



The
University of Mississippi

Oxford • Jackson • Tupelo • Southaven

National Sea Grant Law Center
Kinard Hall, Wing E - Room 262
Post Office Box 1848
University, MS 38677-1848
Office Phone: (662) 915-7775
Fax: (662) 915-5267
E-mail: sealaw@olemiss.edu

July 18, 2013

Julie Davis
Living Marine Resources Extension Specialist
South Carolina Sea Grant Consortium
Beaufort, SC

Re: The Commercial Use of Docks on Small Tidal Creeks in Beaufort County, SC (NSGLC-13-04-05)

This product was prepared by the National Sea Grant Law Center under award number NA09OAR4170200 from the National Oceanic and Atmospheric Administration, U.S. Department of Commerce. The statements, findings, conclusions, and recommendations are those of the authors and do not necessarily reflect the views of NOAA or the U.S. Department of Commerce.

Dear Julie,

Please find below our examination of the current state of the law with respect to the commercial use of residential docks along small tidal creeks in Beaufort County. Recently, an oyster farmer wished to use the dock on his property for mariculture activities. The upland property is zoned agriculture, which would allow mariculture activities on the property. A Beaufort County zoning ordinance, however, prohibits the use of the dock for commercial purposes because it is located on a small tidal creek.

In the recent proceedings with the oyster farmer, the Beaufort County Zoning Board of Appeals identified three potential paths forward:

1. Challenge the small tidal creek classification,
2. Seek a variance, or
3. Amend the zoning text currently restricting the use of the dock.

Before discussing these options, this memo first looks at the South Carolina laws and regulations regarding docks and tidal creeks as it provides important context for the local ordinances. Following an analysis of the three options identified by the Zoning Board of Appeals, this memo examines the zoning

ordinances of surrounding counties to see whether they have similar provisions for private docks and small tidal creeks.

State Law

The relevant provisions of state law can be found in Title 48, Chapter 39 of the South Carolina Code, which addresses Coastal Tideland and Wetlands. These provisions limit the types of activities that can occur in South Carolina's "critical area" – all coastal waters, tidelands, beaches and beach/dune systems, which include the area between the mean high-water mark and the setback lines established under Section 48-39-280.¹ State law prohibits a person from using or erecting a structure that is on, in or alters a critical area without first obtaining a permit from the South Carolina Department of Health and Environmental Control (DHEC).² Therefore, in order to build a dock in a South Carolina critical area, a person must obtain a permit from DHEC. Permits are available for both commercial and noncommercial uses.

DHEC Regulations

Through regulations, DHEC has outlined more detailed rules for building and using docks, which it has defined as "structures that provide docking space for ten boats or less."³ Five categories of docks are identified: boat storage docks, commercial docks, community docks, joint use docks and private docks. Most relevant for the purposes of this memo are the provisions for private and commercial docks.

A private dock is "any facility that provides access for one family, and is not a marina." The allowable size for private docks is based on the width of the relevant creek, which is measured from the marsh vegetation on each side of the creek:

- For creeks less than 10 feet wide, no docks are allowed;
- For creeks less than 20 feet wide, docks are only allowed in certain circumstances;
- For creeks between 20 and 50 feet wide, the maximum allowable size for docks is 120 sq. ft.;
- For creeks between 51 and 150 feet wide, the maximum allowable size for docks is 160 sq. ft.;
- For creeks wider than 150 feet, the maximum allowable size for docks is 600 sq. ft.; and
- For creeks between 20 and 50, 51 and 50, and greater than 150 feet wide, the maximum dock size can be larger if warranted by special geographic circumstances and land uses.

Commercial activities are prohibited at private docks unless they are water-dependent and approved by DHEC. If a person uses a dock illegally, the regulations authorize DHEC to revoke the permit for the dock.⁴

Commercial docks are defined as "a docking facility used for commercial purposes," though commercial docks are "not necessarily a marina, a boat yard, or a dry storage facility." For commercial docks that are not marinas, the regulations specify that the size and any extension of the dock must be reasonable in light of the dock's use and geographic location.⁵ Similar to private docks, no commercial docks are allowed on creeks that are less than 20 feet wide. In addition, commercial docks must meet the following criteria:

- The applicant needs to submit an Operations and Maintenance Manual;

¹ S.C. Code Ann. 48-39-10.

² S.C. Code Ann. 48-39-130.

³ S.C. Code of State Regulations R. 30-1.D(19).

⁴ S.C. Code of State Regulations R. 30-12(2).

⁵ S.C. Code of State Regulations R. 30-12(4).

- Commercial docks are not allowed in shellfish harvesting waters if the use will result in the closure of some of these waters;
- If the use will affect shellfish areas, DHEC is directed to consider the effect on the lessee and the public, as well as any detrimental effect on shellfish resources;
- Commercial docks should only be located where they will have a minimal adverse impact on critical habitat, including wetlands, wildlife, marine resources and water quality;
- The docks need adequate facilities to handle litter, waste and refuse, as well as adequate parking facilities; and
- Any roofs must meet certain criteria.

Regardless of whether the dock under consideration in Beaufort County is classified as a private or commercial dock, the property owner must obtain a permit from DHEC and meet the applicable provisions of the regulations. It is our understanding that the oyster farmer has received the required state approvals for the dock.

Beaufort County Zoning Ordinance

The Beaufort County Zoning Ordinance treats docks as a water-dependent use. The provisions emphasize that waterways are in the public domain and need protection to maintain their ecological benefits for the county's residents. The ordinance further states that "[w]ater dependent uses should be spaced as far apart as feasible, consistent with minimal adverse impacts."

In its dock provisions, Beaufort County emphasizes the ecological sensitivity of tidal creeks and specifically regulates the construction of docks, piers and wharfs on a specific type of creek – small tidal creeks. The Zoning Code defines small tidal creeks "as those bodies of water, being tidally influenced as per the Beaufort County Official Small Tidal Creek delineation map."⁶

Private docks and community docks are allowed on small tidal creeks, but the docks must meet certain criteria. One of these criteria is that the use of the dock "shall be limited to private, non-commercial uses, unless allowed for as part of a Commercial Fishing Village Overlay District."⁷

Therefore, if a property owner in Beaufort County wishes to build a commercial dock or use a private dock for commercial purpose on a small tidal creek that does not fall within the Commercial Fishing Village Overlay District, the property owner appears to have three options:

- (1) Appeal the creek's designation as a small tidal creek;
- (2) Seek a variance; or
- (3) Ask for a change to the text of the zoning ordinance.

Tidal Creek Designation

In its hearing regarding the oyster farmer's commercial use of his dock on a small tidal creek, the Beaufort County Zoning Board of Appeals (ZBOA) indicated that a property owner could challenge the county's designation of the creek as a small tidal creek. In the hearing, the ZBOA indicated that the county designated small tidal creeks based on whether the creek is less than 300 feet wide, from grass-line to grass-line.⁸ Thus, if a property owner could show through a property survey that the creek was wider

⁶ Beaufort County Code Sec. 106-1912(b).

⁷ Beaufort County Code Sec. 106-1912(b)(2)(h).

⁸ Beaufort County Zoning Board of Appeals May 23, 2013 meeting, video available at http://beaufort.granicus.com/MediaPlayer.php?view_id=2&clip_id=973.

than this along his or her particular parcel, the designation as a small tidal creek could be changed.

Variance

The ZBOA also indicated that a property owner in these situations could seek a variance. Variances from the provisions of a zoning ordinance are allowed when the strict enforcement of the zoning ordinance "would represent a unique, undue, and unnecessary hardship."⁹ Variances are decided on a case-by-case basis and are very fact-specific.

In order to obtain a variance, an applicant must meet the following standards:

- (1) The property in question has to be subject to "extraordinary and exceptional conditions." The ordinance lists examples of extraordinary condition, which the provision states "could exist due to topography, street widening, beachfront setback lines or other conditions which make it difficult or impossible to make reasonable use of the property";
- (2) The property's conditions are unique to it and not common to other properties in the area;
- (3) The conditions and application of the zoning ordinance to the property "effectively prohibit or unreasonably restrict" the property owner's use of the property;
- (4) A variance will not have an adverse effect on adjacent properties or the public good; and
- (5) The hardship must be unique and related to land, and the applicant cannot have caused the hardship or be suffering a hardship that is also felt by the general public or adjoining landowners.

Before granting a variance, the ZBOA also needs to find that the variance "is the minimum necessary to relieve unnecessary hardship and permit a reasonable use of the land." Further, the ZBOA must find that the variance will not injure the surrounding neighborhood or the public welfare. Finally, the ZBOA needs to determine that the variance will be consistent with the purpose and intent of the county's zoning ordinance and comprehensive plan. Once an applicant submits a variance request to the Zoning Department, the ZBOA will hold a hearing within 20 days, with the requirement that public notice needs to be issued 15 days before the hearing.¹⁰

Zoning Ordinance Amendment

Finally, the ZBOA indicated that a property owner wishing to use a dock on a small tidal creek for a commercial use could ask for a change to the text of the zoning ordinance. Beaufort County's zoning ordinance allows a property owner to apply for either a change to the zoning map, the zoning ordinance or the comprehensive plan. The zoning ordinance emphasizes that these "changes are not intended to relieve particular hardships or confer special privileges or rights on any person, but only to make necessary adjustments in light of changed conditions." When considering one of these applications, the County needs to consider how consistent the changes will be with the comprehensive plan.¹¹

The County can approve an application to change the text of the zoning ordinance if:

- (1) the change will implement an amendment or new portion of the comprehensive plan;
- (2) it would allow the ordinance to better implement and achieve the goals and objectives of the comprehensive plan;
- (3) the provision of the ordinance is "inconsistent or unreasonable in light of standards for similar uses";
- (4) the change is needed in response to federal and/or state legislation;

⁹ Beaufort County Code Sec. 106-521.

¹⁰ Beaufort County Code Sec. 105-522.

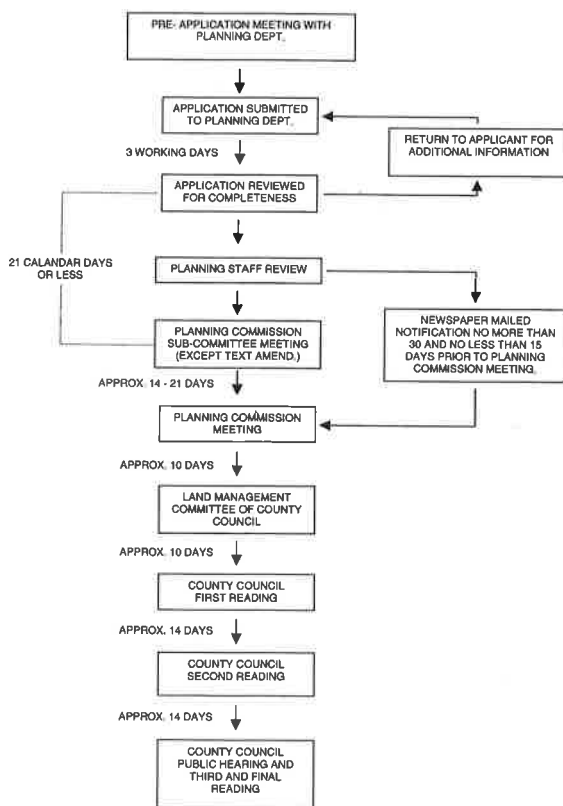
¹¹ Beaufort County Code Sec. 106-491.

- (5) the change will provide “additional flexibility in meeting the ordinance’s objectives without lowering the ordinance’s general standards”;
- (6) the change will address “a new use, changing conditions, and/or clarifies existing language”;
- (7) the change will clarify the ordinance or will make “adjustment to account for interpretation.”

Text amendments will require at least five different hearings before the County Council, who will decide on the application. These will include hearings by the Beaufort County Planning Commission, the Natural Resources Committee of the Beaufort County Council and the County Council. Figure 106-491 from the zoning ordinance shows the procedures and approximate timeline for submitting an application for an amendment. Once the council has the recommendations of the Planning Commission and Planning Committee of the County Council, the County Council can either:

- Follow the recommendation;
- Override the recommendation, which needs a majority vote of the County Council; or
- Return the recommendation to the Planning Commission, with a statement of concerns that the commission will need to reconsider.

Figure 106-491 PROCEDURES FOR ZONING MAP AMENDMENT, ZONING TEXT AMENDMENT, AND COMPREHENSIVE PLAN AMENDMENT



Other Counties’ Treatment of Docks

If a change in Beaufort County’s zoning ordinance is sought, it may be helpful to consider how other coastal counties of South Carolina address the use of docks on creeks. The provisions of some of these counties are discussed below.

Charleston County

The Charleston County Zoning and Land Development Regulations have provisions regulating docks in the county. The ordinance defines a dock as “a structure extending into or upon a waterway, marshland or other natural water feature.”¹² Under the ordinance there are four different types of docks, which are similar to the categories set forth in the DHEC regulations: commercial docks, community docks, joint use docks and private docks. In addition, the ordinance regulates boat ramps and marinas.

Private docks are docks that are intended for the use of one family, while joint use docks are intended for the use of two to four families. Both of these types of docks are exempt from the provisions of the Charleston County ordinance. Community docks, commercial docks and marinas, however, need to meet the requirements of the ordinance.

- A Community Dock is any docking facility that provides access for more than four families (greater than or equal to 5 watercraft slips and less than or equal to 10 watercraft slips) and is not a marina.
- A Commercial Dock is a docking facility used for commercial purposes, though this type of dock is not necessarily a marina, boat yard or dry storage facility.
- A Marina is a (a) lock harbor facility; (b) any facility which provides fueling, pump-out, maintenance or repair services; (c) any facility which has permanent docking space for 11 or more watercraft slips; (d) any water area with a structure which is used for docking or otherwise mooring vessels and constructed to provide temporary or permanent docking space for more than ten boats; or (e) a dry stack facility.

The ordinance provides for a Water-Dependent Use Overlay District (WDU), which was created to accommodate community docks, boat ramps, marinas and commercial docks. The uses allowed in a WDU include community docks, boat ramps, marinas, commercial docks and other uses that require locations near water bodies.¹³

Article 5.3.6 lays out the procedures for commercial docks that are not marinas. Under the ordinance, a proposed commercial dock needs to obtain a Special Exception, which the Board of Zoning Appeals (Board) will issue for a particular use if the applicant demonstrates that the use will comply with the standards of the zoning ordinance. Applying for a Special Exception involves filing the application, a review by the Planning Director and at least one public hearing held by the Board, of which notice will be given. The Board will provide the applicant with a final decision, which will also be available for public review. Any person with a substantial interest in the decision or a county office, board or bureau can file an appeal to the decision in the Circuit Court of Charleston County.¹⁴

The Board can attach conditions to the approval in order to protect property values in the surrounding areas or to promote the public health, safety or general welfare. For the Board to approve an application, a Special Exception must:

- Be consistent with the purpose and intent of the underlying zoning district;
- Be consistent with the Charleston County Comprehensive Plan;
- Be compatible with other existing uses in the area;
- “[N]ot adversely affect the general welfare or character of the immediate community” and not hinder vehicular or pedestrian traffic on adjacent roads;

¹² County of Charleston Zoning and Land Development Regulations, Definitions.

¹³ County of Charleston Zoning and Land Development Regulations Article 5.3.

¹⁴ County of Charleston Zoning and Land Development Regulations Article 3.6.

- Provide adequate provisions for setbacks, buffering and other protections for neighboring properties from issues like noise, vibrations, dust, glare, odor, traffic congestion and similar factors;
- Developed to preserve and incorporate natural features, where applicable; and
- Comply with the other applicable provisions of the ordinance.

The ordinance also provides that an applicant for a proposed commercial dock must go through the Site Review Procedures. The Site Plan Review Committee reviews all Site Plan applications. The committee is comprised of representatives from the Planning Department, the Department of Public Works, DHEC, the Department of Transportation, the Army Corps of Engineers and the Office of Coastal Resource Management, as well as representatives from other departments as determined by the Planning Director. The Committee then makes a recommendation to the Zoning and Planning Director, and the Planning Director can only approve the application if the project complies with the applicable provisions of the zoning ordinance. The Planning Director's decision can be appealed.¹⁵

In addition to Special Exception and Site Plan Review approvals, all commercial docks must also:

- Comply with other state and federal regulatory requirements, as well as the requirements of other local, county, state or federal agencies;
- Meet the dimensional and density/intensity standards of the ordinance;
- Contain facilities to properly handle litter, waste, refuse and petroleum products under DHEC regulations;
- If in shellfish harvesting waters, not cause the closure of additional shellfish harvesting waters;
- Be located in areas where the dock "will have minimal adverse impact on wetlands, wildlife and marine resources, or other critical habitats"; and
- Comply with other provisions in order to have a boat ramp.

Therefore, a property owner in Charleston County seeking to build or use a dock for commercial purposes would have to go through multiple procedures, including obtaining a Special Exception and going through a Site Plan review, as well as meet additional requirements under the zoning ordinance.

Georgetown County

Georgetown County allows docks in all zoning districts as long as the dock meets all the applicable state and federal standards for the location and design of the dock. The ordinance only permits one dock per lot.¹⁶

Horry County

Horry County provides for non-commercial docks in all commercial and residential districts where residential uses are allowed, as long as the dock meets certain other conditions. The zoning ordinance does not provide specific provisions for commercial docks.

Jasper County

In Jasper County, creeks are included in the RC- Resource Conservation District. This district generally has more rigid development standards. In the district, bathhouses and cabanas are listed as a permitted use,

¹⁵ County of Charleston Zoning and Land Development Regulations Article 3.7.

¹⁶ Georgetown County Zoning Ordinance, General Provision 415.

but docks are not specifically referenced.¹⁷ Docks are listed in the provision concerning riparian buffers. This provision states that in developing along the banks of streams, rivers, wetlands and marsh areas, the property owner must provide for a riparian buffer setback of “not less than 50 feet or one-third the depth of a lot or parcel (minimum of 25 feet), whichever is greater.” For all tidal areas, the riparian area setback will “be measured from the critical line as established by OCRM.” The ordinance prohibits development in this buffer area, “except for piers, docks and pervious access paths to the water or wetlands bank,” with the requirement that “[a]ny disturbance of the buffer area shall adhere to OCRM’s Best Management Practices (BMPs)” and that “[r]iparian buffers shall be in accordance with all state and federal regulations.”¹⁸

Colleton County

In Colleton County, creeks are contained in the Resource Conservation-1 District, which is designed to protect fragile ecosystems. The zoning ordinance states that this is the most restrictive district, and the district is designed to protect “environmentally sensitive resources.”¹⁹ The permitted uses in this district include agricultural production, agricultural support services and commercial fishing. In addition, docks are considered an accessory structure/use, which the ordinance classifies as a conditional use.²⁰

Since it is a conditional use, a dock has to meet certain requirements to make sure it is compatible with other uses in the area. If the dock is a residential accessory structure, it is allowed in all yards and its required setback is along the property line where the property line meets the water’s edge. If the dock is a nonresidential accessory structure, it has to meet the dimensional requirements of the property’s district.

Colleton County also has an Environmental Protection Provision that requires riparian setbacks of the least 30 feet or 1/3 of a lot’s depth (whichever is less) for development along rivers, streams and shorelines, and the setback for tidal waters is “measured from the mean high tide line.” However, docks, piers, utilities and pervious access paths to the water are allowed in the buffer area.²¹

Conclusion

In conclusion, if a property owner wishes to use a dock for mariculture activities that are part of a commercial enterprise, the property owner will have to obtain permits and meet certain standards for the commercial use of the dock. The state of South Carolina has set forth in its statutes and regulations requirements for the commercial use of docks. Thus, a commercial use of a residential dock or a commercial dock in the critical area of South Carolina will require DHEC’s approval on the state level. In addition, the county where the dock will be located may have additional requirements or prohibitions on the commercial use of the dock. Further, the state and many of its coastal counties have also recognized the environmental sensitivity of creeks and other coastal areas. In response, the state and many of the counties have restrictive provisions for structures and uses in these areas. Finally, as stated above, Beaufort County specifically prohibits the commercial use of a dock that is located on a small tidal creek. In order to use a dock in this area, a property owner will need to either (1) appeal the designation of the creek as a small tidal creek; (2) seek a variance; or (3) ask for a change to the text of the zoning ordinance.

¹⁷ Jasper County Zoning Ordinance Article 6.1.

¹⁸ Jasper County Zoning Ordinance Article 7.4.

¹⁹ Colleton County Code Art. 14.08-2.030.

²⁰ Colleton County Code Art. 14.08-3.

²¹ Colleton County Code Art. 14.08-4.4.

I hope you have found this information helpful. If you would like additional information, please let us know.

Sincerely,

Catherine Janasie

Catherine Janasie
Ocean and Coastal Law Fellow