

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

James Weatherholtz,

Petitioner,

vs.

South Carolina Department of Health and
Environmental Control,

Respondent.

Docket No. 13-ALJ-07-0494-CC

**AMENDED
FINAL ORDER AND DECISION**

August 12, 2014

Appearances: James E. Weatherholtz, Esquire for Petitioner
Bradley D. Churdar, Esquire for Respondent

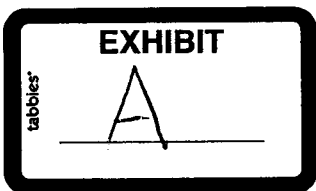
STATEMENT OF THE CASE

This matter comes before me pursuant to a Request for Contested Case Hearing filed by the Petitioner on October 14, 2013, challenging the decision of South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (hereinafter "Department" or "DHEC" or "OCRM") to deny a permit application to build a dock (Permit No. OCRM-13-155-D). A hearing was held on March 5, 2014, before the Administrative Law Court ("ALC") in Columbia, South Carolina. Based on the evidence before me, I find the denial of the permit application should be affirmed.

ISSUES FOR DETERMINATION

The Petitioner raised the following issues for determination by the ALC:

- I. Whether DHEC improperly denied the permit application based on 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) which provides "docks will not be permitted on creeks less than 10 feet wide as measured from marsh vegetation on each side." Petitioner asserts in his permit application the creek is exactly ten feet wide.
- II. Whether DHEC improperly denied the permit application based on 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii) which provides "docks will not be permitted on creeks less than 20 feet wide as measured from marsh vegetation on each side unless one of the following two special geographical circumstances exists: a lot has greater than



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500 feet of water frontage¹ or no potential access via dockage from the opposite side of the creek.”

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and closely passed upon their credibility, taking into consideration the burden of persuasion of the parties, I make the following Findings of Fact by a preponderance of the evidence.

1. The Petitioner, James E. Weatherholtz, owns property on and adjacent to a tributary of Kushiwah Creek (hereinafter referred to only as “Kushiwah Creek”) at 949 Compass Point in Stiles Point Plantation in Charleston, Charleston County, South Carolina.

2. Petitioner applied for a permit to build a dock out to Kushiwah Creek with a five foot by ten foot fixed pierhead and a four foot by two-hundred forty-five foot walkway.

3. Petitioner’s permit application included a survey from land surveyor Thomas Bessent indicating that Kushiwah Creek was ten feet wide.

4. Mr. Bessent relied on measurements obtained by his field crew using an electronic total station instrument.

5. Mr. Bessent did not operate either the electronic total station or the prism in collecting the data used to measure the width of the creek.

6. A man named Billy Ferguson measured from a kayak while holding the prism where he determined the marsh vegetation began.

7. Billy Ferguson did not testify at the hearing.

8. Mr. Bessent reiterated his assertion that the creek width measured ten feet in the area of the proposed dock.

9. Mr. Bessent also testified that he drew a cross-sectional sketch of Kushiwah creek that was marked as the last page of Petitioner’s Exhibit 5.

10. In an email Mr. Bessent sent to the Petitioner four days before trial (February 28, 2014), he described this sketch as part of the “fieldwork on this job.”

¹ Petitioner concedes that his lot does not meet the greater-than-500-feet-of-water-frontage requirement of 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii). Accordingly, the only requirement Petitioner is challenging from 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii) is DHEC’s conclusion that there is in fact both potential access and actual access via dockage from the opposite side of Kushiwah Creek.

11. Mr. Bessent further described this sketch in his February 28, 2014 email to Petitioner as “a hand sketch from my file that I made during my discussion with my field crew at the time of the survey.”

12. The cross-sectional sketch showed vegetation on each side of Kushiwah Creek that the crew might encounter. The hypothetical sketch depicted the initial vegetation to be seven feet to nine feet apart.

13. Mr. Bessent referred to this initial vegetation on each side of Kushiwah Creek as “sprigs”. Mr. Bessent testified that the distance from “sprig to sprig” on the sketch was seven to nine feet. He further testified that the sketch was used to describe to his crew that they should measure from the main vegetation rather than the “sprigs”, or initial vegetation.

14. Jeff Thompson, OCRM Project Manager for this permit application, reviewed the permit application and saw the submitted measurement for Kushiwah Creek was ten feet wide.

15. After reviewing the permit application, Jeff Thompson and Fred Mallet, also an OCRM Project Manager, visited the site on July 11, 2013 using a 48 inch wide jonboat.

16. They arrived at Kushiwah Creek about thirty minutes before high tide.

17. Mr. Thompson testified that Kushiwah Creek is so small that even thirty minutes before high tide, the jonboat “hit bottom a time or two.”

18. Mr. Thompson testified that when he and Mr. Mallet passed the Petitioner’s next door neighbor’s dock in a 48 inch wide jonboat, they had to run the jonboat two feet into the marsh to pass by the dock and their jonboat still hit the side of the neighbor’s dock as they passed by.

19. Mr. Thompson testified that he began measuring the distance from marsh vegetation to marsh vegetation starting at the vegetation furthest out into the creek just to the left side of the jonboat.

20. Using a survey rod, Mr. Thompson and Mr. Mallet measured Kushiwah Creek’s width from the marsh vegetation on each side of the creek.

21. Mr. Thompson and Mr. Mallet took measurements only within the extended property lines of the Petitioner’s lot.

22. Mr. Thompson testified that the Petitioner’s extended property lines and the extended property lines of the neighboring property owner (who currently has actual access via dockage from the opposite side of the creek) did not conflict. Mr. Thompson testified that the

reason the extended property lines of these two parcels did not conflict is because extended property lines terminate at the edge of the water body closest to each parcel.

23. Mr. Thompson and Mr. Mallet measured the creek width at four different locations within the Petitioner's extended property lines.

24. Mr. Thompson measured the portion of Kushiwah Creek within the Petitioner's extended property lines to be seven and a half to eight feet wide.

25. Mr. Thompson does not interpret 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) as allowing him to permit a dock when just a few feet of the creek width may be greater than ten feet wide, because such a small portion of the creek would not be representative of the creek width.

26. The method of measuring creek width and the method of determining the beginning of marsh vegetation that he and Mr. Mallet used are the same methods for measuring creek width and marsh vegetation that the Department has historically used.

27. Regarding the application of 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii) to this permitting decision, Mr. Thompson used a marker to draw the extended property lines of the property on the opposite side of Kushiwah creek as represented by Respondent's Exhibit 5.

28. The extended property lines of the property on the opposite side of Kushiwah Creek form an uneven "pie shape" with a short dock directly in the middle of these two extended property lines and on the opposite side of Kushiwah Creek from the Petitioner's upland property.

29. The property owner on the opposite side of the creek from the Petitioner not only has "potential access via dockage from the opposite side of the creek," but this property owner presently has actual access via dockage from the opposite side of the creek.

30. Mr. Thompson testified that, for purposes of determining whether potential access via dockage from the opposite side of the creek exists or not, it is irrelevant to his permitting decision under 23A S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii) that the dock on the opposite side of the creek in the middle of the two "pie shaped" extended property lines in Respondent's Exhibit 5 is not inside the Petitioner's extended property lines. Stated another way, Mr. Thompson considered the fact that the property owner on the opposite side of the creek presently having a dock was a relevant factor in his Reg. 30-12(A)(2)(c)(ii) analysis, despite the fact that this property owner's dock was upstream and outside of the trajectory of Petitioner's extended property lines.

31. Petitioner's permit application for the proposed dock was denied because Mr. Thompson determined that (a) Kushiwah Creek was less than ten feet wide as measured from marsh vegetation on each side; and (b) that there was both actual and potential access via dockage from the opposite side of Kushiwah Creek.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, this Court concludes the following as a matter of law:

Jurisdiction

The South Carolina Administrative Law Court has subject matter jurisdiction over this action based on S.C. Code Ann. § 1-23-600(A) (Supp. 2013) and S.C. Code Ann. § 44-1-60(F)(2) (Supp. 2013). In contested case hearings involving environmental permitting matters, the Administrative Law Judge is the fact finder and makes a *de novo* determination regarding the matters at issue. Brown v. S.C. Dep't of Health and Envtl. Control, 348 S.C. 507, 560 S.E.2d 410 (2002); Marlboro Park Hosp. v. S.C. Dep't of Health and Envtl. Control, 358 S.C. 573, 595 S.E.2d 851 (Ct. App. 2004). Also, this Court is required to give deference to the Department's specialized knowledge in environmental matters because "[t]he agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence." S.C. Code Ann. § 1-23-330(2013); S.C. Code Ann. § 44-1-60(F)(2). An agency's construction of a statute or regulation which it is charged with administering is generally entitled to deference by the courts and should be overturned only if "plainly erroneous or inconsistent with the regulation." Fed. Mar. Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 745-46 (1973); Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 193 (4th Cir. 2009) (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)); see also Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 496, 536 S.E.2d 892, 900 (Ct. App. 2000) (citing Glover by Cauthen v. Suitt Constr. Co., 318 S.C. 465, 458 S.E.2d 535 (1995)). Petitioner, James Weatherholtz, as the party challenging the denial of the permit, bears the burden of proving that DHEC erred by denying the permit. Leventis v. S.C. Dep't of Health and Envtl. Control, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000).

Standard of Proof

The standard of proof in weighing the evidence and making a decision on the merits at a contested case hearing is a preponderance of the evidence. Nat'l. Health Corp. v. S.C. Dep't of Health and Env'tl. Control, 298 S.C. 373, 380 S.E.2d 841 (Ct. App. 1989). The weight and credibility assigned to evidence presented at a hearing 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) (citing Greyhound Lines, Inc. v. S.C. Pub. Serv. Comm'n, 274 S.C. 161, 165, 262 S.E.2d 18, 20 (1980)). A trial judge who observes a witness is in the best "position to judge the witnesses' demeanor and veracity," and to evaluate the credibility of the testimony. Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996).

General Principles

Permits for private docks in the coastal zone are governed by the South Carolina Coastal Zone Management Act ("CZMA"), S.C. Code Ann. § 48-39-10 et. seq. (2008 & Supp. 2013), and the regulations promulgated pursuant to the Critical Area Permitting Regulations. See S.C. Code Ann. 48-39-130 (Supp. 2013). These regulations enable the Department to govern the management, development, and protection of South Carolina's critical areas by issuing permits. Id. The CZMA defines "critical area" as coastal waters, tidelands, beaches, and the beach/dune system. S.C. Code Ann. § 48-39-10(J) (Supp. 2013). More specifically, the Act defines "coastal waters" as "the navigable waters of the United States subject to the ebb and flood of the tide and which are saline waters, shoreward to their mean high-water mark," S.C. Code Ann. § 48-39-10(F) (2013). It also defines "tidelands" as "all areas at or below mean high tide." S.C. Code Ann. § 48-39-10(G) (Supp. 2013).

I. DHEC correctly denied the Petitioner's permit application for a dock construction permit because the width of the creek was not ten feet.

The Petitioner claims DHEC denied his permit request in error because his parcel included areas of Kushiwah Creek he contends are ten feet wide based on his own measurements and those taken by a land surveyor. The surveyor stated when his team "put in at high tide," a

man in a kayak identified as Billy Ferguson "... physically held the prism target along the edge of the marsh grass at...20 different places along the creek." The surveyor who testified, Mr. Bessent was "not in the boat that day," but he "sent [his crew] out there" to the Petitioner's lot. He further stated the points his crew measured along the vegetation were "[his company's] interpretation of the edge of the marsh grass". Using their measurements, the surveyor came to the conclusion the width of the creek at the dock location was ten feet.

However, DHEC staff went to the same portion of the creek and using the Department's historical interpretation of where to begin measuring, found the creek width was only seven and one half to eight feet wide. DHEC's historical interpretation includes only taking measurements of the creek within only the extended property lines of the lot and using a wetlands expert to determine where the marsh vegetation² begins on either side of the creek bed. Although Petitioner's expert was deemed an expert in the field of surveying, Petitioner failed to establish that his expert had the requisite expertise to establish where marsh vegetation begins. Such expertise is a crucial component in accurately determining the width of the creek in accordance with the Department's regulations.

The Department establishes standards for the use of pierheads and docks based on creek widths. Where the creek is found to measure less than 10 feet wide from marsh vegetation on each side, a dock may not be permitted. S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) (2013). The area of marsh vegetation where the measurement started is shown where the spartina grass begins to the port side of the bow of the boat shown in the photo on page four of Respondent's Exhibit 1. Measuring the vegetation from the left to the right side of the bank, Mr. Thompson found that Kushiwah Creek was less than ten feet wide within Petitioner's extended property lines. I find that Mr. Thompson was a very credible witness who had many years of experience in taking such measurements. Accordingly, Petitioner's permit application was denied using the Department's historical interpretation of measuring marsh vegetation.

² The marsh vegetation is *spartina alterniflora*.

II. DHEC properly denied the permit application based on S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii), because there is a lot with actual dock access from the opposite side of the creek within that property owner's extended property lines that is across the creek from the Petitioner's parcel, and therefore the Petitioner's lot fails to fall within the exception established by S.C. Code Ann 30-12(A)(2)(c)(ii).

The Petitioner argues that an exception to S.C. Code Ann. Regs. 30-12(A)(2)(c)(ii) applies, which allows a dock to be constructed on a creek less than twenty feet if there is no potential dock access from the opposite side of the creek. S.C. Code Ann. Regs. 30-12(A)(2)(c)(ii) reads:

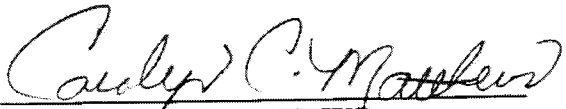
Docks will not be permitted on creeks less than 20 feet wide as measured from marsh vegetation on each side unless one of the following two special geographic circumstances exists: a lot has greater than 500 feet of water frontage or no potential access via dockage from the opposite side of the creek.

The opposite side of the creek includes the land within the neighboring property owner's extended property lines, as defined in relation to waterfront property in S.C. Code Ann. Reg. 30-1(D)(53). There is currently a lot on the opposite side of the creek with actual dock access as well as potential dock access within his extended property lines. Therefore, since there is potential access via dockage from the opposite side of the creek, the Petitioner's lot fails to fall within the exception established by S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii).

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 properly denied the Petitioner's permit application.

IT IS THEREFORE, ORDERED, that DHEC's denial of Permit No. OCRM-13-155-D is **AFFIRMED**.



CAROLYN C. MATHEWS
Administrative Law Judge

August 12, 2014
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Mary Elizabeth Campbell, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

August 12, 2014
Columbia, South Carolina


Mary Elizabeth Campbell
Judicial Law Clerk

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