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JUN 10 2014

STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. Supreme Court

APPEAL FROM ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Court Judge

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JUN 09 2014

Docket No. 09-ALJ-07-0029-CC

SC Court of Appeals

Kiawah Development Partners, II,Respondent,

v.

South Carolina Department of Health and Environmental Control,Appellant.

Docket No. 09-ALJ-07-0039-CC

South Carolina Coastal Conservation League,Appellant,

v.

South Carolina Department of Health and Environmental Control and
Kiawah Development Partners, II,

Of Whom

South Carolina Department of Health and Environmental Control isAppellant,

and Kiawah Development Partners, II, isRespondent.

**DEPARTMENT'S RETURN TO RESPONDENT'S
MOTION TO LIFT SUPERSEDEAS OR, IN THE ALTERNATIVE,
TO REQUIRE POSTING OF A BOND OR OTHER SECURITY**

TO: THE COURT AND ALL PARTIES:

PLEASE TAKE NOTICE that the Appellant, South Carolina Department of
Health and Environmental Control, Office of Ocean and Coastal Resource Management
("DHEC" or "the Department") submits this return opposing Respondent Kiawah Development

Partners, II's ("KDP") motion for an order lifting or modifying the writ of supersedeas ordered by this Honorable Court, or alternatively, to require the posting of a bond. Maintaining this Court's Order granting the writ of supersedeas will continue to allow the resources along the Kiawah River shoreline to remain protected during the pendency of this appeal and will continue to foreclose the possibility of unnecessary destruction of the coastal waters, tidelands and beach areas along the sandy shorelines of the Kiawah River. Furthermore, maintaining the Order will continue to allow the critical areas along the Kiawah River to function as natural habitat and to be used as an intertidal beach accessible by the public, the combination of uses which insures the maximum benefit to the people¹, without authorizing KDP to temporarily and unnecessarily alter in a fundamental way the natural resources along the shoreline and exclude the possibility of public access and use of the shoreline.

As this Court is aware, the revetment/bulkhead at issue would be constructed along the neck of Captain Sam's Spit. The vast majority of this structure (2,513 feet) was not permitted by the Department.² The only portion of the structure that was permitted was the 270 foot revetment/bulkhead along the northeastern end of the project area (along the southwest portion of the Beachwalker County Park parking lot).

The bulkhead portion of the structure would be a vertical wall constructed at the critical area line and would extend above the revetment. The revetment portion of the structure would be 40 feet wide and follow the bulkhead, beginning at the critical area line and extending below the mean low water line and into the channel of the Kiawah River. The concrete wall KDP seeks

¹ This is in accordance with S.C. Code Ann. § 48-39-30(D).

² Under S.C. Code Ann. § 48-39-130, KDP is required to have a permit to undertake construction activity utilizing or altering the critical area. The Department asserts that KDP does not have a permit for the vast majority of this structure (2,513 feet). The administrative order is not a permit, but even if it were, this Court has once overturned that decision and has not issued a final determination of whether that administrative decision was proper. For these reasons, KDP does not have a valid permit for 90% of the proposed structure under which it can proceed, as required by § 48-39-130.

to construct would be built entirely on public trust tidelands; not on KDP's property. The wall would cover up 2.63 acres of this public trust critical area tidelands. The conversion of this sandy shoreline to a hard concrete surface would also eliminate important habitat used by a vast diversity of migratory birds that depend on that habitat.

KDP argues that while the primary purpose of a writ of supersedeas is to maintain the status quo, in this case the status quo has fundamentally changed. In fact, KDP argues that this change is so significant that if the writ of supersedeas is not lifted, they (KDP) will be prevented from using "... the 118 acres of valuable oceanfront highland on Captain Sam's Spit ... including the 20 acres on which limited development is allowed for anything other than open space." (Motion, p. 8).

In addition to the response the South Carolina Coastal Conservation League (SCCCL) submitted to KDP's *status quo* argument, the Department would also point out the reality that neither its permitting decision nor the writ of supersedeas is preventing KDP from developing its upland property. KDP has made a conscious decision not to develop its upland property without their desired revetment/bulkhead installed on public trust property. The only thing denying KDP the opportunity to develop their upland property on Captain Sam's Spit is KDP itself. In other words, this writ of supersedeas is not intruding on their property rights. They can do with their growing³ upland property whatever the law otherwise allows.

In an effort to substantiate its *irreparable harm* argument, KDP attached several affidavits to its Motion. Mark Permar's affidavit has fourteen photographs attached depicting

³ According to KDP's own expert (Dr. Tim Kana), "Kiawah Island contains one of the healthiest beaches on the east coast in terms of its stability or tendency to accrete. According to Dr. Kana, unlike many other beaches in South Carolina or on the east coast, the beach along Kiawah Island has accreted 'for at least 150 years.'" Respondent's Final Brief at 5. Because the Spit is accreting faster on the ocean side (at an annual rate of four to ten feet per year depending on the location, according to Dr. Kana) than it is eroding on the river side, it is experiencing an overall gain in size.

only the 270 foot portion of the Kiawah River adjacent to Beachwalker County Park for which the Department issued a permit.⁴ None of Mr. Permar's photographs (nor any other photographs in KDP's Motion) depict the current condition of the 2,513 feet along the Kiawah River that KDP also sought (and was denied) a permit to install a revetment/bulkhead. This absence of any photographs for 90% of the project speaks for itself. It would be reasonable to expect that KDP would readily provide photographs showing the rest of the critical area they want to armor if such pictures advanced their argument to lift the supersedeas. "It is well settled that if a party fails to produce ... available records, it may be inferred that the ... contents of the records, if presented, would be adverse to the party who fails to ... present the records." Wisconsin Motor Corp. v. Green, 224 S.C. 460, 464, 79 S.E.2d 718, 720 (1954). And like Mr. Permar's photographs that only depict the area adjacent to the Beachwalker County Park, KDP provided an Affidavit and survey from John T. Byrnes, III that also fails to include any of the areas beyond the 270 feet of shoreline adjacent to the Park that was permitted by the Department. "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. Clifton v. United States, 4 How. 242, 247, 11 L.Ed. 957. Silence then becomes evidence of the most convincing character." Interstate Circuit v. United States, 306 U.S. 208, 226, 59 S. Ct. 467, 474, 83 L. Ed. 610 (1939). KDP's "silence" is deafening regarding the current condition of the remaining 2,513 foot stretch of the Kiawah River that they seek to armor.

Mr. Byrnes' affidavit also shares an additional defect that is similar to another KDP affidavit by Douglas L. DeWolff. Both of these affidavits make assertions about the location of the critical area line. Without the Department's review and validation of this data in the affidavits, such assertions are meaningless because "[a] critical area delineation for coastal

⁴ The Department is not taking a position in this Return that is contrary to the permit as issued.

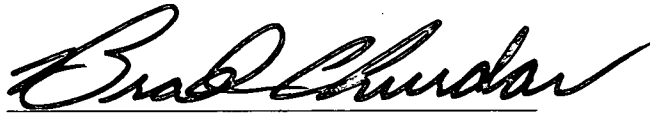
waters or tidelands established by the department is valid only if the line is depicted on a survey performed by a professional surveyor, the line is reviewed by the department, the department validates the location of the boundaries of the coastal waters or tidelands critical area on the survey ..." S.C. Code Ann. § 48-39-210(B). (Emphasis added). As such, both affidavits are unreliable and should be rejected.

Finally, the Department concurs with SCCCL's assertion regarding the unreliability of Ray Pantlick's affidavit. Mr. Pantlick is not an employee or agent of the Town of Kiawah, and as such, he is not authorized to speak to whether the Town has closed the vehicular access road "because of the risk of collapse without stabilization of the bank." Exhibit 5, p. 3. Mr. Pantlick's affidavit is merely speculation and as such, should be rejected.

CONCLUSION

WHEREFORE, the Department opposes KDP's motion for an order lifting or modifying the writ of supersedeas ordered by this Honorable Court.

Respectfully submitted,



Bradley D. Churdar
S.C. Bar No. 12829
Associate General Counsel for DHEC/OCRM
South Carolina Department of Health and
Environmental Control
1362 McMillan Ave., Ste 400
North Charleston, SC 29405
Tel.: (843) 953-0213
Fax: (843) 953-0201
churdabd@dhec.sc.gov

Charleston, South Carolina
June 6, 2014

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

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SC Court of Appeals

Docket No. 09-ALJ-07-00029-CC

Kiawah Development Partners, II,

v.

Respondent,

South Carolina Department of Health and Environmental Control,

Appellant.

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S.C. Supreme Court

Docket No. 09-ALJ-07-00039-CC

South Carolina Coastal Conservation League,

Appellant,

v.

South Carolina Department of Health and Environmental Control and
Kiawah Development Partners, II,

Of Whom

South Carolina Department of Health and Environmental Control is,

Appellant,

and Kiawah Development Partners, II, is

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date she has served the Petitioner's *Return to the Respondent's Motion to Lift Supersedeas or, in the Alternative, to Require Posting of Bond or Other Security* in this matter upon the following, by placing copies of same in the United States Mail, first class postage prepaid, addressed to:

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11629
Columbia, SC 29211

Amy E. Armstrong, Esq.
SC Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585

G. Trenholm Walker, Esquire
Pratt-Thomas Walker
Post Office Drawer 22247
Charleston, SC 29413

Robert T. Brockman, Esquire
The Law Center
701 S. Main Street
Columbia, SC 29208

A. Mattison Bogan, Esquire
C. Mitchell Brown, Esquire
Nelson Mullins Riley & Scarborough
Post Office Box 11070
Columbia, SC 29211

Jordan R. Isreal, Esquire
3621 Neward Street, NW
Apartment 110
Washington, DC 20016-3181


Phillip L. Lawrence, Esquire
SC State Ports Authority
Post Office Box 22287
Charleston, SC 29413-2287

Gedney M. Howe, III, Esquire
Attorney at Law
Post Office Box 1034
Charleston, SC 29402

Alan Wilson, Esquire
John W. McIntosh, Esquire
Robert D. Cook, Esquire
Parkin Hunter, Esquire
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

James B. Richardson, Jr., Esquire
1229 Lincoln Street
Columbia, SC 29211

Frank S. Holleman, III, Esquire
Southern Environmental Law Center
601 West Rosemary Street, Suite 220
Chapel Hill, SC 27516-2355



M. Denise Crawford

June 6, 2014