

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,

v.

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

**RESPONDENT SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL'S
RETURN TO APPELLANT'S PETITION FOR REHEARING**

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SC Court of Appeals

Pursuant to Rule 240(e) of the South Carolina Appellate Court Rules, Respondent South Carolina Department of Health and Environmental Control (“DHEC”) submits this Return in response to Appellant Deerfield Plantation Phase IIB Property Owners Association’s Petition for Rehearing (“Petition”) and respectfully requests this Court to uphold the Order of Dismissal.

This Court endorsed the parties’ Joint Motion to Stay on October 6, 2010. The Order provided “this matter will be held in abeyance pending resolution of the action in the United States District Court.” It further requested “[c]ounsel for the Appellant...to provide status updates as to the progress of this matter.”

On September 8, 2011 this Court issued an Order after being notified by Respondent Deertrack Golf, Inc. (“Deertrack”) that the District Court issued an order in the matter regarding the United States Army Corps of Engineers (“Corps”) jurisdictional determination. Thereafter Deertrack filed a Motion Seeking Establishment of an Appellant Briefing Schedule.

On December 16, 2011 the Department submitted a Return to Respondent’s Motion to Establish Briefing Schedule and to Appellant’s Motion to Remand; DHEC Motion to Remand. On January 12, 2012 this Court denied Deertrack’s motion to establish a briefing schedule and granted Appellant’s motion to remand with instructions to “proceed expeditiously on remand.” The premise of both the Department’s Motion to Remand as well as Appellant’s Motion to Remand was for consideration of the new jurisdictional determination made by the Corps, which was challenged by Appellants in the United States District Court.

Though at the time the Motion for Remand was submitted by the Department a final order was issued by the United States District Court, the Appellants in this matter subsequently challenged the District Court order in the United States Court of Appeals for the Fourth Circuit. Due to Appellant's challenge of the District Court's Order there was no judicial finality in regard to the Corps' jurisdictional determination preventing the Department from reviewing the new information as it pertains to the permit to determine if any action was needed and from taking any action. The Department was not a party to the challenge of the jurisdictional determination and sat in limbo awaiting a ruling. On December 26, 2012 the United States Court of Appeals for the Fourth Circuit issued an unpublished opinion. Appellant's filed a Petition for Rehearing in February of this year and there was no finality of the matter regarding the jurisdictional determination until March of this year.

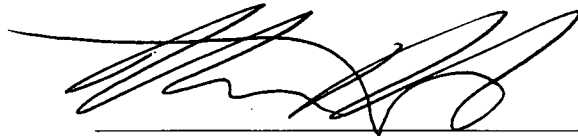
Appellant's Petition provides "[t]he Court dismissed this appeal for failure to proceed expeditiously on remand." Appellant's Petition further asserts, "[t]he purpose of the remand was to allow DHEC to consider new and additional evidence, and to complete all required permitting and certification processes warranted as a result of a new "jurisdictional determination" made by the U.S. Army Corps of Engineers." As the preceding summary supports, the Department has been unable to conduct any substantial review to decide whether agency action will need to be taken based upon Appellant's challenge of the District Court's opinion and the lack of judicial finality in regard to the jurisdictional determination.

The Department requested information from Deertrack in May of 2012 to conduct a review of the permit based on the new information and effectually received no response

until this year, likely after the Fourth Circuit's opinion. The Department's hands were tied by the uncertainty of the outcome of Appellant's action in the Fourth Circuit.

WHEREFORE, the Respondent, Department of Health and Environmental Control respectfully requests this Court to uphold the Order of Dismissal.

Respectfully submitted,



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Environmental Control

June 10, 2013
Charleston, South Carolina

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CERTIFICATE OF SERVICE

I, Nathan Haber, hereby certify that I have on this day, served a copy of *Respondent South Carolina Department of Health and Environmental Control's Return to Appellant's Petition for Rehearing* upon all parties and counsel of record in the above-captioned case, via United States Mail, First Class, postage prepaid, addressed as follows:

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June 10, 2013
Columbia, South Carolina

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