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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Milton G. Kimpson, Administrative Law Judge

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

Appellate Case No. 2022-001792

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

v.

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

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

BRIEF OF APPELLANTS

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STATEMENT OF ISSUE ON APPEAL

Did the Administrative Law Court err in finding Appellants' Request for Final Review was untimely when Appellants requested in writing to be notified and the Department of Health and Environmental Control failed to simultaneously notify Appellants of the issuance of the permit as required by S.C. Code Ann. § 44-1-60(E)(1)?

STATEMENT OF THE CASE

This appeal arises from the Administrative Law Court's ("ALC") reversal of a decision by the Board of Respondent South Carolina Department of Health and Environmental Control ("DHEC" or "the Department") to deny the issuance of a permit to Respondent T. Tree Farms RV Park (Blue Sky Associates, LLC) ("Blue Sky Associates"). DHEC staff initially issued the permit authorizing the installation of an individual onsite wastewater system, also known as a septic tank or septic system, for a recreational vehicle ("RV") park, in Spartanburg County, South Carolina. Appellants ("Homeowners") filed a Request for Final Review ("RFR") Conference, which the DHEC Board conducted on December 20, 2021.

On January 13, 2022, the DHEC Board issued an order overturning the staff decision. On January 14, 2022, Blue Sky Associates filed a request for contested case hearing with the ALC. On April 13, 2022, Blue Sky Associates and Homeowners filed cross-motions to dismiss pursuant to Rules 23(B) and 68, SCALC, and Rule 12(b)(1), SCRCPP. The Honorable Milton G. Kimpson heard the motions on May 12, 2022, and issued an order denying Homeowners' Motion to Dismiss and granting Blue Sky Associates' Motion to Dismiss on the basis that Homeowners' Request for Final Review was untimely. On December 20, 2022, Homeowners filed a Notice of Appeal.

STANDARD OF REVIEW

The Administrative Procedures Act (“APA”) governs appeals from the decision of an administrative agency. *Original Blue Ribbon Taxi Corp. v. S.C. Dep’t of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008) (original citations omitted). Under the APA, this Court may affirm the ALC's decision, remand for further proceedings, or reverse or modify the ALC’s decision if the appellant’s substantive rights have been prejudiced because the ALC’s finding, conclusion, or decision was:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B). The appellate court “will correct the decision of the ALC if it is affected by an error of law, S.C. Code Ann. § 1-23-380(5)(d) (Supp.2010), and questions of law are reviewed de novo.” *S.C. Dep’t of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012). Under this standard, a reviewing court may reverse or modify an agency decision when it is based on an error of law. *Turner v. S.C. Dep’t of Health & Env’tl. Control*, 377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008).

STATEMENT OF FACTS

The facts giving rise to this appeal began with an application for a septic system permit.¹ Blue Sky Associates proposes to build and maintain “T Tree Farms RV Park,” an RV Park located in Spartanburg County at 1970 Landrum Mill Road near Campobello. (R.p. 2). Blue Sky Associates’ plans contemplate fifty-two spaces for recreational vehicles, and intend to provide onsite domestic wastewater disposal via septic system. (R.p. 1). The Department received Blue Sky Associates’ septic system application on April 23, 2021. (R.p. 50).

Appellants are homeowner associations (“HOA”) of four residential neighborhoods comprised of approximately 90 members and shareholders who own property contiguous to and surrounding the proposed RV park site.² (R.p. 1-2). After learning of Blue Sky Associates’ plans to construct a large RV park on adjacent property, Homeowners grew concerned that a septic system processing effluent from fifty-two RVs would negatively affect their health, contaminate drinking water wells, and degrade the environment. (R.p. 63). Finding no DHEC public notices relating to the project or property, Homeowners turned to the Freedom of Information Act (FOIA), S.C. Code Ann. Section 30-4-10, *et seq.*, to obtain more information and participate in the permitting process. (R.p. 67).

On Friday, May 14, 2021, Madelon Wallace, manager and shareholder for Appellant Greenspace of Fairview, LLC, and a member/owner of Appellant Golden Hills of Fairview HOA, Inc., submitted a FOIA request to David Vaughan, Director of DHEC’s Onsite Wastewater Management Division. (R.p. 67; R.p. 87). The request asked for “copies of all documents concerning a proposed recreational vehicle park . . . to be located at or near 1970 Landrum Mill

¹ See S.C. Code Ann. Reg. § 61-56, Onsite Wastewater Systems.

² These neighborhoods cover 1,400 acres subject to conservation easements held by Upstate Forever and Conserving Carolina, both land trusts. (*Homeowners’ Prehearing Statement* at 3). All properties within the four neighborhoods are subject to conservation-focused restrictive covenants and land use restrictions. (*Id.*).

Road, Campobello, SC, in Spartanburg County, Block Map Reference # 1-09-00-020-03” and providing six possible applicant names or derivatives, including “T. Tree RV Park,” “T. Tree Farms RV Park,” and “Blue Sky Associates, LLC.” (R.p. 99 & 100). David Vaughan acknowledged receipt of this FOIA request on Monday, May 17, 2021. (R.p. 100).

Unbeknownst to Homeowners or the public,³ DHEC issued Blue Sky Associates’ septic system permit on June 22, 2021. (R.p. 50). Yet, when members of Homeowners inquired with DHEC representatives on the status of a permit between the end of June and mid-July 2021, DHEC informed them—falsely—that no permit had been issued. (R.p. 72). In late July 2021, approximately two months after their FOIA request, Homeowners began to hear rumors that a septic permit had been issued to Blue Sky Associates; however, as of that time, Appellants had no official confirmation, because they still had not received any response to their FOIA request and DHEC had not provided written notice of the issuance of the septic permit, as required by Section 44-1-60. (R.p. 109; R.p. 33).

DHEC staff attended community meetings with HOA representatives in-person on August 4, 2021, and via video conference on September 30, 2021. (R.p. 73). During those meetings, DHEC staff disclosed that Blue Sky Associates’ septic system contemplated a fifty percent reduction from the standard peak flow set forth in S.C. Reg. § 61-56, likening its septic system to an unidentified KOA campground. (*Id.*). Other aspects of Blue Sky Associates’ proposed septic system, including its characteristics, location, and peak flow data, were not shared with Homeowners. (*Id.*). At this time, Homeowners still had not received any response to their FOIA request. (*Id.* at 14).

After five months, DHEC finally responded to Homeowners’ FOIA request on October 14, 2021. (*Id.* at 14-15; R.p. 3). Twelve days later, on October 26, 2021, Homeowners promptly filed

³ According to the Department’s interpretation of applicable laws and regulations, neither septic system applications nor septic system permits are publicly noticed.

their RFR, alleging the proposed septic system was substandard and insufficient with regard to its processing capacity. (R.p. 29; R.p. 3.) Homeowners also alleged the system, because of its inadequate design, posed a threat of substantial and irreparable harm to human and environmental health. (R.p. 29).

DHEC staff responded on November 17, 2021, arguing that Homeowners' RFR was untimely because it was filed 126 days after the septic permit was issued. (R.p. 51). Despite this incorrect assertion, the DHEC Board heard Homeowners' RFR at a final review conference on December 20, 2021, and, on January 13, 2022, issued its Final Agency Decision ("FAD") overturning and rescinding the staff decision. (R.p. 26). The DHEC Board implicitly rejected the timeliness argument raised by DHEC staff, instead finding issuance of the permit was improper because "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 [provided in the septic system application]." (R.p. 25.)

On January 14, 2022, Blue Sky Associates filed a Request for Contested Case hearing with the ALC, and Blue Sky Associates, DHEC, and Homeowners each submitted Prehearing Statements. (R.p. 2; R.p. 55-84). On April 13, 2022, Blue Sky Associates and Homeowners filed cross-motions to dismiss pursuant to Rules 23(B) and 68, SCALC, and Rule 12(b)(1), SCRCF. (R.p. 2). The Honorable Milton G. Kimpson heard the motions on May 12, 2022, and issued an order denying Homeowners' Motion to Dismiss and granting Blue Sky Associates' Motion to Dismiss on the basis that Homeowners' Request for Final Review was untimely. (R.p. 1).

ARGUMENT

I. The ALC erred in finding Homeowners' Request for Final Review was untimely when Homeowners properly requested in writing to be notified and were entitled to simultaneous notice of any DHEC decision on septic permits for the RV Park.

DHEC is statutorily obligated to simultaneously provide notice of any staff or department decision to all “affected persons who have requested in writing to be notified.” S.C. Code Ann. § 44-1-60(E)(1). Despite Homeowners’ “request[] in writing to be notified” sent to—and acknowledged by—the director of the Department’s septic permit division of “all documents concerning a proposed recreational vehicle park” identified as T. Tree Farms RV Park, DHEC only provided notice to Homeowners four months after its issuance of the permit. (R.p. 2-3). DHEC’s failure to simultaneously notify Homeowners at the time it issued the permit violated Section 44-1-60(E)(1). *See S.C. Coastal Conservation League v. S.C. Dep’t of Health and Env’tl Control*, 390 S.C. 418, 427, 702 S.E.2d 246, 251 (2010) (“Of course, without construing § 44-1-60(E) as requiring that notice of the agency decision be mailed simultaneously to those entitled to notice, the statute would be meaningless in terms of providing notice.”).

As a result, the fifteen-day time frame to file an RFR only began once DHEC provided the statutorily-required notice of its decision to Homeowners on October 14, 2021. *Id.* at 429, 702 S.E.2d at 252 (“[W]e hold that in situations where DHEC fails to simultaneously notify the applicant, permittee, licensee, and affected persons asking to be notified, the latest date of mailing controls when the fifteen day period begins to run.”); (R.p. 152, l. 17-20; R.p. 3). Because Homeowners filed their RFR on October 26, 2021, within fifteen days of DHEC’s notification, their request was timely and the Board properly heard the merits of the challenge. (R.p. 28; R.p. 3).

The ALC's erroneous finding that Homeowners' RFR was untimely ignored the fact that the fifteen-day time period was tolled until DHEC properly notified Homeowners of the permit decision. This ruling emanated from the ALC's error in finding Homeowners' FOIA request did not constitute a "request in writing to be notified" of septic permit decisions for the RV park; thus, the ALC held Homeowners were not entitled to notice. Because Homeowners complied with the requirements of Section 44-1-60(E)(1), Homeowners respectfully request this Court reverse the ALC's decision and remand for a hearing on the merits of the DHEC Board's rescission of the septic permit.

A. The ALC erred in finding Homeowners did not request in writing to be notified.

The ALC incorrectly rejected Homeowners' FOIA request as sufficient to comply with the "request in writing to be notified" requirement set forth in Section 44-1-60(E). The ALC concluded that "there is no evidence that Ms. Wallace or the Homeowners wanted information specifically related to septic tank permits" even though it recognized the FOIA request was "sent to the division *responsible for issuing septic tank permits*" and explicitly emphasized a concern for the discharge of "waste" into the Gold Mine Creek and the North Pacolet River. (R.p. 16 (emphasis added)). The ALC reasoned:

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 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.

(*Id.* at 16 n.15). The ALC's ruling not only erroneously created additional requirements not set forth in the language of the statute, but its rejection of the FOIA request here as insufficient raises

the question what “degree and specificity of the concern communicated to the Department” would ever satisfy this test created by the ALC. (*See id.*).

First, Section 44-1-60(E)(1) provides simply that “[n]otice of a department decision must be sent by certified mail, return receipt requested to the applicant, permittee, licensee, and *affected persons who have requested in writing to be notified.*”⁴ *Id.* (emphasis added). The statute therefore establishes that, to achieve this status, one must be (1) an affected person, (2) who requested in writing, (3) to be notified of department permitting decisions. Our Supreme Court has recognized that the statute does not set forth a clear procedure on acquiring such status. *See Coastal Conservation League*, 390 S.C. at 427, 702 S.E.2d at 251 (“However, the statute is *not clear as to how an individual or entity acquires the status of ‘affected persons who have asked to be notified.’*”).⁵ Here, the ALC acknowledged this precise fact as well. (R.p. 11 (“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 The statute fails to identify the area within the Department that such a request for affected person status should be directed.”)).

As the ALC noted, the statute does not indicate a particular division within the Department where such requests must be directed and does not mandate any elaborate formality or specific language to be used in the request. (R.p. 15 n.13 (noting “the absence of . . . a specific requirement in the statute [to include in a request to be notified the language ‘affected person’] suggests that a person may make a sufficient affected person request *without articulating those exact words*”

⁴ The provision also allows affected persons to consent to notice via regular mail or electronic mail in lieu of certified mail. *Id.* In addition, the same rule applies for “[n]otice of *staff decisions for which a department decision is not required*”: notice must be provided to “affected persons who have requested in writing to be notified.” *Id.* (emphasis added).

⁵ The Court in *Coastal Conservation League* interpreted the prior version of the statute, which is substantially the same to the current version but did not require the request to be notified to be “in writing.” S.C. Code Ann. § 44-1-60(E)(1).

(emphasis added))). Finally, despite its authority to adopt regulations implementing the statute— as well as the repeated instances of litigation surrounding its meaning⁶—DHEC has never specified a particular method by which a member of the public must comply with this provision.⁷ Instead, DHEC continues to “take an informal approach in deciding which parties it notifie[s] of its decision[s].” *Coastal Conservation League*, 390 S.C. at 428, 702 S.E.2d at 252. Because DHEC has voluntarily elected this “informal approach,” the Court should construe against DHEC any ambiguity in whether a person has achieved the status of an “affected person who requested in writing to be notified,” not Homeowners or the public.

The ALC assumed without deciding that Homeowners were “affected persons” and no legitimate dispute exists that the FOIA request was “in writing.” (R.p. 5; R.p. 99-100). Accordingly, the only question before this Court is whether the FOIA request asked for Homeowners “to be notified” of a department or staff decision. Homeowners’ request satisfies both the statutory language *and* the new test created by the ALC. (R.p. 16 (concluding that a “degree and specificity of the concern communicated to the Department about some permitting decision” is required to “place[] the requestor in the class of affected persons and put[] the Department on notice that he seeks such status”)).

⁶ See *Coastal Conservation League; Pickens Cnty. v. South Carolina Dep’t of Health and Env’t Control*, 435 S.C. 99, 866, S.E.2d 537 (2021) (interpreting notice requirement of section 44-1-60); *Preservation Society of Charleston v. South Carolina Dep’t of Health and Env’t Control*, 430 S.C. 200, 845 S.E.2d 481 (2020) (interpreting the meaning of “affected person”); *Wise v. South Carolina Dep’t of Health and Env’t Control*, No. 2013-UP-072 (Ct. App. 2013) (reversing the ALC’s determination that the appellant “did not follow procedures” outlined in Section 44-1-60); *Gullah/Geechee Fishing Ass’n., Inc. v. S.C. Dep’t of Health and Env’t Control and Bay Point Island, LLC*, Appellate Case No. 2022-001126 (briefing in progress raising issue regarding “request to be notified” language).

⁷ Indeed, a review of DHEC’s website reveals no additional guidance on this process. In contrast, for example, the DHEC website provides detailed instructions on how an individual, interest group, or business entity can place their name on a mailing list to be notified about NPDES/ND permits, including the contact information they require as well as detailed contact information for individual staff members within the agency (names and email addresses, phone numbers, mailing addresses, and internet links). See “Mailing Lists for NPDES/ND Permits,” available at <https://scdhec.gov/mailing-lists-npdesnd-permits#individual> (last visited March 28, 2023).

When Homeowners—through Ms. Wallace—submitted their FOIA request on May 14, 2021, they sent their request to the Department’s septic permitting division and explicitly emphasized a concern for the discharge of “waste” into nearby waterways. (R.p. 67; R.p. 100). In fact, Homeowners submitted their request to the Director of the Onsite Wastewater Division (i.e., septic system permitting), David Vaughan, and received an acknowledgement of their request from Mr. Vaughan. (R.p. 99 & 100; R.p. 87). In addition, contrary to the ALC’s finding, the request undeniably “wanted information specifically related to septic tank permits”; the request was directed to the septic permitting division and the concern for the discharge of “waste” rationally and logically refers to the “waste” managed by the septic system the DHEC permitting division may authorize. (*Id.*; R.p. 16). The request asked for copies of “all documents” relating to a specifically identified project—an RV park—at a specifically identified location—1970 Landrum Mill Road, Campobello, SC in Spartanburg County, Block Map Reference #1-09-0-020.03—and specifically identified under several possible names—“T. Tree RV Park, T. Tree Farms RV Park.” (R.p. 99). As the ALC explicitly recognized, the request “was certainly broad enough to encompass septic tank permits, as well as any applications for such permits.” (R.p. 15).

Inherent in such a request to the State agency (and the specific division) responsible for issuing septic permits is a request “to be notified” of any septic permit decision made by the agency regarding this specifically identified project. Nothing in the statutory language mandates the use of the specific language “to be notified” or any derivative thereof. As even the ALC acknowledged, “there are no magic words to trigger affected person status,” and the absence of such a requirement in the statute indicates that “a person may make a sufficient affected person request without articulating those exact words.” (R.p. 15 n.13). Accordingly, the information contained in the request sufficiently prevents the Department from having to “grope in the dark.” (*Id.* at 16 n.15).

Even if the FOIA request alone was insufficient to satisfy the language of the statute or the ALC's test, DHEC was on notice that Homeowners were involved and interested in the issuance of this permit. *See Coastal Conservation League*, 390 S.C. at 428, 702 S.E.2d at 252 (recognizing that the League's "involve[ment] in this particular permitting process from the beginning" established that "the League was not an obscure or unknown party" to DHEC and were entitled to notice). Like the League, Homeowners were not "unknown or obscure" parties to the Department, including during the period in which (1) DHEC received an initial application for this specific permit for this specific project and requested supplemental information from Blue Sky Associates; (2) DHEC received an updated septic tank permit application and updated plans from Blue Sky Associates' engineer; and (3) DHEC finally issued the permit. (R.p. 2-3 (outlining chronology of events)). Specifically, Homeowners submitted their request a mere twenty-one days after Blue Sky Associates filed its initial application, DHEC acknowledged receipt of Homeowners' request three days later, and, between May 17, 2021 and October 14, 2021, Homeowners repeatedly engaged with Mr. Vaughan and other members of the Onsite Wastewater Division of DHEC after submission of the initial request. (R.p.2-3; R.p. 151, l. 5-25). Homeowners even asked the ALC for an evidentiary hearing to present supplemental evidence on this issue. (R.p. 164, l. 19-24).

The ALC minimized Homeowners' involvement by finding that it was "not as pronounced in the permitting stage as was the League's participation in *Coastal Conservation [League]*" because they did not participate in public hearings or submit public comments. (R.p. 15-16). This finding is misleading because DHEC does not publicly notice septic system applications or permits, let alone hold hearings or maintain a scheme for consideration of public comments. *See S.C. Reg. § 61-56*; (R.p. 20; R.p. 175, l. 5-25). Any remaining question regarding Homeowners'

involvement in the permitting process should have been resolved through the evidentiary hearing requested by Homeowners, not simply disregarded by the ALC.

In contradiction to the evidence presented, the ALC concluded that “at 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.” (R.p. 16-17). Yet, Homeowners expressly indicated they were provided false information during this exact and *critical* time period. First, Homeowners informed the ALC in their Prehearing Statement that members of Homeowners inquired with DHEC representatives on the status of a permit *between the end of June and mid-July 2021*, and DHEC informed them—falsely—that *no permit had been issued*. (R.p. 72). Second, during the hearing, Homeowners specifically asserted that “part of DHEC’s comments from staff back to the HOAs during this period [between May 17, 2021 and October 14, 2021] of time was point blank, there has been no permit issued.” (R.p. 151, l. 1-6; R.p. 37, l. 3-5).

In summary, neither Section 44-1-60 nor any case law indicates that the specific words “to be notified” are required in any request; Homeowners clearly identified the specific project and the specific type of permit in their written request to be notified of the Department’s decision; and Homeowners were as deeply involved as they could have been throughout the Department’s consideration and approval of this permit, even in the face of false information. Homeowners complied with the requirements of Section 44-1-60(E) and were entitled to notification of the issuance of the permit. The ALC erred and this Court should reverse.

B. The ALC erred in finding Homeowners’ RFR was untimely.

The ALC also erroneously held that Homeowners’ RFR was untimely because it relied on its incorrect determination that the fifteen-day period to file an RFR expired on July 7, 2021. (R.p.

20). Because the deadline did not expire until October 29, 2021, Homeowners' filing of the RFR on October 26, 2021 was timely and properly implicated the DHEC Board's jurisdiction. (R.p. 2-3 (noting DHEC emailed Ms. Wallace the permit issued to Blue Sky Associates on October 14, 2021 and Homeowners filed their RFR on October 26, 2021)). Accordingly, this Court should reverse the ALC's order.

Section 44-1-60(E)(1) provides that "[n]otice of a department decision must be sent by certified mail, return receipt requested to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified." Our Supreme Court's decision in *Coastal Conservation League* makes clear that the statute requires *simultaneous* notification: "Of course, without construing § 44-1-60(E) as requiring that notice of the agency decision be mailed *simultaneously* to those entitled to notice, the statute would be meaningless in terms of providing notice." 390 S.C. at 427, 702 S.E.2d at 251 (emphasis added). The Court reasoned:

Failing to interpret this statute as requiring DHEC to mail notifications simultaneously would mean DHEC could mail notice of its decision to the applicant and, fifteen days later, mail notice of the decision to affected persons who have asked to be notified. Under this scenario, the time period for appealing the decision would have expired by the time the affected person receives notice; thus, 'affected persons' could be precluded from seeking review. Interpreting the statute to require DHEC to mail the notice of decision to the applicant, permittee, licensee, and affected person at the same time provides a uniform procedure, gives all parties equal opportunity to challenge a decision, and is consistent with the legislative purpose.

Id. at 429, 702 S.E.2d at 252. To remedy an instance when DHEC fails to provide notice simultaneously to the applicant, permittee, licensee, and affected persons who requested to be notified—like the League in *Coastal Conservation League* and like Homeowners here—the Court held that "the latest date of mailing controls when the fifteen[-]day period begins to run." *Id.*

Because Homeowners are affected persons and complied with Section 44-1-60(E)(1) by “request[ing] in writing to be notified” of the Department’s decision on the septic permit at issue here, Homeowners were entitled to simultaneous notice. The Court’s holding in *Coastal Conservation League* makes clear that DHEC’s failure to simultaneously notify Homeowners here results in the tolling of the limitations period until “the latest date of mailing.” *See id.* Here, the latest date of “mailing” was October 14, 2021, when DHEC disclosed the septic tank permit issued to Blue Sky Associates via email to Ms. Wallace. (R.p. 3). Accordingly, the deadline for Homeowners to file their RFR was October 29, 2021, three days after Homeowners filed their RFR. *See* S.C. Code Ann. § 44-1-60(E)(2) (providing the staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision, unless a written request for final review is filed with the Department).

The ALC ignored this principle set forth in *Coastal Conservation League* by misinterpreting the Court’s decision in *Pickens County*. *See* 435 S.C. 99, 866, S.E.2d 537 (2021), *affirming in part and reversing part* 429 S.C. 92, 837 S.E.2d 743 (Ct. App. 2020). In *Pickens County*, our Supreme Court reiterated that actual notice does not trigger the limitations period for requesting final review under Section 44-1-60. 435 S.C. at 105, 866 S.E.2d at 540 (“We agree with the court of appeals on this point and affirm its analysis of our opinion in [*Coastal Conservation League*].”); 429 S.C. at 105; 837 S.E.2d at 750 (“However, nothing in § 44-1-60 suggests the fifteen[-]day period for appealing a DHEC staff decision begins to run upon a party’s simply learning of a permit action.”).

As a result, it is only upon DHEC’s mailing (or, now that the General Assembly authorized email notification, upon e-mailing) of the decision that the fifteen-day period began to run. *Id.* at 426, 702 S.E.2d at 250-51 (concluding the statute’s language dictates that the limitations period

runs from the date notice of the department decision has been mailed). The ALC misinterpreted Homeowners’ argument by concluding that the “*Pickens County* ruling thus undermines the Homeowners’ arguments that their time period for requesting a[n] RFR did not begin until the actual receipt of the permit through the FOIA disclosure in October 2021.” (R.p. 18). Importantly, Homeowners have never argued that the fifteen-day period began upon actual notice; instead, the fifteen-day period began—consistent with the latest date of mailing principle set forth in *Coastal Conservation League*—when “on October 14, [2021,] DHEC responded to that written request and *emailed the permit* and other documents to the [Homeowners].” (R.p. 152, l. 17-20). Therefore, by filing their RFR on October 26, 2021, three days before the deadline expired, Homeowners timely triggered the DHEC Board’s jurisdiction to review the issued permit.

CONCLUSION

The ALC erroneously concluded Homeowners had not requested in writing to be notified of the Department’s septic permit decision. As a result of this incorrect finding, the ALC improperly held that Homeowners’ RFR was untimely because it disregarded the requirement that the latest date of mailing controls if the Department fails to provide simultaneous notification. Homeowners therefore respectfully request this Court reverse the ALC’s order and remand for a hearing on the merits of the DHEC Board’s rescission of the permit.

Respectfully submitted,

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June 29, 2023

Charleston, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Milton G. Kimpson, Administrative Law Judge

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

Appellate Case No. 2022-001792

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

v.

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

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

PROOF OF SERVICE

I hereby certify that on this date, June 29, 2023, I served Appellants' Final Briefs on all parties by emailing a copy of same to the Attorney Information System provided email addresses below:

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June 29, 2023

s/Leslie Lenhardt

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