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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

ALC Docket 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.

PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, Appellant, Enclave at Fairview Homeowners' Association, Inc., Golden Hills of Fairview Homeowners' Association, Inc., Greenspace of Fairview, LLC, and North Pacolet Association, Inc., (collectively, the Homeowners) respectfully petitions this Court for rehearing and reconsideration of its July 3, 2024 Opinion (“the Opinion”) affirming the decision of the Administrative Law Court (“ALC”) to grant Respondent T. Tree Farms RV Park's (Blue Sky Associates, LLC) (“Blue Sky Associates”) motion to dismiss.

INTRODUCTION

The basis for reconsideration is this Court misunderstood the mechanism by which a party can achieve “affected person” status, and misapplied the due process requirements of notice and an opportunity to be heard. “Generally, the purpose of a rehearing on appeal is to afford to litigants, whose rights and interests are affected by the appellate court judgment, an opportunity to have an erroneous judgment corrected by the appellate court deciding the case.” 5 C.J.S. Appeal and Error § 798. “In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument.” *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (citing Rule 221(a), SCACR). In affirming the ALC’s dismissal of the contested case, this Court’s Opinion runs contrary to the plain language of the applicable statute overlooking both the operation of the law and the safeguards in place for meaningful public participation. Further, this Court decided a companion case on the same day, *Gullah/ Geechee Fishing Assoc. v. S.C. Dept. of Health & Env’t. Control.*, No. 001126, 2022 S.C. App. (July 3, 2024), regarding the same issues stemming from failure to provide any public notice whatsoever of individual septic tank permits. Having actual notice of a permit application is a precondition to securing “affected person” status. The Association sought actual notice through its FOIA request. In addition, public notice and an opportunity for a hearing are essential elements of due process

and these rulings collectively could have a significant and lasting impact on the public's ability exercise those rights and meaningfully engage in state agency decisions that impact their health, well-being and livelihood. These cases also reflect that the Department knowingly fails to provide public notice which circumvents the public's opportunity to achieve "affected person" status.

The Court's reasoning, like the ALC's, hinges on the notion that because the Association did not ask to be considered an "affected person" and to be notified of a permit decision – even though it had no way of knowing a permit application had even been submitted – it was not an affected person; therefore, it was not entitled to notice, and the request for review was thus untimely. The problem is that one can only ask to be notified of a permit decision *if, and only if*, they have notice that a permit application has been submitted. Because DHEC does not place septic permit applications on public notice, the only way the public can find out about its existence is through a FOIA request, which the Association did. DHEC does not provide any public notice or other mechanism for the public to become aware that a permit application has been sought. In fact, DHEC rejects any attempt to obtain "affected person" status when no permit application is pending. Exhibit A, (DHEC email re: septic notices). In short, as DHEC operates, one can never be entitled to notice of a permit decision because DHEC does not provide public notice of any kind for septic permit and rejects requests to be notified of future permit applications or decisions.

I. The Court of Appeals incorrectly reached the legal conclusion that is inconsistent with the plain language of the statute, and erroneously relied on administrative procedures not found in the statutory language.

The Court of Appeals held that, "the FOIA request did not constitute a request in writing to be notified of DHEC's permitting decision under section 44-1-60(E)(1)...". Opinion at 2. It did not recognize Appellant's written FOIA request from May 17, 2021 to the director of DHEC's Onsite Wastewater Management Division specifically asking for all documents related Respondent Blue

Sky Associate's RV Park as written notice to DHEC that they would like to be notified of any permits as affected persons. Respectfully, these conclusions are inconsistent with the plain language of § 44-1-60(E)(1). By ruling that the Appellant's method for request of notification is inadequate, this Court and the ALC hold the Appellant to a standard that is not present in the statutory language of § 44-1-60(E)(1).

The statute states that an affected person must request to be notified of a department decision. However, the plain language of the statute does not provide or require a specific procedure for requesting notification. In this case, the written FOIA request to DHEC, included a request for *all* documents related to Blue Sky Associates – that would include the permit decision at hand. Therefore, the Appellant followed the plain language of the statute because the Homeowners requested, in writing to DHEC, notification of the permit application and decision.

As previously acknowledged by all parties, the statute does not define “affected persons.” This Court states that “in her FOIA request and accompanying email, Wallace did not ask to be considered an "affected person" under section 44-1-60(E)(1) for issuance of a wastewater system permit and did not state she wanted to be notified of the issuance of a wastewater system permit.” Opinion at 2. However, the statute does not require an affected person to state that they want to be considered an affected person. Therefore, under the clear and unambiguous terms of the statute, the Appellant was under no obligation to state that they were an affected person in their request. *See S.C. Coastal Conservation League*, 390 S.C. at 425-26, 702 S.E.2d at 250 (“[T]he words used in a statute must be given their ordinary meaning. When a statute's terms are clear and unambiguous . . . there is no room for statutory construction and a court must apply the statute according to its literal meaning.” (citation omitted)).

In *S.C. Coastal Conserv. League v. S.C. Dep't of Health & Env't Control*, 390 S.C. 418, 702 S.E.2d 246 (2010) the Supreme Court noted that “DHEC never stated it followed a formal procedure as to how a party acquires ‘affected persons who have asked to be notified’ status[;] [t]o the contrary, DHEC indicated it took an informal approach in deciding which parties it notified of its decisions.”*Id.* at 428, 252. In that case, the Supreme Court determined that a party was an affected person who DHEC should have notified because the record clearly established throughout the permit application process that a party was not obscure or unknown to the agency. *See Coastal Conserv. League*, 390 S.C. at 428, 702 S.E. 2d at 252. The same applies here, where the Appellant submitted a FOIA request specifically about the property owned by Respondent; which specifically requested all of the documents related to Blue Sky Associate’s RV Park. 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, given that the process for this permit is not public knowledge. Thus, this Court should consider the Appellant to be an affected person for purposes of notification under § 44-1-60(E)(1).

Therefore, Appellant respectfully submits that this Court incorrectly reached its legal conclusion by holding that Appellant’s FOIA request did not follow the criteria listed for permit notification in §44-1-60(E)(1) and erroneously created additional requirements not set forth in the language of the statute. Appellant requests that the Court reconsider its Opinion on this point.

II. The Court of Appeals erred in concluding that the ALC lacked “procedural jurisdiction” to hear this case based on timeliness.

This Court and the ALC both incorrectly stated that Appellant’s RFR was not timely filed because the fifteen-day window to file an RFR had closed. Opinion at 2. However, the Supreme Court held in *S.C. Coastal Conserv. League v. S.C. Dep’t of Health & Env’t Control* 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.” In this case, since this Court should consider Appellant to be an “affected person” based on the facts herein, the window for RFR could not have closed because Appellant did not receive notice. 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].”(Transcript, p. 37, 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. As such, the final review process was still ongoing and no final agency decision could have been made, giving the ALC “procedural jurisdiction” to hear this case.

Therefore, Appellants respectfully submits that this Court erred in finding that the ALC lacked “procedural jurisdiction” to hear this case.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that its Petition for rehearing and reconsideration be granted and that the Court reverse the ALC’s order dismissing the above captioned case for the reasons stated herein and in Appellants’ briefs. Further, given the

pervasiveness of the issue, Appellant respectfully requests this Court allow for Oral Argument to be heard should this petition for rehearing be granted.

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