

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2016-000707

RECEIVED

APR 13 2016

Kiawah Development Partners, II, Petitioner,
SC Court of Appeals

v.

South Carolina Department of Health and Environmental Control Respondent below,

South Carolina Coastal Conservation League Appellant,

v.

South Carolina Department of Health and Environmental Control, and Kiawah
Development Partners, II, Respondents below,

Of whom Kiawah Development Partners, II, is the Respondent.

**RETURN OF RESPONDENT, KIAWAH DEVELOPMENT PARTNERS, II,
TO MOTION OF APPELLANT
SOUTH CAROLINA COASTAL CONSERVATION LEAGUE
FOR ORDER TRANSFERRING CASE TO THE SUPREME COURT**

INTRODUCTION

This matter is an appeal from the final decision of the Administrative Law Court (“ALC”) on remand by the Supreme Court of South Carolina for further consideration of select issues as

directed in its decision in *Kiawah Development Partners, II v. South Carolina Dept. of Health and Environmental Control, et al.*, 411 S.C. 16, 766 S.E.2d 707 (2014) (the “Opinion”).

On March 22, 2016, after having “observed the witnesses and exhibits presented at the hearing and closely passed upon their credibility, taking into consideration the burden of persuasion of the parties,” Judge Anderson applied the Supreme Court’s instructions on remand and issued an Amended Final Order and Decision on Remand (“Amended Final Order on Remand” or “Am. Final Order”) and an Order Granting Clarification and Denying Motions for Reconsideration (“Order of Clarification and Denying Reconsideration” or “Clarification Order”). Based on the arguments in its Motion for Transfer, Appellant South Carolina Coastal Conservation League (“the League”) asserts the ALC committed legal errors in approving a substantially smaller erosion control structure.

In its previous final decision that was reversed and remanded by the majority of the Supreme Court in the Opinion, the ALC had approved issuance of a critical area permit that would allow construction of a bulkhead and revetment along 2783 feet of the bank of the Kiawah River to stop erosion of the developable highland of Respondent, Kiawah Development Partners, II (“Respondent” or “KDP”). The revetment previously approved by the ALC was composed of a mat of articulated concrete block (“ACB”) that would extend 40’ from the toe of the bulkhead over the bank towards the channel of the Kiawah River. In his Order on Remand, after conducting an exhaustive analysis of the issues as directed by the Supreme Court, the ALC approved a permit for the vertical wooden bulkhead against the highland escarpment but disapproved the ACB revetment except for 270’ next to the eroding parking lot of Beachwalker Park operated by the Charleston County Parks and Recreation Commission that the ALC required be covered by a foot of sand of similar quality to the riverbank.

In its highly argumentative Motion for Transfer that selectively mischaracterizes the ALC's Amended Final Order on Remand, the League accuses the ALC of disregarding the legal principles of the Supreme Court in the Opinion and making findings that are contrary to "uncontradicted" evidence. As the Court's review of the Amended Final Order on Remand will show, far from disregarding the legal precepts in the Opinion, the ALC meticulously and thoughtfully applied them to the evidence in the record. The League's vociferous disagreement with those factual determinations does not make them legally erroneous. As the later briefing on this appeal will demonstrate, the ALC as the fact finder made determinations that are fully supported by substantial evidence and did not commit legal error.

The League's Motion goes far beyond its request for transfer and improperly attempts to influence and taint this Court's perspective of the case by arguing the substantive issues to be presented on appeal rather than the narrow procedural issue of whether the appeal should be heard directly by the Supreme Court. This Return addresses some of these improprieties and explains that while transfer of the League's appeal to the Supreme Court is appropriate, it should not be transferred based upon the Motion's hyperbole and inaccuracies.

KDP disagrees with the conclusions and arguments made by the League in support of the Motion for Transfer that are premised on an unbridled assault on the ALC. Nonetheless, KDP agrees that transfer should occur. The Supreme Court is steeped in the background of the case, instructed the ALC on the legal principles to be applied in the ALC's further consideration of the issues, and will ultimately hear the matter. Immediate review by the Supreme Court promotes judicial economy and efficiency and will result in the speediest resolution, a critical factor since time is of the essence.

It has been more than eight years since KDP filed an application with the Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (“the Department”) for an erosion control structure on February 9, 2008. The combined bulkhead and revetment were to protect against the continued erosion of KDP’s valuable highland along a deep bend of the Kiawah River at the isthmus to Captain Sam’s Spit, a peninsula on the southwestern end of Kiawah Island. Even though the General Assembly has expressly provided for the use of erosion control structures for this purpose, the League, through multiple appeals and stays, has managed to prevent the installation of any erosion control structure, and the erosion has continued unabated destroying additional highland.¹ It is absolutely necessary that this appeal proceed as expeditiously as possible.

ARGUMENT

I. Transfer of the Appeal to the Supreme Court is appropriate.

South Carolina Appellate Court Rule 204(b) addresses transfer of cases for review by the Supreme Court. Specifically, the Rule states:

In any case which is pending before the Court of Appeals, the Supreme Court may, in its discretion, on motion of any party to the case, on request by the Court of Appeals, or on its own motion, certify the case for review by the Supreme Court before it has been determined by the Court of Appeals. Certification is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance. The effect of such certification shall be to transfer jurisdiction over the case to the Supreme Court for all purposes.

Rule 204(b), SCACR. Generally identifying this standard, the Appellant’s Motion to Transfer asserts that Supreme Court review of the League’s appeal is appropriate because:

- (1) the decision on appeal arises from a Supreme Court opinion reversing and remanding the case back to the Administrative Law Court;
- (2) this case involves issues of significant public interest and legal principles of major importance; and
- (3) the public interest and judicial economy would best be served by resolution of

¹ The League has not been required to post a bond or to provide any security to KDP whose valuable real property continues to be damaged and lost.

this case by the Court that is already intimately familiar with the factual and legal issues.

Motion at 2.

Transfer of the League's current appeal to the Supreme Court is appropriate. The Supreme Court thoroughly considered the underlying permit application, the record, and applicable law in this case during the extensive first appeal that culminated in the Opinion. As a result of the previous appeal and rulings of the Supreme Court, the issues in the case have been significantly narrowed. Therefore, the Supreme Court's review of the League's current appeal should be able to proceed swiftly thereby avoiding the delay of additional consideration by the Court of Appeals that is understandably less familiar with the case. Having the Supreme Court hear the appeal will also remove the chance for any misunderstanding of the Opinion's instructions to the ALC on remand. Finally and critically, transferring the appeal to the Supreme Court will reduce the amount of time for final resolution thereby reducing the ongoing damage to KDP and reducing the chance of any issues being mooted by the more than eight years of additional erosion since the initial permit application.

As the Supreme Court is aware from the filings associated with KDP's Motion to Lift Supersedeas or, in the Alternative to Require Posting of Bond of Other Security dated May 14, 2014, the erosion now endangers the paved parking lot of Beachwalker County Park, rendering several of its parking spaces unusable; a portion of the unpaved road used by the Town of Kiawah Island for its service and emergency vehicles to gain access to the beach is in jeopardy of collapsing; and the access corridor across the isthmus has narrowed even more on the river side. Left unchecked by the permitted bulkhead, the continued erosion irreparably harms KDP through loss of highland and threatens to permanently destroy KDP's ability to utilize its property.

For these reasons, the Motion should be granted to the extent it seeks the procedural relief of having the Supreme Court accept review of this Appeal.

II. The League's Motion Goes Far Beyond the Procedural Transfer it Seeks.

A. This Court should disregard the Motion's arguments on the merits of the ALJ's Orders.

In its 22-page Motion to Transfer, the League injects a preview of the arguments it will assert in attacking the ALC's Amended Final Order on Remand and the Order of Clarification and Denying Reconsideration. These substantive arguments have no place in a procedural motion seeking transfer under SCACR 204(b). KDP will trust this Court to disregard all the invective and accusations in the League's Motion on this limited procedural question. Even so, KDP is compelled to address some of these assertions out of concern that its failure to do so might be construed as an acknowledgment that part or all of the Appellant's assertions are accurate descriptions of the ALC's rulings and the record below.

With hyperbole and exaggeration, the Motion inaccurately accuses the ALC of issuing "an Amended Final Order in which he crafted a new permit" then goes on to refer to the ALC's rulings as "indicative of his continuing confusion." Motion at 8 and 9. Continuing its attempts to prejudice this Court's view of the Orders on appeal, the Motion alleges the ALC made findings that are contrary to "uncontroverted evidence" and that the ALC "ignored uncontradicted testimony." Motion at 8, 11. The Motion makes additional sweeping accusations that the Order is "in contradiction to the uncontested evidence" and that the ALC ruled "despite uncontradicted evidence to the contrary." Motion at 9.

Contrary to these sweeping assertions, the ALC's findings are fully supported by the extensive record. The ALC refers to the extensive evidence in the record that supports each of his findings and conclusions in the Amended Order on Remand and Order of Clarification and

Denying Reconsideration. If KDP were to attempt to refute all these assertions, KDP would in essence have to prepare and submit its initial brief and would unnecessarily mire this Court in the merits when all that is before the Court is a threshold procedural motion.

Appellant made similar broadside arguments against the ALC that were similarly groundless when the ALC issued its Order and Decision on Remand that was later rescinded and replaced by the Amended Final Order on Remand. Merely by way of example, Appellant claimed that the following findings of the ALC were unsupported by the evidence: “the findings that ‘most of the houses probably will be second homes;’ that these homes would be ‘occupied on an infrequent basis, usually six to eight weeks’ per year; and that the houses on the spit would be constructed over ‘twenty to thirty years.’ (Order, p. 13).” Appellant’s Motion for Reconsideration and Clarification of Order on Remand, p. 10, n. 4. In fact, as the ALC ruled in denying Appellant’s Motion for Reconsideration, there was testimony to support each of those findings:

In support of this allegation, Coastal provides in footnote 4 of its motion examples of findings that it claims is unsupported by evidence in the record. Specifically, these findings are as follows: “most of the houses probably will be second homes”; these homes would be “occupied on an infrequent basis, usually six to eight weeks” per year; and the houses on the Spit would be constructed over “twenty to thirty years.” However, the following pages of the transcript reflect support for those findings: pertaining to second homes, see 171:25-172:14 (specifically, 172:11-14); pertaining to six to eight weeks of occupancy, see 174:19-176:2 (specifically, 175:15-17); and pertaining to houses being constructed over twenty to thirty years, see 1580:7-18. As to the remainder of Coastal’s general and unsubstantiated allegation that the Court’s new findings are unsupported by evidence in the record, the Court stands by its findings as supported by the record on appeal.

Order of Clarification and Denying Reconsideration at 11.

This Court should be equally as skeptical about the many facts that the League claims in its motions were “uncontradicted” or findings it claims were “unsupported.”

In the Amended Final Order on Remand the ALC discussed the significant public benefit from protection of the parking lot of Beachwalker County Park that has been imperiled by the

erosion. Amended Final Order on Remand at 4-5, 17-19, 23, 26-28 (e.g., “The stabilization will protect the parking lot of the Park, allowing access west of the Park for the general public (at least 50,000 people a year) as well as the thousands of members of KICA.” *Id* at 23). Yet, in its 22-page Motion, the League intentionally ignores these important findings and conclusions and makes little or no mention of Beachwalker County Park.

Exhibit A to the League’s Motion includes only select portions of testimony the League has cherry picked from the record in its attempt to sway the Court’s perception of the upcoming appeal. The hearing transcript in this matter exceeds 1,650 pages, but the Court has only been provided 54 pages in conjunction with the League’s Motion. See Motion, Exhibit A. When the Motion relies on the testimony of a witness, the entire testimony is not provided so that this Court could review the context of the cited portions. At this point the Respondent should not be required to go to the length of identifying the citations to the record that provide this Court with the testimony and exhibits that support the ALC’s ruling since that is the purpose of the briefs and record on appeal.

B. The ALC did, in fact, properly address the Supreme Court’s instructions on remand.

Even a cursory review of the orders now on appeal demonstrates the ALC ruling on remand is supported by the record and the applicable law.

In remanding this matter to the ALC, the Supreme Court identified three errors that the ALC identified in its Amended Final Order on Remand as follows:

1. Whether and to what extent the public, as distinct from KDP alone, would benefit from the proposed bulkhead and revetment, as opposed to leaving the tidelands in their natural state;
2. Whether the project, including the proposed residential development it will facilitate, meets the requirements of 2 S.C. Code Ann. Regs. 30-11 (2011), both as to the factors in S.C. Code Ann. § 48-39-150 (2008 & Supp. 2012) and as to the long-range cumulative impacts of the bulkhead and revetment on the upland; and

3. Whether the project meets the requirements of Reg. 30-12(C), in particular, whether KDP proved there are no feasible alternatives to the bulkhead and revetment under Reg. 30-12(C)(1)(d) when strong consideration is given to leaving the riverbank in its natural state.

Am. Final Order at 3.

Addressing each of these issues, the ALC began its analysis by stating “the Supreme Court remanded the cases to this Court to consider both the benefit to the public, if any, and the extent of any such benefit of constructing the bulkhead and/or revetment. [...] [T]his Court is to also consider the public benefit, if any, of leaving the tidelands in their natural state.” Am. Final Order at 4. Completing its duties on remand regarding factual analysis of public benefit, the ALC considered and made detailed factual findings under sub-headings identified as “Protection of Beachwalker Park” (pp.4-5), “Beach Parking for KICA” (pp. 5-6), the Conservation Easement (pp. 6-7), and “Non-action Alternative” (p. 8). See Am. Final Order (as cited). In response to the League’s Motion for Reconsideration and Clarification, the ALC further and thoroughly discussed its analysis of public benefit. See Clarification Order (rejecting the same arguments improperly included in League’s Motion to Transfer under headings captioned “Application of S.C. Code Ann. § 48-39-30(D)” (pp. 2-5), “Consideration of the Natural State and Public Benefits” (pp.5-8)).

Turning next to “the requirements of 2 S.C. Code Ann. Regs. 30-11 (2011), both as to the factors in S.C. Code Ann. § 48-39-150 (2008 & Supp. 2012) and as to the long-range cumulative impacts of the bulkhead and revetment on the upland,” the ALC’s Amended Final Order addresses each of the considerations required by S.C. Code Ann. § 48-39-150. The ALC’s order includes its findings that the evidence demonstrates a lack of adverse impact on wildlife, the project will prevent erosion, there will be no negative impact on the adjoining landowner, and KDP’s intended


development safeguards will eliminate or minimize environmental impacts. See Am. Final Order at pp. 9-11.

Finally, the ALC conducted a detailed analysis of whether there were feasible alternatives under S.C. Code of Regs. § 30-12(C)(1)(d). The Order notes the Supreme Court directed that in making its determination on remand, the ALC was “to give serious consideration to the no-action alternative... .” See Am. Final Order at p. 16. Complying with this instruction, the Order sets out the ALC’s detailed examination of the testimony, including the testimony of the experts, before concluding that “[i]n short, the benefits to the public in general, to the Town of Kiawah’s purposes of developing the Spit, and to KDP from the stabilization of the shoreline via a bulkhead and revetment outweigh leaving the shoreline in a natural state.” Id. at 18. The ALC determined KDP demonstrated that the riverbank highland should be protected and there was no feasible alternative to the bulkhead for the entire requested length and for the ACB revetment for 270 feet adjacent to Beachwalker County Park. Amended Final Order on Remand at 8, 14-10, 26-28.

CONCLUSION

For the foregoing reasons but not for the misplaced arguments advanced by Appellant, transfer of the League’s current appeal to the Supreme Court is appropriate and necessary.

Respectfully Submitted,

By: 

G. Trenholm Walker (Bar No. 5777)
Thomas P. Gressette, Jr. (Bar No. 14065)
Pratt-Thomas Walker, P.A.
Post Office Drawer 22247
Charleston, SC 29413-2247
Telephone: 843-727-2200
gtw@p-tw.com
tpg@p-tw.com

Attorneys for Respondent, Kiawah
Development Partners, II

April 11, 2016

Charleston, South Carolina

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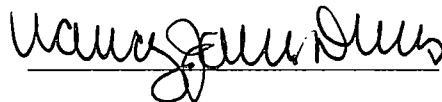
Of whom Kiawah Development Partners, II, is the Respondent.

CERTIFICATE OF SERVICE

I, Nancy Jane Dennis, an employee of Pratt-Thomas Walker, P.A., hereby certify that a copy of the Return to Motion for Order Transferring Case to the Supreme Court was served this 11th day of April 2016, on counsel of record by electronic mail and placing the same in the United States mail, first-class postage pre-paid, to:

Brad Churdar
SCDHEC - Office of General Counsel
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

Amy E. Armstrong
Jessie White
Amelia Thompson
S.C. Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585



PRATT-THOMAS | WALKER

ATTORNEYS AT LAW
PROFESSIONAL ASSOCIATION

16 CHARLOTTE STREET
CHARLESTON, SC 29403
PO DRAWER 22247
CHARLESTON, SC 29413-2247

PHONE: 843.727.2200
FAX: 843.727.2238

WWW.P-TW.COM

April 11, 2016

E-MAIL: gtw@p-tw.com
DIRECT DIAL: 843.727.2208
DIRECT FAX: 843.727-2231

U.S. MAIL FACSIMILE EMAIL

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

RECEIVED
APR 13 2016
SC Court of Appeals

Re: Kiawah Development v. SCDHEC
Appellate Case No. 2016-000707
Our File No.: 2338-042

Dear Ms. Kitchings:

Enclosed please find the original and six copies of the Return of KDP to SCCCL's Motion for Transfer to Supreme Court with Certificate of Service.

With kind regards, I am

Sincerely,

PRATT-THOMAS WALKER, P.A.



G. Trenholm Walker

GTW/njd
Enclosure (Return)

c: Bradley D. Churdar, Esq. (via email and US Mail)
Amy E. Armstrong, Esq. (via email and US Mail)
Jessie Allison White, Esq. (via email and US Mail)
Amelia Ann Thompson, Esq. (via email and US Mail)
Gedney M. Howe, III, Esq. (via email and US Mail)

PRATT-THOMAS | WALKER

ATTORNEYS AT LAW
PROFESSIONAL ASSOCIATION

16 CHARLOTTE STREET
CHARLESTON, SC 29403

PO DRAWER 22247
CHARLESTON, SC 29413-2247



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SC Court of Appeals

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