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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.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

T. Tree Farms RV Park (Blue Sky Associates, LLC), Petitioner, 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., Respondents.	)	Docket No. 22-ALJ-07-0010-CC **ORDER ON MOTIONS TO DISMISS**

Appearances: Alexander G. Shissias, Esquire, for Petitioner

Mathew Richardson, Esquire and Carl F. Muller Esquire for Respondents Enclave at Fairview Homeowners' Association, Inc., Golden Hills of Fairview Homeowner's Association, Inc., Greenspace of Fairview, LLC, and North Pacolet Association, Inc.

Sara Martinez, Esquire for Respondent South Carolina Department of Health and Environmental Control

STATEMENT OF THE CASE

This matter is before the Administrative Law Court ("ALC" or "Court") pursuant to a request for contested case hearing filed by T. Tree Farms RV Park (Blue Sky Associates, LLC) ("Blue Sky" or Petitioner") challenging the decision of Respondent South Carolina Department of Health and Environmental Control ("DHEC" or "Department") to deny Blue Sky's application for an onsite wastewater system ("septic tank") permit. Blue Sky plans to construct a recreational vehicle park ("RV Park") in Spartanburg County, South Carolina; the wastewater system will supply the sewage needs of the proposed RV Park, allowing for up to 52 vehicle sewage hookups On or about June 22, 2021, DHEC staff of the Bureau of Environmental Health Services Division issued the septic tank permit to Blue Sky. Respondents Enclave at Fairview Homeowners' Association, Inc., Golden Hills of Fairview Homeowners' Association, Inc., Greenspace of

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Fairview, LLC and North Pacolet Association, Inc (collectively "Homeowners") filed a request for review ("RFR") with the South Carolina State Board of Health and Environmental Control ("Board") to review the staff decision to grant the permit. On or about January 12, 2022, after a final review conference, the Board overruled the staff decision and denied the septic tank permit. Blue Sky thereafter filed its request for contested case hearing with the ALC on January 14, 2022.

On or about April 13, 2022, Blue Sky filed a Motion to Dismiss Pursuant to SCALC Rules 23(B) and 68 and SCRCP Rule 12(b)(1). Respondent Homeowners filed a response to Blue Sky's Motion to Dismiss on April 25, 2022. Respondent Homeowners filed their own Motion to Dismiss on April 26, 2022, contending that the case should be dismissed pursuant to SCALC Rule 23(B) and SCRCP 12(b)(1). Blue Sky filed a responsive memorandum on May 6, 2022. On May 12, 2022, the Court convened a hearing on the motions at which time, all parties appeared, represented by counsel as indicated. The Department declined to take a position on either of the pending motions. On July 18, 2022, Blue Sky submitted additional legal authority to the Court in support of its position. The Homeowners provided additional memoranda on July 26, 2022 and July 29, 2022.

BACKGROUND

Blue Sky's proposed RV Park is to be located at 1970 Landrum Mill Road in Campobello, South Carolina. Respondent Homeowners represent groups of homeowners living in areas adjacent to the proposed RV Park. Based on the pleadings and memoranda filed, the following is a chronology of events pertinent to the resolution of this case**:**

- **April 23, 2021** – Blue Sky filed its permit application with DHEC for an onsite wastewater system.
- **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 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 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.

- **May 17, 2021** – In a reply email to Ms. Wallace, Mr. Vaughn acknowledged receipt of her May 14, 2021 FOIA request and indicated that he would forward it to the Department's FOIA office.
- **May 27, 2021** – Blue Sky filed an updated septic tank permit application in response to the Department's requests.
- **June 8, 2021** – Blue Sky electronically filed updated septic tank plans with the Department.
- **June 18, 2021** – Final septic tank plans delivered to the Department by Blue Sky's Engineer.
- **June 22, 2021** – DHEC's Bureau of Environmental Health Services issued the septic tank permit to Blue Sky.
- **October 14, 2021** – DHEC responded to the May 14, 2021 FOIA request submitted by Ms. Wallace and disclosed the septic tank permit issued to Blue Sky.
- **October 26, 2021** – Homeowners filed their RFR with Board.
- **December 20, 2021** – Board holds review conference with Blue Sky and Respondent Homeowners.
- **January 13, 2022** – Board issues final agency determination overruling the staff decision and denying Blue Sky's septic tank permit.

Both Blue Sky and the Homeowners cite SCALC Rule 23(B) and SCALC Rule 68, as well as SCRCP Rule 12(b)(1), in support of their motions. SCALC Rule 23(B), "Dismissal of Contested Case for Failure to Comply with Rules, states that:

> Upon motion of any party, or on its own motion, the Court may dismiss a contested case or resolve the contested case adversely to the offending party for failure to comply with any of the rules of procedure for contested cases, including the failure to comply with any of the time limits provided in these rules or by order of the Court.

SCRCP 12(b)(1) provides that:

> Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter.

Finally, SCALC Rule 68 provides that the South Carolina Rules of Civil Procedure, in the discretion of the presiding administrative law judge, may be used at the ALC to resolve questions not addressed by the Administrative Law Court rules.

Although both parties assert that the Court lacks jurisdiction under SCRCP Rule 12(b)(1), they complain about different steps in the administrative process. [1] Blue Sky maintains that the Homeowners failed to timely file their RFR to the Board to challenge the June 22, 2021 DHEC staff decision granting the permit. The Homeowners assert that Blue Sky's request for contested case hearing was insufficient to invoke this Court's jurisdiction.

Whether or not a court has jurisdiction to decide a case is a question of law. "The proper procedure for raising lack of subject matter jurisdiction prior to trial is to file a motion to dismiss pursuant to Rule 12(b)(1), SCRCP, rather than a motion for summary judgment pursuant to Rule 56, SCRCP." *Posey v. Proper Mold & Engineering, Inc*., 378 S.C. 210, 217, 399, 661 S.E.2d 395, 399 (Ct. App. 2008). Furthermore, "affidavits and other evidence outside the pleadings may, in certain circumstances, be considered in support of a motion to dismiss based on a lack of jurisdiction." *Baird v. Charleston County*, 333 S.C. 519, 528-529, 511 S.E.2d 69, 74 (1999). Because there is no rule under the Administrative Law Court Rules of Procedure comparable to SCRCP Rule 12(b)(1), this Court may apply SCRCP Rule 12(b)(1) pursuant to SCALC Rule 68.

I. Homeowners' Motion to Dismiss.

Because this case must be properly filed at the ALC, the Court will initially address the Homeowners' contentions that Blue Sky's case should be dismissed because Blue Sky failed to comply with certain procedural requirements. First, Homeowners assert that the case should be dismissed because Blue Sky named (and served) only the Department and Russell Rock as respondents before the ALC. [2] None of the Homeowners were listed as respondents in the Request

[1] The delicts raised by the parties should properly be characterized as challenges to this Court's procedural jurisdiction and not subject matter jurisdiction. Subject matter jurisdiction refers to a court's power to hear a particular kind of case. *Allison v. Gore & Associates*, 394 S.C. 185, 188, 714 S.E.2d 547, 549 ("A court's subject matter jurisdiction is determined by whether it has the authority to hear the type of case in question."). S.C. Code Ann. § 44-1-60-60(G) gives the ALC the authority to hear contested cases involving the issuance of permits by the Department. Procedural jurisdiction refers to whether the case has been properly brought before the court so that it may exercise jurisdiction. *See FA Logic SC, LLC d/b/a FA Logic v. S.C. Dep't of Revenue*, Docket No. 19-ALJ-17-0002-CC, 2020 WL 1166875 (S.C. Admin. Law Ct. March 3, 2020).

[2] Russell Rock was identified in the DHEC cover letter communicating the Board decision as the Secretary of Golden Hills of Fairview Homeowners Association, Inc. Blue Sky's actual Request for Contested Case Hearing form, however, did not list Mr. Rock's representative capacity, only that he was being served as

for Contested Case Hearing form filed by Blue Sky. Homeowners allege that these omissions are fatal to Blue Sky's action. The Court must disagree. [3]

Homeowners cite SCALC Rule 11(B) which states, in pertinent part, that "[a] copy of the request [for contested case hearing] must be served on each party and on the affected agency or county official…" (Emphasis added). When the party is a corporation, Rule 4(d)(3), SCRCP, allows service "by delivering to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process…" [4] Here, Russell Rock was identified as the Secretary for the Golden Hills of Fairview Homeowner's Association (Golden Hills) in the Homeowners' collective RFR to the Board and he is listed at the bottom of the signature page as the "contact person", presumably on behalf of all of the Homeowners. Moreover, Mr. Rock was identified as acting for Golden Hills in the Homeowners' separate efforts to challenge the permit locally through their county zoning commission. [5] The Court finds that although Blue Sky did not directly serve all possible parties to the action, it made sufficient service on the Department and Golden Hills to avoid dismissal for the proffered reason.

If a litigant initiates its case against a proper respondent at the ALC, the fact that there are other respondents who could have been named in the case, but who were not, is not such a fatal defect that the Court should dismiss a case for a lack of procedural jurisdiction. In such a situation, the Court may simply add the omitted entities who wish to participate as parties as needed for a fair and complete adjudication of the issues. Here, even if not initially named and served as parties to the contested case hearing, the Court may add the other Homeowners as respondents because the case was properly initiated against the Department and Golden Hills.

"Russell Rock." Given the Board decision – which listed all of the Homeowners – the ALC Clerk's Office interpreted Blue Sky's request as naming the Department and Golden Hills of Fairview Homeowners Association, Inc., as Respondents. At some point, Mr. Rock filed a motion to dismiss which the Court returned to him as he was not a named party.

[3] For the purposes of their motion, the Court has assumed, without deciding, that the Homeowners are "affected persons."

[4] The South Carolina Secretary of State's Office website identifies a "Sally S. Rock" of 255 Night Lark Lane, Campobello, SC, as the registered agent for Golden Hills of Fairview Homeowners Association, Inc. Ms. Rock is a member of the California State Bar; the Court granted her petition for pro hac vice in this case on July 19, 2022.

[5] The Homeowners filed an Application for Appeal with the Spartanburg County Planning and Development Department contesting an approval issued to Blue Sky for the RV Park. That document also identifies Mr. Rock as "Secretary, GHHAOS, 255 Night Lark Ln, Campobello, SC 29322."

The addition of the other Homeowners as parties, cannot, however, happen involuntarily at this point in the proceedings. Blue Sky had thirty days after the Board decision to file its request for contested case hearing with the Court and to serve opposing parties. It only served the Department and Golden Hills within this time frame. The question that must be addressed is whether the remaining Homeowners are indispensable under Rule 19, SCRCP, such that without these entities as parties, the action must be dismissed. In pertinent part, Rule19, SCRCP, provides:

> a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.
>
> (b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

"[I]f the party is not indispensable under Rule 19(a), then the considerations listed in SCRCP 19(b) are never reached." *Stewart v. State Crop Pest Com'n*, 307 S.C. 133, 139, 414 S.E.2d 121, 125 (1992). Pursuant to Rule 19(a), a party is indispensable if: (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. Here, the other Homeowners are not indispensable

parties under SCRCP 19(a). This case involves the issuance of a septic tank permit. The Court believes that complete relief can be afforded among the entities already parties to the action – Blue Sky as the applicant, Golden Hills in opposition to the permit, and the Department as the issuing agency. The ability of Golden Hills to seek revocation of the permit issued to Blue Sky is not dependent on inclusion of the omitted Homeowners' associations, and the absence of the other Homeowners as parties does not ultimately preclude complete relief from being obtained in the action.

Finally, consideration of the second prong of the Rule 19(a) test mitigates toward Blue Sky. While the other Homeowners arguably "claim an interest relating to the subject of the action," the test requires that these entities be "so situated that the disposition of the action in their absence may as a practical matter impair or impede their ability to protect that interest." The interests of the other Homeowners are aligned with Golden Hills such that they are adequately protected by Golden Hills' presence. Furthermore, nothing prevents these entities from voluntarily joining the case as parties or participating as witnesses supporting Golden Hills.

To the extent the Homeowners' argue that service of the request for contested case hearing on Russel Rock in his capacity as Secretary of Golden Hills was insufficient because it was served by certified mail, restricted delivery, this argument must also fail. In pertinent part, SCRCP Rule 4(d)(8) specifies that "[s]ervice of a summons and complaint upon a defendant of any class referred to in paragraph (1)[individuals] or (3) [corporations] of this subdivision of this rule may be made by the plaintiff or by any person authorized to serve process … by registered or certified mail, return receipt requested and delivery restricted to the addressee." The method of service by mail at the ALC, however, is less exacting. SCALC Rule 5 addresses service and states that " [s]ervice shall be made by actual delivery, by mail to the last known address, or as otherwise approved by the Court through administrative order." (Emphasis added). According to Blue Sky's Certificate of Service filed with its Request for Contested Case Hearing form, Mr. Rock was served by U.S. Mail at 255 Night Lark Lane, Campobello, SC 29322. The ALC rule contains no requirement that service by mail be sent registered or by certified mail, restricted delivery. The 2021 Revised Notes to SCALC Rule 5 indicate that service by mail at the ALC is broader than under SCRCP Rule 5 by stating that "[a]ny service that satisfies Rule 5, SCRCP, also satisfies this [SCALC] Rule." Accordingly, the manner of service on Russell Rock was sufficient.

The remaining procedural jurisdiction argument to be addressed is whether Blue Sky's Notice of Appeal itself is insufficient because, as posited by the Homeowners, it did not set forth relief requested as required under SCALC Rule 11(D)(4).[6] The Court rejects this contention, as well. In answer to the prompt, "please provide a brief statement regarding why the hearing is sought and relief sought," contained on the Request for Contested Case Hearing form, Blue Sky wrote: "DHEC Board lacked jurisdiction to consider an untimely filed request for RFR on the merits; the staff decision had become the final agency decision 15 days after mailing on July 7, 2022 [2021]. In the alternative, the Board erred in reversing staff's decision to grant Petitioner's septic tank permit."

The Court believes that this statement adequately conveys that Blue Sky is seeking reversal of the Board's decision to deny the septic tank permit at issue for the reason set forth – the RFR was untimely filed. In the alternative, Blue Sky requests a hearing on the merits which it contends would show that the permit should be granted.

In their July 29, 2022 submission to the Court, the Homeowners offer the new argument that the time frames under § 44-1-60(E) are not applicable because the Board, in rescinding Blue Sky's septic tank permit, exercised its authority under the Pollution Control Act, S.C. Code Ann. § 48-1-100, et al. (PCA). The Board decision cites the PCA as the basis for its jurisdiction in matters concerning septic tanks: "Pursuant to 48-1-100(C), DHEC is the state agency with jurisdiction over septic tanks." [7] Relying on § 48-1-100(C) for the proposition that the proposed Blue Sky septic tank constituted "real or potential threats to the health of the people of South Carlina, the Homeowners assert that S.C. Code Ann. § 48-1-50(5), empowered the Board to rescind the permit:

> Issue, deny, revoke, suspend or modify permits, under such conditions as it may prescribe for the discharge of sewage, industrial waste or other waste or air contaminants or for the installation or operation of disposal systems

[6] Under the SCALC Rules in effect when Blue Sky filed its request for contested case hearing, this Rule was denominated as SCALC Rule 11(D)(3).

[7] Section 48-1-100(C) reads:

> The Department of Health and Environmental Control is the agency of state government having jurisdiction over those matters involving real or potential threats to the health of the people of South Carolina, including the handling and disposal of garbage and refuse; septic tanks; and individual or privately owned systems for the disposal of offal and human or animal wastes.

> or sources or parts thereof; provided, however, that no permit shall be revoked without first providing an opportunity for a hearing;

Generally, the Homeowners are correct that the Department has broad authority under the PCA. "[W]here an administrative agency such as DHEC is acting for the protection of the health and welfare of the public, the delegation of authority to that agency should construed liberally." *City of Columbia v. Bd. of Health & Env't Control*, 292 S.C. 199, 202, 355 S.E.2d 536, 538 (1987)). However, the Homeowners' argument here is misplaced.

The Homeowners seek to bypass the specific procedures contained in S.C. Code Ann. § 44-1-60 for Board review of matters pertinent to the issuance, denial, renewal or revocation of permits and licenses. While the Department has jurisdiction over septic tanks under the PCA, in the context of a third party challenging the issuance of a septic tank permit, the Board must still adhere to the procedural requirements of § 44-1-60 to give effect to that jurisdiction. [8] The Board decision itself recites that § 44-1-60 is the statutory procedure invoked: "This matter comes before the South Carolina Board of Health and Environmental Control for final review pursuant to S.C. Code Ann. § 44-1-60." Moreover, the Homeowners' contention that § 44-1-60 does not apply to actions under the PCA would work to impliedly repeal § 44-1-60. There is absolutely no evidence that the General Assembly intended such a result. Instead the Court must read § 44-1-60 and the PCA together. *See City of Rock Hill v. South Carolina Dept. of Health and Environmental Control*, 302 S.C. 161, 167, 394 S.E.2d 327, 331 (1990)("Repeals by implication are not favored by courts and to repeal a statute on account of an asserted conflict or repugnancy with another, 'the repugnancy must not only be plain, but the provisions of the two statutes must be incapable of any reasonable reconcilement; for if they can be construed so that both can stand, the Court will so construe them.'(citing *Pearson v. Mils Manufacturing Co*., 82 S.C. 596, 509, 64 S.E. 407, 409 (1909)) Compliance with § 44-1-60 was thus, a prerequisite to invoking the Board's review of the septic tank permitting decision.

Accordingly, the Homeowners' Motion to Dismiss is **DENIED**.

II. Blue Sky's Motion to Dismiss

[8] This matter is distinct from the Department's enforcement powers under the PCA to issue administrative cease and desist orders, seek civil damages, and in some instances, recommend criminal charges, against violators. *See* S.C. Code Ann. §§ 48-1-90, 48-1-130, 48-1-310- and 48-1-330.

Blue Sky argues that this Court must grant its Motion to Dismiss because the Homeowners' RFR was not filed with the DHEC Board in a timely manner. Subsections (E)(1) and (2) of S.C. Code Ann. § 44-1-60 provide as follows:

> (E)(1) Notice 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. Affected persons may request in writing to be notified by regular mail or electronic mail in lieu of certified mail. Notice of staff decisions for which a department decision is not required pursuant to subsection (D) must be provided by mail, delivery, or other appropriate means to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified.
>
> (2) The 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, licensee, or affected person.

Blue Sky points out that the Department issued the septic tank permit on June 22, 2022, and that this date triggered the fifteen (15) day window for filing an RFR. It further contends that the staff decision to issue the permit became a final decision on July 7, 2022, meaning that the opportunity to file a RFR closed. The Homeowners' filing of an RFR on October 26, 2021 was thus, too late so that the Board should not have granted the Homeowners a forum to challenge the septic tank permit. Nonetheless, the Board did conduct a final review and decided that the septic tank permit was issued improperly. [9]

The Homeowners dispute that their RFR was filed beyond the time period provided by statute. Instead, they assert that the time for them to file an RFR did not actually begin until the Department provided a copy of the septic tank permit as part of its FOIA disclosure to Ms. Wallace on October 14, 2021. The Homeowners filed their RFR on October 26, 2022, twelve days after receipt of the permit.

The Homeowners' argument is predicated upon their contention that the FOIA request submitted by Ms. Wallace on May 14, 2021, was sufficient to put the Department on notice that

[9] The Board rescinded the septic tank permit because the application relied upon consumption data from a campground that was not comparable to that proposed by Blue Sky. Although the Board's written decision did not discuss timeliness of the RFR, the Homeowners offer the issue was vigorously argued by both parties. The decision notes the date the septic tank permit was issued and the date the RFR was filed which indicates the Board was aware of the timeliness issue and still chose to consider the merits of the case.

the Homeowners were affected persons within the meaning of § 44-1-60(E). As recited earlier, Ms. Wallace's May 14, 2021 FOIA request asked for "all documents concerning a proposed recreational vehicle park ("RV Park") to be located at or near 1970 Landrum Mill Road, Campobello, SC, in Spartanburg County, Block Map Reference #1-09-00-020.03. You may confine your search from September 20, 2020 though the date of your response. The RV Park may be listed under one or more of the following names or a derivative of such names: T. Tree RV Park, T. Tree Farms RV Park, …" Pursuant to the FOIA statute, the response date for Ms. Wallace's FOIA request was June 27, 2021; however, no responsive documents were submitted until October 14, 2021. The septic tank permit was issued to Blue Sky on June 22, 2021, five days before the Department should have responded to the FOIA request.

S.C. Code Ann. § 44-1-60(E) does not explain how to become an "affected person" except that "affected persons" are those "who have requested in writing to be notified" and that affected persons "may request in writing to be notified by regular mail or electronic mail in lieu of certified mail." § 44-1-60(E)(1),(2). The statute also fails to identify the area within the Department that such a request for affected person status should be directed. [10]

The question before this Court then, is whether Ms. Wallace's FOIA request can be considered sufficient to establish her as an affected person for purposes of § 44-1-60. Blue Sky cites a recent ALC decision, *Gullah/Geechee Fishing Association, Inc. v. South Carolina Department of Health and Environmental Control, and Bay Point Island, LLC,* 22-ALJ-07-0080-CC)(S.C. Admin. Law Ct. July 15, 2021), in support of its position that a FOIA request does not equate to a request for affected person status under § 44-1-60. The facts in *Bay Point* are remarkably similar to the instant case. There, on August 31, 2021, Bay Point Island, LLC (Bay Point) submitted an application to the Department for a septic tank system to serve a single residential dwelling. Previously, on or about July 19, 2021, Gullah/Geechee Fishing Association, Inc (Gullah) filed a FOIA request to the "Bureau of Water, OCRM [Ocean & Coastal Resource Management]" within the Department for "any and all applications and file documents for NPDES

[10] It is noteworthy, however, that the Wallace FOIA request was emailed to "David Vaughan, Director of Onsite Wastewater Management for SC." Although Mr. Vaughan's signature block indicates that he is with DHEC's "Legislative Affairs" office, during the motions hearing there was the indication that Mr. Vaughan had some responsibility for the Bureau of Environmental Health Services, the Department section which issues septic tank permits. Further the Homeowners apparently met with Mr. Vaughn at some point in August 2021 and September 2021 concerning matters related to the proposed RV Park.

[National Pollutant Discharge Elimination system] or land disturbance permits for Bay Point Island, likely submitted by Bay Point Island, LLC or for any request or file document relating to a Coastal Zone Consistency Certification for Bay Point Island, LLC." On August 3, 2021, and again, on August 31, 2021, the Department responded that it had no documents related to septic tank applications. Gullah filed a second FOIA request on August 31, 2021 which specifically sought "any applications for permits or permits issued by DHEC for septic tanks or land disturbance permits or coastal zone consistency certifications…We are also seeking specifically septic tank applications in addition to any other NPDES permits." The Department issued a septic tank permit to Bay Point on September 23, 2021. Nonetheless, the Department's FOIA response on October 20, 2021 continued to deny it had the requested documents. Gullah did not become aware of the permit's issuance until October 27, 2021; it filed a RFR with the Board on November 9, 2021. The Board declined to conduct a review hearing and Gullah subsequently filed for a contested case hearing at the ALC.

Gullah argued that its FOIA requests were sufficient to achieve affected person status for the purposes of § 44-1-60(E) and further maintained that had DHEC provided accurate FOIA responses within the statutory deadlines, it would have had the information to file a RFR in a timely manner. The presiding Administrative Law Judge, however, declined to allow the FOIA requests to serve the purpose advocated by Gullah.

Several reasons supported the ALC decision in *Bay Point*. First, allowing Gullah to rely upon a FOIA request to establish affected person status would ignore the procedure providing for such status spelled out in § 44-1-60(E)(1) which plainly states that "affected persons may request in writing to be notified by regular mail or electronic mail in lieu of certified mail." Furthermore, despite there being a plain and straightforward procedure set forth in the statute, Gullah never availed itself of that procedure, and instead sought information only through FOIA without mentioning "affected person" under § 44-1-60. The ALC pointed out that allowing the use of FOIA in the manner asserted by Gullah would be inconsistent with the procedure established by the General Assembly to gain such status under § 44-1-60. In addition, the ALC noted that violations of FOIA are handled in the circuit court and not the ALC so that it would be improper for the ALC to attempt to fashion a FOIA remedy by excusing the requirements of § 44-1-60. Finally, the ALC pointed out that even if Gullah's reliance solely on FOIA was not unreasonable, the FOIA requests

themselves were inadequate inasmuch as the first FOIA request was sent prior a septic tank application having been filed and both requests were sent to the "wrong Department division."

The logic of the *Bay Point* decision would seem to compel the same result here. Inasmuch as the septic tank permit was issued to Blue Sky on June 22, 2021, and the Homeowners' RFR was not filed until October 26, 2021, it is apparent that the Homeowners missed the fifteen day window of opportunity to make a proper request for RFR. *See* S.C. Code Ann. § 44-1-60(E)(2)("The 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, licensee, or affected person.") However, both parties have cited appellate cases which give the Court some reservations such that additional analysis is necessary.

In *South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control, et al*., 390 S.C. 418, 702 S.E.2d 246 (2010), the South Carolina Supreme Court evaluated whether the Coastal Conservation League (League) was an affected person under § 44–1–60 with regard to the issuance of certain permits to the States Ports Authority (Ports Authority) and the Department of Transportation (DOT). DHEC issued a final permit to the Ports Authority on November 2, 2006; the permit to DOT was issued on November 13, 2006. The Ports Authority filed a RFR with the Board on November 13, 2006 to seek clarification. *Id*., 390 S.C. at 248-249, 702 S.E.2d at 422. Notice that the permits had been issued had not been provided to the League, and on November 17, 2006, its counsel contacted DHEC to determine their status. A DHEC employee sent an email in reply "making it plain that DHEC was aware of the League's involvement and desire to be notified on the agency decision" and further stating that "you all were on the mailing list and should have received a copy." *Id*., 390 S.C. at 249, 702 S.E.2d at 422. The League was provided notice of the permits on November 20 and filed its RFR regarding the Ports Authority permit that same day. The League filed its RFR concerning the Department of Transportation Permit on November 30, 2006. Significantly, "the League filed its RFRs of the DHEC staff decisions regarding SPS's and DOT's permits more than fifteen days after the staff decisions were mailed to SPA and DOT – the applicants – but within fifteen days of the League receiving notice of the decisions." *Id*. Before the Board, DHEC argued that the League's RFRs were untimely; the Board ruled that the RFRs were timely and, on the merits, of the case, upheld the issuance of the permits. *Id*.

The ALC found that the League's RFRs were untimely, ruling "that the League had a statutory right to request to be notified of the decision and there was no evidence that the League filed a request to be notified of the decision per section 44-1-60(E)." *Id*., 390 S.C. at 423-424, 702 S.E.2d at 249. On appeal, in upholding the ALC, the South Carolina Court of Appeals found that the "League failed to request notification of the staff decision as delineated in Section 44-1-60(E)". *Id*.

The South Carolina Supreme Court, after noting that "the statute [44-1-60(E)] is not clear as to how an individual or entity acquires the status of "affected persons who have asked to be notified," [11] observed the following:

> The ALC and the court of appeals found that the League failed to avail itself of the right to be notified under § 44–1–60(E) because the League failed "to make a formal request to be notified of a decision" and "failed to request notification of the staff decision as delineated in section 44–1 60(E)." We believe the November 17th email acknowledgement by DHEC refutes the suggestion that the League failed to request to be notified of the agency decision.
>
> In our view, the ALC's and the court of appeals' foray into the degree of "formality" needed for § 44–1–60(E) "affected person" status is not necessary for deciding this appeal. DHEC's concession that the League was on the "mailing list and should have received a copy [of the permit decision]" is sufficient for purposes of acquiring "affected person" status. Therefore, given DHEC's concession, we hold the League had asked to be notified of the DHEC staff decision on the permits.

Id., 390 S.C. at 427-428, 702 S.E.2d at 251.

The quoted language from *Conservation League* raises at least two points pertinent to the resolution of the instant case. First, the ALC found that the League had made no formal request to be notified under § 44-1-60(E). Nevertheless, based upon the DHEC email acknowledging that the "League was on the mailing list and should have been notified" the Court rejected the ALC's rationale for not considering the League to be an affected person. *Id*. Secondly, the Supreme Court eschewed the degree of "formality" the ALC and Court of Appeals believed to be necessary to request for affected person status, emphasizing "that throughout the permit application process in

[11] Section 44-1-60(E) has been amended since *Coastal League* to read "affected persons who have requested in writing to be notified."

this matter, the League was not an obscure or unknown party. The League has been involved in this particular permitting process from the beginning." *Id.* [12]

Since *Coastal Conservation*, § 44-1-60(E) has been amended to require that an affected person make a written request to the Department in order to gain that status. The current version of the statute does not, however, define the content of such a written request, [13] and as mentioned earlier, also does not tell an affected person where within the Department such a request is to be filed. The Homeowners argue that there was compliance with this element through Ms. Wallace's written FOIA request. Ms. Wallace's written request – "for all documents concerning a proposed recreational vehicle park" at or near 1970 Landrum Mill Road: – was certainly broad enough to encompass septic tank permits, as well as any applications for such permits. [14] Furthermore, she submitted the request to the Department division responsible for issuing septic tank permits and received a response from its chief acknowledging receipt. In the May 14, 2021 email to Mr. Vaughn accompanying her FOIA request, Ms. Wallace also explained that "Among other things there are serious concerns about the waste that would be channeled to Gold Mine Creek that feeds into the North Pacolet River and runs thru a residential development."

In *Coastal Conservation*, in the absence of a finding that a formal request for affected person status was made to the Department, the Supreme Court placed emphasis on the League's involvement in the permitting process. In response to the public notice issued at the Department's receipt of the disputed permit applications, the League submitted comments to the proposed permits during the comment period. In addition, the League participated in public hearings. These factors, even in the absence of a formal request for affected person status, coupled with the Department's aforementioned acknowledgments of the League's involvement, lead the *Coastal*

[12] The League attended public hearings held pursuant to the Department's public notice requirements and submitted written comments during the public comment period. *Id*., 390 S.C. at 422, 702 S.E.2d at 248.

[13] While it is reasonable that a person who wishes to request affected person status under § 44-1-60(E) would use the language "affected person" in his or her request to the Department, the absence of such a specific requirement in the statute suggests that a person may make a sufficient affected person request without articulating those exact words.

[14] In noting that the septic tank permit had not yet been issued at the time of the FOIA request, Blue Sky argues that FOIA requires the disclosure of documents in an agency's current possession, not documents that the agency may produce in the future. The efficacy of this contention is undermined here where the septic tank application filed by Blue Sky was certainly in the Department's possession at the time Ms. Wallace filed her FOIA request. Had the Department properly responded to the May 14, 2021 FOIA request, the Homeowners would have at least obtained the septic tank application.

Conservation Court to find that the League was an affected person within the meaning of § 44-1-60(E). *Id.*, 390 S.C. at 428, 702 S.E.2d at 251.

Here, accepting their allegations as true, the involvement of the Homeowners thereof, is not as pronounced in the permitting stage as was the League's participation in *Coastal Conservation*. Blue Sky submitted its septic tank application to the Department on April 13, 2021. Ms. Wallace filed her FOIA request on May 14, 2021. Although the FOIA request was sent to the division responsible for issuing septic tank permits, other than the vague reference to "waste" in the accompanying email, there is no evidence that Ms. Wallace or the Homeowners wanted information specifically related to septic tank permits. [15] At the motions hearing, Homeowners suggested that they made inquiries of the Department after submitting the FOIA request regarding septic tank permits but were told no permit had been issued. These inquiries, however, apparently occurred after the June 22, 2021 issuance date of the permit to Blue Sky. In the Homeowners' pre-hearing statement filed with this Court, they allege that "after the permit was issued on June 22, 2021, DHEC provided inaccurate information. In multiple phone inquiries initiated by members of Respondent HOAs, the DHEC staff repeatedly stated that "no permit" had been issued." [16] At

[15] It is the specificity of a request under §44-1-60 (E)(1) that differentiates it from a general request for documents through FOIA. As alluded to earlier, while there are no magic words to trigger affected person status, the Department also cannot be expected to grope in the dark. It is the degree and specificity of the concern communicated to the Department about some permitting decision that places the requestor in the class of affected persons and puts the Department on notice that he seeks such status.

[16] The Homeowners indicated during the motions hearing that a Circuit Court had enjoined further development of Blue Sky's RV Park. The circuit court case file in The Enclave at Fairview Farm Homeowners Association, Inc., et al. v. Spartanburg County, SC, et al., Case No. 2021-CP-42-02713, filed in the Spartanburg County Court of Common Pleas on or about August 19, 2021, is available to the Court on the Spartanburg County Seventh Judicial Circuit Public Index at https://publicindex.sccourts.org/Spartanburg/PublicIndex/CaseDetails.aspx?County=42&CourtAgency=42002&Casenum=2021CP4202713&CaseType=V&HKey=1076590116878771118491046610911065971128581109431111098511552774710866906976835481985550881118649 48. In an exhibit to documents filed in the Circuit Court case, the Homeowners included an "Application for Appeal" to the Spartanburg County Planning & Development Commission, dated July 12, 2021. That exhibit contains a pleading entitled "Appeal of the Planning and Development Commission's Conditional Approval of T Tree Farms RV Park" which references a March 2, 2021 Conditional Approval issued by the Commission to allow Blue Sky to develop and operate the RV park. This same pleading states that "[o]n or about March 16, 2021, Madelon Wallace received a message from a third party that the Commission had granted conditional approval of a commercial RV Park at 1970 Landrum Mill Road." The Conditional Approval, dated March 3, 2021 and included in the Circuit Court case file, was made contingent upon Blue Sky showing that it had obtained approvals from a number of Spartanburg County entities, approval of an architectural design package, water systems and a septic tank permit from DHEC. This pleading continues to make reference to the Homeowners having attended public Commission meetings to complain about the Conditional Approval, the earliest of which was April 2021; however, there is no indication that a representative from

no point have the Homeowners suggested that they were given false information about the status of the permit prior to its issuance or during the fifteen day period between issuance and July 7, 2021. While this Court does not countenance a state agency providing inaccurate information to the public, it is apparent that this alleged inaccurate information did not cause the Homeowners' failure to submit a timely request for affected person status regarding Blue Sky's permit. [17]

Both Blue Sky and the Homeowners cite *Pickens County v. South Carolina Department of Health and Environmental Control*, et al., 435 S.C. 99, 866 S.E.2d 537 (2021), a case involving landfill permits, in support of their respective positions. Blue Sky asserts *Pickens County* stands for the proposition that the time to request an RFR under § 44-1-60(E) begins to run upon the mailing of the staff decision to the permittee, not upon receipt of actual notice of the decision by an affected person. The Homeowners assert that the case affirms the rationale of *Conservation League* with regard to both the amorphous nature of achieving "affected person status" under § 44-1-60(E) and disavowal of the formality of an affected person status request. This Court believes the Supreme Court's decision in *Pickens County* could actually support both parties' positions in this case. Based on the record, however, the result in *Pickens County* compels the Court to grant Blue Sky's Motion to Dismiss.

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the Department was in attendance. While the Homeowners acknowledge public opposition to Blue Sky's development as early as April 2021, they have provided no indication that opposition to any septic tank permit was voiced to the Department at any time prior to the septic tank permit being issued. This is far different from the circumstances present in *Conservation League* where the League actively participated in Department public hearings and submitted written comments to the Department prior to the issuance of the permits.

[17] The Homeowners' also offered the following allegation in their pre-hearing statement:

> In fact, for several month, various members of the DHEC staff discussed the May 14 FOIA request repeatedly with at least 4 members of the Respondent HOAs and their hydrogeologist in person, in a video teleconference, and in emails. The DHEC staff had actual knowledge that the FOIA request and other inquiries were connected with Respondent HOAs.

The pre-hearing statement further makes mention of an in-person meeting with Department personnel on August 4, 2021 and a videoconference on September 30, 2021. These dates are after the issuance of the septic tank permit to Blue Sky. Moreover, it is significant that Ms. Wallace did not exercise available remedies under FOIA and file suit in a circuit court to force the Department to disclose. S.C. Code Ann. 30-4-100 ("A citizen of the State may apply to the circuit court for a declaratory judgment, injunctive relief, or both, to enforce the provisions of this chapter in appropriate cases if the application is made no later than one year after the date of the alleged violation or one year after a public vote in public session, whichever comes later.")

In *Pickens County*, the South Carolina Supreme Court again construed § 44-1-60(E)'s phraseology "Notice 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." In 2007, the County of Pickens, South Carolina (County) entered into agreements with MRR Pickens, LLC to allow the operation of a Class Two landfill. DHEC issued a Class Two Landfill permit to MRR Pickens which authorized it to accept certain types of low level waste. More harmful wastes such as municipal and industrial solid waste were not authorized to be stored in a Class Two landfill. The County did not file a request in writing to DHEC to be notified as an affected person of future decisions related to MRR's landfill permit. *Id*., 435 S.C. at 102-103, 866 S.E.2d at 538-539.

In 2015, MRR applied to DHEC for a "minor permit modification" that would allow it to install a liner required for Class III landfills that accept more harmful waste. Because the modification was characterized as "minor", no public notice of the application was required to be published. [18] DHEC issued the modified permit to MMR on August 10, 2015. *Id*. The County did not learn of the permit until December 2015 and it received a copy of the same from DHEC on January 11, 2016. *Id*. The County filed its request for an RFR on March 23, 2016. The DHEC Board declined to review the case. *Id*.

After the County filed for a contested case hearing, the ALC granted MRR's motion to dismiss based upon the untimely submitted RFR. *Id*., 435 S.C. at 103-104, 866 S.E.2d at 538. On appeal, the South Carolina Court of Appeals reversed based upon the ALC's failure to determine whether MRR misclassified the modification as "minor" and whether the Department had followed public notice requirements. *Id*. On certiorari, the Supreme Court reiterated that under § 44-1-60(E) the fifteen day time period for an affected person to request board review begins on the date the staff permitting decision is mailed to the applicant and not when the affected person receives actual notice of the decision. *Id*., 436 S.C. at 105, 866 S.E.2d at 540. The *Pickens County* ruling thus undermines the Homeowners' arguments that their time period for requesting a RFR did not begin until the actual receipt of the permit through the FOIA disclosure in October 2021. Here, Blue Sky's septic tank permit was mailed to it on June 22, 2021. The fifteen day period to request Board

[18] *See* S.C. Code Ann. § 44-1-60(B) which provides that "The department staff shall comply with all requirements for public notice, receipt of public comments and public hearings before making a department decision. To the maximum extent possible, the department shall use a uniform system of public notice of permit applications, opportunity for public comment and public hearings."

review under § 44-1-60(E) began to run at that time and ended on July 7, 2021. The Homeowners' RFR was not filed until October 26, 2021, and as such, without more, was not timely.

However, *Pickens County* also stands for the proposition that the Department must adhere to any public notice requirements regarding applications for permits. The *Pickens County* Court remanded the case to the ALC to make the factual determinations whether the landfill permit was actually "minor" and, whether public notice provisions were followed. *Id*., 435 S.C. at 107-108, 866 S.E.2d at 541. Applications for "minor" permit modifications did not require notice to the public. To the contrary, applications making major landfill modification did require public notice. As articulated by the Court of Appeals:

> The filing deadlines of § 44-1-60 are contingent upon DHEC's compliance with the procedural and notice requirements of its own regulations. See e.g., S.C. Code Ann. § 44-1-60(B) ("The department staff shall comply with all requirements for public notice, receipt of public comments and public hearings before making a department decision. To the maximum extent possible, the department shall use a uniform system of public notice of permit applications, opportunity for public comment and public hearings."). Our supreme court reiterated this in *South Carolina Coastal Conservation League v. South Carolina Department of Health & Environmental Control*, 390 S.C. 418, 702 S.E.2d 246 (2010), in which the Coastal Conservation League sought review of a critical area permitting decision more than fifteen days after DHEC issued the staff decision. DHEC failed to notify the Coastal Conservation League as required by statute; thus, the time limitations for review did not start to run until DHEC corrected its notice error. Id. at 430, 702 S.E.2d at 253. The plain language of § 44-1-60(A) supports this conclusion here as well: "All department decisions involving the issuance, denial, renewal, suspension, or revocation of permits ... shall be made using the procedures set forth in this section." The procedures in § 44-1-60 particularly emphasize public notification, as reflected in § 44-1-60(B). Only after DHEC issues a staff decision in compliance with the procedural and notice dictates of its own regulations and of § 44-1-60 subsections (A) through (E), does subsection (E)(1) trigger the fifteen day deadline for an appeal of the decision to the DHEC Board.).

Pickens County v. South Carolina Department of Health and Environmental Control, et. al., 429 S.C. 92, 104, 837 S.E.2d 743, 749 (Ct. App. 2020) (Emphasis added).

Although it vacated certain findings of fact entered by the Court of Appeals and remanded the case to the ALC, the Supreme Court approved of the Court of Appeals' rationale regarding notice:

> The ALC must determine on remand whether DHEC properly classified the Permit Modification as a minor modification. [] Only after resolving that

> question can the ALC determine whether the County's request for a contested case hearing was untimely under subsection 44-1-60(E)(2). On remand, the parties may conduct discovery on relevant issues, and the ALC should consider the County's request to intervene on behalf of the neighboring landowners. If the ALC upholds DHEC's classification of the Permit Modification and concludes DHEC complied with all notice requirements, the fifteen-day limitations period began running on August 10, 2015, and the County's challenge should be dismissed. If the ALC determines the Permit Modification was major and DHEC did not fulfill its notice requirements, then the fifteen-day limitations period has not started. (Emphasis added).

Pickens County, 435 S.C. at 107-108, 866 S.E.2d at 541.

While it may seem incongruous given the size of the proposed RV Park at issue here, the Court has not found public notice requirements in either statute or regulation attendant to the Department's issuance of septic tank permits.[19] During the hearing on Blue Sky's Motion, counsel for the Department informed the court that no public notice requirements existed for septic tank applications. Further, the Homeowners have not pointed to any public notice requirements with which the Department was supposed to comply. Therefore, because the Department has not violated § 44-1-60(B), the fifteen day period to file a RFR of the staff decision to grant the permit began on June 22, 2021 and ended on July 7, 2021. The Homeowners' RFR was filed on October 26, 2021 and is thus, untimely.

Under § 44-1-60, the General Assembly clearly set forth a procedure by which the Board could review and take up matters pertinent to the issuance, denial, renewal or revocation of permits, licenses, or other actions. Namely, this statutory provision allots a window of time for affected parties to invoke the authority of the Board before DHEC staff decisions regarding permitting become final. After this window has closed, any action by the Board to review staff decisions is outside of its jurisdiction and void. *See Knight Pub. Co. v. Univ. of S.C.*, 295 S.C. 31, 367 S.E.2d 20 (1988) ("A statute that creates a new liability and affixes the time within which an action may be commenced is not a statute of limitation but a statute of creation; commencement within the time affixed is then an indispensable condition of the action. (internal citation omitted) Unless the action was timely commenced under § 30–4–100(a), the trial judge lacked subject matter jurisdiction and any order issued in this action is void."). Here, given the Homeowners' untimely

[19] *See* Regulation 61-56, Onsite Wastewater Systems.

RFR, the Board acted outside of its authority when it reviewed the staff decision to grant Blue Sky's septic tank permit.

CONCLUSION

For the specified reasons, the Homeowners Associations' Motion to Dismiss is **DENIED**. The Motion to Dismiss filed by Blue Sky is **GRANTED**. Furthermore, the Court hereby vacates the Board decision and reinstates the Department's staff decision to grant the Blue Sky permit.

AND IT IS SO ORDERED.

November 29, 2022
Columbia, S.C.

_____
Milton G. Kimpson, Judge
South Carolina Administrative Law Court

CERTIFICATE OF SERVICE

I, Anthony R. Goldman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



November 29, 2022
Columbia, S.C.

Anthony R. Goldman
Judicial Law Clerk

Healthy People. Healthy Communities.

Board:
Mark R. Elam, Chairman
Seema Shrivastava-Patel, Vice-Chair
Charles M. Joye, II, P.E., Secretary
Jim P. Creel, Jr.
J.B. (Sonny) Kinney
Richard V. Lee, Jr.
Morris E. Brown, III, MD, FAAFP
Robert R. Morgan, Jr., MD, MBA

January 13, 2022

Via Electronic Mail and US Mail Certified 9214 8969 0099 9790 1420 8957 85
Russell Rock
Secretary
Email: russrock78@gmail.com
Golden Hills of Fairview Homeowners' Association, Inc.
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Via Electronic Mail and US Mail Certified 9214 8969 0099 9790 1420 8958 60
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2600 Bull Street
Columbia, SC 29201

RE: Docket No. 21-RFR-81, T. Tree Farms RV Park (Blue Sky Associates, LLC)

Dear Mr. Rock and Counsel of Record:

Please find enclosed the Final Agency Decision in the above referenced matter.

Very truly yours,

M. Denise Crawford
Clerk of the Board

SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL

FINAL AGENCY DECISION

Docket No. 21-RFR-81
T. Tree Farms RV Park (Blue Sky Associates, LLC)

This matter comes before the South Carolina Board of Health and Environmental Control ("Board") for final review pursuant to S.C. Code Ann. § 44-1-60. The Enclave at Fairview Homeowners' Association, Inc., Golden Hills of Fairview Homeowner's Association, Inc., Greenspace of Fairview, LLC, and North Pacolet Association, Inc. ("Requestors") filed a request for final review of the South Carolina Department of Health and Environmental Control ("DHEC" or "Department") staff decision to issue Permit to Construct Onsite Wastewater System, File No. 2021040112 ("Permit) to Blue Sky Associates, LLC ("Blue Sky") for the construction of an onsite wastewater system. On December 20, 2021, the Board conducted a Final Review Conference regarding the matter. After hearing presentations from the Department, Requestors, and Blue Sky, the Board overturns the staff decision for the reasons stated herein.

BACKGROUND

On April 23, 2021, the Department received the permit application for the construction of an onsite wastewater system to serve the T. Tree Farms RV Park located at 1970 Landrum Mill Road in Campobello, South Carolina in Spartanburg County ("Site"). The onsite wastewater system was designed to treat and dispose of a limited quantity of domestic wastewater discharged from 52 lots located at the Site.

After conducting its review, the Department determined that the permit application met all aspects of S.C. Code Ann. Regs. 61-56, *Onsite Wastewater Systems* ("R. 61-56") and issued the

Permit on June 22, 2021. The Requestors filed a request for review of the staff decision on October 14, 2021.

DISCUSSION

Pursuant to S.C. Code 48-1-100(c), DHEC is the state agency with jurisdiction over septic tanks. As authorized by S.C. Code 44-1-140(11), the Department promulgated S.C. Code of Regs. 61-56 ("R 61-56") to ensure onsite wastewater systems are appropriately designed to treat and dispose of domestic wastewater through a combination of natural processes that ultimately result in effluent being transmitted through the soil, renovated, and ultimately discharged to groundwater. The Department's review of onsite wastewater system permit applications is conducted in accordance with the permitting requirements set forth in R.61-56.

Pursuant to R. 61-56, onsite wastewater systems must be sized according to estimated peak sewage flow, as set forth in Appendix R of the regulation. Appendix R sets the peak sewage flow rate standards for campgrounds with no laundry and full water/sewer at 120 gallons per unit per day, but allows for the peak flow rate for non-residential facilities to be increased or reduced when comparable peak water consumption data for similar establishments in similar locations vary from the requirement. When considering such data, at least twelve (12) consecutive months must be presented with the maximum month of consumption and the days of operation per month being utilized to arrive at the peak flow rate.

In its permit application, Blue Sky presented consumption data for a KOA campground in Traveler's Rest, South Carolina ("KOA Campground") and calculations of a peak flow rate of 50.19 gallons per unit per day for the maximum month of consumption over a 12 month period. The Board finds that the KOA Campground is not a similar establishment to the proposed T. Tree Farms RV Park. Therefore, the peak flow rate standard utilized in designing the onsite wastewater

system in the permit application cannot be supported by the peak flow rate data for the KOA Campground.

CONCLUSION

After reviewing the written materials submitted to the Board, including the Administrative Record, and considering all arguments and evidence presented, the Board overturns and rescinds the staff decision in this matter.

Seema Shrivastava-Patel, Vice-Chairwoman
Board of Health and Environmental Control
For the Board

January 13, 2021

Notice of Right to Request Contested Case Hearing Before Administrative Law Court

S.C. Code Ann. § 44-1-60(F)(2) provides that within thirty days after the receipt of the Board's written final agency decision an applicant, permittee, licensee, or affected person desiring to contest the final agency decision may request a contested case hearing before the Administrative Law Court (ALC), in accordance with the Administrative Procedures Act. A request for a contested case hearing before the ALC must be filed in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

Clerk's Office
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton, St. Suite 224
Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: http://www.scalc.net. If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for contested case hearing must be delivered or mailed to DHEC at the following address:

Denise Crawford
Clerk of Board
SC DHEC
2600 Bull Street
Columbia, SC 29201

The above information on filing a request for a contested case hearing before the Administrative Law Court is provide as a courtesy; parties before the ALC are responsible for complying with all applicable requirements of the Court.

STATE OF SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL	)	
IN THE MATTER OF T TREE FARMS RV PARK (BLUE SKY ASSOCIATES, LLC)	)	REQUEST FOR FINAL REVIEW AND RESCISSION OF PERMIT TO CONSTRUCT ONSITE WASTEWATER SYSTEM
APPLICANT,	)	
AND	)	PERMIT FILE NUMBER: 42-2021040112
THE ENCLAVE AT FAIRVIEW FARM HOMEOWNERS' ASSOCIATION, INC., GOLDEN HILLS OF FAIRVIEW HOMEOWNER'S ASSOCIATION, INC., GREENSPACE OF FAIRVIEW, LLC, NORTH PACOLET ASSOCIATION, INC.,	)	
AFFECTED PARTIES.	)	

The Affected Parties hereby submit their Request for Final Review and Rescission of the South Carolina Department of Health and Environmental Control's ("DHEC") issuance of a Permit to Construct Onsite Wastewater System, as more fully described below. Affected Parties state the following in support of their Request for Final Review of the staff decision to grant the subject Permit and seek rescission thereof:

1. The Affected Parties are four homeowner associations and entities ("Communities") resident in a rural/agricultural area of Spartanburg County, comprising approximately 5,000 acres with nearly 100 members and shareholders who own property either adjacent to or near the site of a proposed RV park to be built and maintained by Blue Sky Associates, LLC ("Applicant") as T Tree Farms RV Park ("RV Park"). The site is 1970 Landrum Mill Road near Landrum in Upstate South Carolina.

2. Over 1400 acres of the Communities are under conservation easements with Upstate Forever and Conserving Carolina, which are land trusts. All properties within the Communities are subject to conservation-focused restrictive covenants and land use restrictions.

3. The Applicant submitted a proposed onsite wastewater system application to DHEC, which in turn issued a permit for same ("septic system.") The septic system is sub-standard and insufficient with regard to capacity as well as dangerously close to a water course. Further, the system poses a threat of substantial and irreparable harm to Affected Parties and the environment within and beyond their Communities as more fully described below.

4. The Applicant submitted a proposed stormwater management system design to the County of Spartanburg, which is being reviewed by DHEC. The stormwater management system design is flawed due to inadequate buffer and is not appropriately sized. The stormwater management system is dangerously close to a water course. Further, the system poses a threat of substantial and irreparable harm to Affected Parties and the environment within and beyond their Communities as more fully described below.

5. The primary water source for the Communities is private wells.

6. No delay or detriment will result to Applicant from the granting by DHEC of this Request for Review. Applicant has not yet fulfilled the conditions of the Conditional Approval of the project issued by the Spartanburg County Planning Commission on March 2, 2021. Several such conditions remain unfulfilled, including obtaining public water. There is no public water to the site. Thus, Affected Parties are informed and believe that no work on the

proposed septic system or stormwater management system has been commenced by Applicant.

BASIS FOR REQUEST FOR FINAL REVIEW AND RESCISSION OF PERMIT

7. Affected Parties have retained a professional hydrogeologist, Jonathan Gerst, MS, PG, to review the specifications of Applicant's septic system and the permit granted by DHEC thereon as well as Applicant's proposed stormwater management system. See Opinion Memorandum of Jonathan Gerst, attached hereto as Exhibit A. In summary, Mr. Gerst opines in part as follows:

a. The specifications of the septic system, including sizing for proposed use, daily flow, and capacity are sub-standard. In issuing the permit, DHEC deviated from standard daily flow and waste generation based upon a "comparable KOA campground," the design and specifics of which remain unknown to Affected Parties. Underestimation of the peak sewage flow at the Applicant's Park will result in an undersized system that will more likely than not fail with discharges into Gold Mine Creek. See Map of Gold Mine Creek and Proposed RV Park attached hereto as Exhibit B.

b. As currently designed, the septic system poses a potential negative impact, including flooding, to Gold Mine Creek and the North Pacolet River, which is a tributary of the Broad River. Gold Mine Creek is a watercourse that flows through and along the proposed RV Park and the properties of The Enclave and North Pacolet Association. Gold Mine Creek intersects with and drains into the North Pacolet River within the North Pacolet Association properties. Many of these properties have experienced

severe flooding and been under several feet of water during storm events in recent years.

c. The location of the septic and stormwater systems must meet the setback requirements and is critical to avoid impact to Gold Mine Creek. Development plans do not specify the exact orientation of Gold Mine Creek relative to the systems and do not appear to consider the topography and drainage with a 20% slope draining down to Gold Mine Creek. The location and setback measurements in terms of distance from the creek remain undefined and unclear.

d. To date, there is no evidence received by Affected Parties from DHEC that Applicant has prepared a surface water protection plan or a baseline characterization of the aquatic habitat and water quality in Gold Mine Creek as needed to evaluate impacts to Gold Mine Creek from the proposed development.

e. As to stormwater management, the Applicant's proposed stream buffer is inadequate due to the 20% slope at the proposed retention pond location.

f. Stormwater management controls have apparently been sized by the Applicant to meet minimum requirements for a 10-year, 24-hour storm event. Due to location, slope, and magnitude of flooding within the Communities in recent years, the system should be sized for a larger storm event.

g. Applicant has not satisfied its regulatory burden to produce competent and substantial evidence that the proposed septic and stormwater systems are

appropriately sized and located with respect to the surface water resource, Gold Mine Creek.

8. Although not directly within the jurisdiction of DHEC, Affected Parties note that two endangered species are part of the habitat alongside Gold Mine Creek: the dwarf heartleaf and the ashy hydrangea. Affected Parties are coordinating with the Department of Natural Resources and others regarding the protection of these species.

9. As a result of the issuance of the septic permit to Applicant which authorizes a sub-standard system with deficient specifications, Affected Parties are destined to endure serious irreparable harm, including but not limited to, negative impact from an undersized septic system, potential failure of the septic system at the RV park, and significant harmful impact to their properties that adjoin Gold Mine Creek and the North Pacolet River.

10. As a result of the issuance of the septic permit to Applicant which authorizes a sub-standard system with deficient specifications, the environment and watershed, including Gold Mine Creek and the Pacolet River, are destined to endure serious irreparable harm, including but not limited to, health risks, flooding, and water contamination.

CHRONOLOGICAL BACKGROUND

11. On or about May 14, 2021, Affected Parties submitted a Freedom of Information Act ("FOIA") request to DHEC for all documents and information relating to the RV Park. See Exhibit C attached hereto.

12. On May 17, 2021, David Vaughn, DHEC, acknowledged the receipt of the FOIA request. See Exhibit D attached hereto.

13. On or about June 22, 2021, DHEC issued a septic permit to applicant at file number 42-2021040112. See Exhibit E attached hereto. As of June 22, 2021, Affected Parties had not received a response to their FOIA request.

14. As of September 30, 2021, the FOIA request remained unanswered by DHEC. Affected Parties reminded David Vaughn of the FOIA request via a zoom call on September 30, 2021 to discuss the matter. However, as indicated during the call, Affected Parties and their retained hydrogeologist did not possess the items outlined in the FOIA request and were unable to complete the desired full and meaningful review of the proposed septic system and stormwater management design for the RV park.

15. On October 14, 2021 (5 months after the FOIA Request), Affected Parties received a response to the FOIA request from DHEC. See Exhibit F attached hereto. Prior thereto, Affected Parties awaited the FOIA response and had no written notice from DHEC of the issuance of the subject septic permit. In fact, Affected Parties had incomplete information relative to the DHEC file and Applicant's proposed septic and stormwater management systems. Upon receipt and review of the FOIA response from DHEC on October 14, 2021, Affected Parties moved expeditiously to file the instant Request for Review and Rescission. Affected Parties believe that they still have not been provided with all information from the DHEC file, including all site plans.

Affected Parties' hydrogeologist is in the process of reviewing the information contained in the recent FOIA response.

16. Between February 2021 and the present, Gray Engineering, agent for Applicant, submitted multiple sets of site and design plans to Spartanburg County Planning and Development Department as well as DHEC. The site plans in Affected Parties' possession are oversized documents and thus are not attached. Those which are not already in DHEC's file can be provided by Affected Parties. Said site plans contained consistent and unremedied errors.

a. Gray Engineering recurrently changed their "label" of Landrum Mill Road, which is the access road to the RV park, on their site plans.

b. Gray Engineering repeatedly and mistakenly noted Landrum Mill Road as a "State Road," "SC DOT Right of Way," "Ditch to Ditch Right of Way," "Easement," and "Utility Easement." All of these labels are misrepresentations and misleading.

c. In fact, Landrum Mill Road is privately owned, and members of the Communities own to the center of the road.

d. This is important, because <u>there is no public water</u> or <u>right of way for public water to the site of the RV park.</u>

17. The septic permit was based upon the water supply being "*<u>Public</u>*." As noted in Paragraph 16 above, the misrepresentation by Applicant and its agent, Gray Engineering, renders the permit flawed, defective, and void.

18. The form language on the septic permit states: *"Any unapproved changes will void this permit."* This language is clear and unambiguous. There is no public water to the RV park site as stated on the permit. This renders the permit flawed, defective, and void.

19. The Onsite Wastewater System Application was signed by Applicant's Representative, Kim Burnett, who signed the statement as of April 23, 2021, *"I certify that the information submitted in this document is true and accurate."* See Exhibit G attached hereto. This language on the Application is clear and unambiguous. As noted in Paragraphs 16 and 17, the information from Applicant about *"public water"* was not accurate but in fact was a misrepresentation. This renders the permit flawed, defective, and void.

CONCLUSION

For all the foregoing reasons, which are not exhaustive, Affected Parties submit that review of the septic permit issued by DHEC to Applicant is warranted in the interest of public health and the environment.

Furthermore, Affected Parties respectfully submit that the permit was issued because of mistake, error, oversight, and the misrepresentations of Applicant individually and through its agent, Gray Engineering. As a result, the septic permit issued to Applicant for the proposed RV Park at file number 42-2021040112 should be rescinded by DHEC.

Affected Parties reserve the right to amend this Request for Final Review and Rescission of Permit as more information becomes available to them.

Respectfully submitted by Affected Parties, by and through their representatives, on this 22nd day of October 2021:

Craig Hilton, President
The Enclave at Fairview Farm
Homeowners' Association, Inc.

Judie Klapholz, Vice President
The Enclave at Fairview Farm
Homeowners' Association, Inc.

Larry Jankins, President
Golden Hills of Fairview
Homeowner's Association, Inc.

Russell Rock, Secretary
Golden Hills of Fairview
Homeowner's Association, Inc.

Madelon Wallace, Manager
Greenspace of Fairview, LLC

Cornelia Alexander, Manager
Greenspace of Fairview, LLC

William P. Mills, Jr., President
North Pacolet Association, Inc.

Towles Napper, Secretary
North Pacolet Association, Inc.

CONTACT PERSON:
Russell Rock
255 Night Lark Lane
Campobello, SC 29322
Email: russrock78@gmail.com
Ph: (864) 414-8119

FROM: Jonathan D. Gerst, MS, PG
Peak Hydrogeologic, PLLC

TO: Whom It May Concern

RE: Proposed T Tree Farms RV Park at 1970 Landrum Mill Road

DATE: October 22, 2021

I, Jonathan D. Gerst, am a professional hydrogeologist licensed in NC (#2515) and SC (#2644). My resume and curriculum vitae are available upon request. I possess the skills, training, continuing education, and professional work experience needed to perform geologic assignments related to environmental and hydrogeological planning, site assessment, regulatory coordination, and mitigation of environmental impacts associated with commercial developments. Various relevant work experiences include performance of NEPA environmental impact reviews, coordination with local/state/federal regulatory agencies to ensure compliance with applicable environmental regulations (e.g., USACE Jurisdictional Determinations and Nationwide Permits, DHEC water quality monitoring), expert witness investigations/testimony for water projects, and numerous types of hydrogeological investigations (e.g., USDA NRCS soil classification, seasonal high water table elevation characterization, hydraulic conductivity testing, hydraulic gradient and flow direction determination, grain size/hydrometer analysis, groundwater mounding analysis, evaluation of hydraulic boundary conditions and buffers, etc.)

Four homeowners' associations ("Communities") requested that I review and comment on the potential for environmental degradation and impacts to Water of the United States as well as the sufficiency, location, and potential environmental impact from an on-site wastewater system ("septic system") and stormwater management system for the proposed T. Tree Farms RV Park at 1970 Landrum Mill Road ("TTF RV Park") in Campobello, SC. This site is near Landrum in a rural residential area in Upstate South Carolina.

My understanding is that the developer of TTF RV Park (Blue Sky Associates, LLC) tentatively plans to construct a 52-site RV Park and that the park will be serviced by a septic system and stormwater management system. The area proposed for the disturbance is an approximately 10-acre portion of a 36.68-acre property identified as Spartanburg County Parcel P ID 1-09-00-020.03.

To address the questions posed by the Communities, I have reviewed documents obtained by the Communities from SC Department of Health and Environmental Control (DHEC) via a FOIA request, which included the developer's engineering plans (prepared by Gray Engineering July 2021), a septic permit (File 2021040112), and a stormwater permit application. I performed a field reconnaissance on the adjoining property of Ms. Judie Klapholz at 199 Kelsey Mill Road on July 23, 2021. I have reviewed site conditions available from public mapping databases (DHEC watershed mapper, Spartanburg County GIS, National Wetland Inventory Mapper, USDA NRCS Web Soil Survey, FEMA Floodplain Mapper, etc.). I have also reviewed water quality and biological site assessments of Gold Mine Creek by Mr. Kevin Caldwell of Mountain-to-Sea Ecological and Mr. Frank Holleman of the Southern Environmental Law Center. My review is

EXHIBIT A – Page 1

ongoing, as not all documents and information have yet been provided by DHEC to the Communities. Thus, my opinions expressed below are not exhaustive and are subject to modification and supplementation.

In my opinion, there is insufficient evidence to indicate the developer has addressed environmental impacts associated with the proposed development. Impacts to Gold Mine Creek water quality and sensitive aquatic habitat are anticipated based on our review of the developer's engineering plans as obtained under a FOIA request, which indicate that 1- the developer has not shown the correct location of Gold Mine Creek nor appropriate stream buffer setbacks where septic and stormwater systems are proposed (see attached Figure), 2- their plans do not mention the presence of (nor steps to mitigate impacts to) federal/state listed plant species (Ashy Hydrangea and Dwarf Heartleaf) that were identified in the work area by two independent biological surveys (i.e. by Frank Holleman and Kevin Caldwell), and 3- their plan/narrative does not indicate the developer has coordinated a jurisdictional determination and permit evaluation with USACE regarding site disturbances that are planned on the northern stream bank of Gold Mine Creek. Gold Mine Creek is situated along the southern property line of the TTF PV Park parcel. Gold Mine Creek (HUC 030501051202) is a pristine stream that rests within 28 acres of globally "rare" habitats including a "vulnerable" Piedmont Headwater Stream Forest, and six "critically imperiled" Floodplain Seep wetlands.

Additional details about development concerns are provided below.

SEPTIC

1.) In issuing a septic permit for the TTF PV Park on Landrum Mill Road, DHEC deviated from daily flow and waste generation standards based upon an allegedly "comparable" KOA Campground. To date, DHEC has been unable to provide the specifics, such as the size of RVs at this KOA and their wastewater tanks, the KOA septic system permit, design, topography, location near water courses or any other information about the KOA facility other than handwritten notes from Gray Engineering calculating an average daily flow rate. There is no evidence to support DHEC's finding that this KOA campground is comparable to TTF RV Park.

Based on handwritten notes submitted by Gray Engineering as an exhibit to support the KOA comparison, they assumed for each campsite a daily flow of 1,580-gpd (based on 240-gpd for 2 bedrooms, 300-gpd for 4 washing machines, 50-gpd for 2 bath houses, and 40-gpd for dump station).

This daily flow rate does not indicate that any wastewater will be generated by the 45 campsites at the property, nor does it make any mention of RVs at the site, including their size and volume of wastewater tanks.

Despite presenting the rate of 1,580-gpd as the GPD for each campsite at the beginning of the exhibit, later in the exhibit, Gray Engineering presents this information as "volume from sources other than lots", and they present a calculation that presents the difference of the peak monthly water supply volume (July 2020, 119,000 gallons used) and the "volume from sources other than lots" as the "volume used by lots."

EXHIBIT A – Page 2

This raises many questions, including: (a) why the "volume used by lots" is different than the waste generated from each campsite; (b) how the calculations presented reflect the daily flow expected from 45 RV campsites (45 campsites x 120-gpd = 5,400-gpd), and (c) if the 45-campsite KOA was approved for 50-gpd/RV, then why is daily flow specified as 1,580-gpd when 45 campsites x 50-gpd = 2,250-gpd?

All of these questions and calculations cause concern about the capacity of the septic system design for the TTF PV Park. As stated above, underestimation of the peak sewage flow at the TTF PV Park is critical and will more likely than not result in an undersized system with insufficient capacity to manage the wastewater treatment demands from the proposed development and thus there is an increased likelihood of septic system failure and discharge to Gold Mine Creek.

2.) The septic plans for TTF RV Park show a 100-ft setback between the proposed septic drain lines and the southern property line along Gold Mine Creek. The plans do not show the results of a stream survey (ordinary high water mark and bankfull bench elevations, stream centerline, etc.). It does not appear that the developer has property demonstrated that "No part of the system be located within one hundred linear feet of a receptor" (Gold Mind Creek) as is required for systems that treat greater than 1,500-gpd. The attached figure illustrates the close proximity of the proposed work to Gold Mine Creek.

3.) The Onsite Wastewater Site & Soil Evaluation Report that was prepared by Professional Soil Classifier, Mr. Dennis DeFrancesco is incomplete.

There is neither a narrative, nor pictures, nor a map that accompany the evaluation forms to describe the stream location and setback distances and slope topography.

The report is restricted to soil characterization field notes (soil sample ID, sample location, chroma, concentrations, depletions, texture, zone of saturation depth).

Despite a requirement (as per the DHEC Onsite Wastewater Soil Report Verification Form) for the evaluation report to specify "topographical features" affecting the system design/location, the soil assessor's report does not specify the location of Gold Mine Creek relative to the proposed system, nor does it present information about slope steepness at the proposed drainfield as needed to verify that these considerations have been appropriately addressed.

4.) Regarding the seasonal high water table elevation, the soil assessor's notes on the zone of saturation at soil sample locations P3, P4, and P14 indicate that the seasonal high water table elevation is approximately 38-in, 53-in, and 51-in below ground surface, respectively.

Since there are no photos included with the report to verify the presence and depth of redoximorphic/saturated conditions in test pits, there is no way to verify the depth to the SHWT. However, based on the location and elevation of P3 and P4 (ground surface elevation Approx. 940-ft amsl) and P14 (ground surface elevation Approx. 935-ft amsl) on each side of the drainfield, one would expect hydraulic continuity and presence of a shallow groundwater table across the proposed drainfield leading down to Gold Mine Creek (Approx. elevation of 910-ft amsl

EXHIBIT A – Page 3

below the work area). The permit documents indicate that maximum trench depth is 45-in to 51-in below ground surface.

In the absence of field photographs and without site access for additional review, it is questionable if there is sufficient vertical separation between the seasonal high water table elevation and proposed trench base as needed to support microbial breakdown of wastewater before entering the groundwater fed Gold Mine Creek and associated floodplain seep wetlands.

STORMWATER

5.) As per the Spartanburg County Stormwater Design Manual, the minimum required buffer between a stream and the stormwater pond is 35-ft, and an additional 10-ft of buffer is required where slopes exceed 10% (as is applicable on the 20% slope at the proposed retention pond location). Accordingly, a 45-ft stream buffer is appropriate, and the 30-ft buffer that is currently shown on the TTF RV park plans is incorrect. No Surface Water Protection Plan, baseline water quality characterization, NPDES permit, nor plans for temporary berms/ slope drains on the southern steep slope were provided in response to the FOIA request.

6.) Based on the stormwater management plans, it appears stormwater management controls have been sized to meet the minimum requirement of capacity. However, due to proposed placement of a storm water detention pond within close proximity to steep slopes above the open channel Gold Mine Creek and the potential for water quality impacts and backwater effects to adjoining properties, it is justifiable to increase system capacity in order to avoid inundating the system and causing stormwater discharges to Gold Mine Creek. To further complicate the issue with backwater effects to adjoining properties, my understanding from personal testimony of adjoining property owners is that even though Gold Mine Creek is shown in the FEMA Zone X (500-yr lowest risk zone), that the rate and magnitude of flooding in the area observed in recent years suggests that the flood map is outdated and not reflective of current flood risks.

SURFACE WATER

7.) As previously indicated, impacts to Gold Mine Creek water quality and sensitive aquatic habitat are anticipated based on our review of the developer's engineering plans as obtained under a FOIA request, which indicate that 1- the developer has not shown the correct location of Gold Mine Creek nor appropriate stream buffer setbacks where septic and stormwater systems are proposed (see attached Figure), 2- their plans do not mention the presence of (nor steps to mitigate impacts to) federal/state listed plant species (Ashy Hydrangea and Dwarf Heartleaf) that were identified in the work area by two independent biological surveys (i.e. by Frank Holleman and Kevin Caldwell), and 3- their plan/narrative does not indicate the developer has coordinated a jurisdictional determination and permit evaluation with USACE regarding site disturbances that are planned on the northern stream bank of Gold Mine Creek.

8.) Based on correspondence with Ms. Kristin Andrade of USACE, Ms. Andrade indicated that USACE can only work with the developer (Blue Sky Associates, LLC) or their agent (Gray Engineering) in addressing a proposed project's need for a jurisdictional determination (JD) and nationwide permit (NWP). She did not indicate that the USACE office had reviewed the proposed

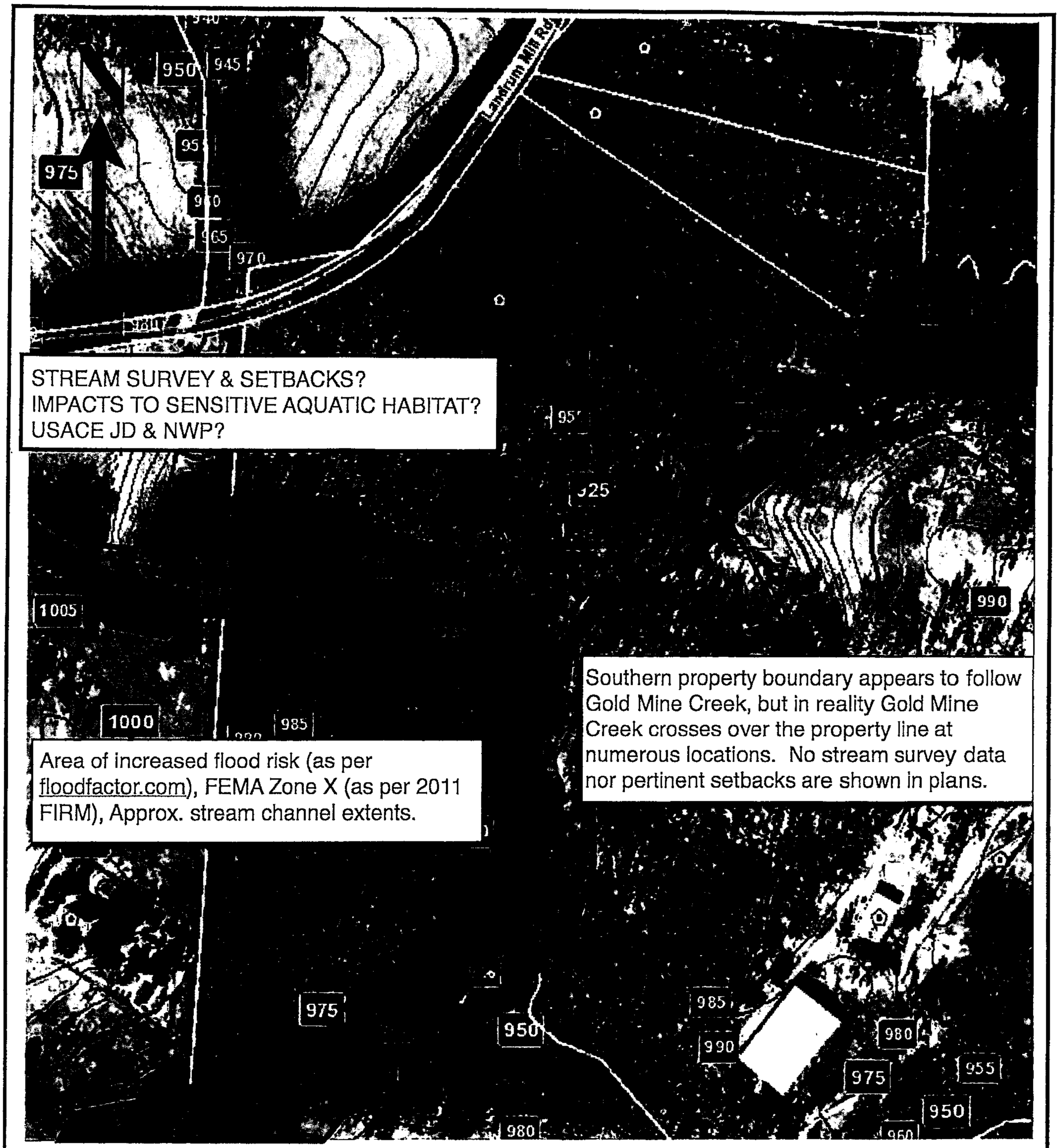
project, and she said that if the developer neglects to address USACE requirements, then the only avenue for restitution that concerned stakeholders may take is to report active violations for enforcement after impacts have already occurred.

9.) As per recommendation by USACE, USFWS and SCDNR were contacted to evaluate their assessment/mitigation requirements for impacts to Gold Mine Creek water quality and habitat for Ashy Hydrangea and Dwarf Heartleaf, but each agency reported that they cannot take any action unless there is an active USACE permit or public notice in play.

CONCLUSIONS

10.) In my professional opinion and based upon my review, it appears that the plans do not properly address 1- regulatory requirements by USACE for impacts to Surface Waters of the United States; 2- DHEC septic system size requirements for a 52-site RV park and required setbacks to Gold Mine Creek; 3- Spartanburg County stormwater treatment system required setbacks to Gold Mine Creek, and (4) concerns from neighboring property owners that the proposed development will cause environmental degradation and that the development is not congruent with the nature and landscape of residential and farm developments that already exist in the area.

11.) Based upon my review of the available information produced in response to the FOIA request, my opinion is that the developer has not satisfied their burden to produce competent and substantial evidence that the proposed development (i.e., septic and stormwater systems) is appropriately located with respect to the surface water resource, Gold Mine Creek. Evidence to demonstrate a developer has appropriately located the development with respect to a surface water resource include performance of and design plans that reflect results of a stream survey, design plans that show appropriate setbacks and best management practices have been applied to protect the surface water resource, preparation of a baseline surface water characterization (and post construction monitoring) study to address impacts of development on aquatic habitat and water quality. The DHEC file does not reflect that these items have been completed by the developer of TTR RV Park.



STREAM SURVEY & SETBACKS?
IMPACTS TO SENSITIVE AQUATIC HABITAT?
USACE JD & NWP?

Southern property boundary appears to follow Gold Mine Creek, but in reality Gold Mine Creek crosses over the property line at numerous locations. No stream survey data nor pertinent setbacks are shown in plans.

Area of increased flood risk (as per floodfactor.com), FEMA Zone X (as per 2011 FIRM), Approx. stream channel extents.

SOURCE: maps.spartanburgcounty.com; floodfactor.com; FOIA T. Tree Farms RV Park Plans (September, 2021)

PEAK HYDROGEOLOGIC

PEAK HYDROGEOLOGIC, PLLC

ENVIRONMENTAL & WATER RESOURCES CONSULTING

GOLD MINE CREEK & PROPOSED RV PARK
1970 Landrum Mill Road (Spartanburg Co. 1-09-00-020.03)
Campobello, SC 29322

PROJ. NO.: 319-21	DRAWN BY: JDG	FIGURE: 1
SCALE: 1-in = 315-ft		DATE: 9/28/2021

EXHIBIT B

Date: May 14, 2021

To: David Vaughan
Director of Onsite Wastewater Management for SC
vaughadr@dhec.sc.gov
vaughandr@dhec.sc.gov
info@dhec.sc.gov

Pursuant to the South Carolina Freedom of Information Act, I hereby request copies of all documents concerning a proposed recreational vehicle park ("RV Park") to be located at or near 1970 Landrum Mill Road, Campobello, SC, in Spartanburg County, Block Map Reference # 1-09-00-020.03. You may confine your search from September 30, 2020 through the date of your response. The RV Park may be listed under one or more of the following names or a derivative of such names:

T. Tree RV Park
T. Tree Farms RV Park
Blue Sky Associates, LLC
William "Bill" McDaniel
McDaniel & Company
Kimbreli B Burnett

If the cost exceeds $100, please let me know in advance.

Please email to me an acknowledgement that you received this.

Sincerely,
Madelon Wallace

Madelon Wallace
PO Box 551
Landrum, SC 28356
864-316-3484
madelonwwe@aol.com
madelonwwe@gmail.com

EXHIBIT C

From: vaughadr@dhec.sc.gov,
To: vaughandr@dhec.sc.gov, info@dhec.sc.gov, MADELONWWE@AOL.COM,
Subject: Re: FOIA
Date: Mon, May 17, 2021 9:23 am
Attachments:

Ms. Wallace,

This is my acknowledgement that your request has been received via this email. The FOIA office may have you submit an actual request form, but we'll let them work that out.

Sincerely,

David R. Vaughan
Legislative Affairs
SC Department of Health and Environmental Control
Office: (803) 896-0574
Mobile: (803) 508-9073
Connect: www.scdhec.gov Facebook LinkedIn



From: Madelon <madelonwwe@aol.com>
Sent: Friday, May 14, 2021 1:05 PM
To: vaughandr@dhec.sc.gov <vaughandr@dhec.sc.gov>; Vaughan, David R. <vaughadr@dhec.sc.gov>; info, info <info@dhec.sc.gov>
Subject: FOIA

*** Caution. This is an EXTERNAL email. DO NOT open attachments or click links from unknown senders or unexpected email. ***

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 Pacolet River and runs thru a residential development.

Thank You,
Madelon Wallace

EXHIBIT D

PERMIT TO CONSTRUCT
Onsite Wastewater System

File Nbr: 2021040112
County: Spartanburg

Name: T. Tree Farms RV Park (Blue Sky Associates LLC)

Type Facility: 52 Space RV Park

Address: PO Box 5930
Spartanburg, S.C. 29304

Program Code: 360

System Code: 150

Subdivision:

Block: Lot:

TM#: 1-09-00-020.03

Site: 1970 Landrum Mill Rd.
Campabello, S.C.

Water Supply: Public

PERMIT TO CONSTRUCT SYSTEM SPECIFICATIONS

Daily Flow (gpd): 3120 **Tank Sizes (gal):** Septic Tank: 5000 Pump Chamber: Grease Trap:

LTAR: .3 **Trenches:** Length (ft): 2600 Width (in): 36 Max. Depth (in): 45 Agg. Depth (in.):

Min. Pump Capacity: gpm at ft. of Head Alternative Product: 1203 EZ Flow

SPECIAL INSTRUCTIONS/CONDITIONS
(See Attached Page(s))

THIS PERMIT IS SITE SPECIFIC. ANY CHANGES TO THE SYSTEM MUST BE APPROVED BY DHEC. ANY UNAPPROVED CHANGES WILL VOID THIS PERMIT.

This Permit To Construct and Operate is issued pursuant to the SCDHEC Large and Community Onsite Wastewater Systems for Peak Flows greater than 1500 GPD.

Issuance of this Large Onsite Wastewater System Permit To Construct does not relinquish the property owner of responsibility in attaining any and all necessary approvals or permits required to develop this property.

PERMIT TO CONSTRUCT

See engineered system design and supporting documentation.

Grey Engineering
(Engineering Company)

Zachary D. Johnson
(Consulting Engineer)

Dennis J. DeFrancesco
(Soil Classifier)

SC 30735
(State and License Number)

SC 31
(State and License Number)

06/17/2021
(Plan Date)

2021006
(Project Number)

Any Permit To Construct and Operate that is issued pursuant to this Standard shall be based upon the consulting engineer's design, certification, and other supporting documentation.

Reviewed By: _____ Date: June 22, 2021

DHEC 1781 (01/2014)

This Permit will Expire and Become Null and Void Five (5) Years from the Issuance Date.

This Permit is Appealable Under the Administrative Procedures Act. There may be an Additional Fee for Changes in this Permit that Require a Site Reevaluation.

Information collected on this form is subject to public scrutiny or release and the Freedom of Information Act.

EXHIBIT E (Page 1)

PERMIT TO CONSTRUCT
Onsite Wastewater System

File Nbr: 2021
County: Spartanburg

SPECIAL INSTRUCTIONS/CONDITIONS

THIS PERMIT IS SITE SPECIFIC. ANY CHANGES TO THE SYSTEM MUST BE APPROVED BY DHEC. ANY UNAPPROVED CHANGES WILL VOID THIS PERMIT.

Special Instructions:

This individual sewage treatment and disposal system must be constructed in exact accordance with the Approved Plan prepared by Grey Engineering dated and stamped by Zachary D. Johnson P.E. June 17, 2021. Any deviations from this plan without prior approval from the Division voids this Permit.

This system was specifically designed to treat and dispose of a limited quantity of domestic wastewater discharged from T. Tree Farms 52 space RV Park (Blue Sky Assoc.) with a peak sewage flow of 3,120 gallons per day total. No further additions of any type shall be permitted to discharge to this system.

Installer must make Brett Fowler (803) 667-1159 email address fowlerba@dhec.sc.gov aware of their intent to begin this project and provide a rough schedule of when work will take place.

Septic tank system installer must hold a valid DHEC septic tank installers license and be a EZ Flow certified installer

Consulting Engineer Must supervise construction of system to insure that it is installed in accordance regulation 61-56 and approved plan.

The Consulting Engineer will be responsible for providing an as-built plan prior to final approval of this project.

Garbage grinders shall not be allowed to discharge to this septic system.

Do not cut, fill, grade or in any way disturb the proposed tile field area.

Do not park or drive any vehicles on the tile field area.

Do not overlay tile field area with any impervious surfaces.

The area reserved for tile field repair/replacement must remain as is. Do not cut, fill, grade or in any way disturb the proposed tile field repair area.

It is the owner's responsibility to operate the system in such a manner that hydraulic overloads and unauthorized discharges do not occur.

Only domestic waste (toilets, hand washing, etc.) is allowed to enter into the OSWW system

EXHIBIT E (Page 2)

-----Original Message-----
From: Keller, Kristen M. <KellerKM@dhec.sc.gov>
To: MADELONWWE@AOL.COM <MADELONWWE@AOL.COM>
Sent: Thu, Oct 14, 2021 11:17 am
Subject: FOI Request # 8847153

Keller, Kristen M. has shared a OneDrive for Business file with you. To view it, click the link below.

T. Tree Farms RV Plans(1).pdf

Good morning Ms. Wallace,
Attached are all the files requested for Tree Farms RV Park. Please let me know if you need anything else.

Thanks!

Kindest regards,
Kristen Keller, Director of Constituent Services
Freedom of Information Office

S.C. Dept. of Health & Environmental Control
Office: (803)898-3796
Mobile: (803) 528-4323
Connect: www.scdhec.gov Facebook Twitter

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EXHIBIT F

Onsite Wastewater System Application

Bureau of Environmental Health Services

Blue Sky Associates, LLC, PO Box 5930
(Name) (Mailing Address)

Spartanburg SC 29304 kbbbil07@yahoo.com
(City/Town) (State) (Zip Code) (Email Address)

Phone No.: 864-809-6484 ☑ Mobile ☐ Home ☐ Work Alternate Phone No.: ☐ Mobile ☐ Home ☐ Work

hereby make application for a Permit to Construct an Individual Sewage Disposal System to serve a:

House: ☐ Mobile Home: ☐ Other (Specify): ☐ RV Park

If in subdivision, give name: _____, Lot #: _____

Property Address: 1970 Landrum Mill Rd Campobello City: _____

County: Spartanburg Tax Map/Property Identification #: 1-09-00-020.03

Check all that apply:

Public Water: ☑ **Well:** ☐ Public ☐ Private ☐ Existing ☐ Proposed **Public Sewer Accessible:** ☐

If residential establishment, answer following:

No. Bedrooms: _____ Basement: ☐ Full ☐ Partial ☐ None Plumbing in Basement: ☐

If commercial establishment, answer following:

Type of Business: RV Park Number of Occupants: ~~50~~ 52 As per P.E. Number of Employees: _____

Public Restrooms: 2 Number of Hours of Daily Operation: 24 Other: _____
(i.e., seating capacity, meals per day)

Lot Identification and Preparation

In order for your application to be processed, stake the corners of the proposed building and property corners with distinctive markers. In clear, sealed bags, place the site location card at the front of the property in a conspicuous location and place the septic location card at the proposed septic location. A legal description (plat, deed, surveyor site plan, etc.) with dimensions of the property must also be submitted with the application. Contact the regional EA office to activate your application when the lot has been staked, house site located, and lot posted. The lot should also be properly prepared by clearing all underbrush, thick vegetation, and any other features that may inhibit the site evaluation within a 150 ft radius of the proposed septic location.

Please give exact directions to lot: .4 miles NE of E Frontage Road on the Southern side of Landrum Mill Road.

I understand that the property must be properly prepared for evaluation and that I must confirm property preparation to activate the application. I also understand a reevaluation fee may be assessed if the above parameters for lot identification and preparation are not met. I certify to the best of my knowledge that the information submitted in this document is true and accurate. Permission and authority is hereby granted for DHEC representatives to enter the above-described property at reasonable hours for the purpose of onsite wastewater system inspection and/or site evaluation.

Property will be ready for activation/evaluation by DHEC on 4/23/21 (Date)

4/23/21 (Date) _____ (Applicant/Representative Signature)

1|5

DHEC 1740 (05/2020) *Personal information provided on this form is subject to public scrutiny or release.*

EXHIBIT G

BEFORE THE BOARD OF HEALTH AND ENVIRONMENTAL CONTROL
STAFF RESPONSE TO REQUEST FOR REVIEW

Docket No. 21-RFR-81

RECEIVED
NOV 17 2021
Clerk, Board of Health
and Environmental Control

Requestors:
The Enclave at Fairview Farm Homeowners' Association, Inc.
Golden Hills of Fairview Homeowner's Association, Inc.
Greenspace of Fairview, LLC
North Pacolet Association, Inc.

Summary of Staff Decision submitted by:
David R. Vaughan, Director
Division of Onsite Wastewater, Rabies Prevention, Vector Surveillance, and Enforcement

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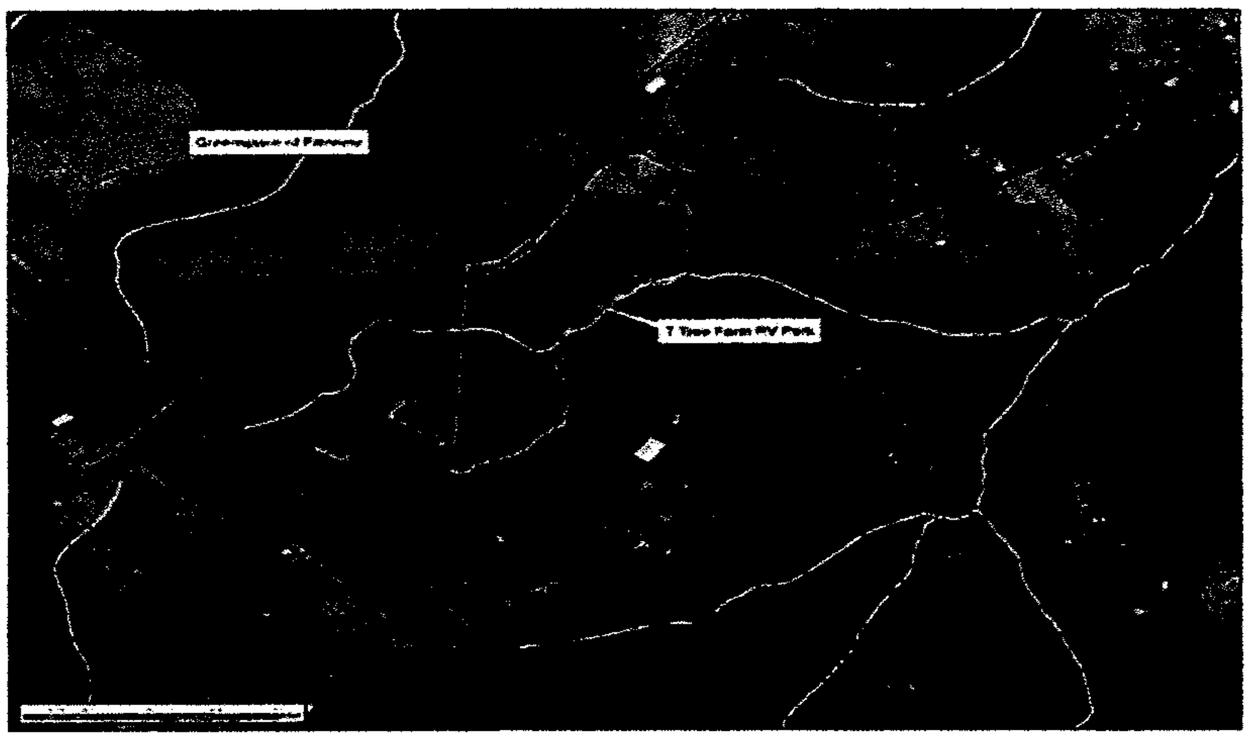
SUMMARY:

This Request for Review ("RFR") challenges the Permit to Construct Onsite Wastewater System ("Permit") issued by the South Carolina Department of Health and Environmental Control ("Department") to Blue Sky Associates, LLC ("Applicant") for the construction of an onsite wastewater system ("OSWW system") to serve the T. Tree Farms RV Park located at 1970 Landrum Mill Road, Campobello, South Carolina in Spartanburg County, Tax Map #1-09-00-020.03 ("Site").

This RFR is untimely and does not establish Requestors' standing as affected persons entitled to review. In addition to these issues, the Board should uphold the Permit because it complies with all statutory and regulatory requirements.

The Requestors allege the OSWW system design is insufficient, risks failure, and poses a danger to nearby surface waters. As explained herein, the Department conducted a thorough review of the information submitted by the Applicant, and the Permit was issued in accordance with all applicable statutes and regulations. The Requestors also make allegations related to the stormwater management system for the Site and endangered species, but these allegations are beyond the scope of review for the Permit being challenged.

The following shows the location of the project outlined in blue with context to the surrounding area:



RELEVANT CHRONOLOGY:

- **April 23, 2021** – The Department received the application from Blue Sky Associates, LLC for the OSWW system. The application was assigned File Number 42-2021040112.

- **May 14, 2021** – Madelon Wallace emailed a FOIA request to David Vaughan for "copies of all documents concerning a proposed recreational vehicle park…to be located at or near 1970 Landrum Mill Road" from September 20, 2020, through the date of response. The FOIA request stated general concerns about waste being channeled to waters, but it did not specifically reference the Permit or make a request to be notified of the issuance of the Permit. While the RFR alleges the FOIA request was submitted by the Requestors, it was submitted by Ms. Wallace in what appeared to be her individual capacity and did not reference any of the Requestor entities.

- **May 17, 2021** – David Vaughan responded to Ms. Wallace acknowledging her request and forwarded it to the Department's FOIA staff for processing.

- **May 27, 2021** – At the Department's request after it conducted a review of the initial application and supporting documentation, the Applicant provided an updated permit application addressing staff comments.

- **June 8, 2021**– The Applicant electronically provided updated septic plans to the Department.

- **June 18, 2021** – The Applicant provided hard copies of the final septic layout signed by the Applicant's engineer.

- **June 22, 2021** – After finalizing its review of the soils work performed by a local professional soil classifier and the plans and certification submitted by Applicant's engineering firm, and after ensuring that the permit application met all aspects of the regulation, the Department's Bureau of Environmental Health Services issued the Permit pursuant to and in accordance with S.C. Regulation 61-56, *Onsite Wastewater Systems*. The Permit specifically states that the OSWW system is to be constructed in exact accordance with the Approved Plan prepared by Grey Engineering dated and stamped by Zachary D. Johnson, P.E. on June 17, 2021.

- **August 4, 2021** – Spartanburg County hosted a public meeting with members of the community to discuss the proposed T. Tree Farms RV Park project. Staff from the DHEC stormwater and onsite wastewater programs were in attendance to answer any questions related to DHEC's role in stormwater and onsite wastewater permitting for the project. It was discussed at this meeting that the Permit had already been issued.

- **September 30, 2021-** Department staff participated in a virtual community meeting, providing information and answering questions related to stormwater and onsite wastewater permitting for the project. It was discussed at this meeting that the Permit had already been issued.

- **October 14, 2021** – The Department's FOIA department provided Ms. Wallace with additional documents responsive to her May 14, 2021, FOIA request.

- **October 26, 2021** – The Requestors filed this untimely RFR, 126 days after the Permit was issued by the Department.

RELEVANT LAW:

- *S.C. Pollution Control Act*, S.C. Code Ann. §§ 48-1-10 *et seq.*
- S.C. Code Ann. §§ 44-1-140 (2018)
- S.C. Code Ann. Regs. 61-56, *Onsite Wastewater Systems* ("R. 61-56")

JURISDICTIONAL ISSUES:

The Requestors have not met the statutory prerequisites to obtain review as affected persons, have failed to submit a timely RFR, and make allegations which are outside the Department's review of the Permit at issue. In raising these identified jurisdictional issues, the Department does not waive any other jurisdictional issues which may exist.

1. *The Requestors have not established themselves as "affected persons" to meet the statutory prerequisites to obtain a review of the Department's decision.*

   The Requestors are four homeowners' associations who state their members have concerns about the issuance of the Permit. The RFR states that the members of the associations own property either adjacent to or near the Site. The Department asserts that the RFR does not establish the Requestors or any of their members have the standing to seek review as affected persons that would suffer from alleged environmental consequences resulting from issuance of the Permit. See *Preservation Soc. of Charleston v. S.C. Dep't of Health and Envtl. Control*, 430 S.C. 200, 216, 845 S.E.2d 481, 490 (2020). Because the RFR does not demonstrate the existence of any cognizable harm rendering them "affected persons," the Requestors have not proved standing to seek review of the Department's decision in this matter.

2. *The RFR was not submitted within the statutory timeframe set forth in S.C. Code §44-1-60.*

   The Requestors claim to have moved expeditiously to file their RFR upon receipt of a response to Madelon Wallace's May 14, 2021, FOIA request. As noted above, the FOIA request did not specifically reference the Permit at issue or make any request to be notified of the issuance of the Permit. Further, it was submitted by Ms. Wallace in what appeared to be her individual capacity and did not reference any of the Requestor entities. While the Requestors claim to have submitted the RFR expeditiously, the request was not in fact timely submitted within the 15-day window imposed by S.C. Code §44-1-60. The Permit was issued on June 22, 2021, Requestors were aware of its issuance no later than August 4, 2021 and this RFR was not filed until October 26, 2021, which is 126 days after the Permit was issued. Because the Requestors failed to timely submit their request for review, the Board is without jurisdiction to review this matter.

3. *The Requestors' allegations concerning the stormwater management design and endangered species are outside the Department's purview in reviewing this Permit application.*

The Requestors allege the stormwater management design for the Site is improperly sized and does not contain an adequate buffer to the Gold Mine Creek and North Pacolet River. These concerns are beyond the scope of the Department's review for the Permit at issue. The Department's authority in reviewing septic system permit applications is limited to the regulatory scheme set forth in R.61-56. This regulatory scheme does not encompass stormwater, which is separately regulated by the Department's Bureau of Water pursuant to the South Carolina Pollution Control Act and Regulation 61-9, *Water Pollution Control Permits*. Of note, the stormwater application for this Site is being reviewed by Spartanburg County. An application has been submitted to the County and their staff are reviewing stormwater management and sediment and erosion control plans and supporting documentation. Once Spartanburg County approves the project, the owners must submit to the Department a request for and be granted coverage under the National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges from Construction Activities prior to starting construction at the Site.

The Requestors acknowledge that the protection of endangered species is outside the jurisdiction of the Department but alleges that two endangered species are part of the habitat alongside Gold Mine Creek. As with Requestors' stormwater concerns, the protection of endangered species is not included in the regulatory scheme set forth in R.61-56. Therefore, these concerns are beyond the scope of the Department's review for the Permit at issue. See *Brawley v. S.C. Dep't of Health and Envtl. Control*, No. 16-ALJ-30-0234-CC, 2016 SC ENV LEXIS 41, at *8 (S.C. Admin. L. Ct. Nov. 17, 2016) (Robinson, J.) (dismissing challenge to sewer project permit for failure to raise any specific concern "within the purview of the Department" regulations).

STAFF RESPONSE:

State statute charges the Department with overseeing the permitting, construction, and operation of onsite wastewater systems. The Department's onsite wastewater program, housed within the Bureau of Environmental Health Services, carries out this duty through implementation and enforcement of R.61-56. The Department's review of onsite wastewater system permit applications is conducted in accordance with applicable onsite wastewater permitting requirements set forth in R.61-56, which establishes a comprehensive framework of system standards, permit procedures, minimum conditions, and other requirements, all designed to ensure "[d]omestic wastewater can be rendered ecologically safe and public health can be protected." R.61-56, Section 100. These regulatory requirements include a range of size and material specifications, minimum site conditions, setbacks, and other provisions designed to protect the environment and public health from potential wastewater discharges. The requirements must be consistently implemented in accordance with the applicable regulatory text. The Department thoroughly evaluated the Permit application and issued the Permit after confirming it complies with all regulatory requirements based on the consulting professional engineer's system design, certification, and supporting documentation. Given the Applicant's satisfaction of R.61-56's requirements, the Department had no grounds to deny issuance of the Permit.

Without waiving the jurisdictional issues discussed above, the Department responds to the specific allegations of the Respondent as follows:

I. The Permit meets the sizing and capacity requirements set forth in R.61-56.

The Requestors assert generally that the permitted OSWW system is substandard and insufficient with regards to capacity. Specifically, the Requestors allege the Permit underestimated the peak

sewage flow for the Site. In fact, the system meets the capacity requirements set forth in R.61-56 which are designed to protect the public health and the environment.

R.61-56, Section 201.1(5), sets forth the requirement that septic tanks serving establishments other than individual dwellings shall be sized according to actual peak flow data, when available, or by estimates of peak sewage flow, as set forth in standards established by the Department. The peak sewage flow rate standards are established by the Department in R.61-56, Section 501, Appendix R. In this appendix, there is a chart which provides the standard for each type of establishment. For all listed establishments other than the listed residential establishments, the regulation states that peak flow rate may either be increased or reduced when comparable peak water consumption data for similar establishments in similar locations vary from the requirement.

The general standard established in R.61-56, Section 501, Appendix R, for the permitted Site is 120 gallons per unit per day. As asserted by the Requestors and as allowed as an alternative standard in R.61-56, Section 501, Appendix R, the Applicant presented at least 12 consecutive months of consumption data for a similar establishment in a similar location that demonstrated a peak of 50.19 gallons per unit per day for the month with the maximum consumption. To be conservative, the Applicant added a 20% safety factor over the comparable peak water consumption data for the similar establishment and used a figure of 60 gallons per unit per day in designing the system. This 60 gallons per unit per day capacity figure was further established based on the consulting licensed Professional Engineer's system design and certification that the system would function satisfactorily and in accordance with the applicable requirements of R.61-56.

II. The Permit meets the setback requirements to any surface water of the state that are set forth in R.61-56.

The Requestors allege the setback measurements in terms of distance to the Gold Mine Creek are unclear and the Department failed to consider topography and drainage to the Gold Mine Creek. While the memo from Jonathan Gerst included with the RFR acknowledges that the engineering plans for the Site show a 100-ft setback between the OSWW system drain lines and the southern property line along Gold Mine Creek, the memo asserts that the plans do not include stream survey data.

R.61-56, Section 200.6, covers the required setbacks for an onsite wastewater system and states that the area where the onsite wastewater system is to be installed shall be of sufficient size so that no part of the system will be within 100 linear feet of any receptor for all systems such as the one at issue which has a sewage flow of greater than 1500 gallons per day. Likewise, R.61-56, Section 401.2, states that a large (greater than 1500 gpd) or community onsite wastewater systems may not be placed any closer to receptors than 100 feet. A receptor is defined in 61-56, Section 101(A), as "any water well or surface water of the state, including estuaries."

The Department reviewed the septic design and layout submitted by the Applicant and noted at least 100 feet of separation from the Gold Mine Creek to all areas covered by the OSWW system. This was demonstrated by at least 100 feet of separation zones from the streamside. In this case, the zones from the streamside include a 30 feet streamside zone, a 45 feet managed use zone, and

a 25 ft upland zone. No further stream survey data was necessary to confirm compliance with the 100 feet setback requirement.

III. The Permittee may request a modification to the Permit if they are unable to connect to public water as stated in their application.

The Requestors allege the Permit was issued in error and/or is invalid, because the permit application stated the Site will be connected to a public water supply although public water is not available at this time. On the contrary, the Permit was not issued in error and is not invalid. First, there is no requirement that a site be connected to public water to obtain a Permit. The permit application requests as information whether the water source for the site will be public or private water. The Permit does reference the intended use of public water within the site description, but does not require a public water supply as a Permit specification or condition. The Permit is not invalid should the type of water supply change, but rather the Permittee would need to notify the Department of a change and obtain Department approval of any necessary changes to the plans.

REQUESTED ACTION:

Department staff respectfully requests the Board deny the Request for Final Review Conference, or in the event the matter is heard, that the Board uphold the issuance of the Permit.

Respectfully submitted,

David R. Vaughan

David R. Vaughan, Director
Division of Onsite Wastewater, Rabies, Vector Surveillance, and Enforcement

Sara Martinez

Sara V. Martinez
Chief Counsel for Environmental Quality Control

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

T. Tree Farms RV Park (Blue Sky Associates, LLC).	)	
Petitioner,	)	Docket No. 22-ALJ-07-0010-CC
vs-	)	**PETITIONER'S PREHEARING STATEMENT**
South Carolina Department of Health and Environmental Control, Enclave at Fairview HOA, Golden Hills of Fairview HOA, Greenspace of Fairview, LLC, and North Pacolet Association, Inc., Respondents.	)	

Petitioner, Blue Sky, LLC, (Blue Sky or Petitioner) hereby files its Prehearing Statement in response to the March 18, 2022, Order of the Court.

1. The nature of this proceeding;

This is a Request for a Contested Case Hearing filed under the Administrative Procedures Act requesting administrative review of the Board of the Department of Health and Environmental Control's (the "Board's") Order issued January 13, 2022. The Board improperly heard an untimely filed Request for Final Review (RFR) on its merits and reversed staff's June 22, 2021, decision to grant Petitioner's onsite wastewater system ("OWWS") permit #2-2021040112.

2. Statutory provisions(s) conferring subject matter jurisdiction to the Administrative Law Court and other applicable statutes and regulations;

This contested case was commenced pursuant to S.C. Code Ann. §44-1-60 (G). This case is before the Administrative Law Court pursuant to S.C. Code Ann. §§44-1-60(G), 1-23-600. This case is before the Administrative Law Court as a "contested case" pursuant to S.C. Code Ann. §§ 1-23-310, 1-23-600. Onsite wastewater system regulations are found at S.C. Code Ann. Regs 61-56.

3. The issues presented for determination;

Whether the Board erred in granting the RFR that Requestors Enclave at Fairview HOA, Golden Hills of Fairview HOA, Greenspace of Fairview, LLC, and North Pacolet Association, Inc., ("Requestors") filed on October 14, 2021, where the permit was issued to Blue Sky on June 22, 2021. Whether the Board erred in reversing DHEC staff's decision to grant the permit in question. Petitioner will raise the claim that Requestors failed to properly exhaust its administrative remedies and failed to timely appeal, thus making the initial staff decision final, and depriving the DHEC Board of jurisdiction to hear this case on its merits.

In the unlikely event the case proceeds to a hearing on the merits, Petitioner will prove that the initial staff decision on the permit was proper and the Board erred in reversing the staff decision.

4. A brief summary of the facts to be presented at the hearing;

The issues in this case are exclusively legal. Requestors filed their RFR 113 days after the permit decision was mailed. Requestors did not request in writing to be notified of staff's decision pursuant to S.C. Code Ann. §44-1-60 (E)(1).[1] The staff decision became final on July 7, 2021. Despite the clear timeliness issue, and without addressing the jurisdictional bar, the Board improperly heard the RFR on its merits and reversed staff's decision on the permit. The Board improperly found that the flow rate data from another RV park used to size the system was not "comparable" to the permit at issue. Both the Board's decision to hear the RFR on its merits and its decision to reverse staff were in error.

5. The action requested of the Court and a detailed statement of the law, including statutory and/or case citations, that support the action requested.

[1] On May 14, 2021, Madelon Wallace filed a FOIA request concerning Petitioner's project. However, Ms. Wallace is not one of the Requestors. Though she is an officer of one of the Requestors, she filed the FOIA request on her own behalf. Most importantly, a FOIA request pertains to documents in the Department's possession. It is not a request to receive documents that the Department might create in the future. A FOIA request cannot be construed as a request to be notified of a final agency decision under Section §44-1-60 (E)(1).

Petitioner requests that the Court reverse the determination of the Board and reinstate the initial DHEC staff decision, based on the exhaustion/jurisdictional issue. In the event the Court hears the case on the merits, Petitioner requests that the Court reverse the determination of the Board, and find that staff's permit decision was proper. With regard to the law, S.C. Code Ann. § 44-1-60 (E)(2) sets out the time limits for filing a RFR and the consequences of failure to timely file. See also *Pickens Cnty. v. S.C. Dep't of Health & Env't Control*, appellate case 2020-000448, (S.C. December 8, 2021).

6. A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion;

Petitioner will shortly file a motion for summary judgment or other dispositive motion on the exhaustion/jurisdictional issue.

7. A list of proposed witnesses and exhibits;

Potential Witnesses:

Petitioner does not believe that any witnesses will be involved in this case; the timeliness issue is dispositive. In the unlikely event that the Court allows this case to be heard on the merits, possible witnesses include:

a) Zachary D. Johnson
b) Dennis J. DeFrancesco
c) Department staff involved in processing the permit
d) any other witness named by the Department or other Respondents.

Petitioner reserves the right to supplement this list.

Potential Exhibits

Portions of the Petitioner's OWWS application file and Requestors' documents filed with the DHEC Board in this case.

Petitioner reserves the right to supplement this list.

8. A statement regarding the necessity for discovery, if any;

Petitioner believes that standard discovery will be sufficient in this case. Petitioner requests that any discovery be stayed pending resolution of Petitioner's motion for summary judgment or other dispositive motion on the jurisdictional issue.

9. Whether Petitioner deems a pre-hearing scheduling conference or other procedural orders necessary;

Petitioner does not believe these are necessary. With regard to settlement attempts such as prehearing mediation, Petitioner has no objection. Petitioner is opposed to any delays in the adjudication of this case in furtherance of mediation, and would object to any request to stay the case pending mediation.

10. The estimated time for a hearing;

Petitioner estimates the case will be disposed of during a one-hour motion hearing. If this case were to proceed to a hearing on the merits, it would take one day.

11. Suggested trial dates;

Petitioner suggests a hearing date in early May of 2022 and has availability on May 2-6 and May 9-13.

12. Email Address for correspondence;

Alex@Shissiaslawfirm.com

April 1, 2022

Alexander G. Shissias
The Shissias Law Firm, LLC
1727 Hampton Street
Columbia, SC 29201
803-540-3090
ATTORNEY FOR PETITIONER
BLUE SKY ASSOCIATES, LLC

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

T. Tree Farms RV Park (Blue Sky Associates, LLC).	)	
Petitioner,	)	Docket No. 22-ALJ-07-0010-CC
vs-	)	**PROOF OF SERVICE**
South Carolina Department of Health and Environmental Control, Enclave at Fairview HOA, Golden Hills of Fairview HOA, Greenspace of Fairview, LLC, and North Pacolet Association, Inc., Respondents.	)	

I hereby certify that on April 1, 2022, I served the above Prehearing Statement upon all parties and counsel of record by placing a copy of same in an envelope and depositing it in the U.S. Mail, first class, with sufficient postage paid, at the addresses indicated below:

Sara Martinez, Esq.
South Carolina Department of Health and Environmental Control
2600 Bull St.
Columbia, SC 29201
Counsel for Respondent DHEC

Carl F. Muller, Esq.
607 Pendleton Streeet
Suite 201
Greenville, SC 29601
Counsel for Respondents Enclave at Fairview HOA, Golden Hills of Fairview HOA, Greenspace of Fairview, LLC, and North Pacolet Association, Inc.

Matthew Richardson, Esq.
Wyche Law Firm
PO Box 12247
Columbia, SC 29211-2247
Counsel for Respondents Enclave at Fairview HOA, Golden Hills of Fairview HOA, Greenspace of Fairview, LLC, and North Pacolet Association, Inc.

Columbia, South Carolina
April 1, 2022



Alexander G. Shissias
The Shissias Law Firm, LLC
1727 Hampton Street
Columbia, SC 29201
803-540-3090
ATTORNEY FOR PETITIONER
BLUE SKY ASSOCIATES, LLC.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

T. Tree Farms RV Park (Blue Sky Associates, LLC), Petitioner, 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., Respondents.	Docket No. 22-ALJ-07-0010-CC **RESPONDENT HOAs' PRE-HEARING STATEMENT**

Respondents, The Enclave at Fairview Homeowners' Association, Inc., Golden Hills of Fairview Homeowner's Association, Inc., Greenspace of Fairview, LLC, and North Pacolet Association, Inc. ("Respondent HOAs") hereby submit their Pre-Hearing Statement. Respondent HOAs reserve the right to supplement this statement and present additional information as discovery progresses and the hearing date approaches.

1. **Nature of Proceeding**

This Request for Contested Case Hearing ("RCCH") seeks reversal of the well-reasoned Final Agency Decision of the South Carolina Board of Health and Environmental Control ("Board") dated January 13, 2022. The Board properly overturned and rescinded the DHEC staff decision to issue Petitioner a permit to construct an onsite wastewater system, File Number 2021040112 ("septic permit"), for its proposed park for recreational vehicles ("RV park") at 1970 Landrum Mill Road, Campobello, which is in northern Spartanburg County. The Board determined that Petitioner's application did not meet the regulatory requirements and contained

The State of South Carolina Administrative Law Court FILED APR 07 2022

key misrepresentations and errors. Petitioner and its engineers misrepresented that a KOA campground was comparable to its project in an attempt to justify a 50% reduction for peak sewage flow in the design of its septic system. The site plans by Petitioner's engineers also contained critical errors about availability of public water, ownership of property, and a non-existent right of way for a water line. The Board's rescission resulted from a Request for Review ("RFR) filed by Respondent HOAs as the Requestors and Affected Parties and was granted at Docket No. 21-RFR-81.

Respondent HOAs sought review by the Board for several health and environmental reasons. Petitioner's proposed septic system design was based upon a non-comparable KOA campground and was undersized, lacked capacity, and risked failure. As permitted and designed, the septic system risked causing irreversible harm to the residents and properties of Respondent HOAs, including contamination of wells and drinking water along with negative impacts on the environment.

The Board Review Conference was held on December 20, 2021 and lasted the better part of a day. Evidence concerning the many serious problems with the septic system design and permit was presented by Respondent HOAs, their hydrogeologist, and 3 conservation organizations. DHEC staff and Petitioner were also heard. The Board then deliberated in executive session with its General Counsel to consider all issues, including Petitioner's argument concerning the timeliness of the RFR. The Board rendered its decision in open forum at the Review Conference, and its written Final Agency Decision was served by mail on January 13, 2022. Petitioner is challenging the Board's reversal of the DHEC staff decision and rescission of the septic permit. Petitioner filed the form prescribed by the Administrative Law Court ("ALC") to initiate its RCCH on January 14, 2022.

Respondent HOAs are four homeowners' associations whose properties do not have public water and are totally dependent on wells for drinking water. These properties surround and are contiguous to the proposed RV park, which would be located on a 12-acre section of a 38-acre parcel on Landrum Mill Road. The Respondent HOAs comprise approximately 5,000 acres of lands with conservation-focused restrictive covenants, and more than 1,400 acres are under formal conservation easements with multiple South Carolina land trusts.

A first-order headwater tributary, Gold Mine Creek, flows below a steep slope on the RV park section and along its common property boundary with Respondent The Enclave. The creek continues through other properties of the Respondent HOAs, where it merges into the North Pacolet River. This watershed is a primary source of drinking water for the city of Spartanburg. The immediate environment of Gold Mine Creek is sensitive and contains both the Dwarf-Flowered Heartleaf, which is a federally listed threatened species under the Endangered Species Act, and the Ashy Hydrangea, which is a Categorized Priority Species by the South Carolina Department of Natural Resources in the State's Wildlife Action Plan.

2. <u>Jurisdiction, Statutory Provisions, And Regulations</u>

- S.C. Code Ann. § 1-23-10 *et seq.* and S.C. Code Ann. § 44-1-60 outline jurisdiction and how it is conferred to the ALC;

- S.C. Code Ann. § 1-23-600(B) provides that all requests for a hearing before the ALC must be filed in accordance with the rules of procedure;

- S.C. Code Ann. § 44-1-60(F)(2) sets a 30-day time limit to contest a final agency decision;

- S.C. Code Ann. § 1-23-505(4) and (5) define "party" as "each person" and includes a corporation and an association within the definition of "person";

- SCALC Rule 11(B) requires that a copy of the request must be served "on each party" and that proof of such service must be included with the request;

- SCALC Rule 11(D)(4) requires that the request must include requested relief;

- SCALC Rule 23(B) provides for dismissal of request for failure to comply with rules;

- SCRCP Rules 4(d)(3) and 4(d)(8) define the required method of service upon a corporation and LLC;

- S.C. Code Ann. R. 61-56 (Onsite Wastewater Systems) and 501 Appendix R (Peak Sewage Flow Rate Standard, p.72); and

- S.C. Code §§ 30-4-10 and 30-4-30 are the South Carolina Freedom of Information Act and the required time for public agency response.

3. Issues for Determination, Claims, and Defenses

(A) Whether the ALC lacks subject matter jurisdiction due to Petitioner's procedural errors

In this case, Petitioner did not comply with mandatory rules of procedure, which divests the ALC of subject matter jurisdiction for the RCCH. Respondent HOAs will further address this jurisdictional issue in a pre-hearing motion. Petitioner's procedural errors are as follows:

- Petitioner failed to properly name and serve "each party" (three corporations and an LLC) within the prescribed 30-day time period [S.C. Code § 44-1-60(F)(2) and SCALC Rule 11(B)];

- Petitioner's attempted service of its RCCH via regular mail addressed to an individual "Russell Rock" was neither proper nor effective service upon three corporations and an LLC [SCRCP Rule 4(d)(3) and 4(d)(8)]; and

- Petitioner failed to state the requested relief in its RCCH [SCALC Rule 11(D)(4)].

(B) Whether the RFR by Respondent HOAs' was timely filed and properly heard by the Board

Contrary to Petitioner's assertions, the facts of this case and relevant law establish that the Board properly considered and granted the RFR filed by Respondent HOAs.

(i) The Board's statutory duty to protect the health and environment is controlling and must not be ignored.

The Board was created by the General Assembly to protect the health of citizens and the environment of the State of South Carolina. Petitioner now seeks to interfere with the Board's ability to perform its statutory duty to correct the DHEC staff's mistake in issuing a permit. By asserting a misplaced argument, Petitioner urges a result that not only interferes with the Board's statutory purpose and responsibility but overlooks its substantiated Final Agency Decision. Such a result would harm the people of South Carolina.

At the Review Conference, Petitioner presented its argument concerning the timeliness of the RFR, and the Board rejected this contention. DHEC General Counsel assisted the Board at the Review Conference and requested case citations on procedural issues. After presentations by the parties in open forum, the Board moved into executive session. Ultimately, the Board properly considered the RFR and corrected the DHEC staff's error in issuing the permit.

Respondent HOAs presented substantial evidence, including expert opinions of a hydrogeologist, that the septic system permitted by the DHEC staff posed a risk of harm to health and the environment because it was undersized, defective, lacked capacity, risked failure, and was based upon errors and misrepresentations by Petitioner and its engineers. The following evidence was offered by Respondent HOAs to substantiate the Board's decision:

- Petitioner and/or its engineers misrepresented to DHEC that a KOA campground was comparable to its project in an attempt to vastly reduce peak flow rate of septic waste at Petitioner's proposed RV park and was not justified;

- the permit application and site plans submitted by Petitioner and its engineers to DHEC contain multiple errors and misrepresentations, including that the site has no existing access to public water, false representations of private property rights and of a non-existent right of way

relating to installation of a public water line, and miscalculations on site plans;

- the DHEC permit issued to Petitioner is void because it was modified to include "*52*" lots/spaces and it exceeds the authority of the Spartanburg County Planning Commission, which gave conditional approval for only "*50*" spaces;

- the RVs discharge extremely harmful odor-suppressing chemicals from their wastewater holding tanks into septic systems, including formaldehyde, bronopol, dowicil, and others; these chemicals are known to cause septic system failure, are known to leach into groundwater causing drinking water contamination, and are a threat to public health and drinking water in Respondent HOAs communities which are dependent on well water;

- the DHEC staff processed Petitioner's application under R. 61-56, Section 102.1, which was the inappropriate regulation because RVs discharge treated and "non-domestic wastewater" with extremely harmful odor-suppressing chemicals, such as formaldehyde from the wastewater holding tanks; the application must be processed under Section 102.8, which provides that a permit shall not be granted unless DHEC determines that the proposed discharge would not pose a significant environmental risk; before issuing the permit, DHEC must have assessed the risk to public health and/or groundwater contamination under Section 102.8.

(ii) Petitioner's assertions regarding jurisdiction and timeliness of the RFR are incorrect.

In its RCCH, Petitioner asserts that "the Board lacked jurisdiction to consider untimely filed request for a RFR on the merits." This is incorrect and should be disregarded for multiple reasons.

Petitioner cites *Pickens County v. S.C. Dep't of Health and Environmental Control*, 435 S.C. 99, 866 S.E.2d 537 (2021), to argue that the Board lacked jurisdiction to grant the RFR in this case. The *Pickens* case is distinguishable from the instant case on several grounds, including that the respondent party (County of Pickens) delayed for several months in requesting an RFR after it received written notice of a DHEC staff decision, and the Board declined its RFR. Here, Respondent HOAs filed their RFR within twelve days of receiving an overdue response to FOIA

requests for all documents from DHEC, and the Board granted its RFR.

Moreover, the *Pickens* decision affirms *South Carolina Coastal Conservation League v. S.C. Dep't. of Health and Environmental Control*, 390 S.C. 418, 702 S.E.2d 246 (2010). In reviewing the requirements of S.C. Code section 41-1-60(E)(2), the supreme court stated 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*," and that "*the foray into the degree of formality needed for § 41-1-60(E) 'affected person' status is not necessary.*" *Id.* (emphasis added). The court noted that DHEC is responsible for managing the welfare of our public health system and the environment and that transparency and full disclosure in matters relating to regulatory authority are required. The court determined that since the respondent in that case was on a mailing list, it was not "*an obscure or unknown party*" and should have received a copy of the permit decision.

In the instant case, a member of the Respondent HOAs submitted a FOIA request on May 14, 2021 for all documents related to the RV park project nearly six weeks before the subject permit was issued. DHEC was aware of the existence of an affected party and its contact information but did not provide any notice of the staff decision. DHEC also delayed for five months in providing its statutorily required FOIA response and misrepresented the status of the permit application to Respondent HOAs as described below.

(iii) The RFR was timely, because the RFR was not due until 15 days after DHEC provided the requested documents, which included the permit.

Applying the applicable law to the facts of this case, the DHEC staff decision did not become final until 15 days after DHEC provided its response to the FOIA request for "all documents concerning the RV Park," which included the permit. Pursuant to the SC Freedom of Information Act, S.C. Code § 30-4-10 *et seq.* ("FOIA"), DHEC must follow the statutory

procedure for replying to a FOIA request. The agency clearly did not follow the procedure and procrastinated with its mandatory reply for five months.

The failure of DHEC to comply with the time limits of FOIA and to provide accurate public information are multifaceted. On May 14, 2021 and nearly six weeks before the permit was issued, Respondent HOAs submitted the FOIA request for all documents relative to this proposed RV Park. Consistent with *South Carolina Coastal Conservation League,* the FOIA request put DHEC on notice that affected parties existed and required notice of any staff decision on the Petitioner's septic permit application. David Vaughan of DHEC acknowledged the FOIA request in writing on May 17, 2021, but there was no notice of the agency determination regarding the request, which is required by S.C. Code section 30-4-30(C).

Notably, after the permit was issued on June 22, 2021, DHEC provided inaccurate information. In multiple phone inquiries initiated by members of Respondent HOAs, the DHEC staff repeatedly stated that "*no permit*" had been issued.

In late July 2021, Respondent HOAs received incomplete information within the community that a permit had been issued to Petitioner. As of that time, Respondent HOAs still had not received the statutorily required response from DHEC to their FOIA request. Respondent HOAs communicated to DHEC that full and complete information was needed to ascertain whether misrepresentations had been made to the DHEC staff by Petitioner and its engineers and to review the underlying facts and data related to any permit issuance.

By September 30, DHEC still had not provided the response required by FOIA. On August 4 (in person) and September 30, 2021 (video teleconference), DHEC officials stated that a KOA campground, which they could not identify, was asserted by Petitioner and its engineers to be a similar establishment to attempt to justify a 50% reduction in peak flow from the R. 61-

56 standard. The identity of the allegedly similar KOA campground, its characteristics, location, and peak flow data were critical to an analysis of Petitioner's septic permit by the hydrogeologist retained by Respondent HOAs. The hydrogeologist related this need in writing to Mr. Vaughan of DHEC. DHEC failed to identify this KOA campground until October 14, 2021, when the agency finally provided its FOIA response to the request of May 14, 2021.

Petitioner incorrectly asserts that the person who submitted the FOIA request, Madelon Wallace, was acting in her own capacity and that detaches Respondent HOAs from the request. Of note, FOIA does not require that the capacity of the requesting person be defined.

Ms. Wallace is a manager and shareholder in Greenspace of Fairview and a member/owner in Golden Hills of Fairview. Ms. Wallace was actively participating in a collective effort by members of Respondent HOAs to obtain information about Petitioner's project and was handling FOIA requests to the county and DHEC.

In fact, for several months, various members of the DHEC staff discussed the May 14 FOIA request repeatedly with at least 4 members of Respondent HOAs and their hydrogeologist in person, in a video teleconference, and in emails. The DHEC staff had actual knowledge that the FOIA request and other inquiries were connected with Respondent HOAs.

Petitioner's attempt to limit the scope of FOIA here is contrary to the findings of the General Assembly in drafting the legislation; namely "*that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity.*" As more fully described in Section 4(B) below, DHEC failed to provide a timely FOIA response and made misleading statements about the issuance of the permit to Respondent HOAs. Petitioner seeks to endorse this deviation from

FOIA and the intent of the legislature that citizens be timely advised of decisions by public officials.

Moreover, Petitioner overlooks the Supreme Court's statement in *South Carolina Coastal Conservation League* that the legislature did not define any formality for how a party becomes an affected party and places DHEC on notice of such status. *See* 390 S.C. at 427, 702 S.E.2d at 251.

(iv) There is no time limit on reporting an applicant's misrepresentations to a government agency.

Petitioner and its engineers made critical errors and misrepresentations in the application and site plans submitted to DHEC. These were not revealed to Respondent HOAs until October 14, 2021, when DHEC provided a seriously overdue response to the May 14 FOIA request.

As noted in the RFR of October 26, 2021, the errors and misrepresentations reported to the Board by Respondent HOAs include:

- a misrepresentation that a KOA campground was a "similar establishment in a similar location" per R. 61-56 to attempt to justify a 50% reduction in peak flow rate;
- a non-existent right of way (for public water) over privately owned properties;
- non-existent public water to the site; and
- errors in the engineering site plans, including exceeding the authority of the Spartanburg County Planning Commission and its 50-space limit.

4. Summary of Facts to Be Presented at the Hearing

(A) History of Petitioner's RV Park Project Within Spartanburg County

On March 2, 2021, the Spartanburg County Planning Commission ("PC") granted conditional approval of Petitioner's plans for its proposed RV park. The PC conditionally approved a "*50 space*" RV park with six conditions being imposed: (1) supplying public water from the Inman Campobello Water District to the park; (2) establishing fire hydrant locations

within the park; (3) naming and addressing park roads; (4) receiving architectural design approval of all park buildings; (5) procuring a stormwater permit; and (6) obtaining a DHEC septic permit. As of the below date, Petitioner has not fulfilled four of the six conditions: public water, stormwater permit, fire hydrants, and septic permit.

For the PC's meeting and deliberations of March 2, 2021, Petitioner submitted site plans prepared by its engineers, Gray Engineering ("Gray"). The engineering plans contained critical errors and misrepresentations concerning the ownership of Landrum Mill Road and a non-existent right of way. Gray labeled Landrum Mill Road as a "state road" with an "SC Department of Transportation right of way," which directly relates to access (or lack thereof) to public water for the park. In fact, Landrum Mill Road is owned by adjoining property owners to the center line of the road. There is no right of way for a water line. There is no existing public water to the park or water for fire hydrants, which are two of six conditions imposed by the PC.

(B) The Septic Permit and DHEC's Failure to Timely Provide Information to Respondent HOAs as Required by Statute

On April 23, 2021, Petitioner, by its manager, Kimberli Burnett, submitted an Onsite Wastewater Application for the proposed RV Park. On the application, Petitioner checked "*public water*" and noted *"50"* as the occupants/spaces. A handwritten notation appears on the application with a change of the number from 50 to "*52 as per P.E.*"

On May 14, 2021 Respondent HOAs, through Madelon Wallace, submitted a Freedom of Information request ("FOIA") to DHEC for "*copies of all documents concerning a proposed recreational vehicle park ("RV Park") to be located at or near 1970 Landrum Mill Road, Campobello, SC, in Spartanburg County, Block Map Reference #1-09-00-020.03."*

On May 17, 2021, DHEC, by David Vaughan, acknowledged the FOIA request. However, his reply did not provide any notice of the agency's determination as required by S.C. Code section

30-4-30(C). By statute, the request was considered approved 10 days after May 14 (exclusive of Saturdays, Sundays, and holidays), and DHEC was required to furnish the requested documents no later than 30 calendar days, i.e., no later than June 27, 2021. This deadline was five days after the permit was issued. The notice and documents were not provided until months later.

On June 22, 2021, DHEC issued the septic permit to Petitioner for "*52*" RVs/lots. DHEC approved a 50% reduction and sub-standard loading rate with a flow of 3,120 gallons per day ("GPD") or 60 gallons per day ("GPD") per RV/lot. This was a deviation from R.61-56, which sets forth a standard of 120 GPD per RV for a campground with no laundry (501. Appendix R, p. 72). While R. 61-56 allows for an adjustment to the calculated peak flow GPD on the condition that the applicant's establishment is "*a similar establishment in a similar location*," there was no information on the permit as to the basis for the sub-standard loading rate.

After the permit was issued, the DHEC staff incorrectly stated in repeated phone inquiries that "*no permit*" had been issued. Between the end of June and mid-July 2021, members of the Respondent HOAs telephoned both the local and state DHEC offices multiple times to inquire whether a septic permit had been issued to Petitioner for the proposed park. The members provided several names for the DHEC phone staff to cross check, including Blue Sky Associates, T Tree Farms RV Park, William McDaniel, and Kimberli Burnett. DHEC staff replied that no permit was issued. This information proved to be inaccurate.

In mid-July, a member of the Respondent HOAs continued in requesting a cross check in a phone call with a DHEC representative, who stated that a permit had been issued the month before.

Respondent HOAs persisted in their requests to DHEC for its response to the May 14 FOIA request and the permit, site plans, drawings, and soils reports. Respondent HOAs retained a

hydrogeologist, Jonathan Gerst, to review the DHEC file and ascertain whether the septic system location was appropriate, whether the septic system design had sufficient capacity to handle the volume of discharged contents from larger RVs with their huge wastewater holding tanks, and whether the septic system posed a risk of failure and threat to health (wells and drinking water) and the environment. Petitioner's managers and others represented to Respondent HOAs that the proposed RV park was designed for large, sizeable RVs. Larger RVs are equipped with giant wastewater holding tanks.

On August 4, 2021, DHEC had not yet provided its FOIA response. Members of Respondent HOAs and their hydrogeologist met with DHEC representatives, David Vaughan and Jill Stewart, at a community meeting in Landrum. Mr. Vaughan mentioned that "*a KOA campground*," which he could not identify, was submitted by Petitioner as the basis for the GPD 50% reduction in its septic permit. He did not provide any other information about the KOA campground. Despite the May 14 request for all documents related to the RV park, there were no site plans, drawings, soils reports, name of an alleged similar establishment, or other essential materials produced by DHEC.

On September 30, 2021, several members of Respondent HOAs and their hydrogeologist participated in a video teleconference with David Vaughan and Jill Stewart. DHEC had not yet replied to the FOIA request. Mr. Vaughan again stated that the GPD for Petitioner's park and the septic permit had been reduced from the standards of R. 61-56 based upon a "*comparable KOA campground*," as asserted by Petitioner. Mr. Vaughan stated that DHEC had no other information on the alleged comparable KOA campground, and he did not provide its identity. The need to assess whether this unidentified KOA campground was indeed comparable was discussed among the participants. The necessity of obtaining specifics such as the address, location, topography,

soils loading rate, slope, hydrogeological, and other information about the KOA campground was mentioned. Members of the HOAs again prompted Mr. Vaughan for the overdue FOIA response and the need for these materials to fully review and evaluate the location, design, sufficiency, and capacity of the Petitioner's proposed septic system. Mr. Vaughan stated that the DHEC FOIA staff was working to provide the requested documents to Respondent HOAs.

As of October 6, 2021, DHEC still had not responded to the FOIA request. On October 6 and 7, additional appeals for all documents per the FOIA request were submitted by members of Respondent HOAs to DHEC via email.

On October 13, 2021, Mr. Gerst, the hydrogeologist retained by the Respondent HOAs, contacted Mr. Vaughan directly and also requested the previously mentioned information, including engineering site plans, drawings, soils reports, and the identity of a KOA campground, which Petitioner asserted was a similar establishment in a similar location per R. 61-56 so as to justify the 50% GPD reduction in the capacity and design of its septic system. Mr. Gerst told Mr. Vaughan that he needed this information to analyze whether the KOA campground was indeed comparable, to assess risks of deleterious impacts of groundwater supply to the drinking wells of Respondent HOAs' residents, to review soil and site conditions, to study water table elevation, and to assess the potential for risk of unauthorized septic release, which would cause water quality impairment. In a reply email, Mr. Vaughan stated that he could not "*recall seeing anything about a KOA campground in the file*" but that a response to the FOIA request was forthcoming from the DHEC FOIA staff "*very soon.*"

On October 14, 2021, DHEC first identified the KOA campground and forwarded its response to the FOIA request via email to a member of the Respondent HOAs. The response was 32 pages and included essential technical documents, some of which contained critical errors and

misrepresentations: the application; permit to construct a "*52*" space RV Park with "*public*" water; engineering septic system sheet/drawing with a description of the construction and specific materials for the septic system, including leach lines and 4 septic tanks with a 5,000 gallon total capacity (2 -1,000 gallon and 2-1500 gallon); engineering site plans for grading, drainage and erosion control displaying location of the septic system (with errors concerning a non-existent right of way and mistakes in labeling/numbering RV spaces); 6-page soils report; *"T Tree Farms"* Flow Data/Gallons used per month for 12 months in 2020 (with error in identification since flow data was not from Petitioner's proposed park); and calculations by an engineer with a notation of "*data taken from Travelers Rest/N. Greenville KOA*" with its peak flow estimations (handwritten on 1 page).

This was the first time that the identity of the KOA campground, computed flow data, and the above-described items were furnished by DHEC to the Respondent HOAs. On October 26, 2021, Respondent HOAs filed their RFR with the Board.

Shortly after the RFR was filed, Petitioner engaged in unlawful grading activities on the parcel. Spartanburg County inspectors promptly conducted an onsite investigation and determined that the parcel was being graded without permits. On November 17, 2021, the county ordered Petitioner to cease. Petitioner was cited for unlawful land disturbance without a grading permit in violation of State Law 72-300, SMS4 Permit, NPDES Permit, and Spartanburg County Stormwater Ordinance. Petitioner was ordered to perform remedial measures and to stabilize the area.

(C) Rescission of the Septic Permit by the Board

On December 8, 2021, the three-member Board RFR Committee conducted its preliminary review and voted to hold a full Review Conference. On December 20, 2021, the Board held a comprehensive Review Conference. The parties participating at the Review Conference were

Respondent HOAs (as the Requestors and Affected Parties), The Southern Environmental Law Center, Upstate Forever (land trust), The South Carolina Native Plant Society, DHEC staff, and Petitioner with its manager, Kimberli Burnett, as well as its counsel.

The Board received each party's evidence, heard arguments, and moved into executive session to deliberate. The Board voted to rescind the DHEC staff decision to issue the subject septic permit. The Board determined that the KOA campground was not a similar establishment to the Petitioner's proposed RV park and agreed with Respondent HOAs that the peak flow rate utilized in designing the onsite wastewater system was not supported by the data for the KOA campground.

(D) Petitioner's RCCH and Failure to Properly Name and Serve Each Party

On January 13, 2022, the Board issued and served its Final Agency Decision, and Petitioner filed its RCCH on January 14, 2022. In its RCCH, Petitioner named "Sara Martinez, DHEC OGC" and "Russell Rock." Petitioner served its RCCH on "Russell Rock" via first class U.S. mail (regular mail) and did not name or serve him in any designated capacity.

Earlier in October 2021, Russell Rock provided his email, telephone and address to the Board as suggested in the DHEC courtesy guidelines on its website, "Guide to Board Review." Mr. Rock did not agree to be the agent for service for the Respondent HOAs or agent for any purpose in ALC proceedings. In fact, Mr. Rock is not the agent for service of process for any of the Respondent HOAs and is not authorized by the 20 Directors and Managers of Respondent HOAs to act as their agent for service.

Respondent HOAs conduct their operations in accordance with S.C. Code Title 33-Corporations, Partnerships and Associations, Ch. 1, *et seq.*, and each has an agent for service duly registered with the Secretary of State. None of these registered agents were served by Petitioner

with its RCCH, and Petitioner's attempted service upon Russell Rock, an individual, was ineffective. Petitioner failed to name and serve each party within the prescribed 30-day period, and this time limit cannot be extended.

5. <u>Action Requested by the Court; Law and Statutes</u>

(a) At the outset, Respondent HOAs request that the court dismiss Petitioner's RCCH with prejudice because the court lacks subject matter jurisdiction due to Petitioner's procedural errors. The basis for such dismissal is outlined below in Section 6 (Petitioner's failure to properly and timely name necessary parties, failure to properly and timely serve 4 business entities, and failure to state requested relief in its RCCH). Applicable statutes include S.C. Code Ann. § 1-23-600(B), S.C. Code Ann. § 44-1-60(F)(2), SCRCP 4(d)(3), 4(d)(8), and SCALC Rules 11(B), 11(C), 11(D)(4), 23(B), and S.C. Code Title 33, Corporations, Partnerships and Associations.

(b) Alternatively to the above, Respondent HOAs request that the court dismiss Petitioner's argument concerning the timeliness of their RFR. Petitioner's assertion that the RFR was untimely filed is unfounded and not substantiated by the applicable law and facts in this case. Petitioner's reliance upon the *Pickens* case is misplaced for the reasons set forth above. Applicable statutes include S.C. Code §§ 30-4-10 and 30-4-30(C). *See also South Carolina Coastal Conservation League, id.*

(c) Alternatively to the above, Respondents request that the court uphold the Board's Final Agency Decision, which rescinded the staff decision and the septic permit issued to Petitioner for good cause and as substantiated by the evidence. Respondent HOAs further request that the court find that the septic permit was improperly issued by the DHEC staff and that Section 102.8 of R. 61-56 is the appropriate section under which this application should have been processed.

6. Summary of Motions and Authority

Respondents will file a motion to dismiss Petitioner's RCCH with prejudice. Due to the Petitioner's procedural errors, the ALC is divested of jurisdiction. The motion to dismiss is based upon the following:

- The ALC does not have jurisdiction to proceed based upon the defective and incomplete RCCH filed by Petitioner, and the 30-day period for Petitioner to contest the Final Agency Decision is expired and cannot be extended [S.C. Code Ann. § 1-23-600(B), S.C. Code Ann. § 44-1-60(F)(2) and SCALC Rule 11(C)];

- Petitioner failed to name the proper, necessary, and indispensable parties, which are the Respondent HOAs (Affected Parties and Requestors in the RFR) [S.C. Code Ann. § 44-1-60 and SCALC Rule 23 (B)];

- Petitioner failed to effect service of process upon each of the 4 parties [SCALC Rule 11(B), SCALC Rule 23 (B)];

- Petitioner attempted service of its RCCH upon the Respondent HOAs by U.S. regular mail addressed to "Russell Rock," an individual; Mr. Rock is not the agent for service of process for Respondent HOAs; Mr. Rock did not agree to accept service; Mr. Rock is not authorized by the 20 Directors and Managers of the Respondent HOAs to accept service; the ALC does not have the statutory authority to impose the legal duty upon an individual person (Russell Rock) to act as an agent for service of process for the 4 business entities; the ALC does not have the statutory authority to override the actions of the Directors and Managers of the 4 business entities in appointing their agents for service of process;

- Petitioner's attempted service upon a corporation and limited liability company by regular mail is improper [Rules 4(d)(3) and 4(d)(8)]; and

- Petitioner failed to state the "requested relief" in its RCCH [SCALC Rule 11(D)(4) and SCALC Rule 23 (B)].

7. Proposed Witnesses and Exhibits

(A) Witnesses

At the present time, Respondent HOAs propose to call the following witnesses and reserve the right to call additional and rebuttal witnesses:

(a) Jonathan Gerst, Hydrogeologist;
(b) Russell Rock;
(c) Joanne McCormick Quatannens; and
(d) Madelon Wallace.

(B) Exhibits

At the present time, Respondent HOAs propose to introduce the following exhibits and reserve the right to supplement and modify this list:

(a) Documents from the DHEC file of Petitioner's septic permit application;
(b) Documents and materials submitted to the Board by Respondent HOAs;
(c) Documents served by Petitioner, including its RCCH, cover letters, and envelopes;
(d) Documents, notes, and reports prepared by Petitioner's engineers and soils specialist;
(e) Maps and photographs of properties, Landrum Mill Road, and watershed;
(f) Documents prepared by Respondent HOAs' expert(s);
(g) The cover letter to the Board's Final Agency Decision;
(h) DHEC's "Courtesy Guide to Board Review;"
(i) Research articles and documents on harmful chemicals in RV holding tank odor suppressants and impact on septic systems and drinking water, including U.S. Environmental Protection Agency, Publication 909-F-99-002; Univ. of Minnesota (2020) "Analysis of Recreational Vehicle Holding Tank Treatment Products;" (2009) DTSC Chemical Toilet Products Advisory for Consumers Fact Sheet; Univ. of Arizona (2018) "RV Holding Tank Treatments and Deodorizers in Septic Systems;" NC Dept. of Health and Human Services (2017), "Permitting and Design Guidance for Wastewater Treatment and Dispersal Systems for Recreational Vehicle Parks;" Washington DOT, "Treatability of Recreational Vehicle Wastewater in Septic Systems at Highway Rest Areas;" and (2019) California SB-317;
(j) Documents and materials regarding variety of RVs, classifications, size, and varying capacity of holding tanks;
(k) Documents, photographs, and materials regarding the KOA campground in Travelers Rest;
(l) Documents and materials from the Spartanburg County file of Petitioner's project, including the Planning Commission's Conditional Approval; and
(m) Notice of Violation, Unlawful Land Disturbing Activities, issued to Petitioner by Spartanburg County on November 17, 2021.

8. **Necessity for Discovery**

Respondent HOAs submit that discovery is necessary in this case. Depositions of Petitioner's witnesses, DHEC's witnesses, and Petitioner's managers are anticipated. A request for a site inspection by Respondent HOAs and their expert(s) will be submitted.

9. **Necessity for Prehearing Scheduling Conference or Other Orders**

Respondent HOAs submit that a Pre-Hearing Scheduling Conference (by telephone) may be beneficial in light of the anticipated motions and discovery.

Respondent HOAs respectfully request that this matter be ordered to mediation to be conducted in either Spartanburg or Greenville County. Respondent HOAs have reached out multiple times to Petitioner's managers and attorneys to discuss possible resolution. Respondent HOAs have offered to purchase the parcel for an amount that reflects a substantial profit over Petitioner's purchase price in September 2020.

Respondent HOAs believe that a mediation would be beneficial and would not cause any delay in Petitioner's project. Over 13 months have passed, and the Petitioner has not met 4 of the 6 conditions of the Spartanburg County Planning Commission's Conditional Approval. There has been no construction related to a septic system. Petitioner was cited by Spartanburg County for unlawful land disturbing activities without a grading permit in November 2021 and ordered to cease all grading.

Of note, the Conditional Approval of the Spartanburg County Planning Commission has been appealed by Respondent HOAs to the 7th Judicial District Court, and that action has been stayed by the court. Petitioner cannot move forward with their project at this time.

10. **Estimated Time Required for Hearing**

Respondent HOAs estimate that the hearing will take 1 to 2 days.

11. **Range of Proposed Dates**

Taking into consideration the dates provided by the other parties and a potential mediation by the end of June, Respondent HOAs' counsel and witnesses are available for a hearing on the following dates: August 9-10, August 15, 17, and August 22-25.

Respondent HOAs request that the case be referred to mediation with a deadline of June 30, 2022; and, if the matter does not resolve at mediation, that the parties be ordered to return to the court for a status conference and mediation report within 15 days of the conclusion of the mediation. At the status conference, the parties should provide a projected discovery cut-off date and proposed factual stipulations so as to conserve judicial resources.

12. **Email Addresses for Correspondence**

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April 7, 2022

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The Enclave at Fairview Homeowners' Association, Inc., Golden Hills of Fairview Homeowner's Association, Inc., Greenspace of Fairview, LLC, and North Pacolet Association, Inc.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

T. Tree Farms RV Park (Blue Sky Associates LLC), Petitioner, vs. South Carolina Department of Health and Environmental Control, The Enclave at Fairview Farm Homeowners' Association, Inc., Golden Hills of Fairview Homeowner's Association, Inc., Greenspace of Fairview, LLC, and North Pacolet Association, Inc., Respondents.	Docket No.: 22-ALJ-07-0010-CC **CERTIFICATE OF SERVICE**

I, Victoria L. Baker, Paralegal for Wyche, PA, hereby certify that I have on this 7th day of April, 2022, served the foregoing: ***Respondents The Enclave at Fairview Farm Homeowners' Association, Inc., Golden Hills of Fairview Homeowner's Association, Inc., Greenspace of Fairview, LLC, and North Pacolet Association, Inc.'s Pre-Hearing Statement*** upon all parties and counsel of record via electronic mail as follows:

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April 7, 2022
Columbia, South Carolina

Victoria L Baker

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

T. Tree Farms RV Park (Blue Sky Associates LLC), **Petitioner,** **vs.** 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. Respondents.	DOCKET NO. 22-ALJ-07-0010-CC **Respondent South Carolina Department of Health and Environmental Control's *Prehearing Statement***

Respondent South Carolina Department of Health and Environmental Control ("Department" or "DHEC") submits this Prehearing Statement pursuant to the Order for Prehearing Statements filed March 18, 2022, by the Honorable Milton G. Kimpson.

1. **The nature of this proceeding:** Petitioner in this contested case is challenging the decision of the South Carolina Board of Health and Environmental Control ("DHEC Board") to overturn and rescind the staff decision to issue Permit to Construct Onsite Wastewater System, File No. 2021040112 ("Permit") to Blue Sky Associates, LLC ("Blue Sky") for the construction of an onsite wastewater system to serve the T. Tree Farms RV Park located at 1970 Landrum Mill Road in Campobello, South Carolina in Spartanburg County. Department staff issued the permit to Blue Sky on June 22, 2021. A request for review of the staff decision was filed by Enclave at Fairview Homeowners' Association, Inc., Golden Hills of Fairview Homeowner's Association, Inc., Greenspace of Fairview, LLC, and North Pacolet Association, Inc. (hereinafter collectively

referred to as "Requestors") on October 26, 2021. After conducting a final review conference on December 20, 2021, the DHEC Board issued its final agency decision to overturn the staff decision to issue the Permit. The DHEC Board found that the peak flow rate standard utilized in designing the onsite wastewater system cannot be supported by the peak flow rate data submitted with the permit application pursuant to S.C. Code Ann. Regs. 61-56, Section 501, Appendix R.

2. **The statutory provision(s) conferring subject matter jurisdiction to the Administrative Law Court (Court) and other applicable statutes and regulations:** Jurisdiction in contested cases generally is conferred pursuant to S.C. Code Ann. §§ 1-23-10 et seq. and S.C. Code Ann. § 44-1-60. The Permit being challenged in this contested case was issued pursuant to the South Carolina Pollution Control Act, S.C. Code Ann. §§ 48-1-10 et seq. The Department's authority in reviewing the Permit is limited to the regulatory framework set forth in S.C. Code Ann. Regs. 61-56, *Onsite Wastewater Systems*.

3. **The issues set forth with particularity, to be presented for determination, including any claims or defenses expected to be raised:** The primary issue for determination is whether the final agency decision to overturn the staff decision to issue the Permit is consistent with applicable statutes and regulations. Petitioner will likely argue the issuance of the Permit complies with all statutes and regulations. Further, the Petitioner will likely argue that the staff decision to issue the Permit became final on July 7, 2021 because no request for review was filed with the 15-day window imposed by S.C. Code Ann. § 44-1-60. If deemed timely under applicable law, the Department will argue that the final agency decision is consistent with S.C. Code Ann. Regs. 61-56, *Onsite Wastewater Systems*.

4. **A brief summary of the facts to be presented at the hearing:** On April 23, 2021, the Department received a permit application, plans, and supporting documentation from Blue Sky

for the construction of an onsite wastewater system to serve the T. Tree Farms RV Park located at 1970 Landrum Mill Road in Campobello, South Carolina in Spartanburg County. Madelon Wallace, who is not a party to this contested case, emailed a FOIA request to a DHEC staff member, David Vaughan, on May 14, 2021 for "copies of all documents concerning a proposed recreational vehicle park…to be located at or near 1970 Landrum Mill Road" from September 20, 2020, through the date of response. **The FOIA request stated general concerns about waste being channeled to waters, but it did not specifically reference the Permit or make a request to be notified of the issuance of the Permit.** Mr. Vaughan acknowledged the request and forwarded it to the Department's FOIA staff for processing on May 17, 2021. At the Department's request after it conducted a review of the initial application and supporting documentation, the Applicant provided an updated permit application addressing staff comments on May 27, 2021. Updated septic plans were provided electronically to the Department on June 8, 2021, with hard copies of the final septic layout signed by Blue Sky's engineer being provided to the Department on June 18, 2021. After finalizing its review of the application and ensuring that it met all requirements of S.C. Code Ann. Regs. 61-56, the Department's Bureau of Environmental Health Services issued the Permit on June 22, 2021. A request for review of the staff decision was filed by the Requestors on October 26, 2021. **The Department did not receive a request for review of the staff decision from Ms. Wallace.**

5. **The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citations:** The Department respectfully requests this honorable Court to uphold the final agency decision as it complies with S.C. Code Ann. Regs. 61-56, *Onsite Wastewater Systems*. Specifically, the peak flow rate standard utilized in designing the onsite wastewater system cannot be supported by the peak flow rate data submitted with the permit application pursuant to S.C. Code Ann. Regs. 61-56, Section 501,

Appendix R.

6. **A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion:** The Department has not yet determined what motions it may file, but reserves the right to do so. **Petitioner will likely file a motion for summary judgment prior to a hearing and argue that the staff decision to issue the Permit became the final agency decision on July 7, 2021 because no request for review was filed with the 15-day window imposed by S.C. Code Ann. § 44-1-60.**

7. **A list of proposed witnesses and exhibits:** At this time, DHEC would anticipate calling the following witnesses, but reserves the right to name additional witnesses:

- Brett Fowler – Environmental Health Manager
- Timothy Stanley – Manager of Onsite Wastewater Division
- David Vaughan – Director of Onsite Wastewater, Rabies Prevention, Vector Surveillance, and Enforcement

At this time, the Department would anticipate introducing the following exhibits, but reserves the right to introduce additional exhibits:

- Documents contained in the Department's administrative file
- Documents obtained in discovery, if conducted

8. **A statement regarding the necessity for discovery:** The Department does not intend to conduct any discovery, but reserves the right to conduct standard discovery and believes it will be sufficient in this contested case.

9. **Whether the party deems it necessary by the undersigned Judge to conduct a Pre-Hearing Scheduling Conference or issue an order regarding motions, discovery, etc.:** At this time, the Department does not believe a Pre-Hearing Scheduling Conference or Scheduling

order is necessary. However, the Department may request the same should the parties elect to engage in extensive discovery.

10. **The estimated time required for the hearing:** The Department believes that a hearing on the merits of this contested case should take no more than one (1) day.

11. **A range of proposed hearing dates for which all of the parties are available for a hearing on the merits in this case:** As of this date, the Department staff and counsel are available for a merits hearing on the following dates: May 11, May 20; May 23-26; May 30-31; June 2-3; June 23-24; June 27-29; July 11-15; July 18-22; and July 25-29.

12. **An e-mail address that the Court can use for e-mail correspondence:** The Department's counsel may be reached at whitehcp@dhec.sc.gov and martinsv@dhec.sc.gov, as well as the Department's paralegal, Sandra R. Wessinger, at wessinsr@dhec.sc.gov.

Respectfully submitted,

Christopher P. Whitehead, S.C. Bar #100264
Sara V. Martinez, S.C. Bar #74822
SCDHEC – Office of General Counsel
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Columbia, SC 29201
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martinsv@dhec.sc.gov

April 5, 2022
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

T. Tree Farms RV Park (Blue Sky Associates, LLC, Petitioner, vs. South Carolina Department of Health and Environmental Control and Golden Hills Of Fairview Homeowners' Association, Inc. Respondents.	Docket No. 22-ALJ-07-0010-CC **Certificate of Service**

I, Sandra R. Wessinger, Paralegal for the South Carolina Department of Health and Environmental Control, hereby certify that I have on this 5th day of April, 2022, served the foregoing: ***Respondent South Carolina Department of Health and Environmental Control's Prehearing Statement*** upon all parties and counsel of record via electronic mail as follows:

Alexander G. Shissias, Esquire
Email: Alex@Shissiaslawfirm.com
Attorney for Blue Sky Associates, LLC

Matthew T. Richardson, Esquire
Email: mrichardson@wyche.com
Attorney for Respondent
The Enclave at Fairview Farm Homeowners' Association, Inc., Golden Hills of Fairview Homeowners' Association, Inc. and Greenspace of Fairview, LLC, North Pacolet Association, Inc.

Carl F. Muller, Esquire
Email: carl@carlmullerlaw.com
Attorney for Respondents The Enclave at Fairview Farm Homeowners' Association, Inc., Golden Hills of Fairview Homeowners' Association, Inc. and Greenspace of Fairview, LLC, North Pacolet Association, Inc.

April 5, 2022
Columbia, South Carolina

Sandra R. Wessinger
Sandra R. Wessinger

THE SHISSIAS LAW FIRM, LLC
ADMINISTRATIVE AND ENVIRONMENTAL LAW

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*ADMITTED IN SOUTH CAROLINA AND DISTRICT OF COLUMBIA
JOHN J. FANTRY, JR., OF COUNSEL EMERITUS†
†Retired

April 13, 2022

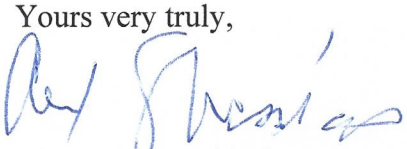
The Honorable Milton G. Kimpson
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: Blue Sky Associates, LLC v. SCDHEC, *et al.*, 22-ALJ-07-0010-CC

Judge Kimpson:

Enclosed for filing please find Petitioner's Motion for Relief under SCALC Rules 23 B and 68 and SCRCP Rule 12(B)(1) along with the required $50.00 filing fee. By this letter I have served a copy on counsel for Respondents via electronic delivery.

Yours very truly,



Alexander G. Shissias

enclosures

cc: Sara Martinez, Esq., Carl Muller, Esq., Matthew Richardson, Esq.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

T. Tree Farms RV Park (Blue Sky Associates, LLC). Petitioner, vs- South Carolina Department of Health and Environmental Control, Enclave at Fairview HOA, Golden Hills of Fairview HOA, Greenspace of Fairview, LLC, and North Pacolet Association, Inc., Respondents.	Docket No. 22-ALJ-07-0010-CC **PETITIONER'S MOTION PURSUANT TO SCALC RULES 23 B AND 68 AND SCRCP RULE 12 (B)(1)**

Pursuant to Rules 23(B) and 68 of the Rules of Procedure for the Administrative Law Court and Rule 12(b)(1) of the South Carolina Rules of Civil Procedure, Petitioner Blue Sky Associates, LLC, (Blue Sky or Petitioner), hereby moves this Court for an Order vacating or reversing the January 13, 2022, decision of the Board of Health and Environmental of Control and finding that the June 22, 2021, staff decision on OWWS permit #2-2021040112 became the final agency decision on July 7, 2021, as discussed in the accompanying Memorandum in Support.

Respectfully submitted,

Alexander G. Shissias
The Shissias Law Firm, LLC
1727 Hampton Street
Columbia, SC 29201
803-540-3090
ATTORNEY FOR PETITIONER
BLUE SKY ASSOCIATES, LLC.

April 13, 2022

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

T. Tree Farms RV Park (Blue Sky Associates, LLC). Petitioner, vs- South Carolina Department of Health and Environmental Control, Enclave at Fairview HOA, Golden Hills of Fairview HOA, Greenspace of Fairview, LLC, and North Pacolet Association, Inc., Respondents.	Docket No. 22-ALJ-07-0010-CC **PETITIONER'S MEMORANDUM IN SUPPORT OF MOTION UNDER SCALC RULES 23(B) AND 68 AND SCRCP RULE 12(B)(1)**

Petitioner Blue Sky Associates, LLC, (Blue Sky or Petitioner) respectfully submits this Memorandum of Law in Support of its Motion for Relief filed pursuant to SCALC Rules 23 (B) and 68 and SCRCP Rule 12 (B)(1).

I. STATEMENT OF FACTS

This contested case involves a June 22, 2021, staff decision to issue onsite wastewater system ("OWWS") permit #2-2021040112. Petitioner sought this permit to develop its property in Spartanburg County as an RV park. Respondents Enclave at Fairview HOA, Golden Hills of Fairview HOA, Greenspace of Fairview, LLC, and North Pacolet Association, Inc. (hereinafter, HOA Respondents) are HOAs for nearby subdivisions and one property owner, and have attempted to frustrate Petitioner's plans. HOA Respondents filed their Request for Final Review ("RFR") on October 26, 2021- over a hundred days after the permit was issued.[1] The DHEC Board disregarded the timeliness defect, heard the RFR on December 20, 2021, and reversed the staff decision.

[1] The RFR was stamped as received by the DHEC Board on October 26, 2021. The Board's final decision states that the RFR was filed on October 14, 2021. In its Prehearing Statement, Petitioner used the October 14, 2021 date. Either way, the RFR is late.

After the Board's decision was issued on January 13, 2022, Petitioner timely filed the instant Request for a Contested Case Hearing on January 14, 2022.

II. ARGUMENT

HOA Respondents Failed to Timely Seek Review with the DHEC Board

The consequences of failure to timely file a RFR generally fall under the doctrine of failure to exhaust administrative remedies, where failure to exhaust deprives the ALC of jurisdiction to hear the case on its merits.[2] Failure to timely file a RFR is a fatal jurisdictional defect. *See, Chris's Dry Cleaning & Shirt Serv. v. S.C. Dep't of Health & Env'tl. Control* (15-ALJ-07-0368-CC); *S.C. Dep't of Health & Env'tl. Control v. Fair Havens Manor* (12-ALJ-07-0425-CC); *Mitchell v. S.C. Dep't of Health & Env'tl. Control*, 12-ALJ-07-0004-CC), *S.C. Dep't of Health & Env'tl. Control v. SCATS, LLC*, (11-ALJ-07-0063-CC), *Fabri, et al. v. S.C. Dep't of Health & Env'tl. Control*, (08-ALJ-07-0336-CC, 2009). *See also, A.O. Smith Corp. v. S.C. Dep't of Health & Env'tl. Control,* 428 S.C. 189, 833 S.E.2d 451 (Ct. App. 2019); *S.C. Coastal Conservation League v. S.C. Dep't of Health and Env'tl. Control,* 380 S.C. 349, 669 S.E.2d 899 (Ct.App. 2008), *rev'd on other grounds,* 390 S.C. 418, 702 S.E.2d 246 (2010).

S.C. Code Ann. §44-1-60(E)(2) provides that the 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. The staff decision to issue OWWS permit #2-2021040112 became final on July 7, 2021 and the RFR was not filed until October 26. This may be the first case where the DHEC Board has taken up a facially untimely RFR, ignored the timeliness defect entirely, and reversed the staff decision to the prejudice of the permittee.[3] As a result, Petitioner cannot simply request dismissal; it must

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[2] Some ALC decisions have used the term "procedural jurisdiction." *See, Sisters of Charity Providence Hospitals v. SCDHEC, et al*, 14-ALJ-07-0332-CC (Interlocutory Order, September 22, 2014); *Amisub v. SCDHEC, et al.*, 08-ALJ-07-0063-CC (2008); *Tract 7, LLC, v. SCDHEC, et al.*, 15-ALJ-07-0258-CC (2015).

[3] The DHEC Board has on at least one occasion heard a RFR where there was a dispute over timeliness. However, in that case the Board addressed the timeliness issue, found the RFR was timely filed, and upheld the staff decision. See *S.C. Coastal Conservation League v. S.C. Dep't of Health and Env'tl. Control*, 390 S.C. at 423, 702 S.E.2d at 249.

request that the Board order be vacated or reversed and that the Court hold that the staff decision became the final agency decision on July 7, 2021.

HOA Respondents Did Not Request in Writing to be Notified of any Staff Decision, a FOIA Request is Not a Request to be Notified, and No Special Notice Provisions Exist Here

Cases applying Section 44-1-60(E) have established two specific exceptions to the fifteen-day rule, and neither apply here. Where a person has requested in writing to be notified of the staff decision, and that person was not mailed a notification along with the permit applicant, or in cases where a statute or regulation specifically imposes a notice procedure, and that notice procedure was not followed, RFRs filed more than fifteen days after the staff decision was mailed to the permittee have been found timely. *See, S.C. Coastal Conservation League v. S.C. Dep't of Health and Env'tl. Control,* 390 S.C. 418, 702 S.E.2d 246 (2010) (League held to be an affected person who asked to be notified based on DHEC's concession that League had asked to be notified[4]); *Pickens County v. S.C. Dep't of Health and Env'tl. Control and MRR,* Appellate Case No. 2020-000448, December 8, 2021) (where regulation contains specific notice requirements for major landfill permit modifications, not minor modifications, case remanded for classification of modification as major or minor). HOA Respondents did not request in writing to be notified of a staff decision on this or any permit, and there are no statutory or regulatory notification requirements for OWWS permits.

On May 14, 2021, Madelon Wallace[5] filed a FOIA request for "...copies of all documents concerning a proposed recreational vehicle park...to be located at or near 1970 Landrum Mill Road." A copy of that document is attached as Exhibit 1 to this memorandum. HOA Respondents claim that the Department did not timely respond to the FOIA request, thus excusing the untimely filing for all four of the HOA Respondents, or

[4] The Court's statement relating to the "degree of 'formality'" in the League's request to be notified arises from the fact that DHEC simply conceded that the League was an affected person who had requested to be notified in writing. It is not a rule of general applicability suggesting that every expression of interest in a project or every FOIA request must be interpreted as a request to be notified of staff decisions.

[5] Ms. Wallace is not one of the HOA Respondents and did not identify herself in the FOIA request as acting in the capacity of an officer or agent for any of them. In the RFR she signed as the "Manager" for Greenspace of Fairview, LLC.

that Ms. Wallace's FOIA request constituted a request to be notified of a specific staff decision on behalf of all four of them.

Regardless of the specifics of the FOIA request, or the Department's failure to respond, a FOIA request alone cannot be construed as a request to be notified of a future agency decision. A FOIA request is covered by S.C. Code Ann. §30-4-30(A)(1). It is a request to review "...any public record of a public body..."- specifically, those documents that the public body has in its possession. It is not a request to review documents that the Department might create in the future such as a staff decision. And while the Department's alleged failure to timely respond to a FOIA request could subject the Department to legal action, that remedy is under S.C. Code Ann. §30-4-110, with an action in the circuit court for disclosure of the withheld documents.

In this case an examination of Exhibit 1 indicates it is not a written request to be notified of an agency decision within the meaning of Section 44-1-60(E)(1). None of the HOA Respondents are "...affected persons who have requested in writing to be notified."

HOA Respondents cannot otherwise use an unfulfilled FOIA request to excuse an untimely appeal. The ALC dealt with similar issues in *Patrick Hubbard, et al. v. S.C. Dep't of Health and Env'tl. Control and Shavon's Purple Lotus Body Art Boutique, LLC*, 07-ALJ-07-0594-CC. In *Hubbard* the licensee was issued its initial license on August 8, 2006, after litigation against DHEC in the ALC. One of the Petitioners filed a FOIA request for the license application on September 15, 2006, and the Department "lost" the request.[6] The Department later located and responded to the FOIA request on December 1, 2006, though Petitioners complained the response was incomplete. On January 5, 2007, Petitioners filed an untimely appeal of the licensee's initial permit, which the DHEC Board properly rejected in February of 2007, and Petitioners did not contest this decision.

The Petitioners subsequently filed the proper request to be notified of future permit decisions involving the Boutique. When the licensee's permit was renewed in September of 2007, Petitioners filed a RFR with the DHEC Board and then a contested case with the ALC. In this contested case Petitioners attempted to raise issues that could only be

[6] The gravamen of Petitioners' argument may have been that had DHEC responded to the request timely, they would have known of the initial license issuance.

challenged in the initial license.[7] In dismissing the case, the ALC noted that the Petitioners had not requested to be notified of the August 2006 staff decision on the initial license, and did not comply with the 15-day RFR requirement in S.C. Code Ann.§ 44-1-60(E) to challenge it. The Court did not deem the FOIA request to be the equivalent of a request to be notified of the initial license decision. The Court also noted that Petitioners were aware of the project, were involved in the zoning process, and were deemed to be aware of the law.[8] The same is the case here. HOA Respondents knew of the project long before the staff decision, and have vociferously opposed it, having objected at a zoning hearing in March of 2021. One of the officers of one of the HOA Respondents is an attorney, and presumably could have looked up the law on the matter.

HOA Respondents argue that DHEC's failure to respond to the FOIA request somehow deprived them of the ability to appeal, to know what to appeal, or the grounds for an appeal, but they had actual notice of the staff decision months before they filed their RFR. On page 8 of HOA Respondents' Prehearing Statement, they discuss August 4 and September 20, 2021, meetings between DHEC staff and HOA representatives. In Staff's Response to the RFR, DHEC staff note that the HOA Respondents were specifically notified of the issuance of the OWWS permit at both meetings, yet they did not file their RFR until October 26, 2021. The Supreme Court has held that actual notice of a staff decision cannot start the 15-day RFR window. *Pickens County v. S.C. Dep't of Health and Env'tl. Control and MRR,* Appellate Case No. 2020-000448, December 8, 2021), at 5-6. However, actual notice does undercut HOA Respondents' argument that they did not know what to appeal until October 26, 2021.

HOA Respondents Cannot Excuse their Untimely Appeal by Alleging Misrepresentation on Petitioner's Part

In their Prehearing Statement, HOA Respondents argue, without foundation, that "[t]here is no time limit on reporting an applicant's misrepresentations to the agency." There is no basis for such a claim anywhere in South Carolina law, and in fact all law on

[7] The *Hubbard* appeal included issues that S.C. Code Ann. § 44-34-110(A)(3) only allow to be litigated in the initial permit- specifically, distance requirements.
[8] Judge Kittrell noted that Petitioner Hubbard is a law professor, and presumably could have looked up the law on the matter.

the issue is to the contrary. DHEC has the authority under S.C. Code Ann. § 48-1-50(5) to "[i]ssue, deny, revoke, suspend or modify permits… for the installation or operation of disposal systems…" As DHEC has presumably been made aware of the outrageous lies Blue Sky has allegedly told, it could simply revoke its permit. However, outside the RFR and contested case process, the statute does not allow third parties to seek redress for alleged "misrepresentations." S.C. Code Ann. § 48-1-250 states that there is no private cause of action created under the Pollution Control Act, either at the ALC or in any other forum for private parties who allege DHEC has somehow been hoodwinked or is not doing its job.[9] Were the Court to rule otherwise, any third party seeking to challenge agency action out of time could simply claim they were attempting to vindicate a misrepresentation in a permit application. Such allegations can only be raised by a third party in a timely filed RFR.

III. RELIEF REQUESTED

Under ALC Rule 21(B):

> Upon motion of any party, or on its own motion, the Court may dismiss a contested case or resolve the contested case adversely to the offending party for failure to comply with any of the rules of procedure for contested cases, including the failure to comply with any of the time limits provided in these rules or by order of the Court.

Again, the situation Petitioner finds itself in is unusual and possibly unique. In all the failure to exhaust cases cited at 2 *supra*, the only action requested of the court was to dismiss a contested case based on the appellant's failure to timely file an RFR with the DHEC Board below. Here Petitioner requests that the Court vacate the January 13, 2022, Board Order and reinstate the June 22, 2021 DHEC staff decision. A mere dismissal is insufficient relief. In this case the Court must determine whether the DHEC Board erred in taking up the case based on the HOA Respondents' failure to exhaust.[10] ALC Rule 68

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[9] HOA Respondents have repeatedly and loudly raised the claim that Petitioner made misrepresentations to staff in its application. When the Department learns of misrepresentations in permit applications it can exercise its authority to address these errors. *See, e.g., DTG Holdings, LLC and Jasper Station Associates, LLC v. S.C. Dep't of Health and Env'tl. Control,* 10-ALJ-07-0217-CC.

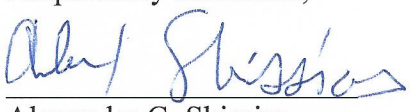
[10] In resolving a question of law, the Court may consider Exhibit 1 and other facts not within the pleadings without converted Petitioner's Motion into a Rule 65 Motion for Summary Judgment. *See, Posey v. Proper Mold & Engineering, Inc.*, 661 S.E.2d 395 (S.C. App. 2008) (Court may consider evidence including

states that "The South Carolina Rules of Civil Procedure..., in contested cases..., may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these rules." SCRCP Rule 12(b)(1) allows a party to present as a defense by motion a challenge to lack of subject matter jurisdiction. In this case, the Department- and more specifically, the DHEC Board, is the "offending party" who has failed to comply with the rules of procedure for contested cases. The Board made an error of law in accepting an untimely filed RFR to be heard on its merits and reversing the staff decision as HOA Respondents failed to exhaust their remedies within the agency. Regardless of which rule Petitioner cites, it is entitled to the relief it seeks.

IV. CONCLUSION

For the reasons stated above, Petitioner requests that the Court grant Petitioner's Motion for relief. Petitioner requests that the Court vacate or reverse the DHEC Board's January 13, 2022, decision on the grounds that the RFR filed by the HOA Respondents on October 26, 2021, was untimely filed, that the HOA Respondents failed to exhaust their administrative remedies within the agency, and that the DHEC Board lacked jurisdiction to hear the RFR on its merits. Petitioner further requests that the Court find that the staff decision issued June 22, 2021, became the final agency decision on July 7, 2021.

Respectfully submitted,



Alexander G. Shissias
The Shissias Law Firm, LLC
1727 Hampton Street
Columbia, SC 29201
803-540-3090
ATTORNEY FOR PETITIONER
BLUE SKY ASSOCIATES, LLC.

April 13, 2022

affidavits on a question of law in a jurisdictional motion without converting the motion into one for summary judgment.)

Date: May 14, 2021

To: David Vaughan
Director of Onsite Wastewater Management for SC
vaughanh@dhec.sc.gov
vaughanwh@dhec.sc.gov
info@dhec.sc.gov

Pursuant to the South Carolina Freedom of Information Act, I hereby request copies of all documents concerning a proposed recreational vehicle park ("RV Park") to be located at or near 1970 Landrum Mill Road, Campobello, SC, in Spartanburg County, Block Map Reference # 1-09-00-020.03. You may confine your search from September 30, 2020 through the date of your response. The **RV Park may be listed under one** or more of the following names or a derivative of such names:

- **T. Tree RV Park**
- **T. Tree Farms RV Park**
- Blue Sky Associates, LLC
- **William "Bill" McDaniel**
- **McDaniel & Company**
- Kimbreli B Burnett

If the cost exceeds $100, please let me know in advance.

Please email to me an acknowledgement that you received this.

Sincerely,
Madelon Wallace

Madelon Wallace
PO Box **551**
Landrum, SC 28356
864-316-3484
madelonwwe@aol.com
madelonwwe@gmail.com

EXHIBIT C

From: vaughadr@dhec.sc.gov,
To: vaughandr@dhec.sc.gov, info@dhec.sc.gov, MADELONWWE@AOL.COM,
Subject: Re: FOIA
Date: Mon, May 17, 2021 9:23 am
Attachments:

Ms. Wallace,

This is my acknowledgement that your request has been received via this email. The FOIA office may have you submit an actual request form, but we'll let them work that out.

Sincerely,

David R. Vaughan
Legislative Affairs
SC Department of Health and Environmental Control
Office: (803) 896-0574
Mobile: (803) 608-9073
Connect: www.scdhec.gov Facebook LinkedIn

From: Madelon <madelonwwe@aol.com>
Sent: Friday, May 14, 2021 1:05 PM
To: vaughandr@dhec.sc.gov <vaughandr@dhec.sc.gov>; Vaughan, David R. <vaughadr@dhec.sc.gov>; info, info <info@dhec.sc.gov>
Subject: FOIA

*** Caution. This is an EXTERNAL email. DO NOT open attachments or click links from unknown senders or unexpected email. ***

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 Pacolet River and runs thru a residential development.

Thank You,
Madelon Wallace

EXHIBIT D

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

T. Tree Farms RV Park (Blue Sky Associates, LLC).	)	
Petitioner,	)	Docket No. 22-ALJ-07-0010-CC
vs-	)	**PROOF OF SERVICE**
South Carolina Department of Health and Environmental Control, Enclave at Fairview HOA, Golden Hills of Fairview HOA, Greenspace of Fairview, LLC, and North Pacolet Association, Inc., Respondents.	)	

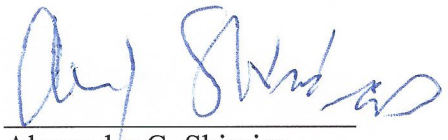
I hereby certify that on April 13, 2022, I served the above Motion upon all parties and counsel of record via electronic delivery:

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Columbia, South Carolina
April 13, 2022



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BLUE SKY ASSOCIATES, LLC.

W Y C H E

Attorneys at Law

April 25, 2022

VIA HAND DELIVERY
Honorable Milton G. Kimpson
South Carolina Administrative Court
1205 Pendleton St, Suite 224
Columbia, SC 29201

RE: T. Tree Farms R.V. Park (Blue Sky Associates, LLC) vs. South Carolina Department of Health and Environmental Control, Enclave at Fairview Homeowners' Association, Inc., Gold Hills of Fairview Homeowner's Association, Inc., Greenspace of Fairview, LLC, and North Pacolet Association, Inc.
Docket No. 22-ALJ-07-0010-CC

Dear Judge Kimpson:

Please find enclosed two (2) copies of Respondents, HOA's Response to Petitioner's Motion For Relief submitted for filing in connection with the above-referenced matter. Please provide a clocked in copy in the self-addressed return envelope provided for your convenience.

Should you have any questions or need any additional information, please do not hesitate to contact our office.

Respectfully,

Victoria Baker
Wyche, PA
803-771-2444
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Enclosures:
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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

T. Tree Farms RV Park (Blue Sky Associates, LLC), Petitioner, 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., Respondents.	Docket No. 22-ALJ-07-0010-CC RESPONDENT HOAs' RESPONSE TO PETITIONER'S MOTION FOR RELIEF

Respondents The Enclave at Fairview Homeowners' Association, Inc., Golden Hills of Fairview Homeowner's Association, Inc., Greenspace of Fairview, LLC, and North Pacolet Association, Inc. (Respondent HOAs) submit their Response to Petitioner's Motion for Relief. Respondent HOAs respectfully submit that Petitioner's Motion for Relief must be disregarded or denied for the reasons set forth herein.

I. PETITIONER FAILED TO PROPERLY INVOKE THE ALC'S JURISDICTION FOR THIS RCCH AND THUS PETITIONER'S MOTION FOR RELIEF SHOULD BE DENIED.

Petitioner failed to properly invoke the jurisdiction of this Court to consider Petitioner's Request for Contested Case Hearing ("RCCH"). Thus, the ALC should not review and rule upon Petitioner's Motion to Dismiss. See Respondent HOAs' Motion to Dismiss, to be filed separately forthwith.

The State of South Carolina
FILED
APR 25 2022
Administrative Law Court

Petitioner's RCCH does not comply with several of the mandatory SCALC Rules, statutory provisions, and SCRCP. Petitioner failed to name the necessary parties, failed to serve all parties, and failed to state its requested relief within the thirty-day period prescribed by S.C. Code section 44-1-60(F)(2). As a result, Petitioner neglected to cross the necessary threshold to invoke the jurisdiction of the ALC. The ALC has no statutory power to proceed with Petitioner's Motion for Relief. Petitioner's RCCH should be dismissed as set forth in Respondent HOAs Motion to Dismiss, to be filed forthwith.

II. PETITIONER'S MOTION FOR RELIEF SHOULD BE DENIED.

In addition to the jurisdictional issues noted above, Petitioner's Motion for Relief is not supported by the applicable law and the facts of this case and ignores the Legislature's intent.

A. Respondent HOAs' Request for Review was timely filed with the DHEC Board.

1. Petitioner's argument of the law on the timeliness issue is flawed.

Petitioner incorrectly argues in its Motion for Relief that Respondent HOAs failed to timely seek relief with the Board of the Department of Health and Environmental Control ("Board"). Petitioner cites multiple ALC decisions between 2008 and 2015. As described below, one of the cases cited does not stand for the proposition which Petitioner asserts. Also, those ALC cases pre-date the decisions of the Supreme Court in 2021 (*Pickens County v. S.C. Dep't of Health and Env'tal Control and MRR*, Appellate Case No. 2020-0000448, December 8, 2021) and the Court of Appeals in 2019 (*A.O. Smith Corp. v. S.C. Dep't of Health & Env'tl. Control,* 428 S.C. 189, 833 S.E.2d 451 (Ct. App. 2019), which are also cited by Petitioner.

Petitioner cites *Pickens County* to argue that the DHEC Board lacked jurisdiction to grant the RFR in the instant case. The *Pickens* case is distinguishable on several grounds, including that the respondent party (County of Pickens) delayed for several months in requesting an RFR after it

received written notice of a DHEC staff decision, and the Board declined its RFR. Here, Respondent HOAs filed their RFR within twelve days of receiving an on overdue response to a FOIA request for all documents from DHEC, and the Board granted its RFR.

Of great importance, the *Pickens* Court reaffirmed *South Carolina Coastal Conservation League v. S.C. Dep't of Health & Env'tl. Control,* 390 S.C. 418, 702 S.E.2d 246 (2010). In reviewing the requirements of Code section 44-1-60(E)(2), the Supreme Court stated 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" and that "the foray into the degree of formality needed for 41-1-60(E) 'affected person' status is not necessary". *Id.* at 427, 428. The court further noted that DHEC is responsible for managing the welfare of the public health system and the environment and that transparency and full disclosure in matters relating to regulatory authority are required. The Court determined that since the League had emailed DHEC and the DHEC staff responded, DHEC was thus aware of its involvement. The League was not "an obscure or unknown party" and should have received a copy of the permit decision. *Id.,* 430.

As noted above, Petitioner incorrectly cites *Patrick Hubbard, et al. v. S.C. Dep't of Health & Env'tl. Control and Shavon's Purple Lotus Body Art Boutique, LLC,* which is a 2007 ALC decision at Docket 07-ALJ-07-0594-CC. Petitioner states that the ALC "did not deem the FOIA request to be the equivalent of a request to be notified" in that case. This assertion by Petitioner is illusory. In its Findings of Fact, the ALC noted that a tattoo facility license was issued on August 8, 2006. *Id.* ¶ 14. A FOIA request was submitted on September 15, 2006. *Id.* ¶ 16. This was five weeks after the issuance of the subject license. The ALC's decision did not further address the FOIA request. Contrary to Petitioner's assertions, the holding in *Hubbard* does not support Petitioner's Motion for Requested Relief because (a) the FOIA request was submitted five weeks

after the subject tattoo facility license was issued in that case; and (b) the Court clearly did not endeavor to analyze whether the FOIA request equated with a request to be notified of a DHEC staff decision. The fact pattern is substantially different from the facts of the current case. Petitioner's reliance upon the *Hubbard* case is misplaced and misleading.

Petitioner also cites *A.O. Smith Corp., supra*, wherein the Court of Appeals held that final approvals are not staff decisions subject to appeal under S.C. Code section 44-1-60. The petitioner in that case did not challenge the underlying permits, which were issued several years prior. The Court of Appeals also referenced the public policy of finality through resolution of conflicts regarding construction projects while in the initial stages and not after substantial investments and construction have occurred.

In the instant case, Respondent HOAs challenged the initial staff decision to issue the septic permit unlike the facts in *A.O. Smith Corp., supra.* Petitioner has not engaged in any construction of its proposed RV park. Petitioner has not and cannot move forward with the project. The Conditional Approval is on appeal to the Seventh Judicial Circuit. Almost fourteen months have passed since Spartanburg County Planning Commission issued the Conditional Approval, and Petitioner has yet to satisfy at least four of the six required conditions. Petitioner has no access to public water, no stormwater permit, no fire hydrant location approval, and no septic permit, which are all specific conditions.

Presently, no land disturbing activities are allowed on the parcel, and Petitioner may not construct a septic system. On November 17, 2021, Petitioner was ordered to "cease and desist" unlawful land disturbing activities on the proposed RV park parcel.

2. Petitioner erroneously asserts that the Board "ignored" the timeliness issue.

In its Motion for Relief, Petitioner states incorrectly that the Board "ignored the timeliness defect entirely." This conclusion ignores that the Board expressly considered the timeliness question. Three members of the Board held a Request for Review Conference on December 8, 2021. One member of the Board commented on the need to address the timeliness of the Respondent HOAs' RFR. At the Review Conference on December 20, 2021, Respondent HOAs, DHEC counsel, and Petitioner's counsel presented extensive argument of the facts and law relative to the timeliness issue. The Board in turn posed questions to Respondent HOAs about the timing of their filing an RFR. General Counsel of DHEC, Marshall Taylor, was present and assisted the Board in open forum and retired into executive session with the members. Before the executive session, Mr. Taylor requested case citations from Respondent HOAs relative to the timeliness issue.

The only reasonable conclusion is that the Board deliberated upon the timeliness and jurisdictional issues in light of the facts and arguments presented by all parties and then rendered its decision, necessarily denying Petitioner's objections based on timeliness. Petitioner's assertion that the Board ignored the timeliness question is baseless and must be disregarded.

3. The RFR was timely, because the RFR was not due until 15 days after DHEC provided the requested documents, which included the permit.

Applying the applicable law to the facts of this case, the DHEC staff decision did not become final until fifteen days after DHEC provided its response to the FOIA request for "all documents concerning the RV Park," which included the permit. Pursuant to the SC Freedom of Information Act, S.C. Code sections 30-4-10 *et seq.* ("FOIA"), DHEC must follow the statutory procedure for replying to a FOIA request. The agency clearly did not follow the procedure and delayed its mandatory reply for five months.

On May 14, 2021 and nearly six weeks before the subject permit was issued, a member of the Respondent HOAs submitted a FOIA request for "all documents" related to the RV park project. Consistent with *South Carolina Coastal Conservation League*, *supra,* the FOIA request put DHEC on notice that affected parties existed and had requested the permit, which embodied the staff decision. On May 17, 2021, David Vaughan, Director, Division of Onsite Wastewater, acknowledged the FOIA request in writing, but there was no notice of the agency determination regarding the request, which is required by S.C. Code section 30-4-30(C). DHEC's response to Respondent HOAs request for all documents was due no later than June 27, 2021, which was five days after the permit was issued. DHEC failed to timely respond and delayed for five months in providing its statutorily required FOIA response.

DHEC also misrepresented the status of the permit application to Respondent HOAs. After the permit was issued on June 22, 2021, DHEC provided inaccurate information. In multiple phone inquiries initiated by members of Respondent HOAs, the DHEC staff stated that no permit had been issued.

In late July 2021, Respondent HOAs received incomplete information within the community that a permit had been issued to Petitioner. As of that time, Respondent HOAs still had not received the statutorily required response from DHEC to their FOIA request. Respondent HOAs communicated to DHEC that full and complete information was needed to ascertain whether misrepresentations had been made to the DHEC staff by Petitioner and its engineers and to review the underlying facts and data related to any permit issuance. Petitioner and its engineers made misrepresentations and submitted inaccurate site plans to the Spartanburg County Planning Commission in March 2021. The County's file did not include documents or septic system plans submitted by Petitioner to DHEC. Respondent HOAs required all documents from DHEC to

allow them to reasonably review the septic system and to determine whether the system could affect their health, drinking water (wells), and environment. Respondent HOAs further needed to ascertain whether the misrepresentations made to the County were also presented to DHEC by Petitioner.

By September 30, DHEC still had not provided the response required by FOIA. On August 4 (in person) and September 30, 2021 (video teleconference), DHEC officials stated that a KOA campground, which they could not identify, was asserted by Petitioner and its engineers to be a similar establishment to attempt to justify a 50% reduction in peak flow from the R. 6156 standard. The identity of the allegedly similar KOA campground, its characteristics, location, and peak flow data were critical to an analysis of Petitioner's septic permit by the hydrogeologist retained by Respondent HOAs. The hydrogeologist related this need in writing to Mr. Vaughan. DHEC failed to identify this KOA campground until October 14, 2021, when the agency finally provided its FOIA response to the request of May 14, 2021. DHEC did not provide a written response to Respondent HOAs with all of the documents (e.g., application, engineering site plans, septic system design, and soils reports) until October 14, 2021. Respondent HOAs' RFR was filed by the Clerk of the Board twelve days later on October 26, 2021.

In its Motion for Relief, Petitioner insinuates that the FOIA request was ineffective and incorrectly asserts that the person who submitted the FOIA request, Madelon Wallace, was "not one of the HOA Respondents." Ms. Wallace is an operations manager of Respondent Greenspace of Fairview, LLC, a shareholder/owner in Respondent Greenspace of Fairview, LLC, and is a member/owner in Respondent Golden Hills of Fairview HOA, Inc. Ms. Wallace was actively participating in a collective effort by members of Respondent HOAs to obtain information about

Petitioner's project and was handling FOIA requests to the County and DHEC. Of note, FOIA does not require that the capacity of the requesting person be defined.

In fact, for several months, various members of the DHEC staff discussed the May 14 FOIA request repeatedly with at least four members of Respondent HOAs and their hydrogeologist in person, in a video teleconference, and in emails. The DHEC staff had knowledge that the FOIA request and other inquiries were connected with Respondent HOAs.

Petitioner's attempt to limit the scope of FOIA here is contrary to the findings of the General Assembly in drafting the FOIA legislation "that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity." Id. DHEC failed to provide a timely FOIA response and made misleading statements about the issuance of the permit to Respondent HOAs. Petitioner seeks to endorse this deviation from FOIA and override the intent of the Legislature that citizens be timely advised of the performance and decisions of public officials.

Based upon the foregoing facts and applicable law, the RFR was timely filed by Respondent HOAs and properly considered by the Board.

4. The Legislature intended for participation by "affected parties" in DHEC matters; full transparency and disclosure by the agency are required.

South Carolina Code section 44-1-60 fully reflects the intent of the Legislature for "affected persons" and "affected parties" to participate in agency staff decisions. The General Assembly has opted not to define how a party should request notification of a staff decision pursuant to S.C. Code section 41-60-(F) and how a person or party achieves "affected party" status within the meaning of section 41-60-(E).

For years, the issue of filing a timely request for review has repeatedly come before the appellate courts in South Carolina. This issue has been approached on a case-by-case basis with some guidance from the judiciary. Despite the most recent amendments in 2010 and 2018 to other portions of the statute, the Legislature has chosen not to define the procedure for how a party may request to be notified of staff decisions and how affected party status is achieved. DHEC has not developed or specified any procedure for making a request to be notified of a staff decision, e.g., a form to complete. DHEC does not follow any formal procedure as to how a party acquires the status of "affected persons who have asked to be notified." Thus, DHEC apparently continues to take the informal approach in deciding which parties to notify of its staff decisions.

The Legislature intended for DHEC to operate with transparency and full disclosure. *South Carolina Coastal Conservation League, supra,* at 430. Before Petitioner's septic permit was issued by DHEC, Respondent HOAs duly requested disclosure of the septic permit and file. DHEC did not provide these materials for five months. The Legislative intent is undermined and thwarted when affected parties such as the Respondent HOAs are handicapped in their participation in agency matters by the agency itself.

The Board was created by the Legislature as an added layer of protection and has the statutory duty to correct DHEC staff errors. Petitioner now seeks to interfere with the Board's ability to correct the mistakenly issued septic permit in the instant case.

B. There is no time limit on reporting an applicant's misrepresentations to a government agency.

Petitioner and its engineers made critical errors and misrepresentations in the application and engineering site plans submitted to DHEC. These were not revealed to Respondent HOAs until October 14, 2021 when DHEC provided a seriously overdue response to the May 14, 2021

FOIA request. As noted in the RFR of October 26, 2021, the errors and misrepresentations reported to the Board by Respondent HOAs include (a) a misrepresentation that a KOA campground was a "similar establishment in a similar location" per R. 61-56 to attempt to justify a 50% reduction in peak flow rate; (b) a non-existent right of way for public water over privately owned properties; (c) non-existent public water to the site for general use and fire hydrants; and (d) errors in the engineering site plans and permit, including exceeding the authority of the Spartanburg County Planning Commission and the 50-space limit. In the nature of fraudulent concealment, these errors and misrepresentations could not have been raised to the Board until the necessary FOIA responses and disclosures were made.

Respondent HOAs submit that there is no time limit on alerting the Board to such critical errors and misrepresentations, upon which the DHEC staff deliberated in rendering its decision to issue the permit. Making such a report to the Board is not time-barred by any statutory provision. These errors and misrepresentations by Petitioner substantiate the rescission of the staff decision and the septic permit.

REQUESTED RELIEF

For all the foregoing reasons, Respondent HOAs respectfully submit that this Court should not consider and rule upon Petitioner's Motion for Relief based on lack of subject matter jurisdiction over the RCCH. In the alternative, Respondent HOAs move the Court for an order denying Petitioner's Motion for Relief. In addition to the reasons set forth above, Respondent HOAs incorporate and reference their Motion to Dismiss and exhibits to be filed this week as additional materials and memoranda in support of this Response.



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April 25, 2022
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

T. Tree Farms RV Park (Blue Sky Associates LLC), Petitioner, vs. South Carolina Department of Health and Environmental Control, The Enclave at Fairview Farm Homeowners' Association, Inc., Golden Hills of Fairview Homeowner's Association, Inc., Greenspace of Fairview, LLC, and North Pacolet Association, Inc., Respondents.	Docket No.: 22-ALJ-07-OOlO-CC CERTIFICATE OF SERVICE

l, Victoria L. Baker, Paralegal for Wyche, PA, hereby certify that I have on this 25th day of April, 2022, served the foregoing RESPONDENT HOAs' RESPONSE TO PETITIONER'S MOTION FOR RELIEF upon all parties and counsel of record via electronic mail as follows:

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April 25, 2022

Columbia, South Carolina

The State of South Carolina FILED APR 25 2022 Administrative Law Court

Victoria L. Baker

OF SOUTH CAROLI
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 22-ALJ-07-0010-CC

T. Tree Farms RV Park (Blue Sky Associates, LLC),	)
Petitioners,	)
v.	)
South Carolina Department of Health and Environmental Control, Enclave at Fairview Homeowners'Association, Inc., Greenspace of Fairview, LLC, and North Pacolet Association, Inc.	)
Respondents.	)

MOTIONS HEARING

****

Wednesday, May 11, 2022
9:59 a.m. - 12:09 p.m.

The hearing before the Honorable Milton G. Kimpson was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 11th day of May, 2022 before Nadine A. Garrett, Court Reporter and Notary Public in and for the State of South Carolina.

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Also Present:
Bill McDaniel
Judy Klapholz
Bill Mills
Russell Rock
Sally Rock

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EXHIBITS

(No exhibits were marked during this hearing.)

STIPULATIONS

It is stipulated and agreed that this hearing is being taken pursuant to the rules of the Administrative Law Court and the South Carolina Rules of Civil Procedure.

CALL TO ORDER:

THE COURT: Good morning. I'm Milton Kimpson. I'm presiding over a motions hearing today. This is case docket number 22-ALJ-07-0010-CC, T. Tree Farms RV Park (Blue Sky Associates, LCC) versus the South Carolina Department of Health and Environmental Control, Enclave at Fairview Homeowners' Association, Golden Hills of Fairview Homeowners' Association, Green Peace -- Green Pace -- excuse me, Greenspace of Fairview, LLC, and North Pacolet Association, Inc. Did I get all of the homeowners' associations?

MR. RICHARDSON: Yes, Honor. Thank you.

THE COURT: Thank you. I'm going to start with Petitioner. If you would introduce yourself, and we will then go -- move to other counsel.

MR. SHISSIAS: Alex Shissias, Blue Sky Associations. With me is Bill McDaniel, one of the two principals.

THE COURT: Good morning. Good morning.

Yes, sir.

MR. RICHARDSON: Good morning, Judge Kimpson. Matthew Richardson on behalf of the homeowners' -- the Respondent homeowners' associations.

And we have here with us today -- Judy Klapholz is here. Bill Mills is on the back row, as well. And then Mr. Russell Rock is here and Ms. Sally Rock.

THE COURT: Good morning. Good morning.

MS. MARTINEZ: Good morning ---

THE COURT: Yes, ma'am.

MS. MARTINEZ: --- Judge Kimpson. Sara Martinez for the Department of Health and Environmental Control. Myself and Christopher Whitehead, my co-counsel.

MR. WHITEHEAD: Good morning, Your Honor.

THE COURT: Good morning. Good seeing both of you.

We have two motions before us. First, we've got a Motion to Dismiss that has been filed by the Petitioner, and I'd like to hear that first. Then we, of course, got a similar Motion to Dismiss filed by the homeowners' associations. And then we'll move -- so once we hear the first motion, we'll move into the second motion.

Mr. Shissias, good morning. Please ---

MR. SHISSIAS: Thank you, Your Honor.

THE COURT: Yes, sir.

MOTION TO DISMISS BY MR. SHISSIAS:

MR. SHISSIAS: May it please the Court. And, you know, Your Honor, I understand that you're saying, it's a Motion to Dismiss. But, you know, technically I had to style this as a motion for relief, because it's not enough just to get out. You have to fix the problem below. That's what we're asking for.

At any rate. Your Honor, we believe this is straightforward. The HOA Respondents filed a late request for review. It's an RFR. And they're flagrantly late. A decision was mailed June 22nd of this year. The RFR was filed on October 26th. The statute requires an RFR to be filed within 15 days of the date of mailing. I cite a bunch of cases on timeliness. The HOAs have responded saying, one of them, MRR doesn't say what we say it says, but it does. The MRR reminds us that the general rule is 15 days from mailing. But if there's a statute that has a particular notice requirement, that's an exception. We don't have that here.

By the way, they also try to distinguish A.O. Smith. A.O. Smith was a case where the Petitioners missed a crucial construction permit. And when DHEC then goes back and says,

This is built as per the permit, we put it in construction -- or put it in operation, they tried to appeal that and drag everything else in and bootstrap it. Both of the cases are on timeliness, Your Honor.

Anyway. Your Honor, other than them trying to throw us out, they've only really got, I think, one argument. And they fall back on this argument that they filed their RFR, quote, Within 12 days of receiving an overdue response to a FOIA request for all documents from DHEC. That's from their brief. And they're saying that their FOIA request is the equivalent of a request to be notified under 44-1-60(E), I believe. It's just a post hoc attempt to save a late RFR, and I'll refute that later.

But I wanted to mention, the first thing they said was the Pickens case -- they said that the Pickens case, that's MRR Pickens, reaffirmed the 2010 Coastal Conservation League decision. And, you know, this is an interesting situation we've got here. In their brief, if you look at what they say about it, they argued their FOIA request stopped the 15-

day clock. And they cite the league decision of the Supreme Court in 2010, said, the foray into the degree of formality needed for a 44-1-60(E) affected person status isn't necessary. Well, that's an error, and they double down on it in their -- by saying in their brief, and I'm quoting again, Despite the most recent amendments in 2010 and 2018 to other portions of the statute, the legislature has chosen not to define the procedure for how a party may request to be notified of staff decisions and how affected party status is achieved. That is simply wrong and let me demonstrate that for you.

Your Honor, the Court may take judicial notice of 2006, Act 387. And don't trust me. Go ahead and you can look it up online. Which said in the first sentence -- this is the way the law was when it was originally passed in 2006 and when the league case was decided in 2010. Notice must be sent to the applicant, permittee, et cetera, who has to be notified by certified mail, return receipt requested. Okay. That's what the Court applied in the League decision.

The Court will also take judicial notice, if you please, of 2010, Act 278. I'd like you to look precisely at what the General Assembly changed. They changed the wording, and it said you had to be requested to be notified in writing. They changed the law. And when they changed it, what formality did they add? They said you had to ask to be notified in writing. By the way, Act 278 has got savings clause. It says it doesn't apply to cases that were in Court then. That's why the League case is decided under the old law.

So where did the HOAs request to be notified in writing? Here's where I'm getting back to refuting the FOIA argument, because they didn't. Madeline Wallace filed a FOIA request back in May of 2021. That's exhibit one to our motion. I'm holding it right here. Now, Madeline Wallace is listed on the RFR as the manager of Greenspace, and she may indeed be an officer. But I defy you to find anything in this FOIA request where she mentions Greenspace or any other entity.

THE COURT: Mr. Shissias, would you put that FOIA request on the ELMO for me, please?

MR. SHISSIAS: Yes, Your Honor. That is exhibit one to our motion to dismiss. I did not see anything in there about the entity.

The other things I'm not seeing is, I do not see the words notify, I do not see the word final agency decision, permit.

Now, Your Honor, I mention the Purple Lotus case in my brief. And I'm sorry I mis-cited to it. It's actually two cases, one following appeals and the other it's kind of complicated. But it's just an example of a case where someone's tried to raise the fact that DHEC didn't respond to a FOIA request as an excuse for a late appeal and Judge Kittredge didn't buy it.

And by the way, this isn't the only time this has happened. Right now there is a case where someone has filed an appeal, a late appeal of, wait for it, a storm water -- sorry, a septic tank permit and their excuse for it is a mishandled FOIA request. Actually, two of them. They had a little FOIA trouble there.

But anyway, putting Purple Lotus aside, let's look at the FOIA law. A FOIA request is a request for documents that are in the

agency's possession. It's not a request for documents that the Department might create in the future. Ms. Wallace's request was filed on May 14th, 2021. The permit was issued on June 22nd. At the time the request was filed and indeed for over a month after there was no permit in the Department's file. Now, it's true that the Department didn't answer, but a FOIA request can't be open-ended. It can't be ongoing forever and ever and ask the agency to produce something that it might create in the future. And some of these permit processes drag on. I mean, to get some kinds of air permits, 18 months easy.

Now, again ---

THE COURT: No, please continue.

MR. SHISSIAS: Yes, Your Honor.

Now, DHEC didn't respond to that FOIA request timely, but there's a legal remedy for that in Circuit Court. Not here. The existence of that remedy cannot be construed to prejudice my client's rights. We have a right to equal protection under the law, too. We have a right to rely on the law that says that 15 days after a permit is issued, if no RFR is

filed within those 15 days, the underlying decision is final, unless somebody's filed a written request to be notified. And it has to have the words request, notify, and decision.

Now, look, we've taken all of this time to get to the point of finality, which is really the point here. How could the existence of an outstanding FOIA request, even one not filed by -- one filed, you know, by somebody's who's not even one of the respondents? The Respondent, Greenspace, is the party in interest. Ms. Wallace filed it. She didn't identify herself as being -- acting on behalf of Greenspace.

THE COURT: But she is some sort of corporate officer of Greenspace?

MR. SHISSIAS: I believe she's a member. She could be an officer. But, Your Honor, she's a corporate officer for four companies, I believe. One in North Carolina and three South Carolina LLCs. And I think what they're asking you to swallow is, if they argue that she had filed this FOIA request, that she was magically filing it on behalf of any four of these companies. I mean, one of them is a mitigation bank. That might have something to do with

this area. It could arguably be a party. Never been mentioned. So are you always automatically -- I mean, look, I'm the registered agent for the Shissias Law Firm. Every time I get a parking ticket, it's not on behalf of the firm. All right.

THE COURT: Mr. Shissias, before you move on -- first of all, thank you for posting the FOIA request. This language is pretty broad. And I hereby request copies of all documents concerning a proposed recreational vehicle park to be located at or near 1970 Landrum Mill Road. Now, I realize this is not with the specificity that you would want under 60 -- under the statute. But does this not -- does that language not encompass a permitting decision?

MR. SHISSIAS: You know, it might encompass a permitting decision that had already been issued, but not one that hasn't been issued, might never be issued.

THE COURT: So there's no continuing obligation -- DHEC did not have a continuing obligation under this FOIA request ---

MR. SHISSIAS: Right.

THE COURT: --- to provide Ms. Wallace with documents after the 14th?

MR. SHISSIAS: Certainly after the 14th and one might even argue that 15 days later would be when it was cut off. Your Honor, a FOIA request simply can't be stretching out forever. It can't be used this way, because agencies respond to FOIA requests and they say, This matter is closed, okay? If the existence of a subsequently-created document then says, you know, You had an obligation to turn that over, well, then that would create a right to file an action in Circuit Court for -- to turn over the undisclosed documents and attorney's fees. And if you read the law in that way, no FOIA request could ever close. I mean, things are added -- everything in the file. Well, things might be added every day. Now, there's -- that's why, under Title 44, there's a separate procedure that's created; You will notify me in the future of everything that may be issued in this case.

And, Your Honor, you know, this is the same issue that came up in this other case, Gullah/Geechee Fishing Association versus DHEC

and Bay Point Island, 22-ALJ-07-008 in front of Judge Lenski. The Respondent, Bay Point Island, filed a motion to dismiss that looks really similar to ours yesterday or maybe the day before. I think it was the day before. And that's pending before Judge Lenski. Same records. Late appeal. The excuse is there was a FOIA request that was botched or mishandled. And because of that, the South Carolina Environmental Law Project says that 15 days don't apply to them. I don't think FOIA can ever work that way.

By the way, there's another problem I was saving for my oral argument. I put it in my brief. But it's clear that nothing in Ms. Wallace's FOIA request says it's on behalf of Greenspace, this separate jural entity, or any of the other corporations and LLCs she's an agent for. But there are four entities seeking relief here, so even if you were to find that Ms. Wallace's FOIA request was a request to be notified of an upcoming permitting decision, which it isn't, and somehow found that it was filed on behalf of Greenspace, and it wasn't, they've got another big problem. That

argument, if you buy it, only helps Greenspace. It doesn't help the other three. Doesn't even affect the timeliness of Enclave, Golden Hills, or North Pacolet. And there's not even an excuse or an explanation as to how this, which is supposed to save Greenspace, saves the other three of them.

So just as they're trying to bootstrap a FOIA request to make it into a request to be notified to excuse a late RFR, they're trying to make Ms. Wallace's FOIA request on it's own behalf to one of the companies that she's an agent for, and then also trying to make it on behalf of all the HOA Respondents. And, I mean, there's nothing supporting that whatsoever.

Now, I want to note that -- another issue, and that is, while the Supreme Court has held, again, an MRR, that while actual notice doesn't act as a substitute for the regulatory notice procedure. These people had actual notice of the decision at two meetings, on August 4th and again on September 20th. They didn't file until October 26th. That's another error on their part. And I want to point this out to

you just to show you that their attempt, their argument to relate that to their FOIA request is entirely arbitrary. And they only did it because they can say, We're within 15 days of something. If they tried to -- the only reason they're not trying to relate back to August 4th or September 20th is because they missed those dates, too.

Your Honor, they take -- also take issue with the fact -- our argument that the DHEC board just ignored the timeliness issue and they're bringing up the -- that they bring up the hearing and the arguments, executive session, and claim the only reasonable conclusion is that the board deliberated on it. And, Your Honor, I have the Final Agency Decision and it's in the record, along with the agency information statement. And the decision is the document. Not a transcript. Not what people say happened. It's the document. I challenge anyone to find anywhere in there where the issues of timeliness are addressed by the board. Now, while your review is de novo, the fact remains, the board just ignored it.

The last argument that they throw at us

after this issue about the timeliness of the FOIA request is that there is, quote, No time limit on reporting an applicant's misrepresentations to a government agency, and there is absolutely no loss, according to this contention. What they're talking about is the complaint. And, you know, there's nothing stopping anyone from filing a complaint. The Department, their view is they have to respond. But DHEC acts on a complaint and they don't -- or they don't. And if you think DHEC isn't doing their job, if there's underlying federal statute with a citizen suit, right, well, then you can file your notice and file suit in Federal Court, but not in the ALC. It doesn't give you the right to reopen a permit. And so they say we lied to the Department in our application. They notified DHEC a lot and DHEC does have the authority to revoke our permit under the Pollution Control Act, and I guess DHEC didn't agree. They didn't revoke our permit.

So there's no underlying statute here. There's no federal right of action. And by the way, the General Assembly has clearly stated --

I think they stated twice that there's no private right of action with the Pollution Control Act, period. And, again, regardless, you don't get to file an RFR and go to this court. If you did, that would open the door to some really wild stuff where anybody would simply be able to say -- pull up a permit and say, Well, there's a misrepresentation here. I can file with the ALC. Does that mean that -- I mean, all of these people, they've got wells and septic tanks that have been issued years ago, so I can file a FOIA request and say, Well, this isn't quite right. This doesn't match what's built. I'm going to appeal their permit ten years after it was issued. I don't think anybody thinks they can do that.

Look, we've got, I think, is a unique case where the board took up an RFR that was filed months after the staff decision was mailed. And that's a real head scratcher for me, is how in the world the DHEC board did this. They heard this case on December 21st. Thirteen days earlier the Supreme Court handed down their MRR case telling everybody that the

general rule is 15 days, unless you have one of those specific exceptions. That doesn't apply here. They took up the case anyway. And I cannot imagine what motivated the board members to approve to take up this case and to reverse the staff's hard work making this permit and deny my client their right to its permit. So now, we're forced to appeal, take five months, you know, thousands of dollars to ask you to fix the board's error, and we have to request that the board reverse and then dismiss on the timeliness issue. I believe we've demonstrated are entitlement and we're entitled to rely on the law that 15 days is jurisdiction. And I thank you.

THE COURT: Before you sit down, if you don't mind, I would like you to address two things. You raised meetings on August 4th and September 30th between the homeowners and DHEC. To the extent you know, why is DHEC meeting with the homeowners at that point?

MR. SHISSIAS: Because they were loud.

MS. MARTINEZ: There were additional permits at this site, Your Honor. And that meeting was actually -- the meetings were being held by

Lancaster County, who was addressing the stormwater permit, because it's an MS4 where they issue the NOI to the Department for review. So it wasn't actually in the Department's purview yet, but we attended that meeting as support, you know, as technical. It wasn't actually supposed to be about the onsite wastewater. It was supposed to be about other issues, Your Honor.

THE COURT: Thank you. That helps. So on those dates, while you -- Mr. Shissias, you say that the homeowners had actual decision -- actual notice of this particular decision, that'd mean those meetings were really about something else; is that fair?

MR. SHISSIAS: I believe that they were held by someone else. And the only point I wanted to bring up is that the permit issuance was mentioned. And I wasn't engaged as counsel then.

THE COURT: Yes, sir.

MR. SHISSIAS: And I don't know if it was DHEC staff that mentioned it or if it was Spartanburg County staff that mentioned it, but, you know, whether they got it at a meeting or saw a flyer

or got a copy of the permit, they didn't know about it. And again, MRR says that, you know, that doesn't -- if you've got -- it doesn't cure the situation -- where you've got a statutory or regulatory notice requirement, it doesn't cure where someone has filed a request to be notified, and they were just told about it, they weren't given a copy. Okay. But ---

THE COURT: And you made that plain in your brief. And I just wanted some greater detail about that

To what extent are you aware of any contact between the homeowners' association and DHEC prior to the issuance of the permit? The permit is, what, June 22nd?

MR. SHISSIAS: Yeah, the permit was issued June 22nd. All that I am personally aware of is, I've seen -- I was engaged in December.

THE COURT: Yes, sir.

MR. SHISSIAS: Okay. All I know that must have happened is I've got a copy of that FOIA request and what the Respondent HOAs have said below to the DHEC board. I believe that probably the Department would be ---

THE COURT: Better suited?

MR. SHISSIAS: Those things would -- but, I mean, we do maintain that, like the Petitioners in the Purple Lotus case, they were actively involved. And one of the other things is, you know, there was a county zoning approval that was issued, I want to say, March of 2021 that these folks had appealed and they showed at those meetings. And those approvals said contingent on obtaining sewer -- septic tank from DHEC and obtaining water from public water supply. So, I mean, like Hubbard and his cohorts, they were aware of and involved in the process even before the permit was issued. That's the best I can do to answer your question.

THE COURT: And that's fine, and I certainly -- I understand you were not retained until later.

MR. SHISSIAS: Yeah.

THE COURT: My last question for you -- and you have to apologize. I kind of write notes down and -- I think I heard you that your grounds for distinguishing Coastal Conservation basically or primarily because of a change in the statute such that later -- the later version of 44-1-60 specifically says, those who have requested notice in writing?

MR. SHISSIAS: Well, I mean, that is one thing.

THE COURT: That's one thing.

MR. SHISSIAS: But I did want to point out the error. However, one of the things about the league case that is a little screwy is -- and I think it's in a footnote, where the Court basically said DHEC conceded the fact that these people were due notice. And so maybe based on -- maybe that was the reason for that statement. We don't see the need to inquire into it. But they just basically went on the fact that -- there's a cite in that case where someone from DHEC says, Oh, I can't believe you weren't on the list. I'll send you a copy. Well, I mean, that's kind of a special situation, because DHEC just basically said, We concede these people were entitled to be given notice. And that's not what happened here or really in any other case since. Is that ...

THE COURT: I think that does address -- and I will ask DHEC, but I wondered about the mechanics of things like putting names on lists, who is to be notified, things of that nature. I'm sure there will be additional questions at some point.

MR. SHISSIAS: I'm ready. Thank you, Your Honor.

THE COURT: Thank you, sir.

Mr. Richardson, do you have anything in response?

RESPONSE TO MOTION TO DISMISS BY MR. RICHARDSON:

MR. RICHARDSON: Your Honor, if it pleases the Court.

THE COURT: Yes, sir.

MR. RICHARDSON: I would like to make some response. I'm inclined to go back to the beginning of the nature of the motion, but first I want to address just two points that I think Your Honor is asking about and we should make clear off the bat. foremost may be this distinguishing Coastal Conservation League. On page 23, this is 390 South Carolina 423.

THE COURT: Give me one second.

MR. RICHARDSON: Yes. In that decision -- this is Justice Kittredge's decision.

THE COURT: Okay. And orient me again to ---

MR. RICHARDSON: South -- excuse me. 390 South Carolina 423. There's a paragraph that starts, On -- at the top of that page, On November the 13th, DHEC approved.

THE COURT: Yes, sir.

MR. RICHARDSON: It starts with that. And footnote three is at the end of that paragraph. But the very next paragraph, Mr. Shissias tried to distinguish it by saying the law has changed in some way, but they're discussing there and quoting section 44-1-60(E). And if you see the third line down in the setoff block quote, which is the code section of 60(E), it says, Affected persons who have asked to be notified. The only difference there is the part about in writing. And, Your Honor, you'll see from our arguments that we would satisfy either of the standards. So we don't think that there's any material difference here in our situation, because we still have the informality of how DHEC determines who are affected parties, right. That hasn't changed. The only difference is, this thing, Who have asked to be notified in writing. And we concede that is the law now. It clearly is. But it's not a sufficient reason to distinguish Costal Conservation League on our facts.

And I want to get back to that in the framework and context of our decision, but the other preliminary matter I think is important

for us to address is just to be clear that Blue Sky -- and he started talking about this at the end. There's no zoning issue anywhere here, okay. He's talking about a land planning -- approval of their overall plan that has lots of factors. And it's more specifically this conditional approval that they've got and then six things they need to do.

Let's be clear. There's no prejudice here, because nothing has or can proceed at this point. And, Your Honor, that's true no matter what the outcome is in this matter, because the permit for onsite wastewater is only one of six of those conditions, three other of which have not been satisfied, and we frankly have taken the position in State court cannot be, because of a very simple fact; they're proposing to run water, which must be run to a site, through a state right of way which does not exist. These are privately owned roads.

And so -- but beyond that, these conditional approval has these six conditions. They had to name the roads. They've done that. That's pretty easy. They had to architectural

approval of a plan of a building that's going to be there. They've done that. That's pretty easy. But they've got no wastewater permit. DHEC has revoked their wastewater permit. We know that, right. And there's no public water access, there's no storm water permit, and no fire hydrants, which would require wells or a tower at this point. So no dirt can be moved up there. And there's no prejudice to the fact that the Petitioner still has a lot of work to do, not -- the least of which is, we say, here on the wastewater permit.

THE COURT: Now, Mr. Richardson, I did note in your brief you talked about conditional approval. Who issues this conditional approval?

MR. RICHARDSON: Spartanburg County, Your Honor.

THE COURT: Spartanburg County. Now, and then you make something about some -- about a cease and desist order having been issued by -- is this the Seventh Judicial Circuit South Carolina Court?

MR. RICHARDSON: I think they're stayed, Your Honor, right now. But, yes, there cannot be any dirt moved up there. And there's a number of things, this being one of them. And, Your

Honor, we're here just make sure they do it right. And that if they're going to do it, they do it safely. And as Your Honor knows, the DHEC board decision found that the campground -- the KOA campground is just not a sufficiently similar establishment to cut the wastewater discharge in half, and so that's why DHEC rejected and revoked their wastewater permit that they're trying to hold on to here.

But if Your Honor would indulge me, I'd like to just go back to what was presented and what's being decided. The Petitioner's motion for relief is under 12(b)(1), okay. You know, it's the discretion of the Court -- he cites an ALC rule. It's the discretion of the Court, he cited rule 68, that we look to the Rules of Civil Procedure. And then he goes into the Rules of Civil Procedure and he selects and only selects 12(b)(1). 12(b)(1) is a lack of subject-matter jurisdiction. And while, Your Honor, we have to concede that we erroneously included the words subject-matter jurisdiction in some of our briefing, the correct word would be procedural jurisdiction, because we know subject-matter jurisdiction is the authority of

this Court to hear and determine the type of cases or a general class of cases to which this proceeding belongs. And in a request for a contested case from a Final Agency Decision, this Court clearly has subject-matter jurisdiction, and there cannot be any dispute of that, but Slezak versus the Department of Corrections, 361 South Carolina at 331. That's a 2004 Supreme Court case, if any citation were needed for that. There's no question this Court has subject-matter jurisdiction in this type of case. So despite making a motion under 12(b)(1), or the fact that he made the motion under 12(b)(1) alone means that this motion needs to be dismissed; however, we should talk about it, because I don't want Your Honor to necessarily -- if Your Honor obviously believes that the 12(b)(6), the lack of subject-matter jurisdiction includes this procedural jurisdiction issue, we want to address that, too.

THE COURT: I think we better address it.

MR. RICHARDSON: Right. And I also want to point out that this issue being presented in the motion for relief is the appeal, right. It is

the substantive -- one of the two substantive issues that this contested case hearing is going to be decided, and we think it should be decided after a presentation of the evidence. That's another reason why we think it should be denied at this point. And the hearing is needed we think in part because the Petitioner seeks and needs, as he pointed out this morning, affirmative relief. It's not enough, right, to dismiss. He needs relief from this Court. He needs relief -- affirmative relief. And he asked for two -- really, three things. One, he asked for a reversal of the DHEC board's Final Agency Decision. Second, he asked for a finding from this Court that the staff permit decision was the Final Agency Decision. And third, he asked to determine that the board erred in reviewing the staff decision and revoked that permit.

Now, we would point out, Your Honor, in passing that the board has independent authority, as he has recognized this morning, particularly under 48-1-50 subsection five. That's the law of statutory authority for DHEC. They had the authority -- independent authority

to revoke this permit, and they've done that, and they gave the reason why they did that.

And so here, we state the ALC clearly has subject-matter jurisdiction, because without it the Petitioner could not get the affirmative relief that he needs, the affirmative relief that the company needs. And the Petitioner's affirmative relief that's being sought requires findings about the DHEC board decision on timeliness of the HOAs' RFR, the board's decision to revoke the permit after the opportunity to be heard, that DHEC conceded that the HOAs, we believe -- I'll tell you about this more, but we believe DHEC has conceded the HOAs were affected parties who requested in writing to be notified by virtue of their decision, rejecting the timeliness arguments made here today explicitly and directly to the board, who then, in his words, ignored them, but in our words, rejected them and revoked the permit. And so those are issues that are for this contested case and why their affirmative relief needs to be heard after a hearing.

Notice of a staff decision was required

and how that notice was not given until, we say, in October of 14. We don't think that's in dispute that DHEC did not give the homeowner associations notice of a staff permit until October 14th. If that's true -- and we don't think that's in dispute. If that's true and we were affected parties who requested to be notified, then our Request for Final Review was timely because it was filed on October 26th. That's the 12 days.

THE COURT: Now -- and I understand that, but your case that your clients were affected parties hinges on the legal significance of this FOIA request.

MR. RICHARDSON: Yes. And let me go ahead and get to that, because there's other issues and other reasons why there's no subject -- and this is not a subject-matter jurisdiction dismissal. Not the least of which it does not get them the relief they want, right. They need this Court to have subject-matter jurisdiction to provide them the affirmative relief they're seeking.

But as Your Honor points out, there is, you know, issues -- legal and factual issues here about the HOAs. We think they're clearly

affected parties. I mean, I don't think anybody would say that the HOAs are not affected parties on this permit. But we also say that we did not delay or sleep on our rights or interest in this matter. And that's an important starting point.

DHEC's decision -- excuse me, their determination of affected parties who request in writing to be notified about permits is informal and it still is. Even if Coastal Conservation League is somehow reversed by adding the words, in writing or undermined, we know that it's still informal and does not require any particular form or substance of that request in writing to be notified. And so we would say, Your Honor, if the Court finds that there are factual issues essential to this decision, then we respectfully request an opportunity to present that evidence at a contested hearing showing we were adequately informed by DHEC of our interest in the permit and our desire to be notified by the permit in writing.

But we've already outlined and we've already been talking about what occurred. On

May 14th, 2021, the homeowners' association made a written FOIA request as broad as Your Honor has read it more than a month before the staff issued the permit. Now, Pat Hubbard, the former law professor in the Shavon case that he says is somewhat controlling, they never made a FOIA request until five weeks after the permit was requested, so we don't think that situation applies here. And there were other circumstances where they were challenging the renewal of a permit, but making arguments about the initial, you know, issuance of a permit. That's not this case either. This case, weeks before on May 14th, more than a month before, the HOAs made the broad written FOIA request before staff issued the permit.

The FOIA request -- this is important because now, we're asking, how does DHEC determine whether they're affected parties who have requested in writing to be notified. Our FOIA request on the 17th was acknowledged, not by a FOIA officer and not by the general counsel's office, but rather by David Vaughan, who is the director of onsite wastewater. He's the guy in charge of the permit being sought in

this case. Between May 17th when David Vaughan, the director of onsite wastewater, acknowledged receipt of our request in writing for all documents concerning the permit, and October 14th when DHEC first sent the permit to the HOAs, okay, during that time the DHEC staff in the onsite wastewater division, David Vaughan and others, discussed that request, that written request, with at least four different members of the HOAs and with the HOAs' hired hydrologist. We hire a hydrologist and he goes and meets in person with David Vaughan and other members of the onsite wastewater division of DHEC. They also had video conference on Zoom, they also exchanged emails, and thus DHEC had actual knowledge of the written requests of the homeowners' associations about all documents concerning the permit, and they had it during that time. Some of the specifics were the August 3rd community meeting in which they specifically reminded David Vaughan about the outstanding request for documents in control of the permit, the September 30th when members of the HOA and the hydrologist, Mr. Gertz, had a Zoom video call

with these same DHEC reps and, again, said we had this request for documents about the permit. And part of DHEC's comments from staff back to the HOAs during this period of time was point blank, There has been no permit issued. And yet we persisted. During the first weeks of October, the HOA sent those -- sent email reminders to David Vaughan in the onsite wastewater division asking for the requested documents about the permit. And then after that or during that period of time, our hydrologist, again, contacted David Vaughan directly and explained the need of why we need, not just any permit that's been issued, but the supporting application and information provided by the Petitioner.

And then for the first time and only time, on October 14th, DHEC responded to that written request and emailed the permit and other documents to the HOAs. And the HOAs turned around and submitted on October 24th by email a Request for Final Review. And then a hard copy and a check for the filing fee were sent overnight mail, received, and filed by the DHEC board clerk on October 26th, 12 days after DHEC

for the first time sent notice of the permit to the HOAs.

And maybe most importantly, maybe most importantly, Petitioner has already presented all of these arguments about the timeliness concern and whether the HOAs were affected parties who requested in writing to be notified. And the DHEC board took all of that, asking for copies of the authorities and they went into executive session, which as Your Honor knows, we have no record of, there is no transcript of, and there doesn't have to be; in fact, there cannot be. And the DHEC board rejected all of those arguments and instead proceeded to decide the Request for Final Review and revoke the permit, because they found that the KOA campground, on which the Petitioner has relied in order to get the permit for reduced water flow, was not comparable and did not establish it had lower discharge level and could not support the inadequate discharge that the Petitioner wants in this permit.

And Your Honor, it doesn't matter -- it does not matter legally if the board explicitly

addresses the timeliness argument, like they did in Coastal Conservation League, or if they just clearly rejected the argument and revoked the staff permit, like they did in this case. And we'll point to -- Your Honor, in the Petitioner's motion -- this is really in the memorandum, I believe, on page two. Excuse me. This is footnote -- the footnote -- footnote three where they point out that they have addressed -- the board has addressed the timeliness issue. That's the Coastal Conservation League. But the difference there was, they upheld the staff permit and here, the Petitioners don't like it because they revoked the permit.

THE COURT: Mr. Richardson, before you leave this point. So it is your argument, your contention -- and I will ask Mr. Shissias the same question or something similar when he gets another opportunity. The fact that the DHEC board issues was a final decision that does not address the timeliness issue at all creates no issue preservation difficulties at this Court?

MR. RICHARDSON: That's correct, Your Honor. In fact, it's issue preservation that leads us to

that conclusion, because when you raise to a lower decision making body an issue that you think's important and that needs to be decided and it's necessarily rejected in order to deliver the decision, you have to file a motion to reconsider to say, Look, you need to decide this issue if you want to preserve it. So, in effect, the Petitioners have not preserved this issue because they raised it to the lower decision maker, didn't get a decision on it explicitly, but did necessarily, because it was rejected by the board by making their decision, and now seeks to get a second bite at the apple and have Your Honor what you can do in a de novo review.

We don't have any complaints about that, but it illustrates why it's not a problem for the board to have not addressed it directly. They don't deal with every -- they don't need to address every issue, but there is no doubt that the DHEC board in the Final Agency Decision rejected those arguments on timeliness and found that the Request for Final Review was timely because they decided it. And if they didn't, then they revoke the permit under its

independent authority in the section 48-1-50 subjection five, and there's no contested case, Your Honor. That's the dilemma that they face, I think.

So we know it's been rejected -- that this argument of timeliness was requested by DHEC. We say that means that DHEC is acknowledging -- like we see in Coastal Conservation League, right? There's similar facts here. Coastal Conservation League, the DHEC board found that the appeal was timely by issuing the Final Agency Decision. In this case, the DHEC board found the appeal was timely. The board's ruling indicated they recognize that they asked to be notified of the decision and was entitled to notified. This is all, Your Honor, in Coastal Conservation League, Justice Kittredge's opinion at 428. And then he reaffirms that DHEC indicated it took an informal approach in deciding which parties it notified of its decision. And so here, the DHEC board, by its decision, has accepted those arguments of the homeowners' association, accepted them as affected parties and decided their Request for a Final Review, accepted the

fact that they were affected parties who had requested in writing to be notified and were notified on October 14th, and therefore filed a timely request for a review, which they then decided, and they revoked the permit in that decision.

And we should -- and having gone through the litany of interactions between the DHEC's division on wastewater permits and the homeowners' association between the May 17th acknowledgment of the writing of request and the October 14th notice of the decision, Coastal Conservation League goes on to say that DHEC believed they asked to be notified and found -- upheld the decision in favor of, in that case, the League, in our case, the homeowners' association, because it was clear they were not an obscure or unknown party. That's the reasoning, not just the decision by the DHEC board that rejected the timeliness decisions and decided the request for review, but that it's clear during the process -- during the application process in this matter, in this case, the League was not an obscure, unknown party. They had been involved from the

beginning, and that's why -- that's part of why Your Honor should not dismiss. Again, it's awkward, but should not find that the request for review was untimely.

THE COURT: And you may have already addressed this, but just let's make sure that I'm clear. And I also realize I'm delving into some factual issues. But what is your understanding of any contact between the homeowners' association or anybody who would conceivably represent the homeowners' association between or prior to the issuance of this permit on June 22nd?

MR. RICHARDSON: Your Honor, we don't think that we need anything more than the May 14th request in writing for all documents concerning the permit and the May 17th acknowledgment of that by David Vaughan, not in the FOIA office, not in the general counsel's office, but in the waste -- onsite wastewater division, which is deciding the permit. And then when we were told there was no staff decision, but we continued to have interactions both in person and in writing through emails and in followup, we were not obscure. We were not sleeping on our rights. We were not estranged to the

process.

And in fact, I'd like to go into a few statements in these case law, because I think it supports exactly what we're saying. The Coastal Conservation League case on page 429 talks about avoiding an absurd result and we think the same concerns are here. If you don't -- and ultimately they say you've got to mail -- you've got to give notice simultaneously. And if you don't, then it's -- the date starts at the date of the last notice given of the decision. And it says, Where DHEC fails to simultaneously notify the affected persons asking to be notified, the latest date of mailing controls where the 15 day period runs. That's October 14th under our perspective. These are the facts. But right above it, it says if you fail to interpret the statute is requiring that they should notify simultaneously, it means that they can -- DHEC, if they wanted to protect their decision, could mail it to the permittee, applicant, hold it for 15 days, and then mail it to the affected parties, and that would obviously be an absurd result. And so that's why the rule is that,

when they fail to notify an affected person asking to be notified, then the time doesn't start to run until you give that last notice. So once we're affected parties who have requested in writing to be notified, October 14th is the trigger date for the Request for Final Review. And that's clear. And that's not affected by this in writing -- minor in-writing difference.

And, Your Honor, I've got to go on and address this issue about actual notice, because Pickens County -- he was calling it MRR decision. I know it as Pickens County versus DHEC. There -- excuse me. Let me get this cite. This is a Lexus cite. I don't want that.

THE COURT: I have it. I have the case.

MR. RICHARDSON: 105. So 435 South Carolina 105. The conclusion is -- and this is Justice James, who actually is affirming the relevant parts of Judge McDonald's opinion in the Court of Appeals, which we're about to look at. But in Justice James' opinion, he says, Thus, while we went on to hold the League's request was timely for a different reason, we rejected the notion

that actual notice triggers the limitations period for requesting final review. Any argument about actual notice is not effective. It starts from October 14th because of Coastal Conservation League and Justice James' decision here in 2021, it looks like -- or '22. That's why the period starts from October 14th regardless of whether -- the facts just don't matter whether we had actual notice or not.

But in any event, Pickens County versus DHEC. Judge McDonald in 2020 says very clearly -- and this part was affirmed by Justice James' review -- opinion Pickens County and this is down at South Carolina -- excuse me, 429 South Carolina 105. Ironically, the same number. It says, The time period begins to run only after DHEC issues a staff decision, in compliance with the applicable statutory and regulatory notice safeguards. And that's why we have the October 14th date.

THE COURT: I understand, but that's contingent upon the affected party having notified -- properly notified DHEC.

MR. RICHARDSON: That's correct.

THE COURT: And it is an affected party.

MR. RICHARDSON: Absolutely.

THE COURT: And all of that hinges upon the -- I apologize that I'm slouching. That is contingent upon the FOIA argument, that this FOIA request met the requirement of 44-1-60.

MR. RICHARDSON: And, Your Honor, if I may, I'm going to next point you to the Administrative Law Court decision by Chief Judge Anderson in Sisters of Charity versus DHEC. And it's more specifically Lexington Medical Center. This order denying the motion to dismiss was filed on September 22nd, 2014. And, Your Honor, on page ten of an unnumbered Order, it has a paragraph that says, When Providence received notice via the response to the FOIA request, Providence acted reasonably and promptly by filing the RFR 15 days thereafter. Exactly the same situation. There, the problem was a CON being kind of repudiated via zeroing out of a line item budget by the Governor and nobody knew whether it applied or not. And so some folks, Lexington Medical Center in this case, proceeded without that, without the notice, without any disclosures, and Sisters of Charity sent a FOIA request asking for notice. And

when they got it, then they acted promptly. As soon as they got the notice, they acted promptly.

And the Court goes on to say in the rest of that paragraph, This right, the right to proceed reasonably and promptly after you get the notice under a FOIA request, the right is expressly given by the applicable statutes and is preserved in Article 1, section 22 of the South Carolina Constitution, which mandates notice and an opportunity to be heard at some point before the agency makes a final decision. Your Honor, I started all of this by saying, we didn't sleep on our rights or our interest. We got on it and we stayed on it until we got it, and then we filed our request for review within 12 days. And that's what we think is important. Therefore, we respectfully request that you deny the Motion for Relief, because DHEC first sent the HOAs a copy of the staff permit giving notice on October 14th, and our request was filed by DHEC on October 26th.

Now, I want to just mention one last thing. And that is, this notice in transparency is really important. It's not

just the rights of a permittee to seek and get and rely on the permit, but it also has to be done the right way and noticed to the affected parties. And there's no dispute we were affected parties. And we needed to know whether and what to request a review on. And it would be patently unfair, Your Honor, we believe, to preclude a presentation of evidence and review of staff decisions where an applicant or a petitioner, in our -- in this case, misleads or fails to provide sufficient support for the agency review. That's what DHEC found, that they did not have a sufficient support for this lower discharge in the permit. And by doing that, by precluding the presentation or review of that staff decision, it would preclude the review by delaying the disclosure of the decision or disclosure of the -- to the affected parties. And we think, Your Honor, that we've shown and could show with an evidentiary hearing at the contested case that we requested in writing before the staff decision to receive disclosure of all documents concerning the permit, and therefore notice.

And, Your Honor, regardless of fault or

culpability, really, it doesn't matter here, for the delay of the notice or the disclosure. It's that affected parties and that DHEC's board should not be precluded from that Final Review that occurred when the request is made within 15 days of the first notice and disclosure to clearly affected parties. Thank you, Your Honor.

THE COURT: Mr. Shissias, if you would like a response. And Mr. Richardson, I'll give you one final say on this, and then we need to take a little break.

Mr. Shissias.

REPLY TO MOTION TO DISMISS BY MR. SHISSIAS:

MR. SHISSIAS: Thank you, Your Honor. I'm just -- I'm going into this just how they -- how -- following his presentation. His attempts to state that the 2010 League case affects this decision, again, I say to you the statute was changed to say, in writing. So where are the words in the writing that say request, notify, permit decision, any of these things? It just says give my your whole file. And, again, FOIA can't possibly be construed to have a request that never closes, because that would subject

the Department to potential prejudice if a late document that someone felt was important after the fact wasn't turned over.

Your Honor, there was some discussion saying that we would suffer no prejudice by this appeal. I think that was -- I don't want to mischaracterize his statements. I want to direct you to your own decision in the dismissal of Mobley versus SCDEW where you held that someone filing an appeal where the tribunal lacks jurisdiction operates to that person's prejudice. And in that case, it was DEW. In this case, it's us. So you've already found that there's prejudice in taking up a late appeal.

There's some discussion about procedural jurisdiction. And as you'll note, in our footnote two, we did mention Sisters of Charity that, you know, some of the ALJ decisions used were procedural jurisdiction. And some discussion that because we cited 12(b)(1), I think there's plenty of case law with this -- with the ALC that, regardless of whether you -- what you cite, if you demonstrate your entitlement to relief, you get it. I saw a

couple of cases where people fumbled over which code citation they requested, and the Court said, Yeah, that's the wrong citation, but you get your relief anyway. You know, the days of code cleaning are gone.

All right. There was some discussion that this should only be considered after a hearing on the merits, and there's a problem with that. And that is, there's plenty of case law that says that the Court has to establish procedural jurisdiction that it can give relief that is requested before it can get to the merits. You have to nail this issue down, I believe, before a contested -- before a merits hearing can be held. And I'm sorry I didn't bring a case like that with me, but I believe that is the law.

All right. They describe what the board did as a permit revocation. I'd like to point out, under the Pollution Control Act, the authority to revoke permits is something that's given to staff. What the board did here was not under the Pollution Control Act, but under Title 44. It was not a permit revocation, it was reversing a staff decision under a provision in Title 44, which is only proper in

the case of a timely-filed RFR.

Suggesting that the board could, at any time, reach out and revoke someone's permit, I don't think there's any authority for that proposition.

I think there was some discussion that -- a claim that DHEC conceded that there was a right to be notified. I don't see anything in there, in the record. And again, I said it before and I'll say it again, where does the agency's duty to respond to a FOIA request end? If you find that this is the equivalent of a request to be notified, you're talking about open-ended FOIA requests, and acting to my client's prejudice. We don't know when a FOIA request is filed, and somebody can always file FOIA requests.

Now, one other thing, there were some statements that Mr. Richardson made about meetings, calls, emails, discussions. And I didn't object, because this is a motions hearing. I nearly came out of my chair, but I didn't. Where in the record is there any evidence discussing these calls, emails, meetings that they're relying on to state that

they informally told DHEC or they informally made the request? I think any statement to that extent is not in the record and that you should exclude those statements from your considerations.

THE COURT: Mr. Shissias, that's interesting you bring that up, and I appreciate -- because isn't there a real argument that with the FOIA request, no matter how you construe it, sent to somebody within the wastewater department, isn't there an argument that somehow, that -- receipt of that document should have triggered DHEC's knowledge that it was -- that the homeowners' association were affected parties and therefore should have received notice?

And I'll certainly give you an opportunity to speak because I love having DHEC here.

MS. MARTINEZ: Yes, sir.

THE COURT: Yes, sir.

MR. SHISSIAS: I think that's the gravamen of their argument, that's all I can really say about it. It doesn't make any sense. When after the fact are you supposed to state for the purpose of the record there's been a request to be notified here? It seems like something that's

only raised on a post hoc basis. Where is there writing that says this? And let me back up. Again, writing, okay? I think it has to be in writing because that's what the statute says. And if you're saying that there's some emanation that at some point, DHEC should finally tip over and come to the conclusion, they asked to be notified. All right. Well, point to it in -- point to the document and it's not there. Did I answer your question?

THE COURT: I think you did. I think you did.

MR. SHISSIAS: Okay. All right. All right. Now, one thing, there's some discussion about the Sisters of Charity case. I don't have that case on me. I could be wrong, but I believe one of the issues in that case is that in CON, I believe there's a statutory notice procedure. And I think there was other cases where it wasn't followed and that excused late appeals. And I don't believe it was followed because DHEC was taking the view you didn't need a CON, I don't have to comply with this notification requirement. Sisters of Charity said, I'll file a FOIA request, and they got the FOIA request. And the judge, You know what, since

you were notified, that's good enough.

I don't think that's the case here. We don't have the orphaned CON program when DHEC was saying, We're not going to take your CON application. We're going to mail it back to you with your check. That's kind of an unusual situation. And I wish I had that case in front of me about whether or not there was a statutory notice procedure. I'm pretty sure it wasn't applied, considering that DHEC at that point said, There is no CON.

THE COURT: That's all right. I'll look at it.

MR. SHISSIAS: Your Honor, look. Look, I wrote a bunch of chicken scratch written down. You've heard enough from me, and I thank you for the opportunity.

THE COURT: Thank you, sir. Now, I'd love to hear from DHEC.

Mr. Richardson, do you have anything more you want to say?

REPLY TO MOTION TO DISMISS BY MR. RICHARDSON:

MR. RICHARDSON: Your Honor, if you're asking me -- yes. I would just say, Your Honor knows that no formality is required in the request for notification in writing. Thank you.

THE COURT: Yes, ma'am.

RESPONSE TO MOTION TO DISMISS BY MS. MARTINEZ:

MS. MARTINEZ: Very quick points, a couple of points, and then I'll answer any questions that you have, Your Honor.

Just -- I don't want to belabor a lot of the facts that are presented. We don't dispute the facts, DHEC does not. We specifically agree with the fact that was presented, that the board decision doesn't address the timeliness issue.

You know, I want to go back to your question about specificity of the FOIA request and emphasize that there was no indication it was anything more than a FOIA request for documents related to the site. If you read it, it doesn't say, I want the permit. It says, I want -- I mean, even if they'd submitted it to FOIA and said, We want a copy of the permit, that's a quicker and easier stretch to make that it's a written request for notice from the Department. But when you just request documents on a site, how is our FOIA department -- we get requests for documents on sites all the time when people are doing environmentals.

Think about all of the phase ones. I could give you a list of the FOIA report that I get every week with the FOIAs that have come in. If we're supposed to take every single request for documents on a site as a -- you know, for perpetuity, a request -- a written request for notification of a permitting decision on that site, I mean, the burden should not be on us to do that. The burden is on 44-1-60, on we have to give notice to any affected party that requested in writing.

You know, the standing issue of whether they're an affected party, we don't even need to go there in this case because, did they request in writing for a notification of the permitting decision?

And I want to distinguish MRR Pickens. You know, that's a very good and bad case for DHEC. You know, we argued -- that case came up as a whether it was a major or a minor modification, because a major modification of that sort of permit requires a landfill permit, requires a -- that if it was major, we have to give notice in writing to any affected parties. If it was minor, we didn't. So it originally

came up of major/minor, but we argued, DHEC, at the initial ALC that motion to dismiss, they had actual notice. You know, they had notice of the permit and this was a minor permit.

The issue that went up to the Court of Appeals and all the way up to the Supreme Court, it started with the Court of Appeals addressing whether this was major or minor. And the Court of Appeals went into whether it was or it wasn't. And the Supreme Court said, you know, No, Court of Appeals, you should not have been determining that, because the only issue right now is whether they require -- you know, that should be the ALC deciding that fact of whether it's major or minor for the purposes of whether we should have given notice. And so the Court sent it back and said, If DHEC did not give the required notice to the parties, affected parties that have requested in writing, then you should hear whether it's major or minor. You should hear it on the merits. But they also said on the flip side, if DHEC complied with its notice requirements, meaning if this was minor and we complied with it and we didn't have to do, you know, any

other notices, if they did that, they said the case should be dismissed effectively. And that's kind of what the issue is here, is it's not -- it's whether or not we satisfied our notice requirements. And there are no separate notice requirements for onsite wastewater septic systems. We issue tens of thousands of those a year. Those specifically do not have set out a separate notice requirement ---

THE COURT: There's no other public ---

MS. MARTINEZ: --- than the ones in 44-1-60.

THE COURT: --- notices that have to be ---

MS. MARTINEZ: Correct.

THE COURT: No public meetings that have to be held.

MS. MARTINEZ: That's correct, Your Honor. It's just 44-1-60, which says when we issue that permit, we have to issue it by certified mail to the permittee and we have to issue it actually in writing, you know, to anybody that requested -- affected party that requested it in writing. And that actually says we can do it in other forms that are agreed upon. So if the other affected parties had said, I want notice via email, we could send it via email to them.

In this case, DHEC did not send -- their argument of, We didn't get this notice, and when they say we didn't know about it, you know, until -- and there's arguments -- I heard you were asking about the August 4th and the September 30th meetings. And, you know, in our staff response to the board, we told them at those meetings that it was discussed that the permit was issued. But I don't even need to talk about actual notice because MRR said -- as co-counsel at the table mentioned, MRR said actual notice doesn't matter, and that is what it is. That's Supreme Court. That's precedent.

And we can talk about Sisters of Charity. We can talk about -- there was, you know, the other case. The Purple Lotus case is what you call it. I call it something different. But, you know, that was ALC and, of course, you all can look at what your other co-judges have done.

THE COURT: Now, when I look for this case, should I look for it as Purple Lotus ---

MR. MARTINEZ: No.

THE COURT: --- or what you call it?

MR. SHISSIAS: It'll show up under either one. Either Hubbard or Purple Lotus ---

THE COURT: Okay.

MS. MARTINEZ: Yeah.

MR. SHISSIAS: Your Honor, it's lurid because it's a tattoo case and that's why I call it that.

THE COURT: Yeah, Hubbard sounds ---

MS. MARTINEZ: Professor Hubbard.

THE COURT: --- familiar. Yes.

MS. MARTINEZ: It's the Professor Hubbard case.

THE COURT: Okay.

MS. MARTINEZ: But, you know, of course, you're going to look at that, but the binding precedent is MRR, which said, Did we give appropriate notice, and if we did, was it timely. And, you know, I hate to -- I just want to stress that because that's a very important point to the Department. As he mentioned, we have a companion case right now -- you know, a similar case. I won't call it companion. A similar case on a septic permit before Judge Lenski that a motion to dismiss was filed on yesterday. And the Department's going to try and stay out of that dispute as much as we can. You know, we're here to offer

-- answer any questions. But it's very important to us that 44-1-60 was changed to require that request in writing and it was at the same time as the CCL. And so when you bring up the CCL case, you have to remember that it was decided under that previous 44-1-60, which didn't require in writing. So the phrases that were mentioned like, was it an obscure or unknown party, well, that's because, you know, it was a different standard than when we had to reply to somebody that was -- requested in writing. When it was just somebody requested, you know, it's not obscure or unknown. Hubbard made the argument, obscure and unknown. I knew about it. I mean, he was meeting with the Department the whole time. And in that case, he submitted a FOIA and he made the argument that, I had a FOIA outstanding. And -- you know, and the ALJ in that case said, You know, did they satisfy their requirements and did they satisfy requirements timely?

One little fact I wanted to mention was, it was mentioned that that FOIA came in after the permit. But if you look at that case, it

was an interesting one because the first permit application that came in was actually rescinded, and then the permitting decision was -- actually, the second permitting decision, the one which was on appeal in that case, was issued actually after the FOIA request. So I just wanted to let you know about that little wrinkle of fact there and answer any questions that you have for me, Your Honor.

THE COURT: Thank you very much. So ---

MR. RICHARDSON: Your Honor, I apologize, but -- and I'm not trying to prolong this hearing. If she had defended the board's actions, I wouldn't have anything more to say, but because she essentially has taken the position of the permittee, I need to respond to a few of those points.

THE COURT: And I'm going to allow you to do that.

MR. RICHARDSON: Thank you, Your Honor.

THE COURT: I think I better take a quick break ---

MR. RICHARDSON: Yes, sir. Thank you, Your Honor.

THE COURT: -- now rather than -- and please, Mr. Richardson, you're up next.

MR. RICHARDSON: Just three points and I appreciate it.

THE COURT: In response.

MR. RICHARDSON: Thank you.

THE COURT: And I apologize. I hate to break up your arguments on the first motion, but I better take a quick break.

MR. RICHARDSON: Yes, Your Honor.

THE COURT: Let's take a ten minute break.

(Off the record at 11:16 a.m. until 11:25 a.m.)

THE COURT: We can go back on the record.

Mr. Richardson.

REPLY TO MOTION BY MR. RICHARDSON:

MR. RICHARDSON: Thank you, Your Honor. And I apologize for this. It was only prompted by a little bit of a surprising position taken by the Department.

Your Honor, the board decision, we think, is clear. The staff decision, you know, we would have a different perspective. But the FOIA request, Your Honor, I want to address that directly, right. I mean, there was some concern about how -- whether a FOIA request is continuing. This decision would have no effect on FOIA requests. The question is whether a clearly in writing request for all documents concerning a permit can be considered as part

of the informal nature of determining who are the affected parties. It can be considered -- and of course, we showed it has been found to be sufficient for a request in writing by affected parties for notice.

Your Honor, on the Hubbard versus the Lotus case, the FOIA was sent after the initial license. The case was about a renewal of the license in which they then tried to bring up challenges to the initial licensing. And so, Your Honor, we don't think that that case applies here factually.

But the last point -- and this is a point I didn't think I would have to make, Your Honor. So if you'll forgive me, I'm going to have to read it from -- DHEC just took the position that the only notice to affected party is who requested in writing. And we think we meet that standard, right, from our writing and the acknowledgment by David Vaughan, who's in the wastewater permitting department. But she also explained how so many permits like these are being issued by staff. It's kind of, you know -- but, Your Honor, that's the whole point of why there needs to be a review. It's the

whole point of why the Constitution says that there has to be, you know, a review by affected parties with a notice and opportunity to be heard before the Final Agency Decision. It's why the DHEC board has this independent authority to revoke permits that have been issued by staff and not just under the Pollution Control Act. But, Your Honor, here -- and because we know that staff makes mistakes and here, the board found that. But there's an additional issue that sometimes, there's more notice required than just in section 60(E). And we haven't pointed this out yet at this level, Your Honor, but below we made this point to the DHEC board and we think it's part of what needs to happen with this permit. DHEC staff processed the Petitioner's application for a permit under regulation 61-56, and specifically, section 102.1, but that permit was revoked. That permit was rejected. Whatever language DHEC wants to use, the board withdrew and took away the permit in part, because -- and they haven't said this, but this is our position, that section 102 is an inappropriate regulation, because recreational

vehicles, the kind that are being proposed to be on this property -- and this permit is specifically servicing their discharge -- they discharge non-domestic wastewater that's been treated with chemicals and that have harmful, chemically harmful, environmentally harmful, odor suppressing chemicals, such as formaldehyde that are in these wastewater holding tanks of RVS. And therefore, the appropriate way to present and to seek a permit in this case is under section 102.8, which also provides that a permit should not be granted, unless DHEC determines that the proposed discharge would not pose a significant environmental risk. And, importantly, before issuing a permit under 102.8 for this type of discharge from RVS that have these odor-suppressing chemicals, DHEC must have assessed the risk of public health and/or groundwater contamination under 102.8, which requires additional notice that has not been provided.

And, you know, because we are here, Your Honor, and it was only because of the response from DHEC, not as strong as I expected them to defend on what the board's actions were, that

I wouldn't have even raised that additional point, Your Honor. And I didn't intend to use it today, but that is an additional reason -- even though we think we survive and we've met the informal requirements of requesting in writing through the very broad FOIA request acknowledged by the DHEC permitting division. Thanks for letting me do that, Your Honor.

THE COURT: Thank you. Because of the funny way I've broken up the hearing, anything more from DHEC or Mr. Shissias on this?

MS. MARTINEZ: No, sir, Your Honor.

THE COURT: All right. Mr. Richardson ---

MR. RICHARDSON: Your Honor ---

THE COURT: --- I think it's your motion now.

MOTION TO DISMISS BY MR. RICHARDSON:

MR. RICHARDSON: Thank you very much. If it please the Court. And I particularly want to thank Your Honor for addressing these separately, because although they may be styled similarly, they are not two sides of the same coin. The homeowners' motion to dismiss is different because it's a different request in a different forum, a different stage in the administrative process, and under different rules. That's

South Carolina code 1-23-600(B).

There's no dispute -- I don't think there's any dispute that the Petitioner did not comply with the ALC rules. I mean, we say that because there's no dispute that these are affected parties. And in Preservation Society case in 2020, the -- it was cited in our briefs, the continuation, so to speak, the fact that you're an affected party below continues through the contested case hearing. That, Your Honor, I think -- and if I didn't cite it, I want to give it to you because I think this is important at this point. Preservation Society of Charleston versus DHEC, 430 South Carolina 200 at 216. This is a 2020 case. And it says, acknowledged by the DHEC board, we think, in granting the review and reversing the permit, the General Assembly intended DHEC to have input from all persons affected by a project with potentially harmful impacts. And this is a quote from the case. That input continues until the administrative process concludes with a contested case hearing. So for that reason under the law, there is no dispute that the homeowners' were affected parties. Obviously,

it's on the face -- it was the reason for the final agency action. It's on the face -- the front page of the final agency action, the four the homeowners'.

And, Your Honor, a base of our motion really is that the Petitioner can't blame DHEC or the homeowners' associations for not following the Court's rules. And, Your Honor, rule 23(B), Your Honor, gives you the authority and the discretion to dismiss. And the board and the ALC and the Circuit Court Appeal, they cite to it, all operate under different rules, but here we're talking about the Administrative Law Court's rules, and Your Honor has the discretion here. Again, this is -- our grounds for our motion, even though we use the words subject-matter jurisdiction, should be struck, and it's procedural. But the procedural, as Mr. Shissias pointed out, means that there are no jurisdiction in cases where the party seeking relief has failed to comply with the rules of procedure in the Court's discretion, under 23(B).

Here, they did not name all of the necessary parties. They didn't even name all

the parties in the face of the agency decision from which they are seeking a contested case hearing. There's no dispute they failed to list any of the four Respondent HOAs, each of which were requesters and affected parties and listed specifically in the cause for the board's Final Agency Decision.

We don't think that there's any doubt that they're necessary parties because they have material interest in the proposed septic system, and that they sought the request, and that they had submitted in writing a request for information about the permit before it was ever issued, and then the preservation society decision, which says, You're a party in this process through a contested case hearing.

Because they failed to name each of the parties, they also failed to serve each of the parties. The rules provide and require that. Specifically, that's rule 11(B). A copy of the request must be served on each party and proof must be included. The proof of service here certifies that a copy was mailed to all other parties, but it was not. We'll talk about that more in a second. But there was clearly no

reference to any of the HOAs on the request for a contested case hearing or in the proof of service or in the related documents from the Petitioner. And the 30-day time limit had expired by March 18th, when the issue was brought to their attention and ultimately corrected, at least on the caption.

Rule 2(H) is important to read. This is -- again, we're in the appellate court rules. 2(H) is the definition of a party. And it says it means each person named or admitted as a party or properly seeking and entitled to be admitted as a party. We don't think there's any question that -- and a requester, and an affected party below in the Preservation Society case means that the HOAs themselves were legal persons who were admitted as a party or were properly seeking and entitled to be admitted as a party. Again, this case did not initiate at the ALC. And because of Preservation Society, we were and are parties.

Rule 5, the service should be made. Your Honor, there was some discussion in the briefing from Petitioner about counsel for the HOAs. And there's no dispute that counsel for

the HOAs appeared and argued in the board review and had discussions in that context. So the Petitioner knew of counsel for the HOAs, but did not serve counsel for the HOAs. They have a good technical argument, that we apparently did not enter as counsel of record, but they clearly knew that the HOAs were represented as counsel, and we think they had a responsibility to do that. They could have easily asked counsel that they knew for the HOAs to accept service or they could have simply sent a courtesy copy in which it could have been -- would be a more appropriate address to send to the HOAs.

THE COURT: Mr. Richardson, just so I'm clear, you were not counsel at the time?

MR. RICHARDSON: I was not, Your Honor, but my co-counsel was and we accept completely what they do and did. But they were never asked to accept the service, they were never sent a courtesy copy, and they were never served either. Instead -- and we know service on corporations and unincorporated associations, which these parties are, they're not individuals, must be served by legal means,

right. And there are lots of ways to do that. It's not our responsibility to tell the Petitioner how to serve. He's more than competent and able to do that. They chose, though, to only mail their request to Mr. Russell Rock, an individual, and not -- that's not legal service on the HOAs. They didn't name the HOAs. They didn't serve them in any capacity on behalf of the HOAs. They simply named an individual and they served that individual. And, Your Honor, this Court has now properly dismissed that individual as not a party.

THE COURT: What do you say in response to the argument Mr. Shissias makes, that Russell Rock was identified in some of the subsequent documents as a contact person?

MR. RICHARDSON: No question. The courtesy guidelines under the DHEC rules -- not the ALC's rules, but the courtesy guidelines for the DHEC rules for DHEC to give notice to folks, you can provide a point of contact. There's no doubt about that and that we did that and that Mr. Russell Rock was that point of contact. There's no doubt about that, but

once you leave the agency and you come to the ALC, the statute requires you to comply with the rules of the ALC and not look back or rely on the rules or the guidelines that apply at DHEC. And more importantly is the fact that they didn't send it to Mr. Russell Rock as some kind of point of contact or as a representative on behalf of the associations. They simply chose not to name the affected parties, not to name the associations, and instead just send it to an individual who is not a party.

THE COURT: I don't want to disrupt the order of your argument. Are you going to address for me -- my overriding question, DHEC, the agency itself, did get this notice of a request for a contested case hearing. DHEC is a party. Was that not sufficient to invoke the jurisdiction of this court?

MR. RICHARDSON: The subject-matter jurisdiction of the court?

THE COURT: As well as the procedural.

MR. RICHARDSON: No, Your Honor. Now, Your Honor's discretion, it certainly -- it could be. Under 23(B), it is discretion, Your Honor's discretion. And there's no doubt that it's

effective as to DHEC. But that doesn't satisfy the ALC rule that it requires service on each party, on each party. And that's the language of 11(B), Your Honor, a copy of the request must also be served on each party. So the only question remains, who are the parties? And the proof of service says it was served on all other parties. And we know that's not true in this case. And there's nothing in here that says, if you serve the agency or the licensee or the permittee, that's sufficient to serve affected parties and folks who are parties in the Final Agency Decision.

THE COURT: But as I understand your argument, you want to dismiss their entire case, you want this Court to dismiss the case.

MR. RICHARDSON: Just their request for a contested case hearing, Your Honor.

And Your Honor, our position is, they've got to go get the permit right anyway for what they're trying to do. So, yes, we're asking you to dismiss the request for a contested case hearing.

You know, and, you know, I think we've covered this, but obviously ---

THE COURT: Even though they clearly have, at minimum, served DHEC?

MR. RICHARDSON: No dispute they served DHEC. No dispute at all they served DHEC. But the rules say they have to serve each party, in part, because we know DHEC, at the staff level, has not done a sufficient job of reviewing and approving the correct permit for this wastewater. I mean, the DHEC board has told us that. And these affected parties, you know, are continuing, right? Preservation Society tells us that the parties would have to continue through until completion of the contested case hearing. And so, if you try to leave them out, then you haven't complied with the rules and you haven't really effectively given the opportunity for the right decision in the matter. And that's why affected -- by the parties, each party has to be served. That's why the parties stay involved under Preservation Society through the contested case hearing.

And we think that, Your Honor, it just boils down to this: I mean, the failure to comply with these procedural rules are not

technical, all right. They're noticed. They're required. And we think, Your Honor, that under 23(B) and the Court's discretion, you can dismiss this request for a contested case hearing.

And it seems that the Petitioner avoided naming these affected parties and avoided serving or providing notice the HOAs legally or through their counsel, which they knew about, and all of which were easily served. I mean, this is lawyering 101, how do you file and serve something. And that wasn't done here, Your Honor. I think ultimately, we would say that, you know, they knew how to serve them and they knew how to name them, they knew they needed to name them, they clearly are parties, and didn't do that. And we think the right result there is for Your Honor to exercise your discretion under 23(B) and dismiss the request for a contested case hearing. Thank you, Your Honor.

THE COURT: Thank you.

Mr. Shissias.

RESPONSE TO MOTION TO DISMISS BY MR. SHISSIAS:

MR. SHISSIAS: Your Honor, before I get started, I

need to address one issue -- one statement that was made by opposing counsel. And had it been Mr. Muller in here making it, I would be filing a rule 11 motion for something that was -- for a statement made in bad faith.

I had a call with Mr. Muller before the board hearing, and he notified me he was not filing a notice of appearance. And so his statement that Mr. Muller was attorney of record at the DHEC board below is not correct.

MR. RICHARDSON: Your Honor, I didn't say that. I said specifically that we ---

THE COURT: Hold me. Excuse me. One at a time, please, now. And, Mr. Richardson, you know ---

MR. RICHARDSON: Excuse me, Your Honor. I apologize.

THE COURT: That's quite all right.

MR. SHISSIAS: Your Honor ---

THE COURT: And I understand. You know I'm going to let you respond. Please.

MR. SHISSIAS: Your Honor, I believe I heard what I heard. If I'm wrong and he's not saying that the Petitioners had counsel at the DHEC board and we knew it, if he's not saying that, okay, fine, no problem. But it sounded like he was,

okay. They had two attorneys there. I think Blan Holman showed up and spoke. Nobody filed a Notice of Appearance. And Mr. Muller told me he wasn't filing one because the DHEC clerk told him he wasn't required to. I wouldn't bring up stuff that's outside the record, except I feel I need to respond.

Now, look. If he's not saying -- again, if he's not saying that the parties had counsel, if he's not saying that and I knew it, okay, fine, forget about it, I apologize. I felt I had to address it. All right.

THE COURT: Please continue. And, Mr. Richardson, you know I'm going to come back to you.

MR. RICHARDSON: Thank you, Your Honor.

MR. SHISSIAS: Your Honor, with regard -- when you practice administrative law, especially environmental law, the law of unintended consequences is pretty strong. And sometimes the Respondents' arguments that they've made in their motion are coming back to bite them, and there's some oops moments in their arguments. So I tried to think of the most efficient way of disposing this motion. I don't know how much time you want me to throw at this, on

naming and serving. And really, the issue is serving. We don't have rules at the ALC about necessary parties. I couldn't find them in the rules. The real argument is service here. And the problem is -- and they don't mention that. If you go look at your agency information statement, the AIS, it's in the record, the problem is, anything they said we did wrong, the DHEC board did wrong, too. Look at page 409. The board served me and the board served Russell Rock. In the affidavit of service, the certificate of service, it says the same thing. Okay. So if you follow their argument, if they gave -- the ALC rules and Title 44 says I have 30 days to file and serve. And if I had to serve all of them and I had to serve in a specific way, get it just right and do it all within 30 days, that means under 44-1(G) my time to appeal didn't even start, because my time to appeal runs 30 days from when the board's Final Agency Decision was received by the parties. I assume the parties is the same throughout. So if the board never notified them right, then how does my time to appeal -- I'm sorry, a contested case filing start?

Which means I'm not late, I'm early, which means you're looking at a remand so that the board can send some letters to their lawyers, and then we're right back here. You know, I think they'd be satisfied with that, because a delay in expenses is what they're after, but somehow, I doubt it.

All right. So that's the simplest way to dispose of this, but I'm not sure it's 100 percent satisfactory to the Court, because it doesn't answer the question of who must be served, because somebody doesn't have to be served or whether there's even a jurisdictional issue here. Now, look. If the board had copied all four, I would have copied all four, all right.

The cases that we cite in our response, they are clear. In the ALC, the truly mandatory party is the agency. And, you know, this isn't a lawsuit. This is an administrative review of an agency decision. And the entity I have a problem with is DHEC, all right. That brings me to ALC rules 5 and 2(H), who is a party and when? You serve all parties to the proceeding. Now, DHEC is the

party. If I didn't serve them, there would be no doubt. And by the way, we do dispute that -- their statement saying that there's no dispute we didn't serve all of the parties. We do dispute that.

Which brings me into rule H. Now, clearly, we're a party and the rule specifically says we're a party. DHEC has to be party. But other than that, it's each person or agency named or admitted as a party or properly seeking and entitled to be admitted as a party. What does that mean? You know, not everybody who appears, complains, is affected, or doesn't like a decision decides to participate at the ALC. Here in our case, even Mr. Goldman had to go and ask -- in February, ask Mr. Rock whether the HOA intended to hire counsel. That was in February. And both Mr. Muller and Mr. Richardson weren't engaged until, I believe, mid March.

You know, I've also argued that an entity that can only participate as a party by hiring counsel can't be a party until they get counsel, and they didn't have one. And that's why I got so hot about the issue about counsel

below. I didn't see a Notice of Appearance. Anybody can appear. And speaking of DHEC RFR. All right. So, look, regardless of who shows up, we're seeking administrative review. We're challenging the DHEC decision. And Rule 12, there's another rule that covers other people who might want to be involved. They can be parties from the start or they can intervene and there's no prejudice to them. So if we were required to serve someone else other than DHEC, and we dispute that, ALC says you serve all parties, and you do this in the initial filing and in all pleadings. In the case of someone without an attorney, by mail to the last known address. Okay. Your Honor, the HOAs' Exhibit B2 and B3 to their motion, all right. It's got all eight signatures. It's got one address on it, Mr. Rock's. We mailed it to him, because that's what the board did. That's the last known address. And by the way, nowhere -- this is a critical fact. Nowhere in here does anybody say that they didn't get notice. They got notice. They're here. All right. The HOAs say that's insufficient and that Rock never agreed to accept, we should

have looked up each HOA. I suppose -- I mean, they should be served to either the agent or the officers or all of them. I'm not sure what would have been sufficient to them, because their motion doesn't even state specifically what we should have done. I'm not clear on it.

With regard to looking up and serving the agent, I mentioned Schatz, the Schatz case from 2011. It was an ALC case, like all of the other cases. It's just persuasive authority. But in there, Judge McLeod provided some framework. He said if a statute prescribes a way of doing something -- and I'm recognizing Schatz. It was an administrative order and an RFR to the board in that case. Here, it's a contested case to the ALC. But the guidance is, you follow the statute. And, look, for contested case, as the APA says, you file a contested case using the ALC rules. And what ALC rule 5 says, Last known address, which is what we did.

Now, remember -- look, in summoning both RFRs -- because they did it twice. You have two officers for each of these entities, signs a document saying, Russell Rock is contact

person. All right. So -- and they did that twice. They specified how they were supposed to be contacted. I mean, and they did it twice. How can they now say that doesn't count? It doesn't matter if Rock said they never agreed. They volunteered for him. This is the only address. I mean, I think that's pretty critical. If you go and look at their filing, the only address I can find anywhere is Russell Rock's address. I think with regard to the FOIA request, there was a P.O. box, but that's the only address I got. And I do not believe that I'm required to comply with SCRCP rule four to go hunting for every single registered agent and get it all done within 30 days or I'm out, okay, because -- and I just don't think that this could be a jurisdictional issue, because then there would be this vast constellation of people I'm supposed to file and serve, and I've got to do it all within 30 days. The rules cannot be that tricky or you would never -- I mean, it cannot be that hard to file a contested case and perfect it.

Look, you have to serve the agency. And out of fairness, I think you should serve

anybody the agency should, okay. But is it mandatory? I don't think there's any law for that. And, again, there's always rule 12 to make sure interested parties are identified. Otherwise, what's the purpose of rule 12? Why bother with it?

All right. Now, I'd be remiss if I failed to remind the Court that the HOAs urge the strict construction of this rule about serving, but they don't follow it. These folks appealed our zoning permit in Circuit Court and they never bothered to serve us. They still have not served us to this day. That's in a forum that has SCRCP Rule 4 on process and rules on necessary parties, unlike the ALC.

All right. So we'll move on to their second issue, which I don't think Mr. Richardson addressed. We had to state our request for relief and that smacks of desperation. There's a little box on the agency form. And I guess they're saying we should have also said, Reverse the board, or, Down with the king, or, Off with their heads, or something. Look, I told you the problem, okay. Second of all, the rule itself specifies

the remedy. It says if it's incomplete, the Court goes to the Petitioner and says, Fix it. And while someone could -- you know, conceivably, somebody could file an appeal on day 29 and the Court only -- the ALC only gets around to saying, Fix it, on day 31, so how can it be jurisdictional? It can't.

All right. And just to be complete. You know, they've got a separate third ground that we violate every rule and you should just throw us out. I'm going to rest on my brief for that, and I thank you, Your Honor.

THE COURT: Thank you.

DHEC, anything before I go back to Mr. Richardson?

MS. MARTINEZ: Nothing from the Department, Your Honor.

THE COURT: Mr. Richardson, please address, first of all, this issue about notices of appearance, and then any further substantive argument you ---

REPLY TO MOTION TO DISMISS BY MR. RICHARDSON:

MR. RICHARDSON: Thank you, Your Honor. Other than the characterization in which I impertinently jumped up, we don't disagree with what Mr.

Shissias was saying or what he might represent Mr. Muller said. He's an officer of the Court and we take him at his word. I wasn't a part of it.

But what I think is undisputed is that lawyers or counsel, both for environmental groups and for the homeowners' associations, appeared at the board review and made presentations. And the Petitioner was aware of who they were and had conversations with them, regardless of what they said. And that's all this is. I also believe I said -- if I didn't, I need to correct it, because I don't think they were counsel of record, because I don't think there is a counsel of record at that stage. But appearing on behalf of a party and making a presentation is pretty close.

And in any event, it really all hearkens back, I think, to this common theme. The Petitioners -- and I hesitate to say this, but the Petitioners are pointing a lot of fingers and blaming a lot of other folks. They've blamed DHEC, they've blamed us, they've blamed the clerk here. And the bottom line is that DHEC's AIS does not control here. It comes

after, and it's a different party's responsibility. And they listed an HOA in the AIS, okay. And they listed all the four HOAs in the board's final action. So they really can't blame DHEC.

And more importantly, we don't think they can blame us. We were affected parties. We were the requesters to get the Final Agency Decision, and we're listed right there on the front page of the Final Agency Decision that they're trying to seek a contested case hearing about.

And the board -- more importantly, the DHEC, just like the Circuit Court or the Appellate Courts, they follow their rules, and if you're there, you follow their rules. And if DHEC has a courtesy guideline of give us a point of contact to make it easy for us and easy for you all to get you to what you need, then that's how you operate in front of DHEC. But when you come to the ALC, the statutes are clear. Other rules don't apply. These rules apply, and they apply to the exclusion of other rules, particularly those at the agency level, because the ALC most appropriately does not

want agencies setting procedural rules for the ALC proceedings. Here, the Petitioners, in order to file a Request for a Contested Case hearing in the ALC, should have complied with and must file consistent with the ALC rules. And we've already pointed those out. Rule 5 is the service. It goes to the heart of this. Any document filed shall be served upon all parties, not just the agency. Not just the one that's always a party and every time they request it, but all parties. That was not done. Then the question is, service shall be made how? Upon counsel if the party is represented. Not were they formally entered as counsel of record at a particular hearing below, but service shall be made upon counsel if a party is represented. The Petitioner had discussions with counsel of the parties that are represented, and it was not served on them. But if there was no counsel, then it tells you how to serve them. Upon the party, period. You must serve the party, period. Russell Rock, as this Court has already decided, is not a party. Service shall be made by delivery by mail to the last known address of the party or

as otherwise approved by the Court through an administrative order. Service is deemed complete upon mailing. That was not done. The Petitioner goes on on page four on his motion -- excuse me, response to our motion to talk about the Department being the only necessary party. As he's pointed out, there is no such thing as a necessary party. There are parties, and then there are not parties. Mr. Rock is not a party. The HOAs are parties. The Preservation Society, they remain parties through the contested case hearing.

And so ultimately, Your Honor, we know that -- you know, that this is, again, something that goes straight to Your Honor's discretion.

THE COURT: Mr. Richardson, if I were to dismiss this request for a contested case hearing as against your clients, would that not leave DHEC as a party to litigate this case with Blue Sky?

MR. RICHARDSON: Your Honor, we're not asking to be dismissed as parties. We're asking for the request to be dismissed because we weren't named and served as parties. It's the -- you know, it's just Rule 23, Your Honor. You have

to comply -- you can't initiate a Request for a Contested Case hearing without naming and must serve all parties. And when that doesn't happen, you procedurally -- under the procedural jurisdiction rules, you haven't really effectively initiated a request for a contested case hearing. So just to be clear, Your Honor, we're not in the position of Mr. Russell Rock, who's not a party and can just be dismissed and everything else go on. It goes -- really, goes back to, Your Honor, I believe, this issue with the Preservation Society where the parties remain through the contested case hearing and Chief Judge Anderson's decision in the Sisters of Charity, November -- excuse me, September 22nd, 2014 where it says -- and he's citing the Ross and Article I, Section 22, notice and opportunity to be heard before the agency makes its final decision. I'm sorry. I've got the wrong cite. But that there needs to be participation by the parties, particularly those affected parties. I mean, that's the whole purpose of the administrative process. And it's why, once we become parties -- and, again, these are totally separate

motions. One occurred at DHEC under DHEC rules. This is occurring in the ALC under ALC rules. And that requires you to continue to have all of the parties named and served and that the parties be able to participate. So we would strongly encourage Your Honor not to dismiss the HOAs as parties and allow the requested contested case hearing -- Request for a Contested Case Hearing to proceed.

We would just say, Your Honor -- and again, I made those arguments about the no prejudice to the Petitioner to illustrate this point. They do need a permit. I'm not saying that this won't have an adverse effect on their seeking that permit, but one way or the other, they've got to go back and get the right permit before this occurs, and they've got conditions that they have not and cannot meet under the conditional approval being handled in a different court, Your Honor. Thank you very much.

THE COURT: All right. Yes, ma'am.

RESPONSE TO MOTION TO DISMISS BY MS. MARTINEZ:

MS. MARTINEZ: Just for clarification of the record, Your Honor. Number four of our AIS where we're

asked to name -- the name, address, and telephone number of any persons who have exercised their legal right to object to the issuance of the permit, we did list all four HOAs.

MR. RICHARDSON: Thank you.

THE COURT: That's where in your AIS?

MS. MARTINEZ: In my AIS number four, name, address, telephone number of any persons who have exercised their legal right to object to the issuance of the permit at issue. Those are the four HOAs who filed the request for review to the DHEC board and we included them here with the last known address that we had. That was after the contested case filing, of course, as you know.

THE COURT: Two quick things, one on the record, one off the record. I just want to make sure I'm clear. There are -- there is -- in addition to what's going on here with regard to the septic tank permits, there's an action pending in Spartanburg County in Circuit Court?

MR. RICHARDSON: Yes, Your Honor.

THE COURT: Now, what stage are we there?

MR. RICHARDSON: I believe it's on appeal. You

know, this is a challenge to Spartanburg's County's conditional approval, but it has the six things that we don't have all of yet. but it has essentially been stayed. But as a practical matter, Your Honor, at least the water proposal over a state right of way that doesn't exist is fatal to that. So we'll -- you know, we'll have to address that in the other matter. There is also a stormwater permit that is required. That's a DHEC issued permit that I don't think has been issued, but I'm frankly not aware of where we are in that step. Then there's a fire hydrant issue, the fire hydrant issue, which requires water.

So there's -- you know, there are a number of things that are -- I hesitate to characterize, but that prevent any work being done. And even the issuance of this permit would not lead to construction.

THE COURT: Are there any other judicial or administrative actions going on other than ---

MR. SHISSIAS: I would like to briefly mention the reason for the stay, and that's because Mr. Muller spoke with the County's attorney and said, Well, because the septic tanks on appeal

have been denied by the DHEC board, let's just stay this. And nobody ever contacted us about the stay. They just did it. And that's the reason why it's stayed.

Thank you, Your Honor.

MR. RICHARDSON: Your Honor, I think that ties into what we are presenting to you today. The Circuit Court operates under Circuit Court rules. And there were some other arguments about that process. They're welcome to intervene and make any arguments they want in that process. That's really independent, but I appreciate Your Honor giving us -- asking about the context in which we're operating down here.

THE COURT: I want to thank the parties for thorough presentations. We'll start -- we've got some fairly involved cases going on in the next couple of months, so I'm going to try to unravel this and get you something very ---

MR. SHISSIAS: Thank you very much.

THE COURT: --- within a reasonable period of time. So I appreciate your presentations. And to the witnesses who have come to observe, you didn't get a chance to talk today, but thank you for

doing so. This is part of how our government works and we appreciate that. Let's go off the record, if we can.

(There being no further questions, the deposition concluded at 12:09 p.m.)

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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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Record on Appeal complies with Rule 210(c) and (e), SCACR, and does not any matter irrelevant to the appeal.

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