

JOSH STEIN
ATTORNEY GENERAL



REPLY TO:
MARY L. LUCASSE
(919) 716-6962
MLUCASSE@NCDOJ.GOV

Memorandum

To: North Carolina Coastal Resource Commission
Fr: Mary L Lucasse, Esq.
Re: Legal Update to the Coastal Resources Commission (CRC 22-11)
Date: April 14, 2022

I. NORTH CAROLINA SUPREME COURT

Batson, Baldwin, and Batson/Baldwin Owners' Association v. CRC (Carteret Co.) Docket No. 94A22. The Commission appealed the Court of Appeal's decision (see below) based on Judge Tyson's dissent that would have held that no fees should have been awarded because the Commission's decision denying the Petitioners' request for a hearing was substantially justified. The Commission brief is due June 6, 2022.

II. NORTH CAROLINA COURT OF APPEALS

Batson, Baldwin, and Batson/Baldwin Owners' Association v. CRC (Carteret Co.) Docket No. COA 21-110. The Commission appealed the Superior Court's order assessing \$89,444.36 in attorneys' fees and costs against the Commission after the Court granted a petition for judicial review overturning the Chair's denial of requests for contested case hearings to challenge the CAMA permit issued to NC DOT for the Harkers Island replacement bridges. On March 1, 2022, the Court of Appeals issued its decision including majority and dissenting opinions. The majority vacated the trial court's opinion awarding attorneys' fees to Petitioners and remanded for the trial court to make additional findings of fact with respect to whether the Commission acted without substantial justification when it denied Petitioners' request for a hearing to challenge the permit. The Commission appealed the decision based on Judge Tyson's dissent that no fees should have been awarded because the Commission's decision was substantially justified. (see above)

Henry Fonvielle v. CRC (New Hanover Co.) Docket No. COA 22-____. Petitioner Henry Fonvielle filed a notice appealing the superior court's order affirming the Commission's final agency decision denying his request for a contested case hearing as untimely. (See below) We expect the record on appeal will be filed in early July and the briefing will be completed in September. This schedule could be expedited if all parties agree.

III. PETITIONS FOR JUDICIAL REVIEW

Smuts, Tignor v. NCDEQ, 98 OB LLC, 134 OB LLC (19 CVS 012379) - Wake Co. Superior Ct. Petitioners appealed Administrative Law Judge Randolph Ward's Final Decision granting summary judgment to DEQ finding the CAMA permits were consistent with the Town of Southern Shores Land Use Plan Update. On July 8, 2020, a hearing was held in Wake Co

Superior Court. At the Court's request, the parties submitted proposed orders and we are waiting for the Court's decision.

Henry Fonvielle v. CRC (21 CVS 003584) - New Hanover Superior Ct. Petitioner appealed the Commission's denial of a TPHP to challenge the minor permit issued by the Town of Wrightsville Beach's LPO authorizing the construction of an oceanfront house based on the LPO's interpretation of the static line exception. The matter was heard on March 8, 2022. By order filed April 5, 2022, the superior court denied the petition for judicial review and affirmed the Commission's denial of the Petitioner's request for a contested case hearing based on its holding that Petitioner is not an "adjacent riparian property owner" under 15A NCAC 7J.0204(b)(5), and accordingly was not entitled to notice of the applicant's intention to develop the applicant's property and apply for a CAMA minor development permit. The superior court agreed with the Commission that the request was untimely. Petitioner appealed. (See above).

IV. OFFICE OF ADMINISTRATIVE HEARINGS (OAH):

McBride v. DCM (21 EHR 4440) Based on alleged interference with navigation under 15A NCAC 07H .1204(c), Petitioner challenged the general permit issued by DCM for the construction of a pier on Newton Creek in Pamlico County. The hearing took place in Pamlico County on April 11-12, 2022. We expect a decision from the ALJ in 45 days. Mary Lucasse and Mary Crawley represented DCM.

V. VARIANCES - None other than the ones before you today.

VI. REQUESTS BY THIRD PARTIES TO FILE CONTESTED CASES IN OAH: Following is a review of the requests received since your last meeting:

Karen and Frank OSaben (CMT22-01 [sic]) filed a request for a contested case hearing to challenge an elevated deck on the oceanfront in Dare County. Once the permit was surrendered, the Petitioners withdrew their request for a hearing.

Wendy Moll (CMT 22-02) filed a request for a contested case hearing to challenge CAMA GP 85146 authorizing the construction of a dock at 80 Pamlico Shores Road in Hyde County, The Chair's final agency decision will be issued by May 6, 2022.

Kevin and Kendra Knoerschild filed a request for a contested case hearing to challenge CAMA per 80186D to construct a pier and marsh sill on the Atlantic Intracoastal Waterway at 2384 W. Tanglewood Dr. SW, Supply NC 28462. The Chair's final agency decision will be issued May 14, 2022.

VII PUBLIC RECORDS REQUEST: On March 3, 2022, DCM and the Commission received a second request for public records from the attorney representing Petitioner Henry Fonvielle for, among other things, documents relating to the use of the words "adjacent" and "adjoining." Work to respond to this extensive request is ongoing.