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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 REPLY BRIEF OF APPELLANTS

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INTRODUCTION

In their response, Blue Sky Associates applies the incorrect standard of review and improperly attempts to inject requirements not included within Section 44-1-60(E)(1)'s language. This Court applies a *de novo* standard of review—not the substantial evidence standard argued by Blue Sky Associates—because the issue raised in this appeal is one of statutory interpretation. Appellants (Homeowners) filed their Request for Final Review (RFR) with the South Carolina Department of Health and Environmental Control (DHEC or the Department) within fifteen days of notice. Accordingly, Homeowners complied with the requirements set forth in Section 44-1-60(E)(1) and the Administrative Law Court (ALC) erred in issuing its order of dismissal. Homeowners respectfully request reversal and remand for a hearing on the merits.

ARGUMENT

I. The ALC committed an error of law when it interpreted the language in section 44-1-60(E)(1) to require Homeowners to include more information in their request than mandated by the statute.

Section 44-1-60(E)(1) provides that “[n]otice of a department decision must be sent by certified mail, return receipt requested to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified.” The statute therefore establishes that, to achieve this status, one must be (1) an affected person, (2) who requested in writing, (3) to be notified of department decisions. Despite concluding that the statute does not require the inclusion of any “magic words,” the ALC rejected Homeowners’ written Freedom of Information Act (FOIA) request as insufficient even though it asked DHEC’s septic system permitting division for “all documents” regarding a specific proposed project associated with a specific parcel. Blue Sky Associates similarly attempts to insert requirements for such a request even while simultaneously acknowledging the statute does not mandate any “magic words.” (*Blue Sky Associates Brief* at 10). The statute does not require anything beyond what Homeowners included in their request

before a person is entitled to notification of a department decision. The ALC and Blue Sky Associates' demand for more contravenes the statutory language and constitutes an error of law. *See City of Camden v. Brassell*, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997) (noting “the court cannot rewrite the statute and inject matters into it which are *not in the legislature’s language*” (emphasis added)).

Because Homeowners' request satisfied section 44-1-60(E)(1), they were entitled to simultaneous notice of DHEC's decision on the septic system permit for Blue Sky Associates' proposed RV Park. *See 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) (concluding that Section 44-1-60(E) requires simultaneous notice). DHEC's failure to simultaneously notify Homeowners of its issuance of the permit resulted in the tolling of the fifteen-day period to file an RFR, and Homeowners' filing of the RFR twelve days after DHEC disclosed the permit was timely. *Id.* at 429, 702 S.E.2d at 252 (“[W]e hold that in situations where DHEC fails to simultaneously notify the applicant, permittee, licensee, and affected persons asking to be notified, the latest date of mailing controls when the fifteen day period begins to run.”). Accordingly, the ALC's order of dismissal was erroneous, and Homeowners respectfully request reversal of the ALC's order and remand for a hearing on the merits.

A. Blue Sky Associates incorrectly applies the “substantial evidence” standard of review when statutory interpretation is a matter of law reviewed de novo.

Blue Sky Associates claims the ALC's decision that Homeowners did not request in writing to be notified of the permit's issuance is a “finding of fact . . . supported by substantial evidence.”¹ (*Blue Sky Associates Initial Brief* at 6-8). In doing so, Blue Sky Associates

¹ Blue Sky Associates also asserts that Homeowners misquote the ALC's Order and that Homeowners claim the ALC found the FOIA request was a “request in writing to be notified.”

misapplies the appropriate standard of review because the issue here involves statutory interpretation. As Blue Sky Associates itself recognizes, “[t]he 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.*” (*Id.* at 3 (citing *Engaging and Guarding Laurens Cnty’s Env’t. v. S.C. Dep’t of Health & Envt’l Control*, 407 S.C. 334, 342, 755 S.E.2d 444, 448 (2014) (emphasis added))).

In contrast to issues of fact, “when the issue on review raises a question of law, this court ‘may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law.’” *Torrance v. S.C. Dep’t of Corrs.*, 433 S.C. 633, 642-43, 861 S.E.2d 36, 41 Ct. App. 2021). Statutory interpretation is a question of law, which is reviewed *de novo*. *Jack’s Custom Cycles, Inc. v. S.C. Dep’t of Revenue*, Op. No. 5970 (S.C. Ct. App., filed Feb. 15, 2023 and withdrawn, substituted, and refiled April 26, 2023) (Howard Adv. Sh. No. 16 at 27, 33).² As the issue in this case raises the proper interpretation of section 44-1-60(E)(1), this Court’s review is *de novo*.

B. Homeowners’ FOIA request satisfied the language of Section 44-1-60(E)(1).

“[T]he cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature.” *Henry-Davenport v. Sch. Dist. of Fairfield Cnty.*, 391 S.C. 85, 88, 705 S.E.2d

(*Blue Sky Associates Brief* at 6). Blue Sky Associates misreads Homeowners’ Brief. Clearly, the quoted phrase refers to the statutory language central to this case as Homeowners’ appeal would be unnecessary if the ALC concluded the FOIA request was a “request in writing to be notified.”² Although courts will defer to an agency’s interpretation of an applicable statute, DHEC has not engaged in any interpretation or construction of section 44-1-60. Indeed, it has not issued *any* guidance regarding how a member of the public can submit a request that complies with the statutory provision. DHEC has never construed the statute in any manner. As a result, there is no agency interpretation to which deference can be afforded. Even if DHEC had construed the statute previously, courts will reject the agency’s interpretation if it is contrary to the statute’s plain language. *Jack’s Custom Cycles*, Op. No. 5970 (Adv. Sh. No. 16 at 33).

26, 28 (2011). “Legislative intent must prevail if it can be reasonably discovered in the language employed and that language must be construed in the light of the intended purpose of the statute.” *Original Blue Ribbon Taxi Corp. v. S.C. Dep’t of Motor Vehicles*, 380 S.C. 600, 607, 670 S.E.2d 674, 678 (Ct. App. 2008). The text of a statute is the best evidence of the General Assembly’s intent. *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012). “Words in the statute should be given their plain and ordinary meaning without resulting to forced or subtle construction.” *Blue Ribbon Taxi*, 380 S.C. at 608, 670 S.E.2d at 678.

As noted above, Section 44-1-60(E)(1) provides that “[n]otice of a department decision must be sent [to] . . . affected persons who have requested in writing to be notified.” Accordingly, to be entitled to receive notice of a department decision, one must be (1) an affected person, (2) who requested in writing, (3) to be notified of department decisions. The ALC assumed without deciding that Homeowners were “affected persons” and no legitimate dispute exists that the FOIA request was “in writing.”³ (*ALC Order* at 5 n.3; *Blue Sky Associates Motion for Relief Exhibits C & D*). Accordingly, the only question before this Court is whether the FOIA request submitted by Homeowners constituted a “request to be notified” of a department or staff decision.

The General Assembly did not define the phrase “request to be notified” and DHEC has not interpreted or ever issued guidance on what constitutes a “request to be notified” of a

³ Blue Sky Associates attempts to characterize the statute’s amendment after the Supreme Court’s decision in *Coastal Conservation League* as significantly clarifying the statute and establishing a “procedure” by which a person becomes entitled to receive notice of a department decision. (*Blue Sky Associates Brief* at 9). Yet, the statute was amended to simply require that the request be “in writing,” thereby ensuring a record of the request and preventing a dispute involving a verbal request to be notified. Beyond the requirement for a *written* request, the amendment did not set forth any “procedure.” Act No. 278, § 1 (2010).

Department decision.⁴ (*See ALC Order* at 15 (noting the statute does not “define the content of such a written request” to be notified). Accordingly, the term must be given its “usual and customary meaning.” *See Strother v. Lexington Cnty. Recreation Comm’n*, 332 S.C. 54, 62, 504 S.E.2d 117, 112 (1998) (“When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning.”). The word “request” is defined as “the act or an instance of asking for something.” *Request*, MERRIAM-WEBSTER DICTIONARY. The word “notify” is defined as “to give formal notice to”; in turn, the word “notice”—when used as an intransitive verb as it is in the statute—means “to become aware of something.” *Notify*, *Notice*, MERRIAM-WEBSTER DICTIONARY. Applied to section 44-1-60, a “request to be notified” means simply “the act or an instance of asking” “to become aware of” the Department’s decision. *Id.*

Here, the FOIA request submitted by Homeowners—through Ms. Wallace—constitutes “an instance of asking” “to become aware of” the Department’s decision on Blue Sky Associates’ septic system permit for its proposed RV Park. The request asked for copies of “all documents” relating to a specifically identified *proposed* project—an RV park—at a specifically identified location, including the county parcel number—“1970 Landrum Mill Road, Campobello, SC in Spartanburg County, Block Map Reference #1-09-0-020.03”—and specifically identified under several possible names—“T. Tree RV Park, T. Tree Farms RV

⁴ Despite the Legislature’s intended purpose for the statute and the fact that every DHEC decision is challenged through the process set forth in Section 44-1-60, DHEC has provided *zero* instruction for how members of the public request to be notified of Department decisions. *See* Act No. 387 § 53 (2006) (“This act is intended to provide a uniform procedure for contested cases and appeals from administrative agencies.”). In contrast, for example, the DHEC website provides detailed instructions on how a person can place their name on a mailing list to be notified about NPDES/ND permits—a significant but discrete category of permits. *See* “Mailing Lists for NPDES/ND Permits,” available at <https://scdhec.gov/mailing-lists-npdesnd-permits#individual> (last visited May 5, 2023).

Park.” (*Blue Sky Associates’ Motion for Relief Exhibit C*). Homeowners sent their request to the Department’s Director of the Onsite Wastewater Division (i.e., septic system permitting) and explicitly emphasized a concern for the discharge of “waste” into nearby waterways—rationally and logically referring to the “waste” managed by the septic system the DHEC permitting division might authorize. (*Homeowners’ Prehearing Statement at 7; Blue Sky Associates’ Motion for Relief Exhibits C & D; DHEC Prehearing Statement at 4*). The Division Director, Mr. Vaughan, acknowledged his receipt of their request. (*Id.*).

Blue Sky Associates claims the content of the FOIA request was insufficient because it did not identify any permit, request notification of any permit decision, or identify Ms. Wallace as filing the request on behalf of the Homeowners. (*Blue Sky Associates Brief at 7, 9-10*). Yet, the content and context of the request belies Blue Sky Associates’ argument. First, Homeowners could not reference a specific permit application by number or other identifier as septic system permit applications are not publicly noticed. Second, their request for “all documents”—as the ALC explicitly recognized—“was certainly broad enough to encompass septic tank permits, as well as any applications for such permits.” (*Blue Sky Associates’ Motion for Relief Exhibit C; ALC Order at 2-3, 15*). Moreover, the context of the request—the fact that it was directed to the agency division responsible for issuing septic system permits, identified the type of project proposed at a specific location with several possible project names, and expressed a concern for the discharge of waste into nearby waterways—indicates it was seeking information relating precisely to the project’s septic system permit, which would naturally include such permit’s issuance. (*Blue Sky Associates’ Motion for Relief Exhibit C*). Blue Sky Associates’ contrary position is logically and practically untenable.

Second, inherent in such a request sent to the specific division responsible for issuing septic system permits is a request “to be notified” when the agency issues a septic system permit decision regarding the proposed project specifically identified in the request.⁵ DHEC could not reasonably consider a request for “all documents” to exclude the ultimate permitting decision on a septic system permit for the specific project. Moreover, the fact that the request related to a *proposed* project further undermines the contention that it did not encompass a request to be notified when a permit was subsequently issued. A person seeking documentation on a *proposed* project is requesting notification of its ultimate approval; a contrary conclusion defies logic and the provision’s emphasis on public notice and the opportunity for comment. *See* S.C. Code Ann. § 44-1-60(B).

The crux of Blue Sky Associates’ argument is that the request did not include language to the effect of “I request to be notified of this project’s septic system permit decision,” which essentially injects a requirement into the statute not present in its language. (*Blue Sky Associates Brief* at 7, 10). Such language or any derivative thereof is not required by the statutory language. As the ALC recognized, “there are no magic words to trigger affected person status.” (*ALC Order* at 16 n.15). The request here sufficiently asked in writing to be notified of DHEC’s decision on any septic system permit for the proposed RV Park. A contrary interpretation strains credulity and conflicts with the language and purpose of the statute. If DHEC can avoid accountability for failing to notify an affected person because their request failed to include

⁵ Blue Sky Associates makes much of the fact that the ALC noted the FOIA request itself “did not ask that [Ms. Wallace] be notified of the issuance of any [septic tank permit],” claiming this finding is determinative and conclusively serves as a finding of fact that the FOIA request “was not a statutory request to be notified under S.C. Code Ann. § 44-1-60(E)(1).” (*Blue Sky Associates Initial Brief* at 7). However, the statutory language does not require a person to use the literal phrase “to be notified” of the decision.

specific wording (not required by the statute and evidently kept secret by DHEC), it would frustrate the statute's purpose. *See* Act No. 387 § 53 (2006) ("This act is intended to provide a uniform procedure for contested cases and appeals from administrative agencies.").

Blue Sky Associates essentially argues that DHEC would be unreasonably burdened by having to determine when a request seeks to be notified of a particular permit decision if the request does not include such magic words. (*Blue Sky Associates Brief* at 7, 10). Yet, DHEC is statutorily obligated to maintain a mailing list of people to notify when DHEC issues a decision regarding a permit, and adding individuals who have requested information regarding a particular project and its permitting status to such a list is hardly a heavy lift beyond DHEC's existing obligations. Blue Sky Associates suggests Homeowners should have "followed the procedure outlined in Section 44-1-60 in addition to the FOIA request." (*Blue Sky Associates Brief* at 10). First, Section 44-1-60 does not set forth *any procedure*. The statute does not outline the *content* of the request. The statute does not identify *to whom* the request must be directed. The statute does not mandate *specific language* that must be included. The notion that Section 44-1-60 established a clear, straightforward procedure is contradicted by a reading of its language. Second, the FOIA request here *is* a written request to be notified, and nothing further was necessary.

Lastly, the absence of a specific reference to which entity on whose behalf Ms. Wallace submitted the request to DHEC is irrelevant. DHEC never provided timely notice of the Department decision to Ms. Wallace, rendering the question of the entity she represented immaterial. Blue Sky Associates complains that DHEC could not have known on whose behalf the FOIA request was filed, but DHEC indisputably knew of Ms. Wallace and her interest in the permitting of a septic system for the proposed RV Park, Yet, DHEC nonetheless failed to timely

inform her of the issuance of the permit. In any event, upon DHEC's belated notification of the issuance of the permit to Ms. Wallace on October 14, 2023, *all four* homeowners' associations comprising Appellants filed the RFR on October 26, 2023, just twelve days later. (*ALC Order* at 10, *Homeowners' RFR*). Furthermore, not only did DHEC fail to provide timely, simultaneous notice to Ms. Wallace, DHEC provided *false* information to members of Homeowners regarding the status of the permit, which the ALC ignored. (*See Homeowners' Prehearing Statement* at 12; *Transcript* at p. 36, l. 1-6; p. 37, l. 3-5; *ALC Order* at 16-17).

In summary, contrary to Blue Sky Associates' contention, neither Section 44-1-60 nor any court decision indicates that the specific words "to be notified" or any other magic words are required in a request before a person is entitled to be notified of DHEC permitting decisions. Through both the content and context of the request, Homeowners unambiguously identified the specific project and the specific type of permit in a written request to be notified of the Department's decision. Homeowners accordingly complied with the requirements of Section 44-1-60(E) and were entitled to notification of the permit's issuance. The ALC's contrary conclusion is error and this Court should reverse the order of dismissal.

C. Homeowners' RFR was timely because the latest date of mailing controls.

The assertion that Homeowners' RFR was untimely depends on the incorrect conclusion that Homeowners were not entitled to notice and that the fifteen-day period to file an RFR expired on July 7, 2021. (*ALC Order* at 20). Blue Sky Associates' arguments rely on this premise. (*Blue Sky Associates Brief* at 9, 11). However, as demonstrated above, Homeowners satisfied the requirements of Section 44-1-60(E)(1) and were entitled to notice.

Blue Sky Associates appears to agree that our Supreme Court's decision in *Coastal Conservation League* requires the tolling of the fifteen-day period to file an RFR if

Homeowners' FOIA request constitutes a "request in writing to be notified" and thereby satisfies the requirements of Section 44-1-60(E)(1). (*Blue Sky Associates Brief* at 11). Because Homeowners are affected persons and complied with Section 44-1-60(E)(1) by "request[ing] in writing to be notified" of the Department's decision on the septic system permit at issue here, Homeowners were entitled to simultaneous notice. *See* 390 S.C. at 427, 702 S.E.2d at 251 ("Of course, without construing § 44-1-60(E) as requiring that notice of the agency decision be mailed *simultaneously* to those entitled to notice, the statute would be meaningless in terms of providing notice." (emphasis added)). DHEC's failure to simultaneously notify Homeowners here mandates the tolling of the limitations period until "the latest date of mailing." *Id.* at 429, 702 S.E.2d at 252 ("[T]he latest date of mailing controls when the fifteen[-]day period begins to run.").

Therefore, the latest date of mailing was October 14, 2021, when DHEC disclosed the septic tank permit issued to Blue Sky Associates via email to Ms. Wallace. (*ALC Order* at 3). Accordingly, the deadline for Homeowners to file their RFR was October 29, 2021. *See* S.C. Code Ann. § 44-1-60(E)(2). By filing their RFR on October 26, 2021, three days before the deadline expired, Homeowners timely triggered the DHEC Board's jurisdiction to review the issued permit.

CONCLUSION

The ALC erroneously concluded Homeowners had not requested in writing to be notified of the Department's septic system permit decision. As a result of this error of law, the ALC improperly held that Homeowners' RFR was untimely because it disregarded the requirement that the latest date of mailing controls if the Department fails to provide simultaneous

notification. Homeowners therefore respectfully request this Court reverse the ALC's order and remand for a hearing on the merits of the DHEC Board's rescission of the permit.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on this date, May 10, 2023, I served Appellants' Initial Reply Brief on all parties by emailing a copy of same on May 10, 2023, to the Attorney Information System provided email addresses below, via attached email:

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