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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable H.W. Funderburk, Jr.

Appellate Case No. 2016-002136

GENE B. SCHWIERS .....Respondent,

vs

SOUTH CAROLINA DEPARTMENT OF HEALTH
AND ENVIRONMENTAL CONTROL and STEWART W. HEATH.....Respondents below,

OF WHOM SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL IS THE RESPONDENT,

AND

STEWART W. HEATH IS THE APPELLANT.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

QUESTIONS PRESENTED

I. **Did the Administrative Law Court (hereafter "ALC") err as a matter of law in finding the proposed dock amendment failed to comply with the requirements of S.C. Code Ann. § 48-39-150?**

II. **Did the ALC err as a matter of law in finding the proposed dock permit failed to comply with the requirements of 2 S.C. Code Ann. Regs. 30-12(A)(1)(e) and 30-12(A)(1)(p)?**

III. **Did the ALC err by failing to consider the Department's requirement to insure consistent permit evaluations pursuant to 2 S.C. Code Ann. Regs. 30-1(A)(2)?**

STATEMENT OF THE CASE

This is a dock permit appeal. On May 18, 2015, Appellant Heath filed an application seeking to add a four-pile 12' x 12' boatlift to the ebb(south)-side of his existing dock. On October 14, 2015, DHEC approved critical area permit number OCRM-12-112-S ("amended permit"). Respondent (Petitioner below) Gene B. Schwiers, Appellant Heath's neighbor to the South, filed a Request for Final Review Conference before the Board of Health and Environmental Control ('Board") on October 28, 2015. The Board declined review November 23, 2015. Respondent Schwiers filed a Request for Contested Case Hearing on December 29, 2015. A hearing was held before the Administrative Law Court (ALC) on July 26, 2016. The ALC issued its Final Order on August 18, 2016, denying the amended permit. The ALC found that DHEC failed to properly consider S.C. Code Ann. § 48-39-150(A)(10) and 2 S.C. Code Ann. Regs. 30-12(A)(1)(e) and 30-12(A)(1)(p). Appellant Heath filed a Motion to Reconsider, Alter or Amend on September 1, 2016. The ALC issued an Amended Final Order on September 23, 2016 again denying the permit. Appellant Heath filed a Notice of Appeal on October 18, 2016.

This Appeal follows.

STANDARD OF REVIEW

In an appeal from an ALC decision, the Administrative Procedures Act provides the appropriate standard of review. S.C.Code Ann. § 1–23–610(B) (Supp.2012). This Court confines its analysis of an ALC decision to whether it is:

> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

Id. In determining whether the ALC's decision was supported by substantial evidence, the Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion as the ALC. However, the Court may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law. Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014).

ARGUMENTS

I. The ALC erred as a matter of law in finding the proposed amendment failed to comply with the requirements of S.C. Code Ann. § 48-39-150.

Pursuant to Section 48–39–150 of the South Carolina Code, in determining whether to grant or deny a permit to alter the critical area, DHEC must be guided by the individual merits of each application and the ten "general considerations" set forth in section 48–39–150(A). After considering the views of interested agencies, local governments and persons, and after evaluation of biological and economic considerations, if the department finds that the application is not contrary to the policies specified in this chapter, it shall issue to the applicant a permit.

The ALC, referencing S.C. Code Ann. §48-39-150(A)(10), found that 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." (Amended Final Order p. 6,8). The ALC placed undue emphasis on Section 48-39-150(A)(10); while failing to consider the individual merits of the permit application as required in Section 48-39-150(A) and failing to consider that the other nine (9) considerations of Section 48-39-150(A) weigh in favor of granting the permit application.

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 v. SC Dep't of Health & Envtl. Control, 384 S.C. 295, 315, 682 S.E.2d 282, 293 (Ct. App. 2009) (emphasis added). Here, the ALC acknowledged that the nine considerations of Section 48-39-150(A)(1)-(A)(9) weigh in favor of granting the boatlift permit application. (Amended Final Order p. 2). The ALC found the only consideration that weighed against granting the permit was subsection (A)(10), or "the extent to which the proposed use could affect the value and enjoyment of adjacent owners."

The only finding of the ALC as to this consideration was that the proposed boatlift would impair the ability to swim, kayak, and fish from Petitioner's dock. (Amended Final Order p. 4). These limitations are recreational in nature, and in no way interfere with the value of Petitioner's property, deep water access from her dock, or her ability to use or access the property.

Here, Petitioner's complaints are akin to those already addressed by the court in Jones where the court held that **limitations on recreational pursuits are more reflective of a lack of convenience than an inability to use the property**. Id. (emphasis added). In the case at bar, nothing in the record suggests that the approval of this permit will render the Petitioner's property devalued, unusable, or even substantially affect her enjoyment of the property.

Even assuming, *arguendo*, that a limitation on recreational pursuits was sufficient basis for the denial of a permit, it is undisputed that Petitioner will still be able to pursue the recreational activities she complains of from three out of four sides of her dock. Furthermore, undisputed testimony indicated that the stairs which provided access to the water for swimming and kayaking are located on the *South* side of Petitioner's dock. "Someone swimming or kayaking, that would be their point of entry into the water. It wouldn't be on the side of Mr. Heath where the encroachment is, it would be on the opposite side, the Padget's." (Transcript p. 128-129).

Further, the Petitioner testified that currently her nephew and others kayak under her existing dock structure, where the space between pilings is typically between 10 and 14 feet. The permitted boatlift will allow 16 feet between the two structures at its most narrow point. Therefore, the kayaks will still be able to navigate between the docks. (Transcript p. 112-113).

There was no testimony or finding as to what affect the proposed boatlift would have on the *value* of the adjacent owner's property. The ALC merely made a finding as to *enjoyment;* that the Petitioner's ability to swim, kayak, and fish on the North side of her dock would be impaired.

Therefore, there will be a very minimal negative effect as to only a portion of one of the ten policy considerations the Department is tasked with balancing.

The ALC also erred by failing to consider the Public Trust Doctrine. Pursuant to the Public Trust Doctrine, Petitioner does not have any ownership interest in the area where her dock sits or the area where the boatlift was permitted for. The Public Trust Doctrine provides that those lands below the high water line are owned by the State and held in trust for the benefit of the public. Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 29, 766 S.E.2d 707, 715 (2014). Therefore, Petitioner does not have any greater right to use this area for swimming, kayaking or fishing than does Appellant Heath or any other member of the public. And pursuant to the Public Trust Doctrine, Petitioner and other members of the public will still be entitled to swim, kayak and fish in the area around the proposed boatlift. Therefore, the affect on the enjoyment of her property is *de minimis* and by itself is not a sufficient ground for denial of the permit.

The Department properly determined that when nine factors weigh in favor of granting the permit, and the only negative is a limitation on the ability to swim, kayak, and fish from **one** of the **four** sides of the adjoining dock, the permit should be approved.

II. The ALC erred as a matter of law in finding the proposed dock permit failed to comply with the requirements of 2 S.C. Code Ann. Regs. 30-12(A)(1)(e) and 30-12(A)(1)(p).

The ALC also found that "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. (Amended Final Order p. 6).

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. (emphasis added).

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....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.

Further, S.C. Code Ann. § 48-39-150(A) requires that when determining whether a permit application is approved or denied, the department shall base its determination on the individual merits of each application. Here, the ALC failed to recognize the individual merits of this application and that the specific characteristics of the site necessitate an alternative alignment. Specifically, the ALC failed to consider that parts of five (5) docks lie within Appellant Heath's extended property lines, making it impossible for him to construct a dock within his extended property lines. (Transcript p. 123; Respondent's Exhibit 4). This is exactly the type of site specific characteristics envisioned by Reg. 30-12(A)(1)(e) and (p) that allow the Department to consider an alternative alignment and permit construction over extended property lines.

The ALC made repeated reference to, and partly based its ruling on the fact that the proposed boatlift would be placed almost wholly within the Petitioner's extended property lines ("This Court finds the proposed second boatlift, located entirely on Petitioner's side of the extended property line, affect Petitioner's value and enjoyment..." (Amended Final Order p. 4)). The failure of the ALC to recognize the site specific characteristics of this area mandates DHEC consider alternative alignments across extended property lines is an error of law. Regs. 30-12(A)(1)(e) and (p) specifically acknowledge and allow that there will be scenarios where the

concept of "extended property lines" will not apply and permits will be approved regardless of their relation to "extended property lines." Otherwise, there would be no need for the last sentence of either regulation. "When interpreting a statute, courts must presume the legislature did not intend to do a futile act." Proctor v. South Carolina Dep't of Health and Envtl. Control, 368 S.C. 279, 311, 628 S.E.2d 496, 513 (Ct. App. 2006). A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous...State v. Sweat, 379 S.C. 367, 665 S.E.2d 645 (Ct. App. 2008). "Regulations are interpreted using the same rules of construction as statutes." Murphy v. South Carolina Dep't of Health and Envtl. Control, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012). The above regulations are intended to give the Department discretion in the permitting process rather than impose a rigid, inequitable hard and fast rule that a dock must always be directly in front of the applicant's property. Any other interpretation leads to the result that a dock would never be permitted outside of the extended property lines of the applicant. Such an interpretation would render the last sentence of each regulation superfluous, a direct violation of the above-cited rules of statutory construction.

The undisputed testimony makes clear that the individual merits of this application and the specific characteristics of the site warrant an alternative alignment. Therefore, it was error for the ALC to find that the proposed boatlift's location in relation to extended property lines amounted to a material harm to the policies of the act in violation of 2 S.C. Code Ann. Regs. 30-12(A)(1)(p).

Deference to the Department's Interpretation of S.C. Code Ann. Regs. 30-12

Furthermore, the ALC failed to give deference to the Department's interpretation of the above regulations. The deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts,

including the ALC, will defer to the agency's interpretation absent compelling reasons. We defer to an agency interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute. Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 34–35, 766 S.E.2d 707, 718 (2014).

Christopher Stout, the Department's project manager, testified that the regulations give the Department flexibility to make permitting decisions in areas such as this which were developed prior to the Coastal Zone Management Act. (Transcript p. 123-125). He further testified that this area of Main Creek contains a large amount of grandfathered docks that don't adhere to the current standards. Therefore, permits cannot be evaluated simply by using an "extended property lines" analysis. Otherwise, the Department would never be able to issue a permit in this area. When asked if the site specific characteristics of this part of Main Creek warrant an alternative alignment, the project manager answered in the affirmative, explaining that most of those who own docks in this area would not be able to qualify for a dock permit under the new rules. (Transcript p. 130-132.) But because they were grandfathered in, the Department cannot require them to tear down their docks. Therefore, they have to consider alternative alignments so that those like Mr. Heath, who do qualify for a dock under the current waterfront property definition, are able to build the docks that the regulations allow them to build. (*Id.*)

Here, it is clear that the Department's interpretation of Regulations 30-12(A)(1)(e) and 30-12(A)(1)(p) allowing permits to be approved in these scenarios is reasonable and consistent with the plain language of the regulation, and therefore there is no reason to deviate from DHEC's construction and application.

Pursuant to the Public Trust Doctrine, discussed *supra*, the State holds title to all land

below the high water mark, and must be held in trust for the benefit of all the citizens of the state. McQueen v. South Carolina Coastal Council II, 354 S.C. 142, 149, 580 S.E.2d 116, 119 (2003). Therefore, the regulatory concept of extended property lines does not imply or grant the landowner any additional rights in the tidal property directly in front of their property. The permitting of a structure across an extended property line does not infringe upon any property rights of the adjacent owner, because the adjacent owner does not own the land upon which the structure sits.

III. Denial of this permit would be in direct conflict with the Department's requirement to insure consistent permit evaluations pursuant to S.C. Code Ann. Regs. 30-1(A)(2).

2 S.C. Code Ann. Regs. 30-1(A)(2) provides that "through the efforts of an overall coastal zone management program and permitting process, the Department seeks to guide the wise preservation and utilization of coastal resources. These rules and regulations are intended to...(b) insure consistent permit evaluations by the Department.(emphasis added). In the case at bar, the Department's project manager testified that the majority of docks in the area lie across extended property lines and many docks have less than 10 feet between them. In fact, there are docks in this area that are almost touching. (Transcript p. 167). He further testified that the location of the proposed boatlift and distance between docks would be very similar to other docks in the area and fitted within the general character of the area. (Transcript p. 134; 136). Because of these considerations, the Department continues to approve similar permits. In doing so, the Department remains consistent as required by 2 S.C. Code Ann. Regs. 30-1(A)(2)(b) without ignoring the requirements of S.C. Code Ann. Regs. 30-12 (2011). Further, there can be no material harm to the policies of the act when the proposed amendment would be very similar to other docks in the area and fits within the general character of the area.

To begin now denying permits that cross extended property lines would be fundamentally inconsistent and in direct violation of its own regulations. Furthermore, such conduct would subject the Department to equal protection claims upon a showing that similarly situated persons received disparate treatment. Weaver v. South Carolina Coastal Council, 309 S.C. 368, 375, 423 S.E.2d 340, 344 (1992) ("The existence of respondent's dock would create no effect distinguishable from that occasioned by the other three existing docks....We conclude that Council violated the equal protection and due process provisions of the state and federal constitutions in treating the respondent in a manner different from Beckmann, Cope and Crowley, thereby denying her a benefit granted to others similarly situated.")

CONCLUSION

For the reasons stated, the decision of the ALC should be reversed. The Appellant requests the Court enter an Order approving critical area permit number OCRM-12-112-S, together with such other relief as the Court deems proper.

Respectfully submitted,

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AND

STEWART W. HEATH IS THE APPELLANT.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Initial Brief of Appellant complies with Supreme Court Order 2007-08-13-02 Regarding Personal Data Identifiers and other sensitive information.

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The undersigned certifies that this Initial Brief of Appellant complies with Rule 211(b), South Carolina Appellate Court Rules.

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PROOF OF SERVICE

I certify that I served a copy of the **APPELLANT'S INITIAL BRIEF** and

APPELLANT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL by depositing a copy in the United States Mail, first class postage prepaid on the 13th day of December, 2016 on the on the following parties and counsel of record listed below:

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