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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.

FINAL REPLY BRIEF OF APPELLANT

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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)?**

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.

Respondent (Petitioner below) Schwiers argues that the Department project manager's failure to communicate directly and in person with Respondent Schwiers is a sufficient basis to deny the permit. Respondent Schwiers cites no authority for this position. Appellant is likewise unaware of any requirement of the Department project manager to meet in person with adjacent owners. S.C. Code Ann. § 48-39-150(B) requires the Department to "consider the views of interested agencies, local governments and persons.... There is no requirement to meet with interested persons to discuss their views. There is likewise no requirement to change a Department permitting decision based on the views of an interested person. Here, the Department's project manager testified that he received correspondence from Respondent Schwiers, considered it, and that "[her] comments and concerns were very clear." (R. p. 75, lines 10-19). Therefore, the Department's project manager properly considered Respondent Schwiers' views and in doing so satisfied the requirements of the statute.

Furthermore, Respondent Schwiers argues that a minimally negative effect of *a portion of one* of the ten considerations the Department is tasked with considering is sufficient to deny the permit. Respondent Schwiers fails to consider the language of S.C. Code Ann. § 48-39-150(B). Subsection (B) requires the Department to issue the permit "if it finds that the application is not contrary to the policies specified in the chapter." "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 Env'tl. 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 Env’tl. Control, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012). The Legislature’s use of the plural form of “policies” indicates a requirement that the Department consider and balance *all* of the policies. If the Legislature had intended a minimally negative effect as to only a portion of one of the ten policy considerations to be sufficient to deny a permit, it would have so stated. Instead, the Legislature intended the Department to consider and balance all of the policies; while also indicating a clear preference in favor of issuing permits by the use of the word “shall” instead of “may.” Therefore, Respondent Schwiers’ argument that a minimal affect as to a portion of one consideration is sufficient to deny a permit is without merit.

Respondent Schwiers also argues, without citing, that “the project manager informed the court that he had not been to the area nor had he observed the area in order to speak to the specifics of the area.” Respondent Schwiers failed to consider that the Department’s project manager testified that he was in fact very familiar with the area and had done the permit reviews for the particular area for the [last] eight years. (R. pp. 43-45; R. p. 69, lines 6-10). Furthermore, the testimony of the department manager and Technical Review Summary (R. pp. 123-127; Respondent’s Exhibit 14) make clear the project manager complied with the statutory requirements of S.C. Code Ann. § 48-39-150 to consider the individual merits of the application.

Respondent Schwiers also argues, without reference to the record, that “the negative impact to the value of the property is clear”. Appellant is unaware of anywhere in the record where Respondent Schwiers presented evidence of the effect the amendment would have on the value of her property. Respondent Schwiers’ failure to present any testimony below in

this regard precludes her from asserting this for the first time on appeal.

Furthermore, Respondent Schwiers appears to argue that the permit should be denied because Appellant Heath should not have two boatlifts. Respondent Schwiers fails to consider or address that S.C. Code Ann. Regs. 30-12(A)(2)(e)(i) specifically allows for two boat storage structures. Further, as was testified to by the Department's project manager, there is a preference for permitting boat storage structures. (R. p. 78, lines 3-15).

Respondent Schwiers asserts in her brief that Appellant Heath would be the only dock in the immediate area to have two structures of this nature, and therefore the proposed structure would not be within the general character of the area. However, Respondent Schwiers fails to explain that the "area" she is referring to is the four docks closest to hers. (R. p. 47, line 21- p. 49, line 13.) Upon cross-examination Respondent Schwiers' eventually admitted that if you include the street she lives on as the "area," there are some docks with two boat storage structures. Furthermore, the Department's project manager testified that there are several docks in the area with multiple boat storage structures (R. p. 59, lines 12- p. 60, line 9). Further, as to the general character of the area, the Department's project manager testified there were several docks in the immediate area that were separated by less than ten feet, and some that were almost touching. (R. p. 79). Therefore, the undisputed testimony, and the testimony of Respondent Schwiers herself, indicates that Appellant Heath's dock would continue to fit within the general character of the area.

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 Appellant realleges and reaffirms all of the arguments contained *supra*, and in Argument II of the Final Brief of Appellant filed herein.

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).

The Appellant realleges and reaffirms all of the arguments contained *supra*, and in Argument III of the Final Brief of Appellant filed herein.

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,

Lake City, South Carolina
March 13, 2017



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CERTIFICATE OF COUNSEL

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

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CERTIFICATE OF COMPLIANCE

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

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