

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
22 EHR 01337

<p>The Umstead Coalition, Petitioner,</p> <p>v.</p> <p>North Carolina Department of Environmental Quality Division of Water Resources, Respondent.</p>	<p style="text-align: center;">ORDER DENYING RESPONDENT’S MOTION FOR SUMMARY JUDGMENT AND GRANTING PETITIONER’S MOTION FOR RECONSIDERATION</p>
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THIS MATTER comes before the Undersigned pursuant to Respondent’s Motion for Summary Judgment (the “Motion”), filed in the Office of Administrative Hearings on September 19, 2022. Petitioner timely filed a response to the Motion on September 29, 2022, in which Petitioner asked for reconsideration of the Undersigned’s June 8, 2022 Order of Partial Dismissal. Respondent’s reply was filed on October 3, 2022. The motion came on for hearing before the Undersigned on October 11, 2022. All parties having been given the opportunity to be heard, the matter is now ripe for disposition.

Upon consideration of the Motion for Summary Judgment and Petitioner’s request to reconsider, the parties written and oral arguments, and other matters of record, the Undersigned hereby DENIES Respondent’s Motion for Summary Judgment and GRANTS Petitioner’s Motion for Reconsideration.

BACKGROUND

Petitioner is a nonprofit organization that advocates for preservation of the natural integrity of the William B. Umstead State Park (the “Park”). Petitioner is a membership organization whose members regularly use and visit the Park. Respondent is the State agency responsible for implementing and enforcing the State’s water quality and riparian buffer rules. Wake Stone Corporation (“Wake Stone”) is a mining company that owns and operates the Triangle Quarry in Cary, North Carolina.

In 2020, Wake Stone applied to the North Carolina Department of Environmental Quality, Division of Energy, Mineral, and Land Resources (“DEMLR”) to expand its quarry operation to a 106 acre tract of land known as the Odd Fellows Tract. The Odd Fellows Tract is adjacent to the Park and is separated from the current Triangle Quarry by Crabtree Creek.

To expand its quarrying operation, Wake Stone also submitted an application to Respondent to construct a bridge spanning Crabtree Creek so that it could transport aggregate from

the quarry expansion to the mining machinery at the Triangle Quarry, such as its primary crusher. Crabtree Creek is subject to the Neuse River Riparian Buffer Protection Rules. The Buffer Rules are designed to maintain and protect the riparian buffers of subject waterbodies. Riparian buffers are vegetative areas adjacent to waterbodies. Wake Stone's mining expansion application was denied, but it was granted a Neuse River Riparian Buffer Authorization Certificate (the "2020 Authorization Certificate") on June 4, 2020.

The 2020 Authorization Certificate allowed Wake Stone to construct its bridge across Crabtree Creek provided it were granted the appropriate mining permit. Under the 2020 Authorization Certificate, Wake Stone was granted permission to disturb 12,049 square feet of the riparian buffer of Crabtree Creek. Upon the issuance of the 2020 Authorization Certificate, Petitioner filed a Petition for a Contested Case Hearing in the Office of Administrative Hearings, arguing that Respondent failed to comply with the applicable rules and statutes when it issued the certificate ("*Umstead I*").

Petitioner's appeal of the 2020 Authorization Certificate was resolved after a contested case hearing on February 17-19, 2021. In *Umstead I*, this Tribunal reversed the 2020 Authorization Certificate in a Final Decision on September 27, 2021, citing Respondent's failure to provide any findings of fact to support its approval. Neither party appealed the 2021 Final Decision.

On October 13, 2021, Wake Stone submitted a second application to Respondent to build a bridge across Crabtree Creek. The proposed bridge would disturb 12,049 square feet of Crabtree Creek's riparian buffer. Thereafter, Respondent issued a second authorization certificate (the "2022 Authorization Certificate") to Wake Stone. Petitioner appealed the issuance of the 2022 Authorization Certificate by filing a Petition for a Contested Case Hearing in the Office of Administrative Hearings on April 11, 2022.

Approximately one month later, on May 12, 2022, Respondent filed a Motion for Partial Dismissal, seeking to dismiss several claims raised by Petitioner on the basis of collateral estoppel. Petitioner timely filed a response to the Motion for Partial Dismissal on May 23, 2022. Respondent filed a reply on May 25, 2022. The Undersigned granted the Motion for Partial Dismissal on June 8, 2022.

On September 19, 2022, after the parties engaged in settlement negotiations and a lengthy discovery period, Respondent filed a Motion for Summary Judgment. Petitioner timely filed a response on September 29, 2022, and Respondent filed its reply on October 3, 2022. In Petitioner's written response, Petitioner sought reconsideration of this Tribunal's June 8, 2022 Order of Partial Dismissal. The Motion for Summary Judgment came on for hearing before the Undersigned on October 11, 2022. At the hearing, Petitioner orally moved for reconsideration of the Tribunal's June 8, 2022 Order of Partial Dismissal.

DISCUSSION

Motion to Reconsider

On May 12, 2022, Respondent moved to dismiss several of Petitioner's claims on the basis of collateral estoppel.¹ Petitioner timely filed a response to the motion to dismiss on May 23, 2022, and Respondent was granted leave to file a reply. The Undersigned granted Respondent's Motion for Partial Dismissal on June 8, 2022. Upon consideration of the parties' written and oral arguments, the Undersigned hereby GRANTS Petitioner's Motion to Reconsider.

Collateral estoppel, or issue preclusion, is "designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally." *McCallum v. N.C. Co-op Extension Serv. of N.C. State Univ.*, 142 N.C. App. 48, 51, 542 S.E.2d 227, 231 (2001) (citations and internal quotation marks omitted). Under this doctrine, the parties may not retry fully litigated issues that have been decided in any prior determination, even where the claims or causes of action differ. *Id.* (citation omitted). However, collateral estoppel only "extends to the facts in issue as they existed at the time the judgment was rendered and does not prevent a re-examination of the same questions between the parties when in the interval the facts have changed or new facts have occurred which may alter the legal rights . . . of the litigants." *Flynt v. Flynt*, 237 N.C. 754, 757, 75 S.E.2d 901, 903 (1953).

To prevail, "[t]he party alleging collateral estoppel must demonstrate that the earlier suit resulted in a final judgment on the merits, that the *issue in question was identical to an issue actually litigated and necessary to the judgment*, and that both the party asserting collateral estoppel and the party against whom collateral estoppel is asserted were either parties to the earlier suit or were in privity with parties." *McElhaney v. Orsbon & Fenninger, LLP*, 278 N.C. App. 214, 2021-NCCOA-301, ¶ 25 (citation omitted) (emphasis in original). In other words, there are three elements: (1) the earlier suit resulted in a final judgment, decided on the merits; (2) the issue in question was identical to an issue that was actually litigated and necessary to the final judgment; (3) the parties are the same or are in privity with the earlier parties. *See id.*

Here, there was no dispute over whether the earlier suit resulted in a final judgment and was decided on the merits. Nor was there a dispute over whether the parties are the same. The issues presented by Respondent's Motion for Partial Dismissal were whether the issues in question are identical to those litigated in the prior proceeding and whether the issues involved were necessary to the final judgment.

"For issues to be considered 'identical' to ones 'actually litigated and necessary' to a previous judgment: (1) the issues must be the same as those involved in the prior action, (2) the issues must have been raised and actually litigated, (3) the issues must have been material and relevant to the disposition of the prior action, and (4) the determination of the issues in the prior action must have been necessary and essential to the resulting judgment." *Id.* (citations omitted). The party asserting collateral estoppel has the burden of showing "with clarity and certainty" what was determined by the prior final judgment. *Id.*

¹ "The doctrine of collateral estoppel generally applies to administrative decisions." *Hillsboro Partners, LLC v. City of Fayetteville*, 226 N.C. App. 30, 36, 738 S.E.2d 819, 824 (2013) (citation omitted).

Petitioner argues that the 2022 Authorization Certificate is a different agency action that must be examined on its own merits to determine whether it was issued in compliance with applicable law and procedure. Petitioner further argues that certain Findings of Fact included in the September 27, 2021 Final Decision were not necessary to the ultimate judgment. Notably, the facts and issues presented by *Umstead I* and the present contested case are remarkably similar. However, the Undersigned notes that the *Umstead I* Final Decision reversed the 2020 Authorization Certificate *in toto* for Respondent's failure to make the requisite Findings of Fact to support its decision. While Respondent points out several findings of fact included within the Final Decision, the Undersigned finds that Respondent failed to meet its burden in showing these fact findings were necessary to the Tribunal's final decision reversing the 2020 Authorization Certificate for Respondent's failure to comply with the plain language of its own rules.

In consideration of the fact that the 2022 Authorization Certificate has an independent agency record, the Undersigned hereby GRANTS Petitioner's Motion for Reconsideration and DENIES Respondent's Motion to Dismiss.

Motion for Summary Judgment

On September 19, 2022, Respondent moved for summary judgment on the claims not dismissed by the Tribunal's June 8, 2022 Order: the width and size of the bridge, and whether there are practical alternatives to the bridge design. Petitioner timely filed a response on September 29, 2022, and Respondent was granted leave to file a reply.

Summary judgment is proper under Rule 56 of the North Carolina Rules of Civil Procedure if "there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56 and 26 N.C. Admin. Code 3 .0101(b). "[A]ll inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975). "[W]hen a moving party has met his burden of showing that he is entitled to an award of summary judgment in his favor the nonmoving party cannot rely on the allegations or denials set forth in her pleading, and must, instead, forecast sufficient evidence to show the existence of a genuine issue of material fact in order to preclude an award of summary judgment." *Steele v. Bowden*, 238 N.C. App. 566, 577, 768 S.E.2d 47, 57 (2014) (internal citation omitted).

Findings of fact are neither necessary nor desirable when ruling on a motion for summary judgment. *See Hyde Ins. Agency, Inc. v. Dixie Leading Corp.*, 26 N.C. App. 138, 142, 215 S.E.2d 162, 164-65 (1975). In its Motion for Summary Judgment, Respondent renews its collateral estoppel arguments. However, Respondent did not include any findings of fact in the issuance of the 2022 Authorization Certificate.² Without a showing that Respondent considered, *inter alia*, practical alternative designs, the size and width of the bridge, and alleged impacts on surface water,

² The Undersigned notes that, in 2020, Respondent reorganized and repromulgated its riparian buffer protection rules as a part of the decennial periodic review. Under the "new" riparian buffer protection rules, Respondent is no longer required to make findings of fact when determining if there is a practical alternative to the proposed project. *Compare* 15A N.C. Admin. Code 2B .0233(8) (2020), *with* 15A N.C. Admin. Code 2B .0611, *and* 15A N.C. Admin. Code 2B .0714.

genuine issues of material fact remain on these issues. Drawing all inferences of fact in the light most favorable to Petitioner, the record reveals that there are genuine issues of material fact with regard to each of the issues raised by Respondent in its Motion for Summary Judgment. Accordingly, Respondent's Motion for Summary Judgment is hereby DENIED.

DECISION

Upon careful consideration of the Motions, the parties written and oral arguments, and other matters of record, the Undersigned hereby GRANTS Petitioner's Motion for Reconsideration, DENIES Respondent's Motion for Partial Dismissal, and DENIES Respondent's Motion for Summary Judgment. This contested case shall proceed to a hearing on the merits to be scheduled at the parties' earliest convenience.

IT IS SO ORDERED.

This the 18th day of October, 2022.



Donald R. van der Vaart
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center which subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 18th day of October, 2022.



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