

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JAN 26 2017
SC Court of Appeals

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

Appellate Case No. 2016-001758

South Carolina Department of Health and Environmental Control and Horry
County Department of Public Works.....Respondents,

Vs.

South Carolina Coastal Conservation League and South Carolina Wildlife
Federation.....Appellants.

RESPONDENT Horry County's RESPONSE IN OPPOSITION TO APPELLANTS'
MOTION FOR RECONSIDERATION OF THE ORDER MODIFYING THE STAY ON
COMPLETION OF CONSTRUCTION OF INTERNATIONAL DRIVE

I.

INTRODUCTION

This Court by Order dated January 20, 2017, granted Horry County's Motion to Vacate the Stay issued by the Court on December 15, 2016 (and modified on January 5, 2017). The Court decided that the International Drive project can be completed by the County on the conditions that, until this appeal is finally resolved, the only traffic on the road is to be emergency vehicles and that there may be no connection of the completed road with adjacent properties. Appellants have now moved for reconsideration of that Order.

Appellants raise three issues they claim warrant reconsideration of the Order conditionally lifting the stay. They argue that: 1) Completing the physical construction of the road will deprive this Court of jurisdiction; 2) The road is currently passable for emergency vehicles; and 3) The considerable cost to the County of continuing the original stay is not a proper consideration for

this Court. As explained below, the County disagrees with each proposition and strongly maintains that the partial lifting of the stay was appropriate and that this Order should not be changed.

II.

Physically Completing International Drive Will Not Deprive this Court of Jurisdiction

Appellants again claim that physical completion of International Drive will somehow deprive this Court of jurisdiction by rendering it “impossible” for the Court to order meaningful relief. The County has maintained that the issues regarding the two DHEC certifications at issue were rendered moot when the Army Corps of Engineers issued its permit authorizing the filling of the wetlands necessary to construct the road. (It was this permit which gave rise to the requirement for DHEC to make the certification decisions challenged by Appellants).¹ The County has also argued that the condition of the road at the time the stay was issued was such that no further work on the road would cause additional environmental impacts. This continues to be the position of the County.

Appellants’ claim that the physical completion of the road will irrevocably alter the environment in ways that cannot be remedied by any further action of this Court, thereby depriving the Court of jurisdiction. First, they claim that they can find no case in which a court has ever ordered the removal of a completed and paved road. Appellants’ suggestion that Courts are impotent in this regard is not only extraordinary, it ignores the fact that such orders have been issued. In 1910, the U.S. Supreme Court upheld an order requiring the removal not just of a road, but of an entire bridge. The bridge had been built in full compliance with both federal and state law, but had come to be regarded as an unreasonable obstruction to navigation by the Army Corps

¹ DHEC and the County have filed their Initial Brief in which they jointly take this same position which is consistent with the position taken by DHEC and the County at the ALC in the motion by Appellants for a stay of the ALC order.

of Engineers who won an order requiring its complete removal. Monongahela Bridge Co. v. United States, 216 U.S. 177 (1910). Courts have also ordered the removal of privately owned roads which constitute encroachments on private property. Ridgway v. TTnT Development Corp., 26 S.W.3d 428 (Mo. App. 2000); and Wildflower Community Assoc. v. Rinderknecht, 25 S.W.3d 530 (Mo. App. W.D. 2000). The considerations for removal of a road are no different than for any other flexing of courts' injunctive power.

Appellants' argument mischaracterizes the issue before the Court. It is not the final physical construction of the road that matters. It is the change in the status quo that would result from that work. If, as the Court has now concluded, physical completion of the road would pose no significant change in the status quo, there is no reason to halt that work. Final physical completion of the road cannot, in and of itself, alter the jurisdiction of this Court. This Court's Order conditionally lifting the stay was a proper exercise of equitable injunctive power. The Court removed those parts of the stay which would not protect the environment and allow the County to provide a greater measure of public safety for its citizens and also avoid a \$1 million expenditure of public funds otherwise unnecessary.

The Affidavit of Mike Wooten, a civil engineer who was personally involved in the design of the International Drive project and who has monitored its progress in construction, explains that completion of the road will not alter the status quo either in terms of environmental impacts or the possibility of restoration of the wetlands which have already been completely filled. Exhibit A. Contrary to unqualified, non-engineer opinions filed earlier by the Appellants, paving the road will not compress the soils further or render restoration of the wetlands previously in the right of way any more difficult than it would already be. The "mucking", removal of organic soil from the

wetlands, which was done months ago, has made their restoration difficult, although certainly not impossible. That is the single greatest factor to consider in restoration.

Physical completion of the road will not create any more environmental impacts. The existing state of the road is not as described in the affidavit of Steve Gilbert. Paving it will not create any water quality threats, and will, in fact, reduce the threat of sediment transport. Nor will paving the road create any additional barrier to wildlife movement across the road right of way. Physical completion of the road will not add to nor subtract from any consideration of mootness or jurisdiction of this Court to consider Appellants' challenges to the two DHEC certifications. This comment by the Supreme Court in the Monongahela Bridge Co. is just as true today:

Suffice it to say that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property.

III.

THE ROAD IN ITS CURRENT CONDITION DOES NOT ALLOW EFFECTIVE USE BY EMERGENCY VEHICLES

Appellants argue that because the road in its current condition is capable of navigation by an emergency vehicle, the County should not be allowed to complete its construction. They correctly note that the County advised the U.S. District Court that the road could be made usable for emergency vehicles. At the stage of a motion for temporary restraining order, the County's clear objective was to secure some access for emergency services. Some emergency access is always better than none. Ultimately, the District Court denied Appellants' motion for a preliminary injunction and dissolved the consent TRO agreed to by the parties.

The question of use by emergency vehicles is one of degree. It is also one informed by the County's recent experience with dangerous flooding in the wake of Hurricane Matthew, an event

which occurred after the County's communication to the District Court. That flooding cut off the residents of Highway 90 from effective emergency services – meaning timely arrival of these services. (See the Declaration of Randy Webster filed as Exhibit C to the County's Motion to Vacate the Stay). It is full access to these communities that would best avoid some tragedy resulting from lack of timely access.

The Affidavit of Mike Wooten explains that emergency vehicles using the road in its current condition would be limited in speed to 20 mph. Exhibit A. Rain events would also render the road less usable. Once completely finished, the road would be fully usable by emergency vehicles at speeds over three times that possible today, even in the event of significant flooding like that the County has experienced twice in less than thirteen months – October 2015 and October 2016. Appellants have made it clear in this case, that they do not give any weight to the safety of the citizens of Horry County. Their arguments, such as the most recent one, are cavalier in their disregard of public safety. They have argued that there is no need for emergency access. They have essentially blamed their lack of important access to emergency services on the residents of the Highway 90 communities themselves for choosing to live there. Now, they argue that minimal use of the current road is enough emergency services access for these people. They have, however, offered no evidence contradicting the conclusions of the Horry County officials responsible for the safety of their citizens.

IV.

THE COSTS OF CONTINUING THE STAY IS A PROPER CONSIDERATION

Appellants' claim that cost is not a proper consideration for this Court in a decision on a stay is simply wrong. The rule concerning stays, SCACR 241, provides at (c)(3-4):

(3) The granting of supersedeas or the lifting of the automatic stay under this Rule may be conditioned upon such terms, including but not limited to the filing of a bond or

undertaking, as the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may deem appropriate. Further, where it appears that the granting or lifting of a stay, or the issuance of a writ of supersedeas is insufficient to afford complete relief, the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may order other affirmative relief upon such terms as are deemed appropriate.

(4) If an order is issued pursuant to Rule 241(c)(1), the terms of that order continue in effect during the pendency of the appeal unless modified or revoked by the lower court, the administrative tribunal or the appellate court or judge or justice of the appellate court which issued it, or by a superior court...

It is hard to imagine language that more completely preserves the discretion of this Court to consider all circumstances it deems appropriate so as to do equity and effect justice in any particular case.

Moreover, this is not a matter involving preserving the status quo as to environmental impacts. All environmental impacts from construction of the road have already occurred. Physical completion of the project will cause no further impacts to the environment. Under the current Order, any impacts Appellants fear associated with use of the road are avoided until this appeal is concluded as the road cannot be used other than for emergency vehicles.

Appellants cite several federal cases holding that financial costs were not weighed heavily when compared to harm to the environment. All of these cases involved *harm that had not yet occurred*. In this case, the harm Appellants say they wanted to prevent from road construction has already occurred – all from actions they admit were completely legal. These cases, therefore, have no application to the issue now before the Court.

CONCLUSION

For the reasons set forth herein, Horry County respectfully requests that Appellants' Motion for Reconsideration be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stan Barnett", with a long horizontal flourish extending to the right.

Stan Barnett

305 North Civitas Street

Mount Pleasant, South Carolina 29464

(843) 884-1031 / (843) 708-4887

stan.barnett@yahoo.com

Attorney for Respondent,

Horry County Public Works

January 26, 2017

Mount Pleasant, South Carolina

EXHIBIT A

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

COASTAL CONSERVATION LEAGUE and)
SOUTH CAROLINA WILDLIFE)
FEDERATION,)

Appellants,)

vs.)

Appellate Case No. 2016-001758

SOUTH CAROLINA DEPARTMENT OF)
HEALTH AND ENVIRONMENTAL)
CONTROL and HORRY COUNTY)
PUBLIC WORKS,)

Respondents.)

DECLARATION OF JAMES MICHAEL WOOTEN, PE F.ASCE

I, James Michael Wooten, declare as follows:

1. I reside at 4807 Lily Pond Drive, Murrells Inlet, SC.
2. I am founder President and Principal Engineer of DDC Engineers, Inc., of 1298 Professional Drive, Myrtle Beach, SC.
3. I have a Bachelor of Science in Civil Engineering from the Citadel which was earned in 1977.
4. I am a Registered Professional Engineer (PE) in South Carolina and have been in good standing since receipt of my license to practice since 1982 and am a Fellow of the America Society of Civil Engineers (F.ASCE).
5. DDC Engineers, Inc. is the Engineer of Record for the International Drive project and has been involved in the efforts of Horry County to improve this road for nearly a decade.
6. My firm has been responsible for more than one thousand development projects over the past thirty (30) years. Not once has a project we designed failed to gain full regulatory approval. Several have received awards for environmental stewardship.

7. I was selected by the SCDHEC Board as the only engineering professional to serve on the S.C. Coastal Futures Council, and was a member of the committee established by the Charleston District of the US Army Corps of Engineers to review and comment on the Standard Operating Procedure (SOP) which is used to determine required mitigation for filling jurisdictional wetlands.
8. DDC Engineers was retained by Horry County to provide surveying, planning and design for the International Drive project. As part of that assignment, we worked directly with The Brigman Company, who was responsible for filing regulatory permit applications and working with State and Federal agencies to achieve regulatory approval. Our interaction included efforts to avoid and minimize wetland impacts, as well as to assist in development of alternatives. Through USACE review, we were asked to include additional stormwater crossings beneath the roadway to increase connectivity to wetland areas which had been blocked for decades by the roadway. Our revised plans include twenty (20) such crossings which, when installed, will improve the value and function of the wetlands on both sides of the roadway.

As part of our assignment from the County, DDC was responsible for development of the Stormwater Pollution Prevention Plan (SWPPP) for the project. Under the regulations of SCDHEC, DDC has been responsible for inspecting the work in progress and completing reports regarding our findings since initiation of construction. As such, our personnel have inspected the site on a regular basis since initiation of construction on August 19, 2016. Initiation of construction was authorized by issuance of regulatory approval from the U.S. Army Corps of Engineers on July 22, 2016. As such, DDC personnel had ample time to confer with Horry County representatives and establish our schedule of inspections prior to initiation of construction.

Horry County personnel initially cleared and grubbed the right-of-way, with the exception of the twenty-four (24) acres which had been purchased from the South Carolina Department of Natural Resources (SCDNR) within the first ten (10) days of construction and then initiated placement of fill material in areas in accordance with the plans/profiles and specifications for the roadway project prepared by DDC. In accordance with SCDHEC requirements, SWPPP inspections by DDC personnel were conducted throughout the construction period.

On September 23, 2016 Federal Judge Harwell issued an order which prohibited Horry County from "further work in wetlands within the right-of-way *which have not been filled as the date of the issuance of this order*". DDC was made aware of the order the same day and, as such was informed that any previously undisturbed wetland on the project must be protected until the order was lifted. Horry County continued work in the areas already impacted by clearing, grubbing and filling operations. However, Horry County did not impact any wetland areas that were not impacted prior to the September 23, 2016 order. This left approximately 24-acres of property left untouched, which included approximately 5.4 acres of wetlands.

9. On November 18, 2016 Judge Harwell issued an order allowing Horry County to continue work. Horry County immediately resumed work on the project and moved to clear and grub the remaining 24± acres. Upon completion of that work, the County initiated the installation of structural fill in an effort to get the entire roadbed, from edge of right-of-way to edge of right-of-way, to the same level of completion, in order for the County to accept bids from contractors to complete construction of the road as designed by DDC Engineers, Inc.
10. Horry County set December 21, 2016 as the bid opening date for International Drive. Based on approvals from both State and Federal judges to proceed, the County was eager to begin

construction for a number of reasons. First and foremost to ensure the wishes of the voters of Horry County were carried out. Second, to attempt to get the project back on some semblance of a schedule, which had been interrupted by the Plaintiffs and, finally, to ensure that a contractor was engaged who was ready and able to dedicate sufficient manpower and equipment to the job to avoid the potential for erosion of the fill material into adjacent wetlands should heavy rains impact the site.

11. On December 20, 2016, the Plaintiffs petition to the S.C. Court of Appeals to have Horry County stop work on the project was granted. Because of this, Horry County did not open the bids and, as required by the order, stopped all work on the project.
12. The stormwater management system for the International Drive project was designed to serve the completed project. It was not anticipated that the project would be halted at any point without the ability to prepare the soils to prevent erosion into the adjoining wetlands or to perform maintenance on the pipes, ditches and slopes to correct erosion or remove sediment that may erode.
13. On January 20, 2017, the Court of Appeals lifted the order and Horry County is moving to open bids, select a contractor and complete the project based on the order from the Court.
14. I have read the Affidavit of Mr. Steve Gilbert. I offer the following:
 - Road status quo is the road built other than paving and final grading. All wetlands are filled completely. All of the Lewis Ocean Bay Preserve (LOBP) part of the R/W is cleared and a portion of the road is ready for final grading, base and paving.
 - Final grading, paving, etc. will not cause any further impacts to wetlands or LOBP.
 - There will be no impacts to water quality from completing the road. In fact completion of the road at this juncture will greatly reduce the potential for adverse impacts to the adjacent wetlands.
 - Completing the road will not create any physical barrier to wildlife that the road in its current condition does not already pose.
 - Mr. Gilbert's comments on impacts of the physical construction of the road – all those impacts have already occurred and will not increase with implementation of the remaining work. In fact, paving will significantly reduce the chance of sediment runoff from the R/W to adjoining wetlands.
15. I have read the Affidavit of Mr. Daniel Tufford (See Exhibit F) Plaintiff's motion from January 24, 2017). From reading this, I offer the following:
 - There is nothing in Mr. Tufford's affidavit of January 17, 2017 that indicates he has any education, training, experience or a license to practice engineering. I also heard his testimony at the ALC hearing in February 2016 and did not hear him claim to have any engineering expertise.
 - His conclusion of Page 10 of his affidavit that paving over a former wetland compresses the soil is without merit. The work completed by the County to date has been accomplished in accordance with ASTM standards for compaction. As such the areas that were once wetlands are now grubbed, filled and compacted. Further work above this strata will create no more harm as these wetlands are eradicated. This is a basic engineering and geotechnical design issue not one of biology or ecology.

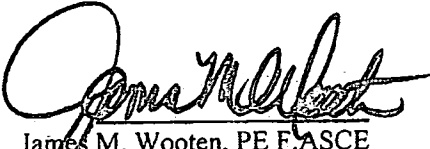
- Restoration of wetlands which have been cleared, grubbed and compacted and then filled in compacted lifts is not impossible but it is very difficult and equally expensive. The materials would have to be excavated and replaced with soils compatible with wetland environment. The hydrology would have to be restored and then vegetation would have to be reintroduced. Completing the roadway at this juncture will not make this action any more difficult than it is today. All of the work discussed herein was completed prior to December 01, 2016, allowing Horry County time to facilitate bidding the remaining work to contractors.
- Mr. Tufford states that paving the road will increase water quality impacts. Again, he lacks the engineering expertise to make this statement. Final design was reviewed and approved by the State agencies and great efforts were made to meet or exceed stormwater quality management requirements. Throughout construction and upon completion, DDC staff will inspect the work in progress and file Stormwater Pollution Prevention Plan (SWPPP) reports in accordance with State law and the applicable regulatory approvals. All pipes, swales, ditches and other stormwater measures work as intended **only** after completion of construction.

I have read Ms. Armstrong's opinion that the road, in its current state, can be utilized for emergency vehicles. To this I offer the following:

- The roadway surface is unpaved and, as such, subject to erosion and displacement eventually creating a surface that cannot support traffic.
- The design speed of the roadway is 60 mph. The intended speed limit for normal traffic is 45 mph. Emergency vehicles are intended to travel at the designed speed. The current condition of the road will not allow vehicles to safely travel at more than 20 mph. As time, weather and traffic erode the road, this will be reduced. As such, there is no assurance that the road without improvement will support emergency traffic in the future.
- This road was intended as a vital transportation link between Highway 90 and Myrtle Beach to allow for access by fire, police and EMS services. In addition, it will effectively reduce traffic on Highway 501, which is one of the most congested roads in South Carolina.

Pursuant to 28 U.S.C. Sec. 1746, I declare, under penalty of perjury, that the foregoing is true and correct to the best of my professional opinion, knowledge and belief.

Signed on the: 25th of January 2017.


James M. Wooten, PE F.ASCE
President and Principal Engineer
DDC Engineers, Inc.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2016-001758

South Carolina Department of Health and Environmental Control
and Horry County Public Works Respondents,

vs.

South Carolina Coastal Conservation League and South Carolina
Wildlife Federation..... Appellants.

PROOF OF SERVICE

I hereby certify that on this date I served the forgoing
Respondent Horry County Response in Opposition to the
Appellants' Motion for Reconsideration by placing copies of same
in the U.S. Mail or delivery by Fed Ex addressed to:

Amy E. Armstrong, Esq.
S.C. Environmental Law Project
430 Highmarket Street
Georgetown, S.C. 29440

Michael S. Traynham, Esq.
SCDHEC
2600 Bull Street
Columbia, S.C. 29201

Nathan M. Haber, Esq.
SCDHEC/OCRM
1362 McMillan Avenue, Suite 400
Charleston, S.C. 29405

A handwritten signature in black ink, appearing to read "Stan Barnett", written over a horizontal line.

Stan Barnett
305 North Civitas Street
Mount Pleasant, South Carolina 29464
(843) 884-1031/ (843) 708-4887
Attorney for Respondent,
Horry County Public Works

January 26, 2017
Mount Pleasant, South Carolina

STAN BARNETT

Attorney at Law
305 North Civitas Street
Mount Pleasant, South Carolina 29464
(843) 884-1031/(843)708-4887
stan.barnett@yahoo.com

RECEIVED
JAN 26 2017
SC COURT OF APPEALS

January 26, 2016

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
1220 Senate Street
Columbia, S.C. 29201

RE: S.C. DHEC and Horry County Public Works v. SC Coastal Conservation League and SC
Wildlife Federation: Admin Law Court Case No. 15-ALJ-07-0404-CC
Appellate Case No.: 2016-001758

Dear Ms Kitchings:

Enclosed for filing, please find the original and six copies of Respondent Horry County's
Response in Opposition to the Appellants' Motion for Reconsideration and Proof of Service.

With kindest regards and appreciation, I remain

Sincerely,


Stan Barnett

Cc: Amy E. Armstrong, Esq.
Michael Traynham, Esq.
Nathan Haber, Esq.
Arrigo Carotti, Esq.