

Legal Update
(MLL revised April 2, 2019)

I. MULTISTATE LITIGATION

United States District Court for the District of South Carolina Charleston Division:

North Carolina, other states, the companies holding the permits, and the American Petroleum Institute, have been allowed to intervene in this litigation requesting declaratory and injunctive relief challenging the National Marine Fisheries Service (NMFS) grant of incidental harassment authorizations (IHA) pursuant to the Marine Mammal Protection Act allowing five companies to conduct seismic testing to explore the ocean floor for potential oil and gas resources. The environmental NGO plaintiffs filed a motion for preliminary injunction on February 20, 2019. The states joined in the motion. The South Carolina plaintiffs filed their own motions for preliminary injunction. The briefing on these motions is ongoing. The federal defendants have filed the administrative record with the court. The parties have asked for a conference with Judge Gergel to set a schedule for the case. No hearing has been set for the motions for preliminary injunction.

II. FEDERAL LITIGATION

United States District Court for the Eastern District of North Carolina, Northern Division

Michael and Catherine Zito, 2:19-cv-11-D. Plaintiffs are alleging the Commission's decision to deny their variance request to rebuild their home which had been destroyed by fire in 2016 even though the proposed development did not meet the ocean front setbacks resulted in a taking of private property without just compensation in violation of the United States Constitution and the North Carolina Constitution and law. Marc Bernstein and Mary Lucasse are representing the Commission. Defendant's response to the Complaint is due April 9, 2019.

III. SUPERIOR COURT – Carteret County

Beverly Pham v. Blair Pointe, LLC et al. 18 CVS 1289. Josh Stein, on behalf of the people of North Carolina, filed a motion to intervene in litigation filed by Plaintiff seeking a declaratory judgement that a conservation restriction placed on an approximately 12 acres (including wetlands) under the Tax Credit Program (repealed by the General Assembly in 2013) was extinguished as a result of a tax foreclosure sale. DCM had done the initial assessment that the land had conservation value. Our office was alerted to the attempt to extinguish the conservation restriction by DEQ, who had been in touch with the NC Coastal Federation and North Carolina Coastal Land Trust. A hearing had been scheduled for March 25, 2019 but was taken off the calendar to allow the parties to review our motion. Mary Lucasse and Shawn Maier are representing North Carolina in the litigation.

IV. PETITION FOR JUDICIAL REVIEW

New Hanover County Superior Court:

SETTLED- Town of Wrightsville Beach v. CRC and Grand View Holdings, LLC, 17 CVS 004392.

Petitioners requested review of the Commission's denial of its request for a hearing to challenge DCM's issue of CAMA Major Development Permit No. 110-17 authorizing eight slips to be added to an existing two-slip docking facility adjacent to the Intercoastal waterway near the Heide Trask Bridge. The Town objected to the pier expansion based on concerns that increased boat traffic would impact its sewer force main located in the Intercoastal Waterway which transports waste from the Town to the Cape Fear Sewage Plant. The permitted pier is located above the sewer main in two places. The parties are circulating the final settlement documents.

V. OFFICE OF ADMINISTRATIVE HEARINGS (OAH):

Sunset Beach Taxpayers Association and NC Coastal Federation v. DCM (16 EHR 7974) and Sun's Set LLC v. DCM (16 EHR 8032). These contested cases are stayed. The cases involve an appeal of

DCM's issuance of Major CAMA Permit No 70-16 for the development of infrastructure for a 21-lot residential project at the western end of Sunset Beach in Brunswick County. On Dec. 8, 2017, the Parties in a related superior court action to quiet title requested the case be placed on inactive status to give the State time to acquire funding to purchase the property. The General Assembly allocated \$2.5 million for the purchase. The developer and the NC Department of Administration have completed title work on the property. Then an appraisal will be done to establish a value for the property.

Gwendolyn Smuts and Marvin Tignor v. DEQ (18 EHR 07490 and 18 HER 07391). Two residents of the Town of Southern Shores have challenged the issuance of CAMA Minor Permits for construction of two 12-bedroom homes on the grounds that the permits are not consistent with the Town's current land use plan. The cases have been consolidated and the permit holders have intervened. We filed a motion for summary judgment arguing that the projects are consistent with objective requirements of the land use plan which incorporate the Town's zoning ordinance requirements for height, density, and lot coverage. The hearing on the motion was April 11, 2019. If the administrative law judge does not grant summary judgement, we will have a hearing in Elizabeth City beginning May 21, 2019.

VI. VARIANCES:

Michael and Catherine Zito (CRC-VR-18-04). During its November 2018 meeting, the Commission denied Petitioners' request for a variance to rebuild a home destroyed by fire in 2016. The proposed variance would have allowed construction oceanward of the oceanfront setback. Petitioners filed a takings claim in USDC (see above)

Thomas and Judith Lampley (CRC-VR-18-05). During its Feb. 2019 meeting, the Commission denied Petitioners' request for a variance that would have allowed a patio (that had been constructed without a CAMA permit) to remain in the public trust EAC adjacent to Yeopim Creek. Petitioners received the FAD on March 25, 2019. Petitioners have until April 25, 2019 to file a petition for judicial review.

Vickie and Joe Hatch (CRC-VR-19-01) During its February 2019 meeting, the Commission considered Petitioners' request for a variance to replace 1905 square feet of deck which did not meet the oceanside setback. The Commission deferred its decision to the next meeting to allow Petitioners to determine whether they could qualify for an exemption under 15A NCAC 07K .0103. Petitioners submitted estimated construction costs and an appraisal to DCM showing the cost of repair is less than 50% of the value of the existing structure. Petitioners received an exemption and do not require a variance.

VII. REQUESTS FOR 3RD PARTY HEARINGS IN OAH:

The time to file a petition for judicial review has not yet run for ***Stefan and Agnes Kribbeler (CMT-19-01)***. The Chair's FAD denying their request for a hearing to challenge issuance of a CAMA minor permit to build a home which they claim improperly removed or relocated dunes was issued February 25, 2019. We have not received the green card showing service of the decision.

Since your last meeting, the Commission Chair has denied one request by a third-party for a hearing in OAH to challenge a permit issued by DCM. Specifically: ***Pelican Point Townhome Condominium Owners Association (CMT 19-02)*** requested permission to file a petition in the Office of Administrative Hearings for a contested case hearing to challenge Emergency General Permit No. 73412C issued to Michelle Taylor and Maureen Bolinger to rebuild a dock and walkway damaged by Hurricane Florence within the existing footprint. The Chair denied the request on the grounds Petitioner had failed to identify any inconsistency between the Commission's rules and the permit and DCM, CRC and OAH do not have jurisdiction to determine the correct interpretation of the property rights held by Petitioner and Permittees as a result of an easement. Petitioner has 30 days following receipt of the FAD to file a petition for judicial review of the decision.