FINAL BRIEF OF APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2022-001353

Jeffery Rush,

Appellant

v.

Shady Moss Apartments,

Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in finding 7 CFR 3560.159(d) stands alone and is not subject to 7 CFR 3560.159(a) requirement to provide notice and an opportunity to correct for criminal activity?

STATEMENT OF THE CASE

Appellant appeals the Court of Common Pleas' ruling upholding the Magistrate Court's ruling granting Appellant's eviction from Shady Moss Apartments. On March 12, 2021, Respondent filed a Rule to Vacate alleging that the tenancy had ended. (R. p. 12). This was the direct result of a lease violation for criminal activity. (R. pp. 187-188). On April 12, 2021, the Magistrate Court held a bench trial after which it found in favor of the Respondent. (R. p. 11). Appellant filed a Motion to Alter or Amend which the Magistrate denied. (R. pp. 13-15). Appellant appealed to the Circuit Court on April 30, 2022. (R. pp. 16-17). The Circuit Court held a hearing on October 18, 2021, and remanded the case to the Magistrate Court. (R. pp. 8-10). On January 31, 2022, the Magistrate Court heard the Motion to Alter or Amend and ordered the case to be re-tried before a different magistrate judge. (R. p. 7). On April 18, 2022, the Honorable William Hutson held a bench trial and found in favor of the Respondent. (R. pp. 4-6). Appellant appealed to the Circuit Court on April 22, 2022. (R. pp. 18-20). The Circuit Court hearing was held on September 21, 2022, and affirmed the Magistrate Court's decision on September 21, 2023. (R. pp. 2-3). Appellant filed and served a Notice of Appeal to the Court of Appeals on September 26, 2022. (R. p. 54).

STATEMENT OF FACTS

On September 16, 2020, Appellant Jeffery Rush, entered into a Lease Agreement with Shady Moss Apartments to lease Unit 6C 1708 Shady Moss Court, Conway, SC 29527. (R. p. 172, ¶1). The community is financed by the United States Department of Agricultural ("USDA") through its Rural Housing Service and is subject to USDA Housing rules and regulations. (R. pp. 172, ¶2, 180, ¶ 26(b)). The Lease specifies that the "use, possession, manufacture, sale or distribution of an illegal controlled substance . . . while in or on any part of this Community is an

illegal act. It is further understood that such action is a material Lease violation." (R. p. 173, ¶6(c)). It also states that any termination of the Lease must be in accordance with USDA regulations, State and local law and the terms of the Lease." (R. p. 180, ¶ 26(b))

On December 30, 2020, Conway Police assisted the United States Marshals in locating and arresting Mr. Terrence Lamont Melvin. (R. pp. 189-191). Mr. Melvin was allegedly involved in an attempted murder that occurred off the rental premises. (R. pp. 189-191). Mr. Melvin was Mr. Jeffery Rush's guest for the holidays. (R. p. 140, lines 20-21). Mr. Rush answered the door and permitted the officers to enter his unit, arrest Mr. Melvin, and search the premises. (R. p. 129, lines 10-14). The police searched the home and located a black bag belonging to Mr. Melvin. (R. pp. 189-191). Inside the bag were 9.6 grams of marijuana and 1.0 gram of heroin, together with a 9mm Smith and Wesson Shield and a sizeable sum of cash in small bills. (R. pp. 189-191). The police subsequently charged Mr. Melvin with possession of marijuana, manufacture, distribution and/or possession of narcotic drugs in Sch. I(b) & (c), LSD, Sched. II and sale or delivery of pistol to, and possession by, certain persons unlawful; stolen pistol. (R. pp. 189-191). Law enforcement did not charge Mr. Rush with any criminal activity, nor was he the subject of the investigation. (R. p. 130, lines 18-25).

On February 8, 2021, Respondent sent Mr. Rush a Notice of Lease Agreement Violation stating there was a "lease agreement violation under Section 26V Drug-related criminal activity engaged in on or near community by any tenant, household member or guest or any such activity on the community by any other person under tenant control." (R. p. 187). The notice stated that Mr. Rush was unable to "correct this violation since it is due to material and/or other good cause. You will be further notified that we will be seeking judicial action by termination of your lease." (R. p. 187). On February 12, 2021, Respondent sent Mr. Rush a Notice of Termination of Lease

giving him thirty days to vacate the unit because of the drug related criminal activity. (R. p. 188). The Notice directed Appellant to vacate by March 12, 2021. (R. p. 188). The Respondent filed a Rule to Vacate for end of tenancy and lease violation dated March 23, 2021. (R. p. 12).

STANDARD OF REVIEW

In appeals of Magistrate Court's ejectment proceedings, the Court of Appeals does not have jurisdiction to reverse the findings of fact from the Circuit Court so long as there is supporting evidence. *Bowers V. Thomas*, 373 S.C. 240, 244, 644 S.E.2d 751, 753 (Ct. App. 2007); See *Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp.*, 280 S.C. 232, 233, 312 S.E.2d 20, 21 (Ct. App. 1984). The Court of Appeals is limited to finding errors of law. *Id.* See *Hadfield v. Glichrest*, 343 S.C. 88, 92-93, 53 S.E.2d 268, 270 (Ct. App. 2000).

If there is an error of law, then the Court of Appeals may affirm or reverse the judgement below. *Id.* However, the "Court of Appeals still retains de novo review of whether the facts show the Circuit Court's affirmation was controlled or affected by errors of law." *Bowers* at 245, 644 S.E. 2d, 751, 753; citing *Hadfield* at 92-93, 53 S.E.2d at 270.

ARGUMENTS

I. The Circuit Court erred in finding 7 CFR 3560.159(d) stands alone and is not subject to 7 CFR 3560.159(a)'s requirement to provide notice and an opportunity to correct for drug related criminal activity.

Resolution of this case requires application of 7 C.F.R. § 3560.159.[1] The Circuit Court affirmed, without analysis, the Magistrate Court's legal ruling that 7 C.F.R. § 3560.159(d) "stands alone" from 7 C.F.R. § 3560.159(a) and did not require Respondent to give Appellant an

1 The property at issue is multi-family housing subsidized by the United States Department of Agriculture ("USDA"). Congress authorized the rural housing program(s) at issue here by title V of the Housing Act of 1949. Pub. L. No. 81-171, 63 Stat. 432 (codified at 42 U.S.C. 1471 et seq.). USDA has issued regulations governing its housing programs pursuant to its authority under 42 U.S.C. § 1480(g). Thus, the property at issue in this case is subject to USDA's multi-family regulations found at 7 C.F.R. § 3560.1 et seq. These regulations govern housing programs funded or supported by Sections 514, 515, 516, and 521 of the Housing Act of 1949 (codified at 42 U.S.C. §§ 1484, 1485, 1486, and 1490a). 7 C.F.R. § 3560.1.

opportunity to correct the drug-related criminal activity for which it terminated his lease. (R. pp. 2-6). This interpretation does not align with the plain language of the regulation, creates an absurdity, fails to defer to the UDSA's interpretive guidance, is not supported in other parts of 7 C.F.R. Part 3560, and relies upon U.S. Department of Housing and Urban Development ("HUD") Handbook 4350.3, which does not govern USDA multi-family housing. For these reasons, the Circuit Court's adoption of the Magistrate Court's reasoning is erroneous and must be reversed.

Courts use the same process to ascertain the meaning of regulations as they do to interpret statutes. *Blackmon v. S.C. Dep't of Health & Env't Control*, 436 S.C. 529, 539, 873 S.E.2d 774, 780 (Ct. App. 2022). "First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation." *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014). "The words of a regulation must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the regulation's operation." *Byerly v. Connor*, 307 S.C. 441, 444, 415 S.E.2d 796, 799, (1992). "Furthermore, the regulation must be construed as a whole rather than read in its component parts in isolation." *S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 261, 725 S.E.2d 480, 483 (2012). If the regulation is "'silent or ambiguous with respect to the specific issue, the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference." *Id.* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)).

A. The Regulation Plainly Treats Drug Possession as "Material Non-Compliance" with the Lease.

The Circuit Court's ruling fails to acknowledge the plain meaning of 7 C.F.R. § 3560.159. In examining the regulation, the drug-related criminal activity of Appellant's guest is either

material non-compliance with the lease or other good cause, and in either event, it is subject to the requirement of notice and an opportunity to correct.

The regulation begins by stating that a borrower[2] "may terminate or refuse to renew a tenant's lease *only*" for three reasons (1) material non-compliance with the lease, (2) material non-compliance with occupancy rules,[3] or (3) other good cause. 7 C.F.R. § 3560.159(a) (emphasis added). The regulation then gives examples of actions constituting material non-compliance with the lease or occupancy rules, including:

> (iii) Admission to or conviction for use, attempted use, possession, manufacture, selling, or distribution of an illegal controlled substance when such activity occurred on the housing project's premises by the tenant, a member of the tenant's household, a guest of the tenant, or any other person under the tenant's control at the time of the activity....

7 C.F.R. § 3560.159(a)(1)(iii). Examples under the regulation of other good cause to terminate a lease include:

> (i) Actions by the tenant or a member of the tenant's household which disrupt the livability of the housing by threatening the health and safety of other persons or the right of other persons to enjoyment of the premises and related facilities;
> (ii) Actions by the tenant or a member of the tenant's household which result in substantial physical damage causing an adverse financial effect on the housing or the property of other persons; or
> (iii) Actions prohibited by state and local laws.

7 C.F.R. § 3560.159(a)(2).

According to the plain language of the regulation, all acts of material non-compliance and other good cause are expressly entitled to a notice and opportunity to correct the behavior. It says,

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2 The USDA interchanges borrower and landlord in both the regulation and their guidance. The borrower and landlord are one in the same person.

3 Respondent terminated Appellant's lease only based on paragraph 26(a)(v) of the lease and not based on a house rule.

> Prior to terminating a lease, the borrower must give the tenant written notice of the violation and give the tenant an opportunity to correct the violation. Subsequently, termination may only occur when the incidences related to the termination are documented and there is documentation that the tenant was given notice prior to the initiation of the termination action that their activities would result in occupancy termination.

7 C.F.R. § 3560.159(a). Thus, criminal activity both is a material non-compliance with the lease, and good cause to terminate after notice of the violation and an opportunity to correct are provided.

7 C.F.R. § 3560.159(a) not only applies to the tenant, but their guest. The regulation clearly states material non-compliance includes admission to or conviction for "possession . . of an illegal controlled substance . . .on the housing project's premises by. . . a guest of the tenant." 7 C.F.R. § 3560.159(a). The Circuit Court's ruling failed to follow the rule that a court should not "determine the meaning of a regulation by reading its component parts in isolation, but rather construe the regulation as a whole." *Spruill v. Richland County Sch. Dist.* 2, 363 S.C. 61 609 S.E.2d 524, 526 (2005). The Court went astray by focusing solely on 7 C.F.R. § 3560.159(d) rather than considering how it operates within the framework of 7 C.F.R. § 3560.159[4].

The Circuit Court adopted the Magistrate Court's position holding that the existence of 7 C.F.R. § 3560.159(d) "stands alone" as a ground to terminate the lease for the criminal acts specified in 24 C.F.R. §§ 5.858, 859, 860, and 861 without regard to 7 C.F.R. § 3560.159(a). However, none of these regulations establish criminal activity as something other than a material non-compliance with the lease. To the contrary, 24 C.F.R. §§ 5.858, 859, 860 do not provide an independent procedure to evict tenants for drug or other criminal activity but direct USDA leases

[4] The Magistrate Court did conduct a rudimentary analysis of 7 C.F.R. § 3560.159, concluding that the regulation is comprised of four subsections and that only subsection (a) contains language about notice and opportunity to correct. Such an analysis is not legally adequate. It fails to consider the meaning of terms used in the regulation such as "material non-compliance" and "other good cause," fails to contextualize the regulation within the regulatory text as a whole, and makes no attempt to resolve the absurdity that such an interpretation generates.

to include specific lease terminology.[5] Nothing in Section 3560.159(d) removes these types of criminal activities from the scope of Section 3560.159(a). The tenancy still must be terminated based on material non-compliance with the lease, occupancy rules, or good cause.

The only published appellate decision to consider this question adopted the same reasoning. In *The CBM Group, Inc. v. Llamas* case, California's Court of Appeals rejected the landlord's argument that 7 C.F.R. § 3560.159(d) provided an independent basis for terminating a USDA multifamily housing lease. (12 Cal. App. 5th Supp. 34, 219 Cal. Rptr. 3d 683 (Cal. Ct. App. 2017)). It held that subpart (d) specifies that the lease should include certain provisions but does not establish any process for terminating a lease. *Id.* The Court concluded,

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[5] 5 C.F.R. § 5.858 says

> The **lease** must provide that drug-related criminal activity engaged in on or near the premises by any tenant, household member, or guest, and any such activity engaged in on the premises by any other person under the tenant's control, is grounds for you to terminate tenancy. In addition, the **lease** must allow you to evict a family when you determine that a household member is illegally using a drug or when you determine that a pattern of illegal use of a drug interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

Emphasis added.

Drug-related criminal activity is "the illegal manufacture, sale, distribution, or use of a drug, or the possession of a drug with intent to manufacture, sell, distribute or use the drug." 24 CFR § 5.100.

5 C.F.R. § 5.859 says in relevant part

> (a) Threat to other residents. The **lease** must provide that the owner may terminate tenancy for any of the following types of criminal activity by a covered person:
>
> (1) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (including property management staff residing on the premises); or
>
> (2) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises.

Emphasis added.

5 C.F.R. § 5.860 says "the **lease** must provide that you may terminate the tenancy if you determine that a household member's abuse or pattern of abuse of alcohol threatens the health, safety, or right to peaceful enjoyment of the premises by other residents." Emphasis added.

> Notably, subpart (d) does not set forth a specific procedure for terminating the lease for criminal activity or alcohol abuse. Instead, subpart (d) incorporates the language of the lease itself by referencing Code of Federal Regulations, title 24, parts 5.858, 5.859, 5.860, and 5.861 (2017), which indicates that any termination for criminal activity would still have to be based on violation of the lease terms. Thus, a termination under subpart (d) would still be based on a "material non-compliance with the lease provisions" under subpart (a), and the same procedures required under subpart (a) would apply to subpart (d) terminations as well.

Id. at 46, 219 Cal. Rptr. 3d at 692. This reasoning is sound and comports with the structure and language of 7 C.F.R. § 3560.159 in its entirety.

Interpreting 7 C.F.R. § 3560.159(d) as standing independent from subpart (a) creates an absurdity. Courts cannot interpret regulations in ways that create absurdities. *Blackmon v. S.C. Dep't of Health & Env't Control,* 436 S.C. 529, 539, 873 S.E.2d 774, 780 (Ct. App. 2022) ("'[I]f applying the regulation's plain language would lead to an absurd result, we will interpret the regulation in a manner which avoids the absurdity.'" (citation omitted)).

The Circuit Court's decision leads to the absurd result that criminal activity both is and is not entitled to notice and an opportunity to correct at the same time. Under the Circuit Court's construction, criminal acts described in 24 C.F.R. § 5.858, 859, and 860 would never require notice and an opportunity to correct. The definitions of drug-related criminal activity and other criminal activity found in those sections are the very same acts as stated in 7 C.F.R. § 3560.159(a). 7 C.F.R. § 3560.159(a) clearly requires notice of the violation and an opportunity to correct. Thus, affirming the Circuit Court's ruling would violate the fundamental rule that absurdities must be avoided. *Ventures S.C., LLC v. S.C. Dep't of Revenue*, 378 S.C. 5, 9, 661 S.E.2d 339, 341 (2008) (noting that even the plain language rule must be jettisoned if it would lead to an absurd result).

In this case the regulations' language is explicit. The plain language of the regulation forces the conclusion that drug possession of a tenant's guest is either "material non-compliance" with the lease or "other good cause" under 7 C.F.R. § 3560.159(a). All material non-compliance or

other good cause must receive prior notice of the violation and an opportunity to correct. Interpreting Section 3560.159(d) to permit termination of a lease by the process described in Section 159(a) harmonizes those two subsections and avoids absurdity. Section 159(d) does not and cannot stand alone. For these reasons the Circuit Court's interpretation was legally erroneous. Because the regulation's meaning is plain, a court "must utilize" it. *Kiawah Dev. Partners, II*, 411 S.C. at 32, 766 S.E.2d at 717. Consequently, Appellant was entitled to notice and an opportunity to correct before lease termination, and the Circuit Court's order must be reversed.

B. The Cannons of Construction Further Demonstrate that Drug Possession is a "Material Non-Compliance" with the Lease Requiring a Notice of the Violation and an Opportunity to Correct.

If 7 C.F.R. § 3560.159 is ambiguous, other interpretive rules and canons of construction apply. These principles also lead to the conclusion that Section 159(d) is not exempt from 159(a)'s requirements.

1. USDA's Guidance Treats Drug Possession as "Material Non-Compliance" with the Lease, and the Court should defer to that agency position.

The USDA itself did not adopt the interpretation that Section 159(d) stands alone. When interpreting an ambiguous or silent administrative regulation, "a court must … look to the administrative construction of the regulation…" *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414, 65 S. Ct. 1215, 1217 (1945). A court "must give deference to the agency's interpretation of the . . . regulation, assuming the interpretation is worthy of deference." *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 33, 766 S.E.2d 707, 717 (2014). See also *Bowles*, 325 U.S. at, 414, 65 S. Ct. at 1217 ("[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.").

The USDA created a handbook providing "guidance about the Agency's procedures for overseeing borrower's performance in meeting their responsibilities under the program." U.S. Dept. of Ag., Handbook HB-2-3560 MFH Asset Management Handbook, Chapter 1, Section 1 (1.1) pg. 1-1 (2005) (available at https://www.rd.usda.gov/resources/directives/handbooks (last visited June 2, 2023) (the "USDA Handbook").[6] Chapter 6 of the USDA Handbook HB-2-3560 MFH controls the rules of occupancy for multi-family housing projects. *Id.* at Section 6.1, pg. 6-1. As relevant to this case, a borrower may terminate a tenant's occupancy during the term of a lease only for the tenant's violation of the lease, occupancy rules, or for other good cause. *Id.* at Section 6.32, pgs. 6-43 - 6-45.

In accordance with the lease, a borrower may terminate or refuse to renew a tenant's lease for material noncompliance with the lease or occupancy rules or for other good cause. . . .

> Material noncompliance with lease provisions or occupancy rules includes actions such as:
> 1. Violations of lease provisions or occupancy rules that are substantial and repeated;
> . . .
> 2. Admission to or conviction for use, attempted use, possession, manufacture, sale of distribution of an illegal controlled substance. Such activity must have occurred on the project's premises by the tenant, a member of the tenant household, or any other person under the tenant's control at the time of the activity.
> . . .
>
> For purposes of terminating a tenant's occupancy, good cause includes actions by the tenant or member of the tenant's household that:
>
> 3. Threaten the health and safety of other persons or the right of other persons to peaceful enjoyment of their dwelling;
> 4. Result in substantial physical damage causing an adverse financial effect on the housing or other persons' property; and

[6] To the extent that the USDA Handbook was not admitted into evidence and is not part of the record, Appellant respectfully asks this Court to take judicial notice of its contents. *See Caha v. United States*, 152 U.S. 211, 221-22, 14 S. Ct. 513, 517 (1894) (taking judicial notice of agency rules); *United States v. City of St. Paul*, 258 F.3d 750, 753 (8th Cir. 2001) (taking judicial notice of a handbook of the Dept. of Housing and Urban Development); *Unibank for Sav. v. 999 Private Jet, LLC*, 31 F.4th 1, 5 (1st Cir. 2022) (taking judicial notice of an agency guidebook).

> 5. Are actions prohibited by state or local law.
> . . .
> *Prior to terminating a lease, the borrower must give the tenant written notice of the violation and give the tenant an opportunity to correct the violation.* Subsequently, termination may only occur when the incidences related to the termination are documented and there is documentation that the tenant was given notice prior to the initiation of the termination action that their activities would result in occupancy termination.

Id. at Section 6.32(A) pgs. 6-43 – 6-45 (emphasis added). Nowhere does the USDA Handbook say that a USDA borrower may terminate occupancy for criminal activity under 7 CFR 3560.159(d) without giving notice and an opportunity to correct.

The Circuit Court affirmed the Magistrate Court's holding that 7 CFR § 3560.159(d) stands alone from subpart (a) and does not require notice or an opportunity to correct. The USDA Handbook does not affirm this interpretation. The only place the USDA Handbook addresses 7 CFR § 3560.159(d), is to note that a borrower may bifurcate a lease in order to remove a member of the home "who engages in criminal activity directly relating to domestic violence, dating violence, sexual assault, or stalking against an affiliated individual or other individual." U.S. Dept. of Ag., Handbook HB-2-3560 MFH Asset Management Handbook Chapter 6, Attachment 6-K, Section O, pg. 27 (2005). Under the USDA's interpretation of its own regulation, criminal activity is a lease violation that constitutes both material non-compliance and good cause requiring notice of the violation and an opportunity to correct. To this interpretation a court must defer because it is not "'plainly erroneous or inconsistent with the [statute]'" *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 33 n.7, 766 S.E. 2d 707, 717 n.7 (2014) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S. Ct. 1215, 89 L. Ed. 1700 (1945)).

Mr. Rush received notice of the lease violation but did not receive an opportunity to correct the violation before Respondent terminated the lease. (R. p. 187). Since Mr. Rush was never provided with an opportunity to correct the violation, the Respondent failed to comply with the

controlling regulation. As a result, the eviction should be overturned as it violates the procedural requirements listed in 7 CFR 3560.159.

2. **The Rule Against Surplusage Support the Interpretation that Subpart (d) is bound to the procedures in 7 C.F.R. § 3560.159(a).**

Treating 7 C.F.R. § 3560.159(d) as a provision standing apart from 7 C.F.R. § 3560.159(a) renders subpart (a) meaningless surplusage. "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (citation omitted). Under the express language of 7 CFR § 3560.159(a), a borrower must provide notice and an opportunity to correct material non-compliance of the lease, which explicitly includes the "admission to or conviction for use, attempted use, possession, manufacture, sale of distribution of an illegal controlled substance," and "actions prohibited by state or local law." 7 CFR § 3560.159(a)(1)(iii) and (2)(iii).

Subpart (d) says that the lease must include prohibitions against "drug-related criminal activity" and any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents or persons living in the immediate vicinity. 7 C.F.R. § 3560.159(d). Subpart (d) encompasses the same acts that subpart (a)(1)(iii) expressly says must receive an opportunity to correct. *Id.* Subpart (d) does not define any activity that is not also referenced in subpart (a)(iii). Reading subpart (d) to stand apart from subpart (a) renders subparts (a)(1)(iii) and (a)(2)(iii) entirely meaningless. Therefore, the activities listed in subpart (d) must follow the procedures expressly stated in 7 C.F.R. § 3560.159(a). Failure to do so renders subpart (a) meaningless surplusage.

3. **The Regulation and Legislative History Shows the Agency's Intent for Tenants to Receive an Opportunity to Correct for Lease Violations of Drug Related Activities.**

In reading 7 C.F.R. Subpart D in its entirety, it shows the Circuit Court erred when it held

7 C.F.R. § 3560.159(d) does not require an opportunity to correct. Section 3560.156(c) also addresses drug-related criminal activity. It requires leases to contain specific provision to permit a borrower to exclude from the premises an adult who uses, possesses, manufactures, sells, or distributes illegal controlled substances "*unless* the person agrees to not commit a drug violation in the future and is either actively participating in a counseling or recovery program, complying with court orders related to a drug violation, or has successfully completed a counseling or recovery program." C.F.R. § 3560.156(c)(15) (emphasis added). The USDA is signaling its position to give tenants who violate a drug provision of the lease a second chance.

USDA's comments on 7 C.F.R. § 3560.156(c) confirm this:

> [C]ommenters stated that the Agency's policy to not allow the lessee or other adult members occupying the unit who commit a drug violation to enter the premises unless the individual agrees not to commit a drug violation in the future, participates in a counseling or recovery program, or has completed such a program is too lax. These commenters recommended that the Agency employ HUD's one-strike policy.
>
> Response: The Agency thanks the commenters for their recommendations; however, the Agency disagrees with the commenter's view that the above-stated policy established in § 3560.156(c) of the interim final rule is too lax. It provides the borrower with the authority to take specific actions to limit the access of such persons *and ultimately terminate tenancy if further drug-related violations are committed.*

Reinvention of the Sections 514, 515, 516, and 521 Multi-Family Housing Programs, 69 Fed. Reg. 69032, 69064 (Nov. 26, 2004) (emphasis added). By rejecting the "one-strike policy"[7] in HUD - subsidized housing, USDA elected to chart a different path ensuring tenants receive an opportunity to correct drug-related criminal activity before being evicted.

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7 As this Court noted in *City of Charleston Hous. Auth. v. Brown*, the one-strike rule derives from federal statutes governing housing subsidized through the Department of Housing and Urban Development. 437 S.C. 514, 518 n.1, 878 S.E.2d 913, 915 n.1 (Ct. App. 2022). The federal statute authorizing the Section 515 Rural Housing Program does not contain a similar directive. 42 U.S.C. § 1485.

HUD's "one strike policy" cannot be reconciled with the plain language of 7 C.F.R. § 3560.159(a). Further, there is no indication within the USDA Handbook or 7 C.F.R. Subpart D that 24 C.F.R. §§ 5.858, 859, 860, and 861 contained within 7 C.F.R. § 3560.159(d) abide by the HUD's "one strike policy". The Magistrate Court did not err by resorting to agency handbooks to assist in interpreting the statute it believed to be ambiguous. Its error stemmed from reviewing the wrong agency's handbook. (R. pp. 4-6). Failing to review relevant parts of the USDA Handbook created a plainly erroneous interpretation of the USDA regulation.

When 7 C.F.R. § 3560.159 and Part 3560 are construed as a whole, it is clear the Circuit Court erred in concluding subpart 159(d) "stands alone." (R. p. 2). *Spruill v. Richland County Sch. Dist. 2*, 363 S.C. 61 609 S.E.2d 524, 526 (2005) (holding that courts do not "determine the meaning of a regulation by reading its component parts in isolation, but rather construe the regulation as a whole."). Therefore, the Court should overturn the Writ of Ejectment for the failure to provide an opportunity to correct the violation.

CONCLUSION

The plain language of 7 C.F.R. § 3560.159 requires notice of the violation and an opportunity to correct for the type of criminal related activity. Interpreting Section 3560.159(d) to stand apart from 159(a) not only violates the plain language rule but also creates the absurd result that criminal activity, specifically drug-related criminal activity, both is and is not entitled to an opportunity correct. Even if the regulation is ambiguous, the USDA's own guidance contradicts the conclusion, guidance to which the Magistrate and Circuit Courts should have deferred because it is not plainly erroneous. Also, the rule against surplusage and the USDA's own statement rejecting HUD's "one strike policy" force the conclusion that terminating a lease based on activities which 7 C.F.R. § 3560.159(d) says a lease must proscribe still must abide by the

procedures listed in 7 C.F.R. § 3560.159(a). The Respondent failed to comply with the mandatory USDA regulations when terminating Appellant's lease. For the reasons stated, this Court should reverse the lower court's decision, and dismiss the Rule to Vacate.

Respectfully submitted,

September 5, 2023

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2022-001353

Jeffery Rush,

Appellant

v.

Shady Moss Apartments,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief comply with Rule 211(b), SCACR.

SOUTH CAROLINA LEGAL SERVICES

September 5, 2023

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