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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden, Administrative Law Judge

Docket No.: 21-ALJ-07-0310-CC
Appellate Case No.: 2022-001641

Robert Klomparens and Whitney Klomparens, ……Respondents,

v.

South Carolina Department of Health and Environmental Control, ……Appellant.

INITIAL BRIEF OF APPELLANT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

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    A. Did the ALC commit reversible error by finding that the Department's interpretation of the "generally shore perpendicular" regulatory requirement locating the *shoreline within the Klomparens' platted property boundary* was not entitled to deference?

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2. Did the ALC commit reversible error by finding that "the Department's argument that a neighbor's potential claim of ownership of marsh property is an obstacle to the permit is raised in the Motion for Reconsideration for the first time"?

STATEMENT OF THE CASE

On September 9, 2020, the Respondents Robert Klomparens and Whitney Klomparens submitted an application for a critical area permit to the Office of Ocean and Coastal Resource Management ("OCRM"), a division of Respondent South Carolina Department of Health and Environmental Control ("SCDHEC" or "the Department"). (Resp. Ex. 1). This application requested permission to construct a private, recreational dock at 706 Creekside Drive Mount Pleasant, SC. (Resp. Ex. 1).

On June 11, 2021, SCDHEC denied the Klomparens' critical area permit application for a private recreational dock. (Resp. Ex. 1). The Department concluded that 706 Creekside Drive did

not meet the regulatory definition of waterfront property.[1] Specifically, the Department determined that a generally shore-perpendicular straight-line extension of the Klomparens' two property boundary lines did not reach a navigable watercourse within 1,000 feet of the marsh critical area line. (Trial Tr. 157:6-15).

On June 23, 2021, the Klomparens' submitted a Request for Final Review Conference with the SCDHEC Board. On July 16, 2021, the SCDHEC Board declined to hold a Final Review Conference, thereby producing the Final Agency Decision. (Letter from Clerk of SCDHEC Board).

On August 12, 2021, the Klomparens' filed a Request for Contested Case with the Administrative Law Court ("ALC") challenging the Department's denial of their critical area permit application to construct a private recreational dock.

On April 2, 2022, the case was heard before the Administrative Law Court. (See generally Trial Transcript).

On September 6, 2022, the Administrative Law Court issued a *Final Order* reversing the Department's permit denial. (See generally *Final Order*).

On September 26, 2022, the Department filed a *Motion for Reconsideration*.

On October 4, 2022, the Klomparens' filed a *Return* to the Department's *Motion for Reconsideration.*

On October 10, 2022, the Department filed a *Reply* to the Klomparen's *Return*.

[1] S.C. Code Regs. 30-1(D)(54) Waterfront property - 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. (Emphasis added).

On October 25, 2022, the Administrative Law Court issued an *Order Denying Respondent's Motion For Reconsideration*.

On November 21, 2022, the Department filed a *Notice of Appeal* with the Court of Appeals.

STANDARD OF REVIEW

The Order of the Administrative Law Court fails to satisfy the standard of review in S.C. Code Ann. § 1-23-610(B). Specifically, the Court of Appeals has the authority to reverse the Administrative Law Court's *Final Order* when the rights of the Department have been prejudiced because that *Final Order* is:

> "(a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) *affected by other error of law*;
>
> (e) *clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record*; or
>
> (f) *arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion*."

S.C. Code Ann. § 1-23-610(B)(a-f). (Emphasis added).

STATEMENT OF FACTS

The Creekside neighborhood in Mt. Pleasant where the Klomparens own their home was developed in the late 1960s (several years before the Coastal Tidelands and Wetlands Act was enacted), with its first house constructed in 1969. (Trial Tr. 19:19).

The development's original surveyor (Mr. Lewis Seabrook's father) platted the properties so that each lot had a marsh corridor to build a dock. (Trial Tr. 74:22-25). Mr. Seabrook conceded on cross examination that the purpose for platting the property boundaries this way was "to enhance the value of the property," not to protect the tidelands. (Trial Tr. 133:13-18).

Although the Klomparens' plat shows that their lot includes tidelands, neither they nor their predecessors in title at 706 Creekside Drive ever quieted title to the public trust tidelands depicted on their plat as required by S.C. Code Ann. § 48-39-220 to prove ownership. (Trial Tr. 42:6-15). No evidence was presented at trial demonstrating that the Klomparens' owned the tidelands as depicted in the plat.

The Klomparens bought their home located at 706 Creekside Drive in 2014 and moved into it in 2016. (Trial Tr. 16:7-14). Because they were experiencing erosion issues, the Klomparens subsequently constructed a bulkhead outside the critical area along the marsh side of their property. (Trial Tr. 31:10-23 and Trial Tr. 34:9 thru 35:16).

On September 9, 2020, the Department received a permit application to construct a private, recreational dock at 706 Creekside Drive, Mt. Pleasant. The Department thereafter placed the permit application on a 15-day public notice. However, after the Department's Technical Review, OCRM concluded the site did not meet the regulatory definition of waterfront property. Specifically, the Department determined that a generally shore-perpendicular straight-line

extension of the Klomparens' two property boundary lines did not reach a navigable watercourse within 1,000 feet of the marsh critical area line. (Trial Tr. 157:6-15).

APPLICABLE STATUTORY AND REGULATORY STANDARDS

The definition of waterfront property per S.C. Code Regs. 30-1(D)(54) is at issue in this case:

> Waterfront property – "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."[2] (Emphasis added).

S.C. Code Regs. 30-2(B)(4) is also at issue in this case and requires the permit applicant to provide OCRM with "[a] certified copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property to carry out the proposal."

SUMMARY OF TESTIMONY

Jacqueline Adams (SCDHEC Project Manager)

Ms. Jacqueline Adams has been employed by SCDHEC for about nine years and has worked for OCRM since 2019. (Trial Tr. 144:14-18). Before starting with SCDHEC, she worked for Florida's Department of Environmental Health and Department of Environmental Protection. (Trial Tr. 145:12-16). She is an OCRM project manager and works with Mr. Blair Williams (OCRM's Critical Area Permitting Section Manager) to make permitting decisions in critical areas.

[2] The approved-dock-master-plan basis for determining whether the Klomparens' property is "waterfront" is not an issue before this Court as there was no dock master plan. Mr. Lewis Seabrook conceded this fact during his cross examination. (Trial Tr. 126:12 to 126:15). Likewise, Mr. Blair Williams testified that "there is no approved dock master plan" for Creekside. (Trial Tr. 190:13 to 190:15).

(Trial Tr. 145:23-146:3). In total, Ms. Adams has reviewed and processed roughly 500 permit applications, of which roughly 400 were for private recreational docks. (Trial Tr. 147:12-18). Specifically, Ms. Adams and Mr. Williams worked together when making this permitting decision. (Trial Tr. 146:12-21).

Ms. Adam's testified that her application of the regulatory definition of "waterfront property" in this permitting decision is consistent with how she has applied this regulatory definition in the "several hundred" other permit applications she has reviewed. (Trial Tr. 165:22-166:3). She stated, "[t]he [Klomparens'] property lines that are… taking an immediate turn, are… not how the department extends the property lines." (Trial 166:21-23). In fact, she testified that based on her own permitting experience and training as an OCRM project manager as well as based on her review of old permits and files, she has never seen the definition of "waterfront property" applied in the way suggested by the Petitioners. (Trial Tr. 169:1-14). Instead, she explained, the property lines that run out to the tributary following the turn are "marsh lines… not the straight-line extensions of the property lines." (Trial Tr. 167:3-4).

Ms. Adams testified that the bulkhead "is the shoreline where the water is coming up" and the other area in the marsh "is not the shoreline for this property." (Trial Tr. 170:6-15).

Blair Williams (SCDHEC Section Manager)

Mr. Williams manages the Critical Area Program in the eight coastal counties for SCDHEC OCRM. (Trial Tr. 186: 18-19). He has been in this role for the last fourteen years, overseeing "several thousand" permit decisions. (Trial Tr. 186:5-7; 188:18-19). In this role, he consults with the staff on certain projects. (Trial Tr. 187:3-5). Specific to this case, Ms. Adams raised the Klomparens' permit request to his attention, and he assisted in deciding the property is not waterfront within the regulatory definition. (Trial Tr. 187:5-14). Mr. Williams testified that the

Department has consistently applied the regulatory definition of "waterfront property" the same way (including the Klomparens' permitting decision) since he became the Section Manager for the Critical Area Program in 2008. (Trial Tr. 188:20-25).

Mr. Williams explained how the Department determines whether or not a permit applicant's property is waterfront by breaking the regulatory definition into separate parts. First, he testified that the shoreline is "where [the] upland meets the saline marsh." (Trial Tr. 193:6 to 193:8). Regarding the Klomparens' permit application, Mr. Williams testified that the shoreline was at the location of the bulkhead, because that is where their upland interfaces with the critical area. (Trial Tr. 191:8 to 193:8).

Next, Mr. Williams testified to what a straight-line extension of generally shore perpendicular, upland property lines means. (Trial Tr. 193:10-195:24). He explained that the *perpendicular* lines are the ones that originate at the street[3] and run the length of the property going toward the shoreline. (Trial Tr. 203:17-204:22). Further, because the Klomparens have never attempted to establish marsh-ownership, the platted lines have "no relevance" when making a permit decision. (Trial Tr. 197:3-17).

Mr. Williams testified about the long-term, cumulative impacts to the critical area that would likely result if the "waterfront property" definition was applied as the Klomparens argue and assert. (Trial Tr. 198:24 to 199:16). Specifically, Mr. Williams testified that such a regulatory interpretation would potentially "lead to overcrowding of tributaries, cordoning off of marsh – marshes and shorelines that are currently -- tributary-type shorelines that are currently accessible by the public. So, it has a potential to affect many things, but probably first top -- a few things I

[3] The Final Order likewise acknowledges that the Klomparens' property lines "extend[] from the road to the rear of the parcel." Final Order, p. 2.

think off the top of my head is use, access, and navigation by the public." (Trial Tr. 198:24 to 199:16).

Robert Klomparens

Robert Klomparens is the recorded deed holder for the residential property at 706 Creekside Drive. (Trial Tr. 18:19-22). He and his wife purchased the property in 2014 and did extensive renovations before moving there in 2016. (Trial Tr. 16:9-17).

Before purchasing the property, Mr. Klomparens reviewed the plat and deed and concluded that a dock corridor was attached to the property as a purported deeded marsh plat. (Trial Tr. 18:4-7; Trial Tr. 19:8-11).

Mr. Klomparens also testified that he built a bulkhead at the back of the property to prevent erosion and maintain his yard. (Trial Tr. 31:11-32:6). He stated that the bulkhead was necessary because the high tides would get so far into his yard that it became unusable several times a month. (Trial Tr. 31:17-18). To fully demonstrate how far the water encroached into his yard, Mr. Klomparens presented several pictures[4] of himself in his boat in the tidelands adjacent to his bulkhead to show "[t]hat there's navigable water behind the house." (Trial Tr. 25:13-17). The navigable water he testified to was the tidelands that flood daily with each high tide cycle. (Trial Tr. 26:17-24).

Mr. Klomparens acknowledged that at his deposition, he testified that his bulkhead separating the marsh from his yard was the shoreline. (Trial Tr. 45:5-12).

Mr. Klomparens testified that he had never attempted to quiet title to prove ownership of the marsh beyond that shoreline. (Trial Tr. 42:7-10). Nor, according to his knowledge, had any previous owner quieted title. (Trial Tr. 42:12-15).

[4] Petitioner's Exhibit Number 23 A, B, C, and D.

Regarding the pictures he submitted into evidence (Petitioner's Exhibit Number 23 A, B, C, and D), Mr. Klomparens testified that he launches his boat in the tidelands adjacent to his bulkhead so that he can "head[] to the tributary that's out [t]here at the point of the neighboring dock that shows in 23-B." (Trial Tr. 26:13-16). He testified that at a "normal" high tide (five to five and a half foot tide), he can launch his boat into the tidelands adjacent to his bulkhead and navigate over to the tributary where he has applied for a dock permit. (Trial Tr. 26:17-24).

Lewis Seabrook (Klomparens' surveyor)

Mr. Seabrook is a licensed professional land surveyor in South Carolina. (Trial Tr. 58:10-11). He is familiar with the neighborhood because his father designed, surveyed, and platted the original subdivision in the 1960s. (Trial Tr. 62:10-15).

Mr. Seabrook testified that the property, as originally developed by his father, likely did not consider the development's effect on the critical area. (Trial Tr. 133:18). Instead, the land was platted to maximize the return on investment for development purposes by allowing everyone to have a dock. (Trial Tr. 133:8-17).

Mr. Seabrook testified that he believes the property in question meets the regulatory definition for waterfront property. (Trial Tr. 76:24-77:2). However, Mr. Seabrook's application of the "*generally* shore perpendicular" requirement in the definition was that the Petitioners' extended property lines were "*generally* shore perpendicular" to "*that whole side of the [Creekside] subdivision*" rather than "*generally* shore perpendicular" to the Klomparens' property. (Trial Tr. 78:21 to 79:13) (Emphasis added). Furthermore, Mr. Seabrook admitted during cross-examination that "from a microscopic view of the subdivision … if you were to extend [the Klomparens property lines as shown on Respondent's Exhibit 7] in the same bearing going out, then *you could say that that was generally perpendicular to that portion of the property line -- of*

the -- of the shoreline" (the shoreline being the bulkhead Mr. Klomparens built). (Trial Tr. 129:22 to 130:17) (Emphasis added).

Mr. Seabrook conceded during cross-examination that the lines of the Klomparens' purported dock corridor run parallel to their bulkheaded shoreline. (Trial Tr. 132:4-14; Trial Tr. 142:7-11).

Mr. Seabrook acknowledged that the Klomparens' purported claim of marsh ownership as represented by their plat does not extend to the creek where they have applied for a dock. (Trial Tr. 135:8-17). He further conceded that the property owner on the other side of this creek in Cooper Estates (TMS number 5170800098) also has a purported claim of marsh ownership based on his (Mr. Seabrook's) father's surveys prepared for Cooper Estates several decades ago. (Trial Tr. 134:12-21). The surveys that Mr. Seabrook's father prepared for both subdivisions (Cooper Estates and Creekside) and the Charleston County GIS aerial map show the same purported marsh ownership representations that are at issue in this case. The survey for the lot on the opposite side of the creek (TMS number 5170800098) purports to show marsh ownership on both sides of the creek, thus blocking the Klomparens' purported marsh ownership from reaching the creek. (Trial Tr. 135:8-17). Mr. Seabrook testified that although he was the Klomparens' agent, he never sought permission for his clients to build their dock across their Cooper Estates neighbors' purportedly privately-owned marsh. (Trial Tr. 135:18 to 136:7).

ARGUMENT

Introduction

OCRM's overarching purpose is to regulate the use of coastal resources "…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." S.C. Code Ann. § 48-39-30(B)(1). Furthermore, the General Assembly directed OCRM "[t]o protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations; [as well as] [t]o formulate a comprehensive tidelands protection program." S.C. Code Ann. § 48-39-30(B)(2) and (3). In order to carry out these policies, the General Assembly enacted the Coastal Tidelands and Wetlands Act.

At trial, Blair Williams, who manages the Critical Area Program in the eight coastal counties for SCDHEC OCRM explained the negative impacts to the tidelands that would likely occur if OCRM applied the regulatory definition of "waterfront property" as the Klomparens argued and as the ALC determined in the *Final Order*. In particular, Blair Williams testified that applying the Klomparens' interpretation of the "waterfront property" definition to dock permit applications would have a significant negative cumulative impact to the tidelands and coastal waters critical areas that "would lead to overcrowding of tributaries, cordoning off of marsh – marshes and shorelines that are currently -- tributary-type shorelines that are currently accessible by the public. So, it has a potential to affect many things, but probably first top -- a few things I think off the top of my head is use, access, and navigation by the public." (Trial Tr. 198:13 to 199:16).

Regarding the protection of tidelands such as the marsh adjacent to the Klomparens' property, the Supreme Court said that "[w]hile all citizens may use and enjoy these lands subject to the State's control, no citizen has an inherent right to take possession of or alter these lands. Accordingly, the public's interest must be the lodestar which guides our legal analysis in regards to the State's tidelands." *Kiawah Dev. Partners, II v. S.C. Dept. of Health and Envtl. Control*, 766 S.E.2d 707, 715 (S.C. 2014). The public's interest as Mr. Williams testified to, was

ignored by the ALC's *Final Order*. It was certainly not "the lodestar" guiding the ALC's legal analysis regarding these tidelands. *Id*.

Deference Overview

The interpretation of a statute or regulation is a question of law to be determined by the court.[5] *A.O. Smith Corp. v. S.C. Dep't of Health and Envtl. Control*, 428 S.C. 189, 202, 833 S.E.2d 451, 445 (Ct. App. 2019) (citations omitted). Whether an agency or a reviewing court, "[t]he cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature. A statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute." *A.O. Smith Corp.*, 428 S.C. at 202, 833 S.E.2d at 459. If an agency's interpretation complies with these requirements "'[t]he construction of . . . [the regulation] by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Id.* 428 S.C. at 203, 833 S.E.2d at 459. *See also Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 636 S.E.2d 598, 607 (2006) ("The construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons."); *Brown v. S.C. Dep't of Health & Envtl. Control*, 560 S.E.2d 410, 414 (2002) (dictum); *Anderson v. Baptist Med. Ctr.*, 541 S.E.2d 526 531 (2001) (deferring to statutory interpretation of S.C. Workers' Compensation Commission); *Stuckey v. State Budget & Control Bd.*, 529 S.E.2d 706, 708 (2000) (deferring to statutory interpretation of S.C. Retirement Systems); *Byerly Hosp. v. S.C. State Health & Human Servs. Fin. Comm'n*, 460 S.E.2d 383, 386 (1995) (deferring to Commission's determination of when Medicaid reimbursement should take into account amendment in Generally

[5] "Regulations are interpreted using the same rules of construction as statutes." *Murphy v. S.C. Dep't of Health and Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012) (citations omitted).

Accepted Accounting Principles); *Dunton v. S.C. Bd. of Exam'rs in Optometry*, 353 S.E.2d 132, 133 (1987) (deferring to S.C. Board of Examiners' statutory interpretation of optometrist licensure statutes); *Bunch v. Cobb*, 257 S.E.2d 225, 228 (1979) (deferring to agency's consistent interpretation of its power to issue licenses to trucks for oversized loads); *Etiwan Fertilizer Co. v. S.C. Tax Comm'n*, 60 S.E.2d 682, 684 (1950) (deferring to Commission's interpretation of income tax statute); *Comm'r of Public Works v. S.C. Dep't of Health & Envtl. Control*, 641 S.E.2d 763, 768 (Ct. App. 2007) (deferring to agency's interpretation when statute is ambiguous); *Risinger v. Knight Textiles*, 577 S.E.2d 222, 224 (Ct. App. 2002) (deferring to statutory interpretation of Workers' Compensation Commission); *Marchant v. Hamilton*, 309 S.E.2d 781, 783-84 (Ct. App. 1983) (deferring to federal comptroller general's interpretation of statute prescribing civilian pay of government employees while on military duty); *see also Neal v. Brown*, 682 S.E.2d 268, 270 (2009) (stating that an agency, not its staff, is typically entitled to deference).

In order to determine if an agency's interpretation of a statute or regulation is worthy of deference, the court applies a two-step process. *Id.* 428 S.C. at 205, 833 S.E.2d at 460. "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. [Second, 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." *A.O. Smith Corp.*, 428 S.C. at 205, 833 S.E.2d at 460 (citing *Kiawah Dev. Partners, II v. S.C. Dept. of Health and Envtl. Control*, 766 S.E.2d 707, 717 (S.C. 2014)). An agency's interpretation is worthy of deference when it is in harmony with the subject matter of the statute or regulation and accords with its general purpose. *A.O. Smith Corp.*, 833 S.E.2d at 458. As noted by the South Carolina Supreme Court in *Kiawah Development Partners*,

II. v. S.C. Dep't of Health and Envtl. Control, 411 S.C. 16, 766 S.E.2d 707 (2014), "[w]e give deference to agencies 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." *Id.* 411 S.C. at 34, 766 S.E.2d 718. Stated another way, "[a]n agency's long-standing interpretation of a statute is usually entitled to be given deference and should not be overruled by a reviewing court in the absence of cogent reasons . . . ." *Media Gen. Commc'ns, Inc., and Media Gen. Broad. of S.C. Holdings, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 149, 694 S.E.2d 525, 531 (2010) (citing *Etiwan Fertilizer Co. v. S.C. Tax Comm'n*, 217 S.C. 354, 360, 60 S.E.2d 682, 684 (1950).[6] In *Etiwan*, the Court further explained that: "[W]here the construction of the statute has been uniform for many years in administrative practice, and has been acquiesced in by the General Assembly for a long period of time, such construction is entitled to weight, and should not be overruled without cogent reasons." *Etiwan*, 217 S.C. at 359, 60 S.E.2d at 684. As the United States Supreme Court noted, "expert discretion [referring to agency expertise] is the lifeblood of the administrative process." *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 167 (1962).

In the matter before this Court, the Klomparens' bear the burden of proving that the Department's policy is "arbitrary, discriminatory or unreasonable." *Colonial Life & Accident Ins. Co. v. S.C. Tax Comm'n,* 248 S.C. 334, 339, 149 S.E.2d 777, 780 (1966) ("The Commission has the power and duty … to prescribe a method for arriving at a tax base which reasonably represents the proportion of the trade or business carried on within this State…and its determination thereabout will not be overthrown by the courts except upon a showing, absent here, that it is

[6] "That rule of deference respects the legislature's decision to make an agency initially responsible for applying the law and the agency's capacity to develop expertise and experience in making the law work." *South Carolina Administrative Practice & Procedure*, Third Edition, page 22, Randolph R. Lowell, Editor.

arbitrary, discriminatory or unreasonable.") (internal quotation marks omitted); *see also Vulcan Materials Co. v. Greenville Cnty. Bd. of Zoning Appeals*, 342 S.C. 480, 496, 536 S.E.2d 892, 900 (Ct. App. 2000) ("The construction of a statute by the agency charged with its administration should be accorded great deference and will not be overruled without a compelling reason."); *Etiwan*, 217 S.C. at 359, 60 S.E.2d at 68

I. The ALC erred by finding that the Department's long-standing interpretation of S.C. Code Regs. 30-1(D)(54) is not entitled to deference. *Final Order*, p. 10.

As prescribed by *Kiawah's* first step in the two-step analysis,[7] the language of S.C. Code Regs. 30-1(D)(54)[8] directly speaks to the issue before the Court; namely, does the Klomparens' lot satisfy the regulatory definition for waterfront property. The Court erred in failing to acknowledge the ambiguity in this case regarding S.C. Code Regs. 30-1(D)(54) that gives rise to agency deference. *A.O. Smith Corp.*, 428 S.C. at 205. Specifically, the Court erroneously concluded that "[t]he Department's definition of waterfront property is clear." *Final Order*, p. 10.[9] Such a conclusion is at odds with the different interpretations of S.C. Code Regs. 30-1(D)(54) articulated by Blair Williams, Mr. Seabrook and the ALC in this case.[10]

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[7] *Kiawah Dev. Partners, II v. S.C. Dept. of Health and Envtl. Control*, 766 S.E.2d 707, 717 (S.C. 2014).

[8] S.C. Code Regs. 30-1(D)(54) "Waterfront property - 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."

[9] Specifically, the *Final Order* states at page 10 that "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."

[10] "Generally" is used twice in S.C. Code Regs. 30-1(D)(54). "*Generally* has three basic meanings: (1) 'disregarding insignificant exceptions' <the level of advocacy in this court is generally very

The word "shore" in the phrase "generally shore perpendicular" can be interpreted in multiple ways. In this case, there were three different interpretations for the word "shore" or "shoreline".[11] First, Blair Williams' explained that the Klomparens' shoreline is at the *almost-completely-bulkheaded*[12] edge of their upland property immediately adjacent to the tidelands as shown in Petitioner's Exhibit 23C and D, because this is "where saline marshes and uplands interface" (Trial Tr. 192:20 to 192:22) and "where that upland meets the saline marsh, that is the shoreline that we're dealing with" (Trial Tr. 193:6 to 193:8). His testimony is consistent with the Department's long-held application of the regulatory definition that a shoreline is within the platted property boundary. At trial, Mr. Klomparens corroborated Blair Williams' testimony when he conceded that he had previously affirmed at his deposition that his bulkhead separating the marsh

high>; (2) 'in many ways' <he was the most generally qualified applicant>; (3) 'usually; most of the time' <he generally left the office at five o'clock>." Garner, Brian A. *A Dictionary of Modern Legal Usage*, p. 383. New York: Oxford University Press, 1995. Of the three above-referenced meanings of "generally", which meaning of "generally" did the Legislature intend when the definition of "waterfront property" was promulgated? The answer to this question is not at all obvious.

From a practical perspective, OCRM needs flexibility when applying the "shore perpendicular" language because, with the exception of property adjacent to manmade waterways such as the Atlantic Intracoastal Waterway along the South Carolina coast or the "canals" in Cherry Grove, most shorelines between tidelands and uplands in the coastal zone are meandering, not straight. The Atlantic Intracoastal Waterway lots and the Cherry Grove "canal" lots are often shaped like horse stalls so that the extended property lines are truly, literally shore perpendicular, not just "generally" shore perpendicular. However, because the Department only occasionally has the "luxury" of applying the "waterfront property" definition to lots where the shoreline is at a right angle with the upland property lines (like the typical Atlantic Intracoastal Waterway lot or Cherry Grove "canal" lot), the Department is most-often tasked with the responsibility of making a "waterfront property" determination by extending the property lines "generally shore perpendicular" along a meandering, bending, curving shoreline.

[11] The first and second interpretations/applications of the word "shore" or "shoreline" by the Department as well as by Mr. Seabrook are addressed in this section. The third interpretation/application of the word "shore" or "shoreline" by the ALC is addressed as a separate section below.

[12] Mr. Klomparens testified that his bulkhead stretches 133 feet across his back yard at the location where his upland interfaces with the tidelands critical area. (Trial Tr. 31:10 to 32:12; specifically 32:6; 35:4; and 45:1).

from his yard was the *shoreline*. (Trial Tr. 45:5-12). Mr. Klomparens further corroborated that the 133-foot bulkhead is his shoreline by authenticating the pictures of him in his boat adjacent to the bulkheaded shoreline in Petitioner's Exhibit 23A and B and by testifying that "there's navigable water behind the house" at a "normal" high tide (Trial Tr. 25:16 and Trial Tr. 26:22-24).

Accordingly, since the Klomparens' bulkhead is their shoreline (even using the ALC's dictionary-definition approach referenced below), the ALC-endorsed extended property lines that take a hard westward/leftward direction, run ***parallel*** to the Klomparens' bulkheaded shoreline, not perpendicular. The only way this fatal flaw in the ALC's *Final Order* (i.e., extended property lines running *parallel* to the shoreline) can be overcome is by the ALC's refusal to extend deference to the Department's reasonable and long-standing interpretation of the ambiguous "waterfront property" definition.

The Klomparens' surveyor, Mr. Seabrook, testified to a second alternative application to the words "generally shore perpendicular". He demonstrated the ambiguity of the "waterfront property" definition by applying the words "generally shore perpendicular" in a manner not contemplated by either the Department or the ALC. Specifically, Mr. Seabrook testified that the Klomparens' extended property lines were "generally shore perpendicular" to "*that whole side of the [Creekside] subdivision*." (Trial Tr. 78:21 to 79:13) (Emphasis added). This "subdivision shoreline" is different from the shoreline outside the Klomparens' platted property boundary that Judge Durden endorsed in her *Final Order*. Nonetheless, because she said that she was "persuaded by the testimony of Seabrook, [as] a licensed professional land surveyor …" (*Final Order*, p. 8) and because Mr. Seabrook was the Klomparens' own surveyor, the Respondents cannot plausibly argue that Mr. Seabrook's application of the regulatory definition is invalid. Mr. Seabrook's testimony about the *subdivision* shoreline rather than the Klomparens' bulkheaded shoreline within

their platted property demonstrates the ambiguity of the regulatory language and the possibility of more than one application. To this point, Mr. Seabrook conceded the following during the Department's cross examination:

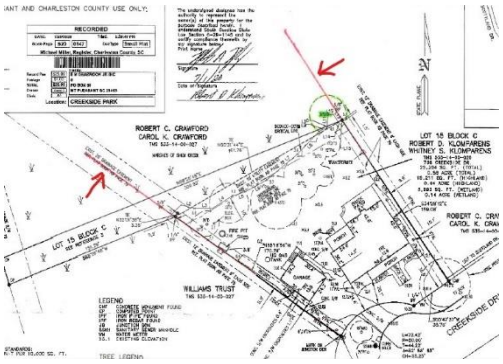
129

Now,
would you agree or concede that the lines as
depicted on this deposition Exhibit Number 5
depicts the property line extensions as

130

generally shore perpendicular? See those red
lines that -- that are extending out from the
property lines, one right there and one over
there, do you see those?

A: **If you're looking at a microscopic view of the subdivision**, those -- those lines -- if they were to extend -- if they were the end of the property line, which they're not, **if you were to extend those in the same bearing going out**, **then you could say that that was generally perpendicular to that portion of the property line -- of the -- of the shoreline**.



(Trial Tr. 129:22 to 130:12) (Emphasis added).

The "microscopic view of the subdivision" Mr. Seabrook was referring to is the Klomparens' platted property. (Survey drawing). As previously mentioned, the typical shoreline meanders, so the Department is most-often tasked with the responsibility of making a "waterfront property" determination by extending the property lines "*generally* shore perpendicular" along a non-linear, bending, curving shoreline. Thus, the ambiguity of the "*generally* shore perpendicular" language allows the Department to implement the regulatory definition in a way that reflects the State's policies found in S.C. Code Ann. § 48-39-30.[13]

[13] The Klomparens argue that because neither Blair Williams nor Jacquie Adams testified they were "confused" by the "*generally* shore perpendicular" regulatory language, there is no ambiguity. Department Staff can certainly interpret and consistently apply this ambiguous regulatory language consistent with the policies of the Act without being *confused* by the ambiguity.

The Department's application of the "waterfront property" definition is a reasonable and long-standing position that is subject to deference. Blair Williams testified that he has been the Wetlands Permitting Section Manager for fourteen years and during that tenure he has overseen "a couple [thousand] to several thousand" critical area permits including dock permits. (Trial Tr. s 188:8 to 188:19). He further testified that during his fourteen year tenure as Section Manager, the Department has "consistently applied the waterfront property definition when making permitting decisions." (Trial Tr. 188:21 to 188:25). In particular, he testified that the Department applied the definition of waterfront property to the Klomparens' lot consistently with how the Department has applied this regulatory definition for his entire fourteen years as Section Manager. (Trial Tr. 189:1 to 189:10).

Regarding the "generally shore perpendicular" language, Blair Williams testified that "the shoreline is where the upland meets salt -- saline marshes. So, where -- where saline marshes and uplands interface, that is a shoreline." (Trial Tr. 192:18 to 192:22). In this instance, Mr. Williams testified at trial as to how the Department applied the "waterfront property" definition in this case:

210

… you would say none of this is shoreline before you get out to marsh and water?

(Petitioner's Exhibit Number 11 was referenced at this time.)

A: No, ma'am. Again, I would go back to what I said between the most eastern and most western property corner points. **Given the fact that the critical area line runs generally in between those two with a bulkhead, that is generally the shoreline and that -- and going back to how we applied the regulatory definition with that north-northwest exposure, straight-line extension of upland property lines, that is the shoreline that we are utilizing to -- to apply this waterfront definition.**

Q: And it's not the presence of the bulkhead, but the presences of the critical line that ---
A: I think you -- you would look at all factors

211

and have a comprehensive look at it. But if you're -- **I mean, he put in a bulkhead to protect his shoreline**.
Q: Well, to protect his ---
A: That hasn't ---
Q: --- property.
A: Right. His -- the shoreline of property.
Q: And if he extended that bulkhead into areas within the two corridor -- two corridor lines, would that change your position today as to whether there should ---
A: We'd have to evaluate that under their permit application **because it would be impacting critical area.** (Emphasis added).

(Trial Tr. 210:6 to 211:14)

At the very least, the Klomparens introduced no evidence to demonstrate that the Department's position is unreasonable. The regulatory definition is ambiguous in this case and the Department is entitled to deference because its application of the regulation is not "arbitrary, capricious or manifestly contrary to the statute." *Kiawah Development Partners,* 766 S.E.2nd at 718.

A. The ALC erred by finding that the Department's interpretation of the "generally shore perpendicular" regulatory requirement locating the *shoreline within the Klomparens' platted property boundary* was not entitled to deference.

As stated above, the ALC rejected the Department's conclusion that the shoreline along the Klomparens' 133-foot bulkhead[14] (see inserted picture – Petitioner's Exhibit 23) was the shoreline properly used to determine whether the extended property lines were "*generally* shore perpendicular." Instead, the ALC used a shoreline located *outside the Petitioners' platted property boundaries* at the creek where the Klomparens have applied for their dock permit.[15] The distance between these two lines that terminate on the platted property boundary short of the Shem Creek tributary are reflected in Petitioners Exhibit 24 and are about 22 feet across; far less than the 133-foot bulkhead the Department concluded was the shoreline for purposes of applying the "*generally* shore perpendicular" requirement to the Klomparens' lot. Blair Williams testified that the Department applies the "generally shore perpendicular" language "[b]ased on the shoreline of a

[14] See Mr. Klomparens' testimony at Trial Tr. 31:10 to 32:12; and specifically Trial Tr. 32:6; 35:4; 45:1.

[15] Specifically, the ALC determined that "'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 [133 foot] 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 [22 feet apart] 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." *Final Order*, p. 6 (Emphasis added).

specific property." (Trial Tr. 209:5 to 209:16). In this case, the shoreline of this specific property generally ran along the Klomparens' 133-foot bulkhead (See Petitioner's Exhibit 23 above). As Blair Williams and Jacquie Adams both testified, this regulatory interpretation has been applied consistently thousands of times. It was neither arbitrary, nor capricious nor manifestly contrary to the statute for the Department to conclude that the 133-foot bulkhead running along the edge of the Klomparens' upland within their platted property boundary was the shoreline from which to apply the "generally shore perpendicular" requirement, rather than the 22 foot shoreline *outside the platted property boundary* beside the Shem Creek tributary.

The ALC found that because the word shoreline is not a defined term in the regulations, the Merriam Webster Dictionary definition of "shoreline" referenced at page 6 in the *Final Order*[16] should be applied. However, the dictionary definition plainly supports the Department's use of the 133-foot bulkheaded shoreline when applying the "generally shore perpendicular" requirement to determine whether the Klomparens lot was waterfront. As the above picture shows, the bulkheaded shoreline within the Klomparens' platted property boundary is undeniably "the line where a body of water and the shoreline meet" and "the strip of land along the shoreline" as defined by Merriam Webster. Accordingly, given the fact that the ALC, Mr. Seabrook and Blair Williams all applied "generally shore perpendicular" differently, the dictionary definition cannot make that patent ambiguity disappear and does not legitimize the ALC's error in refusing to defer to the Department's reasonable and long-standing interpretation of this regulatory language.

[16] (i.e., "the line where a body of water and the shoreline meet" and "the strip of land along the shoreline").

B. The ALC erred in finding that the Department's interpretation of S.C. Code Regs. 30-1(D)(54) "is a result of a flawed legal conclusion" and is not entitled to deference. *Final Order*, p. 10.

Before even addressing the *ALC's "flawed legal conclusion*" determination in the *Final Order* (page 10), it is worth emphasizing that if the Court of Appeals finds the Department was entitled to deference, then this issue becomes moot.

Contrary to the ALC's assertion that the regulatory definition is "clear" (*Final Order*, p. 10), the words "generally shore perpendicular" are ambiguous in this case as demonstrated by the above-referenced multiple interpretations by Blair Williams, Mr. Seabrook and the ALC. Consequently, this ambiguity means that the Department's use of the 133-foot bulkheaded shoreline when applying the regulatory definition was worthy of deference because such application is patently not "arbitrary, capricious or manifestly contrary to the statute." *Kiawah Development Partners*, 766 S.E.2nd at 718. If this Court agrees with this argument, then the ALC's westward/leftward extension of the property lines runs shore ***parallel*** rather than shore ***perpendicular***. Such a result is unworkable and contrary to the "shore perpendicular" regulatory requirement.. The ALC's logic rests entirely on the faulty premise that the regulatory language is *clear* so that she could then deny deference to the Department's interpretation. It is like the Jenga game with wooden blocks. Remove the "wooden block" of "regulatorily-clear language" and the whole thing collapses.

The ALC's error in denying deference to the Department was compounded by allowing Mr. Seabrook to engage in rank speculation in spite of the Department's timely objection.[17]

[17] 97

1 OBJECTION:
2 **MR. CHURDAR: Your Honor, I -- I would object. He**
3 **is getting into speculation, what he believed**

Specifically, the ALC's conclusion that the extended property lines should take a hard westward/leftward turn toward the tributary[18] is based in part on Mr. Seabrook's erroneously-admitted speculation that

> "… *a significant portion of the file would have been corrupted. So, the only thing that could possibly have happened was that something interfered with the beam, the laser from the total station to the prism*." (Trial Tr. 98:12 to 98:20) (Emphasis added).

This so-called corrupted data was collected by Mr. Seabrook's own field crew using his equipment which OCRM relied on to certify the critical line on June 25, 2020. Mr. Seabrook's speculation about this supposed data corruption was the foundation for him to testify that the eastern property pin was outside the critical area two years after OCRM certified the critical area line.[19] Even Mr.

---

happened with his equipment.
MS. SHAHID: I ---
A: My speculation is based on 43 years of experience and knowing what a critical line looks like.
MS. SHAHID: I can ask him some more questions, Your Honor.
THE COURT: Okay. I'm going to overrule the objection. Go ahead and ask the questions. If -- let's see if you can lay a foundation for what he's ---
MS. SHAHID: Yeah.
THE COURT: --- going to testify to.

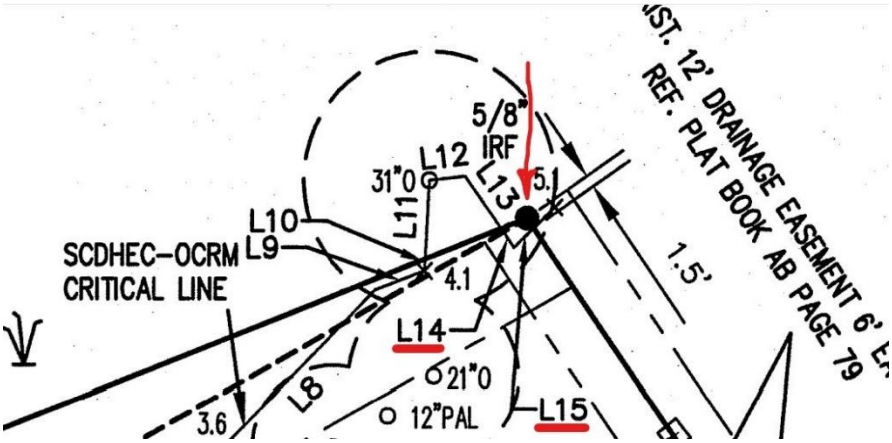
(Trial Tr. 97:1 to 97:16) (Emphasis added).

[18] The ALC found that the Department's regulatory interpretation "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." *Final Order*, p. 10.

[19] In reality, Mr. Seabrook's opinion that the eastern property pin is no longer in the tidelands critical area two years after the critical area line was certified is superseded by the statutory "warning language" above Meredith Wrye's June 25, 2020 signature. (Petitioner's Trial Exhibit 12; Department's Trial Exhibit 25). That "warning language" comes directly from S.C. Code Ann. § 48-39-210(B) and states the following:

> "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*

Seabrook admitted that his testimony was speculation.[20] Conveniently, his testimony about the supposedly-corrupted data only related to Line 14 and 15 of the data his field crew previously provided to OCRM. Undercutting the reliability of these two lines allowed Mr. Seabrook to then testify against what his survey drawing plainly shows; namely that these lines are landward of the eastern property pin (see the red arrow pointing to the black dot), thus placing that property pin in the critical area. The cropped and enlarged section of the survey drawing (see inset) was certified by OCRM on June 25, 2020. (For full survey drawing, see Petitioner's Trial Exhibit 12 and Department's Trial Exhibit 25). In contrast to Mr. Seabrook's after-the-fact "discovery" of what he called "corrupted data" only at the location of the eastern property pin, Blair Williams testified that he had visited the Klomparens' property a week before the trial and based on his visual inspection, he confirmed the property pin on the eastern side of their lot was still in the critical area. (Trial Tr. 213:10 to 213:15; Trial Tr. 214:15 to 214:19; Trial Tr. 216:10 to 216:25).



Because Mr. Seabrook's crew (Mike Sherman and John Brian) did the survey work at the Klomparens' lot at 706 Creekside, his (Mr. Seabrook's) testimony about that field work, which included the supposedly-corrupted data, is not based on his own firsthand knowledge. (Trial Tr.

waives its right to assert permit jurisdiction at any time in any critical area on the subject property, whether shown hereon or not." (Emphasis added).

[20] Mr. Seabrook testified that "*[m]y speculation* is based on 43 years of experience and knowing what a critical line looks like." (Trial Tr. 97:6 to 97:8) (Emphasis added).

118:24 to 119:2).[21] He was not on site. Consequently, Mr. Seabrook's testimony that the reason the eastern property pin was purportedly eight inches too far into the tidelands (marsh) using the original June 25, 2020 OCRM-certified critical line was erroneously-admitted speculation.[22]

The Court further compounded that error by attaching significance to Mr. Seabrook's testimony that the eastern property pin was located above mean high water and landward of 6.8' and 6.9' elevations, thus proving the Klomparens' private property ownership up to the point of the property pin.[23] *Final Order*, p. 6. However, private property ownership is *not* a dispositive factor in applying the regulatory definition of waterfront property. The relevant portion of the waterfront property definition states that "[f]or purposes of these regulations, waterfront property will generally be defined as upland sites where a straight-line extension of both, generally shore

[21] For example, Mike Sherman and John Brian flagged the Klomparens' critical area line, not Mr. Seabrook. (Trial Tr. 96:20 to 96:22). Mike Sherman and John Brian did the other field work and data collection, and Mr. Seabrook merely approved it. (Trial Tr. 88:18 to 89:5; Trial Tr. 95:12 to 95:14; Trial Tr. 96:16 to 96:22; Trial Tr. 101:12 to 101:14).

[22] Mr. Seabrook was not on site that day and neither Mike Sherman nor John Brian testified at trial regarding any interference with the total station beam. Mr. Seabrook further revealed his lack of personal knowledge about his crew's data collection site visit at the Klomparens' property prior to the June 25, 2020 critical area line certification. Specifically, he testified that "the survey crew sets up on a point with known coordinates, gets the instrument level, aligns it on another point of known coordinates, and then it gives locations based on -- on that alignment." (Trial Tr. 99:6 to 99:10). How does Mr. Seabrook know if Mike Sherman and John Brian accurately set up on a point with known coordinates, when he was not present at the site that day and they did not testify at trial? How does Mr. Seabrook know if Mike Sherman and John Brian accurately got the instrument level when he was not present at the site that day and they did not testify at trial? How does Mr. Seabrook know if Mike Sherman and John Brian accurately aligned the instrument on another point of known coordinates that day when he was not present at the site, and they did not testify at trial? According to Mr. Seabrook's testimony, all of these things must be accurately accomplished based on the alignment of the total station to the prism before any given locations can be relied on. Without the testimony of Mike Sherman and John Brian, Mr. Seabrook's "total station and prism" testimony that was the basis to purportedly move the critical area line eight inches toward the tidelands (thus ensuring the eastern property pin is in the upland) is just speculation that was admitted over the Department's objections.

[23] Specifically, the *Final Order* stated that "[t]he 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." *Final Order*, p. 6.

perpendicular, upland property lines reaches a navigable watercourse within 1000′ of the *marsh critical line*." S.C. Code Regs. 30-1(D)(54) (Emphasis added). The Department has no quarrel with the concept that individuals own property above the mean high water mark.[24] However, private property ownership above the mean high water mark has no bearing on the location of the critical line separating tidelands from upland and accordingly, such ownership is irrelevant to the application of S.C. Code Regs. 30-1(D)(54). Even Mr. Seabrook acknowledged that "*in most cases*," the critical area reaches above the mean high mark. (Trial Tr. 136:23 to 137:4) (Emphasis added).[25] Mr. Seabrook's concession bolsters Mr. Williams' testimony that the property pin was still located in the critical area a week before trial,[26] so the point where the regulatorily-required straight line extension begins is not at the property pin, but rather is further south at the point where the upland meets the critical area (a/k/a the shoreline).[27] The Department's straight-line extension on the eastern property boundary started at the cul de sac (as the Court affirmed on page 7 of the

[24] "Under the public trust doctrine, the State holds presumptive title to tidal land <u>*below*</u> the high water mark to be held in trust for the benefit of all people of South Carolina." *Kiawah Dev. Partners, II v. S.C. Dept. of Health and Envtl. Control*, 766 S.E.2d 707, 715 (S.C. 2014) (Quoting from *Estate of Tenney v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 100, 106, 712 S.E.2d 395, 398 (2011) (Emphasis added).

[25]
136
23 Q: … would you agree that the
24 critical area can reach above the mean high
25 water line?
137
1 A: Absolutely. It does.
2 Q: Okay.
3 A: In most cases.
4 Q: Okay. (Trial Tr. 136:23 to 137:4).

[26] See Blair Williams' testimony at Trial Tr. 213:10 to 213:15; Trial Tr. 214:15 to 214:19; and Trial Tr. 216:10 to 216:25.

[27] Specifically, Blair Williams testified that "the shoreline is where the upland meets salt -- saline marshes. So, where -- where saline marshes and uplands interface, that is a shoreline." (Trial Tr. 192:18 to 192:22).

Final Order),[28] and continued straight out into the tidelands at the point where the upland and critical area meet. Both the Project Manager (Jacquie Adams) and Blair Williams testified that this method of extending the Klomparens' property lines out into the tidelands is consistent with how the Department has applied this "waterfront property" definition thousands of times.[29] From the Department's perspective, the purpose for making straight-line extensions of the property lines at the point where the upland meets the critical area is to help the Department manage the public trust tidelands.[30] (Trial Tr. 195:16 to 195:24). As such, this regulatory application is entitled to deference because it is not "arbitrary, capricious or manifestly contrary to the statute." *Kiawah Dev. Partners, II v. S.C. Dept. of Health and Envtl. Control*, 766 S.E.2d 707, 718 (S.C. 2014) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

II. The ALC erred in concluding that the Department's argument was untimely that "a neighbor's potential claim of ownership of marsh property is an obstacle to the permit is raised in the Motion for Reconsideration for the first time." *Order Denying Respondent's Motion For Reconsideration*, p. 2.

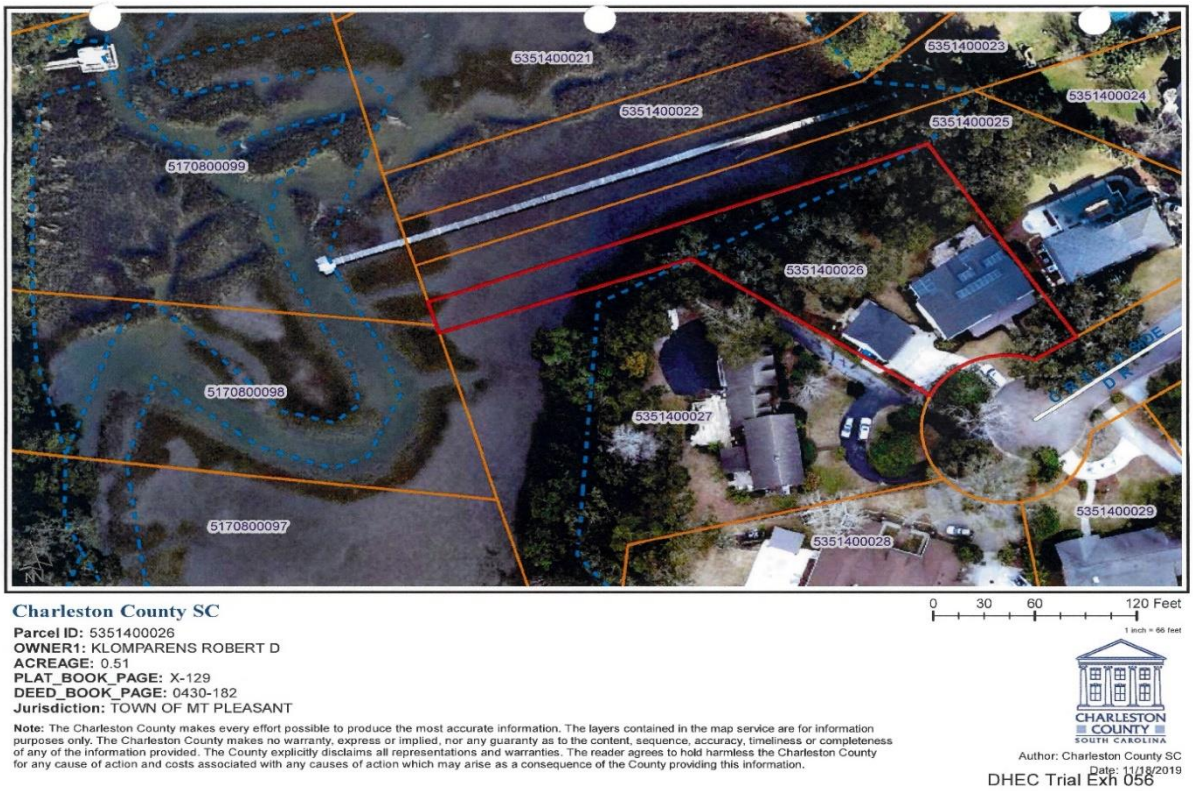
The ALC found that the Klomparens "have a title interest in the area between their boundary lines, described as marshlands above, but such interest is inferior to the interest of the State of South Carolina." (*Final Order*, p. 2). Although the Department does not agree that private property owners have ***any*** title interest in the tidelands without filing a Quiet Title action per S.C. Code

[28] The ALC's *Final Order* affirms that "Petitioners' boundary lines originate at the cul de sac, in upland." *Final Order*, p. 7.

[29] In fact, in 1999 the adjacent property owner at 710 Creekside Drive, who shares the Klomparens' eastern property boundary applied for a dock permit and the Department denied that permit application based on the determination that the extension of this very same eastern property boundary between 706 Creekside and 710 Creekside did not reach a navigable water course within a thousand feet of the marsh critical area line. (Trial Tr. 155:6 to 157:19) (Department's Trial Exhibit 2).

[30] In contrast, Mr. Seabrook acknowledged that the purpose for creating a dock corridor associated with the Klomparens' lot had nothing to do with protecting the tidelands, but rather was for development purposes to enhance the property values in the Creekside subdivision. (Trial Tr. 133:8 to 133:18).

Ann. § 48-39-220(A),[31] the ALC nonetheless held that the Klomparens have some form of title interest. As a matter of fairness, the ALC was obligated to (1) give similar consideration to this same degree of title interest for the neighbors across the creek in Cooper Estates and (2) then decide if such title interests were sufficient to trigger the requirements of S.C. Code Regs. 30-2(B)(4).[32] Since the Klomparens' purported marsh ownership outlined in red (see below picture from DHEC's Trial Exhibit 1) terminates before reaching the tributary to Shem Creek, the Department asserts that, if the ALC's "waterfront property" analysis is upheld, S.C. Code Regs. 30-2(B)(4) required that they get permission from their Cooper Estates neighbors. (Trial Tr.



[31] The Quiet Title requirement of S.C. Code Ann. § 48-39-220(A) is not limited only to those claiming a fee simple ownership interest in the tidelands. Rather, the statute applies to "[a]ny person claiming *an interest* in tidelands…" which would include the Klomparens' title interest recognized by the ALC. (Emphasis added).

[32] When a permit applicant seeks to build a dock across someone else's property, S.C. Code Regs. 30-2(B)(4) requires the applicant to provide OCRM with an "instrument under which the applicant claims … permission from the owner of the property to carry out the proposal."

134:12-21).[33] Mr. Seabrook admitted that, as the Klomparens' agent, he never sought permission from the Cooper Estates neighbors. (Trial Tr. 134:12-21). Consequently, the Klomparens' permit application cannot be further evaluated until this issue is resolved.

This permission-from-the-neighboring-property-owners issue only arose at trial through Mr. Seabrook's cross examination. At the end of the trial, Judge Durden asked both counsel "… how would y'all like to proceed then? Would you like to make brief closing statements? Would you like to waive closing statements and prepare proposed orders at your leisure? Well, not too much at your leisure. I mean, that's a dangerous thing to tell a lawyer. What would you prefer?" (Trial Tr. 220:19 to 221:4). Counsel for both parties agreed to submit proposed Final Orders and waive closing arguments. This exchange between counsel and the ALC is significant, because the first time Department's counsel had the opportunity to argue that the Klomparens' failed to obtain permission from their neighbors (per S.C. Code Regs. 30-2(B)) to build a dock across their supposed privately-owned marsh was via the Department's proposed *Final Order* at page 14. Department's Counsel then made this same argument in the Department's *Motion for Reconsideration* at pages 18 and 19 as well as in footnote 1 of *DHEC's Reply To Petitioners' Return To The Department's Motion For Reconsideration*.

The ALC erroneously relied on *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) for the proposition that "[a] party cannot use a motion for reconsideration to raise for the first time an issue the party could have raised prior to judgment but did not, nor bring before the court theories or arguments that were not advanced earlier." *Order Denying Respondent's Motion For Reconsideration*, page 2. The Department did in fact raise this issue

[33] Mr. Seabrook's father was a surveyor and platted the lots in both Creekside subdivision and Cooper Estates subdivision the same way; namely with purported representations of marsh ownership on either side of the tributary where the Klomparens' have applied for a dock permit.

prior to judgment, both during cross-examination and again in its proposed *Final Order* which, by agreement of the ALC and both counsel, was a substitute for closing arguments. (Trial Tr. 134: 12-21); (DHEC Proposed Order, 14). Additionally, *Hickman* was very different procedurally from this matter. There, the party attempting to introduce the new issue had already tried the case; had the case remanded on appeal; tried the case again; and changed counsel – all before attempting to introduce the new issue in its Motion for Reconsideration. Here, the potential applicability of S.C. Code Regs. 30-2(B)(4) was introduced during cross-examination at the one-and-only trial.

Putting *Hickman* aside, this Court addressed the ALC's error in *Sierra Club v. S.C. Dept. of Health and Envtl. Control*, 693 S.E.2d 13 (S.C. App. 2010). Specifically, this Court held that

> "… *we find the general preservation rule, that an issue must be raised to and ruled upon in order to be preserved for review, should apply*. See *Brown v. S.C. Dep't. of Health & Envtl. Control*, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) ('[I]ssues not raised to *433 and ruled on by the AL[C] are not preserved for appellate consideration.'). Therefore, we must determine whether this issue was properly before the ALC." *Sierra Club*, 693 S.E.2d at 17. (Emphasis added).
>
> "Furthermore, we believe the *Sierra Club* overcame the 'ruled upon' requirement for preservation. Here, the *Sierra Club* submitted a post-trial motion requesting the ALC rule on these issues which the ALC generally denied without addressing specific issues." *Sierra Club*, 693 S.E.2d at 17–18.
> …
>
> "As additional support for the 'ruled upon' preservation requirement, we look to *Pye v. Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006). In *Pye*, the South Carolina Supreme Court identified a ruling by a trial court or a post-trial motion as the two ways to preserve an issue for appeal. 369 S.C. at 566, 633 S.E.2d at 511. The *Pye* court held an issue was **18 preserved for review when *Pye* raised such issue to the trial court through a Rule 59(e) motion. 369 S.C. at 565, 633 S.E.2d at 510." *Sierra Club*, 693 S.E.2d at 17–18.

In the matter before the ALC, the Department preserved its S.C. Code Regs. 30-2(B) argument for appellate review by (1) cross examining Mr. Seabrook about this issue; (2) addressing this matter in the Department's proposed *Final Order* at page 14; (3) by addressing this same issue in the Department's *Motion for Reconsideration* at pages 18 and 19; and (4) by again addressing this

issue in footnote 1 of *DHEC's Reply To Petitioners' Return To The Department's Motion For Reconsideration.* Accordingly, the Klomparens' failure to obtain permission from their neighbors per S.C. Code Regs. 30-2(B) was properly before the ALC and this issue should have received a substantive ruling, so that the neighbors could have had an opportunity to be heard on their arguable property rights.

CONCLUSION

For all the reasons articulated herein, the Department respectfully requests that the Court of Appeals reverse the ALC Order and affirm the Department's permit denial.

Respectfully submitted,

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