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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
Honorable Milton G. Kimpson, Administrative Law Judge

Appellate Case No.: 2023-000441

Stephen Mueller,.....Appellant,

v.

South Carolina Department of Health and Environmental Control, and
Carla Varn DuPre and Jasper B. Varn, III, ...Respondents.

JOINT RETURN TO APPELLANT'S MOTION TO DISREGARD

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PROCEDURAL BACKGROUND

On March 9, 2023, by electronic mail directed to the Court (and, perhaps, by U. S. Mail although not delivered to Respondents), Appellant Stephen Mueller attempted to file an Appeal with this Court *pro se*. Respondents filed and have pending a Joint Motion seeking dismissal of this appeal based on timeliness of the filing. In response to Respondents' Joint Motion, Appellant served by way of electronic mail a Motion to Disregard Respondents' Motion to Dismiss. The document was sent in a format essentially unreadable for Respondents although Respondents were able to view the first paragraph. The first paragraph of the Motion to Disregard contains critical misinformation that Respondents rebut below.

APPELLANT'S INACCURATE STATEMENTS

Appellant claims that the final order of the ALC was "supposedly served" upon Appellant on June 7, "although I did not receive it until emailed to me months later" by Anthony Goldman of the ALC. Appellant further states that the ALC has provided no proof that they served Appellant with the final order.

Attached to this Joint Return, labeled Exhibit A, is the electronic mail received by all parties to the underlying case from Mr. Goldman, Judge Kimpson's law clerk. Mr. Mueller's correct email address is shown on this email, which is dated June 7, 2022. Also Attached is the Final Order issued on June 7, 2022, labeled Exhibit B. Importantly, the last page of the Final Order is a Certificate of Service from Mr. Goldman.

Rule 4 (B)(4) of the RPACL defines "filing" as electronic filing provided there is a process for verifying signatures. The Rule also provides that "[f]ailure of the filers' system

will not excuse failure to comply with a filing deadline unless the court exercises its discretion to extend a deadline."

CONCLUSION

The Final Order was served upon Mr. Mueller at the same time it was provided to the Respondents. Mr. Mueller is incorrect in stating that there is no proof of service upon him, as the Final Order contains a Certificate of Service.

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April 4, 2023
Charleston, South Carolina

Mary D. Shahid

From: Anthony Goldman <agoldman@scalc.net>
Sent: Tuesday, June 7, 2022 1:43 PM
To: stevem44442002@yahoo.com; 'Bradley Churdar'; Shahid, Mary D.
Subject: 21-0144, Mueller (Final Order)
Attachments: 210144.pdf

{EXTERNAL EMAIL}

Mr. Mueller, Mr. Churdar and Ms. Shahid,

Please find attached to this email a copy of the Final Order that was signed by Judge Kimpson.

Take care,

Anthony R. Goldman
Judicial Law Clerk to
The Honorable Milton G. Kimpson
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201
Telephone: (803) 734-6403

CERTIFICATE OF SERVICE

I, Anthony R. Goldman, 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).

Anthony R. Goldman

June 7, 2022
Columbia, S.C.

Anthony R. Goldman
Judicial Law Clerk

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Stephen Mueller, Petitioner, v. South Carolina Department of Health and Environmental Control and Carla Varn DuPre and Jasper B. Varn, III, Respondents.	Docket No. 21-ALJ-07-0144-CC **FINAL ORDER**

Appearances

Counsel for Petitioner	Stephen Mueller, *Pro Se*
Counsel for Respondent South Carolina Department of Health and Environmental Control	Bradley D. Churdar, Esq.
Counsel for Respondents Carla Varn DuPre and Jasper B. Varn, III	Mary D. Shahid, Esq.

STATEMENT OF THE CASE

This matter is before the Administrative Law Court ("ALC" or "Court") pursuant to a request for contested case hearing filed by Stephen Muller ("Muller" or "Petitioner") challenging the decision of Respondent South Carolina Department of Health and Environmental Control's Office of Ocean and Coastal Resource Management ("OCRM" or the "Department") to issue OCRM02808 ("OCRM Permit") to Respondents Carla Varn DuPre ("DuPre") and Jasper B. Varn, III ("Varn")(Ms. DuPre and Mr. Varn are a brother and sister and are sometimes collectively referred to herein as "Varns".) The OCRM Permit authorizes construction of a 2-story residential structure at 410 Palmetto Boulevard, Edisto Beach, South Carolina. Presently, 410 Palmetto Boulevard is an undeveloped beachfront lot adjacent to the Atlantic Ocean. Mr. Muller occupies

407 Palmetto Boulevard, a home located across Palmetto Boulevard from the Varns' lot. [1] As a result of the undeveloped status of 410 Palmetto Boulevard, Muller currently has a direct and unobstructed view of the Atlantic Ocean from 407 Palmetto Boulevard. Members of the public, ostensibly, to include Muller, are able to walk through 410 Palmetto Boulevard to access the beach.

Mr. Muller contends the OCRM Permit is "illegal" because it authorizes construction seaward [2] of what is known as the "baseline". The baseline is one of two invisible but recoverable (by survey) lines on the State's beachfront established by the Department in accordance with S.C. Code Ann. § 48-39-280. [3] The second line, also established by the Department, is called the setback line and is located landward from the baseline. [4] The baseline and setback lines represent the Department's efforts to accommodate changing shorelines and to regulate construction along moving shorelines as it is charged to do under South Carolina law.

A fully contested hearing in this matter was convened on November 8, 2021, at which time, all parties presented testimonial and documentary evidence. In lieu of closing arguments, the parties submitted proposed orders to the Court. [5] On or about March 22, 2022, Mr. Muller filed a Motion to Reopen the Record based on what he described as new evidence. The Varns submitted a Return to the Motion to Reopen on March 30, 2022. The Motion to Reopen is denied.

FINDINGS OF FACT

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[1] 407 Palmetto Boulevard is owned by Moonlighting on Edisto, LLC. While Mr. Muller's testimony makes it clear that he occupies this property, there was no explanation given at trial for the relationship, if any, between he and Moonlighting on Edisto, LLC.

[2] The term "seaward" generally means "the direction or side away from land and toward the open sea" https://www.merriam-webster.com/dictionary/seaward. Here, the Petitioner complains the permit will allow construction in an area between the baseline going toward the ocean.

[3] The baseline – which should more aptly described as the "jurisdictional baseline" – is established with reference to the "primary oceanfront sand dune." *See* Regulation 30-1(D)(4). According to Petitioner's Exhibit 1, which is a screenshot of Palmetto Boulevard taken from the Department's GIS beachfront jurisdictional line viewer, the baseline is shown as a red line which appears to bisect the row of houses on the ocean side of Palmetto Boulevard. The lot at issue here – 410 Palmetto – is situated between two of these oceanside houses.

[4] The term "landward" generally means "to or toward the land." https://www.merriam-webster.com/dictionary/landward. The setback line is depicted in Petitioner's Exhibit 1 as a solid blue line off center on Palmetto Boulevard.

[5] The Varns and the Department submitted a Joint Proposed Order on or about January 31, 2022. Mr. Muller submitted his order on or about February 4, 2022

Based on the testimony, exhibits, and arguments presented at the hearing, and taking into account the credibility of the witnesses and the accuracy of the evidence, this Court makes the following Findings of Fact by a preponderance of the evidence:

I. Procedural Background

1. Respondents DuPre and Varn inherited the property at 410 Palmetto Boulevard from their parents. The Varn family spent many vacations on Edisto Beach, but never built a home on their property. Both DuPre and Varn now live in Columbia, South Carolina, and have recently decided to sell 410 Palmetto Boulevard after the real property taxes increased. The decision to sell was also based on their advancing ages and escalating building costs. The lot is now under contract to sell and the Varns have agreed to obtain all necessary permits for construction, as a contingency in the sales contract.

2. On or about November 12, 2020, with the assistance of Bill Eiser of Eiser Coastal Engineering, the Varns submitted a Permit Application to the Department to obtain approval to build a two-story house at 410 Palmetto Boulevard "partially seaward of the baseline." The house is described as a two-story structure, with a footprint of 54.5 ft by 24.5ft with 1,335 square feet of heated space on each floor for a total of heated square footage of 2,670 square feet. The application further communicated that the house would be serviced by a septic tank but that a separate permit for that would be obtained from another Department division. [6]

3. In August 2020, prior to the submission of the Permit Application, Mr. Eiser met with Matt Slagel, the Department's Beachfront Permitting Project Manager, at 410 Palmetto Boulevard for the purpose of "flagging" or marking the landward toe of the primary oceanfront sand dune. [7] Mr. Slagel set out a number of red flags setting the landward toe of the primary oceanfront sand dune. On the survey for the project included in the Varns' Permit Application, this feature is marked "Toe of Dune" and is situated immediately behind and seaward of what is identified as the drain field area for the Varns' septic tank. Slagel testified that he identified the primary oceanfront sand dune when he "observed in the field that there was a clear elevation change, which we'll see

[6] Respondents have been issued a septic permit from the Department. Septic permits have separate regulatory processes from OCRM permits, different regulatory requirements, and are issued by the Department's Bureau of Environmental Health Services.

[7] Matt Slagel is a beachfront permitting project manager and team leader within the critical area permitting section of OCRM. He has worked for OCRM for 12 years and has worked exclusively on beachfront projects since January 2018.

in my site photos from that day, indicating that there was a dune feature, not only with a change in elevation compared to the beach and the landward side of the dune, but also that there was vegetation both on the top of the dune and seaward of it." Mr. Slagel relied solely on his observations and did not take actual measurements of the dune feature.

4. Notice of the Permit Application was duly published in the Post and Courier and Press and Standard (Colleton County) newspapers for the purpose of allowing public comment.

5. Mr. Mueller was one of several area residents who submitted comments opposing the OCRM Permit. In particular, both in his written comments and at trial, Mr. Muller complained that the Varns' house would be constructed "substantially on the baseline" in violation of South Carolina law which prohibited construction seaward of the baseline and/or on a primary oceanfront sand dune. Mr. Muller further offered that the location of the primary oceanfront sand dune as identified by the Department was inaccurate, that the actual primary oceanfront sand dune was positioned at the baseline and that the Department's primary oceanfront sand dune feature was an emergency berm constructed by the Town of Edisto Beach to protect the beach after damage caused by Hurricane Irma. [8] Muller maintained that an emergency berm should never be considered as a primary oceanfront sand dune.

6. Other area residents expressed concerns that construction would disrupt sea turtle nesting sites, contribute to erosion, limit public access to the beach and destroy sand dunes and sea oats.

7. On February 10, 2021, the Department issued the OCRM Permit to the Varns approving construction at 410 Palmetto Boulevard, subject to fourteen (14) Special Conditions and sixteen (16) General Conditions. The Varns accepted the Permit and conditions on February 18, 2021. By letter dated February 11, 2021, persons who had filed objections were notified that the Varns' OCRM Permit had been issued and provided information on filing a request for review of the OCRM decision by the South Carolina Board of Health and Environmental Control (DHEC Board).

8. Mr. Mueller timely filed a Request for Board review which was denied by the DHEC Board. Mr. Muller then filed his request for contested case hearing.

II. Location of Baseline and Primary Oceanfront Dune

[8] A berm is a "a small hill or wall of dirt or sand." *See Johnson v. Sam English Grading, Inc.*, 412 S.C. 458, 772 S.E.2d 557 n.3 (Ct. App. 2015).

9. In August, 2020, Mr. Slagel visited 410 Palmetto Boulevard to identify a primary oceanfront sand dune for the purpose of the proper siting of the residential structure, septic tank and drainfield. Mr. Slagel explained that a "Special Permit" process allows the authorization of construction of residential structures seaward of the baseline. He further described the baseline and setback lines as defining the area where OCRM has jurisdiction to regulate construction. The Department's jurisdiction is from the setback line seaward. The area on the Atlantic Ocean shoreline subject to OCRM's permitting jurisdiction is known as the "beach/dune system." Mr. Slagel testified that the beach/dune system is not a no-build area, but is an area where OCRM's regulations and statutory requirements are applicable to any construction.

10. The baseline for 410 Palmetto Boulevard was set during what is referred to as the 2008 "establishment cycle" and remained in the same location during the 2018 update timeframe. [9] This area of land is located within a standard erosion zone. At the 2008 establishment cycle, the primary oceanfront sand dune identified by Mr. Slagel for the purposes of the Varns' construction project did not exist. There was no re-positioning of the baseline for the purposes of the Varns' Special Permit. As indicated earlier, the baseline for the instant case is illustrated in Petitioner's Exhibit 1 as a red line which bisects the row of houses adjacent to 410 Palmetto Boulevard. The survey for the construction project included in the Varns' OCRM Permit application shows the "SCDHEC-ORCM Baseline 2009/2018" as being approximately 12.7' to 16.4' seaward from the property edge running alongside Palmetto Boulevard. The 2009/2018 baseline is thus located partially within the walls of the proposed construction such that the majority of the house will be located seaward of the baseline.

11. The Special Permitting process provides additional scrutiny (above and beyond the usual permit application process) for projects situated seaward of the baseline such that building in these areas, if allowed, must undergo a more rigorous approval process. The application includes a higher ($1,000.00) application fee. [10] Along with the statutory requirement of avoiding the primary oceanfront sand dune, OCRM requires that a proposed structure be located no closer to the ocean than the existing structures on either side. OCRM also limits the amount of heated square

[9] The position of the baseline (and setback line) is evaluated through a regular "establishment cycle" occurring every seven to ten years as required by S.C. Code Ann. § 48-39-280(C). S.C. Code Ann. § 48-39-280(C) does not provide for any other adjustment for the positioning of the baseline.

[10] In comparison to the fee charged for permit applications for projects not situated seaward of the baseline.

footage to 5,000 square feet or what is typical in the area. Every Special Permit also includes a permit condition requiring removal should the structure become located on the active beach. [11] Mr. Slagel established that "active beach" is defined by statute and is the area from the ocean to the first line of stable, natural vegetation or the escarpment, whichever occurs first.

12. Based on the restrictions associated with a Special Permit, the primary oceanfront sand dune must be identified to ensure the proposed residential structure does not impact this feature (primary oceanfront sand dune.) Mr. Slagel. explained that although there are two definitions for "primary oceanfront sand dune" in South Carolina law – a statutory definition set out in in S.C. Code Ann. § 48-39-10(I) and a regulatory definition in S.C. Code Ann. Reg. 30-1(D)(44) – for the purpose of locating a primary oceanfront sand dune for contemplated new construction seaward of the baseline, use of the statutory definition was appropriate here. Slagel further asserted that the regulatory definition of primary sand dune did not apply under the circumstances of this case. Significantly, for purposes of the Special Permit, Slagel identified the primary oceanfront sand dune and flagged its toe – these markings will ensure that no construction takes place on the primary oceanfront sand dune itself. [12]

13. Bill Eiser, the Varns' consultant, who was accepted by the Court, without objection, as an expert in coastal zone management and coastal zone processes, provided expert testimony in support of the Varns' Permit Application. [13] He agreed with Mr. Slagel's determination regarding

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[11] Special Condition 1 to the Varns' permit reads, in pertinent part:

> This permit is a Special Permit as described in SC Code of Regulations R.30-15(F). As such, in the event the beach erodes so that in the future the permitted habitable structure is located on the active beach, the permittee agrees to remove the structure at his own expense if and when the Department orders its removal.

Furthermore, Special Condition 2 requires that a permittee record a restrictive covenant along with the deed to permitted property such that the restriction regarding removal of a structure is binding upon subsequent landowners.

[12] Slagel's conclusions were reviewed by the manager of the critical area permitting section, Blair Williams, before the OCRM Permit was issued. Mr. Slagel confirmed that he collaborated with Mr. Williams in issuing the OCRM Permit, as he does with many permits.

[13] Mr. Eiser testified that the term "coastal dynamics" referred to "the science or the study of the physical factors that cause our shoreline or coastline to change – waves, currents, tides and things like that." He further defined "coastal processes" as the "physical processes that cause the shoreline to be dynamic or change. "Mr. Eiser has Bachelor and Master's Degrees from the University of South Carolina in Marine Biology. He worked for a private coastal engineering firm for approximately five (5) years and for approximately 26 years, worked for OCRM reviewing beachfront permit applications and also revising

the position of the primary oceanfront sand dune seaward of the septic tank drainfield and further testified that the dune has stabilized, given the existence of vegetation on the top of the dune and behind the dune. The presence of vegetation is evidence of the upland, not active beach. Mr. Eiser offered that if the dune was being crested regularly, resulting in the area being eroded or inundated, the salt water would have impaired vegetation on the dune. In addition, a wrack-line observed on the beach in front of the dune confirmed that the dune had not been recently crested. [14] Mr. Eiser further noted the natural build-up of sand evident from the sand fencing installed on the top of the dune.

14. Mr. Eiser confirmed Mr. Muller's assertion that the flagged primary oceanfront sand dune had once been an emergency berm. After Hurricane Irma hit the area in 2017, the Town of Edisto Beach constructed an emergency berm on the beach in a location where the Town had been pursuing a large scale beach renourishment project. This emergency berm has remained intact in its original location, becoming stable and covered in vegetation such that Slagel identified it as meeting the statutory definition of "primary oceanfront sand dune." Based upon his review of historical aerial photographs, Eiser further offered that the emergency berm was actually placed by the Town of Edisto Beach in the historical position of a primary sand dune. Significantly, based on his experience, to include his work on a 2019 Report of the Beachfront Jurisdictional Line Stakeholder Workgroup, Eiser offered the following with regard to whether an emergency berm can become a sand dune:

> Q: Okay. Now, do you think the term emergency berm applies to the dune feature that Mr. Slagel says is the primary oceanfront sand dune?
>
> A: I mean, I've got, you know, indirect information from the Town of Edisto Beach that they did some beach restoration work after either Hurricane Matthew or Hurricane Irma. I don't have any information about what they actually did, what the contractor was paid to do. But, as part of this workgroup that I was involved with, we did consider the situation at Edisto Beach, and we talked about at what point could this artificially created berm transition into a sand dune.
>
> Q: Okay. And was this – does this reflect that discussion, if it's generally in the historical footprint and exhibits characteristics of the defined primary oceanfront sand dune?

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baselines and setback lines. After his retirement from the Department, Mr. Eisner founded his consulting firm. Matt Slagel now performs the job Mr. Eiser once held.

[14] According to Wikipedia, a "wrack line" is a "coastal feature where organic material (e.g. kelp, seagrass, sells) and other debris is deposited at high tide." *at* https://en.wikipedia.org/wiki/Wrack_zone

> A: Yeah. Basically, what this is saying is that you can't say that forever an emergency berm can never become a sand dune. It's saying that – it's acknowledging that yes, that transition can occur. [15]

II. Special and General Permit Conditions

15. The Department issued the Varns' permit conditioned on their agreement to honor certain Special and General Conditions. Included within the Special Conditions is the requirement that any home built on the Site be no closer to the ocean than neighboring homes, be limited in size and be removed should it ever become located on the active beach because of erosion. The Special Permit also requires mitigation of any disruption of the area caused by the installation of the septic tank to fulfill the requirements of S.C. Code Ann. Regs. 30-21. The septic tank area must be replanted with native dune species and vegetation. In addition, mitigation measures are to be implemented in the event nesting and/or hatching sea turtles are discovered in the construction area. Clean sand brought onto the construction site and/or clean sand excavated during the project must be left seaward of the property for use in dune building activities. In total, the Special Permit contains 14 special conditions created to address all statutory and regulatory requirements and the concerns raised in comments submitted to OCRM regarding the permit application. As a result, the Special Permit issued by the Department to Respondents authorizes development on an oceanfront lot on Edisto Beach that is similar to the development that has already occurred on Edisto Beach. As Mr. Slagel acknowledged, 410 Palmetto Boulevard is one of very few undeveloped lots left on Edisto Beach.

CONCLUSIONS OF LAW

1. The ALC has jurisdiction over this matter pursuant to the South Carolina Administrative Procedures Act, S.C. Code Ann. § 44-1-60 and S.C. Code Ann. § 1-23-600 (Supp. 2017) ("APA"), S.C. Code Ann. § 48-39-130 and its regulations, S.C. Code Ann. Reg. 30-1(D), 30-11 and 30-12, and the Coastal Tidelands and Wetlands Act S.C. Code Ann. § 48-39-10 *et seq.* In reviewing this matter, the Court serves as the finder of fact and makes a *de novo* determination regarding the matters in controversy. *See* S.C. Code Ann. § 1-23-600(B) (Supp. 2017); *Brown v S.C. Dep't of Health and Envtl. Control*, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002); *see also Marlboro*

[15] The Beachfront Jurisdictional Workgroup was formed at the behest of the General Assembly to provide recommendations to DHEC about setting jurisdictional baselines for the State's coastal areas. Although the Workgroup prepared a report which was presented to DHEC, Mr. Eiser testified that the recommendations never became law or regulation.

Park Hosp. v. S.C. Dep't of Health and Envtl. Control, 358 S.C. 573, 595 S.E.2d 851 (2004). "It is generally recognized that the trier of fact, who has the opportunity to observe the witnesses and listen to their testimony in person, is in the best position to determine issues of witness credibility." *Dixon v. Dixon*, 336 S.C. 260, 263, 519 S.E.2d 357, 358 (Ct. App. 1999).

2. With regard to expert testimony, it is generally recognized that "expert opinion evidence is to be considered or weighed by the triers of the facts like any other testimony or evidence" and that "the triers of the facts cannot, and are not required to, arbitrarily or lightly disregard, or capriciously reject, the testimony of experts or skilled witnesses, and make an unsupported finding contrary to the opinion." 32A C.J.S. Evidence § 727 at 82-83 (1996). However, the trier of fact may give an expert's testimony the weight he or she 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), and may accept the testimony of one expert over that of another, *S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co.*, 308 S.C. 216, 417 S.E.2d 586 (1992). In weighing expert testimony, the general principles for determining whether evidence warrants a finding remain applicable; accordingly, "an expert's opinion which is based on guess, surmise, or conjecture has little evidentiary value, and expert opinion evidence lacks probative force where the conclusions are contingent, speculative, or merely possible." 32A C.J.S. Evidence § 730, at 87 (1996). "Where an expert's testimony is based upon facts sufficient to form the basis for an opinion, the trier of fact determines its probative weight." *Berkley Elec. Coop. v. S.C. Public Serv. Comm'n*, 304 S.C. 15, 402 S.E.2d 674 (1991); *Smoak v. Liebherr-Am., Inc.*, 281 S.C. 420, 422, 315 S.E.2d 116, 118 (1984). In South Carolina, scientific evidence is considered admissible only where the trial judge finds that such evidence will (1) assist the trier of fact, (2) the expert witness is qualified and (3) the underlying science is reliable. *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508 (1999). When examining the third factor, "reliability," a court is to determine, "the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom." *Id.* at 19, quoting *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979).

3. The proper standard of proof to be applied in a contested case before the ALC is a "preponderance of the evidence" standard. *Anonymous (M-156-90) v. State Bd. Of Medical Examiners,* 329 S.C. 371, 375-76, 496 S.E.2d 17, 19 (1998); *National Health Corp. v. Dep't of Health and Envtl. Control,* 298 S.C. 373, 380 S.E.2d 841 (Ct. App. 1989). The weight and

credibility assigned to evidence presented at the hearing of a matter is within the province of the trier of fact. *See S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co.*, 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992).

4. Furthermore, the burden of proof is upon the party asserting the affirmative of an issue, and, therefore, the petitioner bears the burden of proving the agency decision was in error under the statutory and regulatory standards. *Leventis v. Dep't of Health and Envt'l Control*, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000)(holding that the burden of proof in administrative proceedings generally rests upon the party asserting the affirmative of an issue). *See also* Alex Sanders, *et al.*, South Carolina Trial Handbook, Sec. 9:3, Party with Burden, Civil Cases (September 2018 update). The moving party bears the burden of proof in a contested case hearing. S.C. Code Ann. § 44-7-210(E)(Supp. 2010); *see also* 2 Am. Jr. 2d Administrative Law § 342 (2022). In this matter, Mr. Muller has challenged a Special Permit issued to Respondents DuPre and Varn authorizing construction of a residential structure on an oceanfront lot currently owned by Respondents. Muller is thus required to demonstrate the proposed project and/or Special Permit as issued is inconsistent with the governing statutes and regulations.

A. Subject to Conditions, New Construction Seward of the Baseline is Allowed.

Mr. Muller argues that the Varns' proposed house should not be allowed because it will be located seaward of the baseline. Based upon the evidence, most of the Varns' home, if constructed, will be located seaward of the baseline. However, this condition does not preclude construction. S. C. Code Ann. § 48-39-290(A)(6) provides that "(A) No new construction or reconstruction is allowed seaward of the baseline except: ... (6) structures specifically permitted by special permit as provided in subsection (D)." (emphasis added). Subsection (D) of § 48-39-290 provides, in pertinent part:

> (D) Special permits:
>
> (1) If an applicant requests a permit to build or rebuild a structure other than an erosion control structure or device seaward of the baseline that is not allowed otherwise pursuant to Sections 48-39-250 through 48-39-360, the department may issue a special permit to the applicant authorizing the construction or reconstruction if the structure is not constructed or reconstructed on a primary oceanfront sand dune or on the active beach and, if the beach erodes to the extent the permitted structure becomes situated on the active beach, the permittee agrees to remove the structure from the active beach if the department orders the removal. However, the use of the property authorized under this provision, in the determination of the department, must not be detrimental to the public health, safety, or welfare.

(2) The department's Permitting Committee Coastal Division shall consider applications for special permits.

(3) In granting a special permit, the committee may impose reasonable additional conditions and safeguards as, in its judgment, will fulfill the purposes of Sections 48-39-250 through 48-39-360. (emphasis added)

S. C. Code Ann. Regs. 30-15(F) further explains the Special Permit requirements thusly:

Special Permits: The Department shall consider applications for special permits. Special permits are to be issued only in situations where without such a permit, the property owner would have no reasonable use of his property, or when an overriding public benefit can be demonstrated. When issuing special permits, the Department shall consider the legislative findings and policies as set forth in Sections 48-39-30, 48-39-250 and 48-39-260. Specifically, the following criteria shall serve as guidelines when issuing special permits:

(1) A structure cannot be constructed or reconstructed on a primary oceanfront dune or on the active beach, and in the event that the beach erodes so that in the future the permitted habitable structure is located on the active beach, the property owner agrees to remove the structure at his own expense.

(2) There shall be no adverse impact on the stated policies of the Beachfront Management Act, including the policies protecting the sand dunes and preservation of the dry sand beach.

(3) The granting of a special permit shall not create a situation contrary to the public health, safety or welfare.

(4) In determining whether or not a permit is contrary to the public health, safety or welfare, the Department shall consider:

(a) whether or not the proposed structure would be constructed on renourished beach;

(b) the erosion rate at the site;

(c) how soon the structure will be located on the active beach;

(d) whether or not the proposed structure meets American National Standards Institute building standards; and/or

(e) the potential cumulative effect that similar structures will have upon the beach/dune system.

(5) Necessary components of habitable structures, such as sewer lines, septic tanks and utilities, do not require separate special permits. However, decking, patios, driveways, etc., are not considered as necessary components of habitable structures and therefore these items must be shown on the permit application.

(6) Generally, the Department considers special permits only under extraordinary circumstances. Three specific areas, however, where the Department deems that special permits are more appropriate include:

(a) Habitable Structures Seaward of the Baseline: The Department may grant a special permit to construct a single-

family house seaward of the baseline where such permit meets the conditions of R.30-15(F)(1)-(6) and;

(i) The house is no larger than similar structures in the general neighborhood and in no case may it be larger than 5000 square feet;

(ii) The house is no further seaward than the houses on either side unless this would preclude a house from being constructed on the lot;

(iii) The permittee agrees to remove the home when it comes on to the active beach;

(iv) The permittee agrees to such other conditions as the Department deems are appropriate to promote the policies of the Act.

Accordingly, based on § 48-39-290(A)(6) and applicable regulations, new construction in a beach/dune system seaward of the baseline is allowed provided the Department issues a Special Permit as provided for under § 48-39-290(D). Such construction, however, must not be situated on a primary oceanfront sand dune or active beach. Further, in the event the site of the new construction subsequently becomes situated on an active beach, the occupant of the property must remove the structure "if the department orders the removal." [16] The Court further finds that the evidence establishes the Varns' OCRM Permit satisfies the conditions set out in the applicable statutory and regulatory provisions of § 48-39-290(D) and Regulation 30-15(F).

B. <u>The statutory definition of Primary Oeanfront Sand Dune is applicable to the determination whether a Special Permit for new construction may be issued</u>.

As explained by Matt Slagel, there is a statutory definition of "primary oceanfront dune" and then there is a regulatory definition of the term. Section 48-39-10(I) defines Primary oceanfront sand dune" to mean the dune or dunes that constitute the front row of dunes adjacent to the Atlantic Ocean. Regulation 30-1(D)(44) gives the following regulatory definitions:

(44) Primary Oceanfront Sand Dunes - those dunes that constitute the front row of dunes adjacent to the Atlantic Ocean. <u>For the purposes of establishing the jurisdictional baseline, the dune must have a minimum height of thirty-six (36) inches, as measured vertically from the seaward toe</u>

[16] This removal requirement is significant. While the law makes it possible for beachfront landowners to build on their property, it also seeks to protect the State's beaches by providing that structures may have to be removed if the effect of erosion or other forces results in the structure being located on "active beach." The Department repeatedly refers to this requirement in the Varns' permit such that the landowners have adequate notice of the risk of undertaking construction. During trial, Mr. Muller, through the testimony of Matt Slagel, established that the historical erosion rate for the area is approximately 1.4 feet per year. A landowner seeking to build in this area must be willing to accept the consequences, i.e., mandatory removal of structures, that may result from the encroachment of active beach.

> to the crest of the dune. The dune must also form a nearly continuous dune ridge for 500 shore parallel feet and may exhibit minimal breaks such as those resulting from pedestrian or emergency vehicle access points. This dune typically exhibits the presence of stable, native vegetation, and is not scarped, eroded, or overtopped by the highest predicted astronomical tides. However, this dune may be inundated by storm surge which normally accompanies major coastal storm events. (emphasis added)

Throughout these proceedings, Mr. Muller has maintained that the regulatory definition of "primary oceanfront sand dune" is applicable here. In particular, Mr. Muller reads the second and third sentences of Regulation 30-1(D)(44) to require that the "primary oceanfront sand dune" must be at least thirty-six (36) inches in height and 500 feet in length. Because Mr. Slagel acknowledged that he took no measurements when he identified the primary oceanfront sand dune for the Varns' building project, basing his findings only on his personal observations of the topography of the area, Mr. Muller contends that Slagel's identification is inconsistent with regulatory requirements and thus, incorrect. Muller further asserts that the true primary oceanfront sand dune for 410 Palmetto Boulevard is actually at the baseline of the property which fronts Palmetto Boulevard.

Mr. Muller's assertion that the regulatory definition of "primary oceanfront sand dune" is applicable is not wholly incorrect. The first sentence of Regulation 30-1(D)(44) essentially parrots the statutory definition of "primary oceanfront sand dune" and provides that this feature "constitute[s] the front row of dunes adjacent to the Atlantic Ocean." This portion of the regulatory definition is certainly applicable to the instant proceedings.

However, Mr. Muller then seeks to apply the remainder of Regulation 30-1(D)(44) without reference to the introductory clause of the second sentence. Such an application is incorrect. Regulations are interpreted using the same rules of construction as statutes. *Murphy v. South Carolina Department of Health and Environmental Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012) Words in a statute may not be omitted or otherwise rendered meaningless. *Lightner v. Hampton Hall Club, Inc.*, 419 S.C. 357, 364, 798 S.E.2d 555, 558 (2017) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.") Just as words in a statutory provision may not be left out when interpreting the same, words in a regulation must be given their plain and logical meaning without omission. *See Converse Power Corp., v. S.C. Dept. of Health & Envt. Control*, 350 S.C. 39, 47, 564 S.E.2d 341, 346 (Ct. App. 2002)("When interpreting a regulation, we look for the plain and ordinary meaning of the words of the regulation, without resort to subtle or forced construction to limit or expand

the regulation's operation.") The plain language of these regulatory provisions state that the measurements (height and length) required by the second and third sentences only become applicable "[f]or the purposes of establishing the jurisdictional baseline." When Matt Slagel visited 410 Palmetto Boulevard in October 2020, his purpose was not to establish the jurisdictional baseline but instead to find a primary oceanfront sand dune for the purposes of a Special Permit pursuant to § 48-39-290 (D)(1). [17] In other words, the feature Mr. Slagel identified at 410 Palmetto Boulevard, as long as it "constitute[s] the front row of dunes adjacent to the Atlantic Ocean", qualifies as a primary oceanfront sand dune for the purposes here without satisfying the measurement requirements in Regulation 30-1(D)(44). As such, the Court finds that the portion of Regulation 30-1(D)(44) which requires measurements of dune features is not applicable here because the primary oceanfront dune in this instance was not being used for the purposes of establishing a jurisdictional baseline.

C. An Emergency Berm can become a primary oceanfront sand dune within the meaning of § 48-39-10(I).

Mr. Muller challenged the testimony offered by Bill Eisner that an emergency berm could become a primary oceanfront sand dune by referring to language in the DHEC 2019 Beachfront Jurisdictional Line Stakeholder Workgroup final report: "Emergency berms that have been created as temporary barriers do not constitute a primary oceanfront sand dune unless the berm is situated along the historical footprint of an actual dune system and exhibits the characteristics of the defined primary oceanfront sand dune." The DHEC 2019 Beachfront Jurisdictional Line Stakeholder Workgroup report goes to setting the primary oceanfront sand dune for jurisdictional baseline purposes, not a primary oceanfront sand dune for construction purposes. As such, Mr. Muller's reliance on this language is misplaced. Moreover, Muller seems to overlook the last clause of this sentence that allows for an emergency berm to take on the characteristics of a primary oceanfront

[17] Administrative agencies may "'fill the details' by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose" *Heyward v. South Carolina Tax Commission*, 240 S.C. 347, 355, 126 S.E.2d 15, 20 (1962). Nevertheless, an agency may never add an inconsistency to the statutory framework. *See Hay v. South Carolina Tax Commission*, 273 S.C. 269, 273-274, 255 S.E.2d 837, 840 (1979)("Although the South Carolina Tax Commission is vested with rule making power for the purposes of carrying out legislative will expressed in statutory term, it has No authority to enact new laws in the nature of regulations to satisfy its own theory of income tax.") The second and third sentences of Regulation 30-1(D)(44) are not inconsistent with § 48-39-10(I); instead they provide detail to assist the Department in locating a primary oceanfront sand dune when the dune is used for the purpose of setting a jurisdictional baseline.

sand dune. For the purpose of siting the Varns' home, Slagel relied upon a clear elevation change compared to the beach and the landward side of the dune, as well as the vegetation on the top of the dune and seaward of it, which indicated a dune feature. The seaward toe of the dune is marked by a clear change in the slope or the grade, where a change occurs from relatively flat beach to the dune. Based on these observations of the topography at 410 Palmetto Boulevard, Mr. Slagel flagged the landward toe of the primary oceanfront sand dune. Further, Mr. Eiser testified that based on his review of historical maps of the area, the feature was laid upon the footprint of a historical sand dune.

Mr. Muller's belief that an emergency berm can never become a primary oceanfront sand dune serves to explain his contention that the true primary oceanfront sand dune here is located at the baseline which runs adjacent to Palmetto Boulevard. S.C. Code Ann. § 48-39-285. In pertinent part, § 48-39-285(A) sets forth the following:

> Notwithstanding the provisions of Section 48-39-280, the department must initiate a new baseline cycle by no sooner than January 1, 2024. Until the department establishes a new baseline and setback line affecting a landowner as part of that establishment cycle, the baseline and setback line in effect for the landowner are the most seaward of the following, respectively:
>
> (1)(a) the baseline established during the 2008 through 2012 establishment cycle; or
> (b) the baseline proposed by the department on October 6, 2017; and
> (2)(a) the setback line established during the 2008 through 2012 establishment cycle; or
> (b) the setback line proposed by the department on October 6, 2017. (emphasis added)

Mr. Eiser acknowledged during his testimony that during the 2008 establishment cycle, the primary oceanfront sand dune identified for the Varns' home did not exist. Regulation 30-1(D)(4) specifies, in part, that "[w]ithin a standard erosion zone the baseline is established at the location of the crest of the primary oceanfront sand dune." Muller rightly asserts that in order to establish the baseline, the primary oceanfront sand dune had to first be identified. He then posits that the only primary oceanfront sand dune for 410 Palmetto Boulevard is the sand dune used to set "SCDHEC-ORCM Baseline 2009/2018" which runs alongside Palmetto Boulevard.

While Mr. Muller's reasoning fails to take into account the placement of the emergency berm, which, as this Court has concluded, has transformed into a primary oceanfront sand dune

within the meaning of § 48-39-10(I), his assertions also point out why the second and third sentences of Regulation 30-1(D)(44) are necessary. As discussed earlier, these sentences seek to distinguish the statutory primary oceanfront sand dune ("dune or dunes that constitute the front row of dunes adjacent to the Atlantic Ocean") from the primary oceanfront sand dune which must meet certain measurement requirements to establish the jurisdictional baseline. There are obvious differences between a primary oceanfront sand dune for the purposes of establishing a jurisdictional baseline as opposed to a primary oceanfront sand dune for marking where construction seaward of the baseline may be allowed. This case illustrates the need for such a distinction so that the Varns' property is not rendered unmarketable.

D. Any Disruption to Vegetation, turtle nesting sites and beach erosion will be mitigated by the Special and General Conditions attached to the Permit.

At various points during the hearing, Mr. Muller also challenged the Varns' OCRM Permit based on harm that the construction process itself would cause to the area. There is the potential that the proposed construction at 410 Palmetto Boulevard – currently an undeveloped lot – will create environmental problems. However, the Court finds that the Special and General Conditions imposed on the Varns' Permit will sufficiently mitigate any such problems.

E. The Motion to Reopen Is Denied.

Mr. Muller's Motion to Reopen was filed on March 22, 2022 requesting the Court to consider what he describes as new evidence which should impact this matter:

> Since the conclusion of the hearing I have collected copious photographic evidence that the berm is now seriously eroded and has not functioned as a primary dune. At and within 500' of 410 there are escarpments (disqualifying the feature as a dune) measuring 36", and vegetation is not holding. There are areas where the berm has been 100% eroded and has since been replaced by the Town with just a pile of sand and no feature of a dune including no vegetation.

The Varns' reply asserts that the Motion to Reopen is premature inasmuch as it was filed prior to the decision in this case being rendered. They also assert that the Motion has no merit and should be denied because "newly discovered evidence must be such that it will probably change the result of a trial." The Court agrees that the Motion to Reopen is premature. There is no Administrative Law Court rule that addresses reopening the Record in a pending case to accept "newly discovered evidence." However, SCALC Rule 68 allows a party to rely upon the South Carolina Rules of Civil Procedure (SCRCP) to resolve matters not addressed by the ALC rules. SCRCP 60(b)(2) provides an avenue to obtain relief from a judgement where "newly discovered

evidence by which due diligence could not have been discovered in time to move for a new trial under Rule 59(b) [SCRCP]." A motion under Rule 60, SCRCP on this basis shall be made within a reasonable time, and not more than one year after the judgment, order or proceeding was entered or taken. Because Muller's Motion to Reopen was made prior to the issuance of the Court's Final Order in this case, it is premature and therefore, is denied. The Court does not express any opinion on the Varns' argument going to the substance and effect of the evidence Muller describes.

CONCLUSION

Upon hearing all of the testimony and reviewing the evidence, I find the action of the Department in issuing Special Permit OCRM02808 to Respondents Carla Varn DuPre and Jasper B. Varn, III is supported by the evidence and the applicable regulatory and statutory requirements.

IT IS, THEREFORE, ORDERED, that the authorization for the OCRM Permit be, and it is hereby, **AFFIRMED**.

AND IT IS SO ORDERED.

June 7, 2022
Columbia, SC

Milton G. Kimpson, Judge
South Carolina Administrative Law Court

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
Honorable Milton G. Kimpson, Administrative Law Judge
Case No.: 2021-ALJ-07-0144-CC

Appellate Case No.: 2023-000441

Stephen Mueller, ... Appellant,

v.

South Carolina Department of Health and Environmental Control, and
Carla Varn DuPre and Jasper B. Varn, III, ... Respondents.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that I have this date, April 4, 2023, served this Return to Appellant's Motion to Disregard upon all parties to this appeal, and/or their attorneys, by depositing a copy hereof in the United States mail, postage paid, and by electronic mail to the following:

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Mary D. Shahid
Member
Admitted in SC

April 4, 2023

VIA EMAIL & U.S. MAIL

Jenny Adams Kitchings
South Carolina Court of Appeals
Clerk of Court
1220 Senate Street
Columbia, SC 29201

Re: Appellate Case No.: 2023-000441

Dear Madam Clerk:

Please find enclosed and original and six copies of a Respondents' Joint Return to Motion to Disregard in the above referenced appeal filed by Stephen Mueller.

Very truly yours,

Mary D. Shahid

cc: Stephen Mueller (via email)
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