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

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SC Court of Appeals

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

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I. <u>STATEMENT OF ISSUES ON APPEAL</u>

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

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

C. *Whether The Appellant Is Barred From Raising Issues Before This Court Of Appeals Which Were Not Litigated In The Administrative Law Court?*

D. *Whether The Conclusions Of The United States Army Corps Of Engineers', Rendered In 2010, Regarding The Extent Of Federally Jurisdictional Waters Located On The South Course, Invalidated The Permit That Is The Subject Of The Appeal?*

II. STATEMENT OF THE CASE

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

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 at Deer Track holes Nos. 1-18. (R.p.2; R.p.58). The South Course and its companion course, known as the North Course,[1] are located within and adjacent to the existing residential development known as Deerfield Plantation. (R.p.2; R.p.58). There are multiple Property Owners Associations operating in the overall subdivision and Deerfield Plantation POA is one of those entities. (R.p.61, para. 7). Many of Deerfield Plantation POA's residents own real property contiguous to the South Course. (R.p.2).

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. (R.p.2; R.p.58). In turn, Deertrack Golf then marketed the property for sale as residential

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1 Much like the South Course, the North Couse is also the subject of extensive litigation and has already been addressed by this Court of Appeals. *See* Dale Hill, et. al. v. Deertrack Golf and Country Club, Unpub. Op. No. 212-UP-219 (Ct.App., filed 4 April 2012). A Petition for Writ of Certiorari is currently pending before the South Carolina Supreme Court.

development acreage. (R.p.2; R.pp.58-59). 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, and Deertrack Golf entered into a purchase contract for the South Course. (R.p.2; R.pp.58-59; R.p.60, para. 3). 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. (R.p.2). 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. (R.p.3; R.p.59).

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 challenging SCDHEC's issuance of a land disturbance and stormwater management permit to Deertrack Golf which authorized the planned redevelopment of the South Course.[2] Deerfield Plantation POA also combined an appeal from the Horry County Planning

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[2] *See* Deerfield Plantation Phase II B Prop. Owners Assn. v. S.C. Dept. of Health and Envtl. Control, 2009 WL 8167909 (S.C. Adm. Law Div., filed 9 June 2009).

Commission with a request for declaratory judgment relief in a case filed in in the Horry County Court of Common Pleas.[3] Finally, Deerfield Plantation POA 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 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. (R.p.1-38; R.pp.46-76).[5] The ALC upheld SCDHEC's issuance of the stormwater permit authorizing redevelopment of the South Course and that decision spawned this appeal.[6] (R.pp.1-38). Deerfield Plantation POA failed to overturn the Horry County Planning Commission's decision to approve the redevelopment of the South Course. (R.pp.46-56). 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. (R.pp.57-76).

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3 *See* Deerfield Plantation Phase II B Prop. Owners Assn. v. Horry County Planning Com'n., (Horry County Court of Common Pleas, Civil Action No. 2008-CP-26-7692, filed 24 September 2008). As noted herein, the Circuit Court affirmed the Planning Commission (R.pp.46-56) and denied Deerfield Plantation POA any declaratory relief. (R.pp.7-76).

4 *See* Deerfield Plantation Phase II B Prop. Owners Assn v. U.S. Army Corps of Engineers, Chas. Div., 801 F.Supp.2d 446 (D.S.C. 2011), *affirmed*, 501 Fed.Appx. 268 (4th Cir. 2012) (2012 WL 6685770, filed 26 December 2012) (*per curiam*).

5 *See* Deerfield Plantation Phase II B Prop. Owners Assn. v. Horry County Planning Com'n., Civil Action No. 2008-CP-26-7692; Deerfield Plantation Phase II B Prop. Owners Assn. v. U.S. Army Corps of Engineers, Chas. Div., 801 F.Supp.2d 446, *affirmed*, 501 Fed.Appx. 268 (2012 WL 6685770).

6 *See* Deerfield Plantation Phase II B Prop. Owners Assn. v. S.C. Dept. of Health and Envtl. Control, 2009 WL 8167909.

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.[7] On 3 August 2006, the Army Corps of Engineers had issued a Jurisdictional Determination (the "2006 JD") regarding the South Course and finding that the acreage "did not contain any wetland areas or other waters of the United States."[8] This 2006 JD noted it was presumptively valid for five years "[u]nless new information warrant[ed] revision . . before the expiration date."[9] 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.[10] The District Court granted the motion and the Army Corps of Engineers, on 17 March 2010, issued a new JD (the "2010 JD").[11] In that latter JD, the Army Corps of Engineers 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."[12] The District Court noted:

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7 Deerfield Plantation Phase II B Prop. Owners Assn. v. U.S. Army Corps of Engineers, Chas. Div., 801 F.Supp.2d 446, 449.

8 Deerfield Plantation Phase II B Prop. Owners Assn. v. U.S. Army Corps of Engineers, Chas. Div., 801 F.Supp.2d 446, 449.

9 Deerfield Plantation Phase II B Prop. Owners Assn. v. U.S. Army Corps of Engineers, Chas. Div., 801 F.Supp.2d 446, 449.

10 Deerfield Plantation Phase II B Prop. Owners Assn. v. U.S. Army Corps of Engineers, Chas. Div., 801 F.Supp.2d 446, 449.

11 Deerfield Plantation Phase II B Prop. Owners Assn. v. U.S. Army Corps of Engineers, Chas. Div., 801 F.Supp.2d 446, 454.

12 Deerfield Plantation Phase II B Prop. Owners Assn. v. U.S. Army Corps of Engineers, Chas. Div., 801 F.Supp.2d 446, 449.

> [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.**13**

The District Court further concluded as follows:

> The second tributary that the [Army Corps of Engineers] determined to be jurisdictional 'flows into the jurisdictional tributary discussed above and connects with the Atlantic Ocean. [Army Corps of Engineers 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 well as other 'geomorphic indicators including groundwater influx, the red stained vegetation . . within the tributary, [and] the sinuosity of the channel.' Therefore, the [Army Corps of Engineers] concluded that this tributary was 'subject to the [Army Corps of Engineers'] jurisdiction under the [*Clean Water Act*]' based on its 'perennial flow regime and a surface connection with the Atlantic Ocean.' However, the [Army Corps of Engineers] 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 [Army Corps of Engineers] 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 [Army Corps of Engineers] concluded that 'there was no continuous flow or relatively permanent flow' in those

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13 Deerfield Plantation Phase II B Prop. Owners Assn. v. U.S. Army Corps of Engineers, Chas. Div., 801 F.Supp.2d 446, 455.

> portions of the tributary. Thus, the [Army Corps of Engineers] concluded that the jurisdictional reach of the second tributary ceased ... where the above changes were observed.[14]

Importantly, the District Court noted that "[w]hile the [Army Corps of Engineers] determined in the 2010 JD that the above two tributaries were jurisdictional, the [Army Corps of Engineers] concluded that ***the remaining water bodies on the Deerfield Tract were not*** 'waters of the United States.' "[15]

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 Army Corps of Engineers under the *Clean Water Act*, and having every ditch, swale, and irrigation pond on the South Course subject to the Army Corps of Engineers' jurisdiction has been the difference between being able to redevelop the closed golf course one the one hand or being forced to leave the property as a golf course on the other. Deerfield Plantation POA, acutely aware that the Army Corps of Engineers' determination did not prevent redevelopment of the South Course, appealed the District Court's decision. Nevertheless, the United States Court of Appeals for the Fourth Circuit ultimately affirmed the District Court's decision.[16]

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14 Deerfield Plantation Phase II B Prop. Owners Assn. v. U.S. Army Corps of Engineers, Chas. Div., 801 F.Supp.2d 446, 455.

15 Deerfield Plantation Phase II B Prop. Owners Assn. v. U.S. Army Corps of Engineers, Chas. Div., 801 F.Supp.2d 446, 456-457 (Emphasis added).

16 *See* Deerfield Plantation Phase II B Prop. Owners Assn. v. U.S. Army Corps of Engineers, Chas. Div., 801 F.Supp.2d 446, *affirmed,* 501 Fed.Appx. 268 (2012 WL 6685770).

The permit which is the subject of this appeal was issued 28 February 2008, for a five-year term. (R.pp.469-472). 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,[17] and the other in 2013,[18] which effectively stayed and extended all development permits through the economic recession, including Deertrack Golf's Permit.[19]

IV. ARGUMENT AND CITATION OF AUTHORITY

Standard of Review

The standard specifically applicable to review by this Court of Appeals of an 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:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;

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[17] *See* 2010 Acts and Joint Resolutions No. 279, effective 19 May 2010.

[18] *See* 2013 Acts and Joint Resolutions No. 112, effective 20 June 2013.

[19] 2010 Acts and Joint Resolutions No. 279 suspended the running of certain governmental approvals affecting the development of real property in South Carolina from 1 January 2008, through 31 December 2012). 2013 Acts and Joint Resolutions No. 112 extended the suspension time period through 31 December 2016. Pursuant to these Joint Resolutions, Deertrack Golf's permit remains valid and will not expire until at least 1 January 2017.

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.[20]

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." (R.p.19, para. 34). Deerfield Plantation POA own representative - Frank Yelinko - acknowledged that the ponds were stormwater ponds, although with limited function. (R.p.226, line 1 – R.p.146, line 18). Deerfield Plantation POA's expert, a licensed professional civil engineer, characterized the ponds as "stormwater ponds." (R.p.286, lines 14-21). Deerfield Plantation POA's expert witness - Jake Duncan, a wetlands biologist, confirmed that the ponds were interconnected. (R.p.289, line 9 – R.p.290, line 3). These connections facilitated the drainage function. (R.p.37, para. 66; R.p.31, para. 76). Mr. Yelinko confirmed that all the ponds drain through the same outlet. R.pp.22-23, para. 48). Deerfield Plantation POA' entity representative - Mike Couture - testified that the ponds performed a drainage function. (R.p.295, lines 1-21). Deertrack Golf's expert, also a licensed

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[20] *See* S.C. Code Ann. §§ 1-23-610(B)(a)-(f) (Thomson Reuters West 2010). *See also generally* S.C. Code Ann. §§ 1-23-380(5)(a)-(f) (Thomson Reuters West 2010).

professional civil engineer, testified that the golf course ponds provided a stormwater system, but the ponds were presently not efficient. (R.p.361, line 9 – R.p.363, line 1; R.p.392, line 12 – R.p.394, line 19). 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. (R.pp.29-30, paras. 73-74; R.p.395, line 13 – R.p.396, line 7). This is best illustrated by a comparison between Respondent's Exhibit 19A and 19B. (R.pp.29-30, para. 73; R.pp.573-574). This contradicts Deerfield Plantation POA's attempted characterization of the project as eliminating "waters of the State". The ALC found that:

> Presently 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.

(R.p.29, para. 73).

The substantial evidence before the ALC clearly supported the ALC's findings of fact and conclusions of law. Deerfield Plantation POA simply failed to meet its burden to present significant contrary evidence. This Court of Appeals should affirm the ALC in all respects.

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, by definition, the stormwater ponds on the South Course are "waters of the State" and, therefore, cannot be incorporated into the South Course's redevelopment plans without pre-treatment. Deerfield Plantation POA's argument is based, in part on the deposition of Shannon Hicks, SCDHEC stormwater engineer, who assisted in the review of Deertrack Golf's Notice of Intent ("NOI") (R.pp.475-478) to seek permit coverage under the 2006 GP. (R.p.18, para. 33). 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. (R.p.18, para. 33). Ms. Hick's deposition was admitted in its entirety at the contested case hearing below. (R.pp.532-550).

Ms. Hicks testified that the golf course ponds "were constructed for the golf course when it was built." (R.p.539, lines 3-5). Ms. Hicks was then asked if she considered the ponds on the South Course to be waters of the State of South Carolina. (R.p.540, lines 6-9). She responded that "[d]uring the review, they were considered golf course ponds and not waters of the State." (R.p.540, lines 6-9). When Deerfield Plantation POA's counsel her how she distinguished the golf course 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." (R.p.540, lines 10-18). Ms. Hicks went on to state that a strict reading of the definition of "waters of the State" "doesn't distinguish on what type of pond." (R.p.540, line 19 – R.p.541, line 6). When asked if her review would change if the ponds were considered "waters of the State" Ms. Hicks replied "[i]t may change it." (R.p.546, lines 9-14). She provided an example of how the review could change. (R.p.546, lines 15 – R.p.547, line 1). She noted that if the project showed discharges into wetlands than "we would make sure there was pretreatment prior to stormwater flowing into wetlands." (R.p.546, lines 15-25). Furthermore, Ms. Hicks stated that "if waters of the State are on site and stormwater flows to those waters of the State a pretreatment mechanism must be implemented." (R.p.547, line 25 – R.p.548, line 8). Deerfield Plantation POA's counsel asked Ms. Hicks "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?" (R.p.548, lines 14-17). Ms. Hicks replied, the "[u]nder our rules, there would have to be pretreatment provided for any flow, any stormwater flow, that enters waters of the State." (R.p.548, 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 at in today's

present pre-development stage are, in fact, consistently receiving stormwater flows without any pretreatment other than possible filtration treatment provided if and when the stormwater traverses a series of grass swales before actually entering the ponds.

As with the multiple lawsuits brought, and lost, in other forums, and the unsubstantiated allegations of the potential for flooding that Deerfield Plantation POA has asserted for at least the past six years and then inexplicably has abandoned in this appeal, this argument is nothing more than a tactic to block and/or delay the redevelopment. Should Deerfield Plantation POA be able to ultimately persuade SCDHEC or, instead, this Court of Appeals, that the existing stormwater ponds cannot be incorporated into the proposed stormwater management plan for new development such a scenario would certainly create a potentially significant impediment to the South Course's redevelopment.

Nevertheless, Deerfield Plantation POA's argument is simply illogical. Both Deertrack Golf and SCDHEC recognize the breadth and scope of the definition of the term "waters of the State". Deertrack Golf and SCDHEC are cognizant of and acknowledge the current regulatory pretreatment requirements:

> Any discharge into waters of the State must be permitted by the Department [SCDHEC] 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 [SCDHEC] shall be interpreted as creating any vested right in any person. Additionally, any 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 [SCDHEC] 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]

The term "Best Management Practices" or "BMP", as it 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."[22] One such 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."[23]

It is clear from the pretreatment requirement in *S.C. Code Reg.* § 61-68(E), "[t]he Department [SCDHEC] may require best management practices (BMPs) for control of stormwater runoff,"[24] that a constructed stormwater pond provides pretreatment. It is illogical to interpret this same regulation as requiring pretreatment of stormwater before that same stormwater is discharged into a constructed stormwater pond.

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21 *See* S. C. Code Reg. § 61-68(E)(4)(a) (Thomson Reuters West 2010) (Emphasis added).

22 S.C. Code Reg. § 72-301(5) (Thomson Reuters West 2010).

23 S.C. Code Reg. § 72-301(11) (Thomson Reuters West 2010).

24 S. C. Code Reg. § 61-68(E)(4)(a).

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. South Carolina's stormwater management requirements were codified in 1991 with the adoption of the *South Carolina Stormwater Management and Sediment Reduction Act*,[25] which includes the definitions of "detention structure" and "Best Management Practices," which were adopted in accordance therewith. 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. Nevertheless, *S.C. Code Reg.* § 72-300 applies specifically to stormwater management and authorizes the use of constructed ponds to control stormwater flows.[26] As the lower court found "[i]t is well settled that a specific statute controls over a more general one." (R.p.37, para. 4).[27] 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.[28] Detention ponds, also commonly referred to as

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25 *See* S.C. Code Reg. §§ 72-300, *et seq.* (Thomson Reuters West 2010).

26 *See generally* S.C. Code Reg. § 72- 305(B)(5) (Thomson Reuters West 2010); S.C. Code Reg. § 72- 307(C)(5) (Thomson Reuters West 2010).

27 *See e.g.*, Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc., 368 S.C. 137, 628 S.E.2d 38 (2006).

28 S.C. Code Reg. § 61-68(E)(4).

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.

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") (R.pp.479-531) issued to Deertrack has been eliminated. Deerfield Plantation POA states such authority was "eviscerated" by the Army Corps of Engineers' findings in the 2010 JD that 0.37 acres of drainage ditches constituted a "jurisdictional connection" and was subject to Army Corps of Engineers' 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 which had not been identified by either Deertrack Golf or SCDHEC, Deerfield Plantation POA never claimed that the permit coverage would be terminated and/or eviscerated by the Army Corps of Engineers' subsequent assertion of jurisdiction. Moreover, the 2010 JD was issued several months after the ALC issued its *Final Order and Decision* in this case.[29] Without

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29 *Compare* Deerfield Plantation Phase II B Prop. Owners Assn. v. S.C. Dept. of Health and Envtl. Control, 2009 WL 8167909 (ALC decision issued 9 June 2009), with Deerfield Plantation Phase II B Prop. Owners Assn v. U.S. Army Corps of Engineers, Chas. Div., 801 F.Supp.2d 446, 454 (noting the 2010 JD was issued on 10 March 2010).

any argument, and particularly in light of the finding that Deerfield Plantation POA failed to "carry their burden of proof as to the existence of any wetlands on the project site" (R.p.17, para. 30), the ALC did not render any ruling on how the 2006 GP coverage might be affected by any subsequent assertion by the Army Corps of Engineers of a type of "jurisdictional connection".

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."[30] Furthermore, "[i]ssues not raised in the trial court will not be considered on appeal."[31] Additionally, matters not argued to or ruled on by the trial court are not preserved for review.[32]

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 ALC's Final Order and Decision, Deerfield Plantation POA failed to properly preserve the question of whether permit coverage under the 2006 GP could be affected by a subsequent determination of jurisdiction by the Army Corps of Engineers for consideration in this appeal.[33]

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30 *See* State v. Moss, 2007 WL 8324390, *3 (Ct.App., filed 17 January 2007) (Not reported in S.E.2d).

31 Doe v. S.B.M., 327 S.C. 352, 356, 488 S.E.2d 878, 881 (Ct.App. 1997).

32 *See* Brown v. S. C. Dept. of Health and Envtl. Control, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002).

33 Nevertheless, since Deerfield Plantation POA devoted a significant portion of its appellate brief to this unpreserved argument, Deertrack Golf and SCDHEC have addressed that unpreserved 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 which had not been identified to SCDHEC during the permit process. Contrary to Deerfield Plantation POA's position, the testimony and evidence supporting this assertion was focused not on any "jurisdictional" issue, but, instead, solely on the presence of "wetlands" on the golf course or evidence that portions of the South Course had been constructed in "wetlands." (R.p.288, lines 2-5). As is evident from the *Rapanos* Guidance,**34** jurisdiction under the *Clean Water Act* extends to navigable waters, non-navigable tributaries, and wetlands. After hearing all the evidence, the ALC ruled that Deerfield Plantation POA failed to sustain their burden on this issue (R.p.40, para. 8), finding the testimony of Deerfield Plantation POA's expert non-persuasive. (R.pp.40-41, para. 9). And, when the Army Corps of Engineers performed a second review of the South Course's system of ponds and ditches, none of the areas that Deerfield Plantation POA's expert considered to be potentially jurisdictional were identified as such by the Army Corps of Engineers.**35** As noted by the Fourth Circuit, the Army Corps of Engineers holds

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34 *See generally* Rapanos v. United States, 547 U.S. 715 (2006). *See also* Memorandum from the Army Corps of Engineers and the United States Environmental Protection Agency entitled *"Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision[s] in Rapanos v. United States and Carabell v. United States"*.

35 *See generally* Deerfield Plantation Phase II B Prop. Owners Assn v. U.S. Army Corps of Engineers, Chas. Div., 801 F.Supp.2d 446, affirmed, 501 Fed.Appx. 268 (2012 WL 6685770).

the authority to "issue formal determinations concerning the applicability of the Clean Water Act" to "tracts of land."[36] The Army Corps of Engineers may decide whether a tract of land is subject to the agency's regulatory jurisdiction under Section 404 of the Clean Water Act.

The Army Corps of Engineers' 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 Army Corps of Engineers.[37] 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 across Glens Bay Road, under U.S. Route 17 Business, through the Town of Surfside, and into the Atlantic Ocean. (R.p.616). Mr. Yelinko identified the area as an "outlet box." (R.p.553).

Deertrack Golf's NOI (R.pp.475-478), which served as the application form for coverage under the 2006 GP (R.pp.479-531), included a section specifically seeking information regarding the existence of wetlands or federally jurisdictional

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36 Deerfield Plantation Phase II B Prop. Owners Assn v. U.S. Army Corps of Engineers, Chas. Div., 501 Fed.Appx. 268, 270 (2012 WL 6685770, * 1) (*citing* 33 C.F.R. § 320.1(a)(6)).

37 *See* Deerfield Plantation Phase II B Prop. Owners Assn v. U.S. Army Corps of Engineers, Chas. Div., 801 F.Supp.2d 446, 454; Deerfield Plantation Phase II B Prop. Owners Assn v. U.S. Army Corps of Engineers, Chas. Div., 501 Fed.Appx. 268, 271 (2012 WL 6685770, *2).

areas on the South Course. (R.p.475, Section IV). Based on the 2006 JD, Deertrack Golf confirmed the lack of any wetlands or jurisdictional waters and indicated "no" on the NOI. (R.p.475, Section IV).

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. (R.pp.479-531). Deerfield Plantation POA apparently has not read the 2006 GP. (R.pp.479-531). Section 2.1(C) of the 2006 GP provides that "[i]f 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." (R.p.485). Notwithstanding this prohibition, the 2006 GP also provides in Section 2.1(C)(1) that "where the 404 Permit decision will not affect the implementation of the SWPPP [*i.e.*; stormwater pollution prevention plan] the Department [SCDHEC] will issue approval of the SWPPP and grant coverage under this permit before the 404 Permit decision is effective." (R.p.486). Furthermore, pursuant to Section 2.1(C)(2), in situations "where the 404 Permit decision will affect only a portion of the 'Project Area' the Department [SCDHEC] may grant the unaffected portion of the 'Project Area' coverage under this permit [and the] remaining portion of the 'Project Area' will be considered after the 404 Permit is issued and effective." (R.p.486).

Certainly this case constitutes a permissible circumstance for granting permitting coverage. First, in light of the 2006 JD finding of 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 GP or "eviscerate" it as Deerfield Plantation POA 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. According to SCDHEC's instructions, all coverage approvals under the 2006 GP must be revised to meet applicable permit requirements within the 2012 CGP.

On the other hand, as this issue relates to whether the identification of federally jurisdictional waters on the South Course triggers any additional permitting requirements, the terms and conditions set forth in the 2012 CGP are identical to those contained in Section 2.1(C) of the 2006 GP. Neither the 2006 GP nor the 2012 CGP demand the issuance of an effective 404 Permit as a

mandatory prerequisite and/or precondition in all circumstances. Though a 404 Permit may sometimes be required, the 2010 JD herein, contrary to the Deerfield Plantation POA's arguments, 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."[38] Moreover, "[s]ubstantial evidence sufficient to support a finding of

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[38] Greeneagle, Inc. v. S.C. Dept. of Health and Envtl. Control, 399 S.C. 91, 95, 730 S.E.2d 869, 871 (Ct.App. 2012) (Second alteration in original).

the ALC is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached."[39] There is substantial evidence and, in turn, a serious 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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39 Greeneagle, Inc. v. S.C. Dept. of Health and Envtl. Control, 399 S.C. 91, 95, 730 S.E.2d 869, 871.

Respectfully submitted:

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Charleston, South Carolina

25 March 2014

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

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Deerfield Plantation Phase II B
Property Owners Association,

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Environmental Control, Deertrack Golf, Inc.,

Respondents,

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Bill Clark Homes of Myrtle Beach, LLC,

Respondent.

RULE 211, *SCACR*, CERTIFICATION FOR THE JOINT FINAL BRIEF OF THE RESPONDENTS, DEERTRACK GOLF, INC. AND SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

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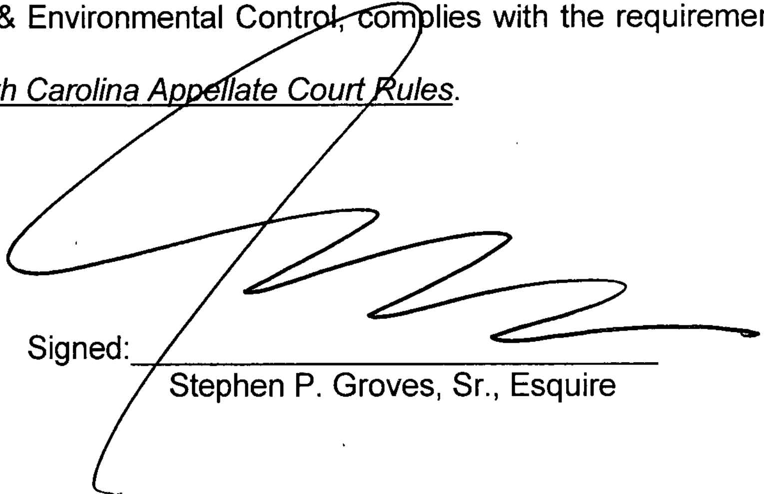
I, Stephen P. Groves, Sr., Esquire, hereby certifies and attests that the ***Joint Final Respondents' Brief*** of the Respondents, Deertrack Golf Inc., and South Carolina Dept. of Health & Environmental Control, complies with the requirements of Rule 211(b) of the *South Carolina Appellate Court Rules*.



Signed:______________________
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Charleston, South Carolina

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I, Stephen P. Groves, Sr., Esquire, hereby certify that on 25 March 2014, served one copy of the ***Joint Final Brief of the Respondents*** submitted on behalf of both the Respondent, Deertrack Golf, Inc., and the Respondent, South Carolina Department of Health and Environmental Control, on all counsel of record herein via United States Mail, postage pre-paid, and addressed as follows:

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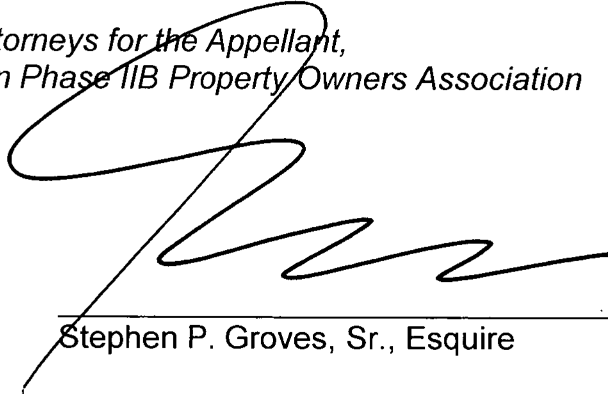

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