

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

Case No. 2014-000847

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AUG 04 2014

SC Court of Appeals

Preservation Society of Charleston,
Historic Charleston Foundation, Historic
Ansonborough Neighborhood Association,
South Carolina Coastal Conservation
League, Charlestowne Neighborhood
Association, Charleston Chapter of the
Surfrider Foundation. and Charleston
Communities for Cruise Control,Appellants,

v.

South Carolina Department of Health and
Environmental Control and South Carolina
State Ports Authority, Respondents.

RETURN TO RESPONDENT STATE PORTS AUTHORITY'S MEMORANDUM IN
SUPPORT OF MOTION TO DISMISS APPEAL

TO: THE COURT AND ALL PARTIES:

PLEASE TAKE NOTICE that the Respondent South Carolina Department of Health and
Environmental Control ("DHEC" or "the Department") hereby submits this Return to
Respondent State Ports Authority's ("SPA") Motion to Dismiss Appeal.

The Department concurs with the majority of the analysis in Respondent State Ports
Authority's Motion to Dismiss. However, the Department contends that this Court can and
should grant SPA's Motion to Dismiss the appeal of the Administrative Law Court ("ALC")

Order Denying Petitioners' Motion to Vacate ("MTV Order") without determining whether the Department issued the 401 Certification with its April 23, 2012 letter to the U.S. Army Corps of Engineers or with its December 18, 2012 critical area permit. Furthermore, this Court can fully grant the requested relief in SPA's Motion by dismissing the Petitioners' appeal of both the MTV Order and the Discovery Order without deciding whether the Department waived its 401 Certification in accordance with S.C. Code Ann. Regs. 61-101.A.6. Moreover, the insufficiency of evidence cited in the ALC's MTV Order (see page 3 below) would preclude this Court from making a final determination on SPA's mootness argument in footnote 8 of its Motion.

In its Motion to Dismiss, SPA asserts that the MTV Order is not properly before this Court because the Order is the equivalent of the denial of a summary judgment motion and, as such, is never appealable.¹ Given Petitioners' argument in their Motion to Vacate,² the Department concurs with SPA's contention that the MTV Order is in reality a non-appealable interlocutory order denying Petitioners' summary judgment motion.³ Like the characteristics of a summary judgment denial order articulated in Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379, (1994) (footnote 1), the MTV Order in this case did not decide the merits of Petitioners'

¹ An order denying summary judgment decides "nothing about the merits"; allows the moving party to raise the issues again at a later stage of the proceedings; and "simply decides the case should proceed to trial." Ballenger v. Bowen, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994). "This Court has repeatedly held that the denial of summary judgment is not directly appealable." Id., 313 S.C. at 476-78, 443 S.E.2d at 380.

² Petitioners argue in pertinent part that, because the Federal District Court "issued an order vacating the Corps' NWP 3 authorization" for the Project, the Permit "should be immediately vacated" or, "[a]lternatively, proceedings in relation to the state permit should be remanded to DHEC." Mot. Vacate pp.2, 3. This argument by Petitioners is simply another way of stating that "there is no genuine issue of material fact [with respect to their claims for relief] and that [they are] entitled to judgment as a matter of law." S.C. R. Civ. P. 56(b).

³ The Petitioners' captioning their motion as a Motion to Vacate is not determinative. "It is the substance of the requested relief that matters regardless of the form in which the relief was framed." Richland County v. Kaiser, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (2002))

arguments, but simply decided the case should proceed to trial. In particular, the ALC stated the following:

Since the Project may still be eligible for general, NWP approval, it appears premature to dismiss this case upon the presumption that an analysis under NWP 3 is improper.⁴

...

At this stage of the litigation, there is not sufficient evidence for this Court to determine the extent of DHEC's review or the procedures that were followed in issuing the permit. Moreover, in presenting their challenge to DHEC's determination, Petitioners can certainly dispute whether review of this matter should be based, in part, on the 401 Certification associated with NWP3 or the critical area permit and CZC Certification. The ALC can then determine based upon the facts of this case in keeping with its de novo review what is the appropriate scope of review for this project and whether the project complies with the standards of that review. Thus, the motion to vacate must be denied at this stage of the litigation.⁵

MTV Order pp. 6-7. (emphasis added). The ALC thus determined that there *was* a genuine issue of material fact regarding when the Department issued its 401 Certification and denied the Petitioners' motion to vacate in order to allow this matter to be resolved after evidence was presented at trial. Consequently, because the MTV Order is a non-appealable interlocutory order and because no evidence was ever submitted addressing when the Department issued its 401

⁴ As of this date (July 31, 2014), the U.S. Army Corps of Engineers ("Corps") has not yet decided how to proceed in response to Judge Gergel's September 18, 2013 Remand Order (i.e., whether to permit this project under the existing NWP3 or require an individual permit). Based on the ALC's language above, there is insufficient evidence for this Court to determine the extent of DHEC's review or the procedures that were followed in issuing the permit.

Accordingly, if the Corps determines at a future date that an individual permit is required, the Department contends that the facts of this case do not preclude a future 401 analysis for that individual permit, if such a 401 Certification is deemed necessary. The 401 Certification issued in conjunction with NWP3 was based on the parameters established in that general permit and may not cover new issues that arise from a new individual permit.

⁵ "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." Ex parte Wilson, 367 S.C. 7, 13, 625 S.E.2d 205, 209 (2005) (citing Mid-State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 336, 426 S.E.2d 777, 780 (1993)). "As a general rule, only final judgments are appealable." Id., (citing Culbertson v. Clemens, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996)).

Certification, it would be premature for this Court (as part of a Dismissal Order) to decide whether the Department waived the 401 Certification per S.C. Code Ann. Regs. 61-101.A.6.

Rule 220(b), SCACR maintains that an appellate court's opinion must express in writing “every point distinctly stated in the case which is necessary to the decision of the appeal . . .” (emphasis added). In this case, deciding the 401 waiver issue is *not* necessary to this Court’s decision per Rule 220(b). The fact that the MTV Order is unappealable and interlocutory is a sufficient basis to dismiss the Petitioners appeal of this order without addressing the 401 waiver issue. Such a course of action (i.e., dismissing the appeal of the MTV Order without addressing the 401 waiver issue) is consistent with the Supreme Court’s long held position that an appellate court need not and should not address remaining issues on appeal where the determination of a prior issue is dispositive. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999); Whiteside v. Cherokee County School District No. One, 311 S.C. 335, 428 S.E.2d 886 (1993); Starnes v. S.C. Dep’t of Public Safety, 342 S.C. 216, 222-23, 535 S.E.2d 665, 668 (Ct. App. 2000). To dismiss the Petitioners’ appeal of the MTV Order, based in part on the 401 waiver issue when no evidence regarding this issue has been presented to the ALC, amounts to an unnecessary advisory opinion; particularly since proper grounds for a dismissal order plainly exist (namely, the MTV Order is a non-appealable interlocutory order). This Court has consistently held that such advisory opinions are improper. See S.C. Labor Ltd., LLC v. E. Tree Serv., Inc., 362 S.C. 654, 658, 609 S.E.2d 305, 307 (Ct. App. 2005) (“We do not address this issue because we do not give advisory opinions.”). Accordingly, dismissal of the MTV Order appeal should not be based on a 401 waiver analysis.

WHEREFORE, the Department supports SPA’s Motion to Dismiss and believes this Court can rule in favor of SPA’s Motion without addressing the 401 waiver issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brad Churdar". The signature is written in a cursive style with a horizontal line underneath.

Bradley D. Churdar, Esquire
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Charleston, South Carolina
July 31, 2014

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Case No. 2014-000847

Preservation Society of Charleston,
Historic Charleston Foundation, Historic
Ansonborough Neighborhood Association,
South Carolina Coastal Conservation
League, Charlestowne Neighborhood
Association, Charleston Chapter of the
Surfrider Foundation. and Charleston
Communities for Cruise Control,Appellants,

vs.

South Carolina Department of Health and
Environmental Control and South Carolina
State Ports Authority,Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date she has served the *Respondent SCDHEC's Return to Respondent State Ports Authority's Motion to Dismiss* in this matter upon the following, by placing copies of same in the United States Mail, first class postage prepaid, addressed to:

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Randolph Lowell, Esquire
Tracey C. Green, Esquire
Chad N. Johnston, Esquire
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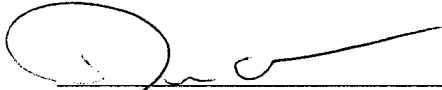
SC Court of Appeals

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M. Denise Crawford

July 31, 2014



Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

July 31, 2014

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: *Preservation Society of Charleston v. S. C. State Ports Authority & SCDHEC*;
Appellate Case No. 2014-000847

Dear Ms. Kitchings:

Please find enclosed the original and seven (7) copies of the Respondent SCDHEC's Return to Respondent State Ports Authority's Motion to Dismiss in the above referenced case. I would appreciate your returning a clocked copy in the enclosed envelope.

By copy of this letter, I am serving all parties of the same.

Very truly yours,

Bradley D. Churdar
Chief Counsel

Enclosure
BDC/mdc

cc: Amy Armstrong, Esquire
Michael Corley, Esquire
Jessie White, Esquire
Jefferson Leath, Esquire
Randolph Lowell, Esquire
Tracey C. Green, Esquire
Chad N. Johnston, Esquire
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Ocean & Coastal Resource Management

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