

5

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
MAY 28 2019
SC Court of Appeals

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

Appellate Case No. 2019-000074

South Carolina Coastal Conservation LeagueAppellant,

v.

South Carolina Department of Health and Environmental Control and KDP II, LLC,
Kiawah Development Partners, II Respondents.

**RESPONDENTS KDP II, LLC and KIAWAH DEVELOPMENT
PARTNERS, II'S RETURN TO APPELLANT'S MOTION
FOR FOURTH EXTENSION OF TIME TO FILE AN
INITIAL BRIEF AND DESIGNATION OF MATTER**

G. Trenholm Walker (SC Bar # 5777)
Thomas P. Gressette (SC Bar #14065)
Walker Gressette Freeman & Linton, LLC
P.O. Box 22167
Charleston, SC 29413
(843) 727-2200
Attorneys for Respondents
KDP II, LLC and Kiawah Development
Partners, II

May 23, 2019
Charleston, South Carolina

Respondents KDP,II, LLC and Kiawah Development Partners, II (jointly “KDP”) file this Return in Opposition to Appellant’s Motion for Fourth Extension of Time.

BACKGROUND

This appeal arises from the final Amended Order and Decision of Ralph King Anderson, III, Chief Judge of the Administrative Law Court (“ALC”) ruling on the merits of a contested case hearing requested by Appellant, South Carolina Coastal Conservation League. Judge Anderson upheld four permits that were issued by Respondent South Carolina Department of Health and Environmental Control (“DHEC”) that allowed the construction of the stormwater system, infrastructure, and underground utilities that will serve 26 residential lots on the western end of Kiawah Island on a peninsula known as Captain Sams Spit. As a condition of its approvals, DHEC required installation of an in-ground steel sheet pile wall (“SSPW”) on the highland interior of the river shoreline near the road right of way to protect both it and the underground utilities from the encroachment of future erosion at any location. The Kiawah River takes a sharp turn at the neck of the peninsula causing erosion to that portion of the riverbank. Appellant stipulated to the structural integrity of the in-ground SSPW that Judge Anderson also found was appropriate.

KDP originally applied for these permits in August 2011 when the Town of Kiawah Island approved a preliminary subdivision plat for residential lots on Captain Sams Spit. DHEC did not issue its approvals until May 2015 after the Supreme Court ruled on an appeal of an unrelated permit for a bulkhead and revetment along the eroding portion of the riverbank. Kiawah Dev. Partners, II v. S.C. Dept. of Health and Envntl. Control, 411 S.C. 16, 766 S.E.2d 707 (2014); Kiawah Dev. Partners, II v. S.C. Dept. of Health and Envntl. Control, 422 S.C. 632, 813 S.E.2d 691 (S.C. 2018)(decision on appeal after order on remand).

By its very nature, erosion of the riverbank continues over time¹ and KDP continues to be harmed and damaged by the delay of the extended litigation process initiated by Appellant. Because Judge Anderson reluctantly granted a stay,² time favors the Appellant. It does not share KDP's sense of urgency.

ARGUMENT

The Appellant has already had 120 days to prepare its initial brief. Time has been, and remains, of the essence to KDP. Time is on the side of the Appellant. The longer the appeal takes, the better for Appellant.

There has been no showing of extraordinary circumstances to justify the request for yet another 30 days. Up until now, KDP has not objected to the repeated requests for extensions but cannot do so any longer. Every request for extension comes at the last minute even though the facts that gave rise to the extension request were known well before the request was made. In its Order granting the third extension entered April 30, 2019, this Court said enough is enough, stating, "No further extensions will be granted absent extraordinary circumstances."

KDP is empathetic with all the personal trials and tribulations of Appellant's counsel as recounted in motion after motion for extensions. KDP certainly offers its sympathies to co-counsel's significant other who suffered a stroke. Yet, each motion is premised on the notion that the brief is only to be done the last week or two of each extension. There is no showing why 120 days has not been enough to prepare the brief during the time that counsel has not been dealing

¹ Only the riverbank in this turn is eroding. The beach on Captain Sams Spit has accreted for more than 70 years.

² "Therefore, although overall the Court finds that with the issuance of an appropriate bond warrants the denial of a stay, without any guidance the Court can only recognize that Supreme Court has previously stayed development at this location under the same asserted facts." Order Granting Motion to Stay, attached as Exhibit 1 hereto, page 13.

with the challenges she recites. Although she mentions that there has been turnover in her office, Jesse White, the attorney who tried the contested case hearing alongside her, is still employed with SCELPA and could have been working on this brief the entire time. There is also no showing why a personal event of a week justifies a 30-day extension as opposed to a week's extension. A week's delay would justify a week's extension.

On the other hand, even though the Appellant is incapable of production of the initial brief within 120 days, it has found the time to file repeated detailed motions seeking extensions and another 12-page motion seeking to transfer this case to the Supreme Court (filed May 17, 2019).

KDP would further point out that the 4000+ page transcript Appellant alludes to has been in the hands of Appellant since October 17, 2017, more than a year and half ago. It was delivered before proposed orders were presented to Judge Anderson. Appellant used that transcript in preparing and submitting its proposed order. The arguments that Appellant presumably will be making in its initial brief should largely be contained in that proposed order and in its extensive motion to reconsider that was filed before the ALC. In other words, the starting gun to review the transcript was not 30 days before the initial brief was first due, but a year before then.

One extension is routine. A second extension in a case of this scope is understandable. Not opposing the third extension was a matter of professional courtesy even though the clock is ticking against KDP.

It must be assumed that Appellant has been working on its brief upon the passing of the last deadline of May 15, 2019, rather than sitting on its hands presuming this Court will grant the request, especially given the strong admonition of this Court in its Order granting the last extension. If any time is granted as to the fourth extension, KDP submits it should be no more

than 15 days, which would allow Appellant to wrap up its work on its initial brief and designation of matter that will have been in the works for over 120 days.

KDP does not oppose the request to exceed the page limitation, provided that KDP receives the same relief.

Respectfully submitted,

WALKER GRESSETTE FREEMAN & LINTON, LLC



G. Trenholm Walker (S.C. Bar No. 5777)
Thomas P. Gressette, Jr., (S.C. Bar No. 14065)

P.O. Drawer 22167

Charleston, SC 29413

T: (843) 727-2252

WALKER@WGFLAW.COM

LINTON@WGFLAW.COM

ATTORNEYS FOR RESPONDENTS,
KDP II, LLC and KIAWAH DEVELOPMENT
PARTNERS, II

May 23, 2019
Charleston, South Carolina



STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation)
League,)
)
Petitioner,)
)
)
vs.)
)
)
South Carolina Department of Health)
and Environmental Control, KDP II, LLC,)
and KRA Development, LP,)
)
)
Respondents.)
)
)
In re: Cape Charles, Phase 1,)
_____)

Docket No. 15-ALJ-07-0369-CC

**ORDER GRANTING
MOTION TO STAY**

This matter comes before the South Carolina Administrative Law Court (Court or ALC) pursuant a Motion to Stay filed by South Carolina Coastal Conservation League (Coastal) on September 25, 2018. Coastal seeks to stay this Court’s Final Order and Decision issued September 24, 2018, to prevent KDP II, LLC, and KRA Development, LP (collectively “KDP”) from beginning construction on Captain Sam’s Spit pursuant to that decision. Coastal argues a stay is necessary to: (1) protect Coastal’s constitutional right to meaningful judicial review; (2) protect access to, and use of, public trust resources; (3) protect fragile coastal resources from irreparable destruction; and (4) preserve the *status quo*. In its response, KDP argues a stay should not be granted because to do so would likely render the case moot. After filing the Motion for Stay, Coastal filed a Motion for Reconsideration with this Court on October 12, 2018.

BACKGROUND

In this Court’s Final Order and Decision, the Court upheld the final agency decision of South Carolina Department of Health and Environmental Control (Department), which granted KDP four permits for the construction of a twenty-six-lot residential subdivision known as “Cape Charles, Phase I” on Captain Sam’s Spit (the Spit). These permits are a National Pollutant Discharge Elimination System (NDPES), Stormwater Discharges Construction Permit, Water Supply Construction Permit, and Wastewater Construction Permit, and they allowed for the

construction of an access road to the site, drainage facilities, underground utilities, and other infrastructure needed for the subdivision. Additionally, the Department granted KDP a Coastal Zone Consistency Certification (CZCC) and approved the construction of a 2,380-linear-foot steel sheet pile wall (SSPW) to stabilize the neck of the Spit and to allow KDP to access and develop the Spit.

DISCUSSION

“A final decision issued by the Administrative Law Court in a contested case may not be stayed except by order of the Administrative Law Court or the court of appeals.” S.C. Code Ann. § 1-23-600(H)(5) (Supp. 2017). Pursuant to Rule 29(E) of the Rules of Procedure for the South Carolina Administrative Law Court (SCALC Rules), “[a]n administrative law judge who issues a final order subject to judicial review may in the order stay its effect.” More specifically,

At any time prior to the filing of a petition for judicial review, and upon the motion of any party, with notice to all parties, the administrative law judge may stay the final order upon appropriate terms. The filing of a motion for a stay does not alter the time for filing a petition for judicial review.

Id.

In determining whether to grant a stay, it helpful to refer to Rule 241 of the South Carolina Appellate Court Rules (SCACR), which governs the imposition of a supersedeas or lifting of the automatic stay in appeals. Although Rule 241 is only implicated when an appeal has been filed, the Court finds imposing a supersedeas is analogous to imposing a stay in the current matter. Pursuant to Rule 241(c)(2), SCACR, a court “should consider whether [imposition of a supersedeas] is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.” Therefore, in appellate matters, the purpose of a supersedeas is to prevent the occurrence of an event that would render judgment or relief, and thus the appeal, meaningless. *See Skydive Myrtle Beach, Inc. v. Horry Cty.*, 424 S.C. 298, 818 S.E.2d 224, 227 (Ct. App. 2018), *reh'g denied* (Sept. 20, 2018) (“A case becomes moot when judgment, if rendered, will have no practical effect upon the existing controversy.”); *id.* (“Mootness also arises when some event occurs making it impossible for the reviewing court to grant effectual relief.”). Indeed, in *Skydive Myrtle Beach, Inc. v. Horry County*, the appellant failed to move for a stay or supersedeas during the pendency of its ejectment action with the result that judgment was executed, and the appellant was ejected from the premises rendering the case moot in the middle of litigation. *Id.*

Having reviewed the applicable law, the Court turns to Coastal's arguments supporting its motion for a stay.

Due Process

Coastal cites to *Ogburn-Matthew v. Loblolly Partners* in its motion to argue it has "due process rights which entitle it to 'notice, an opportunity to be heard in a meaningful way, and judicial review' before construction activities occur on a presently undisturbed, fragile and dynamic area." 332 S.C. 551, 562, 505 W.E.2d 598, 603 (Ct.App. 1998), *overruled on other grounds*. Coastal further contends that "meaningful review cannot be had after this road and [SSPW] are constructed on the Spit," in part, because "[e]ven if the road and [SSPW] could be subsequently removed, the damage will be permanent and irreparable."

This Court agrees that Coastal has a right to due process, including notice, an opportunity to be meaningfully heard, and judicial review. S.C. Const. art. 1, §22; *see also Stono River Envtl. Prot. Ass'n v. S.C. Dep't of Health & Envtl. Control*, 305 S.C. 90, 93–94, 406 S.E.2d 340, 342 (1991); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) ("It is an opportunity which must be granted at a meaningful time and in a meaningful manner."). However, Coastal is not being denied due process. At no time during this litigation has Coastal been denied notice or the opportunity to be meaningfully heard, or been denied the opportunity for judicial review. In fact, Coastal is availing itself of its right to be meaningfully heard before this Court at this moment—having participated in a contested case hearing and now requesting this stay and having filed a motion for reconsideration.

The right to due process does not inherently include the right to stay the execution of judgment until judicial review is completed at the highest level—such logic would lead to the conclusion that Coastal is automatically entitled to such relief, rendering the stay process meaningless. *Cf. Johnson v. Sonoco Prod. Co.*, 381 S.C. 172, 178, 672 S.E.2d 567, 571 (2009) (holding the award of workers' compensation benefits are not automatically stayed on appeal from the circuit court at the conclusions of a statutorily imposed thirty-day supersedeas); Rule 241, SCARC (listing exceptions to the automatic stay triggered by an appeal). Moreover, there is no right to a stay. 5 Am. Jur. 2d *Appellate Review* § 370 (West 2018) ("A 'stay' is not a matter of right, even if irreparable injury might otherwise result; it is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular

case.”). Coastal’s concern regarding the alleged permanent and irreparable harm to the Spit is not a due process issue, but rather an issue that is appropriately addressed by the stay process itself.

Protecting Access to and Use of Public Trust Resources

Coastal contends that the stay is necessary to “protect access to and use of public trust resources.” Public trust resources are, as the South Carolina Supreme Court (Supreme Court) has recently noted, “invaluable—in environmental, economic, and social terms” *Kiawah Dev. Partners, II v. S.C. Dep’t of Health & Env’tl. Control*, 411 S.C. 16, 22, 766 S.E.2d 707, 711 (2014). In this case, unlike the previous case before this Court in 2010 concerning a proposed development on Captain Sam’s Spit, there is no permit involving the critical area that is at issue. There is no direct, immediate impact to the public trust, which includes “tidelands” or “all lands beneath waters influenced by the ebb and flow of the tide.” *Phillips Petroleum Co. v. Miss.*, 484 U.S. 469, 479-80 (1988); *see Lowcountry Open Land Tr. v. State*, 347 S.C. 96, 102, 552 S.E.2d 778, 781 (Ct. App. 2001) (“The State of South Carolina holds presumptive title to all tidelands within its borders, which are held in trust for the benefit of the public.”). This distinction between the current case and the last case before this Court in 2010 is a very important one.

Nevertheless, as this Court recognized in its order,

It is reasonably certain that the Kiawah River’s erosive forces will eventually cause the SSPW to be exposed to some degree, resulting in a loss of riverbank where the SSPW is exposed. This is a long-range effect. However, when the loss of riverbank will occur and the percentage of the SSPW that will eventually be exposed is speculative.

In evaluating whether this reasonably foreseeable impact is a basis upon which a stay should be granted, the Court is constrained by the lack of immediate impact to any public trust resources and unlikelihood that this long-range effect will occur during the pendency of this litigation. The installation of the SSPW and initiation of construction activities related to the permits and CZCC granted in this case only affects the highland area at this juncture.

The Court was also concerned that the current development plans, as permitted, would cross the critical line in two areas near the proposed access road along the SSPW; however, the Court also determined that this issue could be resolved, at least at the time of the hearing, with minor adjustments to the engineering plans. The Court deliberately incorporated the Department’s permit condition requiring the critical line to be re-certified within thirty days before beginning construction to ensure the project was still feasible without entering the critical area.

Thus, there is no immediate effect or impact on the use or existence of the public trust if KDP is allowed to begin construction of the SSPW and other activities associated with the development. If the project is found to interfere with the critical line upon re-certification, KDP will not be able to move forward.

Regarding the protection of public access to public trust resources, as this Court also noted in its order, “the installation of the SSPW will greatly benefit the public in that it will stop further erosion near the park and stabilize the area, protecting the public’s access to the Spit.”¹ Thus, initially, the SSPW will benefit the public by enhancing the safety and preserving the longevity of its access to public trust resources at the Spit. Also as the Court noted in its order, the tall natural escarpment along the Park currently prevents the public from safely accessing the riverbank; therefore, the public’s ability to access the riverbank will be relatively unchanged with the installation of the SSPW. The public’s ability to access the rest of the Spit on the path from the parking lot to the beach will remain unchanged.

In its Reply brief, Coastal now contends the benefit of the SSPW to the public in protecting access is limited because the public can still utilize the park as it currently exists and, if protecting the park were truly the reason for KDP installing the SSPW, then the SSPW would not need to be extended beyond the boundaries to the park. Although Coastal is correct that the park is currently usable, it is constantly being degraded by erosion and the parking lot is unstable. Therefore, the SSPW will provide a benefit to the public that is needed by stabilizing the parking lot that provides access to the beach along the Spit.

Coastal also now contends in its Reply brief that any public benefit could only be claimed with respect to the 270' of the SSPW that fronts the parking lot at Beachwalker Park, and not beyond. It further states, “[i]f the park truly were a concern, KDP, as owner of the park property, could have constructed the bulkhead and revetment system authorized by DHEC and affirmed by

¹ In its Reply brief, Coastal states no evidence exists to establish the loss of “several parking spots” or “some parking for the general public.” This statement is incorrect. The erosion has advanced 10.38 feet into Beachwalker Park, and Charleston County, who manages Beachwalker Park, has noted that the erosion “ha[s] caused concern for safety of humans and vehicles. Ray Pantlik testified that the parking area is unsafe “without some stabilization.” Tr. P. 1622, l. 18-20. Moreover, Charleston County placed KDP on notice that the erosion “negatively affects the way CCPRC operates and how they serve the guest who use this facility.” Tr. P. 1790, l. 10-14. In fact, the exhibits clearly show the collapse of the walkway to the river, the steep escarpment, and the barricades restricting vehicular and public access. A portion of the parking area is closed because “they don't know how extensive the erosion is under the asphalt.” Tr. P. 1790, l. 19-25.

the Supreme Court at any point since the Opinion was issued.”² Thus, Coastal asserts that KDP’s contentions that the permit will serve a public benefit are self-serving. Indeed, Coastal’s contentions regarding KDP may be true and are certainly not missed by this Court.

From a practical perspective, KDP has no incentive to protect the park if they cannot build an erosion control structure that also protects their investment. In this sense, KDP’s ultimate goal in protecting the public’s access at Beachwalker Park is almost certainly motivated, in part, by its need to protect its own interest. Nevertheless, protection of the park is a positive outcome of installing the SSPW that cannot be overlooked simply because KDP’s motivation may not be completely altruistic. Here, this Court is justly seeking to determine not what is in the best interest of the KDP or even Coastal, but what is in the best interest of the public in light of the legal and regulatory considerations. As explained in the Final Order, viewing the case as a whole, the significant benefit offered to the public by Beachwalker Park outweighs the potential loss of some of the riverbank along the Kiawah River. In fact, Dana Beach, the Executive Director of the Coastal Conservation League, testified that Beachwalker Park is “heavily used” and that “thousands of people all over Charleston County” come to Beachwalker Park.” *See also* Tr. 349, l. 7-10 (testimony of George Finly).

Similarly, Coastal contends in its Reply brief that installation of the 270’ of bulkhead and revetment directly adjacent to the parking lot at Beachwalker Park, which was affirmed by the Supreme Court, would protect the public’s interest. However, as Coastal’s own argument suggests, there is no evidence that, in light of the Supreme Court rejection of the bulkhead along the area protecting the back of the Spit, KDP will beneficently construct the 270’ of bulkhead and revetment adjacent to Beachwalker Park. Moreover, Coastal contends that the neck will eventually breach. If it does, access to the end of the Spit would be eliminated by the vast majority of those who walk to it along the beach.

In sum, the reasonably foreseeable, long-range impact of the SSPW on the critical area is a difficult and close issue in this case, but ultimately the Court finds itself constrained by the fact that the permits, as granted, only affect the highlands. Moreover, KDP has indicated a willingness to only install the SSPW, forgo other associated construction activities, and post a bond covering

² It is notable that these arguments were never made in Coastal’s proposed order.

the removal of the SSPW should it lose on appeal, further minimizing the risk of long-term effects of the SSPW's installation.

Irreparable Harm to Fragile Coastal Resources

Coastal argues that even if KDP posts a bond and is allowed to install the SSPW, the subsequent removal of the SSPW if it loses on appeal will cause "permanent and irreparable" harm.³ Coastal contends that, because of the SSPW's proximity to the critical area, it is doubtful it could be constructed without impacting the critical area. The determination of irreparable harm must be based upon a finding that the harm is actual and imminent. See *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991) (holding that for harm "to be irreparable, the harm must be 'neither remote nor speculative, but actual and imminent'" (citation omitted)). As this Court has found, any negative impact on the public's access to portions of the riverbank caused by the SSPW is unlikely to take place right away and there is no concrete timeframe for when this potential harm could occur. Thus, the loss of access to some unknown portion of the riverbank due to erosion eventually reaching the SSPW, although foreseeable, is also speculative at this time.

³ It is notable that in its Reply Brief Coastal contends that it is "Dr. [Robert S.] Young's uncontradicted opinion is that the proposed construction activities would cause irreparable harm." However, in *Black v. Hodge*, 306 S.C. 196, 410 S.E.2d 596 (Ct. App. 1991), the Court of Appeals held that:

The fact that testimony is not contradicted directly does not render it undisputed. *Terwilliger v. Marion*, 222 S.C. 185, 72 S.E.2d 165 (1952). There remains the question of the inherent probability of the testimony and the credibility of the witness or the interests of the witness in the result of the litigation. *Id.* "If there is anything tending to create distrust in his [or her] truthfulness, the question must be left to the jury." *Id.* at 188, 72 S.E.2d at 166.

306 S.C. at 198, 410 S.E.2d at 596; see also *Hoard ex rel. Hoard v. Roper Hosp., Inc.*, 387 S.C. 539, 549, 694 S.E.2d 1, 6 (2010) (recognizing the soundness of the court's determination in *Black*.) Here, regarding the erosion of the riverbank at low tide, Dr. Young testified that "it's not going to happen instantaneously and it's not going to happen along the entire length of the wall all at once, but this is an eroding shoreline on the Kiawah River . . . [and] the beach is going to disappear." Therefore, although Dr. Young testified that the beach will disappear, he offered no timeframe as to when in the future that would occur. Furthermore, he offered an analogy of the movement of sand along the beach shoreline but offered no explanation as to (1) how that dynamic would or would not occur along the river, or (2) what impact sediment transportation would have on the loss of the shoreline. Finally, as explained in the ALC's Final Order:

the SSPW will not eliminate the entire riverbank, and the most well-used portions of the Spit—the beach and southern tip of the Spit—will remain intact for the public to enjoy. Considering the significant benefit to the public that the SSPW will provide in protecting and stabilizing public access to the Spit at Beachwalker Park, the Court finds the relatively small loss of access to the riverbank does not outweigh the benefits.

In further support of its argument, Coastal cites *Amoco Production Co. v. Village of Gambell, AK* for the proposition that “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable.” 480 U.S. 531, 545 (1987). Interestingly, in *Amoco Production Co.*, the United States Supreme Court held the Ninth Circuit Court of Appeals erred in issuing a preliminary injunction enjoining oil exploration of an area where “injury to subsistence resources from exploration was not at all probable” and the applicable federal laws “clearly did not state . . . that subsistence uses are always more important than development of energy resources, or other uses of federal lands; rather, it expressly declared that preservation of subsistence resources is a public interest and established a framework for reconciliation, where possible, of competing public interests.” *Id.* at 545-46.

Here, unlike *Amoco Production Co.*, we are not dealing with a preliminary injunction. However, like in *Amoco Production Co.*, the Court is mindful of the competing interests of both parties, the competing harms both parties will suffer if a stay is imposed, and the unique issue of the probability that those alleged harms will occur in the timeframe of this litigation.⁴

Coastal’s interest is in preserving the public trust lands in their natural state, unimpacted by development, for the use and enjoyment of the public.⁵ This is, indeed, a worthy cause, but it must be balanced with private property rights and KDP’s interest in using its property for lawful purposes.

⁴ As this Court noted in its order, “[a] review of this State’s policy shows the general goal of this state in adopting the CZMA and adopting the CZMP is to balance economic and social development of the coastal zone with preservation of this state’s coastal resources.” See *Kiawah Dev. Partners, II*, 411 S.C. at 41, 766 S.E.2d at 721 (finding “we believe the CZMA was intended to achieve a balance between environmental and public considerations on the one hand and economic and private considerations on the other”). Thus, similar to *Amoco Prod. Co.*, the applicable laws and policies at issue in this case do not state that one use is favored over another – it is a balance. See *id.*; *Amoco Prod. Co.*, 480 U.S. at 545. Moreover, the Court draws a distinction, again, between *this* case and the 2010 case in which the South Carolina Supreme Court found “[t]he State, through the General Assembly, has adopted the policy that the public interest is usually best served by preserving tidelands in their natural state.” *Kiawah Dev. Partners, II v. S.C. Dep’t of Health & Envtl. Control*, 411 S.C. 16, 29, 766 S.E.2d 707, 715 (2014). The permits at issue in this case do not involve a critical area permit.

⁵ In its Reply Brief, Coastal emphasized that the South Carolina Supreme Court noted, “[u]nlike much of our State’s coastline which is now armored and unnatural, the spit remains untouched by human alteration.” Respectfully, this general conclusion regarding the Spit is not supported by the evidence in this case. In fact, the Spit has been dramatically altered by the use of bulldozers and other mechanized equipment to literally cut off a portion of the Spit to relocate the natural flow of the channel. Indeed, this significant alteration to the Spit occurred in the area of the predominant use of the shoreline by the public.

Coastal asserts it will be irreparably harmed by the installation of the SSPW because the SSPW will interrupt the natural processes of accretion and erosion at the Spit, causing the Spit's natural migration to cease.⁶ The Court concludes the installation of the SSPW will not necessarily cause irreparable harm for the purposes of this motion because it will be built in the highland. KDP has indicated that it is willing to post a bond and remove the SSPW if it loses on appeal, which would allow the Spit to return to its natural environmental conditions. Nevertheless, it is possible that this litigation will linger long enough that the exposure of some part of the SSPW due to erosion could occur, making it more difficult to offset any resulting harm.⁷ However, if the SSPW is removed following an appeal, the natural process that supplies sand to the riverbank as reflected by the Record should return. *E.g.* Tr. P. 478, l. 5-15.

In contrast, KDP argues it will suffer irreparable harm if the SSPW is not installed immediately because without it the continued erosion will likely render its entire project unfeasible. In other words, if KDP prevails on appeal, the delay caused by the appeal would result in the loss of the lawful use of its private property. In KDP's case, the harm could, indeed, be truly irreparable as they are very unlikely to gain back buildable highland lost to erosion unless the setback line is moved in the future. Once the highland is eroded, KDP cannot return the land to

⁶ Coastal buttresses its original arguments by including additional evidence about harms in its Reply, which this Court cannot, in good faith, consider in ruling on this motion at this point in the litigation. Specifically, Coastal attached the affidavit of Dr. Robert S. Young from two years ago to argue that exposure of the SSPW will cause the wall to become so unstable that it will need to be further supported or collapse into the Kiawah River causing further harm. Although Dr. Young testified at trial, he never testified that the wall would need extra bolstering or collapse into the river due to erosion—facts that would have been very probative to this Court's decision. In fact, contrary to Dr. Young's affidavit Coastal stipulated to the engineering sufficiency of the wall at trial.

Similarly, in its Reply, Coastal cites to a two-year-old affidavit from Dr. Michael Dorcas in which Dr. Dorcas outlines the specific harms exposure of the SSPW will cause to diamond back terrapins, including attestations of his personal observations of terrapins on the Spit that are much more robust than any testimony Coastal presented at trial. Dr. Dorcas did not testify at trial. Coastal also cites to a book in its Reply brief that describes how vehicles, in this case construction vehicles, impact plants and soils, without ever having introduced similar evidence at trial.

The Court is also concerned that much of the evidence Coastal would have this Court consider in these affidavits and its Reply is testimony and evidence that could have, and should have, been introduced in Coastal's case in chief. This is not the first time this Court has received a motion that, on a level, appears to be a vehicle for correcting deficiencies related to the case-in-chief, as the Court received a discovery motion after the trial in this case was concluded and the Record was closed. The Court reminds the parties that their interests, and the interests of justice, are best served when all evidence, and attacks upon it, are timely prepared and appropriately submitted to this Court within the confines of the rules to ensure each party presents the best case they can and neither party has an unfair second bite at the apple.

⁷ Interestingly, Coastal argues with a sense of urgency that if the SSPW is allowed to be installed, it will become exposed in "short order" due to erosion, leading to a loss of the public trust. However, Coastal also disclaims KDP's argument that the case will be rendered moot due to the imminent loss of buildable highland from erosion. The Court must somehow reconcile these two arguments.

the point in time as it exists now. Thus, in terms of *imminent* irreparable harms, KDP would appear to suffer a higher degree of harm than Coastal.⁸

KDP also argues that imposing a stay will “affirmatively harm the public” because of the continued erosion at Beachwalker Park. Here again, once the highland is eroded, neither KDP nor Charleston County can return the public use of the land as it exists now. Nevertheless, this point is distinguishable. Although the safety of the public at Beachwalker Park is an important consideration, and while this Court certainly agrees that without the construction of the SSPW the parking lot will continue to erode and expand the areas that are unsafe where the erosion is occurring, the Court disagrees that the demise of the entirety of Beachwalker Park is so imminent that the SSPW must be build “as soon as practicable.”

Balancing these interests, it is because KDP is likely to lose any ability to restore, and thus develop, its land as a result of the stay that I find KDP is more likely to suffer irreparable harm than Coastal during the pendency of this action.

Maintaining the Status Quo

Coastal contends that a stay should be imposed to maintain the status quo until judicial finality.⁹ Coastal asserts that to maintain the status quo requires allowing the Spit to continue to naturally accrete, erode, and migrate without the SSPW interfering. The evidence at the hearing clearly showed that the Spit has, indeed, migrated over time and has breached as recently as seventy years ago. As Coastal correctly points out, the status quo of the Spit is its consistently shifting nature.

⁸ Coastal makes a lengthy argument, for this first time its Reply brief, that “KDP Assumed the risk of erosion by virtue of its title in the subject property” and KDP’s ability to utilize its property is constrained by certain common law principles governing littoral land owners. This argument is inappropriate in a reply brief, and it is an argument that would have been better made at trial regarding the merits of this case. *See Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) (“An appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant’s brief.”). Regardless, it is currently unclear whether a purchaser of a dynamic property has the right to protect his property from erosive forces in light of the South Carolina Supreme Court’s decision to grant extraordinary relief enjoining this Court’s order partially lifting the automatic stay in this case and its decision in *McQueen v. South Carolina Coastal Council*, 354 S.C. 142, 150, 354 S.E.2d 116, 120 (2003) (holding the reversion of the highland to tidelands on McQueen’s property “effected a restriction on McQueen’s property rights inherent in the ownership of property bordering tidal water,” and that “[a]ny taking McQueen suffered is not a taking by State regulation but by the forces of nature and **McQueen’s own lack of vigilance in protecting his property**” (emphasis added)).

⁹ In considering the issue of “status quo,” I recognize that this consideration is made under the Court’s determination of whether the imposition of a supersedeas is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot pursuant to Rule 241(c)(2), SCACR.

However, it can also be argued that the maintaining the status quo requires that the buildable width of the neck be maintained at the width it was when this Court upheld the Department's award of the permits and CZCC in this case. Not only must physical alterations be halted, but the workings of time itself.

Thus, there are two interpretations of how to maintain the status quo—(1) the no action alternative argued by Coastal and (2) the installation of the SSPW to preserve the current physical landscape and thus the status of this appeal, as argued by KDP.

In balancing the pros and cons of each interpretation, Coastal's version of the status quo will require no alteration of the environment, but it will further imperil parking spots at Beachwalker Park and the safety of those who utilize the parking area to visit the beach. However, as discussed above, it is improbable that the entire park and public access will erode during the pendency of this litigation.

In contrast, KDP's interpretation will require alternation of the environment, but that alternation will be on its private, highland property, with a bond for its removal. KDP also contends "there will be no change to the status quo of the animal species that Coastal claimed might be adversely affected by the SSPW." In its Final Order, the Court found that the animal species Coastal claimed might be adversely affected would not be adversely affected by KDP's development plan.

Overall, this Court agrees with Coastal that a no-action alternative is more commensurate with maintaining the status quo as it is commonly understood; however, the unique circumstances of this case—the time-sensitive effects of the continued, on-going erosion—make both parties' arguments compelling.

Previous Considerations

KDP argues the case likely will become moot should the stay be imposed. In support of that contention, KDP submitted the affidavit of Jennifer A. Hayes. Ms. Hayes is a licensed civil engineer who was the principal engineer for the SSPW. In her affidavit, Ms. Hayes attests that:

In my professional opinion, the only way that the access corridor can be protected and preserved in accordance with the approved permits is for the approved in-ground SSPW to be installed immediately.

KDP has made this argument before and, indeed, previously supplied a very similar affidavit from Ms. Hayes in support of its previous motion in this case to lift the automatic stay at

the start of this case. Throughout this litigation, the Court has recognized the decreasing width of buildable highland at the neck of the Spit, finding in its order:

Although the neck has maintained a consistent width, because the baseline is affixed the buildable width of the neck has narrowed as the neck and Spit have moved oceanward. In August 2006, the buildable width at the narrowest location on the neck was 97.52 feet. In contrast, in August 2010, this same location measured 64.43 feet; in June 2011 it measured 60.26 feet; in October 2014 it measured 39.41 feet; in June 2015 it measured 37.06 feet; and in May 2016, when the most recent Department critical line was certified, it measured 29.25 feet.

Considering the above, it is very possible that this case may become moot by the time it is resolved if the SSPW is not installed to prevent further loss of the highland along the neck of the Spit. Thus, KDP's argument goes to the heart of Rule 241's concern about preventing a contested issue from becoming moot.¹⁰

Coastal made no argument in this regard in its initial motion; however, in its reply brief, it responded to KDP's argument and maintained that if a stay is not imposed and the SSPW is installed, its case may become moot because the damage it seeks to prevent will have already been done. Coastal argues that removal of the SSPW, should KDP lose on appeal, will not be sufficient to reverse the harm. Considering it would take much more erosion for the riverbank to be exposed than it would take for KDP to lose its ability to execute its construction plans, the Court finds KDP's argument more compelling in this regard.

Nevertheless, the South Carolina Supreme Court, without explanation, previously rejected KDP's argument that it now reasserts again in Ms. Haye's affidavit when it granted Coastal's motion for extraordinary relief enjoining this Court's order partially lifting the automatic stay upon posting of a bond in the amount \$380,000. Furthermore, the Supreme Court has rejected similar arguments twice before in the 2010 case that was before this Court, first granting supersedeas to Coastal in *Kiawah Dev. Partners, II v. S.C. Dep't of Health and Env'tl. Control, et al.*, Op. No. 2010-UP-155629 (filed July 23, 2010), then maintaining that supersedeas on July 11, 2014, following KDP's motion to lift the automatic stay.

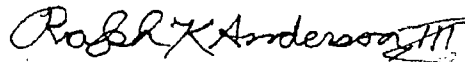
¹⁰ KDP has been making the argument about the imminent need for an erosion control structure to preserve the buildable width of the neck for the past eight years of litigation surrounding Captain Sam's Spit. Although it is now clear that the need for an erosion control structure in the past was not necessarily "imminent," the evidence of the narrowing of buildable width of the neck presented at this trial has convinced the Court that the unabated erosion has finally brought this issue to a critical juncture.

Therefore, although overall the Court finds that with the issuance of an appropriate bond warrants the denial of a stay, without any guidance the Court can only recognize that Supreme Court has previously stayed development at this location under the same asserted facts. For this reason, the Court grants Coastal's motion for a stay this action pending a determination on appeal.

ORDER

IT IS THEREFORE ORDERED that Motion for Stay is **GRANTED**.

AND IT IS SO ORDERED.

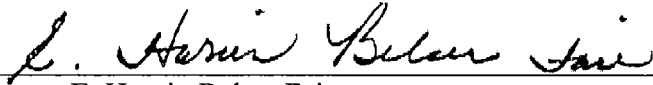


Ralph King Anderson, III
Chief Administrative Law Judge

December 14, 2018
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



E. Harvin Belser Fair
Judicial Law Clerk

December 14, 2018
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
MAY 28 2019
SC Court of Appeals

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

Appellate Case No. 2019-000074

South Carolina Coastal Conservation League Appellant,

v.

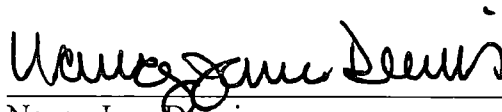
South Carolina Department of Health and Environmental Control and KDP II, LLC,
Kiawah Development Partners, II Respondents.

PROOF OF SERVICE

I hereby certify that I have served a true copy of the foregoing **RESPONDENTS KDP II, LLC AND KIAWAH DEVELOPMENT PARTNERS, II'S RETURN TO APPELLANT'S MOTION FOR FOURTH EXTENSION OF TIME TO FILE AND INITIAL BRIEF AND DESIGNATION OF MATTER** by delivering copies to the following counsel/parties on **May 23, 2019**, by first class mail (postage prepaid, properly addressed) and by electronic mail to the following:

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

Bradley D. Churdar, Esq.
Chief Counsel, DHEC-OCRM
1362 McMillan Ave., Suite 400
Charleston, SC 29405



Nancy Jane Dennis
Paralegal

G. TRENHOLM WALKER
Direct: 843.727.2208
Email: Walker@WGFLAW.com

May 23, 2019

U.S. Mail Facsimile Email

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

RECEIVED
MAY 28 2019
SC Court of Appeals

Re: S.C. Coastal Conservation League v. KDP II, LLC, et al.
Appellate Court Case 2019-000074

Dear Ms. Kitchings:

Enclosed please find for filing with the Court the original and six copies of the Respondents Kiawah Development Partners, II and KDP, II, LLC's Return to Appellant S.C. Coastal Conservation's Motion to Transfer with Certificate of Service. A copy is being sent by facsimile today as well.

Thank you for your many courtesies in these regards.

Sincerely yours,

WALKER GRESSETTE FREEMAN & LINTON, LL



G. Trenholm Walker

Enclosures (Return and COS)

cc: Amy E. Armstrong, Esq. (US Mail and Email)
Jessie A. White, Esq. (US Mail and Email)
Bradley D. Churdar, Esq. (US Mail and Email)

**WALKER
GRESSETTE
FREEMAN
LINTON LLC**

66 Hasell Street, Charleston, SC 29401
PO Box 22167, Charleston, SC 29413

PRIORITY MAIL



US POSTAGE

02 1P

\$ 007.85⁰

0001183649

MAY 23 2019

MAILED FROM ZIP CODE 29401

RECEIVED

MAY 28 2019

SC Court of Appeals

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