

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Docket No. 12-ALJ-07-0434-CC

RECEIVED

NOV 14 2016

SC Court of Appeals

Ken Bruning, Janet Bruning, David Feron, individually and as Trustee,
Mary Feron, individually and as Trustee, Sally Saegmuller Haley and
Terrell Page Haley, individually and as Co-Trustees, Martha James
and Don Haarmeyer, individually and as Co-Trustees, and
Pamela S. North Appellants,

vs.

South Carolina Department of Health and Environmental Control
and Cat Island POA, c/o Gary Meyer Respondents,

In Re: Garfield Park Phase 3.

Cat Island POA, c/o Gary Meyer Petitioner,

vs.

SCDHEC Respondent.

In Re: Garfield Park Phase 3.

PETITION FOR REHEARING

Nathan M. Haber
Counsel
South Carolina Department of
Health and Environmental Control
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Charleston, SC 29405
(843) 953-0229
Attorney for Respondent SCDHEC

TO: THE COURT OF APPEALS AND ALL PARTIES

Pursuant to Rules 219 and 221, SCACR, the South Carolina Department of Health and Environmental Control, (hereinafter, the “Department”), respectfully petitions this Court to vacate Opinion Number 5449, (hereinafter, the “Opinion”) filed on October 26, 2016, and to grant a rehearing in this matter. Further, pursuant to Rule 219, SCACR, the Department suggests that upon rehearing, this matter be heard en banc.

GROUND FOR REHEARING

The Department respectfully submits that the Opinion overlooks or misapprehends the following points:

- (1) The Opinion misapprehends its interpretation and application of Chapter III, Section C(3)(XIII)(A) of the Coastal Management Program Document.
- (2) The Opinion misapprehends the procedural history of this case.

ARGUMENT

I. Rehearing Should Be Granted Because The Opinion Misapprehends the Interpretation And Application Of Chapter III, Section C(3)(XIII)(A) Of The Coastal Management Program Document.

“In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect.” South Carolina State Ports Authority v. Jasper County, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) (citing TNS Mills, Inc. v. South Carolina Dep’t of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998)). A statute should not be construed by concentrating on an isolated phrase. Id. (citing Laurens County Sch. Dist. 55 and 56 v. Cox, 308 S.C. 171, 417 S.E.2d 560 (1992)). “Regulations are interpreted using the same

rules of construction as statutes.” Murphy v. South Carolina Dep’t of Health and Envtl. Control, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012).

Chapter III, Section C(3)(XIII)(A) of the of the Coastal Management Program Document (hereinafter, “CMP”) provides in full:

The regulations of the Storm Water Management and Sediment Reduction Act require that “permanent water quality ponds having a permanent pool shall be designed to store and release the first 1/2 inch of runoff from the site over a 24-hour period. The storage volume shall be designed to accommodate, at least, 1/2 inch of runoff from the entire site.” For all projects, regardless of size, which are located within one-half (1/2) mile of a receiving water body in the coastal zone, this criteria shall be storage of the first 1/2 inch of runoff from the entire site or storage of the first (1) inch of runoff from the built-upon portion of the property, whichever is greater. Storage may be accomplished through retention, detention or infiltration systems, as appropriate for the specific site. In addition, for those projects which are located within 1,000 (one thousand) feet of shellfish beds, the first one and one half (1 1/2) inches of runoff from the built-upon portion of the property must be retained on site.

The Opinion finds the requirement of storage at the end of this section is mandatory, but does not distinguish when such requirement is applicable. In reaching this finding, the Opinion examines some of the language contained in Chapter III, Section C(3)(XIII)(A) of the CMP. Specifically, the Opinion provides:

Section C(3)(XIII)(A) states:

For all projects, regardless of size, which are located within one-half (1/2) mile of a receiving water body in the coastal zone, this criteria shall be storage of the first 1/2 inch of runoff from the entire site or storage of the first (1) inch of runoff from the built-upon portion of the property, whichever is greater. Storage may be accomplished through retention, detention or infiltration systems, as appropriate for the specific site.

Examining this language in isolation the Opinion’s analysis would apply to not only the projects with permanent water quality ponds, but to any land disturbance permit sought in the Coastal Zone. Land disturbing activity is defined as “any use of the land by any person that results in a change in the natural cover or topography that may cause erosion and contribute to sediment and alter the quality or quantity of stormwater runoff.” S.C.

Code Ann. Regs. 72-301(23). This covers a vast array of projects. The Opinion would place a requirement of storage in a permanent pond or pool on any land disturbance permit sought in the Coastal Zone, even for minor activities that may only have a temporary effect on the natural cover and cannot feasibly incorporate a permanent pond or pool and therefore cannot use "retention, detention or infiltration." Case law provides that such requirements should not be singled out and read in isolation, but instead should be read as a whole to effectuate intent. Within Chapter III, Section C(3)(XIII)(A) of the of the CMP there is additional language:

The regulations of the Storm Water Management and Sediment Reduction Act require that "permanent water quality ponds having a permanent pool shall be designed to store and release the first 1/2 inch of runoff from the site over a 24-hour period. The storage volume shall be designed to accommodate, at least, 1/2 inch of runoff from the entire site."

This additional language precedes the requirement analyzed in the Opinion and provides guidance as to when such a requirement for storage is applicable. In interpreting this section as a whole, rather than in isolation, it is clear the requirement considered by the Opinion applies to projects that will incorporate permanent water quality ponds as a means of stormwater treatment. This interpretation is supported in the language analyzed by the Opinion in including "this criteria" as it references back to the preceding language regarding projects that have a permanent water quality pond. Therefore, projects that include a permanent water quality pond in the Coastal Zone must meet these designated criteria for storage and storage may be accomplished through detention, retention, or infiltration systems.

The project at issue was initially permitted to have a permanent water quality pond, however with the failure of the impoundment dike the project as applied for does

not have a permanent water quality pond and therefore would not need to meet such storage requirements.

II. The Opinion Misapprehends The Procedural History Of This Case.

The Opinion found “DHEC and Cat Island POA (collectively, Respondents) appealed the portion of the Board’s order finding they had not established sufficient distance from the shellfish beds to be consistent with the governing requirements of the CMP.” If the Department’s Board (hereinafter, “Board”) elects to hold a final review conference the Board’s decision is a final agency decision pursuant to S.C. Code Ann. §44-1-60(F)(2). Only “[a]n applicant, permittee, licensee, or affected person may file a request with the Administrative Law Court for a contested case hearing.” S.C. Code Ann. §44-1-60(G). After the Board issued its determination in this matter two separate requests for a contested case hearing were filed with the Administrative Law Court contesting the final agency decision. One request was filed by multiple property owners who resided on or near the former impoundment and the other request was filed by Cat Island POA. The Department was the respondent in both of the actions.

In finding the Department appealed the final agency decision, the Opinion misapprehends the procedural history of this case as the Department did not file a request for contested case hearing with the Administrative Law Court.

CONCLUSION

WHEREFORE, based on the foregoing, the Department respectfully requests that the Court grant this petition for rehearing and this Court issue an Opinion consistent with the arguments set forth herein.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'N. Haber', is positioned above a horizontal line.

Nathan M. Haber
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Attorney for Respondent SCDHEC

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has this day served the *Respondent South Carolina Department of Health and Environmental Control's Petition for Rehearing* via U.S. First Class Mail, postage pre-paid to the following:

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

Mary D. Shahid, Esquire
Angelica M. Colwell, Esquire
Nexsen Pruet
Post Office Box 486
Charleston, SC 29402

John E. North, Jr., Esquire
North & Black
916 Bay Street, Suite 100
Beaufort, SC 29902

Cat Island POA
Attention: Gary Meyer
5 Sheffield Court
Lady's Island, SC 29907

A handwritten signature in black ink, appearing to read 'Nathan M. Haber', written over a horizontal line.

Nathan M. Haber

November 9, 2016



November 9, 2016

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

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SC Court of Appeals

Re: Bruning, et al. v. SCDHEC, et al.
Case Tracking No.: 2014-002010

Dear Ms. Kitchings:

Please find enclosed the original and seven (7) copies of the Respondent South Carolina Department of Health and Environmental Control's Petitioner for Rehearing in the above referenced case.

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

I would appreciate your returning a clocked copy in the enclosed envelope.

Sincerely,

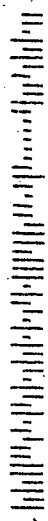
A handwritten signature in black ink, appearing to read "N. Haber", written over a horizontal line.

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NMH/mdc

cc: John E. North, Jr., Esquire
Mary D. Shahid, Esquire
Angelica M. Colwell, Esquire
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Return Service Requested

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