

held, and the Board issued the final agency decision in this case on January 9, 2012. Petitioner then filed a Notice of Request for Contested Case Hearing.

On July 24, 2012, DHEC filed a Motion for Partial Summary Judgment and Motion to Dismiss. The Petitioner filed a response to DHEC's Motion on August 2, 2012. A hearing on the Motion was held at the ALC on August 23, 2012. On October 4, 2012, the Court issued an Order granting DHEC's Motion for Partial Summary Judgment as to issues raised by Petitioner regarding alleged procedural defects in the Final Review Conference process. DHEC's Motion to Dismiss was denied.

A contested case hearing was held on January 15, 2013 before the Administrative Law Court in Columbia, South Carolina. Based on the evidence before me, I find the decision to issue the Amendment should be affirmed.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and taking into consideration the burden of persuasion of the parties, I make the following Findings of Fact by a preponderance of the evidence:

1. The Petitioner is the owner of real property located at 27 Broughton Road, Charleston, South Carolina. Respondent, David Abdo, is the owner of property that is adjacent to the 27 Broughton Road property owned by Petitioner Maull. Mr. Abdo's property is located at 29 Broughton Road. These properties are the permanent residences of both Petitioner and Respondent.

2. The Intervenors, Russell and Laura Schaible, reside at 31 Broughton Road, and their property is also adjacent to Mr. Abdo's property.

3. Petitioner has lived at 27 Broughton Road since the 1980s, and he has a private recreational dock that was originally constructed approximately 23 years ago. According to Petitioner's testimony, he has modified this dock at least twice since it was originally constructed. The Petitioner currently owns a 48-foot sport fishing boat which he prefers to moor on the landward side of his dock for the purpose of protecting it from wave action.

4. The action giving rise to this contested case, the Amendment to critical area permit number OCRM-07-128-F was issued to Mr. Abdo on October 6, 2011 and authorized movement of the dock structure towards the Petitioner's dock and property. The permit was originally issued to Charles R. Palmer, acting on behalf of the Estate of Rebecca Palmer

("Palmer Estate"), on August 2, 2007.¹ Mr. Abdo purchased the 29 Broughton Road property from the Palmer Estate in August 2007. A condition of the purchase was that the Palmer Estate obtain the dock permit. The purchase occurred after the Permit was issued, and Charles R. Palmer assigned and/or transferred the Permit to Mr. Abdo on June 29, 2011.

5. The Petitioner testified as to his recollection of the process resulting in the issuance of the 2007 dock Permit to Charles R. Palmer. According to the Petitioner, the Intervenor in this matter objected to the location of the dock as proposed in the 2007 application submitted to the Department by Charles Palmer. Prior to issuing the Permit, OCRM staff, specifically Amanda Flake, contacted the Petitioner, the Palmers, and the Schaibles for purposes of meeting to discuss the application. The Petitioner suggested that the Palmers move the proposed boatlift from the side of the dock closest to the Schaibles, to the other side, bringing it closer to the Petitioner's property. This configuration resulted in 82.5 feet of separation between the Petitioner and the Palmer (now Abdo) dock. The dock was approved as suggested by the Petitioner. Thereafter, the Schaibles sought review by the Board and such review was denied.² No further challenge was made and the Permit was issued.

6. Following resolution of the configuration of the Palmer dock in August 2007, the Petitioner sought and obtained authorization on May 14, 2008 to change the configuration of the floating docks at 27 Broughton Road. In accordance with this authorization, the Petitioner removed the existing floats which was in a "U" configuration and installed a 10 feet by 44 feet floating dock. The 10 feet by 44 feet floater replaced a 10 feet by 30 feet floater, which reduced the off-set between Mr. Abdo's boatlift as shown on the Permit and the Petitioner's float.³ Specifically, the Petitioner moved his dock to within 19.8 feet from the shared extended property line; slightly less than the 20 feet required by the regulations. The Petitioner submitted the as-built drawings for his dock to DHEC sometime after September 14, 2009. The drawings reflected that Petitioner's dock was built 18 feet from the extended property line shared with Mr. Abdo, rather than the 19.8 feet as set forth in Petitioner's modification application.

¹ Rebecca Palmer was Petitioner's aunt.

² During the course of the Palmer Permit application process, Mr. Abdo was not consulted about the configuration or the location of the dock.

³ The separation between the Abdo dock and Schaible dock increased from 132.1 linear feet as shown in the Permit (Schaible Ex. 7) to 138.6 linear feet as shown in the Amendment (DHEC Ex. 3)

7. After completing renovations and moving into the 29 Broughton Road property in February 2008, Mr. Abdo discussed with Petitioner and the Intervenors his intent to modify the Palmer Permit, and the manner in which he would be seeking to change it. According to Mr. Abdo, upon review of the Permit, he determined that the dock did not suit his or his family's needs. In particular, he found the configuration and location of the dock was different from every other dock in the vicinity and would make the boatlift unusable at times. The Intervenors were amenable to Mr. Abdo's proposed modification; however, the Petitioner was not.

8. In May 2011, Mr. Abdo submitted an amendment application to reconfigure the Palmer Permit. The requested reconfiguration consisted of reconfiguring the pierhead, floater and lift, and that the dock be located 20.5 feet from the extended property line shared with Petitioner.

9. On October 6, 2011, DHEC staff authorized the Amendment to critical area Permit Number OCRM-07-128-F ("Amendment") with a condition that the dock be situated 30.5 feet off the shared extended property line of Mr. Abdo and Petitioner, which resulted in 50 feet of separation between the Abdo and Maull docks.

10. All parties to this matter requested review by the DHEC Board. At the final review conference on December 8, 2011, the Board removed the special condition, and approved the Amendment as applied for in the application. The Board's removal of the special condition was to correct an error made by the DHEC staff in interpreting Petitioner's permit drawings (this error was the staff's basis for the imposition of the 30.5 feet condition). In reviewing the drawings, staff initially believed Petitioner's dock was located 10 feet from the extended property line (the 10-foot measurement initially relied on by DHEC staff was the width of Petitioner's floating dock, not the distance between Petitioner's dock and the extended property line). In fact, Petitioner's dock is located almost 20 feet off the extended property line.⁴

11. Additionally, the edge of Mr. Abdo's dock will be located nearly 85 feet from the edge of the federal navigation channel. The Petitioner's dock is closer at 75.7 feet from the edge of the federal navigation channel.

12. Mr. Abdo testified that when applying for the Amended Permit, he configured his dock and floating dock, and the location of the pierhead in a manner that would preserve space

⁴ A supplement to DHEC staff's response to the request for review provides that "[s]taff's intent is to require that the Abdo dock be 40 feet away from the Maull dock as it is constructed and permitted today." As approved by the Board, there is approximately 40 feet of spacing between the Maul and Abdo docks.

for future additions or alterations to the dock if he or a subsequent property owner so desires, and to maximize its use. Currently, Mr. Abdo's dock is 40 feet from the extended property line shared by Intervenor.

13. The Intervenor, Russell Schaible, testified that he and his wife purchased their property in 2005. According to Mr. Schaible, one of the main reasons they purchased the property was because of the expansive view of the water. Subsequent to the purchase of the property, the Schaibles had a dock drawing made, which would have located the dock in the middle of their property. Because of the importance they placed on the view, they decided to relocate the dock and construct it on the far western side of their property. The Schaibles do not object to Mr. Abdo having a dock, but do object to any location which is closer than what was approved by the Board and which would have a negative impact on their view.

14. Petitioner also does not object to Mr. Abdo building a dock; however Petitioner objects to the location approved by the Amendment. The Petitioner and his expert witness, Crayton Walters, opined that the dock's location will prohibit Petitioner from mooring his 48-foot sport fishing boat on the landward side of his dock. Mr. Walters was qualified as an expert in Maritime matters, including navigation, tidal and water current issues and vessel navigation.

15. According to Mr. Walters, the Petitioner and Mr. Abdo docks are both located on the Wappoo Creek, which is a section of the Intracoastal Waterway ("AIWW"). Mr. Walters testified that he had frequently boated and navigated on the AIWW and Wappoo Creek in several different types of boats, and he noted that the section of the AIWW where the docks are located is one of the most heavily trafficked areas for recreational boating activity in the Charleston Area. According to Mr. Walters, there are especially strong currents near the Petitioner's dock and Mr. Abdo's proposed dock which pose unique navigational hazards to commercial and recreational traffic due to the difficulty of maneuvering and docking in that area.

16. In anticipation of testifying in this case, Mr. Walters took Petitioner's boat out and navigated it in and around the Wappoo Creek. He testified that if Petitioner were to try to get his boat in and out of a 40-foot space it would be unsafe for members of the public who were navigating in the channel. In order to safely navigate in and out of Petitioner's dock, given the length of Petitioner's boat, Mr. Walters testified that he would want 100 feet of space, or approximately two boat lengths. He also testified that because of the siltation and given the lack of water at lower stages, Petitioner has to wait until certain stages of the tide to get his boat out.

17. In terms of the proximity of other docks, the Petitioner's expert agreed that there are many docks existing on the Wappoo Creek and that "they're all very close." He also acknowledged that there were few, if any, boats as large as Petitioner's on that side of the Wappoo Creek, and that it was possible for Petitioner to reconfigure his dock to allow him to continue docking his boat on the landward side.

18. While the Petitioner could dock on the channelward side of the dock (and has done so previously), he prefers docking on the landward side, which he believes reduces wear and tear on his boat and dock. Petitioner also acknowledges that his dock could be reconfigured to enable him to continue to dock on the landward side however Petitioner is unwilling to undertake the expense of another dock modification. Additionally, the Petitioner testified that he would not have undertaken his 2008/2009 dock modifications had he known that Mr. Abdo's dock would be moving closer to him.

19. Jeff Thompson, a senior wetland project manager with DHEC, testified on behalf of the Department. Mr. Thompson testified that amendments to critical area permits are not uncommon occurrences and that property owners who purchase property with an existing dock will often apply for amendments to make changes to the permitted dock. He applies the critical area regulations to every permit application he reviews, and in issuing the Amendment, Mr. Thompson testified that he considered navigational concerns related to the public's ability to navigate in the Wappoo Creek. The Wappoo Creek is approximately 565 feet in width, and due to its width, Mr. Thompson disagreed with Mr. Walters testimony that Petitioner's trying to dock his boat would create a safety hazard in the channel. He also testified that Petitioner's docking would not have much of an impact on public safety.

20. According to Mr. Thompson, the Amendment is consistent with the applicable statute and regulations, and 40 feet between two docks is a standard distance required by the regulations. That distance is based on the requirement each property owner stay 20 feet off extended property lines under most circumstances.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, I conclude the following as a matter of law:

1. This Court has subject matter jurisdiction in this case pursuant to S.C. Code Ann. §1-23-600(A) (Supp. 2012) and S.C. Code Ann. §44-1-60(F)(2) (Supp. 2010). The hearing before this Court is a contested case hearing in which the Administrative Law Judge serves as the

finder of fact and makes a *de novo* determination regarding the matter in controversy. Olson v. South Carolina Dept. of Health and Environmental Control, 663 S.E.2d 497, 379 S.C. 57 (Ct. App. 2008). While the ALC acts as the fact finder and is not restricted to the factual findings of the administrative agency, it is nevertheless required to give consideration to the provisions of S.C. Code Ann. § 1-23-330 (2005) regarding the Department's specialized knowledge in environmental matters. See Risher v. South Carolina Department of Health and Environmental Control, 398 S.C. 198, 712 S.E.2d 428 (2011), and § 44-1-60(F)(2) ("The Court shall give consideration to the provisions of Section 1-23-330 regarding the department's specialized knowledge.")

2. The standard of proof in this proceeding is a preponderance of the evidence. See Anonymous (M-156-90) v. State Bd. of Med. Examiners, 329 S.C. 371, 375, 496 S.E.2d 17, 19 (1998) (stating the standard of proof in administrative hearings is generally a preponderance of the evidence); also see National Health Corp. v. Dep't of Health and Env'tl. Control, 298 S.C. 373, 380 S.E.2d 841 (Ct. App. 1989) (referencing the use of the preponderance of the evidence standard in contested case proceedings involving the Department).

3. Furthermore, the burden of proof is upon the party asserting the affirmative of an issue. See 2 Am.Jr.2d Administrative Law § 360 (1994); Alex Sanders, et al., South Carolina Trial Handbook § 9:3 Party With Burden, Civil Cases (1999) (In civil cases, generally, the burden of proof rests upon the party who asserts the affirmative on an issue). Therefore, the Petitioner bears the burden in this case of proving by a preponderance of the evidence that the Amendment is contrary to the Coastal Tidelands and Wetlands Act, S.C. Code Ann. §48-39-10 et seq. (Act), Regulations and the CMP and that the Amendment should have been denied.

4. "It is generally recognized that the trier of fact, who has the opportunity to observe the witnesses and listen to their testimony in person, is in the best position to determine issues of witness credibility." Dixon v. Dixon, 336 S.C. 260, 263, 519 S.E.2d 357, 358 (Ct. App. 1999); see e.g. Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996); Wallace v. Milliken & Co., 300 S.C. 553, 556, 389 S.E.2d 448, 450 (Ct. App. 1990). The weight and credibility assigned to evidence presented at the hearing of a matter is within the province of the trier of fact. See S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992).

5. "As a creature of statute, a regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged." Captain's Quarters Motor Inn, Inc. v. South Carolina Coastal Council, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991) (citing, City of Rock Hill v. South Carolina Dept. of Health & Env. Control, 302 S.C. 161, 394 S.E.2d 327 (1990)); and City of Columbia v. South Carolina Dept. of Health & Env. Control, 292 S.C. 199, 355 S.E.2d 536 (1987).

6. When the permitted dock is to be located in a critical area as defined in S.C. Code Ann. §48-39-10 (Supp. 2011), S.C. Code Ann. §48-39-130(C) (Supp. 2008) requires a person or entity to obtain a permit for any alteration of the "critical area" of the coastal zone.

7. OCRM must consider "the extent to which the proposed use could affect the value and enjoyment of adjacent owners." S.C. Code Ann. §48-39-150(a)(10), 23A S.C. Code Ann. Regs. 30-11(B)(10).

8. Reg. 30-12.A(1)(p) provides:

No docks, pierheads or other associated structures will be permitted closer than 20 feet from extended property lines with the exception of joint use docks shared by two adjoining property owners. However, the Department may allow construction closer than 20 feet or over extended property lines where there is no material harm to the policies of the Act.

9. The language of this regulation specifically provides the Department has the discretion and authority to permit construction of docks closer than 20 feet to a shared extended property line where there is no material harm to the policies of the Coastal Tidelands and Wetlands Act, S.C. Code Ann. §48-39-10 et seq. Here, however, the Amendment was approved by the Board to be 20.5 feet from the shared extended property lines.

10. S.C. Code Ann. §48-39-150(B) provides, "[t]he permit may be conditioned upon the applicant's amending the proposal to take whatever measures the department feels are necessary to protect the public interest."

11. The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons. Brown v. South Carolina Dept. of Health & Env. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002); citing Dunton v. South Carolina Bd. of Examnrs. in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987). Courts will reject an agency's interpretation of its own regulations

where the plain language of the statute is contrary to the interpretation of the agency. Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003).

12. In the case before the Court, the Petitioner argues that the core issue in the case is the impact of the proximity of Mr. Abdo's dock on Petitioner's ability to navigate the Intercoastal Waterway and the impact on commercial and private boating on the Intercoastal Waterway. However, the Department takes the position that this is a dispute between property owners as it relates to navigation of Petitioner's large boat in and out of his dock, and does not involve the protection of the public interest.

13. In White v. S.C. Dept. of Health and Env'tl. Control, 392 S.C. 247, 708 S.E.2d 812 (Ct. App. 2011), the appellant cited the case of Dorman v. S.C. Dept. of Health and Env'tl. Control, 392 S.C. 247 (2011) in support of its argument that policing disputes between neighboring dock owners is not proper under the OCRM statute and regulations. White, 392 S.C. at 256, 708 S.E.2d at 816. Dorman involved objections to a proposed private recreational dock from neighbors on both sides of the applicant's property. The neighboring property owners objected on the grounds that the proposed dock would be too close to their existing docks and their views would be obstructed. Id. The Court of Appeals adopted the OCRM's interpretation of Regulation 30-12, which was that any issues based solely on private concerns between docks are a private property issue. By contrast, the respondent in White objected to the OCRM's amendment of a dock permit due to a disruption of a commercial business and its customers. In that instance, the Court of Appeals concluded that the dispute was not a private dispute, but also affected members of the general public and the local shrimping industry. Specifically, the Court found the ALC's determination that the dock constituted a significant navigational hazard did not "conflict with OCRM's policy of avoiding the regulation of private navigational disputes. Id., 708 S.E.2d at 816-817.

14. While Petitioner has attempted to characterize this dispute as impacting the public interest, I disagree. These docks are located on a well-travelled water body with numerous docks and a significant amount of traffic, but as the evidence reflects, if Petitioner cannot moor his 48-foot boat on the landward side of his dock, there will be no impact on the public interest. Moreover, there was no evidence that Mr. Abdo's dock itself will negatively impact the public interest. And even if there were a navigational impact, this impact is not unreasonable given the nature of the area and the water body in question. Where these docks are located, the Wappoo

Creek is approximately 565 feet in width; more than 11 times the length of Petitioner's boat. Mr. Abdo's dock will be located no farther channelward than the other adjoining docks on the Wappoo Creek, and in fact, Petitioner's own dock is closer to the channel than Mr. Abdo's will be. Any maneuvering of his vessel that Petitioner asserts he would have to undertake in order to navigate between the two docks, if he can at all, would take place in close proximity to his and Mr. Abdo's docks and would have little or no impact on waterway traffic.

15. Importantly, the Petitioner's expert testified that 100 feet between Petitioner's and Mr. Abdo's docks is necessary to allow for safe navigation by Petitioner to get his large boat between the docks and to moor landside. The evidence clearly establishes that such a clearance is impossible: there is no change to the Amendment nor sufficient movement of Mr. Abdo's dock toward the Intervenor's that would provide Petitioner the 100 feet of space required by his expert while still enabling Respondent Abdo to have a dock that complies with the regulations.

16. In conclusion, the Amendment and Mr. Abdo's dock location is consistent with other docks in the area, and construction of the dock as authorized by the Board will not have an unreasonable impact on navigation in the area. South Carolina law is clear that a reasonable and standard space between a pierhead and extended property line is 20 feet. The Amendment places Mr. Abdo's dock 20.5 off the shared extended property line and therefore complies with the law.

17. I further conclude the Amendment falls within and complies with the applicable regulations and statute.

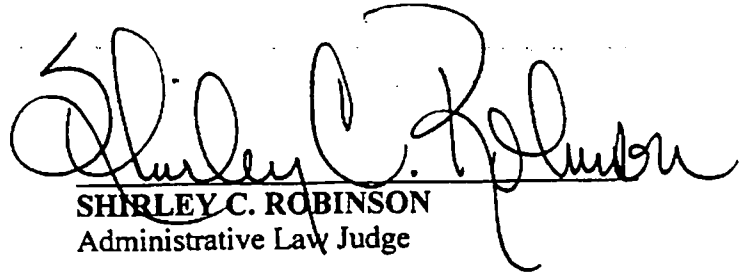
18. This controversy is personal to Petitioner. The evidence establishes Petitioner's dispute would not exist but for the length of Petitioner's boat and his desire to moor it landward rather than channelward.

CONCLUSION

Based on the Findings of Fact and Conclusions of Law set forth above and the applicable statutory and regulatory requirements discussed above, I find and conclude that DHEC has fully complied with the requirements of 23A S.C. Code Ann. Regs. 30-2, 30-4, 30-11, and 30-12 and S.C. Code Ann. §48-39-150.

IT IS THEREFORE ORDERED that DHEC's issuance of the October 6, 2011 amendment to critical area permit OCRM-07-128-F, to Respondent David Abdo be, and is hereby, **AFFIRMED**, as authorized.

AND IT IS SO ORDERED.


SHIRLEY C. ROBINSON
Administrative Law Judge

August 1st, 2013
Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Emergency Mail Service addressed to the party(ies) or their attorney(s).

This 1 day of August 2013
By: Teeba A. Henderson
Judicial Law Clerk