

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Adam Bernholz,

Petitioner,

v.

South Carolina Department of Health and
Environmental Control,

Respondent,

and

South Carolina Coastal Conservation League,

Intervenor.

Docket No. 05-ALJ-07-0475-CC

FINAL ORDER AND DECISION

APPEARANCES:

For the Petitioner: Amber Deutsch, Esquire & C.C. Harness, III, Esquire

For the Respondent/SCDHEC: Leslie S. Riley, Esquire

For the South Carolina Coastal Conservation League: Amy E. Armstrong, Esquire

STATEMENT OF THE CASE

This matter is before the Administrative Law Court ("ALC" or "Court") pursuant to a request for a contested case hearing filed by Adam Bernholz ("Petitioner"). Petitioner challenges the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management's ("Department" or "Respondent") denial of his application for a critical area permit to construct a docking structure on Goat Island, Charleston County, South Carolina.

The South Carolina Coastal Conservation League ("League") moved to intervene in this matter. It supports the Department's denial of the permit. The League demonstrated that it meets both the grounds for intervention set forth in ALC Rule 20(B), as well as the legal test for standing as enunciated in Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130, and wa

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granted intervention by Order dated March 27, 2006.

After timely notice to the parties, a hearing was held before me on May 4, 2006, at the Court in Columbia, South Carolina. Based on the evidence presented, I conclude that the permit application must be denied.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and closely passed upon their credibility, taking into consideration the burden of persuasion by the parties, I make the following Findings of Fact by a preponderance of the evidence:

1. Notice of the date, time, place, and subject matter of the hearing was timely given to all parties.

Goat Island

2. Goat Island is a small, rural island bordered by Morgan Creek and the Atlantic Intercoastal Waterway ("AIWW") in Charleston County; it is adjacent to the Isle of Palms. It is a natural, pristine environment and approximately thirty (30) full-time residents live on the island. It has been designated as a Special Purpose District in Charleston County for Natural Resource Management.

3. There is no bridge access to Goat Island. Residents access the island by driving boats from the mainland to their private docks. There are no public services or serviceable roads on the island. There are several rights of way on it; however, they have never been maintained. Normal usage of these rights of ways after rains results in the creation of large ruts that are filled with water. The ruts create a habitat for mosquitoes to breed. See Intervenor Exhibits 4-6. At times alligators also have been found in these water-filled ruts.

4. All of the materials used to construct the homes on Goat Island were either transported by boat and unloaded at private, four-foot wide docks on the island, transported by landing barges that pulled up to and onto the edge of the island for unloading, or transported by barges that unloaded the materials using a crane.

Petitioner

5. Petitioner owns two houses and two lots on Goat Island. He lives on the island at 2725 Buccaneer Road which is directly across from the Isle of Palms marina. He purchased this

property approximately 2 ½ years prior to the hearing in this matter; it is his permanent residence. Petitioner rents the other house he owns on the island. He intends to construct a larger house for himself and one for his parents on the other two lots he owns on the island.

6. There is a dock at Petitioner's residence that extends from the edge of the island into the AIWW. Petitioner uses his 17 foot boat to transport goods, supplies, materials, groceries and garbage between this dock and the mainland. However, due to the incline of the dock during low tide, he is only able to load and unload goods at his dock at high tide.

7. The cost to rent a barge to transport supplies and materials between the mainland and Goat Island is approximately \$750 to \$1,000 per trip. There is an additional charge to have supplies and materials unloaded. Using this process, goods and supplies must be unloaded over the marshland and onto the adjoining upland.

Permit application

8. On February 18, 2005, Petitioner filed his initial application for a critical area permit to construct a 12 feet wide by 230 feet long elevated access ramp extending from his lot at 3813 Buccaneer Road into the waters of the AIWW in Charleston County, South Carolina. The application also requested a permit to construct a 12 foot by 20 foot landing pad at the landward end of the ramp that would consist of a thick layer of bedding stone.

9. Petitioner desires to construct this ramp to aid the process of transporting supplies between the mainland and Goat Island. He is agreeable for the general public to use this structure to load and unload supplies and for emergency access to and from the island. Also, Petitioner agrees to remove the dock at his residence if the permit is granted. He would then dock his personal boat at a neighbor's dock.

10. The initial public notice (P/N #2005-1R-123-P) for this application was issued on April 29, 2005. On September 9, 2005, a revised Joint Public Notice (P/N #2005-1R-123-P (revised)) for the application was issued by the Charleston District, U.S. Army Corps of Engineers, and the Department. It provided that the purpose for the access ramp was to provide access to the island. In the revised notice, the landing pad was eliminated from the project. Further, the revised notice no longer provided "emergency use" as a purpose for the access ramp. The removal of the landing pad reduced the extension of the proposed structure to 208 feet. The revised notice provided that any interested party had an opportunity to express their views

concerning the request by noon on October 10, 2005.

11. The proposed structure will be constructed of heavy duty rust proof galvanized steel grating using a grid or honeycomb pattern to allow sunlight to pass through. It will be supported by lumber pilings. However, no testimony was given regarding the thickness of the metal grating or the width of the spaces in the grating.

12. The ramp will be constructed approximately 3 feet above existing ground at its landward end. At the point at which the marsh grass ends, the ramp would slope down to the water in the AIWW at the same grade as the ground. It would be accessible during high and low tide; however, only approximately one-third of the structure would be above water at high tide.

13. It is possible that during usage construction debris, transmission fluid and other pollutants will pass through the decking and into the marshland underneath.

14. If the ramp is permitted and constructed, large boats or barges will be able to dock to it and vehicles, construction materials, and supplies would be unloaded and taken via the ramp onto the highland. Vehicles that are transported across the AIWW could be driven off the barge onto the ramp and used to off-load supplies and materials. Conversely, vehicles on the island could be driven onto the ramp and barge, loaded there, and then driven back onto the island for unloading.

15. A typical residential road in South Carolina is approximately 11 feet in width. Petitioner proposes to construct the proposed ramp 12 feet in width which would provide additional room to install mechanisms or guards on each edge to help prevent vehicles from being driven off its side.

16. In determining whether to issue a critical area permit that may impact the critical area, the Department relies on comments received from resource agencies. During the application process, the Department received comment letters concerning this project from several resource agencies. The U.S. Department of the Interior, Fish & Wildlife Service, sent a letter dated October 6, 2005, the U.S. National Marine Fisheries Service sent a letter dated October 7, 2005 and the South Carolina Department of Natural Resources sent letters dated May 9, 2005 and September 12, 2005. Each resource agency recommended denial of the permit application, as revised, because of adverse impacts to the marsh and associated wildlife.

17. These resource agencies believe the proposed structure will create several

negative impacts. One primary issue related to the dimensions of the structure was that it would prevent adequate sunlight from reaching the vegetated wetlands below the dock and cause a loss of *spartina alterniflora* (*spartina*) and other tidal wetland plant species. They opined that the loss of these vegetated tidal wetlands would decrease the primary productivity of the marsh by:

- (1) removing detritus from the marine and estuarine food chain which would eliminate nursery habitat for juvenile fish and invertebrates, such as red drum, white shrimp and brown shrimp, thereby reducing fisheries production;¹
- (2) eliminating the foraging habitat for a variety of estuarine organisms; and
- (3) decreasing water quality maintenance functions of filtration and assimilation from upland runoff, as well as erosion control, suspended sediment trapping and pollution uptake.

In summary, they posited that the proposed structure would lead to the loss of a significant area of estuarine marsh which the S.C. Coastal Zone Management Act and its regulations seek to protect.

18. The Department received 44 comment letters from individuals who opposed the permit request and 23 letters from individuals who supported it. None of the adjoining property owners objected to the permit request.

19. Intervenor Donald West Thompson, a high school carpentry teacher who is a member of the S.C. Coastal Conservation League and president of the Goat Island Association of Neighbors, makes his permanent residence at 2319 Captain John Hutt Road on Goat Island. His home is approximately 1½ miles from the proposed structure. He has lived on the island since 1982.

20. When Mr. Thompson constructed his home on Goat Island, he used boats to transport materials and unloaded the materials onto a floating dock. In the aftermath of Hurricane Hugo in 1989, he hired a tugboat and a barge to bring materials to the island to rebuild his home.

21. Mr. Thompson opposes the permit request, expressing concern due to its nature or configuration. Some of his concerns are that the ramp's proposed width of 12 feet is dissimilar to all other docks on the island which are 4 feet wide and that it would allow large vessels to transport mass quantities of supplies and materials needed for large-scale, intense development

on the island. Further, he was concerned that the proposed structure would become a permanent “commercial/industrial” facility. In Mr. Thompson’s opinion, the creation of a large-scale development on Goat Island would be out of keeping with and change its quaint, natural and pristine character, transforming it into one that would significantly and adversely impact critical area marsh and the surrounding wildlife.

Further, Mr. Thompson was concerned that the proposed ramp, by changing the island’s quiet and natural environment, would adversely impact and diminish his enjoyment of Goat Island. He enjoys walking, boating, swimming, birding, shell gathering, fishing, crabbing and shrimping in and around the island.

22. On November 10, 2005, the Department issued a denial letter for the proposed permit. The Department determined that Petitioner had existing feasible alternatives to the proposed ramp, finding that he had a private use dock on his property and that he could rent landing craft to transport materials, supplies and vehicles to the island. The Department listed the following reasons for its denial:

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- a. There are two feasible alternatives: existing private recreational use dock and the existing practice of landing craft on the island;
 - b. Use of the ramp would not be available to all residents of Goat Island;
 - c. No overwhelming support for the project from the residents of the island;
 - d. Alteration of the character and appearance of Goat Island;
 - e. Precedent set for similar structures;
 - f. S.C. Code Ann. § 48-39-30(A), (B)(1) and (B)(2): the Legislature’s policies for permitting structures in the critical area;
 - g. 23A S.C. Code Ann. Regs. 30-11(B)(3): affect on the production of fish, shrimp, crabs or clams or any marine life or wildlife, or other natural resources in a particular area, including but not limited to water and oxygen supply;
 - h. 23A S.C. Code Ann. Regs. 30-11(B)(8): adverse environmental impact which cannot be avoided by reasonable safeguards;

¹ Detritus is decaying organic material that provides useable nutrients into aquatic food webs that include recreationally, commercially, and ecologically important species.

- i. 23A S.C. Code Ann. Regs. 30-11(B)(10): affect on the value and enjoyment of adjacent owners;
- j. 23A S.C. Code Ann. Regs. 30-11(C)(1): long-rang cumulative effects within the context of other possible development and the general character of the area;
- k. 23A S.C. Code Ann. Regs. 30-12(A)(1)(c): size and extension must be limited to that which is reasonable for the intended use; and
- l. 23A S.C. Code Ann. Regs. 30-12(B)(2)(c): justification for boat ramp construction in environmentally sensitive areas to be considered in order of (i) public use, (ii) restricted use, (iii) private use.

23. The Department has never received an application for a structure with dimensions similar to those of the proposed structure. It asserts that the issuance of the permit would establish a negative precedent by allowing other property owners to seek permits to construct similar structures. Further, it opines that the granting of these permits would significantly change the character and appearance of Goat Island and other small islands throughout coastal South Carolina.

24. The engineering firm of John, Gerry and Taylor Engineering Company ("Company") was hired by Petitioner to assist in the preparation and submission of the permit application. Craig Allen Pawlyk, one of its employees, acted as its planning project manager in preparing and submitting the application. Mr. Pawlyk is not an engineer, did not design this project, and has not previously assisted in the submission of an application for a structure of this nature. He did not know the thickness of the metal decking or width of the holes in the decking. Furthermore, he has never worked on a project that used these types of materials.

25. William C. Eiser is the Assistant Director of Regulatory Programs for the Department's Office of Ocean and Coastal Resource Management. He earned a Bachelor's and Master's Degree in Marine Science. He was assigned by the Department to review this application.

Mr. Eiser asserted that approximately 2,500 square feet of marsh grass would be incapacitated by this structure. Although the Department has granted permits for the construction of bridges that used non-permeable materials, it is not its normal practice to permit a structure that would allow for damage to the marsh grass underneath unless there is some overriding

public interest. In this case, the Department determined that Petitioner had feasible alternatives and there was no overriding public interest.

One feasible alternative available to Petitioner, as suggested by the Department, is the use of a barge to transport materials for construction. Further, the Department asserted that there is less impact on the marsh (with its grass and living organisms) at a location where barges come ashore at infrequent intervals for short periods versus the permanent impact resulting from the construction of a permanent structure over approximately 2,500 square feet of marsh.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I conclude the following as a matter of law:

1. S.C. Code Ann. §§ 1-23-310, et seq. and 48-39-150 grant jurisdiction to the Administrative Law Court to hear this contested case.

2. The South Carolina Coastal Zone Management Act (Act), S.C. Code Ann. § 48-38-10 et seq. (Supp. 2005), and the regulations promulgated thereunder, 23A S.C. Code Ann. Regs. 30-1 et seq., require permits for the alteration of critical areas in the coastal zone. The Department is charged with implementing the Act and regulations, which includes issuing or denying permits for docks, piers and other structures in the critical areas of the coastal zone. 23A S.C. Code Ann. Regs. 30-10(A)(1) (Supp. 2005) and S.C. Code Ann. § 48-39-130 (Supp. 2005).

3. The standard of proof in a contested case hearing is a preponderance of the evidence. National Health Corp. v. S.C. Dept. of Health & Env. Control, 298 S.C. 373, 380 S.E.2d 841 (Ct. App. 1989). Petitioner, therefore, has the burden of proof to show, by a preponderance of the evidence, that the Department's decision was erroneous and that the proposed structure does not violate the Act and the regulations promulgated there under. He has failed to do so. The Department properly denied his permit application.

4. "Docks" are defined in Regulation 30-1(D)(16) (Supp. 2005) as "structures that provide docking space for ten boats or less." Regulation 30-12(A) (Supp. 2005) contains the specific rules governing project standards for permitting docks and piers in the tidelands and coastal waters and provides that "[a] dock or a pier is a structure built over and/or floating on water and is used to provide access to water and for the mooring of boats."

The proposed structure would be built in and over water in a critical area and would

provide for the docking of boats, access to water for mooring large boats or barges and the offloading of construction materials and goods. Accordingly, Petitioner's permit application request is governed by the specific regulations applicable to docks and piers found in Regulation 30-12(A).

5. 23A S.C. Code Ann. Regs. 30-12(A)(1) (Supp. 2005) contains standards that are applicable to all docks and piers. Specifically, Regulation 30-12(A)(1)(c) provides that "[t]he size and extension of a dock or pier must be limited to that which is reasonable for the intended use."

The intended use of this docking structure is to on and off-load construction materials and other goods. Since Petitioner has an existing, functioning dock on his property and all homes on Goat Island have been constructed without using a docking structure similar to the proposed structure, the Court finds and concludes that this structure is in excess of that needed for Petitioner to transport goods and materials to and from his properties on the island. Further, the court finds that a 12 feet wide structure is unreasonable for the intended use as there is currently an existing 4 feet wide dock on Petitioner's property that provides access for him to transport goods and supplies back and forth across the AIWW.

6. 23A S.C. Code Ann. Regs. 30-12(A)(2) (Supp. 2005) lists standards, in addition to those contained in Regulation 30-12(A)(1), that are applicable to the construction of private and joint use docks. Subsection 30-12(A)(2)(b) provides that "[w]alkways leading to a dock or pier shall not exceed 4 feet in width." Since the proposed structure will be used as a private dock and exceeds the 4 feet width limitation, it does not comply with this regulatory standard.

7. Specific standards for transportation projects apply to permit requests for bridge and road projects. 23A S.C. Code Ann. Regs. 30-12(F)(1) and (2).

From a reading of Regulations 30-12(F)(1) and (2), it is apparent to the Court that the legislature did not intend for this regulation to include projects such as the proposed structure; rather, the legislature intended that the regulation apply to structures such as roads and bridges. "The cardinal rule of statutory interpretation is to ascertain the intent of the legislature." State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002). The legislature's intent should be ascertained primarily from the plain language of the statute. State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004). The language used should be given its plain and ordinary meaning

without resort to subtle or forced construction to expand or limit the scope of the statute. Berkebile v. Outen, 311 S.C. 50, 426 S.E.2d 760 (1993). The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose. Mun. Ass'n of South Carolina v. AT&T Communications of Southern States, Inc., 361 S.C. 576, 606 S.E.2d 468 (2004). Therefore, I find that this regulation is inapplicable to the proposed structure at issue in this case.

8. 23A S.C. Code Ann. Regs. 30-12(B) is entitled "Boat Ramps." Section 30-12(B)(1) states that "[b]oat ramps provide access to the water for those who do not have water access by means of docks, piers, or marinas." Further, Section 30-12(B)(2)(d) provides that "[i]n cases where private use is necessary, siting of ramps must, wherever feasible, be located in areas where the least environmental impact will accrue to the area and be limited to 12 feet in width."

This regulation is also inapplicable. Petitioner has an existing dock that provides access to the water and the mainland. Further, there has been no showing that the proposed structure is a boat ramp where private use is necessary.

9. Other than the dock and pier regulations, there are no regulations specific to the proposed structure. See S.C. Code Ann. Regs. 30-1, et seq.

10. The Legislature authorized the Department to promulgate rules and regulations to reduce the irreversible loss of productive tidelands, coastal waters, beaches, and dunes while meeting the long-range development needs of its citizens. In reviewing a permit application wherein an individual wishes to alter the critical areas of this state, the Department must consider and apply the ten general considerations contained in 23A S.C. Code Ann. Regs. 30-11(B) and S.C. Code Ann. § 48-39-150. Also, the Department is guided by the policy statements contained in S.C. Code Ann. §§ 48-39-20 and 48-39-30.

11. 23A S.C. Code Ann. Regs. 30-11(B)(3) requires the Department to consider the "extent to which the applicant's completed project would affect the production of fish, shrimp, oysters, crabs, or clams or any marine life or wildlife, or other natural resources in a particular area, including but not limited to water and oxygen supply." Regulation 30-11(B)(8) requires consideration of the "extent of any adverse environmental impact which cannot be avoided by reasonable safeguards." Regulation 30-11(B)(10) requires consideration of the "extent to which the proposed use could affect the value and enjoyment of adjacent owners." An additional

guideline mandated for the evaluation of permit applications that would alter critical area is Regulation 30-11(C)(1), which requires the Department to consider 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 Department sought input from citizens and from various resource agencies. It relied on comment letters submitted by the S.C. Department of Natural Resources, the U.S. Fish & Wildlife Service, and the U.S. National Marine Fisheries Service that indicated that the proposed ramp would adversely affect marine habitat and wildlife. It found that those impacts could be avoided if Petitioner used less damaging alternatives for transporting goods and materials to the island that would include the use of his existing dock, the use of a landing barge, or the use of a barge with a crane.

Both Petitioner and other owners of property on Goat Island have historically transported materials and supplies by those means of transportation when needed to construct, repair, or remodel homes. That alternative exists today. Many, if not all, of the residents have private docks and all have access to landing areas where barges are able to breach the shoreline for short periods to allow for loading and off-loading of goods, supplies, and other materials.

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Further, the Department properly considered the many letters it received from landowners on Goat Island who opposed the project because of its affect on the island’s pristine and natural character. The proposed structure is simply not in keeping with the nature of island. Goat Island is a quiet and pristine environment. The placement of this structure at Petitioner’s property would make it easier for others to construct houses there, possibly leading to the construction of a large number of additional residences and perhaps the establishment of commercial activities. Further, if the construction of this proposed structure is authorized, a precedent would be established that could lead to other property owners on Goat Island, as well as other coastal property owners, requesting the construction of similar structures. This would significantly change the character and appearance of Goat Island, as well as other coastal properties. In addition, any large-scale development would significantly and adversely impact the critical area marsh and the surrounding wildlife on Goat Island and other coastal properties.

The rights of way on Goat Island are in poor condition and are not serviceable. Thus, there is no need for the transportation of vehicles to owners there. Further, because of these poor

road conditions, vehicles are unable to traverse the island to access Petitioner's property and the proposed structure either in normal times or during an emergency crisis.

Undoubtedly, the construction and existence of a 12 feet wide structure would have a detrimental effect on the marsh grass such as *spartina* and other tidal wetland plant species growing underneath it. Further, the loss of this vegetated wetland would decrease the primary productivity of the marsh by removing detritus from the marine and estuarine food chain, thereby reducing fisheries production by eliminating nursery habitat for juvenile fish and invertebrates, such as red drum, white shrimp and brown shrimp. Also, the loss would eliminate the foraging habitat for a variety of estuarine organisms and would decrease water quality maintenance functions of filtration and assimilation from upland runoff, as well as erosion control, suspended sediment trapping and pollution uptake.

The design for the proposed structure was not completed at the time of the hearing and no evidence was provided concerning either the width/thickness of the metal plating or the holes in it through which sunlight could pass. Since the plans for the proposed structure have not been completed nor provided to the Court, it is inappropriate for the Court to approve the permit. It is possible that construction debris, transmission fluid and other pollutants could pass through the holes in the decking and into the marshland underneath during its usage by motorized vehicles, resulting in a detrimental effect on plant and animal life existing below.

Accordingly, for the all of the reasons set forth above, I find and conclude that Petitioner's permit application should be denied.

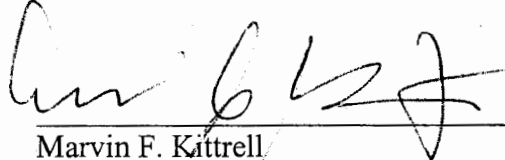
ORDER

Based on the foregoing findings of fact and conclusions of law,

IT IS HEREBY ORDERED that Petitioner's permit application (P/N #2005-1R-123-P) is denied.

AND IT IS SO ORDERED.

March 15, 2007
Columbia, South Carolina


Marvin F. Kittrell
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

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This 15th day of March 2007
By: Bryette B. Autry
Judicial Law Clerk