

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF BEAUFORT )

Karen Wells and the Coastal Conservation ) C/A No. 2019-CP- \_\_\_\_\_  
League, )

Plaintiffs, ) **SUMMONS**

vs. ) (non-jury)

William Oberheim, Nancy Oberheim, LTI )  
Enterprises Inc., Snow Family LLC, David )  
Garvey, Cynthia Garvey, and Bertram Ellis, Jr., )  
and the South Carolina Department of Health and )  
Environmental Control, )

Defendants. )

TO: THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscriber at (if by mail) P.O. Box 1380, Pawleys Island, South Carolina, 29585, or (if by personal delivery) 430 Highmarket Street, Georgetown, SC 29440, or [jessie@scelp.org](mailto:jessie@scelp.org) if by e-filing, within thirty (30) days from the service hereof, exclusive of the date of such service; and if you fail to answer the Complaint within the time aforesaid, Plaintiff will apply to the Court for the relief demanded in the Complaint.

s/Jessie A. White  
Jessie A. White, SC Bar #100832  
SOUTH CAROLINA ENVIRONMENTAL LAW  
PROJECT  
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Beaufort, South Carolina  
November 14, 2019

Attorney for the Plaintiff

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF BEAUFORT )

Karen Wells and the Coastal Conservation ) C/A No. 2019-CP- \_\_\_\_\_  
League, )

Plaintiffs, ) **COMPLAINT**

vs. ) (non-jury)

William Oberheim, Nancy Oberheim, LTI )  
Enterprises Inc., Snow Family LLC, David )  
Garvey, Cynthia Garvey, and Bertram Ellis, Jr., )  
and the South Carolina Department of Health and )  
Environmental Control, )

Defendants. )

The Plaintiffs, complaining of the Defendants, would respectfully show unto the Court:

**JURISDICTION AND VENUE**

1. This is an action involving real property located in Beaufort County, South Carolina.
2. The Plaintiffs allege violations of the South Carolina Coastal Zone Management Act (“CZMA”), S.C. Code § 48-39-10, et seq. The CZMA authorizes the Plaintiffs to bring these claims and grants this Court jurisdiction over the claims. See S.C. Code § 48-39-160.
3. This Court has jurisdiction to grant injunctive relief as well as declare rights, status and other legal relations and to grant other relief pursuant to the South Carolina Uniform Declaratory Judgment Act, S.C. Code Ann. §15-53-10 et seq.
4. This Court has jurisdiction over these parties, subject matter jurisdiction over this action, and venue for this action is appropriate in this Court.

**THE PARTIES**

5. The Defendant South Carolina Department of Health and Environmental Control (“DHEC”) is the state agency responsible for administering the CZMA and its regulations and

programs.

6. The Defendants William Oberheim, Nancy Oberheim, LTI Enterprises Inc., Snow Family LLC, David Garvey, Cynthia Garvey, and Bertram Ellis, Jr (collectively, the “Individual Defendants”) are owners of five adjoining oceanfront properties on Piping Plover Road, Hilton Head. The Individual Defendants have constructed a continuous seawall along the seaward border of their properties. This seawall is designed to shield the structures directly behind the wall from water and wave energy. As a consequence, more water is pushed around the ends of the seawall, jeopardizing adjacent properties.

7. Plaintiff Karen Wells is also a property owner on Hilton Head, residing at 1 South Beach Lane.<sup>1</sup> Ms. Wells lives in close proximity to the Individual Defendants’ properties and the disputed seawall. Starting from the northern end of the seawall, a beach access walkway runs perpendicular from the shoreline back to South Beach Lane. Ms. Wells’ property is adjacent to this beach access, approximately 250 yards from the beach.

8. During past storms and other weather events, the aforementioned beach access has acted as a channel enabling ocean floodwater to move inland toward Ms. Wells’ property. Ms. Wells’ home and property stand to experience more flooding and damage from future storms and other weather events, as the Individual Defendants’ seawall further diverts wave energy and more ocean water down the beach access walkway.

9. Ms. Wells also depends on a healthy, naturally functioning beach in order to maintain her property value and sustain her significant investment in the property. Seawalls protect landward properties to the detriment of the beach in front of the wall. Specifically: seawalls increase erosion on the beach when wave energy reflects off the wall and scours away the sand at the base

of the wall; they trap landward sand, decreasing sand replenishment; and they ultimately lead to a loss of the sandy beach as the ocean moves closer to the seawall. The natural and predictable consequences of this seawall tend to decrease Ms. Wells' property value and impair her investment.

10. Plaintiff Coastal Conservation League ("the League") is a non-profit membership organization existing under the laws of the State of South Carolina and devoted to the protection and conservation of the natural resources of the state. The League has over 4,000 members, representing South Carolina citizens who use, enjoy, and depend upon the coastal resources of the state, including on Hilton Head. The League has members who own property in proximity to Individual Defendants' seawall and who recreate on the beach in front of the seawall. These members were impeded from using the beach while massive construction equipment was utilized for construction of the seawall, and they stand to be further negatively impacted as a result of Individual Defendants' seawall as the wall becomes exposed, exacerbating erosion and leading to a loss of the public's sandy beach.

### **GENERAL ALLEGATIONS**

11. Seawalls have effectively been prohibited in South Carolina since 1988, when the South Carolina legislature adopted the following finding into law: "The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach has not proven effective. These armoring devices have given a false sense of security to beachfront property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beachfront property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach

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<sup>1</sup> Ms. Wells owns the property at 1 South Beach Lane under Royal Tern, LLC.

which is so important to the tourism industry.” S.C. Code § 48-39-250.

12. The “seawall ban” is embodied in South Carolina’s Coastal Zone Management Act. See also S.C. Code § 48-39-290. Other than on Folly Beach, which is exempt from the CZMA, the Defendants’ seawall is the first to be constructed in South Carolina in 30 years.

13. Proponents of seawalls believe that they shield structures directly behind the walls from encroachment by the ocean. In reality, though, seawalls also cause loss of the beach in front of the walls, enhance the risk to nearby properties that are not shielded by a wall, and remove sand from the system that is crucial to long-term shoreline functionality. The scientific and engineering consensus is plainly that seawalls have a net negative impact on private property and the public beach. The South Carolina General Assembly agreed when it passed the CZMA and its ban on new seawalls.

14. Starting in the summer of 2018, the Individual Defendants began constructing a seawall running along the seaward border of their five contiguous properties.

15. The Individual Defendants began construction of the seawall without obtaining any permits or certifications from DHEC.

16. After learning that this unprecedented structure was being built on the beach without any review or approval under our state coastal laws, Plaintiff Coastal Conservation League, represented by undersigned counsel, wrote to DHEC explaining that the wall needed significant legal approvals that had not been obtained and that should be denied.

17. Following this letter, DHEC issued a stop work order, dated August 29, 2018, which directed the Individual Defendants to “discontinue all work activity at this site” and to contact DHEC. See Exhibit A, Stop Work Order.

18. By the time the stop work order was issued, the seawall was almost fully constructed.

Upon information and belief, at around the same time the stop work order was issued, the Individual Defendants' contractor pulled sand from a nearby dune restoration project in order to quickly finish the project.

19. Following the stop work order, DHEC and the Individual Defendants entered a protracted period of discussion, during which Individual Defendants and their contractors attempted to persuade DHEC that the wall was legally constructed.

20. DHEC ultimately reaffirmed its conclusion that the seawall had been constructed without necessary approvals under state law, issuing a Notice of Alleged Violation/Notice of Enforcement Conference on April 11, 2019. See Exhibit B, Consent Order.

21. DHEC entered into enforcement proceedings with the Individual Defendants, which concluded with Consent Order # 19-048-W negotiated between the agency and the property owners, dated August 8, 2019 (hereinafter referred to as the "Consent Order"). Id. As is relevant to this litigation, the Consent Order contained the following terms: (1) DHEC's conclusion is that the Individual Defendants "failed to obtain a permit for stormwater discharges and the required Coastal Zone Consistency Certification" prior to building the seawall; (2) the seawall is nevertheless allowed to remain in place; and (3) the Individual Defendants owe a cumulative total fine of \$15,000.

22. The Consent Order between DHEC and the Individual Defendants did not retroactively bestow the seawall with the regulatory approvals it requires.

23. The seawall remains in place as an unauthorized structure.

24. Further, the only corrective measure in the Consent Order, a fine of \$15,000 split among

five property owners, is entirely inconsequential considering the assessed value of Individual Defendants' homes, in the range of \$4M each, and the price of the seawall construction exceeding \$750,000.

25. Upon information and belief, the actions taken by DHEC which purport to authorize and approve the alteration of critical area and construction of a seawall by the Individual Defendants on Hilton Head are outside the legal authority of the agency, are *ultra vires*, are not a substitute for compliance with the permitting requirements of the CZMA, and do not constitute legal authorization of the alteration of critical area and construction activity in the coastal zone undertaken by or on behalf of the Individual Defendants.

### **LEGAL FRAMEWORK**

26. South Carolina's CZMA establishes two primary coastal regulatory programs, the Coastal Zone Consistency Certification ("CZCC") and the Critical Area Permit. A construction project proposed along the coastline of South Carolina may be required to obtain a CZCC, a Critical Area Permit, or both.

27. As described by SC Code § 48-39-80(B)(11), the CZCC requirement dictates that DHEC "review all state and federal permit applications in the coastal zone, and [ ] certify that these do not contravene the management plan." Basically, if a construction project in the coastal zone requires a state or federal environmental permit, it must also obtain a CZCC in order to proceed.

28. The purpose of the CZCC is to ensure that a proposed project is consistent with the CZMA and the coastal zone management plan that South Carolina has adopted under the statute. A project may obtain the requisite state or federal permit but nevertheless be foreclosed because it does not meet state coastal policies and is denied a CZCC.

29. Separately, a proposed project that would alter “critical area” within the coastal zone requires a Critical Area Permit. S.C. Code § 48-39-130. Pursuant to the CZMA, “critical area” includes “coastal waters,” “tidelands,” “beaches,” and the “beach/dune system which is the area from the mean high-water mark to the setback line as determined in Section 48-39-280.” S.C. Code § 48-39-10(J). Each of these is a defined term under the CZMA and its regulations. See S.C. Code Reg. §§ 30-1 et seq.

30. “Critical area” constitutes the most valuable and sensitive natural resources on our coast, and proposed alterations to such areas require a separate, more rigorous analysis under the law. See S.C. Code § 48-39-130 and S.C. Code Reg. §§ 30-1 et seq.

31. Any construction activities taking place within “coastal waters,” “tidelands,” “beaches,” or the “beach/dune system” along South Carolina’s coast must be reviewed under the Critical Area Regulations and obtain a Critical Area Permit in order to proceed.

**FOR A FIRST CAUSE OF ACTION**  
**(Failure to Obtain Critical Area Permit, S.C. Code § 48-39-130)**

32. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 31 above.

33. The Individual Defendants have constructed a seawall within “beaches” critical area, thereby altering a critical area without the requisite Critical Area Permit.

34. Under the CZMA and its regulations, several categories of critical area occur on the oceanfront. “Tidelands” are defined as “all areas which are at or below mean high tide.” S.C. Code § 48-39-10(J). In other words, all areas on the oceanfront beach that get wet during normal tides are “tidelands” critical area.

35. The “beach/dune system” classification of critical area picks up right at mean high tide and carries the critical area line further inland. Specifically, “beach/dune system” critical area

includes “all land from the mean high-water mark of the Atlantic Ocean landward to the 40-year setback line.” S.C. Code Reg. § 30-1(D)(5).

36. Applying the definitions of “tidelands” and “beach/dune system” to the oceanfront, it is apparent that all areas seaward of the 40-year setback line (an imaginary line drawn by DHEC on the dry sand of the oceanfront pursuant to Section 48-39-280) are necessarily and always critical area. “Beaches” critical area, then, must incorporate portions of the oceanfront that are not captured by this zone.

37. “Beaches” critical area is defined in the CZMA as “those lands subject to periodic inundation by tidal and wave action so that no non-littoral vegetation is established.” S.C. Code § 48-39-10(H).

38. At the time the Individual Defendants constructed their seawall, the area of construction was subject to regular inundation of the tide, was devoid of vegetation other than that associated with the immediate beachfront, and would have appeared to any objective observer to constitute part of the oceanfront beach.

39. These conditions matching the definition of “beaches” critical area existed in the area of construction for an extended period of time prior to Individual Defendants’ erection of the seawall.

40. The Individual Defendants’ seawall was built upon “beaches” critical area. Indeed, by very definition, an oceanfront seawall would never be constructed in an area that is not subject to periodic inundation and part of the beach.

41. The Individual Defendants altered critical area by building their seawall, and they did so without obtaining a Critical Area Permit, in violation of South Carolina’s statutory seawall ban

and the critical area permitting requirement. See S.C. Code Reg. § 30-2(B) and S.C. Code § 48-39-130.

42. Further, the Individual Defendants, through their agents, undertook other sand moving activities on the oceanfront, concurrent with seawall construction, but outside of the construction footprint. These activities constituted an additional, separate critical area alteration without a permit.

43. The Individual Defendants' seawall, though now fully constructed, remains a violation of the CZMA and the critical area regulations.

44. Therefore, the Plaintiffs seek a declaration that the alteration of critical area by or on behalf of the Individual Defendants in order to construct a seawall and other related activities requires a permit properly issued by DHEC in order to comply with the CZMA and the Critical Area Regulations and, in the absence of such duly authorized permit issued by DHEC, constitutes an unpermitted critical area alteration.

45. Further, the Plaintiffs seek a declaration that Defendant DHEC has no legal authority to approve an alteration of critical area except through compliance with the statutory and regulatory requirements for the issuance of a permit pursuant to the CZMA and the Critical Area Regulations. Thus, the Consent Order exceeds the regulatory authority of DHEC, is *ultra vires*, is null and void and does not constitute a bar to this action under S.C. Code Section 48-39-160.

46. Pursuant to the CZMA and Critical Area Regulations, the appropriate remedy is restoration of the critical area to its condition prior to construction of the seawall. See S.C. Code Reg. § 30-8(B) and S.C. Code § 48-39-160.

**FOR A SECOND CAUSE OF ACTION**  
**(Failure to Obtain Coastal Zone Consistency Certification, SC Code § 48-39-80(B)(11))**

47. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 46 above.

48. The Individual Defendants have constructed a seawall within the coastal zone without obtaining the necessary Coastal Zone Consistency Certification.

49. As described above, the CZCC requirement is triggered when a project in the coastal zone requires a state or federal environmental permit. Here, the Individual Defendants' seawall construction required a permit under the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") program—what is commonly called a construction stormwater permit.

50. As explained by DHEC in the exhibits attached hereto, the seawall construction resulted in a footprint of disturbance greater than 0.5 acres, which dictates that the Individual Defendants were required to obtain an NPDES permit for stormwater discharges from the construction site, prior to building the seawall. See S.C. Code Regs 61-9.122.26(a) (2011).

51. The construction stormwater permit that the Individual Defendants were supposed to obtain is a state permit that triggers the CZCC requirement.

52. The seawall requires a CZCC in order to be lawful, but no certification has been sought or obtained. The Individual Defendants undertook construction of a seawall in the coastal zone without obtaining the requisite construction stormwater permit or the accompanying CZCC, meaning that the seawall was constructed without any certification of consistency with the statute and coastal zone management plan.

53. The Individual Defendants' seawall, though now fully constructed, remains in violation of the CZMA and is fundamentally inconsistent with state coastal law and policies.

54. Therefore, the Plaintiffs seek a declaration that the Individual Defendants' seawall

requires a consistency certification properly issued by DHEC in order to comply with the CZMA and the coastal zone management plan and, in the absence of such certification duly authorized by DHEC, constitutes unlawful activity in the coastal zone without the necessary Coastal Zone Consistency Certification.

55. Further, the Plaintiffs seek a declaration that Defendant DHEC has no legal authority to issue a Coastal Zone Consistency Certification except through compliance with the statutory and regulatory requirements for the issuance of a certification pursuant to the CZMA and the coastal zone management plan. Thus, the Consent Order exceeds the regulatory authority of DHEC, is *ultra vires*, is null and void and does not constitute a bar to this action under S.C. Code Section 48-39-160.

56. Pursuant to the CZMA, the appropriate remedy is restoration of the area to its condition prior to construction of the seawall.

WHEREFORE, having fully set forth their allegations against Defendants, Plaintiffs respectfully requests the following relief:

- (1) A declaration that the alteration of critical area by or on behalf of the Individual Defendants in connection with a seawall and other sand moving activities related thereto requires a critical area permit properly issued by the South Carolina Department of Health and Environmental Control in order to comply with the Coastal Zone Management Act, S.C. Code §§ 48-39-10 et seq., and the Critical Area Regulations, S.C. Code Regs. §§ 30-1 et seq.;
- (2) A declaration that the alteration of critical area by or on behalf of the Individual Defendants in connection with a seawall and other sand moving activities related thereto was

done without a duly authorized critical area permit issued by the South Carolina Department of Health and Environmental Control;

(3) A declaration that Individual Defendants' seawall requires a Coastal Zone Consistency Certification properly issued by the South Carolina Department of Health and Environmental Control in order to comply with the Coastal Zone Management Act, S.C. Code §§ 48-39-10 et seq., and the Coastal Zone Management Plan;

(4) A declaration that Individual Defendants' seawall was constructed without a duly authorized Coastal Zone Consistency Certification issued by the South Carolina Department of Health and Environmental Control;

(5) A declaration that the Defendant South Carolina Department of Health and Environmental Control has no legal authority to either approve an alteration to critical area or to certify coastal consistency except through compliance with the statutory and regulatory requirements for the issuance of a permit and certification pursuant to the Coastal Zone Management Act, S.C. Code §§ 48-39-10 et seq., the Critical Area Regulations, S.C. Code Regs. §§ 30-1 et seq., and the Coastal Zone Management Plan;

(6) A declaration that the Consent Order exceeds the regulatory authority of the South Carolina Department of Health and Environmental Control, is *ultra vires*, is null and void and does not constitute a bar to this action under S.C. Code Section 48-39-160;

(7) An injunction enjoining the Individual Defendants from further alteration of the critical area and requiring the Defendants to either obtain all necessary permits and certifications for their seawall from the South Carolina Department of Health and Environmental Control, including, but not limited to, a Critical Area Permit and Coastal Zone Consistency Certification,

or alternatively, to remove the seawall and restore the beach and surrounding environment to its condition prior to construction of the seawall;

- (8) A requirement that Defendants pay the costs of this action; and
- (9) Any other relief the court deems just and proper.

s/Jessie A. White  
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