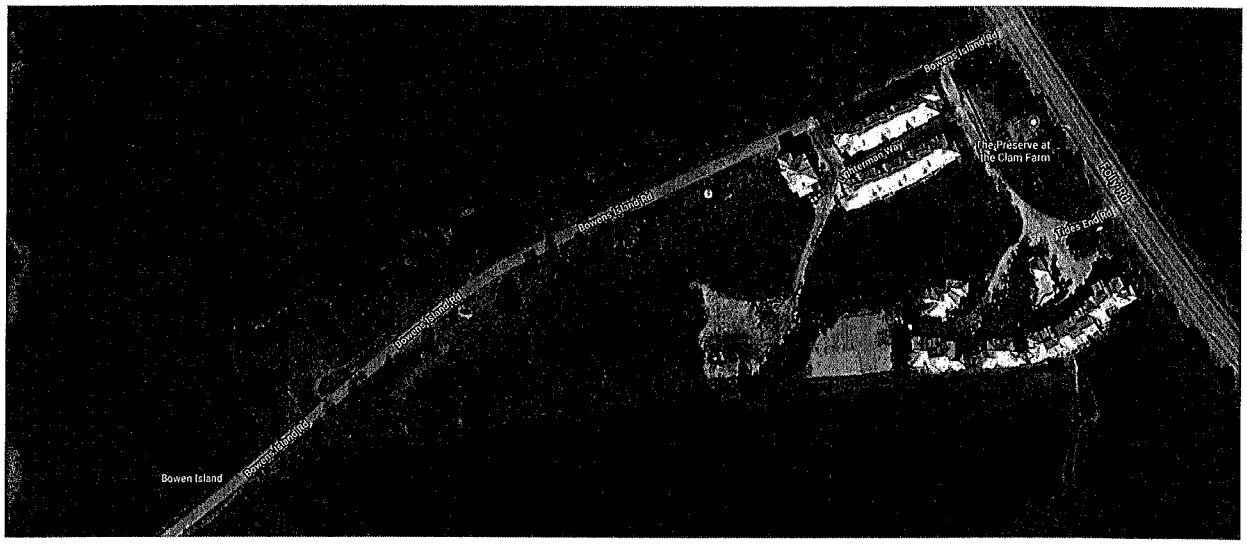
[6] OCRM believes that the Act is clear that it had exclusive authority to determine the Current Critical Area Line and that *it* is entitled to judgment as a matter of law as to Clam Farm's declaratory judgment claims, since it acted within its statutory authority.



(*See id*). However, Clam Farm (and the trial court) never actually analyzed whether this exception applied (or could apply) here.

The Act does not define the term "stream," as used in Section 48-39-210(D). Nor do the relevant regulations. The Act and its regulations do not suggest any intention to have a narrow definition of a "stream." The Act contains no language to suggest a legislative intent to limit OCRM's jurisdiction. In light of the apparent ambiguity from the absence of a definition of a stream, the Court should defer to the OCRM's construction of the Act under which it has jurisdiction to alter the critical area line on the Subject Properties.

For these reasons, the Court should reverse the trial judge's entry of partial summary judgment in favor of Clam Farm.

b. <u>There Was At Least a Scintilla of Evidence That the Change to the Critical Area Line Was the Result of Manmade Alterations.</u>

There is another exception to the five-year expiration of critical area lines "where manmade alterations change the critical area line." *See* S.C. Code § 48-39-130(D). There is at least a scintilla of evidence that the 2020 Critical Area Line was necessitated by Clam Farm's manmade alterations to the Subject Properties. As a result, this case could fall within another express exception under the Act to the five-year duration of critical area lines.

In its filings below, Clam Farm noted that it engaged in extensive work on the Subject Properties that changed those properties:

> Beginning on about April 22, 2020, Clam Farm resumed residential lot construction activities which included the installation removal and modification of certain water lines and sewer lines which had been previously installed. The construction activities also included changes to grade and the development of building pads for vertical construction purposes, additional water lines for fire hydrants were also being installed for the Subject Property. The work being performed as well as the work previously conducted on the Subject Property significantly disturbed the site, which is a normal result of site work operations.

(*See* R. pp. 173-74 ¶ 15). Moreover, in a November 24, 2020 letter to OCRM, counsel for Clam Farm conceded that "[t]his is an active construction site, and *significant land disturbance had occurred prior to your inspection of the property on October 23, 2020.*" (*See* R. p. 228). This evidence is sufficient to warrant denial of summary judgment, insofar as there is a reasonable possibility that changes to the critical areas were the result of Clam Farm's manmade alterations.

OCRM additionally presented evidence supporting that this is a case where a change to the critical area line was necessitated by Clam Farm's manmade alterations:

> [O]n December 16, 2020, Morgan Flake and I [OCRM Manager of the Critical Area Permitting Section] met onsite with two Clam Farm Partnership representatives (Ryan Clarey with Newkirk Environmental and Ron Felkel with HLA, Inc.). We walked the critical area flagging with Mr. Clarey and Mr. Felkel and identified the critical area vegetation that was the basis for our November 9th critical area delineation. Neither Mr. Clarey nor Mr. Felkel disputed that the vegetation we showed them along the flagged line was critical area vegetation. Furthermore, neither Mr. Clarey nor Mr. Felkel disputed the Department's November 9th placement of the critical line. During our conversation, Mr. Clarey and Mr. Felkel said that the site prep/clearing activity at these lots took place around the 2006-2009 timeframe. They also said that this 2006-2009 site prep work may have altered the elevation of various areas at the Site. I agree with Mr. Clarey and Mr. Felkel's assessment. While the transition from upland to tidelands critical area is a process that typically occurs over time, the manmade changes in elevation like the alterations Mr. Clarey and Mr. Felkel referred to can hasten such changes. It is my opinion that these 2006-2009 manmade alterations along with the natural coastal processes likely contributed to the changed critical area line (including changes to the critical area line from September 29, 2016 to November 2020 when OCRM flagged the critical area).

(*See* R. p. 327 (emphasis added)) This evidence supports that this case may involve a situation "*where manmade alterations change the critical area line.*"

For the foregoing reasons, the Court should reverse the trial court's Order because the updating of the 2020 Critical Area Line was appropriate under Section 48-39-210(D).

C. The Trial Court Should Not Have Granted Clam Farm's Request for Preliminary Injunctive Relief.

1. The Trial Judge's Grant of Clam Farm's Motion for Preliminary Injunctive Was Erroneous for the Same Reasons His Order Granting Partial Summary Judgment Was in Error.

As set forth in the preceding sections, the trial court erred in granting summary judgment under the relevant statutes and regulations. In particular, the trial judge erred in concluding that the 2020 Critical Area Line was somehow in violation of the Act and/or OCRM regulations. For those same reasons, the trial court's granting of a temporary injunction was erroneous and an abuse of discretion.

Therefore, for the foregoing reasons, the Court should reverse trial court's grant of summary judgment as to Clam Farm's declaratory judgment claim.

2. Clam Farm Did Not Carry Its Burden of Showing Irreparable Harm.

The trial court, in granting injunctive relief to Clam Farm, effectively enjoined OCRM, a State agency, from executing its statutory duties. Nevertheless, the trial court's injunction stated:

> South Carolina courts have recognized the Court's power to enjoin enforcement of a statute where, as here, the Plaintiff has met its burden for injunctive relief. *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.")

(*See* R. p. 14). However, there is simply no evidence supporting the existence of irreparable harm that would warrant a preliminary injunction. The trial court erred in granting such injunctive relief.

The preliminary injunction here was tantamount to a finding by the trial judge that OCRM's agent who examined and re-flagged the critical are line was somehow acting in an illegal manner. Clam Farm has claimed irreparable harm through "OCRM's acts of flagging new critical line,

issuing cease and desist orders, and issuing a conditional NPDES permit extension." While these actions have precluded the continuation of land disturbance, Clam Farm's failure to timely act during the course of approximately 15 years while the permits were in place is responsible for its current predicament. Contrary to the trial court's holding in granting Clam Farm injunctive relief, such relief is improper because Clam Farm did not sustain irreparable harm and does have an adequate legal remedy available to it. If Clam Farm is correct that the 2016 Critical Area Line still applied, it can seek money damages from OCRM that would provide a complete remedy. The only injury from the denial of injunctive relief would be a delay in the development of the Subject Properties. Clam Farm's alleged injury from that could be measured and compensated in money damages.

Therefore, OCRM respectfully submits that the Court should reverse the trial court's its Order granting Clam Farm injunctive relief.

CONCLUSION

For the foregoing reasons, the Court should reverse and vacate the trial court's grant of partial summary judgment and injunctive relief to Respondent Clam Farm.

September 6, 2022

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON 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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RULE 211 CERTIFICATE

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

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