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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

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 is ..... Appellant,

and Kiawah Development Partners, II, is..... Respondent.

RESPONDENT'S REPLY TO THE RETURN OF APPELLANT SOUTH CAROLINA COASTAL CONSERVATION LEAGUE

Starting with its appeal of the staff decision of December 18, 2008, on the application of Respondent, Kiawah Development Partners, II ("KDP"), for an erosion control structure, Appellant Coastal Conservation League (the "League") has successfully prevented KDP from protecting against the continued erosion of its

valuable highland along the bend of the Kiawah River, even though the General Assembly has expressly provided for the use of erosion control structures for this purpose. During this appeal, the League has not been required to post a bond or to provide other security to compensate KDP for KDP's significant loss of land if the League's appeal is unsuccessful.

When the Court granted the supersedeas without requiring a bond or other security in its Order of July 22, 2010, the Court expedited the appeal to reduce the harm to KDP during the pendency of the appeal. Now that the appeal process has extended four years, KDP is requesting, in fairness, that this Court either lift the stay or require a bond or other security.

The League's opposition to KDP's motion turns on its legal argument that KDP has no property rights that are injured by the continued erosion. The legal precedent the League relies upon is inapplicable. KDP is not seeking to expand KDP's highland by filling public trust wetlands—the objective of the landowners in the cases cited by the League. Instead, KDP is seeking to prevent further erosion of KDP's *existing* highland property.

In further support of its opposition, the League has submitted the affidavit of a biologist who did not testify in the hearing in the Administrative Law Court. The League uses this new witness's affidavit to cast sweeping, unsubstantiated aspersions on the limited development of less than 20% of the highland of Captain Sam's Spit. This biologist provides no insight on the subject of the pending motion—the loss of KDP's upland above the high water mark to erosion over the last several years. The League's use of this television biologist's affidavit to infuse new opinions on facts decided against

the League by Judge Anderson is simply a transparent effort to sway the Court on the merits with impermissible proof. The affidavit should be disregarded.

The previously submitted affidavits of John T. Byrnes, III, and Tom O'Rourke conclusively establish the toll erosion has taken on KDP's highland property since the trial before Judge Anderson. This erosion has indisputably moved the escarpment to a location where it jeopardizes the parking lot for Beachwalker County Park and the segment of the vehicular beach access of the Town of Kiawah Island ("Town") along the Kiawah River, as evident in the photographs attached to the affidavit of Mark Permar. (Exhibit 2 to KDP's Motion). To remove all doubt as to whether the Town is concerned about the threat to its beach access and the importance of that beach access to the Town, KDP herewith submits the affidavit of Mayor Charles R. Lipuma, who explains:

> 2. The Town of Kiawah Island uses the unpaved vehicular beach access starting at the far end of the parking lot of Beachwalker Park for its vehicles to gain access to the beach on the western end of Kiawah Island to patrol the beach and perform other essential functions and services.
>
> . . . .
>
> 5. This beach access is important because it is also used by emergency vehicles, if necessary, to gain access to the beach on the western end of Kiawah Island.
>
> 6. The Town considers the stability of this beach access to be important to the health, safety, and welfare of the citizens of the Town, their guests, and visitors to Kiawah Island.

(Exhibit 1, attached hereto).

ARGUMENT

I. Common law property principles would allow KDP to construct an erosion control structure to protect KDP's highland property—the land above the high water mark—from further erosion.

Contrary to the League's argument, the common law, the common law as modified by the Coastal Zone Management Act ("CZMA"), and the regulations adopted under the CZMA, all entitle KDP to protect its highland from further erosion. The common law principles the League recites are neither controlling nor at issue in this case.

In arguing that KPD cannot suffer harm as a matter of law, the League refers to precedent that accreted land inures to the benefit of the adjoining owner and that the loss of highland to erosion inures to the benefit of the state, relying on Horry County. v. Woodward, 282 S.C. 366, 369, 318 S.E.2d 584, 586 (Ct. App. 1984). Without further citation, the League makes the unsupportable assertion that "KDP has no protective right to 'fix' the boundaries of its property by constructing an erosion control structure." (Return of the League, p. 3).

Woodward did not involve an owner, like KDP, who sought in a timely manner to protect its high ground from erosion. Instead, the dispute in Woodward involved two private owners asserting the right to an island spanning the North Carolina-South Carolina border, which had been subject to accretion and erosion over several decades. Id. at 368, 318 S.E.2d at 585. In fact, the decision in Woodward had *absolutely nothing* to say on the right of either owner to protect his privately-owned, highland property from future erosion. See generally id.

In the present case, unlike Woodward, KDP does not assert title to land below

the high water mark. Instead, KDP seeks a permit to construct an erosion control structure to protect portions of KDP's existing highland along the river bend from ever becoming submerged land. Thus, Woodward is not so much inapposite as totally beside the point.

The common law does not prohibit a riparian owner from constructing an erosion control structure above the high water mark. Under the common law, the high water mark constitutes the boundary of the tidelands to which the state has presumptive title. See State v. Pac. Guano Co., 22 S.C. 50, 79-80 (1884) ("It is a settled principle of the English law that the right of owners of land bounded by the sea or on navigable rivers where the tide ebbs and flows, extends to high water mark; and the shore below common, but not extraordinary high water mark, belongs to the public.") (internal quotation marks and citation omitted). The bulkhead of KDP's erosion control structure would be located above the mean high water mark.

As part of the CZMA, the South Carolina General Assembly adopted a statue that specifically authorizes DHEC to issue permits for erosion control structures for the protection of private property from shore destruction. See S.C. Code §48-39-120(F)("The department ... may issue permits not otherwise provided by state law ... for erosion ... structure in or upon the tidelands, submerged lands and waters of this State below the mean high-water mark ... for the purpose of ... the protection of public and private property from beach and shore destruction ...."). Likewise, the regulations adopted pursuant to the CZMA provide the project-specific criteria for the issuance of these non-ocean front erosion control structures. See 23A S.C. Code Ann. Regs. §30-12(C) (setting forth project-specific criteria for issuance of permit for "Bulkheads and

Revetments"). At the time DHEC staff denied the permit for the most of the eroding shoreline for other reasons, DHEC staff nevertheless recognized that KDP met all of the project specific criteria of section 30-12(C). DHEC noted in its Technical Summary of Review that "[t]hese specific regulatory provisions do not bar this project." (R. p.1966).

A state legislature's adoption of statutes and regulations imposing conditions or restrictions on an owner's activities in tidal waters does not per se eliminate the rights of the riparian owner, as held by the Supreme Court of the United States in Palazzolo v. Rhode Island, 533 U.S. 606 (2001). As discussed by the majority in Palazzolo, if denied a permit, a riparian owner may have a claim for a categorical taking under Lucas v. South Carolina Coastal Counsel, 505 U.S. 1003 (1992) or for a partial taking under Penn Central Transp. Co. v. City of York, 438 U.S. 104 (1978). Id. at 617-18.

Subsequently, in McQueen v. S.C. Dep't of Health & Envtl. Control, 533 U.S. 943 (2001), the Supreme Court of the United States vacated this Court's opinion in McQueen v. S.C. Coastal Council, 340 S.C. 65, 530 S.E.2d 628 (2000), and remanded the case for consideration in light of Palazzolo. On remand, this Court found the property owner had no compensable property rights from the denial of a permit to backfill and place bulkheads on his property *because the property owner had waited too long and sought to fill an area that had reverted to tidelands long before he applied for a permit*: "Any taking McQueen suffered is not a taking effected by State regulation but by the forces of nature and *McQueen's own lack of vigilance in protecting his property*." McQueen v. S.C. Coastal Council, 354 S.C. 142, 150, 580 S.E.2d 116, 120 (2003) (emphasis added).

Here, in contrast, KDP, the property owner, acted vigilantly to protect its property,

applying for a permit in February 2008. (R. pp.295:4-295:12; R. pp.2095-2122). The permit requested by KDP seeks to protect KDP's existing highland property—not to backfill previously-eroded highlands and *then* construct a bulkhead. Consequently, KDP has a common law and statutory right to protect its upland from further erosion and a right to a permit to build a portion of that structure in the critical area if it satisfies the regulatory criteria.

II. The League's return contains several inaccurate statements regarding both the proposed bulkhead-revetment structure and Captain Sam's Spit.

The League laces its return with inaccurate and pejorative descriptions of both the proposed erosion control structure and Captain Sam's Spit.

For example, multiple times the League wrongly calls the erosion control structure sought by KDP a "concrete wall." The structure does not include a concrete wall. It would consist of a vertical wooden bulkhead built against the escarpment. (R.pp.8, 232). A flat, flexible mat of articulated concrete blocks ("ACB"),perforated to allow the growth of aquatic plants, would extend from the base of the bulkhead a distance of either 40 feet or 8 feet, depending on location, towards the river to prevent erosion at the toe of the bulkhead.[1] (R.pp.8-9).

OCRM's regulations approve the use of revetments as erosion control structures. Regulation 30-12(C) specifically refers to the use of "bulkheads and revetments" to control erosion. 23A S.C. Code Ann. Regs. §30-12(C). Regulation 30-1 (D)(22) defines a revetment as "a sloping structure built. . . in front of a bulkhead to protect the shoreline

[1] Both the League and OCRM repeatedly state the ACB mat extends 40' for the entire length of the bulkhead, and overstate its size as 2.63 acres throughout their returns. They fail each time to mention that Judge Anderson reduced the width of the mat to 8 feet for 900 linear feet, significantly reducing the mat's size. (R.pp.10-11).

or bulkhead from erosion." 23A S.C. Code Ann. Regs. §30-1(D)(22). OCRM has issued permits for the installation of revetments composed of an ACB mat in numerous locations including non-oceanfront locations on Kiawah Island. (R.p.19). In its misleading and shrill description of the proposed erosion control structure, the League neglects to mention that the combination bulkhead and revetment is a proven, accepted, and permitted erosion control device.

Not content with its incorrect description of the revetment mat as a concrete wall, the League calls Captain Sam's Spit a "constantly moving and shifting sand bar," another incorrect statement to falsely characterize this highland. (Return of League, p. 8). A sandbar is an expanse of sand that is exposed at low tide and covered by water at high tide every tidal cycle. As the photographs illustrate, the more than mile-long peninsula known as Captain Sam's certainly is not a sand bar. (R.pp. 2040-2045; 2056-2063). Captain Sam's has from four to seven or eight well-defined rows of dunes with ridges as high as fifteen feet on the ocean side and a maritime forest on the river side where homes may be developed. (R.pp. 30-31; pp.722:12-723:5; p.889:9-13). Over the forty years Tim Kana, Ph. D, has been studying the geomorphology of the island, waves have never topped the first dune row, not even during Hurricane Hugo. (R.p.755:3-13; p.889:9-13). Even the League's geologist, Rob Young, Ph. D., testified that Captain Sam's enjoys one of the most robust and healthy accreting beaches on the East Coast. (R.pp.1026:19-1027:10; pp.1031:6-1032:21).

Finally, both the League and DHEC misstate the ACB mat would be installed on a "beach." It will not be on a beach. As a matter of law, the riverbank is not considered a "beach." DHEC's regulations define "beach" as the land on the oceanfront: "5)

Beach/Dune System - all land from the mean high-water mark of the Atlantic Ocean landward to the 40 year setback line described in §48-39-280." 23A S.C. Code Ann. Regs. §30-1(D)(5).

III. Judge Anderson previously rejected the factual arguments raised by the League in its return to KDP's motion. The League improperly attempts to submit new proof to collaterally attack Judge Anderson's findings through the generalized statements made by Patrick McMillan, Ph.D.

KDP's motion is premised on the unchecked river erosion that has continued to destroy KDP's upland since the Court issued its writ of supersedeas four years ago. The question is whether the supersedeas should be lifted or, in the alternative, security required. The issue turns on the manifest harm to KDP.

The longer the appeal process takes, the closer Appellants come to realizing their objective. Time is accomplishing what Appellants may not be successful in obtaining legally. The continued erosion of the river bank and movement of the escarpment towards the setback line in one location on the back side of Captain Sam's is narrowing the width of the land available for a right of way for the road to the limited residential development authorized by the Town in a Development Agreement and in its zoning years ago.

Instead of addressing this obvious and looming harm, the League does little more than reargue facts that were fully litigated in the contested case hearing, seeking to inject all new evidence of the alleged effect of the erosion control structure on wildlife. The League of course presented witnesses at the hearing to testify to its allegations of effects on wildlife, but Patrick McMillan, Ph.D., whose affidavit the League now submits, was not one of them. The upshot of McMillian's affidavit is his opinion that no development should occur on the 20 acres of the more than 100 highland acres of the

Captain Sam's even though allowed under both the zoning of the Town of Kiawah Island and the Development Agreement.[2]

Putting aside that the League's attempts to collaterally attack with new evidence the findings made by Judge Anderson, Dr. McMillan's affidavit suffers from a fatal lack of specificity. He speaks of the Spit generally without providing the specific location of the activity he is talking about or linking it to the bulkhead-revetment. The vast majority of Captain Sam's Spit will be unaffected by either the bulkhead-revetment or the limited residential development. Captain Sam's Spit is large, with more than a mile of beachfront and more than a mile of shore along the Kiawah River. (R.p.4). As noted by Judge Anderson, more than 80% of Captain Sam's Spit will remain in perpetuity in a natural state, unaltered, under the limited development permitted by the zoning and Development Agreement. (R.pp.16-17). Contrary to McMillian's blanket assertions, migratory birds will definitely still be able to use Captain Sam's Spit as a stopover.

McMillan's generalized statements are especially misleading with respect to wintering piping plovers. A tremendous amount of testimony at the contested case hearing was devoted to the Atlantic wintering piping plovers. Overlooked by the League to be a witness at the hearing, McMillan now avers that the "Spit is a critical resting and feeding resource providing migratory habitat for the federally threatened Atlantic Coast population of piping plover (a shore bird).... "(McMillan Affidavit, ¶4). He fails to mention, however, that neither the 20 acres of upland where the limited residential development will occur nor the location of the revetment are habitat for those birds.

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[2] The League proffered a different witness at the hearing on whether Captain Sam's Spit was suitable for any residential development at all—Josh Martin—whose testimony Judge Anderson found to be not credible. (R.p.6, footnote 7).

Judge Anderson weighed the opinions of the three testifying ornithologists on the impact, if any, of the erosion control structure and the limited residential development on wintering piping plovers. (R.pp.11-12). Judge Anderson also received evidence of bird censuses for the wintering piping plover. (R.p.12). The few wintering piping plovers that have been spotted over time are mostly on the extreme western tip of Captain Sam's in the intertidal mud flats beside Captain Sam's Inlet, a significant distance from both the proposed erosion control structure and the proposed residential development. (R.p.12). Indeed, there has never been a confirmed sighting of a wintering piping plover in the vicinity of either the proposed bulkhead-revetment or the proposed residential development. (R.pp.12-13). For these and other reasons, Judge Anderson concluded that neither the erosion control structure nor the limited residential development would have an adverse effect on wintering piping plovers. (R.p.14).

Judge Anderson received and weighed all the evidence submitted by OCRM, the League, and KDP, and he made findings of facts supported by substantial evidence that there were no material adverse effects on wildlife or marine life. KDP respectfully submits that this Court should render its determination of whether Judge Anderson's findings are supported by substantial evidence on this and all other issues based on the record before him. The affidavit of Dr. McMillan, to the extent it bears on these issues, should be disregarded.

IV. The continued erosion of KDP's highland property does *not* preserve the status quo. To the contrary, this erosion threatens to moot the protection of a portion of the highland KDP sought to protect in its February 2008 permit application.

The continued loss of highland through persistent appeals is not the status quo, as argued by the League. When a permit is sought to construct a bulkhead, the status

quo of the owner's property rights is determined at the time the permit is first denied. See McQueen v. S.C. Coastal Council, 354 S.C. 142, 150 note 8, 580 S.E.2d 116, 120 note 8 (2003) ("Condemnation occurred when the permits were denied by a final decision.").

When Judge Anderson issued his Amended Final Decision and Judgment, KDP had the right to obtain a permit from OCRM to construct the bulkhead-revetment upon compliance with the conditions in Judge Anderson's Order. (R.p.31). Were it not for the appeal, KDP would have complied with those conditions, obtained the permit, and constructed the erosion control structure to prevent the further harm it has suffered. That was the status quo at the time this Court issued its opinion expediting the appeal and granting the supersedeas. Since then, continued erosion has moved the escarpment landward, taking land that would not have been lost without the supersedeas.

The League tries to challenge the recent survey of John T. Byrnes, III, by arguing that the Court should disregard it since DHEC did not certify the critical line on his survey of March 17, 2014. The League misses the point. Byrnes does not purport to identify where DHEC might certify the critical line on that day. His survey *marks the location of the escarpment* on March 17, 2014. Neither the League nor DHEC has proffered any contrary proof of the current location of the escarpment. It is the erosion's persistent movement of the escarpment landward that is harming KDP, regardless of whether DHEC certified the critical line on his survey of March 17, 2014.

Likewise, the accretion of the beach many hundred feet seaward of the baseline is irrelevant to whether the continued erosion in the river bend is taking KDP's land as

well as jeopardizing the public facilities of Beachwalker County Park and the Town's beach access. There is no statute, regulation, or case law supporting the League's nonsensical proposition of "subtraction and addition"— i.e., that if an owner benefits from accretion on some portion of his land, he somehow loses his right to prevent erosion on another portion. As noted by Judge Anderson in his order, the erosion on the river bend substantially reduces the land between the critical line and the setback line available for the access road and utilities to the limited residential development permitted on Captain Sam's. (R.pp.6-8). Accretion to the beachfront many hundred feet seaward of the set back line in an area where no construction can occur obviously cannot substitute for land that has eroded on the opposite side of the setback line in the only area where development may occur.

As previously shown, the law does not require a property owner to sit idly by and refrain from taking steps to stop the forces of Mother Nature, as argued by the League. To the contrary, the law enables a property owner who is losing high land to erosion to install erosion control structures to halt a process of Mother Nature. DHEC has issued many hundreds of permits along our tidal rivers and creeks for this important purpose.

CONCLUSION

In its Return the League fails to acknowledge that this Court intentionally expedited this appeal in granting the supersedeas without imposition of a bond or other security for the express purpose of avoiding the type of harm now being suffered by KDP. The League offers nothing in terms of prevention of the ongoing harm to the landowner now that the appeal, instead, has taken four years.

KDP's property rights include the right to protect its highland from continued

erosion. During this appeal, the river shoreline has continued to erode significantly, changing the status quo of the condition of the land 4 years ago. This erosion renders moot the protection of the highland that KDP has lost that could have been saved through construction of the erosion control structure four years ago, and threatens to render moot the protection of its remaining highland.

KDP respectfully submits that this Court either lift the supersedeas or impose a requirement that the League and OCRM provide adequate security for the land lost and that will continue to be lost if the supersedeas remains in effect.

Respectfully Submitted,

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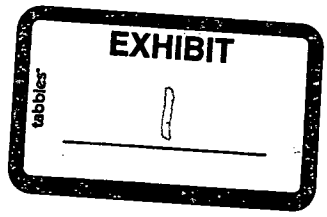
June 16, 2014
Charleston, South Carolina



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Of Whom

South Carolina Department of Health and Environmental Control is..... Appellant,

and Kiawah Development Partners, II, is..... Respondent.

AFFIDAVIT OF CHARLES R. LIPUMA, MAYOR

Personally appeared before me, Charles R. Lipuma, who, being duly sworn under oath, avers and states as follows:

1. I am an official of the Town of Kiawah Island in the capacity of Mayor and have personal knowledge of the matters stated herein.

2. The Town of Kiawah Island uses the unpaved vehicular beach access starting at the far end of the parking lot of Beachwalker Park for its vehicles to gain access to the beach on the western end of Kiawah Island to patrol the beach and perform other essential functions and services.

3. The initial section of this beach access goes west along the Kiawah River before it turns south towards the beach.

4. Over the last three or four years the erosion in this location along the Kiawah River has increased the escarpment to where it is now very close to the vehicular access.

5. This beach access is important because is also used by emergency vehicles, if necessary, to gain access to the beach on the western end of Kiawah Island.

6. The Town considers the stability of this beach access to be important to the health, safety, and welfare of the citizens of the Town, their guests, and visitors to Kiawah Island.

7. The Town is unable to use the beach access as it currently exists.

Further affiant sayeth not.

Charles R. Lipuma

Charles R. Lipuma, Mayor
Town of Kiawah Island

SWORN before me this 9th day of June, 2014

Petra S Reynolds

Notary Public for the State of South Carolina

My Commission Expires: 1-29-2023

PETRA S. REYNOLDS NOTARY PUBLIC SOUTH CAROLINA My Comm. Exp. 01-29-2023

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South Carolina Department of Health and Environmental Control is ..... Appellant,

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Appellate Case No. 2019-155629

PROOF OF SERVICE

I, Nancy Jane Dennis, an employee of Pratt-Thomas Walker, P.A., hereby certify that I have served this 16th day of June 2014, a copy of the Respondent's Reply to the Return of Appellant South Carolina Coastal Conservation League on counsel of record by placing the same in the United States mail, first-class postage pre-paid, to:

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