

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Ralph King Anderson, III, Administrative Law Judge

SC SUPREME COURT

Unpublished Opinion No 2010-UP-182
Heard October 7, 2009 – Filed March 1, 2010

South Carolina Department of Health and Environmental Control,

Appellant,

v

Phillip Przyborowski,

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

S C Department of Health and
Environmental Control, Appellant,

v

Philip Przyborowski, Respondent

Appeal From Richland County
Ralph K. Anderson, III, Administrative Law Court Judge

Unpublished Opinion No 2010-UP-182
Heard October 7, 2009 – Filed March 1, 2010
Withdrawn, Substituted and Refiled June 28, 2010

AFFIRMED AS MODIFIED

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000001

Christopher Holmes, of Mount Pleasant, for
Respondent

PER CURIAM. This appeal concerns an administrative enforcement order issued by South Carolina Department of Health and Environmental Control (the Department) against Philip Przyborowski requiring the removal of a previously approved private dock on the ground that it exceeded the maximum allowable dimensions under the applicable regulation. In the appealed order, the ALC determined that given the absence of any enforcement action against a similarly situated dock owner, the Department's institution of an enforcement action against Przyborowski "reflect[ed] arbitrary and purposeful discrimination in the administration of the law." The Department appeals.

We affirm the following issues raised by the Department pursuant to Rule 220(b), SCACR, and the following authorities: (1) as to the timeliness of Przyborowski's request for review: Rule 6(e), SCRCR (allowing five additional days to any prescribed period after service for a party to respond if service was by mail), Rule 3(C), SCALCR (providing a similar extension to that in Rule 6(e), SCRCR), and (2) as to issues relating to the ALC's finding that the Department's enforcement action against Przyborowski was arbitrary: S C Code Ann. § 1-23-610(B) (Supp. 2009) ("The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact"), Neal v. Brown, 383 S C 619, 623, 682 S E 2d 268, 269 (2009) ("In permitting cases, the ALC serves as the finder of fact"). Pursuant to section 1-23-610(B)(e) and (f), however, we modify the appealed order to uphold the dismissal of the enforcement action based on the ALC's finding that the enforcement action was arbitrary, rather than on the finding that the action amounted to a violation of Przyborowski's equal protection rights.

Based on our decision to affirm the appealed order, we decline to address Przyborowski's argument that the ALC erred in holding it could not invoke equitable estoppel as a defense to the Department's enforcement action. See Futch v. McAllister Towing of Georgetown, Inc., 335 S C 598, 613, 518 S E 2d 591, 598 (1999) (stating an appellate court need not address remaining issues when a decision on a prior issue is dispositive), Whiteside v.

Cherokee County Sch Dist No One, 311 S C 335, 340, 428 S E 2d 886, 889 (1993) (declining to address certain issues on appeal because the decision on another issue was dispositive)

AFFIRMED AS MODIFIED.

HUFF, THOMAS, and PIEPER, JJ., concur

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Case No 07-ALJ-07-0254-CC

South Carolina Department of Health and Environmental Control,

Appellant,

v

Phillip Przyborowski,

Respondent

**PETITION FOR REHEARING,
SUGGESTION FOR REHEARING EN BANC, AND
MEMORANDUM IN SUPPORT**

TO THE COURT OF APPEALS AND ALL PARTIES

Pursuant to Rules 219 and 221, SCACR, the South Carolina Department of Health and Environmental Control (the "Department") respectfully petitions this Court to vacate Opinion Number 2010-UP-182 (the "Opinion"), filed on March 1, 2010, and to grant a rehearing in this matter, further, the Department suggests that upon rehearing, this matter be heard *en banc*

Grounds for Rehearing

The Department respectfully submits that the Opinion overlooks or misapprehends the following points

(1) The Opinion misapprehends the issues presented for review and affirms the dismissal of the administrative enforcement order based upon a ground which does not appear in the Record

(2) There is not substantial evidence in the Record to support a finding that the Administrative Enforcement Order was arbitrary

(3) Section 1-23-610 requires that this Court reverse the ALC's dismissal of the Administrative Enforcement Order

Argument

I Rehearing Should Be Granted Because The Opinion Misapprehends The Issues Presented For Review And Affirms The ALC Based Upon A Ground Which Does Not Appear In The Record

“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal” Rule 220(c), SCACR¹ “An appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record” Iron, LLC v Town of Mt Pleasant, 338 S C 406, 420, 526 S E 2d 716, 723 (2000), see also Rule 208(b)(1)(B), SCACR (“[o]rdinarily, no point will be considered which is not set forth in the statement of issues on appeal”) “The basis for respondent's additional sustaining grounds must appear in the record on appeal, but other requirements contained in former rules and pre-1990 precedent no longer apply Of course, a respondent may abandon an additional sustaining ground under the present rules—just as a respondent could under the former rules—by failing to raise it in the appellate brief” Iron LLC, 338 S C at 420, 526 S E 2d at 723 (citing *Maxey v R L*

¹ Although the Opinion does not cite Rule 220(c) as the authority underlying the Opinion because arbitrariness does not appear in the record or in either party's statement of issues on appeal as a ground on which the ALC could be reversed, the Department assumes that the Opinion relies upon Rule 220(c), SCACR for authority

Bryan Co, 295 S C 334, 336 n 2, 368 S E 2d 466, 467 n 2 (Ct App 1988), and *May v Hopkinson*, 289 S C 549, 558, 347 S E 2d 508, 513 (Ct App 1986))

The Appellant included the following as issues on appeal

- I Did the ALC erred [sic] in concluding Respondent's dock is 1,014 feet in length despite admission by Respondent's counsel that dock was 1,040 feet and the other substantial evidence in the record?
- II Once the Department proved the dock length violation, did the ALC err in utilizing a double standard for proving dock length as between the Department and the Respondent and err in concluding the Albanesi dock similarly situated?
- III Did the ALC err in concluding that Respondent proved purposeful discrimination when there is no evidence in the record supporting such a conclusion?
- IV Did the ALC err in concluding that Respondent proved an equal protection defense when Respondent failed to identify a similarly situated dock or to show any purposeful discrimination?
- V Did the ALC abuse its discretion in not requiring Respondent to remedy the proven dock-length violation when Respondent failed to present a viable defense?

(App Br at 1) Respondent stated the following three issues as issues on appeal

- I Are the Administrative Law Judge's findings of fact supported by substantial evidence in the record?
- II Did the Administrative Law Judge correctly decide Respondent's Equal Protection Claim?
- III Is Equitable Estoppel an available defense to Respondent under the facts presented?²

(Resp Br at 1)

² Though these were stated in Respondent's Brief as Issues on Appeal, they were not properly preserved for review Respondent did not file a cross appeal challenging the ALC's ruling that equitable estoppel and laches are not available as a defense and the ALC's holding that estoppel and laches are unavailable as a defense to Respondent is the law of the case See *Sanders v S C Dept of Corrections*, 379 S C 411, 418, 665 S E.2d 231, 234 (Ct. App 2008) *Commercial Credit Loans, Inc v Riddle*, 334 S C 176, 187, 512 S E.2d 123, 129 (Ct. App 1999) (holding a lower court's finding was the law of the case because respondent failed to cross appeal the issue), Rule 203(c), SCACR (detailing the proper procedure for filing a cross appeal) Thus, estoppel and laches are not grounds appearing in the record on which the Court of Appeals could affirm the ALC's dismissal of the enforcement order because the law of the case is that estoppel and laches are unavailable as a matter of law

The opinion affirms the ALC's dismissal of the enforcement order and provides states the following

We affirm the following issues raised by the Department pursuant to Rule 220(b), SCACR, and the following authorities [] and (2) as to issues relating to the ALJ's finding that the Department's enforcement action against Przyborowski was arbitrary S C Code Ann § 1-23-610(B)(e) (Supp 2009) (providing an appellate court may reverse or modify an ALJ's order "if the substantial rights of the petitioner have been prejudiced because the finding, conclusion, or decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record", Neal v Brown 383 S C 619, 623, 682 S E 2d 268, 269 (2009) ("In permitting cases, the ALC serves as the finder of fact") Pursuant to section 1-23-610(B)(f) of the South Carolina Code, however, we modify the appealed order to uphold the dismissal of the enforcement action based on the ALJ's finding that the action was arbitrary, rather than on his finding that it amounted to a violation of Przyborowski's equal protection rights "

S C Dept of Health and Env'tl Control v Przyborowski, Unpublished Op No 2010-UP-182 (Filed March 1, 2010) (emphasis added) Neither party raised arbitrariness as a ground upon which the ALC could have dismissed the enforcement action Arbitrariness of the enforcement order appears nowhere in the record as a ground on which the ALC did or could have dismissed the enforcement action

The Opinion misapprehends the issues that were presented on appeal and the ruling of the ALC Specifically, the ALC did not make a finding that the Department's enforcement action against Przyborowski was arbitrary In fact, the word "arbitrary" appears only once in the ALC's Order in connection with a finding On the last page of the Order, after discussing the applicable law of an equal protection claim, the ALC found that "the fact that DHEC received the information regarding both docks from the same survey yet instituted an enforcement action against only one of the dock owners with no apparent intention of bringing an action against the other owner reflects arbitrary



and purposeful discrimination in the administration of law” (R p 18) This finding is not a finding that “the enforcement action was arbitrary,” as the Opinion misapprehends. Rather, this is a finding of arbitrary and purposeful discrimination to support a claim of an equal protection violation.³ A finding that a drawing approximating two docks to be ± 1020 ⁴ feet long establishes evidence of arbitrary and purposeful discrimination in the administration of law is very different from a finding that the enforcement action itself is arbitrary.

The Opinion properly does not uphold the ALC’s finding of an equal protection violation. Thus, the ALC’s erroneous finding of arbitrary and purposeful discrimination cannot serve as a basis for finding the enforcement action against Respondent itself arbitrary. Arbitrariness does not appear anywhere in the Record on Appeal or in the Briefs as a ground for dismissing the enforcement action. Therefore, Court should grant this Motion for Rehearing, vacate the Opinion, and reverse the ALC.

II There Is Not Substantial Evidence In The Record To Support A Finding That The Administrative Enforcement Order Was Arbitrary

Though arbitrariness is not a ground appearing in the record and cannot serve as a basis for affirming the ALC’s dismissal of the enforcement action, even if it was, there is not substantial evidence in the record to support a finding that the enforcement action was arbitrary. There is a clear prohibition of docks over 1000’ in the critical area. 23A S C Code Ann Reg 30-12(A)(1)(I) (“Docks longer than 1000’ over the critical area are

³ *Albeit, an erroneous finding* Mr Trumbull testified that the reason he did not intend to bring an enforcement action against Mr Albenesius was because he measured the Albenesius dock and he determined that the Albenesius dock was not longer than 1000’ (R. p 106 line 2-p 107, line 6) Respondent presented no evidence to the contrary, other than the survey approximating both docks to be (Incidentally, Mr Trumbull’s measurement of the Albenesius dock at 1000’ and the Przyborowski dock at 1040 is consistent with a ± 1020 ’ estimation of the average of both docks—1020 is the average of 1040 and 1000) It would have been arbitrary for the Department to bring an enforcement action against Albenesius given that Mr Trumbull determined that it did not exceed 1000

⁴ R. p 246

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prohibited This is inclusive of pierheads, floats, boatlifts, ramps, mooring pilings and other associated features”) (emphasis added) The ALJ found the dock to be in excess of 1,000 feet in the critical area.⁵ Without a valid legal defense, an enforcement action by the Department against a clear violation of the regulation cannot be said to be arbitrary.⁶ The three defenses raised by Respondent were equal protection and the equitable defenses of laches and estoppel. The ALC rejected the Respondent’s arguments as to estoppel and laches, and the Opinion properly does not uphold the ALC’s finding of an equal protection violation. Therefore, there is not substantial evidence in the record to support a finding that the enforcement action was arbitrary since the ALC found that the dock is in clear violation of the regulation.

c. Section 1-23-610 Requires Rehearing and Reversal of the ALC

The Court should rehear this matter and reverse the decision of the ALC, because the ALC’s decision is not supported by substantial evidence and it was an abuse of discretion for the ALC to not require Respondent to remedy a proven violation of the regulation. The ALC found that the dock is in fact in excess of 1000’,⁷ but dismissed the enforcement action based on an erroneous conclusion that the enforcement action

⁵ It was, however, arbitrary for the ALC to find that the Dock was anything less than 1040. Respondent’s Counsel admitted via letter to the Department that the dock was 1040’ in critical area. (R. p 256) Moreover, the ALC’s finding that Respondent’s assertion that the critical line had migrated 22’ over the intervening period lacked credibility. (R. p 7) (The credibility of Mr Przyborowski’s assertion that the critical line has moved 22 feet in the past seven years is questionable. Furthermore, Mr Przyborowski testified there is no erosion between his yard and the marsh which is supported by Mr Trumbull. As explained by the manager of the Critical Area Permitting for DHEC, Curtis Joyner, critical area lines do not typically move significantly along shorelines protected by expanses of marsh, as is the case at the Przyborowski lot.) Given this admission of the length of the dock, it was arbitrary and capricious for the ALC to find that the length of the dock over the critical area was anything less than 1040’.

⁶ The Department is given statutory authority “to revoke and suspend permits of persons who fail or refuse to carry out or comply with the terms and conditions of the permit,” and “to enforce the provisions of this chapter and all rules and regulations promulgated by the department and institute or cause to be instituted in courts of competent jurisdiction of legal proceedings to compel compliance with the provisions of this chapter” and “to exercise all incidental powers necessary to carry out the provisions of this chapter.” S C Code Ann § 48-39-50

⁷ See note 5, supra.

violated Respondent's rights to equal protection. The Opinion did not uphold the equal protection violation.

"The review of the administrative law judge's order must be confined to the record [] The court of appeals [] may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is

(a) in violation of constitutional or statutory provisions,

[]

(d) affected by other error of law,

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or

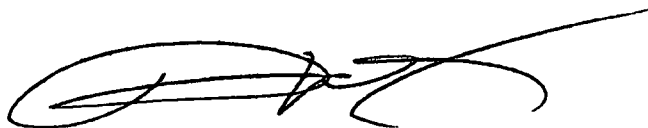
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

S C Code Ann § 1-23-610 (B) The ALC dismissed the enforcement order based on an erroneous finding of an equal protection violation, the Opinion did not uphold the finding of an equal protection violation. Moreover, the Opinion cites S C Code Ann § 1-23-610(B)(e) and (f) as supporting modifying the ALC's decision. The Opinion affirmed the opinion on a ground that does not appear in the record. Given the clear violation of the regulatory prohibition on docks in excess of 1000', there is not substantial evidence in the record to support a finding of that the enforcement action is arbitrary. There being no meritorious available to Respondent, it is an abuse of discretion to not require the Respondent to remedy the violation of the regulations. Thus, this Court should grant rehearing and reverse the decision of the ALC.

CONCLUSION

WHEREFORE, based on the foregoing, the Department of Health and Environmental Control respectfully request that the Court grant this motion for rehearing, further suggests that this matter be reheard *en banc*, and requests that this Court issue an Opinion reversing the ALC in this matter

Respectfully submitted,



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March 15, 2010
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Case No 07-ALJ-07-0254-CC

South Carolina Department of Health and Environmental Control Appellant,

v

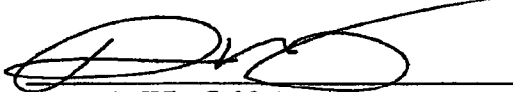
Phillip Przyborowski,

Respondent

PROOF OF SERVICE

I hereby certify that on this date I served the Department's Notice of Appearance in this matter upon the Respondents or their counsel, by placing copies of same in the United States Mail, first class postage prepaid, addressed to

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March 15, 2010

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Case No 07-ALJ-07-0254-CC

South Carolina Department of Health and Environmental Control

Appellant,

v

Philip Przyborowski

Respondent

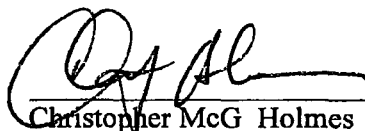
RETURN TO PETITION FOR REHEARING

Respondent believes the Court reached the correct result in its Opinion Number 2010-UP-182 and that there is substantial evidence in the record on appeal to support the decision. While not required to file a return to the Petition, respondent feels compelled to address a particular point advanced by appellant. In challenging this Court's and the Administrative Law Court's finding of arbitrariness in its enforcement action, appellant references the testimony of its employee, Trumbull, and asserts he testified "he measured the Albenesius dock and he determined that the Albenesius dock was not longer than 1000'." In fact, Trumbull testified he "didn't remember exactly right now" if he came up with a measurement but that he didn't "think that it was" over a 1,000', but he was "sure I wrote it down in my notes," notes which he had failed to bring to the hearing. R p 106 ll 16-22. Judge Anderson addressed this specific testimony in his Order of May 15,

2008 R pp 22-25 The trial judge, as the arbiter of fact charged with passing upon the credibility of the evidence presented, found Trumbull's testimony to be "dubious" and gave it little weight Id p 25 The record in this case is replete with examples of the arbitrariness of petitioner's action with respect to the respondent Respondent continually asserted the arbitrariness of appellant's action with respect to his dock as the basis for his challenge to the enforcement action Arbitrariness is an element of an equal protection claim "Further, one seeking to show discriminatory enforcement in violation of the Equal Protection Clause must demonstrate arbitrary and purposeful discrimination in the administration of the law being enforced" Harbit v City of Charleston 382 S C 383, 396, 675 S E 2d 776, 783 (S C App ,2009) The ALC found, as a threshold matter, appellant acted arbitrarily That he proceeded to find an equal protection violation does not negate the finding of arbitrariness or negate the evidence of such behavior in the record

CONCLUSION

Rule 220(c) allows an appellate court to affirm on any grounds appearing in the record Because there is ample evidence of arbitrary actions by petitioner in this record, the Petition should be dismissed



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March 24, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Case No 07-ALJ-07-0254-CC

South Carolina Department of Health and Environmental Control

Appellant,

v

Philip Przyborowski

Respondent

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the Return to Petition for Rehearing on counsel of record by depositing a copy of same in the United States mail, postage prepaid, addressed as follows

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March 24, 2010

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Case No 07-ALJ-07-0254-CC

South Carolina Department of Health and Environmental Control, Appellant,

v

Phillip Przyborowski, Respondent

REPLY TO RETURN TO PETITION FOR REHEARING

TO THE COURT OF APPEALS AND ALL PARTIES

The Department filed a Petition for Rehearing and Suggestion for Rehearing En Banc, primarily on the ground that Opinion Number 2010-UP-182 misapprehended the issues before the Court and affirmed the lower court on a ground not appearing in the record. The Administrative Law Court (ALC) found that Respondent's dock is over 1000', in violation of Regulation 30-12(A)(1)(I),¹ but dismissed the Department's Administrative Enforcement Order Number 06C-011J based on a finding that the Administrative Enforcement Order violated Respondent's rights to equal protection under the law. The Opinion does not uphold the ALC's finding of an equal protection violation. The Opinion "modif[ies] the appealed order to uphold the dismissal of the

¹ The regulation states that "Docks longer than 1,000 feet over critical area are prohibited. This is inclusive of pierheads, floats, boatlifts, ramps, mooring pilings and other associated structures." 23A S.C. Code Ann. Reg. 30-12(A)(1)(I) (Supp. 2007)

enforcement action based on the ALJ's finding that the action was arbitrary, rather on his finding that it amounted to a violation of Przyborowski's equal protection rights "

The ALC did not make a finding that the enforcement order was arbitrary, the only finding of the ALC that included arbitrariness was the ALC's finding that "the fact that DHEC received the information regarding both docks from the same survey yet instituted an enforcement action against only one of the dock owners with no apparent intention of bringing an action against the other owner reflects arbitrary and purposeful discrimination in the administration of law" (R p 18) This finding is related solely to the equal protection claim and is based on the Department's decision not to bring an action against the Albenesius dock, which the Department measured and determined to not be over 1000 feet (Tr p 112 15-113 3, 106 9-107 4) The Opinion does not uphold the ALC's finding of arbitrary and purposeful discrimination in the administration of law, and the ALC made **no finding** that the enforcement action itself was arbitrary Arbitrariness as an independent basis for dismissal of the enforcement order is not a ground appearing in the record, and the Opinion misapprehends the issues presented for review in affirming the ALC's dismissal of the enforcement action on that ground

In his Return to the Petition for Rehearing, Respondent claims he has "continually asserted the arbitrariness of appellant's action with respect to his dock as the basis for his challenge to the enforcement action" (Resp Ret to Pet for Rehearing at 2) **Noticeably missing from Respondent's Return to the Petition for Rehearing is any citation to the record where arbitrariness appears as a ground for dismissal of the enforcement action** The lack of any citation to the record is easily explained, arbitrariness is not a ground appearing in the record

Respondent attempts to cure this by arguing that "arbitrariness is an element of an equal protection claim" (Resp Ret to Pet. For Rehearing at 2) This is an incorrect statement of the law. Though "arbitrary and purposeful discrimination" is an element of an equal protection claim, the inquiry in an equal protection claim is whether the department's decision to pursue an action against Respondent but not to pursue against Respondent's neighbor rises to "arbitrary and purposeful discrimination." This is an entirely different inquiry than whether the Department's enforcement action itself was "arbitrary and capricious" so as to amount to a ground for dismissal under the Administrative Procedures Act. Nowhere in the record does arbitrariness appear as a ground on which the Court could have dismissed the action.

Moreover, there is not substantial evidence in the record to support such a finding. Given the ALC's conclusion in its Order that the dock is in excess of 1000' in the critical area, there is a clear violation of Regulation 30-12(A)(1)(I). Without a valid legal defense, an enforcement action by the Department against a clear violation of the Critical Area Regulations cannot be said to be arbitrary. The Opinion does not uphold the ALC's finding of an equal protection violation. In addition, the ALC correctly found that laches and estoppel are not available as defenses to Respondent, and Respondent does not dispute in his Return to the Petition for Rehearing that the ALC's conclusions on these points became the law of the case when Respondent failed to perfect a cross-appeal of the ALC's Order as required by Rule 203(c), SCACR. The Opinion misapprehended that arbitrariness of the enforcement action was a ground appearing in the record on which it could affirm the ALC's dismissal of the enforcement action, moreover, given that the ALC found the dock to be in excess of 1000', in clear violation of the regulations, and

that there is no legal defense available to Respondent, there is not substantial evidence in the record to support a conclusion that the enforcement action was arbitrary

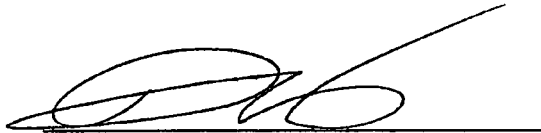
The Opinion modified the ALC's order to remove the ALC's finding of an equal protection violation, the ALC's finding of an equal protection violation was clearly affected by error of law. Moreover, given the ALC's conclusion that Respondent's dock is over 1000', in clear violation of Regulation 30-12(A)(1)(I), and the absence of any legal defense to Respondent, the ALC's decision to dismiss the enforcement action is arbitrary and capricious and characterized by an abuse of discretion. The Opinion misapprehended that the ALC found that the enforcement action was arbitrary, but arbitrariness is not a ground appearing in the record, moreover, a finding that the enforcement action was arbitrary would be clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record given the clear violation of the 1000' rule and the lack of any legal defense to Respondent.

The statute governing review of a final decision of the ALC by the Court of Appeals compels this Court to "reverse [] the decision if the substantive rights of [the Department] have been prejudiced because the [decision of the ALC] is (d) affected by other error of law, (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and (f) "arbitrary [and] capricious [and] characterized by abuse of discretion." S.C. Code Ann. § 1-23-610(B). Therefore it is appropriate to vacate Opinion Number 2010-UP-182, rehear this matter en banc, and reverse the ALC's dismissal of the enforcement action.

Conclusion

WHEREFORE, based on the foregoing arguments, the Department respectfully requests that this matter be reheard, suggests that this matter be reheard *en banc*, and requests that the Opinion be vacated, withdrawn, and substituted with an Opinion reversing the decision of the ALC and requiring Respondent to comply with the Administrative Enforcement Order and bring his dock into compliance with the Critical Area Regulations

Respectfully submitted,



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March 31, 2010
Charleston, South Carolina



The South Carolina Court of Appeals

S C Department of Health and
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v

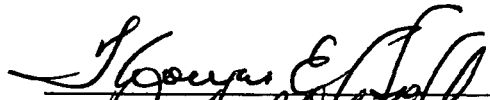
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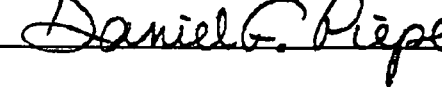
The Honorable Ralph K. Anderson, III
Richland County
Trial Court Case No 2007-AL-07-00254

ORDER DENYING PETITION FOR REHEARING

PER CURIAM Opinion No 2010-UP-182, filed in the appeal above on March 1, 2010, is hereby withdrawn and the following opinion is substituted therefor. Furthermore, after careful consideration of the Petition for Rehearing, the court is unable to discover any material fact or principle of law that was either overlooked or disregarded. Accordingly, there is no basis for rehearing. It is therefore ordered that the petition for rehearing is denied.



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Columbia, South Carolina

Date June 28, 2010

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

S C Department of Health and
Environmental Control, Appellant,

v

Philip Przyborowski, Respondent

Appeal From Richland County
Ralph K. Anderson, III, Administrative Law Court Judge

Unpublished Opinion No 2010-UP-182
Heard October 7, 2009 – Filed March 1, 2010

AFFIRMED AS MODIFIED

Carlisle Roberts, Jr, of Columbia, Davis Arjuna
Whitfield-Cargile, of Charleston, Elizabeth
Applegate Dieck and Evander Whitehead both of
North Charleston, for Appellant

Christopher Holmes, of Mt Pleasant, for Respondent

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PER CURIAM. This appeal concerns an administrative enforcement order issued by Appellant South Carolina Department of Health and Environmental Control against Respondent Philip Przyborowski requiring the removal of a previously approved private dock on the ground that it exceeded the maximum allowable dimensions under the applicable regulation. In the appealed order, the ALJ determined that given the absence of any enforcement action against a similarly situated dock owner, the Department's institution of an enforcement action against Przyborowski "reflect[ed] arbitrary and purposeful discrimination in the administration of the law." The Department appeals.

We affirm the following issues raised by the Department pursuant to Rule 220(b), SCACR, and the following authorities: (1) as to the timeliness of Przyborowski's request for review: Rule 6(e), SCRCRCP (allowing five additional days to any prescribed period after service for a party to respond if service was by mail), ALC Rule 3C (providing a similar extension to that in Rule 6(e), SCRCRCP), and (2) as to issues relating to the ALJ's finding that the Department's enforcement action against Przyborowski was arbitrary: S.C. Code Ann. § 1-23-610(B)(e) (Supp. 2009) (providing an appellate court may reverse or modify an ALJ's order "if the substantial rights of the petitioner have been prejudiced because the finding, conclusion, or decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record"), Neal v. Brown, 383 S.C. 619, 623, 682 S.E.2d 268, 269 (2009) ("In permitting cases, the ALC serves as the finder of fact.") Pursuant to section 1-23-610(B)(f) of the South Carolina Code, however, we modify the appealed order to uphold the dismissal of the enforcement action based on the ALJ's finding that the action was arbitrary, rather than on his finding that it amounted to a violation of Przyborowski's equal protection rights.

Based on our decision to affirm the appealed order, we decline to address Przyborowski's argument that the ALJ erred in holding he could not invoke equitable estoppel as a defense to the Department's enforcement action. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when a decision on a prior issue is dispositive), Whiteside v.

Cherokee County Sch Dist No One, 311 S C 335, 340, 428 S E 2d 886, 889 (1993) (declining to address certain issues on appeal because the decision on another issue was dispositive)

AFFIRMED AS MODIFIED.

HUFF, THOMAS, and PIEPER, JJ , concur