STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

Appeal from the South Carolina Administrative Law Court
Honorable John D. McLeod, Administrative Law Judge
Docket No. 2008-ALJ-07-00221
Appellate Case No. 2009-135686

Deerfield Plantation Phase II B
Property Owners Association,

Appellant,

v.

South Carolina Department of Health and
Environmental Control, Deertrack Golf, Inc.,

Respondents,

v.

Bill Clark Homes of Myrtle Beach, LLC,

Respondent.

JOINT INITIAL BRIEF OF THE RESPONDENTS, DEERTRACK GOLF, INC. AND SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

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II. STATEMENT OF THE CASE

The Respondents, Deertrack Golf, Inc. ("Deertrack Golf"), and the South Carolina Department of Health and Environmental Control ("SCDHEC"), hereby adopt the Statement of the Case submitted by the Appellant, Deerfield Plantation Phase II B Property Owners Association ("Deerfield Plantation POA").

III. STATEMENT OF THE FACTS

Deertrack Golf owns property located in the Town of Surfside Beach, Horry County, consisting of 152 acres known as the Old South Golf Course (the "South Course") at Deer Track holes Nos. 1-18. The South Course and its companion course, known as the North Course, are located within and adjacent to the existing residential development known as Deerfield Plantation. There are multiple Property Owners Associations operating in the overall subdivision and Deerfield Plantation POA is one of those entities. Many of Deerfield Plantation POA's residents own real property contiguous to the South Course.

Due to the declining economic viability of both the North Course and the South Course, Deertrack Golf and the owner of the North Course, an entity unrelated to Deertrack, closed both golf courses in or around 2005. In turn, Deertrack Golf then marketed the property for sale as residential development acreage. When the decision to close both courses was made there was, and remains today, a demand for new homes. Consequently, undeveloped land in the Myrtle Beach area and the Golf Course property was highly desirable, given its location. On 2 September 2005, the Respondent, Bill Clark Homes of Myrtle Beach, LLC ("Bill Clark Homes"), and Deertrack Golf entered into a purchase

contract for the South Course. Bill Clark Homes designed the residential subdivision which gave rise to this controversy and which encompasses some 84.96 acres and involved nine holes of the South Course. Deertrack Golf's decision to offer the South Course for sale and redevelopment, Bill Clark Homes' proposed subdivision, and the sale of the North Course engendered significant controversy and opposition from the surrounding Deerfield Plantation property owners.

Ever since Deertrack Golf and Bill Clark Homes unveiled the South Course's redevelopment plan, Deerfield Plantation POA has filed multiple legal challenges to block the plan and voiced its opposition in every conceivable forum. Deerfield Plantation POA filed this contested case before the South Carolina Administrative Law Court ("ALC") challenging SCDHEC's issuance of a land disturbance and stormwater management permit to Deertrack Golf which authorized the planned redevelopment of the South Course.[1] Deerfield Plantation POA also combined an appeal from the Horry County Planning Commission with a request for declaratory judgment relief[2] in a case filed in in the Horry County Court of Common Pleas.[3] Finally, Deerfield Plantation POA

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1 *See* Deerfield Plantation Phase II B Property Owners Association v. South Carolina Department of Health and Environmental Control, et. al., 2009 WL 8167909 (S.C. Admin. Law Judge Div., filed 9 June 2009).

2 In the declaratory judgment section of the Circuit Court action, Deerfield Plantation POA sought a judicial declaration that its members were entitled to a drainage easement across and through the South Course.

3 *See* Deerfield Plantation Phase IIB Property Owners v. Horry County Planning Commission, Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC, Horry County Court Of Common Pleas, Civil Action No. 2008-CP-26-7692, filed on or about 24 September 2008. The action was dismissed by order issued by the Circuit Court on 2 August 2013.

initiated a civil action in the United States District Court for the District of South Carolina challenging certain determinations of the United States Army Corps of Engineers (the "Corps") rendered in 2010 regarding the South Course.**4**

Deerfield Plantation POA has not prevailed in any of its challenges to the proposed redevelopment of the South Course. The ALC upheld SCDHEC's issuance of the stormwater permit authorizing redevelopment of the South Course and that decision spawned this appeal. Deerfield Plantation POA failed to overturn the Horry County Planning Commission's decision to approve the redevelopment of the South Course. (Order Affirming Decisions of the Horry County Planning Commission, pp.1-10). The Deerfield Plantation POA's declaratory judgment relief claim was severed from the appeal of the Planning Commission's actions and ultimately dismissed by the Circuit Court. (Order of Hon. Steven John filed 13 June 2013, pp.1-20).**5**

Moreover, on 16 April 2009, Deerfield Plantation POA initiated a civil action against the Corps and others, related to a previous determination by the Corps regarding the presence of federally jurisdictional waters on the South Course. On 3 August 2006, the Corps had issued a Jurisdictional Determination (the "JD") regarding the South Course and finding that the acreage "did not

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4 *See* Deerfield Plantation Phase II-B POA, Inc. v. U.S. Army Corps of Engineers *et al.*, 801 F.Supp.2d 446 (D.S.C. 2011), *affirmed*, 501 Fed.Appx. 268 (4th Cir. 2012) (2012 WL 66857709, filed 26 December 2012).

5 Additionally, the property owners in Deerfield Plantation also brought an action against the owners of the North Course (*see* Hill et al. v. Deertrack Golf and Country Club et al., Civil Action No.: 2006-CP-26-4440), seeking a declaration of an implied negative reciprocal easement that the North Course. must always remain a golf course. The Honorable Thomas W. Cooper, Jr., acting as Special Referee, denied the plaintiffs all relief. This Order was affirmed by the this Court of Appeals through Unpublished Opinion No. 2012-UP-219, filed 4 April 2012.

contain any wetland areas or other waters of the United States."[6] This JD was presumably valid for five years "[u]nless new information warrant[ed] revision . . .before the expiration date."[7] On 21 August 2009, the parties jointly moved to voluntarily remand the action so that the Corps could "reconsider" the 2006 JD regarding the South Course's 85 acres. The District Court granted the motion and the Corps, on 17 March 2010, issued a new JD (the "2010 JD"). In that latter JD, the Corps concluded that two non-navigable tributaries of the Atlantic Ocean located on the property, which totaled ***0.37 acres or 920.07 linear feet***, were "waters of the United States."[8] The District Court noted:

> [the first tributary] flows offsite through a box culvert ... continuing through a stormwater detention pond and into a culvert. . . under U.S. Highway 17 to Dogwood Lake. Dogwood Lake is a '. . . water of the United States.' The flow then continues directly into the Atlantic Ocean, a traditional navigable water.[9]

The District Court further concluded as follows:

> The second tributary that the Corps determined to be jurisdictional 'flows into the jurisdictional tributary discussed above and connects with the Atlantic Ocean. [Corps staff member] Fennel noted that this tributary similarly featured "flowing water, a well-defined channel with a firm, sandy bottom and a well-defined ordinary high water mark.' Fennel also noted the 'absence of vegetation within the channel[],' as

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6 Deerfield Plantation Phase II-B Property Owners Ass'n v. U.S. Army Corps of Engineers, *et al.*, 801 F. Supp. 2d 446, 449.

7 Deerfield Plantation Phase II-B Property Owners Ass'n v. U.S. Army Corps of Engineers, *et al.*, 801 F. Supp. 2d 446, 449.

8 Deerfield Plantation Phase II-B Property Owners Ass'n v. U.S. Army Corps of Engineers, *et al.*, 801 F. Supp. 2d 446, 454.

9 Deerfield Plantation Phase II-B Property Owners Ass'n v. U.S. Army Corps of Engineers, *et al.*, 801 F. Supp. 2d 446, 455.

> well as other 'geomorphic indicators including groundwater influx, the red stained vegetation . . within the tributary, [and] the sinuosity of the channel.' Therefore, the Corps concluded that this tributary was 'subject to the Corps' jurisdiction under the [*Clean Water Act*]' based on its 'perennial flow regime and a surface connection with the Atlantic Ocean.' However, the Corps concluded that 'the reach of the continuous flow ceased in the area where there was an abrupt change in the amount of plant life. . . with abundant vegetation in the tributary's channel.' Upstream from this point, the Corps observed that 'vegetation was thick and prevalent,' [and] 'the channel lacked an ordinary high water mark, and there was no evidence of influence by the influx of groundwater,' and therefore the Corps concluded that 'there was no continuous flow or relatively permanent flow' in those portions of the tributary. Thus, the Corps concluded that the jurisdictional reach of the second tributary ceased ... where the above changes were observed.**10**

Importantly, United States District Judge Harwell noted that "[w]hile the Corps determined in the 2010 JD that the above two tributaries were jurisdictional, the Corps concluded that the remaining water bodies on the Deerfield Tract were not 'waters of the United States."**11**

The difference between having less than 4/10ths of an acre located in the downstream reach of a drainage ditch subject to the jurisdiction of the Corps under the *Clean Water Act*, and having every ditch, swale, and irrigation pond on the South Course subject to the Corps' jurisdiction has been the difference between being able to redevelop the closed golf course one the one hand or

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10 Deerfield Plantation Phase II-B Property Owners Ass'n v. U.S. Army Corps of Engineers, *et al.*, 801 F. Supp. 2d 446, 456.

11 Deerfield Plantation Phase II-B Property Owners Ass'n v. U.S. Army Corps of Engineers, *et al.*, 801 F. Supp. 2d 446, 456.

leave it as a golf course on the other. Deerfield Plantation POA, acutely aware that the Corps' determination did not prevent redevelopment of the South Course, appealed the District Court's decision. As noted, the United States Fourth Circuit Court of Appeals ultimately affirmed the District Court's decision.

The permit which is the subject of this appeal was issued 28 February 2008, for a five-year term. (POA Exh. No. 1).**12** During the term of this permit, between 28 February 2008 and 28 February 2013, the South Carolina Legislature adopted two Joint Resolutions, one in 2010 and the other in 2013, which effectively stayed and extended all development permits through the economic recession.**13** Based on the effect of these Joint Resolutions, the permit issued to Deertrack Golf remains valid and will not expire until at least 1 January 2017.

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12 Stormwater discharges are regulated through general permits issued by SCDHEC. SCDHEC's letter of February 28, 2008, authorized permit coverage under the "NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities SCR100000 (2006 GP.)

13 *See* 2009-2010 Bill 4445; 2013-2014 Bill 3774.

IV. ARGUMENT AND CITATION OF AUTHORITY

Standard of Review

The standard specifically applicable to review by this Court of Appeals of a ALC Final Order and Decision is as follows:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
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> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
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> (d) affected by other error of law;
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> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
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> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.**14**

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14 *See* S.C. Code Ann. § 1-23-610 (Thomson Reuters West 2012).

A. The Administrative Law Court's Findings That The Ponds Located On The South Course Are Stormwater Ponds Are Supported By Substantial Evidence And Are Essentially Uncontested.

In this case, the ALC found that "[a]ll witness who testified at the Hearing, including [Deerfield Plantation POA's own] expert civil engineer, characterized the ponds on the Old South Golf Course as stormwater ponds."**15** Deerfield Plantation POA own representative - Frank Yelinko - acknowledged that the ponds were stormwater ponds, although with limited function. (Day 1 Trans. pp.145-146). Deerfield Plantation POA's expert, a licensed professional civil engineer, characterized the ponds as "stormwater ponds." (Day 2 Trans., p.115, lines 18-21). Deerfield Plantation POA's expert witness - Jake Duncan, a wetlands biologist, confirmed that the ponds were interconnected. (Day 2 Trans., p.227). These connections facilitated the drainage function. Mr. Yelinko confirmed that all the ponds drain through the same outlet.**16** Deerfield Plantation POA' entity representative - Mike Couture - testified that the ponds performed a drainage function. (Day 2 Trans., p.261). Deertrack Golf's expert, also a licensed professional civil engineer, testified that the golf course ponds provided a stormwater system, but the ponds were presently not efficient. (Day 3

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15 Deerfield Plantation Phase II B Property Owners Association v. South Carolina Department of Health and Environmental Control, et. al., 2009 WL 8167909, *9 (Finding No. 34).

16 That drainage outlet is the box culvert, described by District Court Judge Harwell, as a component of one of the drainage features over which the Corps asserted jurisdiction. The district Court noted that "[the first tributary] flows offsite through a box culvert . . continuing through a stormwater detention pond and into a culvert . . under U.S. Highway 17 to Dogwood Lake. Dogwood Lake is a '. . . water of the United States.' The flow then continues directly into the Atlantic Ocean, a traditional navigable water." Deerfield Plantation Phase II-B Property Owners Ass'n v. U.S. Army Corps of Engineers, *et al.*, 801 F. Supp. 2d 446, 455.

Trans., pp.65, 68, and 96). The ALC's findings that the ponds on the South Course are stormwater ponds are supported by substantial evidence. There is no evidence in the record before the lower court that would dispute these findings.

Importantly, the proposed redevelopment does not cause the elimination of all water features on the South Course but instead, results in the creation of substantially more ponds. This is best illustrated by a comparison between Respondent's Exhibit 19A and 19B. This contradicts Deerfield Plantation POA's attempted characterization of the project as eliminating Waters of the State. The ALC found that "[p]resently there are 11.55 acres of stormwater ponds on the golf course providing stormwater detention for Phase II B, with existing storage capacity of 5.66 acre feet. The plans for redevelopment include 22.36 acres of ponds and 100.62 acre feet of storage capacity resulting in an increase of approximately 90 acre feet in additional storage capacity."[11]

B. ***The Administrative Law Court Correctly Determined That The Standards Generally Applicable To Waters Of The State, As Set Forth In S.C. Code Reg. § 61-68(E)(4), Did Not Preclude Redevelopment Of The Stormwater Ponds Located On The South Course.***

Deerfield Plantation POA claims that the stormwater ponds on the South Course are "waters of the State", by definition, and therefore cannot be incorporated into the redevelopment plans without pre-treatment. Deerfield Plantation POA's argument is based, in part on the deposition of Shannon Hicks,

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11 *See* Deerfield Plantation Phase II B Property Owners Association v. South Carolina Department of Health and Environmental Control, et. al., 2009 WL 8167909, *14 (Finding No. 73).

DHEC stormwater engineer, who assisted in the review of Deertrack Golf's Notice of Intent ("NOI") to seek permit coverage under the 2006 GP. Ms. Hicks is a registered South Carolina professional engineer and, at the time of her 3 November 2008, deposition, was the manager of the Stormwater and State Certification section of SCDHEC's Office of Ocean and Coastal Resource Management ("OCRM"). Ms. Hick's deposition was admitted in its entirety at the contested case hearing below. (POA's Exh. 85).

Ms. Hicks testified that the golf course ponds "were constructed for the golf course when it was built." (POA Exh. 85, p.8, lines 3-5). Ms. Hicks was asked if she considered the ponds to be waters of the State of South Carolina.[18] She responded that "[d]uring the review, they were considered golf course ponds and not waters of the State." (POA Exh. 85, p.9, lines 8-9). When asked how she distinguished the ponds from the definition of "Waters of the State" Ms. Hicks replied that "[t]hose ponds appeared that they were constructed for the golf course. So that's what I utilized during the review, my understanding at the time."[19] (POA Exh. 85, p.9, lines 13-18). Ms. Hicks went on to state that a strict

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18 "Waters of the State" means lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets canals, the Atlantic Ocean within the territorial limits of the State and all other bodies of surface or undergrounds water, natural or artificial, public or private inland or coastal, fresh or salt, which are wholly or partially within or bordering the State or within its jurisdiction. S.C. Code Reg. 61.9122.2.

19 Ms. Hicks' assumptions were later verified by the Corps in the analysis leading to the 2010 JD. The district Court found that "the Corps . . concluded that the 'artificial ponds were likely constructed for the purpose of retaining water because the culverts that connected the ponds to the swales and ditches were elevated and constructed to maintain a certain water level and would flow only if the pond levels fluctuated above a certain point,' and that the ponds retained water 'primarily for aesthetic reasons associated with typical golf course design.'" Deerfield Plantation

reading of the definition of "Waters of the State" "doesn't distinguish on what type of pond." When asked if her review would change if the ponds were considered "Waters of the State" Ms. Hicks replied "It may change it." She provided an example of how the review could change. If the project showed discharges into wetlands than "we would make sure there was pretreatment prior to stormwater flowing into wetlands." (POA Exh. 85, p.15). And, "if waters of the State are on site and stormwater flows to those waters of the State a pretreatment mechanism must be implemented." (POA Exh. 85, p.17, lines 5-8). Deerfield Plantation POA's counsel asked Ms. Hick "are you saying that if these ponds are considered waters of the State then under your rules they would have to have pretreatment but not become part of the stormwater management plan?" (POA Exh. 85, p.17). Ms. Hicks replied, "[u]nder our rules, there would have to be pretreatment provided for any flow, any stormwater flow, that enters waters of the State." (POA Exh. 85, p.17, lines 18-21).

What Deerfield Plantation POA suggests is that the stormwater ponds that "are being incorporated into the proposed system" (the stormwater management system in the proposed redevelopment) cannot continue to receive stormwater without pretreatment. This is illogical – the ponds as they exist today are receiving stormwater flows without pretreatment other than possible filtration treatment provided if the stormwater traverses a series of grass swales before entering the ponds.

Phase II-B Property Owners Ass'n, v. U.S. Army Corps of Engineers, et al., 801 F.Supp.2d 446, 457.

As with the multiple lawsuits brought, and lost, in other forums, and the unsubstantiated allegations of the potential for flooding[20] that Deerfield Plantation POA has asserted for at least six years and then inexplicably abandons in this appeal, this argument is nothing more than a tactic to block the redevelopment. If Deerfield Plantation POA can persuade SCDHEC, or this Court, that existing stormwater ponds can't be incorporated into the stormwater management plan for new development this could create an impediment to redevelopment.

But the argument is illogical. Both Deertrack Golf and SCDHEC recognize the breadth of the definition of waters of the State. Deertrack Golf and SCDHEC are cognizant of the regulatory pretreatment requirements:

> "Any discharge into waters of the State must be permitted by the Department and receive a degree of treatment and/or control which shall produce an effluent which is consistent with the Act, the *Clean Water Act* (P.L. 92-500, 95-217, 97-117, 100-4), this regulation, and related regulations. No permit issued by the Department shall be interpreted as creating any vested right in any person. Additionally, any

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20 Deerfield Plantation POA claimed before the Horry County Planning Commission, the Horry County Court of Common Pleas, SCDHEC, and the Federal Courts that Deerfield Plantation Phase II B suffered from flooding. In fact, Mr. Yelinko testified before the ALC that all the POA was concerned about was the potential for flooding. (Day 1 Trans., p.110). It is undisputed that the neighborhood did flood until 2001 when the last documented flooding event was recounted by the witnesses at the contested case hearing. (Day 1 Trans., p.74). But, as the ALC found, Horry County expended significant resources in addressing the flooding problems in this area and the cessation of flooding coincides with Horry County's expenditure of at least $2 Million dollars in infrastructure to aid with drainage. See 2009 WL 8167909, Findings Nos. 58 and 62. It was undisputed that both Horry County and SCDHEC required Deertrack and Bill Clark Homes to design a stormwater management plan that would relieve Deerfield Plantation POA of any flooding problems and even Deerfield Plantation POA's own expert professional engineer, Steve Powell, opined that "drainage will likely be improved for the existing homeowners" as a result of the redevelopment. (Day __, Trans., p.64; Resp. Exh. 16).

> discharge into waters of the State containing sanitary wastes shall be effectively disinfected as necessary to meet the appropriate standards of this regulation. ***The Department may require best management practices (BMPs) for control of stormwater runoff as part of the requirements of an NPDES permit, a State construction permit, or a State 401 Water Quality Certification.***"[21] (Emphasis added.)

"Best Management Practices" as relates to stormwater management are defined in S.C. Code Reg. § 72-301(5) as "a wide range of management procedures, schedules of activities, prohibitions on practices and other management practices which have been demonstrated to effectively control the quality and/or quantity of stormwater runoff and which are compatible with the planned land use." One such Best Management Practice, or "BMP," is the use of detention structures, defined as "a permanent stormwater management structure whose primary purpose is to temporarily store stormwater runoff and release the stored runoff at controlled rates."[22]

It is clear from the pretreatment requirement in S.C. Code Reg. § 61-68(E), "[t]he Department may require best management practices (BMPs) for control of stormwater runoff," that a constructed stormwater pond provides pretreatment. It is illogical to interpret this same regulation as requiring pretreatment of stormwater before discharging it into a constructed stormwater pond.

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[21] S.C. Code Reg. § 61-68(E)(4) (Emphasis added).

[22] S.C. Code Reg. § 72-301(11).

The ALC correctly reconciled the breadth of the definition of "Waters of the State" with the requirements for stormwater management and the use of BMPs to control the quality and quantity of stormwater as it flows downstream. Stormwater management requirements were codified in 1991 with the adoption of the *South Carolina Stormwater Management and Sediment Reduction Act*.[23] *S.C. Code Reg.* § 72-300 *et seq.*, which includes the definitions of "detention structure" and "Best Management Practices," were adopted in accordance with the 1991 Act. Both Deertrack Golf and SCDHEC believe that the general rules applicable to all waters embodied in *S.C. Code Reg.* § 61-68(E) were promulgated prior to *S.C. Code Reg.* § 72-300. But regardless, *S.C. Code Reg.* § 72-300 applies specifically to stormwater management and authorizes the use of constructed ponds to control stormwater flows. As the lower court found "[i]t is well settled that a specific statute controls over a more general one."[24] And this Court of Appeals cannot overlook the fact that the rule upon which Deerfield Plantation POA relies to claim that the stormwater ponds require pretreatment contains an express statement authorizing the use of BMPs for the control of stormwater runoff. *S.C. Code Reg.* § 61-68(E)(4). Detention ponds, also commonly referred to as stormwater ponds, are clearly the most commonly used stormwater BMP. A declaration that a stormwater pond can't receive stormwater flows without pretreatment ignores the important underlying function of these constructed ponds.

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23 S.C. Code Ann. § 48-14-10 *et seq.*

24 Capco of Summerville Inc. v. J. H. Gayle Construction Co. Inc., 368 S. C. 137, 628 S.E. 2d 38 (2006).

C. ***Deerfield Plantation POA Is Barred From Raising Issues To This Court Of Appeals Which Were Not Litigated Before The Administrative Law Court.***

Deerfield Plantation POA claims that the authorization to discharge stormwater under the NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("the 2006 GP") issued to Deertrack is "eviscerated" by the Corps' findings embodied in the 2010 JD that 0.37 acres of drainage ditches constituted a "jurisdictional connection"**25** and was subject to Corps' regulations under the *Clean Water Act*.

While Deerfield Plantation POA raised the issue before the ALC as to whether there were wetlands or waters of the United States located on the South Course that were not identified by either Deertrack Golf or SCDHEC, Deerfield Plantation POA never claimed that the permit coverage would be terminated and/or eviscerated by the Corps' subsequent assertion of jurisdiction. Moreover, the 2010 JD was issued several months after the ALC issued its Final Order and Decision in this case. Without any argument, and particularly in light of the finding that Deerfield Plantation POA failed to "carry their burden of proof as to the

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25 The phrase "jurisdictional connection" derives from joint EPA and the Corps Guidance issued after the United States Supreme Court decision in Rapanos v. United States, 547 U. S. 715 (2006). The Corps concluded that the downstream reaches of two drainage ditches were jurisdictional waters of the United States based on "continuous flow and . . surface ***connection*** with the Atlantic Ocean." Deerfield Plantation Phase II-B Property Owners Ass'n, Inc. v. U. S. Army Corps of Engineers, et al., 801 F. Supp. 2d 446, 456 (Emphasis added). The *Rapanos* Guidance provides that "the agencies will assert jurisdiction over non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year round or have continuous flow at least seasonally." Deerfield Plantation Phase II-B Property Owners Ass'n, Inc. v. U. S. Army Corps of Engineers, et al., 801 F. Supp. 2d 446, 453.

existence of any wetlands on the project site," the ALC did not rule on how the 2006 GP coverage might be affected by any subsequent assertion of jurisdiction.**26**

It is well-settled that "[a]s a general rule, an issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review. Issues not raised in the trial court will not be considered on appeal."**27** Furthermore, matters not argued to or ruled on by the trial court are not preserved for review.**28**

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26 *See* Deerfield Plantation Phase II B Property Owners Association v. South Carolina Department of Health and Environmental Control, et. al., 2009 WL 8167909, *7 (Finding No. 30).

27 *See* Anonymous (M-156-90) v. State Bd. Of Medical Examiners, 323 S.C. 260, 278-279, 473 S.E..2d 870, 879-880 (1996), *reversed on other grounds*, 329 S.C. 371, 496 S.E.2d 17 (1998), (*citing* State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1995), *cert. denied*, 516 U.S. 1096 (1996) (defendant's claim that his due process rights were violated because he was not present at pretrial hearing during which trial judge decided to bring in jury from another county because of pretrial publicity was no preserved, where defendant did not object to his absence from pretrial hearing)). See also Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995) (but for very few exceptional situations, appellate court cannot address issue unless it was raised to, and ruled upon by, trial court); Schofield v. Richland County Sch. Dist., 316 S.C. 78, 447 S.E.2d 189 (1994) (issue not raised to or ruled upon by trial judge is not property before Supreme Court on appeal); State v. Williams, 319 S.C. 54, 459 S.E.2d 519 (Ct.App.1995) (to warrant appellate consideration of trial court's ruling on non-jurisdictional issue, issue must have first been presented to trial court and trial court must have then ruled on issue); State v. Barroso, 320 S.C. 1, 462 S.E.2d 862 (Ct.App.1995) (defendant's constitutional challenge to statute allegedly denying defendant opportunity to participate in rehabilitation programs was no raised below and, thus, would not be considered on appeal); Pollard v. County of Florence, 314 S.C. 397, 444 S.E.2d 534 (Ct.App. 1994) (motorist could not argue on appeal that county was estopped from asserting two-year statute of limitations by making payments in partial satisfaction of claim, where motorist did not raise issues to circuit court).

28 Food Mart v. South Carolina Dep't of Health and Envtl. Control, 322 S.C. 232, 471 S.E.2d 688 (1996). *See also generally* Cook v. South Carolina Department of Highways and Pub. Transp., 309 S.C. 179, 420 S.E.2d 847 (1992) (issues not timely raised to and ruled upon by trial court will not be addressed on appeal); Tri-County Ice and Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 399 S.E.2d 779 (1990) (claim that was not raised below would not be considered for first time on appeal); SSI Medical Services

Because Deerfield Plantation POA's arguments before the ALC focused only upon whether the initial wetlands determination was properly made, and because the 2010 JD occurred after issuance and appeal of the lower court's Final Order and Decision, Deerfield Plantation POA failed to properly preserve this question of whether permit coverage under the 2006 GP could be affected by a subsequent determination of jurisdiction by the Corps for consideration in this appeal.

However, since Deerfield Plantation POA has devoted a significant portion of its appellate brief to this argument, Deertrack Golf and SCDHEC have addressed that argument herein below.

D. ***The Corps Of Engineers' 2010 Conclusions Regarding The Extent Of Federally Jurisdictional Waters Located On The South Course, Does Not Invalidate The Permit At Issue In This Appeal.***

Deerfield Plantation POA argued in the ALC that the South Course contained jurisdictional areas that were not identified to SCDHEC in the permit process. However, the testimony and evidence supporting this assertion was focused on the presence of "wetlands" on the golf course, or evidence that portions of the course had been constructed in "wetlands." (Day 2 Trans.,

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Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990) (issue on which trial judge never ruled and which was not raised in post-trial motion was not properly before the Supreme Court); Murphy v. Hagan, 275 S.C. 334, 271 S.E.2d 311 (1980) (appellate court will not hear issues not raised or preserved in lower court proceeding); Dixon v. Besco Eng'g Inc., 320 S.C. 174, 463 S.E.2d 636 (Ct.App. 1994), *affirmed as modified*, 319 S.C. 243, 460 S.E.2d 396 (1996) (issue neither raised at trial nor ruled on by trial court presents no question on appeal); Widewater Square Assocs. V. Opening Break, 314 S.C. 149, 442 S.E.2d 185 (Ct.App. 1994), *affirmed as* modified, 319 S.C. 243, 460 S.E.2d 396 (1995) (issue neither raised at trial nor ruled on by trial court presents no question on appeal); Goddard v. Fairways Dev. Gen. Partnership, 310 S.C. 408, 426 S.E.2d 828 (Ct.App.1993) (issues on which trial judge never ruled and which were not raised in post-trial motion are not properly before Court of Appeals).

p.213). As is evident from the *Rapanos* Guidance, jurisdiction under the Clean Water Act extends to navigable waters, non-navigable tributaries and wetlands.**29** After hearing all the evidence, the ALC ruled that Deerfield Plantation POA failed to sustain their burden on this issue, finding the testimony of Deerfield Plantation POA's expert non-persuasive. And, when the Corps did perform a second review of the system of ponds and ditches on the South Course, none of the areas that Deerfield Plantation POA's expert considered to be potentially jurisdictional were identified by the Corps. As noted by the Fourth Circuit, the Corps holds the authority to "issue formal determinations concerning the applicability of the Clean Water Act" to "tracts of land."**30** The Corps may decide whether a tract of land is subject to the agency's regulatory jurisdiction under Section 404 of the *Clean Water Act*.**31**

The Corps' limited assertion of jurisdiction over ***only 0.37 acres, or 920.07 linear feet, comprises 0.4% (4/10ths of 1%)*** of the total area that was reconsidered by the Corps. And the relatively permanent waters that were determined to be jurisdictional were functioning drainage ditches before the 2010 JD, are functioning drainage ditches currently, and will continue to facilitate drainage with the redevelopment of the South Course. These ditches are "the primary outfall channel" that has functioned to convey runoff from the property

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29 Deerfield Plantation Phase II-B Property Owners Ass'n v. U.S. Army Corps of Engineers, 801 F. Supp. 2d 446.

30 Deerfield Plantation Phase II-B Property Owners Ass'n v. U.S. Army Corps of Engineers, 501 Fed.Appx. 268, ___ (*citing* 33 C.F.R. § 320.1(a)(6)).

31 Deerfield Plantation Phase II-B Property Owners Ass'n v. U.S. Army Corps of Engineers, 501 Fed.Appx. 268, ___ (*citing* 33 C.F.R. § 331.2).

across Glens Bay Road, under U.S. Route 17 Business, through the Town of Surfside, and into the Atlantic Ocean. (POA Exh. 26). Mr. Yelinko identified the area as an "outlet box." (POA Exh. 19, Photo No. 55).

Deertrack Golf's NOI which served as the application form for coverage under the 2006 GP included a section specifically seeking information regarding the existence of wetlands or federally jurisdictional areas on the South Course. Based on the 2006 JD Respondent Deertrack confirmed the lack of any wetlands or jurisdictional waters and indicated "no" on the NOI. (POA Exh. 3).

Deerfield Plantation POA's argument regarding "evisceration" hinges solely on the assertion that the 2010 JD invalidates the authorization of permit coverage under the terms and conditions of the 2006 GP. Deerfield Plantation POA apparently has not read the 2006 GP. Section 2.1 (C) of the 2006 GP provides that "If a US Army Corps of Engineers' 404 Permit is required by Section 404 of the [*Clean Water Act*] for permanent or temporary storm water control structures, DHEC may not grant you coverage under the CGP until the 404 permit has been issued and is effective." However "where the 404 Permit decision will not affect the implementation of the SWPPP [stormwater pollution prevention plan] the department will issue approval of the SWPPP and grant coverage under this permit before the 404 Permit decision is effective." And, "where the 404 Permit decision will affect only a portion of the 'Project Area' the Department may grant the unaffected portion of the 'Project Area' coverage under this permit. The remaining portion of the 'Project Area' will be considered after the 404 Permit is issued and effective." (POA Exh. 12, Section 2.1 C).

Certainly this case constitutes a permissible circumstance for granting permitting coverage. First, in light of the 2006 JD finding no wetlands or waters of the state on the property at the time of application for the permit, there was no need for a 404 Permit inquiry. Second, even if the 2010 JD is interpreted to give rise to a need for the 404 Permit inquiry, it must be agreed that only a portion of the property –in this case, only a very minor portion (0.37 acres out of the total 84.96 acres of the property) - could be affected by any 404 Permit decision. There is no reason for a blanket conclusion that the absence of a 404 Permit should effect eligibility for coverage under the 2006 General Permit or "eviscerate" it as Appellate has argued in this case.

It also must be realized that Deertrack Golf will likely have to submit to an additional approval or updating process at the conclusion of this appeal because the 2006 GP expired and, on 15 October 2012 ("the 2012 CGP"), was reissued with additional terms and conditions.**32** According to SCDHEC's instructions, all coverage approvals under the 2006 General Permit must be revised to meet applicable permit requirements within the 2012 CGP.

However as relates to whether the identification of federally jurisdictional waters on the South Course triggers any additional requirements, the terms and conditions of 2012 GP are identical to Section 2.1C of the 2006 GP. Neither the 2006 GP nor the 2012 CGP demand the issuance of an effective 404 Permit as a mandatory prerequisite or precondition in all circumstances. Though a 404

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32 The GP is a National Pollutant Discharge Elimination System ("NPDES") permit. These permits are valid for 5 years and any continuing discharge is subject to permit reissuance every 5 years. S.C. Code Reg. 61.9.122.26.

Permit may sometimes be required, here the 2010 JD simply does not have the effect of "eviscerating" permit coverage under the 2006 GP.

As to the arguments raised by Deerfield Plantation POA in the subsection titled "DHEC has Acknowledged that Additional Action is Necessary but has Declined to Voluntarily Take that Action," the arguments raised in the SCDHEC's *Memorandum in Support of Petition for Rehearing* received by this Court of Appeals on 27 August 2013, are incorporated herein.

V. CONCLUSION

Deerfield Plantation POA has abandoned several issues which it raised before the ALC. Deerfield Plantation POA's six issues on appeal can be distilled down to two questions: (a) Whether the ALC conclusions that the ponds on the South Course are stormwater ponds and whether the ALC's legal conclusions regarding the standards applicable to stormwater ponds were supported by the law and the evidence? and, (b) Whether the 2010 JD had the effect of divesting Deertrack Golf of permit coverage.

In applying S. C. Code Ann. § 1-23-610(B) this Court of Appeals has held that "[a]s to factual issues, judicial review of administrative agency orders is limited to a determination of whether the order is supported by substantial evidence."**33** Moreover, "[s]ubstantial evidence sufficient to support a finding of the ALC is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency

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33 Murphy v. South Carolina Department of Health and Environmental Control, 396 S. C. 633, 723 S. E. 2d 191 (2012).

reached."[34] There is substantial evidence, and a lack of contradictory evidence, to support the conclusion that the ponds on the South Course are stormwater ponds.

The ALC correctly determined that constructed stormwater ponds are exempt from the pre-treatment requirements of *S. C. Code Reg.* § 61-68(E)(4) since any other conclusion is illogical and ignores the important function of detention structures in controlling stormwater flows and water quality. Ms. Hicks assessment on behalf of DHEC was correct – the ponds were stormwater ponds and not subject to the pretreatment requirement in *S. C. Code Reg.* § 61-68(E)(4).

Finally, Deerfield Plantation POA cannot seek relief from this Court of Appeals on issues that were not raised below to the ALC. The impact of the 2010 JD on Deertrack Golf's ability to proceed with development was not presented to the ALC and, therefore, is not properly before this Court of Appeals. If the 2010 JD has any impact on Deertrack Golf's ability to proceed with the planned redevelopment, such impact will be minimal based on the fact that the areas declared federally jurisdictional constitute only ***0.4% (4/10ths of 1%) of the 85 acres*** that are the subject of the development plan

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34 Greeneagle, Inc., v. South Carolina Department of Health and Environmental Control, ___ S.C. ___, ___, 730 S.E.2d 869, 871 (Ct.App. 2012).

Respectfully submitted:

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Charleston, South Carolina

13 January 2014

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