THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the South Carolina Administrative Law Court

Shirley C. Robinson, Administrative Law Court Judge

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

James R. Maull,

Appellant,

v.

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

Respondents,

and Russell and Laura Schaible,

Respondents.

INITIAL REPLY BRIEF OF APPELLANT

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The Appellant hereby replies to the Respondents' joint brief.

ARGUMENT

I. Maull's challenge to the ALC's decision is preserved for appellate review, and it should be decided on the merits.

To be sure, an issue cannot be raised for the first time on appeal. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). But, to be preserved for appellate review, "[a]ll that [our Supreme Court] has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court." State v. Oxner, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) (quoting Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187, 189 (1939)).

Discussing the subject of appellate issue preservation in the context of motions under Rule 59(e), SCRCP, our Supreme Court expressly recognized that "civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party . . . ." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004); *cf.* Microtronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) (noting "South Carolina's policy favoring the disposition of issues on their merits rather than on technicalities."); Rule 1, SCRCP (civil procedure rules "shall be construed to secure the just, speedy, and inexpensive determination of every action").

Indeed, our Chief Justice has cautioned against "denigrat[ing] the primary purpose of the judiciary" by the "over-zealous application of appellate preservation rules:"

> In my opinion, **an over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice**. . . . I do not believe it is our place to scour the records before us for the purpose of avoiding issues or, even worse, to play a "gotcha" game with attorneys by showcasing their alleged mistakes, at the expense of their clients. This practice ignores the fact that **behind every party name on a caption is a life-blood litigant or criminal defendant that depends on the court system to protect their economic and liberty interests**. In light of my view, I believe that **where the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation**.

Atlantic Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 332-33, 730 S.E.2d 282, 287 (2012) (Toal, C.J., dissenting) (emphasis added).

Here, Maull's challenge to the ALC's affirmance of the Amendment—which not only affects his own interest but the public interest—is preserved for this Court's review. Respectfully, the Respondents urge an overzealous application of appellate preservation rules, taking an unduly narrow—and unjust—view of Maull's position, including the relief he seeks on appeal, contending that "the only issue raised below by

[Maull] 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 . . . ," while also contending, it appears, that the relief he now seeks in this Court, *i.e.*, overturning the Amendment, somehow does not include any issue regarding the allowed placement of the Abdo dock in relation to the shared extended property line. (Respondents' Br. p. 8.)[1]

In support of their issue-preservation argument, the Respondents cite

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[1] In this regard, and, in view of the technical nature of the Respondents' argument (which, again, respectfully, Maull contends is without merit), Maull notes that, technically, the plain and express language of the ALC's holding was—only—as follows:

> **CONCLUSION**
>
> Based on the Findings of Fact and Conclusions of Law set forth above and the applicable statutory and regulatory requirements discussed above, I find and conclude that DHEC has fully complied with the requirements of 23A S.C. Code Ann. Regs. 30-2, 30-4, 30-11, and 30-12 and S.C. Code Ann. § 48-39-150.
>
> **IT IS THEREFORE ORDERED** that DHEC's issuance of the October 6, 2011 amendment to critical area permit OCRM-07-128-F, to Respondent David Abo be, and is hereby, **AFFIRMED**, as authorized.
>
> **AND IT IS SO ORDERED.**

(ALC's Final Order and Decision filed August 1, 2013, pp. 10-11) (emphasis added via underline.) The Amendment DHEC issued on October 6, 2011, included the special condition requiring the Abdo dock to be 30.5 feet off the shared extended property line. (*See* ALC's Final Order and Decision filed August 1, 2013, p. 4 ("On October 6, 2011, DHEC Staff authorized the Amendment to critical area Permit Number OCRM-07-128-F . . . with a condition that the dock be situated 30.5 feet off the shared extended property line of Mr. Abdo and [Maull] . . . .").) The ALC did not affirm the Board's later removal of the special condition, and the Respondents did not ask for alteration or amendment or otherwise seek reconsideration of the ALC's decision, nor did they appeal therefrom.

portions of Maull's submissions to the ALC; namely, his request for a contested case hearing, his pre-hearing statement, and his proposed order. (Respondents' Br. pp. 7-8.) Absent from the citations that the Respondents selected are the following:

From Maull's Request for Contested Case

> [Maull] files this contested case challenging the action of the South Carolina Department of Health and Environmental Control ("SCDHEC") in granting an Amendment to Critical Area Permit No. OCRM-07-128 F to Respondent David Abdo ("Abdo") for property located in Charleston, S.C. 29407, at 29 Broughton Road. The permit, known as OCRM-07-128 F, authorized construction of a walkway with handrails leading to a covered pier head with handrails and benches and ramp leading to a floating dock and the addition of a four-pile boat lift for the Respondent Abdo's personal use at 29 Broughton Road, Charleston, S.C. 29407. However, the permit as amended and subsequently issued to Respondent Abdo at 29 Broughton Road, is too close to . . . Maull's existing dock to ensure safe navigation of the waterway.

(Maull's Notice of Request for Contested Case, p. 1.)

From Maull's Pre-Hearing Statement

> [Maull] provides the following in response to the Court's March 14, 2012 Order for Prehearing Statements:
>
> . . .

3. The issue(s) to be raised for determination, including any claims or defenses expected to be raised.

. . .

C. Whether the Amendment is appropriate, in that it would allow Abdo to improve his dock such that it would be too close to Maull's existing dock to ensure safe navigation of the waterway.

(Maull's Pre-Hearing Statement, pp. 1 and 3.)

From Maull's Proposed Order to the ALC

BACKGROUND

This contested case arises out of Respondent the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management's ("SCDHEC" and "OCRM") issuance of an amendment (hereinafter "the Amendment") to the permit ("the Permit") identified as P/N # OCRM-07-128-F to Respondent David Abdo ("Abdo"). . . .

The action giving rise to this contested case, the Amendment, was issued to Abdo on October 6, 2011 and authorized movement of the dock structure towards Maull's dock and property. . . .

Maull testified that the reasons for his challenge to the Amendment and this contested case are his concerns regarding navigational safety, which is impaired by moving Abdo's dock closer to Maull's dock.

. . .

DISCUSSION

. . .

Maull objects to the Amendment based on safety and navigation . . . .

. . .

The issue for resolution by this Court is whether the hazards as described by [Maull's] expert have the potential to impact the boating public and whether Schaibles' interest in protecting their view and Abdo's interest preserving his ability to undertake dock modifications in the future outweigh Maull's interests in safe navigation in the AIWW.

. . .

FINDINGS OF FACT

. . .

9. DHEC staff authorized the Amendment on October 6, 2011, with a condition that the dock be situated 30.5 feet off the shared extended property line of Abdo and Maull which resulted in 50 feet of separation between the Abdo and Maull docks. Despite telling the Board that the staff misinterpreted the permit drawings, it is clear from the staff's evaluation that the condition requiring 30.5 feet of separation from the extended property line was for purposes of addressing Maull's navigational concerns. (DHEC 4). I find that contrary to DHEC's arguments that this is a private dispute between property owners, DHEC's staff's actions in 2007 and again in 2011 demonstrate that S. C. Code Reg. 30-12(A)(1)(a) imposes a requirement that Maull's navigational

concerns be considered and addressed.

. . .

CONCLUSIONS OF LAW

. . .

20. In accordance with S. C. Code Ann. Sec. 48-39-150(A) DHEC, in its review of the request for the Amendment, is required to consider "the extent to which the development [proposed by the permit] could affect existing public access to ... navigable waters." Here Maull has demonstrated by a preponderance of the evidence that the Amendment will hinder public access in the AIWW by creating a potentially hazardous navigational condition. DHEC is also required to consider "the extent to which the proposed use could affect the value and enjoyment of adjacent owners." Here Schaible has testified that the only interest impacted is his view of the water from his home. It is well settled that there is no prescriptive right to a view in South Carolina. Hill v. Beach Co., 279 S. C. 313, 306 S. E. 2d 604 (1983). Sec. 48-39-150 further requires DHEC to consider the "individual merits of an application." Abdo's speculation that he might buy a larger boat and build a longer floating dock in the future should be given little consideration and lacks merit, particularly with the competing interest of safe navigation of a heavily traveled public waterway.

(Maull's Proposed Order to the ALC, pp. 1-4, 6-8, 10, 14, 18-19.)

Further, Maull notes the following from the contested case hearing and also from ALC's Final Order and Decision:

From the Contested Case Hearing

> [Court]: Good morning. The issue before the court is [Maull's] objection to a permit for an amendment to a critical area permit that was issued by the Department. The permit was issued to Mr. Abdo, and Mr. Maull is objecting to that, and I think the Schaibles have joined as intervenors in this case. They are in support of the amended permit. Is that correct?
>
> [Schaibles' Counsel]: That's correct, Your Honor.
>
> [Court]: Okay. Very good. . . .

(Contested Case Hearing Tr. p. 5, line 19 - p. 6, line 4.)

From the ALC's Final Order and Decision

STATEMENT OF THE CASE

> This matter comes before the South Carolina Administrative Law Court ("ALC" or "Court") pursuant to a Request for Contested Case Hearing filed by James R. Maull ("Petitioner") on February 8, 2012, challenging the decision of the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management ("DHEC" or "Department") to issue an Amendment to critical area permit number OCRM-07-128-F ("Amendment") to David Abdo ("Respondent") for the construction of a private recreational dock.
>
> . . .
>
> A contested case hearing was held on January 15, 2013 before the Administrative Law Court in Columbia, South Carolina. Based on the

evidence before me, I find the decision to issue the Amendment should be affirmed.

FINDINGS OF FACT

. . .

4. The action giving rise to this contested case, the Amendment to critical area permit number OCRM-07-128-F was issued to Mr. Abdo on October 6, 2011 and authorized movement of the dock structure towards the [Maull's] dock and property. . . .

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

. . .

CONCLUSIONS OF LAW

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

1. This Court has subject matter Jurisdiction in this case pursuant to S.C. Code Ann. § 1-23-600(A) (Supp. 2012) and S.C. Code Ann. §44-1-60(F)(2) (Supp. 2010). The hearing before this Court is a contested case hearing in which the Administrative Law Judge serves as the finder of fact and makes a *de novo* determination regarding the matter in controversy. Olson v.

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

. . .

12. In the case before the Court, [Maull] argues that the core issue in the case is the impact of the proximity of Mr. Abdo's dock on [Maull's] ability to navigate the Intercoastal Waterway and the impact on commercial and private boating on the Intercoastal Waterway. . . .

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

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

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

18. This controversy is personal to Petitioner. . . .

CONCLUSION

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

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

AND IT IS SO ORDERED.

(ALC's Final Order and Decision filed August 1, 2013, pp. 1-2, 5-6, and 9-10.)

Clear from the record is the familiar refrain from Maull in opposition to the Amendment, which he now presents to this Court. He has satisfied the cardinal rule of appellate issue preservation, *i.e.*, that the questions presented to this Court have first been fairly and properly raised to the lower court and passed upon by that court. Oxner, 391 S.C. at 134, 705 S.E.2d at 52; *cf.* White v. S.C. Dep't of Health & Envt'l Control, 392 S.C. 247, 255, 708 S.E.2d 812, 816 (Ct. App. 2011) (rejecting the respondent's issue-preservation challenge (that "precise issue" ruled upon by the ALC was not raised by the appellant "in its Prehearing Statement, at the hearing, or in its proposed order") where issue ruled upon by the ALC was properly placed before the ALC via the appellant's request for a contested case hearing).

Indeed, the request for relief set forth in the conclusion of Maull's principal brief (*i.e.*, that the ALC's decision be reversed and the Amendment be invalidated) mirrors the language used in the ALC's Final Order and Decision, which, as recited above, held—only—that the "issuance of the October 6, 2011 amendment to critical area permit OCRM-07-128-F, to Respondent David Abdo be, and is hereby, **AFFIRMED**, as authorized," and which necessarily includes within it any issue regarding the allowed placement of the Abdo's dock in relation to the shared extended property line—which, of course, Maull has consistently challenged.

Most respectfully, Maull's challenge to the ALC's decision is preserved for appellate review, and it should be decided on the merits.

II. The ALC erred in affirming the Amendment when it determined this matter is a private dispute that does not impact the public interest.

In this section of their brief, the Respondents discus how navigability is determined. They also state: "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 [Maull] 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." (Respondents' Br. pp. 11-12.) Respectfully, the Respondents both miss the point (as there is simply no question that Wappoo Cut, part of the AIWW, is navigable water), and, indeed, appear to completely ignore—or simply disregard—Maull's position that the Amendment will unduly restrict navigation of this navigable waterway, not merely cause him undue problems mooring his boat (which it will). *See* White, 392 S.C. at 255, 708 S.E.2d at 816 (finding that the ALC did not misinterpret the term "navigation" by concluding that the subject dock's location constituted a significant navigational hazard and, thus, a material harm to the policies of

the South Carolina Coastal Zone Management Act).

The Respondents' assertion that "[t]he Abdo dock's proximity to [Maull's] dock does not create a navigational hazard because it does not restrict the public use of the waterway," is specious—if not altogether conclusory—founded solely upon the width of the creek and the ALC's own conclusion (which, the Respondents appear to view as self-evident, and which Maull's challenges) that any maneuvering of Maull's vessel to navigate between the Abdo dock would be in close proximity to the docks and "'would have little or no impact on the waterway traffic.'" (Respondents' Br. p. 10.) Respectfully, this focus on the width of the creek is overly simplistic, underscoring the need for expert testimony in this matter, which only Maull provided,[2] and failing entirely to account for expert evidence of many unique and material factors, such as the current and the channel and the nature and volume of the traffic along that portion of the AIWW, that bear upon the navigational hazard posed by the Amendment. (*See, e.g.,* Appellant's Br. pp. 10-13.)

Indeed, Walters testified that commercial traffic along this portion of

[2] *See* Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010) ("Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge. Stated differently, expert evidence is **required** where a factual issue must be resolved with scientific, technical, or any other specialized knowledge.") (emphasis added).

the AIWW has increased in the past decade, with that increase including, among other things, barge traffic. These barges, which are some 100 to 150 feet in length and 30 feet in width, are not self-propelled, but are pushed by tug boats, and they are traveling up and down this section of the AIWW—where, Walters explained, they are encountering probably the strongest currents in the Charleston area—alongside a mass of other commercial and recreational traffic (some of which is operated by inexperienced boaters), including, among other things, waterway cruise ships, yachts, and jet skis. And the difficulty posed by the Amendment sets the stage for the channel—and the traffic utilizing it, including, of course, large barge traffic, which is not adept at maneuvering around obstacles—to be disrupted by attempts to dock safely. (Contested Case Hearing Tr. p. 21, line 18 - p. 38, line 17.)

The Respondents also wrongly argue that the ALC made a credibility determination adverse to Maull's expert, Walters, that is simply nowhere to be found in the ALC's decision. Not only does the ALC's decision contain no such determination, it expressly states, "Mr. Walters was qualified as an expert in Maritime matters, including navigation, tidal and water current issues and vessel navigation." (ALC's Final Order and Decision filed August 1, 2013, p. 5.) The court plays a gatekeeping role with respect to expert testimony, which requires it to make three key preliminary findings

before qualifying an expert: (1) "the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury;" (2) "that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter;" and (3) that, upon the court's evaluation of the substance of the testimony, it is "reliable." Watson, 389 S.C. at 446, 699 S.E.2d at 175. Having qualified Walters as an expert—and thereby made these three key findings—to testify about a subject matter that was essential to this case, and about which no other expert testified, the ALC could not support its decision with substantial evidence without relying on Walters's testimony, and, failing to do so, the ALC did not support its decision with substantial evidence.[3]

Most respectfully, the ALC incorrectly affirmed the Amendment when it determined this matter is a private dispute that does not impact the public interest.

[3] In this section of their brief, the Respondents also make much of the fact that "Walters testified that he **prefers** two boat lengths of distance to maneuver into a dock." (Respondents' Br. p. 16) (emphasis added.) To this premise, the Respondents add that "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. Maull's fishing boat is 48 feet in length." (Respondents' Br. p. 17.) "Weighing these facts," the Respondents continue, "the ALJ concluded that the 'evidence clearly establishes that such a clearance is impossible.'" (Respondents' Br. p. 17.) Respectfully, sanctioning an unduly short distance between docks because the expert's preferred distance is unachievable is the analytical equivalent to throwing the baby out with the bathwater.

III. The ALC erred 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 without considering the adverse impact on the value and enjoyment of Maull's property.

In this section of their brief, the Respondents use a telling, though incorrect, turn of phrase, asserting that Maull "is the author of his own injury." (Respondents' Br. p. 20.) While Maull denies bringing injury upon himself, he certainly agrees that he will be injured by the Amendment.

The Respondents downplay Maull's plight, conceding only that maneuvering his boat to the landward (*i.e.*, protected) side of his dock "might be cumbersome." (Respondents' Br. p. 20.) The Respondents answer the wrong (*i.e.*, immaterial) question when they offer the consolation that Maull "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." (Respondents' Br. p. 20.) Respectfully, that Maull still has **some** ability to enjoy and use his property does not actually address the adverse impact posed by the Amendment upon the value and enjoyment of his property. Similarly misguided is the Respondents' (almost glib) suggestion that Maull could simply modify his dock to accommodate his boat. Besides the obvious cost to Maull from doing this (provided it would be approved), the Respondents pay no mind to the fact

that it was not until **after** the resolution of the Palmer (now Abdo) dock configuration (which placed the dock more than 80 feet from Maull's) that Maull duly sought and obtained a change in his dock's configuration. Indeed, the Respondents likewise pay no mind to the fact that Maull is the only party to this matter that stands to suffer any substantial injury. The "loss of view" that the Schaibles fear is de minimis at most, and, of course, Abdo has not—unlike Maull—actually incurred the expense of constructing his dock.

Most respectfully, the ALC erred 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 without considering the adverse impact on the value and enjoyment of Maull's property.

CONCLUSION

For the foregoing reasons, and those set forth in his principal brief, Maull asks this Honorable Court to reverse the Administrative Law Court's Final Decision and Order affirming the Amendment so that the Amendment is overturned and invalid, or, to be clear, at least reversing the removal from the Amendment of the special condition requiring that the Abdo dock be at least 30.5 feet from the shared extended properly line.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
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I, Michael A. Molony, of Young Clement Rivers, LLP, counsel for the Appellant above named, do hereby certify that I have served the **INITIAL REPLY BRIEF OF APPELLANT** and corresponding **SUPPLEMENTAL DESIGNATION OF MATTER** on the above-named Respondents by depositing a copy of the same in the United States Mail, postage prepaid, on March 24, 2014, addressed as follows to the Respondents or their counsel of record:

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