

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

APPEAL FROM THE ADMINISTRATIVE LAW COURT  
John D. McLeod, Administrative Law Judge

---

Case No. 08-ALC-07-0221-CC

---

Deerfield Plantation Phase IIB Property Owners Association . . . . . Appellant,

vs.

South Carolina Department of Health and Environmental Control,  
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC . . . . . Respondents.

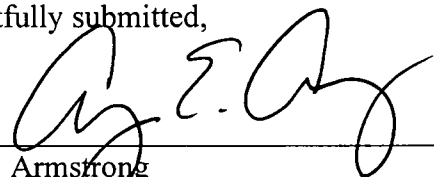
---

**PETITION FOR REHEARING**

---

The Appellant Deerfield Plantation Phase IIB respectfully requests that this Court reconsider its Order dated May 17, 2013, dismissing this appeal as moot, pursuant to SCACR Rule 221(a) and Rule 240. A memorandum in support of this petition is attached hereto. A Record on Appeal has not been filed in this case.

Respectfully submitted,



---

Amy E. Armstrong  
SOUTH CAROLINA ENVIRONMENTAL LAW  
PROJECT

Mailing address: Post Office Box 1380  
Pawleys Island, SC 29585

Office address: 430 Highmarket Street  
Georgetown, SC 29440

Telephone (843) 527-0078

FAX (843) 527-0540

Attorney for the Appellant, Deerfield Plantation  
Phase IIB Property Owners Association

Georgetown, South Carolina

May 30, 2013

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

APPEAL FROM THE ADMINISTRATIVE LAW COURT  
John D. McLeod, Administrative Law Judge  
Case No. 08-ALC-07-0221-CC

---

Deerfield Plantation Phase IIB Property Owners Association . . . . . Appellant,

vs.

South Carolina Department of Health and Environmental Control,  
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC . . . . . Respondents.

---

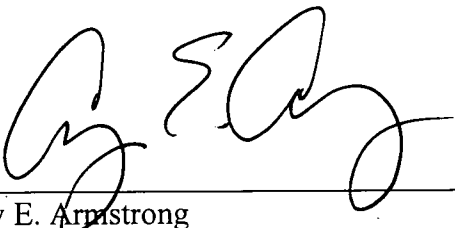
**CERTIFICATE OF SERVICE**

---

I hereby certify that on this date I served the foregoing Petition for Rehearing upon counsel for the Respondents, by placing copies of same in the United State Mail, addressed to:

Nathan Haber, Esquire  
SC DHEC/OCRM  
1362 McMillan Avenue, Suite 400  
Charleston, SC 29405

Mary D. Shahid, Esquire  
Nexsen Pruet  
P. O. Box 486  
Charleston, SC 29402

  
\_\_\_\_\_  
Amy E. Armstrong

Georgetown, South Carolina

May 30, 2013

**RECEIVED**  
MAY 31 2013

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

APPEAL FROM THE ADMINISTRATIVE LAW COURT  
John D. McLeod, Administrative Law Judge

---

Case No. 08-ALC-07-0221-CC

---

Deerfield Plantation Phase IIB Property Owners Association . . . . . Appellant,

vs.

South Carolina Department of Health and Environmental Control,  
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC . . . . . Respondents.

---

**MEMORADUM IN SUPPORT OF  
PETITION FOR REHEARING**

---

**RECEIVED**  
MAY 31 2013

**SC Court of Appeals**

The Appellant Deerfield Plantation Phase IIB respectfully requests that this Court reconsider its Order dated May 17, 2013, dismissing this appeal as moot. The Court of Appeals misapprehended the effect of its Order, the nature of this appeal, the actions taken by the parties and the posture of the parties in dismissing this case. As a result the Court has eliminated Appellant's rights to judicial review. The Court dismissed this appeal for failure to proceed expeditiously on remand. Appellant is the one party who has no control over the proceeding on remand, but it Appellant that is bearing the extreme consequences.

On January 12, 2012, this Court granted Appellant's motion to remand th case back to Respondent S.C. Department of Health and Environmental Control ("DHEC"). The purpose of the remand was to allow DHEC to consider new and additional evidence, and to complete all

required permitting and certification processes warranted as a result of a new “jurisdictional determination” made by the U.S. Army Corps of Engineers.<sup>1</sup> A new DHEC review was necessary to determine compliance with S.C. Code Regs. § R.61-101, S.C. Code Regs. § 61-9.122 and the Coastal Management Program new factual findings in light of the new federal jurisdictional determination.<sup>2</sup>

After the remand, on May 18, 2012, DHEC asked the Respondent Deertrack Golf for additional information necessary to complete the actions required by this Court’s Order. DHEC had not received that information as of March 5, 2013, almost ten (10) months after its request for information necessary to take administrative action. DHEC was on the verge of revoking the permit decision pending on remand. *See* Exhibit A. It was only at that point that Respondent Deertrack Golf, Inc., finally began to submit information to DHEC. Again, Appellant, the party

---

<sup>1</sup>The Corps new “jurisdictional determination,” and conclusion that there were “waters of the United States” on the subject property was a direct result of a Clean Water Act Complaint filed by the Appellants in district court.

<sup>2</sup>In the case pending before this Court, because the Corps had originally concluded, erroneously, that there were no “waters of the United States” on the property, no federal 404 Clean Water Act permit had been required. Consequently, Deertrack Golf, Inc., did not submit an application, there was no public notice and DHEC did not conduct a 401 water quality certification review, did not prepare a written staff assessment and did not issue a certification that the proposed project was consistent with the 401 water quality regulations, as required by S.C. Code Regs. § R.61-101. In turn, the Administrative Law Judge did not rule on the applicability of, or compliance with, S.C. Code Regs. § R.61-101.

Because of the erroneous Corps determination that there were no “waters of the United States” on the property, DHEC accepted the representation of the permit applicant that there were also no “waters of the State” or “wetlands” on the property. Accordingly, DHEC did not consider or apply the rules of the South Carolina Coastal Management Program pertaining to coastal waters and wetlands in issuing a coastal zone consistency certification for the development plan. Section 48-39-80 of the South Carolina Coastal Zone Management Act requires a coastal zone consistency certification which takes into account “all lands and waters in the coastal zone.” *See Spectre, LLC v. DHEC*, 386 S.C. 357, 688 S.E.2d 844 (2010); *South Carolina Wildlife Federation v. South Carolina Coastal Council*, 296 S.C. 187, 371 S.E.2d 521 (1988).

whose appeal was dismissed, had no control over this delay.

Respondent Deertrack Golf, Inc., wrote to this Court on March 7, 2013, indicating its position that, despite this Court remanding the permit decision to DHEC, Deertrack Golf “does not have a permit action pending before DHEC.” *See* Exhibit B. If Deertrack Golf’s position is that it does not have a permit pending before DHEC, and that the permit is pending in the Court of Appeals, it is clear that the Respondent Deertrack Golf, along with Appellant, believes that this appeal is Appellant’s only opportunity to seek review of its permit.

Indeed, in the letter dated March 7, 2013, Deertrack Golf renewed its “request that this appeal be reinstated so the Court can hear the underlying challenge and real issues.” *See* Exhibit B. **The Respondent Deertrack Golf goes even further to recognize that it “wouldn’t be fair to Appellants” to dismiss this appeal “since the matter was remanded for the identification of any necessary administrative action.”** *See* Exhibit B, p. 2. Despite Deertrack Golf’s agreement that this case should not be dismissed at this point, the Court of Appeals chose to do so without any motion or opportunity for arguments.

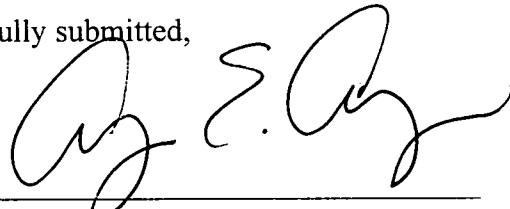
The implication of this Court’s Order of Dismissal, as evidenced in the Respondent Deertrack Golf’s letter, is that the Appellant could lose its rights to challenge the only DHEC permitting decision that has been made thus far. The Appellant has tried repeatedly to determine whether DHEC intended to issue a new or revised permit decision on remand – an action that would allow Appellant an opportunity for administrative review – but has had no luck getting an answer from DHEC. *See* Exhibit C. DHEC’s attorney has indicated that “there are many factors that are uncertain,” including whether DHEC will issue any new decision that will rise to the level of a contested case hearing.

If Deertrack Golf elects to utilize its existing authorization, and there is no subsequent DHEC permit, the Appellant may very well be precluded from administrative or judicial review because the ALC's Final Order and Decision is currently the law of the case, which could be binding upon the Appellant depending on how the Respondent/Applicant intends to proceed.

Again, it should be noted that the Appellant is the only party who has no ability to address the issues identified on remand. The remand was for Respondent Deertrack Golf to provide the necessary information to DHEC and for DHEC to process and review that information. Despite the Appellant's lack of control over how expeditiously the Respondents proceed, the Court's Order, in effect, punishes the Appellant for the failure of the Respondents to "proceed expeditiously."

WHEREFORE, the Appellant, Deerfield Plantation Phase II-B Property Owners Association respectfully requests that the Court of Appeals issue an Order reinstating this appeal.

Respectfully submitted,



---

Amy E. Armstrong  
SOUTH CAROLINA ENVIRONMENTAL LAW  
PROJECT

Mailing address: Post Office Box 1380  
Pawleys Island, SC 29585  
Office address: 430 Highmarket Street  
Georgetown, SC 29440  
Telephone (843) 527-0078  
FAX (843) 527-0540

Attorney for the Appellant, Deerfield Plantation  
Phase IIB Property Owners Association

Georgetown, South Carolina

May 30, 2013



# Exhibit A

Catherine B. Templeton, Director

*Promoting and protecting the health of the public and the environment*

March 5, 2013

**VIA E-MAIL AND U.S. CERTIFIED MAIL #91 7199 9991 7030 0134 2598**

Mary D. Shahid, Esq.

Member

Nexsen Pruet, LLC

205 King Street, Suite 400

Charleston, SC 29401

Re: Deerfield Plantation Phase IIB Property Owners Association v.  
SCDHEC, Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach,  
Case Tracking No.: 2009135686

Dear Mary:

As you are aware, the above referenced matter was remanded by the Administrative Law Court on February 21, 2012 from an Order of the South Carolina Court of Appeals providing that "this case is remanded to the ALC to further remand the matter to DHEC for additional administrative action." After our meeting on March 12, 2012 and discussion with legal counsel, DHEC staff sent you a letter requesting additional information necessary to conduct administrative action on May 18, 2012. The majority of the additional information requested by staff was based upon new information related to this application that surfaced after the time of permit issuance on February 29, 2008.

As indicated in the letter dated May 18, 2012, DHEC staff is in need of the major stormwater plan revisions that occurred to the site design after permit coverage issuance for review to ensure finality of the site design for this project. As you are aware, the Army Corps of Engineers issued a modified jurisdictional determination that resulted in waters of the United States being located within the proposed stormwater management system. A plan modification involving either (1) the elimination of the impacts or (2) authorization of the impacts from the Corps of Engineers and DHEC is necessary for finality. The Notice of Intent application (NOI) is in need of being updated to reflect the Corps finding waters of the United States on the site. The NOI is also in need of being updated to reflect Judge McLeod's Order regarding the presence of waters of the State on the site. Lastly, clarification on the project owner/operator listed on the NOI is necessary for closure of this administrative action.

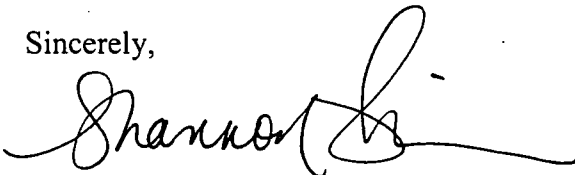
According to S.C. Code Regs. Ann. 61-9.122.62(a), when the Department receives any information, it may determine whether or not one or more of the causes listed in paragraph (d) and (e) of that section for modification or revocation and reissuance or both exist. In this case, Department staff received new information after permit issuance. According to Reg. 61-9.122.62(d)(2), new information that was not available at the time of permit issuance and would have justified the application of different permit conditions at the time of issuance provides cause for modification.

In order to comply with the requirements of the NPDES General Permit for Storm Water Discharges from Construction Activities and R.61-9, these modifications need to be made to the permit coverage before the permitted activity may be conducted. Due to this, it is incumbent upon DHEC staff to

address these matters prior to continuing with legal proceedings. DHEC staff has not received the additional information requested on May 18, 2012. In accordance with R.61-30(H), the application will be considered withdrawn and no longer active if the additional information is not received within 10 calendar days due to lack of response for more than six months. If this information is not submitted as requested in the letter from May 18, 2012 any proposed land disturbance activity at the site location will require a new request for permit coverage and submittal package.

Should you elect to provide the additional information requested above within the time frame provided, the stormwater pollution prevention plan (SWPPP) for this project must be updated in accordance with Section 3.1.1.F of the 2012 NPDES General Permit for Storm Water Discharges from Construction Activities (2012 CGP), which became effective on January 1, 2013 to maintain compliance. Please visit the DHEC website for information about the implementation of the new CGP: <http://www.scdhec.gov/stormwater>. The new application form is posted on the DHEC website at <http://www.scdhec.gov/environment/water/swater/news.htm#top>. Additional review fees are not required by the Department for your project.

Sincerely,



Shannon Hicks, P.E., Manager  
Coastal Stormwater Permitting Section

cc: Amy E. Armstrong, Esq.  
Richard M. Smith, Esq.

ec: Nathan Haber – DHEC  
Ann Clark – DHEC  
Rheta Geddings DiNovo – DHEC  
Bradley D. Churdar, Esq. – DHEC  
Blair Williams – DHEC

Mary D. Shahid  
Member  
Admitted in SC

March 7, 2013

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

Re: Deerfield Plantation v. SCDHEC  
Appellate Case No. 2009-135686

Dear Madam Clerk:

I am in receipt of a copy of your letter dated February 26, 2013, a copy of which is attached for your convenience, asking Appellant's counsel, Amy Armstrong, to provide the Court with information as to whether her client's appeal of the Final Order and Decision of the S. C. Administrative Law Court should be dismissed. While the Court did not ask for a response from me, on behalf of Respondent Deertrack Golf, Inc., I would like for the Court to have the following information.

The Court of Appeals, over Respondent Deertrack Golf, Inc.'s objection, remanded this matter back to Respondent SCDHEC for a determination of what additional administrative actions are needed. On May 18, 2012, SCDHEC sent a letter to me identifying "further administrative actions." A copy of SCDHEC's letter is attached as Exhibit A to this letter. Note that DHEC states in the final paragraph of the letter that the matters identified need to be addressed "before the permitted activity may be conducted." (The permitted activity – redevelopment of a golf course into a residential subdivision – will not take place until this appeal is resolved.) SCDHEC has sent a follow-up letter of March 5, 2013, attached hereto as Exhibit B, reiterating its requests for information and more importantly, threatening to cancel my client's permit application. Please note that my client does not have a permit action pending before SCDHEC. My client has a permit authorizing land disturbing activities that was affirmed in its entirety by the S. C. Administrative Law Court and is the subject of the pending appeal with this Court.

SCDHEC has caused extensive delay over matters such as "clarification of the project owner/operator" and a change in the classification of .37 acres (37/100ths acres) out

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

205 King Street  
Suite 400 (29401)  
PO Box 486  
Charleston, SC 29402  
www.nexsenpruet.com

T 843.720.1788  
F 843.414.8242  
E MShahid@nexsenpruet.com  
Nexsen Pruet, LLC  
Attorneys and Counselors at Law

# Exhibit B

Jenny Abbott Kitchings, Clerk  
March 7, 2013  
Page 2

of approximately 80 acres of land. While I agree that these matters can be addressed by amending the application form that was initially filled-out six years ago by my client Respondent Deertrack Golf Inc., I do not agree that these matters need to be addressed now. The matters that need to be addressed now are the issues raised in the underlying Order of the lower court, the ALC, challenged by the Appellant. Those issues do not relate to the identification of the responsible parties on the six year old permit application form or whether a change in the classification of .37 acres of a drainage ditch is material, but relate to Respondent's fundamental right as land owner to proceed with redevelopment of this closed golf course site. It is unfair and unnecessary to cause further delay in this appeal by requiring Respondent to make certain corrections to an application form, that SCDHEC acknowledged in its May 18<sup>th</sup>, 2012 letter can be made before the "permitted activity is conducted."

I renew my request that this appeal be reinstated so the Court can hear the underlying challenge and real issues dictating redevelopment, which were favorably resolved by the ALC, including whether the proposal to redevelop the site satisfies the applicable rules and regulations, has negative impacts on downstream properties (Appellant's property owners), and whether the ALC provided a correct interpretation to the specific regulations governing stormwater ponds rather than adhering to a general regulation governing waters of the State. These fundamental legal and factual issues need to be heard and resolved by the Court of Appeals as these issues control whether or not Appellant can develop this property.

I have not intentionally "drug my feet" during this remand. This appeal is one of four legal challenges, filed here, filed in Federal District Court (and later the Fourth Circuit Court of Appeals), and in the Court of Common Pleas for Horry County, in Appellant's attempt to block redevelopment of the closed golf course. This past year has been spent obtaining an affirmance of the District Court's favorable decision which was appealed by Appellant to the Fourth Circuit (See Deerfield Plantation Phase II B POA v. the United States Army Corp of Engineers and Deertrack Golf, Inc., et al., 801 F. Supp 2d. 446 (2011), affirmed by the Fourth Circuit Court of Appeals on 12/26/12, Op. No.: 11-1871) and, more recently, getting ready for trial in state court in Horry County in a civil action filed by Appellant challenging redevelopment of the golf course. The matters identified by DHEC on remand require an expenditure of funds on technical professionals and require certainty in the selection of a project engineer all of which is premature, since the larger issues raised by the ALC's Order and on appeal to the Court of Appeals are not mooted or even impacted by any of the alleged "deficiencies" identified by DHEC staff.

I would be delighted if the Court dismissed this appeal, but that wouldn't be fair to Appellants since the matter was remanded for the identification of any necessary administrative action. But I think the attached letters demonstrate that the administrative action goes well beyond simply correcting an application form and I

Jenny Abbott Kitchings, Clerk  
March 7, 2013  
Page 3

think Respondent's threat to "cancel" an application – when in fact my client has a valid permit affirmed by the ALC – is punitive and would indicate that the remand may not be necessary or appropriate at this time. I would simply ask that at this juncture the Court allow the appeal to proceed so that the threshold question of whether redevelopment of the property at issue is resolved. Once that question is resolved, and if resolved favorably for my client, we will take all necessary steps to address identified deficiencies including submitting an amended permit application and starting the permitting process anew if necessary. At least if new or additional review is needed by DHEC, Respondent Deertrack Golf, Inc. would have the benefit of res judicata and judicial finality on certain threshold issues which are raised in the pending appeal.

Very truly yours,



Mary D. Shahid

MS/mds

cc: Deertrack Golf, Inc.  
Richard M. Smith, Esq.  
Bradley Churdar, Esq.  
Amy Armstrong, Esq.

## Re: Deertrack Golf, Inc.

**From:** nathan.haber <haberm@dhec.sc.gov>  
**To:** Amy Armstrong <amy@scelp.org>  
**Cc:** Shannon Hicks <hickss@dhec.sc.gov>, Bradley Churdar <CHURDABD@dhec.sc.gov>, Michael Corley <michael@scelp.org>  
**Subject:** Re: Deertrack Golf, Inc.  
**Date:** Thursday, May 30, 2013 12:15 PM  
**Size:** 10 KB

---

Amy,

Your assessment of our conversation is somewhat correct. As stated in our conversation, there are many factors that are uncertain. As we discussed, there is a possibility of modifications to the stormwater management system based on Horry County's requirements, after the initial permit coverage was issued. These revisions were withdrawn during the pendency of the Appeal. However, if such plan revisions are resubmitted it will be considered a major modification from a stormwater stand point. As I explained in our conversation, the Department is uncertain as to exactly how Deertrack Golf intends to proceed. If plan revisions occur to avoid RPW impacts and those involve changes to the stormwater management system that could likely trigger a major modification.

I can address this from an OCRM standpoint as well, but would like to discuss it further with my client.

Of course, based on your request, the Department will provide you with future decisions made relating to this project.

On Wed, May 29, 2013 at 5:52 PM, Amy Armstrong <amy@scelp.org> wrote:

Shannon, Brad and Nate:

I am writing to confirm our discussion of last week that the Department's position is that Deertrack Golf's stormwater permit will require a "major modification" in order to comply with regulatory permitting requirements, and that the Department intends to issue a decision document reflecting the major modification to the existing permit. Can you please confirm that I am accurately reflecting our discussion?

Also, will you please provide me with any decisions that the Department makes related to the Deertrack Golf project?

Thank you,  
Amy

--  
Amy E. Armstrong  
S.C. Environmental Law Project  
P.O. Box 1380  
Pawleys Island, SC 29585  
Phone: (843) 527-0078  
FAX: (843) 527-0540  
[amy@scelp.org](mailto:amy@scelp.org)

# Exhibit C