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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Deborah Brooks Durden, Administrative Law Judge

Docket Nos. 24-ALJ-07-0088-CC to 24-ALJ-07-0131-CC

South Carolina Coastal Conservation League, Appellant,

v.

South Carolina Department of Health and Environmental Control and
Pulte Homes, LLC, Respondents.

**THIRD MOTION FOR EXTENSION OF TIME FOR FILING
INITIAL BRIEF AND DESIGNATION OF MATTER**

TO: ALL PARTIES AND THE COURT OF APPEALS:

PLEASE TAKE NOTICE that the Appellant, Coastal Conservation League, respectfully moves the Court of Appeals for an extension of time for filing its initial brief and designation of matter. The initial brief and designation are due on Tuesday August 5, 2025, and Appellant seeks an extension of thirty (30) days until Thursday, September 4, 2025. This is the third extension request.

The basis for this request is that one of the two key issues in the pending case—whether Respondent, Department of Environmental Services (“DES”), has violated the Due Process Clause by not providing public notice of permit applications for individual septic systems—has also been litigated in a separate Declaratory Judgment action. *See S.C. Coastal Conservation League &*

Charleston Waterkeeper v. S.C. Dep't of Health & Envtl. Control, Case No. 2022-CP-10-05192, Order dated July 14, 2025 (S.C. Ct. Com. Pl., 9th Jud. Cir.)(attached as Ex. A). As a result of the Circuit Court's ruling in the Declaratory Judgment action, the Respondent DES initiated an effort to find a resolution that would settle the dispute over the Due Process claims. Counsel for Appellant met with counsel for Respondent DES on August 1, 2025, at which time Respondent DES presented its proposed resolution. While details still need to be finalized, and client approval provided, counsel for Appellant is relatively confident that this identical issue can and will be resolved. Should the Due Process claim be settled through the Declaratory Judgment case, it would simultaneously resolve the public notice issue existing in this pending case.

Appellant seeks this extension to allow sufficient time to fully address this identical public notice issue because the outcome is expected to resolve—or at least significantly inform—aspects of the issue in this case. In the name of judicial economy, Appellant seeks this additional time to allow for resolution of the Due Process claim, which it expects will lead to reformulation of the issues and the brief in this case.

Counsel for Appellant has consulted with counsel for Respondents, both of whom consent to the requested extension.

WHEREFORE, the Appellant requests that this Court issue an Order extending the time to file its initial brief and designation of matter until Thursday September 4, 2025.

[signature page to follow]

s/ Monica Whalen
Leslie S. Lenhardt, Esq.
Amy E. Armstrong, Esq.
Monica Whalen, Esq.
S.C. ENVIRONMENTAL LAW PROJECT
510 Live Oak Drive
Mount Pleasant, S.C. 29464
Telephone: (843) 527-0078
FAX: (843) 527-0540

Attorneys for Appellants

Georgetown, S.C.
August 5, 2025

Exhibit A

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	NINTH JUDICIAL CIRCUIT
)	
South Carolina Coastal Conservation League and Charleston Waterkeeper,)	
)	Case No. 2022-CP-10-05192
Plaintiffs,)	
)	
vs.)	ORDER GRANTING PARTIAL SUMMARY JUDGMENT
)	
South Carolina Department of Health and Environmental Control,)	
)	
Defendant.)	
)	

Appearances

Counsel for Plaintiffs	Leslie S. Lenhardt, Esq.
Counsel for Defendant South Carolina Department of Health and Environmental Control	Bradley D. Churdar, Esq.
Court Reporter:	Joseph Giordano, Esq.
Date of Hearing:	WebEx (Video Recording Only)
	February 26, 2025

BACKGROUND AND PROCEDURAL HISTORY

THIS ACTION WAS BROUGHT by the Plaintiffs, South Carolina Coastal Conservation League (“the League”) and Charleston Waterkeeper, (“Waterkeeper”) pursuant to the Uniform Declaratory Judgments Act, S.C. Code Section 15-53-10, et seq. Plaintiffs seek declaratory and injunctive relief to remedy what they assert is, for purposes of this motion for summary judgment, a violation of their constitutional due process rights due to South Carolina Department of Environmental Services’ (“DES” or “the Department”) failure to publicly notice septic tank applications and permit decisions. On July 19, 2024, the Plaintiffs filed a motion for summary judgment. On July 31, the Department filed its cross motion for summary judgment. Both motions were before this Court for a motion hearing on February 26, 2025. Based on the following, this

Court finds in favor of the Plaintiffs on their due process claims and holds DES must publicly notice all septic tank applications in those counties.

To avoid diseases such as dysentery, cholera, infectious hepatitis, typhoid and paratyphoid, which are transmitted through fecal contamination, it is important for the protection of community health to have safe treatment and disposal of domestic wastewater. S.C. Code Ann. Regs. 61-56 (100). One means of rendering wastewater ecologically safe is the utilization of onsite wastewater systems. Generally, these systems are made up of a tank and a drainfield. Primary treatment of the waste occurs in the tank, in which bacteria digest organic materials, and secondary treatment occurs in the drainfield, in which the partially treated effluent is purified via the soil acting as a biological filter. Proper functioning of septic systems is highly dependent upon unsaturated soil within the drainfield, adequate soil type and characteristics, sufficient distance between drainfield and water tables, and the size of the drainfield. Any of these factors can malfunction for a variety of reasons; there are estimates in the record that between (10) and thirty (30) percent of septic systems fail to work properly in an average year.

The environmental dangers abound with installing multiple septic systems on small parcels of land. In the current development market outside of municipal sewer services, developers are relying on individual “small” onsite wastewater treatment systems, those generating less than 1,500 gallons per day (gpd) of wastewater, often for high density, small acreage (sometimes as small as 0.15 acres) parcels. This means that developed land is comprising significant portions of the septic drainfields for these projects. These developmental pressures are substantially increasing.

However, it is without dispute that the Defendant does not provide members of the public with notice of any kind when an application for an individual septic tank is submitted, nor does

DES provide any notice of the issuance of septic tank permit applications.

STANDARD OF REVIEW

In declaratory judgment cases, “[a] declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue.” *Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 46, 717 S.E.2d 589, 592 (2011). “The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the nonmoving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRPC. “Summary judgment is appropriate when there is no genuine issue of material fact, and it is clear the moving party is entitled to a judgment as a matter of law.” *Hancock v. Mid-South Management Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 802 (2009).

ISSUE FOR DETERMINATION

The issue for determination by this Court is whether DES must publicly notice all small septic tank permit applications submitted in order to comply with constitutional due process?

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Plaintiffs allege the Defendants’ lack of public notice of small septic tank applications violates their constitutional due process rights and are seeking notice going forward of any applications for installation of individual septic systems generating less than 1,500 gpd. DES concedes in its Answer that it does not place applications, or issued permits, for individual septic tanks on public notice. Despite this, the Defendant also agrees that administrative agencies such as SCDES are required to meet minimum standards of due process. *Stono River Env’t Prot. Ass’n v. S.C. Dep’t Health & Env’t. Control*, 305 S.C. 90, 93-94 (1991) (citing S.C. Const. Art. 1, § 3; *Smith & Smith*,

Inc. v. S.C. Public Service Comm'n, 271 S.C. 405 (1978). The South Carolina Constitution provides that “[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity be heard . . . and he shall have in all such instances the right to judicial review.” S.C. Const., Art. 1, § 22; *see also Kurschner v. City of Camden Plan. Comm’n*, 376 S.C. 165, 171 (2008) (“Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution.”). “Due process does not require a trial-type hearing in every conceivable case of government impairment of a private interest. Rather, due process is flexible and calls for such procedural protections as the particular situation demands.” *Kurschner*, 376 S.C. at 171-72 (internal citations omitted); *see also Stono River*, 305 S.C. 90, 93-94 (1991) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

Further, S.C. Code Ann. § 48-6-30(B) states: “[t]o the maximum extent possible, [DES] shall use a uniform system of public notice of permit applications, opportunity for public comment, and public hearings.” [emphasis supplied] The purpose of this provision “is intended to provide a uniform procedure for contested cases and appeals from administrative agencies.” *S.C. Coastal Conserv. League v. S.C. Dep’t Health & Env’t. Control*, 390 S.C. 418, 429 (2010) (quoting Act No. 387 § 53).

The quandary for affected persons arises when an applicant submits one small individual septic tank application, or most often more than one, the issuance of which would impact one of Plaintiffs’ members. In order to have the opportunity to provide comment to the Department on the likely negative impacts to that member, they first must be aware that the application is pending to start with.

Under S.C. Code Ann. § 49-3-60, an affected party has only thirty (30) days to contest the issuance of a permit. Currently, Plaintiffs must file a request under the Freedom of Information Act (“FOIA”), S.C. Code Ann. §30-4-10, to even discover that a permit application has been submitted and DES has more than forty (40) days to produce documents pursuant to a request. S.C. Code Ann. §30-4-30. Furthermore, DES will not produce any information pursuant to FOIA unless a permit application has already been submitted and the person requesting such information has to possess the background information about that very application before DES will even process the FOIA request. Therefore, the probability that the time frame for appeal will have run before an affected person learns of the application, much less the permitting decision, is high. This Court agrees that, unless Plaintiffs’ timing is absolutely perfect, Plaintiffs are significantly hampered in their efforts to learn of a pending application in order for their members to have sufficient time to take any action. DES’ current process places Plaintiffs in a classic Catch-22. Plaintiffs are entitled under FOIA to the specific information concerning permit applications, yet Plaintiffs cannot obtain that information via FOIA unless they provide that very information to DES. Moreover, even if Plaintiffs ultimately obtain that information, the thirty (30) day period to contest a permit decision will almost certainly have already run. Put simply, requesting to be an affected person is essentially meaningless in this context unless the public knows that someone has actually applied for a septic permit—which, as explained, is effectively impossible to know without public notice. Accordingly, the Court finds for the Plaintiffs on this issue.

Here, the lack of public notice substantially prejudices the Plaintiffs because they receive no notice of an agency decision and thereby cannot timely challenge that decision, which clearly violates Constitutional due process. The failure to provide public notice for applications or permits creates a system whereby the public cannot engage in the decision-making processes that impact

their rights. In short, affected persons are kept completely in the dark about the state's permitting of septic systems in ecologically sensitive areas that have the potential to harm the quality of their communities and surrounding environment.

Further, there is evidence to show that public notice of these applications is feasible. At the hearing, the Court requested that counsel for DES investigate and provide the Court with affidavits detailing the feasibility and burden on DES of posting these applications on DES' website when they are received but prior to approval. DES submitted an affidavit from Marissa Maria, ePermitting Project leader at DES' Office of Technology. Her affidavit states that it is feasible for DES to electronically publish notice for all applications for septic tanks generating less than 1,500 gallons per day and that it could be done using the Department's existing ePermitting program and at a "negligible cost."

CONCLUSION

To summarize, due process protections require DES to place all septic tank applications on public notice so that affected persons are afforded notice and an opportunity to comment.¹ First, the law clearly requires public notice "to the maximum extent possible." S.C. Code Ann. §48-6-30(B). Second, the posting of notice of these applications is both easy and inexpensive to do. Third, as a practical matter and with all due respect to Joseph Heller, Catch-22s, procedural or otherwise, are disfavored under the law and are anathema to the very concept of due process.

¹ In the Form-4 which was drafted by the Court, the Court ordered public notice for only the eight (8) coastal counties. In the email accompanying the proposed order, Plaintiffs point out that their complaint requested statewide notice, and the affidavit referenced above did not limit notice to the eight (8) coastal counties. Accordingly, the Court is granting the statewide relief originally requested in Plaintiffs' complaint.

IT IS SO ORDERED.

s/ *Frank R. Addy, Jr.*

Frank R. Addy, Jr.
Presiding Circuit Judge

July 14, 2025
Greenwood, South Carolina



Charleston Common Pleas

Case Caption: South Carolina Coastal Conservation League , plaintiff, et al VS
Department Of Health And Environmental Control South Carolin
Case Number: 2022CP1005192
Type: Order/Other

So Ordered

S/ Frank R. Addy, Jr.

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South Carolina Coastal Conservation League, Appellant,

v.

South Carolina Department of Health and Environmental Control and Pulte Homes, LLC,
..... Respondents.

PROOF OF SERVICE

I hereby certify that on this date I served Appellant’s Third Motion for Extension to File Initial Brief on all parties by emailing a copy of same on August 5, 2025, to the Attorney Information System provided email addresses below, via attached e-mail:

Joseph A. Giordano, Esq.
Christopher P. Whitehead, Esq.
South Carolina Department of Environmental Services
2600 Bull Street
Columbia, SC 29201

Ellis Lesemann, Esq.
Lesemann & Associates, LLC
418 King Street Suite 301
Charleston, SC 29403

August 5, 2025

s/ Monica Whalen

Monica Whalen



**SOUTH CAROLINA
ENVIRONMENTAL
LAW PROJECT**

Lawyers for the Wild Side

PO Box 1380, Pawleys Island, SC 29585 | (843) 527-0078 |
www.scelp.org

Executive Director & General Counsel
Amy E. Armstrong | amy@scelp.org

Senior Manager of Strategy
Michael G. Corley | michael@scelp.org

Senior Managing Attorneys
Benjamin D. Cunningham | ben@scelp.org
Leslie S. Lenhardt | leslie@scelp.org

Staff Attorneys
Lauren Megill Milton | lauren@scelp.org
Emily S. Poole | emily@scelp.org
Juan Tolley | juan@scelp.org
Monica K. Whalen | monica@scelp.org

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SC Court of Appeals

VIA U.S. MAIL AND ELECTRONIC MAIL

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

**RE: *South Carolina Coastal Conservation League v. South Carolina Department of Health
and Environmental Control and Pulte Homes, LLC***
Docket No. 24-ALJ-07-0088-CC to 24-ALJ-07-131-CC

Dear Madame Clerk:

Please find enclosed South Carolina Coastal Conservation League's **Third Motion for Extension to File Initial Brief** in the above-referenced consolidated matters. I am also enclosing the proof of service on the Respondents, and the filing fee of \$50.00 is being mailed separately. Thank you for your kind consideration.

Respectfully,

s/ Monica K. Whalen

Monica K. Whalen
Staff Attorney

Enclosures

cc: Joseph A. Giordano, Esq.
Christopher P. Whitehead, Esq.
Ellis R. Lesemann, Esq.