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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable H. W. Funderburk, Jr.

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

GENE B. SCHWIERS..... Petitioner,

vs.

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

STEWART W. HEATH Respondent.

SOUTH CAROLINA DEPARTMENT OF HEALTH
AND ENVIRONMENTAL CONTROL'S RETURN
TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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Respondent South Carolina Department of Health and Environmental Control (DHEC or the Department) opposes the Petition for Writ of Certiorari to the Court of Appeals (“Petition”) filed by Petitioner for the following reasons:

- 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 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 S.C. Code Ann. Regs. 30-12(A)(1)(e) and 30-12(A)(1)(p).
- IV. DHEC and the Court of Appeals did not err in their position that any navigational issue between the Heath and Schweirs docks is a private property issue.
- V. The Court of Appeals did not err in relying on Olson v. S.C. Dep’t of Health and Env’tl. Control, 379 S.C. 57, 663 S.E.2d 497 (Ct. App. 2008), because Olson’s “long-range, cumulative effects” analysis is based on S.C. Code Regs. 30-11(C)(1).

STATEMENT OF THE CASE

The Department supplements Respondent Heath’s Counter-Statement of the Case with the following additional facts:

DHEC found the amended dock permit (1) satisfied S.C. Code Ann. 48-39-150(A) and S.C. Code Ann. Regs. 30-12(A)(1)(e) and (p); and (2) was in keeping with the general characteristics of the area.

The OCRM Project Manager (Mr. Chris Stout) testified that many docks in the same neighborhood are ten feet or less apart (R. p. 79, lines 4-22) meaning that even with an added boat lift, the sixteen foot space between the Petitioner’s and Respondent’s respective docks will be farther apart than many of their neighbors’ docks. Accordingly, the Department approved the critical area permit OCRM-12-112-S.

With the addition of these facts, DHEC likewise agrees with Respondent Heath in requesting this Court to deny the petition for writ of certiorari. None of the factors of Rule 242(b), SCACR apply.¹ Furthermore, the Petitioner 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.” (Resp’t. Return to Pet. for Writ of Cert. p. 3).

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) and S.C. Code Ann. Regs. 30-12(A)(l)(e) and 30-12(A)(l)(p).

A. No Evidence of an Effect on Petitioner’s Recreational Activities.

DHEC agrees with Respondent Heath on the issue of Petitioner’s claim that “the proposed location of the boatlift could interfere with her complete enjoyment of the north side of her dock.” (Resp’t. Return to Pet. for Writ of Cert. p. 3, citing Schwiers v. S.C. Dep’t of Health & Envtl. Control, 429 S.C. 43, 47, 837 S.E.2d 730 (Ct. App. 2019)). Respondent Heath has pointed out that Petitioner will still have full recreational abilities from three of the four sides of her dock and that “an adjacent landowner’s ability to engage in recreational pursuits will be impeded to some degree

¹ Rule 242(b), SCACR states that “[a] writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court’s discretion or power to grant review in general, indicate the character of reasons which will be considered:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.”

as a result of every dock permit issuance.” (Resp’t. Return to Pet. for Writ of Cert. p. 4). Also, Mr. Christopher Stout testified during the Administrative Law Court (ALC) hearing that the Petitioner has stairs from her dock walkway on the south side of her dock, which is on the opposite side of where Heath’s boatlift will be placed. (R. p. 51, lines 15-25). This means that Petitioner Schwiers still has a recreational point of access to the water for kayaking or swimming that is unaffected by the Respondent’s added boatlift. (R. p. 52, lines 1-17). Based upon this evidence, Petitioner’s argument about her inability to enjoy recreational activities because of the addition of the boatlift is without merit. Accordingly, the Department agrees with Respondent Heath that DHEC and the Court of Appeals correctly determined that the Petitioner has presented no evidence to justify denial of the Respondent’s permit amendment application.

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

DHEC also agrees with Respondent Heath’s argument that the Petitioner is improperly arguing that letters submitted by Heath’s and Schwiers’ neighbors were submitted as evidence to prove that there was a showing of diminution in value of Petitioner’s property during the ALC hearing. The Respondent accurately argues that the “ALC’s ruling on this issue excluded from evidence any reference to the contents of the letters” (Resp’t. Return to Pet. for Writ of Cert. p. 4) because the ALC did not admit the letters for the truth of the matters asserted. Rather, the ALC admitted the letters as “examples of documents that were submitted to DHEC and were part of the process.” (R. p. 38, lines 22-25 thru p. 39, lines 1-6). Petitioner did not appeal from this ruling, and “failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal.” (Resp’t. Return to Pet. for Writ of Cert. p. 4, citing Biales v. Young, 315 S.C. 166, 432 S.E.2d 482 (1993)). Therefore, DHEC agrees with Respondent Heath that any issue relying on these letters is not preserved for appellate review, and the letters cannot be used as evidence to support the Petitioner’s arguments.

II. DHEC and the Court of Appeals correctly interpreted S.C. Code Ann. § 48-39-150(A)(10).²

A. Argument not raised in Petition for Rehearing.

DHEC concurs with Respondent Heath's argument that Petitioner has never argued that the "Court of Appeals erroneously interpreted the phrase 'value' to mean 'economic value of real property'" at any time prior to the Court of Appeals' ruling. (Resp't. Return to Pet. for Writ of Cert. p. 5). Thus, Respondent Heath properly asserts that the requirements of Rule 242(d)(2), SCACR, have not been met, and this issue has not been preserved on appeal.³

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

Even assuming that the issue is preserved for review, DHEC agrees with Respondent Heath that the Petitioner incorrectly perceives the meaning of "value" under S.C. Code Ann. § 48-39-150(A)(1) to mean "use, importance, and utility" rather than the Court of Appeals' interpretation of "value" to mean "economic value". DHEC agrees with Respondent Heath that the statute's terms are clear and unambiguous on their face, so "there is no room for statutory construction and a court must apply the statute according to its literal meaning." (Resp't. Return to Pet. for Writ of Cert. p. 5, citing Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994)).

² S.C. Code Ann. § 48-39-150 (A)(10) states that "[i]n determining whether a permit application is approved or denied the department shall base its determination on the individual merits of each application, the policies specified in Sections 48-39-20 and 48-39-30 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."

³ Rule 242(d)(2), SCACR states that "[o]nly 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."

III. DHEC and the Court of Appeals correctly interpreted and applied S.C. Code Ann. Regs. 30-12(A)(1)(e)⁴ and 30-12(A)(1)(p)⁵.

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

DHEC agrees with Respondent Heath's argument that the Department correctly interpreted and applied S.C. Code Ann. Regs. 30-12(A)(1)(e) and (p) by considering the general characteristics of the area. S.C. Code Ann. Reg. 30-12(A)(1)(p) allows the Department to permit construction closer than 20 feet when there is no material harm to the policies of the Act, and S.C. Code Ann. Reg. 30-12(A)(1)(e) will allow DHEC to consider alternative alignments if site specific characteristics warrant them to do so. DHEC agrees with Respondent Heath's reasoning that the "individual merits of this application and the specific characteristics of the site necessitate an alternative alignment" because of the nature of the grandfathered docks and the fact that five docks lie within Respondent Heath's extended property lines. (Resp't. Return to Pet. for Writ of Cert. p. 7). Conversely, the Petitioner incorrectly argues that DHEC did not have authority to consider the general characteristics of the area.

⁴ S.C. Code Regs. 30-12 (A)(1)(e) "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."

⁵ S.C. Code Regs. 30-12 (A)(1)(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."

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

DHEC agrees with Respondent Heath that the Department's interpretation of S.C. Code Reg. 30-12(A)(1)(e) and (p) is entitled to deference based on this Court's analysis in Kiawah Dev. Partners II v. S.C. Dep't of Health and Env'tl. Control, 411 S.C. 16, 34-35, 766 S.E.2d 707, 718 (2014).⁶ Furthermore, the Court of Appeals correctly found that "the ALC failed to give deference to DHEC's interpretation and application of its own regulations and that DHEC properly considered an alternative alignment across extended property lines under regulations 30-12(A)(1)(e) and (p) . . ." (Schwiars v. S.C. Dep't of Health & Env'tl. Control, 429 S.C. 43, 56, 837 S.E.2d 730, 736 (Ct. App. 2019)). Finally, DHEC agrees with Respondent Heath that the Department's interpretation of the regulations by "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." (Resp't. Return to Pet. for Writ of Cert. pp. 8-9).

IV. DHEC and the Court of Appeals did not err in their position that any navigational issue between the Heath and Schweirs docks is a private property issue.

The Petitioner erroneously argues that any navigational issues between the Heath and Schweirs docks are not private property issues because "DHEC, and DHEC alone, authorizes the location of docks on the coast" and "once the authorization to move or place a dock is made, a private

⁶ The Court of Appeals affirmed this Court's deference analysis by holding that "whe[n] 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.'" Schwiars v. S.C. Dep't of Health & Env'tl. Control, 429 S.C. 43, 56 n.6, 837 S.E.2d 730, 737 (Ct. App. 2019) (citing Kiawah Dev. Partners II v. S.C. Dep't of Health and Env'tl. Control, 411 S.C. at 34-35, 766 S.E.2d at 718 (quoting Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984))).

landowner has no redress . . .” (Pet’rs Pet. Writ of Cert. p. 23). This argument is without merit and is directly contrary to Maull v. S.C. Dep’t of Health & Env’tl. Control, 411 S.C. 349, 768 S.E.2d 402 (Ct. App. 2015). In that case, the Court of Appeals

“adopted OCRM’s interpretation of South Carolina Regulation 30-12, which included the position that *any navigational issue between docks is a private property issue*. [citing Dorman v. S.C. Dep’t of Health & Env’tl. Control, 350 S.C. 159, 171, 565 S.E.2d 119, 126 (Ct. App. 2002)]. Specifically, the Appellate Panel of OCRM stated, ‘It is not the policy of OCRM to police navigational disputes that should be dealt with among the adjacent property owners.’ [citing Dorman v. S.C. Dep’t of Health & Env’tl. Control, 350 S.C. 159, 163, 565 S.E.2d 119, 121 (Ct. App. 2002)].”

Id., 411 S.C. 349, 362, 768 S.E.2d 402, 409 (Ct. App. 2015). (Emphasis added).

- V. **The Court of Appeals did not err in relying on Olson v. S.C. Dep’t of Health and Env’tl. Control, 379 S.C. 57, 663 S.E.2d 497 (Ct. App. 2008), because Olson’s “long-range, cumulative effects” analysis is based on S.C. Code Regs. 30-11(C)(1).**

The Petitioner wrongly argues that the Court of Appeals erred in placing the burden of proof on the Petitioner to demonstrate the presence of material harm to the policies of the Act as well as an “undefined something else.” (Pet’rs Pet. Writ of Cert. p. 23). Petitioner erroneously asserts this “undefined something else” is utilized in Olson v. S.C. Dep’t of Health and Env’tl. Control, and is “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 v. S.C. Dep’t of Health and Env’tl. Control, 429 S.C. 43, 54, 837 S.E.2d 730, 736 (Ct. App. 2019). The Court of Appeals both in this case as well as in Olson are applying the language of S.C. Code Regs. 30-11(C)(1) which states the following:

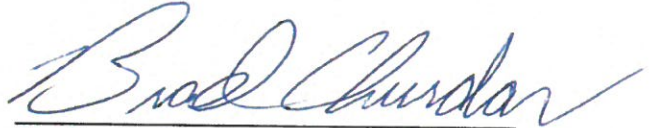
“In the fulfilling of its responsibility under Section 48-39-150, the Department must in part base its decisions regarding permit applications on the policies specified in Sections 48-39-20 and 48-39-30, and thus, be guided by the following: (1) The extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area.”

The Petitioner’s argument is without merit.

CONCLUSION

WHEREFORE, based on the foregoing, DHEC respectfully requests that the Court deny this Petition for Writ of Certiorari.

Respectfully submitted,



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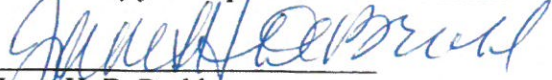
CERTIFICATE OF SERVICE

I certify that on June 9, 2020, I served the South Carolina Department of Health and Environmental Control's Return to Petition for a Writ of Certiorari via U.S. Mail to the addresses indicated below; and by sending a copy of same via email to burl@burlfwilliams.com and lee@ntrlaw.com pursuant to Supreme Court Order re: Operation of the Appellate Courts During the Coronavirus Emergency (g)(3).

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