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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE CIRCUIT COURT

The Honorable Frank R. Addy
Presiding Judge

Civil Action No. 2022-CP-10-05192

Appellate Case No.: 2025-001315

South Carolina Coastal Conservation League
and Charleston WaterkeeperAppellants,

v.

South Carolina Department of Environmental ServicesRespondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether the Circuit Court correctly granted summary judgment to Respondent South Carolina Department of Environmental Services (“Department”) on the grounds that the South Carolina Coastal Tidelands and Wetlands Act does not impose a requirement for the Department to review permits for the construction and installation of individual septic tank systems with peak flow less than 1,500 gallons per day in the coastal zone for consistency with the policies of its Coastal Management program.

STATEMENT OF THE CASE

On November 10, 2022, the South Carolina Coastal Conservation League and Charleston Waterkeeper (“Appellants”) filed an action in the Court of Common Pleas in Charleston County, South Carolina. Appellants Complaint argued that the Department violated South Carolina Code Section 48-39-80 (2008 & Supp. 2023) through its decision to not conduct Coastal Zone Consistency (“CZC”) certification reviews of every individual septic system with a capacity of less than 1,500 gallons per day (“gpd”) within the coastal zone. On April 28, 2023, Appellants filed a Motion for Preliminary Injunction, asserting Appellants were entitled to a preliminary injunction prohibiting the Department from issuing permits without a CZC certification for individual septic system with a capacity of less than 1,500 gpd within the coastal zone. The Circuit Court denied this Motion on January 4, 2024. Appellants and Respondent filed cross-motions for summary judgment on July 19, 2024, and July 31, 2024, respectively.

Following a motions hearing on February 26, 2025, the Circuit Court issued a Form 4 Order, granting partial summary judgment in favor of the Department on the issue of CZC review, holding the Department is not required to conduct CZC reviews of every individual septic system with a capacity of less than 1,500 gpd within the coastal zone on April 29, 2025. A final order for

partial summary judgment was issued on May 30, 2025. Appellant filed a Notice of Appeal on June 27, 2025.

STANDARD OF REVIEW

“An appellate court reviews a grant of summary judgment under the same standard applied by the [circuit] court pursuant to Rule 56, SCRPC.” Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Summary judgment shall be granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that . . . no genuine issue [exists] as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRPC. In determining whether summary judgment is proper, a court must construe “all inferences which can be reasonably drawn therefrom... in the light most favorable to the nonmoving party.” Summer v. Carpenter, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997).

Even though courts are required to view the facts in the light most favorable to the nonmoving party, to survive a motion for summary judgment, “it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.” Town of Hollywood v. Floyd, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013). Once the absence of a genuine issue of material fact is established, the burden shifts to the nonmoving party to “set forth specific facts showing there is a genuine issue for trial.” SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990).

STATEMENT OF FACTS

The Coastal Tidelands and Wetlands Act, S.C. Code Ann. §§ 48-39-10 et seq. directs the Department to develop a comprehensive coastal management program and to establish regulations and policies for reviewing projects within the coastal zone. (R. __ (Affidavit of Christopher M.

Stout p. 2); S.C. Code Ann. § 48-39-80. The Department developed such a program, which is established in the South Carolina Coastal Zone Management Program (“CMP”) document. (R. ___ (Affidavit of Christopher M. Stout p. 2)). The CMP document was enacted in 1979 in accordance with stringent statutory procedures and has been upheld by the South Carolina Supreme Court as valid and enforceable as written. (R. ___ (Affidavit of Christopher M. Stout p. 2)). See also Spectre, LLC v. S.C. Dep’t of Health & Env’t Control, 386 S.C. 357, 370-71, 373 (2010). In Chapter V of the CMP document, the document identifies specific state agency permits that are subject to review and certification pursuant to Section 48-39-80(B)(11). (R. ___ (Affidavit of Christopher M. Stout p. 2)). Specifically, S.C. Code Ann. § 48-39-80(B)(11) states, “the Department shall have the authority to review all state and federal permit applications in the coastal zone and to certify that these do not contravene the management plan.” (emphasis added). Of note, the statute does not expressly require the Department to review all permits.

Regarding Department onsite wastewater (“OSWW”) permitting, the CMP document requires a CZC review of permits for OSWW treatment systems and septic tanks that handle more than 1,500 gallons per day or handle waste other than domestic waste. (R. ___ (Affidavit of Christopher M. Stout p. 2)). However, a CZC review is not required for an OSWW system that handles less than 1,500 gpd and only.¹ (R. ___ (Affidavit of Christopher M. Stout p. 2)). The exemption from review for septic systems handling less than 1,500 gpd of domestic waste only has long been in place and has previously been upheld as properly accounting for factors including the Department’s lack of direct control or authority over sewage treatment and disposal, the sheer number of septic tank permits issued within the coastal zone,² and the design of S.C. Code Ann.

¹ See Table 1 at CMP V-5.

² Since 2020, SCDHEC and the Department has received on average per year over 17,000 applications for the construction and installation of individual septic tank systems with peak flow less than 1,500 gpd of domestic

Regs. 61-56 (“R. 61-56”) “to ensure that state water quality standards in adjacent water bodies must be maintained.” N. Beaufort Cnty. Committee v. S.C. Dep’t of Health & Env’t Control, No. 96-ALJ-07-0117-CC (S.C. Admin. L. Ct., Oct. 28, 1996) (Kittrell, J.).

The South Carolina Pollution Control Act, S.C. Code Ann. §§ 48-1-10 et seq. charges the Department with overseeing the permitting, construction, and operation of onsite wastewater systems. R. 61-56 defines a “small onsite wastewater system” as “[a]n individual system serving an individually deeded dwelling or business that generates less than fifteen hundred GPD of domestic wastewater. Management and maintenance of each system is the responsibility of the individual property owner.” S.C. Code Ann. Regs. 61-56, Section 101.1. Additionally, R. 61-56 defines a “septic tank” as “a watertight, covered receptacle designed and constructed to receive the discharge of domestic wastewater from a building, sewer, separate solids from the liquid, digest organic matter, store digested solids through a period of detention and biological conditions of liquid waste, and allow the effluent to discharge for final treatment and disposal.” Id. R. 61-56 contains extensive detail on determining sufficient area for a successful drain field, requiring setbacks between the drain field and sensitive areas, and site evaluations necessary to determine if groundwater conditions and soil structure are sufficient to support a septic tank. S.C. Code Ann. Regs. 61-56, Section 200.

The Department reviews septic system permit applications in accordance with applicable OSWW permitting requirements set forth in R. 61-56, which establishes a comprehensive

wastewater. Also since 2020, SCDHEC and the Department has issued on average per year over 14,500 Permits to Construct such systems. Specifically, in fiscal year 2020-2021, SCDHEC received 17,256 applications for septic systems and issued 14,443 Permits to Construct individual septic systems; in fiscal year 2021-2022, SCDHEC received 18,105 applications for septic systems and issued 14,760 Permits to Construct individual septic systems; in fiscal year 2022-2023, SCDHEC received 16,026 applications for septic systems and issued 14,511 Permits to Construct individual septic systems; and in fiscal year 2023-2024, SCDHEC and the Department received 17,336 applications for septic systems and issued 13,981 Permits to Construct individual septic systems. (R. ____ (Affidavit #2 of David Vaughan, p. 1-2)).

framework of system standards, permit procedures, minimum conditions, and other requirements designed to protect the environment and public health from potential wastewater discharges. (R. ___ (Affidavit of David R. Vaughan p. 1)). Potential sites for an onsite wastewater system are prohibited from permitting when poor soil conditions are present or the site is in close proximity to listed setback conditions, including tidal waters of coastal waters and tidelands critical areas. S.C. Code Ann. Regs. 61-56, Sections 200.1, 200.2, and 200.6. For example, soils identified as having substantial amounts of expansible clay minerals or smectites are unsuitable for OSWW systems and would not be granted a standard OSWW permit. (R. ___ (Affidavit of David R. Vaughan p. 2)). R. 61-56 ensures that no part of an OSWW system shall be installed within seventy-five (75) linear feet of the delineated critical area line (tidal waters of coastal waters and tidelands critical areas) or within seventy-five (75) linear feet of the mean high-water elevation of an impounded or natural body of water. (R. ___ (Affidavit of David R. Vaughan p. 1)). The age of the onsite wastewater system and when the system was installed are factors the Department considers significant when evaluating whether a system could potentially malfunction. (R. ___ (Affidavit of David R. Vaughan p. 2)). R. 61-56 requires property owners to properly maintain in good working order all OSWW systems and their parts. (R. ___ (Affidavit of David R. Vaughan p. 2)).

In accordance with R. 61-56, the Department investigates complaints related to the functioning of a septic system and, when issues with the system are discovered, prompt timelines for compliance are issued to the responsible party in order to minimize the risk of any discharge presenting significant harm to the environment and public health. (R. ___ (Affidavit of Timothy E. Kinney p. 2)).

ARGUMENT

The Circuit Court Properly Held that the Coastal Zone Management Program Document’s (“CMP”) Limitation on the Department’s Exercise of Its CZC Certification Authority Based on the Capacity of the Wastewater System Is Consistent with the Directive in S.C. Code Ann. § 48-39-80(B)(11) that the Department “Develop A System” Giving the Department the Power to Review Coastal Zone Permits.

S.C. Code Ann. § 48-39-80(B)(11) says that “[i]n devising the management program the department shall consider all lands and waters in the coastal zone for planning purposes. In addition, the department shall ... [d]evelop a system whereby the department shall have the authority to review all state and federal permit applications in the coastal zone, and to certify that these do not contravene the management plan.” (Emphasis added).³

Appellants assert that S.C. Code Ann. § 48-39-80(B)(11) “is clear and unambiguous and the Department’s rogue decision to unilaterally exempt certain permits, specifically small onsite wastewater permits, from coastal zone consistency review exceeds its statutory authority.” App. Br. at 14. According to the Appellants, this statutory clarity presumably imposes on the Bureau of Coastal Management a mandatory duty to conduct a CZC review for every septic tank permit issued, regardless of whether the septic tank flow rate is 1 gallon per day or 1,500 gallons per day⁴ or higher. Such an interpretation and application of S.C. Code Ann. § 48-39-80(B)(11) is flawed and is not in accord with the plain meaning of the words of the statute.

The Appellants focus on the use of the word “shall” in S.C. Code Ann. § 48-39-80(B) without convincingly explaining how the Circuit Court erred in its statutory construction analysis of that same word and how it is used in the statute. The Appellants argue that because “the General Assembly repeatedly uses mandatory language in its directive to create the CMP and to provide

³Appellant argues that because S.C. Code Ann. § 48-39-80(B)(11) uses the word “shall” three times, this “emphasiz[es] the General Assembly’s directive that the agency must undertake coastal zone consistency review.” (App. Br. at 13).

⁴ See Table 1 at CMP V-5.

for a review process,”⁵ when S.C. Code Ann. § 48-39-80(B)(11) states that the Department “shall develop a system,” they contend that the only acceptable system is one that includes a CZC Certification analysis for every septic permit application regardless of the septic tank flow rate. (App. Br. at 15). According to the Appellants’ slippery slope argument, any other interpretation of S.C. Code Ann. § 48-39-80(B)(11) would allow the Department to “simply refuse to review any and all permits in the coastal zone without legal consequence.” App. Br. at 17. This is patently untrue. The Department cannot ignore the Coastal Zone Management Plan (including the 1,500-gpd minimum threshold) after it was approved by the General Assembly and the Governor.

Judge Addy correctly stated the following on page 2 of his April 29, 2025 Form 4 Order: “[t]his Court concurs with the reasoning of Judge Durden. This Court may not substitute its judgment for that of the General Assembly when it has spoken unequivocally. ‘Shall have authority to review’ is permissive language and does not create an affirmative obligation to review every septic permit in the Coastal Management Zone.”⁶

“[S]hall develop a system” per the statute is not synonymous with “shall conduct a CZC review for every septic tank permit application, regardless of the daily flow rate.” In complying with the requirement of S.C. Code Ann. § 48-39-80(B)(11) to “develop a system,” the Department did in fact “consider all lands and waters in the coastal zone for planning purposes” and determined

⁵ App. Br. at 15.

⁶ Judge Durden addressed this same issue in another case currently on appeal before this Court (Appellate Case No. 2025-000379) in which, the Department notes for this Court’s awareness, a Motion to Consolidate was filed on December 5, 2025, to consolidate that appeal with this matter. Judge Durden correctly opined that when “Section 48-39-80(B) states the Department shall create a system whereby the Department ‘shall have the authority to review’ all permit applications in the coastal zone ... the plain meaning of ‘authority’ does not impose a requirement to exercise power, but the right to.” (R. ___ (Order Granting Respondents’ Motion for Summary Judgment p. 4)). (Emphasis added). Accordingly, “the intention of the General Assembly as conveyed by the plain language of section 48-39-80(B) is that the Department must create a system whereby it has the right to exercise power over permit applications in the coastal zone.” (R. ___ (Order Granting Respondents’ Motion for Summary Judgment p. 4)).

that only septic tank permit applications above the 1,500 gpd minimum threshold required a CZC Certification decision to establish adequate environmental protections.⁷ The Department created such a system with the Coastal Zone Management Program Document, which after approval by the General Assembly and the Governor, became “the final management plan for the State’s coastal zone.” S.C. Code Ann. Sec. 48-39-90(D).

Contrary to Appellants’ argument, the Department’s minimum threshold is not an illegitimate exercise of authority that produces “rogue” decisions. App. Br. at 14. In fact, had the Department exercised CZC certification authority below the minimum threshold, that would have been an illegitimate exercise of authority. In Spectre, the Supreme Court held that the Coastal Zone Management Program Document, inclusive of Table 1, is “enforceable” as adopted. Id., 386 S.C. 357, 370, 688 S.E.2d 844, 850 (2010). The Department’s establishment of this minimum threshold takes into account the comprehensive framework of system standards, permit procedures, minimum conditions, and other requirements designed to safeguard the environment and public health from potential wastewater discharges. See S.C. Code Ann. R. 61-56. Stated another way, the Coastal Zone Management Program Document is simply “filling up the details” of the statutory mandate. The Supreme Court said that “[w]hile the Legislature may not delegate its power to make laws, in enacting a law complete in itself, it may authorize an administrative agency or board ‘to fill up the details’ by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.” McNickel's Inc. v. S.C. Dep't of Revenue, 331 S.C. 629, 634, 503 S.E.2d 723, 725 (1998) (citing Heyward v. S.C. Tax Comm'n, 240 S.C. 347, 126 S.E.2d 15 (1962)).⁸

⁷ See Table 1 at CMP V-5.

⁸ In Spectre, the Supreme Court confirmed that the Coastal Zone Management Program Document was approved by the General Assembly and the Governor and has the force of law just as the statutes and regulations. Id. at 369-370.

The Appellants ask this Court to exercise authority that the Supreme Court held is beyond its power to do; namely “to effect a change in the statutes enacted by the Legislature.” Key Corp. Cap., Inc. v. Cnty. of Beaufort, 373 S.C. 55, 59, 644 S.E.2d 675, 677 (2007) (quoting State v. Corey D., 339 S.C. 107, 120, 529 S.E.2d 20, 27 (2000); see also Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (this Court does “not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly”)). “[A] court’s equitable powers must yield in the face of an unambiguously worded statute.” Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm’n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1998).

The Circuit Court correctly found that in accordance with S.C. Code Ann. § 48-39-80, “the Department did in fact ‘consider all lands and waters in the coastal zone for planning purposes’ and further finds that the Department determined that requiring a CZC Certification for all septic tank permits and ‘small’ onsite wastewater systems was unnecessary to establish adequate environmental protections. Instead, the Department established a 1500-gallon-per-day minimum threshold for CZC Certifications. See Table 1 at CMP V-5.” (Page 4 of Judge Addy’s May 30, 2025 Order Granting Partial Summary Judgment).⁹

CONCLUSION

For the foregoing reasons, Respondent South Carolina Department of Environmental Services respectfully requests that the Court affirm the decision of the Circuit Court partially granting the Department’s Motion for Summary Judgment and partially denying Appellants’ Motion for Summary Judgment.

⁹ Judge Durden addressed this same issue stating that “[t]he CMP’s limitation on the Department’s exercise of its power to review based on the capacity of the wastewater system is not inconsistent with the General Assembly’s intent that the Department create a streamlined system giving the Department the power to review coastal zone permits.” (R. ___ (Order Granting Respondents’ Motion for Summary Judgment p. 5)).

Respectfully submitted,

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