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MAY 06 2015

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

SC ADMIN. LAW COURT

James R. Maull,)
)
 Petitioner,)
)
 v.)
)
 South Carolina Department of Health and)
 Environmental Control and David Abdo,)
)
 Respondents,)
 and)
)
 Russel and Laura Shaible,)
)
 Interveners.)

Docket No. 12-ALJ-07-00507-ACC

RECEIVED

JUN 30 2015

SC Court of Appeals

ORDER ON REMAND

APPEARANCES: For the Petitioner: Michael A. Molony, Esquire
 For the Respondent SCDHEC: Nathan Haber, Esquire
 For the Respondent David Abdo: Pro Se
 For the Interveners: Lesley S. Riley, Esquire

This matter comes before the South Carolina Administrative Law Court (“the ALC” or “the Court”) on remand from the South Carolina Court of Appeals. This matter was originally before this 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 Environment Control, Office of Ocean and Coastal Resource Management (“the Department” or “OCRM”) to issue an Amendment to critical area permit number OCRM-07-128-F (“the Amendment”) to David Abdo (“Respondent”) for the construction of a private recreational dock. Russel and Laura Shaible (“the Interveners”) intervened in the action as adjacent property owners.

A contested case hearing was held before this Court on January 15, 2013. Three issues were before the Court: (1) whether the Department properly considered “the extent to which the proposed use could affect the value and enjoyment of adjacent owners;”¹ (2) whether the Amendment complied with Regulation 30-12.A(1)(p)’s general requirement that docks be

¹ S.C. Code Ann. § 48-39-150(a)(10); see also S.C Code Ann. Regs 30-11(B)(10).

constructed no less than twenty feet from adjoining property lines; and (3) whether the Department considered the Amendment negatively affected the public interest pursuant to section 48-39-150(B) of the South Carolina Code. On August 1, 2013, this Court issued a final decision and order affirming the Department's decision to issue the Amendment.

Subsequently, Petitioner appealed to the South Carolina Court of Appeals. On January 28, 2015, the Court of Appeals issued an opinion affirming in part and remanding in part. Specifically, the Court of Appeals affirmed this Court's findings that the Amendment was in compliance with section 48-39-150(B) and that the Amendment concerned a private dispute that did not implicate the public interest or affect public navigation. However, the Court of Appeals found this Court did not make adequate findings of fact in its order to allow it to review this Court's determination that the Department considered the extent to which the proposed use could affect the value and enjoyment of adjacent owners. Therefore, the Court of Appeals has instructed this Court to "make a finding as to whether [the Department] considered the effect of the Amendment on the value and enjoyment of adjacent property owners as required by subsection 48-39-150(A)(10), and to determine whether that finding was justified."

After reviewing the case file, as well as the briefs filed by the parties on this issue, the Court finds the Department considered the effect of the Amendment on the value and enjoyment of adjacent property owners as required by subsection 48-39-150(A)(10) and its determination that the effect of the Amendment on the value and enjoyment of Maull's property was not prohibitive of the Amendment was justified.

FACTS

The Court hereby incorporates the findings of fact from its previous order issued on August 1, 2013, and adds the following findings of fact:

1. Petitioner testified he has been restoring his 48-foot sport finishing boat for approximately five years. He enjoys working on the boat in his retirement as a hobby, and additionally testified he takes the boat off shore 7-8 times a year for cruising. Petitioner asserted dry docking a boat of his size is unheard of in the area; however, Petitioner admitted he could keep the boat at a marina, but he will not because he enjoys having it at home. Petitioner further asserted he is not willing to spend more money to reconfigure his dock again to make docking his boat easier in light of the Amendment.

2. Jeff Thompson, a senior wetland project manager with the Department, testified he has reviewed over 100 dock applications. He asserted he applies the pertinent regulations to every permit, including the Amendment. Thompson further asserted that the Amendment was consistent with all applicable regulations. Specifically, Thompson testified he applied Regulation 30-11 to find the Amendment did not affect the value and enjoyment of adjacent owners. He further stated that in reviewing this requirement, he found no significant impact on the value and enjoyment of adjacent landowners.

DISCUSSION

1. This Court has jurisdiction to hear this case pursuant to sections 1-23-600 of the South Carolina Code (Supp. 2014) and section 44-1-60 of the South Carolina Code (Supp. 2014) (providing “[a]n applicant, permittee, licensee, or affected person may file a request with the Administrative Law Court for a contested case hearing” following a final decision by the Department). In a contested case hearing, the Administrative Law Judge serves as the finder of fact and makes a *de novo* determination regarding the matter in controversy. Olson v. S.C. Dep’t of Health and Env’tl. Control, 379 S.C. 57, 663 S.E.2d 497 (Ct. App 2008).

2. The applicable standard of proof in this contested case hearing is by a preponderance of the evidence. Anonymous v. State Bd. of Med. Exam’rs, 329 S.C. 371, 496 S.E.2d 17 (1998). Furthermore, the burden of proof is generally upon the party asserting the affirmative of an issue. See Leventis v. S.C. Dep’t of Health & Env’tl. Control, 340 S.C. 118, 133, 530 S.E.2d 643, 651 (Ct. App. 2000) (citing 2 Am.Jur.2d Administrative Law § 360 (1994) (“Generally, the burden of proof is on the party asserting the affirmative issue in an adjudicatory administrative proceeding.”)).

3. “In contested permitting cases, the ALC serves as the finder of fact.” Olson v. S.C. Dep’t of Health & Env’tl. Control, 379 S.C. 57, 63, 663 S.E.2d 497, 500 (Ct. App. 2008). The weight and credibility assigned to evidence presented at the hearing of a matter is within the province of the trier of fact. S.C. Cable Television Ass’n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992).

5. “As a creature of statute, a regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged.” Captain’s Quarters Motor Inn, Inc. v. S.C. Coastal Council, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991).

6. When a dock is to be located in a critical area as defined in section 48-39-10 of the South Carolina Code (Supp. 2011), section 48-39-130(C) of the South Carolina Code (Supp. 2011) requires a person or entity to obtain a permit for any alteration of the “critical area” of the coastal zone.

7. One of the factors the Department must consider before granting a permit is “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) (Supp. 2011). This consideration is also required pursuant to Regulation 30-11 of the South Carolina Code of Regulations (providing that in permitting in critical areas, the Department will be guided by several consideration, including “[t]he extent to which the proposed use could affect the value and enjoyment of adjacent owners”).

8. Here, the threshold question is whether the Department considered the extent to which the proposed use could affect the value and enjoyment of adjacent owners as required by section 48-39-150(a)(10) and Regulation 30-11. I find the Department considered the effect of the Amendment on the value and enjoyment of adjacent owners. Thompson specifically testified he considered Regulation 30-11 in granting the permit and found no significant impact on the value or enjoyment of adjacent properties. I note that although Thompson did not specifically mention section 48-39-150(a)(10) of the South Carolina Code, the section’s language is identical to the language of Regulation 30-11; therefore, I find the Department adequately considered the issue.

9. The next question is whether the Department’s decision to grant the Amendment upon consideration of section 48-39-150(a)(10) and Regulation 30-11 is justified. I conclude the Department’s decision to grant the Amendment is justified. Here, Petitioner has the burden to show the Department was not justified in its decision, and I find Petitioner failed to meet this burden. See Leventis, 340 S.C. at 133, 530 S.E.2d at 651 (citing 2 Am.Jur.2d Administrative Law § 360 (1994) (“Generally, the burden of proof is on the party asserting the affirmative issue in an adjudicatory administrative proceeding.”)).

10. Respondent Abdo testified he applied for the Amendment because the Palmer dock did not suit his family’s needs. Specifically, he testified the configuration of the Palmer dock in relation to the tides would prevent the dock from being usable several times during the day. I find Respondent Abdo’s testimony concerning the usability of the dock in its current configuration provides a basis to justify the Amendment.

11. Next, Respondent Abdo's testimony must be weighed against Petitioner's testimony as to the loss of value and enjoyment of his property. Petitioner testified he would no longer be able to dock his 48-foot sport fishing boat on the landward-side of his dock, which is his preferred side to dock on to better protect his boat. Petitioner's testimony goes to his enjoyment of his property, as he provided no testimony that the Amendment to Respondent Abdo's dock will affect the value of his real property. See § 48-39-150(a)(10) (providing the Department must consider "the extent to which the proposed use could affect the value and enjoyment of adjacent owners"). The lack of testimony concerning a loss of value differentiates this case from Olson v. South Carolina Department of Health & Environmental Control, 379 S.C. 57, 67, 663 S.E.2d 497, 503 (Ct. App. 2008), in which the South Carolina Court of Appeals upheld this Court's determination that a dock permit should be denied, in part, because of the effect of a proposed dock on the adjacent owners' value and enjoyment. In Olson, two adjacent landowners testified the existence of another dock would also lower their property values because of "the close proximity," and the proposed dock's likelihood to "clog up the whole view," inhibit navigation, "impair their ability to swim, kayak and fish from their dock, and impede the ability to tie boats up to the side of her dock." Id. Without testimony to a loss of value, I find Petitioner will not suffer a loss of value as a result of the Amendment.

12. As to Petitioner's testimony regarding the loss of enjoyment of his property, I find Petitioner's loss is merely one of preference. Petitioner complains he can no longer dock in his preferred manner, not that he is wholly prevented from docking his boat(s) at his property. Moreover, Petitioner testified he only takes out his 48-foot sport fishing boat 7-8 times a year, which indicates there will be a very limited number of times he is inconvenienced with the difficulty of docking his boat on the channel-side of his dock. Furthermore, Mr. Walters testified Petitioner has one of the largest boats on his side of Wappoo Creek, and Petitioner's choice to own such a large vessel appears to be a contributing factor to Petitioner's docking difficulties. In particular, Petitioner's testimony suggests that his large boat requires more than the standard 20-feet between a pierhead and the extended property line as required by Regulation 30-12.A(1)(p).

13. The 20-foot standard required by Regulation 30-12.A(1)(p) is a minimum, and the Department is not required to increase the minimum to accommodate individual property owners' boats. See S.C. Code Ann. Reg. 30-12.A(1)(p) ("No docks, pierheads 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. However, the Department may allow construction closer than 20 feet or over extended property lines where there is no material harm to the policies of the Act.”). Again, this case is differentiated from Olson, in which the Court of Appeals upheld this Court’s decision denying a proposed dock permit because “the proposed dock would be as close as seven feet” from an adjacent landowner’s dock. 379 S.C. 57, 67, 663 S.E.2d 497, 503. Here, the Amendment places Respondent Abdo’s dock 20.5 feet off the shared extended property line and therefore complies with the law. Further, I note the adjacent landowners in Olson also testified about multiple ways in which the construction of the proposed dock would affect their enjoyment of their property. Specifically, the adjacent landowners testified construction of the proposed dock would require the removal of an existing piling that was used for mooring and to designate a swimming area. 379 S.C. 57, 67, 663 S.E.2d 497, 503. The landowners testified the removal of the piling would create safety issues with swimming and with boat navigation. Id. Here, Petitioner provided no such additional testimony as to how he would lose enjoyment of his property other than the loss of docking his boat in his preferred manner.

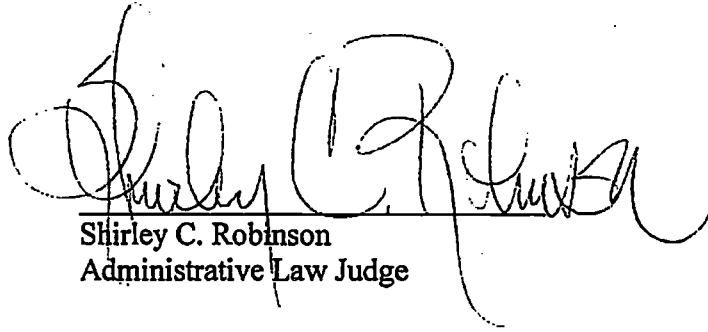
CONCLUSION

Based on the foregoing, I find the Department properly considered the requirements of section 48-39-150(a)(10) and Regulation 30-11. I also find a preponderance of the evidence supports finding the Department was justified in granting the Amendment upon considering the value of the Amendment to Respondent Abdo and the impact of the Amendment on the value and enjoyment of Petitioner’s property. More specifically, I find Petitioner failed to meet his burden to show the Department was not justified in finding Petitioner’s concerns did not rise to a degree requiring the Department to deny the Amendment because of the effect of the Amendment on the value and enjoyment of Petitioner’s property. See Leventis, 340 S.C. at 133, 530 S.E.2d at 651 (citing 2 Am.Jur.2d Administrative Law § 360 (1994) (“Generally, the burden of proof is on the party asserting the affirmative issue in an adjudicatory administrative proceeding.”)).

ORDER

IT IS HEREBY ORDERED that, following consideration of the issues to be addressed on remand, the Department’s issuance of the October 6, 2011 Amendment to critical area permit OCRM-07-128-F to Respondent Abdo is hereby **AFFIRMED**.

AND IT IS SO ORDERED.



Shirley C. Robinson
Administrative Law Judge

May 6th, 2015
Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Intragovernmental Mail Service addressed to the party(ies) or their attorney(s).

This 6th day of May 2015
By: Kathy M. Booker
Judicial Law Clerk