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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Robert L. Reibold, Administrative Law Judge

Appellate Case No. 2022-001402

Coastal Conservation League, ... Appellant,

v.

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.

INITIAL BRIEF OF RESPONDENTS SLOAN, TIBERIO, SCHULTE AND NORTHWEST PROPERTIES OF HICKORY

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Statement of Issues on Appeal

1. Does substantial evidence support the ALC's finding that Dr. Paul Gayes was a party to the DHEC Board's Final Agency Decision approving his Research Proposal, thereby requiring the Appellant to name Dr. Gayes as a party to the contested case proceedings and dictating its dismissal for failure to name and timely serve Dr. Gayes?

2. Should this Court agree with the Appellant's contention that no approval, permit, or license is required for Dr. Gayes to conduct the Research Proposal, is the ALC's alternative finding applying Supreme Court precedent that a contested case proceeding is not cognizable under those circumstances nevertheless controlling and the dismissal of the Appellant's challenge should be affirmed on that basis as well?

Introduction

The issue before this Court is limited and discrete: is the professor who proposed and is responsible for a research project to study natural and engineered beach dune systems in the Grand Strand region a necessary party to a subsequent challenge of that study before the Administrative Law Court (ALC)? Nothing more and nothing less. That study was approved by the South Carolina Department of Health and Environmental Services (DHEC) Board pursuant to a Final Agency Decision (FAD) issued under provisions of State law that authorize such studies to be conducted. The ALC correctly answered this question in the affirmative—the professor that proposed the study and is responsible for it *is* a necessary party—a finding that is supported by substantial evidence. Based on that finding, the ALC further correctly dismissed Appellant South Carolina Coastal Conservation League's (League) request for a contested case challenging the DHEC Board's approval, based on its admitted failure to name or serve the professor in its challenge. This straightforward application of the ALC's rules, governing statutes, and binding court precedent should be affirmed.

Given the League's naked attempt to turn this appeal into something that it is not, and thereby expand the scope of this appeal into the litigation of issues that are not before the Court, it is necessary to re-center the scope of the appeal by highlighting the League's misdirection in its Brief, putting the issues actually before the Court into much-needed context. This is *not* an appeal from an enforcement proceeding. The propriety of Respondent Property Owners'[1] (Property Owners) placement of geotextile sandbags on the beach at their respective properties is not before the Court. Property Owners concede that they did not acquire the necessary permissions and approvals for the sandbags' placement prior to their installation. *That* issue is being resolved

[1] The Respondent Property Owners include Price and Carolyn Sloan, Mark and Anne Tiberio, Michael and Laura Schulte, and Northwest Properties of Hickory, LLC.

through separate enforcement actions applicable to each Property Owner entered by DHEC's Office of Ocean and Coastal Resource Management (Department).

In short, while the circumstances surrounding the placement of the sandbags at Property Owners' properties provide the factual predicate to relevant issues, and served as the vehicle through which the professor's research was conceived and will be implemented, neither the propriety of Property Owners' actions nor any natural consequences to the Property Owners of the approval of the research are issues in this appeal. Notwithstanding, the League goes to great lengths to malign the actions of the Property Owners in an effort to distract from its failure to name the proponent research professor. Again, the discrete issue before this Court is whether substantial evidence supports the findings of the ALC that the DHEC Board's subsequent approval of a research proposal of Dr. Paul Gayes[2] of Coastal Carolina University (CCU) to study the placed sandbags as a part of a larger scientific research project (Research Project) necessarily conferred party status on Dr. Gayes as a part of its approval, thereby requiring him to be a party to any subsequent challenge of that approval. Logic, commonsense, and the applicable statutory definitions and rules dictate that the answer is "yes." Because Dr. Gayes was *the* party that received approval from the DHEC Board for his Research Proposal, and because the League did not name or serve Dr. Gayes in requesting a contested case of the FAD approving the Research Proposal, substantial evidence supports the ALC's decision to dismiss the contested case. The decision of the ALC should be affirmed.

Statement of the Case

In this administrative matter, the League challenges the FAD issued by the DHEC Board. The FAD allows for geotextile sandbags located on the beach adjacent to beachfront properties in

[2] Dr. Gayes is the Director of Coastal Carolina University's Burroughs & Chapin Center for Marine and Wetland Studies and the Palmetto Professor of Marine Science and Geology.

Georgetown County, South Carolina to be covered with sand to form "cored" or "engineered" dune systems and studied pursuant to a research proposal submitted to the Department by Dr. Paul Gayes. [R. pp.] The Research Proposal also includes a variety of study elements designed to evaluate the State's coastal preservation policy[3] as set forth in the Coastal Tidelands and Wetlands Act Chapter of the South Carolina Code of Laws, which includes the Beachfront Management Act and Beachfront Management Reform Act (together, BMA) (S.C. Code Ann. §§ 48-39-10, *et seq*.). The Research Proposal further includes an assessment of the erosion protection provided to the adjacent beachfront properties by the proposed cored dune systems. [R. pp.]

The FAD was issued by the Board on February 10, 2022, and provides that the Research Proposal is allowed to proceed pursuant to both S.C. Code Ann. §§ 48-39-130(D) and 48-39-320(C), subject to the remaining provisions outlined in the FAD. [R. pp.] On March 8, 2022, the League filed a Request for Contested Case Review with the South Carolina Administrative Law Court (ALC) challenging the issuance of the FAD, but only named and served the Respondent Property Owners and the Department as parties to the contested case proceedings. ***Dr. Gayes, who submitted the Research Proposal to the Department and is responsible for conducting all research associated with the proposal, was not named as a party to the proceedings or timely served with a copy of the Request for Contested Case***.

On May 10, 2022, the Property Owners filed a Motion to Dismiss the League's Request for Contested Case Hearing. The grounds for the Motion to Dismiss were the League's failure to name and timely serve its Request for Contested Case Hearing on all requisite parties—namely, Dr. Gayes—pursuant to S.C. Code Ann. § 44-1-60, S.C. Code Ann. § 1-23-600, and the Rules of Procedure of the Administrative Law Court (RPALC), among other authorities outlined in the

[3] *See* discussion *infra* p. 5.

Motion. A hearing on the Motion was held on July 25, 2022. On August 10, 2022, the ALC entered an Order of Dismissal granting the Property Owners' motion and dismissing the case. The League filed a Motion to Reconsider on August 22, 2022. The Department filed a Motion for Clarification on the same date. An Amended Order of Dismissal (Amended Order) was entered by the ALC on September 19, 2022, together with an Order Granting in Part and Denying in Part the League's Motion to Reconsider and Granting the Department's Motion for Clarification (Order on Motion to Reconsider).

In the Amended Order, the ALC found that Dr. Gayes should have been a party to the contested case proceedings and was not timely served, thereby requiring dismissal for the reasons outlined therein and described below. Alternatively, the ALC ruled that, if Dr. Gayes was properly considered not to be a party, and no affirmative approval of the Research Proposal was required, then the matter did not present a proper contested case, which also deprives the ALC of jurisdiction to review the case and must result in dismissal. This appeal followed.

Statement of the Facts and Procedural History

The Property Owners own beachfront property in the Debordieu Colony community (Debordieu) located in Georgetown County, South Carolina. The beach at Debordieu suffers from chronic erosion, and the community has privately funded multiple sand renourishment projects over the past three decades.[4] [R. pp.] On January 24, 2019, Debordieu was issued its most recent renourishment permit by the Department, which allowed for up to 650,000 cubic yards of sand to be added to the beach via offshore dredge to address the erosion problem at the community (Permit

[4] Debordieu has implemented five renourishment projects on the beach in the last 33 years: 1990, 1998, 2006, 2015, and 2022. [R. pp.].

No. 2017-01795) (Renourishment Permit or Renourishment Project).[5] [R. pp.] The Renourishment Project was completed in the spring of 2022.

The erosion at Debordieu is particularly severe at the southern end of the beach where the Property Owners' houses are located. [R. pp.] Despite the previous renourishment projects and presence of an existing wooden bulkhead on the beach adjacent to the Property Owners' houses, each of the properties at issue have suffered significant erosion and associated flooding events during storm and tidal events, both historically and in recent years. [R. pp.] This erosion and flooding inevitably occurs after the dry sand beach and dune system added during a prior renourishment project is eroded away in the years following that renourishment project. [R. pp.]

Relevant here, longstanding policy with respect to beachfront management and policy was altered around the time period giving rise to the issues in this case. Historically, dating back to 1988, the BMA established a comprehensive statewide beachfront management program in South Carolina. The "Policy Statement" section of the BMA provides, among other items, that the State's coastal development policy is to:

> (1) protect, preserve, restore, and enhance the beach/dune system, the highest and best uses of which are declared to provide:
>
> (a) protection of life and property by acting as a buffer from high tides, storm surge, hurricanes, and normal erosion;
>
> (b) a source for the preservation of dry sand beaches which provide recreation and a major source of state and local business revenue;
>
> (c) an environment which harbors natural beauty and enhances the well-being of the citizens of this State and its visitors;
>
> (d) natural habitat for indigenous flora and fauna including endangered species.

[5] The Renourishment Permit also provided for the construction of three groins in combination with the sand renourishment. The groin component of the Renourishment Permit is the subject of separate litigation that is currently pending before this Court. *See Coastal Conservation League v. S.C. Dep't of Health & Env't Control & Debordieu Colony Cmty. Ass'n*, App. Case No. 2021-000158, S.C. Ct. App., appeal filed Feb. 16, 2021.

S.C. Code Ann. § 48-39-260.

Notable here, the BMA also established at the time a policy of "gradual retreat from the [coastal] system over a forty-year period." S.C. Code Ann. § 48-39-260 (1988); *see also* S.C. Code Ann. § 48-39-280 (1988) ("A forty-year policy of retreat from the shoreline is established."). Pursuant to this "forty-year policy of retreat", the Department established jurisdictional development boundaries referred to as the "baseline" and "setback" lines, which govern how close to the ocean property can be developed and what repairs can be made to beachfront property in the event of storm damage, among other items. *See* S.C. Code Ann. § 48-39-280. These jurisdictional lines are updated by the Department every seven to ten years based on best available data pursuant to the statute. *Id.*

The State's coastal retreat policy remained in place for three decades, despite frequent challenges to the Department's authority under the regulatory scheme. Pursuant to the Reform Act, the State's policy of coastal "retreat" was abolished and replaced with a policy of coastal "preservation." Pursuant to the Reform Act, the title of S.C. Code Ann. § 48-39-280 was amended to read, "Beach preservation policy established[.]", and that statute now provides: "[a] policy of beach preservation is established. The department must implement this policy and utilize the best available scientific and historical data in the implementation . . ." S.C. Code Ann. § 48-39-280(A). All references to the State's previous policy of coastal retreat, including a reference in the policy section of the BMA (Section 48-39-260), were eliminated pursuant to the Reform Act, which also holds in place the most seaward beachfront development jurisdictional lines established until that point. *See* S.C. Code Ann. § 48-39-280(A)(1)(4).

Consistent with the Reform Act, in 2021, the Department established the "Beachfront Preservation Technical Advisory Committee" (TAC) to review and evaluate the State's policy of

beach preservation. According to DHEC's website, "[t]he members of the [TAC] will work to inform a future South Carolina Beach Preservation Committee by examining research and information related to beach preservation techniques, including shoreline stabilization, beach nourishment and dune restoration, and land management." The Department's establishment of the TAC has been a positive and productive step forward as the State transitions to its current policy of coastal preservation. However, the Department has not updated any of its substantive regulations related to a beachfront property owner's ability to implement new and effective solutions, including those examined by the TAC, to effectuate the State's policy of beachfront preservation since the Reform Act was passed in 2018, leaving a litany of legacy regulations that were promulgated under the prior "retreat" policy, including as it relates to shoreline stabilization or dune restoration methods currently under consideration by the TAC.

Against this backdrop of the change in law and policy with respect to the State's beach preservation policies, in the spring and fall of 2020, and prior to the Renourishment Project, pillow-shaped, geosynthetic sandbag systems designed and manufactured by a global engineering firm[6] were installed by the Property Owners at each of their respective properties as an emergency method to control the chronic erosion. [R. pp.] The geotextile sandbags installed at the properties were designed to be covered by sand to form the base of cored dune systems and were engineered specifically for the coastal environment, with appropriate tensile strength, abrasion and tearing resistance, and UV resistance, among other factors.[7] [R. pp.]

[6] Huesker, Inc. is one of the world's leading manufacturers of geosynthetics, agricultural, and industrial textiles. It has designed, engineered, and installed coastal geosynthetic applications around the globe. *See* https://www.huesker.us/.

[7] The erosional history of Debordieu and prior methods used to address erosion and water inundation by the Property Owners is extensively outlined in the RFR. [R. pp.]. (RFR pp. 4-8). Notably, since their installation in 2020, the geotextile bags installed at these properties, which are

The placement of sandbags on the beach to protect from erosion requires a permit from the Department pursuant to the procedures outlined in S.C. Code Regs. § 30-15(H). However, the Property Owners did not seek approval from the Department prior to installing the geotextile sandbags at issue. [R. pp.] Accordingly, the Department initiated four separate enforcement proceedings against the respective Property Owners on or about December 11, 2020. [R. pp.]. Following the initiation of the enforcement actions, the Property Owners coordinated with the Department towards a resolution of the enforcement actions allowing the geotextile systems to remain in place through an established Department after-the-fact permitting or emergency order approval[8] process. *See* S.C. Code Regs. § 30-15(H). At the time of this filing, one of the enforcement orders has concluded and three remain pending.[9]

During the enforcement process and prior to the Renourishment Project, the Property Owners approached Dr. Gayes to determine if he would be interested in conducting a research project to evaluate the geotextile sandbags and the protection they afforded to the adjacent houses during storm or tidal events if those sandbags were covered with sand to form engineered dune systems. [R. pp.] Engineered dune systems have not been studied or implemented in this State, and

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landward of an existing bulkhead, have been effective in protecting against erosion and flooding, whereas adjacent commodity sandbag installations permitted by OCRM have continued to fail. [R. pp.]. (*Id.* pp. 8-10). As further outlined in the RFR, the commodity sandbag installations permitted by the Department (*see* S.C. Code Ann. Regs. 30-15(H)) are not designed for the coastal environment and are not effective in protecting beachfront properties from any significant tidal event or storm. [R. pp.]. (*Id.* pp. 7-10). Wave forces during storm or tidal events cause the commodity sandbag installations to fail, resulting in those bags being torn open and apart, and litter from the bags being released into the environment. [R. pp.].(*Id.* pp. 7-8).

[8] *See* Tr. Dep. of Matthew Slagel p. 70, l. 23-p. 71, l.23; p. 74, ll.18-24. During the enforcement process, the Department confirmed that the dimensions of the geotextile sandbags are compliant with the Department's requirements for emergency sandbag approval. *See id*. at 74, ll. 1-10; S.C. Code Regs. § 30-15(H).

[9] The enforcement action against Mark and Anne Tiberio was resolved by Consent Order between the Tiberios and Department following the issuance of the Amended Order.

the Department's regulations do not allow for sandbags to be covered in sand. *See* S.C. Code Ann. Regs. 30-15(H)(3)(d). Accordingly, a research project to evaluate the efficacy of the geotextile sandbags by a researcher like Dr. Gayes is a method by which the sandbags at issue could be covered with sand during or in association with the Renourishment Project.

Specifically, S.C. Code Ann. § 48-39-130, related to permits required to utilize critical areas, provides in subsection (D)(2), that it "shall not be necessary to apply for a permit" for a variety of activities, including "research activities of state agencies and educational institutions . . . provided that such activities cause no material harm to the flora, fauna, physical or aesthetic resources of the area." S.C. Code Ann. § 48-39-130(D)(2)(referred to hereafter as the "Research Statute"). Similarly, S.C. Code Ann. § 48-39-320, which relates to "comprehensive beach management plans and pilot projects to address beach and dune erosion", provides in subsection (C):

> (C) *Notwithstanding 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.

S.C. Code Ann. § 38-39-320(C) (referred to hereafter as Pilot Project Statute) (emphasis added).

Ultimately, Dr. Gayes incorporated the evaluation of the sandbags at issue into a larger study of natural and engineered beach dune systems in the Grand Strand region and the reduction of flood inundation risk related to those natural and artificial dune systems (*i.e.*, the Research Proposal). [R. pp.] On October 25, 2021, Dr. Gayes submitted the Research Proposal to the Department, entitled, "Planned Study and Research Permit Proposal as the State Of South Carolina

Transitions from a Beachfront Policy of 'Retreat' to 'Preservation'". [R. pp.] Among other study components, Dr. Gayes sought permission from the Department in the Research Study to cover the geotextile sandbags with sand to form a cored dune during or in association with the upcoming Renourishment Project [R. pp.] in light of the fact that, ordinarily the covering of sandbags with sand is prohibited by a legacy[10] Department regulation. *See* S.C. Code Ann. Regs. 30-15(H)(3)(d).

On November 10, 2021, the Department issued a staff decision "denying permission" for the sandbags to be left in place and buried, which the Department noted was not permitted pursuant to its regulation. [R. pp.]. On November 23, 2021, the Property Owners submitted the RFR to the DHEC Board. [R. pp.]. A Final Review Conference was heard before the Board on January 13, 2022. The FAD was issued by the DHEC Board on February 10, 2022, and provided that Dr. Gayes' Research Proposal was allowed to proceed pursuant to both the Research and Pilot Project Statutes, subject to the remaining provisions outlined in the FAD. [R. pp.].

The League filed its Request for Contested Case Review on March 8, 2022, ***but only named and served the Property Owners and Department as parties to the contested case proceedings***. In other words, the League failed to name and timely serve the one and only person who requested permission to conduct the Research Proposal, and the one and only person who, in fact, received or could receive authorization from the Department to conduct it. As noted above, the Property Owners moved to dismiss the contested case, which was granted by the ALC.[11] [R. pp.]

[10] *See* discussion, *supra*, regarding the change in policy from "retreat" to "preservation" as a part of the Reform Act.

[11] At the time of this filing, the geotextile sandbags at issue have not been covered with sand to from cored dune systems, as proposed in the Research Study, due to the automatic stay that is in place pursuant to S.C. Code Ann. § 1-23-600(H)(2).

Standard of Review

"In an appeal from the decision of an administrative agency, the Administrative Procedures Act provides the appropriate standard of review." *Jack's Custom Cycles, Inc. v. S.C. Dep't of Revenue*, 439 S.C. 35, 41, 885 S.E.2d 433, 436 (Ct. App. 2023), *reh'g denied* (Apr. 26, 2023)(quoting *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)). S.C. Code Ann. § l-23-610(B) provides the applicable standard:

> (B) The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> > (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.

A decision of the ALC should be upheld, therefore, if it is supported by substantial evidence in the record. "The decision of the [ALC] should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law." *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).

Argument

Substantial evidence supports the ALC's findings that Dr. Gayes was a party to the final agency decision issued by the Department and the League's failure to name Dr. Gayes as a party and timely serve him with the request for contested case pursuant to the clear statutory

requirements and rules of Court was fatal to the League's case. In the alternative, the ALC correctly ruled that it lacked jurisdiction to review the case because the action does not properly qualify as a contested case.

I. The ALC's dismissal of the action based on the League's failure to name and timely serve Dr. Gayes as a party to the contested case proceedings was proper.

The specific requirements that a petitioner must follow to properly initiate a contested case challenging a final agency decision issued by the Department are set forth in (1) Title 44 of the Code of Laws of South Carolina, (2) the South Carolina Administrative Procedures Act (S.C. Code Ann. §§ 1-23-310 *et seq*.) (APA), and (3) the rules of the Court (RPALC). The failure by the League to follow the specific requirements divested the ALC of jurisdiction to review the action and left a condition precedent to the filing of the action unfulfilled. Therefore, the action was properly dismissed by the ALC and this Court should affirm the dismissal.

a. Dr. Gayes should have been named as a party to the action and timely served with a copy of the contested case request.

It is uncontested that the League failed to name Dr. Gayes as a party and serve him with a copy of the contested case request in this case. The rules of the Court specifically provide who must be designated as a party and served with a request for contested case:

> Party means each person or agency named or admitted as a party or properly seeking and entitled to be admitted as a party, including a ***license*** or permit ***applicant***. An applicant or licensee whose ***application or license*** is the subject of a request for a contested case hearing ***shall*** be deemed a party and ***shall*** be served with copies of all papers filed in the case.

Rule 2(H), RPALC (emphasis added).[12] Accordingly, as found by the ALC, "if Dr. Gayes is considered to be an applicant [or licensee], he must be deemed a party, and Petitioner was required

[12] *See also*, Rule 11, RPALC: "A request for contested case . . . must be filed with the clerk of Court." Rule 11(A), RPALC. "A copy of the request must also be served on each **party** and on the

to name Dr. Gayes as a party and serve him with a copy of the request for a contested case hearing." Am. Order, p. 5.

The record is clear that Dr. Gayes is the applicant or licensee for the Research Proposal. The following evidence and findings outlined in the Amended Order, all of which is supported by substantial evidence, as well as other relevant filings supports this obvious conclusion:

1) Dr. Gayes was the person who drafted and submitted the Research Proposal to the Department;
2) The Research Proposal is entitled 'Planned Study and Research *Permit Proposal* as the State of South Carolina Transitions From A Beachfront Policy of 'Retreat' to 'Preservation.'" (emphasis added) [R. pp.];
3) The staff decision by the Department regarding Dr. Gayes' request expressly states that "the Department is not granting *permission* for any sandbags in South Carolina to be buried and left in place as proposed in your study." (emphasis added) [R. pp.];
4) The League's own request for a contested case hearing states that it was contesting the Department's decision to issue an "after-the-fact approval" allowing for placement and covering of the sandbags. [R. pp.];
5) Dr. Gayes is repeatedly designated as the "applicant" in the underlying proceedings and FAD, including:
    a. The Department's staff response to the RFR lists the persons requesting review of the staff decision, but also separately lists the "[a]pplicant" in the heading. [R. pp.];
    b. The "[a]pplicant" in the staff decision is listed as "Dr. Paul Gayes, Coastal Carolina University (CCU)." [R. pp.];
    c. The FAD is entitled: "In Re: *Application* for Approval to Conduct a Planned Study and Research Proposal Submitted by Dr. Paul Gayes (*Applicant*) of Coastal Carolina University, A Research and Educational Institution Located in Horry County, SC." (Emphasis added). [R. pp.];
    d. The FAD notes that Dr. Gayes appeared at the review hearing as the "[a]pplicant." [R. pp.];
    e. In total, the FAD specifically refers to Dr. Gayes as the "[a]pplicant" six times [R. pp.];

affected agency . . . in accordance with Rule 5. Proof of service must be included in the request." (Emphasis added). Relevant here, Rule 5, RPALC, requires that: "Any document filed with the Court shall be served upon all **parties** to the proceeding." (Emphasis added.)

f. The League itself referred to Dr. Gayes as the "[a]pplicant" in its request for contested case hearing, confirming that the League viewed Dr. Gayes as the applicant prior to the filing of the Property Owners' Motion to Dismiss. [R. pp.];

6) The FAD specifically provides that Dr. Gayes—not the Property Owners—is responsible for implementing the Research Proposal: "It is the responsibility of the Applicant to ensure the integrity of these structures and that required modifications be coordinated with [the Department] staff. . . [T]he Applicant must provide sufficient details of the study and success criteria to the Department, in coordination with [the Department] staff. . . . The Applicant is responsible for obtaining any approvals or authorizations from and maintaining compliance with the requirements of other local, federal, or state entities." [R. pp.];

7) Following the submission of the Research Proposal, Dr. Gayes has continued to coordinate with the Department as the applicant for the project, including, but not limited to, the submission of additional study parameters and information to support the Research Proposal. *See*, *e.g.*, Property Owners' Motion to Dismiss, p. 11 and p. 11, n. 24.

Furthermore, pursuant to the Research Statute, as a professor at Coastal Carolina University and Director of the school's Center for Marine and Wetland Studies, Dr. Gayes is *the only person* included in these proceedings who could, in fact, be permitted to conduct the Research Proposal. *See* S.C. Code Ann. § 48-39-130(D)(2) (permitting research activities to be conducted by "state agencies and educational institutions[.]").

Accordingly, as found by the ALC, Dr. Gayes was required to be been named and timely served as a party to the contested case proceedings as the applicant for the Research Proposal. However, despite the clear evidence and legal requirements, the League asserts that Dr. Gayes was not required to be named a party to the contested case because the term "applicant" is defined in the BMA as "any person who files an application for a permit under the provisions of this chapter." S.C. Code Ann. § 48-39-10. Relying on this provision of the BMA, the League's basic argument is that a person who does not file an application for a permit under the BMA is not an applicant. *See* Appellant's Initial Br., pp. 6-9.

In support of this wayward analysis, the League asserts that the Research Statute and Pilot Project Statute exist as exemptions to the permitting requirements outlined in the BMA. *See* S.C.

Code Ann. §§ 48-39-130(D)(2), 38-39-320(C). The League concludes that, because Dr. Gayes was not seeking a formal permit to conduct the Research Proposal, but rather an exemption to a permit, he is not an "applicant" and was not required to be named as a party to the contested case. As noted by the ALC, this flawed argument "places form over substance" and ignores the obvious context of Dr. Gayes' request and the additional statutory and legal provisions applicable to the Research Proposal. Am. Order, p. 6.

Specifically, the APA defines the term "license" as including "the whole or part of any agency permit, franchise, certificate, *approval*, registration, charter, *or similar form of permission required by law*." S.C. Code Ann. § 1-23-310(4) (emphasis added). In addition, as set forth, the Court's rules specifically define the term "party" to include an applicant for a "license," and require that an applicant for licensee *shall* be deemed a party and *shall* be served with a copy of the request for contested case hearing. SCALC Rule 2(H). Dr. Gayes indisputably requested permission or approval from the Department to conduct the Research Proposal, and that permission or approval was ultimately granted to Dr. Gayes by the Board pursuant to the FAD.

An approval to Dr. Gayes to conduct the Research Proposal was, in fact, required by law. Covering the sandbags at issue in this case with sand is specifically prohibited by the Department's regulation. *See* S.C. Code Ann. Regs. 30-15(H)(3)(d).[13] Therefore, Dr. Gayes applied for an approval or a license pursuant to the APA and RPALC.

Regardless of the regulation and its prohibition on the burial of sandbags, permission or approval to conduct the Research Proposal was still legally required. Both the Research Statute and Pilot Project Statute require evidence supporting the proposed technology to be provided to

[13] Notably, there is no statutory provision in the BMA (or elsewhere) which prohibits the covering of sandbags with sand. That prohibition is only contained in S.C. Code Ann. Regs. 30-15(H)(3)(d).

the Department. For Research Statute, the technology can be utilized so long as it is implemented by a state agency or educational facility and causes "no material harm to the flora, fauna, physical or aesthetic resources of the area." S.C. Code Ann. § 48-39-130(D)(2). For the Pilot Project Statute, the Department "may allow" the proposed technology to be utilized so long as "it is reasonably anticipated that the use will be successful in addressing an erosional issue in a beach or dune area." S.C. Code Ann. § 38-39-320(C). Under both statutes, the Department is charged with determining whether the proposed technology can be allowed pursuant to those factors, regardless of whether an actual and formal permit is required to effectuate that proposed technology or study. To hold otherwise—as proposed by the League—would lead to a result where any person or educational institution could implement purported and illegal beachfront erosion control technologies without the threat of any recourse or jurisdiction by the Department to initiate enforcement proceedings regarding the same.[14]

In summary, the League's argument fails to acknowledge the distinction between a formal permit request pursuant to the BMA and a request for a license or approval triggering a contested case pursuant to the ALC's clear rules of procedure and the APA, as outlined above.

Even assuming, for argument's sake, that Dr. Gayes is not an "applicant" pursuant to Section 48-39-10 of the BMA, he nevertheless must be considered the applicant for the Research Proposal per the APA and RPALC. This is due to the fact that (1) he requested permission to conduct the Research Proposal and is responsible for conducting it, (2) that permission was granted to Dr. Gayes per the FAD, and (3) that permission was legally required to be given per the Department's regulation and additional factors outlined above. Therefore, as found by the ALC,

[14] Indeed, as discussed below, this appears to be the argument that the League is making in other sections of its Initial Brief. *See* Appellant's Initial Br., pp. 19-20.

Dr. Gayes should have been named and timely served as a party to the contested case proceedings and the ALC's finding in that regard is supported by substantial evidence and should be affirmed.[15]

b. The League's failure to name and timely serve Dr. Gayes must result in dismissal.

Having correctly found that Dr. Gayes was *the* proper party to the DHEC Board's approval of the Research Proposal, the ALC then correctly applied that finding to the League's failure to name and timely serve Dr. Gayes as a party to the contested case proceedings, holding that this failure either divested the court of jurisdiction to review the matter or left a condition precedent to the filing of the action unfulfilled. In either case, substantial evidence supports the ALC's dismissal of the contested case. Further, the League failed to present any evidence that may have excused its failure in this regard, if any excusal was even possible.

Title 44 of the Code of Laws of South Carolina and the APA delineate the specific requirements that the League was required to follow to initiate the contested case in this matter. Pursuant to S.C. Code § 44-1-60(F)(2), "[w]ithin thirty calendar days after the receipt of the decision an . . . affected person desiring to contest the final agency decision may request a contested case hearing before the Administrative Law Court, *in accordance with the Administrative Procedures Act*." (Emphasis added).[16] Similarly, pursuant to S.C. Code § 1-23-600(B), "[a]ll requests for a hearing before the Administrative Law Court *must be filed in accordance with the*

[15] The ALC's Amended Order makes another important holding regarding the implications of the contested case were Dr. Gayes not made a party to it. Specifically, the specific relief sought by the League is a reversal of the approval of the Research Proposal so that the sandbags at issue cannot be covered with sand. "If, however, Dr. Gayes is not a party to this proceeding, he will likely not be bound by any order the Court might issue in this matter, and presumably could nevertheless proceed with the study." Am. Order, p. 7 (citing *Roberts v. Recovery Bureau, Inc*., 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct. App. 1994)). Notably, the League ***wholly fails to address this important line of analysis in its Initial Brief***, which would likely render any decision by the ALC on the merits of the contested case as a mere "advisory opinion." Am. Order, p. 8.

[16] *See also* S.C. Code Ann. § 44-1-60(G)(3).

court's rules of procedure."[17] (Emphasis added). Accordingly, Title 44 of the Code incorporates by direct reference the requirements of the APA, and the APA incorporates by direct reference the ALC's rules of procedure. As previously outlined, Rule 2(H), RPALC, requires that the applicant *shall* be deemed a party and *shall* be served with copies of all papers filed in the case. Furthermore, pursuant to Rule 11(A), RPALC, "[a] copy of the request must also be served on each *party* and on the affected agency . . . in accordance with Rule 5. Proof of service must be included in the request." (Emphasis added). Relevant here, Rule 5, RPALC, requires that "[a]ny document filed with the Court *shall be served upon all parties* to the proceeding." (Emphasis added.)

As outlined by the ALC, the League's failure to follow these requirements by naming Dr. Gayes as a party and timely serving him with a copy of the request for contested case within thirty days after the FAD divested the ALC of jurisdiction to review the matter. This is because "[s]ervice of a notice of appeal is a jurisdictional requirement for which courts have no authority to extend the prescribed time." Am. Order, p. 8. (citing *Mears v. Mears*, 287 S.C. 168, 169, 337 S.E.2d 207, 207 (1985) and *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004)). According to the Supreme Court in *Elam*, "[t]he requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." *Elam v. S.C. Dep't of Transp.*, 361 S.C. at 14-15, 602 S.E.2d at 775 (citing *Mears v. Mears*, 287 S.C. at 169, 337 S.E.2d at 207). Relying on the *Elam* decision and the strict filing and service requirements outlined above, the ALC correctly ruled that it was "prohibited from 'rescuing' Petitioner from this fatal defect" because the League was unable to "cross the mandatory jurisdictional threshold of timely naming and serving Dr.

[17] S.C. Code Ann. § 1-23-600(B).

Gayes as a party to this action." Am. Order, p. 8 (quoting *Elam v. S.C. Dep't of Transp.*, 361 S.C. at 14-15, 602 S.E.2d at 775).

The League's attempts to distinguish the *Mears* and *Elam* decisions are unavailing. According to the League, the *Mears* case should be distinguished because it "was cited in another, non-binding ALC order" regarding a Notice of Intent to Appeal under this Court's Appellate Rules. Appellant's Initial Br., p. 11. Notably, in this case, ***the ALC did not rely on or cite to whatever separate ALC ruling the League is referencing in this argument***, which is not identified by the League.[18] Nor does it matter, as *Mears* is a Supreme Court opinion and binding precedent. As it relates to the *Elam* decision, the League asserts that the case should be distinguished because it dealt with the failure of an appellant to timely file and serve a Notice of Appeal following a Rule 59(e) motion under the South Carolina Rules of Civil Procedure (SCRCP). Appellant's Initial Br., p. 11.

In effect, the League's basic argument is that the elemental requirement for case parties to properly follow statutory procedures when challenging the decision of an agency or lower court should not apply here because that rule has never specifically been applied *by an appellate court* to a contested case petitioner's failure to name and timely serve a required party, despite the fact that the rule has consistently been applied by the ALC. *See* n. 15, *supra*. This argument is simply incorrect and further ignores the clear import of those decisions to the case at hand.

The clear and simple rule to be gleaned from the *Mears* and *Elam* line of cases is, in fact, directly on point: the failure to follow the specific statutory requirements of timely filing or serving

[18] In their Motion to Dismiss the contested case, the Property Owners cited to multiple ALC decisions which stand for the proposition that the ALC lacks jurisdiction to review a case if appropriate procedure is not followed by timely naming and serving a party to the case pursuant to the *Mears* line of analysis. *See* Property Owners' Mot. to Dismiss, pp. 7-10. However, none of those ALC decisions were cited to or relied upon by the ALC in the Amended Order.

a required party to the litigation divests the reviewing court of jurisdiction to consider the matter. As noted by the ALC, "[w]hile Petitioner filed its request for contested case hearing within thirty days of the receipt of the Board's decision, it failed to name and serve Dr. Gayes before the expiration of this deadline[,]" which was a specific statutory requirement pursuant to the analysis outlined in the previous section. Therefore, the ALC correctly ruled that the case must be dismissed.

Regardless, as further determined by the ALC, even if the requirement to name and timely serve Dr. Gayes was not a purely jurisdictional requirement, it was nevertheless a condition precedent necessary to properly maintain the action. As outlined by the ALC in the Amended Order:

> It is well-settled that, where, as here, "[a] statute that creates a new liability and affixes the time within which an action may be commenced . . . [is] a statue of creation; **commencement within the time affixed is an indispensable condition of the action**." Such an action "**cannot be maintained unless brought within the time allowed by that statute**."

Am. Order, p. 9. (emphasis added) (internal citations omitted) (quoting *Knight Publishing Co. v. Univ. of S.C.*, 295 S.C. 31, 33, 367 S.E.2d 20, 22 (1988), *overruled on other grounds by McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 443 S.E.2d 539 (1994) and *Simpson v. Sanders*, 314 S.C. 413, 415 n.1, 445 S.E.2d 93, 94 n.1 (1994), respectively) (- citing 54 C.J.S. *Limitations of Actions* § 30 (May 2022 Update)).

Notably, in its Initial Brief, the League ***fails to cite or even address this "statute of creation" line of analysis***.[19] Instead, citing to "Am. Order, pp. 3-4", the League's Initial Brief

[19] *See Turner v. S.C. Dep't of Health & Env't Control*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008)("**[I]f respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct**.") (quoting

states that the Amended Order decision wrongfully relied on "unreported decisions of the ALC" to support its holding based on "procedural jurisdiction" grounds. Appellant's Initial Br., p. 10. It is unclear if the League's reference to "procedural jurisdiction" is meant to refer to the failure of the League to satisfy a condition precedent necessary to perfect the contested case (*i.e.*, the statute of creation doctrine), as analyzed by the ALC in the Amended Order. *See* Am. Order, pp. 9-11. Furthermore, pages 3 and 4 of the Amended Order are in the preliminary "Background" section of the holding, which gives an overview of the facts leading up to the decision and does not provide any legal analysis or case citations regarding the same. *See* Am. Order, pp. 3-4. In any event, as previously noted, ***neither the Amended Order nor the Order on the Motion to Reconsider cite to or incorporate any other rulings from the ALC***. Therefore, this claim is baseless and should be disregarded.

On the other hand, in the underlying Motion to Dismiss before the ALC, the Property Owners did cite to a separate ALC decision which provides a background of the statute of creation doctrine and applies it in a similar instance. *See* Property Owners' Motion to Dismiss, pp. 7-9. Specifically, in *Heath Hill v. S.C. Department of Health and Environmental Control*, No. 10-ALJ-07-0625-CC, 2010 WL 5781666 (S.C. Admin. Law Ct. Dec. 9, 2010), Judge Anderson reviewed a case in which the petitioner failed to timely file his request for a contested case challenging a Department decision. At the outset, and citing the Supreme Court's decision in *Mears*, Judge Anderson noted that strict compliance with prescribed time periods to appeal was required, and a failure to do so divested the court of jurisdiction to review the matter. *Id.* at *3. However, because the *Mears* line of cases dealt with appellate review jurisdiction—whereas the ALC functions more

First Union Nat'l Bank v. FCVS Communications, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996), *rev'd on other grounds,* 328 S.C. 290, 494 S.E.2d 429 (1997))(emphasis added).

like a trial tribunal in a contested case pursuant to Section 44-1-60 and review is *de novo*—Judge Anderson concluded that the *Mears* case and its progeny may not be "directly applicable." *Id.* (*citing Brown v. S.C. Dep't of Health and Env't Control*, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002)). Nevertheless, Judge Anderson determined that the petitioner's failure to timely file was fatal to his case and the court's jurisdiction to review the matter pursuant to the statute of creation doctrine, as follows:

> [T]he Legislature has unquestionably established a prescribed procedure to seek review of these matters within a specific time frame. Under South Carolina law, a statute that creates a new liability and affixes the time within which an action may be commenced is a "statute of creation," and commencement within the time affixed is an indispensable condition of the action. Although the failure to timely commence an action pursuant to a statute of creation is not a subject matter jurisdiction defect, such an action "cannot be maintained unless brought within the time allowed by that statute." **When a statute both creates a cause of action and includes a time limit for its commencement, compliance with the time limit is a condition precedent to the maintenance of the action.** "Such a statutory time limit conditions the existence of the right of action, thereby creating a substantive, rather than procedural, limitation on the right. **Bringing suit within the prescribed time is a condition of liability itself**, not of the remedy alone."
>
> . . . .
>
> Therefore, [because petitioners could not historically challenge agency decisions under common law,] I find that Section 44-1-60 is a statute of creation because it creates a right which did not exist under the common law and fixes a time frame necessary in order to bring an action under it. Accordingly, though a party who fails to timely request a contested case hearing before the ALC is not jurisdictionally precluded under the holding in *Mears*, **its request is nonetheless precluded because the party failed to establish a condition precedent necessary for the Court to invoke its jurisdiction.**

Id. (Emphasis added; internal citations omitted).

As noted by the League (to the extent it was making reference to Property Owners' analysis of the *Heath Hill* and other related ALC decision in their Motion to Dismiss, pp. 7-10), decisions

by the ALC are not binding on this Court. However, as noted, the *Heath Hill* decision was not relied on or cited to by the ALC in the Amended Order, nor was any other decision of the ALC. *See* Am. Order, pp. 8-9. Instead, the ALC citations in support of the appellate review jurisdiction (i.e., *Mears* and *Elam*) and statute of creation (i.e., *Knight Publishing Co.* and *Simpson*) analyses are to decisions rendered by the Supreme Court, which, of course, are binding on this Court. *Id.*

In any event, Title 44 of the South Carolina Code of Laws, the APA, and the RPALC describe the specific conditions which must be satisfied by a petitioner to properly bring a contested case in this instance. In this case, the League failed to satisfy the most straightforward condition necessary to properly bring a case challenging the issuance of the FAD: naming Dr. Gayes—the party on whom permission was granted by the FAD—as a party to the proceedings and timely serving him with a copy of the contested case request. Accordingly, the ALC correctly ruled that the case must still be dismissed to the extent the statute of creation doctrine is the applicable standard to apply.

The League is either unable or purposely unwilling to connect the straightforward legal dots applicable to the ALC's analysis in the Amended Order. Dr. Gayes—not the Property Owners—is the person who sought permission to conduct the Research Proposal. Dr. Gayes—not the Property Owners—is the person to whom approval was granted to conduct the Research Proposal. And finally, Dr. Gayes—not the Property Owners—is the person responsible for conducting the Research Proposal and complying with the additional requirements of the FAD. Therefore, Dr. Gayes must be considered the licensee or applicant for purposes of the plan and unambiguous rules of Court and statutory requirements.[20] If those rules are not followed, then the

[20] *See State v. Jacobs*, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) ("Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory

relevant case law makes clear that the ALC lacks jurisdiction to review the case, or that the League failed to satisfy the most straightforward condition precedent necessary to properly challenge the FAD. In either event, dismissal by the ALC was appropriate and required.[21]

c. *The ALC property exercised its discretion to decline to apply Rule 19, SCRCP or Rule 3(B), RPALC to rescue the League's failure to name and timely serve Dr. Gayes.*

In a last ditch effort to save itself from the mandatory result of dismissal, the League invokes Rule 19(a), SCRCP, for the proposition that, to the extent Dr. Gayes was, in fact, required to be named as a party to the proceedings, its failure to do so should be excused and Dr. Gayes should now be added as a party to the contested case proceedings pursuant to the standards outlined in that rule. *See* Appellant's Initial Br., pp. 11-12.[22] In its Amended Order and Order on the Motion to Reconsider, the ALC correctly declined to apply Rule 19, SCRCP to rescue the League's failure, as outlined below. This decision was not an abuse of discretion under the circumstances.

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interpretation are not needed and the court has no right to impose another meaning.") (*quoting Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)).

[21] The League also asserts that, as an "academician", Dr. Gayes would not be an appropriate person to conduct the Research Proposal pursuant to the Pilot Project Statute. Appellant's Initial Br., p. 8 In the words of the ALC, this is another statement by the League that "borders on the absurd." Order on Motion to Reconsider, p. 8, n.10. As noted, Dr. Gayes is a research scientist and the Director of the Center for Marine and Wetland Studies at CCU. He is a prolific coastal researcher who has received millions of dollars in research grants from a wide range of federal and state agencies such as the National Science Foundation, U.S. Geological Survey, U.S. Army Corps of Engineers, U.S. Minerals Management Service, National Oceanic and Atmospheric Administration, S.C. Sea Grant, S.C. Department of Natural Resources, the National Park Service, and even the Department *See https://www.coastal.edu/marketing/expertise/expert.php?id=80* (accessed June 18, 2023). Dr. Gayes was also named to the TAC Committee established by the Department to evaluate the State's coastal preservation policy. [R.pp.]. Further, CCU was recently selected as a partner of the Cooperative Institute for Research to Operations in Hydrology (CIROH) under Dr. Gayes' leadership. The CIROH is a $360 million alliance formed to study water-related coastal processes and related issues, funded over the next five years by the National Oceanic and Atmospheric Administration. *See https://www.coastal.edu/ ccustories/news/news-article/index.php?id=5424* (accessed June 18, 2023).

[22] The League's first mention of Rule 19, SCRCP, was in passing during the hearing on the Property Owners' Motion to Dismiss. *See* Tr. p. 49, ll.12-20. [R. pp].

Specifically, Rule 19(a), SCRCP, which is entitled, "Joinder of Persons Needed for Just Adjudication," 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.

Rule 19(a), SCRCP.

As an initial matter, the ALC correctly noted that the application of Rule 19, SCRCP, was in the Court's discretion pursuant to Rule 68, RPALC, which provides that the SCRCP "may, *in the discretion of the presiding administrative law judge*, be applied to resolve questions not address by these rules." (Emphasis added). *See* Order on Mot. to Recons., p. 4. In any event, the ALC further determined that the application of Rule 19, SCRCP, does not require Dr. Gayes to be added as a party, regardless of the Court's discretion to apply to rule pursuant to Rule 68, RPALC.

According to the ALC, Rule 19(a) cannot be applied in this case due to the primary factor that Dr. Gayes is no longer "subject to service of process," as required under the Rule. *Id.* at n. 6. Furthermore, the ALC determined that the League's argument on this topic "does not consider the import of subsection (b) of Rule 19." *Id.* at p. 4. Pursuant to that subsection, the Court must consider whether the party in question can actually be made a party, and if not, to consider whether the action should proceed in the party's absence. Rule 19(b), SCRCP. *Id.*

Specifically, the Amended Order explains that "[i]f , as the Court concludes, the failure to file and serve Dr. Gayes within the specified time period is jurisdictional in nature, then the Court lacks the ability to extend the time for service." Am. Order, pp. 9-10 (citing *Allison v. W.L. Gore & Assocs.*, 394 S.C. 185, 189, 714 S.E.2d 547, 550 (2011) ("[A]n appellate body may not extend the time to appeal."); *State v. Johnston*, 327 S.C. 435, 438, 489 S.E.2d 228, 230 (Ct. App. 1997) (holding that "it is the duty of the court to assure that it renders no decision in a matter when it has no authority to act"), *rev'd on other grounds,* 333 S.C. 459, 510 S.E.2d 423 (1999); and Rule 23(B), RPALC.[23] On the other hand, to the extent the failure to serve Dr. Gayes is not jurisdictional, but is instead a failure to fulfill a condition necessary to the maintenance of a contested case pursuant to the statute of creation doctrine, then a different analysis may be required or permitted. Am. Order, p. 10. However, ***at no time has the League ever provided any rule or statute that would provide the ALC with discretion to extend the time to perfect service upon Dr. Gayes***. *See* Am. Order, p. 10.

The only conceivable rule which could allow for the extension of time to name and serve Dr. Gayes as a party to the contested case proceedings is Rule 3(B), RPALC. *Id.* Pursuant to the rule: "For good cause shown, the administrative law judge may extend or shorten the time to take any action, except as otherwise provided by rule or law." Rule 3(B), RPALC. However, the League has failed to show or even allege any "good cause" that would support the application of Rule 3(B) in this instance. *Id.* at 11. As noted by the ALC:

> The record is clear Petitioner knew of Dr. Gayes's identity prior to the final review hearing. Dr. Gayes submitted the research request which resulted in the FAD. The very purpose of Petitioner's request

[23] Rule 23(B), RPALC provides: "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."

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

Id. Based on these uncontested facts, the ALC appropriately declined to extend Rule 3(B), RPALC, to the circumstances at issue in this matter.

Accordingly, regardless of whether the League's failure in this case was a jurisdictional defect, or a procedural misstep under the statute of creation doctrine, the ALC correctly determined that Rule 19(a) should not be applied to rescue the League from its dispositive mistake. The ALC's finding in this regard is supported by substantial evidence, was not an abuse of discretion, and should be affirmed by this Court.[24]

[24] The Property Owners would be remiss if they did not address what the League asserts in passing is the "most critical fact to the issues raised by the Property Owners"—that being the fact that they did not name Dr. Gayes as a party to the RFR before the DHEC Board. Appellant's Initial Br., pp. 9, 12, and 14. To the extent the League truly believes this is the "most critical fact" at issue in this appeal, it is interesting that it dedicated a mere five conclusory sentences to the argument within the entire twenty-two pages of its Brief, and further did not designate the RFR in its Designation of Matter. *See id*. and League's Designation of Matter. In any event, there is no requirement that any parties be "named" in a request for review. There is neither a statutory requirement nor any regulatory requirement. *See* S.C. Code Ann. § 44-1-60(E). Rather, the Property Owners complied with the statutory requirements that they file a written request for review along with a filing fee within fifteen days after notice of the staff decision being mailed. *Id*. Further, despite there being no requirement that they notify Dr. Gayes that the RFR had been filed, the Property Owners provided Dr. Gayes with a courtesy copy of their request at the time that it was filed. [R. pp.]. In reality, the only person that did not comply with the clear statutory requirements applicable in this case is the League. It appears that the League's inclusion of this argument is another attempt to assert an "equitable estoppel" type of analysis into this proceeding. *See* Appellant's Motion to Reconsider, [R. pp.] pp. 5-6. The inapplicability of the equitable estoppel doctrine, which was raised for the first time in the League's Motion to Reconsider, was thoroughly addressed by the ALC in its Order on Motion to Reconsider. *See* Order on Mot. to Recons., pp. 6-7.

II. In the alternative, even if the Court were to accept the League's assertion regarding the requirement of an application, permit, or license for the Research Proposal, as the ALC correctly ruled, such a finding would strip the ALC of its jurisdiction to review the League's challenge, which also requires dismissal of the action.[25]

To the extent the League is correct that Dr. Gayes is not a proper party to the underlying contested case proceedings (which is denied) on account of the fact that the governing statutes do not require a permit or license to undertake a research project or pilot program, the ALC correctly ruled in the alternative that under those circumstances, the underlying matter would not be a proper contested case proceeding, depriving the ALC of jurisdiction to review the matter. *See* Am. Order, pp. 11-17.

As background, by statute, the General Assembly authorizes the ALC to preside over "contested case" proceedings. *See* S.C. Code Ann. § 1-23-600(A). As noted by the ALC, a contested case is "a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a *party* are *required by law* or by Article I, Section 22, Constitution of the State of South Carolina, 1895, to be determined by an agency or the [ALC] after an opportunity for hearing." Am. Order, p. 11 (quoting S.C. Code Ann. § 1-23-505(3)(emphasis added). Stated differently, if the underlying agency decision is not required by law, then a subsequent challenge to what would amount to being a non-binding advisory opinion of the agency would not be cognizable and the ALC would lack jurisdiction to entertain it.

[25] Despite the analysis provided in this section, the Property Owners assert that the League's failure to name and timely serve Dr. Gayes as a party to the contested case proceedings is dispositive of the issue on appeal and dismissal of the action should be affirmed on that basis. *See Futch v. McAllister Towing of Georgetown, Inc*., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999)(appellate court need not address remaining issues when disposition of prior issue is dispositive).

a. In Dr. Gayes absence, the Property Owners are not the correct party to the case.

As outlined by the ALC, the Property Owners are not the correct parties to the request for approval of the Research Proposal; nor are they adequate substitutes as the primary party to the case in Dr. Gayes' absence. Indeed, following the DHEC Board's approval of the Research Proposal, it is not the Property Owners' rights to keep the geotextile sandbags in place and cover them with sand, and potential culpability regarding the same—which is really what the League cares about in this case—that are being determined by the FAD. Instead, those rights and consequences are being determined pursuant to the separate enforcement actions currently pending against the Property Owners, as outlined in the FAD:

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

Am. Order, p. 12 (quoting FAD, p. 4) (emphasis added). Although the Property Owners stand to benefit from the Research Proposal—a point they readily acknowledged in light of the significant protection provided to their properties by the geotextile sandbags compared to alternative options—and hope that it is successful, it does not change the simple fact that they are not the person who proposed (or was lawfully able to propose), will be conducting, or who is ultimately responsible for the Research Proposal per the FAD. *See* Order on Motion to Re., pp. 7-10.

On the other hand, the FAD and the continued actions by the Department and Dr. Gayes make clear that Dr. Gayes is the applicant and party responsible for conducting the Research Proposal. As noted by the ALC:

> The FAD [] clearly imposes obligations on Dr. Gayes rather than Property Owners. For example, the FAD provides that it is the responsibility of the Applicant (Dr. Gayes) to ensure the integrity of these structures (the sandbags) and that required modifications be

> coordinated with the OCRM staff; that the Applicant (Dr. Gayes) must provide sufficient details of the study and success criteria to the Department; and that the Applicant must obtain any approvals or authorizations from and maintain compliance with the requirements of other local, federal, and state entities. Since the FAD in connection with the study, the Department has directed its correspondences, including that a bond or other financial security be provided, to Dr. Gayes.

Am. Order, p. 12. *See also* FAD. [R. pp]

As further noted by the ALC, the relief sought by the League in this case is reversal of the FAD, thereby restoring the Department's earlier denial of Dr. Gayes' request to conduct the Research Proposal. *Id.* Accordingly, the relief sought in the underlying contested case applicable to this matter is against Dr. Gayes, not the Property Owners. *Id.* Despite the League's underlying motivations in filing the contested case—*see* Order on Mot. to Recons., p. 7, n. 9, p. 8—the only party whose rights and duties in the FAD that could be affected by a decision of the ALC with respect to the Research Proposal, which was the only issue before the Department, is plainly Dr. Gayes. *See* Am. Order, p, 12.

b. If Dr. Gayes is not required to be a party, permission to conduct the Research Proposal is not required by law.

Furthermore, if the Department was not required to give approval or permission to Dr. Gayes in order for him to conduct the Research Proposal as a permit exemption, as asserted by the League, then the underlying contested case was not appropriate because a determination by the Department or ALC was not *required by law*, as required by S.C. Code Ann. § 1-23-505(3).

As outlined by the Supreme Court in *Amisub of South Carolina, Inc. v. South Carolina Department of Health & Environmental Control*, 403 S.C. 576, 596, 743 S.E.2d 786, 797 (2013), if there is "no legal duty owed by DHEC to issue a staff decision in this matter, which is the trigger giving rise to a contested case [per S.C. Code Ann. § 1-23-505(3)], there [is] no corresponding

obligation that [a petitioner] be afforded a contested case hearing before the ALC."[26] According to the ALC in this case, "[t]his language makes clear that the trigger for a contested case proceedings is whether the Department had a legal duty to issue a staff decision." Am. Order, p. 16.[27] The ALC ruled that the Department had that legal duty, and Property Owners agree; however, if the League is correct that Dr. Gayes is not required to be a party because he did not apply for a permit of license, but rather an exemption from the permit of licensing process, then the Department did not have a legal duty to issue a staff decision on his request.[28]

Similarly, if the Department was not required to give approval or permission to Dr. Gayes for the Research Proposal, then the underlying contested case was not appropriate because a

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[26] The *Amisub* case was also asserted by counsel for the Property Owners as a basis for dismissal of the action pursuant to the reasoning applied by the ALC in the Amended Order during the hearing on the Property Owners' Motion to Dismiss. *See* [R. pp.]. (Tr. p. 34, l. 3-p. 35, ll.1-20).

[27] The ALC provides a detailed review of the facts leadings up to the *Amisub* decision in the Amended Order. *See* Am. Order, p. 15-16. The Property Owners adopt the reasoning of the Amended Order with regard to the failure of the League to properly distinguish the *Amisub* case from the present facts at issue here.

[28] In support of this analysis, the ALC also cites to Section 48-39-355 of the BMA, which provides:

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

See Am. Order, p. 13 (quoting S.C. Code Ann. § 48-39-355) (emphasis added). As noted by the ALC, this provision of the BMA infers that the Department *may* take actions on research exemption requests, but that action is not legally mandated. *Id*. (citing *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 352–53, 549 S.E.2d 243, 250 (2001) ("The use of the word 'may' signifies permission and generally means that the action spoken of is optional or discretionary unless it appears to require that it be given any other meaning in the present statute."). Additional factors in support of the Property Owners' contention that the ALC was not legally required to make a determination in this matter if Dr. Gayes is not required to be a party are outlined in the Amended Order. *See* Am. Order, pp. 13-15.

determination by the Department or ALC was not by required by Article I, Section 22 of the State's Constitution, or concomitantly by S.C. Code Ann. § 1-23-505(3). Article I, Section 22 provides:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

S.C. Const. art. I, § 22.

As an initial matter, the League fails to address the ALC's holding on this issue that, in the absence of a requirement for a Department determination, it would not have "private rights" that would be affected by the underlying contested case pursuant to Article I, Section 22 of the State Constitution. Instead, the League makes general allegations of its purported rights as an "affected person" under Title 44 of the South Carolina Code, the Due Process clause of the South Carolina Constitution, and the Public Trust Doctrine which are only applicable if the predicate requirement for a Department determination is present. *See* Appellant's Initial Br., p. 17; *see also* Am. Order, p. 17 (noting the distinction between private and public rights).

In any event, and regardless of whether the League has the rights, duties, or privileges of a party applicable to this action, the League would have no method of enforcing those rights if the contested case were allowed to proceed in Dr. Gayes' absence. As previously set forth, the Property Owners are not the correct party to the case in Dr. Gayes' absence because a holding in the contested case in their favor (or against them) would have no bearing on whether Dr. Gayes could

conduct the Research Proposal. Rather, per the FAD, approval to complete the Research Proposal was granted to Dr. Gayes, and Dr. Gayes alone.[29]

Finally, and most importantly, the League's primary basis for asserting that Dr. Gayes should not be considered a party to this matter—*i.e.*, because the Pilot Project and Research Statutes are exemptions that do not actually require approval from the Department—is completely inconsistent with its argument on the present issue regarding whether this is an appropriate contested case proceeding in Dr. Gayes' absence. (*Compare* Appellant's Initial Br. pp. 15, 18: "whether the sandbags were allowed to remain or be removed ultimately hinged entirely on the Department decision to allow or disallow the sandbags vis-à-vis Gayes' research proposal", and "the Department still has a ***clear legal duty*** to make determinations regarding the two exemptions at issue", (emphasis added), *with* Appellant's Initial Br. p. 7: "An exemption from licensing or permitting means *no* license is required; hence, ***permission is not required by law***." (italics in original, additional emphasis added). The League cannot have it both ways**.** It cannot simultaneously argue there was no applicant for the Research Proposal or requirement for Dr. Gayes to seek approval for the study, while at the same time arguing that there was an application or legal approval needed such that a contested case proceeding was properly triggered.

Further, the League accuses the Property Owners of using "jurisdictional gamesmanship" to successfully have this matter dismissed. Appellant's Initial Br., p. 6. But such an accusation is misplaced, as the Property Owners had no role in the League's request for contested case, and as set forth multiple times, the record is clear that: (1) Dr. Gayes requested permission to conduct the Research Project; (2) Dr. Gayes is the person to whom approval to conduct the Research Proposal

[29] *See also* Order on Mot. to Recons., p. 7, n.9; fn. 14, *supra*.

was granted; and (3) Dr. Gayes is the person responsible for conducting the Research Proposal and complying with the additional requirements of the FAD The Property Owners are none of those things. And the Property Owner's rights and potential culpability with regard to the placement of the sandbags at issue in this case is separately being determined pursuant to enforcement actions. These facts clearly support the ALC's determination that Dr. Gayes was the applicant for the Research Proposal and further demonstrate that, if Dr. Gayes is not a party, then the contested case proceeding cannot move forward in his absence. In light of those factors, a requirement for Dr. Gayes to be named and timely served as a party to these proceedings does not amount to jurisdictional gamesmanship; it reflects a straightforward application of the law to the indisputable facts in this case.

Conclusion

Dr. Gayes should have been named as a party to these proceedings, and the League's unexcused failure to do so was fatal to its case. In the alternative, this matter did not present a proper contested case and its dismissal should be affirmed for that additional reason. Accordingly, and for the reasons explained herein, the Property Owners respectfully contend that the ALC's decision is supported by substantial evidence, did not amount to an abuse of discretion, and was not otherwise based on any error of law and should be affirmed by this Court.

[*signature page follows*]

Respectfully submitted,

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