

IN THE SUPREME COURT OF NORTH CAROLINA

No. 161A12

FILED 13 JUNE 2013

APPLEWOOD PROPERTIES, LLC and APPLE CREEK EXECUTIVE GOLF CLUB, LLC

v.

NEW SOUTH PROPERTIES, LLC; APPLE CREEK VILLAGE, LLC; HUNTER CONSTRUCTION GROUP, INC.; and URBAN DESIGN PARTNERS

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 725 S.E.2d 360 (2012), affirming an order granting partial summary judgment for defendants entered on 16 April 2010 by Judge Jesse B. Caldwell, III in Superior Court, Gaston County. Heard in the Supreme Court on 14 November 2012.

Womble Carlyle Sandridge & Rice, LLP, by Raboteau T. Wilder, Jr. and Amanda G. Ray, for plaintiff-appellants.

Dean & Gibson, PLLC, by Jeremy S. Foster and Michael G. Gibson, for defendant-appellee Hunter Construction Group, Inc.

Roy Cooper, Attorney General, by John F. Maddrey, Solicitor General; James C. Gulick, Senior Deputy Attorney General; Jennie Hauser, Special Deputy Attorney General; and Anita LeVeaux, Assistant Attorney General, for State of North Carolina ex rel. Dee Freeman, Secretary of North Carolina Department of Environment and Natural Resources, Division of Land Resources, amicus curiae.

JACKSON, Justice.

In this appeal we consider whether an injured person may bring a civil action against a defendant pursuant to the civil relief provision of the Sedimentation

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Pollution Control Act of 1973 (“SPCA”) when the defendant has received notices of noncompliance, but has not been cited for a violation of a relevant law, rule, order, or erosion and sedimentation control plan. We hold that before an injured person can have standing to bring a civil action pursuant to section 113A-66 of the SPCA, the defendant must have been cited for a *violation* of a law, rule, ordinance, order, or erosion and sedimentation control plan. Accordingly, we modify and affirm the opinion of the Court of Appeals majority.

On 1 September 2005, plaintiff Applewood Properties, LLC sold a parcel of land located adjacent to the Apple Creek Executive Golf Club, LLC to defendants New South Properties, LLC and Apple Creek Village, LLC for development as a residential community. Subsequently, New South hired defendant Urban Design Partners to design erosion control measures, site plans, storm water collection and control systems, and utilities for the project. On 15 September 2005, New South obtained approval of its erosion and sedimentation control plan from the Gaston County Natural Resources Department (“GNRD”). New South then hired defendant Hunter Construction Group, Inc. to prepare the parcel for construction of new homes in accordance with the approved plan. Hunter cleared and graded the parcel and built erosion control structures and devices, including a silt collection basin.

On 28 March 2006, the GNRD inspected the parcel and found that New South had “[f]ail[ed] to [t]ake [a]ll [r]easonable [m]easures” to control erosion and

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sedimentation as required by Title 15A, Chapter 04B, Section .0105 of the North Carolina Administrative Code. The GNRD indicated in its report that corrective actions were necessary, including “a revision with an added berm with stone wier to the draw in the center of the property to reduce the concentrated flow to the basin that is it’s [sic] outlet.” The GNRD sent New South a “Notice of Non-Compliance,” which informed New South of its “[f]ailure to take all reasonable measures” and mandated that it take the aforementioned corrective actions by 11 April 2006. New South forwarded the notice to Hunter and instructed the contractor to correct the problems. After inspecting the parcel again on 5 May 2006, the GNRD found that the site was in compliance with the SPCA, but indicated that additional corrective actions were needed, including “[m]ak[ing] sure all basins are cleaned and maintained, per our conversation.”

On 27 June 2006, a dam that Hunter had constructed to form the silt collection basin ruptured, causing mud, water, and other debris to flood the golf course. The GNRD inspected the parcel and found that New South had taken “Insufficient Measures to Retain Sediment on Site” in violation of section 113A-57(3) of the North Carolina General Statutes and had “Fail[ed] to Take All Reasonable Measures” to control erosion and sedimentation. The GNRD noted in its report that sediment damage had occurred as a result of “Offsite sediment [being deposited] onto [the] neighboring golf course.” The GNRD issued a “Notice of Non-Compliance” to New South, which informed New South of these findings and

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mandated that the company take corrective action, including “Restor[ing] adequate [sic] sediment control measures, to retain sediment on site” by 6 July 2006. New South continued to forward these notices to Hunter.

Representatives from Hunter visited the site to assess the damage, and they told New South’s project manager that “they were going to take care of it.” Although Hunter initially undertook some cleanup and repair work following the rupture, it ultimately suspended its efforts several weeks later before completing the work. As a result, the silt collection basin repeatedly overflowed in the ensuing months, depositing more mud and silt onto the golf course. The GNRD issued New South another “Notice of Non-Compliance” on 13 July 2006, indicating that the company had “Fail[ed] to submit [a] revised Plan” that showed the “changes to topography and drainage area” that had occurred on the parcel. On 23 August 2006, the GNRD again issued New South a “Notice of Non-Compliance,” indicating that the company had failed to: (1) “submit [a] revised Plan”; (2) “provide adequate ground cover”; (3) “take all reasonable measures”; and (4) “maintain erosion control measures.” The GNRD also mandated corrective actions, including submission of a revised plan.

New South submitted a revised plan to the GNRD, but on 8 September 2006, the GNRD “disapproved” the plan. Nonetheless, on 25 October 2006, the Gaston County Environmental Review Board “resolved that no further action [wa]s

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required on [the] site, provided that vegetation [wa]s established and [the] site [wa]s adequate to retain sediment on site for the purpose of water quality.” Meanwhile, the GNRD continued to issue “Notice[s] of Non-Compliance” to New South through March 2009. In addition, on 8 January 2007, the North Carolina Division of Water Quality issued New South a “Notice of Violation” for failing to comply with the “State General Stormwater Permit” that was issued along with its approved erosion and sediment control plan.

As a result of the damage to the golf course, on 4 December 2006, plaintiffs filed an action against New South, Apple Creek Village, and Hunter, asserting claims of negligence, nuisance, trespass, violations of the SPCA, negligence per se, and intentional misconduct and gross negligence. Plaintiffs added Urban Design as a defendant on 17 April 2009. On 3 August 2009, Hunter moved for partial summary judgment on the SPCA claim. Apple Creek Village also moved for partial summary judgment, and New South moved for summary judgment on all claims against it. On 16 April 2010, the trial court granted these defendants’ motions for summary judgment on the SPCA claim, but denied the motions as to all other claims.

The remaining claims were heard in the Superior Court, Gaston County beginning on 19 April 2010. At the conclusion of the evidence, the jury found that plaintiffs were damaged by defendants’ negligence and concluded that plaintiffs

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were entitled to \$675,000.00 in damages. On 10 June 2010, the trial court entered its judgment, awarding plaintiffs \$675,000.00 in damages.

On 23 September 2010, plaintiffs appealed the trial court's order granting defendants' motions for summary judgment on the SPCA claim. Subsequently, plaintiffs filed a motion to withdraw their appeal against all defendants except Hunter. The Court of Appeals allowed plaintiffs' motion on 1 July 2011. The Court of Appeals later affirmed the trial court's order in a divided opinion. *Applewood Props., LLC v. New S. Props., LLC*, ___ N.C. App. ___, 725 S.E.2d 360 (2012). The majority concluded that the SPCA did not apply because "a 'land-disturbing activity' requires an element of deposition into a body of water" and there was no evidence in this case that sediment had been deposited into a body of water. *Id.* at ___, 725 S.E.2d at 362. The dissent disagreed and argued that the relevant statutory provisions indicate that "a 'land-disturbing activity' subject to the provisions of the SPCA is one which 'may cause or contribute to sedimentation,' rather than one which actually does result in sedimentation." *Id.* at ___, 725 S.E.2d at 366 (Ervin, J., dissenting) (citation omitted). Therefore, the dissent concluded that sedimentation "cannot be understood to incorporate a deposition into a body of water requirement." *Id.* at ___, 725 S.E.2d at 366 (quotation marks omitted).

Plaintiffs appealed to this Court as of right pursuant to section 7A-30(2) of the North Carolina General Statutes. Without considering the merits of plaintiffs'

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appeal, we conclude that plaintiffs lacked standing to bring an SPCA claim against Hunter.

Whether plaintiffs had standing to bring an SPCA claim against Hunter hinges on the proper interpretation of section 113A-66 of the North Carolina General Statutes, which provides injured persons a private cause of action pursuant to the SPCA. As a result, “[t]his matter presents a question of statutory interpretation, which we review de novo. The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent.” *Dickson v. Rucho*, ___ N.C. ___, ___, 737 S.E.2d 362, 368 (2013) (citations and internal quotation marks omitted). It is well settled that:

[W]hen the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment. In these situations, the history of the legislation may be considered in connection with the object, purpose and language of the statute in order to arrive at its true meaning. However, [w]hen the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required.

In re Foreclosure of Vogler Realty, Inc., 365 N.C. 389, 392, 722 S.E.2d 459, 462 (2012) (alterations in original) (citations and internal quotation marks omitted).

Subsection 113A-66(a) states in pertinent part:

(a) Any person injured by a *violation* of this Article or any ordinance, rule, or order duly adopted by the Secretary or a local government, or by the initiation or

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continuation of a land-disturbing activity for which an erosion and sedimentation control plan is required other than in accordance with the terms, conditions, and provisions of an approved plan, may bring a civil action against the person alleged to be in *violation* (including the State and any local government). The action may seek any of the following:

- (1) Injunctive relief.
- (2) An order enforcing the law, rule, ordinance, order, or erosion and sedimentation control plan *violated*.
- (3) Damages caused by the *violation*.

N.C.G.S. § 113A-66(a) (2011) (emphases added). The plain language of subsection 113A-66(a) indicates that the legislature intended to provide injured persons a private cause of action when there has been a *violation* of: (1) the SPCA; (2) a relevant ordinance, rule, or order; or (3) an erosion and sedimentation control plan. The first clause of subsection 113A-66(a) unambiguously states that a private cause of action will lie when there has been a violation of the SPCA or a relevant ordinance, rule, or order. Although the term “violation” does not appear in the second clause of subsection 113A-66(a), the legislature’s use of the term “violated” in subdivision 113A-66(a)(2), which also refers to “law, rule, ordinance, [and] order,” demonstrates the General Assembly’s intent that a *violation* of, rather than mere noncompliance with, an erosion and sedimentation control plan must have occurred to give rise to a private cause of action pursuant to this clause. *See id.* § 113A-66(a)(2). Furthermore, the directive in subsection 113A-66(a) that injured persons “may bring a civil action against the person *alleged to be in violation*” evidences the

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legislature’s intent that a defendant actually have been cited for a violation before a private cause of action can arise. *See id.* § 113A-66(a) (emphasis added). “We presume that the General Assembly carefully chose each word used in drafting the legislation.” *Dickson*, ___ N.C. at ___, 737 S.E.2d at 371 (internal quotation marks omitted). The legislature could have used the word “noncompliance,” or another broader term to describe the conduct necessary to trigger a private cause of action, but chose not to do so. Instead, it opted to use the narrow term “violation.” As such, we conclude that the legislature intended to create a private cause of action only when the defendant has been cited for a violation pursuant to the SPCA.

This interpretation is consistent with our decision in *Holly Ridge Associates, LLC v. North Carolina Department of Environment & Natural Resources*, in which we recognized that an aggrieved party might be entitled to bring a civil action pursuant to section 113A-66 in a case in which the defendant had been cited for a violation of the SPCA. *See* 361 N.C. 531, 533, 538, 648 S.E.2d 830, 833, 836 (2007) (stating that the defendant previously had received “a Notice of Violations of” the SPCA and had been assessed a civil penalty by the Department of Environment and Natural Resources and observing that the intervening parties’ “allegations of injury could be an appropriate basis . . . to file a private claim under the SPCA”). Moreover, this interpretation does not leave an injured person without recourse when the offending party has not been cited for a violation because the injured person alternatively may bring a traditional tort action in nuisance for any damages

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caused by the offending party's actions. In fact, in the case *sub judice* plaintiffs did pursue such a successful claim. Therefore, we hold that for an injured person to have standing to bring a civil action against a defendant pursuant to section 113A-66, the defendant previously must have been cited for a *violation* of a law, rule, ordinance, order, or erosion and sedimentation control plan as described by this section. Were we to hold otherwise, a defendant could be subject to civil liability pursuant to the SPCA even if its actions had not risen to the level of a violation.¹ The legislature certainly did not intend such an absurd result, especially in cases such as this in which the enforcing agency has given the offending party an allotted time period in which to take corrective actions before being subjected to any penalties pursuant to the SPCA. *See Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 494, 467 S.E.2d 34, 41 (1996) (“[T]h[is] Court will, whenever possible, interpret a statute so as to avoid absurd consequences.” (quotation marks omitted)).

In the case *sub judice* it is apparent that the GNRD issued New South numerous “Notice[s] of Non-Compliance” during the eight months leading up to the filing of plaintiffs’ SPCA claim. These notices were sent to New South, but not Hunter, and informed the recipient of numerous violations of relevant ordinances, statutes, and administrative code provisions and recommended appropriate corrective actions. Although the GNRD repeatedly warned New South about these

¹ In the instant case, this holding is even more compelling because the notices of noncompliance were issued to New South, rather than Hunter. As such, Hunter never was directly put on notice that it potentially could be held responsible for any of the violations.

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violations, neither New South nor Hunter ever was issued a “Notice of Violation” before plaintiffs initially brought their SPCA claim.² Instead, the GNRD repeatedly informed New South that it would have the opportunity to take corrective actions within a specified time period before being subject to any penalties pursuant to the SPCA. Although it is notable that none of these “Notice[s] of Non-Compliance” were directed at Hunter, that fact is immaterial in the case before us. Because Hunter never was cited for a violation, we must conclude that plaintiffs lacked standing to bring a civil action against Hunter pursuant to section 113A-66. Therefore, the trial court properly granted defendants’ motions for summary judgment on plaintiffs’ SPCA claim against Hunter. Accordingly, we modify and affirm the opinion of the Court of Appeals majority.

MODIFIED AND AFFIRMED

Justice BEASLEY did not participate in the consideration or decision of this case.

² As we have noted, the record indicates that the Division of Water Quality issued New South a “Notice of Violation” for failing to comply with the “State General Stormwater Permit” on 8 January 2007, nearly one month after plaintiffs brought their SPCA claim on 4 December 2006. Since this notice was issued after plaintiffs filed their original complaint, it could not have conferred standing on plaintiffs to bring their SPCA claim on 4 December 2006. However, we also note that the record indicates that plaintiffs filed an amended complaint on 17 April 2009, well after New South was issued the “Notice of Violation.” Nevertheless, we need not decide the effect of plaintiffs’ amended complaint because the “Notice of Violation” was issued to New South, and we are concerned only with plaintiffs’ standing to sue Hunter in the case *sub judice*.

Justice EDMUNDS dissenting.

I believe the majority opinion incorrectly restricts the reach of N.C.G.S. § 113A-66(a) by giving State and local agencies gatekeeping powers nowhere found or implied in Chapter 113A. Under the majority's interpretation, a plaintiff may not seek redress against a party under this statute unless a violation notice has been issued to that party. In other words, a plaintiff must wait and see whether a governmental body such as the GNRD or the North Carolina Division of Water Quality will exercise its unbridled discretion to issue a violation notice before that plaintiff can bring a civil action under section 113A-66. Applying that reasoning here, the majority concludes that, because the GNRD chose for whatever reason not to issue a notice of violation to defendant Hunter, plaintiff has no recourse and simply has to write off section 113A-66 as a source of relief. I find problematic the majority's holding that the statute is triggered not by a plaintiff's injury but by an administrative decision whether to issue a violation notice. Allowing an injured plaintiff to seek redress is not an "absurd result" as the majority states; rather, it is precisely what the statute allows.

In its analysis, the majority misreads subsection 113A-66(a). That statute creates two bases for a claim. The first applies when a plaintiff is "injured by a violation of this Article or any ordinance, rule, or order duly adopted by the Secretary or a local government." N.C.G.S. § 113A-66(a) (2011). The second applies

when a plaintiff is injured “by the initiation or continuation of a land-disturbing activity for which an erosion and sedimentation control plan is required other than in accordance with the terms, conditions, and provisions of an approved plan.” *Id.* Under either circumstance, an injured plaintiff may bring suit using subsection 113A-66(a) “against the person alleged to be in violation.” *Id.* The statute as written does not require plaintiff to await action by the GNRD or by anyone else. Here, relying on the second basis, the injured plaintiff brought suit against a defendant alleged to be “engaged in land-disturbing activity . . . without installing erosion and sedimentation control devices” and “without filing or complying with erosion and sedimentation control plans with the governing agency.” This allegation is sufficient to confer standing.

The gatekeeping function created today serves to limit the remedies available to an injured plaintiff. *Holly Ridge Associates, LLC v. North Carolina Department of Environment & Natural Resources*, 361 N.C. 531, 648 S.E.2d 830 (2007), cited by the majority, is not to the contrary. In *Holly Ridge*, the defendant had already been issued Notices of Violations and assessed several civil penalties by the time suit was brought under the Sedimentation Pollution Control Act. *Id.* at 533-34, 648 S.E.2d at 833. Consequently, *Holly Ridge* gives little guidance in the case at bar.

Because I believe that subsection 113A-66(a) gives plaintiff standing, I respectfully dissent from the majority holding.

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EDMUNDS, J., dissenting

Justice HUDSON joins in this dissenting opinion.



North Carolina Department of Environment and Natural Resources
Division Energy, Mineral, and Land Resources
Land Quality Section

Tracy E. Davis, PE, CPM
Director

Beverly Eaves Perdue, Governor
Dee Freeman, Secretary

October 31, 2012

Gaston County
Attention: Joseph D. Alm, CPESC, CPSWQ, CFM
1303 Cherryville Hwy
Dallas, NC 28034

Subject: Sedimentation and Erosion Control Local Program Review

Dear Mr. Alm:

On October 9, 2012, Zahid Khan, Ryan Kormanik, and Matt Poling conducted a review of Gaston County's Local Program. Two staff members work full time in the erosion control program. The County has 174 active projects. The County has reviewed 39 plans, with 39 approvals, and has conducted 947 inspections, issued 7 notices of violations, and assessed 7 civil penalties in the past 12 months. Four projects were reviewed.

The following is a summary of the projects that were inspected:

1. CTL Packaging USA

This site is a 23 acre industrial project. The file for this project included a FRO, inspection reports, calculations, and an approval letter. The erosion and sediment control plan was approved and was found to be adequate. The last inspection was on 10/5/2012 and the site was out of compliance. The site has not received a Notice of Violations. The site was active at the time of the inspection and was in compliance.

Comments:

- 1) Provide adequate ground cover on all bare and inactive areas.
- 2) Ensure all slopes are tracked perpendicular to the slope.

2. Mattamy Homes

This site is a 7 acre residential project. The file for this project included a FRO, inspection reports, calculations, and an approval letter. The erosion and sediment control plan was approved and was adequate. The last inspection was on 10/2/2012 and the site was called out of compliance. The site was under a Notice of Violations that was issued on 10/2/2012. The site was active at the time of the inspection and was out of compliance. Violations included failure to follow approved plan, failure to provide

adequate groundcover, insufficient measures to retain sediment on site, failure to take all reasonable measures, and failure to maintain measures.

Corrective Actions:

- 1) Mulching throughout site is inadequate; please use the correct application rate that is stated in the North Carolina Erosion and Sediment Control Planning and Design Manual.
- 2) Maintain and repair all inlet protection throughout site.
- 3) Home Site #78 needs additional measures at the back of the property to prevent further offsite sedimentation.
- 4) Provide adequate ground cover on all bare and inactive areas.

3. Lanxess

This site is a 11.9 acre industrial project. The file for this project included a FRO, inspection reports, check, calculations, and an approval letter. The erosion and sediment control plan was approved and was adequate. The last inspection was on 9/19/2012 and the site was in compliance. The site has not received a Notice of Violations. The site was active at the time of the inspection and was in compliance.

Comments:

- 1) Continue to provide adequate ground cover on all bare and inactive areas.
- 2) Ensure all slopes are tracked perpendicular to the slope.

4. Dixon

This site is a 9.8 acre institutional project. The file for this project included correspondence, FRO, inspection reports, check, calculations, and an approval letter. The erosion and sediment control plan was approved and was found to be adequate. The last inspection was on 10/8/2012 and the site was out of compliance. The site was actively being graded at the time of the inspection and was out of compliance. Violations included failure to follow approved plan, insufficient measures to retain sediment on site, failure to take all reasonable measures, and failure to maintain measures.

Corrective Action:

- 1) Install an adequate construction entrance to retain sediment on site.
 - 2) Install/repair/maintain all inlet protection throughout site.
 - 3) Grading has occurred outside the limits of disturbance. Please submit a revised plan to the county showing such activities.
 - 4) Provide adequate ground cover on all bare and inactive areas.
-
- 1) Comment: Recommend issuing a Notice of Violation for this project.

Conclusion:

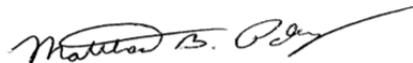
The Gaston County's Local Program is visiting sites on a frequent basis, which is appreciated. The local program should implement the following recommendations to improve the program:

- 1) Continue requiring that adequate ground cover is provided within the time limits of the local ordinance and approved plan.
- 2) Continue to check for self-inspection records on site.
- 3) Please reference the North Carolina General Statutes and the North Carolina Administrative Code next to each possible violation on the sedimentation inspection report in addition to the citation of the corresponding county ordinance.

A summary of the review will be presented to the Sedimentation Control Commission (SCC) on November 14, 2012. Staff will recommend continued delegation contingent upon implementing the above recommendations. Thank you again for the efforts of you and your staff to protect the State's waters from sedimentation.

Sincerely,

T. Gray Hauser, Jr., PE
State Sedimentation Specialist



Matthew B. Poling, PE
Assistant State Sedimentation Specialist

cc: Zahid Khan, Mooresville Regional Engineer

SEDIMENTATION AND EROSION CONTROL LOCAL PROGRAM REVIEW

October 16, 2013

GENERAL

Local Government: Gaston County
County: Gaston
Contact Person: Joseph Alm
Address:
Phone Number: 704.922.2157
Fax Number:
Email Address: joseph.alm@co.gaston.nc.us

Date of Review: October 16, 2013
Land Quality Staff Present: Ryan Kormanik, Environmental Senior Specialist, James Moore, Assistant Regional Engineer
Local Program Staff Present: Joseph Alm, James Cook
Number of Staff: 2 Full Time Equivalents: 2

Number of Current Projects: 218 (172 are <1 acre, 46 are >1 acre)
Number of Inspections per Year: (January 1, 2013-Present) 992

PLAN REVIEWS (JANUARY 1, 2013-PRESENT)

Number of Plan Approvals: 39 Number of Plan Disapprovals: 0
Total Number of Plan Reviews: 39
Maximum Length of Plan Review Time (Days): 30, Average 8 days
Person(s) Reviewing Plans and Qualifications: James Cook, CPESC and Joseph Alm, CPESC

ENFORCEMENT (JANUARY 1, 2013-PRESENT)

Notices of Violation Issued: 17
Civil Penalties Assessed: \$5100, \$4050 collected
Stop Work Orders Issued: 0
Have Civil Penalty Assessment Guidelines Been Adopted?: Yes
Is Local Ordinance Current and as Stringent as SPCA? Yes

LOCAL PROGRAM PROJECT INSPECTIONS

PROJECT NAME: SUMMIT CROSSING, PHASE IV

Type: Commercial

Disturbed Acreage: 12.1

Weather and Soil Conditions: Sunny, workable soils

Is the site under a Notice of Violation?: No Any Past NOV's?: No

Is the site in compliance with the local ordinance and SPCA?: Yes

If not, describe

Does the site have an approved plan?: Yes Is the plan adequate?: Yes

If not, describe:

Does the file contain adequate documentation?: Yes

Describe: File contains properly filled out FR/O, adequate fees, calculations, narrative, approval letter, dates of inspections and compliance status.

COMMENTS: The site was inspected by James Cook on October 11, 2013 and shown in compliance. The site was in compliance at the time of inspection.

PROJECT NAME: LONG CREEK APARTMENTS

Type: Residential

Disturbed Acreage: 9

Weather and Soil Conditions: Sunny, workable soils

Is the site under a Notice of Violation?: No Any Past NOV's?: Yes (6/3/10)

Is the site in compliance with the local ordinance and SPCA?: No

If not, describe: Inlet protections at the rear of the project have been impacted by recent electrical work and need to be restored. The skimmer basin in the front of the site has not been installed, instead two sediment traps in series have been installed.

This configuration does not meet the requirements of the NPDES requirements.

Does the site have an approved plan?: Yes Is the plan adequate?: Yes

If not, describe:

Does the file contain adequate documentation?: Yes

Describe: File contains properly filled out FR/O, adequate fees, calculations, narrative, approval letter, dates of inspections and compliance status.

COMMENTS: This site was inspected on October 10, 2013 and was noted out of compliance. Several of the issues noted in the inspection report have been corrected, however the need of a revised plan for the modified basin with appropriate calculations as was requested is being developed.

LOCAL PROGRAM PROJECT INSPECTIONS

PROJECT NAME: ROSEGATE PHASE III

Type: Residential

Disturbed Acreage: 27

Weather and Soil Conditions: Sunny, workable soils

Is the site under a Notice of Violation?: No Any Past NOV's?: No

Is the site in compliance with the local ordinance and SPCA?: No

If not, describe: All basins were in need of maintenance including sediment removal, baffle repairs and skimmer maintenance. Inlet protections need refreshing. Sediment bags in drop inlets are full and need to be emptied. Diversion ditches need to be constructed in a manner which will allow establishment of ground cover. Repair all rills/wash outs throughout the site and stabilize. Various stockpiles and slopes need to be stabilized.

Does the site have an approved plan?: Yes Is the plan adequate?: Yes

If not, describe:

Does the file contain adequate documentation?: Yes

Describe: File contains properly filled out FR/O, adequate fees, calculations, narrative, approval letter, dates of inspections and compliance status.

COMMENTS: This site was inspected on October 14, 2013 and was noted as out of compliance. The inspection gave a timeline of October 24, 2013 for compliance. Recommend a compliance inspection at that time, and if the site is not in compliance a Notice of Violation would be recommended.

SUMMARY

Joseph and James are doing a great job overseeing all the active projects. The projects are inspected at least once every 30 days, more if needed. The documentation is very thorough and the communications with engineers, FR/O's and site personnel are done in a professional manner.

Local Program Report to the SCC

Gaston County

The Gaston County program was reviewed May 20, 2009. Currently a staff of 4 contributes an equivalent of 3.7 full time equivalents to erosion control. There were currently 140 projects. Last year the staff approved 71 new projects and conducted 1230 inspections.

Five projects were evaluated. Three projects were found to be noncompliant with the local ordinance and SPCA as noted in recent inspection reports.

Dollar General of Gastonia, a 1.7 acre commercial site, was found to have maintenance issues and needed to establish groundcover.

Apple Creek Village was a 54 acre residential site with a history of NOVs. Off-site sediment damage was observed during the review. There was a recent NOV for failure to establish groundcover, exposed slopes, and failure to maintain measures. A civil penalty for \$4,000 was assessed, which was appealed and upheld—payment has not been made.

Evergreen Landing Apartments was a 7.48 acre residential site that was noncompliant with the local ordinance and SPCA. From field inspection it was determined that the plan was inadequate because it failed to address various phases of the project and the construction sequence didn't adequately address grading/fill with respect to the stream crossing and retaining wall. The slopes of the sediment basin needed stabilization and sediment in the creek/drainage way needed removal.

Documentation of plan reviews, inspections and enforcement actions was good. An integrated data management and word processing system generated inspection reports, all correspondence and a complete record for all sites as well as corresponding photo documentation to document activity.

Continued delegation of the program is recommended.

Summary of the Applewood Site, Gaston County

A residential subdivision was being built above the site of a new golf course. A sediment basin on the subdivision site failed along the barrel pipe, with sediment being deposited across a fairway on the golf course. Mr. Danon Lawson was the inspector for the Gaston County Department of Natural Resources. The developers assured him that anti-seep collars had been installed along the barrel pipe according to the approved plan. The sediment basin was rebuilt. Mr. Lawson issued a non-compliant inspection report, but did not issue a Notice of Violation. His reasoning was that the basin had failed despite being built according to the approved plan.

Later, Mr. Lawson and the Gaston County Department of Natural Resources recommended to the Gaston County Environmental Review Board that the residential developer be ordered to restore the sediment damage on the golf course. The Environmental Review Board agreed, and required restoration, however the landowner and board did not agree on the level of restoration needed as the neighboring waters were not impacted.

The golf course developer filed a civil action against the residential developer for damages from the sedimentation. The NC Court of Appeals ruled against collecting damages under the provisions of the SPCA because damages had occurred to land, not waters. The case was appealed to the NC Supreme Court. At the request of DENR, the Attorney General's Office filed a brief arguing that the SPCA allowed for restoration of sediment damage to land as well as water. The Supreme Court ruled against the golf course developer on the grounds that a violation of the SPCA had not been established because a Notice of Violation was not issued. The issue of requiring restoration of sedimentation damage to land was considered moot, and not addressed by the NC Supreme Court.

All local programs, including Gaston County have been advised that a Notice of Violation must be issued to establish a violation. Local programs have been advised to stop using documents called Notice of Non-Compliance, since they do not satisfy the requirements of the SPCA.

Dear Mr. Ratchford,

Thank you for your email to the Sedimentation Control Commission (Commission) dated December 12, 2013. The Commission appreciates the nature and significance of your concerns and regrets the unfortunate events that prompted your email. The Commission takes very seriously its responsibility to ensure that the Sedimentation Pollution Control Act (SPCA) is properly administered and enforced. In response to the North Carolina Supreme Court's opinion in Applewood Properties, LLC v. New South Properties, LLC, and addressing the concerns expressed in your email, the Commission has educated local governments administering erosion and sedimentation control programs on the Applewood decision and has reviewed the Commission's records on the Gaston County local program for indications that Gaston County has failed to properly administer the SPCA.

The Commission believes any potential problems with local program enforcement of the SPCA based on the Court's decision in Applewood can and have been resolved by educating local program staff. Staff members representing fifty local programs attended the Local Program Erosion and Sedimentation Control Workshop. At the workshop, the Applewood decision was presented and local program staff members were informed that, absent a notice of violation, no private right of recovery under the SPCA exists. Staff from the Land Quality Section encouraged local programs to issue a notice of violation any time off-site sedimentation occurs.

Although this training comes too late to alleviate the circumstances that lead to the Court's decision in Applewood, the Commission believes the training will prevent similar occurrences in the future. The Commission's goal in providing training and support to local programs is to effectuate consistent, informed and effective enforcement of the SPCA. Although your letter suggests that the Applewood decision "raises the threshold beyond the ability of Local Authorities to comply," the Commission is confident that local program officials have been properly educated on the significance of the Applewood decision and that local programs are capable of providing fair and consistent administration of the SPCA.

The Commission has examined reviews of the Gaston County local program conducted by DEMLR. Since 2006, DEMLR has reviewed the Gaston County local erosion and sedimentation control program in 2009, 2012 and 2013. DEMLR presented the results of each review to the Commission and each time the Commission voted to continue Gaston County's delegation. The results of the DEMLR reviews demonstrate that Gaston County is appropriately and adequately enforcing the SPCA. The Commission will continue to review periodically the Gaston County local program and all other delegated local programs to ensure that the SPCA is properly administered.

Your email urged the Commission to consider several courses of action that the Commission lacks the authority to pursue. The power to restructure the Department of Environment and Natural Resources (DENR), dissolve Gaston County Natural Resources, and eliminate local government authority to administer erosion and sedimentation control programs, lies with the Secretary of Environment and Natural Resources, Gaston County, and the General Assembly, respectively.

While only the General Assembly can eliminate local government authority under the SPCA, the Commission would not recommend such a change because the Commission recognizes the benefit and necessity of local government administration of the SPCA. Local erosion and sedimentation control programs are vital to the enforcement of the SPCA because local governments are better equipped to address problems unique to their respective communities. Further, despite a dedicated and hard-working staff, DEMLR's Land Quality Section lacks the resources to administer the SPCA within the more than fifty jurisdictions currently served by local programs throughout the State in addition to its current responsibilities.

The Commission will continue to monitor the administration of the SPCA, including the administration of the SPCA by those local governments with delegated programs.

Sincerely,

Robin K. Smith

Chairman, NC Sedimentation Control Commission

Cc: Office of Governor Pat McCrory
Office of US Congressman Patrick McHenry
NC Senator Kathy Harrington
NC Representative Kelly Hastings
NC Institute of Local Government
Office of NC Attorney General Roy Cooper