

Nov 21 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Robert Klomparens and Whitney Klomparens,

Docket No. 21-ALJ-07-0310-CC

Petitioners,

v.

FINAL ORDER

South Carolina Department of Health and
Environmental Control,

Respondent.

APPEARANCES: For Petitioners: Mary D. Shahid, Esquire
Angelica Colwell, EsquireFor Respondent: Bradley D. Churdar, Esquire
Sallie P. Phelan, Esquire

This matter is before the South Carolina Administrative Law Court (ALC or Court) following a hearing on April 25, 2022. This contested case arose from the application of Robert and Whitney Klomparens (Petitioners) for a dock permit at their residence located at 706 Creekside Drive (706 Creekside), Mt. Pleasant, South Carolina, extending to a tributary of Shem Creek. Petitioners' property is described as "on and adjacent" to the tributary. Respondent South Carolina Department of Health and Environmental Control (Department) denied Petitioners' permit application by letter dated June 11, 2021. Petitioners invoked the administrative procedures set forth in S.C. Code Ann. section 44-1-60 (2018 & Supp. 2021), and the Board of Health and Environmental Control denied Petitioners' request for final review on July 16, 2021. Petitioners initiated this contested case hearing on August 13, 2021.

BACKGROUND

Petitioners purchased 706 Creekside in 2014. The legal description of the property, as set forth in Petitioners' deed, is a two-part description:

All that certain piece, parcel, or lot of land, together with any improvements thereon, situate, lying and being in CREEKSIDE PARK SUBDIVISION in the Town of Mount Pleasant, County of Charleston, State of South Carolina, and being known and designated as LOT NO. 15, BLOCK C, on a plat of said Subdivision by E.M. Seabrook, Jr., Inc., dated July 31, 1968 and duly recorded in the Office of the RMC for Charleston County, SC, in Plat Book X at Page 129. Said lot having such size, shape, metes, bounds, and dimensions as are shown on said plat, with reference thereto being craved for a more complete and full description.

AND

FILED

09/06/2022

SC Admin. Law Court

ALL of Grantor's right, title, and interest in and to the Marshland lying between Lot 15, Block C, and Shem Creek between the North, South, and West lines of said lot as projected to said Creek.

A recorded survey and other exhibits depicting 706 Creekside show the lot adjacent to the cul de sac with boundary lines extending from the road to the rear of the parcel and then turning toward a tributary of Shem Creek. Charleston County's depictions of lots in Creekside Park Subdivision and across the tributary in the subdivision Cooper Estates indicate similar lot configurations. The reference in the property description to "Marshland lying between Lot 15, Block C, and Shem Creek" is a reference to the area within the boundary lines of 706 Creekside extending to the tributary of Shem Creek.

Petitioners have a title interest in the area between their boundary lines, described as marshlands above, but such interest is inferior to the interest of the State of South Carolina.

The public trust doctrine provides that lands below the high water mark are presumptively owned by the State and held in trust for the benefit of the public, and it has been a vital part of the jurisprudence of South Carolina and many other states for centuries, even pre-dating the beginning of our republic. The doctrine rightfully forbids the State from permitting activity substantially impairing the public interest in marine life, water quality, or public access.

Hoyler v. State, 428 S.C. 279, 291, 833 S.E.2d 845, 851-52 (Ct. App. 2019).

[O]ne claiming an interest in tidelands pursuant to section 48-39-220(A)¹ must convince the court that the State intended to include the tidelands within the boundaries expressed in the deed.

Id. at 292-93, 852.

Clear title to or ownership of marshland is not a necessary pre-requisite to obtaining authorization to construct a dock. "Tidelands" are defined as "critical area" in accordance with S.C. Code Reg. 30-1(D)(15) (Supp. 2021). The Department is charged with the responsibility of "providing for the orderly and beneficial use of the critical areas." S.C. Code Ann. § 48-39-80(A) (2008). This includes reviewing applications for private docks submitted by waterfront property owners. § 48-39-80(B)(11) (Supp. 2021). Property below mean high water (MHW) is public trust

¹ This statute sets out the requirements for claiming ownership of lands between the mean high water mark and mean low water mark, also described as "tidelands." Such action must be initiated against the State. Subsequent case law established the need for a sovereign grant from the King of England, the Lord Proprietors, or the State of South Carolina. Such grant must include information supporting a conclusion that the sovereign clearly intended to convey the marsh. See Query v. Burgess, 371 S.C. 407, 639 S.E.2d 455 (Ct. App. 2006), Hobonny Club, Inc. v. McEachern, 272 S.C. 392, 252 S.E.2d 133 (1979).

property. Private property does exist above mean high water (MHW), and Petitioners own those areas above MHW that are within the boundary lines of 706 Creekside.

ISSUES

Both Petitioners and the Department rely on the regulatory definition of waterfront property, S.C. Code Reg. 30-1(D)(54) (2011), in asserting their positions.

For purposes of these regulations, waterfront property will generally be defined as upland sites where a straight-line extension of both, generally shore perpendicular, upland property lines reaches a navigable watercourse within 1000' of the marsh critical line. Waterfront property may also be identified via an approved dock master plan where designated corridors differing from upland property line extensions are delineated.

Petitioners are not claiming that the property lines which extend to the tributary of Shem Creek are approved "designated corridors." Petitioners are claiming that 706 Creekside is waterfront in accordance with the regulatory definition. The Department denied Petitioners' permit application based on the conclusion that 706 Creekside does not satisfy the regulatory definition of waterfront property.

FINDINGS OF FACT

The Department's witnesses, in rejecting Petitioners' arguments that 706 Creekside is waterfront, noted that their opinions would be different if Petitioners demonstrated ownership of the marshland located between the boundary lines as these lines extend to the tributary of Shem Creek. When asked what difference it would make, Blair Williams, Critical Area Permitting Manager, testified that "[i]f there was a King's grant with an attorney's opinion, that they actually physically own the marsh, and basically they are proving marsh ownership, then those extended property lines would essentially become a continuation of property that they own, they have rights to."

Petitioners' permit drawings, submitted in support of the application, include a "typical profile" plan that demonstrates one section and a portion of the adjoining section of property located between Petitioners' boundary lines extending to the tributary are located above MHW. The described sections of property are depicted under the first two pilings proposed for the dock walkway. These drawings are consistent with the testimony of Petitioners' surveyor, Lewis Seabrook.

A: To satisfy my own curiosity, I wanted to see where the mean high water line fell relative to the critical line.

Q: Okay. And what did you discover?

- A: I discovered that the mean high water line is well out away from the house from the – from the critical line.
- Q: Okay. Is – is it in proximity to the critical line or is it - or is it not –
- A: Several feet farther out.

In addition to the survey data reflected on the permit drawings, Petitioners provided a survey of 706 Creekside prepared by Seabrook and recorded with the Town of Mt. Pleasant depicting elevations of 6.9', 6.8' and 6.6' in the marshland located between the extension of the boundary lines. Seabrook testified that mean highwater is "closer to 5.4'." The survey confirms elevations at the inception point of the boundaries of 706 Creekside oriented toward Shem Creek. This information is relevant to the discussion below of the applicable regulatory standard. But it is also significant given the Department's statements that their position in this matter would be impacted by evidence of ownership of property between the boundary lines extending to the tributary.

The Court's findings concerning the individual requirements of the regulatory definition in evaluating the parties' positions are set forth below.

Straight Line Extensions

The definition of waterfront property requires that "straight line extensions" reach navigable water. The Department argues that straight line extensions of 706 Creekside's property lines result in reaching the existing dock north of 706 Creekside, rather than reaching the tributary to Shem Creek. Petitioners argue that the Department cannot disregard the turn, or bend in the property lines in applying the regulatory definition. This argument is supported by the findings and analysis of Petitioners' professional land surveyor, Lewis Seabrook.

In accordance with the statutory definition of a professional land surveyor, a surveyor "locates, relocates, establishes, reestablishes, lays out, or retraces any property line or boundary of any tract of land or any road, right-of-way, easement, alignment, or elevation of any fixed works embraced within the practice of land surveying, or makes any survey for the subdivision of land." S.C. Code Ann. § 40-22-20(26)(a) (Supp. 2021). "All property lines shall be defined by bearings and horizontal distances and plotted to the scale indicated on the plat." S.C. Code Reg. 49-460(A)(2)(n) (2011). Petitioners' surveyor Seabrook, who testified as an expert in the identification and location of boundary lines, relied on the initial subdivision plat that his father prepared in the late 1960s to locate the boundary lines of 706 Creekside. He located the position of the boundaries of Petitioners' property, consisting of two platted lines extending from the cul

de sac on either side of 706 Creekside and turning toward the tributary, to tie into the middle line of the tributary – the boundary between the Creekside development and the Cooper Estates development. When asked about the precise location and angle of the “turn” or “extension” of the boundary lines, Seabrook noted reliance on the “bearings on the property lines, plural, from which angles can be calculated to show the change in direction.” These bearings are provided on the original subdivision plat which Seabrook reviewed. Seabrook’s reliance on the original subdivision plat is also noted as a reference in the survey he created for 706 Creekside that was approved by the Town of Mt. Pleasant and Charleston County and is recorded with the Register of Deeds for Charleston County at Book S20 Page 0147.

Seabrook noted there were two property boundary lines and each line consisted of two segments. The location of the lines as they turn to run perpendicular to the creek is based on the existence of an iron pipe and iron rebar, discussed more fully below, that are clearly visible on the property.

The regulatory definition refers to “straight line extensions” which, as explained by the Department’s witness Blair Williams, is an exercise of extending property lines into the marsh where such lines do not normally exist. That exercise is unnecessary as relates to 706 Creekside, as the lines extending into the marsh are already platted in the original subdivision plat and are depicted as boundary lines in aerial images that reflect Charleston County real property information. Petitioners have no discretion in creating straight line extensions as those lines extending to the creek were determined with the recording of the original subdivision plat. Seabrook testified that from the cul de sac to the creek, the northern and southern boundary were each one continuous line.

Generally Shore Perpendicular

Seabrook noted that the lines are “generally shore perpendicular” based on the segments extending to the creek. The recorded plat prepared by Seabrook indicates straight line extensions that are clearly perpendicular to the center line of the creek. The plat also depicts the critical line at 706 Creekside, certified by the Department on June 25, 2020.

The Department concluded that the alignment of the upland property lines of 706 Creekside is shore parallel, not perpendicular, and concluded that reliance on “specific plotted points landward of the critical line to extend to the tributary does not make the property waterfront, nor does it fall in line with current regulations.” The Department’s witness, Blair Williams,

testified “. . . permitting authority is delineated by the certified critical area line. And that certified critical area line runs along where the property owner’s upland meets saline marsh vegetation.” In response to a question from the Court, Williams confirmed that the shoreline and the critical line are “generally the same.” Based on the location of the bulkhead along 706 Creekside, Williams concluded that the property lines were shore parallel and, if extended, would reach the adjoining dock north of 706 Creekside rather than the tributary of Shem Creek. This conclusion relies upon Williams’ conclusion that the bulkhead placed by Petitioners reflects the shoreline and also rejects the platted alignment of the property. Williams testified, “Because of the presumption of State ownership, the point to where those lines turn and go out in the marsh has no relevance to the Department as making a determination of whether its, one, waterfront property or if it’s dock eligible.”

Williams’ testimony does not take into account the higher elevations of the property located within the boundary lines that extend to the tributary. Petitioners provided the Court with elevation data reflected on a detail of the recorded plat – the areas seaward of the iron rebar and iron pipe that were located. The elevations noted range between 6.8’ and 6.9’ and are above mean high water elevation and, as such, constitute private property of the Petitioners.

The Department’s conclusion that the shoreline, as dictated by the critical line, is parallel to 706 Creekside fails to account for the fact that the shoreline is also the critical area running the length and width of Petitioners’ property out of the tributary. “Shoreline” is an undefined term in the Department’s regulations. “When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning.” Strother v. Lexington Cty. Recreation Com’n, 332 S.C. 54, 62, 505 S.E.2d 117, 122 (1998). “Dictionaries can be helpful tools during the initial stages of legal research.” Heilker v. Zoning Bd. of Appeals for City of Beaufort, 346 S.C. 401, 409, 552 S.E.2d 42, 46 (Ct. App. 2001).

“Shoreline” is defined as “the line where a body of water and the shore meet” and as “the strip of land along the shoreline.” Merriam Webster Dictionary. The line depicted on Seabrook’s plat, where water and shore meet, is not limited to the shoreline along the northern section of 706 Creekside but also exists along the western section of the property, where marsh and critical area are depicted between the property lines as they extend toward the center line of the tributary. Images of the surrounding properties and docks confirm that the area where Petitioners propose to locate their dock is considered shoreline by neighboring property owners.

The Department's conclusions are influenced by the orientation of Petitioner's property without taking into account that the orientation shifts with the bend in the property lines. The definition of waterfront property does not hinge on the orientation of property. Instead, it is dependent upon whether the property lines are "shore perpendicular." In rejecting Petitioners' permit application the Department is, ignoring any bend, turn, or angle in property lines. Yet, the bends and turns are part of the property lines. "Metes and bounds are the boundary lines of land, **with their terminal points and angles.**" Black's Law Dictionary as cited in 29 S.C. Jurisprudence § 8. (emphasis added).

Upland Property Lines

Petitioners' boundary lines originate at the cul de sac, in upland. If the focus is on the segment of the boundary line perpendicular to the tributary, Seabrook observed an iron rebar (IRF) which indicated the change of position, or angle of turn, of the northwestern boundary line and the iron pipe (IPF) indicating the inception point for the turn of the southwestern boundary line.² The recorded plat prepared by Seabrook depicts the northwestern "5/8" IRF" on the critical line, or as described by Seabrook, "in upland area." According to Seabrook, the plat he prepared showed the iron rebar near the edge of highland/critical area, but not in the critical area. The iron pipe marking the turn of the southwestern boundary line is shown on the plat as outside, or upland of, the critical line.

Seabrook sent his survey crew back to 706 Creekside to re-create the critical line by placing flags on the ground to demonstrate the location of the certified line as reflected on the approved and recorded plat. His re-creation efforts were to locate, on the ground, the certified critical line reflected in the permit application drawings and the recorded plat. These efforts were in response to questions raised by the Department's counsel during Seabrook's deposition related to whether a location on the edge of high ground or the edge of the critical line would be considered upland. Each point of the certified line was established by the placement of a blue flag. Seabrook inspected the flagging of the re-established points and observed that the point described as the "apex of the line L14 and L15" was "way up into the property and is clearly not critical area." The actual location of the apex between L14 and L15 is significant as it determines the distance between these

² Rebar and Pipe are artificial monuments as opposed to natural boundaries. "When determining boundaries, resort is generally had first to natural boundaries, next to artificial monuments, then to adjacent boundaries, and last to course and distances." Bodiford v. Spanish Oak Farms, 317 S.C. 539, 543, 455 S.E.2d 194, 197, n. 1 (Ct. App. 1995).

points on the critical line and the IRF. Seabrook provided a photograph showing the “on the ground” location of the “apex between L14 and L15” and noted the location of the blue flag behind four small boards shown in the photo in the upland. Seabrook noted that the elevation in this area was seven feet, “over a foot and a half above and inland from the mean high water line.”

Based on the surveying team’s ability to flag all other points of the critical line, and based on visual confirmation that those flagged areas did represent the certified critical line reflected in the approved and recorded plat, Seabrook concluded that the only point of corruption was the data identifying the apex of L14 and L15, which aligned with the 5/8” IRF. That corruption of a single data point occurs infrequently, but could be explained by interference of the “wavelength of the laser light.” Petitioners are not contesting the validity of the critical line as depicted on the recorded plat, but in response to the Department’s scrutiny as to whether the “edge of the critical line” or the “edge of the upland” was sufficient. Seabrook confirmed, in the field, the distance between the 5/8” IRF and the apex of lines 14-15. Having previously observed the location of the 5/8” IRF and IPF on Petitioners’ property, the proximity of the IRF to the critical line as shown on the recorded plat was inconsistent with Seabrook’s observations. Seabrook had inspected the property on at least four occasions. He had located the IRF and IPF. He and his crew had flagged the critical line for approval and certification by OCRM. He testified as to considerable experience in identifying and establishing critical lines, having done so at least “a couple hundred times.”

Seabrook provided photographs reflecting the location of the 5/8” IRF, staked with a pink flag to contrast with the blue flags marking the critical line. Based on his visual observations of the site and as is reflected in the photos, the location of the pink flag is in upland, at an 8-inch offset from the critical line flags. Seabrook had inspected the property as recently as a week prior to the hearing and testified that based on his observations both pins marking the turn or angle of the property line were located in upland.

ANALYSIS

This Court is persuaded by the testimony of Seabrook, a licensed professional land surveyor identifying and describing Petitioners’ boundary lines. An expert in land surveying is qualified to review the relevant deeds and plats, and to render his opinion as to the location of the boundary. Bodiford, 317 S.C. at 542, 455 S.E.2d at 196. “A surveyor . . . is a competent witness in actions concerning the boundary line and may testify as to lines, corners, or monuments.” Richardson v. Register, 227 S.C. 81, 89, 87 S.E.2d 40, 44 (1955). Seabrook identified property

lines that include an angle, identified by artificial monuments, resulting in boundary lines perpendicular to the tributary. The Department's position fails to take into account a boundary line with a turn in direction.

Critical to this analysis is whether the segments of Petitioners' boundary lines that extend to the center line of the tributary are upland lines. Petitioners have demonstrated by substantial evidence that the rebar and iron pipe lie in upland. The initial evidence of the location of the rebar (the northwestern boundary line) is the recorded plat which includes the certified critical line. The 5/8" IRF is at the apex of L14 and L15 and is, as described by Seabrook, on the edge of the line. The rebar is 8 inches upland from the critical line. The 5/8" IPF where the southwestern line segment makes its turn is upland from the critical line in the vicinity of L1 and L2.

The Department's witnesses ignored that portion of the property lines that extend to and terminate in the tributary, having stopped their analysis before the lines turned toward the creek. The only testimony presented by the Department regarding the location of the IRF and IPF was from Blair Williams who testified that he inspected the property on one occasion and was "not confident that both originate in the upland."

CONCLUSIONS OF LAW

This Court has subject matter jurisdiction in this case pursuant to S.C. Code Ann. section 1-23-600(A) (Supp. 2021), S.C. Code Ann. section 44-1-60 (2018 & Supp. 2021), and section 48-1-10. In contested case hearings, the Court serves as the finder of fact and makes a *de novo* determination regarding the matters in controversy. S.C. Code Ann. § 1-23-600(B) (Supp. 2021); Brown v. S.C. Dep't of Health & Env'tl. Control, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002). The weight and credibility assigned to evidence presented at the hearing on the merits in a contested case hearing is within the providence of the trier of fact. S.C. Cable Television Ass'n v. Southern Bell Tel. & Tel. Co., 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992). Therefore, as the trier of fact, the Court may give testimony the weight it determines it deserves. Florence County Dep't of Soc. Servs. v. Ward, 310 S.C. 69, 72-73, 425 S.E.2d 61, 63 (Ct. App. 1992). Nevertheless, while the ALC acts as the fact finder, due consideration is given to the experience, technical competence, and specialized knowledge of the agency and its staff in evaluating the evidence. S.C. Code Ann. § 1-23-330(4) (2005 & Supp. 2021).

The ALC must give deference to the Department's interpretation of its statutes and regulations.

[T]he deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons. We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'

Kiawah Development Partners II v. S.C. Dep't of Health & Env'tl. Control, 411 S.C. 16, 34-35, 766 S.E.2d 707, 718 (2014), citing Chevron USA, Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).

Finally, the standard of proof in cases before the ALC is the preponderance of the evidence. Sierra Club v. S.C. Dep't of Health and Env'tl. Control, 426 S.C. 236, 257, 826 S.E.2d 595, 606 (2019), citing S.C. Code Ann. § 1-23-600(A)(5) (Supp. 2018). In contested cases, the party asserting the affirmative of an issue has the burden of proof. Id. Therefore, Petitioners bear the burden of proving, by the preponderance of the evidence, that the Department misapplied its regulatory definition of waterfront property in denying Petitioners' permit application.

Petitioners' expert provided uncontested opinions regarding the location of the property lines. The Department gave no consideration to that portion of Petitioners' boundary lines that turned toward the tributary. The Department determined, incorrectly, that Petitioners' property lines were shore-parallel rather than shore-perpendicular. The Department's definition of waterfront property is clear. But in applying the definition the Department erred in its lack of recognition of the validity of the angle or turn in the property lines. This does not amount to an interpretation by the Department, which may be entitled to deference. Instead, it is a result of a flawed legal conclusion wherein the Department cut each boundary line in half and only considered the upper half of each line in its evaluation without accounting for the lower half – the extension into the tributary.

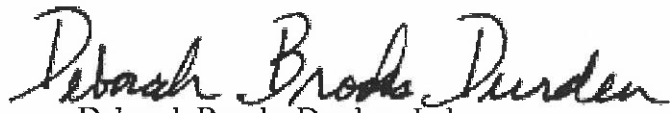
The preponderance of the evidence indicates that the point of turn of the southwestern boundary line (the one closest to the house) is clearly depicted landward or upland of the critical line. The turn of the northwestern boundary line, the line closest to the neighboring dock, is as described by Seabrook initially located on the edge of the critical line. Seabrook demonstrated that the location of the 5/8" IRF is eight inches landward of the critical line. The Department provided no evidence to refute the testimony of Petitioners' surveyor to establish the location of the boundary markers except for Mr. Williams' testimony that he was not confident as to whether the location of the artificial monuments was upland. This Court concludes that 706 Creekside is waterfront as it satisfies the regulatory definition applied by the Department.

ORDER

IT IS THEREFORE ORDERED that 706 Creekside Drive is waterfront property according to the regulatory definition.

IT IS FURTHER ORDERED that this matter is remanded to the Department for further evaluation of the permit application submitted by Petitioner for sufficiency with the Department's regulations related to the design, location, and size of the proposed dock. Such evaluation is necessary as the Department's initial evaluation ended with its erroneous determination that 706 Creekside Drive does not qualify for a dock.

AND IT IS SO ORDERED.



Deborah Brooks Durden, Judge
S.C. Administrative Law Court

September 6, 2022
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Robin Coleman

Robin E. Coleman
Judicial Aide to Judge Deborah Brooks Durden

September 6, 2022
Columbia, South Carolina

FILED
09/06/2022
SC Admin. Law Court