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### **Memorandum**

To: North Carolina Coastal Resource Commission  
Fr: Mary L Lucasse, Esq.  
Re: Legal Update to the Coastal Resources Commission **(CRC 22-21)**  
Date: August 31, 2022

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#### **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 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 filed its brief on June 6, 2022. Petitioners requested the NC Supreme Court remand the case to the superior court for findings of fact. The Court denied Petitioners' motion. Petitioners then requested two extensions of time and eventually filed their brief on Aug 29, 2022. The Commission's reply brief will be filed shortly.

#### **II. NORTH CAROLINA COURT OF APPEALS**

**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. We have settled the record on appeal and expect that the briefing will be completed this fall.

#### **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. We received the superior court's decision denying the petition for judicial review and affirming the issuance of the permits. The Petitioners did not file a notice of appeal by the deadline of August 18. I will close this file.

**Petition for Rulemaking by Nelson G. Paul (22CVS5974) – Wake Co. Superior Ct.** The Commission denied Mr. Paul's Request for Rulemaking to repeal 15A NCAC 07H .0205(e). Mr. Paul appealed the decision. The Commission filed the record with the superior court and filed its Memorandum in Opposition to the Petition for Judicial Review on August 31, 2022. We have asked that a hearing on the petition be calendared for the week of October 10, 2022.

**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. The ALJ issued her Final Decision affirming DCM's decision to issue the Permit on August 8. The Petitioners have until Sept 7, 2022 to file a petition for judicial review. Mary Lucasse and Mary Crawley represent DCM in this case.

**V. VARIANCES** – None other than the ones before you today.

**VI. REQUESTS BY THIRD PARTIES TO FILE CONTESTED CASES IN OAH:** Following is the status of the current requests:

**Kevin and Kendra Knoernschild** (CMT 22-04) filed a request for a contested case hearing to challenge the Notice of Violation (“NOV”) issued by DCM that directs the removal of the encroachment of a pier and marsh sill constructed by Mr. Strobel on his property located on the Atlantic Intracoastal Waterway at 2384 W. Tanglewood Dr. SW, Supply NC 28462. DCM Issued the NOV based on a signed sealed survey provided by the permittee. Petitioners’ request for a third-party hearing to challenge the NOV is based on two additional surveys they provided to DCM which they allege show that the development significantly encroaches on the riparian area and makes navigating more difficult. The Chair denied the request based on the statute which only provides the third party hearing process for requests to challenge permit decisions. The Petitioners did not appeal and I will close our file.

**Chuck Jenkins** (CMT 22-05) submitted a request for a contested case hearing to challenge CAMA Minor Permit 07-22 authorizing the construction of a single-family residence, pool, and decking on an oceanfront lot at 44 Porpoise Place, in North Topsail Beach, Onslow County, North Carolina. On May 18, 2022, the Chair denied the request based on Petitioner’s failure to allege facts or make legal arguments demonstrating that the permit was inconsistent with the CAMA or the Commission’s rules. Petitioner did not appeal and I will close our file.

**Mark and Delaine Mead** (CMT 22-06) submitted a request for a contested case hearing to challenge CAMA Minor Permit OKI21-76 authorizing the construction of an ADA accessible circle drive providing temporary parking to drop off persons using wheelchairs or other assistive mobility devices that were permitted for construction on the Town’s property on two oceanfront lots, including an extension of SE 46th Street south of E Beach Drive in the Town of Oak Island. The Chair’s denial of the request was based on the Petitioners’ failure to allege facts or make legal arguments demonstrating that the permit was inconsistent with CAMA or the Commission’s rules. Petitioner did not appeal and I will close our file.

**Richard McMillen** (CMT 22-07) submitted a request for a contested case hearing to challenge a CAMA Minor Permit authorizing the relocation of a structure from an oceanfront lot in Rodanthe to another lot that is not oceanfront in the same neighborhood. The Chair’s denial of the request was based on the Petitioners’ failure to allege facts or make legal arguments demonstrating that the permit was inconsistent with CAMA or the Commission’s rules. The Petitioner did not file a petition for judicial review in the superior court by the deadline of August 29, 2022. I will close our file.

**Gregory Baccari** (CMT 22-08) submitted a request for a contested case hearing to challenge the CAMA permit authorizing an addition to an existing dock/pier. The Chair denied the request based on a settlement agreement signed by the Permittee and the Petitioner in 2007 which approved the location of the existing pier. Given this agreement, the Chair held that the Petitioner had failed to allege facts or make legal arguments to show a contested case hearing would not be frivolous because the location of the permitted kayak pier is within the agreed-to-footprint for the existing pier. The deadline for the Petitioner to file a petition for judicial review in the superior court is September 22, 2022.

**Bianca and Edward Aniski** (CMT 22-09) submitted a request for a contested case hearing to challenge CAMA permit HI-18-2022 to develop a parcel in Avon in Dare County. The Chair denied the request for a contested case hearing on the grounds that neither the Commission nor OAH have jurisdiction to resolve property line disputes or challenges to the survey submitted in support of the permit application. In addition, the Chair held that the Petitioners had failed to allege facts or make legal arguments that the permit was inconsistent with CAMA or the Commission's rules. The deadline for the Petitioners to file a petition for judicial review in the superior court is Oct 1, 2022. 2022.

**William Stewart** (CMT 22-10) submitted a request for a contested case hearing to challenge CAMA Minor Permit OI 22-44 authorizing development in the Ocean Hazard AEC. The Chair's decision is due September 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.