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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
S. Phillip Lenski, Administrative Law Judge

Docket No. 22-ALJ-07-0008-CC
Appellate Case No. 2022-001126

Gullah/Geechee Fishing Association, Inc., ………………………………………….Appellant,

vs.

South Carolina Department of Health and Environmental Control, and
Bay Point Island, LLC, ………………………………………………………………Respondents.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Administrative Law Court erred in finding that it lacks "procedural jurisdiction" to hear Appellant's contested case.

2. Whether the Administrative Law Court erred in finding Appellant's Request for Final Review was untimely.

3. Whether the Administrative Law Court erred in finding that Appellant's Freedom of Information Act requests did not qualify it as an "affected person."

STATEMENT OF THE CASE

This contested case stems from a permit issued to Respondent Bay Point Island, LLC ("BPI, LLC") by Respondent South Carolina Department of Health and Environmental Control ("DHEC" or "the Department") authorizing the installation of an individual onsite wastewater system, also referred to as a septic tank system, on Bay Point Island, a barrier island located in Beaufort County, South Carolina.

Appellant filed a Request for Final Review Conference with the DHEC Board, which was denied on December 17, 2021. On January 17, 2022, Appellant filed a Request for Contested Case Hearing. On May 9, 2022, BPI, LLC filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction. On May 27, 2022, DHEC and Appellant both filed Motions for Summary Judgment. On June 20, 2022, Administrative Law Judge S. Phillip Lenski held a hearing on all three pending motions. On July 15, 2022, Judge Lenski issued an Order Granting Bay Point's Motion to Dismiss on the basis that the ALC lacked "procedural jurisdiction" to hear the matter based on Appellant's "untimely filing" of its Request for Final Review. On August 12, 2022, Appellant filed a Notice of Appeal.

STANDARD OF REVIEW

In an appeal from the decision of an administrative agency, the Administrative Procedures Act ("APA") provides the appropriate standard of review. *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008) (original citations omitted). Pursuant to the APA, S.C. Code Section 1-23-610(B), this Court may affirm the ALC's decision or remand the case for further proceedings, or it may reverse or modify the ALC's decision if the substantive rights of the Appellant have been prejudiced because its finding, conclusion, or decision was:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

An appellate Court "will correct the decision of the ALC if it is affected by an error of law, S.C. Code Ann. § 1–23–380(5)(d) (Supp.2010), and questions of law are reviewed de novo." *S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012), (reh'g denied May 4, 2012) (citing *Town of Summerville v. City of N. Charleston,* 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)). Under this standard, a reviewing Court may reverse or modify an agency decision based on errors of law. *Turner v. S.C. Dep't of Health & Envtl. Control*, 377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008).

STATEMENT OF FACTS

Bay Point Island is a barrier island in Beaufort County, South Carolina. The island is accessible only by water and aside from the landing dock, no other man-made structure exists currently on the approximately 400-acre island. This island is an ecologically and culturally significant natural resource and asset, a portion of which is recognized as an Audubon Important Bird Area and loggerhead sea turtle nesting habitat.

Bay Point Island and other sea islands in Beaufort have additional cultural and historical significance to the Gullah/Geechee Nation, a people from numerous African ethnic groups linked with indigenous Americans who created the unique African-based Creole language, "Gullah," and traditions, from which the later came "Geechee." The Gullah/Geechee people have been considered "a nation within a nation" from the time of chattel enslavement in the United States until they officially became an internationally recognized nation on July 2, 2000. The people of the Gullah/Geechee Nation have cultivated coastal lands and fished from the waters of the Atlantic Ocean for hundreds of years, carrying on their cultural traditions, language, and customs to this day.

Appellant's mission is to advocate for the members of the Gullah/Geechee Nation, whose livelihoods depend on the ocean's resources, particularly in and around Port Royal Sound where Bay Point Island is located. Formally organized in 2010, Appellant is headquartered on St. Helena Island in Beaufort County, but its members live and work on the sea islands and coastal lands from North Carolina to Florida, including along the shores of Bay Point Island. Appellant's members consist of businesses whose profits derive from the harvesting of various types of seafood around the sea island region, including oysters, fish, shrimp, and crabs. Many members also provide

interactive educational demonstrations to groups concerning Gullah/Geechee fishing traditions, and harvest fish and shellfish for their own sustenance.

BPI, LLC is a development entity that has sought approval to develop Bay Point Island for years through the construction of a high-end luxury resort and residential subdivision, and presently seeks to initiate construction of a series of single-family houses. Appellant has been involved in seeking protections for Bay Point Island as a priceless cultural and environmental asset, in particular its members rights to use the public trust tidelands in, on and around the island.

Wary of BPI, LLC's development plans, Appellant, through its attorneys, filed a Freedom of Information Act ("FOIA") request with DHEC on July 19, 2021, seeking "[a]ny and all applications and file documents for NPDES or land disturbance permits for Bay Point Island, likely submitted by Bay Point Island, LLC, or for any requests or file documents relating to a Coastal Zone Consistency Certification for Bay Point Island, LLC." (R. p. 135). DHEC responded on August 31, 2022 but produced no documents relevant to Appellant's request. (R. p. 5)

Later that day, August 31, 2021, Appellant submitted a second FOIA request to DHEC, this time requesting the following:

> Any applications for permits or permits issued by DHEC for septic tanks or land disturbance permits or coastal zone consistency certifications for the following properties located on Bay Point Island:
> R300 045 000 0001 through
> R300 045 000 0043
> Owners should all be Bay Point Island LLC but these TMS numbers were not included in the earlier request that I submitted. We are also seeking specifically septic tank applications in addition to any other NPDES permits.

(R. p. 137)

Unbeknownst to Appellant, on that same day, August 31, 2021, BPI, LLC submitted an application to the Department seeking to install a septic system on Bay Point Island; per this

application, the proposed septic system would handle less than 1500 gallons per day (gpd) of domestic waste. (R. p. 144) DHEC requested additional information from BPI, LLC on September 15, 2021. (R. p. 102) BPI, LLC responded to that request on September 20, 2021. *Id.* DHEC ultimately approved the application and issued the permit on September 23, 2021. (R. p. 107)

Meanwhile, the Department failed to answer Appellant's August 31 FOIA request until October 20, 2021—well beyond the mandated time for a FOIA response and nearly one month after the permit was issued—finally responding that "OCRM staff said they do not have any information responsive to the above-referenced request. We also researched the information you provided and were unable to locate any files." (R. p. 46) Appellant's second FOIA request clearly covered BPI's septic application, yet the Department's failure to respond timely and accurately left Appellant – whether intentional or not – in the dark as to continued to remain unaware of its existence because neither the septic application nor septic permit were ever produced by DHEC. Instead, Appellant's attorney received notice of the septic permit through an email forwarded by a third party (Beaufort County) on October 27, 2021. (R. p. 48)

ARGUMENT

The facts of this matter lead to only one conclusion: DHEC is solely responsible for creating the circumstances resulting in Appellant's lack of notice and the ALC's dismissal of Appellant's appeal. DHEC violated the mandate of FOIA in failing to provide the requested notification of Respondent BPI, LLC's septic tank permit; it failed to recognize Appellant as an "affected person" under S.C. Code Ann. §44-1-60 despite Appellant's diligent attempts to learn of any permit applications pending or issued related to BPI, LLC's development plans; and it has violated Appellant's Constitutional rights to due process by failing to provide notice and an opportunity to be heard on these types of permits. As a result, the ALC's Order is based on the

premise that the Gullah/Geechee Fishing Association should have requested notice of permit decision that it had absolutely no way of knowing existed due to DHEC's lack of publicly-noticing such applications. The ALC dismissed this appeal, despite DHEC's failure to timely and accurately respond to a FOIA request seeking information related to any permit applications, and DHEC's failure to provide notice of the permit decision even though it knew that the Appellant had requested that exact information in writing. Appellant urges this Court to correct the wrongful dismissal of Appellant's contested case and order a remand so Appellant may be heard on the merits.

1. The ALC erred in finding that it lacks "procedural jurisdiction" to hear Appellant's contested case.

Respondent BPI, LLC, asserted that the Court lacked "procedural jurisdiction" to hear Appellant's claims based on Appellant's purported failure to follow all applicable procedures necessary to initiate a contested case, thereby depriving the Court of the "power to render the particular judgment requested." (R. p. 81) The Court agreed, finding that "since the Petitioner did not submit a written request to notified [sic], and did not file its RFR within the fifteen (15) day statutory window, this Court is without authority to extend the deadline to file an RFR based the [sic] Petitioner's actual notice of the Department's determination." (R. p. 11) According to the ALC, this timing divested the Court of its "procedural jurisdiction" to hear the entire case. Appellant asserts this conclusion constitutes an error of law.

Subject matter jurisdiction is widely defined as "the power to hear and determine cases of the general class to which the proceedings in question belong." *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994). Our Supreme Court has held that "the question of compliance with rules, regulations, and statutes governing an appeal [from an administrative agency] is one of appellate jurisdiction[.]" *Allison v. W.L. Gore & Assocs.*, 394 S.C. 185, 188, 714

S.E.2d 547, 549 (2011). "The failure of a party to comply with the procedural requirements for perfecting an appeal <u>may</u> deprive the Court of 'appellate' jurisdiction over the case, but it does not affect the Court's subject matter jurisdiction." *Great Games, Inc. v. S.C. Dep't of Revenue*, 339 S.C. 79, 82 n.5, 529 S.E.2d 6, 7 n.5 (2000) (emphasis added). The ALC cited a number of cases in support of the additional contention that a party's failure to follow intermediate administrative steps at the agency level prior to requesting a contested case hearing deprives the ALC of "procedural jurisdiction" (R. pp. 6-7); however, each and every one is an unreported decision of the ALC, none of which are controlling. *See, e.g.*, Rule 268(d)(2), SCACR ("Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved."). Appellant can find no case law supporting the use of Administrative Law Court decisions as precedent to support the ALC's contention there is no procedural jurisdiction here.

It is undisputed that in this matter, the ALC has power to hear and determine cases of this general class, i.e., appeals from a decision of the DHEC Board, and to render the particular judgment requested by Appellants. *See* S.C. Code Ann. § 44-1-60 (providing that "[a]ll department decisions involving the issuance . . . of permits" are subject to a request for final review by the DHEC Board, and the Board's decision may be appealed to the ALC for a contested case hearing.) Accordingly, the ALC's conclusion that it lacked jurisdiction over this contested case due to a purported failure to timely file its RFR constitutes an error of law.

2. The ALC erred in finding Appellant's RFR was untimely.

The ALC's finding that it lacked jurisdiction hinges on the Court's further conclusion that Appellant's RFR was untimely. For the reasons explained below, Appellant asserts that this conclusion constitutes an error of law.

BPI, LLC asserted that DHEC staff's decision to issue the septic permit became final on October 8, 2021, because no written request for a final hearing was submitted to the DHEC board by that date. (R. p. 80) BPI, LLC further argued, and the ALC concluded, that Appellant should have instead requested in writing to be notified of relevant septic tank permitting decisions pursuant to S.C. Code Section 44-1-60(E)(1), which provides in pertinent part:

> Notice of a department decision must be sent by certified mail, return receipt requested to . . . affected persons who have requested in writing to be notified.

In finding that Appellant's RFR was untimely, the ALC overlooked the legislative intent of applicable statutory law and ignored several other factors, to include: the lack of stated procedure for making an "affected persons" request under Section 44-1-60(E); the practical impossibility of making such a request under the Department's current permitting regime; the fact that Appellant was actively seeking the exact same information by another valid, legal avenue (FOIA); the fact that the Department failed to comply with its statutory obligations under FOIA; and the fact that the Department is responsible for all of the above due to its failure to review septic permits for consistency with the State Coastal Management Program and its related exclusion of septic tank applications and permits from public notice.

A. No uniform procedure exists for notifying DHEC of "affected persons" status.

Both BPI, LLC and the ALC suggest that Appellant could have simply notified the Department that it wanted to be considered an "affected person" under Section 44-1-60(E). While this sounds simple in theory, the task in actuality is effectively impossible. The Supreme Court considered Section 44-1-60(E) in 2010, stating that "the statute is not clear as to how an individual or entity acquires the status of "affected persons who have asked to be notified." *S.C. Coastal Conserv. League v. S.C. Dep't of Health & Envtl. Control*, 390 S.C. 418, 427, 702 S.E.2d 246, 251

(2010). The Court further noted that "DHEC never stated it followed a formal procedure as to how a party acquires 'affected persons who have asked to be notified' status[;] [t]o the contrary, DHEC indicated it took an informal approach in deciding which parties it notified of its decisions." *Id*. at 428, 252. While the Court declined to set forth a process of party notification in its opinion, that same year, the South Carolina Legislature attempted to clarify procedures by adding the following language to Subsection (E)(1): "Affected persons may request in writing to be notified by regular mail or electronic mail in lieu of certified mail." *See* Act No. 278 § 1 (2010). However, this additional language is essentially meaningless in providing any additional direction as to how one can become considered an "affected person."[1]

BPI, LLC suggests that Appellant is inappropriately attempting to shift the burden of notifying affected parties to DHEC, but the Supreme Court has previously declined to entertain that contention where DHEC was charged with notice. *See Coastal Conserv. League*, 390 S.C. at 428, 702 S.E. 2d at 252 ("The record clearly establishes throughout the permit application process in this matter, the League was not an obscure or unknown party . . . . Therefore, [developer's] bold statement that DHEC should not bear the burden of 'guess[ing] which commenter or member of the public would like to know about particular decisions' is unavailing under these facts."). In fact, even the ALC noted that "the term 'affected person' is interpreted rather broadly." (Order Granting Resp't Motion to Dismiss at 6). Indeed, the burden for notification should not be shifted to the public to guess whether and when DHEC might be considering a permit application in every geographical area of the State where it may be affected. The solution here is simple: notify the

[1] A review of DHEC's website reveals no additional guidance on this process. In contrast, for example, the DHEC website provides detailed instructions on how an individual, interest group, or business entity can place their name on a mailing list to be notified about NPDES/ND permits, including the contact information they require as well as detailed contact information for individual staff members within the agency (names and email addresses, phone numbers, mailing addresses, and internet links). *See* "Mailing Lists for NPDES/ND Permits," available at https://scdhec.gov/mailing-lists-npdesnd-permits#individual (last visited Nov. 10, 2022).

public of all septic system applications and/or issued permits in the coastal zone, just as DHEC does with every other type of permit as part of its mandatory Coastal Zone Consistency Review. *See* discussion *infra*, pp. 17-20.

B. Appellant made other attempts to obtain permit information under the Freedom of Information Act.

BPI, LLC argued that this contested case should be dismissed due to inaction of the Appellant; however, this argument has no basis in fact. Because DHEC has unilaterally decided septic tank permits are exempted from Coastal Zone Consistency review, BPI, LLC and DHEC evaded public scrutiny of this specific permit, forcing Appellant to seek this information via other valid legal means, specifically the Freedom of Information Act, S.C. Code Section 30-4-10, *et seq.*

The ALC asserts that it has no jurisdiction to remedy purported FOIA violations, and Appellant agrees. However, Appellant raises this issue not to obtain relief or enforce the provisions of FOIA, but to instead show that: (1) it was actively trying to obtain documents regarding the septic application and permit at issue during the time period in question; (2) the Department's failure to timely and accurately respond to such requests as is required by statute, then Appellant would have received notice and been able to challenge the permit within 15 days of the issuance; and (3) DHEC was on notice of Appellant's material interest in this particular property sufficient to constitute "affected person" status.

a. DHEC failed to timely comply with disclosure of public records pursuant to FOIA.

Finding it "vital in a democratic society that public business be performed in an open and public manner," the South Carolina Legislature enacted FOIA in 1987 "so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public

activity[.]" S.C. Code Ann. § 30-4-15. To that end, FOIA provides a very specific timeline for record production that must be followed by public bodies:

> Each public body, upon written request for records . . . shall within ten days . . . of the receipt of the request, notify the person making the request of its determination and the reasons for it[.] . . . This determination must constitute the final opinion of the public body as to the public availability of the requested public record[.]

S.C. Code Ann. § 30-4-30(C). After the public body provides this ten-day final determination notice, the next clock begins to run:

> If the request is granted, the record must be furnished or made available for inspection or copying no later than thirty calendar days from the date on which the final determination was provided.

Appellant submitted its first written request for records to DHEC pursuant to FOIA on July 19, 2021. DHEC responded on August 3, 2021 that it had no responsive documents related to septic tank applications or permits, only documents and correspondence for an unrelated issue on Bay Point Island. The next communication received from DHEC was dated August 31, 2021, stating that the Department had no information or documents to produce. With the second FOIA request submitted to the agency on August 31, 2021, no response of any kind was provided by DHEC until October 20, 2021, fifty-one (51) days after the initial request was made.

b. DHEC failed to accurately disclose the existence of public records in its possession pursuant to FOIA.

DHEC received BPI, LLC's permit application on August 31, 2021, the same date as Appellant's second FOIA request. DHEC finally responded on October 20, 2021, stating that it had no records to disclose. However, DHEC admitted that it had in its possession, at a minimum, the following: (1) BPI's permit application (submitted August 31, 2021); (2) DHEC's request for additional information from BPI (September 15, 2021); (3) BPI's response to that request (September 20, 2021); and (4) the finalized permit (September 23, 2021).

FOIA creates an affirmative duty on the part of public bodies to disclose information. *Bellamy v. Brown*, 305 S.C. 291, 295, 408 S.E.2d 219, 222 (1991). Despite this, BPI argued that DHEC only had an obligation to search for records in its possession prior to the date of the FOIA request, i.e., items received or generated on or before August 31, 2021. This conclusion was provided without legal authority and is contrary to the General Assembly's stated purpose of FOIA. Even if DHEC had no continuing obligation to disclose information through the date of its ten-day final determination notice, it is undisputed that DHEC had at least one item in its possession—BPI's permit application—on the date of the FOIA request. That singular document would have been enough to give Appellant notice that a permit application was pending. In other words, had DHEC properly and timely disclosed even the existence of BPI's septic permit application, Appellant would have been able to submit a comment letter, track its progress, request notification of ant decision on that application and submit a RFR pursuant to the typical time frame. BPI acknowledges as much in its Motion to Dismiss ("[T]he Department admittedly provided incorrect information in response to the FOIA request[.]"). (Bay Point Mot. to Dismiss at 12). Indeed, even the ALC acknowledged "[t]he Court is troubled by the Department's late and inaccurate response to the Petitioner's second FOIA request." (Order Granting Resp't Mot. to Dismiss at 8, n.6).

In summary, Appellant never sat on its rights. At each stage, Appellant took every step it could, based on the information available, despite circumstances shrouded in uncertainty and non-transparency, to make the appropriate legal filings within statutory time frames. Appellant should not be penalized at any stage for the failure of an administrative arm of the government to comply with its statutory obligations under FOIA.

C. The Department is ignoring the intent of the General Assembly.

Bay Point's arguments and the ALC's Order both ignore the overall legislative intent of both S.C. Code Section 44-1-60 and FOIA, suggesting an extreme result—dismissal—that is contrary to the purpose and spirit of the law by allowing an agency decision made behind closed doors to go unchallenged.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993) (citing *Bankers Trust of S.C. v. Bruce*, 275 S.C. 35, 267 S.E.2d 424 (1980)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the Courts are bound to give effect to the expressed intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citing Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)). Courts must interpret a statute as a whole, "consonant with the purpose, design, and policy of the lawmakers." *New York Times v. Spartanburg Cnty. Sch. Dist.,* 374 S.C. 307, 310, 649 S.E.2d 28, 30 (2007) (citing *Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992)); *see also State v. Sweat,* 379 S.C. 367, 384, 665 S.E.2d 645, 649-50 (Ct. App. 2008) ("The language [of a statute] must be read in a sense which harmonizes with its subject matter and accords with its general purpose."). "In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature." *Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) (citing *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 663 S.E.2d 484 (2008)).

a. The Legislature intended FOIA to protect the public from closed-door agency decisions.

FOIA was enacted to promote transparency in government. *See, e.g., DomainsNewMedia.com v. Hilton Head Island-Bluffton Chamber of Commerce*, 423 S.C. 295,

297, 814 S.E.2d 513, 514 (2018). The essential purpose of FOIA is to protect the public from secret government activity." *Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 8-9, 760 S.E.2d 785, 789 (2014). The FOIA statute itself is clear about the legislative intent behind its inception:

> The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy.

S.C. Code Ann. § 30-4-15. The FOIA statute goes on to state that its provisions should be applied so that citizens can "learn and report fully the activities of their public officials at a minimum cost or delay[.]" *Id*. To this end, FOIA "should be liberally construed to carry out the purpose mandated by the legislature." *Quality Towing v. City of Myrtle Beach*, 345 S.C. 156, 161, 547 S.E.2d 862, 864-65 (2001) (citing *S.C. Dep't of Mental Health v. Hanna*, 270 S.C. 210, 241 S.E.2d 563 (1978)).

DHEC's failure to produce a record it had in its possession on August 31—and that was requested on August 31—is a clear contradiction of the stated purpose of FOIA and well-established jurisprudence that the statute should be construed liberally to promote transparency at minimal cost or delay. To find otherwise would mean that public disclosure of government activity was thwarted over a technicality, or an overly-strict statutory interpretation. Again, Appellant raises this issue not to seek a remedy available under FOIA, but to support the contention that it should not be prejudiced in this matter due to the Department's failure to fulfill a duty required by law.

b. The Legislature intended S.C. Code Section 44-1-60 to provide for public participation in agency decisions.

Administrative agencies such as DHEC are required to meet minimum standards of due process. *Stono River Env't Prot. Ass'n v. S.C. Dep't Health & Env't Control*, 305 S.C. 90, 93-94, 406 S.E.2d 340, 342 (1991) (citing S.C. Const. Art. 1 § 3; *Smith & Smith, Inc. v. S.C. Pub. Serv.*

Comm 'n, 271 S.C. 405 (1978)). The South Carolina Constitution provides that "[n]o 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 be heard . . . and he shall have in all such instances the right to judicial review." S.C. Const. Art. 1 § 22. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Stono River*, 305 S.C. 90 at 94, 406 S.E.2d at 342 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972)).

The General Assembly codified the same when it enacted Section 44-1-60(8), which provides:

> 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.

The purpose of this act "is intended to provide a uniform procedure for contested cases and appeals from administrative agencies." Act No. 387 § 53 (2006). *See also Coastal Conserv. League*, 390 S.C. at 429, 702 S.E.2d at 252 (quoting *id.* and further interpreting Section 44-1-60 to find that the mailing requirement "gives all parties equal opportunity to challenge a decision[.]").

It is clear that the Constitution itself as well as multiple statutes promulgated by the General Assembly envision a system of government where administrative agencies seek public input to promote transparency and thorough decision-making. When legislative intent is subverted by an agency's failure to follow plainly stated processes and procedures, citizens are denied the rights conferred on them by the legislature and the Constitution. Such a result should not be permitted to stand, and the affected members of the public (i.e., Appellant) should not be further prejudiced as a result.

D. DHEC is failing to abide by its statutory duty to review all state and federal permits within the coastal zone for consistency with the Coastal Management Program.

Perhaps most importantly, it is critical to note that the procedural hurdles of both FOIA and S.C. Code Section 44-1-60, which are now being used to penalize the Gullah/Geechee Fishing Association's good faith efforts to challenge the septic permit on behalf of its members, would be moot if the Department would simply abide by its statutory mandate to review all state and federal permits for consistency with the state's Coastal Management Program. Ironically, this failure to conduct a consistency review was precisely the reason why Appellant challenged the septic permit in the first place.

As background, the United States Congress promulgated the Coastal Zone Management Act in 1972, finding an "urgent need to protect and to give high priority to natural systems in the coastal zone," 16 U.S.C. Section 1451, *et seq*., and declaring a national policy "to preserve, protect, develop, and where possible, to restore and enhance, the resources of the Nation's coastal zone for this and succeeding generations." Thereafter, South Carolina promulgated the Coastal Tidelands and Wetlands Act ("the Act") in 1977. S.C. Code Ann. § 48-39-10, *et seq*. In promulgating the Act, the General Assembly found that "increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development . . . have resulted in the decline or loss of living marine resources, wildlife, nutrient-rich areas, [and] permanent and adverse changes to ecological systems[.]" S.C. Code Ann. § 48-39-20. The General Assembly also found that the coastal zone is "ecologically fragile and consequently extremely vulnerable to destruction by man's alterations" and that "[i]mportant ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historical values in the coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values." *Id*. Therefore, the General Assembly declared that "the basic state policy in the implementation of [the Act] is to protect the quality of the coastal environment and to promote the

economic and social improvement of the coastal zone and of all the people of the State." S.C. Code Ann. § 48-39-30(A).

The Department, by and through its Office of Ocean and Coastal Management ("OCRM"), is charged with the Act's administration, including the implementation and enforcement of a comprehensive coastal management program. *See* S.C. Code Ann. § 48-39-80. To that end, the Department promulgated the Coastal Management Program ("CMP"), which was approved by the General Assembly in 1979 and amended once in 1993. The CMP contains binding norms applicable to activities in the coastal zone[2] and has been upheld by the South Carolina Supreme Court as valid and enforceable. *See, e.g., Spectre v. S.C. Dep't Health & Envtl. Control,* 386 S.C. 357, 688 S.E.2d 844 (2010). In developing the CMP, DHEC was directed to take into account "all lands and waters in the coastal zone," which encompasses the eight coastal counties, including Beaufort County. *See* S.C. Code Ann. § 48-39-10.

The Act directed DHEC to create two distinct regulatory programs: (1) a permitting program applicable to all uses and alterations of the coastal zone's "critical areas"[3] where OCRM has direct permitting authority (S.C. Code Ann. § 48-39-130); and (2) a review and certification program, applicable throughout all of the coastal zone, through which the Department is directed to "[d]evelop a system whereby [OCRM] shall have the authority to review all state and federal permit applications in the coastal zone, and to certify that these do not contravene the management plan." S.C. Code Ann. § 48-39-80(B)(11) (emphasis added). The CMP provides the following guidelines for evaluation of all projects in the coastal zone:

> (1) The extent to which the project will further the policies of the South Carolina General Assembly which are mandated for

[2] The "Coastal Zone" is comprised of Charleston, Beaufort, Berkeley, Colleton, Dorchester, Georgetown, Horry, and Jasper counties. S.C. Code Ann. § 48-39-10(B).

[3] "Critical area" includes coastal waters, tidelands, beaches, and the beach/dune system. S.C. Code Ann. § 48-39-10(J).

> [OCRM] in implementation of its management program, these being: (a) "to promote the economic and social improvement of the citizens of this State . . . **with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development** . . . ; (b) to protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations."
>
> (2) The extent to which the project will have adverse impacts on the "critical areas" (beaches, primary ocean-front sand dunes, coastal waters, tidelands).
>
> (3) The extent to which the project will protect, maintain or improve water quality, particularly in coastal aquatic areas of special resource value, for example, spawning areas or productive oyster beds.
>
> . . .
>
> (7) The possible long-range, cumulative effects of the project, when reviewed in the context of other possible development and the general character of the area.
>
> (8) The extent and significance of negative impacts on Geographic Areas of Particular Concern (GAPCs).

CMP III-14 (internal citations omitted, emphases added).

The CMP contains a provision that "DHEC retains regulatory authority over septic tanks with flow rate of 1500 gallons per day or greater (Section 44-1-40, S.C. Code of Laws)." CMP III-62; *see also* CMP V-5. However, nothing in the statute authorizes such a limitation on DHEC's certification review. Nor can the CMP override the plain language of the statute. *See, e.g., Milliken v. S.C. Dep't of Labor*, 275 S.C. 264, 269 S.E.2d 765 (1980). "Although a regulation has the force of law, it must fall when it alters or adds to a statute." *S.C. Coastal Conserv. League v. S.C. Dep't Health & Envtl. Control*, 390 S.C. 418, 429, 702 S.E.2d 246, 252 (2010).

Despite the preceding, and despite the General Assembly's clear mandate that DHEC "review <u>all</u> state and federal permit applications in the coastal zone, and to certify that these do not contravene the [CMP]" (S.C. Code Ann. § 48-39-80(B)(11) (emphasis added)), DHEC has entirely

failed to undertake this review for typical residential septic permits in low-lying and dynamic coastal areas, excluding OCRM staff from incorporating their specialized knowledge of coastal processes and forces into its permitting of shoreline adjacent septic systems. This disconnect between DHEC's coastal authority and its septic permuting violates the plain language of the statute and reflects a serious flaw in the Department's decision-making process.

3. The ALC erred in finding that Appellant's FOIA requests did not place the Department on notice of its interest in Bay Point Island as an "affected person."

Bay Point argued, and the ALC agreed, that Appellant's repeated efforts to obtain information regarding the septic tank application and permit was not sufficient to place DHEC on notice that it wished to be notified of permit decisions on Bay Point Island, finding that doing so "would be problematic for a number of reasons" including a statement that Appellant's "sole reliance on the FOIA requests was unreasonable" and the FOIA requests themselves were "inadequate." (R. pp. 8-11)

Our Supreme Court examined the issue of timeliness regarding S.C. Code Section 44-1-60(E) in *S.C. Coastal Conserv. League v. S.C. Dep't of Health & Env't Control*, 390 S.C. 418, 702 S.E.2d 246 (2010). In that case, DHEC issued permits to the S.C. Ports Authority ("SPA") on October 30, 2006, for development of a proposed container terminal facility following multiple public hearings and public comment periods, Coastal Conservation League ("the League") participated in DHEC's decision-making process by attending hearings and providing written comments at all stages. On November 2, DHEC amended one of the permits and sent notice of the amendment to SPA via certified mail, but did not notify the League. On November 17, the League notified DHEC that it had learned of the amended permit through an outside source, which prompted DHEC to mail the League notice. On November 20, 2006, the League received that

notice and immediately filed an RFR. The Department argued the League's RFR was not timely pursuant to Section 44-l-60(E) because it was filed several days after the fifteen-day time frame that began when DHEC mailed the amended notice to SPA. The Supreme Court ultimately made two relevant findings. First, because the League had 'been involved in this particular permitting process from the beginning" the Court found "the League was not an obscure or unknown party" and that "SPA's bold statement that DHEC should not bear the burden of 'guess[ing] which commenter or member of the public would like to know about particular decisions' is unavailing under these facts." *Id.* at 428, 252. Second, the Court held:

> Failing to interpret [44-1-60(E)] as requiring DHEC to mail notifications simultaneously would mean DHEC could mail notice of its decision to the applicant, and, fifteen days later, mail notice of the decision to affected persons who have asked to be notified. Under this scenario, the time period for appealing the decision would have expired by the time the affected person receives notice; thus "affected persons" could be precluded from seeking review.

Id. at 429, 252. The Court then stated that notice should be mailed simultaneously to all parties referenced in Section 44-1-60(E), and, if that does not occur,

> [W]e hold that in situations where DHEC fails to simultaneously notify the applicant, permittee, licensee, and affected persons asking to be notified, the latest date of mailing controls when the fifteen day period begins to run.

Id.

Here, consistent with *Coastal Conserv. League*, Appellant's FOIA requests put DHEC on notice that affected parties existed; the septic tank permit was the embodiment of the staff decision. As explained in *Coastal Conserv. League*, the Court recognized the League as an affected party by virtue of its involvement in the public commenting process; here, the multiple FOIA requests submitted by Appellant put DHEC on notice that it, too, was an affected party. The factor that distinguishes the League from Appellant here is that the League provided public comment on the

proposed project; however, here, Appellant was not afforded the same opportunity because DHEC did not notify the public of the permit application. The fact that Appellant was excluded from the Bay Point septic tank permit decision-making process (and in fact had no actual knowledge of its existence) severely prejudiced Appellant. Further, pursuant to the Supreme Court's holding in *Coastal Conserv. League*, the fifteen-day clock to file an RFR technically never started running because Appellant was never mailed notice of the permit decision; however, if we substitute the date of actual notice for the date of mailing—October 27, 2021—Petitioner timely filed its RFR within fifteen calendar days (on November 9, 2021).

CONCLUSION

WHEREFORE, Appellant Gullah/Geechee Fishing Association respectfully requests this Court issue an opinion reversing the Administrative Law Court's Order Granting Respondent's Motion to Dismiss Appellant's contested case.

Respectfully submitted,

s/Leslie Lenhardt

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