RECEIVED
Sep 13 2022
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

---

FINAL REPLY BRIEF OF APPELLANT THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT

Allison Marie Burns
John William Fletcher
211 King Street
Suite 300
Charleston SC 29401
Counssel for Appellants The South Carolina Department of Health and Environmental Control Office of Ocean and Coastal Resource Management

Randell C. Stoney, Jr., Esq. (S.C. #5375)
John W. Fletcher, Esq. (S.C. #69550)
BARNWELL WHALEY PATTERSON & HELMS, LLC
211 King Street, Suite 300 (29401)
PO Drawer H
Charleston, SC 29402
Phone: (843) 577-7700 Fax: (843) 577-7708
Counsel for Appellants The South Carolina Department of Health and Environmental Control Office of Ocean and Coastal Resource Management

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES/RULES/REGULATIONS

ARGUMENT

A. Clam Farm's Assertion That OCRM Failed to Properly Preserve Arguments Is Misplaced.

In its Respondent's Brief, Clam Farm argues that OCRM has failed to preserve certain arguments or failed to timely present certain information to the trial court:

- Clam Farm objects to OCRM's argument — and citation to the Affidavit of Blair Williams, which was an exhibit to its Motion for Reconsideration — that the Court should give deference to OCRM's traditional interpretation of S.C. Code § 48-38-210.

- Clam Farm contends that the Court should disregard OCRM's argument that Clam Farm waived its right to challenge OCRM's cease work directives because: (a) OCRM did not plead waiver as an affirmative defense; and (b) OCRM did not raise this argument before the trial court.

- Clam Farm contends that OCRM did not preserve its argument that the exceptions set forth in S.C. Code § 48-38-210(D) apply.

For the reasons that follow, OCRM has properly raised and preserved all of the issues argued in its Brief of Appellant.

1. OCRM Properly Raised and Preserved Its Argument That Its Argument Is Consistent with the Agency's Historical Construction of the Statute.

In its Brief of Respondent, Clam Farm complains that "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" and that "OCRM never raised this argument to the trial court prior to its motion for reconsideration." (*See* Brief of Respondent, at 15). However, upon analysis, it is clear that OCRM's interpretation of the statute it administers was properly presented to the trial court.

Contrary to Clam Farm's contention in its Brief of Respondent, OCRM specifically asserted at oral argument — prior to the trial court's decision on Clam Farm's motions — on Clam Farm's motions that OCRM's construction of the Act is consistent with the agency's long standing construction of that statute:

> Your Honor, Barbara Neal, who's with, with us in Court, is, is submitted an affidavit and essentially says she, it's not in this case, but *she would testify under oath that this limitation, as plaintiff's counsel would have us impose, has never been followed by OCRM.* They've always had the position that they could go in and adjust a critical line where need be.

(*See* R. p. 416:5-11 (emphasis added)). In other words, OCRM contended to the trial judge — and even offered to provide live testimony — precisely what it argues on appeal: *i.e.,* that OCRM's agency interpretation of the Act is consistent with its actions in this case. Importantly, Clam Farm did not object to this offer of proof and did not argue that Ms. Neal's testimony would be necessary. Thus, this issue has been adequately preserved by OCRM.

OCRM further supported this contention in its Motion to Alter or Amend. In particular, the Affidavit OCRM attached to its Motion to Alter or Amend — although from a witness other than Ms. Neal — is consistent with the previous offer of proof that OCRM's counsel made concerning Ms. Neal's anticipated testimony:

> I am familiar with SCDHEC/OCRM's long-standing interpretation and application of S.C. Code Ann. § 48-39-210. . . . 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). . . . OCRM has interpreted the broad language of S.C. Code Ann. § 48-39-210(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

(*See* R. pp. 326-27). In other words, this Affidavit merely confirms what Ms. Neal would have testified to earlier, if asked to do so. OCRM's Motion to Alter or Amend was *not* the first time it argued that the trial court should defer to its agency interpretation of the Act. *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (noting that issue preservation requires that issue be raised to trial judge to enable lower court to rule after considering all relevant facts, law, and arguments) (citation omitted).

Therefore, for the foregoing reasons, OCRM properly preserved issues relating to its historical agency interpretation of the relevant statute.

2. OCRM Properly Raised and Preserved Its Waiver Argument.

Clam Farm next argues that OCRM waived the ability to argue waiver because: (a) "OCRM did not plead waiver as a defense in its answer"; and (b) it "did not raise this argument to the trial court." (*See* Br. of Respondent, at 16). For the reasons that follow, OCRM plainly preserved the substance of this argument for appellate review.

South Carolina law is clear that a technical failure to plead waiver will not waive that defense if the defense is timely raised in the trial court:

> Generally, "a failure to plead an affirmative defense is deemed a waiver of the right to assert it." *Whitehead v. State*, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002). However, because the aim of this pleading requirement is to avoid surprise defenses, see Rule 8(c), SCRCP note, *many courts allow the assertion of affirmative defenses despite a technical failure to comply with the initial pleading requirements where the defense is timely raised to the trial court without resulting in unfair surprise to the opposing party.*

See Plyler v. Burns, 373 S.C. 637, 648, 647 S.E.2d 188, 194 (2007) (emphasis added). "Although waiver is an affirmative defense and must be specifically pled, waiver may be inferred by acts inconsistent with the known right despite the failure to specifically plead waiver." *Covil Corp. v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 436 S.C. 85, 93-94, 870 S.E.2d 191, 196 (Ct. App. 2022). The evidence here shows that OCRM timely made the substance of its waiver argument to the trial court prior to the order granting Clam Farm's motions, with no prejudice to Clam Farm. There is no reason for the Court to prohibit OCRM from making this meritorious argument on appeal.

OCRM's "waiver" argument in its Brief before this Court (accurately) asserts that Clam Farm should not be permitted to complain about the change of the Critical Area Line for only a few properties, when it accepted a change in that line as to many of its other properties:

> 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 ... " [Citation omitted.] 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.

(*See* Appellant's Br., at 25). The basis for this argument is that Clam Farm's acceptance of OCRM's right to change the Critical Area Line for the majority of its properties should preclude it from now arguing to the contrary as to a few select parcels.

In its Memorandum in Opposition to Motion for Partial Summary Judgment and Preliminary Injunction before the trial court, OCRM made *almost precisely the same argument*:

> Further, the Plaintiff did not question OCRM's authority to establish new critical area lines for other lots on the property. In a letter to OCRM, the Plaintiff accepted the establishment of the newly delineated critical areas in nine out of fourteen of the lots on the Subject Property. Although the Plaintiff accepted the new critical line for a majority of the lots, the Plaintiff now asserts that OCRM did not have the authority to set a new critical line before September 29, 2021. The Plaintiff should not be permitted to accept OCRM's authority in some instances and dispute it in others.

(*See* R. p. 303). While the Memorandum in Opposition might not have used the word "waiver," OCRM plainly made the same argument that it makes now on appeal. OCRM contended (and now argues) that Clam Farm should not be allowed to accept the Critical Area Line as to certain properties, while arguing that OCRM lacked the authority to modify the Critical Area Line. OCRM made this substantive argument to the trial court and preserved it for review.

3. OCRM Properly Raised and Preserved Its Arguments Under S.C. Code 48-39-12(D).

Finally, Clam Farm argues that OCRM did not preserve an argument that one of the exceptions in subsection 48-38-210(D) might apply here, because "[t]here 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." (*See* Br. of Respondent, at 18). For the following reasons, the Court should reject this argument.

OCRM plainly raised those statutory exceptions in its original briefing and arguments to the trial court. For example, OCRM's Memorandum in Opposition to Motion for Partial Summary Judgment and Preliminary Injunction quotes the exceptions set forth in S.C. Code § 48-39-210(D). (*See* R. p. 301). At oral argument, Clam Farm's counsel referenced the "exceptions" in subsection (D) for "eroding stream banks and manmade alterations." (*See* R. p. 409:11-16). OCRM's counsel further argued before the trial court that:

> Your Honor, counsel cites -- would have you -- have the Court accept the fact that Subpart D of this statute that we've been talking about, which states two exceptions, are exclusive as to those two exceptions and that's incorrect. It doesn't state that those are the only exceptions. It just gives those as examples of exceptions and there are other exceptions, and in the circumstance such as here, as we have put in our, in our response, there is a *force majeure* and that was what the Court held in *McQueen* and that is exactly what we have here.

(*See* R. p. 418:14-23). Just as tellingly, *Clam Farm's* counsel expressly addressed the exceptions in Subsection (D) at oral argument:

> [The statute] gives two specific exceptions to Exception C or as to, to Subsection C which are eroding coastal saltwater or stream banks and manmade alterations.
>
> So, it's clear from the statute that it provides, when OCRM handles the permit and utilization of critical areas, you can rely on a delineation for five years if they sign the approved survey that -- which was done here. That's attached to our motion, and the only exceptions to that, eroding stream banks and manmade alterations.

(*See* R. p. 409:8-16). Clam Farm cannot suggest that it was unfairly surprised or prejudiced by an argument that this case fell within one of the Subsection (D) exceptions.

Additionally, the Affidavit of Blair Williams submitted in support of OCRM's Motion to Alter or Amend also suggests that one of the Subsection (D) exceptions applies:

> Accordingly, even if the Court disagrees with OCRM's long-standing interpretation and application of S.C. Code Ann. § 48-39-210(B), subsection (D) of this statute gives further confirmation of OCRM's authority to modify this critical area line at any time prior to the five-year expiration date per S.C. Code Ann. § 48-39-210(C). S.C. Code Ann. § 48-39-210(D) states that "*[e]xceptions 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* R. pp. 327-28 (emphasis in original)).

For the foregoing reasons, the Court should consider this argument and should reverse the decision of the trial judge.

B. Contrary to Clam Farm's Arguments, the Statute Does Not Clearly prohibits OCRM from Modifying the Critical Area Line.

Clam Farm's primary contention is that the effect of the September 16, 2016 Critical Area Line "is clear under South Carolina law, as under S.C. Code Ann. § 48-39-210, the certification is operative for five years." (*See* Resp.'s Br., at 12). Clam Farm takes the position that Section 48-39-210(C) "very clearly provides" that "a certified critical line does not expire for five years." (*See id.*). OCRM respectfully submits that the statute clearly grants it the authority to modify the Critical Area Line at any time, if circumstances warrant.

First, it is clear that the Act does not state that the Critical Area Line "does not expire for five years" That is not what the Act says. To the contrary, the Act provides only that (emphasis added): "[n]otwithstanding any other provision of this chapter, a critical area line established . . . *expires after five years* from the department date on the survey." The statute does not expressly create a guarantee that a Critical Area Line will remain unchanged for five years. It does not prohibit OCRM from modifying the Critical Area Line. It does not create a legally-enforceable entitlement to a particular Critical Area Line. Instead, it only provides that, *at the latest*, a Critical Area Line expires in five years. Nothing in the language of the Act supports Clam Farm's construction, that the five year expiration guarantees a minimum five-year period during which OCRM may not modify the Critical Area Line. There is no language in that Act prohibiting OCRM from recognizing a changed Critical Area Line before the expiration of five years. In fact, S.C. Code § 48-39-210(B) says the opposite (*i.e.*, that "[c]ritical 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"). Clam Farm's argument undermines the purposes of the Act by preventing OCRM from taking steps necessary to protect the environment in the face of

changed circumstances. The Act tasks OCRM with creating a comprehensive coastal management program to "[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' . . . ."). "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 designed "to reduce the irreversible loss of productive tidelands, coastal waters, beaches, and dunes while meeting long-range State development needs." *See id.* The Act recognizes that "[c]ritical areas by their nature are dynamic and subject to change over time." *See* S.C. Code § 48-39-210(B)[1]; S.C. Code Regs. 30-1(B)(1) ("The tidelands and coastal waters of the South Carolina coast are a very dynamic ecosystem."). The legislature granted OCRM exclusive authority to oversee these critical areas in the public interest, making it "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).

---

[1] 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."

Clam Farm's interpretation undermines the Act and interferes with OCRM's exclusive 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). Clam Farm fails to recognize that critical areas are dynamic and subject to change, and that OCRM is the exclusive entity authorized to delineate critical areas. *See* S.C. Code § 48-39-210(A) (OCRM "is the only state agency with authority to permit or deny any alteration or utilization within the critical area."). The Act gives OCRM 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. The OCRM retains, at all times, the jurisdiction to modify the Critical Area Line to keep up with changing circumstances on the ground.

In fact, 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. It also 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). Clam Farm never objected to the language stating that the 2016 Critical Area Line was "dynamic and subject to change." Clam Farm never suggested until after the fact (and then only to a minority of its properties) that OCRM lacked the power to change the Critical Area Line to conform to the real facts on the ground at the properties.

The unambiguous language of the Act clearly establishes that OCRM has the right to assert authority over critical areas "at any time." 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 trial court construed the Act as *only* allowing OCRM to exercise its authority to modify critical area lines prior to the expiration of five years *where an* exception contained in Section 48-39-210(D) applies.[2] However, if the legislature intended for do that, it would have said so. In fact,

[2] *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

elsewhere in the Act, the legislature expressly made clear that an exception was the *only* such exception:

> 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 presents no evidence that OCRM's construction of the Act is inappropriate or that there are reasons that the Court should disregard OCRM's construction of the statute it is empowered to administer.

Therefore, for the foregoing reasons, the Court should reverse the trial court's orders and should deny Clam Farm's motions concerning OCRM.

C. Contrary to Clam Farm's Arguments, the Court Should Not Disregard OCRM's Historical Interpretation of the Statute at Issue.

---

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.

As argued previously, South Carolina courts must defer to an agency's interpretation of the statute it implements. *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). OCRM has "been entrusted with administering [its] statutes and regulations" and have "unique skill and expertise in administering those statutes and regulations." *See 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.").

OCRM argued to the trial court that under its historical interpretation of the Act it may modify critical area lines to reflect the changing tidelands within the scope of its permitting jurisdiction. S.C. Code Ann. § 48-39-210(B). OCRM's construction of the Act is based on its plain language and was communicated to Clam Farm at the time OCRM set the original critical area line. The Act recognizes that critical area lines are dynamic. Clam Farm's argument — that the law should tie OCRM's hands for five years, even when valid reasons might require an adjustment of the critical area line — is contrary to the express policies of the Act:

> (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). Clam Farm's construction of the Act, which interferes with OCRM's protection of natural resources, is contrary to those policies.

OCRM has cogently and logically argued that the Court should defer to its interpretation of the Act, which it is charged with administering. In response, Clam Farm argues that "[t]he 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." (*See* Resp.'s Br., at 16 (*citing 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."))).

However, *Brown* is distinguishable from this case. Brown was a workers' compensation case, in which the employer hired a rehabilitation nurse to talk to the employee's physicians about her condition and the cause of her falls. When the employee's attorney wrote to the nurse demanding that she stop talking to the employee's doctors, the Commission ordered the employee's attorney to stop interfering with the nurse's contacting of employee's doctors. The Commission based its decision on S.C. Code § 42-15-95 of the Workers Compensation Act, which provided that employers should be provided "information compiled by a health care facility" and required that healthcare providers "send the requested information" to the employer. The employer argued that the Court should defer to the Commission's interpretation of Section 42-15-95, which suggested that the employer could directly contact and speak with the employee's doctors (and not merely request medical records).

The Supreme Court reversed, holding that Section 42-15-95, by its express terms *only* allowed the employer to request and obtain existing medical records. Importantly, the Court

disregarded the Commission's construction of the Workers Compensation Act, because it plainly did not provide for or permit the employer to have direct contact with the employee's doctors:

> Section 42-15-95 contemplates the disclosure of existing written records and documentary materials. The statute refers to the exchange of "existing information," "medical records," and "X-rays" after receipt of a written request. Moreover, it provides a penalty if the facility or physician fails to "send" information as requested. This language indicates the General Assembly's clear intent to require health care providers and facilities to forward existing written records and documents. The statute does not authorize other "*ex parte*" methods of communication between an insurance carrier, employer, or their representatives and the claimant's health care provider. Of course, insurance carriers and employers may obtain additional information through approved methods of discovery. See § 42-3-160 (providing for taking of depositions in workers' compensation actions). Likewise, employer representatives may speak with the claimant's health care provider provided they obtain the claimant's permission.
>
> We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation. [Citation omitted.] 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.

Brown, 354 S.C. at 439-41, 581 S.E.2d at 838-39. In other words, the Court found that the Commission could not manufacture non-existent provisions of or rights under the Workers' Compensation Act.

This case is distinguishable from *Brown,* insofar as the OCRM is not creating or recognizing a power not provided in the Act. The Act expressly grants exclusive authority over Critical Area Lines to OCRM. The Act expressly sets forth detailed policies to be served by OCRM. The Act expressly recognizes that critical areas are dynamic and can change. The Act creates a five-year limit on Critical Area Lines, though it never guarantees or creates an entitlement to a Critical Area Line for a specific period. The Commission in *Brown* interpreted a statute to create a right that did not exist (and was contrary to the express language of the statute, which was limited to obtaining existing, written medical records). Here, OCRM's construction of the Act is consistent with OCRM's construction. OCRM is not creating any new rights or obligations; rather, it merely is effectuating the purposes of the Act by ensuring that Critical Area Lines are accurate

and reflect the facts in existence. The Court should defer to OCRM's historical interpretation and construction of the Act.

For the foregoing reasons, the Court should reverse the trial court's decision in this matter on Clam Farm's motions for summary judgment and for preliminary injunction.

D. Contrary to Clam Farm's Arguments, the Evidence Shows That It Waived or Otherwise Relinquished the Right to Challenge the Change to the Critical Area Line as to *Some* of Its Properties, Where It Accepted the Line as to the Majority of Its Properties.

As OCRM has previously argued, Clam Farm's current position in this appeal — that OCRM is legally prohibited from changing a Critical Area Line before the expiration of 5 years — is disingenuous and inconsistent with its *acceptance of* modifications of the 2020 Critical Area Line as to the majority of its properties. Specifically, in a letter to OCRM, Clam Farm accepted the new 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. 240-43). Clam Farm did so without challenging, in any way, OCRM's authority to modify the line as to most of its Subject Properties. Despite this, Clam Farm now takes the contrary position that that OCRM could not modify the 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 granted OCRM broad and *exclusive* authority over critical areas. Clam Farm's partial acceptance of the 2020 Critical Area Line is at least a scintilla of evidence that Clam Farm waived (or otherwise elected to forego) any right to challenge OCRM's authority to impose 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.

CONCLUSION

For the foregoing reasons and those set forth in OCRM's Brief of Appellant, 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

BARNWELL WHALEY PATTERSON & HELMS, LLC

By:_____

Randell C. Stoney, Jr., Esq. (S.C. #5375)
John W. Fletcher, Esq. (S.C. #69550)
211 King Street, Suite 300 (29401)
PO Drawer H
Charleston, SC 29402
Phone: (843) 577-7700 Fax: (843) 577-7708
Counsel for Appellants The South Carolina Department of Health and Environmental Control Office of Ocean and Coastal Resource Management

RECEIVED
Sep 13 2022
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

---

RULE 211 CERTIFICATE

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

BARNWELL WHALEY PATTERSON & HELMS, LLC

By:_____
Randell C. Stoney, Jr., Esq. (S.C. #5375)
John W. Fletcher, Esq. (S.C. #69550)
211 King Street, Suite 300 (29401)
PO Drawer H
Charleston, SC 29402
Phone: (843) 577-7700 Fax: (843) 577-7708
Counsel for Appellant The South Carolina Department of Health and Environmental Control Office of Ocean and Coastal Resource Management