STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Coastal Conservation League, Petitioner, vs. South Carolina Department of Health and Environmental Control, Price Sloan, Carolyn Sloan, Mark Tiberio, Anne Tiberio, Michael Schulte, Laura Schulte, and Northwest Properties of Hickory, LLC, Respondents.	)	Docket No. 22-ALJ-07-0082-CC **ORDER GRANTING PROPERTY OWNERS' MOTION TO DISMISS**

APPEARANCES:

For Petitioner:	Leslie S. Lenhardt, Esquire Emily M. Nellermoe, Esquire Amy Elizabeth Armstrong, Esquire
For Respondent DHEC:	Bradley David Churdar, Esquire Sallie Page Phelan, Esquire
For Respondents Property Owners:	John Joseph Owens, Esquire Randolph Russell Lowell, Esquire Stephen Lewis Goldfinch, Jr., Esquire

STATEMENT OF THE CASE

This matter is pending before the South Carolina Administrative Law Court (the ALC or the Court) pursuant to a request for contested case hearing filed on March 8, 2022, by the South Carolina Coastal Conservation League (Petitioner), challenging a conclusion of the South Carolina Department of Health and Environmental Control (the Department or DHEC). Petitioner is specifically challenging a conclusion of DHEC's Board (the Board) that a coastal erosion research study proposed by Dr. Gayes of Coastal Carolina University (CCU) on the use of geotextile sandbags[1] in critical areas at DeBordieu Colony in Georgetown County was "allowed" to proceed

[1] The geotextile sandbags at issue in this matter are pillow-shaped synthetic sandbags designed and manufactured by HUESKER. Throughout the record, these bags are also referred to "geotextile systems," "geotubes," and "geosynthetic sandbags." For simplicity, the Court will refer to them as geotextile sandbags throughout this order.

pursuant to the South Carolina Coastal Tidelands and Wetlands Act, also referred to as the Beachfront Management Reform Act (BMA).[2] Price Sloan, Carolyn Sloan, Mark Tiberio, Anne Tiberio, Michael Schulte, Laura Schulte, and Northwest Properties of Hickory, LLC (collectively, Property Owners) placed the geotextile sandbags at issue in this matter in the critical area without a permit as required by the Department.[3] Dr. Paul Gayes, Director of CCU's Burroughs & Chapin Center for Marine and Wetland Studies, proposed the research study to the Department's office of Ocean & Coastal Resource Management (OCRM). Petitioner is a non-profit membership corporation organized and existing under the laws of the State of South Carolina with the stated mission of working to protect the health of the natural resources of the South Carolina coastal plain.

On May 10, 2022, Property Owners filed a motion to dismiss, arguing Petitioner failed to name and timely serve its request for a contested case hearing on all requisite parties—specifically, upon Dr. Gayes—in violation of the Court's rules. On May 17, 2022, this Court noticed a hearing on the motion to dismiss to begin at 10:00 A.M. before the undersigned judge on July 25, 2022, at the ALC. Petitioner filed a response to Property Owners' motion to dismiss on May 20, 2022, challenging Property Owners' contention that the Court should dismiss this matter. The parties additionally furnished prehearing statements. On June 2, 2022, the undersigned noticed a hearing on the merits to begin at 10:00 A.M. at the ALC should the motion to dismiss not be dispositive. On June 14, 2022, the parties filed a consent motion for expanded discovery, requesting an additional thirty days to respond to discovery requests, permission to conduct up to ten depositions per party, and permission for discovery to extend beyond the 90-day timeframe set forth in SCALC Rule 21(A); the undersigned granted the consent motion on June 20, 2022.

For the reasons set forth below, the undersigned grants Property Owners' motion to dismiss.

BACKGROUND

Property Owners own beachfront property on the southern end of DeBordieu Beach in DeBordieu Colony, a community development in Georgetown County. On January 24, 2019, the Department issued a critical area permit for a privately-funded renourishment project in this area

[2] S.C. Code Ann. §§ 48-39-10 to -360 (2008 & Supp. 2021).
[3] Separate enforcement matters for these permitting violations are pending with the Department as of the date of this order.

to address ongoing erosion, including placement of 650,000 cubic yards of sand and the installation of a groin field.[4] During the spring and fall of 2020, prior to the start of the renourishment project, and without seeking a critical area permit from the Department as required by section 48-39-130 of the South Carolina Code, Property Owners installed geotextile sandbags as a method of erosion control. During a September 23, 2020 routine site inspection, the Department became aware of the unpermitted geotextile sandbags and requested that Property Owners remove them. On September 24, 2020, the Department sent cease and desist directives to Property Owners, followed by notices to comply on October 1, 2020. The Department conducted a follow-up inspection on November 6, 2020, and the geotextile sandbags remained. On December 11, 2020, the Department issued notice of alleged violation letters to Property Owners.

On October 25, 2021, Dr. Gayes emailed the details of a proposed research study to OCRM for review. A portion of the study contemplated burying Property Owners' geotextile sandbags with sand during the permitted beach renourishment project for purposes of assessing the level of protection the geotextile sandbags may provide after exposure during future erosional events. On November 10, 2021, the Department issued a staff decision, "denying permission" for the sandbags to be left in place and buried, which the Department indicated was prohibited by regulation. *See* S.C. Code Ann. Regs. 30-15(H)(3)(d) (Supp. 2021). The Department also expressed concern that the research project may interfere with the upcoming beach renourishment project. A request for final review (RFR) was submitted to DHEC by Property Owners on November 23, 2021, and was granted by the Board. While Property Owners acknowledged that the covering of sandbags was prohibited by regulations on erosion control during emergency orders in the RFR, they indicated "Dr. Gayes [was seeking] permission under the 'Educational Institution Research' and/or 'Pilot Project' provisions of the BMA to conduct the study such that the geotextile [sandbags] at the properties could be covered with sand during the upcoming renourishment project." The staff response to the RFR was filed with the Board on December 10, 2021. Public comments were also received and provided to the Board.

A final review conference was held on January 13, 2022, and the Board heard arguments

[4] This permit is the subject of additional litigation that is currently pending before the South Carolina Court of Appeals. *See Coastal Conservation League v. S.C. Dep't of Health & Env't Control & DeBordieu Colony Cmty. Ass'n*, App. Case No. 2021-000158, S.C. Ct. App., appeal filed Feb. 16, 2021.

from Property Owners and DHEC staff and viewed a presentation by Dr. Gayes detailing the research proposal.[5] On February 10, 2022, the Board issued a final agency decision concluding that Dr. Gayes' proposed research study was permissible. The Board found that, as research activity of an educational institution and as a pilot project reasonably anticipated to be successful in addressing an erosional issue in a beach or dune area, the study fell under two statutory exemptions that did not require application for a DHEC permit. *See* §§ 48-39-130(D), -320(C). The Board detailed that the decision was "made in part upon the representations of [Property Owners] and [Dr. Gayes] that the proposed research activity will have no negative effect on coastal flora or fauna, including no impact to turtle nesting." The Board also clarified that the study was only to be conducted on the sandbags present at the subject properties and that Dr. Gayes was required to coordinate with OCRM staff for the study to proceed and was responsible for obtaining and complying with any related local, state, or federal authorizations and requirements.[6] Finally, the Board concluded that allowing the research study to proceed did not render OCRM's enforcement actions against Property Owners moot. Following that decision, Petitioner filed the request for a contested case hearing with this Court and only served Property Owners and DHEC.

DISCUSSION

In the motion to dismiss, Property Owners assert Petitioner failed to: (1) name Dr. Gayes as a party to the contested case and (2) serve Dr. Gayes with the request for a contested hearing. Property Owners further assert that these failures divest this court of jurisdiction over this matter or alternatively, require dismissal of this action because service of the request for a contested case hearing on Dr. Gayes within thirty (30) days after the date of the Board's final decision is a requirement of instituting a contested case proceeding. They argue that Dr. Gayes and/or CCU, as the parties seeking to conduct the study, are real parties in interest and "applicants," such that they are required to be parties to this proceeding.

Petitioner argues Dr. Gayes is not required to be a party to this matter and was, therefore, not required to be served with the request for a contested case hearing. Petitioner notes that in his communications with the Department, Dr. Gayes did not seek a license or permit; rather, he sought

[5] Neither Dr. Gayes nor CCU challenged the Department's staff decision denying the study.
[6] At hearing, the parties asserted that the renourishment project was completed in mid-2022; however, the geotextile sandbags at issue in this matter are still in place and uncovered.

to conduct a study which was statutorily exempt from the requirement of a permit or license. According to Petitioner, only a party seeking a permit or license is an "applicant," as that term is defined, and because Dr. Gayes is not an applicant, he was not required to be a made a party to this matter or to be served with a copy of the request for a contested case hearing pursuant to the Court's rules or the Administrative Procedures Act (APA).[7]

After careful review of the arguments and submissions of the parties, the Court agrees with Property Owners that Petitioner's failure to name Dr. Gayes as a party and serve him with a copy of the request for a contested case hearing is fatal to Petitioner's case.

I. Dr. Gayes Should Be a Party and Petitioner Was Required to Serve Dr. Gayes with a Copy of the Request for a Contested Case Hearing.

Petitioner's arguments rest upon the definitions of the terms "party" and "applicant." The rules of the Court provide that the term "party" means "each person or agency named or admitted as a party or properly seeking and entitled to be admitted as a party, including a license or permit applicant." SCALC Rule 2(H). SCALC Rule 2(H) further provides that "[a]n applicant or licensee whose application or license is the subject of a request for a contested case hearing *shall* be deemed a party and *shall* be served with copies of all papers in this case." *Id.* (emphases added). Accordingly, if Dr. Gayes is considered to be an applicant, he must be deemed a party, and Petitioner was required to name Dr. Gayes as a party and serve him with a copy of the request for a contested case hearing.

The term "applicant" is statutorily defined as "any person who files an application for a permit under the provisions of this chapter." S.C. Code Ann. § 48-39-10. Relying on this definition, Petitioner asserts that a person who does *not* file an application for a permit is not an applicant. Petitioner correctly notes that no permit or license is required for Dr. Gayes's study to procced. Instead, a research study and/or pilot project[8] is exempt from the permitting process. *See* §§ 48-39-130(D), -320(C). Petitioner therefore concludes that because Dr. Gayes was not seeking

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[7] S.C. Code Ann. §§ 1-23-310 *et seq.* (2005 & Supp. 2021). The Court refers to the APA as statutory requirements set forth in Chapter 23 of Title 1 of the South Carolina Code.

[8] At the hearing, counsel for Petitioner noted that the communication from Dr. Gayes to DHEC concerning the research study never used the term "pilot project," suggesting that Dr. Gayes's study might not be properly characterized as a pilot project under the governing statute. However, counsel for Petitioner acknowledged at the hearing that the term "pilot project" is not defined and that the study could potentially qualify as a pilot project.

a permit or license, he is not an applicant and was not required to be named as a party to these proceedings.

This argument places form over substance. The APA defines the term "license" as including "the whole or part of any agency permit, franchise, certificate, *approval*, registration, charter, *or similar form of permission required by law*." S.C. Code Ann. § 1-23-310(4) (emphasis added). If Dr. Gayes's request for permission to conduct a research study included a request to allow the sandbags to remain in place, the existence of a condition in violation of Department's regulations, then Dr. Gayes can be viewed as having applied for a license. Furthermore, the Court's rules specifically define the term "party" to include an applicant for a "license," and in fact, require that an applicant for license shall be deemed a party and shall be served with a copy of all papers filed, including the request for a contested case hearing. SCALC Rule 2(H).

In this case, the record is clear that Dr. Gayes's request did include a request for permission to allow the sandbags to remain in place for purposes of the study. The Department, Property Owners, and Petitioner viewed Dr. Gayes's proposal as seeking permission or approval from the Department to leave the sandbags in place for the purpose of the study. The subject line of Dr. Gayes's initial October 25, 2021 email to the Department regarding the study was "Beach 'Functionality' Preservation Research Proposal." Ex. 2 to Pet'r's Return to Mot. to Dismiss. The email heading also indicates that an attachment was included with the email. That attachment is entitled "Planned Study and Research *Permit Proposal* as the State of South Carolina Transitions From A Beachfront Policy of 'Retreat' to 'Preservation.'" *Id.* (emphasis added). The staff decision issued in letter form by the Department in response to Dr. Gayes's request expressly states that "the Department is not granting *permission* for any sandbags in South Carolina to be buried and left in place as proposed in your study." Property Owners' Mot. to Dismiss Ex. 18 (emphasis added). Petitioner's own request for a contested case hearing states that it was contesting the Department's decision to issue an "after-the-fact approval" allowing for placement and covering of sandbags.[9]

Dr. Gayes was also repeatedly designated as an "[a]pplicant" in the proceedings below.

[9] In its letter to the Board opposing a final review hearing, DHEC staff noted that use of the term "permit" was incorrect because Dr. Gayes's study was exempt from the permitting process. This is the same argument made by Petitioner, and it ignores the fact that Dr. Gayes was treated as a permit applicant and did seek approval from DHEC to leave the sandbags in place for his study.

The Department's staff response to the request for review lists the persons requesting review of the staff decision but also separately lists the "[a]pplicant" in the heading. The "[a]pplicant" is listed as "Dr. Paul Gayes, Coastal Carolina University (CCU)." The final agency decision (FAD) in this matter is entitled: "In Re: *Application* for Approval to Conduct a Planned Study and Research Proposal Submitted by Dr. Paul Gayes (*Applicant*) of Coastal Carolina University, A Research and Educational Institution Located in Horry County, SC." Ex. To Pet'r's Req. for Contested Case Hr'g. The FAD notes that Dr. Gayes appeared at the review hearing as the "Applicant." In total, the FAD refers to Dr. Gayes as the "[a]pplicant" six times. Finally, Petitioner itself referred to Dr. Gayes as the "[a]pplicant" in its request for contested case hearing, indicating that Petitioner viewed Dr. Gayes an applicant prior to the filing of the Property Owners' motion to dismiss.[10] Pet'r's Req. for a Contested Case Hearing at 3.

Moreover, the Court is troubled by Petitioner's position that it can obtain relief against Dr. Gayes without his presence in these proceedings. The relief sought by Petitioner is a reversal of the Board's decision to allow Dr. Gayes to conduct a study. If, however, Dr. Gayes is not a party to this proceeding, he will likely not be bound by any order the Court might issue in this matter, and presumably could nevertheless proceed with the study.[11] For Petitioner to achieve its objective, Dr. Gayes must be a party to the action. If Dr. Gayes is not a party to this matter, there is no point in proceeding. In that scenario, any decision the Court might render on the merits in

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[10] References to Dr. Gayes as an "[a]pplicant" in the record include the Department's initial staff response to Property Owners' RFR; the FAD issued by the Board; in an April 12, 2022 correspondence from the Department to the Secretaries of Commerce and Interior; and a June 30, 2022 correspondence from the Department's Beachfront Permitting Project Manager Matthew Slagel.

[11] "Where one is not a party to a prior action, the only way he or she can be precluded from relitigating an issue is if he or she is in privity with a party to the prior action against whom an adverse finding is made." *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct. App. 1994). While the question of privity is not currently before the Court, it is unlikely, in the opinion of the Court, that Dr. Gayes will be regarded as being in privity with Property Owners. *See id.* ("One whose interest is almost identical with that of a party, but who does not claim through him, is not in privity with him."). Dr. Gayes does not claim through Property Owners, and following the FAD, the Department has looked exclusively to Dr. Gayes, and/or CCU, to fulfill the prerequisites of the study. *See* Prop. Owners' Ex. 1, March 4, 2022 letter from the Department to Dr. Gayes requesting additional details regarding the study; Prop. Owners' Ex. 2, March 4, 2022 email from the Department to Dr. Gayes regarding the study; Prop. Owners' Ex. 3, June 30, 2022 letter and email from the Department to Dr. Gayes requesting clarification on information provided by Dr. Gayes about the study.

favor of the Petitioner is merely an advisory opinion.

For all of these reasons, the Court concludes that Dr. Gayes should be a party to these proceedings and should have been served with a copy of the request for a contested case hearing by Petitioner.

Because the Court concludes Dr. Gayes should have been a party to the action, and is not, it must next address the consequences of Petitioner's failure to name and serve Dr. Gayes. The failure to name and timely serve Dr. Gayes with the request for a contested case hearing requires dismissal of this action. This failure either divests the Court of jurisdiction or leaves a necessary condition precedent to the Petitioner's claim unfulfilled.

Service of a notice of appeal is a jurisdictional requirement for which courts have no authority to extend the prescribed time. *Mears v. Mears*, 287 S.C. 168, 169, 337 S.E.2d 207, 207 (1985); *see also Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004) ("The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice."). Section 44-1-60(G) of the South Carolina Code (2018) requires the filing of a request for a contested case hearing for review of a Department decision be filed within thirty calendar days after: (1) notice is mailed that the Board has declined to hold a final review conference, (2) the sixty calendar day deadline to hold the final review conference lapses without a conference, or (3) the final agency decision resulting from a final review conference is received by the parties. While Petitioner filed its request for contested case hearing within thirty days of the receipt of the Board's decision, it failed to name and serve Dr. Gayes before the expiration of this deadline. Because this Court is prohibited from "rescu[ing]" Petitioner from this fatal defect, Petitioner did not—and cannot now—cross the mandatory jurisdictional threshold of timely naming and serving Dr. Gayes as a party to this action.

Even if the failure to name and serve Dr. Gayes is not viewed as purely jurisdictional, the failure nevertheless leaves a condition necessary to the maintenance of this action unfulfilled. It is well-settled that, where, as here, "[a] statute that creates a new liability and affixes the time within which an action may be commenced . . . [is] a statue of creation; commencement within the time affixed is an indispensable condition of the action." *Knight Publ'g Co. v. Univ. of S.C.*, 295 S.C. 31, 33, 367 S.E.2d 20, 22 (1988), *overruled on other grounds by McLendon v. S.C. Dep't of*

Highways & Pub. Transp., 313 S.C. 525, 443 S.E.2d 539 (1994). Such an action "cannot be maintained unless brought within the time allowed by that statute." *Simpson v. Sanders*, 314 S.C. 413, 415 n.1, 445 S.E.2d 93, 94 n.1 (1994). *See generally* 54 C.J.S. *Limitations of Actions* § 30 (May 2022 Update).

Section 44-1-60 of the South Carolina Code (2018 & Supp. 2021) describes conditions which must be satisfied before a contested case hearing may be maintained. Subsection (F)(2) of this statute provides that "within thirty calendar days after the receipt of the decision an applicant, permittee, licensee, or affected person desiring to contest the final agency decision may request a contested case hearing before the [the ALC], *in accordance with the [APA].*" § 44-1-60(F)(2) (emphasis added). The statute therefore incorporates by direct reference the requirements of the APA. The APA in turn provides that "*[a]ll* requests for a hearing before the [ALC] *must* be filed in accordance with the [C]ourt's rules of procedure." S.C. Code Ann. § 1-23-600(B) (emphases added). Finally, the rules of this Court states that a request for a contested case hearing must be "filed and served" within thirty days after actual or constructive notice of the agency determination. SCALC Rule 11(C). The Court therefore concludes that service of the request for a contested case hearing on all parties to the contested case is a condition which must be satisfied before a contested case hearing may be maintained.

Petitioner filed its request for contested case hearing on March 8, 2022, within thirty days of the Board's February 10, 2022 decision but failed to name and serve Dr. Gayes in accordance with the requirements outlined in section 44-1-60, extinguishing Petitioner's cause of action.

Petitioner asks the Court to excuse its omission, and permit Dr. Gayes to be made a party and served at this juncture, more than five months after the issuance of the agency decision that is the subject of the contested case proceeding. If, as the Court concludes above, the failure to file and serve Dr. Gayes within the specified time period is jurisdictional in nature, then the Court lacks the ability to extend the time for service. *See generally Allison v. W.L. Gore & Assocs.*, 394 S.C. 185, 189, 714 S.E.2d 547, 550 (2011) ("[A]n appellate body may not extend the time to appeal."); *State v. Johnston*, 327 S.C. 435, 438, 489 S.E.2d 228, 230 (Ct. App. 1997) (holding that "it is the duty of the court to assure that it renders no decision in a matter when it has no authority to act"), *rev'd on other grounds,* 333 S.C. 459, 510 S.E.2d 423 (1999); SCALC Rule 23(B) ("Upon motion of any party, or on its own motion, the Court may dismiss a contested case or resolve the contested case adversely to the offending party for failure to comply with any of the rules of

procedure for contested cases, including the failure to comply with any of the time limits provided in these rules or by order of the Court.").

If the failure to serve Dr. Gayes is not jurisdictional, but instead is a failure to fulfill a condition necessary to the maintenance of a contested case hearing, then a different analysis is required. When questioned during the motion hearing, Petitioner did not identify any rule or statute which gave the Court discretion to extend the time for service upon Dr. Gayes. Counsel for Respondents took the position that there is no rule or statute which vests the Court with discretion to extend the deadline. In the Court's view, the only rule which could conceivably permit extension of the deadline to serve is SCALC Rule 3. This rule states: "For good cause shown, the administrative law judge may extend or shorten the time to take any action, except as otherwise provided by rule or law." SCALC Rule 3(B).

However, an extension of the deadline under Rule 3(B) is not appropriate. First, the Court construes Rule 3(B) to require that the party seeking an extension must move for such an extension. This construction is apparent from the language of Rule 3(B), which only permits extensions upon good cause shown. For this language to have meaning, someone, presumably the moving party, must make a showing of good cause to the Court. Rule 3(B) also contains no language authorizing the Court to extend or shorten time limits in the absence of a motion. *Cf.* Rule 6(b), SCRCP ("When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the time may be extended by written agreement of counsel for an additional period not exceeding the original time provided in these rules, or the court for cause shown may at any time in its discretion (1) *with or without written motion or notice* order the period enlarged if request therefor is made before the expiration of the period as originally prescribed or extended . . . ." (emphasis added)).

In the ALC, all motions made before the hearing on the merits must be written. SCALC Rule 19(A). Petitioner made no written motion for additional time to serve Dr. Gayes. Petitioner wholly failed to mention SCALC Rule 3(B) when it requested additional time and failed to identify SCALC Rule 3(B) when asked by the Court about the existence of authority vesting the Court with discretion to extend the deadline.

Additionally, and perhaps more importantly, there is no good cause for an extension of time in which to serve Dr. Gayes. The record is clear Petitioner knew of Dr. Gayes's identity prior to the final review hearing. Dr Gayes submitted the research request which resulted in the FAD.

The very purpose of Petitioner's request for a contested case was to negate the permission to conduct the study which Dr. Gayes received from the Board. Dr. Gayes was identified as the applicant by the FAD and was present at the hearing resulting in the FAD. Again, Dr. Gayes is in reality the party against whom Petitioner seeks relief. Petitioner presented no evidence of circumstances which might justify an extension such as an inability to locate Dr. Gayes or personal or business emergencies which prevented earlier service.

In the absence of good cause, SCALC Rule 3(B) does not authorize the Court to extend the time for service upon Dr. Gayes.

II. Alternatively, the Court Lacks Jurisdiction Because this Matter Is Not a Proper Contested Case.

Alternatively, the Court concludes that dismissal is appropriate even if Petitioner is correct that Dr. Gayes is not a party. If Dr. Gayes is not a party, then this matter is not a proper contested case proceeding, depriving the Court of jurisdiction. A contested case hearing is a "proceeding including, but not restricted to, ratemaking, price fixing, and licensing in which the legal rights, duties, or privileges of a party are required by law or by Article 1, Section 22, Constitution of South Carolina, 1895, to be determined by an agency or the Administrative Law Court after an opportunity for a hearing." S.C. Code Ann. § 1-23-505(3); *see also* SCALC Rule 2(H). This definition is not satisfied here because: (1) in the absence of Dr. Gayes, this proceeding would not involve the legal rights, duties or privileges of a *party*; and (2) neither the Department nor the Court is required by law or the South Carolina Constitution to determine the rights involved in this case.

A. In the Absence of Dr. Gayes, This Proceeding Does Not Involve the Legal Rights, Duties, or Privileges of a Party.

As discussed above, a contested case is one in which a determination of the legal rights, duties, or privileges "of a party" are determined. This requirement is not met here. If Dr. Gayes is not a party, then a determination of his legal rights, duties, and privileges cannot serve as the basis for a contested case hearing.

Property Owners themselves cannot be considered parties whose legal rights are to be determined for purposes of a contested case hearing. In the FAD, the Board expressly carves out the Property Owners' legal situation from the scope of the determination. It states:

> The Board further concludes that allowing the research study to proceed *does not* render OCRM's enforcement action moot. While this [FAD] allows the sandbags to remain in place and be buried for the study, the Department may otherwise proceed with the pending enforcement actions and exercise its full enforcement authority.

FAD at 5 (emphasis added). The FAD also clearly imposes obligations on Dr. Gayes rather than Property Owners. For example, the FAD provides that it is the responsibility of the Applicant (Dr. Gayes) to ensure the integrity of these structures (the sandbags) and that required modifications be coordinated with the OCRM staff; that the Applicant (Dr. Gayes) must provide sufficient details of the study and success criteria to the Department; and that the Applicant must obtain any approvals or authorizations from and maintain compliance with the requirements of other local, federal, and state entities. Since the FAD in connection with the study, the Department has directed its correspondences, including that a bond or other financial security be provided, to Dr. Gayes.

Finally, while affected persons such as Petitioner have a statutory right to request a contested case hearing, there must still be some underlying right, privilege, or duty of party to be determined before a contested case hearing is proper. Petitioner has no such underlying right, privilege, or duty related to maintenance of the study or use of the property to conduct the study. Petitioner is not the person or entity that requested the study and has no ownership or other interest in the subject property.

Notably, the relief requested by Petitioner in this matter is the reversal of the Board's decision, thereby restoring the Department's earlier denial of Dr. Gayes's request to conduct a research study. The relief sought is relief against Dr. Gayes. It is Dr. Gayes's rights and duties which Petitioner hopes to affect.

B. Neither the Department Nor the Court is Required to Determine the Rights Involved in this Matter.

A second requirement for a proper contested case hearing is that the agency or the ALC must be required by law or the South Carolina Constitution to determine the legal rights, duties or privileges in question. S.C. Code Ann. § 1-23-505(3). If an agency or the ALC is not required to make a determination, then the matter is not a contested case proceeding. Here, neither the Department nor this Court is required to make a determination.

1. The Department Was Not Required to Make a Determination.

As a general matter, the BMA requires permits for utilization of critical areas along South Carolina's coast. There are, however, statutory exceptions to the BMA's permitting requirement. A permit is not required for "research activities of . . . educational institutions . . . provided that such activities cause no material harm to the flora, fauna, physical or aesthetic resources of the area." § 48-39-130(D) (2). The BMA further provides the following:

> A permit is not required for an activity specifically authorized in this chapter. However, the [D]epartment may require documentation before the activity begins from a person wishing to undertake an authorized construction or reconstruction activity. The documentation must provide that the construction or reconstruction is in compliance with the terms of the exemptions or exceptions provided in [s]ections 48-39-280 through 48-39-360.

S.C. Code Ann. § 48-39-355. In summary, a permit is not required for an education institution such as CCU to conduct research activities. The Department's ability to regulate research studies before they occur is limited to requesting documentation to establish that the proposed research complies with the statute. Even in these cases, the Department is not required to request such documentation. *See Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 352–53, 549 S.E.2d 243, 250 (2001) ("The use of the word 'may' signifies permission and generally means that the action spoken of is optional or discretionary unless it appears to require that it be given any other meaning in the present statute.").

2. The ALC Is Not Required to Make a Determination.

There are three sources of law that could trigger a contested case in this matter: (1) the BMA; (2) section 44-1-60's general appeal language; and (3) the APA. Because the instant matter does not meet the requirements of any of these sources, the Court does not have subject matter jurisdiction and is not authorized to hear Petitioner's appeal. *See Dove v. Gold Kist, Inc.*, 314 S.C. 235, 238, 442 S.E.2d 598, 600 (1994) ("A court lacking subject matter jurisdiction, however, has no authority to act regardless of the . . . consent of the litigants."); *see also Coon v. Coon*, 364 S.C. 563, 566, 614 S.E.2d 616, 617 (2005) ("A judgment of a court without subject matter jurisdiction is void.").

Pursuant to the BMA, section 48-39-180 states in pertinent part:

> Any applicant whose permit application has been finally denied, revoked, suspended or approved subject to conditions of the

> department, or any person adversely affected by the permit, may obtain judicial review as provided in Chapter 23 of Title 1, or may file a petition in the circuit court having jurisdiction over the affected land.

If Petitioner's position that Dr. Gayes did not file an application for a permit and no permit was issued is correct, then a contested case cannot be triggered under this provision of the BMA. The existence of a permit application or permit is a condition precedent to obtaining judicial review pursuant to this section,

Section 44-1-60(A) also references contested case hearings. It provides that the "[D]epartment decisions involving the issuance, denial, renewal, suspension, or revocation of permits, license, or other actions of the Department which may give rise to a contested case . . . must be made using the procedures set forth in this section." S.C. Code Ann. § 44-1-60(A). The Court does not view this section as an authorization for contested case proceedings but rather a requirement that the procedures outlined in section 44-1-60 must be used in any matter that could otherwise give rise to a contested case proceeding. Accordingly, this section does not independently authorize a contested case hearing.

Section 44-1-60(G) discusses requests for a contested case hearing. It states that applicants, permittees, licensees, or other affected persons may file a request for a contested case hearing within thirty days after the final agency decision. The Court construes this section as addressing who has standing to file a request for a contested case hearing, *see Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control*, 430 S.C. 200, 208-19, 845 S.E.2d 481, 485-91 (2020), rather than whether a particular matter meets the criteria for a contested case hearing.

The APA also does not require that a contested case hearing be held in this matter. There are two provisions of the APA which could be construed to address this Court's obligation to conduct a hearing on the merits: (1) S.C. Code § 1-23-380 and (2) S.C. Code § 1-23-600. Section 1-23-380 states "[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article and Article 1." This plain language of this statute indicates that a party who is aggrieved in a contested case is entitled to judicial review. However, this statute also makes clear that to be entitled to judicial review, a party must have been involved in a "contested case," which is a defined term. Because the statute assumes that a contested case exists, it cannot be construed as a statute that supplies the definitional foundation of a contested case.

Section 1-23-600 states in pertinent part:

> An administrative law judge shall preside over all hearings of contested cases as defined in [s]ection 1-23-505 or Article I, Section 22, Constitution of the State of South Carolina, 1895, involving the departments of the executive branch of government as defined in Section 1-30-10 [where the Court] is authorized or permitted by law or regulation to hear and decide these cases . . . .

However, this statute also assumes that the requirements for a contested case have already been satisfied before the requirement to exercise jurisdiction takes effect. Without more, section 1-23-600 does not alone trigger the right to a contested case.

Ultimately, the Court finds persuasive our supreme court's decision in *Amisub of South Carolina, Inc. v. South Carolina Department of Health and Environmental Control*, 403 S.C. 576, 743 S.E.2d 786 (2013).[12] In *Amisub*, Carolina Physicians Network (CPN), a subsidiary of a nonprofit health care system, requested confirmation from the Department that it did not need to apply for certificate of need (CON) review prior to initiating construction of a medical office. 403 S.C. at 579, 743 S.E.2d at 788. DHEC staff confirmed in writing that no CON was necessary because the proposed building was considered an expenditure for a non-medical project, an exception to the CON regulatory requirements. *Id.* At that time, CPN made a written assurance to the Department that it would not open an urgent care center at the facility without seeking a CON or a non-applicability determination (NAD).[13] 403 S.C. at 580, 743 S.E.2d 788. Thereafter, CPN informed the Department of its intention to open an urgent care center in the now-completed building and was informed verbally by Department staff that it would not take any action against CPN for opening the urgent care center. *Id.* at 580-81, 743 S.E.2d at 789. Amisub requested a final review conference, and the Board declined the request. *Id.* at 581, 789 S.E.2d at 789. Amisub then filed for a contested case hearing at the ALC, challenging the Department's failure to require a CON or NAD for the urgent care center. *Id.* at 582, 789 S.E.2d 790.

Before the ALC, the Department argued that because the urgent care center was a licensed

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[12] The Court recognizes that in *Amisub* the Board did not conduct a final agency review hearing as it did in this matter. However, our supreme court's reasoning in *Amisub* nevertheless applies because, under Petitioner's argument, there exists no legal duty or obligation for the Department to hold a hearing or issue a decision prior to Dr. Gayes initiating his study.

[13] An NAD is a decision by the Department that indicates a proposed project is not subject to the CON Act; such decision is valid for a period of twelve months from the date of issuance. *See* S.C. Code Ann. Regs. 61-15 § 105 (Supp. 2021).

private practitioner's office, it was exempt from the CON requirements and no written exemption from the Department was required. *Id.* at 583, 743 S.E.2d at 790. The ALC found that it lacked jurisdiction over the matter because the urgent care center qualified as the office of a licensed private practitioner, an exception to the CON Act; however, the decision was remanded by the South Carolina Court of Appeals, which found that the ALC had subject matter jurisdiction over the matter. *Id.* at 584, 743 S.E.2d at 791.

DHEC appealed to the supreme court, which reversed the decision by the court of appeals. *Id.* at 579, 743 S.E.2d at 788. Our supreme court held that because CPN's opening of the urgent care center met an exemption to the CON, there was no requirement for CPN to seek the Department's approval or permission and, therefore, the Department had no obligation to issue a decision. *Id.* at 592-97, 743 S.E.2d at 79-98. It held that a party may not use the contested case review process where it has not been authorized by the General Assembly. *Id.* at 596, 743 S.E.2d at 797.

In the Court's view, the language in *Amisub* most applicable to the instant matter is the following: "Since there was no legal duty owed by DHEC to issue a staff decision in this matter, which is the trigger giving rise to a contested case, there was no corresponding obligation that [Amisub] be afforded a contested case hearing before the ALC." *Id.* This language makes clear that the trigger for a contested case proceeding is whether the Department had a legal duty to issue a staff decision. If the Petitioner is correct that Dr. Gayes is not required to be a party because he did not apply for a permit or license, but rather for an exemption for the permitting process, then the Department had no legal duty to issue a staff decision on his request. Again, the BMA does not require the Department to act on requests for research studies, and the Department's authority is limited to requesting documentation from the party seeking to conduct such a study. S.C. Code Ann. § 48-39-355.

Absent a statutory trigger for a contested case under the BMA or APA, it becomes necessary to determine whether Article I, Section 22 of the South Carolina Constitution requires the Court to hear this case. Article I, Section 22 of the South Carolina Constitution provides the following:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard . . . nor shall he be deprived of liberty or property unless by a mode of procedure

> prescribed by the General Assembly, and he shall have in all instances the right to judicial review.

If the Petitioner's position that Dr. Gayes is not required to be a party to this proceeding is correct, then Article I, Section 22 of the South Carolina Constitution does not require this Court to hear this matter. The decision would neither affect "private rights" nor deprive any current party of liberty or property.

Private rights are distinguished from public rights. While public rights are rights held collectively by the community, such as the right to navigate public waters, fish in public waters, use public roads, and be free from criminal actions, private rights are held by individuals and include such things as life, liberty, property and personal security. *See Private Right, Black's Law Dictionary* (11th ed. 2019) ("A personal right, as opposed to a right of the public or the state."); *see also Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 576, 614 S.E2d 619, 622-23 (2005) (holding no private right of action may be maintained for environmental statute enacted primarily for the benefit and protection of the public generally).

Petitioner asserts that it has an interest in this matter because "[m]embers of the League enjoy recreating on DeBordieu Beach in the vicinity of the sandbags, as well as along the Hobcaw Barony to the associated Outstanding Resource Water of North Inlet, for harvesting oysters, fishing, boating, beach-walking, observing wildlife and other recreational purposes." Req. for Contested Case Hr'g at 4. Petitioner also asserts that its members are concerned about the sea turtle population. *Id.* These interests are public rights; they belong to the public in general, not any specific individual.

Property Owners have private rights that might be impacted by the proposed research study such as ownership and use of private property but a decision by this Court would not affect those rights. Were this case to proceed on the merits in Dr. Gayes's absence, the Court would merely determine whether Dr. Gayes's proposed study qualifies for an exemption to the permitting. Such a ruling from the Court would not force or require Property Owners to cooperate with the study. Property Owners would remain free to control their property as they see fit.

Finally, even assuming Dr. Gayes has a private right in conducting the research study, Dr. Gayes would not be a party and would not be bound by the Court's ruling. He could not therefore be finally bound as contemplated by Article I, Section 22 of the South Carolina Constitution.

CONCLUSION

In summary, the Court concludes Dr. Gayes should be regarded as a party and was, therefore, required to be served with the request for a contested case hearing. It is undisputed that this did not occur within the thirty-day deadline found in section 44-1-60, requiring dismissal of this matter. Alternatively, if Dr. Gayes is not a party because he did not apply for a permit or license, then the Department took no real action below; it did not grant or deny a license or permit and lacked the power to prohibit Dr. Gayes from attempting to pursue the study. As a result, this case would not be a proper contested case, depriving this Court of jurisdiction. Accordingly, Property Owners' motion to dismiss must be granted.

ORDER

IT IS THEREFORE ORDERED that Property Owners' motion to dismiss is **GRANTED** and the above-captioned case is **DISMISSED WITH PREJUDICE.**[14]

AND IT IS SO ORDERED.

Robert L. Reibold
Administrative Law Judge

August 10, 2022
Columbia, South Carolina

[14] Because the motion to dismiss is dispositive, the hearing scheduled to begin before the undersigned on Tuesday, September 13, 2022, is cancelled.

CERTIFICATE OF SERVICE

I, James Smith Harrison, III, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

James Smith Harrison, III
Judicial Law Clerk

August 10, 2022
Columbia, South Carolina