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SC Court of Appeals

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from the Administrative Law Court
Honorable S. Phillip Lenski, Administrative Law Judge
Case No.: 2022-ALJ-07-0008-CC

Appellate Case No.: 2022-001126

Gullah/Geechee Fishing Association, Inc., Appellant,
v.

South Carolina Department of Health and Environmental Control, and
Bay Point Island, LLC, Respondents.

INITIAL JOINT BRIEF OF RESPONDENTS

Sara V. Martinez, Esquire
Christopher P. Whitehead, Esquire
SCDHEC
2600 Bull Street
Columbia, SC 29201
Office: 803.898.0288
Cell: 803.465.2822
Email: martinsv@dhec.sc.gov
whitehcp@dhec.sc.gov

*Attorneys for the Respondent,
SCDHEC*

Mary D. Shahid, Esquire
Angelica M. Colwell, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400
Charleston, SC 29401
Telephone: 843.720.1788
Facsimile: 843.414.8242
Email: mshahid@nexsenpruet.com
acolwell@nexsenpruet.com

*Attorneys for the Respondent,
Bay Point Island, LLC*

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
I. STATEMENT OF THE CASE AND FACTS.....	1
Respondent’s Statement of the Case	1
Respondent’s Statement of the Facts.....	1
II. STANDARD OF REVIEW	4
III. ARGUMENT AND CITATION OF AUTHORITY	4
A. <u>The ALC made no error, and followed valid South Carolina law, in finding that it lacked jurisdiction to hear Appellant’s contested case.</u>	6
B. <u>The ALC made no error, and followed valid South Carolina law, in finding Appellant’s Request for Final Review untimely.</u>	8
C. <u>The ALC made no error, and followed valid South Carolina law, in finding that a Freedom of Information Act does not serve as a substitute for the procedure set forth in S.C. Code §44-1-60 for requesting notification of a permitting action.</u>	9
IV. CONCLUSION.....	11

TABLE OF AUTHORITIES
Case Decisions

Engaging and Guarding Laurens County’s Environment (“EAGLE”) v. SCDHEC,
407 S.C. 334, 755 S.E.2d 444 (2014) 4

Hill v. SCDHEC, 389 S.C. 1, 698 S.E.2d 612 (2010) 4

South Carolina Coastal Conservation League v. SCDHEC,
380 S.C. 349, 669 S.E.2d 899 (2008) 7

South Carolina Coastal Conservation League v. SCDHEC,
390 S.C. 418, 702 S.E.2d 246 (2010) 7

Statutes, Regulations, and Court Rules

S.C. Code Ann. § 1-23-610(B)
(Thomson Reuters West 2014) 4

S.C. Code Ann. § 30-4-10
(Thomson Reuters West 2014) 2

S.C. Code Ann § 30-4-15
(Thomson Reuters West 2014) 10

S.C. Code Ann § 44-1-60
(Thomson Reuters West 2014) 3, 4, 5, 6, 7, 8, 9, 10, 11

Act No. 278 § 1, 2006 S.C. Acts & Joint Resolutions 8

Act No. 387, Section 53, 2006 S.C. Acts & Joint Resolutions 7

Books, Learned Treatises, and Other Authorities

Website for South Carolina Attorney General 10

I. STATEMENT OF THE CASE AND FACTS

This matter is before the Court on appeal by Appellant Gullah/Geechee Fishing Association, Inc. (“GGFA” or “Appellant”) from the Order Granting Bay Point’s Motion to Dismiss issued by the Administrative Law Court (“ALC”) on July 15, 2022.

On August 12, 2022, Appellant filed its Notice of Appeal. Respondents’ Joint Initial Appellate Brief is being timely filed pursuant to an extension ordered by this Court at the request of the undersigned counsel, which was consented to by Appellant.

RESPONDENTS’ STATEMENT OF CASE

Respondents agree with the Statement of the Case recited in the Initial Brief of Appellant, with the clarification that the permit issued by the South Carolina Department of Health and Environmental Control (“SCDHEC” or “the Department”) to Respondent Bay Point Island, LLC (“Bay Point”) authorizes the construction of a single septic tank and drainfield to serve a single, four-bedroom residential dwelling located on a single lot on Bay Point Island (“the Septic Permit”) located at 98 Bay Point Island Drive (a/k/a Lot 13, Bay Point Island Drive, St. Helena, S.C.).

RESPONDENTS’ STATEMENT OF FACTS

Bay Point Island is a 493-acre island located in Beaufort County, South Carolina. The island is currently entitled by a subdivision plat prepared over 20 years ago and approved by Beaufort County. In the past, Bay Point proposed development of the island to support an environmentally sensitive resort and residential subdivision. That proposal, which met significant resistance and is no longer under review by SCDHEC at this time, is unrelated to the Septic Permit at issue in this case. As previously stated, the subject

Septic Permit is for the construction of a septic tank and drainfield to serve a single residence.

Bay Point submitted its application for the Septic Permit to the Department's Bureau of Environmental Health Services ("BEHS") on August 31, 2021. Ex. 1 to SCDHEC's Notice of Motion and Motion for Summary Judgment. Prior to the date Bay Point submitted its application, on July 19, 2021, Appellant filed a request under the South Carolina Freedom of Information Act ("FOIA")¹ with the "Bureau of Water, OCRM" listed as the file custodian within SCDHEC. This FOIA requested "[a]ny and all applications and file documents for NPDES or land disturbance permits for Bay Point Island, likely submitted by Bay Point Island, LLC, or for any requests or file documents relating to a Coastal Zone Consistency Certification for Bay Point Island, LLC." Ex. 2 to Petitioner's Request for Contested Case.

All FOIA requests submitted to SCDHEC are processed by the Department's Freedom of Information Office, which subsequently did forward documents responsive to Appellant's request to Appellant's counsel on August 31, 2021. Order Granting Bay Point's Motion to Dismiss, p. 2. This response from SCDHEC prompted Appellant to send a second FOIA request to the Department, again listing the SCDHEC file custodian as "Bureau of Water, OCRM," and seeking "[a]ny applications for permits or permits issued by DHEC for septic tanks or land disturbance permit or coastal zone consistency certification ... [and also] septic tank applications in addition to any other NPDES permits." Ex. 3 to Petitioner's Request for Contested Case. While Appellant's second FOIA explicitly requested septic tank applications, it did not list the appropriate file custodian

¹ S.C. Code Ann. § 30-4-10 *et seq.*

within the Department for septic tank applications or permits. As indicated on the septic tank permit application, these applications are processed and permits are issued by BEHS, not the Department's Bureau of Water or OCRM.

On October 20, 2021, the Department's FOIA Office Director responded to Appellant's second FOIA with the following email: "OCRM staff said they do not have any information responsive to the above-referenced request. We also researched the information you provided and were unable to locate any files." Ex. 4 to Petitioner's Request for Contested Case. The email invited any additional information Appellant could share that might help the Department locate any records. No additional information was provided in response to this invitation.

Seven days later, on October 27, 2021, Appellant was informed by a third party that the Septic Permit had been issued. Order Granting Bay Point's Motion to Dismiss, p. 3 and Ex. 5 to Petitioner's Request for Contested Case. On November 9, 2021, Appellant submitted a Request for Final Review to the Department. Order Granting Bay Point's Motion to Dismiss, p. 3. This filing was made more than 15 days after the Septic Permit was issued. Respondent Bay Point Island LLC's Motion to Dismiss, p. 2.

Appellant's Statement of Facts alleges that SCDHEC failed to provide the septic application in response to the second FOIA request and that this failure resulted in Appellant being "in the dark" as to the existence of the Septic Permit. However, the actual circumstances – as the Respondents will explain herein – which led to Appellant being "in the dark" were Appellant's failures to accurately identify the staff responsible for handling septic permitting and to exercise its statutory right to submit a written request for notice of the Septic Permit in accordance with S.C. Code Ann. § 44-1-60(E)(1).

II. STANDARD OF REVIEW

In an action at law without a jury, this Court of Appeals' review extends only to the correction of errors of law. Respondents agree with the Standard of Review stated by Appellant, adding that, according to S.C. Code Ann. § 1-23-610(B), "[t]he review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact." The appellate court's review is limited to determining whether the ALC's findings were supported by substantial evidence or were controlled by an error of law. Engaging and Guarding Laurens County's Environment ("EAGLE") v. SCDHEC, 407 S.C. 334, 342, 755 S.E.2d 444, 448 (2014), citing Hill v. SCDHEC, 389 S.C. 1, 9, 698 S.E.2d 612, 616 (2010) (citations omitted). "In determining whether the ALC's decision was supported by substantial evidence, the court need only find that, upon looking at the entire record on appeal, there is evidence from which reasonable minds could reach the same conclusion that the ALC reached." Id., citing Hill, 389 S.C. at 9-10, 698 S.E.2d at 617.

III. ARGUMENT AND CITATION OF AUTHORITY

Appellant's argument on all three issues on appeal casts all blame for Appellant's lack of notice and untimely challenge of the Septic Permit on SCDHEC. Specifically, Appellant makes the following claims:

- 1) SCDHEC failed to notify Appellant of the Septic Permit in response to the FOIA requests submitted by Appellant's counsel;
- 2) SCDHEC failed to recognize Appellant as an "affected person" or treat Appellant's FOIA request as a written request for notification of a permit decision under S.C. Code Ann. § 44-1-60; and

- 3) Appellant had “absolutely no way of knowing” that a decision had been made by SCDHEC, because there is no requirement for SCDHEC to put applications for septic permits on public notice.

In short, Appellant is attempting to blame the Department for its lack of notice and untimely challenge of the Septic Permit despite *its* choice to disregard the clear and straightforward procedure established by the General Assembly for requesting notice and challenging agency decisions in S.C. Code Ann. § 44-1-60. Throughout this case, Appellant has repeatedly argued that § 44-1-60 does not clearly establish how any individual or entity becomes an “affected person” under this statute. This argument is nothing more than a blatant attempt to distract attention from the fact that nothing in the statute requires qualification of such status as a *prerequisite* to submission of a request for notice or SCDHEC’s acceptance of it. Regardless, Appellant could have followed the procedure outlined in § 44-1-60 *in addition* to the FOIA requests it submitted. Because it inexplicably failed to do so, it then argued to the ALC below and continues to argue that its FOIA request should have put SCDHEC on notice that affected parties existed and SCDHEC should, therefore, have provided notice of the permitting decision to Appellant. Petitioner’s Response to Respondent’s Motion to Dismiss, p. 8; Appellant’s Initial Brief, p. 22.

As explained herein, the ALC correctly found Appellant’s choice, whether intentional or not, to rely solely on its FOIA request unreasonable under the circumstances, given the lack of any legal authority suggesting that a FOIA request can or should serve as a substitute for the procedure set forth in S.C. Code Ann. § 44-1-60. As the ALC stated, allowing such substitution would improperly “expand the procedural influence of a FOIA request and the Department’s obligations thereto.” Order Granting Respondent Bay Point’s Motion to Dismiss, p. 7. Overall, the ALC correctly recognized

that the Department was *not* solely responsible for creating the circumstances resulting in dismissal of Appellant's appeal.

A. The ALC made no error, and followed valid South Carolina law, in finding that it lacked jurisdiction to hear Appellant's contested case.

In its brief, Appellant refers to the broad subject matter jurisdiction of the ALC. Respondents do not contest the fact that the ALC has the power to hear and determine timely appeals from final agency decisions of SCDHEC that reach the ALC through the process set forth in S.C. Code Ann. § 44-1-60. Rather, the point of Bay Point's Motion to Dismiss was that Appellant's failure to comply with procedural requirements for perfecting its appeal of the Septic Permit deprived the ALC of jurisdiction over the underlying case. The ALC called this a loss of "procedural jurisdiction," which Respondent agrees appears to be a term recently used by the ALC when dealing with issues of timeliness in relation to contested cases, such as presented with this case. Order Granting Bay Point's Motion to Dismiss, p. 4.

As stated above, the Appellant is attempting to distract attention from its own failure to follow the statutory procedure to request notice of or to timely request review of the Septic Permit. It was this failure that precluded Appellant's eligibility for administrative remedies under this statutory process. Respondents agree that the ALC could have heard Appellant's case if Appellant had followed S.C. Code Ann. § 44-1-60 to request notice and timely filed a Request for Final Review. It is undisputed that Appellant failed to do so in this case.

Appellant asserts there is a lack of any precedent to support a decision of no procedural jurisdiction where a petitioner does not follow the statutory procedure to obtain judicial review. This is not correct, as there have been many cases where the ALC, the

Court of Appeals, and the S.C. Supreme Court have all addressed the procedural requirements of S.C. Code Ann. § 44-1-60, which is entitled “Appeals from department decisions giving rise to contested case; procedures.” According to the first paragraph: “All department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of the department which may give rise to a contested case **shall be made using the procedures set forth in this section.**” S.C. Code Ann. § 44-1-60(A) (emphasis added). The statute was enacted by the General Assembly in Act Number 387, effective July 1, 2006, wherein the state legislature succinctly explained its intent in enacting the law “... to provide a uniform procedure for contested cases and appeals from administrative agencies...” Act No. 387, 53, 2006 S.C. Acts & Joint Resolutions. South Carolina Coastal Conservation League v. SCDHEC, 380 S.C. 349, 363 (2008). The South Carolina Supreme Court has found that the statute “clearly and unambiguously provides that the [department] decision is final fifteen days after notice is mailed to the applicant.” South Carolina Coastal Conservation League v. SCDHEC, 390 S.C. 418, 427 (2010).

Appellant’s argument attempts to distract from its failure to follow the procedure in S.C. Code §44-1-60 by asserting SCDHEC failed to recognize Appellant as an “affected person” and provide notification of a permit decision. Again, Respondents note that S.C. Code §44-1-60 contains no requirement for establishing “affected person” status as a prerequisite to submitting a written request for notice of a permitting decision. The Supreme Court has not specified any particular process for an affected party to ask for notice of a Department decision, but rather, has allowed SCDHEC to use an informal approach for identifying an “affected party.” Id. at 428. Respondents agree with Appellant

that this likely caused the addition of language to S.C. Code Ann. § 44-1-60(E)(1) providing the ability for affected persons to request notification of department decisions in writing by regular mail, email or certified mail. Appellant's Brief p. 10, citing Act No. 278 § 1 (2010).

Respondents do not agree, however, with Appellant's argument that the additional language is "essentially meaningless" in providing direction to the public. On the contrary, Respondents view the language as significantly simplifying the procedure for requesting notice down to requiring only the submission of a single written communication – either by email or regular mail.² By not submitting a written request for notice of the Septic Permit, it was Appellant who deprived SCDHEC the ability to recognize it as an "affected person" by failing to follow the simple procedure laid out by the statute.

B. The ALC made no error, and followed valid South Carolina law, in finding Appellant's Request for Final Review untimely.

Based upon the undisputed facts before the ALC, the Appellant's failure to timely file a Request for Final Review constitutes a failure to timely exhaust its administrative remedies under S.C. Code Ann. § 44-1-60. The language of Section 44-1-60(E)(2) plainly requires that "[t]he staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department by the applicant, permittee, or affected person." As outlined in the ALC's Final Order, Appellant's Request

² It is normal practice, if a party is concerned about future permitting actions, to notify the appropriate department within DHEC and ask for written notification of a permitting decision. The fact that the program may not provide public notice of certain permit applications is not a deterrent. Appellant obviously has a long-standing concern regarding septic tanks on Bay Point Island and could have, and should have, contacted DHEC staff and advised them of Appellant's interest, requesting notification thereof.

for Final Review was not filed until forty-eight (48) days after the staff decision regarding the Septic Permit was issued, or thirty-three (33) days after the decision became final. Order Granting Respondent Bay Point's Motion to Dismiss, pp. 4-5. Thus, Appellant's filing was untimely.

Appellant's legal advocacy group, the South Carolina Environmental Law Project, has participated in hundreds of permit challenges and is surely aware of the process for affected parties to ask for notification of agency decisions. As explained above, Appellant deprived itself of obtaining notice of the permit by failing to follow the simple procedure laid out by the statute for requesting notification of the permitting decision at issue in this case.

C. The ALC made no error, and followed valid South Carolina law, in finding that a Freedom of Information Act does not serve as a substitute for the procedure set forth in S.C. Code §44-1-60 for requesting notification of a permitting action.

To distract from its failure to follow the procedure set forth in S.C. Code § 44-1-60 and request notification of the Septic Permit, Appellant argues that its FOIA request should have been considered and treated as a written request for notification. Appellant has never cited any authority supportive of this unreasonable assertion. As the ALC correctly ruled, it would be improper to substitute an FOIA request for the *specific* statutory procedure set forth in S.C. Code Ann. § 44-1-60(E)(1). As reasoned by the Court, allowing such substitution would not only "significantly expand the procedural influence of an FOIA request," but would also be outside the stated purpose for which FOIA was created. Order Granting Respondent Bay Point's Motion to Dismiss, p. 7. Moreover, such substitution would render the statutory procedure set for in S.C. Code § 44-1-60 essentially meaningless.

South Carolina's FOIA was drafted to provide an avenue for the general public access to public documents or meetings. See, <https://www.scag.gov/freedom-of-information-act-foia/> and S.C. Code Ann § 30-4-15.. There is no language in the FOIA statute suggesting that it should be used for any purpose other than providing public access to agency records.

Even though Appellant's failure to request written notice of the Septic Permit was clearly the root cause of the Appellant being "in the dark" about the permit, Appellant continues to inappropriately attempt to shift the burden of notifying affected parties of permitting decisions to Respondent SCDHEC. Appellant has done so throughout this case because it lacks any valid justification for its failure to send a simple email to SCDHEC asking for notice of any department decision. Instead of facing this omission, Appellant has repeatedly claimed in all its prior filings that SCDHEC should have been required to issue a public notice of this septic system application and permit. There is no legal authority requiring SCDHEC to public notice septic permits.³ Additionally, and inconsequential to the untimeliness of Appellant's Request for Final Review, Appellant has repeatedly claimed in all its prior filings that SCDHEC should have been required to certify that this Septic Permit does not contravene the Department's Coastal Zone Management Program. Again, the legal authority does not support this claim.

CONCLUSION

Appellant claims that its FOIA requests entitled it to receive notification of the Septic Permit, but this Court must not lose sight of the fact that SCDHEC provides

³ Again, the fact that a program may not provide public notice of certain permit applications is not a deterrent from parties requesting notice of a permitting decision or challenging it pursuant to S.C. Code § 44-1-60.

extensive instruction on its website⁴ related to submitted FOIA requests, including that information provided in the submittal must include the “file custodian/staff contact.” None of Appellant’s FOIA requests included information related to the appropriate staff/department. Instead, Appellant submitted incorrect information identifying the Bureau of Water and the Office of Ocean and Coastal Resource Management. Moreover, Appellant has no legal authority to support this claim, the practical result of which would be to improperly “expand the procedural influence of a FOIA request and the Department’s obligations thereto.” See, p. 5, *infra*.

In conclusion, Appellant ignored the stated procedure set forth in S.C. Code § 44-1-60 for requesting notice of a permitting decision and timely filing a Request for Final Review of such decision. The procedure affords Appellant and the public a method for obtaining notice and challenging a permitting decision. Appellant simply failed to use it in this case.

Accordingly, Respondents respectfully request that the opinion of the Administrative Law Court granting Respondent Bay Point’s Motion to Dismiss be upheld in its entirety.

Respectfully submitted,

By: s/ Angelica M. Colwell
Mary D. Shahid, Esquire
Angelica M. Colwell, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400
Charleston, SC 29401

⁴ See <https://scdhec.gov/about-dhec/freedom-information-act-requests>, FAQ’s and <https://scdhec.gov/about-dhec/accessibility-nondiscrimination-privacy-notices/foiac-policies-and-procedures>. The online form is accessible at [SC DHEC FOI Request \(lmhostediq.com\)](https://scdhec.gov/foia-request)

Telephone: 843.720.1725
Facsimile: 843.414.8242

*Attorneys for Respondent,
Bay Point, LLC*

By: s/ Sara V. Martinez
Sara V. Martinez, Esquire
Christopher Whitehead, Esquire
SCDHEC
2600 Bull Street
Columbia, SC 29201
Office: 803.898.0288
Cell: 803.465.2822

*Attorneys for Respondent,
SCDHEC*

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