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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.

REPONDENTS' JOINT INITIAL BRIEF

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STATEMENT OF THE CASE

On February 10, 2021, the South Carolina Department of Health and Environmental Control ("DHEC" or "Department"), through its Office of Ocean and Coastal Resource Management ("OCRM"), issued a permit - #OCRM02808 – ("Permit") to Respondents Carla Varn DuPre and Jasper B. Varn, III ("DuPre and Varn"). The Permit was challenged by Appellant who submitted a request for final review conference to the Board of Health and Environmental Control (the "Board"). The Board declined review and Appellant filed a Request for Contested Case with the South Carolina Administrative Law Court ("SCALC"). The case was assigned to the Honorable Milton G. Kimpson, Administrative Law Judge ("ALJ"). A contested case hearing was conducted on November 8, 2021. Nearly five months after the completion of the hearing, but before a Final Order was issued, Appellant filed a Motion to "to introduce crucial evidence" on March 22, 2022 based on alleged newly discovered evidence. DuPre and Varn responded to Appellant's March 22, 2022 Motion. **(Appellant's March 22 email and attachments) (Respondents' Return to Petitioner's Motion to Re-Open Record.)**

The ALJ issued the Final Order in the case underlying this appeal on June 7, 2022. The Final Order addresses the contested case filed by Appellant challenging the Department's action in authorizing construction of a 2-story residential structure with 1,335 square feet of heated space on each floor at 410 Palmetto Boulevard, Edisto Beach. 410 Palmetto Boulevard is an undeveloped beachfront lot owned by Respondents Dupre and Varn. Appellant characterized the OCRM Permit issued by the Department as an "illegal permit" because he believed the authorized construction would impact the primary oceanfront sand dune in direct violation of the Department's statutory

requirements for construction on beachfront properties. The ALJ concluded that the action of Department, in authorizing the Permit, was supported by the evidence and consistent with the applicable regulatory and statutory requirements. In addition, the ALJ denied Appellant's Motion to Introduce Crucial Evidence in the Final Order:

> *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.* **(ALC Final Order and Decision Pages 16-22.)**

Subsequently, on November 28, 2022, Appellant attempted to move for Relief from the Final Order, contending that it contained errors of law and that relief was warranted under SCRCP 60(b), again because of alleged newly discovered evidence. Respondents DuPre and Varn filed a Return to the motion on December 12, 2022, arguing that the ALC lacked jurisdiction because the time to file any post-trial motion had already passed. Respondents also argued that it was appropriate for the Court to deny Appellant's second attempt to introduce new evidence to the record because Appellant had already tried the strategy, *albeit* applying a different title to the motion, and been denied. **(Motion to Re-open and Exhibits) (Respondents' Return.)**

The ALJ denied the Motion for Relief on March 3, 2023:

> *Here the Court chooses not to reopen this case under SCRCP Rule 60(b)(1) or (2). To the extent Petitioner believes that there are changes in the character of the beach at 410 Palmetto Boulevard that warrant regulatory intervention, the Court finds that the proper avenue for Petitioner is to proceed through the Department and its regulatory staff.*

On March 9, 2023, by electronic mail directed to the Court, Appellant attempted to file a Notice of Appeal with this Court *pro se*. This Court sent Appellant the first of several deficiency letters issued to address problems with his attempted filings. Appellant was given notice of his failure to send the required Proof of Service with the Notice of Appeal he attempted to file, and further instructed that the Notice was incorrectly formatted. Appellant failed to address the deficiencies of his initial filing before the deadline provided in the Court's letter. In fact, he failed to file anything until March 28, 2023.

On March 29, 2023, Respondents filed their first Joint Motion to Dismiss Petition for Appeal with this Court based on the untimeliness of Appellant's attempt to appeal the Final Order. On May 24, 2023, this Court issued an Order granting Respondents' motion to dismiss, in part, but allowing Appellant to continue with his appeal of the denial of Appellant's request for relief under SCRCP Rule 60(b). This Court concluded in its May 24th Order that "*Appellant's appeal of the March 3, 2023 Order denying his Rule 60(b) SCRCP Motion is timely and shall proceed.*"

This appeal concerns the lower court's decisions related to Appellant's March 22, 2022, Motion to Re-Open the Record and November 28, 2022 Motion for Relief from Final Order. In both of these filings the Appellant sought relief based what he claims to be new and or "crucial" evidence. Importantly, this appeal does not concern the merits of the Final Order and Decision of the lower court, including the lower court's findings regarding whether the emergency berm on Edisto Beach is properly designated as a primary oceanfront sand dune. "Rule 60(b) motions are made by parties seeking relief from a judgment for some reason other than the merits of the case." C-Sculptures, LLC, No. 3 v. Brown, 393 S. C. 27, 709 S. E. 2d 705 (2011 Ct.App).

STATEMENT OF FACTS

Respondents DuPre and Varn are the record owners of an undeveloped oceanfront lot located at 410 Palmetto Boulevard, Edisto Beach, South Carolina. Appellant owns 407 Palmetto Boulevard, an improved property with a residential structure, located across the street from the Respondents' property. It is noteworthy that the testimony before the lower court reflects that Appellant is, at least in part, motivated to block issuance of Respondents Dupre's and Varn's permit because of concerns of losing his unobstructed view of the Atlantic Ocean. Tr. p. 221, l. 22-25. P. 222, l. 14-25, p. 223 l. 1-10.

This appeal initiated with the issuance of a permit by the Department to Respondents DuPre and Varn, Permit # OCRM02808 (the "Permit") authorizing the construction of a two-story residential structure located seaward of the baseline as established by DHEC on Edisto Beach. As explained in the lower court's Final Order, "[t]he 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. Sec. 48-39-280. The second line, also established by the Department, is called the setback line and is located landward from the baseline. The baseline and setback lines represent the Department's efforts to accommodate changing shorelines and to regulate construction along moving shoreline as it is charged to do under South Carolina law." **(Final Order SC ALC dated June 7, 2022, p. 2).**

The Permit includes the following description of the project:

> *The plans submitted by you, attached hereto, show the work consists of constructing an elevated 2-story residential habitable structure partially seaward of the DHEC-OCRM Baseline. Specifically, the habitable structure will have an approximate 25' x 55' footprint with 1,335 square feet of heated*

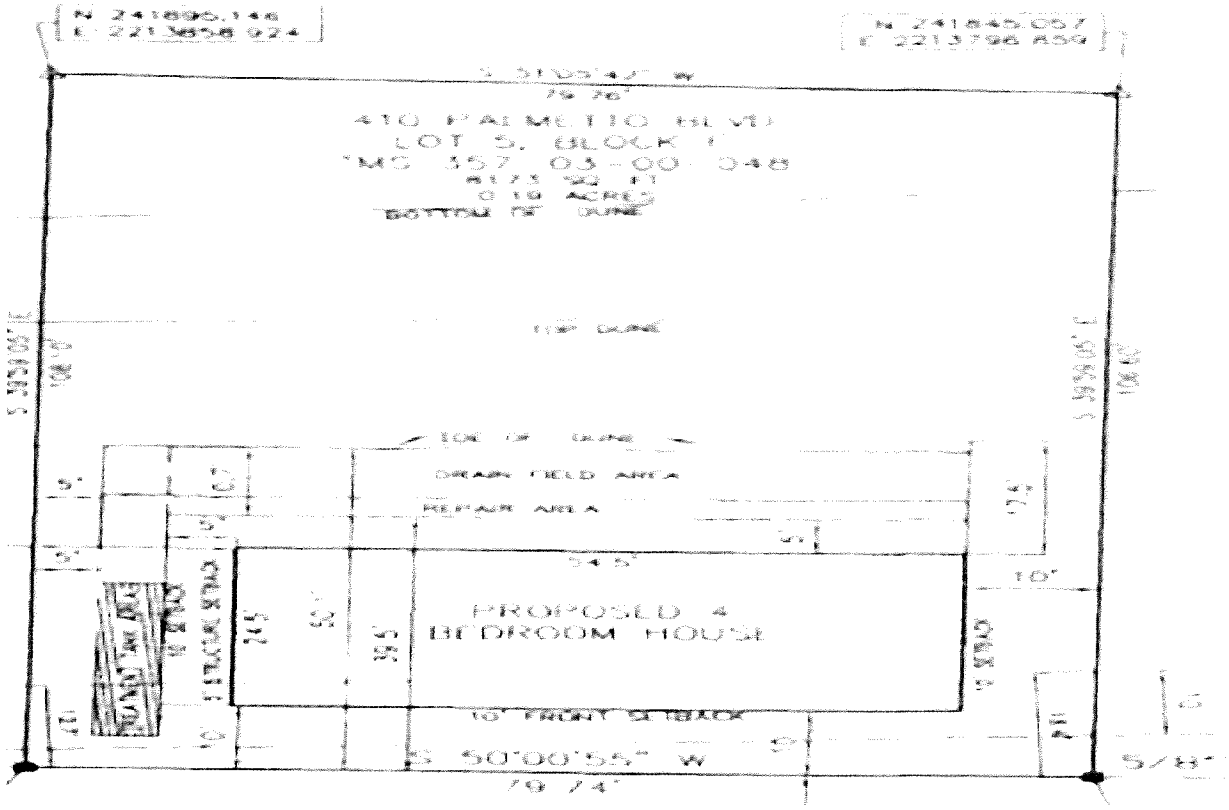
space on each floor, resulting in a total heated square footage of 2,670 square feet. The purpose of the project is to construct a habitable structure for private residential use.

The Permit also included binding, protective conditions, in particular Special Condition #1:

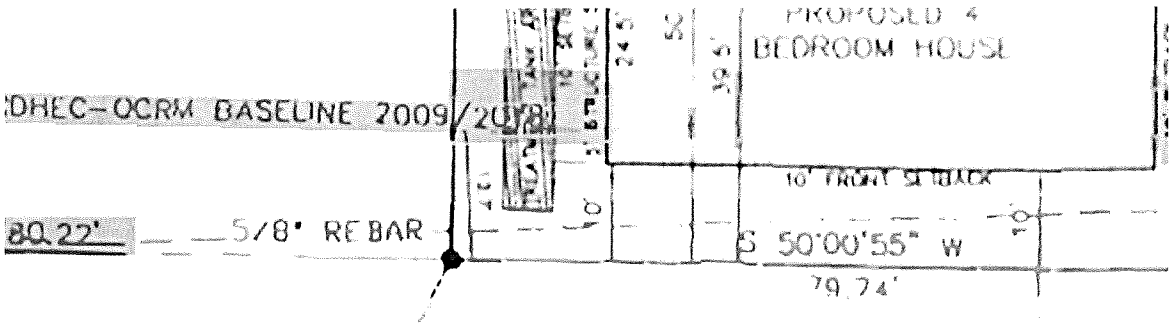
> *In the event that the beach erodes so that in the future the permitted habitable structure is located on the active beach, the permittee agrees to remove the structure at his own expense if and when the Department orders its removal. By signing this permit, the permittee agrees to remove the habitable structure if it becomes located on the active beach.* **(Permit)**

At issue in the underlying case is whether the dune depicted in the excerpt from the Permit below as "toe of dune," "top dune," and "bottom of dune" was correctly determined by DHEC to be a primary ocean front sand dune. The significance of this designation derives from the requirements of S. C. Code Ann. Sec. 48-39-290(D) authorizing "Special Permits" on the beachfront: [T]he department may issue a special permit to the applicant authorizing the construction or reconstruction [seaward of the baseline] if the structure is not constructed or reconstructed on a primary oceanfront sand dune or on the active beach. Notably, the permit drawing below indicates that all construction is landward of the "toe of the dune."

Appellant argued before the lower court that the dune located on the permit drawings is not the primary dune and claims that the location of the primary dune is adjacent to Palmetto Boulevard at the Department's existing baseline. Appellant further disputes the identification of the dune as the primary oceanfront sand dune because the dune originated as an emergency berm created by the Town of Edisto Beach after damage to the beach from major storm events.



A detailed, close-up portion of the drawing is reproduced below to clarify the location of the baseline:



The basis of the determination of the location of the primary oceanfront sand dune was fully vetted in the contested case hearing. Matt Slagel, the Department's beachfront permitting manager, visited 410 Palmetto Boulevard for purposes of locating and flagging the primary oceanfront sand dune in advance of DuPre and Varn seeking any permits for construction. Mr. Slagel cited and applied the statutory definition of "primary oceanfront sand dune" in accordance with S. C. Code Ann. Sec. 48-39-210(D)(l). The primary oceanfront sand dune "means the dune or dunes that constitute the front row of dunes adjacent to the Atlantic Ocean." **(Tr. p. 21 l. 1-16)** In the context of the contested case hearing the Department referred to this as the "statutory definition." Slagel confirmed that the dune was constructed in response to damage caused by Hurricane Irma and was referred to by the Town as an emergency berm. **(Tr. p. 22 l. 1-25)** Slagel also confirmed that the dune was elevated above the beach and that vegetation appeared on the dune and seaward of the dune. In his examination, Appellant questioned Mr. Slagel about a regulatory definition of a dune that was different from the statutory definition.

> S. C. Code Reg. 30-12(D) (44) Primary Oceanfront Sand Dunes - those dunes that constitute the front row of dunes adjacent to the Atlantic Ocean. ***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 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.

Mr. Slagel testified that he has a degree in Environmental Sciences and a Master of Science Degree in Ocean Sciences. He has been employed by the Department since 2007 and was charged with managing all beachfront applications beginning in January of

2018. **(Tr. p. 78 l. 1-25)** In explaining the purpose of having both a regulatory definition and a statutory definition of a primary oceanfront sand dune, Slagel testified that "within the [regulatory definition] it goes on to say, 'for the purposes of establishing the jurisdictional baseline', and then it lists a number of qualifiers. So the primary oceanfront sand dune ... it's the dune that is closest to the Atlantic Ocean. And then, every seven to ten years, when the Department is evaluating the location of the baseline, that is when we evaluate the criteria to determine if the dune feature is also a baseline dune feature." **(Tr. p. 101 l. 6-24)**

This process as described by Mr. Slagel is consistent with the Department's statutory responsibilities under S. C. Code Ann. Sec. 48-39-280.

> **SECTION 48-39-280.** Beach preservation policy established; notice requirements; appeals procedures.
>
> (A) A policy of beach preservation is established. The department must implement this policy and utilize the best available scientific and historical data in the implementation. The department must establish a baseline that parallels the shoreline for each standard erosion zone and each inlet erosion zone.
>
> (1) **The baseline for each standard erosion zone is established at the location of the crest of the primary oceanfront sand dune in that zone.**
>
> (C) The department must establish baselines and setback lines for all geographic areas where baselines and setback lines were established on or before January 31, 2012. **The baselines and setback lines must be established anew during establishment cycles that are not less than every seven years, but not more than every ten years following a previous establishment cycle and must be based upon the best available data**. Until the department establishes new baselines and setback lines for a geographic area, the existing baselines and setback lines for the geographic area must be used. (emphasis added)

Slagel testified that the Department never applies the regulatory definition in reviewing permits for residential construction seaward of the baseline. **(Tr. p. 102**

l. 1-15) When asked by the lower court to "give me a summary of the purpose, then, of the regulatory definition," Slagel responded:

> [T]he "regulatory definition is primarily used for updating the baseline position, so that red line that we saw on a few of the aerial photographs. And that's why – the regulatory definition, if you look at the first sentence of it, it's almost identical to the statute. They both state that it's one says the dune or dunes, and then the regulatory definition says those dunes. But they both say, that constitute the front row of dunes adjacent to the Atlantic Ocean. And then the regulatory definition then continues, starting with for the purpose for establishing the jurisdictional baseline. And then it lists those other criteria. For our interpretation of that is that those other factors, the 36-inch height, the 500-foot continuity, those come into play when updating the baseline.

(Tr. p. 143 l. 12-25, Tr. p. 144 l.1-6)

Former OCRM employee now private consultant, Bill Eiser, testified and was qualified by the Court as an expert witness in coastal zone management and coastal processes. **(Tr. p. 159 l. 7-9)** Mr. Eiser served on the Beachfront Jurisdictional Line Stakeholder Work Group. In his service on the Work Group he assisted in drafting what became the regulatory definition of a primary oceanfront sand dune. **(Tr. p. 227 l. 25-24)** The Work Group, with the help of OCRM staff, published a report of the Work Group's activities and considerations. The report includes the following: "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 define primary oceanfront sand dune."[1] Notably, this language does not appear in either the statutory or the regulatory definition. Eiser acknowledged that his understanding of the mission of the Work Group was consideration

[1] Eiser testified that this statement in the Work Group's report was not intended to be enforceable but rather a starting point "for OCRM fulfilling that statutory mandate of promulgating a regulation having to do with what is a primary oceanfront sand dune." **(Tr. p. 180-181)**

of the primary oceanfront sand dune as relates to the next round of evaluation of the baselines. **(Tr. p. 183 l. 20-24, Tr. p. 182 l. 10-14.)**

The lower court concluded that the statutory definition, not the regulatory definition, was the definition applicable to evaluation of a permit for residential construction seaward of the baseline. Applying the rules of statutory construction, the lower court concluded that "the plain language of these regulatory provisions state that the measurements (height and length) required by the second and third sentences only become applicable for purposes of establishing the jurisdictional baseline." **(Final Order p. 13-14.)** The lower court ultimately concluded that the emergency berm has transformed into a primary oceanfront sand dune within the meaning of Sec. 48-39-10(D)(l). **(Final Order p. 14-15.)**

This appeal arises from post-trial efforts of Appellant to persuade the lower court to re-open the underlying proceeding for the introduction of photographic evidence depicting the condition of the emergency berm well after conclusion of the contested case hearing but before issuance of the Final Order. On March 22, 2022, Appellant requested that the lower court allow admission of what he described as "crucial evidence ...discovered since the conclusion of the hearing." **(Mueller email 3/28/22)** The evidence described by Appellant depicted erosion of the emergency berm/primary oceanfront sand dune at 410 Palmetto. Respondents Dupre and Varn filed a response to Appellant's efforts to introduce new evidence that included an acknowledgement that there are normal, seasonal fluctuations in the shoreline and erosion is often at its worst during the winter months. Respondents further noted that the permit as issued would not allow construction on the lot if the erosion was so extensive as to render the property "active beach" as defined by the Department. **(Respondents' Carla Varn Dupre and**

Jasper B. Varn, III, Return to Petitioner's Motion to Re-Open Record) eA similar motion was filed on November 28, 2022.

The ALJ's Final Order includes a ruling as to Appellant's efforts to introduce new evidence by way of the March 22, 2022 Motion. **(Final Order p. 16-17.)** The lower court issued its ruling on the November 28, 2022 Motion in a three-page Order issued on March 3, 2023.

> To the extent that Petitioner believes that there are changes in the character of the beach at 410 Palmetto Boulevard that warrant regulatory intervention, the Court finds that the proper avenue for Petitioner is to proceed through the Department and its regulatory staff. **(Order 3/3/23)**[2]

REQUIREMENTS OF APPLICABLE RULE AND STANDARD OF REVIEW

"SCRCP Rule 60(b)(2) authorizes a court to relieve a party or his legal representative from a final judgment or order based on newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule SCRCP 59(b). To obtain a new trial based on newly discovered evidence, **a movant must establish** that the newly discovered evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue, and (5) is not merely cumulative or impeaching." James F. Flanagan S. C. Civil Procedure 484 (2nd ed. 1996) (emphasis added), *cited in* Lanier v. Lanier, 365 S. C. 211, 216, 612 S. E. 2d 459 (Ct. App. 2005). *See also* Jaimson v. Ford Motor Co., 373 S. C. 2248, 272, 644 S. E. 2d 755, 767 (Ct. App. 2007).

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[2] The March 3, 2023 Order is confusing in the manner in which identifies the November 28, 2022 Motion but the email exchange of November 28, 2022 between Appellant and the lower court makes clear that the March 3, 2023 Order is addressing the November 28th, 2022 Motion. **(E-Mail Exchange lower court and Appellant 11/28/22.)**

"Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the trial court. *Coleman v. Dunlap*, 306 S.C. 491, 494, 413 S.E.2d 15, 22 (1992). Therefore, our standard of review is limited to determining whether there was an abuse of discretion. *Raby Const., L.L.P. v. Orr*, 358 S.C. 10, 18, 594 S.E.2d 478, 482 (2004). An abuse of discretion arises when the order was controlled by an error of law or when the order is based on factual conclusions that are without evidentiary support. *Tri–County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990). Southeastern Housing Foundation v. Smith, 380 S. C. 621, 636, 670 S. E. 2d 680, 688 (Ct. App. 2008).

ARGUMENTS

A. Appellant failed to provide information to the lower court to satisfy the requirements for obtaining relief from a judgment and/or new trial based on after-discovered evidence

(1) March 22, 2022 Motion

(2) November 28, 2022 Motion

B Appellant's failure to offer arguments regarding his Motions that reflect compliance with the cited rule and applicable case law supports a finding and conclusion that the lower court's denials of Appellant's motions do not constitute an abuse of discretion.

A (1). Appellant failed to provide information to the lower court to satisfy the requirements for obtaining relief from a judgment and/or new trial based on after-discovered evidence in his Motion of March 22, 2022.

Appellant transmitted an e-mail to Respondents and to the lower court on March 22, 2022, in which Appellant claimed that "*regarding the building and septic permits for 410 Palmetto ... I hereby make a Motion to introduce crucial evidence that I have discovered since the conclusion of the referenced hearing. ... 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 features of a dune including no vegetation. The Town continues to conduct a failing effort to protect existing beachfront property with these temporary measures, to allow further construction in the area is irresponsible." Appellant went on to request the lower court to order a new survey of the property and to require the Department to revisit the property.

Appellant offered no arguments consistent with the demonstration required for relief under SCRCP Rule 60(b)(2) as discussed below.

Will probably change the result if a new trial is granted.

As Respondents argued to the lower court in response to Appellant's concerns regarding erosion of the existing berm that was determined to the primary oceanfront sand dune, it is the norm, not the exception, that beaches in South Carolina erode. That is, in part, why the emergency berm was created and why the Town of Edisto continues to repair the berm. At the time the Permit was issued to DuPre and Varn by OCRM, the berm was in excellent condition and the area landward of the dune was upland, not active beach, as is evidenced by photographs introduced into evidence. **(Respondents' Exhibits 1, 15-A-N, 18 A and 18 B, photos contained in DHEC Ex. 1)** The Permit, however, addresses Appellant's concerns and no construction will be allowed on 410 Palmetto if what was previously considered upland becomes active beach. Note special condition one of the Permit:

(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. **(Permit)**

Respondents' Varn and Dupre possess a Permit that is valid for five years and its term is stayed in held in abeyance during all judicial proceedings. S. C. Code Ann 48-39-150(F).[3] 410 Palmetto Blvd. possessed the attributes necessary to qualify for a permit at the time of issuance and during the pendency of the proceedings before the lower court. If at some point in time 410 Palmetto Blvd. does *not* qualify for construction, the Permit would not be implemented unless and until the beach recovers. The condition of the beach would be assessed before construction begins since construction under any OCRM permit requires a request from the property owner to the Department for a construction placard. That request triggers an inspection of the beachfront by the staff before construction is authorized.

The fact that the beach endured a period of erosion during the winter and early spring of 2022, which is typical coastal dynamics, is not a basis to allow the introduction of new evidence. It is logical to believe that the Town of Edisto Beach will respond to erosion as it has in the past by constructing or repairing the berm. If the Town does not take such action, the dune is flattened and 410 Palmetto Blvd. becomes active beach, Special Condition #1 in the Permit would prevent construction until tidal activity no longer invades the property.

[3] "The time periods required by this subsection must be tolled during the pendency of an administrative or a judicial appeal of the permit issuance."

Certainly Appellant failed to carry his burden of demonstrating to the Court that the Permit as issued does not address his concerns. Nor did Appellant argue that the introduction of his photographs will likely change the outcome of the contested case hearing. The information that Appellant relies upon to seek relief will not have an impact in any new trial, if ordered, as it is immaterial to whether the Permit was properly issued.

Evidence has been discovered since the trial/Could not have been discovered before the trial.

Photos depicting the emergency berm several months after the Permit was issued and after the contested case hearing concluded are highly prejudicial and irrelevant. The Permit is reviewed in accordance with property conditions at the time the Permit is issued. As discussed extensively above the Permit is crafted to provide a remedy to prevent implementation if 410 Palmetto is no longer suitable for construction. A single snapshot in time is not helpful or persuasive in resolving this case. The beach/dune system is designated as "critical areas" and, as noted in S. C. Code Ann. Sec. 48-19-210(B). "Critical areas by their nature are dynamic and subject to change over time."

Is material to the issue.

Importantly, in his Motion, Appellant cites standards that do not apply to evaluation of a dune for purposes of construction of a residential structure on an oceanfront lot. Appellant stated that "*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 features of a dune including no vegetation.*" Appellant is overlooking the fact that the statutory definition of a primary oceanfront sand dune is what dictates the determination of the location of the dune. "Primary oceanfront sand dune means the dune

or dunes that constitute the front row of dunes adjacent to the Atlantic Ocean." S. C. Code Ann. Sec. 48-39-10(D)(l). Whereas the regulatory definition, not applied in this instance and only applied when evaluating and re-evaluating the location of the baseline, requires that a dune demonstrate a height of thirty-six inches, form a continuous ridge for 500 shore parallel feet, and show no evidence of escarpment. S. C. Code Reg. 30-12(D)(44).

The fact that a sand dune may fail to meet the criteria set forth in the regulation, which was adopted to provide guidance to the Department in locating the baseline, is immaterial to the issues in this contested case, which did not involve the collection of data to establish or re-establish the baseline but instead, was related to a permit for residential construction, thereby triggering implementation of the statutory definition.

Is not merely cumulative or impeaching.

The information that Appellant describes as crucial evidence is cumulative as Appellant, throughout the contested case hearing, relied solely on the regulatory definition to support his allegations and not the statutory definition. But, the evidence offered by Appellant is also irrelevant, immaterial, and would not change the outcome of the case and fails the standards necessary to determine if Appellant is entitled to relief under Rule 60(b).

(A)(2) Appellant failed to provide information to the lower court to satisfy the requirements for obtaining relief from a judgment and/or new trial based on after-discovered evidence in his Motion of November 28, 2022.

In the Motion for Relief filed by Appellant with the lower court on November 28, 2022, Appellant had the burden of demonstrating compliance with Rule 60(b)(2), that is,

that the Motion satisfied the five factors set forth by this court for a demonstration under Rule 60(b)(2).

Will probably change the result if a new trial is granted.

Appellant claims that DHEC is required to demonstrate that a primary oceanfront sand dune must be situated at a historical footprint. Appellant further submitted aerial imagery to the Court that he claimed indicated no "historical footprint" in 2007, 2008, 2011, 2012, 2013, 2015. There is no reference in the applicable statutes in Title 48, Chapter 39 (often referred to as the Beachfront Management Act) requiring a primary oceanfront sand dune to be established in a historical footprint. Neither the regulatory nor the statutory definition of primary oceanfront dune, set forth above, require the establishment of a historical dune footprint. Therefore, Appellant's misplaced claims of the significance of the historical dune footprint requirement would not have changed the result of the contested case hearing as those claims bear no relationship to the task of establishing the location of the primary oceanfront sand dune.

Has been discovered since trial/Could not be discovered before trial.

Appellant didn't "discover" evidence. Instead, Appellant did a simple search of the internet for evidence that was available to him all along, but that he failed to present at the contested case hearing. The images proffered by Appellant are available on Google Earth and Charleston County GIS and were available in 2021 prior to the contested case hearing. Two of the images proffered by Appellant in his post-trial motions and referenced in his Brief are found on the Department's website at the "jurisdictional line" link. These images have been available for years and certainly were available prior to the contested

case hearing in 2021. The shoreline depictions from 2009, 2019, 2022, and 2007 that are included in Appellant's brief include the signature "Eagle View Technology Corporation." Eagle View Technologies publishes on its website[4] that it has been in business for a decade providing accurate aerial imagery of property.

Is material to the issue.

As noted above, the requirement of a historical footprint is not included in either the statutory or the regulatory definition of "primary ocean front sand dune." Therefore, any information related to a historical footprint is not material to the issues before the lower court.

Is not merely cumulative or impeaching.

The aerial imagery is used for impeachment purposes. In his November 28, 2022 Motion for Relief, Appellant listed the following reasons why he was entitled to relief, all of which constitute efforts to impeach testimony relied upon by the Court in the Final Order.

- Respondent's Expert was compensated for his testimony.
- Respondent's Expert had lunch with the Department's beachfront permitting manager the day the primary oceanfront sand dune was located and flagged.
- Respondent's Expert Bill Eiser influenced the Department's permitting manager Matt Slagel to make a "very bad decision."
- Mr. Eiser testified under oath that he reviewed aerial photographs of historical dunes, possibly lied, and produced none in evidence

[4] www.Eagleview.com

- Mr. Slagel colluded with Mr. Eiser. **(Appellant's Motion for Relief)**

Of even greater significance, however, is that Appellant failed to address any of the factors set forth above that would support the Motion for Relief. Appellant ignored the elements necessary to carry his burden of proof or create a record that would support a decision by the lower court that Appellant is entitled to the relief requested under Rule 60(b).

B. Appellant's failure to offer arguments regarding his Motions that reflect compliance with the cited rule and applicable case law supports a finding and conclusion that the lower court's denials of Appellant's motions do not constitute an abuse of discretion

"A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief. *Bowers v. Bowers,* 304 S.C. 65, 67, 403 S.E.2d 127, 129 (1991). Whether to grant or deny a motion under Rule 60(b) is within the sound discretion of the trial judge. *Coleman v. Dunlap,* 306 S.C. 491, 494, 413 S.E.2d 15, 22 (1992). On review, we are limited to determining whether the trial court abused its discretion in granting or denying such a motion. *Saro Invs. v. Ocean Holiday P'ship,* 314 S.C. 116, 441 S.E.2d 835, 840 (Ct.App.1994)." "The admission or exclusion of evidence is a matter within the [circuit] court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" *Thompson v. Swicegood*, 430 S.C. 648, 661, 845 S.E.2d 920, 926–27 (Ct. App. 2020) (quoting *Burke v. Republic Parking Sys., Inc.*, 421 S.C. 553, 558, 808 S.E.2d 626, 628 (Ct. App. 2022)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* at 661, 845 S.E.2d at

927 (quoting *Burke*, 421 S.C. at 558, 808 S.E.2d at 628); *see also Haselden v. Davis*, 341 S.C. 486, 497, 534 S.E.2d 295, 301 (Ct. App. 2000) ("Absent a showing of a clear abuse of that discretion, the [circuit] court's admission or rejection of evidence is not subject to reversal on appeal."). *Glenn v. 3M Company* 440 S. C. 34, 890 S. E. 2d 569 (S.C.App. 2023)

Here, Appellant filed two very similar motions seeking to admit photographic evidence after the conclusion of the contested case hearing. In both motions Appellant failed to demonstrate compliance with the five standards set forth herein by which the evidence should be considered. Essentially, the Appellant failed to carry his burden of proof as relates to admission of post-trial evidence. Upon review, much of the evidence sought to be introduced was available to Appellant prior the commencement of the contested case hearing via internet search. The photos of the emergency berm indicating erosion, an escarpment, and other damage were not relevant as the definition of primary oceanfront sand dune for purposes of the issued Permit is simply the dune closest to the Atlantic Ocean (the statutory definition.) But, Appellant continued to assert his position that the regulatory definition of primary oceanfront sand dune was material to the case, when it was clear that the regulatory definition is limited in applicability to the analysis performed by the Department's staff in periodically locating the baseline along South Carolina's various beaches as directed by statute. Moreover, the lower court accurately concluded that the concerns voiced by Appellant over the conditions of the dunes are addressed by the conditions in the Permit which would prohibit construction on the active beach.

There is no basis to conclude that the lower court committed an error of law and certainly no basis upon which to find that the lower court abused its discretion particularly when Appellant made no effort to demonstrate that the proffered evidence satisfied the standards by which the Court may conclude that Appellant is entitled to relief.

CONCLUSION

For the reasons set forth in the arguments above, the lower court did not err in refusing to allow post-trial introduction of evidence in the form of photographs depicting alleged erosion of the emergency berm/primary oceanfront sand dune. Respondents request that the actions of the lower court in denying Appellant's Rule 60(b) Motion be affirmed and Appellant's appeal be dismissed.

Respectfully Submitted,

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