

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

T. Tree Farms RV Park (Blue Sky Associates, LLC),
Petitioner,
v.
South Carolina Department of Health and Environmental Control, Enclave at Fairview Homeowners' Association, Inc., Golden Hills of Fairview Homeowner's Association, Inc., Greenspace of Fairview, LLC, and North Pacolet Association, Inc.,
Respondents.

Docket No. 22-ALJ-07-0010-CC

**ORDER ON MOTIONS TO
DISMISS**

RECEIVED
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SC Court of Appeals

Appearances: Alexander G. Shissias, Esquire, for Petitioner

Mathew Richardson, Esquire and Carl F. Muller Esquire for Respondents Enclave at Fairview Homeowners' Association, Inc., Golden Hills of Fairview Homeowner's Association, Inc., Greenspace of Fairview, LLC, and North Pacolet Association, Inc.

Sara Martinez, Esquire for Respondent South Carolina Department of Health and Environmental Control

STATEMENT OF THE CASE

This matter is before the Administrative Law Court ("ALC" or "Court") pursuant to a request for contested case hearing filed by T. Tree Farms RV Park (Blue Sky Associates, LLC) ("Blue Sky" or Petitioner") challenging the decision of Respondent South Carolina Department of Health and Environmental Control ("DHEC" or "Department") to deny Blue Sky's application for an onsite wastewater system ("septic tank") permit. Blue Sky plans to construct a recreational vehicle park ("RV Park") in Spartanburg County, South Carolina; the wastewater system will supply the sewage needs of the proposed RV Park, allowing for up to 52 vehicle sewage hookups. On or about June 22, 2021, DHEC staff of the Bureau of Environmental Health Services Division issued the septic tank permit to Blue Sky. Respondents Enclave at Fairview Homeowners' Association, Inc., Golden Hills of Fairview Homeowners' Association, Inc., Greenspace of



Fairview, LLC and North Pacolet Association, Inc (collectively “Homeowners”) filed a request for review (“RFR”) with the South Carolina State Board of Health and Environmental Control (“Board”) to review the staff decision to grant the permit. On or about January 12, 2022, after a final review conference, the Board overruled the staff decision and denied the septic tank permit. Blue Sky thereafter filed its request for contested case hearing with the ALC on January 14, 2022.

On or about April 13, 2022, Blue Sky filed a Motion to Dismiss Pursuant to SCALC Rules 23(B) and 68 and SCRCP Rule 12(b)(1). Respondent Homeowners filed a response to Blue Sky’s Motion to Dismiss on April 25, 2022. Respondent Homeowners filed their own Motion to Dismiss on April 26, 2022, contending that the case should be dismissed pursuant to SCALC Rule 23(B) and SCRCP 12(b)(1). Blue Sky filed a responsive memorandum on May 6, 2022. On May 12, 2022, the Court convened a hearing on the motions at which time, all parties appeared, represented by counsel as indicated. The Department declined to take a position on either of the pending motions. On July 18, 2022, Blue Sky submitted additional legal authority to the Court in support of its position. The Homeowners provided additional memoranda on July 26, 2022 and July 29, 2022.

BACKGROUND

Blue Sky’s proposed RV Park is to be located at 1970 Landrum Mill Road in Campobello, South Carolina. Respondent Homeowners represent groups of homeowners living in areas adjacent to the proposed RV Park. Based on the pleadings and memoranda filed, the following is a chronology of events pertinent to the resolution of this case:

- **April 23, 2021** – Blue Sky filed its permit application with DHEC for an onsite wastewater system.
- **May 14, 2021** – Madelon Wallace, an area resident, emailed a request under the Freedom of Information Act (FOIA) to the Department addressed to “David Vaughan, Director of Onsite Wastewater Management for SC,” seeking “copies of all documents concerning a proposed recreational vehicle park ... to be located at or near Landrum Mill Road from Sept 20, 2020 to present.” In the May 14, 2021 email that served as a cover letter to her FOIA request, Ms. Wallace wrote: “Please see the attached FOIA request. Among other things there are serious concerns about the waste that would be channeled to Gold Mine Creek that feeds into the North Pacolet River and runs thru a residential development.” Although her request for information did not reveal in what capacity she was seeking this information, Ms Wallace was listed in other documents as a Manger of Greenspace of Fairview, LLC. Ms. Wallace’s FOIA request did not state that she wanted to be considered an “affected person” for purposes of a

septic tank permit and it did not ask that she be notified of the issuance of any such permit.

- **May 17, 2021** – In a reply email to Ms. Wallace, Mr. Vaughn acknowledged receipt of her May 14, 2021 FOIA request and indicated that he would forward it to the Department’s FOIA office.
- **May 27, 2021** – Blue Sky filed an updated septic tank permit application in response to the Department’s requests.
- **June 8, 2021** – Blue Sky electronically filed updated septic tank plans with the Department.
- **June 18, 2021** – Final septic tank plans delivered to the Department by Blue Sky’s Engineer.
- **June 22, 2021** – DHEC’s Bureau of Environmental Health Services issued the septic tank permit to Blue Sky.
- **October 14, 2021** – DHEC responded to the May 14, 2021 FOIA request submitted by Ms. Wallace and disclosed the septic tank permit issued to Blue Sky.
- **October 26, 2021** – Homeowners filed their RFR with Board.
- **December 20, 2021** – Board holds review conference with Blue Sky and Respondent Homeowners.
- **January 13, 2022** – Board issues final agency determination overruling the staff decision and denying Blue Sky’s septic tank permit.

Both Blue Sky and the Homeowners cite SCALC Rule 23(B) and SCALC Rule 68, as well as SCRCF Rule 12(b)(1), in support of their motions. SCALC Rule 23(B), “Dismissal of Contested Case for Failure to Comply with Rules, states that:

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.

SCRCF 12(b)(1) provides that:

Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter.

Finally, SCALC Rule 68 provides that the South Carolina Rules of Civil Procedure, in the discretion of the presiding administrative law judge, may be used at the ALC to resolve questions not addressed by the Administrative Law Court rules.

Although both parties assert that the Court lacks jurisdiction under SCRCF Rule 12(b)(1), they complain about different steps in the administrative process.¹ Blue Sky maintains that the Homeowners failed to timely file their RFR to the Board to challenge the June 22, 2021 DHEC staff decision granting the permit. The Homeowners assert that Blue Sky's request for contested case hearing was insufficient to invoke this Court's jurisdiction.

Whether or not a court has jurisdiction to decide a case is a question of law. "The proper procedure for raising lack of subject matter jurisdiction prior to trial is to file a motion to dismiss pursuant to Rule 12(b)(1), SCRCF, rather than a motion for summary judgment pursuant to Rule 56, SCRCF." *Posey v. Proper Mold & Engineering, Inc.*, 378 S.C. 210, 217, 399, 661 S.E.2d 395, 399 (Ct. App. 2008). Furthermore, "affidavits and other evidence outside the pleadings may, in certain circumstances, be considered in support of a motion to dismiss based on a lack of jurisdiction." *Baird v. Charleston County*, 333 S.C. 519, 528-529, 511 S.E.2d 69, 74 (1999). Because there is no rule under the Administrative Law Court Rules of Procedure comparable to SCRCF Rule 12(b)(1), this Court may apply SCRCF Rule 12(b)(1) pursuant to SCALC Rule 68.

I. Homeowners' Motion to Dismiss.

Because this case must be properly filed at the ALC, the Court will initially address the Homeowners' contentions that Blue Sky's case should be dismissed because Blue Sky failed to comply with certain procedural requirements. First, Homeowners assert that the case should be dismissed because Blue Sky named (and served) only the Department and Russell Rock as respondents before the ALC.² None of the Homeowners were listed as respondents in the Request

¹ The delicts raised by the parties should properly be characterized as challenges to this Court's procedural jurisdiction and not subject matter jurisdiction. Subject matter jurisdiction refers to a court's power to hear a particular kind of case. *Allison v. Gore & Associates*, 394 S.C. 185, 188, 714 S.E.2d 547, 549 ("A court's subject matter jurisdiction is determined by whether it has the authority to hear the type of case in question."). S.C. Code Ann. § 44-1-60-60(G) gives the ALC the authority to hear contested cases involving the issuance of permits by the Department. Procedural jurisdiction refers to whether the case has been properly brought before the court so that it may exercise jurisdiction. *See FA Logic SC, LLC d/b/a FA Logic v. S.C. Dep't of Revenue*, Docket No. 19-ALJ-17-0002-CC, 2020 WL 1166875 (S.C. Admin. Law Ct. March 3, 2020).

² Russell Rock was identified in the DHEC cover letter communicating the Board decision as the Secretary of Golden Hills of Fairview Homeowners Association, Inc. Blue Sky's actual Request for Contested Case Hearing form, however, did not list Mr. Rock's representative capacity, only that he was being served as

for Contested Case Hearing form filed by Blue Sky. Homeowners allege that these omissions are fatal to Blue Sky's action. The Court must disagree.³

Homeowners cite SCALC Rule 11(B) which states, in pertinent part, that “[a] copy of the request [for contested case hearing] must be served on each party and on the affected agency or county official...” (Emphasis added). When the party is a corporation, Rule 4(d)(3), SCRCF, allows service “by delivering to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process...”⁴ Here, Russell Rock was identified as the Secretary for the Golden Hills of Fairview Homeowner's Association (Golden Hills) in the Homeowners' collective RFR to the Board and he is listed at the bottom of the signature page as the “contact person”, presumably on behalf of all of the Homeowners. Moreover, Mr. Rock was identified as acting for Golden Hills in the Homeowners' separate efforts to challenge the permit locally through their county zoning commission.⁵ The Court finds that although Blue Sky did not directly serve all possible parties to the action, it made sufficient service on the Department and Golden Hills to avoid dismissal for the proffered reason.

If a litigant initiates its case against a proper respondent at the ALC, the fact that there are other respondents who could have been named in the case, but who were not, is not such a fatal defect that the Court should dismiss a case for a lack of procedural jurisdiction. In such a situation, the Court may simply add the omitted entities who wish to participate as parties as needed for a fair and complete adjudication of the issues. Here, even if not initially named and served as parties to the contested case hearing, the Court may add the other Homeowners as respondents because the case was properly initiated against the Department and Golden Hills.

“Russell Rock.” Given the Board decision – which listed all of the Homeowners – the ALC Clerk's Office interpreted Blue Sky's request as naming the Department and Golden Hills of Fairview Homeowners Association, Inc., as Respondents. At some point, Mr. Rock filed a motion to dismiss which the Court returned to him as he was not a named party.

³ For the purposes of their motion, the Court has assumed, without deciding, that the Homeowners are “affected persons.”

⁴ The South Carolina Secretary of State's Office website identifies a “Sally S. Rock” of 255 Night Lark Lane, Campobello, SC, as the registered agent for Golden Hills of Fairview Homeowners Association, Inc. Ms. Rock is a member of the California State Bar; the Court granted her petition for pro hac vice in this case on July 19, 2022.

⁵ The Homeowners filed an Application for Appeal with the Spartanburg County Planning and Development Department contesting an approval issued to Blue Sky for the RV Park. That document also identifies Mr. Rock as “Secretary, GHHAOS, 255 Night Lark Ln, Campobello, SC 29322.”

The addition of the other Homeowners as parties, cannot, however, happen involuntarily at this point in the proceedings. Blue Sky had thirty days after the Board decision to file its request for contested case hearing with the Court and to serve opposing parties. It only served the Department and Golden Hills within this time frame. The question that must be addressed is whether the remaining Homeowners are indispensable under Rule 19, SCRCF, such that without these entities as parties, the action must be dismissed. In pertinent part, Rule 19, SCRCF, provides:

a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

“[I]f the party is not indispensable under Rule 19(a), then the considerations listed in SCRCF 19(b) are never reached.” *Stewart v. State Crop Pest Com’n*, 307 S.C. 133, 139, 414 S.E.2d 121, 125 (1992). Pursuant to Rule 19(a), a party is indispensable if: (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. Here, the other Homeowners are not indispensable

parties under SCRCP 19(a). This case involves the issuance of a septic tank permit. The Court believes that complete relief can be afforded among the entities already parties to the action – Blue Sky as the applicant, Golden Hills in opposition to the permit, and the Department as the issuing agency. The ability of Golden Hills to seek revocation of the permit issued to Blue Sky is not dependent on inclusion of the omitted Homeowners’ associations, and the absence of the other Homeowners as parties does not ultimately preclude complete relief from being obtained in the action.

Finally, consideration of the second prong of the Rule 19(a) test mitigates toward Blue Sky. While the other Homeowners arguably “claim an interest relating to the subject of the action,” the test requires that these entities be “so situated that the disposition of the action in their absence may as a practical matter impair or impede their ability to protect that interest.” The interests of the other Homeowners are aligned with Golden Hills such that they are adequately protected by Golden Hills’ presence. Furthermore, nothing prevents these entities from voluntarily joining the case as parties or participating as witnesses supporting Golden Hills.

To the extent the Homeowners’ argue that service of the request for contested case hearing on Russel Rock in his capacity as Secretary of Golden Hills was insufficient because it was served by certified mail, restricted delivery, this argument must also fail. In pertinent part, SCRCP Rule 4(d)(8) specifies that “[s]ervice of a summons and complaint upon a defendant of any class referred to in paragraph (1)[individuals] or (3) [corporations] of this subdivision of this rule may be made by the plaintiff or by any person authorized to serve process ... by registered or certified mail, return receipt requested and delivery restricted to the addressee.” The method of service by mail at the ALC, however, is less exacting. SCALC Rule 5 addresses service and states that “[s]ervice shall be made by actual delivery, by mail to the last known address, or as otherwise approved by the Court through administrative order.” (Emphasis added). According to Blue Sky’s Certificate of Service filed with its Request for Contested Case Hearing form, Mr. Rock was served by U.S. Mail at 255 Night Lark Lane, Campobello, SC 29322. The ALC rule contains no requirement that service by mail be sent registered or by certified mail, restricted delivery. The 2021 Revised Notes to SCALC Rule 5 indicate that service by mail at the ALC is broader than under SCRCP Rule 5 by stating that “[a]ny service that satisfies Rule 5, SCRCP, also satisfies this [SCALC] Rule.” Accordingly, the manner of service on Russell Rock was sufficient.

The remaining procedural jurisdiction argument to be addressed is whether Blue Sky's Notice of Appeal itself is insufficient because, as posited by the Homeowners, it did not set forth relief requested as required under SCALC Rule 11(D)(4).⁶ The Court rejects this contention, as well. In answer to the prompt, "please provide a brief statement regarding why the hearing is sought and relief sought," contained on the Request for Contested Case Hearing form, Blue Sky wrote: "DHEC Board lacked jurisdiction to consider an untimely filed request for RFR on the merits; the staff decision had become the final agency decision 15 days after mailing on July 7, 2022 [2021]. In the alternative, the Board erred in reversing staff's decision to grant Petitioner's septic tank permit."

The Court believes that this statement adequately conveys that Blue Sky is seeking reversal of the Board's decision to deny the septic tank permit at issue for the reason set forth – the RFR was untimely filed. In the alternative, Blue Sky requests a hearing on the merits which it contends would show that the permit should be granted.

In their July 29, 2022 submission to the Court, the Homeowners offer the new argument that the time frames under § 44-1-60(E) are not applicable because the Board, in rescinding Blue Sky's septic tank permit, exercised its authority under the Pollution Control Act, S.C. Code Ann. § 48-1-100, et al. (PCA). The Board decision cites the PCA as the basis for its jurisdiction in matters concerning septic tanks: "Pursuant to 48-1-100(C), DHEC is the state agency with jurisdiction over septic tanks."⁷ Relying on § 48-1-100(C) for the proposition that the proposed Blue Sky septic tank constituted "real or potential threats to the health of the people of South Carolina, the Homeowners assert that S.C. Code Ann. § 48-1-50(5), empowered the Board to rescind the permit:

Issue, deny, revoke, suspend or modify permits, under such conditions as it may prescribe for the discharge of sewage, industrial waste or other waste or air contaminants or for the installation or operation of disposal systems

⁶ Under the SCALC Rules in effect when Blue Sky filed its request for contested case hearing, this Rule was denominated as SCALC Rule 11(D)(3).

⁷ Section 48-1-100(C) reads:

The Department of Health and Environmental Control is the agency of state government having jurisdiction over those matters involving real or potential threats to the health of the people of South Carolina, including the handling and disposal of garbage and refuse; septic tanks; and individual or privately owned systems for the disposal of offal and human or animal wastes.

or sources or parts thereof; provided, however, that no permit shall be revoked without first providing an opportunity for a hearing;

Generally, the Homeowners are correct that the Department has broad authority under the PCA. “[W]here an administrative agency such as DHEC is acting for the protection of the health and welfare of the public, the delegation of authority to that agency should construed liberally.” *City of Columbia v. Bd. of Health & Env’t Control*, 292 S.C. 199, 202, 355 S.E.2d 536, 538 (1987)). However, the Homeowners’ argument here is misplaced.

The Homeowners seek to bypass the specific procedures contained in S.C. Code Ann. § 44-1-60 for Board review of matters pertinent to the issuance, denial, renewal or revocation of permits and licenses. While the Department has jurisdiction over septic tanks under the PCA, in the context of a third party challenging the issuance of a septic tank permit, the Board must still adhere to the procedural requirements of § 44-1-60 to give effect to that jurisdiction.⁸ The Board decision itself recites that § 44-1-60 is the statutory procedure invoked: “This matter comes before the South Carolina Board of Health and Environmental Control for final review pursuant to S.C. Code Ann. § 44-1-60.” Moreover, the Homeowners’ contention that § 44-1-60 does not apply to actions under the PCA would work to impliedly repeal § 44-1-60. There is absolutely no evidence that the General Assembly intended such a result. Instead the Court must read § 44-1-60 and the PCA together. *See City of Rock Hill v. South Carolina Dept. of Health and Environmental Control*, 302 S.C. 161, 167, 394 S.E.2d 327, 331 (1990)(“Repeals by implication are not favored by courts and to repeal a statute on account of an asserted conflict or repugnancy with another, ‘the repugnancy must not only be plain, but the provisions of the two statutes must be incapable of any reasonable reconciliation; for if they can be construed so that both can stand, the Court will so construe them.’(citing *Pearson v. Mils Manufacturing Co.*, 82 S.C. 596, 509, 64 S.E. 407, 409 (1909)) Compliance with § 44-1-60 was thus, a prerequisite to invoking the Board’s review of the septic tank permitting decision.

Accordingly, the Homeowners’ Motion to Dismiss is **DENIED**.

II. Blue Sky’s Motion to Dismiss

⁸ This matter is distinct from the Department’s enforcement powers under the PCA to issue administrative cease and desist orders, seek civil damages, and in some instances, recommend criminal charges, against violators. *See* S.C. Code Ann. §§ 48-1-90, 48-1-130, 48-1-310- and 48-1-330.

Blue Sky argues that this Court must grant its Motion to Dismiss because the Homeowners' RFR was not filed with the DHEC Board in a timely manner. Subsections (E)(1) and (2) of S.C. Code Ann. § 44-1-60 provide as follows:

(E)(1) Notice of a department decision must be sent by certified mail, returned receipt requested to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified. Affected persons may request in writing to be notified by regular mail or electronic mail in lieu of certified mail. Notice of staff decisions for which a department decision is not required pursuant to subsection (D) must be provided by mail, delivery, or other appropriate means to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified.

(2) The staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department by the applicant, permittee, licensee, or affected person.

Blue Sky points out that the Department issued the septic tank permit on June 22, 2022, and that this date triggered the fifteen (15) day window for filing an RFR. It further contends that the staff decision to issue the permit became a final decision on July 7, 2022, meaning that the opportunity to file a RFR closed. The Homeowners' filing of an RFR on October 26, 2021 was thus, too late so that the Board should not have granted the Homeowners a forum to challenge the septic tank permit. Nonetheless, the Board did conduct a final review and decided that the septic tank permit was issued improperly.⁹

The Homeowners dispute that their RFR was filed beyond the time period provided by statute. Instead, they assert that the time for them to file an RFR did not actually begin until the Department provided a copy of the septic tank permit as part of its FOIA disclosure to Ms. Wallace on October 14, 2021. The Homeowners filed their RFR on October 26, 2022, twelve days after receipt of the permit.

The Homeowners' argument is predicated upon their contention that the FOIA request submitted by Ms. Wallace on May 14, 2021, was sufficient to put the Department on notice that

⁹ The Board rescinded the septic tank permit because the application relied upon consumption data from a campground that was not comparable to that proposed by Blue Sky. Although the Board's written decision did not discuss timeliness of the RFR, the Homeowners offer the issue was vigorously argued by both parties. The decision notes the date the septic tank permit was issued and the date the RFR was filed which indicates the Board was aware of the timeliness issue and still chose to consider the merits of the case.

the Homeowners were affected persons within the meaning of § 44-1-60(E). As recited earlier, Ms. Wallace’s May 14, 2021 FOIA request asked for “all documents concerning a proposed recreational vehicle park (“RV Park”) to be located at or near 1970 Landrum Mill Road, Campobello, SC, in Spartanburg County, Block Map Reference #1-09-00-020.03. You may confine your search from September 20, 2020 though the date of your response. The RV Park may be listed under one or more of the following names or a derivative of such names: T. Tree RV Park, T. Tree Farms RV Park, ...” Pursuant to the FOIA statute, the response date for Ms. Wallace’s FOIA request was June 27, 2021; however, no responsive documents were submitted until October 14, 2021. The septic tank permit was issued to Blue Sky on June 22, 2021, five days before the Department should have responded to the FOIA request.

S.C. Code Ann. § 44-1-60(E) does not explain how to become an “affected person” except that “affected persons” are those “who have requested in writing to be notified” and that affected persons “may request in writing to be notified by regular mail or electronic mail in lieu of certified mail.” § 44-1-60(E)(1),(2). The statute also fails to identify the area within the Department that such a request for affected person status should be directed.¹⁰

The question before this Court then, is whether Ms. Wallace’s FOIA request can be considered sufficient to establish her as an affected person for purposes of § 44-1-60. Blue Sky cites a recent ALC decision, *Gullah/Geechee Fishing Association, Inc. v. South Carolina Department of Health and Environmental Control, and Bay Point Island, LLC*, 22-ALJ-07-0080-CC)(S.C. Admin. Law Ct. July 15, 2021), in support of its position that a FOIA request does not equate to a request for affected person status under § 44-1-60. The facts in *Bay Point* are remarkably similar to the instant case. There, on August 31, 2021, Bay Point Island, LLC (Bay Point) submitted an application to the Department for a septic tank system to serve a single residential dwelling. Previously, on or about July 19, 2021, Gullah/Geechee Fishing Association, Inc (Gullah) filed a FOIA request to the “Bureau of Water, OCRM [Ocean & Coastal Resource Management]” within the Department for “any and all applications and file documents for NPDES

¹⁰ It is noteworthy, however, that the Wallace FOIA request was emailed to “David Vaughan, Director of Onsite Wastewater Management for SC.” Although Mr. Vaughan’s signature block indicates that he is with DHEC’s “Legislative Affairs” office, during the motions hearing there was the indication that Mr. Vaughan had some responsibility for the Bureau of Environmental Health Services, the Department section which issues septic tank permits. Further the Homeowners apparently met with Mr. Vaughn at some point in August 2021 and September 2021 concerning matters related to the proposed RV Park.

[National Pollutant Discharge Elimination system] or land disturbance permits for Bay Point Island, likely submitted by Bay Point Island, LLC or for any request or file document relating to a Coastal Zone Consistency Certification for Bay Point Island, LLC.” On August 3, 2021, and again, on August 31, 2021, the Department responded that it had no documents related to septic tank applications. Gullah filed a second FOIA request on August 31, 2021 which specifically sought “any applications for permits or permits issued by DHEC for septic tanks or land disturbance permits or coastal zone consistency certifications...We are also seeking specifically septic tank applications in addition to any other NPDES permits.” The Department issued a septic tank permit to Bay Point on September 23, 2021. Nonetheless, the Department’s FOIA response on October 20, 2021 continued to deny it had the requested documents. Gullah did not become aware of the permit’s issuance until October 27, 2021; it filed a RFR with the Board on November 9, 2021. The Board declined to conduct a review hearing and Gullah subsequently filed for a contested case hearing at the ALC.

Gullah argued that its FOIA requests were sufficient to achieve affected person status for the purposes of § 44-1-60(E) and further maintained that had DHEC provided accurate FOIA responses within the statutory deadlines, it would have had the information to file a RFR in a timely manner. The presiding Administrative Law Judge, however, declined to allow the FOIA requests to serve the purpose advocated by Gullah.

Several reasons supported the ALC decision in *Bay Point*. First, allowing Gullah to rely upon a FOIA request to establish affected person status would ignore the procedure providing for such status spelled out in § 44-1-60(E)(1) which plainly states that “affected persons may request in writing to be notified by regular mail or electronic mail in lieu of certified mail.” Furthermore, despite there being a plain and straightforward procedure set forth in the statute, Gullah never availed itself of that procedure, and instead sought information only through FOIA without mentioning “affected person” under § 44-1-60. The ALC pointed out that allowing the use of FOIA in the manner asserted by Gullah would be inconsistent with the procedure established by the General Assembly to gain such status under § 44-1-60. In addition, the ALC noted that violations of FOIA are handled in the circuit court and not the ALC so that it would be improper for the ALC to attempt to fashion a FOIA remedy by excusing the requirements of § 44-1-60. Finally, the ALC pointed out that even if Gullah’s reliance solely on FOIA was not unreasonable, the FOIA requests

themselves were inadequate inasmuch as the first FOIA request was sent prior a septic tank application having been filed and both requests were sent to the “wrong Department division.”

The logic of the *Bay Point* decision would seem to compel the same result here. Inasmuch as the septic tank permit was issued to Blue Sky on June 22, 2021, and the Homeowners’ RFR was not filed until October 26, 2021, it is apparent that the Homeowners missed the fifteen day window of opportunity to make a proper request for RFR. *See* S.C. Code Ann. § 44-1-60(E)(2)(“The staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department by the applicant, permittee, licensee, or affected person.”) However, both parties have cited appellate cases which give the Court some reservations such that additional analysis is necessary.

In *South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control, et al.*, 390 S.C. 418, 702 S.E.2d 246 (2010), the South Carolina Supreme Court evaluated whether the Coastal Conservation League (League) was an affected person under § 44–1–60 with regard to the issuance of certain permits to the States Ports Authority (Ports Authority) and the Department of Transportation (DOT). DHEC issued a final permit to the Ports Authority on November 2, 2006; the permit to DOT was issued on November 13, 2006. The Ports Authority filed a RFR with the Board on November 13, 2006 to seek clarification. *Id.*, 390 S.C. at 248-249, 702 S.E.2d at 422. Notice that the permits had been issued had not been provided to the League, and on November 17, 2006, its counsel contacted DHEC to determine their status. A DHEC employee sent an email in reply “making it plain that DHEC was aware of the League’s involvement and desire to be notified on the agency decision” and further stating that “you all were on the mailing list and should have received a copy.” *Id.*, 390 S.C. at 249, 702 S.E.2d at 422. The League was provided notice of the permits on November 20 and filed its RFR regarding the Ports Authority permit that same day. The League filed its RFR concerning the Department of Transportation Permit on November 30, 2006. Significantly, “the League filed its RFRs of the DHEC staff decisions regarding SPS’s and DOT’s permits more than fifteen days after the staff decisions were mailed to SPA and DOT – the applicants – but within fifteen days of the League receiving notice of the decisions.” *Id.* Before the Board, DHEC argued that the League’s RFRs were untimely; the Board ruled that the RFRs were timely and, on the merits, of the case, upheld the issuance of the permits. *Id.*

The ALC found that the League’s RFRs were untimely, ruling “that the League had a statutory right to request to be notified of the decision and there was no evidence that the League filed a request to be notified of the decision per section 44-1-60(E).” *Id.*, 390 S.C. at 423-424, 702 S.E.2d at 249. On appeal, in upholding the ALC, the South Carolina Court of Appeals found that the “League failed to request notification of the staff decision as delineated in Section 44-1-60(E)”. *Id.*

The South Carolina Supreme Court, after noting that “the statute [44-1-60(E)] is not clear as to how an individual or entity acquires the status of “affected persons who have asked to be notified,”¹¹ observed the following:

The ALC and the court of appeals found that the League failed to avail itself of the right to be notified under § 44–1–60(E) because the League failed “to make a formal request to be notified of a decision” and “failed to request notification of the staff decision as delineated in section 44–1 60(E).” We believe the November 17th email acknowledgement by DHEC refutes the suggestion that the League failed to request to be notified of the agency decision.

In our view, the ALC’s and the court of appeals’ foray into the degree of “formality” needed for § 44–1–60(E) “affected person” status is not necessary for deciding this appeal. DHEC’s concession that the League was on the “mailing list and should have received a copy [of the permit decision]” is sufficient for purposes of acquiring “affected person” status. Therefore, given DHEC’s concession, we hold the League had asked to be notified of the DHEC staff decision on the permits.

Id., 390 S.C. at 427-428, 702 S.E.2d at 251.

The quoted language from *Conservation League* raises at least two points pertinent to the resolution of the instant case. First, the ALC found that the League had made no formal request to be notified under § 44-1-60(E). Nevertheless, based upon the DHEC email acknowledging that the “League was on the mailing list and should have been notified” the Court rejected the ALC’s rationale for not considering the League to be an affected person. *Id.* Secondly, the Supreme Court eschewed the degree of “formality” the ALC and Court of Appeals believed to be necessary to request for affected person status, emphasizing “that throughout the permit application process in

¹¹ Section 44-1-60(E) has been amended since *Coastal League* to read “affected persons who have requested in writing to be notified.”

this matter, the League was not an obscure or unknown party. The League has been involved in this particular permitting process from the beginning.” *Id.*¹²

Since *Coastal Conservation*, § 44-1-60(E) has been amended to require that an affected person make a written request to the Department in order to gain that status. The current version of the statute does not, however, define the content of such a written request,¹³ and as mentioned earlier, also does not tell an affected person where within the Department such a request is to be filed. The Homeowners argue that there was compliance with this element through Ms. Wallace’s written FOIA request. Ms. Wallace’s written request – “for all documents concerning a proposed recreational vehicle park” at or near 1970 Landrum Mill Road: – was certainly broad enough to encompass septic tank permits, as well as any applications for such permits.¹⁴ Furthermore, she submitted the request to the Department division responsible for issuing septic tank permits and received a response from its chief acknowledging receipt. In the May 14, 2021 email to Mr. Vaughn accompanying her FOIA request, Ms. Wallace also explained that “Among other things there are serious concerns about the waste that would be channeled to Gold Mine Creek that feeds into the North Pacolet River and runs thru a residential development.”

In *Coastal Conservation*, in the absence of a finding that a formal request for affected person status was made to the Department, the Supreme Court placed emphasis on the League’s involvement in the permitting process. In response to the public notice issued at the Department’s receipt of the disputed permit applications, the League submitted comments to the proposed permits during the comment period. In addition, the League participated in public hearings. These factors, even in the absence of a formal request for affected person status, coupled with the Department’s aforementioned acknowledgments of the League’s involvement, lead the *Coastal*

¹² The League attended public hearings held pursuant to the Department’s public notice requirements and submitted written comments during the public comment period. *Id.*, 390 S.C. at 422, 702 S.E.2d at 248.

¹³ While it is reasonable that a person who wishes to request affected person status under § 44-1-60(E) would use the language “affected person” in his or her request to the Department, the absence of such a specific requirement in the statute suggests that a person may make a sufficient affected person request without articulating those exact words.

¹⁴ In noting that the septic tank permit had not yet been issued at the time of the FOIA request, Blue Sky argues that FOIA requires the disclosure of documents in an agency’s current possession, not documents that the agency may produce in the future. The efficacy of this contention is undermined here where the septic tank application filed by Blue Sky was certainly in the Department’s possession at the time Ms. Wallace filed her FOIA request. Had the Department properly responded to the May 14, 2021 FOIA request, the Homeowners would have at least obtained the septic tank application.

Conservation Court to find that the League was an affected person within the meaning of § 44-1-60(E). *Id.*, 390 S.C. at 428, 702 S.E.2d at 251.

Here, accepting their allegations as true, the involvement of the Homeowners thereof, is not as pronounced in the permitting stage as was the League's participation in *Coastal Conservation*. Blue Sky submitted its septic tank application to the Department on April 13, 2021. Ms. Wallace filed her FOIA request on May 14, 2021. Although the FOIA request was sent to the division responsible for issuing septic tank permits, other than the vague reference to "waste" in the accompanying email, there is no evidence that Ms. Wallace or the Homeowners wanted information specifically related to septic tank permits.¹⁵ At the motions hearing, Homeowners suggested that they made inquiries of the Department after submitting the FOIA request regarding septic tank permits but were told no permit had been issued. These inquiries, however, apparently occurred after the June 22, 2021 issuance date of the permit to Blue Sky. In the Homeowners' pre-hearing statement filed with this Court, they allege that "after the permit was issued on June 22, 2021, DHEC provided inaccurate information. In multiple phone inquiries initiated by members of Respondent HOAs, the DHEC staff repeatedly stated that "no permit" had been issued."¹⁶ At

¹⁵ It is the specificity of a request under §44-1-60 (E)(1) that differentiates it from a general request for documents through FOIA. As alluded to earlier, while there are no magic words to trigger affected person status, the Department also cannot be expected to grope in the dark. It is the degree and specificity of the concern communicated to the Department about some permitting decision that places the requestor in the class of affected persons and puts the Department on notice that he seeks such status.

¹⁶ The Homeowners indicated during the motions hearing that a Circuit Court had enjoined further development of Blue Sky's RV Park. The circuit court case file in *The Enclave at Fairview Farm Homeowners Association, Inc., et al. v. Spartanburg County, SC, et al.*, Case No. 2021-CP-42-02713, filed in the Spartanburg County Court of Common Pleas on or about August 19, 2021, is available to the Court on the Spartanburg County Seventh Judicial Circuit Public Index at <https://publicindex.sccourts.org/Spartanburg/PublicIndex/CaseDetails.aspx?County=42&CourtAgency=42002&Casenum=2021CP4202713&CaseType=V&HKey=107659011687877111849104661091106597112858110943111109851155277471086690697683548198555088111864948>. In an exhibit to documents filed in the Circuit Court case, the Homeowners included an "Application for Appeal" to the Spartanburg County Planning & Development Commission, dated July 12, 2021. That exhibit contains a pleading entitled "Appeal of the Planning and Development Commission's Conditional Approval of T Tree Farms RV Park" which references a March 2, 2021 Conditional Approval issued by the Commission to allow Blue Sky to develop and operate the RV park. This same pleading states that "[o]n or about March 16, 2021, Madelon Wallace received a message from a third party that the Commission had granted conditional approval of a commercial RV Park at 1970 Landrum Mill Road." The Conditional Approval, dated March 3, 2021 and included in the Circuit Court case file, was made contingent upon Blue Sky showing that it had obtained approvals from a number of Spartanburg County entities, approval of an architectural design package, water systems and a septic tank permit from DHEC. This pleading continues to make reference to the Homeowners having attended public Commission meetings to complain about the Conditional Approval, the earliest of which was April 2021; however, there is no indication that a representative from

no point have the Homeowners suggested that they were given false information about the status of the permit prior to its issuance or during the fifteen day period between issuance and July 7, 2021. While this Court does not countenance a state agency providing inaccurate information to the public, it is apparent that this alleged inaccurate information did not cause the Homeowners' failure to submit a timely request for affected person status regarding Blue Sky's permit.¹⁷

Both Blue Sky and the Homeowners cite *Pickens County v. South Carolina Department of Health and Environmental Control*, et al., 435 S.C. 99, 866 S.E.2d 537 (2021), a case involving landfill permits, in support of their respective positions. Blue Sky asserts *Pickens County* stands for the proposition that the time to request an RFR under § 44-1-60(E) begins to run upon the mailing of the staff decision to the permittee, not upon receipt of actual notice of the decision by an affected person. The Homeowners assert that the case affirms the rationale of *Conservation League* with regard to both the amorphous nature of achieving "affected person status" under § 44-1-60(E) and disavowal of the formality of an affected person status request. This Court believes the Supreme Court's decision in *Pickens County* could actually support both parties' positions in this case. Based on the record, however, the result in *Pickens County* compels the Court to grant Blue Sky's Motion to Dismiss.

the Department was in attendance. While the Homeowners acknowledge public opposition to Blue Sky's development as early as April 2021, they have provided no indication that opposition to any septic tank permit was voiced to the Department at any time prior to the septic tank permit being issued. This is far different from the circumstances present in *Conservation League* where the League actively participated in Department public hearings and submitted written comments to the Department prior to the issuance of the permits.

¹⁷ The Homeowners' also offered the following allegation in their pre-hearing statement:

In fact, for several month, various members of the DHEC staff discussed the May 14 FOIA request repeatedly with at least 4 members of the Respondent HOAs and their hydrogeologist in person, in a video teleconference, and in emails. The DHEC staff had actual knowledge that the FOIA request and other inquiries were connected with Respondent HOAs.

The pre-hearing statement further makes mention of an in-person meeting with Department personnel on August 4, 2021 and a videoconference on September 30, 2021. These dates are after the issuance of the septic tank permit to Blue Sky. Moreover, it is significant that Ms. Wallace did not exercise available remedies under FOIA and file suit in a circuit court to force the Department to disclose. S.C. Code Ann. 30-4-100 ("A citizen of the State may apply to the circuit court for a declaratory judgment, injunctive relief, or both, to enforce the provisions of this chapter in appropriate cases if the application is made no later than one year after the date of the alleged violation or one year after a public vote in public session, whichever comes later.")

In *Pickens County*, the South Carolina Supreme Court again construed § 44-1-60(E)'s phraseology "Notice of a department decision must be sent by certified mail, returned receipt requested to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified." In 2007, the County of Pickens, South Carolina (County) entered into agreements with MRR Pickens, LLC to allow the operation of a Class Two landfill. DHEC issued a Class Two Landfill permit to MRR Pickens which authorized it to accept certain types of low level waste. More harmful wastes such as municipal and industrial solid waste were not authorized to be stored in a Class Two landfill. The County did not file a request in writing to DHEC to be notified as an affected person of future decisions related to MRR's landfill permit. *Id.*, 435 S.C. at 102-103, 866 S.E.2d at 538-539.

In 2015, MRR applied to DHEC for a "minor permit modification" that would allow it to install a liner required for Class III landfills that accept more harmful waste. Because the modification was characterized as "minor", no public notice of the application was required to be published.¹⁸ DHEC issued the modified permit to MMR on August 10, 2015. *Id.* The County did not learn of the permit until December 2015 and it received a copy of the same from DHEC on January 11, 2016. *Id.* The County filed its request for an RFR on March 23, 2016. The DHEC Board declined to review the case. *Id.*

After the County filed for a contested case hearing, the ALC granted MRR's motion to dismiss based upon the untimely submitted RFR. *Id.*, 435 S.C. at 103-104, 866 S.E.2d at 538. On appeal, the South Carolina Court of Appeals reversed based upon the ALC's failure to determine whether MRR misclassified the modification as "minor" and whether the Department had followed public notice requirements. *Id.* On certiorari, the Supreme Court reiterated that under § 44-1-60(E) the fifteen day time period for an affected person to request board review begins on the date the staff permitting decision is mailed to the applicant and not when the affected person receives actual notice of the decision. *Id.*, 436 S.C. at 105, 866 S.E.2d at 540. The *Pickens County* ruling thus undermines the Homeowners' arguments that their time period for requesting a RFR did not begin until the actual receipt of the permit through the FOIA disclosure in October 2021. Here, Blue Sky's septic tank permit was mailed to it on June 22, 2021. The fifteen day period to request Board

¹⁸ See S.C. Code Ann. § 44-1-60(B) which provides that "The department staff shall comply with all requirements for public notice, receipt of public comments and public hearings before making a department decision. To the maximum extent possible, the department shall use a uniform system of public notice of permit applications, opportunity for public comment and public hearings."

review under § 44-1-60(E) began to run at that time and ended on July 7, 2021. The Homeowners' RFR was not filed until October 26, 2021, and as such, without more, was not timely.

However, *Pickens County* also stands for the proposition that the Department must adhere to any public notice requirements regarding applications for permits. The *Pickens County* Court remanded the case to the ALC to make the factual determinations whether the landfill permit was actually “minor” and, whether public notice provisions were followed. *Id.*, 435 S.C. at 107-108, 866 S.E.2d at 541. Applications for “minor” permit modifications did not require notice to the public. To the contrary, applications making major landfill modification did require public notice. As articulated by the Court of Appeals:

The filing deadlines of § 44-1-60 are contingent upon DHEC’s compliance with the procedural and notice requirements of its own regulations. See e.g., S.C. Code Ann. § 44-1-60(B) (“The department staff shall comply with all requirements for public notice, receipt of public comments and public hearings before making a department decision. To the maximum extent possible, the department shall use a uniform system of public notice of permit applications, opportunity for public comment and public hearings.”). Our supreme court reiterated this in *South Carolina Coastal Conservation League v. South Carolina Department of Health & Environmental Control*, 390 S.C. 418, 702 S.E.2d 246 (2010), in which the Coastal Conservation League sought review of a critical area permitting decision more than fifteen days after DHEC issued the staff decision. DHEC failed to notify the Coastal Conservation League as required by statute; thus, the time limitations for review did not start to run until DHEC corrected its notice error. *Id.* at 430, 702 S.E.2d at 253. The plain language of § 44-1-60(A) supports this conclusion here as well: “All department decisions involving the issuance, denial, renewal, suspension, or revocation of permits ... shall be made using the procedures set forth in this section.” The procedures in § 44-1-60 particularly emphasize public notification, as reflected in § 44-1-60(B). Only after DHEC issues a staff decision in compliance with the procedural and notice dictates of its own regulations and of § 44-1-60 subsections (A) through (E), does subsection (E)(1) trigger the fifteen day deadline for an appeal of the decision to the DHEC Board.

Pickens County v. South Carolina Department of Health and Environmental Control, et. al., 429 S.C. 92, 104, 837 S.E.2d 743, 749 (Ct. App. 2020) (Emphasis added).

Although it vacated certain findings of fact entered by the Court of Appeals and remanded the case to the ALC, the Supreme Court approved of the Court of Appeals’ rationale regarding notice:

The ALC must determine on remand whether DHEC properly classified the Permit Modification as a minor modification. [] Only after resolving that

question can the ALC determine whether the County's request for a contested case hearing was untimely under subsection 44-1-60(E)(2). On remand, the parties may conduct discovery on relevant issues, and the ALC should consider the County's request to intervene on behalf of the neighboring landowners. If the ALC upholds DHEC's classification of the Permit Modification and concludes DHEC complied with all notice requirements, the fifteen-day limitations period began running on August 10, 2015, and the County's challenge should be dismissed. If the ALC determines the Permit Modification was major and DHEC did not fulfill its notice requirements, then the fifteen-day limitations period has not started. (Emphasis added).

Pickens County, 435 S.C. at 107-108, 866 S.E.2d at 541.

While it may seem incongruous given the size of the proposed RV Park at issue here, the Court has not found public notice requirements in either statute or regulation attendant to the Department's issuance of septic tank permits.¹⁹ During the hearing on Blue Sky's Motion, counsel for the Department informed the court that no public notice requirements existed for septic tank applications. Further, the Homeowners have not pointed to any public notice requirements with which the Department was supposed to comply. Therefore, because the Department has not violated § 44-1-60(B), the fifteen day period to file a RFR of the staff decision to grant the permit began on June 22, 2021 and ended on July 7, 2021. The Homeowners' RFR was filed on October 26, 2021 and is thus, untimely.

Under § 44-1-60, the General Assembly clearly set forth a procedure by which the Board could review and take up matters pertinent to the issuance, denial, renewal or revocation of permits, licenses, or other actions. Namely, this statutory provision allots a window of time for affected parties to invoke the authority of the Board before DHEC staff decisions regarding permitting become final. After this window has closed, any action by the Board to review staff decisions is outside of its jurisdiction and void. *See Knight Pub. Co. v. Univ. of S.C.*, 295 S.C. 31, 367 S.E.2d 20 (1988) ("A statute that creates a new liability and affixes the time within which an action may be commenced is not a statute of limitation but a statute of creation; commencement within the time affixed is then an indispensable condition of the action. (internal citation omitted) Unless the action was timely commenced under § 30-4-100(a), the trial judge lacked subject matter jurisdiction and any order issued in this action is void."). Here, given the Homeowners' untimely

¹⁹ See Regulation 61-56, Onsite Wastewater Systems.

RFR, the Board acted outside of its authority when it reviewed the staff decision to grant Blue Sky's septic tank permit.

CONCLUSION

For the specified reasons, the Homeowners Associations' Motion to Dismiss is **DENIED**. The Motion to Dismiss filed by Blue Sky is **GRANTED**. Furthermore, the Court hereby vacates the Board decision and reinstates the Department's staff decision to grant the Blue Sky permit.

AND IT IS SO ORDERED.



November 29, 2022
Columbia, S.C.

Milton G. Kimpson, Judge
South Carolina Administrative Law Court

CERTIFICATE OF SERVICE

I, Anthony R. Goldman, 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, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



November 29, 2022
Columbia, S.C.

Anthony R. Goldman
Judicial Law Clerk