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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Petitioner, v. South Carolina Department of Health and Environmental Control and DeBordieu Colony Community Association, Respondents.	Docket No. 19-ALJ-07-0089-CC **ORDER DENYING MOTION FOR SUPERSEDEAS**

RECEIVED
Oct 13 2021
SC Court of Appeals

Appearances:

For Petitioner: Leslie S. Lenhardt, Esq.
For Respondent DCCA: Tracey C. Green, Esq., J. Joseph Owens, Esq.
For Respondent DHEC: Sallie P. Phelan, Esq.

STATEMENT OF THE CASE

This matter is before the Administrative Law Court (Court or ALC) on a Motion for Supersedeas (Motion) filed by Petitioner South Carolina Coastal Conservation League (League) pursuant to Rule 241(c) of the South Carolina Appellate Court Rules (SCACR) and Rule 68 of the Rules of Procedure for the Administrative Law Court (SCALC Rules). Petitioner asks this Court to impose a supersedeas staying the operation of the Court's Final Order in this case pending the resolution of Petitioner's appeal. This Court's Final Order affirmed the issuance of a permit by the South Carolina Department of Health and Environmental Control (Department) to Respondent DeBordieu Colony Community Association (DCCA) to construct three groins on Debidue Island in Georgetown, South Carolina. Petitioner argues the supersedeas is necessary to preserve the status quo and, therefore, prevent the appeal from becoming moot. DCCA filed a Response in Opposition, and Petitioner filed a Reply.[1] A hearing on the Motion was held at the Court's offices in Columbia, South Carolina, on September 15, 2021. After a thorough review of the filings in

[1] The Reply was not properly submitted to the ALC. However, the arguments made in the Reply were reiterated at the hearing in this matter and were therefore considered by the ALC.

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this case and consideration of the parties' arguments, I conclude the Motion must be denied for the reasons stated below.

PROCEDURAL BACKGROUND

This matter originally came before the Court pursuant to a Request for Contested Case Hearing filed by the League challenging the Department's decision to issue Permit 2017-01795 to DCCA for beach renourishment and the construction of three groins along a 1.5-mile section of Debidue Island. This original case, docket number 19-ALJ-07-0089-CC, was consolidated for hearing purposes with another Request for Contested Case filed by the Belle W. Baruch Foundation (Baruch) (docket number 19-ALJ-07-0088-CC) challenging the same permit issued by the Department. While the litigation was pending in these cases, Baruch and DCCA filed a Joint Motion for Approval of a Settlement Agreement. On April 3, 2020, the Court dismissed Baruch's case with prejudice consistent with the Settlement Agreement, which included the amendment of the permit.

On April 15, 2020, consistent with this Court's Order of Dismissal, the Department issued an Amended Permit, which remained identified as permit number 2017-01795. The Department advised that the amendment was made part of the original Permit and was subject to the full terms of the Permit as issued. After this Amended Permit was issued, the League requested a Final Review Conference before the Department's Board, which was denied. The League thereafter filed a second Request for Contested Case to challenge the Amended Permit. This case was assigned docket number 20-ALJ-07-0161-CC and was consolidated with the League's original case pursuant to an Order of Consolidation issued on July 30, 2020.

Accordingly, at the time of the merits hearing in this case, the League's two contested cases challenging the original Permit and the Amended Permit were before the Court. The merits hearing was held on August 24-26, 2020, at the Court's offices in Columbia, South Carolina. On January 15, 2021, the Court issued a Final Order in this case affirming the Department's issuance of the permit, as amended. On February 15, 2021, the League appealed this Court's Final Order to the South Carolina Court of Appeals.[2] The League has raised the following three issues before the Court of Appeals:

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[2] Although the Final Order disposed of two cases, which were consolidated for hearing purposes, the League did not appeal docket number 20-ALJ-07-0161-CC, but instead, only appealed docket number 19-ALJ-07-0089-CC. Therefore, the Motion before this Court only listed that docket number as well.

1. Did the ALC err in finding that [the] proposed permit does not violate S.C. Code Ann. § 48-39-290(A)(8), which states that new groins are only allowed "on beaches that have high erosion rates"?
2. Did the ALC err in finding that [the] proposed permit does not violate S.C. Code Ann. § 48-39-290(A)(8), which states that new groins are only allowed on beaches "with erosion threatening existing development or public parks"?
3. Did the ALC err in finding that [the] proposed permit does not violate S.C. Code Ann. § 48-39-290(A)(8)(b), which states that "[g]roins may be permitted only after thorough analysis demonstrates that the groin will not cause a detrimental effect on adjacent or downdrift areas"?

In the matter now before the Court, the League contends that DCCA will complete its renourishment and construction activities before its appeal is concluded, resulting in the case becoming moot. Based upon the permit, DCCA's renourishment and construction activities are limited to the time period of November 1 through June 30 of any given year to avoid disturbing sea turtle nesting season. Therefore, if a supersedeas is not imposed, DCCA could begin construction as early as November 1, 2021. Based on the affidavit of Steven Traynum,[3] DCCA currently plans to begin mobilization in October of this year, start construction in November, and

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3 Steven Traynum is a project manager as Coastal Science & Engineering (CSE), the firm hired by DCCA to evaluate its options for renourishment and erosion control at Debidue Beach. Mr. Traynum did not testify at the merits hearing in this case and, therefore, has not been qualified as an expert.

The League argues this Court should not rely on Mr. Traynum's affidavit because he is not a professional engineer, his deposition showed minimal involvement with the project, and he was not qualified as an expert. Following the submission of his initial affidavit, DCCA submitted a supplemental affidavit for Mr. Traynum in which Mr. Traynum attests to his experience as a project manager for groin installation projects at Hunting Island, South Carolina, Edisto Island, South Carolina, and his experience as an assistance project manager for groin installation at Folly Beach, South Carolina. He avers he has extensive experience with groin analysis, design, permitting, construction, installation oversight, modification, and subsequent monitoring. The evidence thus reflects that although Mr. Traynum did not initially have extensive involvement with the project at the time he was originally deposed in this case, his involvement with this matter is now significant. For instance, Mr. Traynum is now the project manager for construction, oversight, installation, and subsequent monitoring of this project. Accordingly, he is very familiar with the project, and he is authorized to speak about the project on behalf of CSE.

Mr. Traynum attests that the concerns he voices in his original affidavit concerning the imposition of a supersedeas are a product of his professional opinion to a reasonable degree of scientific certainty. He further attests that the documents he relied upon in forming his opinions in the affidavits are the type of materials reasonably relied upon by experts in the field. The validity of Mr. Traynum's attestations was verified in supplemental affidavits submitted by Dr. Timothy Kana and Dr. Haiqing Kaczkowski, both of whom were qualified as experts and testified at the merits hearing in this case. The League contends Dr. Kana's and Dr. Kaczkowski's affidavits merely serve to bolster Mr. Traynum's affidavit when their own affidavits would have been more reliable and compelling.

Overall, I conclude the supplemental affidavits resolve any concerns this Court may have had about the credibility or reliability of Mr. Traynum's original affidavit. Accordingly, I find Mr. Traynum's affidavits to be credible and reliable, although I find they are entitled to less weight than testimony subject to cross-examination given at the merits hearing in this case. Moreover, the affidavits of Dr. Kana and Dr. Kaczkowski, both of whom were determined to be reliable experts by this Court and subject to cross examination, were very credible.

complete the project by February 2022. Groin construction is expected to commence approximately two weeks after the renourishment and take twelve to fourteen weeks to complete.

DISCUSSION

The serving and filing of a notice of appeal does not automatically stay the enforcement of an order of this Court. S.C. Code Ann. § 1-23-600(H)(5) (Supp. 2020); S.C. Code Ann. § 1-23-610(A) (Supp. 2020), *see also* Rule 241(b)(11), SCACR (providing appeals from administrative tribunals are an exception to the automatic stay in appeals). However, Rule 241(c), SCACR, provides that when no automatic stay is imposed, a party may move for an order imposing a supersedeas of matters decided in the order being appealed. *See* SCALC Rule 68 ("[T]he South Carolina Appellate Court Rules . . . may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these rules."). Generally, a supersedeas is a writ or order that suspends or stays the enforcement of a judgment pending appeal. *See, e.g.*, *Supersedeas*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A writ or bond that suspends a judgment creditor's power to levy execution, usu. pending appeal."). The motion for a supersedeas must first be made in this Court. Rule 241(d)(1), SCACR. When determining whether to grant the motion for supersedeas, the Court "should consider whether such an order is necessary to preserve jurisdiction or the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR. Additionally, the court has the authority to condition the granting of the supersedeas upon such terms it may deem appropriate, including the filing of a bond. Rule 241(c)(3), SCACR.

Status Quo

The League moves this Court for a supersedeas, in part, to preserve the status quo. Whether to preserve the status quo is not a consideration contemplated by Rule 241; rather, preserving the status quo is the effect of granting a supersedeas. *Melton v. Walker*, 209 S.C. 330, 336, 40 S.E.2d 161, 164 (1946) (holding "[t]he general rule is that the effect of a supersedeas or stay is to suspend proceedings and preserve the status quo pending the determination of the appeal or proceeding in error"). Nevertheless, the League argues that "preserving the status quo is equated with preserving the Court's jurisdiction."

Equating preserving the status quo with preserving jurisdiction is an overly broad assertion, and I do not find that jurisdiction will always be lost if the status quo is not maintained. If this were the case, then there should be no exceptions to the imposition of the automatic stay on appeal.

Yet, the legislature has made it clear that some cases, like this one, are exempt from the automatic stay. § 1-23-600(H)(5) ("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."); § 1-23-610(A)(2) ("Except as otherwise provided in this chapter, the serving and filing of the notice of appeal does not itself stay enforcement of the administrative law judge's decision."). In fact, the legislature's recent revision of the statute governing the lifting of the automatic stay following a request for a contested cases from a decision by a State board or commission shows the legislature's intent to make it easier to lift stays even before the contested case is determined by the ALC, thus allowing permitted projects to move forward. § 1-23-600(H)(4)(a) ("The court **shall** lift the stay unless the party that requested a contested case hearing proves: (i) the likelihood of irreparable harm if the stay is lifted, (ii) the substantial likelihood that the party requesting the contested case and stay will succeed on the merits of the case, (iii) the balance of equities weigh in favor of continuing the stay, and (iv) continuing the stay serves the public interest." (emphasis added)). The legislature's determination to allow the automatic stay to be more easily lifted when a contested case comes to the ALC, and to impose no automatic stay following the ALC's final order in these cases, reflects a legislative conclusion that the benefits of allowing projects to move forward can outweigh the potential cost of reversal on appeal. *See* § 1-23-600(H)(4)(a); § 1-23-600(H)(5); § 1-23-610(A). Indeed, allowing projects to move forward makes sense in cases where actions taken pursuant to the lower court's ruling can be adequately, and cost-effectively, reversed upon an adverse ruling on appeal.

Use of the Beachfront

In this case, the status quo the League seeks to preserve is the natural processes of the beachfront and the "natural ebb and flow that allows for unhindered access for the members of the public who regularly use it." While I agree with the League that allowing the groins to be constructed will not preserve the status quo, the legislature has made it clear that in cases like this, preserving the status quo is not the default on appeal, it is the exception. *See* § 1-23-600(H)(5); § 1-23-610(A). Therefore, the League must show a specific need for a stay under the facts of this case—the League must show preserving the status quo is necessary to preserve jurisdiction or prevent an issue from becoming moot. Rule 241(c)(2), SCACR.

Turning to the current appellate litigation and issues raised in that litigation, it is notable that "unhindered access for members of the public" is not one of the issues the League is litigating

on appeal. Nor has the League provided any argument why preserving unhindered public access is necessary to retain jurisdiction. *Id.* Therefore, preserving the status quo of unhindered public access is not necessary to prevent this "issue" from becoming moot, since it is not an issue.[4] *Id.* Moreover, the facts presented at trial indicate that ultimately access to the beach will be protected by a specific requirement of the permit.[5]

Preserving the Natural Ebb and Flow of the Beachfront

Next, the League contends that allowing "the significant disruption of the natural beach" through the construction of the groins before the League can obtain judicial review is contrary to preserving the status quo. However, the League's desire to preserve the status quo of the natural ebb and flow of the beach is ironic because the League does not oppose DCCA renourishing the beach, which is part of the contested permit. The addition of this sand is a significant, unnatural addition to the environment that involves the use of heavy machinery to add hundreds of thousands of cubic yards of sand to the beach that will change the shape of the beachscape and the amount of sand moving within the littoral system. The League nonetheless maintains that because it did not contest the renourishment before this Court, the renourishment is part of the "status quo." Yet, if the status quo is truly maintained in this case, the beach would remain in the condition it is in absent the permit (no renourishment or groin construction).

Irony aside, the League has failed to show that maintaining the natural ebb and flow of the beach without the groins is necessary to prevent the loss of jurisdiction or to prevent an issue or

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[4] Even if this issue were considered, approximately 2,000 ft. of DeBordieu Colony beach is so eroded that there is no walkable area from mid-tide and higher. As a result, during at least half of any typical day, beachgoers cannot walk the beach from the north side of DeBordieu Colony to the south side. At the south end of the bulkhead, there are presently only a few hours of access around low tide. The permitted project (which includes renourishment and installation of the groins) will remedy those restrictions allowing the beach to be passable in front of the bulkhead at high tide. Furthermore, access to the beach will be limited by the sand renourishment project which the League. Construction of the groins will mostly coincide with that renourishment project.

[5] Special Condition 15 of the permit requires that "[a]ccess along the beach in the vicinity of the new groins must be maintained or improved." This condition further provides that "[i]f access is impacted or eliminated, temporary access around or over the groins must be established immediately" and "[w]ithin 30 days of notification from the department, a plan to provide permanent access around or over the groins must be submitted by the entity responsible for the groin construction." The permanent access plan must be implemented within ninety days of the Department's approval of the plan.

Additionally, as this Court found in its Order, after groin construction, beach access and useability should not be impeded by the groins. Initially, the amount of sand deposited in the renourishment will completely cover the groins. However, the groins will eventually be uncovered across mainly the front beach and could force some people to hop over them while walking or impede the use of bicycles. Nevertheless, Dr. Kana testified the groins should remain relatively covered at the back beach without impediment. Therefore, as the groins move towards their trapping capacity, they will impact the usability of the front part of the beach, but other parts will remain freely accessible.

the case from becoming moot. "A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Byrd v. Irmo High Sch.*, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996) (quoting *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)). Here, if the groins could not be removed and the beach could not be restored upon completion of construction, or if DCCA was no longer governed by the permit upon completion of the project, then the case would be rendered moot because (1) a judgment reversing the issuance of the permit would have no effect on the controversy and (2) redress would be impossible. However, the League has failed to show that the groins cannot be removed, and the beach restored if the appellate court issues an adverse ruling.

At the merits hearing in this case, Dr. Timothy William Kana[6] explained that although he has not been personally involved in completely removing groins, he has experience with pulling groins up and repositioning them during the construction and installation process. Dr. Kana opined that, after observing groin construction at Hunting Island and Folly Beach, the process of groin removal would be fairly straightforward. The groins will be constructed using sheet pile, and each section of sheet pile can be removed relatively quickly by breaking the cap connecting the sheets. The rocks used to create the scour would then be removed, and the beach would be returned to its natural state. This project could be completed in approximately four weeks. Mr. Traynum also attested in his affidavit that based upon CSE's experience with repositioning groins, it is likely the groins could be removed in approximately four weeks and the beach restored to its original condition. Accordingly, construction of the groins in this case would not render the League's appeal moot.

Furthermore, when this Court originally addressed the issue of lifting the stay in this matter, the Court denied that request because of a concern that there were insufficient funds to pay for the removal of the groins. Since that determination, DCCA addressed those concerns at the merits hearing. Specifically, Dr. Kana opined the groins could be removed for around $435,000.[7] Mr.

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[6] Dr. Kana is the President of CSE, and the Court qualified him as an expert in beach erosion, coastal geomorphology and processes, sediment buckets and transport, beach restoration, planning design and implementation, and tidal inlet sediment dynamics. The Court found Dr. Kana to be highly credible and his testimony to be persuasive.

[7] The League's expert witness at the merits hearing, Dr. Robert Young, opined that $1 million would not be enough to mobilize sand with dredges much less remove groins. However, Dr. Young acknowledged that he has no experience

Traynum similarly attested that the groins could be removed for $500,000 or less. Additionally, in accordance with the permit issued in this case, DCCA supplied a letter of credit showing it can cover $1 million in costs associated with any remediation necessary as a result of mitigation for the groin impact—either reconstructing or removing the groins and renourishment of the impacted beach. DCCA also maintains a Beach Preservation Fund, which contains funds to cover the cost of beach maintenance and restoration at DeBordieu Colony. It is a seventeen-year annually funded account that started in 2017 and is projected to go through 2033, at which point it is estimated it will contain $10-12 million in funds. Therefore, DCCA established that removal of the groins in the event of a reversal is feasible, and it has the finances to undertake the removal of the groins and restoration of the beach.

In opposition to the evidence presented by DCCA, the League refers to the affidavit of Dr. Mohamed Dabees, which was offered by The Belle Baruch Foundation in response to DCCA's Motion to Lift Stay when the Baruch was still a party to this case.[8] The League maintains this affidavit remains relevant even though Dr. Dabees is not one of its witnesses and was not called at trial. Although affidavits are allowed to support motions, the Court finds Dr. Dabee's affidavit should not be given much weight. Dr. Dabees' assertions were not subject to cross-examination as was the testimony at trial and further, his affidavit was not submitted for the purpose of the Motion currently before the Court.

Moreover, consideration of Dr. Dabee's affidavit does not change this Court's determination that the groins can be successfully removed, and the beach restored if the appellate court issues an adverse ruling. In his affidavit, Dr. Dabees attested that, in his expert opinion, "the cost and time required to remove the structures (including preparation of technical specifications, bid preparation and consideration, mobilization of crews and equipment, and then implementation of a removal plan) will be significant impediments to prompt and complete removal of the structures, resulting in a prolonged removal process." In other words, Dr. Dabees was concerned with how promptly the groins could be removed but he did not attest they could not be removed.[9]

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with groin removal, or the project costs associated with them. I therefore found Dr. Kana's testimony on the subject of groin removal to be more credible and persuasive.

[8] The Belle Baruch Foundation entered into a settlement agreement with the Department and withdrew as a party to the case after this Court's order on the Motion to Lift Stay was issued.

[9] The League also cited to this Court's concerns in its Order on the Motion to Lift Stay about the DCCA's ability to adequately remove the groins. At that time, the Court was concerned about the removal and its cost, but as explained

In sum, because there is no testimony or affidavits supporting the position that the groins, if constructed, cannot be removed and the beach restored in the event of an adverse ruling, then there is no evidence to show the issue of permitting the groin construction will become moot upon completion of construction. *See Byrd*, 321 S.C. at 431, 468 S.E.2d at 864 ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." (quoting *Mathis*, 260 S.C. at 346, 195 S.E.2d at 715)). I further find the groins could be removed upon reversal of the permit for approximately $435,000, and DCCA has the funds to finance this removal.

A Completed Project Does Not Render the Case Moot

Despite the testimony and attestations that the groins can be adequately removed and the beach restored, the League argues that if the permitted activity is completed before a ruling on the appeal is issued, then the case will nevertheless be rendered moot under the South Carolina Supreme Court's ruling in *Town of Arcadia Lakes v. S.C. Dep't of Health & Env't Control*, S.C. Sup. Ct. Order dated April 9, 2015 (*Arcadia Lakes*). *See also Town of Arcadia Lakes v. S.C. Dep't of Health & Env't Control*, 433 S.C. 47, 52, 855 S.E.2d 325, 328 (Ct. App. 2021), *reh'g denied* (Mar. 25, 2021) ("Our supreme court granted a writ to review this court's decision but dismissed the writ because the Developer finished the project while the appeal was pending, rendering moot any dispute about DHEC's permitting decision." (citing S.C. Sup. Ct. Order dated April 9, 2015.)). In this unpublished, un-reported opinion, the South Carolina Supreme Court dismissed the case as moot because the construction activities authorized under the contested permit issued by the Department had been completed during the pendency of the action. *Arcadia Lakes*, S.C. Sup. Ct. Order dated April 9, 2015. The Supreme Court found that because the activities authorized by the permit were completed, the Respondent's "coverage under the [permit] is now terminated" and "it is now impossible for this Court to grant any redress in the context of the issues as framed and litigated below (i.e., modify or revoke authorization for [Respondent's] construction activities under the state-wide general permit)." *Id.*

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above the Court's concerns were assuaged by Dr. Kana's testimony at the merits hearing. Therefore, the Court does not have the same concerns now having benefited from the testimony presented at trial.

Based upon this Supreme Court order, the League contends this case will become moot if DCCA finishes the permitted project before the appeal can be resolved. At the outset, the Supreme Court's order in *Arcadia Lakes* was not only unpublished, but un-reported. It therefore has no precedential value and cannot be relied upon in this case. Additionally, unlike DCCA in this case, the Respondent's "coverage" under the contested permit in *Arcadia Lakes* was terminated once the authorized construction activities were completed. Here, DCCA will be covered by the contested permit even after the groins are constructed due to the numerous special conditions in the permit that govern the monitoring of the groins for the duration of their existence. Therefore, unlike in *Arcadia Lakes*, because DCCA will remain covered by the permit, the possibility of redress (amendment or denial of the permit) will remain even after construction is completed. *See Byrd*, 321 S.C. at 431, 468 S.E.2d at 864 ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." (quoting *Mathis*, 260 S.C. at 346, 195 S.E.2d at 715)). Therefore, in this case, it will be possible for the appellate court to grant effectual relief—removal of the groins and restoration of the beach—even after the groins are constructed.

The League also cites to *Berry v. Ianuario*, 281 S.C. 21, 314 S.E.2d 308, (1983), in further support of its argument that allowing the actions granted by a lower court to proceed to completion will render an appeal moot. In *Berry*, the South Carolina Supreme Court granted a motion for supersedeas to stay the operation of the lower court's order, which terminated a father's parental rights and directed the child to be adopted by the mother's husband. *Id.* at 21, 314 S.E.2d at 308. In a very brief order, the Supreme Court explained it granted the supersedeas "to prevent the appeal from becoming moot." *Id.* The League maintains that the termination and adoption could have been reversed if an adverse ruling had been handed down and yet the Supreme Court found the appeal would be rendered moot if the lower court's order was carried out. However, the Supreme Court did not explain its reasoning why the case would be rendered moot. Certainly, the fact that this was a Family Court matter and the implications of completing an adoption process before the efficacy of that adoption is determined is not lost upon this Court. Furthermore, this Court has not found, nor have the parties provided it with, any South Carolina law that parental rights can be reinstated once they are terminated. *See* S.C. Code Ann. §§ 63-7-2510 to -2620 (2010 & Supp. 2020). Accordingly, *Berry* is distinguishable from the case at bar because it is a family court case

involving different dynamics and redress would not necessarily have been possible in *Berry* had the family court's order terminating parental rights and granting adoption been carried out. Therefore, I do not find it persuasive.

Right to Meaningful Judicial Review

The League argues if the status quo is not preserved, they will be denied their due process right to judicial review—in particular, their right to "meaningful" judicial review. The League asserts it has a constitutionally protected due process right that entitles it to administrative finality before construction activities occur and any review that comes after the construction of these structures "can hardly be described as 'meaningful.'" The League cites to the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and Article I, Section 22 of the South Carolina Constitution, which provides:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, **and he shall have in all such instances the right to judicial review**.

(emphasis added).

In other words, the League contends that appellate review must be complete before construction begins in order for it to receive meaningful judicial review.

I find the League's argument to be problematic for several reasons. First, aside from describing a review after construction as being "hardly meaningful," the League provides no legal support for its position that the kind of review provided under the statutory scheme and the appellate rules is not "meaningful." Additionally, at the Motion hearing, the League admitted that it is currently receiving due process and no violation of due process has yet occurred. The League thus has not explained what violation of due process is distinct from a case being rendered moot or a court being deprived of jurisdiction, which is the standard this Court is currently considering in reviewing the League's Motion for Supersedeas. *See* Rule 241, SCACR. Accordingly, the Court fails to see the relevance of this argument to the Motion before the Court.

Second, this argument is speculative and hypothetical at this time. The League has not alleged a current deprivation of due process; indeed, they admitted at the Motion hearing that they are currently receiving due process. The due process violation contemplated by the League will not occur unless and until the permitted project is completed before the appellate process is

complete. In other words, not only is the due process issue raised by the League not relevant to the supersedeas standard, but it is also not ripe. *Cf. Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 227, 467 S.E.2d 913, 917–18 (1996) ("A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute.").

Third, the League's argument suggests the due process right to meaningful judicial review[10] will always be violated in the absence of an automatic stay. Or, at the very least, their argument suggests that Rule 241, which allows for a supersedeas (stay) to be imposed in the absence of an automatic stay, and of which the League is availing itself currently, does not provide adequate due process if it does not result in the imposition of the supersedeas (stay). In other words, even if this Court properly considers this issue pursuant to the terms of Rule 241(c), the League contends their due process rights will be violated if the result they seek is not achieved. Either interpretation of the League's argument is a facial attack on the constitutionality of the statutory scheme declining to impose the automatic stay and/or Rule 241. This court cannot address facial attacks to the constitutionality of statutes. *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 108, 705 S.E.2d 28, 38 (2011) ("It is well settled in this State that ALCs, as part of the executive branch, are without power to pass on the constitutional validity of a statute or regulation.").

For all of these reasons, the Court finds this argument is not an appropriate basis upon which to determine whether a supersedeas should be granted in this case.

Conclusion

Because the League has failed to meet its burden to show the imposition of a supersedeas is necessary to preserve jurisdiction or prevent an issue from becoming moot, I deny the League's Motion.

Bond

Although I deny the Motion, because the parties presented extensive evidence regarding the amount of a bond to be imposed had the Court granted a supersedeas, I make the following findings of fact regarding a bond should the denial of this Motion be reversed. In its Response in Opposition to the Motion, DCCA argues the League should be required to post a supersedeas bond

[10] The League's argument presumes that "judicial review" encompasses appellate review.

if the Motion is granted. Pursuant to Rule 241(c)(3), the granting of a supersedeas "may be conditioned upon such terms, including but not limited to the filing of a bond or undertaking," as the court deems appropriate. Similarly, if the court finds the imposition of the supersedeas is insufficient to provide complete relief, the court "may order other affirmative relief upon such terms as are deemed appropriate." *Id.* Therefore, this Court has the authority to impose a bond with a supersedeas if the Court deems it appropriate. *See id.*

DCCA argues that a delay in construction will cause them to incur costs (damages) above and beyond those originally contemplated by the renourishment and construction of the groins. DCCA thus asks the Court to require the League to post a bond in the amount of these damages should the Court impose a supersedeas.

The estimated damages if construction is not completed during the current construction window were not discussed at trial. DCCA relies on the affidavit and supplemental affidavit of Mr. Traynum (and, to a lesser extent, the supplemental affidavits of Dr. Kana and Dr. Kaczkowski) to support its estimation of damages. To calculate the increased costs DCCA would incur in absence of the groins, Mr. Traynum looked data on erosion along Debidue Beach from a 2008 ATM study, a 2016 ATM study, and CSE's own studies of the area.[11] Based on post-2015 monitoring, CSE believes that if the scheduled renourishment goes forward in November of this year, construction of the groins will be possible for about six months thereafter before erosion will make the project no longer feasible. After six months, there will no longer be enough sand on the beach to accommodate the groins as designed. Similarly, erosion rates from the 2008 ATM study also show that construction would no longer be feasible after the 2021-2022 window without further renourishment. Mr. Traynum further avers that if construction is not completed during the 2021-2022 construction window, then DCCA will have to wait until the next renourishment project can be completed in about six years to construct the groins. It appears that conducting another, smaller renourishment prior to the usual six-year cycle is not practical because the current permit expires after five years, and this is the last construction window during which the groins can be completed before expiration. If the permit expires, a new permit, environmental impact analysis,

[11] The last renourishment took place in 2015. Mr. Traynum attests that between 2015-2021, the project area lost approximately 500,000 cy of sand, which represents a loss of 77% of the renourishment volume from 2015. This amount of sand loss is equivalent to $7,325,000 in 2015 costs and approximately $8,675,000 in 2021 costs.

and federal and state review will be required in addition to further consulting fees and possible litigation fees.

If DCCA cannot install the groins during the 2021 permitting window, Mr. Traynum attests it will suffer a loss up to $1,872,500 in lost mobilization and material costs, which represents approximately 70% of the total cost of the groins ($2,675,000). Additionally, if DCCA cannot complete the project during the 2021 construction window and the permit expires, DCCA will have lost approximately $400,000 in consulting and permitting fees. Further, without the groins reducing the erosion rate by 50%, DCCA will have to conduct another renourishment that it would not have had to undertake with the groins at a cost of $11,300,000 for the sand alone at 2021 costs. Finally, Mr. Traynum avers that each year without the construction of the groins will cause the beach to lose more sand than it would have lost had the groins been in place, and this lost sand has a monetary value of $4,337,500 over a six-year period.[12]

Overall, when the costs lost mobilization and material costs, the lost consulting and permitting fees, and the extra renourishment are added together, DCCA expects to suffer damages in excess of $13,500,000 if it cannot complete the groins this construction window (2021-2022).

The League simply argues DCCA has failed to show a bond is necessary and disputes these estimated damages. The League asserts the estimate of $13,500,000 is "absurd" and "[s]urely, a supplement nourishment would not be that expensive" because DCCA could always conduct another, smaller renourishment if needed. The League further contends Mr. Traynum and CSE's reliance on data after 2015 does not give a realistic picture of the erosional rates in the area, and therefore the likely damages, because Tropical Storm Ana and Hurricane Joaquin exacerbated erosion very shortly after the 2015 renourishment. The League also argues that prior data is insufficient to predict future losses but suggested no alternative method to calculate DCCA's losses.

To the contrary, in his supplemental affidavit, Mr. Traynum supplemented the 2015 data with data from ATM's 2008 study after the 2006 renourishment and came to the same result as far as impacts to the project. Additionally, Mr. Traynum averred that the post-2015 data is more reliable because storm events are increasing and the relatively calm period after the 2006

[12] Specifically, DCCA asserts the net loss of sand on the beach without the groins compared to the beach with the groin will cost $632,971 the first year after renourishment, and $740,906 per year averaged over the remaining period.

renourishment does not reflect the new norm of increased storms. The League offered no evidence to dispute DCCA's assertions or to support its assertions.

While past erosion rates may not be able to precisely predict future erosion rates, I find they are the best available data for predicting future erosion and DCCA reasonably relied upon them to estimate damages in this case. Furthermore, whether DCCA relies on the data from 2006 or 2015, the only evidence before the Court is that that the 2021-2022 construction window is the last feasible construction window before this permit expires. Therefore, the preponderance of evidence reflects that the cost to DCCA for completing an additional renourishment project (without groins) is approximately $11,300,000, at current 2021 project costs (i.e., 17.35/cy). *See Be Mi, Inc. v. S.C. Dep't of Revenue*, 408 S.C. 290, 297, 758 S.E.2d 737, 740 (Ct. App. 2014) ("Absent an allegation of fraud or a statu[t]e or a court rule requiring a higher standard, the standard of proof in administrative hearings is generally a preponderance of the evidence."). Furthermore, DCCA would lose the $1,872,500 in mobilization and material costs and $400,000 in consulting and permitting fees if construction is not completed in the 2021-2022 window. Accordingly, if a supersedeas is granted and the League does not prevail upon its appeal, a reasonable estimate of the amount of a bond necessary to cover DCCA's damages would be $13,500,000.

ORDER

IT IS THEREFORE ORDERED that Petitioner's Motion for Supersedeas is **DENIED**. **AND IT IS SO ORDERED**.

Ralph King Anderson, III
Chief Administrative Law Judge

September 27, 2021
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Stephanie Perez, 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).

Stephanie Perez
Judicial Law Clerk

September 27, 2021
Columbia, South Carolina