SC DEPARTMENT of ENVIRONMENTAL SERVICES

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RECEIVED
Sep 04 2026
SC Court of Appeals

September 4, 2026

Jasmine D. Smith
Deputy Clerk
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Robert Klomparens v. SCDHEC
Appellate Case No. 2022-001641

Dear Ms. Smith:

This letter responds to the Court's request for the parties to address the impact of Act 251 of 2026 (the Act) and its amendment to Section 1-23-380 of the South Carolina Code and whether the deadline for filing a motion for rehearing with the Administrative Law Court (ALC) may be validly extended by order or consent.

Issue #1
The impact if any of Act 251 of 2026 and its amendment to S.C. Code Section 1-23-380

In this case, the Department denied the Klomparens' permit request for a private, recreational dock because it determined that a generally shore perpendicular straight-line extension of the Klomparens' property boundary lines did not reach a navigable watercourse within 1,000 feet of the marsh critical line as required by S.C. Code Regs. 30-1(D)(54) to be considered "waterfront property." (R. 282). The Klomparens filed a request for contested case, and after a hearing on the case the ALC issued a final order reversing the Department's permit denial. (R. 32-42). On appeal, the Department argued the ALC committed reversible error in finding the Department's long-standing interpretation of Reg. 30-1(D)(54) was not entitled to deference.

Act 251 amended sections 1-23-380(5) and 1-23-610 to add subsection (b) and (c) respectively, which state "the court shall not defer to the agency's interpretation of the statute or regulation and instead shall interpret the statute or regulation de novo." These amendments should not be applied retroactively in this case because the Act does not include a specific provision or clear legislative intent to apply the amendments retroactively. *Edwards v. State L. Enf't Div.*, 395 S.C. 571, 579, 720 S.E.2d 462, 466 (2011) ("It is a well-settled rule of statutory construction that absent a specific provision or clear legislative intent to the contrary, statutes are to be construed prospectively rather than retroactively, unless the statute is remedial or procedural in nature."); see also *State v. Hilton*, 406 S.C. 580, 582, 752 S.E.2d 549, 551 (Ct. App. 2013) ("When the legislative intent is not clear, courts adhere to the presumption that statutory enactments are to be given prospective rather than retroactive application.'" (*citing State v. Bolin,* 381 S.C. 557, 561, 673 S.E.2d 885, 886-887 (Ct.App.2009)). The Act provides that it will take effect upon the Governor's

approval, which occurred on June 30, 2026. The Act does not include any language providing that the Act should be applied before that date. This case originated with the denial letter for a permit to construct a dock dated June 11, 2021. The parties filed their Final Briefs to this Court in October and November 2023, over two years before the Act became effective. Therefore, any application of the Act to this case would be retroactive. Without a statement of legislative intent to apply the Act retroactively, the Act should be resolved in favor of prospectivity, not retroactivity, for cases on appeal before June 30, 2026.

Additionally, the amendments to Sections 1-23-380(5) and 1-23-610 should not apply retroactively because they are substantive in nature, not remedial or procedural. *Id.; Bartley v. Bartley Logging Co.*, 293 S.C. 88, 92, 359 S.E.2d 55, 56 (1987) (holding a substantive statute does not apply retroactively). "A statute is remedial where it creates new remedies for existing rights or enlarges the rights of [claimants]." *Id.* at 579, 720 S.E.2d at 466. "[A] 'procedural' law sets out a mode of procedure for a court to follow, or 'prescribes a method of enforcing rights.'" *Id.* at 580, 720 S.E.2d at 467 (quoting Black's Law Dictionary 1083 (1979)). These amendments are not remedial because they do not affect the remedy to the case, but the Department's right to deference to its interpretation of statutes and regulation. *Hercules, Inc. v. S.C. Tax Comm'n,* 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980) (holding that statutes affecting the remedy, not the right, are remedial and generally retrospective). These amendments are not merely procedural because they substantively affect the Department's right to deference regarding its interpretation of statutes and regulations. *Edwards*, 395 S.C. at 579, 720 S.E.2d at 466 ("When a statute creates a new obligation or imposes a new duty, courts generally consider the statute prospective only."). The Department presented its argument establishing that it was entitled to deference based on statutory language in place at the time of its appeal, before the Act became effective. Requiring the Department to now make its arguments based on the amended statutes would create new obligations on the Department to address issues it was not required to address when it presented its case in its briefs to this Court. Therefore, this Court should not retroactively apply the substantive amendments made by the Act in this case. To do otherwise would be fundamentally unfair. The agency made its interpretive decisions in the underlying proceedings and presented its evidence in reliance on the existing deference standard, and the ALC applied that standard in its 2022 Final Order. (R. 32-42). Applying a new, more stringent standard of review retroactively to a record on appeal and decision made under a different legal framework is inconsistent with the presumption of prospectivity articulated in *Edwards v. State L. Enf't Div.* and *State v. Hilton.*

However, even if the Court applies the Act retroactively, and therefore cannot defer to the agency's interpretation of the regulation under the amendments to sections 1-23-380(5) and 1-23-610, the amendments do not require the Court to disregard the agency's interpretation of the regulation. In fact, S.C. Code Ann. Section 1-23-330(4) provides that in Contested Cases, "[t]he agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence." This section is consistent with the case of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In *Skidmore*, the Supreme Court of the United States stated the court

> [c]onsider[ed] that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort

> for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 140. This Court has cited to *Skidmore* when considering an agency's interpretation of a statute in the case *Colonial Pipeline Co. v. S.C. Dep't of Revenue*, 443 S.C. 448, 459, 905 S.E.2d 129, 134 (Ct. App. 2024), *reh'g denied* (Aug. 19, 2024), *cert. denied* (Feb. 12, 2025).[1]

At trial, Department staff testified that their application of the regulatory definition of "waterfront property" in this permitting decision is consistent with how the Department has applied the definition for many years. (R. 290-91, 313). Jacqueline Adams, the Department's Project Manager who worked on this permitting decision, testified she had processed approximately 400 permit applications for private recreational docks and that the application of the regulatory definition of "waterfront property" in this decision is consistent with how it has been applied in "several hundred" permit applications she reviewed. (R. 272, 290-91). Blair Williams, the Department's Critical Area Permit Section Manager, testified he has overseen "several thousand" permit decisions and that the Department has applied the regulatory definition of "waterfront property" in the way it applied the definition to the Klomparens' property since he became Section Manager of the Critical Area Program in 2008. (R. 311-12). Under *Skidmore*, this Court may consider the long-standing consistency of the Department's application of the regulatory definition of "waterfront property" in making its determination without deferring to the Department's interpretation of the regulation.

Skidmore further states that, in addition to considering a long and consistent history of applying the regulatory language, the "validity of [the agency's] reasoning" should be considered when using that agency's decision as guidance. *Id*. at 140. Blair Williams's reasoning as to why the Department consistently interpreted the regulatory language as it did is consistent with one of the General Assembly's broad stated policies for the Department to implement under S.C. Code Ann. Section 48-39-30; namely to provide a "combination of uses which will insure the maximum benefit to the people." S.C. Code Ann. § 48-39-30(D). Mr. Williams testified to the long-term, cumulative critical area impacts that would likely result if the "waterfront property" definition was applied as Klomparens proposes (and as the ALC affirmed in the Final Order). (R. 41, 323-324). Specifically, Mr. Williams testified that such a regulatory interpretation would "lead to overcrowding of tributaries, cordoning off of marsh – marshes and shorelines that are currently -- tributary-type shorelines that are currently accessible by the public. So, it has a potential to affect many things, but probably first … is [the] use, access, and navigation by the public." (R. 323-324). This is sound reasoning that should be considered pursuant to *Skidmore* when making a decision in this case, even if the Department's interpretation of the regulation is not given deference.

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[1] "The Court overruled *Chevron*, which 'demand[ed] that courts mechanically afford *binding* deference to agency interpretations' while leaving in place *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944), which endorses 'exercising independent judgment ... consistent with the 'respect' historically given to Executive Branch interpretations.'" *Colonial Pipeline Co.*, 905 S.E.2d at 134–35 (*quoting Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 372, 399 (2024)).

Issue #2

Whether the deadline for filing a motion for rehearing with the Administrative Law Court may be validly extended by order or consent

The ALC validly extended the deadline for filing the Department's Motion for Reconsideration. On September 6, 2022, the ALC issued its Final Order in this case. As indicated by the attached email chain, on September 14, 2022 (two days prior to the deadline), Department's counsel sought and received opposing counsel's consent to a ten-day extension because the Department had a two-day trial scheduled the following week. That same day (September 14, 2022), the Department's counsel requested a 10-day extension from the ALC due to the above-mentioned scheduling conflict, changing the filing deadline from September 16, 2022, to September 26, 2022. As the attached email chain indicates, the ALC granted the extension that same day (September 14, 2022), two days before the deadline to file the motion. Notably, in granting the Department's extension request, the Court expressed no concern that it would lose jurisdiction over the case by granting the extension. The Department relied on the Court's communication that the extension was granted when it filed its Motion for Reconsideration on the later date. The first time the ALC expressed any concern about its authority to grant the extension was long after the original filing deadline had expired in the ALC's October 25, 2022 Order Denying Respondent's Motion For Reconsideration. Had the Department known on September 14, 2022, that the ALC would assert lack of jurisdiction on October 25, 2022, the Department would have worked around the clock and done everything it could to file the Motion for Reconsideration by the original filing deadline (September 16, 2022). To find out *after* everyone agreed to a 10-day extension and the September 16, 2022 filing deadline had passed when the Department could do nothing about it that the Court had questions about its jurisdiction is grossly unfair.

Regardless, the ALC had the authority to grant the extension pursuant to Rule 3(b), SCALCR, which states that "[f]or good cause shown, the administrative law judge may extend or shorten the time to take any action, except as otherwise provided by rule or law." Unlike the South Carolina Rules of Civil Procedure, the Administrative Law Court Rules do not provide an exclusion that prevents Rule 3(b), SCALCR, from applying to motions for reconsideration under Rule 29(d), SCALCR.[2] *Compare* Rule 6(b), SCRCP ("The time for taking any action under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the extent and under the conditions stated in them.") *with* Rule 3(b), SCALCR ("For good cause shown, the administrative law judge may extend or shorten the time to take any action, except as otherwise provided by rule or law.").

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[2] In the Court of Appeals August 11, 2026 letter, this Court referred to the Department's motion as a "motion for rehearing," not a motion for reconsideration. Because this litigation originated as a contested case in the ALC, it would be governed by Rule 29, SCALCR, which allows for a *motion for reconsideration* of a final decision of an administrative law judge in a contested case. Even if this were a motion for rehearing instead of reconsideration, we note that in an unpublished opinion this Court recognized that Rule 3(b), SCALCR, applied to the extension of time to file a motion for rehearing in the ALC. *See Brooks v. S.C. Dep't of Lab., Licensing, & Regul*, Op. No. 2025-UP-208 (S.C. Ct. App. filed June 25, 2025) Therefore, pursuant to the rationale expressed in this case, the administrative law judge would have the authority to extend the time to file a motion for rehearing as well as a motion for reconsideration under Rule 3(b), SCALCR.

While Rule 29(d), SCALCR, refers to Rule 59, SCRCP, this reference has to do with the fact that Rule 29(d) includes the same time limits for filing a motion for reconsideration that were included in Rule 59, SCRCP, until recently when that rule was amended to allow 20 days to file and respond to the motion instead of 10 days. Nothing in Rule 29(d) indicates that Rule 3(b), which states it applies "to any action," would not allow for an extension of time to file a motion for reconsideration.

The case *Russell v. Wachovia Bank*, N.A., 370 S.C. 5, 20, 633 S.E.2d 722, 730 (2006), which the ALC cited in its order denying its motion for reconsideration regarding its possible lack of jurisdiction, was an appeal from the circuit court, not the ALC. Therefore, *Russell* was governed by the South Carolina Rules of Civil Procedure, which do not allow an extension of time to file a motion for reconsideration. However, this case was governed by the South Carolina Administrative Law Court Rules, which allows for an extension of time under Rule 3(b). *See also* Rule 1(A), SCALCR ("[The Administrative Law Court Rules] apply exclusively in all proceedings before the Administrative Law Court."); Rule 68, SCALCR ("The South Carolina Rules of Civil Procedure and the South Carolina Appellate Court Rules, in contested cases and appeals respectively, may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these Rules."); Rule 69, SCALCR ("Once the Court acquires jurisdiction of a matter from an agency, the SCALC Rules shall govern all procedural aspects of the matter, notwithstanding any other procedural statute, agency regulation or rule."). Other cases in which the court held the ten-day deadline governing a Rule 59(e) motion was not subject to extension were *appeals from the circuit court, which follows Rule 6(b), SCRCP*. *See Overland, Inc. v. Nance*, 423 S.C. 253, 256-57, 815 S.E.2d 431, 433-34 (2018) (stating in an appeal from the circuit court that "the ten-day deadline in Rule 59(e) is an absolute deadline").

The ALC addressed whether the enlargement provision found in the Office of Motor Vehicle Hearing (OMVH) rules, which is the same as the provision found in the Administrative Law Court Rules, applied to a motion for reconsideration in the case of *S.C. Dep't of Motor Vehicles & Cayce Dep't of Pub. Safety*, No. 18-ALJ-21-0419-AP, 2019 WL 6492403 (Nov. 20, 2019). OMVH Rule 3(B) ("For good cause shown, the hearing officer to whom a case is assigned may extend or shorten the time to take any action, except as otherwise provided by rule or law."). In that case, the South Carolina Department of Motor Vehicles argued that the OMVH lost its jurisdiction after the ten-day period to file a motion for reconsideration had lapsed. *Id.* at *3. The ALC found that OMVH Rule 3(B), allowed for an extension of the time to file a motion for reconsideration if the party requested the extension within the ten-day period to file the motion. *Id.* at *3-4. Here, the SCDES requested the extension before the ten-day period to file a motion for reconsideration ended. Therefore, the ALC had the authority to grant (and did grant) the extension for the Department's Motion for Reconsideration under Rule 3(B), SCALCR.

Thank you for the opportunity to address these issues before oral argument.

Sincerely,

Bradley D. Churdar

Bradley D. Churdar
Associate General Counsel

BDC/rab

Outlook

Re: Klomparens Motion for Reconsideration

From Churdar, Bradley <churdabd@dhec.sc.gov>
Date Mon 26/09/2022 17:49
To Robin Coleman <rcoleman@scalc.net>
Cc mshahid@nexsenpruet.com <mshahid@nexsenpruet.com>; DeBruhl, Janet H. <debruhjh@dhec.sc.gov>

1 attachment (223 KB)
2022-09-26 - DHEC's Motion to Reconsider with cover letter & COS [Klomparens].pdf;

Robin:

Attached please find the Department's Motion for Reconsideration for the Klomparens case.

Thanks,
Brad

Bradley D. Churdar
Associate General Counsel
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1362 McMillan Avenue, Suite 400
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From: Robin Coleman <rcoleman@scalc.net>
Sent: Wednesday, September 14, 2022 3:02 PM
To: Churdar, Bradley <churdabd@dhec.sc.gov>
Cc: mshahid@nexsenpruet.com <mshahid@nexsenpruet.com>
Subject: RE: Klomparens Motion for Reconsideration

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Dear Mr. Churdar,

With the understanding that there is no objection, Judge Durden will grant the extension of time.

Robin E. Coleman
Judicial Aide to Judge Deborah Brooks Durden
S.C. Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201
(803) 734-6407

From: Churdar, Bradley <churdabd@dhec.sc.gov>
Sent: Wednesday, September 14, 2022 1:56 PM
To: Robin Coleman <rcoleman@scalc.net>
Cc: mshahid@nexsenpruet.com
Subject: Re: Klomparens Motion for Reconsideration

Ms. Coleman:

I am preparing a Motion for Reconsideration of Judge Durden's Final Order for Klomparens (Docket No. 21-ALJ-0-0310-CC). With the consent of opposing counsel (Mary Shahid), I am requesting a 10-day extension to file my Motion. If the Court grants this extension, the due date would be Monday, September 26th. I have a trial currently scheduled for next Thursday and Friday. Thank you very much.

Brad

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From: Shahid, Mary D. <MShahid@nexsenpruet.com>
Sent: Wednesday, September 14, 2022 9:11 AM
To: Churdar, Bradley <churdabd@dhec.sc.gov>
Subject: Re: Klomparens Motion for Reconsideration

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Yes no problem

Sent from my iPhone

On Sep 14, 2022, at 7:07 AM, Churdar, Bradley <churdabd@dhec.sc.gov> wrote:

{EXTERNAL EMAIL}

Mary:

I'm preparing a Motion for Reconsideration of the Klomparens Final Order. The deadline is Friday, September 16th. Would you consent to a 10-day extension until Monday, September 26th? I have a 2-day trial scheduled for next Thursday and Friday and would appreciate a little extra time.

Thanks,
Brad

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