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SC Court of Appeals

FINAL BRIEF

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SOUTH CAROLINA, ADMINISTRATIVE LAW COURT

Milton G. Kimpson, Judge
Docket No. 21-ALJ-07-0144-CC

Appellate Case No. 2023-0004441

South Carolina DHEC, Carla Varn DuPre, and Jasper Varn III Respondents

v.

Stephen Mueller, Pro Se Appellant

I am appealing the final order of the Administrative Law Court of South Carolina, Docket No. 21-ALJ-07-0144-CC on June 7, 2022 to affirm the authorization of the OCRM Permit OCRM0208 which authorizes construction at 410 Palmetto Blvd., Edisto Beach S.C.

The language of the Statutes of the State of SC is included in the transcript of the ALC case which I have provided. I will not repeat it word for word in this brief.

My appeal asserts that OCRM/DHEC has violated the Statute 48-39-290(A)(6) stating that new construction on a beach/dune system may be seaward of the OCRM/DHEC situated baseline by special permit, however construction MUST NOT BE SITUATED ON A PRIMARY OCEANFRONT SAND DUNE OR ON ACTIVE BEACH. The ALC concluded without evidence that there has formed a new primary oceanfront dune (POSD) some 30' seaward of the baseline which is, according to Statute, situated on the actual POSD. The Department used the erroneous location of a new dune by permitting officer Matt Slagel to issue building permits. As a result there are DHEC building permits allowing construction and septic systems on primary dunes and Active Beach.

Relevant background is that the Town of Edisto constructed an “emergency berm to temporarily keep sand off of Palmetto Blvd.” in 2018, after Hurricane Irma. I attach a photo of the berm, **Exhibit # 11**. It is just a pile of sand bulldozed landward to protect the actual dunes. Two years later Mr. Matt Slagel, a permitting officer of DHEC identified this as a Primary Oceanfront Sand dune for the purpose of building permits.

I am seeking relief from the Order under SCRCP 60 (b). Mistakes have been made and I offer newly discovered evidence.

Errors: The Court erred in its determination that an “emergency berm” that was constructed in 2018 had become a POSD by July 2020. The Court had no evidence that the berm had become a POSD

other than the testimony of Mr. Matt Slagel, the DHEC permitting officer who identified it as a POSD despite the berm having no statutory or regulatory characteristics of a dune. Mr. Slagel erred grievously by identifying a POSD at the location of the berm for the following reasons.

1. Eight months before his identification of the POSD, the Department in the ALC case, Docket 18-ALJ-07-0023-CC testified that “the Dept. conducted a “preliminary dune analysis” for the purpose of locating a POSD from 120 Palmetto Blvd. to 612 Palmetto Blvd.” Their testimony published Nov. 2019 was that “the Dept. did not locate a POSD seaward of the 2008 baseline”. DHEC/OCRM also has published data indicating that the current erosion rate in the area analyzed is 1.5 feet per year of shoreline. Mr. Slagel's superior, Elizabeth von Kolnitz signed the testimony and Mr. Slagel was copied and clearly should have understood that there was no POSD seaward of the baseline. 410 Palmetto Blvd. is the shallowest lot in the surveyed area. Furthermore in the 8 months between Nov. 2019 and July 2020, considering erosion, there was **less** of a possibility of there being a POSD seaward of the baseline. Yet Mr. Slagel in July 2020 identified one **30' seaward** of the baseline!
2. Present was Mr. Bill Eiser of Eiser Coastal Consulting. Mr. Eiser was being compensated by the permit applicants to obtain a construction permit on the lot. Mr. Eiser, later testified at the hearing as an “expert witness”. Mr. Eiser happens to be Mr. Slagel's ex-boss and mentor. The two met at the 7/2020 survey and subsequently Mr. Slagel with Mr. Eiser, made the indisputably erroneous decision to “flag” a primary oceanfront sand dune at the location of the berm. Mr. Slagel testified under oath that the two “did not talk about the dune”. This testimony is obviously false. Mr. Eiser wisely, because he was under oath, did not testify that the berm had miraculously become a dune but would only say that “you cannot say forever that a berm cannot become a dune”. Possibly Mr. Slagel's inexperience and Mr. Eiser's influence resulted in Mr. Slagel making a very bad decision.
3. Regarding the lack of evidence, the Court relied solely on Mr. Slagel's testimony that a berm had become a dune. It also relied on Mr. Eiser as an “expert witness”, even though he was a paid advocate of the applicants. The requirements of a berm becoming a dune include the feature being at an historical location of a primary dune. Mr. Eiser testified under oath that he reviewed aerial photographs of historical dunes, but produced none in evidence. I have found with diligent research, no evidence of primary dunes ever being at the location of the berm and I offer into evidence the attached photos back to 2007. DHEC, despite my requests, has refused to provide me with previous photographic evidence of dunes.

For reference I offer Exhibit #1 showing the location of the 2008 Jurisdictional Baseline which historically, and by Law, is located on the POSD. The primary dune is clearly visible at the baseline. In 2015 the State recommended that the baseline be located even FURTHER LANDWARD but the decision was postponed by the Legislature and the baseline was re-established at the 2008 location in 2016. Despite all evidence available to Mr. Slagel, he, and he alone (quite possibly in collusion with Mr. Eiser), decided that there was miraculously formed a new POSD 30' seaward of that established and testified to by his own Dept.

There is no historical photography as far back as 2007 showing any feature like a primary dune at the location of the berm. Furthermore Mr. Eiser testified that “in 2008 when the baseline (dune) was established, “a POSD did not exist seaward of the baseline”. Ms von Kolnitz

testified in 2019 that there was no dune seaward of the baseline. Mr. Slagel also testified that he “took no measurements of elevation or continuity of the “dune”. He relied SOLELY on his visual observation of the feature and that “there was a change in elevation and vegetation on it”. I suspect Mr. Eiser concurred for the advantage of his client. No superior, supervisor, or other DHEC official checked his work. The requirement for a berm becoming a dune also includes that it is vegetated with established native vegetation and is not escarped by normal high tides. The vegetation today, in January 2023, is almost gone and the berm is 90% eroded or escarped by normal tides.

Exhibit #2: 410 Palmetto Blvd. in 2007”. The picture shows no evidence of a POSD in the area flagged by Mr. Slagel and Mr. Eiser. Both testified under oath that there historically has been a POSD seaward of the baseline.

Exhibit #3: “410 2009” Again no evidence of a dune seaward of the baseline.

Exhibits #4, #5, #6,: 410 at 2012, 2017, 2019” again showing no evidence of a POSD seaward of the baseline.

In 2020, Mr. Slagel “flagged” a POSD at the referenced location. Again I've show that there is NO historical evidence of a dune being at his location.

Exhibit #7: Nov.2023 shows the berm completely eroded with sand fencing destroyed. None of the Regulatory characteristics of a POSD are existing.

*The requirement for a berm becoming a dune also includes that it is vegetated with established native vegetation and is not escarped by normal high tides. **Exhibit #8:** shows escarpment in October 2023. Berm mostly gone.*

Exhibit #9and #10: November 2023, berm gone. Slagel dune identified. The vegetation to the left in the photo is the first line of stable vegetation from the ocean.

Active Beach” Title 48-39-270(13)(13) Active beach is that area seaward of the escarpment or the first line of stable natural vegetation, whichever first occurs, measured from the ocean.

Per Title 48-39-290(a)(6) construction MUST NOT BE SITUATED ON A PRIMARY OCEANFRONT SAND DUNE OR ON ACTIVE BEACH

In conclusion, I believe by the preponderance of evidence that OCRM/DHEC, permitting officer Matt Slagel, Mr. Slagel's' supervisors who performed no oversight, and Bill Eiser identified a Primary Oceanfront Sand dune for the purpose of beachfront construction permits erroneously. The POSD by definition is at the baseline and DHEC/OCRM has permitted construction ON a POSD and ON active beach which is strictly prohibited by SC Law.

For this reason I am appealing the Final Order referenced and request a new trial or a summary judgement in my favor and immediate revocation of the permits.

Stephen Mueller Jan 9, 2024

EXHIBIT 1



2008 JURISDICTIONAL BASELINE

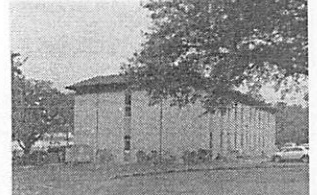
(SITUATED AT PRIMARY OCEANFRONT SAND DUNE)

Pictometry

EXHIBIT # 2



Information



Colleton County, SC
31 Klein Street
Harrelson Building, Room 307
Walterboro, SC 29488

Assessor

[George McCormack](#)
(843) 549-1213

Announcements

[How to use the Beacon site - view Demo Videos](#)

410 2009
EXHIBIT #3



02/21/2009

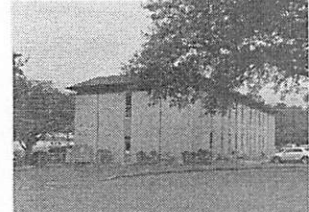
EXHIBIT #4 2012



Pictometry



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Developed by  Schneider GEOSPATIAL

410 2017

EXHIBIT #5



03/07/2017

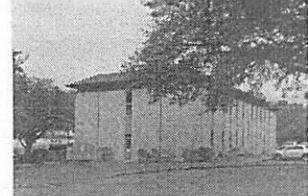
EXHIBIT #6 2019



Pictometry



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EXHIBIT #7 11/2023



EXHIBIT #8

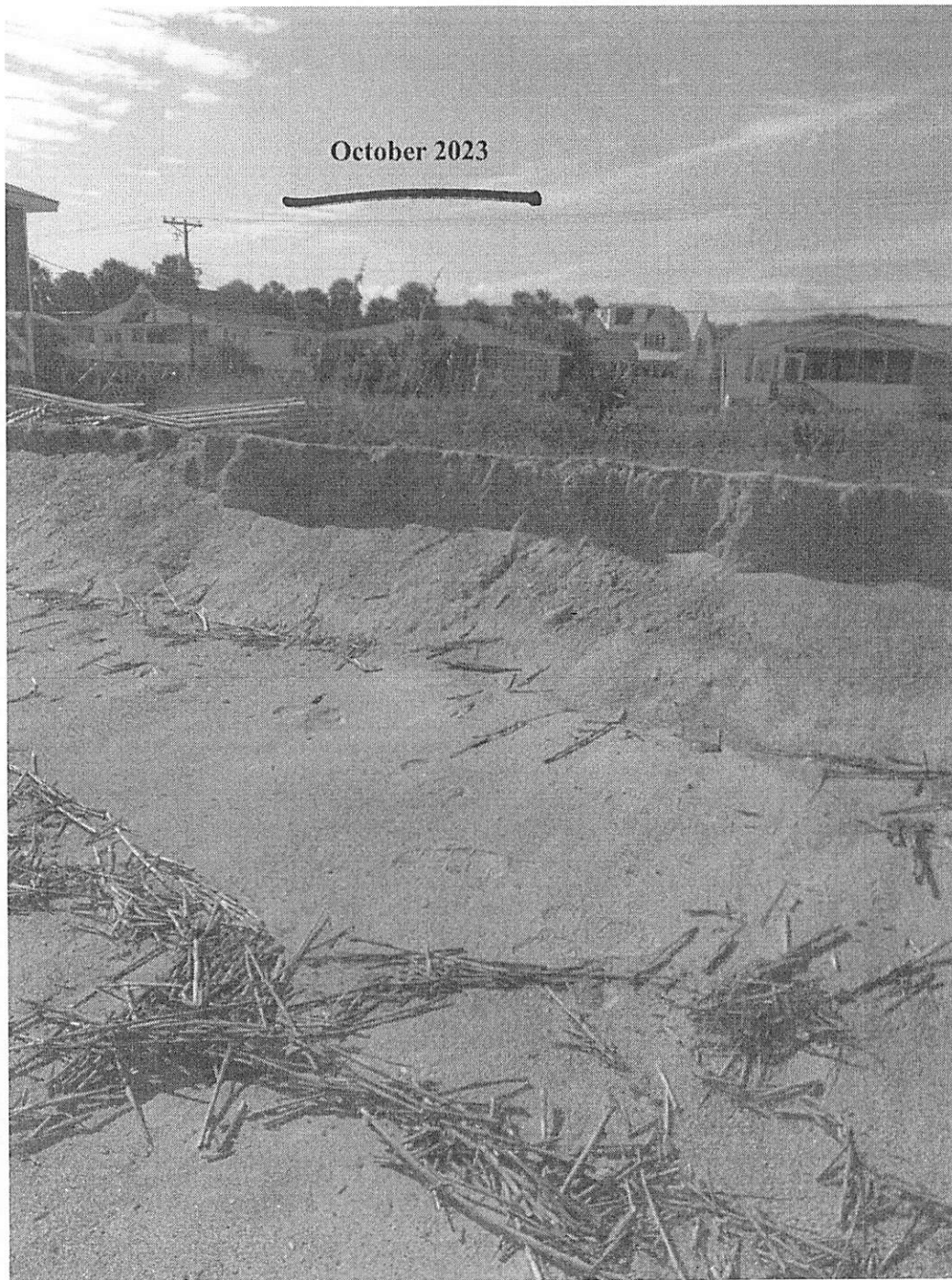


EXHIBIT #9 Nov. 2023

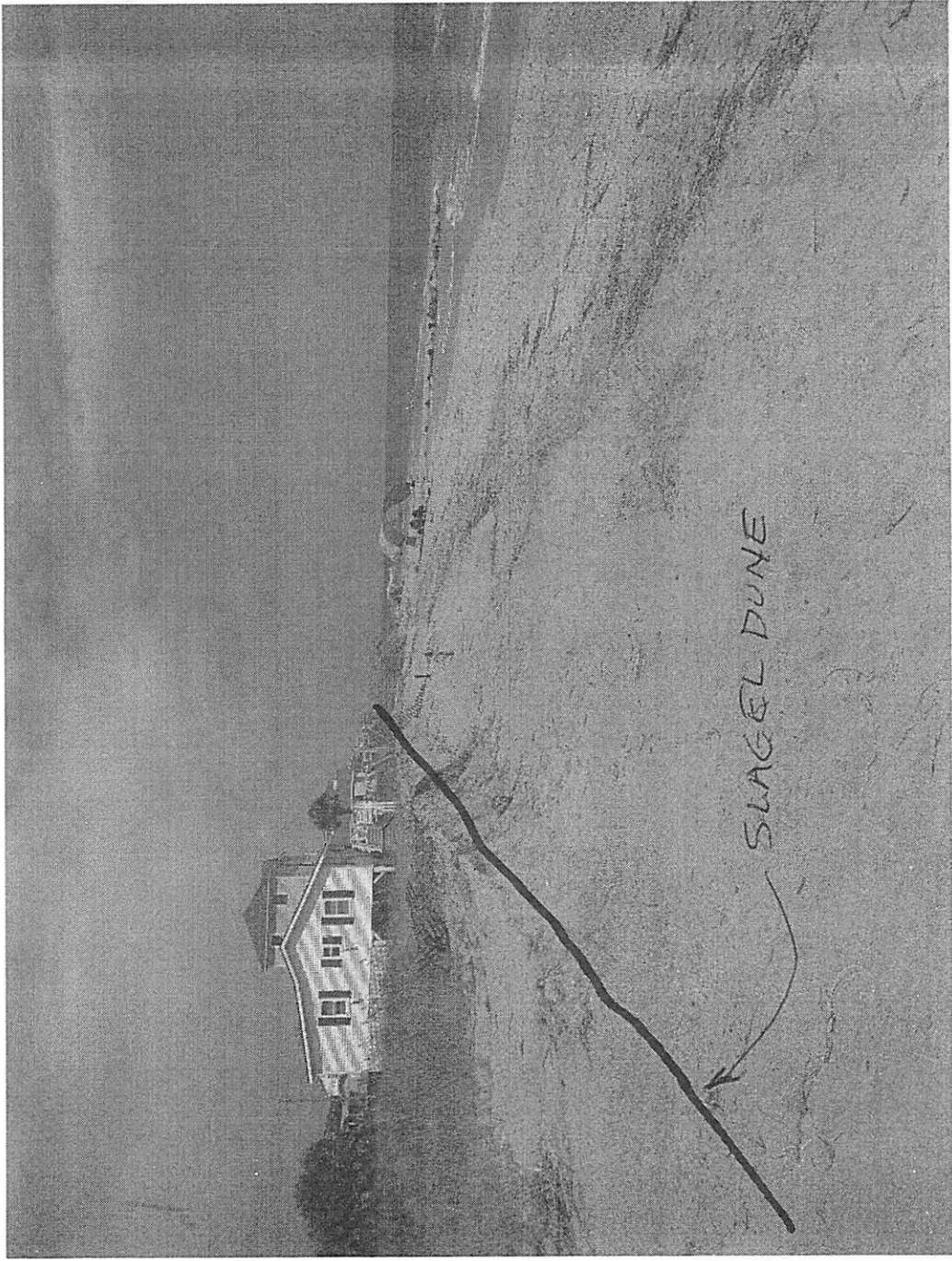


EXHIBIT #10 DEC. 2023



SLAGEL DUNE

EXHIBIT # 11
2019



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v.

Stephen Mueller, Pro Se

Appellant

Bradley Curdar, SCDHEC

Mary Shahid, Maynard Nexon PC

Bradley D. Churdar, Esquire

SCDHEC

1362 McMillan Avenue, Suite 400 Columbia, SC 29201 Office: 843.953.0213 Mobile:843.718.5685

Fax: 843.953.0201 Email: churdabd@dhec.sc.gov

Attorneys for the Respondent, SCDHEC

Mary Shhid, 205 King St. Charleston, SC 29402

I hereby certify that I have on this date Jan. 12, 2023, served this Final Brief upon all parties by electronic mail and USPS mail, 15 copies to the court.