

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Deborah Brooks Durden, Administrative Law Judge

Docket Nos. 24-ALJ-07-0088-CC to 24-ALJ-07-0131-CC
Appellate Case No. 2025-000379

South Carolina Coastal Conservation League..... Appellant,

v.

South Carolina Department of Health and Environmental Control and
Pulte Homes, LLC,..... Respondents.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

In its Brief, South Carolina Coastal Conservation League (“Appellant”), thoroughly detailed the Administrative Law Court’s error in finding that the Department of Environmental Services (“Department” or “DES”) 1) complied with Section 48-39-80 in issuing forty-four small onsite wastewater system permits despite failing to conduct a Coastal Zone Consistency review, and 2) complied with public notice requirements for the permits. The Respondents’ Briefs reflect foundational and procedural misunderstandings on these issues. In particular, Respondents, individually and, in some instances, collectively, misunderstand the final review process before the DES Board, apply improper standards of review to the present case, and fail to refute that DES’ determination that Small Onsite Wastewater Systems do not pose a sufficient risk to the coastal environment—and, therefore, are not subject to coastal zone consistency review—is not arbitrary.

ARGUMENT

I. Respondents Invoke an Erroneous Standard of Review.

Both Respondents Pulte and DES begin by citing an erroneous standard of review. Respondent Pulte Appellate Brief, p. 5. On appeal, the substantial evidence standard does not apply where no findings of fact are required and the decision was made on the law. S.C. Code Ann. § 1-23-280(A)(6); *Hill v. South Carolina Dept. of Health & Env’tl. Control*, 389 S.C. 1, 698 S.E.2d 612 (2010). The parties filed cross-motions for summary judgment and agreed no issues of material fact exist. The ALC’s statement that the League did not present an issue of material fact (Respondent Pulte’s Brief, p. 9) is completely off base; no dispute exists that DES is not conducting CZC review for individual septic tanks, the only question – which is a question of law – is whether it is legally required to do so under Section 48-39-80.

As such, this appeal is reviewed *de novo*. *S.C. Dept. of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480,483 (2012) (finding that all questions of law are reviewed *de novo*). Statutory interpretation is one such question of law. *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 390 S.C. 418, 425, 702 S.E.2d 246, 250 (2010); *see also Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). The *de novo* standard of review “allows this court to reverse the ALC’s decision if it is affected by an error of law.” *Chapman v. S.C. Dep't of Soc. Serv.*, 420 S.C. 184, 188, 801 S.E.2d,403 (Ct. App. 2017) (quoting *Ackerman v. S.C. Dep't of Corr.*, 415 S.C. 412, 417, 782 S.E.2d 757,760 (Ct. App. 2016)) (internal quotation marks omitted).

II. Respondent DES Makes an Improper Argument Based on Mootness, Relying on Extra-Record Evidence Not Contained in the Record on Appeal.

Respondent DES argues to this Court that “Appellant’s argument [regarding DES’ public notice of individual septic tanks] is moot because the Department provides the public with free, timely, and accessible information of such septic tank applications and permits.” Initial Brief of Respondent DES, p. 20. All of the evidence cited by DES in support of its mootness argument is not contained within the Record on Appeal in this case, cannot be verified and is in reasonable question, and occurred subsequent to the lower court’s order under appeal. Appellant has filed with this Court a Motion to Strike Extra-Record Evidence and incorporates by reference the arguments therein. This extra-record evidence should be stricken and the argument regarding mootness should not be considered by this Court.

III. The Administrative Law Court Erred in Ruling That the South Carolina Tidelands and Wetlands Act Does Not Require the Department of Environmental Services to Review Individual Septic Permits in the Coastal Zone for Consistency.

Section 48-39-80 states that the Department shall develop a comprehensive coastal management program, and thereafter have the responsibility for enforcing and administering the program in accordance with the provisions of this chapter. S.C. Code Ann. § 48-39-80. It goes on to state that the Department shall consider all lands and waters in the coastal zone in devising the coastal management program (“CMP”), permitting the method adopted to be “streamlined and simplified *so as to avoid duplication*” and assigning the Department the requisite authority to *review all state and federal permit applications* in the coastal zone. *Id.* at (B)(10) and (11) (emphasis added).

Pursuant to Section 48-39-80, the General Assembly and the Governor approved the CMP approximately forty-five years ago. The CMP purports to exempt individual wastewater system permits for systems with capacities of less than 1,500 gallons per day from Coastal Zone Consistency review, even though the Act provides for no such exemption. *See* Table 1 CMP V-5. Thus, the question before this Court is whether the Department’s exemption of individual wastewater system permits from Coastal Zone Consistency review by way of the CMP itself violates the Act’s statutory mandate. Moreover, does such a regulatory exemption lead to an absurd result; results that are all the more absurd by the unfettered and unconceived use of mass quantities of individual septic tanks in South Carolina’s coastal region.

Appellant’s arguments are firmly rooted in the language and purpose of the Act. The Act does not empower the Department to exempt septic tanks from CZC certification, as it explicitly directs the Department to review all state and federal permits. Despite this instruction, the ALC construed the Act as giving DES unlimited discretion to create exemptions from the coastal consistency review process. The ruling primarily relies on the plain and ordinary meaning of the word, “authority,” concluding that the Department must merely “create a system whereby it has

the right to exercise power over permit applications in the coastal zone,” but that it could simply decide not to exercise that power at will. Order Granting Respondents’ Motion for Summary Judgment and Denial of Petitioner’s Motion for Summary Judgment, pp. 3-5, citing *Authority*, Black’s Law Dictionary (6th Ed. 1990) (“Permission. Right to exercise powers; to implement and enforce laws; to exact obedience; to command; to judge. Control over; jurisdiction.”).

However, in construing a statute, “[R]egardless of how plain the ordinary meaning of the words in a statute, courts will reject that meaning when to accept it would lead to an absurd result so plainly absurd that it could not have been intended by the General Assembly.” *Duke Energy Corp. v. S.C. Dep’t of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016). If this construction stands, the Department could create exemptions whenever it desired, including for every single state permit and certification. Not only does the ALC’s ruling lead to an absurd result, it also leads to arbitrary and capricious decision-making on behalf of the agency as to which permits are not worth of CZC review. “A decision is arbitrary if it is without a rational basis, is based alone on one’s will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards.” *Converse Power Corp. v. S.C. Dep’t of Health & Env’t Control*, 350 S.C. 39, 47, 564 S.E.2d 341, 345 (Ct. App. 2002), quoting *Deese v. State Bd. of Dentistry*, 286 S.C. 182, 184–85, 332 S.E.2d 539, 541 (Ct.App.1985).

Neither DES nor the ALC identify any metric for determining when something is to be exempted, and inference suggests that line is easily undermined by perceived burden and inefficiency.

Respondent Pulte claims that Appellant SCCCL is raising policy issues to this Court that should be addressed in the legislative forum. Initial Brief of Respondent Pulte, p. 5. The

cornerstone of judicial power is statutory interpretation; statutory interpretation does not violate separation of powers. *Strickland v. Richland Cnty. Legislative Delegation*, 440 S.C. 438, 444, 892 S.E.2d 288, 291 (2023). The Court must reject a statutory interpretation if it leads to an absurd result that could not possibly have been intended by the legislature or that defeats plain legislative intent. *State v. Taylor*, 436 S.C. 28, 34, 870 S.E.2d 168, 171 (2022).

While Respondent DES raises issues of practicality as it relates to the resources available for the Department to administratively review all septic tank permits, it fails to acknowledge that the omission of all individual septic tank permits exceeds the Department's statutory authority. A permission to simplify does not authorize abandonment of agency obligations. The agency can and has employed tools to streamline permitting, such as General Permits and General Coastal Zone Consistency Certifications without completely rejecting its permitting responsibilities. *See* S.C. Code Ann. § 48-39-130(E) ("The department, in its discretion, may issue a general permit when the issuance of the general permit would advance the implementation of the goals, policies, and purposes contained in Sections 48-39-20, 48-39-30, and 48-39-280.").

Respondent Pulte claims that "DES determined that Small Onsite Wastewater Systems do not pose a sufficient risk to the coastal environment and therefore, are not subject to coastal zone consistency review." Initial Brief of Respondent Pulte, p. 8. Yet nothing in the record or anywhere in the Coastal Management Program or the Coastal Tidelands and Wetlands Act supports this statement. Indeed, neither Respondent Pulte nor Respondent DES have offered any evidence to support the claim that the Department gave any real consideration as to the risks posed by small onsite wastewater systems to South Carolina's coastal environment: no analysis, no scientific findings, no rationale. Nothing exists that explains what the agency *actually considered* in deciding to exempt these types of septic systems from regulatory oversight. Instead, the CMP is replete with

observations, findings and conclusions about the deleterious impacts associated with septic systems.¹ The decision, therefore, is arbitrary for completely abandoning the Department's mandate to protect human health and the environment without reasoned explanation or rational basis.

Pulte cites to *City of Rock Hill v. S.C. Dept. of Health & Env. Control*, 302 S.C. 161, 394 S.E.2d 327 (1990) for the proposition that “when an administrative agency is acting for the protection of the health of the environment, the delegation of authority to that agency should be construed liberally.” *Id.* at 165, 330; Initial Brief of Respondent Pulte at 11. Pulte attempts to apply the broad grant of discretion to DES to its failure to review thousands of environmental permits that would serve that very environmental protection. *City of Rock Hill* addressed DES' imposition of over \$150,000 in fines to the City for discharging over 2 million gallons of sludge into the Catawba River, in violation of the South Carolina Pollution Control Act. The Supreme Court's expression of this broad authority cannot be applied where DES is shirking its statutory duty to protect the health of the environment.

IV. The Administrative Law Court Erred in ruling that the Department of Environmental Services Provided Sufficient Public Notice to Satisfy Due Process.

Administrative agencies such as DES are required to meet minimum standards of due process. *Stono River Env't Prot. Ass'n v. DHEC*, 305 S.C. 90, 93-94 (1991) (citing S.C. Const. Art. I, §3; *Smith & Smith, Inc. v. S.C. Public Service Comm'n*, 271 S.C. 405 (1978)). S.C. Code Ann. Section 44-1-60(B) states: “*To the maximum extent possible*, [DES] shall use a uniform system of public notice of permit applications, opportunity for public comment, and public hearings.” (emphasis added). Respondent SCDES has included extra record evidence in its Brief. This evidence should

¹ See dozens of mentions of adverse impacts from septic throughout the CMP at III-6, III-48, and V-2.

be treated as an admission that at the inception of this case, and for some number of years prior, it was entirely feasible for SCDES to issue public notice of small onsite wastewater systems. Despite this truth, they did not provide any public notice, falling well short of their mandate to issue public notice of permit applications to the “maximum extent possible” and failing to satisfy due process requirements under Article I of the South Carolina Constitution.

The South Carolina Constitution provides that “[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights *except on due notice* and an opportunity to be heard... and he shall have in all such instances the right to judicial review.” S.C. Const., Art. I, §22 (emphasis added); *see also Kurschner v. City of Camden Plan. Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (“Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution.”). “Due process does not require a trial-type hearing in every conceivable case of government impairment of a private interest. Rather, due process is flexible and calls for such procedural protections as the particular situation demands.” *Kurschner*, 376 S.C. at 171-72, 350 (internal citations omitted); *see also Stono River, supra*, (citing *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 22 L.Ed.2d 484 (1972)). To prevail on a claim of denial of due process in an administrative proceeding, there must be a showing of substantial prejudice. *See, e.g., Palmetto Alliance, Inc. v. S.C. Public Serv. Comm'n*, 282 S.C. 430, 319 S.E.2d 695 (1984).

Regarding the lack of public notice of small onsite wastewater systems specifically, Appellant is entitled under the FOIA to the specific information concerning *any* permit applications. However, Appellant cannot obtain that information via the FOIA unless it provides that very information about a specific application. Unless Appellant’s timing is absolutely perfect,

i.e. a FOIA request is submitted with such accuracy and responded to by the Department so timely that the thirty (30) day period to contest a permit application has not yet run, then Appellants have lost any opportunity to review and intervene.² This administrative oversight is an anathema to the very concept of due process, and its impact should not be minimized by the Appellant's circumstantial "luck" that has afforded it the opportunity to raise this constitutional violation before this Court.

Although the ALC acknowledged that "SCCCL was able to learn of the permits through *significant effort* on its part, including the use of FOIA requests," the court ultimately found that Appellant was not substantially prejudiced in large part because of the alleged lack of public notice requirement for small onsite wastewater systems. ALC Order at 5 (emphasis added). This ruling undermines due process requirements for public notice by hinging the argument on a misinterpretation of the Act, as discussed above. Appellant contends that because the CZC certification exception exceeds the Act's statutory mandate, so to do any claims of public notice exemption.

Moreover, it is entirely reductive to conclude that because a party has been given the opportunity to present its case before a Court, it has effectively forgone any claims of substantial prejudice. *See* Respondent Pulte's Brief, pp. 15-16. Appellant was *actually* and *meaningfully* impaired in its ability to contest the permit applications. On June 14, 2022, the undersigned counsel requested written notification pursuant to S.C. Code Ann. §44-1-60 for septic tank applications submitted for the White Tract. (Exhibit 2 to Request for Final Review), and the request was repeated and included additional TMS numbers. *Id.* It was not until January 2, 2024, that counsel for Respondent DES sent notification "pursuant to your request and *as a courtesy*" via email that

² Under S.C. Code Ann. Section 48-6-30, an interested party has only thirty (30) days to contest the issuance of a permit.

permits had been issued on December 21, 2023. *Id.* It was only because of the relationship between counsel that the Appellant was able to timely file requests for final review with the DHEC Board within the very short 15-day window. There was no opportunity to provide public comment and no opportunity to meaningfully review the permits before initiating Appellant’s appeal, hampering Appellant’s ability to fully articulate its arguments to the DHEC Board.

It is not a hypothetical that Appellant was substantially disadvantaged in its opportunity to challenge the septic tank permits at issue in this matter; Appellant was excluded from the permitting process at the outset and had no opportunity to act until well after the permits had been issued. The failure to provide public notice for applications or permits creates a system whereby the public cannot engage in decision-making processes that impact their rights.

A. Respondent Pulte Misrepresents and Misunderstands the DES Final Review Process Before the Board of Health and Environmental Control.

Pulte states that “SCCCL was afforded a meaningful opportunity to be heard during the Board of SCDES’ review process as a result of its timely Requests for Final Review.” Initial Brief of Respondent Pulte, p. 12. The Board declined to hold a final review conference under Section 44-1-60; it did not review the matter on the merits in any way.

Pulte incorrectly describes the final review process before the DES Board prior to the Restructuring Act, Act No. 60 (2023). Section 44-1-60, the provision governing administrative challenges of DES decisions prior to 2024, required that an affected person request a final review conference to be held by the Board of Health and Environmental Control to review the permitting decision. That conference is discretionary. Pulte incorrectly states that “the Board issued a Staff Response to the Requests for Review in which it confirmed the Staff decision that the Permits are not subject to a coastal zone consistency review pursuant to SCDES’s established regulations and

policies for reviewing projects in the coastal zone and that SCDES was not required under state law to issue public notices for the issuance of the Permits.” Initial Brief of Respondent Pulte, p. 3. The Staff Response is submitted by the staff, not the Board, in response to the final review requests. (DHEC Staff Response).

The DHEC Board notified Appellant that it was declining to conduct final review conferences to review the permitting decisions on the merits. (Letter from DHEC Board dated March 6, 2024, Request for Contested Case Hearing, Permit No. OSWW0 10845 v 1.0³). Based on this, Pulte mischaracterizes that mandatory appeal process as Friends’ “first loss on the merits.” Id. p. 4.

CONCLUSION

Respondent DES has not carried out its duty of environmental protection in failing to conduct Coastal Zone Consistency Certification reviews for individual septic tanks, which are recognized in DES’ Coastal Management Program as having negative environmental consequences, particularly in coastal, densely-sited locations. Moreover, the persons affected by this failure cannot participate in the decision-making process, as the South Carolina Constitution requires. The Administrative Law Court erred as a matter of law in concluding to the contrary.

³ Because DES conducts individual reviews of small septic tanks and issues separate permitting decisions, Appellant was forced to appeal all 44 permitting decisions individually. The citation to this permitting decision appeal is exemplary of all of the permit appeals in this case, which were consolidated before the Administrative Law Court.

Respectfully submitted,

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