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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden, Administrative Law Judge

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

Robert Klomparens and Whitney Klomparens, ……………………………………Respondents,

v.

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

FINAL REPLY BRIEF OF APPELLANT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

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ARGUMENT

The Department stands by the arguments made in its opening brief. Additionally, the Department offers the following reply to Klomparens' Respondents' Brief.

I. Respondents' argument against deference is without merit.

A. "Generally shore perpendicular" in the regulatory definition of "Waterfront Property" is ambiguous language.

Judge Durden erred in concluding that the regulatory definition of "waterfront property" is not ambiguous.[1] At page 10 of Judge Durden's *Final Order* (R. p. 041), she concludes that the regulatory definition is "clear", ignoring that Mr. Seabrook and the Department each determined that the shoreline was a different location from the shoreline she chose when applying the "generally shore perpendicular" standard. Respondents' Initial Brief likewise ignores the three different regulatory interpretations provided by Judge Durden, Mr. Seabrook and Blair Williams.[2] Furthermore, Respondents' Brief ignores the fact that their interpretation as to where the shoreline is differs from Judge Durden's acknowledgment that there are two equally valid shorelines in applying the regulatory definition. (R. p. 037; *Final Order*, p. 6). The Court of Appeals held that

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[1] S.C. Code Regs. 30-1(D)(54) "Waterfront property - For purposes of these regulations, waterfront property will generally be defined as upland sites where a straight-line extension of both, *generally shore perpendicular*, upland property lines reaches a navigable watercourse within 1000′ of the marsh critical line. Waterfront property may also be identified via an approved dock master plan where designated corridors differing from upland property line extensions are delineated." (Emphasis added).

[2] The three different regulatory interpretations of the words "generally shore perpendicular" in this case are:

A. Blair Williams: the Klomparens' shoreline is at the *almost-completely-bulkheaded* edge of their upland property within their platted property boundary immediately adjacent to the tidelands as shown in Petitioner's Exhibit 23C and D (R. pp. 427 and 428) (i.e., "where that upland meets the saline marsh, that is the shoreline that we're dealing with") (R. p. 318; Trial Tr. 193:6 to 193:8).

B. Mr. Seabrook: the Klomparens' shoreline is the "*whole side of the [Creekside] subdivision*." (R. pp. 203-204; Trial Tr. 78:21 to 79:13).

C. Judge Durden: the Klomparens' shoreline is either where Blair Williams says it is or alternatively, the shoreline is outside the platted property boundary "along the western section of the property, where marsh and critical area are depicted between the property lines as they extend toward the center line of the tributary." (R. p. 037; *Final Order*, p. 6) (Emphasis added).

"[i]f a statute is susceptible to two reasonable interpretations, it is ambiguous." S.C. Dept. of Soc. Services v. Lisa C., 669 S.E.2d 647, 652 (S.C. App. 2008).

The Supreme Court addressed an almost-identical "ambiguity issue" in *Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 413 S.E.2d 13, 14 (S.C. 1991), when multiple experts held differing opinions. In that case, the Supreme Court held that "[t]he trial court's finding the statute is unambiguous is refuted by the variety of expert opinions elicited at trial concerning what should be included for damage assessment of a seawall. Moreover, we find Coastal Council's construction of the statute reasonable and find no compelling reason to overrule it." *Captain's Quarters*, S.E.2d at 14 (citing *Jasper County Tax Assessor v. Westvaco Corp.*, 305 S.C. 346, 409 S.E.2d 333 (1991); *Dunton v. South Carolina Bd. of Examiners in Optometry*, 291 S.C. 221, 353 S.E.2d 132 (1987) (construction of a statute by an agency charged with its administration will be accorded most respectful consideration and will not be overruled absent compelling reasons). (Emphasis added).

Given the varying interpretations in this case, Judge Durden should have recognized the ambiguity in the regulatory language. Then the Department's consistent application of "generally shore perpendicular" for thousands of prior permits is entitled to deference since the ALC did not find the Department's application is "arbitrary, capricious, or manifestly contrary to the statute."[3] *Kiawah Dev. Partners, II v. S.C. Dept. of Health and Envtl. Control*, 766 S.E.2d 707, 718 (S.C. 2014) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). Stated another way, if the Klomparens' 130-foot bulkheaded shoreline within their platted property boundary could *reasonably* be interpreted as "the shoreline" referenced in the regulatory language "generally shore perpendicular,"[4] that interpretation should be upheld. Then all other issues in the

[3] This applies to the interpretation of both statutes and regulations. *Kiawah Dev. Partners, II v. S.C. Dept. of Health and Envtl. Control*, 411 S.C. 16, 32-35, 766 S.E.2d 707, 717-18 (S.C. 2014).
[4] This is the shoreline SCDHEC used in applying S.C. Code Regs. 30-1(D)(54).

Respondents' Brief become moot, because the extended property lines as determined in Judge Durden's Final Order run *shore parallel*[5] to the bulkhead/shoreline in violation of the regulatory requirement that the extended property lines of waterfront property run *shore perpendicular*.[6]

Judge Durden plainly acknowledged the legitimacy of the Department's interpretation when she held that

> "[t]he line depicted on Seabrook's plat, where water and shore meet, is <u>*not limited to*</u> the shoreline along the northern section of 706 Creekside [referring to the 130-foot bulkhead within the platted property boundary] <u>*but also*</u> exists along the western section of the property, where marsh and critical area are depicted between the property lines as they extend toward the center line of the tributary." (R. p. 037; *Final Order*, p. 6) (Emphasis added).

By concluding that use of the word "shoreline" is "<u>*not limited to*</u>" the Department's interpretation, but could "<u>*also*</u>" include her preferred interpretation of "shoreline" outside the Klomparens' platted property boundary, Judge Durden acknowledges that multiple valid interpretations of "shore" in the words "generally shore perpendicular" could exist.

The U.S. Supreme Court addressed the applicability of agency deference when the trial court concludes, like Judge Durden did, that there could be multiple valid regulatory interpretations.[7] In <u>*Decker v. N.W. Envtl. Def. Ctr.*</u> the U.S. Supreme Court held that "[i]t is well established that *an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail*. When an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is 'plainly erroneous or inconsistent with the

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[5] Even the Klomparens' surveyor (Mr. Seabrook) conceded during cross-examination that the lines of their *purported* dock corridor run *parallel* to their bulkheaded shoreline. (R. p. 257; Trial Tr. 132:4-14) (R. p. 267; Tr. Tr. 142:7-11).

[6] A statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute." <u>*A.O. Smith Corp. v. S.C. Dep't of Health and Envtl. Control*</u>, 428 S.C. 189, 202, 833 S.E.2d 451, 459 (Ct. App. 2019).

[7] The Department does not concede that the ALC's use of a shoreline outside the Klomparens' platted property boundary is a valid application of the regulatory language "generally shore perpendicular."

regulation.'" Decker v. N.W. Envtl. Def. Ctr., 568 U.S. 597, 613 (2013) (quoting Chase Bank USA, N.A. v. McCoy, 562 U.S. 195, 208, 131 S.Ct. 871, 880, 178 L.Ed.2d 716 (2011)) (Emphasis added). Even if Judge Durden concluded that the Department's regulatory interpretation was not the *best* one (per Decker), she conceded that it was a valid interpretation. (R.p. 037; *Final Order*, page 6), Accordingly, she was compelled to follow Decker as well as this Court's ruling in A.O. Smith and the Supreme Court's ruling in Captain's Quarters and Kiawah and give the Department's regulatory interpretation the "most respectful consideration"[8] and not overrule that interpretation "absent compelling reasons."[9] Instead, Judge Durden rejected it out of hand without showing that the Department acted "arbitrar[ily], capricious[ly], or manifestly contrary to the statute." A.O. Smith Corp., 428 S.C. at 203, 833 S.E.2d at 459.

This was reversible error.

B. Respondents' erroneously rely on the *Harry* ALC *Final Order*.

Respondents cite Steve Harry v. SCDHEC, Docket No. 09-ALJ-07-0255, 2010 WL 8425978 (SCALC July 15, 2010) in support of their argument against deference to DHEC-OCRM's long-standing regulatory interpretation. Respondents' reliance on this ALC *Final Order* is fraught with a host of problems and has no precedential value.

First, Harry was a case decided in the Administrative Law Court and is not binding on this court. Second, the Final Order in Harry is not applicable to this case. Respondents, in their Initial Brief, and Judge Anderson, in his Harry Final Order, erroneously equate the present DHEC Board with the Coastal Zone Appellate Panel. Third, as articulated in detail below, this court is bound by

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[8] Because the Department's regulatory interpretation has been consistent over thousands of permitting decisions.
[9] S.C. Code Ann. § 1-23-330(4) states that in contested cases before the ALC, "[t]he agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence."

the precedent set forth by the South Carolina Supreme Court in Etiwan Fertilizer Company v. S.C. Tax Commission, 217 S.C. 354, 60 S.E.2d 682 (1950).

Respondents erroneously equate the present DHEC Board with the Coastal Zone Appellate Panel and rely on an ALC Final Order that does the same

On page 22 of Respondents' Initial Brief, Respondents quote *Harry* for the proposition that "[i]t is the interpretations of DHEC's Board, not its staff, which are entitled to deference from the courts." *Harry v. SCDHEC*, 2010 WL 8425978 at 5. Further, Respondents quote from the *Harry* Final Order that "[w]ithout 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." *Id.* Respondents erroneously rely on a misstatement of law by Judge Anderson in his *Harry* Final Order.

In *Harry*, Judge Anderson misquotes and wrongly applies *S.C. Coastal Conservation League* v. *S.C. Dep't of Health and Envtl. Control*, 363 S.C. 67, 610 S.E.2d 482 (2005) ("*CCL*") regarding deference. Judge Anderson erroneously states that "it is the interpretations of DHEC's *Board*, not its staff, which are entitled to deference from the courts." *Harry* 2010 WL 8425978 at 5. This is an incorrect cite to *CCL* which actually holds that "[t]he [Coastal Zone Appellate] *Panel*, not OCRM staff, is entitled to deference from the courts." *CCL* 363 S.C. 75, 610 S.E.2d 486. The Panel and the Board are two separate entities that serve two separate procedural functions.[10]

Judge Anderson and Respondents' assertion that the DHEC Board's regulatory interpretation deserves deference—but not the DHEC-OCRM staff's regulatory interpretation—is erroneous and contrary to the plain language of the presently-governing statute. S.C. Code Ann.

[10] The Coastal Zone Appellate Panel was not even functioning when the *Harry* case came before the ALC. As of June 9, 2006 when Act 387 (H.B. 3285) became effective, the Coastal Zone Appellate Panel was eliminated.

§ 44-1-60(E)(2) states that "[t]he staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant" unless it is reviewed by the DHEC Board.

The ALC and the Respondents misapply CCL and Neal v. Brown and SCDHEC, 383 S.C. 619, 682 S.E.2d 268 (2009). In both cases, the Coastal Zone Appellate Panel issued the final administrative decision. Here, the OCRM staff decision was the final administrative decision. This Court should follow Murphy v. South Carolina Dept. of Health and Environmental Control, 396 S.C. 633, 723 S.E.2d 191 (2012), whose procedure mirrors that of the present case.

In CCL, an appeal ultimately went to the Coastal Zone Appellate Panel. CCL, 363 S.C. 70, 610 S.E.2d 484. The Panel affirmed the ALC without analysis. Id. An appeal to the circuit court reversed the decision of the Panel and vacated the permit. Id. The Supreme Court reinstated the permit and deferred to the Panel's interpretation rather than OCRM staff.[11] Id. The Panel had issued the final administrative decision.

In Neal, DHEC-OCRM staff made the initial determination to grant a dock permit. Neal, 383 S.C. 268. The Appellate Panel reversed the grant of the permit. Id. The Court of Appeals reversed the decision of the Panel and adopted the position of the OCRM staff. Id. The Supreme Court found that the Panel's final administrative decision should have been granted deference and denied the permit, overturning the Court of Appeals. Id. Notably, both Neal and CCL do not procedurally track with the present case.

This Court should look to Supreme Court decisions made pursuant to S.C. Code Ann. § 44-1-60. In Murphy, DHEC staff granted a permit. Murphy, 396 S.C. at 636-38. The DHEC Board declined review, and the staff decision became DHEC's final decision pursuant to S.C. Code Ann.

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[11] It is important to note that although the permit was upheld by the Panel, the Panel used a different analysis (applying a different regulation) than OCRM staff.

§ 44-1-60. *Id*. Murphy then requested a contested case hearing before the ALC. *Id*. The ALC affirmed DHEC's decision and Murphy appealed. *Id*. The Supreme Court upheld the granting of the permit. *Id*. The *Murphy* court notably gave deference to staff, stating:

> "we give deference to the interpretation of a regulation by the agency charged with it [sic] enforcement. (citation omitted). During her testimony, Jennifer Haynes, who had been the DHEC project manager for the Chapin High School WQC, clarified that DHEC interpreted the 'vicinity of the project' on a case-by-case basis according to its best professional judgment as each project is different. Thus, Haynes testified that when applying Regulation 61–101, she 'considered the vicinity [to include] more than just the 727 feet of stream' and noted that although she did not have an exact area, it included many miles. Because this interpretation is both reasonable and consistent with the plain language of the regulation, we see no reason to deviate from DHEC's construction and application."[12]

Id. at 640-641.

Given the posture of this case, Respondents' argument that staff is not entitled to deference is therefore without merit. Accordingly, the ALC should have deferred to Blair Williams' and Jacquie Adams' consistent and longstanding[13] interpretation of the regulations because "'[t]he construction of . . . [the regulation] by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *A.O. Smith Corp. v. S.C. Dep't of Health and Envtl. Control*, 428 S.C. 189, 203, 833 S.E.2d 451, 459 (Ct. App. 2019).

This Court is bound by the Supreme Court's *Etiwan* analysis

As set forth above, Judge Anderson erroneously equating the present DHEC Board with the Coastal Zone Appellate Panel in his *Harry* Final Order is a fundamental flaw. Nonetheless,

[12] Note the decision focuses its deference to DHEC's Water Quality staff, *not* the DHEC Board (the Board declined review). Notably, the Court granted deference to the agency based on the testimony of a DHEC project manager.

[13] "An agency's long-standing interpretation of a statute is usually entitled to be given deference and should not be overruled by a reviewing court in the absence of cogent reasons . . . ." *Media Gen. Commc'ns, Inc., and Media Gen. Broad. of S.C. Holdings, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 149, 694 S.E.2d 525, 531 (2010) (citing *Etiwan Fertilizer Co. v. S.C. Tax Comm'n*, 217 S.C. 354, 360, 60 S.E.2d 682, 684 (1950).

his Order cites Etiwan Fertilizer Company v. S.C. Tax Commission, 217 S.C. 354, 60 S.E.2d 682 (1950) which is still good law. It is telling that the Respondents' reliance on the *Harry* Final Order leaves out the *Etiwan* analysis referenced in the Order. The below-referenced quote from *Etiwan* comes directly after opposing counsel stops quoting from the *Harry* Final Order at page 22 of Respondents' Initial Brief.

> "Moreover, in *Etiwan Fertilizer Company v. S.C. Tax Commission*, 217 S.C. 354, 60 S.E.2d 682 (1950), the Supreme Court stated that:
>
> We have held in many cases that where the construction of the statute has been uniform for many years in administrative practice, and has been acquiesced in by the General Assembly for a long period of time, such construction is entitled to weight, and should not be overruled without cogent reasons.
>
> . . . Thus, an underlying requirement to draw upon the agency deference doctrine is that the construction of the statute has been uniform for many years so as to lead to the conclusion that the General Assembly has acquiesced to that construction. To find otherwise would allow an agency to construe its regulations on a case by case basis and grant deference to that irresolute interpretation."

Harry v. SCDHEC 2010 WL 8425978 at 5.

As per the Supreme Court's holding in *Etiwan*, the regulatory definition of "waterfront property" has been uniformly applied by SCDHEC-OCRM for many years. Blair Williams has managed the Critical Area Program for DHEC-OCRM for the last fourteen years. (R. p. 311; Trial Tr. 186:5-7; 186:18-19) (R. p. 313; Trial Tr. 188:18-19). Additionally, Mr. Williams testified that the Department has consistently applied the regulatory definition of "waterfront property" the same way since June 2003, when the regulation was put in place. (R. p. 314; Trial Tr. 189:7-10). Jacquie Adams also testified that her application of the regulatory definition of "waterfront property" in this permitting decision is consistent with how she has applied the regulatory definition in the "several hundred" other permit applications she has reviewed. (R. pp. 290-291; Trial Tr. 165:22- 166:3).

On page 23 of Respondents' Initial Brief, responses from Ms. Adams and Mr. Williams regarding the application of subject regulation are misrepresented. At trial, opposing counsel asked Ms. Adams if there were other properties that Ms. Adams could identify by "*name*". (R. p. 303; Trial Tr. 178:5). Only when opposing counsel asked Ms. Adams about specific property owners names, Ms. Adams was unable to give an exact response. Additionally, Respondents ignore the fact that when opposing counsel asked whether Mr. Williams had "dealt with areas where there are plats with lines going into the marsh," Mr. Williams stated "Yes, ma'am." (R. p. 327; Trial Tr. 202:5-7). Again, when asked about which specific "*neighborhoods*" Mr. Williams has dealt with this issue before, it was then when Mr. Williams could not recall specific instances. (R. p. 327; Trial Tr. 202:8-10).

II. <u>Respondents' application of their "riparian rights" argument would render The Coastal Tidelands and Wetlands Act meaningless.</u>

Contrary to Respondents' claim that their "riparian rights, or ability to construct a dock, have been *eliminated* by the Department's interpretation of its regulatory definition" (Respondents' Initial Brief, p. 19), Mr. Klomparens submitted the below pictures (next page) into evidence as Petitioners' Exhibit 23 (R. pp. 425-426). These pictures were taken from his back yard immediately adjacent to the marsh (R. pp. 150-153; Trial Tr. 25-28). Mr. Klomparens is plainly demonstrating that he does in fact exercise whatever riparian rights he may possess and that such rights have not been *eliminated* by the Department's permitting decision. (R. pp. 150-153; Trial Tr. 25-28). The tributary to Shem Creek is visible in the background.

Any riparian right to construct a dock that Respondents' may have is not absolute. These pictures demonstrate that Respondents already have reasonable use of the tributary of Shem Creek without the construction of a dock. Respondents erroneously attempt to diminish DHEC's

authority to regulate the granting of dock permits for property owners with riparian rights, thereby rendering the Coastal Tidelands and Wetlands Act meaningless. However, Respondents' ability to construct a dock is not absolute and is subject to limitations by, among other things, DHEC-OCRM's authority and the common law. "[T]he right of the riparian owner . . . [is] limited according to the law of the state . . ." *Lowcountry Open Land Trust v. State*, 347 S.C. 96, 108, 552 S.E.2d 778, 784 (SC Ct. App. 2001) (citing *Packer v. Bird*, 137 U.S. 661, 669-70, 11 S.Ct. 210, 34 L.Ed. 819 (1891)). OCRM has the power to approve or deny dock permits regardless of a claim of riparian rights.[14] Respondents admit that "the Department's is vested with the authority to adopt and enforce a definition of waterfront property." (Respondents' Initial Brief, p. 20).

Respondents cite no authority that would automatically entitle property owners with riparian rights to a dock without further consideration. If property owners with riparian rights were automatically entitled to a dock, OCRM would have little or no authority to deny (or approve) a dock permit for those property owners.[15] Additional facts and determinations must be assessed when evaluating a permit.

The Supreme Court has held that "[u]nder the common law, riparian property owners . . . hold special rights allowing them to make 'reasonable use' of the water adjacent to their property." *Jowers v. SCDHEC*, 423 S.C. 343, 355, 815 S.E.2d 446, 452 (S.C. 2018); *White's Mill Colony, Inc. v. Williams*, 363 S.C. 117, 129, 609 S.E.2d 811, 817 (Ct. App. 2005) (citing *Lowe v. Ottaray*

[14] *See e.g.,* 48-39-210(A). *See also* 48-39-130(D) (showing that a claim of riparian rights is not an exemption to a permit application).

[15] If the only determination regarding the permitting of a dock was a finding that the applicant had riparian rights, OCRM would have no authority to make any other determinations. Examples of other considerations that OCRM must consider, regardless of a claim of riparian rights are: whether the property is waterfront, whether the proposed dock would impact navigation, whether the proposed dock would impact marine or wildlife, etc. *See* S.C. Code Ann. § 48-39-150. *See also* S.C. Code Ann. § 48-39-210(A).

Mills, 93 S.C. 420, 423, 77 S.E. 135, 136 (1913)). Respondents have reasonable use of the tributary of Shem Creek without the construction of a dock.

Respondents put forth no evidence suggesting that they do not already have reasonable use of their riparian rights to access the tributary of Shem Creek. Respondents admit that they can access the tributary at every high tide—meaning that Respondents can generally access the tributary of Shem Creek twice a day. (R. pp. 150-152; Trial Tr. 25-27). Additionally, Mr. Klomparens admits that "there's navigable water behind the house". (R. p. 150; Trial Tr. 25:16). When asked what kind of tidal event was needed to get his boat off Respondents property and use the tributary, Mr. Klomparens stated that "[u]sually, it's -- it's got to be like around five – five and a half foot tide." (R. p. 151; Trial Tr. 26:11-21). When asked if the five-and-a-half-foot tide was "higher than normal high tide," Mr. Klomparens stated "No". (R. p. 151; Trial Tr. 26:22-24). Mr. Klomparens also admits that he can get his boat into the navigable water at the bulkhead "one of two ways. I can back it down the -- the property line between Dr. Williams and myself. I can literally just shove it off." (R. p. 151; Trial Tr. 26:6-9).

III. Evidence gathered after the permit decision was issued is irrelevant.

In the *Appellant's Initial Brief*, the Department argued that the ALC's admission of Mr. Seabrook's speculation testimony was reversible error. (*Appellant's Initial Brief*, pp. 23-26). Respondents fail to address this argument and instead point this Court to the "admonition to refrain from substituting its judgment for the judgment of the ALJ regarding the weight of the evidence." (Citing S.C. Code Ann. Sec. 1-23-610(B)) (*Respondent's Initial Brief*, p. 30). Respondents also cite this Court's recent Opinion in McEntire Produce Inc. v. SC Department of Revenue for the proposition that "[t]he decision of the [ALC] should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law." McEntire Produce Inc. v. SC Department

of Revenue, 439 S.C. 238, 246, 886 S.E.2d 697, 701 (Ct. App. 2023) (citing Original Blue Ribbon Taxi Corp. v. SC Department of Motor Vehicles, 380 S.C. 600, 604, 670 S.E.2d 674, 676).

The Department is not asking this Court to substitute its judgment for the judgment of the ALJ regarding the *weight* of the evidence, but rather to recognize that Mr. Seabrook's inadmissible speculation based on his site visit long after the permitting decision was issued should not have been relied on to reverse the Department's permitting decision.[16]

In the matter before this Court, the critical area line was delineated not by Mr. Seabrook, but his field crew on June 1, 2020. Subsequently the Department certified this critical area line on June 25, 2020 (R. p. 452; DHEC Exhibit 1, p. 20). This June 25, 2020 critical area line is the only line that matters in making the permitting decision. Given the "dynamic" nature of the critical area,[17] changes to the location of the critical area line almost two years[18] after certification are to be expected. Accordingly, Mr. Seabrook's testimony that he went to the Klomparens' property almost two years after certification of the critical area line that was used for the Department's permitting decision and saw an eight-inch difference from the June 25, 2020 certified critical area line[19] is irrelevant regarding the Department's permitting decision two years earlier. S.C. Code Ann. § 1-23-330(1) states that in contested cases before the ALC, "[i]rrelevant … evidence *shall* be excluded." (Emphasis added).

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[16] Judge Durden's *Final Order* (R. pp. 032-042) relies on Mr. Seabrook's inadmissible speculation to reach her Conclusions of Law in the following excerpts:

- "Seabrook had inspected the property as recently as a week prior to the hearing and testified that based on his observations both pins marking the turn or the angle of the property line were located in upland . . . . This Court is persuaded by the testimony of Seabrook, a licensed professional land surveyor identifying and describing Petitioners' boundary lines." (R. p. 039; *Final Order*, p. 8).
- "The 5/8" IRF is at the apex of L14 and L15 and is, as described by Seabrook, on the edge of the line. *The rebar is 8 inches upland from the critical line*." (R. p. 040; *Final Order*, p. 9). (Emphasis added).

[17] S.C. Code 48-39-210(B).

[18] At the April 25, 2022 trial of this case before the ALC, Mr. Seabrook testified that he had made a site visit to the Klomparens' property a week before trial and noticed that the property pin was eight inches landward of what he testified was the critical area line. (R. p. 203; Trial Transcript Page 78:9 to 78:15).

[19] R. pp. 216-217; Trial Transcript Pages 91:15 to 92:11.

IV. Respondents' claim that the Department unfairly denied their dock permit application compared with other lots in Creekside subdivision is not supported by the record.

Respondents assert that "existing aerial imagery indicates an inconsistency as to how the regulatory definition may have been applied in the areas surrounding 706 Creekside Drive. (R. pp. 381-383; Klomparens Ex. 8-10); (R. pp. 502-503; DHEC Ex. 1, p. 070-071)" (Respondent's Initial Brief, p. 10). There is no evidence in the record showing whether the other docks in Creekside were permitted structures or were grandfathered docks that existed before the Coastal Tidelands and Wetlands Act became law in 1977. Additionally, there is no evidence in the record showing whether the other properties in Creekside with permitted docks received their dock permits under the same regulatory language as the Respondents' dock permit denial. The ALC shut down the Respondents' efforts at trial to expand the Court's consideration of other existing docks in the Creekside subdivision. Specifically, Judge Durden said:

> *"I'm really not very interested in the other lots. I'm only interested in this lot and whether it meets the definition. So, to me, I would find all of that of very little relevance unless one of you can explain to me why we should go through all of that, other than, as you said, showing consistency, which I think you've [SCDHEC counsel] already demonstrated."* (R. p. 285; Trial Tr. 160:2-9)

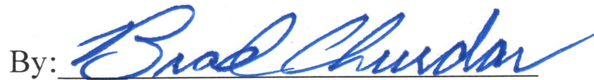
Accordingly, this Court should give no weight to Respondents' argument of unfair and inconsistent treatment compared to the other lots in Creekside subdivision.

CONCLUSION

The Department respectfully requests that the Court of Appeals reverse the ALC's *Final Order* and *Order Denying Motion for Reconsideration* for the reasons set forth above.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL

By: 

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October 25, 2023
Charleston, South Carolina

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

Robert Klomparens and Whitney Klomparens .... Respondents,

vs.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that DHEC's Final Reply Brief complies with Rule 211(b), SCACR.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has this day served the ***Appellant South Carolina Department of Control's Final Reply Brief*** via electronic delivery upon the following counsel of record as indicated below:

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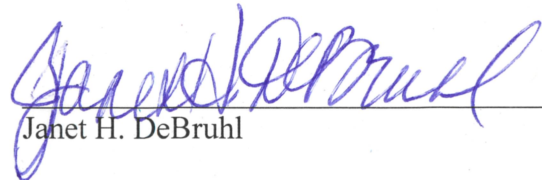

Janet H. DeBruhl

October 25, 2023

Charleston, South Carolina

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(Via email to ctappfilings@sccourts.org)
The Honorable Jenny Abbott Kitchings
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P.O. Box 11629
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RE: *Robert Klomparens and Whitney Klomparens v. SCDHEC*
Appellate Case No.: 2022-001641

Dear Ms. Kitchings:

Please find enclosed for filing the Appellant South Carolina Department of Health and Environmental Control's Final Reply Brief in the above-referenced matter. By copy hereof, I am serving all interested parties as reflected in the attached Certificate of Service.

Please address all correspondence in this matter to my attention at 1362 McMillan Avenue, Suite 400, Charleston, South Carolina 29405.

Sincerely,

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Associate General Counsel

BDC/jhd

Enclosures

cc: Mary D. Shahid, Esquire (via email to mshahid@maynardnexsen.com)

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