IN THE SUPREME COURT OF ALABAMA

CITIZENS FOR THE PRESERVATION OF THE SHELL TOOMER PARKWAY,	)	
Plaintiff,	)	
v.	)	Supreme Court Case No. 1071002
M. BARNETT LAWLEY, COMMISSIONER, ALABAMA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,	)	Montgomery County Case No. CV-07-211
Defendants.	)	

ON APPEAL FROM THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA - CASE No. CV-07-211

REPLY BRIEF OF APPELLANTS

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SUMMARY OF THE ARGUMENT

The essence of Intervenors' argument that Plaintiff lacks standing is that Plaintiff does not have a "legal or economic" interest in the land at issue. Intervenors ignore that other interests, such as recreational and aesthetic, can also give rise to standing to challenge official actions. In this case, the Vest affidavit shows that Plaintiff claims protect able recreational and aesthetic interests, so that Plaintiff has standing. The one case cited by Intervenors, *Broadwater*, in fact supports Plaintiff's position because that case acknowledged not that only economic interests give standing, but that other interests might as well.

Intervenors' claims of laches and unclean hands are also misplaced because there is no evidence that the Plaintiff, as opposed, perhaps, to some of its members, slept on its rights to the Intervenors' detriment. Rather, the evidence is that the Plaintiff, an organization composed of many members most of whom do not have property abutting the Shell Toomer Parkway, filed suit within 2 months of the easement challenged in this case, so that laches does not apply. Moreover, as to the unclean hands argument, the Intervenors similarly attempt to prove unclean hands by alleged inequitable conduct of some

of the members of the CPSTP who have themselves obtained driveway easements on the Parkway. However, their situations, which were not contested, are different, as they were landlocked whereas the Intervenors are not landlocked. Therefore, unclean hands does not bar Plaintiff's (the group's) claims.

As to the argument that Defendant had the lawful authority to grant a driveway easement, the Appellees' arguments are simply wrong. As proper application of the rules of statutory construction demonstrate, the specific statute, § 9-14-1(3) stating that abutting landowners shall have no right of access to a state parkway, controls over the general statutes giving the Commissioner of the DCNR the right to sell, lease, exchange lands in the park system. Plaintiff's argument gives meaning and effect to all the laws cited by the parties, whereas the Appellees' argument would , unnecessarily, require this Court to chose to give effect to one statute to the exclusion of the other, more specific statute. Hence, Appellees' claims are wrong.

Finally, Appellees claim the AAPA does not apply because the granting driveway easements are not "policies" of the DCNR with statewide applicability. They are wrong. Three simple

"memos" by bureaucrats in the DCNR have effectively determined that anyone who applies for an easement on a state Parkway can get it by paying the requisite price per foot-however that price was derived. That these memos are policies is not realistically in dispute. As the AAPA requires all agencies to with statutory rulemaking authority to use the AAPA rulemaking process to develop policies, and the DCNR has rulemaking authority, it must use the AAPA procedures. It did not, so the "memos" are ineffectual and the Defendant violated the AAPA by granting the driveway easement to the Intervenors.

ARGUMENT

Defendant and Intervenors (Appellees) present the issues in the reverse order that Plaintiff presented them. To reply, Plaintiff will answer these arguments in the order presented by the Appellees.

I. THE INTERVENORS ARGUEMENT THAT CPSTP HAS NO STANDING.

The essence of Intervenors argument is that Plaintiff lacks standing because the Plaintiffs do not have a "legal or economic interest in the property at issue sufficient to establish standing to challenge the action of DCNR at issue." (Intervenors' Brief at Page 8). Intervenors would like this

court to believe that only a "legal or economic" interest can give rise to standing.

Intervenors are simply wrong. In support of their argument, Intervenors only cite one case, *Broadwater v. Blue and Gray Patio Club,* 403 So.2d 209 (Ala.1981). They do not even address the cases cited by the Plaintiff, including *Black Warrior River Keeper, Inc. v. East Walker County Sewer Authority and ADEM,* 979 So.2d 69 (Ala.Civ.App. 2007) or the cited federal cases on standing, including *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000).

The cases referenced by Plaintiff make clear that interests other than "legal and economic" interests can give standing to a party to challenge actions of governmental authorities. Specifically, those cases make clear that where governmental actions are shown to affect the organization's members' "recreational, aesthetic, and economic interests", a citizen group can have standing to sue. *E.g., Friends of the Earth,* 120 S.Ct. at 705 (*citing and relying upon Sierra Club v. Morton*, 405 U.S. 727, 735, 92 S. Ct. 1361, 31 L.Ed.2d 636 (1972)).

The one case cited by Intervenors, *Broadwater v. Blue and Gray Patio Club,* 403 So.2d 209 (Ala.1981), simply does not support their position. In *Broadwater*, the Alabama Supreme Court reiterated that a "[c]ontroversy touching the legality of acts of public officials or public agencies challenged by parties whose interest is adversely affected is ***one*** of the favored fields for declaratory judgments." *Broadwater*, 403 So.2d at 212 (emphasis added). The Court further stated

> "the mere fact that pecuniary interests were involved does not deprive the declaratory judgment act of a field of operation. In most litigation involving the legal rights of the parties, some underlying economic advantage or loss will result from the determination of those legal rights. Here, there was a real and justiciable controversy because the private club licensee contended that the ABC Board's interpretation of the statute impinged upon its economic interest and that interest was not de minimis."

In other words, the *Broadwater* case does not at all support the proposition for which Intervenors claim. Rather, *Broadwater* supports the Plaintiff's case by showing that there is indeed standing where an interest, not necessarily economic, is at stake. The Vest Affidavit made clear that the Plaintiff's aesthetic and recreational interests are at stake. Ms. Vest stated, for example at C-231 to C-234, that the Intervenors' actions "will turn the parkway from a pretty two-lane country road with a few gravel turnouts and a few paved

streets turning out, into a widened area that will definitely change the look of the parkway. In fact, the place they intend to tear up and pave over will destroy wild flowers planted on the parkway." She and other members of the CPSTP are concerned that the development "will destroy the nature and character of this state parkway", unnecessarily. These are exactly the types of recreational and aesthetic interests that are and should be allowed to be litigated under the Declaratory Judgment Act, as recognized by the authorities previously cited. Intervenors' principal argument is therefore without merit.

Intervenors also apparently try to tie Plaintiff's standing to the substantive issues of whether the DCNR and Defendant Lawley are bound by the AAPA and/or whether he has the substantive legal right and power to grant easements when the statute says he cannot. Frankly, Plaintiff does not understand the arguments. Whether Defendant has the power to grant the easement is unrelated to whether Plaintiff has standing. Plaintiff has standing under the cases cited, so this issue must be resolved in favor of the Plaintiff.

II. INTERVENORS' CLAIM THAT LACHES BARS PLAINTIFF'S CASE.

The Intervenors also argue that laches bars Plaintiff's complaint. Laches is, as the cases cited by Intervenors show, an equitable doctrine based on the theory that a person who sleeps on his rights to the detriment of others, loses those rights to the extent others are harmed by sleeping.

In this case, it is difficult to follow Intervenors' argument on laches. Intervenors apparently believe that because utilities easements have been granted for decades, "laches" bars the CPSTP's complaint.[1] They seem also to argue that because some of the members of the CPSTP have themselves benefitted by the receipt of illegal or potentially illegal driveway easements[2] on the parkway, the group CPSTP is barred

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[1] This argument, to the extent it is relevant, is misplaced because utilities easements are not easements "to which the owners or lessees of abutting property shall have no right of direct access". Ala. Code § 9-14-1(3). That is, a utility is not an abutting landowner. Thus, section 9-14-1 is not relevant and does not bar utilities easements.

[2] We say "illegal or potentially illegal" because these driveway easements obtained by the CPSTP members may very well not have been illegal. This is because many or all of those members were landlocked, and an issue in their situation is whether they were entitled to the easements by virtue of other laws on rights of access to public roads. That issue is not relevant in this case because the Intervenors unquestionably have complete and unfettered alternate access from Mill Creek Road to their huge development.

by laches. The problem for the Intervenors is that the CPSTP is an organization made up of many members, most of whom do not have access easements on the Shell Toomer Parkway. The true character of the Plaintiff in this case is that of an organization made up of many concerned citizens who intend to preserve the scenic beauty and aesthetic and recreational character of the Shell Toomer Parkway. Intervenors cannot seem to understand this distinction between the actual Plaintiff, the CPSTP, and its members, who are not plaintiffs. Even if some of the individual members slept on their rights, there is no authority for the proposition that the entire group is thus barred by laches due to the errors of a portion of its membership. Intervenors' laches argument is thus fundamentally flawed.

Finally, to the extent that there is an argument about the facts, then that argument would of course bar summary judgment in favor of the Intervenors on this affirmative defense, the burden of proof of which lies on the Intervenors. Plaintiff contends there really is no argument of fact - the facts as evidenced by the Vest Affidavit and the other exhibits in the record, all show that the CPTSP has not slept on its rights and has in fact attempted at every turn to contest the

Intervenors' actions in obtaining the driveway easement. For example, the driveway easement was given to Intervenors on December 5, 2006, C-208 to C-216, and this suit was filed two months later on February 2, 2007. C-10.

III. INTERVENORS' CLAIM THAT UNCLEAN HANDS BARS PLAINTIFF'S COMPLAINT.

To the extent that the Intervenors argue unclean hands, they are simply mistaken. Their statements of law regarding the principles of unclean hands are certainly proper. A party can be barred from receiving equitable relief if it has committed the same inequitable actions it seeks to prevent. This, though, is not the case. The Plaintiff is the CPSTP, not those few members who obtained driveway easements from the DCNR in the past.[3] Unclean hands simply does not apply to the CPSTP.

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[3] As to the members having driveway easements, as mentioned earlier, there is a distinguishing feature to their claims as opposed to the claims of the Intervenors - those members were landlocked and had to have access to the parkway. Intervenors are not landlocked and do not have to have access to the parkway. Therefore, there is no proof by undisputed fact that the members' easements were improperly obtained. The question is whether the Intervenors' easement was improperly obtained, not whether those members' easements were improperly obtained.

IV. DEFENDANT'S AND INTERVENORS' CLAIMS THAT DEFENDANT LAWLEY'S GRANTING OF A DRIVEWAY EASEMENT WAS PROPER.

The Defendant and the Intervenors each claim that Defendant Lawley has the legal right under the law to grant driveway easements on the Shell Toomer Parkway. Their principal reliance for this argument is on various provisions of the Alabama Code that generally grant the Commissioner of the DCNR the authority to sell and exchange or lease lands, make rules and regulations, etc. What the Intervenors and the Defendant ignore is that there is a statute that specifically prohibits granting a driveway easement to an abutting landowner, Alabama Code § 9-14-1(3) which specifically defines a parkway as:

> "Any elongated strip of land suitable for recreation and a pleasure vehicle road **to which the owners or lessees of abutting property shall have no right of direct access.**"

(Bold added). The legislature could hardly be more clear than in this statement, which is simple and to the point. While the Commissioner of the Department of Conservation and Natural Resources clearly has the right, generally, to sell, exchange, rent, or lease lands, he does not have the authority to grant driveway easements to abutting landowners.

In this regard, several principles of statutory construction are relevant and must be considered when evaluating Appellees' claims. These principles of statutory construction are well stated in two of this Court's opinions quoted at length below:

Pittsburgh & Midway Coal Min. Co. v. Tuscaloosa County, __ So. 2d __, 2008 WL 2068083 (Ala. 2008), at 12:

> "'There is no rule which prohibits the repeal by implication of a special or specific act by a general or broad one. The question is always one of legislative intention, and the special or specific act must yield to the later general or broad act, where there is a manifest legislative intent that the general act shall be of universal application notwithstanding the prior special or specific act. It is, however, equally true that the policy against implied repeals has peculiar and special force when the conflicting provisions, which are thought to work a repeal, are contained in a special or specific act and a later general or broad act. In such case, there is a presumption that the general or broad law was not designed to repeal the special or specific act, but that the special or specific act was intended to remain in force as an exception to the general or broad act, and there is a tendency to hold that where there are two acts, one special or specific act which certainly includes the matter in question, and the other a general act which standing alone would include the same matter so that the provisions of the two conflict, the special or specific act must be given the effect of establishing an exception to the general or broad act. Hence, it is a canon of statutory construction that a later statute general in its terms and not expressly repealing a prior special or specific statute, will be considered as not intended to affect the special or specific provisions of the earlier statute, *unless the*

intention to effect the repeal is clearly manifested or unavoidably implied by the irreconcilability of the continued operation of both, or unless there is something in the general law or in the course of legislation upon its subject matter that makes it manifest that the legislature contemplated and intended a repeal. Unless there is a plain indication of an intent that the general act shall repeal the special act, the special act will continue to have effect, and the general words with which it conflicts will be restrained and modified accordingly, so that the two are to be deemed to stand together, one as the general law of the land, and the other as the law of the particular case.' Day v. Morgan County Comm'n, 487 So.2d 856, 858-59 (Ala.1986) (emphasis added)."

And *Ex Parte Jones Mfg. Co.* 589 So.2d 208, 211 (Ala. 1991):

"The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the statute. Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect. *Tuscaloosa County Comm'n v. Deputy Sheriffs' Ass'n of Tuscaloosa County*, 589 So.2d 687 (Ala.1991)."

"*IMED Corp. v. Systems Eng'g Assocs. Corp.*, 602 So.2d 344, 346 (Ala.1992). Courts will attempt to give meaning to a legislative enactment and it is presumed that the Legislature did not do a vain and useless thing." *Alidor v. Mobile County Comm'n*, 291 Ala. 552, 558, 284 So.2d 257, 261 (1973). Sections of the Code dealing *385 with the same subject matter are in pari materia. As a general rule, such statutes should be construed together to ascertain the meaning and intent of each. *Locke v. Wheat*, 350 So.2d 451, 453 (Ala.1977) (citations omitted).

> In the event of a conflict between two statutes, a specific statute relating to a specific subject is regarded as an exception to, and will prevail over, a general statute relating to a broad subject. *Murphy v. City of Mobile*, 504 So.2d 243 (Ala.1987); *Bouldin v. City of Homewood*, 277 Ala. 665, 174 So.2d 306 (1965)."

These are long-standing principles of statutory construction that the Defendant and Intervenors are simply ignoring. Applying these principles to our facts, we see that there is a comprehensive set of statutes that grant the DCNR the right to sell, lease, exchange, etc., lands under its control. Yet, there is also a specific statute that limits that right in one defined instance: the Commissioner cannot grant easements to abutting landowners on state parkways. The statutes can easily be read *in pari materia* and without conflict under Plaintiff's claims, whereas, if the Court adopts the Appellees' arguments, the Court must chose one statute to the exclusion of the other, and must, in effect, ignore the specific prohibition of section 9-14-1(3). There is no reason to do that, and the Court should adopt Plaintiff's reasoning.

V. DEFENDANT'S AND INTERVENORS' CLAIMS THAT THE ADMINISTRATIVE PROCEDURES ACT DOES NOT APPLY IN THIS CASE.

The final argument advanced by the Defendant and Intervenors is that the Alabama Administrative Procedures Act

(AAPA) does not apply to this situation. The AAPA cannot be more clear that agencies must adopt formal rules and regulations pursuant to the AAPA rather than use informal procedures not adopted by the rulemaking process. That the driveway easement procedures utilized by Defendant Lawley in this case, and apparently by other commissioners as well, are informal (a series of memos by staff members) could not be more clear. These memos are in the record at C-217 to C-222. In fact, Defendant granted a driveway easement based on some formula that some official in the DCNR came up with for valuing land. The DCNR simply charges a set price based on some number that some bureaucrat came up with, for a driveway easement. There is no evaluation of the circumstances, there is no right of the public to become involved in the process of determining when state lands will be forever destroyed, and there is no basis whatsoever for arguing that this is other than an informal policy sent out by memos among bureaucrats in the DCNR. These memos certainly create a "policy" for the DCNR that cannot under any set of circumstances be considered to be in conformity with the AAPA.

The AAPA is a clear statement of the legislative intention and requirement of law: agencies to which the AAPA applies

must use the rule making process and cannot simply adopt informal policies for the administration of state properties: *see* Ala. Code § 41-22-2(a) (statement of legislative intent to provide a minimum procedural code for the operation of agencies affecting the rights and duties of the public); § 41-21-1(d) ("Every state agency having express statutory authority to promulgate rules and regulations shall be governed by the provisions of this chapter."); § 9-2-3 (clearly stating that the DCNR has the "authority to make such rules and regulations for the management, administration, occupancy and use of said state parks **and parkways**"); and § 41-22-4(a)(2) (expressly stating that all departments, such as DCNR, must formally adopt rules and regulations: "Each agency shall: ... (2) adopt rules of practice setting forth the nature and requirement of all formal **and informal** procedures available,").

As argued in Plaintiff's Initial Brief on Appeal, state agencies simply have to use the rule making authority in the manner set forth by the legislature rather than by, willy nilly, coming up with "memos" that directly affect the substantive rights of the people of the state of Alabama. To think differently and to quote little pieces of cases that are

not directly on point is disingenuous, as the legislature's clearly spoken edict is that this Commissioner must adopt rules and regulations under the AAPA before he can simply grant rights to state parkways to whomever he so desires.[4]

CONCLUSION

For the reasons stated, the CPSTP, respectfully requests this Honorable Court to (1) declare that the "driveway easement" purportedly granted to the Intervenors is null and void; (2) declare that the Intervenors have no right to use the "driveway easement" or any other easement obtained from the Alabama Department of Conservation and Natural Resources in order to obtain access to the Shell Toomer Parkway; (3) enter an order requiring the Circuit Court to enjoin the Defendant and the Intervenors from using the proposed access to the Shell Toomer Parkway and from altering, in any manner,

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[4] An interesting and quite timely reason for why rules and regulations need formally to be adopted is evidenced by the very facts of this case. On the one hand, the Commissioner of the DCNR, Defendant Lawley, granted a driveway easement to the Cleveland Brothers on one side of the Shell Toomer Parkway, and turned around and denied a requested easement on the other side of the Shell Toomer Parkway to another developer. That other developer has filed suit against the DCNR, such litigation now pending in the Circuit Court of Montgomery County, West Pace LLC vs. Barnett, Montgomery County Circuit Court Case No. CV-2008-572.

the Shell Toomer Parkway; (4) if and only if the Court determines that the ADCNR may validly grant "driveway easements" of this character, then to hold, declare, and enjoin the Defendant and the Intervenors from obtaining any such driveway easement until and unless the proper procedures are taken pursuant to the Alabama Administrative Procedures Act; and (5) grant the CPSTP any other and further relief to which it is entitled, including attorney's fees and costs pursuant to the public trust doctrine.

Respectfully submitted this the 25th day of July, 2008.

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CERTIFICATE OF SERVICE

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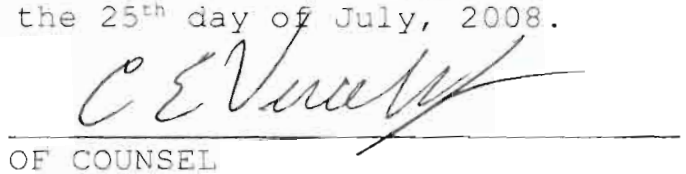

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