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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden, Administrative Law Judge

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

Robert Klomparens and Whitney Klomparens ..... Respondents,

v.

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

Respondents' Initial Brief

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June 6, 2023
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STATEMENT OF THE CASE

Respondents (Petitioners in the lower court), Robert Klomparens and Whitney Klomparens, are the owners of a property located in Mt. Pleasant, Charleston County identified as TMS # 535-14-00-026. The property is located in Creekside Park Subdivision at 706 Creekside Drive (hereinafter "706 Creekside.") Respondents acquired 706 Creekside on September 16, 2014. [Klomparens Ex. 5] Respondents submitted an application to obtain a dock permit for private, recreational use to Appellant South Carolina Department of Health and Environmental Control ("DHEC" or "Department") on September 28, 2020 [Klomparens Ex. 2] The permit application was accompanied by the required drawings and depiction of a proposed dock extending to a tributary of Shem Creek prepared by Respondents' registered professional engineer and surveyor, Lewis E. Seabrook. [Klomparens Ex. 7]

The Department denied Respondents' permit application by letter dated June 11, 2021. [Klomparens Ex. 3] Respondents initiated the review processes as required in S.C. Code Ann. Sec. 44-1-60 by seeking review of the decision to deny the permit from the Board of Health and Environmental Control ("Board") on June 23, 2021. The Board denied review on July 16, 2021, and Respondents initiated a contested case by filing with the South Carolina Administrative Law Court ("ALC") on August 12, 2021.

The contested case was assigned to the Honorable Deborah Durden, Administrative Law Judge ("ALJ") on August 18, 2021. A contested case hearing was conducted on April 25, 2022. Judge Durden issued her Final Order on

September 6, 2022. [Final Order] The Department filed a Motion for Reconsideration on September 26, 2022. [Motion] Respondents filed their Return to the Motion to Reconsider on October 4, 2022. [Return] The Department filed its Reply on October 10, 2022 and Judge Durden issued an Order Denying Respondent's Motion for Reconsideration on October 25, 2022. [Order on Reconsideration] This appeal followed.

STATEMENT OF FACTS

Respondents hired a licensed professional surveyor who also possesses an engineering license, Lewis Seabrook, to prepare the permit application now at issue in this case. In support of the permit application, Seabrook prepared, obtained approval for, and recorded a plat of 706 Creekside. [Klomparens Ex. 12] The plat indicates property boundaries originating on Creekside Drive, extending northwest, connecting with an iron pipe property pin on one side (southwestern) and an iron rebar property pin on the other side (northwestern) [Klomparens Ex. 12]. Those pins mark the location of two separate property line segments that extend to a tributary of Shem Creek. [Klomparens Ex. 7 "Plan Lot" Klomparens Ex. 12]

Cooper Estates Subdivision was constructed on the opposite side of the tributary to Shem Creek from Creekside Park Subdivision, where the Respondents propose to construct a dock. The center line of that tributary is a shared boundary line between the two subdivisions. [Tr. p. 70, l. 17, p. 73 l. 4-10, l.17-25, Klomparens Ex. 25 and 26, DHEC Ex. 3] Multiple docks have been permitted and constructed within the segments of property boundary lines that extend through

the marsh and to the tributary. [Klomparens Ex. 16A, 16B, 17A, 17B, 18A, 18B, 19A, 19B, 20A, 20B, 21A, 21B, 22A, 22B] Aerial imagery shows docks located on both sides of the tributary extending on one side of the marsh from Cooper Estates and on the other side from Creekside. [Klomparens Ex. 8, 9, 10] The lots bounding the marshes of the tributary of Shem Creek share similar configurations with 706 Creekside, as Charleston County GIS depicts property lines that extend to the center line of the tributary. [Klomparens Ex. 8, 9, 10.] Several of the depicted lots share the same "pipe stem" configuration as 706 Creekside with docks located within the "stem."

The governing regulation at issue is a regulatory definition promulgated by the Department to aid in identifying waterfront property:

> 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. S.C. Code Reg. 30-1(D)(53).

Upon its review of the Respondents' permit application the Department concluded that Respondents' property lines were shore parallel and not shore perpendicular. As explained by the Department, when the line segments originating at Creekside Drive are extended, they extend over the neighbor's adjoining lot and not to the marsh adjacent to the tributary or the tributary. [Tr. p. 157 l. 2-19.] As such, the Department concluded that the shoreline for 706 Creekside Drive was not located between and at the end of the property segments extending to the tributary but instead, in the direction of the multiple other docks located north of 706 Creekside

Drive. [Klomparens Ex.4, p. 0016] The Department issued a denial letter informing Respondents of the following basis for its decision - "your property does not meet the regulatory definition of waterfront property and therefore is not eligible for a dock." [Klomparens Ex. 3.]

In the absence of a dock, Respondents have been accessing the tributary to Shem Creek by backing a boat into the water behind Respondents' home, at high tide, and entering the tributary. The photographs provided depict Respondent Robert Klomparens in a small boat navigating between the property lines extending to the tributary. [Klomparens Ex. 23 A and 23 B, Tr. p. 26, l. 3 – p. 27, l. 1-17] In preparation for construction of a dock Respondents obtained a permit from the United States Army Corps of Engineers (Corps). [Klomparens Ex. 6] The Corps identifies the location of the dock as "navigable waters of the United States." [Klomparens Ex. 6 page 1 paragraph 1.]

Prior to denial of Respondents' permit application, the Department notified Respondent of "deficiencies" in the permit application. [Klomparens Ex. 1] The Department referenced "current alignment of the upland property lines (not the marsh lines)" do not satisfy the definition of waterfront property. The Department also referenced a permit denial for a nearby lot. In their response to the deficiency letter [DHEC Ex. 1, p. 062-065] and at the hearing before the ALJ Respondents relied extensively on the testimony of their professional surveyor and engineer, Lewis Seabrook, as discussed more fully in arguments set forth herein.

As Mr. Seabrook testified, the Department failed to recognize that the northern and southern property lines of 706 Creekside, while consisting of two

segments, are each one line, originating on Creekside Drive. [Klomparens Ex. 26, Tr. p. 72 l. 3-25, p. 73 l. 1-25, p. 74 l. 1-25, p. 75 l. 6-12.] As both a licensed surveyor and an engineer, Mr. Seabrook is knowledgeable of the legal definition of "boundary line":

> *Any line bounding an area or dividing separate properties; adequately dimensioned and described. Such lines may be straight, irregular, circular, or spiral*." S.C. Code Reg. 49-430 (C)(1).

As noted by the ALJ, "[m]etes and bounds are the boundary lines of land, with their terminal points and angles." [Final Order p. 7] Mr. Seabrook, knowledgeable of the regulatory definition of waterfront property, determined that the boundary lines for Lot 706 originated in upland and extended into the tributary of Shem Creek by following the bearings and distances of the lines as they turned to the Creek. [Tr. p. 75 l. 6-12, p. 115 l. 3-10, p. 116 l. 5-9, p. 78 l. 9-18 Klomparens Ex. 12.] Throughout the process of reviewing the permit application, the Department refused to acknowledge the entirety of the boundary line and only focused on the initial segment extending from Creekside Drive on both sides of the property. This is inconsistent with a plain reading of the regulatory definition. Moreover, existing aerial imagery indicates an inconsistency as to how the regulatory definition may have been applied in the areas surrounding 706 Creekside Drive. [Klomparens Ex. 8, 9, 10; DHEC Ex. 1, p. 070-071]

In order to support its position, the Department relied on two contradictory and confusing theories. First, the Department asserted that the shoreline at 706 Creekside was parallel to the Klomparens' seawall and faced the multiple other docks to the north of 706 Creekside. [DHEC Ex. 1 p. 56, Tr. p. 165 l. 15-21, Tr. p.

167 l. 1-16.] The seawall was constructed by Respondents to control erosion caused by the rising tide within the pipe-stem section of Respondents' boundary lines.

The Department identified the area north of 706 Creekside as "shoreline" to refute the claim that the property boundaries extended generally shore perpendicular, as required in the regulation. [DHEC Ex. 1, p. 074] If the boundary lines for 706 Creekside that originate on Creekside Drive are extended from the bearings of the first line segment, such lines will cross over existing docks and not reach navigable water [Klomparens Ex. 11.] Department witness Blair Williams testified that "the shoreline is – is an interface between upland and critical area. The upland and critical area is here. That – this – this way is all marsh. This here is upland." Upon clarification of his statement Williams concluded that the existing bulkhead was the shoreline. [Tr. p. 205-210]

The Department selected the area seaward of the bulkhead as "the shoreline," upon which the Department could then evaluate whether 706 Creekside Dr. qualified for a dock. [Tr. p. 205 l. 4-25, p. 208 l. 11-14.] The Department next created straight line extensions of the first segment of the boundary lines of Respondents' property and concluded these extensions failed to reach navigable water within a thousand feet.

"Shoreline" is "defined as 'the line where a body of water and the shore meet.'" (Sourced from Miriam Webster Dictionary.) [Final Order p. 6] Our courts, in the development of a body of water law, have recognized the characteristics of the natural flow of water. "Respondents' land is higher in elevation,

and water naturally flows from respondents' property to petitioner's property." Lucas v. Rawl Family Ltd. Partnership, 359 S.C. 505, 598 S.E.2d 712 (S.C. 2004). It is generally understood and accepted that water flows to the lowest point and the only thing that stops such flow is an elevation. The fact that tidal flow from the tributary of Shem Creek flows up under existing docks in Creekside and into the marsh under these existing docks does not mean there are two separate shorelines. It means that water will naturally flow from a navigable stream into the low elevations of surrounding marsh until it is blocked from flow by construction or by higher elevations, as water does not run uphill.

The Department's second focus was whether Respondents had any ownership interest in the lands located within the pipe stem. Although marsh ownership is not referenced in the regulatory definition, the Department's witnesses stated repeatedly that if Respondents owned the land described herein as "within the pipe stem" then their claim of right to construct a dock would be more heavily weighted. [Tr. p. 175, l. 5-14, p. 173 l. 14-25, p. 174 l. 1-10, Klomparens Ex. 4 p. 3 last paragraph, Tr. p. 212 l. 21-25.] The following testimony was elicited by the Department's counsel when questioning the Department's witness Jacquelyn Adams:

> Q: Okay, and when you say there's been no claim of marsh ownership, what is – what is the – who owns – presumptively owns the tidelands?
>
> A: The State. The State.
>
> Q: The State of South Carolina?
>
> A: Un-huh.

Q: Okay. And that would apply to all of these yellow lines that are going out into the marsh that are purporting to – to show marsh ownership by all these lots up and down Scotland Drive and Creekside Drives. That without what you described as a quiet title actions would not be for permitting purposes needing to be privately owned marsh. Would that be fair to say?

A: Yes.

Q: Okay. Now if someone is claiming marsh ownership, do you reach out to them to – to take any action to – prove that?

A: Yes.

Q: And what – what is that when you reach out to them?

A: Well, if they claim marsh ownership, there are steps that – for them to take within a certain time frame to be able to file with the court.

[Tr. p. 153 -154]

When asked in cross examination why a quiet title action would have made a difference in evaluating whether the property was waterfront, Ms. Adams replied "because I would be extending the upland lines. I'm not extending – we're not – the Department's not extending these marsh lines. The marsh lines are in the area where the State is presumed to own." [Tr. p. 173-174]

Like Mr. Williams' claim that 706 Creekside is not waterfront because the shoreline is where the bulkhead is located and the property line extensions don't reach navigable water within 1,000 feet, Ms. Adams' claim that this matter would be handled differently if Respondents had demonstrated ownership of the marsh is nonsensical. How does marsh ownership allow the regulatory definition to fit? When asked how establishment of marsh ownership would suddenly render the permit application more favorable treatment, Department witness Blair Williams

testified that “If there was a king’s grant with an attorney’s opinion, that they actually physically own the marsh, and basically they are providing marsh ownership, then those extended property lines would essentially become a continuation of property that they own, that have right to. It’s not – It’s within the public trust kind of analysis. It – it’s still there. It’s kind of like a building permit, can we get a building permit. But the - the – he would – he would assert that he has or the confirmation that he has ownership of that marsh.” [Tr. p. 211-212]

As established by the foregoing, the Department improperly truncated Respondents’ property lines, refusing to acknowledge that the line segments extending to the tributary of Shem Creek remain boundary lines. The Department ignored and rejected evidence provided by Respondents’ surveyor that the line segment classified by the Department as “marsh lines,” if distinguished as the Department insisted on from the entirety of the boundary line, also originated in upland. To justify these conclusions, the Department invented theories about the location of the shore in relation to Respondents’ property and to the need to establish private ownership of the marsh, ignoring the fact that it is the Department’s responsibility to grant license or permission to use the State-owned marsh to riparian owners. [DHEC Ex. 1 p. 48-49, p. 53, p. 57, p. 60, p. 74. Klomparens Ex 1, Ex. 2 p. 0032, Klomparens Ex. 4 p. 0016-17, Klomparens Ex. 12 critical line. Regulatory Definition of Waterfront property.] The ALJ properly rejected these theories and applied the regulation as written.

SUMMARY OF ARGUMENT

While reviewing courts typically defer to the agency's interpretation of an applicable statute, an agency interpretation is subject to rejection where the plain

language of a statute or regulation is contrary to the agency's interpretation. As a general rule, an agency should not apply subtle or forced construction in order to limit or expand the meaning of a regulation. Importantly, the agency has the ability to promulgate a new regulation if the existing regulation does not express what the agency intended. 706 Creekside is bounded on the north and south by two boundary lines that originate in upland and extend to Shem Creek. The determination that the two boundary lines are actually four lines and that the lines within the pipe stem section of the lot are meaningless is forced construction limiting the meaning of the regulatory definition. [Tr. p. 141 l. 12-25, p. 142 l. 1-12, p. 203 l. 13-25, p. 204 l. 1-2, p. 201 l. 11-22, p. 210 l. 10-22.]

The Coastal Tidelands and Wetlands Act, S. C. Code Ann. Sec. 48-39-10 *et seq*., recognizes the existence of competing uses of the State's tidelands. The competing uses include "recreation." S.C. Code Ann. Sec. 48-39-20(B). And while protection of tidelands is clearly a policy and goal of the Act, promoting economic and social improvement of citizens of the coastal zone is of equal importance. S.C. Code Ann. Sec. 48-39-30(B)(1).

Moreover, the Department ties this interpretation to concerns regarding protection of use, access, and navigation of the public.[1] In Jowers v. SCDHEC, 423 S.C. 343, 815 S.E.2d 446 (S.C. 2018), this State's Supreme Court recognized the common law right of riparian owners to make reasonable use of the water. Docks are ubiquitous in the State's coastal zone. Jacqueline Adams, only a three-year employee at the time of the hearing before the ALJ, testified that she had

[1] Appellant's Brief, page 8.

reviewed and processed approximately 500 critical area applications of which 400 were for private recreational docks. [Tr. p. 147, l. 2-18] Blair Williams, a 17-year employee, has acknowledged review of thousands of applications. [Tr. p. 201, l. 25.]

ARGUMENT

A. *There is no evidence in the pre-decisional documents to support Appellant's claim that construction of a dock at 706 Creekside will impact navigation and public use of coastal tidelands and wetlands.*

Appellant justifies its construction of the regulatory definition of waterfront property by claiming such construction is warranted to protect public navigation. [Tr. p. 199 l. 1-16.] S.C. Code Reg. 30-12(1)(A) endows Appellant with authority to deny or condition a permit if construction of a dock impacts navigation. "Docks and piers shall be limited to one structure per parcel or lot and in all instances, parcels or lots must be waterfront as defined by 30-1D.(53), **shall not restrict the reasonable navigation or public use of State lands and waters** …" (Emphasis added.) If the dock proposed by Respondents has the potential to impact public navigation, such potential is a basis for denial.

The application deficiency letter supplied to Respondents identifies failure to comply with the regulatory definition but is silent as to a determination of navigable impacts. [Klomparens Ex. 1] Moreover, there are no findings in the Department's Technical Summary of Review related to navigational concerns and the Department's primary concern appears to be consistency with the regulatory

definition.[2] [Klomparens Ex. 2] Appellant's denial letter is supported by the conclusion that Respondents' property does not satisfy the regulatory definition of waterfront property but does not reference any finding that Respondent's proposal harms navigation. [Klomparens Ex. 3] In its Technical Summary of Review, provided to the Board, the Department places great emphasis on the regulatory definition as the basis for denial without any reference to a potential for navigational impediments. [Klomparens Ex. 4]

Admittedly, the Department's reference to protection of navigation is supplied as justification for its interpretation of the regulatory definition. If this Court rejects the Department's interpretation, it is important for this Court to understand, and Respondents assure, that construction of the minimal docking structure proposed by Respondents will have no impact on navigation or use of the public trust waterways. [Final Order p. 11 remand instructions. Tr. p. 181 l. 11-25, p. 182 l. 1-3, p. 40 l. 1-25, p. 41 l. 1-8.]

B. ***Respondents are not required to demonstrate King's Grant title to the marsh when making application with the State's licensing agency to construct a dock over marsh.***

Appellant claims first that the boundary lines extending to a tributary of Shem Creek are not considered under the regulatory definition. But, Appellant clouds that claim by stating that this permit application may have been handled differently if Respondents could demonstrate title to the marsh located within the pipe stem section of the boundary lines. [Tr. p. 142 l. 1-23, p. 153 l. 1-10, p. 154 l.

[2] A neighboring property owner on Creekside Drive expressed concern during the public comment period regarding the proximity of Respondents' proposed dock to any dock the neighbor might construct.

1-25, p. 157 l. 2-19, p. 165 l. 4-21, p. 170 l. 6-24, p. 173 l. 15-25, p. 174 l. 1-10, p. 183 l. 10-25.] "Where wharfing out is not a littoral right and title to marshlands rests in the state, the requisite permission to erect a dock or similar structure by one not owning the underlying land usually is obtained through a regulatory licensing procedures." In South Carolina, regulatory authority is vested in DHEC's Office of Coastal Resource Management. *See* Sierra Club v. Kiawah Resort Assoc., 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995) ("[U]nder the South Carolina Coastal Management Act, the State through the [Office of Coastal Resource Management] maintains control over the public trust [tide]lands.") Lowcountry Open Land Trust v. State, 347 S.C. 96, 552 S.E.2d 778 (Ct. App. 2001).

Although the Department has attempted to tie marsh ownership to its ability to recognize the full extent of Respondents' property lines, it must be understood that the Department is authorized to grant a license (in the form of a permit) for dock construction *without* concern over whether the marsh is privately owned. [Tr. p. 197 l. 1-25, p. 211 l. 25, p. 212 l. 1-25.] The Department imposes unspoken limitations to the regulatory definition by refusing to consider described and platted boundary lines absent demonstration of private ownership. This is in contradiction to the Department's regulations that permits do not convey property rights. S.C. Code Reg. 30-4(2)(E) ("No permit shall convey, nor be interpreted to convey, a property right in the land or water in which the permitted activity is located."); S.C. Code Reg. 30-8(A) ("All permits issued by the Department are revocable licenses.").

C. *Respondents have riparian rights to access the tributary of Shem Creek.*

As was demonstrated by Respondents through photographs of the area between the pipe stem section of the boundary lines, that area is inundated at high tide and provides a direct connection to the tributary of Shem Creek. [Klomparens Ex. 23A, B, C, D] And, while hastily rejected by the Department as having no meaning or import, the Army Corps of Engineers – the federal agency charged with identification and protection of navigable waters of the United States – has identified the area within the pipe-stem depicted in Respondents' photos as navigable waters. [DHEC Ex. 1 pg. 60-61, Komparens Ex. 6.]

This Court has recognized the existence of riparian rights.

> Under the common law, owners of land along rivers, streams, lakes and other bodies of water possess a property right incident to their ownership of the bank and bed of a watercourse that is distinct from those rights that may be enjoyed by the public at large. In general, these special rights allow abutting landowners to make "reasonable use" of the body of water for any lawful purpose, whether for commerce or recreation. Lowe v. Ottaray Mills, 93 S.C. 420, 421–22, 77 S.E. 135, 136 (1913). These rights are subject to the limitation that the use may not interfere with the like rights of those above, below, or on the opposite shore. *See* Mason v. Apalache Mills, 81 S.C. 554, 559, 62 S.E. 399, 401 (1908). With regard to these rights, there is a distinction in classification that our courts have indicated a desire to strictly observe: owners of land along rivers and streams are said to hold "riparian" rights, while owners of land abutting oceans, seas, or lakes, are said to hold "littoral" rights. White's Mill Colony, Inc. v. Williams, 363 S.C. 117, 609 S.E.2d 811 (Ct. App. 2005).

Respondents' riparian rights, or ability to construct a dock, have been eliminated by the Department's interpretation of its regulatory definition. Certainly, the Department is vested with the authority to adopt and enforce a definition of waterfront property. But, the Department's interpretation of the regulation and

confusing rationale underlying that interpretation is subject to scrutiny by this Court.

In Neal v. Brown and SCDHEC, 374 S.C. 641, 649 S.E.2d 164, (Ct. App. 2007) this Court reviewed the Department's interpretation of S.C. Code Reg. 30-12(A)(1)(o):

> This section applies to lots subdivided or resubdivided after May 23, 1993.
>
> (i) To be eligible for a private or commercial dock, a lot must have:
>
> (a) 75 feet of frontage at the marsh edge, and
> (b) 75 feet between its extended property lines at the location in the waterbody of the proposed dock.
>
> (ii) Joint use docks will be considered for adjacent waterfront properties each of which must have:
>
> (a) 50 feet of frontage at the marsh edge, and
> (b) 50 feet between its extended property lines at the location in the waterbody of the proposed dock.

The Department had initially concluded, in determining whether Neal qualified for a dock permit, that a new, recently-recorded plat of Neal's property constituted a subdivision after 1993, thus disqualifying Neal. Later, the Department conceded that the filing of a new plat was not the equivalent of a subdivision, which had initially occurred in 1940. This Court upheld the Department's conclusions that the 75' feet of waterfrontage requirement was inapplicable to Neal's permit application.

The South Carolina Supreme Court reversed the conclusions of this Court upholding the staff's interpretation:

> We find that the Court of Appeals erred in granting [staff] testimony deference over the Panel's interpretation for two reasons. First, as we have previously held, an agency's Appellate Panel, not its staff,

> is typically entitled to deference in interpreting agency regulations. S.C. Coastal Conservation League v. S.C. Dep't of Health & Env. Control, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005). The majority of the Court of Appeals should have deferred to the Panel's interpretation, rather than [staff].
>
> Second, the regulatory language is clear and unambiguous, and the Court of Appeals erred in interpreting the regulation to permit the issuance of a dock permit. "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). In our reading, the distinction between a "survey" and a "plat" is illusory. The key question is whether a piece of real property was mapped and recorded for the first time after the effective date of May 23, 1993. [Staff] testimony indicates that he believed the regulation was intended to prevent the owners of newly-*subdivided* lots from building docks on less than seventy-five feet of water frontage. However, this could have been easily incorporated into the language of the regulation if this was the true intent. We believe the plain language of the regulation indicates that it was intended to prevent owners of all newly created lots—whether subdivided or amalgamated (as in the present case)—from building docks on less than seventy-five feet of water frontage. Notwithstanding staff's involvement in the drafting of the regulation, the Panel is entitled to deference in interpreting its own regulation, and it found that the regulation prevented the granting of a permit in this case. In our view, the plain language of the regulation supports this interpretation.

Neal v. Brown and SCDHEC, 383 S.C. 619, 682 S.E.2d 268, 270-271 (S.C. 2009).

D. ***In this instance, agency staff is not entitled to deference.***

In support of the Supreme Court's conclusions regarding which entity – staff or review board – is entitled to deference, the Chief Judge of the Administrative Law Court, Judge Ralph King Anderson, III, determined that the Department staff should not be afforded deference in matters of interpretation of regulation in Steve Harry v. SCDHEC, Docket No. 09-ALJ-07-0255, 2010 WL 8425978 (SCALC July 15, 2010). Moreover, the fact that the Board (Appellant Panel is no longer in existence) declined review may not be interpreted as the Board adopting the staff's rationale for its permitting decision.

> Thus, the Department propounds that if the Board chooses not to conduct a review conference, whatever underlying interpretations it made in reaching its decision are by implication adopted as the board's interpretation. This reasoning is fundamentally flawed.
>
> In Conservation League, the Court recognized that "[c]ourts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ." S.C. Coastal Conservation League v. S.C. Department of Health & Environmental Control, 363 S.C. 67, 610 S.E.2d 482 (2005) Nevertheless, this deference has limits.
>
> For instance, it is the interpretations of DHEC's Board, not its staff, which are entitled to deference from the courts. Id. *See also* Randy R. Lowell and Stephen P. Bates, South Carolina Administrative Practice and Procedure 15-18 (2004). The basis of the Court's reasoning was the recognition that the Department's Board, and not its staff, is the policymaker for the Department and thus possesses the authority to establish its interpretation of its regulatory and statutory provisions. The fact that the Board chooses not to review a matter neither relegates that authority to the Department's staff nor creates an implicit affirmation of the staff's underlying interpretation of the law in reaching their decision. Without an explicit statutory explanation by the General Assembly to the contrary, the Board's decision not to review a matter means nothing more than it chose not to have further input.

Harry v. SCDHEC, 2010 WL 8425978 at 4-5.

Matters similar to what concerned Judge Anderson regarding affording staff deference are present here in the trial record before the ALJ. Blair Williams, employed by the Department for 17 years, was asked how often he has made determinations related to platted boundary line into the marsh. Williams responded "I've seen some areas that --- I don't recall off the top of my head. But we've dealt with areas similar to this." When asked if he could recall the location of these areas he replied "Not off the top of my head." [Tr. p. 202, l. 1-10]

Similarly, Ms. Adams, the Department's project manager, when asked if she could identify another instance similar to the Klomparens decision she replied "[n]ot of the top of my head, no." [Tr. p. 177-178]

E. ***The regulatory definition of waterfront property is not ambiguous.***

The decision to extend deference to an agency interpretation is triggered only upon a conclusion that a regulation is ambiguous. The ALJ concluded that "[t]he Departments' definition of waterfront property is clear." [Final Order p. 10.] "*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*."

The Department concluded that "[t]he current alignment of the upland property lines for 706 Creekside (observed on Charleston County GIS and the submitted plan are shore parallel and do not meet the Department's regulatory definition of waterfront property." [Klomparens Ex. 2] This is not an acknowledgment of ambiguity but is a deficiency in understanding the difference

between a line segment and a property line. Identical rationale was provided to the Board – "[t]he current alignment of the upland property lines (not marsh lines) for 706 Creekside…is generally shore parallel and do not meet the Department's regulatory definition of waterfront property." [Komparens Ex. 4, p. 0016]

The Department's witness, Jacqueline Adams, Project Manager, quickly identified the Department's concerns and conclusions in her testimony as "whether or not the lot was waterfront.' [Tr. p. 153, l. 7-9.] There is no indication of any struggle by the Department with applying its interpretation to the regulatory definition to 706 Creekside. Ms. Adams testified that she applied the definition of waterfront property as being restricted to "generally shore perpendicular upland property lines" with regard to the Klomparens' application as she had with all applications. Ms. Adams also concurred with DHEC's counsel that she had never applied the regulation in the manner that the Klomparens seek to have it applied. [Tr. p. 168, l. 1-10.] This testimony does not support a theory that Ms. Adams was confronted with an ambiguity in applying the regulation.

Similarly, Blair Williams' testimony does not indicate that Department staff considered the regulation ambiguous. He testified that he applied the regulatory definition in the same manner that he has since 2008. [Tr. p. 188-189] He simply gave no weight to the line segments extending to the tributary of Shem Creek.

Consequently, there is no evidence to support that the Department applied rules of construction or interpretation when evaluating the Klomparens' permit application. Respondents' position is that the Department committed legal error in not attaching any weight to what it referred to as "marsh lines" in evaluating

whether 706 Creekside is waterfront. When forced to defend its decision, Department staff claimed that the application required a quiet title action, even though Respondents are not seeking to have title declared to the marsh and are merely requesting a license from the appropriate agency to construct in the marsh. [Tr. p. 211, l. 23-25, p. 212 l. 1-12.]

Department staff further claims that they apply the regulation in this manner in order to protect trust resources and navigation. [Tr. p. 199 l. 4-16.] However, there is no indication that the Department was ever concerned about the dock impacting navigation in the tributary. Appellants further refer to S.C. Code Ann. Sec. 48-39-30(B) (Legislative Policies) as supporting the staff's conclusions:

> (2) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations;
>
> (3) To formulate a comprehensive tidelands protection program.

As noted herein, the legislature has recognized competing uses and interests in coastal tidelands and wetlands and included the following policy in Sec. 48-39-30(B):

> (1) To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone.

Clearly, in referencing economic and social improvement, the legislature also assigned value to a property owner's ability to access water for recreational purposes.[3]

The ALJ relied upon the testimony of Respondents' witness Lewis Seabrook, who was qualified as an expert in the identification and location of boundary lines. [Tr. p. 66, l. 15 – p. 67, l. 7] In accordance with S.C. Code Ann. Sec. 40-22-20, a land surveyor:

> (1) locates, relocates, establishes, reestablishes, lays out, or retraces any property line or boundary of any tract of land or any road, right-of-way, easement, alignment, or elevation of any fixed works embraced within the practice of land surveying, or makes any survey for the subdivision of land;
>
> (2) determines, by the use of principles of land surveying, the position for any survey monument or reference point; or sets, resets, or replaces such monument or reference; determines the topographic configuration or contour of the earth's surface with terrestrial measurements; conducts hydrographic surveys;

Consequently, where a regulatory definition refers to the identification of generally shore perpendicular upland property lines, a licensed surveyor is qualified to identify those described lines. [Final Order ALC p. 4.] Seabrook identified the boundary lines of 706 Creekside by first referencing the original subdivision plat. He identified both boundary lines that originate on Creekside Drive separately as "one continuous line … the property line." [Tr. p. 72, l. 1-25, p. 73, l. 1-25] He noted

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[3] The increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, residential development, **recreation**, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal and harvesting of fish, shellfish and other living marine resources have resulted in the decline or loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use and shoreline erosion. S.C. Code Ann. Sec. 48-39-20, *et. seq*. (Emphasis added.)

that both lines turn to extend to the tributary of Shem Creek. When asked how to determine where the lines turn he replies that "[t]here are bearings on – on the property lines, plural, from which angles can be calculated to show the change in direction."[4] [Tr. p. 73, l. 22-25, p. 74, l. 1-3] A review of the deed of conveyance to Respondents includes the following property description:

> All that certain piece, parcel, or lot of land, together with any improvements thereon, situate, lying and being in Creekside Park Subdivision in the Town of Mount Pleasant, County of Charleston State of South Carolina and being known and designated as Lot No. 15 Block C, on a plat of said Subdivision by EM Seabrook Jr., Inc., dated July 31, 1968 and duly recorded in the Office of the RMC for Charleston County, SC, in Plat Book X at Page 129. Said lot having such size, shape, metes, bounds, and dimensions as are shown on said plat, with reference thereto being craved for a more complete and full description. AND All of Grantor's right, title and interest in and to the Marshland lying between Lot 15, Block C, and Shem Creek between the North, South, and West lines of said lot as project to said Creek.[5] [Klomparens Ex. 5]

Importantly, the South Carolina Legislature recognizes that surveyors are the professional qualified to resolve title and boundary disputes.

> Appointment of surveyors where land title in dispute; nomination by parties.
>
> If any cause be pending in any circuit court or within its jurisdiction wherein the title or boundaries of lands shall be brought into dispute, the judge of the court shall appoint surveyors at the nomination of the parties, to survey such lands, at the charge of such parties, and to return such survey, on oath, at the next sitting of the court.

S.C. Code Ann. Sec. 27-1-20.

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[4] As noted by the ALJ, "Metes and bounds are the boundary lines of land with their terminal points and angles." [Final Order p. 7]

[5] Respondents are cognizant that a mere deed to marshland does not convey ownership of the marsh absent a judicial determination as provided in S.C. Code Ann. Sec. 48-39-220. Respondent has no need or desire to claim ownership of the marsh, but only to demonstrate that the property boundaries are platted through the marsh.

In addition to providing expert testimony regarding creation of a new plat for recording and identification of boundary lines, Seabrook provided testimony regarding conditions between the pipe stem, elevations, and whether the property pins marking the inception of the pipe stem were located either above or below the mean high water mark. Klomparens' ownership interest extends to mean high water.

> We have held that in determining the extent of the boundary of a body of land, the same rule does not apply to tidal navigable streams, such as the one in question, that applies to a nonnavigable stream. When a body of land is bounded by a nonnavigable stream, the general rule is that the boundary line is the middle of the stream, whereas, in the case of a tidal navigable stream the boundary line is the high water mark, in the absence of more specific language showing that it was intended to go below high water mark, and the portion between high and low water mark remains in the State in trust for the benefit of the public.

State v. Hardee, 259 S.C. 535, 539, 193 S.E.2d 496, 499 (S.C. 1972).

Here, the ALJ concluded that "[p]roperty below mean high water (MHW) is public trust property. Private property does not exist below mean high water (absent a successful action under S.C. Code Ann. Sec. 48-39-220) and Petitioners own those areas above mean high water that are within the boundary lines of 706 Creekside. [Final Order p. 3] The ALJ also noted that the permit drawings prepared by Seabrook located MHW seaward of the starting position of the planned dock so that portions of the dock walkway were in areas above MHW. [Final Order p. 3, Klomparens Ex. 7 "Typical Dock Plan"] Seabrook also noted elevations in the areas within the pipe stem approaching 7' (6.9', 6.8', 6.6') and opined that mean high water is "closer to 5.4." [Final Order p. 4 Klomparens Ex. 14, pp. 9-10]

Consequently, if ownership is that standard that the Department is to apply, Respondents own the areas within the pipe stem where the dock originates.

> An "upland" owner is one holding title to land bordering a body of water. *lowel's Law Dictionary* 1540 (6th ed.1990). "Wharfing out" describes the "[e]xercise of [an **upland** owner's] right to construct or maintain a wharf," including "a pier, a dock, or a related structure[,] to permit effective access to and from the water." *Waters and Water Rights,* § 6.01(a)(2) (Robert E. Beck ed., 1991). Lowcountry Open Land Trust v. State, 347 S.C. 96, 552 S.E.2d 778 (SC Ct. App. 2001) fn 7.

As lands above MHW are private property, there is no reasonable dispute as to whether Respondents' ownership interest extends into the pipe stem. The Department refused to acknowledge such interest as it insisted that the entirety of the pipe-stem was critical area and there was no upland within the pipe stem. Much of the Department's opposition was that the lines dictating the pipe stem did not originate in upland but are in critical area. [Tr. p. 213 l. 8-9, p. 202 l. 16-21

This argument fails because 1) the line segment is part of an existing boundary line, not a separate line, that indisputably originates in upland; 2) uncontested elevations provided by a licensed, professional surveyor indicate areas above MHW and subject to private ownership, where the dock will initiate; and 3) the critical line depicted on the newly recorded plat indicates the northwestern property pin outside of the critical line segment marked L-14/15.[6]

[6] It is interesting to note here that a critical line, the boundary between critical area and unregulated land, consists of multiple segments always identified in the manner reflected on Klomparens Ex. 12 as multiple line segments – L1, L2, etc. Yet the Department would never dissect the critical line into individual segments and, instead, refers to the segments as a whole as the critical line. For whatever reason the Department applies a different rational to a property line and separates it into different segments treated as separate lines. [Tr. p. 203 l. 20-25, p. 204 l. 1-2.]

This was noted by the Department as a basis to rebut Respondents' claim that there is upland within the pipe stem. [Tr. p. 183 l. 10-25.] However, Seabrook found that the data establishing the critical line included a corruption identifying the "apex" of L14 and L15. Seabrook provided photos of that area, testified that elevations were in the realm of 7', and concluded that the pin marking the longest of the lines extending to the tributary originated in upland. [Final Order p. 7-8], [Klomparens' Ex. 15A- I].

F. ***The ALJ placed considerable weight on the testimony of Lewis Seabrook and there is substantial evidence to support the ALJ's conclusions.***

This Court's standard of review includes an admonition to refrain from substituting its judgment for the judgment of the ALJ regarding the weight of the evidence.

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision 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. Sec. 1-23-610(B).

> The decision of the [ALC] should not be overturned unless it is unsupported by substantial evidence or controlled by some error of

> law." Original Blue Ribbon Taxi Corp. v. SC Department of Motor Vehicles, 380 S.C. 600, 604, 670 S.E.2d 674, 676. "The court of appeals may reverse or modify the decision only if the appellant's substantive rights have been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion, or affected by other error of law." SGM-Moonglo, Inc. v. S.C. Dep't of Revenue, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (Ct. App. 2008).

McEntire Produce Inc. v. SC Department of Revenue, 439 S.C. 238, 246, 886 S.E.2d 697, 701 (Ct. App. 2023).

Mr. Seabrook provided a considerable amount of expert testimony regarding the location of boundary lines at 706 Creekside, resulting in substantial evidence to support the ALJ's findings and conclusions. Mr. Seabrook has worked as an engineer and surveyor for 43 years at the company E. M. Seabrook, Jr., Inc. [Tr. p. 57, l. 10] He has flagged a proximately 200 critical lines for purposes of obtaining OCRM approval and for surveying purposes. [Tr. p. 60.] Seabrook noted that he has been qualified as an expert by the Master-in-Equity in land surveying "many times." [Tr. p. 63, l. 2-23.] He acknowledged being bound by a code of conduct and ethics and testified that he would never use his expertise to "stretch" the truth just to confirm a client's position. [Tr. p. 65-66.] The ALJ admitted Seabrook, over no objection, as an expert in land surveying which includes the location and direction of boundary lines. [Tr. p. 66.]

Seabrook reviewed Klomparens' Exhibit 12, the plat he prepared, and identified the property pins that indicate the point of inception of the lines extending towards the tributary of Shem Creek. The pins are located proximate to L-13 and L-1, line segments labeled as part of the critical line. He testified that the boundary

lines of 706 Creekside are, on both sides, one continuous line extending to the tributary of Shem Creek. His ability to locate the position of these lines is based on the existence of bearings which allow for the calculation of angles. [Tr. p. 72-74.] According to Seabrook, the bearings "give me an angle to calculate to determine the change in direction of that segment of the property line." [Tr. p. 76, l. 12-14.] He observed that the pins forming the inception of the lines extending to the tributary are in upland. [Tr. p. 78, l. 10-18.] "Well, those points – those lines – portions of the lines start on the upland for sure." [Tr. p. 83, l. 8-16.]

Mr. Seabrook addressed the "apex of L14 and L15" as depicted on the plat, Exhibit 12. Prior to re-examining this issue, Seabrook had described the pin as located "on the edge of the highland and the edge of the critical area." [Tr. p. 85, l. 21-25.] To gain clarity on this location Seabrook sent his crew to re-install flags at the points identifying the critical line. "We installed new stakes with blue flagging on them to indicate where the certified critical line was located." [Tr. p. 87, l. 21-25.] The blue flags confirmed that the critical line was as originally depicted on Exhibit 12, with the exception of the location of the line at L-14 and L-15. Based on Seabrook's onsite observation – the area flagged as critical line at L-14 and L-15 was "way up into the property and clearly is not critical area." Tr. p. 90, l. 11-15. The Court asked for clarification and the blue flag behind the four small boards in Ex. 15A represents the corrupt point and is located at least one foot upland from the critical line. [Tr. p. 95, l. 20-25, p. 96, l. 1-10.]

Seabrook explained the potential for corruption in surveying data. "So in this particular instance, a single data point appears to be wrong. It's not corruption

of the – of the file data because the whole file would have been corrupt a significant portion of the file would have been corrupted. So the only thing that could possibly have happened is that something interfered with the beam, the laser from the total station to the prism." [Tr. p. 98] "[T]here is no way to tell that you're getting incorrect information until you put it on paper and take a look at it and compare it to what it looks like on the ground, which is the exercise we went through last week." [Tr. p. 100.] Seabrook prepared Exhibit 13 to illustrate his testimony that the property pin of the longer of the two sides of the pipe stem, described as a five-eighth rebar, is located 8 inches landward of the critical line. Exhibit 13 indicates elevations of 6.8 and 6.9, above MHW and in upland. Seabrook noted on observation that "there is no critical line vegetation on the house side of these four boards" as shown in Exhibit 15A. [Tr. p. 100, l. 23-25.] He inspected the property at high tide and water did not reach the four boards or the area of the blue flag behind the four boards. [Tr. p. 101, l. 2-10.] The pink flag depicted in Ex. 15A – I identifies the location of the 5/8th inch rebar and is behind, or upland, of the blue flags marking the critical line. Importantly, the flag identified in the photos that is behind the four wooden blocks is the corrupt position noted to be upland from the critical line. "[I]t is pretty clear that the pink flag is inland from the blue flags." [Tr. p. 114, l. 13-14.]

This Court may wonder why so much attention is focused on the result of an 8" separation between the property pin and the critical line. As explained by Seabrook, 8" is the distance perpendicular from the critical line – he measured a straight line from the pink flag to the area between the two blue flags. [Tr. p. 115, l. 3-4.] Seabrook referred to Klomparens Ex. 11, testifying that "[a]s you are going

from right to left on that photograph along the yellow line, it crosses dirt and tree, and a little more dirt before it starts getting into what is commonly considered critical area." [Tr. p. 115, l. 19-23.] This supports Seabrook's conclusion that "the [boundary] line turns at that point and traverses more than eight inches of highland." [Tr. p. 115, l. 6-10.] Seabrook's observations are based on physical inspection and observation of the property. [Tr. p. 115, l. 24-25, p. 226 l. 1-4.]

As relates to the shorter of the two lines forming the pipe stem, the property pin is landward of the critical line (the critical area is located on the opposite side of L-1 from the pin). [Klomparens Ex. 12] Seabrook has personally inspected 706 Creekside on four separate occasions. [Tr. p. 69, l. 23-25.] Based on these inspections Seabrook concluded that both pins are in upland, although the primary focus of his testimony was the area bounded by L-14/15 (described in testimony as the northeastern corner). [Tr. p. 78, l. 16-25.] In its initial staff response to the Board, Ex. 4, the Department does not refute that the property pins originate in upland but instead states that "specific plotted points that are landward of the critical line … does not make the property waterfront." [DHEC Ex. 1, p. 0017]

Jacqueline Adams inspected 706 Creekside for the first time a week prior to the contested case hearing. [Tr. p. 176, l. 11 – 23.] The purpose of her visit was to inspect the pin located in the vicinity of L15. [Tr. p. 176, l. 22-25.] Prior to that, and before making a permit decision, Ms. Adams had not inspected 706 Creekside. [Tr. p. 177, l. 2-8.] Ms. Adams acknowledged that an upland property line is a line that originates in upland. [Tr. p. 179, l. 22-25.] Adams acknowledged that according to Exhibit 12, the point of origination of the shorter of the lines extending

to the tributary was landward of the critical line and in upland. [Tr. p. 181, l. 1-11.] Mr. Williams testified that he is "not confident that both lines originate in the upland." [Tr. p. 213 l. 8-9.] He, like Ms. Adams, visited 706 Creekside on one occasion, a week before the hearing.

The Department acknowledges that an upland line is a line that originates in upland. [Tr. p. 179 l. 23-25.] The overwhelming weight of the evidence is that one data point was corrupt in the critical line survey and incorrectly reflected a property pin seaward of the critical area. Upon correction the property pin is landward of the critical area. The other property pin has always been landward of the critical area [Klomparens Ex. 12]. Williams' lack of confidence as to whether the lines extending to the tributary of Shem Creek originate in upland is not sufficient to defeat the photographs, elevations, analysis, and inspections conducted by Seabrook and his team. It is apparent that the Department's decision to deny the permit rests on its refusal to consider the turn or angle in the property boundary and the Department's opinion regarding the character of the property where the pins are located is not supported with elevations, photographs, analysis of vegetation, or any of the number of things that would indicate lands below MHW or within the critical area.

> This Court is tasked with determining whether the ALJ's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. [T]his Court's review is limited to determining whether the ALC's findings were supported by substantial evidence or were controlled by an error of law." Engaging & Guarding Laurens Cnty.'s Env't v. S.C. Dep't of Health & Env't Control, 407 S.C. 334, 341, 755 S.E.2d 444, 448 (2014). Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below." CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C.

> 67, 74, 716 S.E.2d 877, 881 (2011). The [c]ourt may not substitute its judgment for the ALC's judgment as to the weight of the evidence on questions of fact." Engaging & Guarding Laurens Cnty.'s Env't, 407 S.C. at 342, 755 S.E.2d at 448. In determining whether the ALC's decision was supported by substantial evidence, this court need only find that, upon looking at the entire record on appeal, there is evidence from which reasonable minds could reach the same conclusion that the ALC reached. Geohagan v. SCDEW, 439 S.C. 14, 28, 885 S.E 2d 422, 429 (Ct. App. 2023).

As to findings and conclusions regarding the points of origination of the property pins, the ALJ determined that both the northwestern and southwestern line segments originate in upland. [Final Order p. 9] In so finding the ALJ placed significant weight on the expert testimony of Lewis Seabrook. Such findings are accurate, not erroneous, based on Mr. Seabrook's familiarity with 706 Creekside, his extensive analysis including determining whether the critical line in the vicinity of the northwestern pin was an accurate compilation of the collected survey data.

There was little to no focus on the part of the Department's witnesses as to the conditions surrounding the northwestern and southwestern pins. The Department was almost exclusively focused on determining that the property boundaries were shore parallel, not shore perpendicular.

G. *The ALJ did not commit an error of law in concluding that the Department's application of the regulatory definition was not entitled to deference.*

The ALJ concluded:

> 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 line. 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 of the extension in the tributary. [Final Order p. 19.]

According to the South Carolina Supreme Court:

> As repeatedly stated in our decisions, our deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations "unless there is a compelling reason to differ." Accordingly, the deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons. We defer to an agency interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute.

Kiawah Development Partners v. SCDHEC et al., 411 S.C. 16, 34, 766 S.E.2d 707, 718 (S.C. 2014).

Here, there are compelling reasons to reject the Department's "interpretation" of the regulatory definition. First, the Department's action defies the "plain language" of the regulatory definition.

> Because we already found the ALC correctly determined ATVs and UTVs are motor vehicles under section 12-36-2110(A), we also find the ALC correctly found SCDOR's interpretation of section 12-36-2110(A) was not entitled to deference. *See* Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836 838 (2003) (holding that while this court typically defers to the agency's interpretation of an applicable statute, we will reject its interpretation where the plain language of the statute is contrary to the agency's interpretation); Be Mi, Inc. v. S.C. Dep't of Revenue, 408 S.C. 290 298, 758 S.E.2d 737, 741 (Ct.App. 2014) ("Words in a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's application." (quoting Epstein v. Coastal Timber Co., 393 S.C. 276, 285, 711 S.E.2d 912 917 (2011)); CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 77, 716 S.E.2d 877, 882 (2011) (stating courts will reject an agency's interpretation if it conflicts with the statute's plain language). We also find the ALC correctly found SCDOR is not entitled to deference of its interpretation of Title 56, which is administered by SCDMV, not SCDOR. *See* Brown, 354 S.C. at 440, 581 S.E.2d at

> 838 (recognizing this court generally gives deference to an administrative agency's interpretation of an applicable statute).

Jack's Custom Cycles, Inc. v. SCDNR, 439 S.C. 35, 42, 885 S.E.2d 433, 437 (Ct. App. 2023).

The Department's construction is "forced," as it hinges on explanations requiring quiet title actions and as it reflects an inaccurate understanding of boundary lines. Moreover, it operates to limit the regulatory definition's scope and application. Finally, while the Department claims that it has always applied this definition in the manner applied here, it is unable to recall or provide an example of similar instances.

The particulars of the regulatory definition of "waterfront property" are:

1. Waterfront property will generally be defined as upland sites.

2. Where a straight-line extension of both, generally shore perpendicular, upland property lines reaches a navigable watercourse within 1000' of the marsh critical line.

S.C. Code Reg. 30-1D.(50).

There is substantial evidence to support the findings and conclusions that an upland property line is one that originates in upland. [Tr. p. 179, l. 23-25.] The Department's witness conceded that point. [Tr. p. 179 l. 23-25.] There is substantial evidence to conclude that the pipe-stem lines originate in upland. Finally, there is substantial evidence to demonstrate that the property pins creating what is described as the northeastern and northwestern line segments, are upland property lines and are straight line extensions, generally shore perpendicular, to a navigable watercourse. The plain language of the regulatory definition is in conflict

with the Department's application. These are compelling reasons for the ALJ to reject the Department's conclusions that 706 Creekside is not a waterfront property in accordance with the regulatory definition. The Department's inaccurate conclusions regarding the nature of described and platted boundary lines is arbitrary and capricious as its witnesses acknowledge that the property pins in question originate in upland and, based on their testimony, are therefore the originating point of upland property lines. [Tr. p. 100 l. 23-25, p. 101 l. 2-10, p. 114 l. 13-14.]

H. ***The ALC correctly found that the Department failed to raise the issue regarding the impact of a neighbor's potential claim of ownership of marsh property in a timely manner and with sufficient specificity to preserve the issue for appeal as required by South Carolina law.***

While parties are given multiple opportunities through both the permitting process and the pre-trial ALC process to identify significant issues associated with a critical area permit application, the Department's counsel attempted to raise a new issue with the permit application by a single question during the cross examination of Respondents' expert, Lewis Seabrook as to whether Mr. Seabrook requested any permission from Respondents' neighbors "across the creek." [Tr. p. 134]. After receiving an answer in the negative, counsel asked no follow up questions on the issue. The Department's Proposed Order mentioned, again, Mr. Seabrook's admission that no such permission was ever sought, but, again, provided no context for the significance of the admission other than suggesting that a GIS map could be considered evidence of a purported claim of marsh owners for the Klomparens' cross creek neighbors. As will be explained below, this suggestion is incorrect.

Counsel then, for the first time, in the Department's Motion for Reconsideration, set forth an expanded theory that this lack of permission consequently prevented the Klomparens' permit application from any further evaluation due to a claim of marsh ownership the Department perceived exists for the neighbors that is equivalent to the Klomparens' claim. However, as the Department's witnesses made very clear, the Klomparens did not assert any claim of ownership of the marsh during the permitting process. Instead, Respondents appropriately pursued their permit application to obtain a license authorizing them to use the marsh. Before the Department's Motion for Reconsideration, the only evidence in the record associated with Counsel's claim is that Mr. Seabrook did not notify the owner across the creek.

First, it must be understood that the Department has no authority establishing depictions of property lines on GIS maps as sufficient evidence of property boundaries. It has already been argued that the expertise of a land surveyor is required to interpret property boundaries. In fact, the entry page to the website where the very GIS map cited in the Department's brief is located conveys a clear disclaimer warning against using it as DHEC suggested:

Second, it is a settled rule of South Carolina law that "an appellate court cannot address an issue unless it was raised to and ruled upon by the [lower] court." Chastain v. Hiltabidle, 381 S.C. 508, 514–15, 673 S.E.2d 826, 829 (Ct. App. 2009). Appellant first raised the arguments recited above in the Motion for Reconsideration filed regarding the ALC's Final Order. [DHEC's Motion to Reconsider, p. 19.] This was too late. "[A] party may not raise an issue in a motion

to reconsider, alter or amend a judgment that could have been presented prior to the judgment." Kiawah Prop. Owners Group v. Pub. Serv. Comm'n of S.C., 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004), citing Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (1995).

As the ALC recognized, the Department failed to timely raise the argument that a neighbor's potential claim of ownership of marsh property as an obstacle to the permit because it failed to make this expanded argument at the hearing or in the Proposed Final Order filed with the Court. Instead, the Department's Counsel stopped short in both instances after confirming Mr. Seabrook's admission of no permission being sought. Department's counsel declined additional explanation when it was offered by Mr. Seabrook. [Tr. p. 136, l. 8-12]. Mr. Seabrook's admission alone did not convey anything about a position ever previously taken by the Department that lack of permission had prevented further processing of the Respondents' application. In order to be preserved, an issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge. Herron v. Century BMW, 719 S.E.2d 640 (2011).

Moreover, it is unclear why the cross creek neighbor would have any concern about the proposed dock crossing the small area of marsh appearing to lie within their boundary lines since that owner already has a dock extending into the tributary on the opposite side from where the dock as proposed by the Klomparens would be located. It is also unclear why the Department raised this issue when there are other docks clearly visible on GIS extending through a

neighbor's marsh, including a dock extending from 1019 Scotland Drive, which is adjacent to the Klomparens property and extends into the cross creek neighbor's marsh raised by the Department as an issue.

Under OCRM regulations, it is the burden of the purported marsh owner to have title declared under S.C. Code Ann. Sec. 48-39-220 to marsh to block or prevent docks. The lack of permission had never been identified as a deficiency to Respondents' application or even raised by the Department during the application process. It is unclear how this single point - that a property owner across the creek was not notified of the permit application - should be considered material to the Department's success in this appeal when it certainly was not material during the Department's lengthy review of the application. If, at the eleventh hour, the agency decides that the application is deficient because of failure to notify the neighbor across the creek, it would be possible to correct that upon remand which the ALJ has provided for in its Order. But it is also horribly prejudicial to Respondent and it is unclear how it would prejudice the Department if this Court were to determine that the issue wasn't properly preserved. The owner across from Klomparens can, at any time, seek title to its marshland and, if successful, eject the Klomparens or require removal of their dock or even charge them to keep the dock in place. To identify this issue so late in the process, in such a circumspect manner, does little more than to set a trap for Respondents.

CONCLUSION

Wherefore, Respondent respectfully asks the Court to affirm the decision of the Administrative Law Court.

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