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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Milton G. Kimpson, Administrative Law Judge

Trial Court Case No. 22-ALJ-07-0010-CC

Appellate Case No. 2022-001792

T. Tree Farms RV Park (Blue Sky Associates, LLC), Respondents,

v.

South Carolina Department of Health and Environmental Control, Enclave at Fairview Homeowners' Association, Inc., Golden Hills of Fairview Homeowner's Association, Inc., Greenspace of Fairview, LLC, and North Pacolet Association, Inc.,

of which Enclave at Fairview Homeowners' Association, Inc., Greenspace of Fairview, LLC, North Pacolet Association, Inc. and Golden Hills of Fairview Homeowner's Association, Inc., are the Appellants and South Carolina Department of Health and Environmental Control is a Respondent.

INITIAL BRIEF OF RESPONDENT T. TREE FARMS RV PARK (BLUE SKY ASSOCIATES, LLC)

Alexander G. Shissias, Esquire

S.C. Bar # 11610

The Shissias Law Firm, LLC

1727 Hampton Street

Columbia, South Carolina 29201

803-540-3090

*Counsel for Respondent T. Tree Farms RV
Park (Blue Sky Associates, LLC)*

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STATEMENT OF ISSUES ON APPEAL

Is the Administrative Law Court's finding of fact that the Appellants did not request to be notified of the issuance of the permit supported by substantial evidence?

Did the Administrative Law Court err in finding Appellants' Request for Final Review was untimely when it found that Appellants did not request in writing to be notified of the issuance of the permit pursuant to S.C. Code Ann. §44-1-60(E)(1)?

STATEMENT OF THE CASE

This appeal arises from the Administrative Law Court's ("ALC") November 29, 2022, decision reinstating a June 22, 2021, DHEC staff decision authorizing an individual onsite wastewater system for Respondent T. Tree Farms RV Park (Blue Sky Associates, LLC) ("Respondent" or "Blue Sky") for a recreational vehicle park in Spartanburg, South Carolina. Appellants filed a Request for a Final Review ("RFR") conference 126 days after the permit was issued, on October 26, 2021. The Board of the South Carolina Department of Health and Environmental Control ("Board") held a RFR conference on December 20, 2021. On January 13, 2022, the Board issued a Final Administrative Decision ("FAD") overturning the staff decision and denying the permit. On January 14, 2022, Blue Sky filed a request for a contested case hearing with the ALC and subsequently filed a motion requesting that the Board's order be overturned and that the staff decision be reinstated. In response, Appellants filed a motion requesting that Blue Sky's contested case be dismissed. The Honorable Milton G. Kimpson heard the motions on May 12, 2022. On November 29, 2022, Judge Kimpson issued an order denying the Appellants' Motion to Dismiss and granting Blue Sky's Motion to Dismiss on the basis that the Appellants' RFR was untimely filed, and that the Board acted outside its authority when it reviewed the staff decision. On December 20, 2022, Appellants filed their Notice of Appeal. The South Carolina Department of Health and Environmental Control did not appeal.

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. Respondent agrees with the Standard of Review stated by Appellants regarding errors of law. However, with regard to findings of fact, the standard of review is the "substantial evidence" standard. 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.

RESPONDENT'S STATEMENT OF FACTS

The facts giving rise to this appeal began with Blue Sky's April 23 2021, application for a septic system permit for an RV Park located in Spartanburg County at 1970 Landrum Mill Road near Campobello. (*ALC Order* at 2). Appellants are homeowners' associations that own residences and hobby farms contiguous or near the proposed RV park site, and they oppose the development. Appellants' brief at 4-6 devotes much attention to the alleged motivations of Appellants and alleged delicts in Respondent's permit, which are all irrelevant to a case relating to the timeliness of a Request for Final Review before the DHEC Board.

On May 14, 2021, Madelon Wallace filed a request under the Freedom of Information Act ("FOIA") for information related to Blue Sky's project. Ms. Wallace's request did not identify herself as acting on behalf of any organization, did not reference any permit, and she did not request to be notified of any permit decision. (*Ex. C & D to Blue Sky Motion for Relief*). DHEC staff mailed Blue Sky's permit on June 22, 2021. (*ALC Order* at 1). DHEC staff responded to Ms. Wallace's FOIA request on October 14, 2021. (*Id.* at 11) Under FOIA, DHEC had 10 days to notify Ms. Wallace of its determination and 30 days to produce the documents, making DHEC's response due on June 27, 2021. (*Id.*).

Appellants allege that DHEC failed to provide the septic tank permit in response to Ms. Wallace's FOIA request and that as a result, Appellants were unaware of the permit's issuance. They now attempt to recast Ms. Wallace's FOIA request as a written request by all four Appellants to be notified of the septic tank permit decision under S.C. Code Ann §44-1-60(E)(1). Appellants' failure to file a timely RFR was caused by their failure to exercise their statutory right to submit a written request to be notified of a permit decision.

Appellants filed a RFR with the DHEC Board on October 26, 2021. Before the Board, DHEC staff argued that the RFR was untimely because it was filed 126 days after the permit was issued. (*DHEC Staff Response to RFR* at 3). However, the Board not only agreed to hear Appellants' RFR on December 20, 2021, on January 13, 2022, issued a Final Agency Decision overturning DHEC staff's decision. (*FAD* at 3). The Board took issue with the comparable flow calculations¹ in the permit, which were from a KOA Campground RV Park, finding this park was not "...a similar establishment" to Blue Sky's project. (*FAD* at 2). The Board disregarded the timeliness issue entirely and did not mention the FOIA request. (*Id.*)

Blue Sky requested a contested case hearing with the ALC on January 14, 2022. On April 13, 2022, Blue Sky filed a motion requesting that the Court overturn the Board decision and reinstate the staff decision. (*Blue Sky Motion for Relief*). In response, Appellants alleged that the FOIA request constituted a request under S.C. Code Ann. §44-1-60(E)(1). (*Homeowners' Response to Motion for Relief* at 5-6). On April 26, 2022, Appellants filed their own motion to dismiss alleging that Blue Sky had made various procedural errors. (*ALC Order* at 4-9). The Honorable Milton G. Kimpson heard the motions on May 12, 2022. On November 29, 2022, he issued an order denying Appellants' motion to dismiss² and granting Blue Sky's motion on the basis that Appellants' RFR was untimely and that the Board lacked the authority to review DHEC staff's decision. (*Id.* at 20-21). This appeal followed.

¹ Under S.C. Code Ann. Regs. 61-56.501, the peak flow rate for non-residential facilities (such as RV parks) may "...either be increased or reduced when comparable peak water consumption data for similar establishments in similar locations vary from the requirement."

² Appellants did not appeal Judge Kimpson's denial of their motion to dismiss.

ARGUMENT

The ALC found as a matter of fact that Appellants had not requested to be notified of the permit decision in writing, and those findings are supported by substantial evidence. The ALC properly found Appellants' RFR was untimely.

In the absence of a specific statute or regulation specifying a notification process,³ DHEC's statutory obligation to provide notification of any permit decision is limited to "...affected persons who have requested in writing to be notified." S.C. Code Ann. §44-1-60(E)(1). Appellants attempt to blame DHEC for their untimely challenge of the permit despite their choice to disregard the clear and straightforward procedure established by the General Assembly for requesting notification of DHEC permit decisions.

A. The ALC's finding of fact that Appellants did not request in writing to be notified is supported by substantial evidence.

Appellants assert without basis that they did request in writing to be notified of a permit decision, although Judge Kimpton did not make such a finding. Appellants seem to misquote the ALC's Order as finding there was a "request[] in writing to be notified" (*Appellants' Brief* at 8, citing *ALC Order* at 2-3). The ALC's Order says no such thing. In dismissing the case, Judge Kimpton made findings of fact to the contrary- that Appellants did not make such a request. The ALC made the following findings of fact which Respondent cites in full:

May 14, 2021 – *Madelon Wallace, an area resident, emailed a request under the Freedom of Information Act (FOIA) to the Department* addressed to "David Vaughan, Director of Onsite Wastewater Management for SC," seeking "copies of all documents concerning a proposed recreational vehicle park ... to be located at or near Landrum Mill Road from Sept 20, 2020 to present." In the May 14, 2021 email that served as a cover letter to her FOIA request, Ms. Wallace wrote: "Please see the attached FOIA request. Among other things there are serious concerns about the waste that would be channeled to Gold Mine Creek that feeds into the North

³ For example: major modifications to Solid Waste Landfills, S.C. Code Ann. Regs. 61-107.19, pt. I, D.2.c-g (2008), certain Coastal Zone Permits, S.C. Code Ann. Regs. 30-2 (2002).

Pacolet River and runs thru a residential development.” Although *her request for information did not reveal in what capacity she was seeking this information*, Ms Wallace was listed in other documents as a Manger [sic] of Greenspace of Fairview, LLC. *Ms. Wallace’s FOIA request did not state that she wanted to be considered an “affected person” for purposes of a septic tank permit and it did not ask that she be notified of the issuance of any such permit.*

(ALC Order at 2-3, bold in original, emphasis added, *see also Blue Sky Motion for Relief Exhibit C & D.*)

Judge Kimpson found as a matter of fact that Ms. Wallace’s FOIA email was not a statutory request to be notified under S.C. Code Ann. §44-1-60(E)(1).⁴ *See also ALC Order* at p.12 l. 19- p. 13 l. 9. As findings of fact, they are subject to review under the “substantial evidence” standard.

Judge Kimpson’s findings are supported by substantial evidence, namely the FOIA request itself and the cover email. (*Blue Sky’s Motion for Relief Exhibit C & D*). In fact, all the relevant evidence upon the record supports this finding. Under the plain language of the statute, the request must be in “writing,” so the Court’s review must be limited to the writing as well. The FOIA request did not identify any “permit,” did not request notification of any permit decision, and did not identify Ms. Wallace as filing the request on behalf of any of the four Appellants in this case. Ms. Wallace was not a named Petitioner below. While Judge Kimpson recognized that in other documents Ms. Wallace was listed as manager of Greenspace of Fairview, LLC, (*ALC Order* at 2-3) and Appellant’s brief refers to her as a member of Golden Hills, (*Appellant’s Brief* at 4) there is no reference to these or any other entities in Ms. Wallace’s FOIA request. There was no way

⁴ By necessity Judge Kimpson made these findings of fact in issuing his order. Similarly, in cases where a trial court dismisses a case for insufficient service of process, it must make findings of fact, although in the case of a trial court the standard of review for these findings is abuse of discretion, not substantial evidence. *Clark v. Key*, 304 S.C. 497, 500, 405 S.E.2d 599, 601 (1991) "The trial court's findings of fact regarding validity of service of process are reviewed under an abuse of discretion standard."

DHEC staff could have known on whose behalf they were filed. As counsel for Blue Sky argued at the hearing, Ms. Wallace is listed as the agent for several entities, (*Tr.* at 12) and just because a FOIA request has her name on it, it does not follow that she is filing it on behalf of one, or all those entities.⁵ Appellants go on to state in their brief, without foundation, that “[h]omeowners- through Ms. Wallace- submitted their FOIA request...” (*Appellant’s Brief* at 12). A plain reading of the request shows no indication that it was filed on behalf of anyone other than Ms. Wallace, “...an area resident.” (*ALC Order* at 2).

Appellants then devote two pages to a discussion of all the things Appellants did from the date of Ms. Wallace’s FOIA request to the date the RFR was filed, arguing that DHEC staff should have known these four Appellants wanted to be notified of this permit decision. (*Appellant’s Brief* at 5-6). This is an attempt to distract from what Appellants could have done, but did not, which was to actually file a request under S.C. Code Ann. §44-1-60(E)(1).

“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.” *Hill v. SCDHEC*, 389 S.C. at 9-10, 698 S.E.2d at 617. Based upon the record, there is evidence from which a reasonable finder of fact could conclude that Appellants did not request in writing to be notified of the issuance of the permit. For that reason, Judge Kimpson’s findings of fact ought not be disturbed on appeal.

B. The ALC properly found Appellants’ RFR was untimely as the FOIA request cannot be construed to trigger S.C. Code Ann. §44-1-60(E)(1).

⁵ Similarly, it does not follow that Ms. Wallace was filing the request on behalf of the two Appellants of which she was neither a member nor an officer. (*Tr.* at 15-16).

Under S.C. Code Ann. §44-1-60(E)(2) a DHEC staff decision becomes the final agency decision fifteen days after notice of the staff decision has been mailed to the applicant unless a written request for final review is filed with the DHEC Board by the applicant, permittee, licensee or an affected person. Appellants attempt to invoke an exception to the fifteen day rule of finality. In *S.C. Coastal Conservation League v. S.C. Dep't of Health and Env't'l Control*, 390 S.C. 418, 427, 702 S.E.2d 246, 251 (2010), the Supreme Court held that under S.C. Code Ann. §44-1-60(E)(1), when a party requests to be notified of a permit decision, and DHEC fails to make that notification, the fifteen day appeal period only starts on the day DHEC mails the last notification. *Id.*, 390 S.C. at 429, 702 S.E.2d at 252. Appellants make much of the finding that "...the statute is not clear as to how an individual or entity acquires the status of 'affected persons who have asked to be notified.'" *Id.*, 390 S.C. at 427, 702 S.E.2d at 251.⁶ However, the General Assembly subsequently clarified the statute. In 2010, it amended S.C. Code Ann. §44-1-60(E)(1) to state that "[n]otice of a department decision must be sent by certified mail, returned receipt requested to the applicant, permittee, licensee, and affected persons **who have requested in writing to be notified.**" Act No 278, § 1, 2010 Acts & Joint Resolutions (emphasis added). Whatever else the statute may require, the request must be "in writing." The amendment simplified the procedure for requesting notice down to requiring only the submission of a single written communication by email or regular mail. But the writing must, at minimum, enable DHEC to identify the person making the request (and anyone else she was making the request on behalf of), identify the permit decision or decisions (or reference all permit decisions relating to a particular permittee or

⁶ The holding in *Coastal Conservation League* is of limited applicability in this case as DHEC simply conceded that the League had requested to be notified. A DHEC staffer sent an email stating: "[y]ou were on the mailing list and should have received a copy. Did you not get it?" *Coastal Conservation League*, 390 S.C. at 422, 702 S.E.2d at 249. Here, the fact that Appellants did not make such a request is at the heart of the case.

permittees) and the person must ask for notification of those permit decisions. No particular “magic words” need be recited, but DHEC staff must be able to make those determinations from the face of the writing in question. This is the only way DHEC staff can be expected to distinguish a request for notification under S.C. Code Ann. §44-1-60(E)(1) from a simple FOIA request under S.C. Code Ann. §30-4-30. Further, a reviewing court can go no further than the writing itself to determine whether it is a request to be notified and who is filing it.

Appellants argue that Section 44-1-60 does not clearly establish how any individual or entity becomes an “affected person” under this statute. This argument is simply an 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 DHEC’s acceptance of it. Regardless, Appellants could have followed the procedure outlined in Section 44-1-60 in addition to the FOIA request Ms. Wallace submitted. Because they failed to do so, they argued to the ALC below and continue to argue that Ms. Wallace’s FOIA request should have put DHEC on notice that affected parties existed and asked to be notified about this permit, and that DHEC should, therefore, have provided notice of the permitting decision to all four Appellants. The ALC correctly found Appellants’ choice, whether intentional or not, to rely solely on Ms. Wallace’s FOIA request unreasonable, 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. Appellants have argued that had DHEC responded to Ms. Wallace’s FOIA request on June 27, 2021, Petitioners would have presumably had a copy of the June 22, 2021, permit and presumably could have filed a timely RFR. However, this argument overlooks two important details. First, it is entirely possible that DHEC could have responded to the request before June 22, 2021, in which case the permit would not have been included in the response. Second, even if DHEC failed to produce the permit

in a FOIA response, that does not excuse an untimely RFR. Our Supreme Court has held that there are only two exceptions to the fifteen day rule of finality. The first is where a person “requests in writing to be notified” and where DHEC fails to make that notification, as in *S.C. Coastal Conserv. League v. S.C. Dep’t of Health & Env’tl Control*, 390 S.C. 418, 702 S.E.2d 246 (2010). The second is where a DHEC statute or regulation has its own unique notification requirement and DHEC fails to comply with it. *Pickens County v. S.C. Dep’t of Health & Env’tl Control, et al.*, 435 S.C. 99, 866 S.E.2d 537 (2021). Respondent has demonstrated the first does not apply here and as septic tank regulations contain no notice provisions, the second exception does not apply here either.

Requiring DHEC to parse every single FOIA request to determine whether it possibly triggers Section 44-1-60(E)(1) as Appellants argue would have a significant effect on DHEC’s obligations under FOIA. First, DHEC would have to attempt to divine all the entities upon whose behalf a request is being filed. Here, Appellants argue that Ms. Wallace’s (unstated) status as a manager of one Appellant and her (unstated) status as a member of another entitled all four Appellants to notification. Second, DHEC would have to determine all the permits that could possibly be construed as being covered by the FOIA request, presumably from whom it was sent within DHEC and the content of the concerns stated in the request, based upon the arguments Appellants make in their brief. Then DHEC would be required to provide notification for each entity for each permit decision. Finally, as a FOIA request like this includes permits that have not yet been issued, DHEC would have to apply FOIA prospectively and provide notifications for future permit decisions. This goes far beyond the ambit of a FOIA request. If a person were allowed to substitute a FOIA request for the specific statutory procedure set forth in S.C. Code Ann. §44-1-60(E)(1), this would significantly alter the procedural impact of a FOIA request far

beyond the stated purpose for which FOIA was created. *See* S.C. Code Ann. §30-4-15. If this substitution were allowed, it would render the specific statutory procedure set forth in S.C. Code §44-1-60 meaningless.

Appellants, in their brief at 9 argue that the ALC's Order (*ALC Order* at 16 and n.15) imposed "additional requirements" not found in the statute. This is not the case. If anything, the ALC was simply trying to determine whether this particular FOIA request could possibly be construed to have sufficient specificity to place DHEC on notice that a particular person is seeking the status of an "affected person who has requested to be notified" of a particular permit decision, and how that might work. While Respondent maintains this analysis was unnecessary, and requiring DHEC to undertake such an analysis is unreasonable, the ALC ultimately reached the correct conclusion that Ms. Wallace's FOIA request did not trigger a notification requirement.

CONCLUSION

The ALC properly concluded Appellants did not request in writing to be notified of the Department's permit decision, having ignored the procedure set forth in the statute. The ALC properly held that Appellants' RFR was untimely as it was filed more than 15 days after the permit decision was mailed. Respondent therefore respectfully requests this Court uphold the ALC's order.

Respectfully submitted,

s/Alexander G. Shissias
Alexander G. Shissias, S.C. Bar #11610
The Shissias Law Firm, LLC
1727 Hampton St.
Columbia, SC 29201
803-540-3090, alex@shissiaslawfirm.com
Counsel for Respondent Blue Sky Associates

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