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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA ADMINISTRATIVE LAW COURT
Honorable Shirley C. Robinson, Presiding Judge

Case No. 12 ALJ-07-0434-CC

Ken Bruning, Janet Bruning, David Feron, individually and as Trustee,
Mary Feron, individually and as Trustee, Sally Saegmuller Haley and
Terrell Page Haley, individually and as Co-Trustees, Martha James
and Don Haarmeyer, individually and as Co-Trustees, and
Pamela S. North.....Appellants,

v.

SCDHEC and Cat Island, c/o Gary Meyer..... Respondents.

Case No. 12 ALJ-07-0436-CC

In Re: Garfield Park, Phase 3

Cat Island POA, c/o Gary Meyer.....Petitioner,

v.

SCDHEC.....Respondent.

RETURN TO JOINT MOTION TO DISMISS

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I. Introduction

The Appellants are owners of lake-front property adjacent to Cat Island Lake that DHEC permitted and approved as a stormwater management system. The lake was created by an earthen dike between it and the tidal waters of Chowan Creek and had been in place since the 1960s. When the dike failed, the Developer elected to not repair it, and sought a permit from DHEC to “Retrofit” the stormwater management system to use “in-line” filters rather than the detention provided by the lake. As a result of the failure to repair the dike, the former lakebed became a tidal mud flat and tidal waters flowed unimpeded across the former lakebed onto the property of the Appellants. Appellants asserted that DHEC’s action, in granting a permit that allowed the Developer to abandon the existing and approved stormwater system and to forever leave the dike unrepaired, deprived Appellants of the lake-front property that they had purchased, deprived Appellants of their previously enjoyed wildlife and water views, and resulted in tidal encroachment upon their residential property.

In their Joint Motion to Dismiss (“Motion”) presently before this Court, Respondents contend that the Appellants have no standing to object to DHEC’s action. Their position lacks merit for multiple independent reasons.

First, the standing issue was raised to the Administrative Law Court (“ALC”) and decided adversely to Respondents. That ruling was not the subject of Motion to Reconsider, was not appealed by the Respondents, and is not

asserted in their brief in this Court as to any Appellant other than Pamela North.¹ Second, in order to accept Respondents' lack of standing argument, this Court must be persuaded that the scope of the agency action at issue was only the approval of the use of in-line filters to treat stormwater when, in fact, even the Respondents admit that the General Permit issued by DHEC allowed the developer to retrofit the stormwater treatment system, to abandon the use of the lake to treat stormwater, and to leave the dike unrepaired. The resulting loss of the lake amenity and the encroachment of tidal waters onto the residential properties of the Appellants gives them standing to object to the approval of the General Permit.

The Motion is both procedurally and factual flawed and should be denied. The Motion cites and attaches evidence that is not based on a full and complete record of the proceedings below. However, rather than submit this matter without any evidentiary rebuttal, Appellants have submitted with this Return an Appendix of portions of the record below, which is offered in rebuttal to the submittal of the Respondents.

II. Law of the Case

In their Motion for Summary Judgment before the ALC, the Respondents objected to Appellants' standing on the same grounds as asserted in the pending Motion. The ALC found that, for purposes of standing, the appropriate view of the scope of the agency action was:

¹ Her standing is challenged on the basis of a sale of her real estate and the merits of the argument are addressed hereinafter.

² There was substantial testimony adduced by Cat Island that the former lake may eventually

the agency action in question involves more than simply permission to install filters. DHEC's approval of the General Permit grants Cat Island POA approval to retrofit the previously approved and permitted stormwater treatment system for Garfield Park, Phase 3. Implicit in such a retrofit is the abandonment of the previously approved system of treatment by the detention provided by the lake that abuts the residential property of the Petitioners. Cat Island POA's Motion concedes at page 18 that 'because installation of the filters is intended to be an alternative to any repair, the breach in the dike would be allowed to remain if the General Permit was declared final and complete.'

(Order Denying Motion for Summary Judgment, p. 2).

It is axiomatic that an unappealed ruling becomes the law of the case and cannot be challenged. *Judy v. Martin*, 381 S.C. 455 (2009).

There is no question that Appellants' standing was litigated before the ALC and that the issues now raised by the Respondents were before the ALC, who made factual findings and legal conclusions with respect to those issues.

Those findings included the following:

1. The Petitioners allege that, should the Retrofit Permit become final and the dike and lake abandoned, the consequences to them include the following:

- a. Encroachment of tidal waters onto their residential property.
- b. Destruction of their landscaping by the exposure to tidal salt water.
- c. Loss of the value of the lakefront property of Petitioners.
- d. Loss of the esthetics of the lake and its wildlife.

2. In addition to the economic impact to them if the Retrofit Permit becomes final, Petitioners relied upon *Sea Pines* case, supra, to establish that deprivation of their aesthetic and recreational interests in enjoying and observing wildlife is a "judicially cognizable legal injury in fact" which also provides them standing in this matter. 345 S.C., at 600-601.

3. This Court finds that, when considering the totality of the agency action, which not only allows use of in-line filters but further allows for the abandonment of the lake as the detention basin and permits the dike to remain unrepaired, the Petitioners have demonstrated that there is the

possibility the Petitioners may suffer some injury resulting from the agency action.

4. Cat Island POA further argues that Petitioners lack standing because the injuries to Petitioners are not likely to be redressed by a favorable decision of this Court. In support of its position, Cat Island POA argues that this Court cannot order the repair of the dike and restoration of the lake because other federal and state regulatory action may be required before any such repair could be made.

5. Whether this Court can or should order the dike repaired need not be decided at this juncture of the proceedings. What is clear is that, if the Petitioners are able to carry their burden to show at trial that DHEC's approval of the General Permit violates numerous laws and regulations, this Court has the power to set aside the issuance of the Permit. If that were to happen, the permission of DHEC to change the stormwater system from detention by the lake to filters will have been rescinded. That would leave the original stormwater permit in place and any injuries to the Petitioners arising from DHEC permanently authorizing the use of filters and the abandonment of the lake as the detention basin will be redressed.

6. Cat Island POA contends on page 5 of its Motion that, "The fate of the dike would be in the hands of multiple state and federal permitting and resource agencies. It is unknown whether the outcome of that process would be successful..." However, the fact that other agency action might be required before an actual repair to the dike is commenced does not deprive the Petitioners of their standing to object to the DHEC's approval of the General Permit.

The Respondents did not challenge those findings by renewing their standing argument after the close of the evidence, by filing a Motion to Reconsider the ALC's final Order, nor did they cross-appeal on this issue. Accordingly, the findings of the ALC are the law of the case and cannot be relitigated.

III. Respondents Did Not Raise Standing in Their Initial Brief in this Court.

Not only did the Respondents fail to preserve their standing argument for appeal, in their Initial Briefs, they argued lack of standing only as to Appellant North and only on the basis of a sale of her real estate. (Initial Brief of

Respondents, page 39). The lack of merit in that argument is addressed herein in Section VII. Because the standing issue was not raised with regard to any of the other Appellants, the Joint Motion to Dismiss should be summarily denied with regard to each of the Appellants for which no issue was raised.

IV. The Evidence At Trial Established Appellants' Standing.

There are three elements that must be satisfied to demonstrate standing. The Appellants must have suffered an invasion of a legally protected interest, there must be a causal connection between DHEC's action and that injury, and the injury must be able to be redressed by a favorable decision. *Sea Pines Assn. for the Prot. Of Wildlife, Inc. v. S. C. Department of Natural Resources*, 345 S.C. 594, 600 (2001).

By Respondents' own admission, the effect of DHEC's grant of the General Permit "allowed the breach in the dike to remain open" and "this meant that the impoundment would be exposed to tidal flows..." (Joint Initial Brief of Respondents, p. 8). There can be no serious dispute that there is a causal connection between DHEC's approval of the General Permit and the injuries complained of by the Appellants.

The evidence at trial demonstrated that the Appellants had standing to object to the issuance of the General Permit.

- a. The Cat Island engineer acknowledged that any change from the currently permitted Lake and dike for the treatment of stormwater, whether by in-line filters or any other method that did not include repair of the dike, would result in saltwater tides reaching the Appellants' property.

Q: Would you agree that leaving the dike open in any retrofit, whether it's inline filters or anything else, will result in the same adverse consequence to homeowners resulting from

tides being able to come upon their property?

A: The tides have the ability to reach upon their property....

(605:7-15).

b. The Cat Island engineer further agreed that the Appellants' properties were downstream of the project site and that having tidal flows over their properties would be an adverse impact to them. (603:18-604:1 and 571:19-24).

c. The Appellants presented a survey with elevations taken on the property line of Appellant North. (Homeowners' Ex. 74). This survey demonstrated that a 7.0 foot spring tide would result in saltwater at a depth of 1.4 feet along the boundary line of the North property and allow saltwater to reach the in-ground light located well inside the boundary of the North property. (Homeowners' Exhibit 74). Petitioner North testified that she had observed tidal waters within three feet of the edge of her house. (398:2-3).

d. Appellants established that the Cat Island Lake was a habitat for nesting and wading birds, including wood storks, herons, alligators, and other species of animals. (384:4-387:2; Homeowners' Ex. 1. p. 31-34). They further established that, with the dike unrepaired, the wildlife is gone and the lake is a rutted mudflat referred to by the residents as the "mud pit". (390:1-391:1; 400:20-402:4). Appellant North produced a photo of the lake from her deck with water in the lake and the same view with the mud, which she characterized as "ugly". (Homeowners Exhibit 1, page 25, 26; 400:20-402:4). The other Appellants voiced similar claims with regard to the loss of the beauty of the lake and the wildlife. (448:22-449:5; 461:17-23; 475:1-11).²

e. Photographs from the residences of the Appellants taken the week before the trial demonstrate expanses of mud flat consistent with their descriptions (Homeowners Ex. 63), as well as dead trees around the lake (Homeowners' Ex. 1. p. 23) and tree roots that had become exposed along the edge of the lake (Homeowners' Ex. 1. p. 21). Appellant North testified to the loss of many species of freshwater vegetation after her property was exposed to the saltwater tides. (412:9-22). George Madlinger, the senior wetland project manager in the Beaufort office of OCRM, acknowledged that the photos of wildlife, including wood storks, depicted in

² There was substantial testimony adduced by Cat Island that the former lake may eventually "naturalize" and become a tidal, saltwater marsh. Whether that eventually occurs or not does not detract from the testimony of the Petitioners concerning their aesthetic and economic loss resulting from the Retrofit Project.

Homeowners' Ex. 1, pages 31-34, were consistent with his observations over the years and that, without water in the Lake, the birds would find other places to inhabit. (748:19-749:17).

f. Appellant Feron testified that his property had lost value when the lake was lost and adduced appraisals supporting his contention. (Homeowners' Ex. 14 and 15). Appellant North testified that, in her opinion, the value of her property decreased from the loss of the lake when her water view was replaced by mud. (411:18-412:3). Even the Developer conceded that the lake view was more attractive and that most buyers would prefer the lake view depicted on Homeowners' Ex. 1, p. 25 to the mud view depicted on Exhibit 1, p. 26. (66:15-22).

In an effort to argue that the Appellants have no injury resulting from the approval of the General Permit, and thus no standing to contest it, Respondents assert that no Appellant other than Pamela North lost landscaping. However, Mr. Feron testified that "there was quite a few things that died when the water came – the tidal water came in..." (452:6-11). Sally Haley testified that she lost Chinese tallow trees and yaupon holly. Although she could not swear to the cause of death, she testified that "the fact that it died after the infringement of the salt water, it seems logical that that's what fueled it". (468:3-14).

Respondents further asserted that the testimony of Pamela North with regard to lost landscaping was speculative with regard to the timing and cause of the alleged loss. (Joint Motion, p. 12-13). However, the actual evidence was clear that the loss did not occur until the breach in the dike allowed salt water encroachment and that she lost the bog iris, camellias, azaleas, holly trees, and grass between her driveway and the edge of the lake and that efforts to replant were unsuccessful. (412:9-22).

Respondents represented to the Court that David Feron "admitted that the

trees were not on his residential property” (Joint Motion, p.13), which is a sad distortion of the evidence. The trees that had died were located on the empty lake-front lot that is owned by Mr. Feron and which is immediately adjacent to his residence. (Cat Island Ex. 2C and 2D; 452:12-17).

The Respondents contend that the evidence of loss of value was speculative because the owners’ testimony was not supported by appraisal evidence and because the two appraisals presented by Mr. Feron from before and after the break in the dike also corresponded to the timeframe of an economic recession. (Joint Motion, p. 13). However, there is no requirement that the exact dollar amount of injury be proven in order to establish standing. When the Developer concedes that the lake view is more attractive and that most buyers would prefer the lake view depicted on Homeowners’ Ex. 1, p. 25 to the mud view depicted on Exhibit 1, p. 26. (66:15-22), the negative impact to the Appellants from the approval of the General Permit is established and is not reasonably in dispute.

It is undisputed that allowing the dike to remain open transforms the pristine freshwater wildlife habitat into a rutted tidal mud flat. However, the Respondents argue on the basis of *O’Shea v. Lesser*, 308 S.C. 10, 18 (1992) that “Loss of view is not a cognizable claim in South Carolina”. (Joint Motion, p.13). That is not the holding of *O’Shea*.

The issue in that case was whether, by building an extension of their patio, O’Shea’s next-door neighbors were interfering with her view of the neighbors’

rear yard. The Court found that the right to a view across the property of another could not be acquired by prescription and, accordingly, the Appellant had no right to a continuation of her view of the neighbor's back yard. The *O'Shea* Court further held that even if *O'Shea* had some legal basis to continuation of a view, that right had not been interfered with.

Appellant's home is situated so that her attention is drawn away from the Lessers' home. *Appellant's view of the golf course is not impaired by the extension to the Lessers' residence.* Accordingly, we find that the master-in-equity's order conforms to his findings of fact, and that he did not err in finding that appellant suffered no damages. (emphasis supplied)

Id. at 18.

O'Shea does not stand for the proposition that loss of view is not a "legally cognizable claim", but only that the litigant in *O'Shea* could not establish that the view to which she was allegedly entitled was impaired.

The right to a view is, indeed, a cognizable legal right in South Carolina. In *Sea Pines Assn. for the Prot. Of Wildlife, Inc. v. S. C. Department of Natural Resources*, 345 S.C. 594, (2001), at issue was the standing of the parties objecting to the planned reduction of the deer population. *Sea Pines* and the cases cited therein clearly support the Petitioner's position that deprivation of their enjoyment of the wetlands and observation and enjoyment of the wildlife adjacent to their residences is a "legally cognizable injury" providing them standing in this matter. *Id.* at 600 – 602.

The Retrofit Project required a waiver of applicable water quantity requirements, which DHEC granted. Under S.C. Reg. 72-302 (B)(2), DHEC could grant such a waiver only if the "proposed project" will have no significant

adverse consequences to downstream property owners. (Homeowners' Ex. 3, p. 10). The Appellants are downstream property owners. (603:18-22). S.C. Reg. 72-301 (1) defines adverse impacts³ to include an increased risk of flooding as well as negative impacts on wildlife and other resources. (Homeowners' Ex. 3, p. 2). Certainly, when the Appellants' own downstream properties, they have standing to object to the grant of the waiver, especially when those downstream properties are subjected to tidal flows.

One of the issues presented in this appeal is whether the Retrofit Project required the issuance of a critical area permit and, if so, whether DHEC was required by §48-39-150 of the Coastal Tidelands Act to consider "the extent to which the proposed use could affect the value and enjoyment of adjacent owners."

DHEC admitted that, before granting the General Permit, it did not give consideration to the effect upon the use, enjoyment, and value of Appellants' property or any of the other nine statutory considerations that DHEC is required to consider with regard to permits that affect the critical area. (158:2-8).

Mr. Madlinger, testifying on behalf of DHEC, made it clear that the project did affect the critical area by adding 4 to 8 acres of freshwater lake bottom to it, by allowing the entire drainage basin served by the lake to flow out, and by allowing the pollutants from the last fifty years which had settled to the bottom of the lake to be tidally influenced and wash back and forth in the critical area. Mr.

³ Adverse impacts for purposes of determining standing are not limited to those applicable to waivers pursuant to this regulation, but would certainly include such adverse impacts.

Madlinger characterized these effects on the critical area as negative effects. (755:23–757:1).

When DHEC failed to consider the effect on the value of the Appellants' properties and the use and enjoyment of them, DHEC compromised Appellants' rights and Appellants have standing to object.

As to the availability of redress if the decision of this Court is favorable, if the Appellants demonstrate that DHEC's approval of the General Permit violates numerous laws and regulations, the Permit can be set aside. If that were to happen, the permission of DHEC to change the stormwater system from detention by the lake to filters will have been rescinded, leaving the original stormwater permit which utilized the dike and lake, in place. Accordingly, the restoration of the lake would protect the Appellants' property from tidal flows and restore the wildlife habitat previously enjoyed.

Cat Island POA has previously contended that "The fate of the dike would be in the hands of multiple state and federal permitting and resource agencies. It is unknown whether the outcome of that process would be successful..." However, the fact that other agency action might be required before an actual repair to the dike is commenced does not deprive the Petitioners of their standing to object to the DHEC's approval of the General Permit.

V. Pamela North Retained Her Rights and Claims in this Proceeding.

Respondents argue that, because the residence of Pamela North was sold during the five years that her objections to the retrofit have been pending, she no

longer has standing to oppose the approval of the General Permit. The argument is based on a mischaracterization of the rights specifically retained by Pamela North when she sold her property.

Respondents argue that only an “ongoing right to the claims for property loss and diminution of value” were retained. (Joint Motion, p. 7). However, the actual language of the deed attached to the Joint Motion clearly shows that the Grantors do:

“not convey and specifically retain any and all rights and claims that Grantors may have against Chowan Creek Partners, L.P. or others resulting from or relating to the failure to maintain and repair the dike and lake adjacent to said property and the damage and diminution of value of the property during the Grantors ownership of the real property only as a result of the failure of repair the breach of the dike and the loss of the lake amenity.”

Accordingly, Pamela North retained both “rights” and “claims”. Those rights included those against “others” without limitation. Those rights included all of those resulting from or relating to the failure to maintain the lake. Those rights included all of those resulting from or relating to the loss of the lake amenity. As such, Pamela North retained all rights relating to her claims in this proceeding.

Conclusion

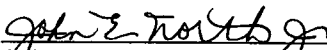
The Respondents made precisely the same standing argument in the context of a Motion for Summary Judgment before the ALC. That motion was decided. At the close of trial before the ALC, they did not renew their standing argument, nor did they file a post-trial motion with respect to same. They failed to cross-appeal with respect to the ALC’s decision on the standing issue or to even raise these issues in their brief upon appeal. Accordingly, the ALC’s

conclusion that the Appellants had standing to contest DHEC's decision is the law of the case and cannot now be relitigated.

The evidence further establishes that the Appellants did demonstrate all of the elements of standing. DHEC's approval of the General Permit allows the Cat Island developer to abandon the lake as a stormwater management facility and to leave the breached dike open. That action directly results in the former pristine freshwater wildlife habitat adjacent to Appellants' residential property to become a rutted, tidal mudflat and allows tidal waters to encroach upon their property. Under the relevant statutes, regulations, and case law authority, Appellants' legally cognizable rights have been compromised and they have standing to contest DHEC's action.

For all of the foregoing reasons, the Appellants respectfully request that the Motion to Dismiss be denied.

Kenneth Bruning, Janet Bruning, David Feron, Individually and as Trustee, Mary Feron, Individually and as Trustee, Sally Saigmuller Haley, Individually and as Trustee, Terrell Page Haley, as Trustee, Martha James and Don Haarmeyer, Individually and as Co-Trustees, and Pamela North, Appellants,

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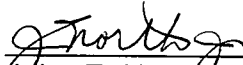
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The undersigned hereby certifies that he served the Return to Joint Motion to Dismiss and the Appendix in Opposition to Joint Motion to Dismiss upon the attorney for Cat Island POA, Mary Shaid, P.O. Box 486, Charleston, SC 29402 and the attorney for DHEC, Nathan Haber, 1362 McMillan Avenue, Suite 400, Charleston, SC 29405 by United States Mail, postage prepaid on the 16th day of March, 2015.



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March 16, 2015

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
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MAR 17 2015
SC Court of Appeals

Re: Bruning, et al v. Cat Island POA and DHEC
Appellate Case No. 002010

Dear Ms. Kitchings:

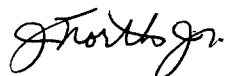
Enclosed please find relative to the above-referenced matter an original and seven copies of Return to Joint Motion to Dismiss and an original and seven copies of Appendix in Opposition to Joint Motion to Dismiss. The Affidavit of Counsel concerning the authenticity of the materials in the Appendix is included therein. We have also enclosed an original and one copy of a Proof of Service with respect thereto.

Please see that these materials are properly filed and a time-stamped copy returned to us in the enclosed, postage pre-paid self addressed envelope.

We have confirmed with your office today that pursuant to Rule 240(b) SCACR, the filing of the Motion to Dismiss stayed the further progress of the appeal until the Motion is decided. Accordingly, we will not be submitting Appellants Initial Reply Brief until the Motion is decided. If this is incorrect, please advise as soon as possible.

Thank you for your assistance with this matter.

Very truly yours,



John E. North, Jr.

JEN/p
Encl

C: Mary Shahid; Nathan Haber