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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Docket No. 19-ALJ-07-0089-CC

South Carolina Coastal Conservation League, ...Appellant,

vs.

South Carolina Department of Health and Environmental Control and
Debordieu Colony Community Association, ... Respondents.

South Carolina Coastal Conservation League's Reply in Support of its Petition for Writ of Supersedeas

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By the tone of its Return, Respondent, DeBordieu Colony Community Association sees itself as having an absolute right to install groins even though it recognizes in its Return that this installation will necessarily make the public beach inaccessible during construction. Resp. Return at p. 14 ("access to areas under construction may be temporarily inaccessible during the construction period") and even though there was ample evidence that was adduced during the contested case hearing that the groins will interrupt the flow of sand to the south of the project (R. p. 970 l.25 - p. 971 l. 1; p. 974 ll. 8-15) and that the groins will eventually be exposed and will interrupt walking along the beach by creating a difference of several feet in elevation among the groin cells. (R. p. 867 ll. 14-22).

Appellant does not have the sinister motive that Respondent ascribes to it. Appellant is attempting to preserve the merits of its appeal and right to judicial review granted it by the South Carolina Constitution and also to preclude injuries to its members that will necessarily attend the excavation and hundreds of feet of public beach for the deposition of tons of large rocks upon the beach. Unlike Respondent, Appellant will not tout the merits of its position regarding the underlying merits of the appeal. Appellant will note, however, that Respondent's repeated characterization of the erosion rate at the project as "high" is without basis and that Respondent is incorrect in arguing that substantial evidence is the proper standard of review of the issues on appeal. That standard relates to findings of fact and none of the conclusions at issue here are properly characterized as factual in nature.

Argument

1. Appellant is Entitled to Supersedeas to Preserve the Jurisdiction of this Court and to Prevent the Appeal from Becoming Moot.

Appellant's right to appellate judicial review is beyond question. It is provided expressly in Article 1, § 22 of the South Carolina Constitution and Appellant has followed the statutory protocols to avail itself of its rights. The proceeding in the ALC is distinct from Appellant's right to "judicial review" that is provided by the South Carolina Constitution. That distinction was noted by the Supreme Court of South Carolina in *Engaging & Guarding Laurens Cty.'s En'vt ("EAGLE") v. S.C. Dep't of Health & Envtl. Control*. 407 S.C. 334, 344, 755 S.E.2d 444, 449 (2014)(ALC decision is final agency decision "subject to judicial review"). Setting that distinction aside, Respondent seems to believe that Appellant is making a due process claim now. That is not the case although Appellant and its members do have liberty and property interests at stake.

Indeed, without these interests and the alleged injuries to them, Appellant would not have Constitutional standing to proceed.

While Appellant certainly also has a statutory right as an "affected person" under S.C. Code Ann. § 44-1-60 (G), which Respondent recognizes, Appellant also has Constitutional interests, which is a distinction recognized by the Supreme Court of South Carolina. *See Preservation Society of Charleston v. South Carolina Dep't of Health & Envtl. Control*, 430 S.C. 200, 845 S.E.2d 481, (2020)(citation omitted). These constitutionally protected interests have been recognized in South Carolina repeatedly. *See e.g. Smiley v. S.C. Dep't of Health & Envtl. Control*, 374 S.C. 326, 332-33, 649 S.E.2d 31,34-35 (2007)(project that interrupted witness's enjoyment of beach-walking caused an injury-in-fact and was not a temporary inconvenience); *Sea Pins Ass'n for Protection of Wildlife, Inc. v. South Carolina Dep't of Natural Resources*, 345 S.C. 594, 601-02, 550 S.E.2d 287, 291-92 (2001)(South Carolina law recognizes aesthetic interests in use and enjoyment of natural resources are protected and degradation of these interests constitutes an injury in fact)(citing *Wildlife Fed'n v. S.C. Coastal Council*, 296 S.C. 187, 371 S.E.2d 521 (1988); *Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision)*, 332 S.C. 551, 505 S.E.2d 598 (Ct.App. 1998)).

All of these recognized Constitutional interests are important because Appellant risks forfeiting them unless this Court grants its Petition for a writ of supersedeas. If Appellant's appeal is mooted before it has obtained judicial review, those rights will be lost. The injuries that Appellant's members testified to concerning this proposal's interruption and degradation of their use and enjoyment of the public beach will be incapable of being remedied as well. Granting Appellant's Petition is also supported by the cases cited by Appellant.

Respondent's attempt to distinguish the South Carolina Supreme Court's decision to issue a writ of supersedeas in *Kiawah Development Partners, II v. S.C. Dept. of Health & Env. Control*, is unavailing. Instead of addressing the key similarity, that like the revetment and bulkhead in that case, the groins in this case could perhaps be removed following a reversal, but environmental injuries would be compounded, Respondent highlights the differences in how the structures are treated in the regulations. The difference in treatment is irrelevant because the difference in regulatory status does not affect supersedeas consideration or whether all are capable of inflicting environmental harm during both their installation, operation and during their removal. Respondent then notes that DHEC had objected to the broadening of the permit at issue in *Kiawah* but again, that is irrelevant to whether the structures were capable of removal. Similarly, the alleged public benefit of the groins and the interaction of the public trust doctrine also do not relate to the question of whether the structures are capable of being removed which is the key consideration. While there are doubtless other factual differences between the *Kiawah* case and the present case, the relevant similarity is persuasive. The revetment and bulkhead could have been removed after a successful appeal but supersedeas was still granted to avoid harm in the interim and compounding the harm later. *Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct.App. 1990)("[T]he purpose … of a supersedeas … is to … stay proceedings in the trial court, to preserve the status quo pending the determination of the appeal …, and to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him")(quoting 4A C.J.S. *Appeal & Error* § 662 at 494-95 (1957)).

The decision in *Olson*, cited by Respondents, is distinguishable from the present case because there, not only was the issue whether the Olsons were afforded due process, there was no evidence that they claimed the construction of the dock in question was causing them any harm.

To the contrary, the Olsons wanted the dock to be built and argued that the dock permit granted to their neighbors was a joint-use dock permit that would allow them to cross their neighbor's property to access the dock. *Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 64-65, 663 S.E.2d 497, 501-02 (Ct.App. 2008). The only allegations that any dock would cause harm in that case were made by the neighbors about the Olsons' attempt to build their own dock. *Id*. at 67-68 (safety issues with swimming created by proposed dock and for boat navigation if new dock). Here, the objections related to this project for the use and enjoyment of the beach by Appellant's members were made at the outset, both in response to the Motion to Lift the Stay and during the contested case. Appellant's members will necessarily have their use and enjoyment interrupted by this project if it goes forward now. Whether the groins are ultimately capable of removal would not remedy the injuries already inflicted in the installation process.

Respondent apparently failed to read the portion of Appellant's brief that discussed the ALC's mishandling of the decision in *Berry v. Inanuario*, 281 S.C. 21, 314 S.E.2d. 308 (1983). App. Brief at pp. 7-8. The Respondent makes the same error as the ALC when it dismisses the import of that decision by claiming that "there is no authority for reinstating parental rights once terminated[.]" Resp. Return at p. 20. As Appellant already explained, whether parental rights can be reinstated after termination is not the issue or why the decision is relevant. The decision in *Berry* is relevant because an order to terminate parental rights is subject to judicial review and reversal and the harm in the interim, temporary though it may be and capable of remediation by a reversal of the lower court's order, was avoided by the issuance of supersedeas there. We are presented with a similar case here.

Respondent wishes to discard Appellant's members' injuries by arguing that Appellant did not appeal the specific issue of beach access. But Appellant has alleged that Respondent is not

entitled to place the groins on the public beach for a variety of reasons **because** its members will be injured if the groins are installed. That is the underlying rationale that animates this permit challenge. The failure of the critical area permit to comply with the statutory directives is the vehicle by which Appellant's members' interests are injured because it allows these destructive groins on the public beach these members use and enjoy.

2. Appellant's Bond Should only be set for a Nominal Amount.

Respondent wants to have things both ways, apparently. On one hand, it touts its project's alleged benefits by stating that "[i]n the **initial years of the project**, the 650,000 cubic yards of sand added to the beach will exceed the trapping capacity of the groins" which is "about three times as much sand as [is] need[ed] to satisfy the [] trapping capacity of each groin." Resp. Return at pp. 6-7 (emphasis added). Yet, on the other hand and despite the excessive sand that will be present over the course of the "initial years of the project[,]" Respondent now claims that sufficient sand won't last even a year such that it may conduct its groin installation if allowed. Resp. Return at p. 26. The groins are to be filled beyond capacity at the outset so they could not be expected to prevent the sand from leaving the project area for years, according to Respondent. The reason for Respondent's inconsistent stances is because it wishes to advocate for an excessive bond.

Respondent DCCA makes sweeping statements about the inevitable, concrete and imminent damages it will suffer, such as, "[b]y the next regulatorily permissible project window (late 2022/early 2023), there likely would not be enough remaining sand at the project area to install the groins as designed, and DCCA would be forced to wait until the following renourishment cycle (six to seven years) to install the groins." Resp. Return at p. 2. The bases of

these assertions are unsound, however, beyond the contraction of Respondent's claims that it will sprinkle the beach with an excessive amount of sand at the outset of the project.

Respondent relies on the Affidavits of Steven Traynum attached to its Return. Exhibit 2, Return in Opposition. Mr. Traynum did not testify at the hearing on the merits before the ALC and was not at that time nor any time since qualified by the lower tribunal as an expert, yet makes conclusions "to a reasonable degree of professional and scientific certainty" and that the documents he relies on "by other experts in the field… ." Exhibit 2 Return in Opposition, ¶¶ 11, 12. The ALC relied extensively on Mr. Traynum's statements in its Order. Mr. Traynum is not a licensed professional engineer and does not consider himself a professional engineer. Appellant Exhibit 1, Excerpt Depo. Transcript S. Traynum at p. 12, ll. 7-14. Nor is Mr. Traynum a licensed coastal geologist. Exhibit A to Exhibit 1, Traynum CV, Return in Opposition.

At the outset, Mr. Traynum makes a false comparison between the current groin permit challenge and any subsequent renorishment permit. Mr. Traynum opines that "[g]iven the pending litigation and potential for subsequent appeal or additional litigation … it is possible DCCA would not be successful in receiving a separate permit to renourish the south end renourishment [sic] area for three years, if not longer." Resp. Return Ex. 2, p. 6, ¶ 19. That is an inapt comparison. Appellant did not challenge the renourishment portion of this underlying permit. Nor did any other party. Thus, there is no basis to conclude that a renourishment permit could not be issued sooner than three years. Indeed, there is every reason to believe that one must be issued within a year as the concomitant Army Corps of Engineers permit application and 401 water quality and CZC certifications must be completed within one year. *See Hoopa Valley Tribe v. Federal Energy Regulatory Commission*, 913 F.3d 1099 (D.C. App. 2019); 33 U.S.C.A. § 1341(d); S.C. Code. Regs. 61-101(A)(8). The excessive delay in completing the project anticipated by Mr. Traynum

and relied upon by the ALC, is unsupported and there is no basis to conclude that this flawed project could not be concluded in short order. Another reason Mr. Traynum's analysis is flawed is because he utilized inflated erosion rates in his calculation of damages. He used "post-2015 project erosion data" to estimate sand loss and to estimate damages related to this loss. *Id*. at pp. 7 ¶¶ 20-21, 12, ¶ 32. These sand loss estimates were, as the authors of the underlying reports acknowledged, skewed due to the unexpected influence of storms during the first year of the project.

The 2015 renourishment was concluded in April of 2015. On May 10th, 2015, Tropical Storm Ana made landfall in North Myrtle Beach. Hurricane Joaquin later contributed to historic flooding throughout South Carolina later in the fall and the ATM Report cited and relied upon by Mr. Traynum recognized the primary role these storms had in the vast diminution of renourishment sand. Resp. Return Ex. 1, Ex. B at p. 1. To wit, ATM stated as follows:

> The 2006 nourishment saw a 14 percent loss in its first year, whereas the 2016 survey data shows a loss of approximately 21 percent. The larger losses observed in the first year of the 2015 nourishment can largely be attributed to Tropical Storm Ana and Hurricane Joaquin, which severely impacted the DCCA shoreline. In contrast to the 2015 storm activity, the project shoreline experienced only mild storm activity within the first year of the 2006 nourishment.

Id.

Later in this same report, the authors note that within "[a]pproximately one week" of the renourishment's completion, Tropical Storm Ana "began impacting the DCCA shoreline with waves and high water levels creating erosion over the course of several days[.] It is believed that at least a portion of the recently placed and tilled material was lost during Ana." *Id*. at p. 15.

In the fall, Hurricane Joaquin was "slow moving and affected the DCCA shoreline as a Category 3 and 4 for many days (9/27 to 10/5)." *Id*. Hurricane Joaquin produced "[w]aves, higher

than normal water levels, and [a] strong north-south longshore current [which] all combined to create highly erosive conditions along DeBordieu beach." *Id.* at p. 16. ATM conducted a post-storm evaluation and "found the isolated losses from Joaquin to be approximately **76,000 cy within the project reach, which accounts for ~12 percent of the placed material from the 2015 nourishment**." *Id.* (emphasis added). In its Downdrift Impacts Analysis, CSE itself recognized the effect that Hurricane Joaquin had on the exacerbating the removal of the 2015 renourishment sand when, after reviewing this data, it concluded that "[t]hese conditions produced strong southerly transport and greater-than-normal erosion of the project." Resp. Return, Ex. 1, Ex. C at p. 35.

Despite the unusual timing of these storms and their undoubted influence upon the resiliency of the 2015 renourishment, Mr. Traynum concludes that the 2015 data should be used because there have been a few more storms in South Carolina lately. Resp. Return, Ex. 2 at p. 10, ¶ 28. There is no basis to use the past weather to predict what will occur next year. Indeed, the rarity of the early arrival of Ana would argue against using that data at all. If nothing else, some adjustment based upon the impact of the storms to the data should have been made but Mr. Traynum failed to do so.

The underlying bases of Respondent's arguments for the excessive bond are flawed and speculative, at best, but even if they weren't, Appellant's nonprofit status and limited means prohibits the imposition of a bond for anything but a nominal amount.

a. It is axiomatic that Appellant's nonprofit status and due process rights to appellate judicial review must be considered in setting a bond amount.

Respondent is wrong when it claims that none of the cases Appellant cited '"involved private parties that would incur very real and very significant monetary damages as a result of the delay caused by the injunction." Resp. Return at p. 27. In *Bragg v. Robertson*, the mining company presented expert testimony "that total economic losses from the withholding of the permit until September 1999, the approximate time of trial, is over twenty million dollars." 54 F.Supp.2d 635, 644 (S.D.W.Va. 1999). Respondent's attempts to distinguish the applicability of other cases also fails because whether a government entity is involved or not, damages incurred affect other private parties and the fact that a litigant is the government does not make it less deserving of consideration.

Indeed, the speculative nature of the damages in the *Powelton Civic Home Owners Association* case, 184 F.Supp. 809, 840 (E.D.Pa. 1968), make it more analogous to the present matter and therefore more persuasive, not less as Respondent contends. Resp. Return at p. 31. Respondent asserts that a nominal bond is inappropriate but the cases it cites do not support the contention that a nominal bond is inappropriate when a nonprofit entity is an appellant, has access to limited means, and requiring an excessive bond would lead to the forfeiture of its right to judicial review. The primary distinction is that the cases cited by Respondent all concern injunctions granted pursuant to Rule 65, SCRCP and that Rule requires the payment of security. Rule 65(a), SCRCP ("no restraining order or temporary injunction shall issue except upon the giving of security by the applicant"). Rule 241(c)(3) provides, however, that the issuance of supersedeas "*may* be conditioned upon such terms, including but not limited to the filing of a bond … as the … appellate court … *may* deem appropriate." Rule 241 (c)(3), SCRAP (emphasis added). The difference between "shall" and "may" in the two Rules is significant.

Moreover, there was never an allegation that the amount of bond would preclude judicial review in any of the cases. For example, in *Atwood Agency v. Black,* the trial court had issued an ex parte temporary restraining order with a nominal bond. 374 S.C. 68, 70, 646 S.E.2d 882, 883 (2007). The appellate court's setting of the bond was erroneous because "it erroneously assumes the injunction is proper….." *Id*. at 73. There was no allegation, however, that the amount of bond was beyond the capacity of the respondent in that case--which was unlikely given the corporate character of the entity--or that an excessive bond would preclude the litigant's ability to exercise its right to judicial review.

The reality is that South Carolina law already recognizes bond amounts may be set for less than what has been adjudicated as an injury. The South Carolina General Assembly has already set limits on the amount of bonds for judgments which depend upon whether a large business entity is involved or whether a smaller entity is involved. S.C. Code Ann. § 18-9-130(A)(1)(a)-(b)(bond amount for a business entity that employs more than fifty person and with gross revenues exceeding five million dollars may not exceed twenty-five million while bond for "all other entities or individuals" may not exceed "one million dollars"). These limitations on bonds relate to damages that have been scrutinized and that are actual, not hypothetical and speculative as is the case here.

Respondent argues that this Court "should not reduce the bond amount set by the ALC[,]" Resp. Return at p. 32, but fails to acknowledge that the ALC did not set an actual bond. Instead, the ALC tried to improperly constrict this Court's consideration of a bond by couching its dicta and advisory opinion as a determination of fact. That was improper. Respondent is also mistaken when it contends that Appellant has not "present[ed] any evidence that the bond amount should be reduced." Resp. Return at p. 33. Appellant's Petition is verified and it is undisputed that Appellant

is a nonprofit organization of limited means. Respondent has not challenged those assertions in Appellant's Petition.

Respondent contends that Appellant has waived its arguments about the bond amount even though no bond has been imposed by any Court. That circular logic is not persuasive. Appellant has argued that if this Court grants it supersedeas, then no bond or a nominal bond should be set. This Court would be the first to impose a bond as the ALC denied Appellant relief that would have triggered the bond inquiry. There is no need to entertain whether this argument has been preserved when it is obvious that this Court has the authority to grant supersedeas relief and impose (or alter) a bond.

Appellant has not "impl[ied] that only the appellate court has the authority to set the bond amount." Resp. Return at p. 34. That is contrary to the plain language of Rule 241. Instead, what Appellant has argued and what Respondent fails to grasp is that this Court may grant Appellant a writ of supersedeas and then address the bond question. Respondent seems to concede, albeit begrudgingly, that this Court has the authority to impose or alter any bond set by a lower court. Resp. Return at p. 33 ("to the extent this Court has the authority to reduce the amount of bond"). Thus, it is appropriate to argue that if this Court sets a bond, it should be based upon Appellant's nonprofit status and limited means. Even if this Court sets a bond that is beyond Appellant's means, Appellant would still have the ability to petition this Court for a bond reduction. *See Bunkum v. Manor Properties*, 321 S.C. 95, 97 (Ct.App. 1996)(noting that the Supreme Court reduced the appeal bond from $150,000 to $36,400 upon Bunkum's filing for supersedeas in that forum); *Bentree Apartments v. Allen*, 1991 WL 11766245 at *1 (Aug. 20, 1991).

In its last, desperate attempt to avoid the grant of supersedeas, Respondent argues that Appellant is not entitled to supersedeas "because it has failed to seek review of the ALC's decision denying supersedeas[.]" Resp. Return, at p. 35. Seeking review of the ALC's order and obtaining a writ of supersedeas is, of course, exactly what Appellant's Petition is designed to do. Appellant provided this Court with a copy of the ALC's order and has argued both in the initial Petition and here how the ALC erred in refusing to grant Appellant supersedeas. SCACR, Rule 241 (c)(1) provides that "in a case subject to an exception, any party may move for an order imposing a supersedeas of matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal." SCARC, Rule 241 (d)(2) allows Appellant to "petition" this Court for a review of the lower court's order. Appellant has followed this procedure precisely and has skipped no procedural steps to obtain its relief. Obviously, Appellant contends that its Petition for Supersedeas was unjustifiably denied. Otherwise, it would not have filed its Petition with this Court.

In essence, Respondent's interpretation would require Appellant to file a notice of appeal of the ALC's ruling which would necessarily frustrate the point of obtaining a writ of supersedeas. An appeal of the denial of supersedeas would not be decided before the initial appeal on the merits. Appellant has followed the proper procedure to obtain review of the ALC's denial of its Petition and this Court is capable and, indeed, obligated to consider whether Appellant is entitled to supersedeas based upon the criteria of Rule 241.

Conclusion

Based on the foregoing, Appellant respectfully requests that this Court issue an Order granting Supersedeas and decline to impose a bond. In the alternative, Appellant requests that any bond imposed be nominal based on Appellant's nonprofit status.

Respectfully submitted,

s/ Leslie S. Lenhardt

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November 1, 2021

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EXHIBIT 1

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

DEPOSITION OF STEVEN TRAYNUM

SOUTH CAROLINA COASTAL CONSERVATION LEAGUE,

Petitioner,

vs. Docket No. 19-ALJ-07-0089-CC

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL AND DEBORDIEU COLONY COMMUNITY ASSOCIATION,

Respondents.

THE BELLE W. BARUCH FOUNDATION,

Petitioner,

vs. Docket No. 19-ALJ-07-0088-CC

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL AND DEBORDIEU COLONY COMMUNITY ASSOCIATION,

Respondents.

DEPONENT: STEVEN TRAYNUM

DATE: OCTOBER 28, 2019

TIME: 9:41 A.M.

LOCATION: WILLOUGHBY & HOEFER
COLUMBIA, SC

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EXHIBITS

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STEVEN TRAYNUM,
being first duly sworn, testified as follows:

EXAMINATION

BY MR. GRESSETTE:

Q. Good morning, Mr. Traynum.

A. Good morning.

Q. My name is Tom Gressette. I'm with the law firm of Walker Gressette Freeman & Linton. We represent the Belle W. Baruch Foundation in this case. If you would, please state your full name for the record.

A. Steven Bruce Traynum.

Q. Have you ever had your deposition taken before?

A. I do not believe so.

Q. Okay. So what we're going to do today is ask you a few questions about your work in the case. The court reporter here is taking down a written transcript, so if you would please provide verbal answers so she can get them down.

Nodding or shaking your head sometimes can get confusing. So if I need to, I may at some point say, hey, don't forget a verbal answer. It's not something you do every day, so no sweat. We'll sort it out.

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A. I think just more just specific experience with, you know, additional projects we've managed, maybe just revising some words and things, nothing substantial.
Q. And do you have somewhere a more up-to-date version of your CV?
A. I believe it is on our website.
Q. I'll represent to you this is the one I pulled off the website, but the file name was actually, like, 2012 or something. So you're right, it may be an old one.
A. If it's not updated on our website, then that's something I need to fix, but it does exist somewhere.
Q. All right. So does Exhibit No. 2 accurately reflect your educational background?
A. It does. I also -- since I think this has been completed, I do have a coastal engineering certificate from Old Dominion University and I've taken several engineering courses, you know, specific to coastal engineering through there. That's part of a very long-term strategy of getting an engineering degree, so working on that.
Q. And where are you in getting your engineering degree?

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A. I've taken all the courses. I just need to actually take the engineering exam.
Q. Oh, so you have a -- do you have a BS in engineering?
A. I do not. There's still a -- I've taken all the courses, but I've not got the degree. There's a -- basically I just did not finish the project for it.
Q. Okay. So you've completed the coursework for a --
A. Master's in engineering, short of the project requirement.
Q. And do you plan to complete the project requirement?
A. If I need to, but I think I have all the qualifications to sit for the PE exam, so that's really the goal is to sit for that.
Q. And when will you sit for the PE exam?
A. I've not scheduled it yet, but hopefully in the next six months or so.
Q. Can you tell me about your course of study for the coastal engineering certificate?
A. It's a four-course curriculum offered through Old Dominion. It's an online course that deals with beach nourishment. Dredging, coastal

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processes and I believe physical oceanography were the four core courses, coastal zone management. And as part of those additional courses, there was coastal zone management classes, additional physics classes and math classes and things like that.
Q. So how many classes did you have to take?
A. The program was a full 30-hour program for the online engineering degree. The certificate program was four courses.
Q. And so have you done 30 hours plus the four courses?
A. The four courses were part of -- were included in part of that, so that was 12 hours of them.
Q. So you've done a full 30 hours of coursework?
A. I'm not sure I've completed the 30. I'm not sure where I stand with that last course or the project part of that curriculum, so I'm not sure where that actually stood. I kind of got busy with projects and...
Q. Sure, sure.
A. And seven children and trying to raise all those. It got a little hectic, so that's the excuse on why that --

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Q. How many kids?
A. Currently it's seven.
Q. That's a lot of kids.
A. It is.
Q. That's great though.
A. Yes.
Q. So is it accurate to say that you have some engineering class training but are not a certified engineer?
A. I'm not a registered professional engineer, correct.
Q. Do you consider yourself an engineer?
A. I do not consider myself a professional engineer, no.
Q. Have you ever been a witness in any other kind of court case besides the one involving Hunting Island?
A. I was involved in a case with the Seabrook Island inlet relocation project, which was the Captain Sam's inlet relocation project, but I do not think that I was actually -- I know I was not called as a witness, but I was kind of involved in that case a little bit.
Q. And what did you do with regard to the Seabrook Island relocation?

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A. I did a lot of the permitting, did some of the construction administration, so I oversaw the project as it was actually being constructed, did some of the data analysis justifying the project.
Q. And who was interested in justifying the project?
A. The permit went forward and I think there was an appeal by a local resident on Seabrook Island, who I believe his argument was that his beach was already wide enough and we did not need to make it any wider. So it ended up getting -- I don't remember if it got dropped or if, you know, the Town of Seabrook was awarded, you know, a successful case. But the project ended up moving forward in 2015, was built.
Q. And has that inlet been relocated more than once?
A. Yes.
Q. And have you been involved in each of those?
A. No, the first one was in 1983, the second one was in 1996 and the last one was in 2015.
Q. So just the last one --
A. Correct.
Q. -- you were involved in. Okay.
Where are you currently employed?

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A. Coastal Science & Engineering, Columbia, South Carolina.
Q. And what do you currently do for Coastal Science & Engineering?
A. So I manage all aspects of certain projects and then help in pretty much all of our other projects. I'm at least somewhat involved with -- in some part of all of the projects. I'm usually involved with some part of it, the permitting or design or something like that.
I mainly serve as a project manager for several of our South Carolina projects, and in that role, I am the head person who does all the liaison between the client and our office, between permitting agencies and other interested parties.
In the projects that I don't manage, and Debidue is one of those, I may serve to, you know, handle some data analysis or, you know, provide liaison as needed, you know, when the actual project managers or people who are more involved, you know, aren't available or just kind of offer input, you know, as any small office would and coordinate with each other.
Q. And I may not have understood you correctly. Are you the project manager for the project in this

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case?
A. No, I am not.
Q. Okay. And what is your role in the project that we identified earlier that's the subject of this case?
A. This project, I actually did not do a whole lot other than a little bit of, you know, just coordination with the client. I attended a couple of meetings. I did not do the data analysis as far as the determination of erosion rates, determining the suitability of the borrow area, designing the groins or beach fill. So I actually did not do a whole lot with this case or with this particular project.
Q. All right. So we've talked about what you didn't do for this project. Am I correct that you didn't do any data analysis, you didn't do any shoreline analysis and you didn't do any groin design?
A. Correct.
Q. Am I correct that you did coordinate with the client at some point?
A. I've had some communication with the clients, client, and I'm trying to remember back to what those meetings were. I know one or two of

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them fell, you know, after all the permitting's gone through and just kind of prep for potential lawsuits or appeals of the permit.
But prior to that, I honestly did not do a whole lot of communication other than just kind of filling in for -- whether it was Tim Kana or anybody else involved with it, you know, just answering phone calls and answering some general questions like that.
Q. All right. And when you say you fill in for Tim Kana, is that because Tim Kana is in charge of the project for CSE?
A. Yes, Tim's the project director.
Q. Okay. He's the project director. And who else works on the project from CSE?
A. Haiqing Kaczkowski is our engineer, so she is kind of over all the technical engineering and contracting. Dr. Patrick Barrineau I believe was involved in some of the data analysis. Trey Hair is our drawing -- he does all our CAD work and produces our graphics and drawings, so he provided or produced the permit documents, you know, the drawings and things that have to be submitted with the application. But mostly analysis would have been done by Tim with the help of Haiqing and

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Patrick.
Q. All right. And do you know with regard to this project how Dr. Kana, Dr. Kaczkowski and Mr. Barrineau divided up the tasks?
A. I do not know specifically how it was divided up. Also, we did have an intern from Delft University in the Netherlands who did some of the computer modeling. That was somebody else who was involved.
Q. All right. And what was the student's name?
A. Rueben Visser.
Q. Can you spell that?
A. V-I-S-S-E-R, I believe, but it may have been A-R.
Q. Where does Mr. Visser live?
A. He's in the Netherlands now. He was with us for close to a year.
Q. And what time frame period was he with CSE?
A. 2017 to 2018, I believe, and I can't tell you the months, I'm sorry. They run together.
Q. Sure, that's fine. And what was Mr. Visser's role at CSE generally?
A. Generally he did computer modeling and then served to supplement our field crews when we were surveying and, you know, just kind of assisting in

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the role of an intern, just grunt work sometimes.
Q. And where was he in school?
A. At Delft University.
Q. Can you spell that for me?
A. D-E-L-F-T.
Q. And do you know what year he was or what kind of degree he was working on?
A. It was part of a graduate degree, I believe. And don't hold me to this, but I believe as part of their graduate degrees, they have to do an internship with an engineering-type company, so this was part of his studies to do that.
Q. Okay. And do you know how long CSE has been involved with beachfront management for the Debidue Beach?
A. I believe it dates back to the '80s.
Q. And when did you first come to be involved with any work for issues related to Debidue Beach?
A. I believe it was around 2016 or so when they hired us to start monitoring their beach after their last project.
Q. And who was monitoring the beach before CSE began in 2016?
A. I believe it was a company called ATM.
Q. And do you have any information about why

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ATM ceased monitoring the beach for DeBordieu?
A. I do not.
Q. And after 2016 when you became involved with beach monitoring at Debidue, what was your first role for CSE?
A. Again, I have not been involved in Debidue very much at all. I may have helped with some of the shoreline analysis, and in that role, I wouldn't have been the person that was actually looking at the numbers and calculating the rates.
I've written several programs that help analyze our data to provide the volume numbers. But once the volume numbers were generated, they would have been put into tables and all the erosion rates and things would have been calculated.
So I did not do that, but I may have processed it enough to at least get the numbers to whoever was running that, and I honestly can't remember who was running those numbers.
Q. So when you say you wrote some computer programs that deal with volume, I may have misquoted you there. Can you tell me about the computer programs you've written?
A. So they're programs that are in MATLAB, so computing software that's for data analysis and the

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programs take our survey data and generate beach profiles from it and calculate sand volumes from those profiles.
So it's a fairly standard method of, you know, calculating volumes on a beach, but the programs are there to do it as kind of a rapid calculation.
Q. And is MATLAB a computer program that you modify, or is it a platform? Can you tell me about that?
A. It is a program that you write code for.
Q. Okay. And if I understand correctly, the program functions to calculate rates of erosion over a period of time; is that right?
A. No, the program -- all it basically does is take a -- the survey data that's in an X, Y, Z distance format and it converts that format from a text file into a file that either provides you a volume for that section of beach that then we put into Excel and use Excel to calculate erosion rates and things like that.
So it certainly could do those kind of calculations with enough coding, you know, just like any other shoreline software, but we strictly use it for generating beach profiles from --

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groins permitted for Debidue?
A. No.
Q. So if you haven't talked to any contractors about the specific costs of removing the groins at Debidue, on what do you base your opinion that the cost for removing them would be less than $250,000?
A. Based off the conversations about Hunting Island and our experience with, you know, groin projects in general, the pace at which they can be built and the -- the amount of material costs that goes along with the installation, which you would not have in your removal of them.
Q. Does the length of time that a groin has been installed impact the cost of removal?
A. It could, but that's all based off the conditions, you know, of the beach over time.
Q. Okay. How could the length of time impact cost?
A. Fuel prices, workloads, additional, you know, safety measures, just general costs that contractors may face over time, cost inflation.
From the physical standpoint, you know, if a beach -- when you first install the groin under a design like this, you know, sand would be out to the end of it and be easy to access. If the groins

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are holding sand, then that should maintain itself, especially in South Carolina's tide range. You have a low tide that reaches out pretty far, so you'd be able to extend them.
If the groins were not holding sand, then the seaward ends of them would be harder to get to.
Q. How are groins like the ones performed for Debidue removed?
A. Using heavy equipment similar to the equipment you would use to install them. I believe that we have designed a concrete cap for these. And if that's correct, that would either be just broken off or cut off of the tops of the sheets and removed into a dumpster or dump truck. The sheets would be vibrated out using the same hammer that was used to install them.
And we've -- we have not removed a groin, but in the process of constructing them, we have pulled sheets out, you know, that they've put in, have had to remove them to adjust the layout of it, the alignment of it, or for any other reason.
So they're pulled out just as easily as they are put in, and then the rock would just be picked up with an excavator, which is loaded into a truck, basically just opposite of installing them.

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Q. And so I'm clear, you have not participated in the removal of a groin ever?
MS. PHELAN: Object to the form.
THE WITNESS: Correct.
Q. Have you ever participated in the removal of a groin?
A. Not in -- again, I said we've been around part of a removal when they've had to realign several. It was probably 80 feet worth of sheets that they had driven out of alignment. We told them to pull them out and redrive them straight. But other than that, we have not been involved in the complete removal of a groin.
Q. So the extent of your personal involvement with the removal of a groin structure is limited to the removal of eight sheets within a groin structure?
A. About 80 feet.
Q. 80 feet within a groin structure?
A. Right, which is probably close to 20 to 25 sheets.
Q. Okay. And if the groins at Debidue had to be removed, how would someone in charge of removal ensure that all of the rocks around the groin were actually removed?

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A. You would -- we would have a survey of where the rocks were in place. That's part of any post-project monitoring is we survey the footprint of the groin. So we did this at Edisto recently where we extended groins, and we also have them at Hunting Island when we installed them.
We surveyed around where the rocks are. So you would mark that area and have the excavator dig into that area until they were not able to locate any more. You could potentially have a diver or snorkeler in that area, you know, physically look around to see if there were any more, you know, rocks.
Q. Would that be expensive?
A. No.
Q. Well, is having the diver actually go down and look for rocks the only way to ensure that all rocks that were installed as part of the groin are in fact removed?
A. That's not the only way to do it. You could also -- there's several things you could do, if necessary, is count each rock when you put them in and have a record of it.
Q. Do you understand that the installation of these groins will involve counting all of the

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somewhere in the order of six to eight years, but I'm not certain.
Q. Do you have an opinion about whether or not any storm activity contributed to the diminishment of the nourishment sanding on Debidue Beach currently after the 2015 project?
A. I do know we've had several storm events since 2015. To the level that sand was actually lost from the beach as opposed to sand being eroded from the dunes and deposited lower in the profile and staying within the system, I'm not sure what those numbers are. I would not be surprised to see that, you know, erosion over the past several years is higher than typical due to those storms.
Q. Now, when you were asked or answering questions about the merits of this project, you made reference to a desire to maintain long-term beach stability. Do you recall that testimony?
A. I do.
Q. And what, in your opinion, constitutes long-term beach stability?
A. In my opinion, long-term would mean we would have a stable dune lasting at least ten years and before you would have to add additional sand to protect that dune, you know, barring catastrophic

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storm events, and I would include the sum of, you know, Hurricanes Matthew, Irma and the other ones that we've had as getting close to that condition of having, you know, significant storm activity.
So, again, from the standpoint of just an acceptable renourishment interval, I would think over ten years, but ideally that's part of a management program that, you know, again, is funded and designed to protect the beach and maintain the sand supply for the long-term and at least a funding mechanism that plans out 30 to 40 years.
Q. Did you just testify that Hurricanes Matthew and Irma approached, in your opinion, some level of major or catastrophic event?
A. I think when -- you had a situation where you had a significant event with the hurricanes and, you know, if one hurricane happens and then you have a three-year calm period, the beach has time to kind of build back and the dune can accumulate windblown sand, but when you have storms every year, you lose that ability for the beach to naturally recover.
So that's where a lot of communities have been the past couple years. So the definition of catastrophic, I wouldn't call it catastrophic. I

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would just call it very significant.
Q. Do you have a minimum characterization or quantification of what would constitute a significant storm?
A. No, because each storm is unique. You can't just look at a wind speed or duration or things like that. You kind of have to look at each storm individually. And even within that, it may affect, you know, nearby towns and areas differently just due to the tide stage it hits or certain unique aspects of that storm.
Q. Fair enough. In discussing the methodology for your opinions, you made reference to long-term chronic erosion. Do you recall that phrase being used?
A. Mm-hmm, I do.
Q. And can you define for me what you characterize as long-term chronic erosion?
A. So long-term chronic erosion I would define as any erosion that has consistently occurred in the absence of mitigating forces, whether it's nourishment or other alterations of the coastal zone that can be demonstrated as occurring over 20 to 30 years or longer.
So in -- use Myrtle Beach for an example.

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It would be the erosion rate that if you took into consideration all the nourishment projects that have been completed, take those out of the equation, it's whatever the background erosion rate affecting an area is.
Q. How did you arrive at the 20- to 30-year time frame as a minimum for long-term erosion?
A. Just due to seasonal fluctuations. And when I say seasonal, it may be, you know, cycles like the El Nino cycles and things like that can affect weather patterns over a period of several years. And then it just may be by sheer probability of wind directions and things that occur in yearly to decadal scales. You know, when I say decadal, like up to several years. It can average out or can change typical patterns that if you looked at a 50-year trend, it would be different.
So just like looking at sea level trends, you have minor fluctuations occurring every year, and some three-year periods may show sea levels actually dropping, but if you look at the last 100 years, there's a fairly consistent rise.
So at least 20 to 30 years takes -- it takes out, you know, storm events, so if you have one real bad hurricane like a Hugo, it kind of averages

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So that bulge is an area that's kind of a likely spot for focused erosion because waves kind of hit that first and then spread sand to either side of it, so I think that's a reasonable assessment of the primary cause of erosion there.

But again, I have not looked at the individual volume change for every station that's monitored on the beach to do my own analysis of it. I'm deferring to the analysis that was done by my coworkers.

Q. Fair enough. Let me ask you just real quickly, what input, if any, did you have to the downdrift impact analysis document that was submitted in support of the permit?

A. I don't believe I had any input to that.

Q. What input, if any, did you have with respect to the 30-year plan for DCCA that was submitted in support of this permit?

A. I don't believe I had any input to that either.

Q. What input, if any, did you have in the alternatives analysis or the supplemental alternatives analysis that was submitted in support of this permit?

A. None that I can recall.

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MR. CUNNINGHAM: All right. I believe those are all my questions. Thank you very much.

MR. GRESSETTE: I do have just a couple of quick follow-up questions, Mr. Traynum.

BY MR. GRESSETTE:

Q. Did I understand you to say that when you're calculating the long-term erosion rate for a given beach area that you should factor out the nourishment impacts?

A. Yes, if you're just trying to determine how much a beach is eroding, then you have to look at what's going on in the background. And we -- so like, anywhere where you add a big slug of sand, it's not the technical definition, but when you do a nourishment project, that sand is going to move potentially in both directions, but primarily it will move in one, and over time you can track that sand moving into a down-coast area.

So, for instance, at Isle of Palms, we added over a million and a half yards of sand to the beach in one area and we can see several hundred thousand yards in the first couple of years are moving to the south, which is feeding the rest of the island.

It's all great, but from the standpoint of

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what's the background erosion rate of that area, you have to factor that out, otherwise if that nourishment program stopped, then that erosion rate would be back to what it was beforehand.

Q. And to properly calculate the background erosion rate, do you also factor out storm events?

A. If you're using a linear shoreline, so from an aerial image, and this is something that DHEC kind of got into when they were determining their setback lines and jurisdictional lines is if you're using an aerial image, they're much more susceptible to storm impacts than the beach volume.

We try to do everything based off of beach volumes because a storm will shift sand from the dune to the low tide area. So if you're measuring the volume of the whole beach, you account for that, but an aerial image only gives you a line that you're kind of arbitrarily drawing, whether it's a vegetation line, maybe the wrack line if there's, you know, seaweed that's kind of at the high tide swash line, but you're drawing that based off of that one instance in time.

So if you take a photo right after a hurricane that set the dune back 40 feet, then that's kind of an artificial shoreline. So we

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would factor that out, but if the beach has had time to recover, then the dune kind of gets back to where it wants to be and you can factor that in.

So you really have to evaluate it on a case-by-case basis and make sure that you're not throwing in outlier data that's going to bias your erosion rate one way or another.

Q. Are you aware of whether or not the background erosion rate calculated in this case factored out renourishment but included storm events?

MR. GREEN: Objection as to form.

MS. PHELAN: Objection to form.

THE WITNESS: I'm not sure what the specific data points were. I do know that the period that included up to, I want to say it was 1990, but I may be wrong on that, factored out the nourishments, but I'm not sure what the analysis was for the -- or what was used for the rates specifically.

Q. Okay. And when you were speaking earlier about a 20-foot erosion rate being an extreme rate, do you recall that?

A. Yes.

Q. Can you quantify 20 feet in terms of volume

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Docket No. 19-ALJ-07-0089-CC

South Carolina Coastal Conservation League, ...Appellant,

vs.

South Carolina Department of Health and Environmental Control and
Debordieu Colony Community Association, ... Respondents.

PROOF OF SERVICE

I hereby certify that on this date I served the Appellant's Reply in Support of its Motion for Supersedeas on all parties by emailing a copy of same on November 1, 2021, to the Attorney Information System provided email addresses below, via attached e-mail:

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s/ Leslie S. Lenhardt
Leslie S. Lenhardt

November 1, 2021

CCL v. DHEC & DCCA, Reply in Support

From: Leslie Lenhardt <leslie@scelp.org>
To: Tracey Green <tgreen@willoughbyhoefer.com>, Sallie Phelan <phelansp@dhec.sc.gov>, Bradley Churdar <churdabd@dhec.sc.gov>
Cc: Ben Cunningham <ben@scelp.org>
Subject: CCL v. DHEC & DCCA, Reply in Support
Date: Monday, November 01, 2021 3:06 PM
Size: 2.7 MB

All,
Please find attached Appellant's Reply in Support of its Petition for Supersedeas for service on you.
Thank you,
Leslie

--
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Reply in Support of Petition for Supersedeas.pdf 2.0 MB

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Our Mission To protect the natural environment of South Carolina by providing legal services and advice to environmental organizations and concerned citizens and by improving the state's system of environmental regulation.

November 1, 2021

VIA ELECTRONIC FILING SYSTEM

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

Re: Coastal Conservation League v. DHEC & DeBordieu Colony Community Assn.
Appellate Case No. 2021-000158

Dear Ms. Kitchings:

Enclosed please find a Reply in Support of Petition for Writ of Supersedeas and proof of service in the above-referenced matter. Thank you for your kind assistance.

Respectfully,

Leslie S. Lenhardt
Staff Attorney

Enclosure

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