

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

S.C. SUPREME COURT

The Honorable H.W. Funderburk, Jr.

Op. No. 5700 (S.C. Ct. App. Filed December 31, 2019)
Appellate Case No.: 2020-000469

GENE B. SCHWIERS,.....Petitioner,

v.

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

STEWART W. HEATH,.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. DHEC and the Court of Appeals correctly determined that no evidence existed to justify the denial of the dock amendment permit pursuant to 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).**
- II. DHEC and the Court of Appeals correctly interpreted S.C. Code Ann. § 48-39-150(A)(10).**
- III. DHEC and the Court of Appeals correctly interpreted and applied 2 S.C. Code Ann. Regs. 30-12(A)(1)(e) and 30-12(A)(1)(p).**

COUNTER-STATEMENT OF THE CASE

This is a dock permit appeal. On May 18, 2015, Respondent Heath filed an application seeking to add a four-pile 12' x 12' boatlift to the south side of his existing dock located on Main Creek in Garden City. This area of Main Creek was developed prior to the enactment of the Coastal Zone Management Act (CZMA) and contains grandfathered docks that do not comply with current permitting standards. (R. pp. 48-50). Specifically, landowners to the north of Respondent constructed docks within Respondent's extended property lines, making it impossible for Respondent to construct a dock within his extended property lines. (R. p. 48, lines 2-6; R. p. 104). This requires the Department to consider alternative alignments for dock permits in the area pursuant to S.C. Code Ann. § 48-39-150(A), 2 S.C. Code Ann. Regs. 30-12(A)(1)(e) and 30-12(A)(1)(p).

On October 14, 2015, DHEC approved critical area permit number OCRM-12-112-S ("amended permit"). Petitioner Gene B. Schwiers, Respondent 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 on November 23, 2015.

Petitioner 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). Respondent 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.

Respondent Heath filed a Notice of Appeal to the Court of Appeals on October 18, 2016. On December 31, 2019, the Court of Appeals unanimously reversed the decision of the ALC, finding the proposed dock permit did not create a material harm to the policies of the Act under Regulation 30-12(A)(1)(p) and S.C. Code Ann. § 48-39-150(A). Petitioner filed a Petition for Rehearing, which was denied by the Court of Appeals on February 14, 2020.

This Court should deny the petition for a writ of certiorari. None of the factors in Rule 242(b), SCACR, exist to justify the issuance of the writ. There is no novel question of law, no dissenting opinion at the Court of Appeals, no conflict with this Court's precedent, no constitutional issue, and no federal question presented. Petitioner also raises new arguments that were not raised in Petitioner's Petition for Rehearing to the Court of Appeals and therefore should not be considered as a question presented to the Supreme Court pursuant to Rule 242(d)(2), SCACR.

ARGUMENT

I. DHEC and the Court of Appeals correctly determined that no evidence existed to justify the denial of the dock amendment permit pursuant to S.C. Code Ann. § 48-39-150(A)(10).

DHEC and the Court of Appeals correctly determined that there was no evidence submitted during the review process or contested case hearing indicating approval of this permit would adversely affect the value of adjacent landowners.

A. No Evidence of an Affect on Neighboring Property Value

The only testimony Petitioner presented during the ALC hearing was that the proposed location of the boatlift could interfere with her complete recreational enjoyment of the north side of her dock. Schwiers v. S.C. Dep't of Health & Envtl. Control, 429 S.C. 43, 47, 837 S.E.2d 730 (Ct. App. 2019). A limitation on the ability to pursue **recreational** activities such as fishing, crabbing,

and catching minnows from *one* of the four sides of an adjacent owner's dock cannot be sufficient justification for denial of a permit or otherwise constitute a material harm to the policies of the Act.

An adjacent landowner's ability to engage in recreational pursuits will be impeded to some degree as a result of every dock permit issuance. There is no evidence in the record that the Petitioner's property will be rendered devalued, unusable, or even substantially affect her enjoyment of the property. Therefore, the Department and the Court of Appeals correctly determined that there was no evidence to justify the denial of the permit.

B. Improper reliance on letters submitted to DHEC during the review process

Petitioner also argues that letters submitted by neighbors to DHEC are sufficient to establish a showing of diminution in value. However, Petitioner places undue emphasis on the letters. During the trial of this matter, DHEC objected to the introduction of these letters based on hearsay. The Administrative Law Court (ALC) thereafter sustained the objection, ruling that these letters were admitted into evidence only as examples of documents that were submitted to DHEC as part of DHEC's review process, and were not admitted for the truth of the matters asserted. (R. p. 38, line 22- p.39, line 7.) The ALC's ruling on this issue excluded from evidence any reference to the contents of the letters. Petitioner did not appeal from this ruling and it is now the law of the case. It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling. Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. Biales v. Young, 315 S.C. 166, 432 S.E.2d 482 (1993). Food Mart v. S.C. Dep't of Health & Env'tl. Control, 322 S.C. 232, 471 S.E.2d 688 (1996). Therefore, the admissibility of the contents of the letters is not preserved for appellate

review, and any reference to the contents of the letters cannot be used in argument in support of a petition for writ of certiorari.

II. DHEC and the Court of Appeals correctly interpreted S.C. Code Ann. § 48-39-150(A)(10).

A. Argument not Raised in Petition for Rehearing

Petitioner argues that the Court of Appeals erroneously interpreted the phrase “value” to mean “economic value of real property.” Respondent is not aware of this question or argument being raised in the Court of Appeals or in Petitioner’s petition for rehearing. Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court. Rule 242(d)(2), SCACR. Accordingly, this issue is not preserved.

B. Statute’s terms are clear and unambiguous on their face

Even assuming *arguendo* that the issue is preserved, Petitioner asks the court to adopt an interpretation of the phrase “value and enjoyment” that would explicitly exclude the word “value”, and add the words “use, importance, and utility.” Such an interpretation would be in direct conflict with fundamental rules of statutory construction. The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988); State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). Sloan v. Hardee, 371 S.C. 495, 498-499, 640 S.E.2d 457, 459. 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).

In the present case, the statute's terms are clear and unambiguous on their face. Simply, the Department is tasked with considering "the extent to which the proposed use could affect the value and enjoyment of adjacent owners." Because the legislature specifically instructed the Department to consider two factors that are clear and unambiguous on their face, there is no need for a forced construction that would delete one factor and insert three new ones.

III. DHEC and the Court of Appeals correctly interpreted and applied 2 S.C. Code Ann. Regs. 30-12(A)(1)(e) and 30-12(A)(1)(p).

A. Regulation 30-12(A)(1)(e) requires DHEC to consider site specific characteristics of the area

Petitioner argues that the Department did not have the authority to consider the general characteristics of the area when determining whether to issue Heath's permit. However, Petitioner's argument fails to address 2 S.C. Code Ann. Regs. 30-12(A)(1)(e), which 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).

This regulation specifically authorizes the Department to consider an alternative alignment outside of the normal "extended property lines" concept when site specific characteristics warrant.

Further, S.C. Code Ann. § 48-39-150(A) requires the department to base its determination on the individual merits of each application when determining whether a permit application is

approved or denied. This statute and regulation make clear that DHEC not only has the authority to consider the general characteristics of the area, but is required to do so.

In this case, the individual merits of this application and the specific characteristics of the site necessitate an alternative alignment. Specifically, this area of Main Creek, Garden City was developed prior to enactment of the CZMA (R. pp. 48-50). The construction of neighboring docks resulted in parts of five (5) docks lying within Respondent Heath's extended property lines, making it impossible for Respondent Heath to construct a dock within his extended property lines. (R. p. 48, lines 2-6; R. p. 104).

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. 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 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 Department's interpretation is also consistent with 2 S.C. Code Ann. Regs. 30-12(A)(1)(p), which provides

(p) 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.

Regs. 30-12(A)(1)(p) specifically contemplates scenarios where the concept of “extended property lines” will have no bearing on whether to approve a permit application. 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. Such an interpretation would also lead to the inequitable result that an applicant’s permit to construct a dock would be denied solely because their neighbors had already constructed docks within the applicant’s extended property lines.

B. Deference to DHEC’s interpretation of S.C. Code Ann. Regs. 30-12

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). In the instant case, DHEC interpreted S.C. Code Reg. 30-12(A)(1)(e) and (p) to allow an alternative alignment across extended property lines because portions of several other landowner’s docks already lie within Respondent’s extended property lines, making it impossible for him to construct a dock within his extended property lines. (R. p. 48, lines 2-6; R. p. 104). Here, 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.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

May 18, 2020

Respectfully Submitted,



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