

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable H.W. Funderburk, Jr.

RECEIVED

Apr 20 2020

Opinion No. 5700 (S.C. Ct. App. Filed December 31, 2019)

S.C. SUPREME COURT

GENE B. SCHWIERS.....Petitioner,

vs.

SOUTH CAROLINA DEPARTMENT OF HEALTH
AND ENVIRONMENTAL CONTROL & STEWART W. HEATH OF WHOM

STEWART W. HEATHRespondent.

PETITION FOR A WRIT OF CERTIORARI

BURL F. WILLIAMS, P.A.

Burl F. Williams (S.C. Bar No. 77901)

201 Riverplace, Suite 500

Greenville, South Carolina 29601

864.546.5035

burl@burlfwilliams.com

Attorney for Petitioner

Other Counsel of Record:

Nettles Turbeville & Reddeck

Eugene L. Nettles, III

P.O. Box 699

Lake City, South Carolina 29560

843.374.8511

lee@ntrlaw.com

Attorney for Respondent

S.C. Dept. of Health and Environmental Control

Bradley D. Churdar

1362 Mcmillan Avenue, Suite 400

Charleston, South Carolina 29405

843.953.0213

churdabd@dhec.sc.gov

Attorney for DHEC

TABLE OF CONTENTS

Certificate of Counsel	1
Questions Presented.....	1
I. INTRODUCTION.....	2
II. STATEMENT OF THE CASE.....	4
A. Opposition Letters from Neighbors Submitted Prior to Approval.....	5
B. DHEC Reviews the Objections but Approves the Request.....	7
C. Summary of Contested Case Hearing Testimony	8
D. The ALC’s Order	11
E. The Court of Appeals Opinion	13
III. THE COURT OF APPEALS COMMITTED MULTIPLE ERRORS OF LAW	14
A. Substantial Evidence Standard Has Been Met.....	14
B. The Court of Appeals Erroneously Interpreted the Applicable Statutes and Regulations	18
1. <i>The court of appeals erroneously interpreted the phrase “value” to mean “economic value of real property.”</i>	18
2. <i>The court of appeals erred by approving of DHEC’s decision to grant the permit because the amendment would be consistent with the existing general characteristics of the area.</i>	21
a. <i>The court of appeals also erred by approving of DHEC’s policy distinction between commercial harm versus residential harm in making dock permitting decisions.</i>	22
b. <i>The court of appeals erred by adding a non-statutory requirement that further supported DHEC’s declination policy</i>	23
IV. CONCLUSION	24

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the court of appeals on February 14, 2020.

QUESTIONS PRESENTED

1. Whether the court of appeals erred by not applying the substantial evidence standard against the entire record on appeal and thereby erred in reversing the decision of the Administrative Law Court.
2. Whether the court of appeals erred in its interpretation and application of S.C. Code Ann. §48-39-150(A)(10) by incorrectly interpreting the word “value” within the phrase “value and enjoyment of adjacent owners” to mean “economic value of the real property.”
3. Whether the court of appeals erred in its application of S.C. Code Ann. Reg. 30-12(A)(1)(p) by adopting the Department of Health and Environmental Control’s view that a non-commercial dock challenge is a private navigation dispute among property owners and it is permissible to approve a dock placement amendment by comparing the proposed dock’s placement to other docks located in the immediate area.

The Petitioner is pursuing a righteous case, albeit one about a private dock down at the beach. The Petitioner's neighbor sought to add a second boatlift to his dock that would impinge on the value and enjoyment of her dock and would likely prevent her from ever adding a boatlift on that side of the dock—she doesn't have a boatlift anywhere. The Department of Health and Environmental Control approved the application over the objection of Petitioner and many other neighbors. Contrary to the controlling statute and regulation, the Department allowed the second boatlift because it views these types of disputes as private property matters unworthy of its regulatory scrutiny. The problem with that reasoning is that this is not a private property matter. It is a government regulatory matter that the Department cannot simply rubber stamp and let the private parties later resolve. The Administrative Law Court recognized the fallacy of the Department's position and issued a well-reasoned order denying the permit. The court of appeals reversed that decision, and in doing so committed glaring errors of statutory interpretation. These errors are novel and have never been decided by this Court. This Court should grant the petition for a writ of certiorari.

I. INTRODUCTION

The Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management ("DHEC") issued a permit that authorized Respondent Stewart W. Heath ("Heath") to expand his dock by adding a second boatlift. With the addition of the second boatlift, Heath's dock would rest sixteen (16) feet from Petitioner Gene B. Schwiers' ("Schwiers") existing dock and twenty-two feet (22) from his neighbors on the north (the "Hadden Family").

DHEC's regulation regarding the physical location of a dock provides as follows:

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.

S.C. Code Ann. Regs. 30-12(A)(1)(p). This regulation means “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 & Env’tl. Control*, 411 S.C. 349, 357, 768 S.E.2d at 402, 407 (Ct. App. 2015).

DHEC can make an exception to this regulation if it concludes that a closer alignment would not result in material harm to the policies of the Act. The policy of the Act at issue is as follows:

In determining whether a permit application is approved or denied the department shall base its determination on the individual merits of each application . . . and be guided by the following general considerations: (10) The extent to which the proposed use could affect the value and enjoyment of adjacent owners.

S.C. Code Ann. § 48-39-150(A)(10).

After DHEC gave notice of Heath’s requested amendment, it received objection correspondence from Heath’s immediate neighbors to the north and south, and another immediately south of the southern neighbor. The general thrust of the objections provided that the addition would negatively impact the value and enjoyment of these landowners. Nevertheless, DHEC approved the permit notwithstanding the physical location of the affected docks. The general reasons given for the approval were that this area was already “very crowded,” and DHEC considered this a private navigational dispute which it deemed a private property matter that did not require DHEC to undertake regulatory scrutiny.

Schwiers appealed the permit approval to a DHEC panel which declined to review the decision. Next, Schwiers appealed to the Administrative Law Court (“ALC”) for a contested case hearing. Following a day of testimony and the introduction of exhibits, the ALC issued an order reversing DHEC.

The essence of the ALC's order follows: Schwiars "testified that [the proximity of the proposed second boatlift] 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." App. 10, 12. The ALC found, however, that this dispute could not be disregarded by DHEC because, "it does impact the adjacent owner's value and enjoyment." App. 12. Further, the Court found that "[a]lthough 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." App. 14.

As noted below, Heath appealed that decision, and the court of appeals handed down a published opinion that reversed the ALC, thus allowing for Heath's dock to be altered. The opinion is in error because it imposed requirements on a dock challenger not supported by the language of the statute and then greenlighted DHEC's position, not based in statute or regulation, that the location of a private dock is essentially a private property matter underserving of serious regulatory scrutiny.

The court of appeals decision is manifestly in error. This Court should grant the petition for a writ of certiorari, reverse the court of appeals erroneous interpretation of the statutes and, most importantly, reject DHEC's position that the location of a private dock is a private navigational matter not subject to their regulatory concern.

II. STATEMENT OF THE CASE

Heath purchased the house at 1666 Dolphin Street, Garden City, South Carolina, in 2012. Later that same year, Heath petitioned DHEC to make alterations to the existing dock. Schwiars did not oppose the 2012 request. App. 60, ln. 23 – 61, ln. 2; App. 97, ln. 13-22. In 2015, Heath

again petitioned DHEC for an amendment to his dock permit. App. 112. The 2015 request sought the addition of a proposed second boatlift on the south side of Heath's existing dock. The proposed twelve foot by twelve foot boatlift would move Heath's dock approximately 12 feet closer to Schwiers' dock to the south, and four feet closer to the Hadden Family's dock on the northern side. App. 112-15. As a result of the proposed amendment, Heath's dock would then be sixteen (16) feet away from Schwiers and twenty-two (22) feet from the Hadden Family's floating dock. Following this request, DHEC provided notice to the neighborhood. As a result, seven landowners voiced written opposition to the proposed amendments to the Heath dock.

A. Opposition Letters from Neighbors Submitted Prior to Approval

Robert Hadden is a co-owner of 1658 Dolphin Street. His home is north of, and next door to, Heath's. On June 11, 2015, he wrote a letter to DHEC voicing his opposition to Heath's amended permit application. App. 89. Hadden noted that if "Heath were allowed to amend his permit, it would leave little to no room between the docks in that area and substantially impair one's ability to boat fish, crab and use docks surrounding this area." App. 90. He further noted that, "[t]his proposed structure would significantly reduce our ability to enjoy our dock. Specifically, by adding this boatlift, it creates a very crowded area around the docks in that vicinity." *Id.* Hadden ended by noting that, "I am concerned that this amendment, if allowed, would decrease the value of our property and those properties around it (which is certainly an unnecessary and unfair result)." *Id.*

Morris Hadden and his wife Anne Breazeale Hadden are the other co-owners of 1658 Dolphin Street. On June 12, 2015, Morris Hadden wrote a letter to DHEC expressing their opposition to the amended permit application. Morris Hadden noted that Heath "apparently wants to move his existing boatlift and floating dock several feet closer to our dock, essentially squeezing

our available space so he can have a second boatlift.” App. 91. He continued, “[t]hese continued encroachments on our space affect the overall enjoyment of our land and inlet. Eye appeal is compromised. We are very aggrieved and upset at his request. He currently has one boatlift, and if this request is allowed, he will be the only entity along the shore line with two boatlifts.” App. 91-92.

Morris Hadden pointed out that “[a]t some point in time, we may want to erect a boatlift on our dock, and if such a choice were made, the docks would be so surrounded with the lifts side by side, an extreme and unsightly hazard would be presented, not to mention a restricted bottleneck between the multiple boat docks/boatlifts.” App. 92. “Finally, [he noted], we think that the market value would be depreciated by this unreasonable request. If someone were comparing our property with similar property for sale, in the event we were to place it on the market, certainly the buyer would choose the less restricted more aesthetically pleasing . . . than the one which has a nearby cavalcade of boatlifts, large boats and expanded docks.” App. 92.

Nancee Paget (Paget) resides at 1682 Dolphin Street (two homes south of Heath). On June 16, 2015, Paget sent an email to DHEC noting that she and her husband (Ben Paget) “oppose this amendment.” App. 87. She noted that “[t]his amendment will be detrimental to this very congested area. This will interfere with crabbing, clamming, gathering oysters, catching minnows under the walkways, fishing from docks and the environment in general.” *Id.*

On June 20, 2015, Paget again wrote to DHEC. She forwarded the prior email (noted above) that she previously sent to an incorrect email address. She noted her concern with “another addition to this same dock.” App. 86 (second to last paragraph). She voiced a concern for the “potential harm to this wonderful natural resource” and “from a safety perspective.” *Id.*

Schwiers is a co-owner of 1674 Dolphin Street. Her home is south of, and next door to, Heath's home. On June 8, 2015, Schwiers wrote a letter to DHEC expressing her opposition to the proposed amended dock application. Schwiers noted that the "proposed 12' x 12' boatlift on the flood side of the pier head will encroach on my dock drastically." App. 84. She further noted that if "Heath [is] allowed to amend his permit it would leave little to no room between our docks and completely block my ability to fish, crab, catch minnows and all other activities to the north side." *Id.*

Schwiers also noted that her mother, who at the time was 84 years old, uses the dock to fish, crab, spend time with her grandson, and enjoy the view." App. 84. She noted that her disabled mother's use of the dock in this regard would be obstructed by the proposed encroachment from Heath's dock. Schwiers also noted that her sole nephew "would not be able to navigate through the docks in his kayak nor would he be able to swim in the inlets as he does today on this side of the dock." *Id.*

B. DHEC Reviews the Objections but Approves the Request

After receiving objections from the adjacent landowners, DHEC generated a "technical summary of review" document. App. P. 124-27. The technical summary identified the adjacent landowners that objected to the proposed second boatlift, and provided a brief summary of their objections. Regarding the objections from the Hadden Family, however, DHEC did not include either of the two separately expressed concerns that the proposed second boatlift could negatively affect the value of their properties. *Compare* App. 124-25 with 90, 92. Furthermore, in response to DHEC's form question whether there are "any corridor or extended property line issues; is there a harm allowing a crossing of lines," the agent stated the following:

The existing dock replaced a grandfathered dock within the same footprint, and crosses the southern extended property lines. The dock's alignment is consistent

with other docks and fits the general character of the area. . . . There would be a minimum of 16' between the proposed boatlift and the adjoining property's dock to the south and 22' between the relocated floating dock and the adjoining property's dock to the north.

App. 125.

It is important to pause and underscore this response. Regulation 30-12(a)(1)(p) provides that no docks may rest less than forty (40) feet apart unless there is no material harm to the policies of the Act. In the question of whether there is a harm allowing a crossing of lines—that is, does the amended permit cause material harm to the policies of the Act—the DHEC agent entered no information regarding the harms identified by the adjacent landowners. He noted only that the proposed second boatlift appeared to fit the general character of the area.

In the Notes section, the agent described the objections as follows: “objections were received expressing concerns over the proposed modification’s potential impact of view and navigation on the adjoining properties.” App. 126. Again, there was no mention of the Hadden Family’s concern for real property values nor was there a mention of Schwiers concern for fishing, crabbing, or simply enjoying the open space. DHEC approved the amendment.

Representing herself (Schwiers is not a lawyer) and speaking for her objecting neighbors, Schwiers sought review by a DHEC panel. Her requested review, which presumably called for a review of the technical summary report, was denied by DHEC. Afterwards, Schwiers initiated a contested case in the ALC.

C. Summary of Contested Case Hearing Testimony

Still representing herself, Schwiers appeared for the contested case hearing to present her opposition to the Heath’s second boatlift. The hearing spanned a single day of testimony. The objection letters, as well as DHEC’s file, and several aerial photographs, were introduced as

exhibits. The transcript from the contested case hearing is very limited in the record on appeal.¹ But from a review of the available transcript, the following can be gleaned from what is available.

Christopher Stout (“Stout”) works for DHEC in the Ocean and Coastal Resources Management division; Stout conducted the permit review and testified for DHEC. App. 97, ln. 6-9. He testified that this area of Main Creek was “very crowded.” App. 125, ln. 3-5. Nevertheless, under cross examination, Stout refused to admit that adding a twelve-foot by twelve-foot boatlift in an already crowded area would only exacerbate the problem:

- Q. So, when you then add a boat lift to Heath’s dock in a crowded area, which you say is already crowded then there’s a smaller amount of room between those two docks, is it now overcrowded?
- A. I wouldn’t say so, no.
- Q. So, is it more crowded?
- A. The addition of four pilings?
- Q. Four pilings coming over how many feet?
- A. Twelve feet.
- Q. Twelve feet. Is it more crowded than it was prior to that boat lift?
- A. There’s less open space between your two docks.^[2]

App. 73, ln. 4-16. The general position of DHEC appeared to be that since this area already had dock congestion, then what was the harm in adding to it?

During cross-examination regarding DHEC’s obligation to consider the use and enjoyment of the proposed amendment, Stout testified that “we review our site visit photographs,^[3] aerial photographs that can be produced either through the county’s website, Google Earth or our GIS

¹ Schwiers also represented herself at the court of appeals and did not appreciate the need for the entire transcript, especially considering the substantial evidence standard of review. Heath, on the other hand, only lightly cited the transcript. As will be discussed herein, the court of appeals concluded that the record lacked substantial evidence to support the ALC’s decision. If this Court grants the petition for a writ of certiorari, then it may be necessary to remand this case to the court of appeals, with instructions to supplement the record on appeal.

² The ALC’s Order denying the dock permit specifically noted that it “observed the witnesses and exhibits presented at the hearing and closely passed upon their credibility.” App. 8.

³ No site visit occurred.

data reviews.” App. 74, ln. 6-19. Stout never visited the area to make a visual inspection following the objections. Instead, sitting at his computer, he reviewed computer photographs. *Id.* He never spoke to Schwiers about her concerns. App. 62, ln. 3-13. He exchanged a single email and phone call with Robert Hadden to notify him that the proposed second boatlift would not be on his side and to inquire whether his objection remained. It did. App. 89; 61, ln. 14-24. Stout did correspond with the company (Earthworks) that Heath hired to assist with the permit. App. 62, ln. 14-25.

Stout presented the objections to Earthworks for them to make modifications to address those concerns. App. 63, ln. 1-25. DHEC did not like the initial response from Earthworks because they (Earthworks) proposed extending Heath’s dock toward the channel—that is westward. App. 63, ln. 22-24. There was apparently one or more further suggestion made between DHEC and Earthworks in order to “meet Mr. Heath’s request and what he wanted to do at his dock.” App. 65, ln. 1-21. During this process, however, the affected landowners were never contacted. App. 65, ln. 21. Ultimately, Earthworks re-submitted the original plan. App. 64, 1-25. DHEC then approved the original plan. *Id.*

During direct examination of Stout, counsel for DHEC elicited testimony generally demonstrating that DHEC views this case as a private navigational matter. App. 78, ln. 21-25. Furthermore, and viewing the case as not subject to its serious regulatory concern, DHEC acknowledged that the character of, and location of, the existing docks drove its decision-making process. App. 49, ln. 24- p. 50, ln. 11; p. 57, ln. 6- p. 60, ln. 9.

During direct examination of Stout, either DHEC or Heath elicited testimony that Heath’s dock already had two boatlifts previously. App. 65, ln. 22 – p. 66, ln. 2. The inference to be drawn from the back and forth is that DHEC sought to portray the current request as simply a reconfiguration. App. 66, ln. 3-25. Under cross-examination, however, Stout was forced to admit

that the existing second “boatlift” was actually a davit connected to the northern side of Heath’s walkway. App. 66, ln. 3-22; p. 67, ln. 3-6.

Schwiers objected to the second boatlift because it would encroach upon her and her family’s ability to navigate a kayak from the northern end of the dock and fish from that kayak. App. 40, ln. 13-17. She also testified it would diminish her ability to clam and fish from the north side of her dock. App. 38, ln. 1-14.

D. The ALC’s Order

On August 18, 2016, the ALC issued its final order denying the amended permit. Heath then filed a motion to reconsider, which resulted in the ALC issuing the amended final order on September 23, 2016. It is important to note that DHEC did not file a motion to alter or amend. In the amended final order (the “Order”), the ALC made the following findings of fact and conclusions of law.

After receiving the objections from the adjacent landowners, Stout then notified Heath’s agent (Earthworks) of the concerns. “No evidence was presented to show that changes to the proposed second boatlift were considered by Stout or suggested to Heath’s agent.” App. 9.

Stout “conceded that most of Heath’s existing dock and all of the proposed construction are outside of Heath’s extended property lines [that is, they were almost entirely in Schwiers’ extended property line] but pointed out that the entirety of three other docks and a portion of a fourth are inside of Heath’s extended property lines.” App. 9.

Stout did not communicate with Schwiers about her specific objections. *Id.* “To solicit objections to a permit application and then only consider the general factors of [Section 48-39-150(A)], without further communication suggests a lack of adequate attention to concerns raised.” *Id.* Section 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.” *Id.* The ALC concluded that the evidence demonstrated that DHEC did not give “adequate attention to the issues raised” by Schwiers. *Id.*

The ALC found the location of the second boatlift would impair Schwiers value and enjoyment. “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.” App. 9. “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.” App. 10.

The ALC also noted that, “DHEC declined to consider this argument [that is, navigation and recreation] because it regards navigability between the docks to be a private property matter.” App. 10, 12. The court found, however, that this issue could not be disregarded by DHEC because “it does impact the adjacent owner’s value and enjoyment.” App. 12. Further, the Court found that “[a]lthough 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.” App. 14.

Accordingly, the ALC found 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).” App. 14.

E. The court of appeals opinion

DHEC did not file a notice of appeal from the ALC's order. Only Heath appealed. In a published decision handed down following oral argument, the court of appeals reversed the ALC. The court noted that "[a]lthough our appellate courts have considered contested dock permits in a number of cases, few have addressed an ALC's finding that the location of a private dock constitutes a material harm to the policies of the Coastal Zone Management Act." *Schwiers v. S.C. Dep't of Health & Envtl. Control*, 429 S.C. 43, 52, 837 S.E.2d 730, 734 (Ct. App. 2019). Following this lead-in, the court of appeals conducted a review of the existing case law and concluded the ALC's order should be reversed.

The court of appeals articulated an erroneous legal standard necessary to sustain the denial of a permit, and then concluded that Schwiers failed to introduce sufficient evidence to meet this standard. In its opinion, the court of appeals acknowledged the dearth of detail in the record. Nevertheless, rather than request a supplementation of the record or remand for further evidence collection, it reversed the ALC.

The court of appeals held that a challenger cannot meet the "value" element unless they present evidence of a "decrease [in] the value of [t]he[i]r property." *Id.* at 55, 837 S.E.2d at 736. Accordingly, under the court of appeals analysis, a challenger cannot demonstrate a material harm to policies of the Act unless they present evidence that the proposed dock amendment will devalue their real property.

In explaining why it was permissible to deviate from the regulatory requirement that all docks remain at least 40 feet apart, the court of appeals accepted DHEC's explanation that the second boatlift "would cause no material harm to the policies of the Act because the proposed modification and spacing were consistent with other docks along Heath's street and in the

vicinity.” *Id.* at 58, 837 S.E.2d at 738. In reaching this conclusion, the court of appeals failed to properly apply both the applicable regulation and statutory standard.

The court of appeals’ erroneously accepted DHEC’s general character analysis and amplified that error by adding requirements on a dock petition challenger not found in the plain language of the Act. Specifically, a dock challenge needed to either: (1) implicate commercial harms in order to rise to the level of a “material harm to the policies of the Act.” *Id.* at 53, 837 S.E.2d at 735, or (2) there must be something more than just a finding of negative affect on value and enjoyment in order to sustain a permit denial. *Id.* at 54-55, 837 S.E.2d at 736 (noting that in a prior case the landowners “considerations differed from those of this case because an alleged impact to value and enjoyment was not the *sole* basis for denial of the permit”) (emphasis in original).

The court of appeals analysis is not based in the text of the applicable statutes and regulations. Instead, the court of appeals added non-textual requirements onto the applicable statutes and regulation. After doing so, it concluded that Schwiers failed to present the necessary evidence to support the ALC’s order and reversed. As a result, the court of appeals committed legal error and its decision should be reversed.

III. THE COURT OF APPEALS COMMITTED MULTIPLE ERRORS OF LAW

A. Substantial Evidence Standard Has Been Met

The court of appeals held that the administrative law court’s decision could not be sustained by the substantial evidence standard, and in doing so plainly failed in its duty to properly apply that standard of review. This holding is contrary to the record on appeal. The ALC’s order should be reinstated because substantial evidence supports its order.

“In a contested permitting case, the ALC presides as the fact finder.” *Jones v. S.C. Dep’t of Health & Env’tl. Control*, 384 S.C. 295, 682 S.E.2d 282 (Ct. App. 2009). “In determining whether the ALC’s decision is 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.” *Kiawah Dev. Partners, II v. S.C. Dep’t of Health & Env’tl. Control*, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014). “The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence.” *Hill v. S.C. Dep’t of Health & Env’tl. Control*, 389 S.C. 1, 10, 698 S.E.2d 612, 617 (2010).

The court of appeals reversed the ALC because it concluded Schwiers failed to present the evidence necessary to sustain the ALC’s order. Specifically, the court of appeals held that Schwiers failed to present evidence demonstrating that the dock permit would “decrease the value of her property.” *Schwiers*, 429 S.C. at 55, 837 S.E.2d at 736. As discussed in Part III.B.1. *infra*, the court of appeals erred by interpreting the word value to mean the economic value of real property. Notwithstanding the error in statutory interpretation, Schwiers did indeed present evidence regarding a decrease in property value: (1) she presented evidence that it would impair her ability to swim, kayak, and fish from the north side of the dock, and (2) she introduced two letters from the Hadden Family that identified a decrease in the economic value of real property.

The first bucket of evidence to highlight is Schwiers devaluation testimony. This testimony requires the context of the court of appeals decision in *Olson v. South Carolina Department of Health and Environmental Control*. There, the court of appeals found that an objecting landowner “testified to the decreased value of her property” by “stating it would ‘clog up the whole view,’ make it impossible to navigate, impair the ability to swim, kayak and fish from their dock, and

impede[] the ability to tie boats up to the side of her dock.” 379 S.C. 57, 67, 663 S.E.2d 497, 503 (Ct. App. 2008). Schwiers presented this same evidence to the ALC. App. 38, ln. 1-14; App. 40, ln. 13-17; App. 84.

The second bucket of evidence is the Hadden Family letters. In spotlighting these letters, it is important to first note that one of the holdings of the ALC addressed landowners other than Schwiers. “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 it would cause material harm to the policies of the Act.” App. 14 (emphasis added).⁴ In determining that adjacent owners would be negatively affected, the Court relied upon all the evidence presented, including the opposition letters from every neighbor. As noted above, “[i]n 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.” App. P. 8.

The Hadden Family owns the home that abuts Heath’s on the north. They presented letters outlining their concerns regarding diminished value of their real property.

- Morris Hadden and his wife Anne Breazeale Hadden stated that, “we think that the market value would be depreciated by this unreasonable request. If someone were comparing our property with similar property for sale, in the event we were to place it on the market, certainly the buyer would choose the less restricted more aesthetically pleasing . . . than the one which has a nearby cavalcade of boatlifts, large boats and expanded docks.” App. 92.

⁴ Admittedly, in other areas of the Order, the ALC referred only to Petitioner and not all of the adjacent landowners, in finding that the permit should be denied: “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.” App. 10.

- Robert Hadden stated that “I am concerned that this amendment, if allowed, would decrease the value of our property and those properties around it (which is certainly an unnecessary and unfair result).” App. 90.

Schwiers evidence regarding her impaired use of the property and the Hadden Family letters demonstrate that the ALC received evidence concerning diminishment in the value of the real property in and around Heath’s dock.⁵ Under the substantial evidence standard of review, the court of appeals was required to “look[] at the entire record on appeal.” *Kiawah Dev. Partners, II*, 411 S.C. at 28, 766 S.E.2d at 715. The entire record on appeal contains evidence that the addition of Heath’s proposed second boatlift would diminish real property values. Accordingly, applying the substantial evidence standard of review, the court of appeals erred when it reversed the ALC.

In addition to failing to acknowledge the above evidence, the court of appeals erred by declaring that “Schwiers conceded during oral argument that she presented no evidence to the ALC that the proposed boatlift would decrease the value of her property.” *Schwiers*, 429 S.C. at 55, 837 S.E.2d at 736. The recording of the oral argument is at odds with that sentence. In response to “value” questions, Schwiers acknowledged that she did not present the testimony of a real estate appraisal/expert.” Ct. App. Oral Argument, time stamp beginning at minutes 25:40-26:50. When further questioned from the panel about the location of testimony on devaluation versus enjoyment, Schwiers responded that she testified at the ALC that she would not be able to place a future boatlift to the north. *Id.* at minutes 26:00-26:43. The panel appeared to dismiss Schwiers’ response about *her testimony*. South Carolina law is clear, however, that a property owner can testify as to the value of their property. *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 598, 493 S.E.2d 875, 881 (Ct. App. 1997) (“The rule that a property owner is competent to present an opinion as the

⁵ The court of appeals noted that “Heath has not challenged the admission of these letters on appeal.” *Schwiers*, 429 S.C. at 55 n.3, 837 S.E.2d 736 n.3.

property's value is well recognized.”). Indeed, as noted in *Olson supra*, a prior panel of the court of appeals has credited landowner testimony as “value” testimony.” *Olson*, 379 S.C. at 67, 663 S.E.2d at 503 (describing testimony about a decrease in the value of property with these example: “it would ‘clog up the whole view,’ make it impossible to navigate, impair the ability to swim, kayak and fish from their dock, and impede[] the ability to tie boats up to the side of her dock”). Consequently, Schwiers cannot not be faulted for not hiring an expert witness, and in fact has presented substantial evidence to sustain the ALC’s order.

B. The Court of Appeals Erroneously Interpreted the Applicable Statutes and Regulations

1. *The court of appeals erroneously interpreted the phrase “value” to mean “economic value of real property.”*

The ALC found that the proposed second boatlift would cause material harm to the policies of the Act with respect to section 48-39-150(A)(10). Again, subsection (A)(10) states: “The extent to which the proposed use could affect the value and enjoyment of adjacent owners.” The ALC correctly interpreted this subsection by giving the phrase “value and enjoyment of adjacent owners” its plain and ordinary meaning: use, importance, utility.

The court of appeals held that the word value meant the economic value of the real property. In doing so, it committed legal error. Applying the rules of statutory interpretation demonstrates that the General Assembly intended for the statutory word value to have a non-monetary definition. As a result, the court of appeals opinion should be reversed for Schwiers proved to the ALC that the proposed second boatlift would affect the value and enjoyment of her ownership.

“A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers.” *Travelscape, LLC v. S.C. Dep’t of Rev.*, 391 S.C. 89, 99, 705 S.E.2d 28, 33 (2011) (citation omitted). “When faced with an undefined statutory

term, the Court must interpret the term in accordance with its usual and customary meaning.” *Id.* at 99, 705 S.E.2d at 33.

In Black’s Law Dictionary, value is defined as (1) “[t]he significance, desirability, or utility of something,” or “[t]he monetary worth or price of something.” BLACK’S LAW DICTIONARY (11th ed. 2019). In the same dictionary, enjoyment is defined as: “[p]ossession and use.” BLACK’S LAW DICTIONARY (11th ed. 2019). On *Merriam-Webster’s Online Dictionary*, value is defined as: “relative worth, utility, or importance,” or (2) “the monetary worth of something.” MERRIAM-WEBSTER.COM/VALUE. In the same dictionary, enjoyment is defined as: “possession and use,” or “something that gives keen satisfaction.” MERRIAM-WEBSTER.COM/ENJOYMENT.

The General Assembly’s use of the words value and enjoyment as a phrase demonstrates the two words share a similarity in meaning. This phrase communicates the General Assembly’s concern for the use, importance, and utility of the other landowners.

Other phrases in the same statute confirm this interpretation. In subsections (A)(1) and (A)(7) of section 48-39-150, the General Assembly used the phrase “economically enhanced” and “economic benefits,” respectively, to demonstrate its concern for monetary considerations. “This Court has held that words in a statute must be construed in context, and their meaning may be ascertained by reference to words associated with them in the statute.” *Travelscape*, 391 S.C. at 101, 705 S.E.2d at 34. Moreover, this Court adheres to the canon of statutory construction of *expressio unius est exclusio alterius* or *inclusio unius exclusio alterius*—that is, “to express or include one thing implies the exclusion of another, or the alternative.” *City of Rock Hill v. Harris*, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011). The General Assembly expressed its policy concern for monetary considerations by using the word “economic” in this statute. The decision not to

modify the word “value” with the word “economic” was intentional and demonstrates that “value” in subsection (A)(10) does not include the monetary definition of that word.

Reading subsection (A)(10) in light of its proper interpretation, the court of appeals erred in its analysis of the record on appeal. The court of appeals should have only sought to determine whether Schwiers presented evidence to the ALC that Heath’s proposed second boatlift would negatively affect the value and enjoyment of her property—that is, did it affect the use, importance, or utility. Indeed, other decisions from the court of appeals have correctly interchanged the word “use” for “value.” *Mauil*, 411 S.C. at 365, 768 S.E.2d at 411 (“The ALC, however, never specifically addressed the impact the Amendment would have on Mauil’s *use* and enjoyment of his property.”) (emphasis added); *Jones*, 384 S.C. at 315, 682 S.E.2d at 293 (“We find substantial evidence of record supports the ALC’s finding that the impact on the Joneses’ *use* and enjoyment of their property is outweighed by the justification for granting the amended permit.”) (emphasis added).⁶

Applying the correct interpretation of the phrase to the record on appeal demonstrates that the ALC’s order should be reinstated. Schwiers presented evidence that the proposed second boatlift would negatively affect the value and enjoyment of her property. App. 38, ln. 1-14; App. 40, ln. 13-17; App. 84. Accordingly, substantial evidence in the record supports the ALC’s order and the court of appeals opinion should be reversed.

⁶ In a different environmental context, this Court has noted that the word “values” in the phrase “functions and values” is a term of art that refers to the “benefits that humans derive from a natural system.” *Murphy v. S.C. Dep’t of Health & Envtl. Control*, 396 S.C. 633, 640 n.5, 723 S.E.2d 191, 195, n.5 (2012).

2. *The court of appeals erred by approving of DHEC's decision to grant the permit because the amendment would be consistent with the existing general characteristics of the area.*

The contested case hearing and direct questioning from counsel for DHEC demonstrated that the agency views its role regarding the approval of private dock permits to only ensure any dock request fits within the general characteristics of the area. This view of its regulatory role is at odds with its own regulations.

Regulation 30-12(a)(1)(p) states that “[n]o docks . . . will be permitted closer than 20 feet from extended property lines.” In order to make an exception, DHEC must determine that the exception will not result in “material harm to the policies of the Act.” S.C. Code Ann. Regs. 30-12(a)(1)(p). Accordingly, DHEC must find, as applicable here, that the proposed second boatlift will not cause material harm to the “value and enjoyment of adjacent owners.” S.C. Code Ann. §48-39-150(A)(10). DHEC does not have the authority to disregard the statute when the dispute only implicates private dock placement disputes.

The regulation does not contain an exception for the general characteristics of the area when considering dock placements. The regulation does contain that exception, however, when DHEC considers dock **roofs**:

Roofs on private docks will be permitted on a case-by-case basis, with consideration given to the individual merits of each application. Precedent in the vicinity for similar structures will be considered as well as the potential for impacting the view of others. Roofs that have the potential to seriously impact views will not be allowed, while those that have minimal impact may be allowed.

S.C. Code Ann. Reg 30-12(A)(2)(d) (emphasis added). Creating a regulation that expressly authorizes the consideration of the general characteristics of the area when considering a dock's roof necessarily means that DHEC cannot make this consideration for a dock's physical placement.

Harris, 391 S.C. at 154, 705 S.E.2d at 55 (explaining that “to express or include one thing implies the exclusion of another, or the alternative”).

“[T]he Court generally gives deference to an administrative agency’s interpretation of an applicable statute or its own regulation.” *Sierra Club v. S.C. Dep’t of Health and Env’tl. Control*, 426 S.C. 236, 256, 826 S.E.2d 595, 606 (2019) (citation omitted). “If the statute or regulation is silent or ambiguous with respect to the specific issue, the court then must give deference to the agency’s interpretation of the statute or regulation, assuming the interpretation is worthy of deference.” *Id.* at 256, 826 S.E.2d at 606 (citation omitted). “Nevertheless, where . . . the plain language of the statute [or regulation] is contrary to the agency’s interpretation, the Court will reject the agency’s interpretation.” *Id.* at 256, 826 S.E.2d at 606 (citation omitted).

DHEC’s decision to defer to a review of the general characteristics of the area in its dock placement approval process for contested private docks is at odds with its own regulation and the applicable statute. Accordingly, the court of appeals erred in allowing DHEC’s approach to serve as a basis to support its opinion.

a. The court of appeals also erred by approving of DHEC’s policy distinction between commercial harm versus residential harm in making dock permitting decisions.

DHEC’s approach to approving dock placement applications (general characteristics of the area) demonstrates that it views purely residential placement disputes as not deserving of serious regulatory scrutiny. The court of appeals referenced this position in its opinion. It noted in *White v. South Carolina Department of Health and Environmental Control*, the court drew a distinction between “private navigational disputes and the disruption of a commercial enterprise and its customer.” *Schwiers*, 429 S.C. at 52-53, 837 S.E.2d at 735. This distinction was drawn from DHEC’s “position that any navigational issue between docks is a private property issue.” *White*,

392 S.C. at 256, 708 S.E.2d at 816. The problem with this distinction is that it *is not a private property issue*. DHEC, and DHEC alone, authorizes the location of docks on the coast. Once the authorization to move or place a dock is made, a private landowner has no redress—except, as here, in our court system.

The ALC identified the problem with DHEC’s position. As noted above, the ALC noted that, “DHEC declined to consider” Schwiers’ position with respect to navigation and recreation because it “regards navigability between the docks to be a private property matter.” App. 10, 12. The ALC correctly rejected this position as inconsistent with DHEC’s obligation to consider whether any placement closer than forty (40) feet “impact[s] the adjacent owner’s value and enjoyment.” App. 12. The court of appeals acceptance of DHEC’s declination of its duty to resolve these conflicts was legal error.

b. The court of appeals erred by adding a non-statutory requirement that further supported DHEC’s declination policy

The court of appeals also erred by placing a burden upon Schwiers to prove not only the presence of material harm to the policies of the Act, but an undefined something else. Citing *Olson v. South Carolina Department of Health and Environmental Control*, the court of appeals noted that the “ALC found DHEC’s denial of the Olson permit was warranted based on both [1] the impact of the dock on the adjacent owners’ value and enjoyment *and* [2] ‘the extent to which long-range, cumulative effects of the project may result with the context of other possible development and the general character of the area.’” *Schwiers*, 429 S.C. at 54, 837 S.E.2d at 736 (emphasis added).

The second concern identified by *Olson* and cited by the court of appeals is found nowhere in the text of the Act. But even if it were a legitimate basis to ground a decision, Schwiers can easily meet the burden. Schwiers does not have a boatlift on her dock. If she were to one day want

to add one on the northern side of her dock, then she would likely be prevented from adding that boatlift because of the presence of Heath's proposed second boatlift. But even if she could add the boatlift, assuming she added the same boatlift as Heath proposes to add, then it would rest approximately four feet from his.

IV. CONCLUSION

The court of appeals manifestly failed in its duty to apply the substantial evidence standard of review. It then compounded that error by interpreting the applicable statute and regulations in a manner that has no basis in the plain language of either, and was at odds with prior court of appeals opinions. Only after undertaking these interpretative gymnastics was it possible to reverse the ALC. Its opinion should be reversed, and the ALC's order should be reinstated.

April 20, 2020

Respectfully submitted,

BURL F. WILLIAMS, P.A.

s/ Burl F. Williams

Burl F. Williams (S.C. Bar No. 77901)

201 Riverplace, Suite 500

Greenville, South Carolina 29601

864-546-5035

burl@burlfwilliams.com

Attorney for Petitioner