THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellant Case No. 2015-000602

Dan Abel and Mary Abel,

Appellants,

vs.

South Carolina Department of Health and Environmental Control and Pawleys Island Community Church,

Respondents.

INITIAL BRIEF OF APPELLANTS

Amy E. Armstrong
Jessie A. White
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Mailing address: Post Office Box 1380
Pawleys Island, SC 29585
Office address: 430 Highmarket Street
Georgetown, SC 29440
Telephone (843) 527-0078
FAX (843) 527-0540

Attorneys for the Appellants

Georgetown, SC

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TABLE OF CONTENTS

Page

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES CITED

Page

CASES:

STATUTES:

REGULATIONS:

STATEMENT OF THE ISSUES

I. **Whether the Administrative Law Judge Erred in Interpretation of the Consent Order by Disregarding its Clear and Unambiguous Language Restricting Land-Disturbing Activity on the Church Property and Protecting Onsite Wetlands and by Imposing a Temporal Limitation on its Force and Effect, Despite the Lack of any such Limiting Language?**

II. **Whether the Administrative Law Judge Erred in Concluding that the Valid and Enforceable Consent Order, Which Requires that the Wetlands on the Church Property Shall Remain Preserved in their Natural State, is Inapplicable to and Unenforceable Against the Land-Disturbing Activity Authorized under the 2014 Permit and Certification, Which Involves Impacts to those Protected Wetlands?**

III. **Whether the Administrative Law Judge Erred in Failing to Enforce the Consent Order, Which Requires that the Wetlands on the Church Property Shall Remain Preserved in their Natural State, as a Final Order of its Own Court Against the Land-Disturbing Activity Authorized under the 2014 Permit and Certification, Which Involves Impacts to those Protected Wetlands?**

STATEMENT OF THE CASE

This matter arises from a request for contested case that was filed in the Administrative Law Court by Dan and Mary Abel[1] ("Abels") pursuant to S.C. Code Ann. §1-23-600(A) and S.C. Code Ann. § 44-1-60 challenging a stormwater permit (SCR10Q459) and coastal zone consistency certification (CZC-12-0149) (collectively the "2014 Permit and Certification") issued by the Department of Health and Environmental Control ("DHEC" or "Department") to the Pawleys Island Community Church ("Church") for land-disturbing activity associated with a redevelopment project on its property. The case was assigned to Administrative Law Judge Shirley C. Robinson and given Docket Number 14-ALC-07-0282-CC.

The Abels challenged the 2014 Permit and Certification as inconsistent with the terms of the Consent Order of Settlement and Dismissal ("Consent Order") issued by Administrative Law Judge C. Dukes Scott on January 8, 2001 to which the Abels, the Department, and the Church are all parties.[2] The 2014 Permit and Certification were issued on April 1, 2014. On April 16, 2014, the Abels filed a request for a Final Review Conference with the DHEC Board, which was declined. On June 13, 2014, the Abels filed their request for a contested case hearing before the Administrative Law Court.

The parties consented to a scheduling order for limited discovery and the filing of dispositive motions, which was issued by Judge Robinson on September 3, 2014. On

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[1] On October 29, 2014, the Administrative Law Court granted William Mashburn's request to withdraw as one of the parties to the contested case.

[2] David F. Mims is also a party to the Consent Order.

November 25, 2014, the Abels filed a Motion to Enforce the Consent Order and to Consolidate the case with the action under Docket Number 14-ALC-07-0282-CC, which gave rise to the Consent Order. On December 12, 2014, the Church and the Department filed a joint Motion to Dismiss. On December 15, 2014, the Abels filed a Motion for Summary Judgment.

On February 4, 2015 a hearing was held on all motions. On February 12, 2015, Judge Robinson issued the Order Granting Motion to Dismiss and Denying Motion to Consolidate, Motion to Enforce, and Motion for Summary Judgment ("Order Granting Dismissal"), from which the Abels now appeal. The Notice of Appeal was filed on March 16, 2015.

STANDARD OF REVIEW

The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C.Code Ann. 1-23-380.

The appellate court "will correct the decision of the ALC if it is affected by an error of law, S.C.Code Ann. § 1–23–380(5)(d) (Supp.2010), and questions of law are reviewed de novo." S.C. Dept. of Revenue v. Blue Moon of Newberry, Inc., 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012), reh'g denied (May 4, 2012) (citing Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)). When the evidence gives rise to but one reasonable inference the question becomes one of law for the courts to decide. Kinsey v. Champion Am. Service Center, 268 S.C. 177, 181, 232 S.E.2d 720, 722 (1977); Sharpe v. Case Produce Co., 329 S.C. 534, 545, 495 S.E.2d 790, 795 (Ct.App.1997) (rev'd on other grounds). Under this standard, a reviewing court may reverse or modify an agency decision based on errors of law. Turner v. S.C. Dept. of Health & Envtl. Control, 377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct.App.2008).

ARGUMENT

Summary of Argument

The 2014 stormwater permit (SCR10Q459) and coastal zone consistency certification (CZC-12-0149) (collectively "2014 Permit and Certification") issued by the Department to the Church authorizing land-disturbing activity are in violation of a Consent Order of Settlement and Dismissal ("Consent Order") filed with the Administrative Law Court (ALC) in 2001. The 2001 Consent Order placed restrictions on land-disturbing activity on the Church property and specifically required that "the wetland preserved by this Consent Order shall remain in its natural state." (R. p. ___). The DHEC authorizations explicitly allows alteration of those wetlands required to be preserved. (R. p. ___).

The ALC acknowledged that the Consent Order is a valid and enforceable document, but failed to apply and enforce it to the proposed land-disturbing activities on the same property, involving the same parties and the same wetlands which were protected under that Order. While the ALC correctly recited principles of contract law, it failed to apply those standards. More particularly, the ALC failed to find the language of the Consent Order clear and unambiguous; it looked to parties' intent absent a finding of ambiguity in the language of the Consent Order itself; it failed to read the Consent Order as whole and instead selectively construed its provisions in favor of a temporal limitation on the agreement; it failed to read clear and unambiguous language of the Consent Order as such; it ignored certain provisions of the Consent Order altogether; and it imparted meaning to the Consent Order that is simply not expressed in the plain language.

The ALC failed to apply basic principles of contract law; failed to apply the plain, unambiguous terms of the Consent Order; and failed to enforce an Order of its own court. Due to the ALC's fundamental misapplication of these basic rules, it incorrectly concluded that the Consent Order was inapplicable to and unenforceable against the 2014 Permit and Certification.

I. FACTUAL OVERVIEW OF THE CASE

Historical Context

Back in 2000, the Church (formerly known as the Pawleys Island Baptist Church), applied for permits in connection with a plan to expand its existing facilities. (R. p. ___). The Church's expansion project included land-disturbing activity that would impact onsite wetlands, specifically the filling and excavation of 0.30 acres of freshwater wetlands. (R. p. ___). Thus, the Church was required to obtain a stormwater permit[3] and associated coastal zone consistency certification[4] from the Department, as well as federal authorization from the Army Corps of Engineers, to carry out the land-disturbing activity.

On October 2, 2000, the Department issued a stormwater permit and coastal zone consistency certification, referenced as Permit #22-00-06-03 (the "2000 Permit and

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3 The Department has state permitting authority under the NPDES Program to require stormwater permit coverage for all land-disturbing activities to ensure proper stormwater management and controls. S.C.Code Ann. 48-14-10, et seq.; S.C.Code Ann.Regs. 72-300, et seq.

4 The Department must certify all state and federal projects in the coastal zone for consistency with the Coastal Management Program (CMP) before such permit can issue. S.C.Code Ann. 48-39-80.

Certification"), to the Church authorizing land-disturbing activity for expansion of its facilities. (R. p. ___). And on October 9, 2000, the Department also certified the portion of the project in connection with the federal authorization to fill the onsite wetlands, referenced as P/N 2000-1D-262-C. (R. p. ___).

The Abels filed a request for a contested case hearing before the ALC seeking review of the 2000 Permit and Certification, which was given Docket Number 00-ALJ-07-0626-CC. The parties had numerous settlement discussions that eventually resulted in the Consent Order. The Abels, Mr. Mims, the Church and the Department are all parties to the Consent Order which was issued by Judge C. Dukes Scott on January 8, 2001. (R. p. ___).

According to the Consent Order: "The parties have met, discussed, negotiated, and resolved their differences, and have reached a settlement which they desire to have incorporated into this order." Consent Order 1. This settlement was "made a part of th[e] final order of the Administrative Law Judge Division" and "FURTHER ORDERED that th[e] matter shall be DISMISSED, with prejudice, **except that the parties shall retain full rights to enforce the agreements stated herein.**" Id. at 3. Therefore, under the terms of the Consent Order, the parties agreed to the dismissal of the challenge in exchange for certain binding concessions with regard to land-disturbing activity on the Church property.

The wetlands on the Church property, which are adjacent to an important salt marsh creek in Pawleys Island, formed a key issue in the Abels' challenge giving rise to the Consent Order.[5] Accordingly, the inclusion of specific protections for the onsite wetlands in the

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See Aff. Dan Abel ¶ 4-7 ("Of primary concern was the Church's proposal to fill in 0.3 acres of jurisdictional wetlands onsite. . . . . Those wetlands were a source of joy to us."));

Consent Order played a significant role in facilitating an agreement between the parties. See Aff. Dan Abel ¶ 7 ("As with many compromises, the decision to fill in the wetlands left us (and the church as well, we suspect) with a bittersweet feeling. We were saddened at the loss of half of the wetlands, but were comforted that the remaining half would continue to exist."). With restrictions on land-disturbing activity and protections for the wetlands secured under the Consent Order, the Abels agreed to dismiss their challenge to the 2000 Permit and Certification. In turn, the Church was able to move forward with its 2000 project as amended by the Consent Order.

The Consent Order set forth the parameters within which land-disturbing activity could occur on the Church property in two ways. First, it amended the permissible land-disturbing activity associated with the 2000 Permit and Certification. See, e.g., Consent Order 3 ("It is further ordered that the DHEC/OCRM permit and certification shall be, and same hereby are, amended in accordance with this agreement and order."). Second, it generally restricted land-disturbing activity on the Church property and protected the onsite wetlands by proscribing any disturbance beyond that authorized. See, e.g., id. at ¶ 3 ("[T]he wetland preserved by this Consent Order shall remain in its natural state.").

In pertinent part, the Consent Order modified the Church's expansion project, including that the construction of "the storm water pond and other improvement at the site shall be amended **so that approximately one-half (50%) of the wetland area on the site**

Id. at ¶ 5 ("[T]he onsite wetlands have a direct surface and hydrological connection to Pawleys Creek, a salt water creek in the Pawleys Island community. Currently Pawleys Island Creek is a eutrophic system owing to polluted groundwater and surface water runoff from the watershed. Wetlands mitigate nutrients and sediment runoff and contribute to biodiversity of the creek and surrounding area.").

shall be preserved." Consent Order 2 ¶ 1 (emphasis added). Further, it established "**[T]he Church agrees that the wetland preserved by this Consent Order shall remain in its natural state.**" Id. at ¶ 3 (emphasis added).

Consistent with the requisite protection of the remaining onsite wetlands, the Consent Order required all agents, employees, contractors, and others undertaking land-disturbing activity on the Church property "to continue to explore additional design changes . . . which will allow **possible additional expansion of the wetland area to be preserved**" and "to employ all available Best Management Practices **to prevent harm to the wetland beyond that authorized** by this agreement and by the permit and certification as hereby amended." Id. at ¶¶ 2, 4 (emphases added). Additionally, the Church was required to maintain a "30' Noise/Visual Buffer" of native vegetation to alleviate some of the impacts associated with the land-disturbing activity on its property, but for the portion of this buffer overlapping with the onsite wetlands it was to allow those areas to "**remain in their natural state.**" Consent Order 2-3 ¶ 5 (emphasis added). And, in the event that unauthorized "**additional harm to the wetland occurs despite best efforts, the church will restore or mitigate any such harm.**" Id. at 2 ¶ 4 (emphasis added).

Accordingly, the Consent Order placed restrictions on land-disturbing activity on the Church property and protections on the remaining onsite wetlands. While it amended specific land-disturbing activity associated with the 2000 Permit and Certification, the language of the Consent Order purposefully extends beyond that project to ensure that the wetlands are protected.

The terms of the Consent Order as a whole are clear, they provide:

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.** The storm water pond shall be altered to be located and configured as depicted in the drawing attached hereto as Exhibit A. The Church shall also amend its plans for the proposed structure shown on Exhibit A as "Proposed Future Building Phase II" so that **no portion of this structure will encroach upon the area of the wetland.**

2. The Church agrees that it will instruct its engineers, architects, contractors and others working on the Church improvement project and storm water management project, to **continue to explore additional design changes**, where feasible from a time and cost perspective, **which will allow possible additional expansion of the wetland area to be preserved.**

3. **The Church agrees that the wetland preserved by this Consent Order shall remain in its natural state.**

4. In constructing the storm water system and church improvements, the Church shall instruct its engineers, architects, contractors and others working on its behalf to employ all available Best Management Practices to **prevent harm to the wetland beyond that authorized by this agreement** and by the permit and certification as hereby amended. **In the event such additional harm to the wetland occurs despite best efforts, the church will restore or mitigate any such harm.**

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.**

Consent Order 2-3 (emphases added).[6]

6

The sixth and seventh clauses address concerns regarding the location of basketball and volleyball fields and the lighting on the Church property. See Consent Order at 3. The eighth clause allows the Church to begin undertaking land-disturbing activity "not inconsistent with this agreement and order" upon its execution. Id. And in the ninth clause, the parties agreed to cooperate in the event any further amendments are needed "to carry out the provisions of this agreement and order." Id.

The Consent Order then concludes:

> IT IS HEREBY ORDERED that the agreements stated hereinabove shall be, and same hereby is, made a **part of this final order of the Administrative Law Judge Division.**
> IT IS FURTHER ORDERED that the DHEC/OCRM permit and certification shall be, and same hereby are, amended in accordance with this agreement or 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.**

Id. at 3 (emphases added).

Yet, in June 2012, the Church applied for permits in connection with a plan for redevelopment of its existing facilities that was inconsistent with the Consent Order. The redevelopment project included land-disturbing activity, thus the Church again sought a stormwater permit and associated coastal zone consistency certification from the Department. (R. p. ___). In particular, the Church proposed the construction of additional buildings and associated infrastructure and the reconfiguration and expansion of the existing stormwater pond on its property. According to the permit application and associated drawings, the reconfiguration and expansion of the stormwater pond will result in alteration or other disturbance to the remaining wetlands on the Church property, which are protected by the Consent Order. See Permit Application (reflecting impacts to 0.17 acres of wetlands); SWPPP, Site and Staging Plan (depicting the re-design for the stormwater pond into the wetlands); Consent Order 2 ¶ 1 (the remaining "one-half (50%) of the wetland area on the site shall be preserved.")

In other words, the Church has sought authorization to impact the remaining half of the onsite wetlands that were explicitly set aside and protected by the Consent Order.

Shortly after initiating review of the Church's redevelopment project, the Department became aware of the Consent Order and determined that there was a conflict between the land-disturbing activity proposed and the terms of that agreement and order. (R. p. ___). In fact, the Department drafted a coastal zone consistency document dated July 31, 2012 stating that it reviewed the Church's redevelopment project and "has determined that the project is **Inconsistent** based upon a Consent Order of Settlement and Dismissal" between the Abels, Mr. Mims, the Department, and the Church filed with the ALC on January 8, 2001. See Coastal Zone Inconsistency Memorandum. In support of its determination of inconsistency, the Department cited to the provisions of the Consent Order requiring "that approximately one-half (50%) of the wetland area on site shall be preserved" and that "[t]he Church agrees that the wetland preserved by this Consent Order shall remain in its natural state." Id.

The Department also notified the Church about the conflict between its redevelopment project and the Consent Order which "indicate[d] that the wetlands remaining on-site shall be preserved." See Email from Department, dated Jul. 31, 2012. Therefore, early on in the permitting process for the Church's redevelopment project, both the Department and the Church were aware of the Consent Order and that the project could not move forward unless either the project or the agreement itself was modified. By letter dated October 31, 2012, the Department informed the Church that its redevelopment project was on hold until further notice and memorialized the nature of the conflict between the project and the Consent Order:

> **The Consent Order, dated January 8, 2001, restricts the property to certain requirements including the preservation of an onsite jurisdictional wetland. The current request proposes to impact the preserved wetland and is contrary to the conditions of the Order.** Any modification or reopening of the Order must be agreed to by the Administrative Law Judge division and all consenting parties. [The Department] has discussed the matter and strongly suggests withdrawal of the current request to consider redesign options that incorporates the conditions of the Order.

Letter from Department, dated Oct. 31, 2012 (emphasis added).

Several months later, the Church communicated to the Department that it was negotiating with its neighbors to reach a revised agreement with "a set of terms which would allow the Church to proceed with the project as proposed in 2012." See Letter from Church, dated Feb. 6, 2013. The Church asked that the Department continue to hold its redevelopment project while it attempted to secure a modified Consent Order "that would supersede the 2001 consent order and set out new conditions which would allow the Church to proceed with the proposed project as depicted by the 2012 plans." Id. Thus, the Church clearly acknowledged its redevelopment project involving impacts to the remaining onsite wetland was inconsistent with the Consent Order and that it could not move forward without modifying the Consent Order.

Recognizing that it needed the consent of the parties to the Consent Order for modification, the Church reached out to one of the parties to the Consent Order and secured their assent. (R. p. ___). However, the Church made no attempt to contact or consult with the Abels. (R. p. ___). On October 10, 2013, it proceeded in submitting a proposed Modified Consent Order of Settlement and Dismissal ("Proposed Modified Order") to the Administrative Law Court notwithstanding the lack of consent from all signatory parties to the original Consent Order. (R. p. ___).

Under the Proposed Modified Order, the Church admitted that it "**desires to modify its site plan and mak[e] further modifications to the Church property not in compliance with the original Order**" and that its redevelopment project cannot move forward until modification is approved by the ALC. Id. at 1, 2. In substance, the Proposed Modified Order sought to tailor the restrictions on land-disturbing activity originally agreed to under the Consent Order to fit with the Church's desired design for the redevelopment of its property, which meant elimination of the protection for the onsite wetlands. See id. at 2 ¶ 1 (replacing depiction of permissible land disturbance on Church property and deleting all other restrictions).

The Proposed Modified Order was not agreed to or signed by all parties to the original Consent Order as the Abels neither consented to nor signed the modified agreement. (R. p. ___). As the Proposed Modified Order eviscerated the protections to the wetlands that formed the basis of the Abels' decision to enter into the Consent Order in the first place, they were not able to consent to the modification. (R. p. ___). By order dated January 7, 2014, the ALC declined to modify the Consent Order and dismissed the Church's request. See Order on Request to Modify a Settlement and Dismissal.

Then, inexplicably, on April 1, 2014, the Department issued the 2014 Permit and Certification to the Church for its redevelopment project authorizing land-disturbing activity that will impact the remaining onsite wetlands. See 2014 Department decision documents. The Department issued the 2014 Permit and Certification despite the fact that it had previously found that land-disturbing activity inconsistent with and contrary to the terms of the Consent Order since it would impact the protected wetlands. (R. p. ___). The

Department also issued the 2014 Permit and Certification despite the fact that it knew the Church was also aware of the conflict between that land-disturbing activity and the Consent Order and that the Church unsuccessfully sought modification of the Consent Order to remove the inconsistency and move forward with its redevelopment project. (R. p. ___).

The Consent Order was never modified and the Church's redevelopment project was never amended. (R. p. ___). Thus, with no apparent basis in fact or law, the Department completely reversed its prior position on the conflict between the Church's redevelopment project and the Consent Order and directly authorized land-disturbing activity on the Church property that will impact the protected wetlands.

Specifically, the 2014 Permit and Certification authorized the construction of additional buildings and associated infrastructure as well as the reconfiguration and expansion of the existing stormwater pond on the Church property, which will result in alteration to the remaining 0.17 acres of onsite wetlands. (R. p. ___). Those remaining onsite wetlands are expressly protected under the Consent Order providing that "**approximately one-half (50%) of the wetland area on the site shall be preserved**" and that "**[t]he Church agrees that the wetland preserved by this Consent Order shall remain in its natural state.**" Consent Order 2, ¶¶ 1, 3 (emphases added).

It is unclear precisely what transpired between 2012-2013 when the Church's redevelopment project was being reviewed – during which time the Department determined that the project was inconsistent with the Consent Order and the Church attempted to have the Consent Order modified – and 2014 when the permits suddenly issued. However, it is clear that at one point, all parties agreed that the Consent Order restricted the ability to

impact onsite wetlands and that the land-disturbing activity associated with the Church's redevelopment project was inconsistent with those terms. Steps taken toward addressing that inconsistency were ultimately unsuccessful, leaving both the original Consent Order and proposed redevelopment project unmodified. And yet, the project was authorized anyway. Following the inability to have the Consent Order modified, the Church gained the Department's complicity in shifting gears and arguing the Consent Order does not apply to the land-disturbing activity authorized under the 2014 Permit and Certification.

The Decision Before the Administrative Law Court

The Abels challenged the 2014 Permit and Certification as authorizing land-disturbing activity on the Church property that is inconsistent with and in violation of the Consent Order. On November 25, 2014, in an effort to be certain the Consent Order was placed squarely before the ALJ, the Abels filed a motion to enforce the Consent Order and to consolidate the original action giving rise to the agreement under Docket Number 00-ALJ-07-0626-CC with the pending challenge. Pursuant to the Scheduling Order issued by Judge Robinson, the parties filed competing dispositive motions on or before December 15, 2015, with the Abels moving for summary judgment and the Church and Department jointly moving to dismiss.

The basis of the Abels' motion for summary judgment was straightforward in light of the following undisputed facts: the Abels, Church, and Department are all parties to the Consent Order issued by the ALC and are all parties to the present case; under the Consent Order, those same parties had agreed to settle a prior challenge to the same type of authorizations for the same type of activity in exchange for certain restrictions on land-

disturbing activity and protections to the wetlands on the Church property; the Consent Order protects the wetlands on the Church property stating "the wetland area on the site shall be preserved" and "shall remain in its natural state"; before the 2014 Permit and Certification issued, all parties admitted and agreed that the Church's redevelopment project was inconsistent with the Consent Order in that it involved impacts to the protected onsite wetlands; the Church was unable to secure modification of the Consent Order; the 2014 Permit and Certification authorize land-disturbing activity on the Church property that will result in impacts to the protected wetlands. Accordingly, all that remained were questions of law for the court: interpretation and enforcement of the Consent Order against the 2014 Permit and Certification authorizing a violation of its terms.

Respondents' motion to dismiss, on the other hand, was rooted in misapplication of legal principles and a selective rendering of the facts relevant to this case – errors which were adopted by the ALJ in her final order. Specifically, the ALC concluded that the Consent Order only restricted the protected wetlands in connection with the 2000 Permit and Certification and had no applicability beyond the 2001 construction activities.[7]

7

Respondents also urged the ALC to adopt principles of property law inapplicable to this case. See Motion to Dismiss (arguing lack of restrictive covenants or language binding future heirs and assigns). Respondents' reliance on property law is misplaced and has no bearing on the real issues in this case which derive from contract law, as the ALC correctly determined.

In addition, Respondents argued the Abels were divested of their rights under the Consent Order upon moving residences and therefore no longer had standing to enforce the agreement. This argument was also correctly dispelled by the ALC.

Failing to secure the consent of all parties, the Respondents have taken the as-of-late position that the Abels lost their rights under the Consent Order because they moved residences since the agreement and order was entered into. While the Abels were neighboring property owners to the Church when the 2001 Consent Order was entered and have since moved a couple miles up the road to a new residence within the same

Indeed, all of the relevant actors were before the ALC – the Church, the Department, and the Abels. The Church still owns the property subject to the terms of the Consent Order and the Abels' retain their status as parties to the Consent Order with rights of enforcement independent of their property ownership. As parties to the Consent Order, the Abels are entitled to hold the other contracting parties to the agreed upon terms. Moreover, the ALJ was charged with enforcement of the Consent Order as a final order of its own court where the parties to that agreement and order were before it.

Following a hearing on all motions on February 4, 2015, Judge Robinson issued the Order Granting Dismissal dated February 12, 2015.

II. THE ALC ERRED BY FUNDAMENTAL MISAPPLICATION OF PRINCIPLES OF CONTRACT LAW IN ITS INTERPRETATION OF THE CONSENT ORDER

The ALC was tasked with interpretation of a clear contractual agreement, which was made a final court order–that is, the Consent Order. The Consent Order arose from a prior challenge to the same type of authorizations, for the same type of activity, on the same property, involving the same wetlands and the same interested parties as the present action.

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community, the Abels' interests in this matter and rights under the Consent Order are not and have never been contingent upon their property ownership. Rather, the Abels maintain many of the same concerns regarding land-disturbing activity on the Church property as led to the challenge in the first instance and which were deliberately included as terms of the Consent Order – namely, concern for the water quality of the Pawleys Creek tributary system adjacent to the Church from stormwater runoff and other discharges associated with land disturbance on the Church property. See Aff. Dan Abel.

Simply because the Abels' residence changed does not affect their rights as parties to the Consent Order, which includes consenting or objecting to any changes to that agreement.

Under the terms of the Consent Order, the parties agreed to settle that challenge in exchange for certain binding restrictions on land-disturbing activity on the Church property and protection of the onsite wetlands. The Abels now challenge the 2014 Permit and Certification authorizing land-disturbing activity on the Church property that will impact protected wetlands in violation of the Consent Order.

The Consent Order clearly and unambiguously restricts land-disturbing activity on the Church property and protects the remaining onsite wetlands in their natural state. The ALC correctly recognized that the matter before the court involved the interpretation of the Consent Order according to principles of contract.[8] However, it erred as a matter of law in crafting its own standard for interpretation, framing its analysis of the Consent Order in the context of "temporal applicability" and narrowly constricting its terms in contradiction of the plain language. See Order Granting Dismissal 6.[9] Despite citing to applicable legal

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8

Under South Carolina law, whether a contract is ambiguous, and the interpretation of an unambiguous contract, are questions of law for the court. E.g., S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 550 S.E.2d 299, 302–03 (2001). If the court determines a contract is ambiguous, then the determination of the parties' intent is a question of fact. Id. If, however, the court determines a contract is unambiguous, "the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 81, 749 S.E.2d 139, 146 (Ct.App.2013); see Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 46, 747 S.E.2d 178, 184 (2013); Ecclesiastes Prod. Ministries v. Outparcel Assocs., 374 S.C. 483, 497–98, 649 S.E.2d 494, 501–02 (Ct.App.2007).

9

According to the ALC's understanding, it needed to either: grant Appellants' motion to enforce if it determined the Consent Order *was not* limited to the 2000 Permit and Certification; or grant Respondents' motion to dismiss if it determined the Consent Order *was* limited to the 2000 Permit and Certification. Id. This created an erroneous juxtaposition that shaped the ALC's misapplication of the law and its incorrect conclusions that followed.

standards, the ALC utterly failed in its application of these standards to the case at hand. Instead of looking at whether there is ambiguity in the language of the Consent Order, the ALC discarded the language in the Consent Order that evidences the intent and created a time limit on the wetland restrictions where none exists. As a result, the ALC improperly granted dismissal and erroneously concluded that the Consent Order was inapplicable to and unenforceable against the land-disturbing activity authorized by the 2014 Permit and Certification. See Id. at 10.

A. The Consent Order clearly and unambiguously restricts land-disturbing activity on the Church property and protects the remaining onsite wetlands

The Abels, the Church, and the Department have all agreed on the existence of a conflict between the Consent Order and the proposed redevelopment project. (R. p.). The Department initially recognized the clear prohibition on wetland impacts and urged the Church to re-design its project in order to avoid impacts to the protected wetlands. (R. p.). The Church attempted to have the Consent Order modified by the ALC to remove the conflict and move forward with its project. (R. p.). Unable to secure such modification, the Church gained the Department's compliance in changing course and adopting the position that the Consent Order was inapplicable to the 2014 redevelopment project. This new position undermines basic principles of contract law and public policy, for parties are not entitled to simply change their minds after-the-fact or pick and choose the force and effect of an agreement they entered into, but rather must be held to the plain language upon which

they agreed.[10] The language of the Consent Order is clear and unambiguous and must be read and enforced as such.

The ALC should have made an initial determination on whether the Consent Order was ambiguous or unambiguous.[11] Yet the ALC never made a definitive finding on whether the Consent Order itself was ambiguous or unambiguous. Instead, the ALC looked at whether the *intent of the parties* was ambiguous, finding that intention "clear and unambiguous;" however, that is not the correct standard. See Order Granting Dismissal 7, 8.

Only if the ALC determined that the Consent Order was ambiguous should it have looked beyond the language of the agreement itself to ascertain the parties' intent.[12] Without finding that the language of the Consent Order was ambiguous, the ALC jumped to a consideration of the parties' intent. It is apparent from the ALC's finding regarding "the intention of the parties *in executing the Consent Order*" that its analysis looked beyond the

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See Hensley v. Alcon Labs., Inc., 277 F.3d 535, 540 (4th Cir. 2002) ("Having second thoughts about the results of a valid settlement agreement does not justify setting aside an otherwise valid agreement").

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See, e.g., M & M Grp., Inc. v. Holmes, 379 S.C. 468, 476, 666 S.E.2d 262, 266 (Ct.App.2008) ("To discover the intention of a contract, the court must first look to its language—if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect."); Nicholson v. Nicholson, 378 S.C. 523, 533, 663 S.E.2d 74, 79 (Ct.App.2008) ("Whether an ambiguity exists in an agreement must be ascertained from the language of the instrument.").

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See, e.g., N. Am. Rescue Products, Inc. v. Richardson, 411 S.C. 371, 379, 769 S.E.2d 237, 241 (2015), reh'g denied (Mar. 19, 2015) ("Only if a document itself creates a contractual ambiguity should a court look to outside evidence to aid in interpretation."); Wallace v. Day, 390 S.C. 69, 75, 700 S.E.2d 446, 449 (Ct.App.2010).

agreement's express language. See Order Granting Dismissal 7, 8 (emphasis added). This was improper and indeed the ALC erroneously considered extrinsic evidence absent a finding of ambiguity in the Consent Order. See, e.g., Order Granting Dismissal 8 (discussing the affidavit of Appellant Dan Abel and extrinsic documents showing the Department previously found the land-disturbing activity associated with the 2014 Permit and Certification inconsistent with the Consent Order). Given its finding–albeit flawed–that the parties' intent surrounding the execution of the Consent Order was clear and unambiguous the ALC should have confined its interpretation to the contents of the agreement itself.[13]

Clause 3 of the Consent Order[14]

In its entirety, Clause 3 states:

> **The Church agrees that the wetland preserved by this Consent Order shall remain in its natural state.**

Consent Order 2 ¶ 3 (emphasis added).

This language is clear, unambiguous, and unconditional. It solidifies the preservation requirement for the wetlands on the Church property, as well as elucidates what that protection must entail. The phrase "the wetland preserved by this Consent Order" reiterates

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See, e.g., S.C. Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct.App.2008) ("When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense."); see also Laser Supply & Servs., Inc. v. Orchard Park Assocs., 382 S.C. 326, 334, 676 S.E.2d 139, 144 (Ct.App.2009) ("A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.").

14

Due to the ALC's particularly egregious errors with regard to this provision, Appellants discuss it first.

that the agreement does in fact require protection of wetlands on the Church property. Id. Clause 3 also defines the requisite preservation to mean the wetlands must be kept in their natural state. Id. ("[T]he wetland preserved by this Consent Order *shall remain in its natural state.*") (emphasis added). Absent from the Consent Order is any restrictive language limiting its scope or effect as found by the ALC. See Order Granting Dismissal 7-8.

The phrase "shall remain" is prospective, and prevails indefinitely into the future unless further modified. See Lyon v. Campbell, 217 F.3d 839 (4th Cir. 2000) (interpreting "shall remain" as prospective and permanent as to the object the phrase modified in contract); Plaza Dev. Servs. v. Joe Harden Builder, Inc., 294 S.C. 430, 433-34, 365 S.E.2d 231, 232-33 (Ct.App.1988) (same). Thus, the wetland shall remain in its natural state, means that the wetland must continue to be in its natural state forever. The law is clear that this is the proper use of the phrase "shall remain," and, further, that "shall remain" is an unambiguous phrase. Stanaland v. Jamison, 275 S.C. 50, 53, 268 S.E.2d 578, 580 (1980) (holding that contract with "shall remain" language was clear and unambiguous, thus it was error for the lower court to consider parol evidence).

Yet the ALC erroneously read ambiguity into the clear and unambiguous language of Clause 3 when it found it could be interpreted in more than one way. See Order Granting Dismissal 7 ("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."). Furthermore, the ALC improperly characterized the Appellants as seeking to create ambiguity in the Consent Order through Clause 3. Id. ("Although one clause in the Consent Order, clause 3, is arguably ambiguous as to time, [Appellants] may

not use this one clause to create ambiguity in the entire document."). In fact, Appellants have consistently maintained the Consent Order and its terms are plainly *unambiguous*. (R. p.). Appellants have never asserted that any ambiguity exists and Clause 3 can be read in harmony with the entirety of the Consent Order requiring that the onsite wetlands remain preserved in their natural state indefinitely.

Indeed, a court must interpret a contract by reference to the contents of the document as a whole rather than any particular provision thereof.[15] Though the ALC cited to this rule, see Order Granting Dismissal 7, it completely failed in its execution. In fact, the ALC had to disregard Clause 3 altogether in order to arrive at the conclusion that the Consent Order was inapplicable to land-disturbing activity on the Church property impacting the very wetlands required to be protected thereunder. It is simply not possible to reach this conclusion without removing Clause 3 from the analysis. Had the ALC properly read Clause 3 together with the contents of the Consent Order as a whole, the conclusion it should have reached is obvious – the agreement unambiguously requires preservation of the wetlands remaining on the Church property in their natural state, without any temporal limitation.

If the wetlands on the Church property were not required to be preserved in perpetuity under the Consent Order, then the language specifically amending the land-disturbing activity authorized under the 2000 Permit and Certification would have been sufficient. See, e.g., Consent Order 2, ¶ 1 ("The designs for the storm water pond and other improvements at the

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Ecclesiastes Prod. Ministries, 374 S.C. at 489, 649 S.E.2d at 502; see also Gaffney v. Gaffney, 401 S.C. 216, 222, 736 S.E.2d 683, 687 (Ct.App.2012) ("[T]he court must examine the entire contract and not merely whether certain phrases taken in isolation could be interpreted in more than one way.").

site shall be amended so that approximately one-half (50%) of the wetland area on the site shall be preserved."). However, the Consent Order goes a step further and includes a separately enumerated, independently enforceable provision reiterating the protection of the wetlands on the Church property. Id. at ¶ 3 ("[T]he wetland preserved by this Consent Order shall remain in its natural state."). Indeed, the very inclusion of Clause 3 obviates any doubt that preservation of the remaining wetlands was intended to be anything other than absolute. See, e.g., N. Am. Rescue Products, 411 S.C. at 378, 769 S.E.2d at 240 ("The best evidence of the parties' intent is the contract's plain language.").

Certainly the Abels' interests in and concerns for protection of the wetlands are not tied to the Church's 2000 expansion project, nor do those interests and concerns dissipate with the passage of time. It would have been illogical and pointless to settle a case where the protections sought and agreed upon would vanish upon completion of the Church's 2000 expansion project, especially absent language to that effect. Rather, the protections for the wetlands must be perpetual if they are to have any real meaning.

Thus, it was reasonable to expect in entering into an agreement stating "the wetland preserved by this Consent Order shall remain in its natural state" that such protection would persist indefinitely. In order for the terms agreed upon as the Consent Order to be meaningful they must necessarily be read as a permanent protection for the wetlands. It renders the agreement futile to interpret that language as intending the protection for the wetlands to evaporate upon completion of the Church's 2000 expansion project (or at any time at all) given the lack of any language to that effect, yet that is precisely what the ALC has done. See, e.g., Stevens Aviation, Inc. v. DynCorp Int'l LLC, 407 S.C. 407, 417, 756

S.E.2d 148, 153 (2014), reh'g denied (June 25, 2014) ("[A]"n interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous.")

The ALC completely disregarded Clause 3 and selectively treated other portions of the Consent Order as better evidencing the parties' intent. For instance, the ALC expanded the significance of the general background to the Consent Order, reading into it a limitation on the agreement's applicability as a whole while ignoring the actual terms the parties agreed to moving forward. See Order Granting Dismissal 7. As with many orders or agreements of its type, the Consent Order begins with a brief summary of the facts giving rise to the matter before the court. See Consent Order 1. This background serves to describe the origins of the dispute between the parties and place the agreed upon resolution that follows into context. It was improper for the ALC to read meaning beyond that.[16] Thus, it was improper for the ALC to determine the reference to the 2000 Permit and Certification as giving rise to the Consent Order meant that the agreement was limited in applicability to that specific project, notwithstanding the clear language to the contrary that followed. Id.

There was no basis for the ALC to ignore Clause 3 in its interpretation of the Consent Order. The parties freely bound themselves to the Consent Order, and its precise terms. The ALC erred as a matter of law and public policy by narrowly construing the Consent Order in favor of a limitation on the agreement's force and effect notwithstanding the plain

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See Wallace v. Day, 390 S.C. at 74, 700 S.E.2d at 449 ("The court is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed.").

language evidencing the parties intended otherwise.[17] If the parties intended "shall remain" to be of limited duration in the Consent Order, they could have added such language to the agreement by stating that the wetland shall remain in its natural state *until* or *unless* the Church seeks to undertake further land-disturbing activities.[18] Or, the parties could have left out Clause 3 altogether. See also Progressive Max Ins., 405 S.C. at 46, 747 S.E.2d at 184 ("Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions."); Laser Supply, 382 S.C. at 334, 676 S.E.2d at 143-44 ("Interpretation 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.").

As written, Clause 3 is an explicit and unambiguous provision evidencing the parties' intended agreement and final order of the court that the wetlands on the Church property remain perpetually protected in their natural state and the ALC erred in failing to interpret and enforce it accordingly.

Clause 1 of the Consent Order

The first enumerated clause of the Consent Order begins by providing: "The designs for the storm water pond and other improvements at the site shall be amended so that

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E.g., M & T Enterprises of Mt. Pleasant, 379 S.C. at 657, 667 S.E.2d at 13-14 ("Courts must construe and enforce contracts as written, in order to preserve the fundamental right of freedom of contract; in general, parties may bind themselves as they see fit by contract, unless the contract would violate the law or is contrary to public policy.").

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See, e.g., In re Connector 2000 Ass'n, Inc., 447 B.R. 752, 772-73 (Bankr. D.S.C. 2011) (contracting for consensual terms that "shall remain in effect *until* the Final Decree") (emphasis added).

approximately one-half (50%) of the wetland area on the site shall be preserved." Consent Order 2 ¶ 1. Further, Clause 1 states "[t]he storm water pond shall be altered to be located and configured as depicted in the drawing attached hereto as Exhibit A." Id. Lastly, it requires the Church to amend its plan for a proposed structure on the property "so that no portion of this structure will encroach upon the area of the wetland." Id.

Clause 1 clearly and unambiguously establishes protection for the remaining onsite wetlands. While it does require certain amendments to the 2000 Permit and Certification for land-disturbing activity on the Church property, it explicitly requires such modifications be made "*so that* approximately one-half (50%) of the wetland area on the site shall be preserved" and "*so that* no portion of [the proposed] structure will encroach upon the area of the wetland." Id. (emphases added). The language is further clarified by reference to a depiction of the Church property showing the permissible design for the stormwater pond and the adjacent wetlands that must remain preserved. Id.

Certainly the protection of the wetlands was intended to endure beyond the land-disturbing activity associated with the 2000 Permit and Certification. To read this language as ineffective outside the context of the 2000 Permit and Certification renders it meaningless and conflicts with rules of contract interpretation. See Laser Supply, 382 S.C. at 334, 676 S.E.2d at 144; Stevens Aviation, 407 S.C. at 417, 756 S.E.2d at 153. Clause 1 expressly requires that the onsite wetlands adjacent to the stormwater pond remain preserved and free from encroachment without qualification. In order to arrive at a different conclusion, the ALC necessarily erred as a matter of law and read into the language some ambiguity or

meaning that is not there.[19] Any disturbance to the remaining wetlands adjacent to the stormwater pond on the Church property is inconsistent with the Consent Order, and it was error for the ALC to find otherwise. See Order Granting Dismissal 7.

Clauses 5, 6, and 7 of the Consent Order

The ALC improperly elevated the import of Clauses 5, 6 and 7 in order to arrive at its erroneous conclusion that the Consent Order was temporally limited. See Order Granting Dismissal 7, 8 ("[T]he 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."). The ALC's conclusion is based presumably on its determination that Clauses 5, 6, and 7 "incorporate[d] restrictions specifically intended to shield neighboring properties from noise and visual obstructions through the use of buffers and setbacks." See Order Granting Dismissal 8. The language of Clauses 5, 6, and 7 simply does not support the ALC's narrow interpretation of the Consent Order. The provisions do address some particular concerns raised by neighboring property owners. See, e.g., Consent Order 4 ¶ 7 ("All lighting on the church property will be placed so that it is shielded or directed away from the properties adjacent to the '30' Noise/Visual Buffer,' shown on Exhibit A"). But simply because the Consent Order contained provisions in addition to the preservation of the onsite wetlands is no reason to discount the clear wetlands preservation language in Clause 3.

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See, e.g., Park Regency, LLC v. R & D Dev. of the Carolinas, LLC, 402 S.C. 401, 412, 741 S.E.2d 528, 534 (Ct.App.2012) ("A meaning cannot be given to a contract other than that expressed; hence words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed."); Wallace v. Day, 390 S.C. at 74, 700 S.E.2d at 449.

In fact, other provisions contain explicit reference to the preservation requirement for the wetlands on the Church property. See Consent Order 2-3 ¶ 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 . . . 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.*") (emphases added).

Looking at Clauses 5, 6, and 7 in the context of the Consent Order as a whole, the weight the ALC assigned to them is clearly misplaced. The agreement unambiguously restricts land-disturbing activity on the Church property and protects the remaining onsite wetlands without limitation. To find the parties intended otherwise, the ALC necessarily misapplied basic principles of contract law.[20] See Park Regency, 402 S.C. at 412, 741 S.E.2d at 534.

Clauses 2 and 4 of the Consent Order

Neither Clause 2 nor Clause 4 contain language suggesting an intent that their terms apply exclusively to the land-disturbing activity authorized under the 2000 Permit and Certification. Rather they describe a *continuing* obligation to incorporate protection of the wetland area into the undertaking of land-disturbing activities on the Church property. See Consent Order 2 ¶ 2 (requiring those undertaking land-disturbing activities "to continue to explore additional design changes . . . which will allow possible additional expansion of the

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Likewise, the ALC constrained Clause 9 to fit its narrow interpretation of the Consent Order. See Order Granting Dismissal 8. Clause 9 merely provides that the parties will cooperate as "needed to secure any required permit amendments to carry out the provisions of this agreement and order" without direct reference to the 2000 Permit and Certification or associated land-disturbing activity. Consent Order 3 ¶ 9.

wetland area to be preserved."); ¶ 4 (requiring those undertaking land-disturbing activities "to employ all available Best Management Practices to prevent harm to the wetland beyond that authorized by this agreement and by the permit and certification as hereby amended."). Moreover, Clause 4 states: "In the event such additional harm to the wetland occurs despite best efforts, the church will restore or mitigate any such harm." Id. at ¶ 4.

This language clearly envisions the protection of the remaining onsite wetlands persisting into the future. Indeed, it imposes an affirmative duty on the Church to preserve the wetlands on its property and to restore or mitigate for any disturbance to those wetlands beyond what is authorized. Yet the ALC narrowly construed these provisions to find the Consent Order applied only to the land-disturbing activity associated with the 2000 Permit and Certification,[21] and this was improper. See Stevens Aviation, 407 S.C. at 417, 756 S.E.2d at 153.

Looking to Clauses 2 and 4 and the Consent Order as a whole, the agreement clearly and unambiguously restricts land-disturbing activity on the Church property and protects the remaining onsite wetlands. The ALC erred as a matter of law by constraining and repurposing the language of the agreement in favor of temporal limitation despite the terms' plain and ordinary meaning to the contrary. See Laser Supply, 382 S.C. at 334, 676 S.E.2d at 144.

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See Order Granting Dismissal 7-8 ("Clauses 2 and 4 similarly reference specific 'improvements' and 'designs' associated with the 2001 construction project."). Notably, this was the extent of the ALC's treatment of Clauses 2 and 4 in its interpretation of the Consent Order.

B. There is no legal basis for the ALC's "temporal scope" standard in interpreting the Consent Order

The language of the Consent Order is clear, unambiguous, and devoid of temporal limitation, therefore the ALC's interpretation should have been governed by the plain language of the agreement.[22] However, in interpreting the Consent Order, the ALC narrowly construed the agreement in favor of a limitation on its terms' duration or effect, as advocated as-of-late by Respondents. See Order Granting Dismissal 6. This was error.[23]

It is well-established that a court's primary function when interpreting an agreement is to determine and effectuate the agreement as intended by the parties, which requires the court to first look to the language of the agreement itself to determine if there is any ambiguity.[24] The ALC recognized its role in determining and giving effect to the agreement

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E.g., ERIE Ins. Co. v. Winter Const. Co., 393 S.C. 455, 461, 713 S.E.2d 318, 321 (Ct.App.2011) ("When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect and the court must construe it according to its plain, ordinary, and popular meaning; in addition, where an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it.").

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See Laser Supply, 382 S.C. at 334, 676 S.E.2d at 143-44 ("Interpretation 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."); see also Hensley, 277 F.3d at 540 ("Having second thoughts about the results of a valid settlement agreement does not justify setting aside an otherwise valid agreement").

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E.g., Watson v. Underwood, 407 S.C. 443, 454-55, 756 S.E.2d 155, 161 (Ct.App.2014) ("The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language of the contract."); Park Regency, 402 S.C. at 412, 741 S.E.2d at 534 ("A court reviewing a written contract must discern the intention of the parties and the meaning, which are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the

as intended, see Order Granting Dismissal 6 (citing Ecclesiastes Prod. Ministries, 374 S.C. at 497, 649 S.E.2d at 501); however, it erred in its execution. Instead, the ALC's use of a "temporal scope" standard improperly constrained its analysis of the Consent Order to the parties' intent *surrounding execution* of the agreement absent a finding of ambiguity in the language of the document itself. See Order Granting Dismissal 6-9.

The ALC erred in its primary objective in interpretation of the Consent Order by deviating from established principles of contract law and creating its own "temporal scope" standard despite the absence of any language evidencing an intent for the protection of wetlands as anything other than permanent. The ALC acknowledged that Clause 1 restricted land-disturbing activity, but erroneously construed the language to be limited in force and effect to the activity associated with the 2000 Permit and Certification. See Order Granting Dismissal 7 ("[C]lause 1 contains a restraint on the development of wetlands, but this is clearly within the context of the construction project"). There is nothing in the plain language of Clause 1 or the Consent Order as a whole to suggest that "the wetlands area on the site shall be preserved" was intended to be limited in duration or effect. The 2000 construction project gave rise to the Consent Order, but there is simply no basis to read that as a limitation. As a result, the ALC's analysis and subsequent conclusions regarding the Consent Order are erroneous.

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four corners of the instrument, and when such contract is clear and unequivocal, its meaning must be determined by its contents alone.").

C. The Consent Order is enforceable against the land-disturbing activity authorized by the 2014 Permit and Certification

The Consent Order is a valid and enforceable contract.[25] The ALC correctly found the Consent Order is a valid and enforceable contract. See Order Granting Dismissal 6. Where the ALC erred, however, was in determining that the Consent Order was inapplicable to and unenforceable against the land-disturbing activity authorized under the 2014 Permit and Certification. See id. at 9-10. There is no basis for the ALC to conclude that the Consent Order is a valid and enforceable contract but that it is inapplicable and unenforceable against the same type of authorizations, for the same type of activity, on the same property, involving the same wetlands, and the same interested parties as the Consent Order.[26]

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Under South Carolina law, a settlement agreement is viewed as a contract and the enforcement of its terms is governed by general principals of contract law. Byrd v. Livingston, 398 S.C. 237, 241, 727 S.E.2d 620, 621-22 (Ct.App.2012); Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241-42 672 S.E.2d 799, 802-03 (Ct.App.2009). Accordingly, a valid settlement agreement entered into by the parties is enforceable as a matter of law.

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The following is shared in common by the 2000 and 2014 Permits and Certifications: both consist of a stormwater permit and coastal zone consistency determination issued by the Department to the Church for land-disturbing activity; both authorized land-disturbing activity on the Church property in connection with construction and improvements to the site; and both authorized land-disturbance related to a stormwater detention pond. More particularly, the 2000 Permit and Certification authorized construction of the now-existing stormwater pond on the Church property, which is the same stormwater pond that was amended by the Consent Order *so that* approximately half of the adjacent wetlands would remain preserved, and the same stormwater pond that was authorized for reconfiguration and expansion under the 2014 Permit and Certification. The reconstruction and expansion of the stormwater pond necessarily will result in impacts to the adjacent onsite wetlands, which were required to remain preserved in their natural state, in violation of the terms of the Consent Order.

The language used throughout the Consent Order is purposeful and direct. Its express commands that the stormwater pond *shall* be constructed in a particular way *so that* the adjacent wetlands *shall be preserved* and that the protected wetlands *shall remain* in their natural state evidence a clear and unambiguous intent to incorporate robust protections in connection with land-disturbing activity on the Church property. See Consent Order 2 ¶¶ 1, 3.[27] However, the land-disturbing activity authorized by the 2014 Permit and Certification includes reconstructing and expanding the existing stormwater pond and the proposed design involves disturbance to the very wetlands sought to be protected via the Consent Order. (R. p.).

Under its plain terms, any disturbance to the natural state of the wetlands on the Church property is inconsistent with the Consent Order. If its terms were not intended to be mandatory and unconditional, then the parties would have used language to that effect, imparting some discretion moving forward. See, e.g., Kennedy v. S.C. Ret. Sys., 345 S.C. 339, 352-53, 549 S.E.2d 243, 250 (2001) ("The use of the word 'may' signifies permission and generally means that the action spoken of is optional or discretionary unless it appears to require that it be given any other meaning"); contra Plaza Dev. Servs., 294 S.C. at 433-34, 365 S.E.2d at 232-33. In fact, there is nothing within the four corners of the Consent Order limiting the duration or effect of the obligations agreed to therein. The language is perfectly

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See also id. at ¶ 4 (those undertaking land-disturbing activity on the Church property "to employ all available Best Management Practices *to prevent harm to the wetland beyond that authorized* by this agreement and by the permit and certification as hereby amended.") (emphasis added); ¶ 5 (the Church "*shall* maintain" a buffer zone consisting of certain vegetation and density except that the part of the buffer within the wetland areas "*will remain* in their natural state.") (emphases added).

clear and unambiguous in restricting land-disturbing activity on the Church property and protecting the remaining onsite wetlands in their natural state.

The land-disturbing activity authorized under the 2014 Permit and Certification includes expanding and reconfiguring the stormwater pond on the Church property. (R. p.). The proposed expansion and reconfiguration of the stormwater pond will result in disturbance to the protected wetlands on the Church property. (R. p.). Therefore, the 2014 Permit and Certification authorized land-disturbing activity on the Church property that will result in impacts to the protected wetlands in violation of the Consent Order.

It contradicts the most basic principles of contract interpretation to conclude the requirement that the wetlands on the Church property *shall remain preserved* in their natural state is unenforceable against activity that will result in disturbance to the natural state of those wetlands. Yet that is precisely what the ALC concluded. See Order Granting Dismissal 9-10. The ALC erred as a matter of law by engaging in improper construction of the Consent Order.[28]

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See M & T Enterprises of Mt. Pleasant, 379 S.C. at 655, 667 S.E.2d at 13 ("Courts are without authority to alter an unambiguous contract by construction or to make new contracts for the parties."); see also Topiwala v. Wessell, 509 F. App'x 184, 187 (4th Cir.) cert. denied, 134 S. Ct. 701, 187 L. Ed. 2d 552 (2013) (upholding an order granting a motion to enforce a settlement agreement where the parties were bound by the agreement and its terms were unambiguous).

III. THE ALC ERRED IN ITS DUTY TO ENFORCE THE CONSENT ORDER AS A FINAL ORDER OF THE COURT

A consent order is a "binding and conclusive" contract between the parties, signed by all parties and a judge. Jones & Parker v. Webb, 8 S.C. 202, 206 (1876). It is enforceable by any party to the contract.[29] A consent order cannot be altered or amended without the consent of all parties, and the authorization of the court. See, e.g., Outlaw v. Barnes, 118 S.C. 189, 110 S.E. 124, 125 (1921) (setting aside a court order which amended a consent order without the consent of the parties). Moreover, a settlement agreement is enforceable by virtue of being adopted as a final order of the court. Motley v. Williams, 374 S.C. 107, 110, 647 S.E.2d 244, 246 (Ct.App.2007) ("To be enforceable, settlement agreements must either be entered into the court's record or acknowledged in open court and placed upon the record").

A final agreement was definitively reached between the Abels, Mr. Mims, the Department and the Church and adopted as the Consent Order. See Consent Order 1 ("The parties have met, discussed, negotiated, and resolved their differences, and have reached a settlement which they desire to have incorporated into this order."). The Consent Order sets forth in clear and unambiguous terms restrictions on land-disturbing activity on the Church property and protections for the remaining onsite wetlands. See id. at 2 - 3. The ALC reviewed, accepted, and made the terms agreed to as the Consent Order part of its final order. See id. at 3. Each of the parties and the ALC signed the Consent Order and it was entered

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See Monster Daddy, LLC v. Monster Cable Prods., Inc., 483 F. App'x 831, 834 (4th Cir. 2012) (treating a consent order like a contract, subject to South Carolina contract law).

as part of the court's record. See id. at 4. Therefore, the Consent Order is a final, binding, and conclusive settlement agreement and court order that is enforceable as a matter of law.

The ALC retained jurisdiction over the Consent Order, including enforcement of its terms, by virtue of having been issued as a final order of that court. See State v. Bevilacqua, 316 S.C. 122, 128, 447 S.E.2d 213, 216 (Ct.App.1994) ("Courts have no more important function to perform in the administration of justice than to ensure their orders are obeyed."); see also Kumar v. Third Generation, Inc., 324 S.C. 284, 289-90, 485 S.E.2d 626, 629 (Ct.App.1995) ("A trial court has inherent jurisdiction to enforce settlement agreements entered before it."). The ALC referenced the fact that the Consent Order dismissed the challenge to the 2000 Permit and Certification with prejudice presumably in support of its decision to deny consolidation. See Order Granting Dismissal 5. However, the ALC's interpretation ignores the explicit language vesting the parties with the right to enforce the terms of the Consent Order. See Consent Order 3 ("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.**") (emphasis added).

Certainly the parties to a valid settlement agreement and court order must be able to rely on the court to ensure that its orders are obeyed by holding all parties to its terms and taking enforcement measures where necessary. Not only is the integrity of the judicial system in providing meaningful relief jeopardized by a court's failure to uphold the terms of its own orders, but also the incentive for consensual resolution of disputes is eliminated when parties are not assured that their agreement will be backed by the force and effect of the law in the future.

As parties to the Consent Order, the Appellants hold enforcement rights and sought consolidation in order to ensure the agreement and order was squarely before the ALC in ruling on the consistency of the land-disturbing activity authorized by the 2014 Permit and Certification with its terms. The ALC erred in denying the request of a party with enforcement rights under the Consent Order to consolidate the original action giving rise to that order and agreement with an integrally related pending action. See Order Granting Dismissal 5. The ALC further erred in failing to invoke its jurisdiction to review an alleged violation of a final order of its own court.

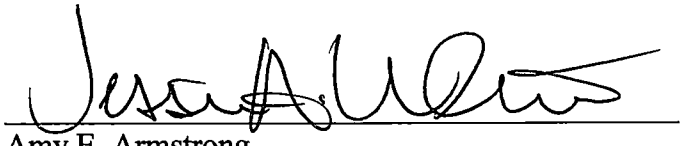
The Consent Order is a valid, binding, and enforceable settlement agreement and court order. Its language clearly and unambiguously restricts land-disturbing activity on the Church property and protects the onsite wetlands from any disturbance to their natural state. The ALC erroneously concluded the Consent Order was inapplicable to and unenforceable against the land-disturbing activity authorized under the 2014 Permit and Certification, which will result in disturbance to the natural state of the wetlands on the Church property.

CONCLUSION

The language of the Consent Order is clear and unambiguous – it restricts land-disturbing activity on the Church property and protects the remaining onsite wetlands from disturbance to their natural state – thus, it's terms must be given their plain, ordinary meaning and govern as the parties' intended agreement. Yet rather than interpret the plain and ordinary meaning of the Consent Order, the ALC misapplied fundamental principles of contract law, erroneously construed the agreement, failed to effectuate the intent of the parties, and failed to enforce an order of its own court. The ALC incorrectly granted dismissal and concluded that the Consent Order was inapplicable to and unenforceable against the land-disturbing activity authorized under the 2014 Permit and Certification, which will impact the remaining wetlands on the Church property in direct violation of the agreement and order.

For the foregoing errors of law, the Order Granting Motion to Dismiss and Denying Motion to Consolidate, Motion to Enforce, and Motion for Summary Judgment should be reversed.

Respectfully submitted,



Amy E. Armstrong
Amelia Thompson
Jessie A. White
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Mailing address: Post Office Box 1380
Pawleys Island, SC 29585

Office address: 430 Highmarket Street
Georgetown, SC 29440
Telephone (843) 527-0078
FAX (843) 527-0540

Georgetown, South Carolina

June 15, 2015

OTHER COUNSEL OF RECORD:

Nathan M. Haber
SC DHEC/OCRM
1362 McMillan Avenue, Suite 400
Charleston, SC 29405
(843) 953-0229

Attorney for S.C. Department of Health & Environmental Control

Daniel W. Stacy, Jr.
Oxner & Stacy, PA
90 Wall Street
Pawleys Island, SC 29585
(843) 235-6747

Attorney for Pawleys Island Community Church

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellant Case No. 2015-000602

Dan Abel and Mary Abel,

Appellants,

vs.

South Carolina Department of Health and Environmental Control and Pawleys Island Community Church,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing Initial Brief and Designation of Appellants on Respondents SCDHEC and Pawleys Island Community Church by placing copies of same in the U.S. Mail addressed to:

Daniel W. Stacy, Jr., Esquire
Oxner & Stacy, PA
90 Wall Street
Pawleys Island, SC 29585

Nathan M. Haber, Esquire
SCDHEC/OCRM
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

Jessie A. White

Georgetown, South Carolina
June 15, 2015

The South Carolina Environmental Law Project

Lawyers for the Wild Side of South Carolina

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

June 15, 2015

Honorable Jenny Abbott Kitchings
Clerk, Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Dan Abel and Mary Abel v. SCDHEC and Pawleys Island Community Church;
Appellate Case No. 2015-000602

Dear Ms. Kitchings:

Enclosed for filing please find the Appellants' Initial Brief and Designation of Matter, along with my Certificate of Service in the above-referenced case.

Please return a clocked-in copy in the self-addressed, stamped envelope provided.

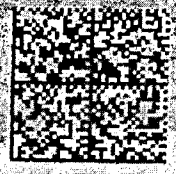
Thank you very much for your kind cooperation and assistance.

Yours very truly,

Jessie A. White

cc: Nathan M. Haber, Esq.
Daniel W. Stacy, Jr., Esq.

Carolina Environmental Law Project
Post Office Box 1380
Pawleys Island, South Carolina 29585



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Honorable Jenny Abbott Kitchings
Clerk, Court of Appeals
P.O. Box 11629
Columbia, SC 29211