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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA ADMINISTRATIVE LAW COURT
Honorable Shirley C. Robinson, Presiding Judge

Appellate Case No. 2014 - 002010

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,

v.

SCDHEC and Cat Island POA, c/o Gary Meyer..... Respondents.

In Re: Garfield Park, Phase 3

Cat Island POA, c/o Gary Meyer.....Petitioner,

v.

SCDHEC.....Respondent.

APPELLANTS' RETURN TO SCDHEC'S PETITION FOR
REHEARING AND REHEARING *EN BANC*

COME NOW the Appellants and for their Return to SCDHEC's Petition for Rehearing and Rehearing *en banc* ("Petition") and state as follows:

1. SCDHEC's Petition Must Be Denied as Untimely.

Rule 221(a) SCACR requires that SCDHEC's Petition must have been actually received by this Court no later than fifteen days after the filing of the Opinion herein, by November 10, 2016. It was not. Accordingly, it must be denied as untimely.

2. In Their Joint Brief, Neither SCDHEC nor Cat Island POA ("Cat island") Raised the Issue Now Presented in SCDHEC's Petition.

As its primary basis for rehearing, SCDHEC now argues that the statute interpreted by the Court requiring the storage of storm water by one of the three statutorily mandated methods applies only to projects which incorporate a "permanent water quality pond". Since, according to DHEC, the project at issue in this litigation did not contemplate such a pond, and instead sought to use "in-line filters", the Court should not have found that the statute applied. "[I]t is clear the requirement considered by the Opinion applies to projects that will incorporate permanent water quality ponds as a means of storm water treatment." Petition at page 4.

SCDHEC's argument has not been previous raised and is thus not preserved and it is both meritless and circular.

In their jointly submitted brief, Cat island (which has not sought rehearing) and SCDHEC concede that the CMP “requires that treatment of stormwater within the critical area must be through storage”. Brief of Cat Island and SCDHEC, page 8. The only argument made by the Respondents in the Brief was that, while storage of stormwater with the coastal zone is mandatory, the method by which storage is to be accomplished is “permissive”. Brief of Cat Island and SCDHEC, page 8. At no point in their Brief did either of the parties contend that because the “project” at issue did not contemplate a permanent water quality pond, that the storage requirements imposed by XIII-A of the Coastal Management Program (“CMP”) did not apply. The issue was not raised and ruled upon in the ALC.

It is axiomatic that an issue cannot be raised for the first time in a petition for rehearing. *Herron v. Century BMW*, 395 S.C. 461, 719 S.E. 2d 640 (2011) Accordingly, the SCDHEC’s Petition should be denied for failure to properly preserve the issue.

Even if SCDHEC’s failure to preserve the issue was not fatal to its Petition, the argument is meritless.

SCDHEC contends that the Court erred when it imposed the requirement that stormwater be stored for “even minor activities” in the Coastal Zone. The clear language of the CMP dispatches with that argument. First, the Opinion does not impose any requirement for stormwater management, it merely applies the clear language of the CMP which imposes the requirements. Second, SCDHEC’s argument ignores the clear language of the CMP that imposes the

storage requirement, not to the entire Coastal Zone, but only to projects within one-half mile of a receiving water body in the Coastal Zone. Third, the CMP clearly states that the Stormwater Runoff Storage Requirements apply “[f]or all projects, *regardless of size...*” (CMP, p. III-60, R. 1543) (emphasis supplied). This language could not be more clear.

To accept SCDHEC’s position would allow any work in the Coastal Zone to avoid the storage requirements of the CMP by simply not employing a “permanent water quality pond” in the project. That construction would allow for the use of any type of stormwater treatment despite the language of the Stormwater Runoff Storage Requirements set forth in the CMP (CMP, p. III-60, R. 1543) and would circumvent the clear intent of the CMP to require one of three types of stormwater “storage” within one-half mile of a receiving water body.

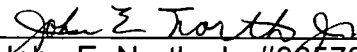
The Court’s Opinion is correct with respect to the applicability and interpretation of the CMP with regard to the permit at issue in this litigation.

3. The Mischaracterization of SCDHEC as an Appellant in the ALC with Respect to a Finding of the DHEC Board is Not a Point “Misapprehended or Overlooked” by the Court in Its Opinion.

A Petition for Rehearing is intended to address substantive issues “overlooked or misapprehended” by the Court in its Opinion. SCDHEC complains that the Court erroneously described SCDHEC as an appellant with respect to the DHEC Board’s decision with respect to the proximity of the shellfish beds. That error does not rise to the level of significance justifying

rehearing, particularly when SCDHEC is correctly identified in the caption of this appeal as a "Respondent" with respect to Cat Island POA's appeal to the ALC.

For all of the foregoing reasons, the Appellants respectfully requires the Petition for Rehearing filed by SCDHEC be denied, in its entirety.



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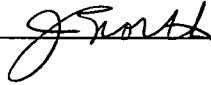
v.

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PROOF OF SERVICE

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The undersigned hereby certifies that the Appellants' Return to Petition for Rehearing was served upon the attorney for Cat Island POA, Mary Shahid, PO Box 486, Charleston, SC 29402 and the attorney for SCDHEC, Nathan Haber, 1362 McMillan Avenue, Suite 400, Charleston, SC 29405 by United States Mail, postage prepaid on the 17th day November, 2016.



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November 16, 2016

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

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Re: Bruning, et al v. Cat Island POA and DHEC
Appellate Case No. 2014 - 002010


Dear Ms. Kitchings:

Enclosed please find relative to the above-referenced matter an original and six copies of Appellants' Return to Petition for Rehearing and an original of Proof of Service with regard thereto.

Please see that these materials are properly filed.

Thank you for your assistance with this matter.

Very truly yours,


John E. North, Jr.

JEN/p

Encl

C: Mary Shahid; Nathan Haber