FILED
FEB 12 2015
SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Dan Abel and Mary Abel, Petitioners, v. South Carolina Department of Health and Environmental Control and Pawleys Island Community Church, Respondents.	Docket No. 14-ALJ-07-0282-CC **ORDER GRANTING MOTION TO DISMISS AND DENYING MOTION TO CONSOLIDATE, MOTION TO ENFORCE, AND MOTION FOR SUMMARY JUDGMENT**

RECEIVED
JUN 04 2015
SC Court of Appeals

APPEARANCES:

For the Petitioners: Jessie A. White, Esquire
Amy E. Armstrong, Esquire

For the Department: Nathan M. Haber, Esquire

For the Respondent: Daniel W. Stacy, Jr., Esquire

STATEMENT OF THE CASE

This matter comes before the South Carolina Administrative Law Court ("the ALC" or "the Court") as a result of Petitioners[1] Dan and Mary Abel filing a request for a contested case hearing with this Court challenging the Department's issuance of a stormwater permit (SCR10Q459) and a Coastal Zone Consistency Certification ("CZC") (CZC-12-0149) to Pawleys Island Community Church ("Respondent"). Thereafter, Petitioners filed a Motion to Enforce the Consent Order and to Consolidate. Respondents filed a Response to Petitioners' motion and filed a Motion to Dismiss. Petitioners filed a Response to Respondents' Motion to Dismiss and filed a Motion for Summary Judgment. Respondents then filed a Response in Opposition to Petitioners' Motion for Summary Judgment to which Petitioners filed a Reply. After reviewing the filings by the parties, the Court denies Petitioners' Motions and grants Respondent's Motion to Dismiss.

[1] On October 29, 2014, this Court granted William Mashburn's request to withdraw as a third Petitioner in this case.

BACKGROUND

In 2000, Pawleys Island Community Church ("the Church") sought to expand its facility by adding a new sanctuary and other improvements. Because the Church would be conducting land disturbing activity, the Church was required by law to apply to the South Carolina Department of Health and Environmental Control ("the Department") for a state stormwater permit and a related coastal zone consistency certification pursuant to federal National Pollution Discharge Elimination System ("NPDES") general permit requirements as administered by the state of South Carolina. See 33 U.S.C.A § 1342 (West) (discussing NPDES permit implementation and administration). Additionally, because the Church's construction plans also included filling in jurisdictional wetlands, the Church obtained a permit from the United States Army Corps of Engineers and a related CZC. See 33 U.S.C.A. § 1344 (West) (requiring a permit from the U.S. Army Corps of Engineers to fill or dredge navigable waters); 33 U.S.C.A. § 1362(7) (West) (providing "'navigable waters' means the waters of the United States, including the territorial seas"); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 139, (1985) (holding "waters of the United States" includes wetlands adjacent to navigable waters). The Army Corps of Engineers issued the Church a permit to fill wetlands on the Church's property, and the Department issued a CZC for the Corps permit and a state stormwater permit (collectively, "the 2000 permit and CZC"). Subsequently, Petitioners and David F. Mims[2] filed a request for a contested case hearing with the ALC, challenging the Department's decisions to issue the 2000 permit and CZC. The parties eventually agreed to a settlement memorialized in a consent order ("the Consent Order") issued by this Court on January 8, 2001.

The Consent Order stated the proceeding arose from Respondents' application for a stormwater permit and an accompanying CZC for "construction of a new sanctuary and other improvements of its property." It included the following restrictive clauses, among others:

> 1. The designs for the storm water pond and other improvements at the site shall be amended so that approximately one-half (50%) of the wetland area on the site shall be preserved.
>
> ***
>
> 3. The Church agrees that the wetland preserved by this Consent Order shall remain in its natural state.
>
> ***

[2] At the time the 2000 contested case, Petitioners and Mims owned property adjacent to the Church.

> 5. Within the area designated on Exhibit A as the '30 NOISE/VISUAL BUFFER," the Church shall maintain a vegetated buffer of native, evergreen shrubbery and trees, with a density of at least one evergreen tree and one shrub every ten (10) feet; the trees and shrubs will be Leyland cypress and wax myrtles and similar species, and at planting will be at least six (6) feet in height with fifty percent (50%) of the trees at least ten (10) feet in height; provided however, that the portions of the vegetated buffer in wetland areas or in wooded areas not affected by development on the property, will remain in their natural state.
>
> ***
>
> 9. The Church and the Petitioners will cooperate in the execution of any documents needed to secure any required permit amendments to carry out the provisions of this agreement and order.
>
> ***
>
> It is further ordered that this matter shall be dismissed, with prejudice, except that the parties shall retain full rights to enforce the agreements stated herein.

The Church concluded the construction activities to which the 2000 permit and CZC pertained in the early 2000s.

On June 26, 2012, several years after the original construction project was complete, the Church applied for (1) a new state stormwater permit and accompanying CZC ("the 2012 permit and CZC"), and (2) a new Corps fill permit and accompanying CZC ("the Corps permit and CZC"), for a new and distinct construction project. For the new construction project, the Church planned to reconfigure an existing drive, add parking, construct a 4,000 square foot administrative building, expand and reconfigure the existing retention pond and outlet structure, and add an infiltration system. The construction project would impact 0.17 acres of wetlands on the Church's property. In October 2013, and in response to concerns by Mims, who was a party to the Consent Order, the Church motioned this Court to approve a modification of the Consent Order with Mims' approval. This Court dismissed the case for lack of jurisdiction because the Department had yet to render, for the purposes of administrative review, a final decision regarding the issuance of the state stormwater permit and its accompanying CZC. See Docket No. 13-ALJ-07-0547-CC (filed Jan. 7, 2014).

On March 31, 2014, and March 26, 2014, respectively, the Department granted the Church's request for the 2012 permit (SCR10Q459) and CZC (CZC-12-0149). On April 16, 2014, Petitioners Dan and Mary Abel[3] filed a request for Final Review of the 2012 permit and

[3] Sometime between the signing of the Consent Order and the initiation of this action, the Abels sold their property adjacent to the church and purchased a non-adjacent property a few blocks away.

CZC with the Department's Board. On May 14, 2014, the Board denied Petitioner's request for a Final Review, which rendered the Department's staff decision final.

On June 13, 2014, Petitioners filed a Request for Contested Case Hearing with this Court challenging the Department's decision to issue the 2012 permit and CZC. Petitioners did not challenge the Corps permit and CZC (CZC-12-0297). Subsequently, Petitioners also filed a Motion to Enforce the Consent Order and to Consolidate, in which Petitioners sought to enforce the Consent Order and consolidate this case with the 2001 ALC case. Respondents filed a Response in Opposition to Petitioners' Motion to Enforce and to Consolidate, and filed a Motion to Dismiss pursuant to ALC Rule 68 and Rule 12(b)(6) of the South Carolina Rules of Civil Procedure ("SCRCP"). Thereafter, Petitioners filed a Motion for Summary Judgment pursuant to ALC Rule 68 and Rule 56, SCRCP. Respondents then filed a Response in Opposition to Petitioners' Motion for Summary Judgment, to which Petitioners filed a Reply.

DISCUSSION

This Court has jurisdiction to hear this case pursuant to sections 1-23-310 et seq. of the South Carolina Code (Supp. 2014) and section 44-1-60 of the South Carolina Code (Supp. 2014) (providing "[a]n applicant, permittee, licensee, or affected person may file a request with the Administrative Law Court for a contested case hearing" following a final decision by the Department).

Petitioners ask this Court to consolidate this case with the 2001 ALC case and to enforce the Consent Order because the actions authorized under the 2012 permit and CZC violate restrictions in the Consent Order. Specifically, they argue the 2012 permit and CZC violate the Consent Order because they allow the Church to (1) fill part of the remaining wetlands on its property, and (2) diminish the required buffer under the Consent Order. Petitioners also move for summary judgment to find the 2012 permit and CZC are inconsistent with the Consent Order.

Respondents oppose Petitioner's motion to consolidate and enforce the Consent Order, arguing the Consent Order does not apply to the 2012 permit and CZC, and Petitioners do not have standing to enforce the Consent Order. Respondents also oppose Petitioners' motion for summary judgment, arguing Petitioners failed to challenge the correct permit and CZC (the Corps permit and CZC), and also arguing the 2001 Consent Order does not apply to the current construction project and its associated 2012 permit and CZC. Further, Respondents' move this Court to dismiss this action on two grounds. First, Respondents argue Petitioners have failed to

state sufficient facts to constitute a cause of action under Rule 12(b)(6), SCRCP, because the 2001 Consent Order is not applicable to the 2012 Permit and CZC. Second, Respondents argue Petitioners do not have standing because Petitioners no longer own property neighboring the Church to show they receive a benefit from the Consent Order's restrictions.

After reviewing the filings by the parties, the Court denies Petitioners' Motion to Enforce and Consolidate and Motion for Summary Judgment. The Court grants Respondent's Motion to Dismiss.

A. Motion to Consolidate

Petitioners move to consolidate this case with the 2001 case. I deny Petitioners' motion. The 2001 case was dismissed with prejudice, and it is not necessary to reopen the 2001 case to resolve the issues presented in the current case. Whether the Consent Order is enforceable against, and consistent with, the 2012 permit and CZC is not affected by whether the cases are consolidated.

B. Motion to Enforce, Motion to Dismiss, and Motion for Summary Judgment

The Rules of Procedure for the Administrative Law Court provide "[t]he South Carolina Rules of Civil Procedure . . . may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these rules." ALC Rule 68. Rule 12(b)(6), SCRCP, provides a party may move to dismiss an action for "failure to state facts sufficient to constitute a cause of action." "In considering a motion to dismiss under Rule 12(b)(6), a court must base its ruling solely on the allegations set forth in the complaint." Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 74, 753 S.E.2d 846, 850 (2014). "If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, dismissal under Rule 12(b)(6) is improper." Id. at 74-74, 753 S.E.2d at 850.

Petitioners move to enforce the Consent Order to prevent the Church from taking actions authorized by the 2012 permit and CZC that are inconsistent with restrictions in the Consent Order. Petitioners also move this court to grant summary judgment to find the 2012 permit and CZC are inconsistent with the Consent Order. In contrast, Respondents move to dismiss this action on two grounds.[4] First, Respondents argue Petitioners have failed to state sufficient facts

[4] I note that in opposition to Petitioners' Motion for Summary Judgment, Respondents argued Petitioners contested the wrong permit and CZC; however, Respondents did not raise this as ground for dismissal.

to constitute a cause of action under Rule 12(b)(6), SCRCP, because the 2001 Consent Order is inapplicable to the Church's 2012 permit and CZC. Second, Respondents argue Petitioners do not have standing because Petitioners no longer own property neighboring the Church; therefore, Petitioners cannot show they benefit from the restrictions, if any, placed on the property.

First, I will address Petitioners' motion to enforce and Respondents' motion to dismiss. Petitioners' and Respondents' motions overlap because both motions require the interpretation of the temporal applicability of the Consent Order to be resolved, which is a question of law. See Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001) (holding an action to construe a contract is an action at law). If the applicability of the Consent Order is not limited to the 2000 permit and CZC, then it is enforceable against the 2012 permit and CZC, and Petitioners' motion to should be granted. However, if the applicability of the Consent Order is limited to the 2000 permit and CZC, then it is inapplicable to the 2012 permit and CZC, and Respondents' motion to dismiss should be granted.

Initially, I note I agree with Petitioners' contention that the Consent Order is a valid and enforceable contract. See Leventis v. S.C. Dep't of Health & Envtl. Control, 340 S.C. 118, 133, 530 S.E.2d 643, 651 (Ct. App. 2000) (citing section 1-23-320(f) of the South Carolina Code (1986), which provides: "Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default."); Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009) ("In South Carolina jurisprudence, settlement agreements are viewed as contracts."). However, the parties disagree whether the Consent Order is enforceable in the current action. To determine whether the Consent Order is enforceable in the current action, I must determine the temporal scope of the Consent Order, which requires me to construe the contract.

"In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties." Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007). "The parties' intention must, in the first instance, be derived from the language of the contract." Id. Moreover, "[t]he parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof." Id. at 498, 649 S.E.2d at 502. "A contract is read as a whole document so that 'one may not, by pointing out a single sentence or clause, create an ambiguity.'" S. Atl. Fin. Servs., Inc. v. Middleton, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003) (citation omitted). Similarly, "[w]hether

the language of a contract is ambiguous is a question of law for the court" and "must be determined from the entire contract and not from any isolated clause of the agreement." Pee Dee Stores, 381 S.C. at 242, 672 S.E.2d at 803. "A contract is ambiguous when the terms of the contract are reasonably susceptible to more than one interpretation." Id.

In the context of the entire agreement, I find the intention of the parties in executing the Consent Order is clear and unambiguous, and the Consent Order's applicability is limited to the 2001 construction project. Specifically, I find the intent of the parties was to assuage the concerns of neighboring property owners related to the construction activity authorized by the 2000 permit and CZC, and the Consent Order was not intended to apply to distinct, future construction projects. See Ecclesiastes Prod. Ministries, 374 S.C. at 497, 649 S.E.2d at 501 ("The parties' intention must, in the first instance, be derived from the language of the contract."); id. at 498, 649 S.E.2d at 502 ("The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof.").

Although one clause in the Consent Order, clause 3, is arguably ambiguous as to time, Petitioners may not use this one clause to create ambiguity in the entire document. S. Atl. Fin. Servs., Inc., 356 S.C. at 447, 590 S.E.2d at 29 ("A contract is read as a whole document so that 'one may not, by pointing out a single sentence or clause, create an ambiguity.'" (citation omitted)). While one can read clause 3 as implying the wetlands are to be preserved indefinitely, the remaining eight clauses show the temporal applicability of the Consent Order was limited. For example, the opening paragraph of the Consent Order provides:

> "[t]his proceeding arises out of the application of the Pawleys Island Baptist Church . . . for a state storm water permit *for the construction of a new sanctuary and other improvements of its property* . . . . In a related application, the church also requested a wetland fill permit from the U.S. Army Corps of Engineers which required a [CZC] by the [Department]."

(emphasis added). This language indicates the Consent Order was executed to address two *specific applications* (the 2000 Permit and CZC) related to a *specific construction project* to be undertaken by the Church in or around 2001. Next, clause 1 contains a restraint on the development of wetlands, but this is clearly within the context of the construction project: "The *designs for the storm water pond and other improvements at the site* shall be amended so that approximately one-half (50%) of the wetland area on the site shall be preserved." (emphasis added). This language describes specific designs for the Church's 2001 construction project for which the Church requested a specific stormwater permit and CZC. Clauses 2 and 4 similarly

reference specific "improvements" and "designs" associated with the 2001 construction project. Clauses 5, 6, and 7 incorporate restrictions specifically intended to shield neighboring properties from noise and visual obstructions through the use of buffers and setbacks. Finally, in clause 9, the word "amendments" is modified by the word "permit," which refers to the 2000 permit issued to the Church. Therefore, I find this clause is limited to amendments to the 2000 permit that might have become necessary to complete the 2001 construction project, not future projects.

Petitioners submitted the affidavit of one of the Petitioners, Dan Abel, who attests he understood that because the Consent Order contained an absence of "time limitations," the restrictions in the Consent Order would continue in perpetuity. In his affidavit, he claims he primarily entered into the Consent Order to preserve the wetlands indefinitely. Although it may have been Mr. Abel's intent to at the time to have the restrictions last in perpetuity, "[i]nterpretation of a contract is governed by the objective manifestation of the parties' assent at the time the contract was made, rather than the subjective, after-the-fact meaning one party assigns to it." Laser Supply & Servs., Inc., 382 S.C. at 334, 676 S.E.2d at 143-44 (Ct. App. 2009).

Similarly, Petitioners submitted several Department documents showing that during the 2012 permit process, the Department vacillated as to whether the Consent Order prevented the activities authorized by the 2012 permit and CZC. Ultimately, the Department determined the Consent Order did not apply. Like Mr. Abel's affidavit, this evidence has less weight than the intention of the parties as manifested in the document.

Accordingly, in the context of the entire agreement, I find the intention of the parties in executing the Consent Order was clear and unambiguous. In particular, the parties intent was to assuage the concerns of neighboring property owners related to the construction activities authorized by the 2000 permit and CZC, and the Consent Order was not intended to apply to distinct, future construction projects. See Ecclesiastes Prod. Ministries, 374 S.C. at 497, 649 S.E.2d at 501 ("In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties."); id. at 498, 649 S.E.2d at 502 ("The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof."). The 2001 construction project for which the 2000 permit and CZC were issued was completed several years ago – approximately twelve years ago according to Respondents. The current case arises from a new permit and a new CZC application for a separate and distinct construction

project. Because the Consent Order only applies to construction activities undertaken under the 2000 permit and CZC, Petitioners cannot resurrect the Consent Order to challenge the Church's new construction under the 2012 permit and CZC. For all the reasons stated above, I deny Petitioners' Motion to Enforce the Consent Order.

Because I find the Consent Order is inapplicable to the 2012 permit and CZC, and Petitioners did not challenge the permit and CZC on any other grounds, I also find Petitioners have failed to state facts sufficient to constitute a cause of action; accordingly, I grant Respondents' Motion to Dismiss pursuant to Rule 12(b)(6), SCRCP.

Further, I deny Petitioners' Motion for Summary Judgment. Both Petitioners' Motion for Summary Judgment and Respondents' Motion to Dismiss are appropriate to address an issue of law. Here, I have chosen to grant Respondents' Motion to Dismiss, which effectively resolves the questions of law raised in this case. Moreover, Petitioners' motion asked this court to determine that the 2012 permit and CZC were inconsistent with the Consent Order; however, because I find the Consent Order is not enforceable against the 2012 permit and CZC, it is not necessary to determine whether the 2012 permit is consistent or inconsistent with the Consent Order.

Last, Respondents also move to dismiss this action because they claim Petitioners do not have standing to enforce the Consent Order. Specifically, Respondents contend Petitioners cannot enforce the Consent Order because they no longer own property adjacent to the Church. To support their argument, Respondents cite to real property law governing restrictive covenants, which states "the grantor lacks standing to enforce a covenant against a remote grantee when the grantor no longer owns real property which would benefit from the enforcement of that restrictive covenant." McLeod v. Baptise, 315 S.C. 246, 247, 433 S.E.2d 834, 835 (1993). The Consent Order does not constitute a restrictive covenant and, as such, principles of standing under restrictive covenant real property law do not apply in this case. Therefore, I find Respondents' challenge to Petitioners' standing on this ground is not an alternative ground for dismissal.

CONCLUSION

Based on the language of the Consent Order and the intention of the parties as gleaned from the entire document, I find the Consent Order only applies to the Church's 2001 construction project and its associated 2000 permit and CZC. See Ecclesiastes Prod. Ministries,

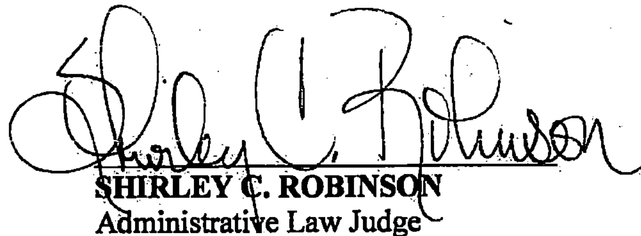
374 S.C. at 497, 649 S.E.2d at 501 ("In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties."); id. at 498, 649 S.E.2d at 502 ("The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof."). Because the Consent Order only applies to construction activities undertaken under the 2000 permit and CZC, I find Petitioners cannot resurrect the Consent Order to enforce it against the Church's new and distinct construction project as authorized by the 2012 permit and CZC. Further, because I find the Consent Order is inapplicable to the 2012 permit and CZC, and Petitioners did not challenge the permit and CZC on any other grounds, I find Petitioners have failed to state facts sufficient to constitute a cause of action. Thus, I grant Respondents' Motion to Dismiss pursuant to Rule 12(b)(6), SCRCP.

ORDER

IT IS HEREBY ORDERED that Petitioners' Motion to Consolidate and Enforce, and Petitioners' Motion for Summary Judgment are **DENIED.**

IT IS FURTHER ORDERED that Respondents' Motion to Dismiss is **GRANTED.**

AND IT IS SO ORDERED.



SHIRLEY C. ROBINSON
Administrative Law Judge

February 12, 2015
Columbia, South Carolina

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).
This 12 day of February 2015
By: [signature]
Judicial Law Clerk

The South Carolina Environmental Law Project

Lawyers for the Wild Side of South Carolina

June 1, 2015

a 501c3
non-profit organization

Amy E. Armstrong
Executive Director
Amelia A. Thompson
Staff Attorney
Jessie A. White
Staff Attorney

OFFICE ADDRESS
430 Highmarket Street
Georgetown, SC 29440

MAILING ADDRESS
P.O. Box 1380
Pawleys Island, SC 29585

(843) 527-0078
Fax (843) 527 0540
E-mail amy@scelp.org
amelia@scelp.org
jessie@scelp.org

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Michael G. Corley, Esq.

V. Claire Allen
Deputy Clerk, Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
JUN 04 2015
SC Court of Appeals

Re: Dan Abel v. SCDHEC
Appellate Case No. 2015-000602

Dear Ms. Allen:

Enclosed please find a copy of the Order Granting Motion to Dismiss and Denying Motion to Consolidate, Motion to Enforce, and Motion for Summary Judgment, which is being challenged in the above-referenced appeal. This transmittal is intended to correct the deficiency identified in your letter dated May 27, 2015.

Thank you very much for your kind cooperation and assistance.

Yours very truly,

Jessie A. White

cc (without encl.): Nathan M. Haber, Esq.
Daniel W. Stacy, Jr., Esq.

S.C. Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585

RECEIVED
JUN 04 2015
SC Court of Appeals

V. Claire Allen
Deputy Clerk, Court of Appeals
P.O. Box 11629
Columbia, SC 29211