

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable H.W. Funderburk, Jr.

RECEIVED

MAR 30 2017

Appellate Case No. 2016-002136

SC Court of Appeals

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.

FINAL BRIEF OF RESPONDENT

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Respondent

TABLE OF CONTENTS

Table of Contents.....	2
Table of Authorities.....	3
Statement of the Case.....	4
Arguments.....	6
I. The ALC did not 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.....	6
II. The ALC did not 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).....	10
III. The ALC did not 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).....	13
Conclusion.....	14
Certificate of Compliance.....	15

TABLE OF AUTHORITIES

Maul, 411 S.C. at 366, 768 S.E.2d at 412.....	11
White v. S.C. Dep't of Health and Envtl. Control, 392 S.C. 247,257, 708 S.E.2d 812, 817 (Ct. App. 2011).....	11
Triska v, S.C. Dep't Health and Envtl. Control, 292 S.C. 190, 355 S.E.2d 531 (1987).....	12
<i>C.f. Olson</i> , 379 S.C. at 67, 663 S.E.2d at 502-03.....	13

OTHER AUTHORITIES

S.C. Code Ann. 48-39-150.....	6
S.C. Code Ann 48-39-150(A).....	6
2 S.C. Code Ann. Regs. 30-12(A)(1)(e) and 30-12(A)(1)(p).....	10
2 S.C. Code Ann. Regs. 30-12 (A)(1)(p)	12

STATEMENT OF THE CASE

The matter before the Court is regarding a request to appeal the decision of the Honorable H.W. Funderburk, Jr. regarding the Administrative Law Court Docket No. 15-ALJ-07-00580-CC by Appellant, Stewart W. Heath. In the Appellant's Statement of Case the Counsel of Record for the Appellant fails to mention that when the initial request for the "amended permit" (OCRM-12-112-S) was sent to those residents of the area that were to be impacted by the request a total of 7 residents strongly opposed the request and all submitted their opposition letters to the South Carolina Department of Health and Environmental Control. However, the South Carolina Department of Health and Environmental Control ignored the opposition to the requested permit. Therefore, the Respondent in this matter, Gene B. Schwiers, requested a Final Review by the South Carolina Board of Health and Environmental Control and this request was declined. The Respondent, Gene B. Schwiers, then requested a Contested Case Hearing before the Administrative Law Court (ALC). A hearing was held before the Administrative Law Court on July 26, 2016. Based on the facts presented to the court and the conclusion of law the requested permit was denied. The Court found that the requested permit does impact the adjacent owner's value and enjoyment of their docks. In addition, the court found that the entire structure was to be built on the Respondent's, Gene B. Schwiers, side of the extended property line thus causing material harm to the to the policies of the Act. The Court found that "no state agency can disregard its own regulations." The Appellant, Stewart W. Heath, filed a Motion to Reconsider, Alter, or Amend on September 1, 2016. On September 9, 2016 the Respondent, Gene B. Schwiers, responded to the Motion to Reconsider, Alter, or Amend. The Honorable Judge H.W. Funderburk, Jr. filed the Amended Final Order on September 23, 2016 once again denying the requested permit based on the findings of fact and the conclusion of law. The Appellant, Stewart

W. Heath, fails to mention in the request for appeal that the Administrative Law Court found that the South Carolina Department of Health and Environmental Control failed in its requirement by law to provide adequate attention to the concerns raised by the Respondent, Gene B. Schwiers. This is in direct violation of the laws set forth requiring the South Carolina Department of Health and Environmental Control to complete their due diligence in these matters. In addition, the Appellant, Stewart W. Heath, also fails to mention the fact that the South Carolina Department of Health and Environmental Control **did not** file a Motion to Reconsider, Alter, or Amend the Final Order from the Administrative Law Court Docket No. 15-ALJ-07-00580-CC as would be their right should they have concerns with the findings of the facts or the conclusion of the law regarding the matter before the Court. In addition, the South Carolina Department of Health and Environmental Control **did not file a notice to appeal the decision** of the Administrative Law Court regarding this matter. The South Carolina Department responsible for the issuance of these permits did not find it necessary to appeal the decision of the Administrative Law Court or to challenge the findings of fact or conclusion of law presented by the Honorable H.W. Funderburk, Jr.

ARGUMENTS

I. The ALC did not err as a matter of law in finding the proposed amendment failed to comply with the requirements of S.C. Code Ann. 48-39-150.

The Court in the Findings of Fact found that indeed the South Carolina Department of Health and Environmental Control did not communicate with the Respondent, Gene B. Schwiers, (Petitioner to the Administrative Law Court) at any time regarding the concerns and objections to the proposed boat lift. (R. p. 9, lines 15-21). In addition, the South Carolina Department of Health and Environmental Control also admitted that indeed they had not reached out to any of the residents that opposed the proposed structure or discuss their concerns. (R. pp. 61-65). The Project Manager, Christopher Stout, informed the court that indeed he had not been to the area nor had he observed the area in order to speak to the specifics of the area. (R. p. 62, lines 5-13). It was indeed the Project Manager, Christopher Stout, which stated he made his decision by sitting in the office and conducting a google search of the area. (R. p. 74- p. 75, lines 1-19). **By his own testimony in the court he made his decision to allow the permit because as his attorney stated “the cat was already out of the bag.”** (R. p. 59, lines 9-11- p. 76, lines 2-6). The Court found that to consider the general factors of S.C. Code Ann 48-39-150(A), without further communication suggests a lack of adequate attention to all the concerns raised regarding the matter (Amended Order page 3) (R. p. 9, lines 15-21). In addition, the Court found that indeed the South Carolina Department of Health and Environmental Control is required to consider these factors. The Court also found that the physical proximity of the proposed second boat lift and the Respondent’s, Gene B. Schwiers, (Petitioner before the Administrative Law Court) was a concern especially considering the huge impact on the ability to have full enjoyment of the dock. (Amended Order page 4). (R. p.10, lines 5-18). While the Appellant, Stewart W. Heath, states these limitation are recreational in nature and in no way interfere with

the value or enjoyment of the Respondent's dock this statement is both inaccurate and offensive. As found by the Court the proposed structure would drastically limit activity currently enjoyed on the Respondent's dock and would diminish the value of the property. (R. pp.11-12). Should the boat lift be allowed there would no room for the Respondent, Gene B. Schwiers, to make any amendments to her dock in the future should it be desired as the entire structure would on the Respondent's side of the extended property lines and severely encroach on her dock. The negative impact to the value of the property of those individuals impacted is clear. The continued over-crowding of the area and disregard of the regulations set forth to protect all individuals rights has a direct impact on the value of the property. This was clearly stated by five individuals opposing the request for the permit. (R. pp. 84-92). By allowing certain individuals to encroach on others the negative impact is felt by those that will have severe limitations in the future. To state as was in the Appellant's, Stewart W. Heath, argument that use of "three out of four sides" of the dock was enough for the Respondent while the Appellant is allowed to continue to encroach on the Respondent and have full enjoyment of his dock is both arrogant and discriminatory. In addition, by this statement the Appellant, Stewart W. Heath, is admitting that the structure will limit the full enjoyment of the Respondent's dock and this in itself is enough to deny the requested permit as was stated in the Final Order based upon the regulations and laws set forth. (R. p. 6, lines 2-18). The full enjoyment of the Respondent's, Gene B. Schwiers, dock does not mean $\frac{3}{4}$ enjoyment while the Appellant, Stewart W. Heath, retains full enjoyment of his dock. There is also no mention of the potential safety concerns or the fact that the Appellant, Stewart W. Heath, already has one boat lift and has already amended his dock once to increase the size of his dock. It is clear that the full enjoyment of others to include, but not limited to the Respondent is seen as secondary by the Appellant or of no

concern. In addition, it should be noted that at no time did the Appellant or the South Carolina Department of Health and Environmental Control take into consideration that for a person that is **disabled** such as the Respondent's, Gene B. Schwiers, mother this would result in limiting her full enjoyment drastically as she is confined to the pier head. An individual confined to a wheel chair is limited to the activity of the pier head and the addition of a second boat lift completely blocking all activity to the North of the pier head would result in drastic limitation. When considering an individual's full enjoyment it is the obligation of the party weighing all factors to not only consider them from their perspective and abilities but also from the perspectives and abilities of all individuals that will be impacted to include the disabled. It would appear by the statements made by the Appellant that the rights of all individuals are of little to no concern unless it is their own. Regulations and laws are put in place so that all individuals have the same right to full enjoyment of their property. This is not simply a "lack of convenience" this is clearly an inability to use the property as has been done so for over 40 years and as have the others in opposition for over 35 years. This portion of the Respondent's dock will become void of all activities currently in use. The Department's Project Manager testified that indeed a kayak with fishing rods and lines would not have enough room to navigate in this area to include the public. (R. p.68, lines 14-19). Should this permit be allowed the Appellant, Stewart W. Heath, would completely limit any individual to navigate on either side of his dock and eliminate the enjoyment of the area. The Appellant also refers to the Public Trust Doctrine and states, "Petitioner does not have any ownership interest in the area where dock sits." The Appellant, Stewart W. Heath, **does not either** and furthermore, the full enjoyment of his dock should not encroach on the Respondent's, Gene B. Schwiers' rights or any individual's rights. Nor should one individual be allowed to minimalize the enjoyment of others for any reason. The

Appellant's argument states that "the Petitioner does not have any a greater right to use this area..." The motion fails to mention that the Appellant does not have any greater right to use the area to encroach on the rights of others or limit the full enjoyment of the docks of others. The Appellant's argument before the court clearly dismisses the rights of all individuals with the exception of the Appellant, Stewart W. Heath. It is clear by the statements made in the Appellant's, Stewart W. Heath, argument before the court that they have little to no regard for the Respondent's, Gene B. Schwiers, concerns or right to have full not partial enjoyment of her dock. This is not a personal matter this is simply about standing up for what is right, what is legal, and holding those accountable for making decisions to do so with the utmost integrity and within the regulations set forth. The Court found that the proposed second boat lift, located **entirely on the Respondent's side of the extended property line affects the value and enjoyment of the Respondent's dock thus producing material harm to the act.** (R. p. 9, lines 22-28- p. 10, lines 1-18- p. 13, lines 16-23- p.14).). In addition, the South Carolina Department of Health and Environmental Control did not find sufficient evidence to warrant an appeal of the Final Order or Amended Final Order regarding this matter.

II. The ALC did not 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).

The Administrative Law Court did not err as a matter of law. This is clearly addressed in the Final Order and in the Amended Order (Amended Order pages 5 and 6) (R. pp.10-12). The court placed the correct emphasis on the concept of "extended property lines," a concept of regulation which indeed does have implication in the case at bar. It was indeed the Appellant that outlined the concept of extended property lines and stated during the hearing that the characteristics of the area were indeed a product of the South Carolina Department of Health and Environmental Control's decisions to completely disregard their own regulations. It was made clear during the hearing that the South Carolina Department of Health and Environmental Control has abused their discretionary rights by using the regulation both as a sword and a shield. The Court found that in this case the evidence shows that the South Carolina Department of Health and Environmental Control did not adequately evaluate the Appellant's application in light of the Respondent's concerns. (Amended Order page 6) (R. p. 12, lines 15-30). The South Carolina Department of Health and Environmental Control admitted during the process that they had not even been to the area in question, never stepped foot on the Respondent's dock, or even provided the Respondent with the common courtesy of taking the time to personally discuss or review the concerns of the Respondent or the other six individuals that opposed the proposed boat lift. (R. pp. 61-64- p.65, lines 1-21). It does not matter how many times the Appellant states that the Appellant cannot construct a boat lift due to the fact that there are other docks within the Appellant's extended property line make it true or a fact. The fact of the matter is that the Appellant cannot construct a boat lift on the North side of his dock because he already has another boat lift on the North side of the dock. It has absolutely nothing to do with other docks.

The Appellant fails to mention that he has already amended his dock prior and encroached already on the Respondent, currently has a boat lift on the dock, and would be the only dock in the immediate area to have two structures of this nature. (R. p.60, lines20-25- p.61, lines1-2). **Therefore, this proposed structure would not be within the character of the area.** Had the South Carolina Department of Health and Environmental Control visited the area and not simply done a google search they would have been able to make an informed decision and not one simply because as stated by their counsel “the cat was already out of the bag.” (R. p. 59, lines 9-11). The Court stated that 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 by the appellant “that the evidence does not support the ALJ’s conclusion that the location of its dock constitutes a material harm to the policies of the Act.”)” (Amended Order pages 7 and 8). (R. pp. 13-15). The fact that portions of docks reside within others property lines is a result of the South Carolina Department of Health and Environmental Control as they have continued to make exceptions to the regulations set forth to the point that they have indeed caused material harm to the policies of the Act as found by the court. (R. p.6, lines 7-18). As presented to the court the position of the South Carolina Department of Health and Environmental Control is that simply because mistakes and violations have taken place in the past it should continue and that no regard should be given to their own regulations regardless of the impacts to others. It is the Respondent’s, Gene B.

Schwiers, stance that two wrongs will never make a right. The total disregard for the law is simply unacceptable. As stated in the Amended Order, "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 Health and Env'tl. Control, 292 S.C. 190, 355 S.E.2d 531 (1987) (no state agency can disregard its own regulations.) (Amended Order page 8). (R. p. 14, lines 4-25). If indeed the Appellant believes that the concept has no bearing then the Respondent, Gene B. Schwiers, is confused as to why a great deal of the time of the court was spent on this concept by the Appellant and the South Carolina Department of Health and Environmental Control. It appears to the Respondent based on this statement that due to the fact that the court denied the permit based on the law the Appellant now wants to disregard the law all together. Based on what is stated by the Appellant there has been an about face due to the fact that the initial argument presented by them to the court did not provide them with the decision they sought while the Respondent, Gene B. Schwiers, has remained consistent that all regulations, processes, procedures, and laws should be regarded with the highest integrity and protect the rights of all parties. (R. p. 32, lines 10-25- pp.33-36- p.37, lines 1-12- p.80, lines 2-25- pp. 81-82- p.83, lines1-24-pp. 98-101- pp.135-139). To even further weaken the argument made by the Appellant, Stewart W. Heath, the South Carolina Department of Health and Environmental Control did not find decision made by the Administrative Law Court worthy of an appeal and based on this fact alone have accepted the findings by the Honorable H.W. Funderburk, Jr. to be both accurate and factual:

III. The ALC did not 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)

This is clearly addressed in the Amended Order issued and filed by the Administrative Law Court. "Making consistent permit evaluations' requires DHEC to consider specified factors, not that it reach identical decisions in every case. *C.f. 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.)" (Amended Order page 8). (R. p. 13, lines 16-23- pp. 14-15). The Court found that there was nothing presented during the matter before the Court that this decision would result in another person receiving disparate treatment. (Amended Order page 8) (R. pp.13-14). The Appellant's argument is that the South Carolina Department of Health and Environmental Control's Project Manager testified that the proposed boat lift would be "within the general character of the area." It does not matter how many times a falsehood is repeated it still remains untrue as with this statement. The Project Manager had not been to the area, the Project Manager had not stepped foot on the Respondent's dock to indeed make an educated assessment of the concerns presented nor had the Project Manager been on any of the docks in opposition to the requested amendment nor could the Project Manager testify to any specifics of the area to the South or North of Respondent's, Gene B. Schwiers, dock. (R. p. 60, lines 20-25- pp. 61-22- p.69, lines 21-25, pp. 70-76- p. 77, lines 1-11). The Project Manager did not provide any specifics due to the fact he did not have any specifics just generalizations based on a goggle search. Should this proposed structure be allowed **it would not be within the character of the area; it would be the exception.** There is not one example or one specific provided in the argument or during the hearing before the Court that would substantiate the claim that this structure "fits in the general character of the area." The reason is that there is not one available or it would have been

presented. When questioned during the hearing the Project Manager could not provide the Respondent, Gene B. Schwiers, with one property owner that currently has such a permit as the one requested. It is unacceptable to make generalizations just because the needed and required due diligence was not done prior by the South Carolina Department of Health and Environmental Control. Had the South Carolina Department of Health and Environmental Control determined based on the facts presented and the testimony of their own Project Manager that the Final Order and/or Amended Order would subject the Department to equal protection claims they would have swiftly appealed the Order. However, the South Carolina Department of Health and Environmental Control did not file a Motion to Reconsider, Alter, or Amend the Order nor have they found it necessary or any merit in filing an Appeal of the Order.

CONCLUSION

For the reasons stated, the findings of fact, and the conclusion of the law set forth above the decision of the Administrative Law Court should be upheld. The Respondent, Gene B. Schwiers, requests the Court to enter an Order denying the amendment to Permit OCRM-12-112-S.

March 28, 2017

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Reply of Respondent complies with supreme Court
Order 2007-08-13-02 Regarding Personal Data Identifiers and other sensitive information.

March 28, 2017



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