

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Case No. 08-ALC-07-0221-CC

Deerfield Plantation Phase IIB Property Owners Association Appellant,

vs.

South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC Respondents.

**APPELLANT'S RETURN TO
PETITION FOR REHEARING**

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COURT OF APPEALS

The Appellant Deerfield Plantation Phase IIB hereby responds to the Petitions for Rehearing filed by Respondent Deertrack Golf, Inc. ("Deertrack"), and the South Carolina Department of Health and Environmental Control ("DHEC").

As this Court is eminently aware, this case has a complicated history and has been pending for quite some time. On January 12, 2012, this Court granted Appellant's motion to remand the case back to Respondent S.C. Department of Health and Environmental Control ("DHEC"). The basis of the remand was that the Appellant's related federal district court challenge resulted in the U.S. Army Corps of Engineers rescinding its original determination that there were no "waters of the U.S." on the subject property and asserting Clean Water Act jurisdiction over a small portion of the interconnected channels on the property. In support of its

motion to remand, Appellant attached a letter from DHEC dated October 6, 2011, in which it stated that “additional administrative action on the permit [is] warranted” as a result of the new jurisdictional determination. The purpose of the remand was to allow DHEC to undertake this “additional administrative action” on its previous permit and certification decision.

DHEC’s Argument of “Judicial Finality” is Misplaced

Contrary to DHEC’s assertion, the Court of Appeals has not misapprehended anything in relation to the federal action. (DHEC memo, p. 1). In fact, DHEC confuses and blurs the issues in this appeal with that separate federal action.

This Court did not remand this case to DHEC for the purpose of awaiting a decision from the Fourth Circuit Court of Appeals.¹ After the Corps of Engineers reversed itself and asserted jurisdiction over waters on the subject property, DHEC informed Deertrack Golf, by letter dated October 6, 2011, that modifications to the permit are required; that the existing permit cannot authorize construction; and that DHEC would need to conduct additional reviews prior to any construction activities. However, now DHEC injects its theory that it needed “judicial finality” in the federal action in order for it to take any action on the remanded permit and certification. DHEC admits that it “sat in limbo” while awaiting a ruling from the Fourth Circuit. (DHEC memo, p. 2). The purpose of the remand was not for DHEC to “sit in limbo.”

DHEC’s response that it was sitting in limbo is not only contrary to this Court’s Order, but is also in conflict with the letters DHEC sent to Deertrack Golf on October 6, 2011, May 18,

¹Appellant filed an amended complaint challenging the new jurisdictional determination, believing that the second determination was still deficient, but this was never a basis for the motion to remand. The motion to remand was simply for DHEC to review its decision in light of the new jurisdictional determination.

2012 and March 5, 2013. Those letters indicate, not that DHEC was waiting around for a federal opinion, but that it needed information from Deertrack in order to complete its administrative action. Additionally, DHEC's letters betray its present argument that it was prevented from "reviewing the new information as it pertains to the permit to determine if any action was needed." (DHEC memo, p. 2). DHEC has acknowledged that a new review is necessary in light of the Corps' new jurisdictional determination. The basis for remand was fully and thoroughly fleshed out in Deerfield's motion, and DHEC should have acted pursuant to that remand, regardless of a final ruling from the Fourth Circuit.²

Whether Deertrack Submitted Information to DHEC is Irrelevant at this Late Stage

After the remand, on May 18, 2012, DHEC asked the Respondent Deertrack Golf for additional information necessary to complete the actions required by this Court's Order. DHEC had not received that information as of March 5, 2013, and was on the verge of revoking the permit decision pending on remand. It was only at that point that Respondent Deertrack Golf, Inc., finally began to submit information to DHEC. And DHEC admits that Deertrack Golf only "attempted to answer some of the questions raised by DHEC." (DHEC memo, p. 3). Despite DHEC's letter claiming revocation as a certain outcome, it back-peddles by saying it never began the permit revocation procedure. (Id.).

Respondent Deertrack Golf, Inc., wrote to this Court on March 7, 2013, indicating its

²The Corps' new "jurisdictional determination," and conclusion that there were "waters of the United States" on the subject property was a direct result of a Clean Water Act Complaint filed by the Appellants in district court. If the second, amended complaint in the federal action would have led to the Corps being directed to again reverse itself and assert jurisdiction over even more "waters of the U.S.," Appellant would certainly bring that to DHEC's attention and expect that it be considered. But the fact that there was a chance of a third jurisdictional determination should not have been an obstacle to DHEC moving forward with its review one way or another.

position that, despite this Court remanding the permit decision to DHEC, Deertrack Golf “does not have a permit action pending before DHEC.” Deertrack Golf’s position frustrates the purpose and intent of this Court’s remand and necessitates the conclusions outlined in this Court’s recent Order.

The Appellant has tried repeatedly to determine whether DHEC intends to issue a new or revised permit decision on remand – an action that would allow Appellant an opportunity for administrative review – but has had no luck getting an answer from DHEC. It is apparent from DHEC’s memorandum in support of its petition for rehearing that it is still not any closer to such a decision. Again, it should be noted that the Appellant is the only party who has no ability to address the issues identified on remand. The remand was for Respondent Deertrack Golf to provide the necessary information to DHEC and for DHEC to process and review that information. Such action has still not taken place.

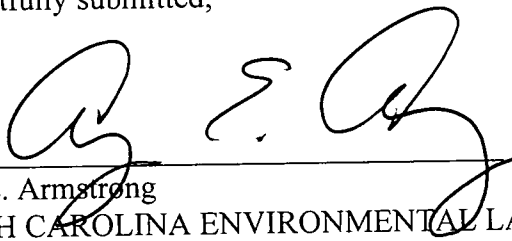
Deertrack Golf’s belief and insistence that it has an “active stormwater permit,” despite this Court’s Order on remand, is nothing short of troubling. Deertrack Golf includes an email dated March 12, 2013, in which it asserts that the “permit was valid when issued,” but acknowledges that because Deerfield’s challenge to Corps’ jurisdictional determination resulted in a determination that there are federally jurisdictional waters on site, Deertrack Golf will require “a 404 in place for the downstream outfall.”³ (Deertrack memo, Exhibit B). DHEC’s letters indicate its position that Deertrack does not have an active permit, and this Court’s

³A “404” refers to a Clean Water Act Section 404 permit for impacts to “waters of the U.S.” A Section 404 permit triggers the requirement for a Section 401 Water Quality Certification, which would have to be issued by DHEC. A new DHEC review is thus necessary to determine compliance with S.C. Code Regs. § R.61-101, S.C. Code Regs. § 61-9.122 and the Coastal Management Program new factual findings in light of the new federal jurisdictional determination.

reliance on those letters was appropriate. Deertrack Golf is not left without a remedy in this situation. Clearly, the Corps' jurisdictional determination changed the complexion of this appeal such that DHEC needs to undertake a new review. Under this Court's Order of Dismissal, Deertrack can proceed with a permit application to DHEC complete with all of the information DHEC needs in order to process the request.

WHEREFORE Deerfield Plantation Phase II-B Property Owners Association respectfully requests that the Court of Appeals deny DHEC and Deertrack Golf, Inc's Petitions for Rehearing.

Respectfully submitted,



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September 3, 2013

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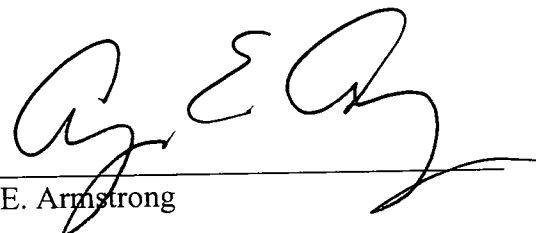
South Carolina Department of Health and Environmental Control,
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CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing Return to the Petitions for Rehearing upon counsel for the Respondents, by placing copies of same in the United State Mail, addressed to:

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