

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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OCT 18 2016

SC Court of Appeals

Gene B. Schwiers,)
)
Petitioner,)
)
vs.)
)
South Carolina Department of Health)
and Environmental Control and)
Stewart W. Heath,)
)
Respondents.)
)
_____)

Docket No. 15-ALJ-07-0580-CC

AMENDED FINAL ORDER

FILED

SEP 23 2016

SC ADMIN. LAW COURT

This matter comes before the South Carolina Administrative Law Court (“ALC” or “Court”) pursuant to a Request for a Contested Case filed by Gene B. Schwiers (“Petitioner”) on December 29, 2015, challenging the decision of the South Carolina Department of Health and Environmental Control (“DHEC”), Office of Ocean and Coastal Resource Management (“ORCM”) to amend critical area permit number OCRM-12-112-S (“amended permit”).¹ The amended permit would authorize the modification of a private use dock by installing a 12’x12’ four-pile boatlift on the ebb-side of the existing fixed pierhead and by shifting the existing floating dock four (4) feet to the flood-side (north). DHEC approved the amended permit on October 14, 2015. Petitioner filed a Request for Final Review Conference before the Board of Health and Environmental Control (“Board”) on October 28, 2015. The Board issued its decision declining review on November 23, 2015. Petitioner then filed a Request for Contested Case Hearing on December 29, 2015. A hearing was held in this matter at the ALC in Columbia, South Carolina on July 26, 2016. The Court issued its Final Order on August 18, 2016, denying the amended permit.

On September 1, 2016, Respondent Stewart W. Heath (“Heath”) filed his Motion to Reconsider, Alter or Amend, which raised three grounds for the Court to reconsider its decision denying the amended permit.

¹ Schwiers is a general partner of Sparkling Waters, L.P., which is the legal owner of property adjacent to the property involved in the permit granted by DHEC.

First, Heath claims that the Court based its decision on an undue emphasis on extended property lines. Next, Heath claims that Petitioner did not meet her burden to show that OCRM did not give adequate attention to her issues during the permitting process. Finally, Heath argues that the denial of the amended permit would be inconsistent with DHEC's requirement to ensure uniform permit evaluations.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and closely passed upon their credibility, and taking into consideration the burden of proof upon the parties, the Court makes the following findings of fact by a preponderance of the evidence.

Sparkling Waters, L.P., is the owner of real property at 1674 Dolphin Street, Garden City, South Carolina. Heath owns adjacent property at 1666 Dolphin Street. On June 27, 2012, DHEC issued critical area permit OCRM-12-112-S to Heath, which allowed the modification of an existing "grandfathered" dock. Among other things these modifications allowed Heath to replace an existing boatlift, expand the existing pierhead, and install a roof over the pierhead and boatlift. It also allowed the existing floating dock to be relocated four (4) feet "channel-ward."²

On May 18, 2015, Heath filed an application asking to add a second boatlift (a four-pile 12'x12' boatlift) and to relocate the floating dock four (4) feet northwards. In June 2015, DHEC received opposition letters and emails from Petitioner and neighboring property owners. These challengers raised several grounds in opposition to the application for the amended permit: encroachment, impediments to navigation, and diminished value and enjoyment of their properties.

After review of the testimony and the evidence presented at the hearing, the Court finds that the addition will not harmfully obstruct the natural flow of navigable water. The addition will also not affect the production of wildlife. None of the local commercial crabbers or fishers objected to the issuance of the permit. Further, there is nothing to suggest that the boatlift would affect the habitats of endangered species or historic sites along the South Carolina coastal zone. The boatlift will not cause erosion or creation of stagnant water. Nothing before this Court suggests the boatlift will affect existing public access to tidal and submerged lands, navigable waters and beaches, or other

² Apparently a davit lift located on the walkway was removed although the original permit notes that it was to be retained.

recreational coastal resources.

DHEC's project manager, Christopher Stout, testified that he reviewed the objections and notified Heath's agent of the concerns raised. At least one alternative was considered and rejected because it would extend the floating dock further into the creek than surrounding docks and would make it more of an impediment to public navigation. No evidence was presented to show that changes to the proposed second boatlift were considered by Stout or suggested to Heath's agent.

Stout also testified that he considered the impact of encroachment on adjacent properties, the impact on the visual corridor, and the impact of the permitted addition on the value and enjoyment of the properties. He denied that there would be any negative impact on public navigation on the creek. He conceded that most of Heath's existing dock and all of the proposed construction are outside of Heath's extended property lines but pointed out that the entirety of three other docks and a portion of a fourth are inside of Heath's extended property lines. Stout also pointed out that there is a maximum of two boatlifts to a property. 2 S.C. Code Ann. Regs. 30-12(A)(2)(e)(i) (2011). He stated that several docks nearby already have two boatlifts.

However, Stout admitted that he did not communicate with Petitioner about her specific objections. To solicit objections to a permit application and then only consider the general factors of S.C. Code Ann. § 48-39-150(A), without further communication suggests lack of adequate attention to the concerns raised. S.C. Code Ann. § 48-39-150(A)(10) requires DHEC to consider how the proposed use would affect the value and enjoyment of adjacent owners, guidance that includes subjective elements. Therefore, this Court cannot find that DHEC gave adequate attention to the issues raised by Petitioner.

Currently, twenty-eight (28) feet separate Petitioner's dock and Heath's existing dock. Permit plans for the 2012 expansion, show a pierhead of sixteen and six-tenths (16.6) feet in width on Petitioner's side of the joint extended property line. The roof and existing boatlift on the northern side of the pierhead are almost all on Petitioner's side except for the landward corner which is intersected by the extended property line.

Petitioner argues that the permit should be denied under the terms of 2 S.C. Code Ann. Regs. 30-12(A)(1)(p) (2011), because the intrusion allowed by the amended permit would leave only sixteen

(16) feet between Petitioner's pierhead and Heath's proposed boatlift. Petitioner testified that this proximity limits navigation and diminishes the value and enjoyment of the property. DHEC declined to consider this argument because it regards navigability between the docks to be a private property matter.

Petitioner objected to the permit because the second boatlift, wholly inside Petitioner's extended property lines, would limit the ability to crab and fish from Petitioner's pier. Petitioner also objected because the boatlift would restrict her nephew's ability to fish from his kayak around the docks.

The physical proximity of the proposed second boatlift and Petitioner's dock is a concern, especially considering that the boatlift will impair the ability to swim, kayak, and fish from Petitioner's dock. The extent to which a proposed use affects the use and enjoyment of adjacent property is one of many factors for the ALC to consider. *See Jones v. S.C. Dep't of Health and Env'tl. Control*, 384 S.C. 295, 315, 682 S.E.2d 282, 294 (Ct. App. 2009).

DHEC "may allow construction closer than 20 feet or over extended property lines..." as stated in 2 S.C. Code Ann. Regs 30-12(A)(1)(p) when there is no material harm to the policies of the Act. This Court finds that the proposed second boatlift, located entirely on Petitioner's side of the extended property line, affects Petitioner's value and enjoyment by impairing the ability to swim, kayak, and fish from the dock, thereby producing material harm to the policies of the Act.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Court concludes the following as a matter of law.

The ALC has subject matter jurisdiction in this action pursuant to S.C. Code Ann. §§ 1-23-310 *et seq.* (2005 and Supp. 2015) and 44-1-60 (Supp. 2015). In reviewing this matter, the Court serves as the finder of fact and makes a *de novo* determination regarding the matters in controversy. *See* S.C. Code Ann. § 1-23-600(A); *Brown v. S.C. Dep't of Health and Env'tl. Control*, 348 S.C. 507, 560 S.E.2d 410 (2002). The standard of proof to be used by the Court in weighing the evidence and making a decision on the merits during a contested case proceeding is a preponderance of the evidence. S.C. Code Ann. §§ 1-23-330(1) and 1-23-600(A)(5); *Anonymous (M-156-90) v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 496 S.E.2d 17 (1998).

In addition, Petitioner has the burden of proving by a preponderance of the evidence that DHEC's decision was in error under the governing statutory and regulatory standards. *Leventis v. S.C. Dep't of Health and Envtl. Control*, 340 S.C. 118, 133, 530 S.E.2d 643, 651 (Ct. App. 2000) ("Generally, the burden of proof is on the party asserting the affirmative issue in an adjudicatory administrative hearing." (quoting 2 Am.Jur.2d *Administrative Law* § 360 (1994))); *Nat'l Health Corp. v. S.C. Dep't of Health and Envtl. Control*, 298 S.C. 373, 380 S.E.2d 841 (Ct. App. 1989).

This Court should consider the Department staff's utilization of its specialized knowledge and expertise in making a determination. See S.C. Code Ann. § 1-23-330(4). However, as the trier of fact, the Court may give an expert's testimony the weight and credibility it deserves. *Florence Cty. Dep't of Soc. Servs. v. Ward*, 310 S.C. 69, 425 S.E.2d 61 (Ct. App. 1992).

Permits for the alteration of critical areas in the coastal zone are governed by the South Carolina Coastal Zone Management Act, S.C. Code Ann. §§ 48-39-10 *et seq.* (2008 and Supp. 2015), and the regulations promulgated pursuant to these provisions, found at 2 S.C. Code Ann. Regs. 30-1 *et seq.* (2011). These regulations govern the management, development, and protection of the critical areas and coastal zone of South Carolina.

When a dock is to be located in the critical area as defined in S.C. Code Ann. § 48-39-10, S.C. Code Ann. § 48-39-130(C) requires a person or entity to obtain a permit for any alteration of the "critical area" of the coastal zone. "Critical area" includes coastal waters. S.C. Code Ann. § 48-39-10(J)(1). "Coastal waters" means 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).

In evaluating a critical area permit such as the dock modification in this case, DHEC must consider *inter alia* "[t]he extent to which the proposed use could affect the value and enjoyment of adjacent owners." S.C. Code Ann. § 48-39-150(A)(10); 2 S.C. Code Reg. 30-11(B)(10).

2 S.C. Code Ann. Regs. 30-12(A)(1)(e) provides:

All applications for docks and piers should accurately illustrate the alignment of property boundaries with adjacent owners and show the distance of the proposed dock from such extended property boundaries. For the purpose of this section, the

extension of these boundaries will be an extension of the high ground property line. The Department may consider an alternative alignment if site specific characteristics warrant or in the case of dock master plans, when appropriate.

2 S.C. Code Ann. Regs. 30-12(A)(1)(p) provides:

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.** (emphasis added).

Twenty (20) feet from extended property lines means that “40 feet between two docks is a standard distance based on the requirement that each property owner’s dock be twenty feet from the extended property line under DHEC regulations.” *Maull v. S.C. Dep’t of Health and Envtl. Control*, 411 S.C. 349, 357, 768 S.E.2d 402, 407 (Ct. App. 2015).

In this case, the evidence shows that DHEC did not adequately evaluate Heath’s application in light of Petitioner’s objections. Petitioner claimed that the modifications would affect navigation between the docks and in the area between the marsh and the end of the floating dock. DHEC takes the position that this issue is a private dispute between neighbors and does not affect public navigation in the main channel of the creek. However, it does impact the adjacent owner’s value and enjoyment. *Olson v. S.C. Dep’t of Health and Envtl. Control*, 379 S.C. 57, 67, 663 S.E.2d 497, 503 (Ct. App. 2008) (finding evidence to support the effect on an adjacent owner’s value and enjoyment by making it impossible to navigate and impeding the ability to swim, kayak and fish from the property owner’s dock).

The amended permit is denied because the proposed boatlift will affect the value and enjoyment of adjacent owners to the extent of producing material harm to the policies of the Act. The fact that the proposed boatlift would be built on Petitioner’s side of the extended property line is part of the Court’s consideration of the specific impact on the value and enjoyment of adjacent property owners. S.C. Code Ann. § 48-39-150. In determining that the amended permit constitutes a material harm to the policies of the Act, the Court is mindful that “the extent to which the proposed use could affect the value and enjoyment of the adjacent landowners is but one of many factors to consider.” *Jones*, 384 S.C. at 315, 682 S.E.2d at 293.

As stated in 2 S.C. Code Ann. Regs. 30-1(A)(2)(b), DHEC must comply with the rules and regulations to ensure consistency. DHEC must consider many factors when evaluating a permit, and each factor, in and of itself, has differing considerations. S.C. Code Ann. § 48-39-150 demands a “determination on the individual merits of each application.” Each individual application is different, and to suggest that this resolution would conflict with a DHEC consistency requirement is incorrect. While the location near the amended permit has many docks that are close to each other, although none as close as Petitioner’s and Heath’s, there may be varying reasons for DHEC to approve some permits and deny others.³

As argued in his Motion to Reconsider, Alter or Amend, Heath claims that Petitioner did not meet her burden to show OCRM disregarded the extent to which the proposed boatlift could affect the adjacent owners’ value and enjoyment. For support, Heath cites to *Young v. S.C. Dep’t of Health and Env’tl. Control*, 383 S.C. 452, 461, 680 S.E.2d 784, 789 (Ct. App. 2009) (“In the present case, however, the issue [is] not whether aesthetic concerns and recreational activities are appropriate factors to consider in evaluating the propriety of the proposed boat storage dock but whether the issues Young raised were in fact given adequate attention during the permitting process.”).

However, that does not end the inquiry of this Court. In *Maull*, the Court of Appeals affirmed a portion of the ALC’s decision, but also remanded the case to the ALC with the instruction, “to make a finding as to whether DHEC considered the effect of the amended permit 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.**” *Maull*, 411 S.C. at 366, 768 S.E.2d at 412 (emphasis added); *See also White v. S.C. Dep’t of Health and Env’tl. Control*, 392 S.C. 247, 257, 708 S.E.2d 812, 817 (Ct. App. 2011) (The Court of Appeals disagreed with the argument advanced by appellant “that the evidence does not support the ALJ’s conclusion that the location of its dock

³ With regard to potential equal protection claims, the Court notes that “[t]he *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment.” *Grant v. S.C. Coastal Council*, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995) (citing *Weaver v. S.C. Coastal Council*, 309 S.C. 368, 423 S.E.2d 340 (1992)).

One reason for disparate treatment could be the date the structure was originally constructed. *See* S.C. Code Ann. § 48-39-130(C) (2008). These grandfathered docks have numerous benefits not afforded similarly situated docks. *See generally* 2 S.C. Code Ann. Regs. 30-5 (2011) (allowing normal maintenance and repair of a grandfathered structure to its original dimensions even though those dimensions would not currently be permitted); 2 S.C. Code Ann. Regs. 30-12(A)(1)(q) (allowing a dock to be rebuilt to its previous configuration so long as the reconstruction is completed within five years of the destruction); and 2 S.C. Code Ann. Regs. 30-12(A)(2)(c)(vii) (allowing grandfathered docks to be larger than those currently permitted).

constitutes a material harm to the policies of the Act.”). Therefore, not only must the Court determine whether DHEC considered the effect on the value and enjoyment of adjacent owners, but also must determine whether the finding by DHEC was justified.

DHEC’s regulations make repeated reference to extended property lines as a means of determining the impact and the scope of proposed private projects on neighboring properties. *See* 2 S.C. Code Ann. Regs. 30-12 (A)(1)(e), (n), (o)(i)(b), (o)(ii)(b), and (p). Although DHEC has the authority to “allow construction closer than 20 feet or over extended property lines where there is no material harm to the policies of the act,” it does not have the authority to ignore completely the extended property lines. 2 S.C. Code Ann. Regs. 30-12 (A)(1)(p); *see also Triska v. S.C. Dep’t of Health and Env’tl. Control*, 292 S.C. 190, 355 S.E.2d 531 (1987) (no state agency can disregard its own regulations).

Here, as mandated by S.C. Code Ann. § 48-39-150, an individual analysis of the amended permit was conducted, and the Court concludes that the proposed boatlift will affect the value and enjoyment of adjacent owners to the extent that it would cause material harm to the policies of the Act. Making “consistent permit evaluations” requires DHEC to consider specified factors, not that it reach identical decisions in every case. *Cf. Olson*, 379 S.C. at 67, 663 S.E.2d at 502-03 (the granting of a dock permit on one lot effectively prohibited the permitting of a dock on an adjacent lot). Although proximity to Petitioner’s dock is a consideration, it is not the sole factor in the Court’s decision. The ability to swim, kayak, and fish from Petitioner’s dock is sufficiently impeded by the close proximity of the proposed second boatlift to constitute material harm to the policies of the Act. Additionally, there is nothing before this Court to suggest that similarly situated persons are receiving disparate treatment.

The Court concludes that the proposed location of Heath’s new boatlift violates S.C. Code Ann. § 48-39-150(A)(10) and 2 S.C. Code Ann. Regs. 30-11(B)(10) by causing a material harm to the policies of the Act as referenced in 2 S.C. Code Ann. Regs. 30-12(A)(1)(p).

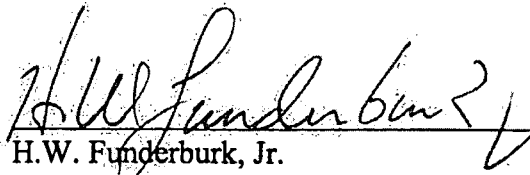
ORDER

Therefore, based on the Findings of Fact and Conclusion of Law set forth above, it is

ORDERED that the amendment to Permit OCRM-12-112-S is **DENIED**.

AND IT IS SO ORDERED

September 23, 2016
Columbia, South Carolina



H.W. Funderburk, Jr.
Administrative Law Judge

FILED

SEP 23 2016

SC ADMIN. LAW COURT

CERTIFICATE OF SERVICE


I, Julia M. Miller, 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, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

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Julia M. Miller
Judicial Law Clerk

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