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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Docket No. 12-ALJ-07-0050-CC

James R. Maull

Appellant,

vs.

South Carolina Department of Health and Environmental Control
and David Abdo,

Respondents,

and

Russell and Laura Schaible,

Respondents.

RESPONDENTS' JOINT INITIAL BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

- I. Is overturning and declaring invalid the Amendment preserved for appellate review when Appellant did not raise this issue or have it ruled on by the ALC?

- II. Did the ALC err in affirming the Amendment when it determined this matter is a private dispute that does impact the public interest based on the following:
 - a. Did the ALC correctly determine the Amendment complied with 23A S.C. Code Ann. Reg. §30-12(A)(1)(a) when it applied case law and DHEC OCRM's regulations regarding public navigational hazards?
 - b. Did the ALC correctly review material and evidence regarding the potential for public harm resulting from the Amendment?

- III. Did the ALC err in affirming the Amendment where it determined that the Amendment complied with the requirements of 23A S.C. Code Ann. Reg. §30-11 and S.C. Code Ann. §48-39-150 and did not adversely impact the value and enjoyment of adjacent property?

STATEMENT OF THE CASE

The action giving rise to this case, the Amendment to Critical Area Permit Number OCRM-07-128-F (Amendment), containing a Special Condition, was issued to David Abdo (Abdo) by the South Carolina Department of Environmental Control (DHEC) on October 6, 2011. This Amendment authorized reconfiguration and the movement of Abdo's proposed dock structure towards the extended property line of James R. Maull (Maull). Russell and Laura Schaible (Schaibles) reside at 31 Broughton Road in Charleston County, South Carolina and this property also abuts Abdo's property. On October 14, 2011, Maull requested a Final Review Conference before the Board of Health and Environmental Control (Board). In response, Abdo and the Schaibles subsequently submitted timely requests for a Final Review Conference. The Final Review Conference was held on December 8, 2011. The Board issued the Final Agency Decision on the matter January 9, 2012. A Request for Contested Case was made to the Administrative Law Court (ALC) by Maull on February 8, 2012. The Schaibles moved to intervene which motion was granted on March 8, 2012. DHEC filed a Motion for Partial Summary Judgment and Motion to Dismiss on July 24, 2012. Maull filed a response to DHEC's motions on August 2, 2012. A hearing on the motions was held at the ALC on August 23, 2012. The Court issued an Order granting DHEC's Motion for Partial Summary Judgment on October 14, 2012. DHEC's Motion to Dismiss was denied at this time. A Contested Case hearing was held before the ALC in Columbia, South Carolina on January 15, 2013. The ALC issued its Final Order and Decision on August 1, 2013 affirming DHEC's issuance of the Amendment. On August 19, 2013, Appellant's

filed a Notice of Appeal with the South Carolina Court of Appeals asserting the ALC erred in affirming the Department's decision to issue the Amendment to Abdo.

STATEMENT OF THE FACTS

Abdo purchased the property at 29 Broughton Road Charleston County, South Carolina, from the Palmer Estate in August of 2007. (Tr. p. 116, l. 6-7, 16-23.) A condition of this purchase was for the Palmer Estate (Palmer) to obtain a dock permit, which Palmer obtained in 2007. (Tr. p. 117, l. 10-12.) The Schaibles reside at 31 Broughton Road in Charleston County, South Carolina, and their property is adjacent to Abdo's property. (Tr. p. 143, l. 15-16, ALC Final Order, Findings of Fact 2.) A permit was approved and issued to Palmer by DHEC on August 2, 2007, which was later transferred to Abdo. (ALC Final Order, Finding of Fact 4.) In December 2007, Appellant applied to DHEC to modify his dock; however, despite knowing Abdo was the owner of 29 Broughton Road, Appellant's application did not identify him as an adjoining property owner. (Tr. p. 81, l. 23-p. 82, l. 10, l. 14-17, Abdo Ex. 3.) Instead, Appellant named his cousin, Charles Palmer, an executor of the Palmer Estate. (Tr. p. 63, l. 12-24, Abdo Ex. 3.) In February 2008, Abdo met with Appellant to discuss amending the Palmer permit to reconfigure the dock and move it closer to their shared property line; however, Appellant refused to consent to Abdo's application. (Tr. p. 119, l. 18-p.120, l. 21.) Appellant's application was approved by DHEC on May 14, 2008, which permitted Appellant to exchange his floats for longer floats, thereby bringing his dock closer to his shared property line with Abdo. (Tr. p. 82, l. 21-83, l. 23.)

Due to Appellant's failure to identify Abdo as the adjoining property owner, Abdo did not receive notice of Appellant's application to amend his permit until after he witnessed Appellant commencing construction nine months later in September 2008. (Tr.

p. 120, l. 22-p.121, l. 12.) As a result, Abdo did not have an opportunity to comment on Appellant's application. (Tr. p.121, l. 19 – p.122, l. 4.)

In May of 2011, Abdo applied to amend the Palmer permit. (DHEC Ex. 2.) The Amendment was issued October 6, 2011, containing a special condition requiring the structure to be located 30.5 feet from the extended property line shared with Maull. (DHEC Ex. 1.)

Thereafter, Maull requested a Final Review Conference before the Board, and in reply, Abdo and the Schaibles requested a Final Review Conference, which was held on December 8, 2011. (DHEC Ex. 5, p. 2.) On January 9, 2012, the Board issued a Final Agency Decision removing the special condition based upon Staff's erroneous determination that Maull's dock was located 10 feet rather than 18.5 feet from the shared extended property line. (DHEC Ex. 5.) The Amendment authorized the movement of Abdo's proposed dock structure, allowing roughly 39 feet between the Abdo proposed dock and Maull's dock. (Tr. p. 179, l. 15-20.)

A timely Request for Contested Case was made to the ALC by Maull on February 8, 2012. (ALC Final Order, Statement of the Case, Maull Notice of Request for Contested Case.) The Schaibles' Motion to Intervene was granted by Order of the ALC filed March 8, 2012. (ALC Order Granting Motion to Intervene.) Maull objects to the location approved by the Amendment. (Maull Notice of Request for Contested Case.) Maull specifically complains that the distance between the two docks will not allow him enough space to maneuver his 48-foot fishing boat into the landward side of his dock. (ALC Final Order, Finding of Fact 14.) Maull has a private recreational dock that was originally constructed 23 years ago, which he has modified by amendment several times over the

years, including the addition of a longer floating dock in September 2008. (Tr. p. 83, l. 1-23, Abdo Ex. 3.)

The ALC issued an Order granting DHEC's Motion for Partial Summary Judgment on October 14, 2012. The Court also denied DHEC's Motion of Dismiss at that time. (ALC Order granting Partial Summary Judgment to DHEC.)

A Hearing on the Contested Case was held before the ALC in Columbia, South Carolina on January 15, 2013. The ALC issued its Final Order and Decision affirming DHEC's issuance of the Amendment without Special Conditions. On August 19, 2013, Appellant filed a Notice of Appeal with the South Carolina Court of Appeals asserting the ALC erred in affirming DHEC's decision to issue the Amendment to Abdo.

ARGUMENT

I. Appellant did not raise nor get a ruling on overturning and declaring invalid the Amendment, and thus this matter is not preserved for appellate review.

“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” Gause v. Smithers, 742 S.E.2d 644, 650, 403 S.C. 140, 151 (2013) (internal citation omitted). “When a trial judge makes a general ruling on an issue, but does not address the specific argument raised by the appellant and the appellant does not make a motion to alter or amend pursuant to Rule 59(e), SCRPC, to obtain a ruling on the argument, the appellate court cannot consider the argument on appeal.” Floyd v. Floyd, 365 S.C. 56, 73, 615 S.E.2d 465, 474 (Ct.App. 2005).

In Appellant’s appeal for a Final Review Conference, he requests the Abdo dock be located 40.5 feet from the shared property line. (Maull Ex. 5, p. 2.) Similarly, Appellant’s Notice of Request for Contested Case asked the ALC “to issue an Order reversing the action of the Board and modifying the actions of the staff and maintaining a 40.5 foot offset from Petitioner Maull’s dock.” (Maull’s Notice of Request for Contested Case, p. 4.) In his Pre-Hearing Statement, Appellant requested that the ALC “issue its Order reversing the Decision, modifying the actions of the Board, and maintaining a 40.5’ offset from the critical line.” (Appellant’s Pre-Hearing Statement, p. 3.) At the conclusion of the trial, pursuant to Appellant’s proposal, the parties agreed to submit proposed

orders to the ALC in lieu of closing arguments. (Tr. p. 194, l. 19-p.195, l.15.) Appellant's Proposed Order Granting Petitioner's Request sets forth his request for relief in its conclusion, and a proposed grant of relief. Therein, Appellant again requests that the Board be reversed but that DHEC Staff's decision be reinstated and "the Abdo dock be located 30.5 feet" from the shared property line.¹ (Maull's Proposed Order, Conclusion.)

In his Initial Brief, Appellant requests the Amendment be "overturned and declared invalid." (Appellant's Initial Brief, pp. 24-25.) However, Appellant now raises this issue for the first time on appeal. As noted above, the only issue raised below by Appellant is that the Board decision be reversed and that the Abdo dock be located at either 30.5 feet or 40.5 feet from the shared property line with Appellant. Even if Appellant asserts he did argue at the hearing that the Amendment be overturned, which is not supported by the record, Appellant did not move to alter or amend to obtain a ruling on that issue after his receipt of the Final Order and Decision affirming the Amendment, which placed Abdo's dock 20.5 feet from the shared property line. Due to Appellant's failure to raise this argument and obtain a ruling, this issue is not properly preserved for Appellate Review.

¹ It is important to note that Appellant's request for relief to the ALC is exactly the same as the initial Abdo amendment with special condition, which he complained of when he began this appeal in his request for Final Review Conference: both locations are 30.5 feet from the shared property line.

II. The ALC was correct in affirming the Amendment when it determined this matter is a private dispute that does impact the public interest based on the following:

a. The ALC correctly determined the Amendment complied with 23A S.C. Code Ann. Reg. §30-12(A)(1)(a) when it applied case law and DHEC OCRM's regulations regarding public navigational hazards.

23A S.C. Code Ann. Reg. §30-12(A)(1)(a) states that “Docks and piers shall be limited to one structure per parcel or lot and in all instances, parcels or lots must be waterfront...” and “...shall not restrict the reasonable navigation or public use of State lands and waters.” At common law navigation was determined by the ebb and flow of the tide. However, the Court in State v. Pacific Guano Company, 22 S.C. 50, 56 (1884), later determined that neither the character of the craft nor the relative ease or difficulty of navigation are tests of navigability. In determining navigability, “[t]he true test to be applied is whether a stream inherently and by its nature has the *capacity* for valuable floatage, irrespective of the fact of actual use or the extent of such use.” State ex rel. Medlock v. South Carolina Coastal Council, 289 S.C. 445, 449, 346 S.E.2d 716, 719 (1986).

“Valuable floatage” is defined broadly to include any “legitimate and beneficial public use.” White's Mill Colony, Inc. v. Williams, 363 S.C. 117, 125, 609 S.E.2d 811, 815 (Ct.App. 2005), citing State ex rel. Medlock v. South Carolina Coastal Council, 289 S.C. 445, 450, 346 S.E.2d 716, 719 (1986). Such public use includes all varieties of commercial traffic, ranging from passage of the largest freighter to the floating of raw timber downstream to mill. State ex rel. Medlock v. South Carolina Coastal Council, 289

S.C. 445, 449, 346 S.E.2d 716, 719 (1986). Recreational uses are no less important - boating, hunting, and fishing have been found to fall within the ambit of valuable floatage. White's Mill Colony, Inc. v. Williams, 363 S.C. 117, 125, 609 S.E.2d 811, 815 (Ct.App. 2005), *see* Hughes v. Nelson, 303 S.C. 102, 105, 399 S.E.2d 24, 25 (Ct.App. 1990).

Appellant argues the proximity of Abdo's dock to Appellant's dock creates a navigational hazard on commercial and private boating on the Intercoastal Waterway. (Appellant's Initial Brief p. 17.) However, Appellant misinterprets the term "navigation" within the meaning of Regulation §30-12(A)(1) when he concluded that the location of Amendment "requires additional, unnecessary, and potentially dangerous maneuvering in the busy Wappoo Creek area posing an impediment to the free flow of commercial and recreational traffic in the area." (Appellant's Initial Brief, p. 16.) The Abdo dock's proximity to Appellant's dock does not create a navigational hazard because it does not restrict the public use of the waterway. The Wappoo Creek is approximately 565 feet in width (Tr. p. 180, l. 8-14.) and is frequently used for pleasure boating, yachts, tug boats, and barges. (Tr. p. 20, l. 14-16, p. 24, l. 3.) Appellant's expert testified these vessels can range from a small Jon boat to commercial barges at an average of 30 feet in width. (Tr. p. 25, l. 2-6.) As the ALC correctly asserts, any maneuvering of Petitioner's vessel "in order to navigate between the two docks, if he can at all, would take place in close proximity to his and Abdo's docks and would have little or no impact on the waterway traffic." (ALC Final Order, Conclusion of Law 14.) Maneuvering Appellant's 48-foot boat into the dock would still leave ample room across the waterway for various size vessels to safely travel. (Tr. p. 46, l. 21-25, p. 186, l. 3-18.) Therefore, the navigation of

Appellant's fishing boat in and out of his dock does not involve the protection of public interest. (DHEC Ex. 5, p. 3-4, ALC Final Order, Conclusion of Law 14.)

Additionally, Appellant argues that the Board's decision to grant the Amendment has "spawned this litigation to protect the use and enjoyment of Maull's dock as well as the interest of the public." (Appellant's Initial Brief p. 17.) Appellant looks to Brownlee for guidance. Brownlee v. S.C. Dep't of Health and Env'tl. Control, 382 S.C. 129, 676 S.E.2d 116 (2009).

In Brownlee, an issue for determination was whether a tributary should be deemed non-navigable due to the fact that a manmade structure was creating an impediment to navigation by members of the public. Brownlee, 382 S.C. at 136-137, 676 S.E.2d at 119-120. The structure, a dock constructed by Mr. Atkinson, was located in the mouth of the tributary and was out of compliance with his DHEC permit. Id. at 129 at 131, 676 S.E.2d at 117. The Appellants sought to have this tributary designated as non-navigable because they wished to extend their docks across the tributary to the Bohicket River, which is deeper and has more desirable water access than the small intervening tributary. Id. Though the Supreme Court admonished the Department for allowing the Atkinson dock to remain out of compliance, they concluded that even the Atkinson dock could not render the tributary non-navigable. Id. at 142, 676 S.E.2d at 122-123.

This case is distinguishable. The tributary that was impeded by the Atkinson dock was a small tributary of approximately 25 feet in width, as opposed to the over 500 feet in width of the Wappoo Cut. This was a case where, despite the impediment of the Atkinson dock, the tributary was still deemed to be navigable. Here, the issue is more about the dock structures, rather than the navigability of the Wappoo Cut. There is no

argument being raised here that this waterbody, which is over 500 feet in width, will cease to be navigable. In the case at bar, the only real complaint raised by the Appellant is that he will have problems with mooring his boat on the landward side of this floating dock, not that the Abdo dock will prevent him, or even impede in any way, his, or anyone else's ability to navigate through the Wappoo Cut.

Furthermore, Appellant argues Brownlee is similar to the matter at hand and rests on the Supreme Court's phrase, "we are bewildered as to why DHEC has allowed the Atkinson dock to remain." Brownlee, 382 S.C. at 142, 676 S.E.2d at 623, (2009). The Court's statement, however, relates to compliance with the original permit issued and regulatory enforcement of the non-conforming dock. In this matter, the Amendment conforms to other docks in the area and complies with regulations.

The ALJ correctly applied South Carolina case law when it found the Amendment is not a public navigational hazard. (ALC Final Order, Conclusion of Law 14.) As case law reflects, South Carolina courts have adopted the view that navigational issues between docks are a private property issue. Dorman v. Department of Health and Environmental Control, 350 S.C. 159, 171, 565 S.E.2d 119, 126 (Ct.App. 2002), White v. S.C. Department of Health and Environmental Control, 392 S.C. 247, 255, 707 S.E.2d 812, 816 (Ct.App. 2011). Dorman involved objections to a proposed private recreational dock from neighbors on both sides of the applicant's property. Dorman v. Department of Health and Environmental Control, 350 S.C. at 162-63, 565 S.E.2d at 121 (Ct.App. 2002). The neighboring property owners objected on the grounds that the proposed dock would be too close to their existing docks. Id. at 163, 565 S.E.2d at 121. The court adopted OCRM's interpretation Regulation §30-12 stating "it is not the policy of OCRM

to police navigational disputes that should be dealt with among adjacent property owners.”² Id. In contrast to Dorman, the respondent in White objected to the OCRM’s amendment of a dock permit due to a disruption of a commercial business and its customers. The Court of Appeals concluded that the dispute was not a private dispute, but affected members of the general public and the local shrimping industry. White v. S.C. Department of Health and Environmental Control, 392 S.C. 247 at 257.

Appellant argues the Amendment constitutes more than a private dispute and looks to White for guidance. (Appellant’s Initial Brief, p. 14) (*citing* White v. S.C. Department of Health and Environmental Control, 392 S.C. 247, 707 S.E.2d 812 (Ct.App. 2011)). However, the case at hand is factually different from the situation in White. Both the Abdo and Maull docks are private and not open to members of the public. (Abdo Ex. 3, DHEC Ex. 1.) Moreover, Maull’s dock is seldom used. Maull testified he only takes his boat offshore about 7-8 times a year. (Tr. p. 58, l. 15.) The dock in White was open to the public and frequently used by commercial fishing boats for ice and fuel. White, 392 S.C. at 250, 707 S.E.2d at 814. Additionally, the distance between the Abdo dock and Maull’s dock is roughly 39 feet and his boat is 48 feet in length. (Tr. p. 140-141, l. 25, 1-4, p. 58, l. 11.) However, the distance between the docks in White was 35 feet and the average shrimp boat was 70 feet in length. White, 392 S.C. at 258, 707 S.E. at 817, n.5 (Ct.App. 2011). The likelihood of large shrimping boats approaching the dock and colliding with others leaving is far greater, posing a true navigational concern on public safety. The Amendment’s positioning and Maull’s preference for

² The Court found, “[t]he Panel, in interpreting its own regulation, held that navigation, as contemplated in the regulation, did not encompass problems between neighbors or conflict with nearby docks but only applied to impediments to the general public’s use of State waters.” Dorman v. Department of Health and Environmental Control, 350 S.C. 159, 163, 565 S.E.2d 119, 124 (Ct.App. 2002).

mooring his 48-foot boat into the landward side of his dock will not disrupt commercial business or recreational activity, nor jeopardize the safety of the general public or commercial navigation on the Wappoo.

The ALJ correctly applied DHEC's regulations when it found the Amendment was not a public navigational hazard. S.C. Code Ann. Regs. §30-12(A)(1)(p) provides that, "No docks, pier heads or other associated structures will be permitted closer than 20 feet from extended property lines with the exception of joint use docks shared by two adjoining property owners." Additionally, S.C. Code Ann. §48-39-150(B) is plainly clear on its face and states a "permit may be conditioned upon the applicant's amending the proposal to take whatever measures the department feels are necessary to protect the public interest." The Department only exercises this authority when a condition is necessary to protect the public interest or to bring an activity into compliance with the regulations. DHEC allows the applicant to weigh any compelling interests and construct the option he chooses so long as that option complies with the law.

Here, Abdo applied for his dock to be situated 20.5 feet off the shared extended property line with Maull. (Tr. p. 103, l. 15-17.) He did so to enable possible future amendments in the event of changing needs, uses, and watercraft, which then might necessitate his dock coming closer to the shared extended property line with the Schaibles. (Tr. p. 125, l. 14- 126, l. 21.) This alignment for the proposed structure does not violate the regulations and is Abdo's preference. (Tr. p. 178, l. 13-16.) The ALJ accorded significant weight to the Department's interpretation of navigation under the regulations, revealing that none of the subsections individually was a substantial enough reason to deny the permit. (ALC Final Order, Conclusion of Law 12.) Therefore, the ALJ

correctly applied DHEC's regulations when it found that the "Amendment places Mr. Abdo's dock 20.5 off the shared extended property line and therefore complies with the law." (ALC Order, Conclusion of Law 16.)

b. The ALC correctly reviewed material and evidence regarding the potential for public harm resulting from the Amendment.

Under the Administrative procedures Act, the ALJ presides as the fact-finder in contested cases. S.C. Code Ann. §§ 1-23-600(B) (Supp.2001), *see also* Hill v. S.C. Dep't of Health and Envtl. Control, 389 S.C. 1, 9, 698 S.E.2d 612, 116 (2010), *citing* Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 560 S.E.2d 410 (2002). "It is generally recognized that the trier of fact, who has the opportunity to observe the witnesses and listen to their testimony in person, is the best position to determine the issues of witness credibility." Dixon v. Dixon, 336 S.C. 260, 263 (Ct.App. 1999). The weight and credibility assigned to evidence presented at the hearing of a matter is within the province of the trier of fact. *See* S.C. Cable Television Ass'n v. S. Bell Tel. & Tel Co., 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992).

The Appellant argues that the ALC wrongfully ignores or "misapprehends" the expert testimony of Walters. (Appellant's Initial Brief p. 10.) However, as the fact finder, the ALJ can weigh the evidence and assess the witness's testimony and credibility before ruling on whether there is potential public harm resulting from the Amendment. McKissick v. J.F. Cleckley & Co., 479 S.E.2d 67, 325 S.C. 327 (Ct.App. 1996) (the weight to be given evidence lies within the province of the factfinder); Branche Builders, Inc. v. Coggins, 386 S.C. 43, 686 S.E.2d 200 (Ct.App. 2009) (questions regarding credibility and the weight of the evidence are exclusively for the trial court); Okatie

River, L.L.C. v. Southeastern Site Prep, L.L.C., 577 S.E.2d 468, 474-5, 353 S.C. 327 , 338-9 (Ct.App. 2003)(internal citations omitted) ("The fact that testimony is not contradicted directly does not render it undisputed. The court is not required to accept undisputed evidence as establishing the truth where there is reason for disbelief. This is especially true where the court finds the unchallenged testimony not convincing. Credibility determinations regarding testimony are a matter for the finder of fact, who has the opportunity to observe the witnesses, and those determinations are entitled to great deference on appeal.") Further, Appellant posits that the ALC decision cannot be sustained as it relied on evidence from non-expert witnesses and that because they were not experts, their testimony is unreliable and not probative. (Appellant's Initial Brief pp. 12-14.) This argument is flawed. Testimony is not given additional weight simply because it is presented by an expert. "The same tests which are commonly applied in the evaluation of ordinary evidence are to be used in judging the weight and sufficiency of expert testimony." State v. Douglas, 671 S.E.2d 606, 609, 380 S.C. 499, 500 (2009)(citing Anderson v. Campbell Tile Co., 202 S.C. 54, 24 S.E.2d 104 (1943). "As with any witness, the [factfinder] is free to accept or reject the testimony of an expert witness." State v. Douglas, 671 S.E.2d 606, 609, 380 S.C. 499, 500 (2009)(citing State v. Milian-Hernandez, 287 S.C. 183, 186, 336 S.E.2d 476, 478 (1985).

The ALJ correctly reviewed and considered the following testimony:

1. Walters testified that he prefers two boat lengths of distance to maneuver into a dock.³ (Tr. p. 33, l. 1-7.), (ALC Final Order, Finding of Fact 16.) However,

³ Maull testified that he had no problem with the Palmer dock, just the Amendment. (Tr. p. 80, l. 7-17.) However, "the original Palmer permit proposed for 82.5ft of separation from the Maull dock."(Tr. p. 140, l. 16-18.) A distance of 82.5feet of separation would not be sufficient according to Appellant's expert's testimony. (Tr. p. 48, l. 19-24.)

Maull's dock is around 18.5 feet from the neighboring property line and the Amendment is 20.5 feet from the neighboring property line, leaving roughly 39 feet between the two docks. (Tr. p. 140-141, l. 25, 1-4.) Maull's fishing boat is 48 feet in length. (Tr. p. 58, l. 11.) Weighing these facts, the ALJ concluded that the "evidence clearly establishes that such a clearance is impossible." (ALC Final Order, Conclusion of Law 15.)

2. Walters testifies that without sufficient space for Appellant to maneuver his 48-foot boat on the landward side of his dock, there is a risk to other vessels and for accidents. (Tr. p. 35, l. 1-17.) Testimony from Thompson, however, explains that the Department's decision to issue the permit was based on guidance and application of 23A S.C. Code Ann. Reg. § 30-11. Specifically, Thompson determined the dock Amendment would not be harmful nor "obstruct the natural flow of navigable waters." (Tr. p. 173, l. 1-17.) Weighing these opinions, the ALJ concluded that "construction of the dock as authorized by the Board will not have an unreasonable impact on navigation in the area." (ALC Final Order, Conclusion of Law 16.)
3. Maull testified that he prefers to moor his 48 foot fishing boat on the landward side of the dock for the purpose of protecting the vessel from wave action, even though in the past he has moored on the channelward side of his dock. (Tr. p. 58, l. 23-59, 1.20, ALC Final Order, Finding of Fact 3.) However, Walters testified that Maull has other mooring options and dock configurations available to him. (Tr. p. 49-51.) Specifically, Walters stated that Maull could extend his dock farther out, giving him the ability to approach the dock safely at 100 feet from

either direction. (Tr. p. 50-51, l. 24-25, 1-7.) Balancing these facts, the ALJ concluded that this controversy would not exist “but for the length of Petitioner’s boat and his desire to moor it landward rather than channelward.” (ALC Order, Conclusion of Law 18.)

Being in the unique position to weigh the evidence and assess the witnesses’ testimony, the ALC was within its discretion to conclude that there is “no evidence that Mr. Abdo’s dock itself will negatively impact the public interest.” (ALC Order, Conclusion of Law 14.) Smith v. Smith, 363 S.E.2d 404, 407, 294 S.C. 194, 198 (Ct.App. 1987)(the weight that the trial court affords the testimony of witnesses, including parties, is discretionary with the trial court.) While Appellant is dissatisfied with and disputes the ALC’s conclusions, it is clear that the ALC did evaluate the testimony and made credibility determinations, and that there is ample evidence in the record to support its findings. Danley Williams v. Moore, 733 S.E.2d 224, 231, 400 S.C. 90, 104 (Ct.App. 2012)(court of appeals affirmed where it found the trial court’s determinations regarding the weight and credibility of the witnesses and exhibits were supported by reasonable evidence.)

III. The ALC was correct in affirming the Amendment when it determined that the Amendment complied with the requirements of 23A S.C. Code Ann. Reg. §30-11 and S.C. Code Ann. §48-39-150 and did not adversely impact the value and enjoyment of adjacent property.

S.C. Code Ann. §48-39-150(a)(10) requires DHEC to consider “the extent to which the proposed use could affect the value and enjoyment of adjacent owners.” In determining whether to approve or deny a permit application, the Department is to base

its decision on the individual merits of each application, the policies specified in South Carolina Code §§ 48-39-20 and 48-39-30, and specified statutory general considerations. Olson v. S.C. Dep't of Health & Env'tl. Control, 379 S.C. 57, 68-69, 663 S.E.2d 497, 503-04 (Ct.App. 2008). These considerations include "the extent to which the proposed use could affect the value and enjoyment of adjacent owners." S.C. Code Ann. § 48-39-150(A)(10) (2008). "After considering the views of interested agencies, local governments and persons, and after evaluation of biological and economic considerations, *if the department finds that the application is not contrary to the policies specified in this chapter*, it shall issue to the applicant a permit." Olson v. S.C. Dep't of Health & Env'tl. Control, 379 S.C. 57, 66, 663 S.E.2d 497, 502 (Ct.App. 2008), citing S.C. Code Ann. § 48-39-150(B) (2008) (emphasis added). S.C. Code Ann. Regs. §30-11(B)(10) includes the same general considerations as S.C. Code Ann. §48-39-150, stating that the Department must consider "[t]he extent to which the proposed use could affect the value and enjoyment of adjacent owners." Id. at 66, 663 S.E.2d at 502, *citing* 23A S.C. Code Ann. Regs. § 30-11(B)(10) (Supp.2007).

The Court in Olson determined the proposed dock affected the value and enjoyment of adjacent property owners. Id. at 66, 663 S.E.2d at 502-503. In Olson, there was evidence that the proposed dock would come through some trees and run down a drainage ditch easement border between the Olson and Ball property lines. Specifically, the dock would have to run between the Ball dock and Sims/McCown dock and would be as close as seven feet from the Ball dock. The Abdo dock in this matter however, does not impact any sort of easement and does not require the adjacent property to be altered to fit the dock's configuration. Additionally, there is roughly 39 feet between the

Amendment and Maull's dock (Tr. p. 179, l. 15-20.), a distance almost six times greater than the space between the proposed dock in Olson.

The Court in Jones, however, determined the proposed dock did not affect the value and enjoyment of adjacent property owners. Jones v. S.C. Dep't of Health & Env'tl. Control, 384 S.C. 295, 682 S.E.2d 282 (Ct.App. 2009). The Jones' argued the dock would prevent their son from navigating his powerboat from their dock on the Wando to the edge of their lot. The Court of Appeals agreed with the ALC that any inability the son might have maneuvering his power boat was more reflective of a lack of convenience than an inability to use the Jones' property. Id. at 315, 682 S.E.2d at 294. Similar to Jones, although Maull's inability to maneuver his 48-foot fishing boat to the landward side of his dock might be cumbersome, this, however, is not enough to prove the Amendment affects the value and enjoyment of his property. Appellant still has the ability to enjoy and use his property, and the right of way to and from navigable water, including the ability to moor his boat on the channelward side of his dock. Furthermore, the Amendment to the Abdo dock does not restrict Maull's ability to modify his dock to accommodate docking his large fishing boat. Maull made the private choice to purchase a larger boat and then later to move his dock closer to the Abdo shared extended property line, thereby subjecting himself to any maneuvering concerns. Thus, importantly, Appellant is the author of his own injury.⁴ Accordingly, the ALC was correct in affirming the Amendment when it determined that the Amendment complied with the

⁴ It is interesting to note that while Maull complains about the proximity of the Abdo Amendment, Maull's 2008 amendment brought him closer to the shared extended property line with Abdo, to within 19.8 feet, and Maull's as-built plan shows his dock with actually built even closer: 18 feet from the shared property line with Abdo. (Abdo Ex. 6 and Abdo Ex. 8, p. 2.)

requirements of 23A S.C. Code Ann. Reg. §30-11 and S.C. Code Ann. §48-39-150 and did not adversely impact the value and enjoyment of Maull's adjacent property.


CONCLUSION

Based on the foregoing arguments and any other reason that be approved from record, the Respondents respectfully request this Court affirm the Administrative Law Court's Final Order and Decision.

Respectfully Submitted,



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February 20, 2014
Charleston, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Docket No. 12-ALJ-07-0050-CC

James R. Maull

Appellant,

vs.

South Carolina Department of Health and Environmental Control
and David Abdo,

Respondents,

and

Russell and Laura Schaible,

Respondents.

DESIGNATION OF MATTER TO BE INCLUDED
IN THE RECORD ON APPEAL

Respondents' designate the following be included in the Record on Appeal.


1. Maull Notice of Request for Contested Case
2. Administrative Law Court Notice of Assignment
3. Notice of Motion and Motion for Intervention of Schaibles
4. Administrative Law Court Order Granting Motion for Intervention
5. Administrative Law Court Order for Prehearing Statements
6. Maull Prehearing Statement
7. DHEC Prehearing Statement
8. Abdo Prehearing Statement
9. Schaibles Prehearing Statement
10. DHEC Notice of Motion and Motion for Partial Summary Judgment and Motion to Dismiss
11. Maull's Response to DHEC Motion to Dismiss and Motion for Partial Summary Judgment
12. Maull's Motion to Dismiss
13. Abdo's Response to Maull's Motion to Dismiss
14. Maull's Notice of Withdrawal of Motion to Dismiss
15. Administrative Law Court Order granting Partial Summary Judgment to DHEC

16. January 15, 2013 Administrative Law Court Hearing Transcript and Exhibits
17. Maull Proposed Order
18. August 1, 2013 Administrative Law Court Final Order and Decision

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CERTIFICATE OF COUNSEL

I, Nathan M. Haber, counsel of record for the Respondent SCDHEC, hereby certify that the Designation of Matter to be Included in the Record on Appeal contains no matter which is irrelevant to the appeal.



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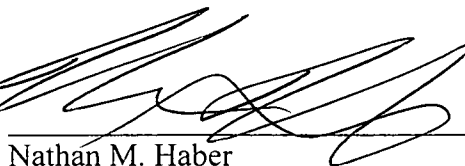
The undersigned hereby certifies that he has this day served the *Respondents' Joint Initial Brief and Designation of Matter* by depositing a copy of it in the United States mail, postage pre-paid, addressed as follows:

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February 20, 2014



Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

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SC Court of Appeals

February 20, 2014

The Honorable Jenny Abbott Kitchings
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Re: James R. Maull v. SCDHEC, et al.
Case Tracking No.: 2013-001878

Dear Ms. Kitchings:

Enclosed for filing, please find an original and one copy of the Respondents' Joint Initial Brief, the Designation of Matter to be Included in the Record on Appeal, and proof of service in the above referenced case. I would appreciate your returning a clocked copy in the enclosed envelope.

By copy of this letter, I am serving all parties of record.

Very truly yours,

Nathan M. Haber
Counsel

NMH/mdc

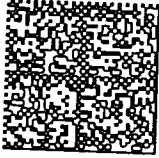
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