THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

Appeal from the Administrative Law Court
Shirley C. Robinson, Administrative Law Judge

Trial Court Case No. 2014ALJ070282CC
Appellate Case No. 2015-000602

Dan Abel and Mary Abel,

Appellants,

v.

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

Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE ISSUES ON APPEAL

The Respondents would restate the issues on appeal as follows:

Did the Administrative Law Judge properly dismiss the Appellants' request for a contested case hearing to challenge the grant of a stormwater permit and coastal zone consistency certification by Respondent S.C. Department of Environmental Control (DHEC) to the Respondent Pawleys Island Community Church in connection with a new construction project in 2014?

I. The ALJ correctly found that the Consent Order of Settlement and Dismissal between the parties entered in 2001 in a prior challenge by the Appellants to permits issued in 2000 in connection with a separate, and long since completed, construction project is not applicable to the 2012-14 permitting process for the new project.

II. The dismissal can also be sustained on the additional ground that the Appellants' have no standing to challenge the permits because they no longer own property next to the Church property.

STATEMENT OF THE CASE[1]

This case arises out of a DHEC permitting process in connection with a construction/improvement project planned by Pawleys Island Community Church.[2] As required by various regulations,[3] the Church applied to DHEC for a stormwater permit and Coastal Zone Consistency Certification "CZC Certification" in 2012. [ROA ___; 6/7/12 Notice of Intent, 6/22/12 CZC Request.] Due a time lapse in the review process, the Church was required to submit a new NOI, which was received by DHEC on March 3, 2014. [ROA ___; 3/3/14 NOI.] DHEC Staff approved the Church Stormwater Pollution Prevention Plan and granted the stormwater permit and certification in 2014. [ROA ___; Letter/Notice , dated 4/1/14. ROA ___; CZC Certification, dated 3/26/14.] However, the Appellants Dan Abel and Mary Abel filed a Request for a Final Review,

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[1] To the extent that the pertinent facts are part of the procedural history, no separate Statement of the Facts is necessary.

[2] The project included plans to reconfigure and extend the driveway and add parking and to construct a utility building and an administrative building which included expanding the existing stormwater retention pond and adding an infiltration system.

[3] The applicable state and federal statutes include the S.C. Stormwater Management and Sediment Reduction Act", S.C. Code Ann. §§48-14-10 et seq., Coastal Management Program, S.C. Code Ann. §§48-39-10 et seq., and the Clean Water Act, 33 U.S.C. §§1251 et seq. Applicable DHEC regulations include S.C. Reg. 61-9 Water Pollution Control Permits, and S.C. Regs. 72-300 – 316 Standards for Stormwater Management and Sediment Reduction. DHEC administers the NPDES (National Pollutant Discharge Elimination System) Permit Program which requires that anyone planning land disturbance activities (i.e. clearing, excavating, grubbing) apply for a stormwater permit. A Coastal Zone Consistency Certification also is required if a project is located in one of South Carolina's eight coastal counties (Beaufort, Berkeley, Charleston, Colleton, Dorchester, Georgetown, Horry, and Jasper). This CZC certification process is performed by DHEC's Office of Ocean and Coastal Resource Management (OCRM) pursuant to §48-39-80(B)(11).

which was denied by the DHEC Board.[4] [ROA ___; Request for Final Review Conference, 4/18/14. ROA ___; Board denial, 5/14/14.] Thereafter the Appellants filed a Request for a Contested Case Hearing in the Administrative Law Court. [ROA ___; Request, dated 6/13/14]. In the ALC, the Appellants moved for summary judgment, and the Respondents moved to dismiss. [ROA ___; Joint Motion to Dismiss, dated 12/12/14. ROA ___; Abels' Motion for Summary Judgment, dated 12/15/14.]

The sole basis for the Abels challenge to the current stormwater permit and CZC certification is founded on a Consent Order of Settlement and Dismissal entered in prior permitting applications made by the Church back in 2000.[5] The Respondents sought dismissal on the grounds that (1) the 2001 Consent Order is not applicable to the 2014 Permit and CZC, and (2) the Abels do not have standing because they no longer own property adjoining the Church's property.

The old 2001 Consent Order arose from an application submitted by the Church (then Pawleys Island Baptist Church) in May 2000, for a stormwater permit and CZC certification for construction of a new sanctuary and other improvements. When DHEC/OCRM issued a permit/certification, requests for a contested case hearing were filed by the Abels and David F. Mims, who owned property adjoining the Church

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[4]The review/appeal process is provided by S.C. Code Ann. § 44-1-60. Appeals from department decisions giving rise to contested case; procedures.

[5] "The Stormwater Permit and Consistency Certification are in plain violation of a previous settlement agreement entered between the Abels, the Church, DHEC and OCRM." [ROA ___; Request for Final Review, p. 1.] "The Stormwater Permit and Consistency Certification are in plain violation of a previous settlement agreement..." [ROA ___; Request for Contested Case Hearing, p. 1.] Because a new permit was issued any affected persons had the opportunity to contest the issuance of the permit coverage and CZC, but the Appellants did not assert any environmental concerns on the basis of any applicable regulations.

property. Ultimately, the parties reached a settlement that was memorialized in a Consent Order of Settlement and Dismissal and approved by ALJ C. Dukes Scott, which provides:

> This proceeding arises out of the application of the Pawleys Island Baptist Church, a South Carolina Not-for-Profit Corporation, [hereinafter the "Church"] for a state storm water permit for the construction of a new sanctuary and other improvements of its property on US Highway 17 in the Pawleys Island area of Georgetown County. In a related application, the church also requested a wetland fill permit form the US Army Corps of Engineers which required a coastal zone consistency certification by the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Management (DHEC/OCRM). After DHEC/OCRM issued the storm water permit and consistency certification, requests for a contested case hearing were filed by Mary W. Abel, Daniel C. Abel, and David F. Mims.
>
> The parties have met, discussed, negotiated, and resolved their differences, and have reached a settlement which they desire to have incorporated into this order. Specifically, the parties have agreed as follows:
>
> 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' NOICE/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.

6. The existing basketball and volleyball fields will be removed and will not be relocated any closer to the rear property line of the church property than the front of the new sanctuary.

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.

8. Upon execution of this Consent Order, the Church may immediately begin construction of the new sanctuary and other improvements not inconsistent with this agreement and order.

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.

After review of the agreement, I conclude that it should be accepted and made a part of this order. Accordingly, upon the joint motion and consent of the parties,

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 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.

[ROA ___; Consent Order of Settlement and Dismissal, Docket No. 00-ALJ-07-0626-

CC, filed January 8, 2001.] The work under the old 2000 stormwater permit and CZC Certification as issued under the 2001 Consent Order has long since been completed.

In the process of reviewing the Church's new 2012 application for the CZC certification, the OCRM Staff expressed concern that the current request for land disturbance activity was inconsistent with the old 2001 Consent Order. [ROA ___; Coastal Zone Inconsistency Memorandum, Ex. 13 – Abels' Motion for Summary Judgment.] As noted on the document, this was a preliminary "Draft" determination of inconsistency. [See also ROA ___; DHEC email 7/31/12, Ex. 14 – Abels' Motion for Summary Judgment.] The CZC review was placed on hold while the Church attempted to resolve these initial concerns. [ROA ___; DHEC letter 10/31/12, Ex. 15 – Abels' Motion for Summary Judgment.]

The Church negotiated an agreement with the Mims (who still owned adjoining property) to modify the old 2001 Consent Order, and filed a request with the Administrative Law Court to approve the proposed Modified Consent Order. [ROA ___; Oxner & Stacy letter to ALC 10/10/13, Ex. C – Abels' Motion to Enforce Consent Order. See also ROA ___; ETS letter to DHEC 2/6/13, Ex. 18 – Abels' Motion for Summary Judgment.] The ALJ refused to consider the request for modification on the ground that any action on the request would be premature because the permits were still pending DHEC review. [ROA ___; Order on Request to Modify a Settlement and Dismissal, Docket No. 13-ALJ-07-0547-CC, filed 1/7/14. (J. Anderson.]

Thereafter, the Church submitted a new NOI because of the lapse of time,[6] DHEC-OCRM completed their review process and granted coverage under the Construction General Permit (SCR10Q459) and issued the CZC Certification (CZC-12-0149). As noted above, the Abels filed a Request for a Final Review Conference which was denied by the DHEC Board, and then filed a Request for a Contested Case Hearing in the Administrative Law Court and moved for summary judgment. However, the Abels also filed a motion seeking to consolidate the old ALC action (Docket No. 00-ALJ-07-0626-CC) with the current 2014 action and to enforce the old 2001 Consent Order. [ROA ___; Motion to Enforce Consent Order and to Consolidate, 11/25/14.]

A hearing was conducted by the Administrative Law Judge on February 4, 2015, and an order was issued February 12, 2015, denying the Abels' motions and granting a dismissal. [ROA ___; Order Granting Motion to Dismiss and Denying Motion to Consolidate, Motion to Enforce, and Motion for Summary Judgment.] In granting the motion to dismiss, the ALJ considered the intent of the parties from the language of the entire document and found that 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. [ROA ___; Order, p. 8.] The Appellants timely filed and served a Notice of Appeal on March 16, 2015.

[6] [*See* [ROA ___-____; Correspondence from DHEC to Church, Ex. 16 & 17 to Abels' Motion for Summary Judgment.]

ARGUMENT

THE ADMINISTRATIVE LAW JUDGE PROPERLY DISMISSED THE APPELLANTS' REQUEST FOR A CONTESTED CASE HEARING TO CHALLENGE RESPONDENT DHEC'S GRANT OF A STORMWATER PERMIT AND COASTAL ZONE CONSISTENCY CERTIFICATION TO THE RESPONDENT PAWLEYS ISLAND COMMUNITY CHURCH IN CONNECTION WITH A NEW CONSTRUCTION PROJECT IN 2014.

I. The ALJ correctly found that the Consent Order of Settlement and Dismissal between the parties entered in 2001 in a prior challenge by the Appellants to permits issued in 2001 in connection with a separate, and long since completed, construction project is not applicable to the 2012-14 permitting process for the new project.

As viewed by the ALJ, the Abels' motions to enforce and for summary judgment and the Respondents' motion to dismiss turn on the same question as to the temporal applicability of the Consent Order, namely whether the 2001 Consent Order is limited to the 2000 permit and CZC. The ALJ held: "Based on the language of the Consent Order and the intention of the parties as gleaned from the entire document, I find that the Consent Order only applies to the Church's 2001 construction project and its associated 2000 permit and CZC." [ROA ___; Order, p. 9.]

Judicial review of the Administrative Law Judge's final decision is governed by S.C. Code Ann. § 1-23-610, which provides, in pertinent part, that: "The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is: ... (d) affected by other error of law." Kiawah Dev. Partners, II v. S. Carolina Dep't of Health & Envtl. Control, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014) (In an appeal from a decision by the ALC, the

Administrative Procedures Act, §1-23-610(B), provides the appropriate standard of review.)[7]

The Appellants argue that the ALJ committed an error of law in interpretation of the temporal scope of the Consent Order as being limited to the permit/certification issued for the 2001 construction project because there is no time limitation placed on the provision in the Consent Order that "the wetland preserved by this Consent Order shall remain in its natural state." However, the Respondents maintain that the ALJ properly followed the rules of construction and reached the correct conclusion as to the intent of the parties by looking to the language of the entire document.

Rules of Construction

"Settlement agreements are viewed as contracts between the parties," and general contract principles are applied in their construction. Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 177, 557 S.E.2d 708, 711 (Ct. App. 2001). Even when a settlement agreement is court-approved and reduced to an order it still is construed as a contract. City of N. Myrtle Beach v. E. Cherry Grove Realty Co., LLC, 397 S.C. 497, 503, 725 S.E.2d 676, 679 (2012) (court-approved settlement/consent order to be construed like other written instruments.) The rules of construction and interpretation of contracts are well settled.

Rule No. 1-- Ascertain the intent of the parties. The Appellants argue that the ALJ erred in looking to the parties' intent absent a finding of ambiguity. However,

[7] S.C. Code Ann. § 1–23–380 is a sister statute of section 1–23–610, which similarly provides for judicial review of final agency decisions under the same standards. *See* Bone v. U.S. Food Serv., 404 S.C. 67, 90, 744 S.E.2d 552, 565 n.12 (2013) (§1-23-380 applies to Workers' Compensation appeals).

seeking the parties' intent is the paramount question in contract cases. "In construing a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties." Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 46, 747 S.E.2d 178, 183 (2013). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." Alexander's Land Co., L.L.C. v. M & M & K Corp., 390 S.C. 582, 598, 703 S.E.2d 207, 215 (2010); Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007)("In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties.").

Rule No. 2 -- Look first to the language of the contract—the entire contract. "In construing terms in contracts, this Court must first look at the language of the contract to determine the intentions of the parties." C.A.N. Enters., Inc. v. S.C. Health & Human Services Fin. Comm'n., 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). "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." Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC, 649 S.E.2d at 501(citing Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973)). "The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof." *Id.* at 502 (citing Thomas–McCain, Inc. v. Siter, 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977)); Williams v. Gov't Employees Ins. Co. (GEICO), 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014) (contract must be read as a whole document). The Appellants agree that the Consent Order should be read as a whole, but argue that the ALJ erred in considering only selected provisions

of the Consent Order. However, it is the Appellants who rely on a single, isolated clause, while the ALJ properly considered all the language of the entire Consent Order.

Rule No. 3 -- The question of ambiguity is a question of law for the Court. It is for the court to determine whether the contract is ambiguous or not, and where the language is unambiguous, it is for the court to construe and apply it. "It is a question of law for the court whether the language of a contract is ambiguous." S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001). The construction of a clear and unambiguous contract is a question of law for the court to determine. Williams v. Gov't Employees Ins. Co. (GEICO), 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014) (citing Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct.App.1997)).

Only where the language is ambiguous, will extrinsic and parole evidence be admitted to ascertain the parties' intent. "Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). "Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. The determination of the parties' intent is then a question of fact. On the other hand, the construction of a clear and unambiguous deed is a question of law for the court." S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 303 (2001) (citing Hawkins, supra).

A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation. *Id.* However, a party may not create an ambiguity by pointing out a single sentence or clause because a contract must be read as a whole

document. Williams v.GEICO, *id.* "Whether a contract is ambiguous is to be determined from the entire contract and not from isolated portions of the contract." Farr v. Duke Power Co., 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975). "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); McGill v. Moore, *id.*. Similarly, "[m]ere lack of clarity on casual reading is not the standard for determining whether a contract is afflicted with ambiguity." Gamble, Givens & Moody by Gamble v. Moise, 288 S.C. 210, 215, 341 S.E.2d 147, 150 (Ct. App. 1986); Stribling v. Stribling, 369 S.C. 400, 404, 632 S.E.2d 291, 293 (Ct. App. 2006).

A. The 2001 Consent Order of Settlement and Dismissal is not ambiguous.

The Appellants maintain that the Consent Order is clear and unambiguous, arguing that clause 3 – "The Church agrees that the wetland preserved by this Consent Order shall remain in its natural state." -- creates an unlimited, perpetual restriction requiring that the wetlands on the Church property remain untouched forever.[8] While the ALJ found that the Consent Order is clear and unambiguous, the ALJ properly concluded that: "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. While one can read clause 3 as implying the wetlands are to be

[8] The Respondents maintain that neither the 2014 stormwater permit nor the CZC actually authorize the alteration of wetlands. See CZC at ROA ___ - "This Coastal Zone Consistency did not include a review and authorization for any direct or indirect wetland impacts to freshwater wetlands or critical area. Any impacts to Critical Areas as determined by SCDHEC-OCRM, and/or freshwater wetlands, as determined by the U.S. Army Corps of Engineers must be authorized by the appropriate agency." See Permit at ROA ___ - "You are responsible for obtaining any other federal, state, or local permit that may be required for this project. In particular, any permits through the U.S. Army Corps of Engineers for the placement of fill materials in the Waters of the United States."

preserved indefinitely, the remaining eight clauses show the temporal applicability of the Consent Order was limited." [ROA ___; Order, p. 7 (citations omitted).]

First, the Court noted that the opening paragraph of the Consent Order provides specificity as to the 2000 permit and CZC and the associated construction project:

> This proceeding arises out of the application of the Pawleys Island Baptist Church, a South Carolina Not-for-Profit Corporation, ... for a state storm water permit for the construction of a new sanctuary and other improvements of its property ....

The Appellants argue that the ALJ improperly considered this language. However, the underlying application/permitting process as recited in the Consent Order constitutes part of the document for consideration of the parties intent,[9] *See* M & M Grp., Inc. v. Holmes, 379 S.C. 468, 475-76, 666 S.E.2d 262, 266 (Ct. App. 2008)(intent may be found in whereas clause describing background leading to contract)(citing Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 199 S.E.2d 719 (1973) (holding the intention of an instrument is determined by its language, regardless of whether such language is in a whereas clause); Bruce v. Blalock, 241 S.C. 155, 161, 127 S.E.2d 439, 442 (1962) ("The subject matter of the contract and the purpose of its exception are material to the ascertainment of the intention of the parties and the meaning of the terms they use.").

[9] It also merits consideration of the fact – as a matter of law – that the ALJ's jurisdiction in 2001 was limited to review of the 2000 permit/CZC issued by DHEC/OCRM. It is arguable that the ALJ did not have jurisdiction to approve and order a perpetual restrictive contractual obligation outside of its jurisdiction over the subject matter before it. *See cf.* SGM-Moonglo, Inc. v. S. Carolina Dep't of Revenue, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (Ct. App. 2008) ("An administrative agency has only the powers conferred on it by law and must act within the authority created for that purpose. Pursuant to section 61–4–520 of the South Carolina Code (Supp.2006), the ALC must determine whether a proposed location is proper and suitable prior to granting an off-premises beer and wine permit. Restrictions in the chain of title of a proposed location, however, are not a legitimate concern of the ALC in determining whether the location is suitable.")

Thus, contrary to the Appellants' argument, the ALJ properly considered the context and background of the underlying administrative proceedings as recited in the opening paragraph, and correctly found that: "This language indicates the Consent Order was executed to address two *specific applications* (the 2000 Permit and CZC) and related to a *specific construction project*..." [ROA ___; Order, p. 7 (emphasis in original).]

The Court also considered the other clauses, finding that the specific restraint on wetlands in clause 1 was clearly within the context of the designs and plans for the specific construction project under review:

> 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.

Again, the Court properly concluded that: "This language describes specific designs for the Church's 2001 construction project for which the Church requested a specific stormwater permit and CZC." [ROA ___; Order, p. 7.] Likewise, the Court found that the language in clauses 2 and 4 reference specific improvements and designs associated with the 2001 construction project. Similarly, clauses 5, 6 and 7 provide for restrictive buffers and setbacks to the proposed plans, and clause 9 provides for amendments to the 2000 permits. Moreover, clause 8 authorizes the Church to begin construction on the new sanctuary project and other improvements not inconsistent with the agreement. Considering all the language of the entire Consent Order of Settlement and Dismissal, the ALJ reached the correct conclusion that the clear and unambiguous intent of the parties

was to address the 2000 permit and CZC, and not to apply to any new, future construction projects.

Attempting to enforce the 2001 Consent Order in the new application/NOI, the Appellants argue that the Consent Order arose from a prior challenge to the same type of authorization and for the same type of activity on the same property. They also argue that the provisions for enforcement -- "the parties shall retain full rights to enforce the agreements stated herein" -- empowers and requires the ALJ to enforce the 2001 Consent Order in this 2012-14 permitting process. However, the 2000 permit/CZC was approved based on a specific and distinct construction project. The clear intent in reserving enforcement rights after dismissal of the administrative appeal was to allow the parties to come back before the ALC to compel compliance with the terms of the 2001 Consent Order in connection with the 2000 permit/CZC on that construction project which was completed years ago.

The Respondents would submit that in addition, limiting the duration of the Consent Order of Settlement and Dismissal to the time frame of the associated construction project is consistent with and supported by the 2000 permit and CZC which were the subject of the administrative appeal in which the Consent Order was entered.[10] The Permit and CZC, dated October 2, 2000, specifically provide that the approval was to

[10] The permit/CZC constitute part of the Consent Order. *Cf.* Dibble v. Sumter Ice & Fuel Co., 283 S.C. 278, 282, 322 S.E.2d 674, 677 (Ct. App. 1984)("An order should be construed within the context of the proceeding in which it is rendered."); Williams v. Gov't Employees Ins. Co. (GEICO), 409 S.C. 586, 596-97, 762 S.E.2d 705, 711 (2014) (by reference in the contract, the application and declarations constituted part of the entire insurance policy).

remain valid for five (5) years, and the approval was only applicable for the plans submitted at that time. [ROA ___; Ex.5 – Abels' Motion for Summary Judgment, p. 2.]

B. The 2001 Consent Order does not create a perpetual restriction enforceable in a new administrative process for a new stormwater permit and CZC for a separate and distinct construction project.

The ALJ's consideration and construction of clause 3 and rejection of the Appellants' contention that it creates a perpetual restriction is supported by the Court's opinion in S.C. Dep't of Natural Res. v. Town of McClellanville, supra. In that case, the Court considered the interpretation of a deed restriction which included language that a parking area and boat ramp "shall remain accessible to and remain available for use by the public." 550 S.E.2d at 301. When the grantee/Town enacted a boat ramp fee, the grantor/DNR sought an injunction on the ground that the boat ramp fee violated the restrictive covenant contained in the deed. The Court held: "Although the word 'remain' read alone might be considered ambiguous, the covenant as a whole is not. Nothing in the plain language of the deed prohibits the town from requiring a permit or charging a fee to use the facilities." *Id.* at 303. Similarly, in this case, the use of the term "remain" in clause 3 -- standing alone, out of context with no clear, express language of perpetual duration -- does not forever restrict the Church from seeking a new stormwater permit or CZC for new future construction.

As discussed, the ALJ's ruling is fully supported by the language of the Consent Order of Settlement and Dismissal, and it is also consistent with established precedent regarding the duration of contracts in general and restrictive covenants which disfavors perpetual provisions. "Historically, perpetual contracts have not been favored in South Carolina and are generally upheld only where the perpetual nature of the agreement is an

express term of the contract." Carolina Cable Network v. Alert Cable TV, Inc., 316 S.C. 98, 447 S.E.2d 199, 200 (1994).

The Appellants maintain that there is no time limit on the wetland restrictions in clause 3. In fact the Appellants describe it as "devoid of temporal limitation."[11] However, the absence of any duration does not constitute "forever," and there is no express language evidencing intent that the restriction is perpetual. As long ago stated by the Court in Childs v. City of Columbia, 87 S.C. 566, 70 S.E. 296, 298 (1911), "[w]here the parties to a contract express no period for its duration, and no definite time can be implied from the nature of the contract or from the circumstances surrounding them, it would be unreasonable to impute to the parties an intention to make a contract binding themselves perpetually." *See also* Dobyns v. South Carolina Dept. of Parks, Recreation and Tourism, 325 S.C. 97, 480 S.E.2d 81, 83 n. 5 (1997).

In this case the Appellants argue,[12] and the ALJ so held, that the provisions of the Consent Order are not restrictive covenants. [See discussion infra on standing issue.] However, the distinction is inapposite to this issue because a restrictive covenant is – at its core – contractual in nature. To the extent that restrictive covenants are contractual provisions that restrict the free use of land by its owner and while restrictive covenants run with the land which entails certain special aspects of property law, the provisions in the Consent Order of Settlement and Dismissal are no different in that the same rules of construction apply. Palmetto Dunes Resort, Div. of Greenwood Dev. Corp. v. Brown, 287 S.C. 1, 6, 336 S.E.2d 15, 18 (Ct. App. 1985) ("Restrictive covenants are contractual

[11] See Appellants' Brief, p. 34.

[12] "Respondents' reliance on property law is misplaced and has no bearing on the real issues in this case which derive from contract law...." [Appellants' Brief, p. 19 n.7.]

in nature," so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document.); *see also* Queen's Grant II Horizontal Property Regime v. Greenwood, 368 S.C. 342, 628 S.E.2d 902, 913 (2006)("restrictive covenants affecting real property cannot be properly and fully understood without resort to property law").

The well-settled rules applied to contractual restrictive covenants hold that "a restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006) (quoting Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980)). Particularly applicable here is the corollary rule that: "The Court is to construe any ambiguity in favor of limited duration and against restricting property." *Id. See also* 3 Tiffany Real Prop. § 870 (3d ed.)("in the absence of any provision that it shall be perpetual or placing any limitation upon it, it will usually be implied that its duration is such as is reasonable under the circumstances of the case"); Gardner v. Maffitt, 335 Mo. 959, 965, 74 S.W.2d 604, 607 (1934)("Where the time during which a restrictive covenant is to endure has not been expressly limited by the parties, it should be implied that some limitation was intended and that it was such as the nature of the case would indicate as reasonable."); Union Stock Yards Co. v. Nashville Packing Co., 140 F. 701, 705 (6th Cir. 1905).

If the parties had intended the restrictions on land use in the Consent Order of Settlement and Dismissal to apply in the future forever, the intent would have been expressed in clear language in the document, and there would have been provisions for

accomplishing the necessary recording in the chain of title to effectuate a perpetual restriction to run with the land. Here, the Consent Order is, by its unambiguous terms, an agreement in an administrative permitting process related to a specific permit/CZC for a specific construction project, and the ALJ correctly held that it does not apply to the new 2014 permit/CZC for the new construction project.

C. The ALJ did not consider extrinsic, parole evidence to prove the parties' intent.

Contrary to the Appellants' contention,[13] the ALJ never looked beyond the language of the Consent Order nor considered extrinsic evidence. While the Appellant Dan Abel submitted an affidavit [ROA ___] attesting to his understanding and intent that the restrictions would continue in perpetuity, the ALJ discussed the affidavit and properly discounted that extrinsic, parole evidence of Mr. Abel's personal, subjective intent because the intent of the parties is clear and unambiguous from all the language of the Consent Order as a whole. The Court also properly rejected the Appellants' attempt to create ambiguity from the DHEC Staff's preliminary concern/inquiry about the applicability of the 2001 Consent Order when reviewing the 2012 NOI and CZC application. For similar reasons, ambiguity cannot be created by the Church's attempt to modify the old 2001 Consent Order to meet any concerns by the Mims, as the remaining owners of adjoining property. *See cf.* Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997) (While judicial estoppel may preclude a party from adopting a position in conflict with one earlier taken in the same or related litigation, it applies only to inconsistent statements of fact, not to conclusions of law or assertions of legal theories.); Hall v. Palmetto Enterprises II, Inc., of Clinton, 282 S.C. 87, 92, 317

[13] See Appellants' Brief, p. 23.

S.E.2d 140, 143 (Ct. App. 1984) ("an offer to compromise the controversy involved in a litigation is generally not admissible as an admission").

II. The dismissal can be sustained on the additional ground that the Appellants have no standing to challenge the permits because they no longer own property next to the Church property.

The Respondents argued to the ALJ that if the 2001 Consent Order is interpreted to impose permanent restriction on the Church's land, then the Abels lack standing to enforce such a restriction because they sold their property in 2007, and no longer own adjoining land. [*See* ROA ___; Deed – Ex. C – Respondents' Memorandum in Support of Motion to Dismiss.] In support of their argument the Respondents cited to McLeod v. Baptiste, 315 S.C. 246, 247, 433 S.E.2d 834, 835 (1993), wherein the Court held that a grantor that created a restrictive covenant lacked standing to enforce the covenant when it no longer owned any real property which would benefit from the covenant's enforcement. Although they still live in the area, they are now a remote party and will not benefit from the covenant's enforcement. The ALJ rejected the standing argument, holding that: "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." [ROA ___; Order, p. 9.]

The Respondents maintain that the lack of standing is a sufficient additional ground to sustain the dismissal because the core of the Appellants' argument invokes the law governing restrictive covenants. The Appellants steadfastly contend that clause 3 constitutes a perpetual restriction on the Church property yet insist that it is not a restrictive covenant. As discussed above, clause 3 is a perpetual restriction on the use of real property even though it is not found in a deed, it does not bind heirs, assigns and

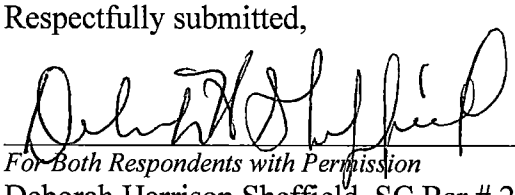
successors, and it does not appear in the chain of title. If it is a perpetual restriction on the use of real property – whether of record or not – the Appellants should not have standing to enforce it once they no longer own adjoining property and will not benefit.

CONCLUSION

The Appellants' sole challenge to the 2014 DHEC/OCRM stormwater permit and CZC rests on their reading of the 2001 Consent Order of Settlement and Dismissal. Applying the proper rules of construction, the ALJ correctly found that the intent of the parties evidenced in the language of the Consent Order, as a whole, is clear and unambiguous. The Consent Order only applies to the Church's 2001 construction project and its associated 2000 permit and CZC, and accordingly, the Administrative Law Judge properly dismissed the Appellants' request for a contested case hearing to challenge Respondent DHEC's grant of a stormwater permit and coastal zone certification to the Respondent Pawleys Island Community Church in connection with a new construction project in 2014. The dismissal can also be sustained on the additional ground that the Appellants have no standing to challenge the permits because they no longer own property next to the Church property.

WHEREFORE, based on the foregoing, the Respondents DHEC and Pawleys Island Community Church respectfully request that the Court affirm the ALJ's decision.

Respectfully submitted,



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September 14, 2015

Certificate of Service

I certify that on this 14th day of September, 2015, a copy of the foregoing Initial Brief was served on the Appellants by depositing said copy in the U.S. Mail, with sufficient first class postage, addressed to their Counsel of Record of as listed below:

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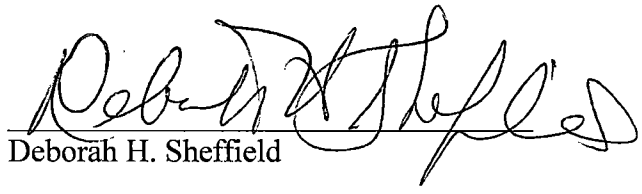

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September 14, 2015

The Honorable Jenny Abbott Kitchings
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RE: Dan Abel and Mary Abel v. South Carolina Department of Health and Environmental Control and Pawleys Island Community Church, App. Tracking No. 2015-000602

Dear Madam Clerk:

Enclosed please find a copy of the Initial Brief of Respondents which I am serving on Counsel for the Appellants by copy of this letter. The Respondents have no matters to designate for inclusion in the Record on Appeal beyond those already designated by the Appellants.

Yours truly,

Deborah Harrison Sheffield

cc: Jessie White, SC Environmental Law Project
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