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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable H.W. Funderburk, Jr.

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

GENE B. SCHWIERS.....Petitioner,

vs.

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

STEWART W. HEATHRespondent.

REPLY TO DHEC RETURN TO PETITION FOR A WRIT OF CERTIORARI

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“In evaluating the issues arising from Judge Funderburk’s Amended Final Order, the Department decided not to file a Notice of Appeal.”

- **Chief Counsel, DHEC**

I. INTRODUCTION

In the process of opposing Respondent’s efforts to add a second boat lift to his dock, Petitioner realized that DHEC takes a very hands-off approach to its regulatory duty to oversee residential dock permitting. Petitioner came to realize that DHEC views these matters as private property dispute that do not warrant serious regulatory scrutiny. The ALC saw the problem with that position. The court rightly concluded that the Act obligates DHEC to consider the “value and enjoyment of adjacent owners” and the proximity of two docks directly implicates that consideration. App. 12, 14. The ALC rejected DHEC’s reasoning, essentially stated that DHEC had failed to do its job, and concluded the evidence warranted a denial of the dock application. As a result, DHEC elected not to seek appellate scrutiny of the decision. (*Exhibit 1*, February 13, 2017 Letter from DHEC to the Court of Appeals).

Although it did not appeal, DHEC was served with Respondent’s notice of appeal and has been “in” the appeal with a Respondent label since the beginning. Nevertheless, DHEC did not file a brief or take part in oral argument at the court of appeals. Likewise, it did not take part in the petition for rehearing briefing. Although DHEC has played no role in the appeal, and a motion to strike its Return may be warranted, Petitioner respectfully submits that DHEC has a role to play. Specifically, Petitioner respectfully submits that her Petition should be granted and DHEC should file a brief, and in particular, as to Petitioner’s Question Presented No. 3.¹

¹ Question Presented No. 3 asks: 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 submits the following points in reply to DHEC's Return and in support of the Petition.

II. REPLY IN SUPPORT OF THE PETITION

A. DHEC Arguments I – III

The Petitioner stands by the points raised in her Petition and Reply to Respondent's Return. Consequently, the matters identified by DHEC wherein it "agrees" or "concur" with "Respondent Heath's argument," (DHEC Return, pp. 3, 4, 5, 6, 7), are covered by Petitioner's prior briefing.

B. DHEC Argument IV

DHEC states that "Petitioner erroneously argues that any navigational issues between the Heath and Schwiers docks are not private property issues." (DHEC Return, p. 7). In support of that position, DHEC points to the court of appeals decision in *Maull v. South Carolina Department of Health and Environmental Control*. According to DHEC, *Maull* authorized DHEC to view a navigational issue between docks as a private property issue. (DHEC Return, p. 8).

Based on DHEC's Return, (and in the absence of any explanation and none was provided), DHEC appears to take the position that the location of a private dock is a private property matter. That position does not square with reality. How does a landowner rectify an infringement on its private property when the government authorizes the infringement? Is DHEC stating that a landowner should resort to a private nuisance action to address any concerns? Wouldn't a defense that the government authorized the location of the proposed offending dock operate as a total bar? Further, DHEC's apparent position does not square with the regulation on this precise issue. Section 30-12(A)(1)(p) makes clear that 40 feet between docks is the default rule unless there is no material harm to the policies of the Act. S.C. Code Ann. Regs. 30-12(A)(1)(p). Again, how is the location of a dock a private navigational dispute when the government is the one deciding on

the location of the dock? These questions demonstrate, respectfully, why the Court should grant the Petition and require DHEC to respond to Question Presented No. 3.

The Petitioner speculates that DHEC's private property position gives it cover to avoid wading into a "value and enjoyment" analysis between two competing landowners. And while that may be the path of least resistance for DHEC, it is at odds with DHEC's legal duty to exercise its regulatory scrutiny. While this is just a case about a dock, it is also a case about the proper functioning of government.

C. DHEC Argument V

DHEC states that "Petitioner wrongly argues that the [c]ourt of [a]ppeals erred in placing the burden of proof on the Petitioner" to demonstrate more than material harm to the policies of the Act. (DHEC Return, p. 8). The Petitioner acknowledges that DHEC has promulgated a regulation with the language Petitioner challenged at page 23 of the Petition. While the language is not found in the Act, it is in Regulation 30-11(C)(1). Nevertheless, Petitioner remains firm that the record evidence supports a finding that the ALC's decision complies with subsection (C)(1) of the regulation.

Regulation 30-11(C)(1) states, in part, that "the Department must in part base its decisions regarding permit applications" on 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 record demonstrates that Petitioner does not have a boatlift on the northern end of her dock (or the southern end). Consequently, DHEC's decision to approve Respondent's second boatlift would negatively impact Petitioner's efforts to one day add a boatlift on the northern side of her dock. Accordingly, the record demonstrates that Petitioner has met this inquiry.

III. CONCLUSION

For the reasons set out in the Petition and herein, Petitioner respectfully requests that this Court exercise its discretion and grant the petition for a writ of certiorari.

June 19, 2020

Respectfully submitted,

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