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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Robert L. Reibold, Administrative Law Judge
Docket No.: 22-ALJ-07-0082-CC

Appellate Case No.: 2022-001402

Coastal Conservation League, ... Appellant

vs.

South Carolina Department of Health and Environmental Control, Price Sloan, Carolyn Sloan, Mark Tiberio, Anne Tiberio, Michael Schulte, Laura Schulte, and Northwest Properties of Hickory, LLC …………………………………………………..Respondents,

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INITIAL BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Respectfully submitted,

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Statement of Issues on Appeal

1. Did the Administrative Law Court correctly decide that the Petitioner's failure to name and timely serve Dr. Paul Gayes as a party to the contested case proceedings required dismissal of the action?

2. Did the Administrative Law Court correctly decide that it lacked jurisdiction to review the case because the action is not a proper contested case if Dr. Paul Gayes is not a party?

Statement of the Case

The South Carolina Department of Health and Environmental Control (Department) adopts and incorporates by reference the Statement of the Case articulated by the Administrative Law Court (ALC) from the *Amended Order Granting Property Owners' Motion to Dismiss*. (R. p. ___). To avoid any question as to whether the Department has inadvertently adopted the Appellant's Statement of the Case per SCACR Rule 208(b)(2),[1] the ALC's adopted Statement of the Case is set forth verbatim as follows:

> This matter is pending before the South Carolina Administrative Law Court (the ALC or the Court) pursuant to a request for contested case hearing filed on March 8, 2022, by the South Carolina Coastal Conservation League (Petitioner), challenging a conclusion of the South Carolina Department of Health and Environmental Control (the Department or DHEC). Petitioner is specifically challenging a conclusion of DHEC's Board (the Board) that a coastal erosion research study proposed by Dr. Paul Gayes of Coastal Carolina University (CCU) on the use of geotextile sandbags[2] in critical areas at

[1] Rule 208(b)(2), SCACR "If a respondent does not include his own statement of the case, he shall be bound by the matters stated or alleged in appellant's statement of the case."

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

DeBordieu Colony in Georgetown County was "allowed" to proceed pursuant to the South Carolina Coastal Tidelands and Wetlands Act and the Beachfront Management Reform Act (BMA).[3] Price Sloan, Carolyn Sloan, Mark Tiberio, Anne Tiberio, Michael Schulte, Laura Schulte, and Northwest Properties of Hickory, LLC (collectively, Property Owners) placed the geotextile sandbags at issue in this matter in the critical area without a permit as required by the Department.[4] Dr. Gayes, Director of CCU's Burroughs & Chapin Center for Marine and Wetland Studies, proposed the research study to the Department's office of Ocean & Coastal Resource Management (OCRM). Petitioner is a non-profit membership corporation organized and existing under the laws of the State of South Carolina with the stated mission of working to protect the health of the natural resources of the South Carolina coastal plain.

On May 10, 2022, Property Owners filed a motion to dismiss, arguing Petitioner failed to name and timely serve its request for a contested case hearing on all requisite parties—specifically, upon Dr. Gayes—in violation of the Court's rules. On May 17, 2022, this Court noticed a hearing on the motion to dismiss for July 25, 2022. Petitioner filed a response to Property Owners' motion to dismiss on May 20, 2022, challenging Property Owners' contention that the Court should dismiss this matter. The parties additionally furnished prehearing statements. On June 2, 2022, the undersigned [referring to Judge Reibold] noticed a hearing on the merits for September 13-15, 2022, if the motion to dismiss were not dispositive. On June 14, 2022, the parties filed a consent motion for expanded discovery, requesting an additional thirty days to respond to discovery requests,

[3] S.C. Code Ann. §§ 48-39-10 *et seq.* (2008 & Supp. 2021).

[4] Separate enforcement matters for these permitting violations are pending with the Department as of the date of this order.

permission to conduct up to ten depositions per party, and permission for discovery to extend beyond the 90-day timeframe set forth in SCALC Rule 21(A); the undersigned [referring to Judge Reibold] granted the consent motion.

The hearing on the motion to dismiss was held on July 25, 2022. Subsequently, the Court granted the motion to dismiss by written order dated August 10, 2022. The Court ruled that Dr. Gayes should be a party, and was not timely served, thereby requiring dismissal, or alternatively that, if Dr. Gayes were properly considered not to be party, the matter did not present a contested case hearing, as that term is defined in the Administrative Procedures Act, depriving the Court of jurisdiction. On August 22, 2022, Petitioner filed a motion to reconsider, and DHEC filed a motion for clarification. By order dated September 19, 2022, the Court ruled on these motions; this amended order is the result of those motions.

Statement of Facts

The Department adopts and incorporates by reference the section captioned "Background" from the Administrative Law Court's *Amended Order Granting Property Owners' Motion to Dismiss* as the Department's Statement of Facts. (R. p. ___).

Standard of Review

The two Orders of the Administrative Law Court satisfy the standard of review in S.C. Code Ann. § 1-23-610(B). Specifically, the Court of Appeals can only reverse the Administrative Law Court's *Amended Order Granting Property Owners' Motion to Dismiss* and the *Order Granting Petitioner's Motion in Part, Denying Petitioner's Motion in Part, Granting the Department's Motion, & Issuing an Amended Order* if the rights of the Coastal Conservation League have been prejudiced because these Orders are:

"(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." S.C. Code Ann. § 1-23-610(B)(a-f).

Argument

1. The Administrative Law Court correctly ruled that the Petitioner's failure to name and timely serve Dr. Paul Gayes as a party to the contested case proceedings required dismissal of the action.

The Department concurs with Section I of the ALC's analysis, starting at page 5 of the *Amended Order Granting Property Owners' Motion to Dismiss*. The Appellant fails to establish any grounds for reversal of the ALC's rulings on this issue under the applicable standard of review. Dr. Gayes and/or Coastal Carolina University (CCU) are the parties of interest seeking to perform the study and are responsible for meeting the conditions of the Department's Final Agency Decision (FAD).

2. The Administrative Law Court correctly ruled that it lacked jurisdiction to review the action because the action is not a proper contested case if Dr. Paul Gayes is not a party

The Department concurs with Section II.A of the ALC's analysis in the *Amended Order Granting Property Owners' Motion to Dismiss,* with the exception of any inference that property

ownership conveys any rights related to such a pilot program or study.[5] The Appellant fails to establish any grounds for reversal of the ALC's rulings on this issue under the applicable standard of review. As stated above, Dr. Gayes and/or Coastal Carolina University (CCU) are the parties of interest seeking to perform the study and are responsible for meeting the conditions of the Department's Final Agency Decision (FAD).

Regarding Section II.B.1 and 2, the Department is not challenging the Court's dismissal of the Request for Contested Case. However, even though the ALC "removed the language indicating the Department's authority is limited to requesting documentation,"[6] the Department is nonetheless concerned that the *Amended Order Granting Property Owners' Motion to Dismiss* may have the future effect of limiting the Department's authority over pilot projects and research activities of state educational institutions (collectively referred to as "pilot projects") to merely taking enforcement action after a structure has been placed in the critical area without Department knowledge or input.

Regarding the Department's authority over pilot projects, although the General Assembly did not use "shall"[7], the Beachfront Management Act gives the Department discretion by using

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[5] The ALC states the following in the *Amended Order Granting Property Owners' Motion to Dismiss* (page 12): "Finally, while affected persons such as Petitioner have a statutory right to request a contested case hearing, there must still be some underlying right, privilege, or duty of party to be determined before a contested case hearing is proper. *Petitioner has no such underlying right, privilege, or duty related to maintenance of the study or use of the property to conduct the study. Petitioner is not the person or entity that requested the study and has no ownership or other interest in the subject property*." (Emphasis added).

[6] *Order Granting Petitioner's Motion in Part, Denying Petitioner's Motion in Part, Granting the Department's Motion, & Issuing an Amended Order*, page 14.

[7] It is well established that the term "shall" in a statute or regulation is mandatory. *See, e.g., Massey v. Glenn,* 106 S.C. 53, 90 S.E. 321, 324 (1916); *Montgomery v. Keziah*, 277 S.C. 84, 85, 282 S.E.2d 853, 854 (1981), *South Carolina Police Officers Retirement System v. City of Spartanburg,* 30 S.C. 188, 191, 391 S.E.2d 239, 241 (1990). Conversely, "may" or "should" are precatory rather than mandatory, and set forth recommendations, not requirements. *See, e.g., Association of Flight*

"may" twice in determining whether pilot projects should be allowed.[8] The Department contends that if it "may allow" a pilot project, it is necessarily implied that the Department has discretion to *not allow* such a pilot project. In order to fully effectuate the legislative intent, this Court should clarify that the Department has the authority to allow or disallow pilot projects and similar exemptions.

The Department's discretion to allow or disallow the pilot project is supported by the Department's broad authority from the beginning to the end of a pilot project. It is well established that in the absence of express restricting limitations, a governmental agency "possesses not merely the powers which in terms are conferred upon it, but also such powers as must be inferred or implied in order to enable the agency to effectively exercise powers admittedly possessed by it." *Carolina Water Service Inc. v. South Carolina Public Commission*, 272 S.C. 81, 87, 248 S.E.2d, 924, 927 (1978), quoting *Beard-Laney, Inc. v. Darby*, 213 S.C. 380, 49 S.E.2d 564, 567 (1948). Specifically, neither S.C. Code Ann. § 48-39-320 nor S.C. Code Ann. § 48-39-355 imposes any limiting language to the Department's authority in "ensuring that the activities cause no material harm to the flora, fauna, physical or aesthetic resources of the area" pursuant to S.C. Code Ann. §48-39-30. Furthermore, neither S.C. Code Ann. § 48-39-320 nor S.C. Code Ann. § 48-39-355

Attendants-CWA, AFL-CIO v. Huerta, 785 F.3d 710, 718 (D.C. Cir. 2015) (*citing Judd v. Billington*, 863 F.2d 103, 106 (D.C. Cir. 1988) ("The use of language like 'may' and 'should' instead of 'shall' or 'must' suggests that the provisions that follow are meant to be 'precatory, not mandatory'").

[8] S.C. Code Ann. § 48-39-320(C) states that "[n]otwithstanding any other provision of law contained in this chapter, the board, or the Office of Ocean and Coastal Resource Management, *may allow* the use in a pilot project of any technology, methodology, or structure, whether or not referenced in this chapter, if it is reasonably anticipated that the use will be successful in addressing an erosional issue in a beach or dune area. If success is demonstrated, the board, or the Office of Ocean and Coastal Resource Management, *may allow* the continued use of the technology, methodology, or structure used in the pilot project location and additional locations." (Emphasis added).

imposes any limiting language to the Department's authority in ensuring that "the use [of the proposed pilot project's technology, methodology, or structure] will be successful in addressing an erosional issue in the beach or dune area." S.C. Code Ann. § 48-39-320(C).

When the Beachfront Management Act was passed, the General Assembly found that the beach/dune system was "extremely important", S.C. Code Ann. § 48-39-250(1), and that

> "Chapter 39 of Title 48, Coastal Tidelands and Wetlands, prior to 1988, did not provide adequate jurisdiction to the South Carolina Coastal Council to enable it to effectively protect the integrity of the beach/dune system. Consequently, without adequate controls, development unwisely has been sited too close to the system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and private interests to protect the system from this unwise development."

S.C. Code Ann. § 48-39-250(4). Consistent with the legislative intent to expand the Department's authority to protect the beach/dune system, DHEC's legislatively-granted discretion to allow or disallow these studies, along with the lack of limiting statutory language, mitigates against a narrow application of S.C. Code Ann. § 48-39-355. Therefore, the Department contends that the General Assembly intended for OCRM to have discretion over pilot projects beyond merely "fixing the problem" after the fact through an enforcement action.

The South Carolina Supreme Court held that courts "defer to an agency's interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 766 S.E.2d 707, 718 (2014) (quoting *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). The rationale for the rule is that "'[t]he officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are . . . called upon to interpret.'" *Id.,* 766 S.E.2d at 718 (quoting *United States v. Moore,* 95 U.S. 760, 763 (1877)). The Department maintains that OCRM's statutory application is not arbitrary, capricious, or manifestly contrary to

the statute, and respectfully requests that the Court give deference to this interpretation of the Department's scope of authority regarding pilot projects.

Conclusion

Based on the foregoing arguments, the Department respectfully requests that the Court of Appeals affirm the ALC decision to dismiss the Petition.

Respectfully submitted,

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