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SC Court of Appeals

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

KDP, II, LLC,)
)
Petitioner,)
)
v.)
)
SOUTH CAROLINA DEPARTMENT OF)
HEALTH & ENVIRONMENTAL)
CONTROL,)
)
Respondent.)
_____)

Docket No. 18-ALJ-0047-CC

**ORDER
(Denying Motion to Intervene)**

I. STATEMENT OF THE CASE

This case involves Respondent South Carolina Department of Health & Environmental Control's (Department) delineation of base and setback lines as pertains to beachfront property owned by Petitioner KDP, II, LLC (Petitioner). The matter immediately before the Administrative Law Court (ALC or Court) is a Motion to Intervene filed by the Coastal Conservation League (League). After reviewing the submissions and the applicable law, the League's motion is denied.

II. BACKGROUND

Petitioner owns beachfront property on Kiawah Island, South Carolina, generally referred to as "Captain Sam's Spit" (Property). Petitioner is authorized to develop the Property under the terms of an agreement with Kiawah. On October 6, 2017, the Department published notice of proposed new baselines for all South Carolina beaches. Petitioner disagreed with the Department's proposed baseline and setback line (delineation). At the time, Section 48-39-280(E) provided the following avenue for landowners to present their concerns to the Department about its preliminary determination:

A landowner claiming ownership of property affected who feels that the final or revised set back line, baseline, or erosion rate as adopted is in error, upon submittal of substantiating evidence, must be granted a review of the setback line, baseline, or erosion rate, or a review of all three ...

FILED

July 10, 2020

SC ADMIN. LAW COURT

S.C. Code Ann. § 48-39-280 (Supp. 2017).¹ On November 20, 2017, Petitioner filed a Request for Final Review Conference before the Department's Board. On January 5, 2018, the Department denied the request. On February 5, 2018, Petitioner filed a Request for Contested Case Hearing with this Court. On October 24, 2018, the Department filed a Motion to Dismiss Petitioner's Request for a Contested Case Hearing arguing that Petitioner failed to exhaust its administrative remedies. On March 29, 2019, the Court issued an order denying the motion.

On June 6, 2019 and at the request of the parties, the Court issued a Consent Order of Stay and Remand. Pursuant to this order, the case was stayed and remanded to the Department to allow Petitioner and the Department to confer so as to allow the Department to make a considered determination of the delineation in accordance with the applicable statutes and regulations. On December 6, 2019 and after the Court granted multiple requests for the extension of deadlines on remand made at the request of the parties, the Department issued a Final Decision on Remand which left unchanged, its delineation that is under appeal. On December 23, 2019, Petitioner filed a Request for a Final Review Conference with the Department's Board. On February 11, 2020, the Department declined to conduct the review. On March 6, 2020, Petitioner filed a Renewed Request for Contested Case Hearing After Remand and Request to Lift Stay. On June 10, 2020, the Court lifted the stay and directed all parties to update their prehearing statements and submit a consent scheduling order by June 30, 2020.

On May 26, 2020, the League filed a motion seeking intervention in this matter. On June 15, 2020, Petitioner submitted a memorandum opposing the motion. On June 24, 2020, the League submitted a return. The Department has not taken a position in this matter.

III. APPLICABLE STANDARD

Citing to Section 48-39-280(E) of the South Carolina Code, Petitioner argues that the Court does not have jurisdiction to permit intervention by the League. On its face, the plain language of

¹ The statute was later amended by 2018 South Carolina Laws Act No. 173 (H. 4683) and effective May 3, 2018 to provide in part that "A landowner claiming ownership of property adversely affected by the establishment of a baseline or setback line, upon submittal of substantiating evidence, must be granted a review of the baseline or setback line. Alternatively, the municipality or county in which the property is situated, acting on behalf of the landowner with his written authorization, or an organization acting on behalf of the landowner with his written authorization, upon submittal of substantiating evidence, must be granted a review of the baseline and setback line ..." S.C. Code Ann. § 48-39-280(F)(1) (Supp. 2019).

Section 48-39-280(E) (and now, Section 48-39-280(F)(1)) limits the right to request a department review and contested case to a landowner. The statute is silent, however, as to intervention.

SCALC Rule 20(B) provides that:

- Any person may intervene in a pending contested case hearing upon a showing that:
- (1) the movant will be aggrieved or adversely affected by the final order;
 - (2) the interests of the movant are not being adequately represented by the existing parties, or that it is otherwise entitled to intervene;
 - (3) that intervention will not unduly prolong the proceedings or otherwise prejudice the right of existing parties.

SCALC Rule 20(C) further provides that a motion to intervene “shall be filed as early in the proceedings as possible to avoid adverse impact on the existing parties or the disposition of the proceedings.”

A party seeking to intervene has the burden of showing that intervention is proper. *See In re Horry Co. State Bank*, 361 S.C. 503, 508, 604 S.E.2d 723, 725 (Ct. App. 2004). For intervention purposes, a person “will be aggrieved or adversely affected by the final order” if final disposition of a matter may impair his ability to protect his interests. ALJD Rule 20(B)(1); *cf.* Rule 24(a)(2), SCRCPC; *Berkeley Electric Cooperative, Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 394 S.E.2d 712, 714-715 (1990). Here, the League has not met its burden.

IV. DISCUSSION

A. The League Will Not Be Aggrieved or Adversely Affected by the Final Order in this Case

In its motion, the League states:

The League seeks intervention in this case because an order moving the beachfront jurisdictional lines seaward on the Spit *will create the opportunity* for Petitioner to construct a road to access the proposed lots to be developed and thereby will injure the members of the League who use and enjoy the Spit (emphasis added).

The access road that the League seeks to prevent was permitted in *S.C. Coastal Conservation League v. S.C. Dep’t of Health and Envtl. Control and Kiawah Dev. Partners, II*, Docket No. 15-ALJ-07-0369-CC (Sept. 24, 2018). The League vigorously contested the issuance of those permits and the case is now on appeal. *See S.C. Coastal Conservation League v. S.C. Dep’t of Health and Envtl. Control, KDP, II, LLC, and KRA Dev., LP*, Appellate Case No. 2019-000074. Whether a road can or cannot be built is not at issue in this case but rather, the application of the statutory criteria to the facts that govern the setting of jurisdictional lines on beachfront property that is

privately owned. For this same reason, the affidavit² submitted with the League's return fails to establish that it will be adversely affected by the final order in this case.

Here, the League has no personal stake in the delineation of the base and setback lines. The injury about which the League and its affiant complain (that the possibility of a seaward movement of the jurisdictional line "will create the opportunity for Petitioner to construct a road"), is neither actual nor imminent but rather conjectural or hypothetical. See generally, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1991); *Sea Pines Ass'n for the Protection of Wildlife, Inc. v. S.C. Dep't of Natural Resources*, 345 S.C. 594, 550 S.E.2d 287 (2001). The League has presented no evidence that a decision by the Court establishing the jurisdictional lines will result in any individualized or particularized harm.

While not determinative of this matter, the Court notes that the legislative scheme that governs who may request a review or a contested case for matters involving the establishment of a baseline or setback line, evidences an intent by the legislature to limit that relief to a landowner or property owner. See S.C. Code Ann. §§ 48-39-280(E) (Supp. 2017); 48-39-280(F)(1) and (5) (Supp. 2019); S.C. Code Ann. Regs. § 30-14(F) (2011).³

² The League submitted the affidavit of an individual who resides three miles from the Property and regularly engages in recreational activities either on the beach at or in the vicinity of the Property. The individual states that he testified in a contested case hearing at this Court wherein another judge granted Petitioner a permit to install a sheet pile wall for purposes of erosion control (his affidavit did not mention that the order in that case which is on appeal also authorized the construction of a roadway, stormwater management system, utility lines, gravity sewer, manholes, a pump station, a force main, and water lines in connection with a twenty-six lot residential development on the Property) and that his understanding is that is the location of the jurisdictional lines in this matter would provide additional room to allow for the construction of the road. He concludes that the construction of an access road along with development would diminish his enjoyment of the area and deter the existing wildlife habitat that exists in the area of the Property. Again, the issue in this case does not pertain to the construction of an access road or any permit that would allow for development.

³ Without any discussion, the League asserts that Regulation 30-14(F)(2) indicates that an "any 'affected person,'" may file an appeal. The League's reference to Regulation 30-14(F) is misplaced. Regulation 30-14(F)(1) specifically limits review by the Department to requests initiated by a "landowner claiming ownership of affected property" or "property owners." While Regulation 30-14(F)(2) provides that "Appeals are governed by R. 30-6," the rules of statutory construction evidence that this was merely a reference intended for purposes of outlining a procedural mechanism for landowners and not conferring standing. See *Atlas Food Systems and Services, Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 558, 440 S.E.2d 858, 859 (1994) ("The general rule of statutory construction is that a specific statute prevails over a more general one."). Additional support can be discerned from the fact that Regulation 30-6 specifically addresses "Department decision[s] involving the issuance, denial, suspension, or revocation of a permit or certification" and not matters pertaining to the delineation of a base and setback lines. Finally, any such appeal is limited to an affected person **with standing** and not "any 'affected person.'" S.C. Code Ann. Regs. § 30-6 (2011). Although not applicable to this matter, the Court notes that effective June 26, 2020, the text of subsection (F) of Regulation 30-14 has been deleted.

B. The League's Intervention Will Cause Undue Delay and Prejudice Petitioner

The League makes a blanket assertion that its intervention “will not unduly delay or prejudice the adjudication of the rights of the original parties,” and that “the proposed intervenor will not seek to prolong the adjudication of any issue.” Because of the Department’s inability to timely arrive at a final decision as to the delineation of the baseline and set back lines for the Property, Petitioner has been denied a timely final adjudication on the merits for more than thirty-two months. The addition of the League as a party at this late stage would introduce new attorneys and witnesses and added discovery (written and depositions) thereby prolonging the proceedings which have already been unduly delayed through no fault of Petitioner. Intervention by the League would also serve to exponentially increase the time and costs incurred by Petitioner in preparing for and trying this contested matter where any possible interest the League may have is speculative at best.

C. The League's Motion is Untimely

SCALC Rule 20(C) provides that a motion to intervene “shall be filed as early in the proceedings as possible to avoid adverse impact on the existing parties or the disposition of the proceedings.” The League asserts that “it was unaware of the existence of this particular appeal” and that even if it had been so aware, it maintains that it would not have been appropriate to intervene during the pendency of a motion to dismiss. This case has been pending with the Court since February 5, 2018 and is a matter of public record. Thus, even if the League did not have actual knowledge of this pending case, the League should have known by the exercise of reasonable diligence that a request for a contested case hearing had been filed and sought to intervene in a timely manner so as to not prejudice existing parties to the litigation.

Moreover, other facts indicate that the League was aware as early as 2016 that the baseline for the Property would be set in 2017. An article in the Post & Courier quoted Dana Beach, the League’s executive director as stating, “setting it [the baseline] next year will put the setback line in the river and the baseline 100 feet back in the former dunes.” *Hurricane confirms instability of Capt. Sam’s Spit*, Post and Courier, October 16, 2016, available online at https://www.postandcourier.com/opinion/editorials/hurricane-confirms-instability-of-capt-sams-spit/article_1cba2d94-9643-11e6-8d44-974a15f79888.html. Mr. Beach’s comments were reiterated on November 8, 2016. See *A Wedge in the Sand: Nature Intervenes in Construction Line Controversy: Hurricane Matthew moved the battle lines on Kiawah Island's controversial*


Captain Sam's Spit, The Journal of Light Construction, November 8, 2016, available online at: https://www.jlconline.com/coastal-contractor-news/nature-intervenues-in-construction-line-controversy_o.

As the Court has concluded that: (1) the League's motion is untimely; (2) the League has failed to show that it will be aggrieved or adversely affected by the final order; (3) and that the League's intervention will unduly prolong the proceedings and otherwise prejudice Petitioner, the Court need not address whether the League's interests will be adequately represented by the Department.

V. ORDER

IT IS THEREFORE ORDERED that the Coastal Conservation League's Motion to Intervene in the above-captioned matter is **DENIED**.

AND IT IS SO ORDERED.



SHIRLEY C. ROBINSON
Administrative Law Judge

July 10, 2020
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Ti'a Smith, 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, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



Ti'a Smith
Judicial Law Clerk

July 10, 2020
Columbia, South Carolina