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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Docket No. 22-ALJ-07-0082-CC
Appellate Case No. 2022-001402

Coastal Conservation League ....Appellant,

vs.

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

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL iv

STATEMENT OF THE CASE 1

STANDARD OF REVIEW 3

STATEMENT OF FACTS 4

ARGUMENT 6

I. The ALC made an error of law in ruling SCALC Rule 2(H) requires dismissal of the contested case 6

A. Paul Gayes is not a "party" under SCALC Rule 2(H) 6

B. The ALC erred in concluding that SCALC Rule 2(H) requires dismissal 9

II. The ALC erred in concluding that the Final Agency Decision did not give rise to a contested case 12

A. The underlying matter is a "proper contested case" because it involves the legal rights, duties, or privileges of a party 13

i. Paul Gayes has no legal rights, duties, or privileges of a party 13

ii. Property Owners do have legal rights, duties, or privileges of a party 14

iii. The League has legal rights, duties, or privileges of a party 17

B. The ALC erred in finding that the Department is not obligated to determine whether the Board properly approved the project 18

C. The ALC is required to make a determination under existing law 20

CONCLUSION 22

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

CASES

Allison v. W.L. Gore & Assocs., 394 S.C. 185, 714 S.E.2d 547 (2011)……………………………10

Amisub of South Carolina, Inc. v. S.C. Dep't Health & Env't Control,
403 S.C. 576, 595, 743 S.E.2d 786, 796 (2013) ……………………………………………..…21

Dove v. Gold Kist, Inc., 324 S.C. 235, 442 S.E.2d 598, (1994)………………………………..…10

Elam v. S.C. Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004)………………………………11

Great Games, Inc. v. S.C. Dept. of Revenue, 339 S.C.79, 529 S.E.2d 6 (2000)…………………10

Heath Hill v. S.C. Dep't Health & Env't Control,
10-ALJ-07-0625-CC, 2010 WL 5781666 ……..………………………………………..……10

Hoyler v. State, 428 S.C. 279, 291, 833 S.E.2d 845, 851 (Ct. App. 2019) ………………………17

Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985) ……………………………………..……11

Megan Bums v. S.C. Dep't of Emp't & Workforce,
14-ALJ-07-0017-CC, 2014 WL 784948 …………………………………………………………11

Nationwide Mut. Ins. Co. v. Yungwirth, 940 A.2d 523, 528 n.5 (Pa. Super. 2008) ……………10

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) ………………………………..……3

People v. Hill, 834 N.Y.S.2d 840, 845 (N.Y. City Crim. Ct. 2007) ……………………….……10

Pres. Soc'y of Charleston v. S.C. Dep't Health & Env't Control,
430 S.C. 200, 214, 845 S.E.2d 481, 488 (2020) ……………………………………………19, 20

S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.,
397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012) …………………………………………..……3

Town of Summerville v. City of N. Charleston, 378 S.C. 107, 662 S.E.2d 40 (2008)………..…3

Turner v. S.C. Dep't of Health & Env't Control,
377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008) ……………………………….…….3

STATUTES & REGULATIONS

S.C. Code Ann. § 1-23-310(4)……………………………………………………………….…6

S.C. Code Ann. § 1-23-505…………………………………………………………8, 9, 13, 18, 21

S.C. Code Ann. § 1-23-600(A) …………………………………………………………....8, 9

S.C. Code Ann. § 1-23-610(B)………………………………………………………….………3

S.C. Code Ann. § 44-1-60 ……………………………………..……………..……8, 20, 21, 22

S.C. Code Ann. § 48-39-10, et seq. …………………………………………..………..7, 18

S.C. Code Ann. § 48-39-50…………………………………………………………………19

S.C. Code Ann. § 48-39-130(D)(2)………………………………………1, 5, 7, 14, 15, 17, 18, 20

S.C. Code Ann. § 48-39-140 ……………………………………………………..………….8
.
S.C. Code Ann. § 48-39-250, et seq. ………………………………………………...……4

S.C. Code Ann. § 48-39-320(C)……………………………………….…1, 4, 5, 7, 14, 18, 20

S.C. Code Ann. Regs. 30-1……………………………………………..………………..15

S.C. Code Ann. Regs. 30-5……………………………………………...……………..15

S.C. Code Ann. Regs. 30-15…………………………………………….……………..15

OTHER AUTHORITIES

SCACR 268(d)(2)……………………………………………………………………..10

SCALC Rule 2(H)………………………………………………………………5, 6, 8, 9

SCALC Rule 5………………………………………………………………..…………5

SCALC Rule 11……………………………………………………………...………….5

SCRCP Rule 19 ……………………………………………………………...……..…12

STATEMENT OF ISSUES ON APPEAL

I. Did the Administrative Law Court's ruling that SCALC Rule 2(H) requires dismissal of the contested case constitute an error of law?

II. Did the Administrative Law Court's conclusion that the Final Agency Decision did not give rise to a contested case constitute an error of law?

STATEMENT OF THE CASE

Appellant Coastal Conservation League ("the League") initiated this matter following two statutory exemptions recognized by the Board of Respondent, South Carolina Department of Health and Environmental Control ("DHEC" or "the Department") involving illegally-placed sandbags on Debidue Beach in Georgetown County. The sandbags were installed by Respondents Price and Carolyn Sloan, Mark and Anne Tiberio, Michael and Laura Schulte, and Northwest Properties of Hickory, LLC (collectively, "Property Owners") in front of their respective beachfront properties. At the time of the events giving rise to the underlying contested case, DHEC was actively pursuing enforcement proceedings against Property Owners for the same illegally installed sandbags. While enforcement proceedings were underway, on October 25, 2021, Dr. Paul Gayes of Coastal Carolina University contacted DHEC and requested an exemption from established state policy, statutes, and regulations to study the sandbags, presumably, but not explicitly pursuant to, Section 48-39-130(D)(2) of the Beachfront Management Act ("research exemption"). Dr. Gayes' research proposal consisted of observing the installed sandbags and covering them with sand from a previously-permitted beach renourishment project to create artificial dunes. DHEC staff reviewed Dr. Gayes' research proposal and rejected the requested exemption. Subsequently, the Property Owners—not Paul Gayes—filed a Request for Final Review Conference with the DHEC Board; they did not identify Dr. Gayes as a party to the proceedings. Following the Final Review Conference, the DHEC Board issued an order on February 10, 2022, reversing DHEC staff and allowing the illegal sandbags to remain in place pursuant to not only the aforementioned research exemption, but also under a separate exemption for "pilot projects."[1]

[1] S.C. Code Ann. § 48-39-320(C).

On March 8, 2022, the League filed a Request for Contested Case Hearing. On May 10, 2022, Property Owners filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction. On July 25, 2022, Administrative Law Judge Robert L. Reibold held a hearing on that motion. On August 10, 2022, Judge Reibold issued an Order granting Property Owners' Motion to Dismiss on the basis that the Administrative Law Court ("ALC") lacked "procedural jurisdiction" to hear the matter. Following Appellant's Motion to Reconsider and DHEC's Motion for Clarification, Judge Reibold issued an Amended Order granting Property Owners' Motion to Dismiss on September 19, 2022. On October 5, 2022, Appellant filed a Notice of Appeal.

STANDARD OF REVIEW

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

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

S.C. Code Section 1-23-610(B). An appellate court "will correct the decision of the ALC if it is affected by an error of law, S.C. Code Ann. § 1–23–380(5)(d) (Supp.2010), and questions of law are reviewed de novo." S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc., 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012), (reh'g denied May 4, 2012) (citing Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)). Under this standard, a reviewing court may reverse or modify an agency decision based on errors of law. Turner v. S.C. Dep't of Health & Env't Control, 377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008).

STATEMENT OF FACTS

The facts giving rise to this appeal began with a post-hoc justification for the Property Owners' violation of the Beachfront Management Act, S.C. Code Ann. Section 48-39-250, et seq., and the regulations promulgated thereunder. The Property Owners own beachfront properties in the Debordieu Colony residential development on the southern end of Debidue Beach, which are located landward of a long-existing wooden seawall along the seaward edge of their properties.

In 2020, Property Owners, who have stated they were "not satisfied with current regulatory options for addressing emergency erosion conditions on the beachfront" (R.p. 225.), and who apparently were undeterred by the law, installed sandbags without obtaining any permit or other approval from DHEC. In September of 2020, DHEC staff discovered the illegal sandbags and initiated enforcement activities. (R.p. 86.) For over a year, Property Owners refused to remove the illegal bags and forced the DHEC staff to engage in protracted enforcement negotiations.

Well into the enforcement process, Property Owners enlisted Dr. Paul Gayes, a professor at Coastal Carolina University, to use his position at the University to obtain a research exemption in an effort to keep the illegal sandbags in place. On October 25, 2021, Dr. Gayes submitted a "research study proposal" to DHEC for the purpose of studying what happens when sandbags are buried under sand. (R.p. 201.) Significantly, Dr. Gayes did not seek any feedback from DHEC on whether the proposed study qualified as a "pilot project" exemption under Section 48-39-320(C). Dr. Gayes described the study as involving the sandbags being covered with sand supplied through an upcoming and already-permitted beach renourishment project. DHEC staff reviewed the proposal and responded to Dr. Gayes on November 10, 2021, rejecting the requested exemption and specifically outlining why the sandbags do not meet the standards for either a research exemption under Section 48-39-130(D)(2) or a pilot project exemption under Section 48-39-

320(C); more particularly, the staff response explained why sandbags are specifically prohibited under the Beachfront Management Act. (R.p. 86.)

Dr. Gayes took no further action in response to DHEC staff's response, but the Property Owners themselves submitted a Request for a Final Review Conference to the DHEC Board on November 23, 2021. Notably, the Property Owners did not identify Dr. Gayes as a party to the Request for Final Review.

In its Final Agency Decision dated February 10, 2022, the DHEC Board reversed staff's decision and approved Dr. Gayes' request under both the "research exemption" (Section 48-39-130(D)) and the "pilot project exemption" (Section 48-39-320(C)). (R.p. 175.)

Appellant filed a Request for Contested Case Hearing on March 8, 2022, serving the Department pursuant to S.C. Code Ann. Section 1-23-320 and serving the parties to the case (Property Owners) on the same day pursuant to Rules 5 and 11, SCALC. On May 10, 2022, Property Owners filed a Motion to Dismiss on the following grounds: (1) that Appellant failed to name and serve Dr. Paul Gayes with the Request for Contested Case; and (2) that SCALC Rule 2(H) is jurisdictional. Property Owners claimed the failure to name Dr. Gayes as a party to the proceedings and serve him within thirty (30) days required dismissal of the entire Contested Case.

Following a motion hearing on July 25, 2022, the ALC granted the Property Owners' Motion to Dismiss. Both Appellant and the Department filed Motions in response to the Order. On September 19, 2022, the ALC issued an Amended Order finding that: "Dr. Gayes should be a party and Petitioner was required to serve Dr. Gayes with a copy of the Request for Contested Case Hearing." (R.p. 42.) "Alternatively, the Court lacks jurisdiction because this matter is not a proper contested case." (R.p. 48.)

ARGUMENT

Property Owners, the only Respondents who have anything at stake relating to the sandbags on their property, succeeded in using jurisdictional gamesmanship in order to keep the League from revealing the lack of a legal basis to allow the illegal sandbags to remain in place and to protect their multi-million dollar houses by utilizing a college professor—who has never sought to be formally involved in any of these administrative appeal proceedings—as a cover for their refusal to comply with the law.

I. The ALC made an error of law in ruling SCALC Rule 2(H) requires dismissal of the contested case.

A. Paul Gayes is not a "party" under SCALC Rule 2(H).

The ALC found that "Dr. Gayes Should be a Party and Petitioner was Required to Serve Dr. Gayes with a Copy of the Request for a Contested Case Hearing." (R.p. 42.) Appellant asserts that this conclusion constitutes an error of law, because Paul Gayes is not a "party" under SCALC Rule 2(H).

Rule 2(H) of the Administrative Law Court Rules of Procedure provides as follows:

> **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.

(emphasis in original). The APA defines "license" as "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). Under the Coastal Zone Management Act ("CZMA"), an "applicant" is defined as "any person who files an application for a permit under the provisions of this chapter." S.C. Code Ann. § 48-39-10(A).

As the DHEC Board concluded, Dr. Gayes was seeking an *exemption* for research purposes, not a "license" or "permit." (R.p. 173.) An "exemption" from licensing or permitting

means *no* license is required; hence, permission is not required by law. Section 48-39-130(D) provides as follows:

> It shall not be necessary to apply for a permit for the following activities:
>
> . . .
>
> (2) Hunting, erecting duckblinds, fishing, shellfishing and trapping when and where otherwise permitted by law; the conservation, repletion and *research activities of state agencies and educational institutions… provided that* such activities cause no material harm to the flora, fauna, physical or aesthetic resources to the area.

(emphasis added). Matt Slagel, the DHEC staff member responsible for reviewing Dr. Gayes' proposal, further explained that the research exemption in Section 48-39-130(D) "allows an activity to move forward without going through the normal permitting process." (R.p. 621.)

> Q: It was not an application that was submitted by Dr. Gayes. Is that right?
> A: That's right.

Id. at 23.

Dr. Gayes also is not an applicant for the "pilot project" exemption. Section 48-39-320(C) provides as follows:

> 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.

Even assuming there was any evidence whatsoever that Dr. Gayes sought approval under the CZMA's "pilot project" provision and that he, as an academician, even would have been the proper person to request approval, that provision does not require an application or a permit, and the DHEC Board clearly acknowledged that the statutory provisions regarding research projects and pilot projects were *exemptions* from the typical permitting process. (R.p. 175.) The Property

Owners' Request for Final Review ("RFR") similarly took the position that Dr. Gayes sought "permit exceptions." (R.p. 239.) Gayes unequivocally did not submit any application to DHEC; therefore, under the pilot project provision, he is not an "applicant." His request did not require a "license" and he did not receive a license from the DHEC Board; therefore, he was not required to be named in the League's Request for Contested Case. Similarly, because Dr. Gayes is not an "applicant" or "licensee," he is not required to be "deemed a party" nor must he "be served with copies of all papers filed in the case" under SCALC Rule 2(H). This clearly exempts Dr. Gayes' request from all of the application requirements contained in Section 48-39-140 and the associated regulations.

Further, the statutory procedure outlined in S.C. Code Section 44-1-60 makes clear that Gayes is not a "party" for purposes of this analysis. Section 44-1-60 provides the procedure by which challenges to staff decisions giving rise to a contested case are made. Once a Request for Final Review is filed with the DHEC Board and the Board (1) decides to hold a Final Review Conference; (2) holds the Final Review Conference and votes on the matter; and (3) issues a written order, "[w]ithin thirty calendar days after the receipt of the decision an applicant, permittee, licensee, or 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." S.C. Code Ann. § 44-1-60(F)(2).

The APA confers jurisdiction on the Administrative Law Court to "preside over all hearings of contested cases as defined in Section 1-23-505…" S.C. Code Ann. § 1-23-600(A). Section 1-23-505(3) defines a contested case as "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 … to be determined by an agency or the Administrative Law Court after the

opportunity for a hearing." (emphasis added). A "party" is defined as "each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party." Id. at § 1-23-505(5).

At the time of the filing of the RFR, Dr. Gayes was not named as a party, not admitted as a party, and did not seek to be admitted as a party, either to the proceedings in front of the DHEC Board or the ALC; therefore, he does not meet the APA's definition of "party."

B. The ALC erred in concluding that SCALC Rule 2(H) requires dismissal.

The 2019 Revised Notes to Rule 2(H) provide that "the definition of a party makes it clear that the licensee or applicant is to be made a party to any matter which involves the license or permit, and that he shall be served with copies of all papers filed in the case." Though the Rule requires a person or entity who meets the definition of an "applicant" or "licensee" *to be made a party*, it does not require dismissal of a case because that person or entity is not initially named, only that the "applicant" or "licensee" be served with all filings in the existing contested case. The plain language of the rule and its clarifying notes, therefore, do not mandate dismissal of the case, even assuming Dr. Gayes was a "party" under the applicable definitions.

The ALC concluded that Rule 2(H) requires dismissal because it imposes a jurisdictional requirement described as "procedural jurisdiction." It is well-settled that subject matter jurisdiction is broadly defined as "the power to hear and determine cases of the general class to which the proceedings in question belong." Dove v. Gold Kist, Inc., 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994). Our Supreme Court has held that "the question of compliance with rules, regulations, and statutes governing an appeal [from an administrative agency] is one of appellate jurisdiction[.]" Allison v. W.L. Gore & Assocs., 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011). "The failure of a party to comply with the procedural requirements for perfecting an appeal *may*

deprive the Court of 'appellate' jurisdiction over the case, but it does not affect the Court's subject matter jurisdiction." Great Games, Inc. v. S.C. Dep't of Revenue, 339 S.C. 79, 82 n.5, 529 S.E.2d 6, 7 n.5 (2000) (emphasis added).

The ALC cited a number of cases in support of its conclusion that a party's failure to follow intermediate administrative steps at the agency level prior to requesting a contested case hearing deprives the ALC of "procedural jurisdiction." (R.p. 40-41.) However, each is an unreported decision of the ALC, and none are controlling. See, e.g., Rule 268(d)(2), SCACR ("Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved."). Appellant can find no case law supporting the use of ALC decisions as precedent to support the ALC's contention there is no procedural jurisdiction here.[2]

Even assuming the ALC decisions can be instructive, they are not on point. Heath Hill v. S.C. Dep't of Health & Env't Control, 10-ALJ-07-0625-CC, 2010 WL 5781666, presented the fact pattern of a party filing and serving a request for a contested case hearing more than 30 days after the DHEC Board's decision; there, the ALC applied the clear statutory time limits contained in Section 44-1-60. In Megan Bums v. S.C. Dep't of Emp't & Workforce, 14-ALJ-07-0017-CC, 2014 WL 784948, the ALC ruled that the Petitioner failed to serve the agency that issued the decision under appeal when she filed her request for contested case; again, those facts are entirely dissimilar to the facts here. Serving the agency is clearly a requirement to perfect service under S.C. Code Section 1-23-600(B), which requires that "[a] party that files a request for a hearing

[2] "It is rudimentary that courts are not bound by the decisions of other courts of equal jurisdiction. The power to establish precedent is lodged in courts of superior jurisdiction."); People v. Hill, 834 N.Y.S.2d 840, 845 (N.Y. City Crim. Ct. 2007) ("A decision of a court of co-ordinate jurisdiction is not a binding precedent."); Nationwide Mut. Ins. Co. v. Yungwirth, 940 A.2d 523, 528 n.5 (Pa. Super. 2008) ("While the Superior Court is bound to give due consideration to the decisions and reasoning of the Commonwealth Court, this Court is not bound to follow such decisions as controlling precedent.").

with the Administrative Law Court must simultaneously serve a copy of the request on the affected agency." Here, the League properly served DHEC.

The ALC's Amended Order cites to Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985) as support for its conclusion that "[s]ervice of a notice of appeal is a jurisdictional requirement for which courts have no authority to extend the prescribed time." (R.p. 45.) This case is distinguishable and is not supportive of this conclusion. Mears was cited in another, non-binding ALC order, which ruled that a party did not timely serve the opposing party of a Notice of Intent to Appeal under the Appellate Court Rules, implicating entirely different legal authority inapplicable under these circumstances. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004), also cited in the Amended Order, is even less relevant to this Court's analysis. In that case, the Court held an appeal was untimely in the context of a successive SCRCP Rule 59(e) motion, where the motion did not toll the time to file an appeal.

The fact that another individual could have been named in the case but was not is not fatal to this contested case. Even if this Court agrees with the lower court that Dr. Gayes is a "party," the remedy is not the drastic result of dismissal. The South Carolina Rules of Civil Procedure are instructive and specifically provide for joinder of persons needed for just adjudication:

> 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.

SCRCP Rule 19(a). The Note to SCRCP Rule 19 provides additional guidance:

> This Rule 19(a) is the same as the Federal Rule. The principle behind this Rule is that whenever possible persons materially interested in the action should be joined so that they may be heard and a complete determination had. When this joinder is not possible, the case should be examined pragmatically and a choice made between proceeding without the particular party or dismissing the action.

In the absence of Dr. Gayes, the ALC certainly could have ordered the affirmance of the DHEC Board's Order, which would have allowed the sandbags to remain even without Dr. Gayes' involvement. Dr. Gayes has not "claimed an interest" since his research proposal was denied and there is no risk that not joining him will require the Property Owners or DHEC to incur any additional or otherwise inconsistent obligations.

The most critical fact to the issues raised by the Property Owners—and the one to which the ALC afforded little weight—is that Dr. Gayes was not included in the initiation of the RFR giving rise to this case. The Property Owners evidently did not consider Dr. Gayes a party, as they excluded him from their RFR and sought the DHEC Board's approval under not only the research exemption but also the pilot project exemption, an exemption that Dr. Gayes did not request. (R.p. 226.)

II. <u>The ALC erred in concluding that the Final Agency Decision did not give rise to a contested case.</u>

The ALC concluded that the matter before it was not a "proper contested case" because "(1) in the absence of Dr. Gayes, this proceeding would not involve the legal rights, duties, or privileges of a *party*; and (2) neither the Department nor the Court is required by law or the South Carolina Constitution to determine the rights involved in this case." (R.p. 48.) Appellant asserts both conclusions are errors of law.

A. The underlying matter is a "proper contested case" because it involves the legal rights, duties, or privileges of a party.

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 "determined by an agency or the Administrative Law Court after an opportunity for hearing." S.C. Code Ann. § 1-23-505(3). As discussed, the ALC held that Dr. Gayes was a necessary party to the underlying contested case, and, without him, there were no remaining "parties whose legal rights are to be determined" because "[i]t is Dr. Gayes's rights and duties which Petitioner hopes to effect." (R.p. 49.) The ALC further found that "Property Owners themselves cannot be considered parties whose legal rights are to be determined for purposes of a contested case hearing." Id. Finally, the ALC concluded that the League "has no such underlying right, privilege, or duty related to maintenance or the study or use of the property to conduct the study" because the League "is not the person or entity who requested the study and has no ownership or other interest in the subject property." Id. All of these conclusions are misplaced and constitute an error of law.

i. Paul Gayes has no legal rights, duties, or privileges of a party.

First, Paul Gayes has no legal right, duty, or privilege to conduct the sandbag "research" he proposed. A research project or pilot project exemption can be *requested* by someone wishing to conduct scientific studies that would otherwise be in contravention of state laws and regulations, but no one—not even a university professor—has an absolute legal right, duty, or privilege for the same. See S.C. Code Ann. §§ 48-39-130(D)(2) and 320(C). Further, Gayes' "research proposal" merely aims to study the impacts of existing sandbags *that were placed by Property Owners.* Had Property Owners not installed the sandbags, there would be nothing for Gayes to "study." His "research" was only possible *because of the illegal sandbag placement by Property Owners*.[3]

[3] The ALC further reasoned that the Final Agency Decision "clearly imposes obligations on Gayes rather than property owners" including ensuring the integrity of the sandbags and modifications be coordinated

If Gayes had a legal right, duty, or privilege involved in the denial of his "research proposal," he would have—and should have—requested final review; he did not, and he should not now be considered a necessary party if he did not initiate an appeal to the DHEC Board. Further, if Gayes had a legal right, duty, or privilege involved in the denial of his "research proposal," Property Owners should have named him in their Request for Final Review, and the fact that they did not speaks volumes to which persons actually considered themselves to be aggrieved by the decision of DHEC staff. Property Owners should not now be permitted to raise this argument, given that they did the exact thing they are now accusing Appellant of—failing to name a necessary party—in their initial appeal to the Board.

ii. Property Owners do have legal rights, duties, or privileges of a party.

The Property Owners, on the other hand, *do* have legal rights, duties, or privileges involved in this matter. The ALC actually admitted as much in its Amended Order ("Property Owners have private rights that might be impacted by the proposed research study such as ownership and use of private property") but concluded, illogically and without explanation, that those rights would not be affected by its decision ("but a decision by this Court would not affect those rights."). (R.p. 54.)

First and foremost, Property Owners have a legal duty to abide by state laws and regulations regarding actions taken on their property and the adjacent beach, namely to refrain from installing sandbags. See S.C. Code Ann. § 48-39-130, S.C. Code Ann. Regs. 30-15, 30-1, 30-5 (prohibiting sandbags except for temporary use under emergency orders and providing specific criteria for material, size, placement, maintenance, and removal). Property Owners have unilaterally—and admittedly—decided they will go to great lengths to protect their properties in contravention of

with Department staff. (R.p. 49.) However, Gayes could not have accomplished this because the sandbags were already placed by Property Owners, and he merely aimed to observe them as-is.

the law and without regard for the health of the critical area or the public's right to access the beach.

Second, the Property Owners have private rights such as ownership and use of private property, as the ALC noted, as well as private rights of ownership and use of their personal property, i.e., the sandbags they purchased and installed. The ALC was asked to determine whether Property Owners properly have the right to keep their sandbags in place; whether the sandbags were allowed to remain or be removed ultimately hinged entirely on the Department decision to allow or disallow the sandbags to remain vis-à-vis Gayes' "research proposal." The Property Owners themselves initiated this entire chain of events by installing illegal sandbags for the express purpose of protecting their properties from naturally-occurring beach erosion. The limited record in this case reveals that *years* before Gayes submitted his "research proposal" in October of 2021, the Property Owners began exploring the possibility of installing sandbags between their homes and the ocean. (R.p. 231.) ("Requestors began searching for a new solution to protect their properties . . . in or around 2018.") The record shows that *Property Owners—not Gayes*—consulted a firm regarding the material, shape, size, and placement of the sandbags. The record shows that *Property Owners—not Gayes*—installed the sandbags. If Gayes' "research proposal" had not been "authorized" by the Board, Property Owners would have been required to remove their sandbags, which they otherwise refused to remove during Department compliance and enforcement efforts. The ALC's conclusion that "a ruling from the Court would not force or require Property Owners to cooperate with the study" overlooks the fact that a ruling favorable to Property Owners would allow them to proceed as they wanted; they would happily comply with a study they commissioned themselves. It is abundantly clear that the Property Owners ultimate intention and goal was to install the sandbags and never remove them, and they stood to directly

benefit from Gayes' "research proposal" exemption. The ALC stated a ruling would "merely" determine "whether Dr. Gayes's [sic] proposed study qualifies for an exemption to the permitting." (R.p. 54.) That is precisely what the League is asking the ALC to do. Moreover, the sole purpose of the proposed study is to provide a post-hoc justification for *Property Owners'* violation of the law. The Properties Owners are therefore the appropriate "party" and properly named and served by the League.

Further, an exemption granted under the *pilot project exception* does not involve Gayes in any way, because it was the Property Owners themselves who first raised the claim that the sandbags should be authorized as a pilot project. Property Owners sought and obtained authorization under the pilot project provision separate and apart from the "research proposal" submitted by Gayes. Gayes could not have had the alleged "new technology" in his study because (1) sandbags are not new technology; and (2) the sandbags were designed and installed well over a year before he submitted his "research proposal." Further, it was the Department's understanding that Gayes' "research proposal" was submitted pursuant to the "research exemption," not the "pilot project" exception. <u>See</u> R.p. 621 ("I'm not certain if [Gayes] specified under what statute or regulation he was seeking approval to do the study, but the fact that he, as a professor at a state university, submitted the request, the Department's understanding was that he was submitting that under the research exemption in 48-39-130 that we just discussed.").

Therefore, Property Owners are parties whose rights, duties, and privileges must be determined by the ALC under both the research exemption and the pilot project exemption.

iii. The League has legal rights, duties, or privileges of a party.

Finally, the ALC held that the League "has no such underlying right, privilege, or duty related to maintenance or the study or use of the property to conduct the study" because the League

"is not the person or entity who requested the study and has no ownership or other interest in the subject property." (R.p. 49.) If this were true, no "third-party" would ever be able to challenge DHEC staff and Board decisions, when in fact, this is done routinely and expressly envisioned by statute. This conclusion is objectively a clear error because the law clearly allows third parties—even those without ownership interests—to challenge decisions of the DHEC staff and Board. The League, as an "affected person," has a right to a contested case hearing under not only the statutes presented here but also under the Due Process clause of the South Carolina Constitution. Further, the League and its members, as members of the public, have a right to use and access the beach pursuant to the Public Trust Doctrine. See, e.g., Hoyler v. State, 428 S.C. 279, 291, 833 S.E.2d 845, 851 (Ct. App. 2019) ("The public trust doctrine provides that lands below the high-water mark are presumptively owned by the State and held in trust for the benefit of the public, and it has been a vital part of the jurisprudence of South Carolina and many other states for centuries, even pre-dating the beginning of our republic." (citations omitted)). Property Owners' sandbags infringe on the League's and the public's legal right to use and access Debidue Beach. Furthermore, impacts to the environment from these sandbags must be considered in the context of the environmental impacts pursuant to S.C. Code Ann. § 48-39-130(D); Appellant asserts the sandbags will cause material harm to the "flora, fauna, physical or aesthetic resources of the area." For these reasons, the League possesses the legal rights and privileges of a party.

B. The ALC erred in finding that the Department is not obligated to determine whether the Board properly approved the project.

A "proper" contested case hearing involves a matter that requires the agency or the ALC to determine the legal rights, duties, or privileges in question. S.C. Code Ann. § 1-23-505(3). Here, the ALC held that the Department was not required to make a determination. (R.p. 50.) The League submits this holding is an error of law.

The Coastal Tidelands and Wetlands Act, S.C. Code Ann. Section 48-39-10 et seq., requires the Department to make determinations under both exemptions (research and pilot project) at issue in this case. The research exemption provides that a permit is not required where an educational institution conducts a research activity; however, Section 48-39-130(D)(2) still requires a determination that "such activities cause no material harm to the flora, fauna, physical or aesthetic resources of the area." The "pilot project" exemption similarly provides that the Department "may allow" an exemption from the permitting/licensing requirements "if it reasonably anticipated that the use will be successful in addressing an erosional issue in a beach or dune area." S.C. Code Ann. § 48-39-320(C). Thus, neither exemption is automatic or granted as-of-right; rather, each is conditioned on additional factors that must be considered by the Department.

The ALC reasoned that because "exemptions" were at issue, not "permits" or "licenses," that the Department was not required to make a determination, thus barring any requests for a contested case. The League disagrees and argues that even in the absence of a "license" or "permit," the Department still has a clear legal duty to make determinations regarding the two exemptions at issue:

> The South Carolina Department of Health and Environmental Control shall have the following powers and duties:
>
> (F) To administer the provisions of this chapter and all rules, regulations and orders promulgated under it.

S.C. Code Ann. § 48-39-50(F).

Further, the ALC's logic is circular: if there is no proper contested case because no "determination" was made by Department staff, then it follows that there could have been no Request for Final Review. If this were true, the ALC should have not only dismissed the contested

case but also vacated the decision of the Board. However, the ALC declined to do so. The ALC's ruling means that only the named parties to the RFR, the Department and Property Owners, could challenge the decision of the Board. Of course, neither party would; DHEC cannot challenge their own Board, and the Property Owners prevailed. What remains is an absurd result: a Final Agency Decision that cannot be appealed, in contravention of the stated purpose of state law. See Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control, 430 S.C. 200, 216, 845 S.E.2d 481, 489 (2020) ("The General Assembly surely intended DHEC to receive input from all persons affected by a project with potentially harmful environmental impacts. Such input, which continues until the administrative review process concludes with a contested case hearing, allows the agency's permit review process to fully assess the project's impact. The purpose of this administrative process is to discover and evaluate harm to the surrounding environment and to persons who would be affected by the proposed project.").

In summary, both the research exemption and the pilot project exemption mandate the Department to make additional determinations before permission to act under cover of an exemption is provided. If the legislature had intended these exemptions to be given automatically or as-of-right, it would not have included conditional language.[4] While not a "license" or a "permit," the law still requires a *determination* by Department staff, thus properly giving rise to a contested case here.

C. The ALC is required to make a determination under existing law.

[4] That conditional language is as follows. The research exemption is made conditional by the language "provided that such activities cause no material harm to the flora, fauna, physical or aesthetic resources to the area." S.C. Code Ann. § 48-39-130(D)(2). The pilot project exemption is made conditional by the language "if 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. § 48-39-320(C).

There are two sources of law that can trigger a contested case in this matter: (1) S.C. Code Ann. Section 44-1-60; and (2) the Administrative Procedures Act. The ALC held that "the instant matter does not meet the requirements of either of these sources" and therefore "the Court does not have subject matter jurisdiction and is not authorized to hear Petitioner's appeal." (R.p. 50.) Appellant asserts this conclusion constitutes an error of law.

Section 44-1-60 supports the conclusion the underlying matter is a contested case that requires a determination by the ALC. This statutory provision allows for "affected persons" to "file a request for a contested case hearing within thirty days after the final agency decision." Here, the DHEC Board issued a Final Agency Decision that was timely appealed by the League, an "affected person." The plain language of the statute provides for an appeal to the ALC where there is a final agency decision, as there was in this case. See, e.g., Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control, 430 S.C. 200, 845 S.E.2d 481 (2020) (discussing "affected persons" in regard to associational standing).

The APA defines "contested case" as 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 Administrative Law Court after an opportunity for a hearing." S.C. Code Ann. § 1-23-505(3).

The ALC declined to apply either Section 44-1-60 or the APA to the underlying case, reasoning that both statutes merely delineate criteria for a proper contested case and finding that its requirements were not met here because there was "no legal duty owed by DHEC to issue a staff decision in this matter, which is the trigger giving rise to a contested case. . . . Again, the Department was not required to act on requests for research studies." (R.p. 53.) The ALC cited

and relied heavily on one case to reach this conclusion: Amisub of South Carolina, Inc. v. S.C. Dep't of Env't Health & Control, 403 S.C. 576, 743 S.E.2d 786 (2013). Appellant contends that case is distinguishable from the instant matter and therefore does not support the ALC's conclusion.

Amisub involved the Certificate of Need ("CON") Act and the regulations promulgated thereunder, which include twelve "transactions that are exempt from CON requirements." Id. "Six of the twelve exempted transactions require that approval of the exemption be obtained *in writing* from DHEC." Id. at 589 (internal citations omitted). In other words, the CON regulatory regime specifies exemptions that require *written* notice. In Amisub, Petitioner attempted to challenge a "staff decision" - a telephone conversation between DHEC and Amisub's counsel where DHEC staff informed counsel that a written approval was not required. The Amisub Court concluded that DHEC staff's telephone communication did not give rise to a contested case, ruling that "CPN and CHS neither sought nor received a formal approval from DHEC for a CON or a NAD, and there was no license, order, or decision issued." Id. at 595. Therefore, there was no legal duty owed by DHEC to issue a staff decision in that case.

The Amisub facts are distinct from the case at bar, where there has been both a written request for approval *and* a written staff decision denying the same request. Further, despite the fact that the person who submitted the request (Gayes) did not challenge the staff decision, a Request for Final Review was filed by the Property Owners whereafter the DHEC Board issued a Final Agency Decision; this Final Agency Decision allows an affected person to request a contested case under Section 44-1-60.

The ALC's decision that the underlying matter did not meet the requirements of Section 44-1-60 or the APA hinged on one factor: existence of a "proper" contested case. Having

demonstrated that a contested case did "properly" exist, the League asserts that it did have a statutory right to have this case heard at the ALC, and that the ALC has jurisdiction to hear it. Thus, the ALC's dismissal of the contested case constituted an error of law.

CONCLUSION

WHEREFORE, Appellant Coastal Conservation League respectfully requests this Court issue an opinion reversing the Administrative Law Court's Amended Order Granting Respondents' Motion to Dismiss Appellant's Contested Case.

Respectfully submitted,

s/Leslie Lenhardt

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