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OCT 18 2016

SC Court of Appeals

**STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT**

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

**FINAL ORDER**

**FILED**

AUG 18 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.<sup>1</sup> The amended permit would authorize the modification of a private use dock by installing a 12’ X 12’ four-pile boat lift 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 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.

**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

<sup>1</sup> 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.

Carolina. Stewart W. Heath (“Heath”) owns adjacent property at 1666 Dolphin Street, Garden City, South Carolina. 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.”<sup>2</sup>

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

DHEC 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. Navigation between docks (as argued by Petitioner) is considered a private matter.

DHEC’s project manager, Christopher Stout, 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.

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

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

side of the pierhead are almost all on Petitioner's side except for the landward corner which is intersected by the extended property line.

In addition to the proposed location of Heath's second boatlift being wholly inside Petitioner's extended property line, Petitioner objected to the permit because the boatlift would limit Petitioner's ability to crab and fish from the pier. Petitioner also objected because the boatlift would restrict her nephew's ability to fish from his kayak around the docks.

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. Important in this finding is that none of the local commercial crabbers or fishers objected to the issuance of the permit. Petitioner's objection concerning the inability to fish or crab deals exclusively with preference of location on her pier, and the boatlift would not significantly hamper Petitioner's ability to engage in that activity.

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 recreational coastal resources. As noted above, Petitioner's objection regarding navigability between the docks for her nephew is considered a private property matter by DHEC. Further, there is nothing to suggest that the boatlift will affect the habitats of endangered species or historic sites along the South Carolina coastal zone.

Petitioner also 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 the value and enjoyment of the property.

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 Envtl. Control*, 384 S.C. 295, 315, 682 S.E.2d 282, 294 (Ct.App.2009).

### **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 Envtl. 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). Furthermore, 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). It is also proper to 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).

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 evaluated 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. While it does not affect public navigation, 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 from the impossibility to navigate, swim, kayak and fish from the property owner’s dock). Moreover, the whole of the proposed construction will take place on Petitioner’s side of the joint extended property line, thereby causing material harm to the policies of the Act as referenced in S.C. Code Ann. 48-39-150 (A)(10); 2 S.C. Code Ann. Regs. 30-11(B)(10) and 30-12(A)(1)(p).

The encroachment of which Petitioner complains reflects the crowded condition of the area which

dates back to circumstances extant prior to the enactment of the original Coastal Zone Management Act. Finally, the contention that the value and enjoyment of Petitioner's property would be diminished by Heath's additions would be enough to deny the permit application. Although the ALC was affirmed on most issues supporting DHEC's granting an amended permit to expand a dock, the Court of Appeals remanded the case to consider the impact on the value and enjoyment of adjacent owners. *Maull*, at 364, 768 S.E.2d 402, 411.

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 Envtl. Control*, 292 S.C. 190, 355 S.E.2d 531 (1987) (no state agency can disregard its own regulations).

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), and the proposed location, by ignoring the restrictions implicit in the concept of extended property lines, would cause a material harm to the policies of the Act as referenced in 2 S.C. Code Ann. Regs. 30-12(A)(1)(p).

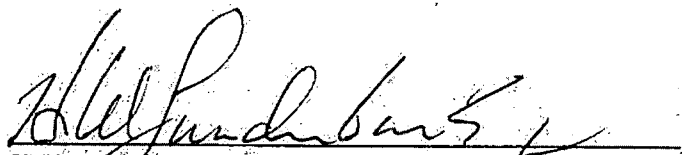
**ORDER**

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**

August 18, 2016  
Columbia, South Carolina

  
H.W. Funderburk, Jr.  
Administrative Law Judge

**FILED**

AUG 18 2016

**CERTIFICATE OF SERVICE**

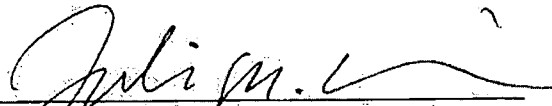
I, Julia M. Miller, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Gene Schwiers  
4 East Cleveland Bay Ct.  
Greenville, SC 29615  
genebaxleyschwiers@yahoo.com

Bradley D. Churdar, Esquire  
SCDHEC  
1362 McMillan Ave., Suite 400  
North Charleston, SC 29405  
churdbd@dhec.sc.gov

E. LeRoy Nettles, III, Esquire  
P.O. Box 699  
Lake City, SC 29560  
lee@ntrlaw.com

August 18, 2016  
Columbia, S.C.

  
Julia M. Miller  
Judicial Law Clerk

**FILED**

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