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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
S. Phillip Lenski, Administrative Law Judge

Docket No. 22-ALJ-07-0008-CC
Appellate Case No. 2022-001126

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

vs.

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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

In their response, with minimal cited authority, Respondents attempt to shift blame back to Appellant for its failure to do the impossible: look into a crystal ball and predict the future. Based on a series of failures by the Department, Appellant was precluded from (1) knowing about the existence of the application at issue; (2) knowing the date the application was submitted to the Department; (3) knowing about the issuance of the permit at issue; and (4) knowing the date of the issuance of said permit. Despite this, Respondents still claim that it was Appellant's fault that it did not know things that *could not have been known* under the Department's flawed permitting regime for onsite wastewater (OSWW) systems (septic systems).

ARGUMENT

I. The Administrative Law Court was not devoid of jurisdiction to hear this Contested Case because Appellant qualifies as an "affected party" and Appellant requested notice in compliance with 44-1-60 and DHEC failed to provide it. Appellant's appeal is, therefore, timely.

First and foremost, Appellant rejects the premise that the Department has a "clear and straightforward procedure" for requesting notice of agency decisions pursuant to S.C. Code Ann. Section 44-1-60. A plain reading of this Section reveals very little is required to be considered an affected party other than making a written request to be notified of a department decision, which is mentioned three times within Subsection (E)(1):

- "Notice of a department decision must be sent by certified mail, returned [sic] receipt requested to the applicant, permittee, licensee, *and affected persons who have requested in writing to be notified*."

- "*Affected persons may request in writing* to be notified by regular mail or electronic mail in lieu of certified mail."

- "Notice of staff decisions . . . must be provided . . . to the applicant, permittee, licensee, and *affected persons who have requested in writing to be notified*."

S.C. Code Ann. § 44-1-60(E)(1) (emphases added). No agency division is specified; no form is specified; no method is specified; the only requirement is that the request to be notified is made "in writing." The Supreme Court has agreed, stating that Section 44-1-60 "is not clear as to how an individual or entity acquires the status of 'affected persons who have asked to be notified.'" *S.C. Coastal Conserv. League v. S.C. Dep't of Health & Envtl. Control*, 390 S.C. 418, 427, 702 S.E. 2d 246, 251 (2010). In that same case, the Supreme Court further noted that "DHEC never stated it followed a formal procedure as to how a party acquires 'affected persons who have asked to be notified' status. To the contrary, DHEC indicated it took an informal approach in deciding which parties it notified of its decisions." *Id.* at 428, 252. Respondents allege "there have been **many** cases where the ALC, the Court of Appeals, and the Supreme Court have all addressed the procedural requirements of S.C. Code Ann. § 44-1-60 . . ." yet cite only two cases with no discussion of any factual similarities or distinctions from the case at bar. Resp. Initial Brief at 7 (emphasis added).

Here, Appellant *did* ask the Department *in writing* to be notified of applications or department decisions, and specifically tailored that request to septic permits for a particular tract of land, by virtue of its two Freedom of Information Act ("FOIA") requests. While the FOIA requests did not invoke the "magic words" Respondents claim it should have had, i.e., a citation to Section 44-1-60, it is clear that the statute does not require any level of formality other than the request be made "in writing."

Further, Respondents fail to recognize the impossibility of being recognized as an "affected person" for a department decision that is not currently pending or discoverable. Section 44-1-60 does not provide a mechanism for requesting notification of a department decision *regarding a particular piece of land*; it only provides a mechanism for requesting notification of a "department

decision[] involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of the department[.]" S.C. Code Ann. § 44-1-60(A). In other words, a would-be "affected person" cannot ask the Department to be notified of a department decision if none are pending. Here, if Appellant had done so on the date of its first FOIA request (July 19, 2021), the Department's response would have been that there are no pending department decisions involving Bay Point Island, because Respondent Bay Point Island, LLC did not submit a septic system application until August 31, 2021. In fact, counsel for Appellant has asked DHEC on other occasions to be notified of any agency decisions and has been told that the agency cannot provide notice if no application has been submitted and no decision is pending.[1]

The fact that undersigned counsel "has participated in hundreds of permit challenges and is surely aware of the process for affected parties to ask for notification of agency decisions" (Resp. Initial Brief at 9) is completely irrelevant where, as here, the Department has no process to allow for discovery of the pendency of an application. However, Respondents raise an important point: if a party represented by seasoned environmental attorneys cannot discover a permit that is never placed on public notice—how many other parties has this impacted and how many more times will DHEC exclude the public from its decision-making?

The Department clearly has taken the position that neither applications nor permits for individual septic systems, which process 1500 gallons of wastewater per day (gpd) or less, are subject to public notice requirements. Therefore, the only entities that have knowledge of such applications and permits are (1) the applicant; and (2) the Department. It follows, then, that "affected person" status was only available after the septic application was "pending" with the

[1] Counsel intends to file a motion to supplement the record to include newly-discovered evidence establishing that the Department's position in this litigation is directly contrary to the position it takes when an affected person attempts to receive notice of a decision prior to submission of an application.

Department—August 31, 2021—a date which Appellant could not have known. If an affected party cannot ask for notifications of department decisions unless and until an application is submitted and decision pending, and if third parties are completely excluded from learning about the existence of septic system applications and permits due to lack of public notice, how can an affected party ever appeal a department decision within fifteen calendar days of the staff decision?

A person's request to be notified of department decisions through means other than Section 44-1-60 is not a novel concept. For example, as discussed in Appellant's Initial Brief, our Supreme Court has held a third party's involvement in the permitting process—not a Section 44-1-60(E) request—rendered it an affected person that "was not an obscure or unknown party" to the Department. *S.C. Coastal Conserv. League v. S.C. Dep't of Health & Envt'l Control*, 390 S.C. 418, 428, 702 S.E. 2d 246, 252 (2010). The Court stated that "giv[ing] all parties equal opportunity to challenge a decision [] is consistent with the legislative purpose." *Id.* at 429, 252 (citing Act No. 387 § 53 ("This act is intended to provide a uniform procedure for contested cases and appeals from administrative agencies.")).

Respondents read "the language [added by the legislature to Section 44-1-60(E), i.e., that affected persons "may" request in writing "*to be notified by* regular mail or electronic mail in lieu of certified mail"] 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." Resp. Initial Brief at 8. This conclusion is misplaced, as the additional language applies to the form in which the affected person "may" request to be notified; it does not apply to the authority under which the request may be made.

Contrary to Respondents' characterizations, there is **no** clear and simple procedure for a member of the public that is concerned about development on a pristine barrier island to identify

which permits would be sought for development of that property and to time a request for notification such that it would capture a pending application. Appellant posits this hypothetical: An affected person, being concerned about the potential for development on Bay Point Island, fears there might be a large gated community developed on part of the island that has already been platted into multiple individual lots. Part of this development might include septic tanks but also might need other permits, such as a National Pollutant Discharge Elimination System (NPDES)[2] or land disturbance permit, or a Coastal Zone Consistency Certification.[3] Affected person has no way of knowing what the developer plans to do, despite monitoring the regular public notices that are published on DHEC's website for some (but clearly not all) applications. The affected person decides to request notification pursuant to Section 44-1-60 as the Respondents would direct them to do in order to protect their rights. Affected person has no public notice number or permit number to reference. How does the affected person know what to request and to whom? What if there is no pending application? Who would process such a request where there has been no public notice of an application (or no application submitted)? Respondents have no answers to these questions, only the defense that one procedure for public information gathering was followed to the exclusion of another.

Respondents claim that "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." Resp. Initial Brief at 8. This is wholly inaccurate. The "untimely" RFR was not the "failure"

[2] NPDES permits for construction are issued pursuant to the South Carolina Pollution Control Act (S.C. Code § 48-1-10, et seq.) and in accordance with the provisions of the federal Clean Water Act (33 U.S.C. § 1251, et. seq.).

[3] Coastal Zone Consistency Certifications are issued pursuant to the Coastal Tidelands and Wetlands Act, (S.C. Code Ann. § 48-39-10, et seq.) and the policies enumerated by the Coastal Management Program.

by the Appellant, but a failure by the Department to notify Appellant of a department decision despite repeated requests.

As discussed in Appellant's Initial Brief, the Supreme Court has held 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." *S.C. Coastal Conserv. League v. S.C. Dep't Health & Envt'l Control*, 390 S.C. 418, 429, 702 S.E.2d 246, 252 (2010). The Court did this to avoid "an absurd result not possibly intended by the legislature." *Id*. (citing *Hamm v. S.C. Pub. Serv. Comm'n*, 287 S.C. 180, 336 S.E.2d 470 (1985)).

Here, the Department failed to recognize Appellant as person who had requested to be notified of a department decision, and thus failed to provide Appellant with notice of its decision to issue the septic permit. Thanks to its own independent connections with a third party, and despite false information provided by the Department that no pertinent records could be located responsive to Appellant's FOIA requests, Appellant received actual notification of the department decision on October 27, 2021. Thus, in keeping with the holding in *S.C. Coastal Conserv. League*, the fifteen-day clock to appeal the department decision began on October 27, 2021, which Appellant abided by, filing its Request for Final Review on November 9, 2021.

II. The Administrative Law Court erred in finding a FOIA request can never serve as a request for notice under S.C. Code Section 44-1-60.

Contrary to Respondents' characterization of Appellant's FOIA requests as a distraction, (Resp. Initial Brief at 9), it is Respondents' arguments that are the distraction by simultaneously asserting that any unspecified request for notification is sufficient, while the highly specific FOIA request is not As stated above, Appellant's FOIA requests were sufficient to satisfy the simple "in writing" requirement of Section 44-1-60, thereby placing the Department on notice of Appellant's clear desire to obtain the information it was seeking regarding Bay Point Island—this is not an

"unreasonable assertion." Further, discussion of the FOIA requests is critical in painting a full picture for this Court, and in illustrating the utter lack of transparency in the Department's permitting regime for septic systems.

Both Respondents and the ALC assert that allowing FOIA requests to serve as a "substitution" for the procedure set forth in Section 44-1-60 "would be outside the stated purpose for which FOIA was created." Resp. Initial Brief at 9. This is in direct contradiction to the actual purpose and spirit of FOIA. Finding it "vital in a democratic society that public business be performed in an open and public manner," the South Carolina Legislature enacted FOIA in 1987 "so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity[.]" S.C. Code Ann. § 30-4-15. Here, the Department failed to accurately *and* timely disclose information in its possession to Appellant in contravention of its statutory mandate under FOIA, intentionally withholding public materials to which Appellant was legally entitled. Because of the Department's *additional* failure to recognize Appellant as an affected party by virtue of its FOIA requests, the "public business" of the Department was *not* "performed in an open and public manner" and the Appellant was unable to "be advised of the performance of public officials and of the decisions that are reached in public activity." Appellant recognizes that under some circumstances, such as where there is a public notice issued, a party could be charged with actual notice of a permit application and thus be charged with invoking Section 44-1-60. Clearly this is not that scenario.

All of this illustrates the active efforts Appellant took to obtain the information regarding septic applications and/or other permits on Bay Point Island through written notice on two separate occasions. Despite these requests, the Department never provided documents in its possession, nor treated the written request as one seeking notice of Department decisions, even though the

Appellant obviously sought both. For these reasons, Respondents' claim that it was Appellant's fault—not the state government agency—that it did not know the things it *could not have known* under the Department's flawed permitting regime for septic systems should be rejected.[4]

CONCLUSION

WHEREFORE, Appellant Gullah/Geechee Fishing Association respectfully requests that this Court reverse the Administrative Law Court's Order.

Respectfully submitted,

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[4] In their brief, Respondents provide some testimonial information about what normal practice is, information that is baseless and not in the record, conceivably because their Initial Brief is devoid of so much legal authority for their arguments. Resp. Initial Brief at 8, n.2.