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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Robert L. Reibold, Administrative Law Judge
Case No. 2022ALJ070033CC

APPELLATE CASE NO. 2023-001592

William P. Scurry and J & W Corporation of Greenwood,

Appellants,

v.

South Carolina Department of Health and Environmental Control and Simmons Family
Holdings, LLC,

Respondents.

BRIEF OF APPELLANTS

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Bluffton, South Carolina
October 10, 2024

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STATEMENT OF ISSUES ON APPEAL

1. Did the Court err in admitting and considering the hearsay statement of Josh Hoke alleging that Petitioner William Scurry had admitted to Hoke that J & W's push boat captain would be able to safely maneuver the barge in and out of Barge Creek if dolphin mooring were added?

2. Was the Court's final decision, which allows the construction of the Simmons Family Holdings, LLC's marina in the "O'Quinn Alternative," to include the reductions to the length of the finger piers on the Area-of-Concern side of the marina and the increase from three-pile to five-pile dolphins, supported by substantial evidence?

STATEMENT OF THE CASE

This matter arose before the South Carolina Administrative Law Court (the “Court” or the “ALC”) pursuant to a January 31, 2022 request for a contested case hearing filed by William P. Scurry and the J & W Corporation of Greenwood (collectively, Petitioners). Petitioners challenged a determination of the South Carolina Department of Health Environmental Control (“DHEC” or the “Department”) to issue a permit to Simmons Family Holdings, LLC (Simmons) to construct a marina on the shores of Broad Creek on Hilton Head Island, in Beaufort County. Simmons and DHEC responded by claiming the permit had been properly authorized by DHEC. The action giving rise to this contested case, a critical area permit number OCRM-2018-00462, was issued to Simmons Family Holdings, LLC, on November 12, 2018.

A merits hearing was held on April 26 and 27, 2023 before the Hon. Robert L. Reibold. On the second day of trial and at the conclusion of Petitioners’ case, both DHEC and Simmons (collectively, Respondents) moved for a directed verdict pursuant to Rule 50(a), SCRCP, and SCALCR 68. The Court denied the motions for directed verdict on all grounds, except that of exhaustion of administrative remedies. The Court requested additional authority on that issue and after receiving same, denied Respondents’ motions for directed verdict or involuntary nonsuit.

The Court issued its final Order on August 16, 2023, in which it affirmed and modified the permit to conform the design of the future marina to what is known as the “O’Quinn Alternative,” (as proposed by the Respondents’ expert Duncan O’Quinn), which included reductions to the length of the finger piers on what is known as the “Area of Concern” side

of the marina and the increase in size from three-pile to five-pile dolphins. Further, the Court required the Respondents to post and maintain a readable sign at the marina to “warn recreational boaters, including kayakers...” of the risk of collision with the barge as it moves in and out of its landing.

The Department then filed a motion for reconsideration under SCALC Rule 29(D) on August 25, 2023, and the Petitioners filed a motion for reconsideration on August 26, 2023. On September 11, 2023, the Court denied Petitioners’ motion for reconsideration and granted the Departments’ motion for reconsideration, and amended the Court’s Final Order and Judgment to provide that the matter is remanded to the Department for the issuance of the permit in compliance with the terms of the Court’s final order of August 16, 2023.

The Petitioners filed and served their Notice of Appeal on October 10, 2023.

STANDARD OF REVIEW ON APPEAL

In an appeal from an ALC decision, the Administrative Procedures Act provides the appropriate standard of review. S.C. Code Annot. Section 1-23-610(B). Thereunder, the Court of Appeals should confine its analysis of the ALC decision to whether it is:

- a. In violation of constitutional or statutory provisions;
- b. In excess of the statutory authority of the agency;
- c. Made upon unlawful procedure;
- d. Affected by other error of law;
- e. Is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole records; or,
- f. Is arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

Thus, if the ALC's decision was affected by an error of law, the Court may reverse the decision. Further, even if this Court determines there was not an error of law, the Court should examine whether the ALC decision was supported by substantial evidence. To do so, the court should look at the entire record on appeal and determine whether there was evidence from which reasonable minds could reach the same conclusion as the ALC. See Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envir. Control, 411 S.C. 16, 766 S.E.2d 707 (S.C. 2014); Bruning v. S.C. Dep't of Health & Envir. Control, 418 S.C. 537, 795 S.E.2d 290 (S.C.App. 2016).

ARGUMENT

1. THE COURT ERRED IN ADMITTING AND CONSIDERING THE HEARSAY STATEMENT OF JOSH HOKE ALLEGING THAT PETITIONER WILLIAM SCURRY HAD ADMITTED TO HOKE THAT J & W'S PUSH BOAT CAPTAIN WOULD BE ABLE TO SAFELY MANEUVER THE BARGE IN AND OUT OF BARGE CREEK IF DOLPHIN MOORING WERE ADDED.

Statement of Facts Relevant To Argument

This case revolves around DHEC's granting of a permit to construct a marina that will, when constructed, be an impediment to the safe navigation of the Petitioners' adjacent barging operation, and will create a dangerous confluence of recreational boaters leaving a water-side restaurant/bar and a large 120 foot by 30 foot barge entering its landing, and which, like all moving barges, does not stop on a dime.

The Petitioners own a 99-year lease on a barge landing at Broad Creek Marina (R. p. 598), The barge landing loading and unloading structure is located at the end of a relatively narrow tidal creek known as "Barge Creek," which runs perpendicular to Broad Creek, a much larger tidal waterway that basically bisects the interior of the Hilton Head Island in Southern Beaufort County. (R. p. 751) Petitioners have operated a commercial barging operation out of Barge Creek on Hilton Head Island, to Daufuskie Island, also located in Southern Beaufort County, for some 45 years, beginning in 1977. (R. p. 169, line 8). Over the years, using a variety of barges and landing crafts, the Petitioners have transported construction materials, equipment, tractors, U-Hauls, bulls, cows, chickens, dump trucks, tankers, and a multitude of construction-related materials between Hilton Head Island and Daufuskie Island. (R. p. 168) and Petitioners Exhibits 5 (R. p. 546), and 6 (R. p. 547).

Petitioners currently utilize a 120 foot by 30-foot barge, with a 40-foot ramp affixed to the front of the barge, which is pushed and pulled by a “push boat” known as the “Jake Washington.” (R. p. 103, lines 21-25 – p. 104, lines 1-15. Petitioners’ barge is the only South Carolina-based barging operation serving Daufuskie Island and there are no other barge landing sites in Southern Beaufort County aside from Barge Creek. (R. p. 200, lines 12-15)

Simmons is the owner of real property that is adjacent to Barge Creek to the northeast, upon which was constructed in 2016, a restaurant known as Fish Camp on Broad Creek (“Fish Camp”). (R. p. 433-444) In 2018, in order to bolster the number of customers frequenting the Fish Camp, Simmons applied for an OCRM/DHEC permit to construct a marina adjacent to Barge Creek and Broad Creek. The proposed marina will provide dockage for up to 28 boats and will be the anticipated home of a commercial kayak rental business. See Permit issued November 12, 2021, in OCRM’s Exhibit 1. (R. p. 734-749) If the marina is constructed as permitted, it is reasonably anticipated that up to 24 recreational boats may be entering, leaving or docking at any given time on the southwest side of the marina, on dock “fingers” that lead directly into Barge Creek. The marina will handle a total of 48 boats. According to the owner of the Fish Camp, Brendan Reilly, the marina is being constructed to serve the public desire for “docking and dining.” (R. p. 438, lines 22-24)

Further according to the Fish Camp owner, alcohol sales make up approximately 20 percent of the Fish Camp’s annual five to seven million dollars in revenue (R. p. 444, line 16 and p. 451, lines 23-25), and he expects an increase in revenues from the “docking and dining” boaters, of approximately \$500,000 a year. Each arriving boat is projected to spend approximately \$250 at the Fish Camp. The Fish Camp has an outdoor bar and daily “Happy

Hours” from 4 p.m. until 6 p.m. (R. p. 446, line 18), but Mr. Reilly testified that he was not concerned about the safety aspects of his Fish Camp guests accidentally pulling their boats out of the southwest facing marina slips into Barge Creek potentially in front or behind an entering or existing barge, because “we won’t serve somebody in excess.” (R. p. 447, line 19-22)

The Petitioners’ barge runs generally three days a week (depending on the demands of the economy), and the push boat is currently piloted by Capt. Teron Daley, a USCG-licensed captain. The barge is generally loaded on Hilton Head beginning about one hour after low tide and then pulls out of Barge Creek, directly beside the area where Simmons has been permitted to build its marina, at about two hours past low tide. It takes about an hour and a half to make the trip to Freeport Marina’s barge landing on Daufuskie Island, where the barge is off-loaded. The barge then sits at Freeport for about two hours to allow transported workers and their vehicles to complete certain tasks, and then begins its return journey to Hilton Head right at high tide. (R. p. 107, lines 11-25; R. p. 108, lines 1-25; and R. p. 109, lines 11-13)

According to the sworn testimony of Capt. Daley, William P. Scurry, and Eric Lunde, all of whom have piloted the push-boat and barge frequently over the last ten years, safely entering and exiting Barge Creek into Broad Creek, is a challenging proposition because of tidal movement and routine winds. The current routine practice of pulling the barge out of Barge Creek into Broad Creek on an incoming or “flooding” tide, results in the push-boat and the back of the barge being moved northeast up Broad Creek as the push-boat and back of the barge enter the current of Broad Creek. According to Daley, Scurry and Lunde, each of whom was qualified as an expert by the Court in the field of barge operations in the area of the Barge

Creek and Broad Creek confluence, if the marina is built as permitted, the barge will routinely come in contact with the outermost southwest fingers of the marina as it exits Barge Creek because of the tidal movement of the barge. (R. p. 107, line 11 through p. 109, line 13; p. 120, line 24 through p. 121, line 19; Petitioners' Exhibit 13; p. 554, line 10 through line 22; and p. 236, line 25 through p. 239, line 19)

All three testifying barge operators for the Petitioners expressed grave concerns about recreational boaters "docking and dining" at the Fish Camp restaurant and then returning to their boats and accidentally pulling in front of the moving barge entering or existing Barge Creek. Capt. Daley testified that he has had experiences with recreational boaters who did not appreciate the size and movement of the barge and that people will "kinda cut you off or they'll get in front of you at you know, maybe 15 feet, 20 feet and try to take a picture of it or something like, not, not realizing that if something was to occur to their boat to where they stopped or something, you know, you wouldn't be able to stop in time to assist them or get out of their way..."(R. p. 130, line 17 through p. 131, line 6) Capt. Daley went on to testify that it would take 10 to 15 seconds to stop the barge in the likely event a recreational boater accidentally pulled out of the marina into his on-coming path. (R. p. 131, lines 15-18)

Capt. Lunde testified: "And I could see—the probability would be there that some guy who's coming out of the Simmons Restaurant getting in his boat and getting ready to leave, and he didn't either hear the, the horns, because of the storm or whatever, and he could back right out in front of you and there would be nothing you could do. So from my aspect the finger piers on the south side of that dock are a danger to, to the boat and to the public that uses it." (R. p. 264, line 6 through p. 265, line 6)

Scurry, the owner of the Petitioner J & W and the founder of the barging operation 45 years ago, was even more blunt: “ You can’t control Mother Nature, and you better just live with it. The last thing anybody wants to do is for this man not to have a dock. I don’t care whether he has a dock, I don’t even own Broad Creek anymore. So that’s got nothing to do with it. Somebody’s gonna die out there. I promise you, somebody will die. It this—if this is done and some, some kind of correction isn’t done, somebody’ll die.” (R. p. 189, lines 8-17) Scurry further testified: “When you come around you can’t see a damn thing over here (indicating). Nothing. You can see nothing. So you’re coming around here and there’s four kayakers or some guy—the way they’re building this dock, look you’re gonna have 30 foot boats in here. You got a 30 foot boat with a guy half drunk backing out here.” (R. p. 189, lines 19-25)

Nate Jones, the Vice-President and General Manager of Broad Creek Marina, the property owner on the south side of Barge Creek, testified and identified Petitioners’ Exhibits (R. p. 562 and p. 563) as letters he wrote on behalf of Broad Creek Marina to DHEC and the Corps of Engineers during the public comment period for the Simmons proposed permit in 2018, objecting to the issuance of this permit. (R. p. 272, line 7 through p. 273, line 22, and Petitioners’ Exhibits R. p. 562 and p. 563) Therein, Mr. Jones pleaded to OCRM and the Corps: “Issuance of this permit would allow the construction of the marina—of a marina that would put our marina property in immediate peril due to risk of collision with the barging operation that currently operates out of it....We believe the construction of the proposed marina would make the barging operation unable to operate safely entirely. The construction of the proposed marina would also create a hazard to navigation for all boaters currently

utilizing our marina which has been in business for more than 20 years.” (R. p. 274, line 21 through p. 275, line 13)

In support of the permit, Simmons produced the testimony of Duncan O’Quinn, a Beaufort-based marine contractor with a life time of experience in the marine industry, but who had never actually piloted a barge and push-boat into or out of, Barge Creek. (R. p. 469, lines 5-8) Mr. O’Quinn, who admitted he hoped the marina permit would be upheld because he hoped to be awarded the construction contract that he estimated to be valued at between \$600,000 and \$850,000 (R. p. 518, lines 16-20), acknowledged the concerns of Scurry, Daley and Lunde “are legitimate, but there are ways to compensate and do that maneuver.” (R. p. 477, lines 20-22) Capt. O’Quinn went on to opine that he did not believe the construction of the marina would restrict reasonable navigation on public waters, but his testimony, in context, seems to reflect a belief that the question asked was about impeding navigation in Broad Creek—not Barge Creek. (R. p. 477, line 18 thorough p. 479, line 18) And when questioned further by Simmons’ counsel as to his opinion on an impediment, he stated “It is going to make it more challenging. It’s not that it’s going to –it’s, it can be done.” (R. p. 479, lines 3-4) But then when asked about whether he believed that recreational boaters pulling into Barge Creek from the new marina structure would restrict the reasonable navigation of state waters by the barge, he replied “Well, that’s a whole different story. If there was a boat in the middle of the river would be impeding the barges path. So if it was in the way, and it was out in the middle of it, it could, but so could a boat leaving the Broad Creek Marina impede the navigation of the barge.” (R. p. 479, lines 14-18)

Mr. O'Quinn then concluded his testimony by identifying Petitioners' Exhibit 43 (R. p. 616), a drawing he believes is a preferred design for the Simmons marina, which removed 15 feet from the outlying finger, shortened the other southwest fingers to 40 feet and installed five-pile dolphins, substantive changes from the as-permitted marina that was before the Court. "That was my design and the way I think it should be built. I'm not speaking for Simmons Family Holdings. That's just if I were designing the marina, and I think that is a very fair, safe assessment, to make it safe for all parties." (R. p. 527, line 16 through p. 528, line 25 and Petitioners' Exhibit 43.) (R. p. 616) Exhibit 43 later was embraced by the Court as the "O'Quinn Alternative." See Final Order, (R. p. 36, paragraph 26, subparagraph (1)).

Respondent OCRM called a single witness: Blair Williams, the manager of the Critical Area Permitting Program. Mr. Williams testified that his staff, in evaluating the permit application, applied its interpretation of S.C. Code of Regulations 30-12(a) and 30-12(e), after analyzing the permit under Reg. 30-11. (R. p. 366, line 12 through p. 368, line 12) "So, the Department determined that, you know, ultimately by issuing the permit decision that we determined that it would not restrict the reasonable navigation or the public use of state lands and waters." (R. p. 368, line 24 through p.369, line 3) "Yeah so, I mean, I'll be very candid. I mean, that was a very tough decision." (R. p. 369, lines 14-15)

Mr. Williams admitted that OCRM does consider safety concerns that are raised about a project during public comment. (R. p. 363, lines 14-19.) As to the issue of whether the marina will cause an impediment to navigation, Mr. Williams—like Mr. O'Quinn—appeared to believe that the question should focus on the issue of navigation in Broad Creek, not Barge Creek. When asked about the factors that brought the Department to the conclusion that

navigation was not a basis to deny the permit, he responded: “And given the geographic setting of this area, that is a very, very large river. There’s a lot of room in the river to do the same maneuvering techniques that has been described here in the past two days to be able to move in and out of Broad Creek into the small portion of Barge Creek.” (R. p. 376, lines 7-13) And in response to his counsel’s question of “The width of Broad Creek was a consideration?,” Mr. Williams stated, “That’s correct.” (R. p. 388, lines 14-16.)

Mr. Williams repeatedly told the Court of an alleged telephone conversation between OCRM staff member Josh Hoke (who did not testify and was not present) and Petitioner Scurry, wherein Scurry supposedly said that a three-pile dolphin at the end of the outlying southwest finger of the proposed Simmons’ marina would solve all navigation problems. Williams testified that that alleged conversation was an important consideration in the OCRM staff decision. “Mr. Scurry then represented to the Department that he would be able to navigate in and out safely if dolphin pilings were installed.” (R. p. 371, line 8 through p. 373, line 13) However, on cross-examination, Mr. Williams acknowledged no personal knowledge of Mr. Scurry every making that statement: “The project manager, Josh Hoke, and I had a conversation when he got off the phone with Mr. Scurry on May 25, 2021, I believe, and stated that he suggested the dolphin piles would have given the ability to move in and out safely, and that his lawyer would follow up with a letter.” Mr. Williams then acknowledged that OCRM never received any confirmation letter (R. p. 399, line 23 through p. 400, line 10), and Mr. Scurry testified that he only suggested that dolphin pilings could help as the barge was being pulled out of Barge Creek—but did not in any way alleviate the impediment presented to the barge entering Barge Creek. (R. p. 177, lines 4-6) Mr. Williams never

personally spoke to Scurry, even though he had spoken directly with proposed permittees in the past. (R. p. 400, line 11 through p. 401, line 20.)

During the entirety of the Department's three-year review of the proposed permit application, no one from OCRM ever determined where and at what physical point in the "turning arc" of the waters at the intersection of Barge Creek and Broad Creek, it was necessary to be clear, for the barge to be able to safely turn into Barge Creek from Broad Creek. "Not after the point that Mr. Scurry admitted that he'd be able to in—access in and out safely." (Testimony of Williams (R. p. 409, lines 14-16) No independent testing was performed nor were markers placed in the water designating the layout of the to-be-permitted marina to see if the barge could safely turn into the Barge Creek. (R. p. 412) In sum, DHEC's only witness made it very clear that the Department based its decision on the permit in large part, on the hearsay conversation that supposedly took place between Mr. Scurry and DHEC's Josh Hoke:

Question: "So once again, the Department was relying on this supposed acquiescence to these three dolphin pilings as being the answer?"

Williams: "Mr. Scurry, as the barge operation and his expertise and, and knowledge of moving in and out of Barge Creek when he represented the Department that he could safely navigate in and out of Barge Creek with the use of those pilings. Yes."

(R. p. 412, lines 3-11)

Argument 1:

The Court erred in admitting and considering the hearsay statement of Josh Hoke alleging that Petitioner William Scurry had admitted to Hoke that J & W's push boat captain would be able to safely maneuver the barge in and out of Barge Creek if dolphin mooring were added.

The Court erroneously accepted certain evidence that clearly violated the S.C.R.E. 802 prohibition on hearsay, and then relied on same extensively in its Order. As is noted above, DHEC presented its Manager of the Critical Area Permitting Program, Blair Williams, to testify as to exactly what actions DHEC undertook in evaluating the permit application and the objections to same from J & W. Unfortunately, much of the actual work on the permit application was performed by former DHEC employee Josh Hoke, who was not at trial and whose deposition was not taken. Some of the important work performed by Mr. Hoke apparently included talking with Petitioner Scurry by telephone on at least one occasion, and then supposedly Mr. Hoke relayed some or all of that conversation to Mr. Williams, who was then allowed to present it as evidence at trial over Petitioner's hearsay objection. That was an error of law by the Court, and prejudicial to the Petitioners.

SCRE 801 defines "hearsay" as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. SCRE 802 declares that "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." On April 27, 2023, the second day of the contested case, Blair Williams was put on the stand by Brad Churdar, counsel for DHEC, and Mr. Williams testified at length to alleged extensive work SCDHEC put in to try to solve the conflicting positions of the restaurant's desire to build its marina and J & W's desire to insure safe passage for the barge:

(Mr. Williams) Yeah so, I mean, I'll be very candid. I mean, this was a tough decision. (R. p. 369, lines 14-15) A lot of concerns were raised as it relates to the barge operation, their ability to access in and out. (R. p. 369, lines 19-20) But ultimately, we tried very hard to work with both Mr. Scurry

and the Simmons Family Holdings to address the concern related to the barge operations and the ability to navigate in and out. (R. p. 370, lines 11-15)

When Mr. Williams began to recite what Petitioner's counsel knew would be hearsay testimony, it was objected to:

(Mr. Williams) Then there's been communications with Mr. Scurry, we've provided the revised drawings saying does this appease your concerns? Mr. Scurry, picked up the phone call staff and documented in the regulatory file that we consider for our permitting decision that if mooring piles—

(Mr. Taylor) Objection. Hearsay.

(The Court) It's your clients own comments used by the opposing party.

(Mr. Taylor) Yes, sir. Given and being supported as coming through a DHEC staff member I believe who's not here. I do not think it was him.

(The Court to Mr. Churdar) Any response?

(Mr. Taylor) Your Honor, if you understand—I'm sorry. My objection is not as to what Mr. Scurry said. It is that he's testifying as to what his staff member who allegedly spoke to Mr. Scurry told him, I believe.

(Mr. Churdar) I, I don't—I don't think that that was what—I mean Mr. Williams didn't quite get his words out. I, I don't think that's where he was going. I mean, I don't know that he was focused on that so much as the result. Well, he jumped in early enough that I, I don't want to speak for him. But that was what I was thinking the direction that he was going was not focused on what Mr. Scurry said. But what the Department did in response to the input from Mr. Scurry.

(The Court) I'll let you go.

(R. p. 371, line 8 through p. 372, line 19)

Immediately after the Court overruled the hearsay objection, Mr. Williams testified: “We then coordinated that information with the—Mr. Scurry, who objected. Mr. Scurry then represented to the Department that he would be able to navigate in and out safely if dolphin pilings were installed. We then coordinated that information, that comment back to the

applicant, and applicant agreed to install dolphin pilings. We had revised plan done. And then having—that’s one component of—that we felt that this would not restrict the reasonable navigation of the operation because it was represented to the Department that he could safely navigate in and out with the dock being moved and the dolphin pilings in place.” (R. p. 372, line 24 through p. 373, line 13)

On cross, Petitioners’ counsel elicited testimony from Mr. Williams that made it crystal clear that the testimony regarding Mr. Scurry’s alleged admission was not something Mr. Williams heard from Mr. Scurry (which would have then fallen under the exception of SCRE 801 (d)(2) (Admission by Party-Opponent), but was instead pure hearsay, same being a statement from then-SCDHEC employee Josh Hoke who was not at trial:

(Mr. Taylor) First, tell me who, to your knowledge, said Wick Scurry agreed that those dolphin pilings would cure the problem?

(Mr. Williams) The project manager, Josh Hoke, and I had a conversation when he got off the phone with Mr. Scurry on May 25, 2021, I believe, and stated that he suggested the dolphin piles would have given the ability to move in and out safely, and that his lawyer would follow up with a letter.

(Mr. Taylor) But you never got a letter from me or from Mr. Scurry saying those dolphins would satisfy his concerns, did you.”

(Mr. Williams) We did not receive a letter.

(R. p. 399, line 20 through p. 400, line 10)

The importance of the erroneous admission of this hearsay testimony is difficult to overstate, because the Court clearly accepted and relied upon the testimony as being an admission that the installation of the pilings would allow the barge “to move in and out safely” even though Mr. Scurry’s earlier testimony during the hearing had made it clear that his discussions with DHEC about dolphins only impacted (and assisted) the barge when

leaving Barge Creek, when the incoming tide naturally pushed the barge up Broad Creek (toward the new SFH marina), where the barge could then “lay” against the pilings as it was pulled out into Broad Creek. The pilings would do nothing but present another obstacle for the barge to strike as it maneuvered into Barge Creek unless the marina were moved out of the “turning arc.”

(Mr. Taylor) And will you tell us your experience and your opinion as to what will occur on the pulling out of the barge from Broad Creek if the Simmons’ Marina is built as it’s shown in Exhibit 13. (R. p. 554) You can walk through how you pull it out and that type thing if it’ll help you.

(Mr. Scurry) Well, I assume this is Charlie’s old dock, the green, is that correct?

(Mr. Taylor) That’s what they say. Yes, sir.

(Mr. Scurry) Okay. What I was---

(Mr. Taylor) Charlie being Charlie Simmons.

(Mr. Scurry) Charlie Simmons, yes. I’m sorry. When I was running the barge, I would—I would aim at Charlie’s barge just because for whatever re—at his dock with the boat. We just head out to that side. And when I would get here (indicating), you know, fairly close to his dock, I would roll the wheel to the starboard, kick it in. That would throw the bow toward the Simmons Fish Camp, that way. And, and I would ease out. But when you get here (indicating), the thing about a – whether you have a twin screw or single screw boat, doesn’t matter, when you’re sideways to the current you have really no control of the boat. In other words, it’s gonna go about where the current takes it. So you, you almost have to do all the work back here (indicating). Right? So I think there was a picture that we had taken, did we not, of where the boat was on a normal tide? And it basically came across here (indicating), if this it the same drawing, correct?

(Mr. Taylor) Yes, sir.

(Mr. Scurry) It hit the dock. And that’s where we came into discussions about putting the dolphins out here. The dolphins would go along here (indicating) so that you could come out and at least you could lay up against this (indicating). You could lay it up against this and get yourself out because without that you would hit that dock. And just like Teron said, you’ve got all

kinds of situations when you're running anything. I mean, you can't—you can't run a barge on the best day. Now there are days we have to close the barge down because of inclement weather. But just for normal wind blowing out of the Northeast or, or whatever direction, when it kicks up out there it's going to affect the operation of the barge, it's as simple as that. So that's why we had agreed to put those dolphins out here.

(Mr. Taylor) For the moving of the boat out, out—

(Mr. Scurry) For the barge getting out.

The erroneous admission of the hearsay statement of Josh Hoke supposedly summarizing what he and Mr. Scurry had discussed, apparently confused Mr. Williams (who testified that Hoke had said Mr. Scurry had said “he would be able to navigate in and out safely if dolphin pilings were installed” (R. p. 373, lines 1-3), and clearly confused the Court, which accepted the hearsay statement and based important findings in the Final Order on it:

1. “The witnesses on both sides agreed that dolphins would give the barge something to lay against in the Area of Concern, protecting the barge from the marina and marina from the barge.” (Final Order, R. p. 7, paragraph 21. However, the footnote cites to the Transcript refer to testimony concerning the barge leaving Barge Creek, or unrelated pilings at Freeport Marina. The only time the pilings are cited as being potentially helpful to the barge returning to Barge Creek came from the Respondents' expert O'Quinn who opined that if J & W would keep the barge at Freeport for eight hours and wait for the tide to rise again, it could then enter Barge Creek and use the new pilings to lay against again. Mr. Scurry testified that keeping the barge at Freeport for 8 hours would financially ruin J & W's business operation. “I might as well close it. But I—unfortunately, I'm not sure that that is an option on Daufuskie, so I'm not sure what I would do.” R. p. 540, lines 1-4)

2. “Mr. Williams testified that Mr. Scurry verbally represented to OCRM staff prior to the final permitting decision that the addition of the dolphin pilings would allow him to safely navigate the barge in and out of its mooring at BCM. While Petitioner’s counsel cross-examined Mr. Williams thoroughly on this testimony, no contradictory testimony was offered by Mr. Scurry.” (Final Order, R. p. 24, paragraph 92)
3. “During the entirety of the Department’s three-year review of the proposed permit application, no one from OCRM ever determined where and at what physical point in the “turning arc” of the water it was necessary to be clear for the barge to be able to safely turn into Barge Creek from Broad Creek. ‘Not after the point that Mr. Scurry admitted that he’d be able to in—access in and out safely’.” (Final Order, R. p. 24, paragraph 95)
4. “Perhaps most telling is Mr. Scurry’s admission to Mr. Williams that the addition of the dolphin pilings would allow him to safely navigate the barge in and out of its mooring at BCM. Stated differently, Mr. Scurry admitted that neither the length of the catwalk on the Marina nor the existence of finger pier [sic] on the western side of the dock would be of import if dolphin pilings were added. Mr. Scurry testified to the contrary at trial, this admission weakens his arguments.” (Final Order, R. p. 25, paragraph 103) (Actually, this provision of the Final Order is perhaps most telling as to the damage that admission of the hearsay statement of Josh Hoke caused in this hearing: By this point in the Order, the statement is being recited as if Mr. Scurry had actually spoken directly to Mr. Williams, which again, as noted above, would

have put the statement in an exception category had it been the case. But it wasn't. And this mistaken understanding of the testimony by the Court clearly impacted the Court's view of Mr. Scurry's testimony. ("[T]his admission weakens his argument(s). (Final Order, R. p. 25, paragraph 103)

5. "Moreover, J & W's contention that the finger piers on the western side of the proposed marina is undercut by Mr. Scurry's admission to Mr. Williams that the addition of the dolphin pilings would allow him to safely navigate the barge in and out of its mooring at BCM." (Final Order, R. p. 32, paragraph 26)

Five times in the Final Order—four in the Findings of Fact and once in the Conclusions of Law—the Court relied upon the hearsay evidence of Josh Hoke (through Blair Williams) that was improperly admitted. And the damage it caused is evident, and is precisely why the Rules of Evidence prohibit hearsay except in limited exceptions (none of which existed here). Without Mr. Hoke present in Court to be cross-examined, where presumably he would have acknowledged that he and Mr. Scurry discussed the pilings in relation only to the benefits they offered in leaving Barge Creek, it was impossible for the Petitioners' counsel to properly probe the truthfulness of Mr. Hoke's (or Mr. Williams) statement. And what ultimately happened here--the Court mistakenly accepting the testimony and then relied on it as the basis for important factual findings and conclusions of law-- is why the hearsay bar exists.

Erroneously admitted hearsay of probative value is presumed prejudicial. SCDSS v. Beeks, 325 S.C. 243, 481 S.E. 2d 703 (1997). Here, the Petitioners were clearly prejudiced

by the error. Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it “could not reasonably had affected the result of the trial.” State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (S.C. 1985), *citing* State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971). Due to this error of law, under S.C. Code Section 1-23-610(B), this Court may and should reverse the ALC.

Argument 2:

The ALC’s final decision, which allows the construction of the Simmons Family Holdings, LLC’s marina in the “O’Quinn Alternative,” to include the reductions to the length of the finger piers on the Area-of-Concern side of the marina and the increase from three-pile to five-pile dolphins, was not supported by substantial evidence. A review of the entire record on appeal reveals that reasonable minds would not have reached the same conclusions as the ALC.

The Court mistakenly misread or misunderstood certain testimony, which resulted in a number of Findings of Fact and Conclusions of Law in its Final Order that are unsupported by substantial evidence.

1. In its 31st Conclusion of Law, the Court concludes that “Petitioners safety concerns” (about the barge and push boat colliding with a recreational boater leaving the restaurant after dining and drinking, and entering the narrow Barge Creek) “are also undermined by the Petitioners’ operations at Freeport Marina which, along with a marina-adjacent restaurant that serves alcohol to recreational boaters, is owned by Petitioner Scurry.” (Final Order, R. p. 34, paragraph 31) However, this conclusion overlooks or mistakes the preponderance of the testimony that shows that the barge landing approach and

leaving at Freeport is dramatically different and much easier than the approach and leaving at Freeport.

Freeport Marina is located on a large expanse of the Cooper River and the push boat captain can see everything in front of him as he makes a direct approach to the barge landing at slack tide. *See* Scurry's testimony at R. p. 195, lines 5-8: "My barge comes in here (indicating), by the way, but it's a totally different situation because you can see the whole way. They can see the whole way." *See also* Simmons' Family Holdings Exhibit 3, (R. p. 544). The approach and leaving from Freeport is clear and open on a slack (high) tide as compared to the difficult turning maneuver against a falling tide that creates a temporary blind spot for the Captain, as he attempts to safely enter the narrow Barge Creek. *See* the testimony of Capt. Daley at R. p. 118, lines 7-22. "As you're turning the corner, as I was saying, you kind of lose visibility here for a while until you basically get to about here (indicating). And once you get up here, you're going to be facing almost directly at the marina. And the reason being is what I was saying earlier where you lead with your head. So if you get into a funny situation, you almost kind of want to just run it into the mud right here (indicating). So you'd be coming in, your stern would almost be close to this dock (indicating) as possible. At the last minute you would turn it and you just run it up in there (indicating) as hard as you can." The Court correctly noted that Capt. Daley's testimony could be summarized as proving "The barge docks in Freeport Marina with a significantly easier maneuver according to testimony from Mr. Daley because of the movement of the tide." (Final Order, R. p. 10 at paragraph 32)

The only testimony countering Capt. Daley and Mr. Scurry's differentiation of the much easier Freeport landing, was by the Petitioners' expert O'Quinn, whose entire testimony on the matter was admitted speculation, yet the Court relied upon the testimony in its Final Order. O'Quinn testified: "So coming in, he turns you know, he probably would make his approach down here (indicating) below the screen, come up from this area, and then, you know, come straight in and nosing up to right there (indicating). I was told, you know, because he don't have any spuds." (R. p. 509, lines 12-17) From that basic testimony of O'Quinn, the Court erroneously concluded that "J & W is already operating in an environment with high recreational boater traffic, including boaters who have alcohol service available to them." (Final Order, R. p. 10, paragraph 36)

The substantial evidence presented during the contested case hearing established that the barge's approach and leaving from Freeport Marina on Daufuskie Island is completely different and much easier because of the visibility and tide, and the ALC erred by holding that the Freeport landing "undermines" Petitioners' safety concerns. There was no substantial evidence tending to show the approaches were similar.

2. The Court's Final Order mistakenly considered the former location of the original Simmons' Family dock as being relevant to the issue of the newly permitted marina creating an impediment to navigation. Notwithstanding the Respondents' counsel's repeated questioning of all witnesses as to the existence of a former gap "of less than 100 feet between the BCM concrete pier to the west and the former SFH dock to the east" (Final Order, R. p. 5, paragraph 13), a plain review of SFH Exhibit 14 (R. p. 941) and the overlay of Appellants' Exhibit 13 (R. p. 554) shows that the location of the former dock was not in the "turning

arc” at issue in this case, and that the former SFH dock was located much further down Barge Creek, where the barge is not being impacted by the tidal movement. While it is correct that J & W safely navigated the barge and push boat through that quiet section of Barge Creek for years, that is completely unrelated to the issue of whether the new marina, which will be constructed much further east and in the “turning arc” of the barge, will create an impediment to navigation. As Mr. Scurry testified: “[I]t’s very clear that that dock did not go out into the water the way this new configuration does.” (R. p. 213, line 25 through p. 214, line 2)

Each of the witnesses (Daley and Lunde) who have actually piloted the push boat and barge into Barge Creek in recent years, testified that if the new marina is constructed in the location permitted, the barge will likely strike the new marina in certain circumstances as it turns out of Broad Creek and into Barge Creek. Capt. Daley testified: “[W]e’d be driving over these fingers right there (indicating) sir.” (R. p. 120, lines 24-25) Capt. Lundy testified that the construction of the new marina in the location as permitted, would make it “almost impossible” for the barge and push boat to enter Barge Creek under certain conditions. (R. p. 237, lines 1-7) Reasonable minds would not reach the same conclusion as the ALC did because the substantial evidence is that the site of the former Simmons’ Family dock was dramatically different than the site of the proposed new construction.

3. The Court mistakenly construed the testimony of Capt. Daley as being that he was not “worried” about striking “the marina” while operating the barge and push boat (implicitly assuming it was the new SFH Marina he was describing). (Final Order, R. p. 15, paragraph 55: “Capt. Daley specifically testified that while he was concerned about the safety of boaters, he was not worried about hitting the marina or anything like that.”)

A review of the hearing transcript makes it abundantly clear that this quote is taken out of context and that the “marina” being addressed by Capt. Daley in that answer *was the existing Broad Creek Marina and its long concrete pier*, and not the “to be constructed” new Simmons Family Holding marina. (R. p. 159, lines 16 through 25 and p. 160, lines 1 through 6.

(Mr. Taylor) Turan, when you just said you’re not concerned about hitting the marina, which marina are you talking about?

(Mr. Daley) I’m sorry.

(Mr. Taylor) Which marina were you just talking about when you just answered the question, you’re not concerned about hitting the marina? Do you understand what I’m asking? Michael just asked you a question about were you concerned about hitting the marina and it sounded as if you said you were not and I’m trying to figure out what marina. Are you talking about Broad Creek Marina, are you talking about the proposed Simmons Family extension?

(Mr. Daley) Broad Creek Marina, sir.

Capt. Daley never testified that he was “not concerned” about striking the to-be-constructed Simmons Family Holding’s marina; he consistently testified that if the Simmons marina is built as permitted, that he’ll be colliding with the new marina in certain circumstances as he attempts to enter Barge Creek. *See* above multiple cites to Trial Transcript.

The effect of this mistake by the ALC was compounded by the Court’s confusion as to when the addition of the pilings to the Simmons marina fingers will be of assistance to the barge and push boat captain. *See* Final Order Conclusion of Law number 24 (R. p. 32), where the Court mistakenly concludes that the “modifications” providing for dolphin pilings “for the barge to lay against, protecting both the barge and the marina,” would make docking

the barge “achievable.” A review of the entirety of the evidence presented during the hearing makes it clear the pilings will be used by the barge and push boat to “lay against” only when the barge is being pulled out of Barge Creek to begin its journey to Daufuskie Island. The only thing the pilings and Simmons finger docks will be to the barge and push boat Captain on the way back, while entering Barge Creek, is an unmistakable impediment to navigation that the testimony shows, will result in likely collisions. Reasonable minds could not reach any other conclusion.

4. When viewed in its totality, the evidence presented by DHEC’s witness Williams was replete with errors and misunderstandings sufficient to show DHEC was mistaken in its approval of the permit. As the Court notes in its Final Order Finding of Fact number 91 (R. p. 23, paragraph 91), Blair Williams testified that DHEC considered “numerous factors” to determine whether the Simmons marina would restrict reasonable navigation. They were:

a. The width of Broad Creek and the space available for maneuvering at the project. Mr. Williams specifically testified in response to his counsel’s question as to what were the factors that brought the Department to the conclusion that claimed impediment to navigation was not a basis to deny the permit application, “[G]iven the geographic setting of the this area, that is a very, very large river. There’s a lot of room to do the same maneuvering techniques that has been described here in the past two days to be able to move in and out of Broad Creek into the small portion of Barge Creek.” (R. p. 376, lines 7-13) The width of Broad Creek, be it 500 yards or a mile, plays no role whatsoever in the maneuver that Daley, Scurry and

Lundy all testified was required to enter Barge Creek: the barge and push boat must be on the most western side of Broad Creek, just off the existing Broad Creek Marina, pushing directly into the falling tide, before the bow of the barge is turned left toward Barge Creek, because the falling tide immediately begins to sweep the barge down (south) toward the existing concrete pier of Broad Creek Marina. If, as Mr. Williams apparently believes, J & W would simply “use the width of Broad Creek” and make a wider turn, all the testimony shows the barge would be swept into the concrete pier of Broad Creek Marina, causing probably serious damage. As it returns to Hilton Head, the barge and push boat must hug the left side of Broad Creek in order to move the barge into Barge Creek before it is swept against the concrete pier by the falling tide. Reasonable minds cannot differ on what the substantial evidence showed.

b. Another of the “numerous” factors supposedly considered by DHEC was the width of the barge compared to the “gap” between the permitted structure and the existing structure at Broad Creek Marina. Although Mr. Williams said that was a criteria (R. p. 388, lines 17-20), it is undisputed that once the barge and push boat make the turn (which is when the collision is likely to happen), there is no problem with the barge and push boat traversing the narrow creek as it has done for forty years.

c. Another of the “numerous” factors supposedly considered by DHEC was the supposed fact that the former Simmons dock was closer to the BCM pier than the Simmons marina at issue under the permit. As noted above, the fact of the matter is that the former Simmons dock was much further up Barge Creek toward

the actual concrete barge landing, well out of the “turning arc” and presented no interference to the barge operations for years. By the time the barge and push boat passed by the old Simmons dock when moving up Barge Creek, they are out of the current, under full control and simply nosing up Barge Creek to the concrete barge landing.

d. Another of the numerous factors supposedly considered by DHEC, was the permittee’s revision of the original permitted design to move the new marina 20 feet to the adjoining property line. That supposedly moved it “as far away as possible from the barge operation that they could by locating the marina on the on the most northern extended property line. (Final Order, R. p. 24, paragraph 94) Although the Petitioners acknowledge that DHEC and Simmons did in fact move the location of the proposed marina an additional 20 feet north in order to try to alleviate the potential collision point in the turning arc, that move did not remove the to-be-built marina finger piers from the collision point. Thus, while laudable, the move did not cure the problem, and saying that it’s been moved as far as possible doesn’t cure the problem. Reasonable minds here would not reach that conclusion based upon the substantial evidence.

Taking the testimony of Mr. Williams as a whole, it is clear that once Josh Hoke, through what hopefully was a good-faith mistake in relaying parts of his discussion with Mr. Scurry about the pilings that would assist in moving the barge out of Barge Creek, advised Mr. Williams of his conversation with Mr. Scurry, DHEC ceased any further good-faith

investigation into the matter. “I mean that helped us and aided in, in determining that it would be reasonable navigation.” (R. p. 399, lines 17-19).

(Mr. Taylor) Well, I ask you one more time, then I’ll try to move on from this. You testified that moving this from the initial placement 20 feet north as far as it could go was satisfactory to the Department for safety purposes and impediment purposes, right?

(Mr. Williams) As it relates to the objections that were presented by Mr. Scurry, which was the impacts of the barge operation and to the structure by putting those pilings there he would be able to safely navigate in and out of Barge Creek without creating an issue for the barge operation or the structure that was being permitted.

(Mr. Taylor) Okay. So the Department never actually determined where and what point in this area of water it was necessary to be clear for the barge to be able to turn left and go in?

(Mr. Williams) Not after the point that Mr. Scurry admitted that he’d be able to in—access in and out safely.

(R. p. 408, line 21 through p. 409, line 16)

The Hoke hearsay statement, improperly allowed and relied upon by the ALC, was the determinative factor in DHEC’s decision, and was improper. It was hearsay and should have been excluded, and clearly played a major role in the ALC’s Final Order, thereby causing actual prejudice to the Petitioners. The remaining record on appeal also shows that the ALC’s decision was not supported by substantial evidence, and that reasonable minds could not reach the same conclusions as the ALC.

CONCLUSION

This case was a hard case. DHEC admitted that, but ultimately based its approval on hearsay relayed through a staff member. The ALC then admitted and relied on that hearsay, which clearly was in error. Mr. Scurry’s suggestion that pilings at the end of the Simmons

finger docks to be approved in an appropriate location outside of the turning arc, would help as the barge was pulled out of Barge Creek and began to be moved up river by the rising tide, somehow mistakenly was converted by the ALC into an alleged admission that the addition of pilings to the end of the finger dock in the currently-permitted location, would resolve all issues. And that runs contra to all the evidence presented in the contested case hearing regarding the required turning arc out of Broad Creek and into Barge Creek. Considering the entire record, the ALC's decision was not supported by substantial evidence, and reasonable minds would not have reached the same conclusion as the ALC did.

For the foregoing reasons, this Court should reverse the ALC's Final Order of August 16, 2023, and deny the permit.

CERTIFICATE OF COUNSEL

I certify that this Final Brief complies with SCACR 211(b).

Respectfully submitted,

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