THE STATE OF SOUTH CAROLINA

In the 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

Ct. App. Opinion No. 5474, filed March 15, 2017

Dan Abel and Mary Abel,

Appellants,

v.

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

Respondents.

Petition for Rehearing on behalf of Respondent Pawleys Island Community Church

This case arises out of a DHEC permitting process in connection with a construction/improvement project planned by Pawleys Island Community Church. As required by various regulations, the Church applied to DHEC for a stormwater permit and Coastal Zone Consistency Certification "CZC Certification." The sole basis for the Appellant's 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, specifically Clause 3 – "The Church agrees that the wetland preserved by this Consent Order shall remain in its natural state." The ALJ dismissed the Appellants' challenge, holding: "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 9; Order, p. 9.]

The Court has reversed the ALJ's decision, holding that there is no temporal limitation in clause 3 and that the Consent Order prohibits the Church from ever seeking to modify the wetlands in any future building plans. The Church maintains that 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.

Pursuant to Rule 221, S.C.R.A.P, the Respondent Pawleys Island Community Church petitions the Court for rehearing on the ground that the Court overlooked or misapprehended the following points as noted below and as more fully discussed in Respondents' Brief, which arguments are incorporated herein as if fully restated:

1. The Court overlooks or misapprehends the nature of the administrative permitting process at issue. Back in 2000 and again in 2012, the Church applied for a CZC certification and stormwater permit in connection with construction/improvement projects. Neither the stormwater permit nor the CZC actually authorize the alteration of wetlands. Any permits to fill wetlands are issued by the U.S. Army Corps of Engineers. See discussion at Respondent's Brief, p. 12, ft. 8; see also ALJ Order, ROA 2. The Court also overlooks or misapprehends that the Appellant never actually challenged the wetlands fill permit issued by the Corps or the accompanying CZC issued by DHEC. See ALJ Order, ROA 4. See discussion at Respondent's Brief, p.

2. The Court overlooks or misapprehends the process and implication of the Church's efforts to seek modification of the 2001 Consent Order. That effort was an attempt to meet the concerns of the DHEC staff and encompassed a negotiated agreement with the Mims (who still owned

adjoining property), which should not be considered as probative on the interpretation of the Consent Order. See discussion at Respondent's Brief, p. 18-19.

3. The Court overlooks or misapprehends the applicable rules of contract construction that apply to settlement agreements reduced to consent orders. See discussion at Respondent's Brief, p. 9-12.

a. The Court overlooks or misapprehends that Rule No. 1 is to ascertain the intent of the parties. "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).

b. The Court overlooks or misapprehends that the court must look to the language of the entire contract. "The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof." Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC, 374 S.C. 483, 497, 649 S.E.2d 494, 502 (Ct. App. 2007).

4. The Court overlooks or misapprehends the ALJ's assessment of clause 3. The ALJ did not, as the Court states, "acknowledge[] that clause 3 requiring the Church to preserve the protected wetlands, is ambiguous as to time." Opinion, p. 5. Rather, the ALJ found it was "arguably ambiguous" and properly refused to consider that one clause in isolation: "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 preserved indefinitely, the remaining eight clauses show the temporal applicability of the Consent Order was limited." [ROA 7; Order, p. 7 (citations omitted).]

5. The Court overlooks or misapprehends the rule of construction requiring that the parties' intention must be gathered from the contents of the entire agreement.

a. Clause 3 reads: "The Church agrees that the wetland preserved by this Consent Order shall remain in its natural state." This clause must, at the very least, be read in context with "the wetland preserved by this Consent Order." The "wetland preserved" is referenced in clause 1 and relates to the plan and permit then before DHEC.

b. The explanatory opening paragraph to the consent order creates a temporal restriction to the extent that underlying application/permitting process as recited in the Consent Order constitutes part of the document for consideration of the parties' intent. *See* M & M Grp., Inc. v. Holmes, 379 S.C. 468, 475-76, 666 S.E.2d 262, 266 (Ct. App. 2008). There was a specific permit application for a specific improvement plan at issue, and when that plan was completed in compliance with the permit, the contract had been fulfilled. See discussion in Respondent's Brief, p. 13-14.

6. In considering the hypothetical prospect that the Church could file for another permit and render the settlement meaningless, the Court overlooked or misapprehended the context of the settlement. The settlement agreement arose in an administrative permitting process. There was a permit application before DHEC for a specific project and the agreement applied to that project. The ALJ's jurisdiction in 2001 was limited to review of the 2000 permit/CZC issued by DHEC/OCRM. See 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."). When the project was completed in accordance with the plans as approved under the consent order, the purpose of the settlement was fully accomplished. The ALJ did not have jurisdiction to approve and order a perpetual restrictive contractual obligation outside of DHEC's jurisdiction over the subject matter before it. See discussion in Respondent's Brief, p. 13, ft. 9.

7. The Court has overlooked or misapprehended that all the clauses, including those addressing maintenance of the landscaping and lighting and location of the volleyball courts, are encompassed under the permit application and plan before DHEC. Moreover, none of those clauses are at issue in this appeal, and yet the Court has seemingly created perpetual obligations/restrictions imposed on the Church on these points. In the words of the Court, it "strains the imagination" to accept the conclusion that the parties intended to create such perpetual obligations/restrictions in the process of resolving a contest to an administrative permitting process.

8. The Court has overlooked or misapprehended the 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). "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). In particular, the Court has overlooked the corollary rule that: "The Court is to construe any ambiguity in favor of limited duration and against restricting property." Id. See discussion in Respondent's Brief, p. 16-19.

9. The Court has overlooked or misapprehended that it has created a perpetual restriction inconsistent with the Supreme Court's opinion in S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 550 S.E.2d 299, 302 (2001), wherein 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.". 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. See discussion in Respondent's Brief, p. 16.]

10. The Court overlooked or misapprehended that the dismissal should be sustained on the ground that the Appellants have no standing to challenge the permits because they no longer own property next to the Church property. The Church maintains 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. 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. McLeod v. Baptiste, 315 S.C. 246, 247, 433 S.E.2d 834, 835 (1993) (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.) See discussion in Respondents' Brief, p. 20-21.

11. The Court overlooks or misapprehends nature and scope of the administrative process in issue. The Appellants sought to challenge the DHEC actions in issuing the stormwater permit and the CZC through the administrative process and requested that the ALJ reverse DHEC's decision to issue the permit and CZC. See ROA 39; Petitioner's Request for Contested Case Hearing. See also ROA 69; Petitioner's Prehearing Statement ¶ 4. The Appellants did not seek an injunction to enforce the Consent Order separate or apart from their administrative challenge to the stormwater permit/CZC.

CONCLUSION

The Appellants' sole challenge to the 2014 DHEC/OCRM stormwater permit and CZC rests on the argument that clause 3 of the 2001 Consent Order of Settlement and Dismissal creates a perpetual restriction on any of the Church's future construction projects. The ALJ correctly found that 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 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 reconsider its opinion and affirm the ALJ's decision.

Respectfully submitted,

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Certificate of Service

I certify that on this 30th day of March, 2017, a copy of the foregoing Petition for Rehearing was served on the Appellants and Respondent DHEC 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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March 30. 2017

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
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Dear Madam Clerk:

Enclosed please find the original and six copies of the Petition for Rehearing on behalf of the Respondent Pawleys Island Community Church along with my firm check for the $25.00 filing fee. As evidenced on my Certificate of Service, I am serving a copy of the Petition on Counsel for the Appellants and the Respondent DHEC this same day.

Yours truly,

Deborah Harrison Sheffield

cc: Jessie White, SC Environmental Law Project
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