

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley C. Robinson, Administrative Law Judge

RECEIVED

Case No. 16-ALJ-07-0082-CC

DEC 19 2016

SC Court of Appeals

A. O. Smith Corporation..... Appellant,

v.

South Carolina Department of Health and Environmental Control
and Town of McBee..... Respondents.

**APPELLANT’S REPLY TO TOWN OF MCBEE’S RESPONSE TO
PETITION FOR WRIT OF SUPERSEDEAS**

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Appellant A. O. Smith Corporation (“A.O. Smith”) respectfully submits this Reply to Town of McBee’s Response to Petition for Writ of Supersedeas (“Town’s Response”) filed on December 8, 2016.

I. THE FINAL APPROVALS ARE FOR CONSTRUCTION SUBJECT TO THE CAPACITY REQUIREMENT IN S.C. CODE REG. § 61-58.2(B) AND THE FINAL APPROVALS ACKNOWLEDGE THAT THE TOWN HAS NOT SATISFIED THIS REQUIREMENT.

In its Response, the Town asserts that there is “no legal connection between the capacity issues of which A.O. Smith complains and the regulatory structure under which DHEC issued the challenged permits.” (Town’s Response, p. 2). Specifically, the Town contends that its public water system is an existing system which is not subject to the requirements of S.C. CODE REG. § 61-58.2(B)(1)(b), but is instead only subject to the capacity requirements of S.C. CODE REG. §§ 61-58.7(C)(12) and (D)(12). Contrary to the Town’s contention, Section 61-58.2 clearly applies to the Department decisions challenged by A.O. Smith. Specifically, Section 61-58.2(A) identifies the applicability of this section of the Regulation as follows:

This regulation applies to **all new construction and all expansions or modifications of existing public water systems**. If the Department can reasonably demonstrate that safe delivery of potable water to the public is jeopardized, a system may have to upgrade its existing facilities in order for an expansion or modification to meet the requirements of this regulation. This regulation prescribes **minimum design standards for the construction of groundwater sources and treatment facilities**.

S.C. CODE REG. § 61-58.2(A) (emphasis added). The Final Approvals at issue in this case are for a new groundwater source (i.e., Well No. 2 Operating Equipment) and for new treatment facilities (i.e., the GAC Contactor). Therefore, the Town must satisfy the capacity requirements in S.C. CODE REG. § 61-58.2(B)(1)(b).

In its Response, the Town attempts to demonstrate through affidavits of its own personnel and questionable calculations that its wells have sufficient capacity to meet the regulatory requirements of S.C. CODE REG. § 61-58.2(B)(1)(b). As a preliminary matter, if that is the case, then the Town should have no concerns about a remand of the Final Approvals to the DHEC staff to determine whether the Town's wells meet this regulatory requirement. Indeed, the Town is not currently operating its well because such operation is prohibiting under an injunction issued in *Town of McBee v. Alligator Water & Sewer Company, Inc., et al.*, Case No. 2015-CP-13-00379 ("State Court Case"), which is currently pending in the Court of Common Pleas for Chesterfield County. Accordingly, a remand to the DHEC staff for this determination could be concluded during the pendency of the State Court Action.

Despite the Town's efforts to demonstrate that the operation of its wells independent of Alligator meet the capacity requirements in S.C. CODE REG. § 61-58.2(B)(1)(b), there is no question that the Town has not met this requirement. The Final Approvals clearly state that the Town has not yet demonstrated sufficient capacity to operate its wells independent of Alligator. The Final Approvals each contain the following identical "Special Conditions":

This Final Approval to operate is being conditionally approved. **The Department has concerns about the water system's capacity if only Well No. 1 and Well No. 2 are the sole sources for water supply.** The Town of McBee's Public Water System Operating Permit, Permit Number 1310004, contains the following language:

B. System Specific Conditions

The Town of Mc Bee shall maintain its water system in compliance with all of the applicable requirements of the State Primary Drinking Water Regulations, 61-58. The operator of record for the treatment system and the distribution system must be of the appropriate grade.

The total developed groundwater source capacity shall equal or exceed

the design maximum day demand without pumping more than sixteen (16) hours a day. With the largest producing well out of service, the capacity of the remaining well(s) pumping twenty-four (24) hours a day shall equal or exceed the design maximum daily demand, except those systems requiring only one well. The capacity from an additional source (Surface Water Plant or Master Meter) will be included in the quantity analysis. However, emergency and stand-by wells will not be included in the quantity analysis. If the Town decides to operate and maintain their water systems either by themselves, or through a different contract operator, they can not violate either the water quantity or water quality portion of the SPDWR and the SDWA. Since Alligator's contract for operation and maintenance is linked to their supply of water, this means that prior to possible independent operation (as contemplated by the preliminary engineering report dated December 6, 2010), the Town must have at least two DHEC-approved sources of sufficient quantity and quality to ensure compliance.

The Department recommends that the Town of McBee investigate this capacity issue to demonstrate sufficient capacity exists before utilizing Well No. 1 and Well No. 2 as the primary supply of water.

(Final Approvals, attached to Exhibit 1 of Hartley Aff. (Exhibit I) (emphasis added). The Final Approvals are clearly stated to be "conditionally approved" and state that DHEC "has concerns about the water system's capacity if only Well No. 1 and Well No. 2 are the sole sources for water supply." It is therefore undisputed that the Town has failed to demonstrate compliance with S.C. CODE REG. § 61-58.2(B)(1)(b).

II. A.O. SMITH HAS OFFERED SUFFICIENT EVIDENCE TO SUPPORT ITS CLAIM THAT THE TOWN'S WELLS DO NOT MEET THE CAPACITY REQUIREMENTS OF S.C. CODE REG. § 61-58.2(B)(1)(B).

The Town asserts that A.O. Smith's claim that the Town fails to meet the capacity requirement is "based on speculation and hearsay related to the possible future actions by Alligator." (Town's Response, p. 6). A.O. Smith has presented evidence from the DHEC record to demonstrate that Alligator has repeatedly advised DHEC that it will not serve as a backup source if the Town places its wells into operation. Moreover, in its Motion to Dismiss, the Town also admitted that the purpose of permitting these two wells

is “to operate its own sources of drinking water and to **cease using water purchased from Alligator**.” (Town’s Motion, p. 1, Exhibit 4 to Hartley Aff. (Exhibit I) (emphasis added)).¹ Similarly, in support of its Response, the Town offered the Affidavit of John Campolong, Mayor of Town of McBee (Ex. K to Town’s Response, hereinafter “Campolong Aff.”). This Affidavit conveys a clear intent to discontinue use of the Alligator water source once the Town places its wells into operation. (Campolong Aff., ¶¶ 5-7). Therefore, A.O. Smith’s expectation that Alligator will not continue to supply . . . ToTown system once the Town places its own wells into service is not only reasonable—it is substantiated by the DHEC record and the Town’s own admissions.

Additionally, and significantly, A.O. Smith engaged a third-party engineer to assess whether the Town’s two wells operating alone are adequate to meet A.O. Smith’s demands and to meet the capacity requirements under the regulations. According to A.O. Smith’s engineer, the two water wells will not be sufficient to meet A.O. Smith’s demands, including its instantaneous fire flow demands for its Chesterfield County facility. (Parnell Aff., Exhibit V, ¶ 12).² A.O. Smith’s engineer further opines that the capacity of the Town wells does not meet the redundancy requirements of Section 61-58.2(B)(1) of the State Primary Drinking Water Regulation. (Parnell Aff., Exhibit V, ¶ 12). Contrary to the Town’s assertions, A.O. Smith has presented evidence to demonstrate that the Town is incapable of meeting its regulatory obligations without Alligator’s water supply.

¹ All references to Exhibit I refer to Exhibit I to Petition for Writ of Supersedeas filed on November 28, 2016.

² All references to Exhibit V refer to Exhibit V to Petition for Writ of Supersedeas filed on November 28, 2016.

III. THE PENDING LITIGATION IN CIRCUIT COURT DOES NOT CREATE THE POTENTIAL OF INCONSISTENT COURT ORDERS.

The Town asserts that a stay of the ALC Order would be inconsistent with an order of this Court vacating the injunction issued in the State Court Action. The State Court Action and this action deal with two separate and unrelated legal issues. The State Court Action was filed by the Town asserting the exclusive right to serve A.O. Smith pursuant to 12 U.S.C. § 1926(b), which prohibits a competing entity from curtailing or limiting the service area of an association with indebtedness to the USDA. Alligator counterclaimed and sought an order enjoining the Town from operating its wells during the pendency of the case. The court granted the injunction which is currently under appeal in this Court. The State Court Action does not in any manner involve whether the Town meets the state regulatory requirements for operation of its public water system. Accordingly, the Town fails to identify a basis for inconsistent orders in these two distinct actions.

Additionally, to the extent that the Town is arguing that it might not be able to comply with this Court's decision on the injunction in the State Court Action and an order staying the Final Approvals during the pendency of this appeal, the Town has failed to identify such circumstances, and indeed, none exists. If this Court vacates the order which enjoins the Town from operating its well, then such injunction would no longer prevent the Town's operation of its wells; however, it would not require the Town to operate its wells. Therefore, a continuing stay of the Final Approvals issued by DHEC would not be inconsistent with this Court's order vacating the injunction. Moreover, regardless of any action in the State Court Action as to which entity may serve A.O. Smith under Alligator, that entity must still meet the regulatory requirements for

operation of its system under the DHEC regulations. There is simply no merit to the Town's assertion that granting A.O. Smith's Petition for Writ of Supersedeas could result in inconsistent orders from this Court.

IV. A.O. SMITH TIMELY FILED AN APPEAL OF THE FINAL APPROVALS.

The Town contends that it would be inequitable to grant the requested supersedeas because A.O. Smith's appeal is untimely. However, such contention is based on the very issue on appeal in this matter. A.O. Smith's appeal of the Final Approvals were timely filed. The legal issue on appeal to this Court is whether the Final Approval constitute an agency decision subject to appeal under S.C. CODE ANN. § 44-1-60. A writ of supersedeas is necessary "to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him." *Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990) (citations omitted). As discussed more fully in A.O. Smith's Petition for Writ of Supersedeas, the Final Approvals are not stayed during the pendency of this appeal, A.O. Smith could be deprived of the requested relief if this Court thereafter reverses the ALC's dismissal of the contested case.

As the Town notes in its Response, the court in the State Court Action issued an order enjoining the operation of the Town's wells and the Town has appealed that order. If this Court vacates the order in the State Court Action, then the Town could place its wells into operation. In such case, A.O. Smith could be deprived of the relief sought in this action if this Court thereafter reverses the ALC dismissal of the appeal of the Final Approvals. Without a stay of the September 9, 2016 ALC Order and the Final Approvals, it may be expected that Alligator will discontinue service to the Town and that the Town will cease using water from Alligator. Therefore, even if A.O. Smith

prevails in this appeal, the ALC would no longer be able to grant the relief requested in the contested case—i.e., requiring the Town to demonstrate compliance with the regulatory requirement of Section 61-58.2(B) of the State Primary Drinking Water Regulation prior to operating its public water supply system independent of Alligator. As discussed in A.O. Smith’s Petition, A.O. Smith and the other water customers of the Town would be at risk of inadequate water supply to meet their demands and it would take considerable time for the Town to come into compliance with the capacity requirements in the regulations. Indeed, in its Response, the Town acknowledges that it “can correct any deficiency in water supply . . . by drilling an additional well at a cost on the order of \$250,000 to \$500,000.” (Town’s Response, p. 6). However, the Town fails to acknowledge the fact that the permitting and development of an additional well is a multi-year endeavor during which time A.O. Smith and the Town’s other water customers are left without sufficient capacity to meet their water needs. As such, the equities favor the grant of A.O. Smith’s Petition for Writ of Supersedeas.

V. THE TOWN HAS FAILED TO STATE A VALID BASIS FOR THE REQUESTED BOND.

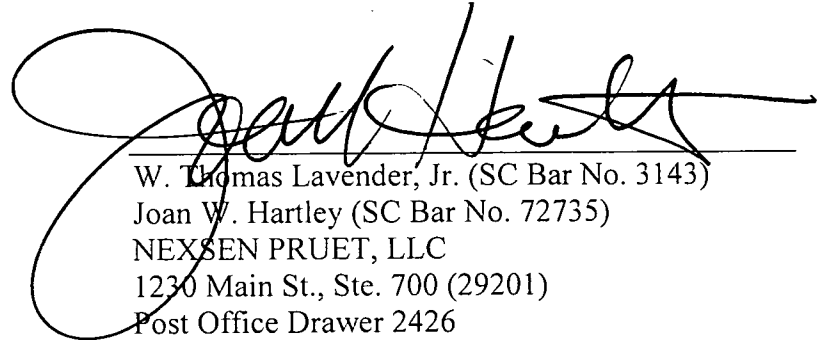
The Town offers the Affidavit of John Campalong (Ex. K to the Town’s Response) in support of its request that A.O. Smith post a bond of at least \$125,000. As a preliminary matter, the Town provides no methodology for the calculation of this requested bond. Moreover, as the Town has acknowledged in its Response, the injunction in the State Court Action prohibits the operation its wells. Therefore, the stay of the Final Approvals will not result in increased costs to the Town. If this Court vacates the injunction in the State Court Action, then the Town may move the Court for a

bond to be posted to cover an increase in costs from the date on which this Court vacates the injunction through the remainder of the pendency of this appeal.

CONCLUSION

A.O. Smith respectfully requests that this Court grant the relief sought in the Petition and reject those arguments raised in the Town's Response.

December 15, 2016



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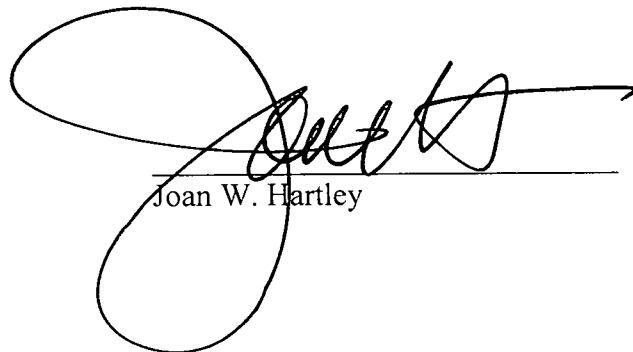
South Carolina Department of Health and Environmental Control
and Town of McBee..... Respondents.

PROOF OF SERVICE

I certify that I served Appellant's Reply to Town of McBee's Response to Petition for Writ of Supersedeas and Verification on counsel of record for Respondents by depositing a copy of them in the United States Mail, postage prepaid, on December 15, 2016, addressed to the following:

Stephen P. Hightower, Esquire
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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: *A.O. Smith Corporation vs. South Carolina Department of Health
and Environmental Control and Town of McBee*
Docket No. 16-ALJ-07-0082-CC
Appellate Case No. 2016-002108

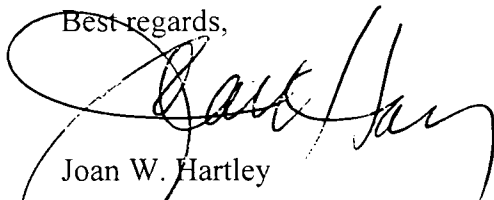
Dear Ms. Kitchings:

Enclosed for filing are the original and seven copies of Appellant's Reply to Town of McBee's Response to Petition for Writ of Supersedeas and Proof of Service in the above-referenced matter. Please return a clocked-in copy of each via the enclosed envelope.

By copy of this letter, we are serving same on counsel of record. Thank you for your assistance in this matter

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach
Raleigh

Best regards,



Joan W. Hartley
JWH/dh

cc: Stephen P. Hightower, Esquire
Belton T. Zeigler, Esquire
M. Todd Carroll, Esquire
Kathryn Mansfield, Esquire