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SC Court of Appeals

THE 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 Environmental Services and
Pulte Homes, LLC ....Respondents

FINAL BRIEF OF RESPONDENT PULTE HOMES, LLC

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STATEMENT OF ISSUES ON APPEAL

I. **DID THE ALC CORRECTLY DECLINE TO READ THE PERMISSIVE LANGUAGE OF S.C. CODE § 48-39-80(B)(11) STATING THAT THE SCDES "SHALL HAVE AUTHORITY TO REVIEW" AS IMPOSING AN AFFIRMATIVE OBLIGATION TO REVIEW EVERY SEPTIC PERMIT FOR CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM?**

II. **DID THE ALC CORRECTLY GRANT SUMMARY JUDGMENT ON SCCCL'S DUE PROCESS CLAIM WHERE SCCCL RECEIVED NOTICE OF THE ISSUANCE OF THE SEPTIC PERMITS AND WAS AFFORDED MEANINGFUL OPPORTUNITY TO PARTICIPATE BOTH IN THE REVIEW PROCESS BEFORE SCDES AND IN THE CONTESTED CASE HEARING?**

III. **DID SCCCL WAIVE ITS ARGUMENT THAT THE LACK OF PUBLIC NOTICE FOR SMALL ONSITE WASTEWATER SYSTEM PERMITS VIOLATES S.C. CODE § 48-6-30(B) (FORMERLY, S.C. CODE § 44-1-60(E)) WHERE SCCCL FAILED TO RAISE THE ISSUE TO THE ALC IN THE CONTESTED CASE?**

STATEMENT OF THE CASE

Following forty-four (44) orders granting summary judgment against Appellant South Carolina Coastal Conservation League ("SCCCL"), SCCCL now seeks a third review of forty-four (44) permits to construct onsite wastewater systems issued by Respondent South Carolina Department of Environmental Services[1] to Respondent Pulte Homes, LLC ("Pulte").[2] The Permits authorize the construction of individual onsite wastewater systems designed for peak flows less than 1,500 gallons per day to serve the homes within the planned residential development known as the White Tract, identified by Tax Map Nos. 644-00-00-023 and 644-00-00-025, located in Awendaw, South Carolina.

On April 18, 2022, the Town of Awendaw (the "Town") approved Pulte's Preliminary Plat for the development of the White Tract, which requires the use of onsite wastewater (septic tanks) because there is no available public wastewater treatment system in the Town. (R. pp. 2065 – 2066.) Pulte assembled a team of licensed professionals, including a certified professional soil scientist and a licensed professional engineer, to examine the soil conditions and other particulars on the White Tract and to determine the suitability of the properties for installation of an engineered system. (R. p. 2066.) Pulte's team determined that the White Tract, in its entirety, has the capacity to support 204 individual systems. Forty-four (44) individual onsite wastewater systems would facilitate the White Tract Phase 1. In September of 2023, Pulte submitted applications, plans, and

[1] As of July 1, 2024, the South Carolina Department of Health and Environmental Control ("DHEC") was restructured to become two separate agencies: South Carolina Department of Environmental Services ("SCDES") and South Carolina Department of Public Health. For purposes of this Brief, DHEC and SCDES are collectively referred to as "SCDES."

[2] Pulte has been incorrectly identified in this appeal as "Pulte Homes, LLC." However, the correct name of the entity is Pulte Home Company, LLC.

supporting documentation to SCDES for permits to construct forty-four (44) individual onsite wastewater systems designed for peak flows of less than 1,500 gallons per day to serve the residences on the White Tract Phase 1 (the "Permits"). (R. pp. 1557 – 1560.)

Under the South Carolina Coastal Zone Management Program ("CZMP") document, wastewater treatment systems and septic tanks that handle more than 1,500 gallons per day ("Large Onsite Wastewater System") are subject to the Coastal Zone Consistency Certification process. An individual system that generates less than 1,500 gallons per day of domestic wastewater ("Small Onsite Wastewater System") is not subject to coastal zone consistency review. Pulte's submissions to SCDES, including the designs, certifications, and other supporting documentation provided by a licensed professional engineer and a licensed professional soil classifier, confirm that the applications were for Permits to construct Small Onsite Wastewater Systems on White Tract Phase 1. (R. pp. 1557 – 1560.) SCDES conducted a thorough review of Pulte's applications between September 2023 and December 2023 to ensure that they met all applicable statutory and regulatory requirements. (R. pp. 1557 – 1558.) SCDES evaluated each of the forty-four (44) applications and determined that each individual application complied with applicable regulatory requirements based on the consulting professional engineer's system design, certification, and supporting documentation received by SCDES. (R. pp. 1557 – 1558.)

Upon completing its review of the applications, SCDES issued the Permits to Pulte on December 21, 2023, and on January 2, 2024. (R. p. 1558.) On January 2, 2024, SCDES provided notice of the issuance of the Permits to SCCCL's counsel. (R. p. 1558.) On January 17, 2024, SCCCL filed forty-four (44) Requests for Review before the Board of Health and Environmental Control in which it challenged the issuance of the Permits as contrary to statutory and regulatory provisions on the alleged basis that SCDES did not conduct a coastal zone consistency review of

the applications and did not place the applications on public notice. (R. pp. 36 – 739, 1557 – 1558.) SCCCL's Requests for Review did not challenge the issuance of the Permits on the grounds that the applications were in some way deficient or that SCDES did not properly follow S.C. Code Ann. Regs. 61-56, which sets forth the applicable onsite wastewater permitting requirements. (R. pp. 36 – 739.) SCCCL took no issue with the Permits themselves, but rather the exemption of less than 1,500 gallons per day provided in the CZMP document. The Board issued a Staff Response to the Requests for Review in which it confirmed 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. (R. pp. 1557 – 1560.)

On April 5, 2024, following its first loss on the merits, SCCCL filed forty-four (44) separate Requests for Contested Case Hearing before the South Carolina Administrative Law Court ("ALC") against Pulte and SCDES relating to each Permit. (R. pp. 1561 – 2044.) The forty-four (44) contested cases were consolidated by the ALC's Order for Consolidation. (R. pp. 1 – 2.) On May 28, 2024, the parties each submitted a Prehearing Statement in accordance with the ALC's Order for Prehearing Statements. (R. pp. 3 – 5, 2045 – 2068.) The parties to the contested case hearing agreed to proceed with the disposition of the contested case through motions for summary judgment. (R. p. 2070, pp. 2190 – 2191.) On October 1, 2024, Respondents filed a Joint Motion for Summary Judgment with the ALC. (R. pp. 2069 – 2075.) On October 10, 2024, SCCCL filed a Response to Respondents' Joint Motion for Summary Judgment and Cross-Motion for Summary Judgment. (R. pp. 2076 – 2100.) Respondents filed a Joint Response to SCCCL's Cross-Motion for Summary Judgment on October 21, 2024, and SCCCL filed a Reply to the Joint Response on October 28, 2024. (R. pp. 2102 – 2108, 2111 – 2116.)

On November 4, 2024, SCCCL, SCDES, and Pulte participated in a motion hearing before the ALC. (R. pp. 2140 – 2181.) On December 18, 2024, the ALC issued the Order Granting Respondents' Motion for Summary Judgment and Denying SCCCL's Motion for Summary Judgment (the "Order"). (R. pp. 6 – 11.) On December 30, 2024, following its second loss on the merits, SCCCL filed a Motion for Reconsideration and Stay of the Order. (R. pp. 2119 – 2125.) On January 21, 2025, the ALC issued the Order Denying SCCCL's Motion for Reconsideration and for Stay (the "Order Denying Reconsideration"), noting that SCCCL had simply recycled the same arguments that the court had already resolved. (R. pp. 12 – 15.) On February 20, 2025, undeterred by its third loss on the merits, SCCCL served the Notice of Appeal of both the Order and the Order Denying Reconsideration.

STANDARD OF REVIEW ON APPEAL

The ALC, not the appellate court, acts as the finder of fact when reviewing permitting decisions in contested case hearings. *Pickens Cnty. v. S.C. Dep't of Health & Env't Control*, 435 S.C. 99, 106, 866 S.E.2d 537, 540–41 (2021). In an appeal from a decision of the ALC, the appellate "[c]ourt's review is limited to determining whether the ALC's findings were supported by substantial evidence or were controlled by an error of law." *See Engaging & Guarding Laurens Cty.'s Env't (EAGLE) v. S.C. Dep't of Health & Env't Control*, 407 S.C. 334, 341, 755 S.E.2d 444, 448 (2014). "In determining whether the ALC's decision was supported by substantial evidence, this [C]ourt need only find that, upon looking at the entire record on appeal, there is evidence from which reasonable minds could reach the same conclusion that the ALC reached." *See Engaging & Guarding Laurens Cty.'s Env't (EAGLE) v. S.C. Dep't of Health & Env't Control*, 407 S.C. 334, 342, 755 S.E.2d 444, 448 (2014). "The Court may not substitute its judgment for the ALC's

judgment as to the weight of the evidence on questions of fact." *Id.*; *see also* S.C. Code § 1–23–610(B).

ARGUMENT

SCCCL appeals to this Court to raise policy issues that cannot be remedied in this action against these Respondents. SCCCL asks this Court to adopt an impermissible interpretation of South Carolina law and to reverse the ALC based on SCCCL's subjective and ideologically-driven standards. SCCCL's policy objectives cannot sustain this appeal where SCCCL has failed to show that the ALC's Orders in the contested case were: (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 an abuse of discretion or clearly unwarranted exercise of discretion. *See* S.C. Code § 1–23–610(B) (providing the grounds for reversing or modifying the decision of the ALC).

The ALC correctly found that coastal zone consistency review is not required for individual systems generating less than 1,500 gallons per day of domestic wastewater. (R. pp. 7 – 10.) The ALC also refused to find that SCCCL was denied due process relating to the issuance of the Permits. (R. p. 10.) There is no statutory or regulatory requirement that SCDES issue public notice of individual septic tank permits. (R. p. 10.) Furthermore, SCCCL: (i) received notice on January 2, 2024, when the Permits were issued to Pulte; (ii) was provided the opportunity to file forty-four (44) Requests for Review with the Board for SCDES and forty-four (44) contested cases with the ALC; (iii) was afforded a meaningful opportunity to be heard in the contested case hearing. (R. pp. 36 – 739, 1558, 1561 – 2044, 2140 – 2181.) This appeal is borne out of environmental activism as opposed to any error on the part of the ALC.

As discussed below, SCCCL presents no lawful basis for reversing the ALC's Orders.

I. THE ALC PROPERLY GRANTED SUMMARY JUDGMENT ON SCCCL'S CLAIM THAT THE ISSUANCE OF THE PERMITS VIOLATES S.C. CODE § 48-39-80(B)(11)

In appealing to this Court, SCCCL argues that the ALC erred in finding that SCDES has the authority to decide which permits are subject to coastal zone consistency review. The ALC committed no error.

A. The Permits are Exempt from Coastal Zone Consistency Certification.

The South Carolina Coastal Tidelands and Wetlands Act, S.C. Code §§ 48-39-10 *et seq*. (the "Wetlands Act") sets forth the specific state policies to be followed "[t]o promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program[.]" *See* S.C. Code § 48-39-30(B). The Wetlands Act advances the policy of encouraging state agencies and local government to develop and implement "comprehensive programs to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values as well as to the needs for economic and social development and resources conservation." *See* S.C. Code § 48-39-30(B). Under the Wetlands Act, SCDES shall have the power and duty to "undertake the related programs necessary to develop and recommend to the Governor and the General Assembly a comprehensive program designed to promote the[se] policies." *See* S.C. Code § 48-39-50.

Section 48-39-80 of the Wetlands Act directs SCDES to develop a comprehensive coastal management program ("CMP") and to establish regulations and policies for reviewing projects

within the Coastal Zone.[3] *See* S.C. Code § 48-39-80. The Wetlands Act provides that "[i]n devising the management program the department shall consider all lands and waters in the coastal zone for planning purposes." *See* S.C. Code § 48-39-80(B). "In addition, the department shall [d]evelop a system whereby the department ***shall have the authority to review*** all state and federal permit applications in the coastal zone, and to certify that these do not contravene the management plan." *See* S.C. Code § 48-39-80(B)(11) (emphasis added). Thus, based on its interpretation of Section 48–39–80, SCDES "conducted what is in essence a consistency review for every state and federal permit application to determine compliance with the CMP." *See Spectre, LLC v. S.C. Dep't of Health & Env't Control*, 386 S.C. 357, 360, 688 S.E.2d 844, 845 (2010); *see also* S.C. Code § 48-39-80.

In accordance with the authority conferred under Section 48-39-80(B)(11), SCDES developed the South Carolina Coastal Zone Management Program ("CZMP") document, which identifies the specific state agency permits that are subject to review and certification for coastal zone consistency. Upon consideration of the environmental implications of septic tanks and onsite wastewater systems, SCDES 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. *See* S.C. Code Ann. Regs. 61-56.101 (defining a "Small Onsite Wastewater System" as "[a]n individual system serving an individually deeded dwelling or business that generates less than fifteen hundred (1500) gpd of domestic wastewater"). Large Onsite Wastewater Systems, on the other hand, are subject to the Coastal Zone Consistency Certification process. *See* S.C. Code

[3] "Coastal zone" is defined in the Wetlands Act as "all coastal waters and submerged lands seaward to the state's jurisdictional limits and all lands and waters in the counties of the State which contain any one or more of the critical areas." *See* S.C. Code § 48-39-10(B). These counties are Beaufort, Berkeley, Charleston, Colleton, Dorchester, Horry, Jasper, and Georgetown. *Id*.

Ann. Regs. 61-56.101 (defining a "Large Onsite Wastewater System" as "[a]n individual system that treats and disposes of domestic wastewater discharges in excess of fifteen hundred (1500) gpd"). The CZMP document, including the minimum threshold for requiring a coastal zone consistency certification, was enacted in accordance with the specific procedures set forth by the General Assembly in Section 48-39-90. *See* S.C. Code § 48-39-90. It is "valid and enforceable" as written. *See Spectre,* 386 S.C. at 373, 688 S.E.2d at 852.

The ALC correctly found that SCDES did not violate South Carolina law by issuing the Permits without conducting coastal zone consistency review because Small Onsite Wastewater Systems are expressly exempted from such review pursuant to the "valid and enforceable" CZMP document. *Spectre,* 386 S.C. at 373, 688 S.E.2d at 852. (R. pp. 8 – 10) It is undisputed that the onsite wastewater systems to be constructed on the White Tract Phase 1 will generate less than 1,500 gallons per day. (R. p. 1557.) It is also undisputed that the approved CZMP provides that no coastal zone consistency review is required for Small Onsite Wastewater Systems. SCCCL did not challenge the classification of the Permits as "Small" Onsite Wastewater Systems nor identify any perceived deficiency in Pulte's application under applicable regulations, statutes, or law. (R. pp. 1557 – 1560, 2045 – 2055.) SCCCL did not challenge the groundwater assessment, soil assessment, design, capacity, or functionality of any one of the onsite wastewater systems to be constructed on White Tract Phase 1. (R. pp. 1557 – 1560, 2064 – 2065.) SCCCL's disagreement with the minimum threshold does not establish noncompliance with the CZMP. (R. pp. 1559 – 1560.) The ALC correctly found that SCCCL failed to create a genuine issue of material fact as to whether SCDES violated S.C. Code § 48-39-80 when it issued any one of the forty-four (44) Permits to Pulte. (R. p. 10.)

The ALC committed no reversible error in granting summary judgment on SCCCL's claim that SCDES violated South Carolina law when it issued the Permits for Small Onsite Wastewater Systems without conducting Coastal Zone Consistency Review. (R. pp. 6 – 10.)

B. SCCCL's Challenge to the Issuance of the Permits is Based on an Incorrect Interpretation of South Carolina Law.

Pursuant to the Wetlands Act, "[t]he department shall develop a comprehensive coastal management program" and **"[i]n devising the management program**, **the department shall [d]evelop a system whereby the department shall have the authority to review all state and federal permit applications in the coastal zone**, and to certify that these do not contravene the management plan." *See* S.C. Code § 48-39-80(B)(11) (emphasis added). The CZMP is the manifestation of the system developed by SCDES. In devising the CZMP document, SCDES considered "all lands and waters in the coastal zone for planning purposes," including the environmental implications of septic tanks and small onsite wastewater systems, and concluded that 1,500 gallons per day or less is the threshold for which a coastal zone consistency certification is not required. *See* S.C. Code § 48-39-80(B). (R. pp. 1559 – 1560.) Section 48-39-80 requires only that SCDES "[d]evelop a *system*" for reviewing state and federal permit applications in the coastal zone for CMP consistency. *Spectre*, 386 S.C. at 371, 688 S.E.2d at 851. It does not mandate that SCDES review all permit applications in the Coastal Zone.

Notwithstanding the permissive language of the statute, SCCCL argued in its Requests for Review before the Board and in the contested case hearing before the ALC that Section 48-39-80(B) should be interpreted as the General Assembly's directive that SCDES ***must*** undertake coastal zone consistency review of all permit applications. (R. pp. 2051 – 2053, 2076 – 2091, 2111 – 2116.) The ALC correctly refused to adopt SCCCL's flawed interpretation of S.C. Code § 48-39-80(B). As indicated in the Order, the ALC relied on South Carolina law applicable to statutory

construction. (R. pp. 8 – 10.) *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."). In applying the rules of statutory construction to S.C. Code § 48-39-80(B)(11), the ALC found that the language of the statute providing that SCDES "shall have the authority to review" is permissive. (R. p. 9.) The word "shall" in S.C. Code § 48-39-80(B)(11) does not directly precede the word "review" and does not create an affirmative duty to review every septic permit in the coastal zone. (R. p. 9.) The ALC also gave appropriate consideration to the statute as a whole and in a manner that was intended by the General Assembly. *See Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) (recognizing that courts deciding questions of statutory interpretation "should not concentrate on isolated phrases within the statute, but rather, read the statute as a whole and in a manner consonant and in harmony with its purpose"). The Wetlands Act mandates that SCDES must "[d]evise a method by which the permitting process shall be streamlined and simplified so as to avoid duplication." (R. pp. 9 – 10.) *See* S.C. Code § 48-39-80(B)(10) ("In addition, the department shall: [d]evise a method by which the permitting process shall be streamlined and simplified so as to avoid duplication.) The ALC found that the minimum gallons per day threshold for coastal zone consistency review is consistent with the General Assembly's intent that SCDES create a streamlined permitting process in exercising its authority to review permit applications in the coastal zone. (R. p. 10.) The ALC correctly observed that the exemption of Small Onsite Wastewater Systems has been approved by the General Assembly and in place for over forty-five years. (R. pp. 8 – 9.) *See Etiwan Fertilizer Co. v. S.C. Tax Comm'n*, 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950) (recognizing "that where the construction of the statute has been uniform for many years in administrative practice, and has

been acquiesced in by the General Assembly for a long period of time, such construction is entitled to weight").

SCCCL invokes this Court's appellate jurisdiction as an opportunity to challenge the "rogue decision" by SCDES to exempt Small Onsite Wastewater Systems from coastal zone consistency review under the CZMP. Yet, SCCCL fails to show that any aspect of the ALC's decision was affected by an error of law, an erroneous view of the record, or any other ground for reversal. *See* S.C. Code § 1–23–610(B). SCCCL relies on its misguided interpretation of the permissive language in Section 48-39-80(B). *See* S.C. Code § 48-39-80(B)(11) (providing that SCDES shall "[d]evelop a system whereby the department ***shall have the authority to review*** all state and federal permit applications in the coastal zone, and to certify that these do not contravene the management plan") (emphasis added). SCCCL's alleged concern that the ALC's decision gives SCDES unlimited discretion to create exemptions and, by SCCCL's logic, the ability "to refuse to review any and all permits in the coastal zone without legal consequences." (Appellant's Initial Br. pp. 13 – 14.) "[W]here an administrative agency such as [SCDES] is acting for the protection of the health of the environment, the delegation of authority to that agency should be construed liberally." *City of Rock Hill v. S.C. Dep't of Health & Env't Control*, 302 S.C. 161, 165, 394 S.E.2d 327, 330 (1990).

SCCCL's unsubstantiated concerns that SCDES could become untethered from its purpose or the law presents no justiciable controversy in this appeal against Pulte and provides no basis for reversal of the ALC's Orders.

II. THE ALC CORRECTLY FOUND THAT SCCCL FAILED TO CREATE A GENUINE ISSUE OF MATERIAL FACT TO SUPPORT ITS DUE PROCESS CLAIM

SCCCL asks this Court to find that the ALC erred in granting summary judgment on SCCCL's uncorroborated due process claim and to reverse the ALC's Orders, which were issued following briefing by the parties, presentation of evidence, and a motion hearing in which SCCCL participated and presented its arguments. Before exercising its due process rights in the contested case hearing on the merits, SCCCL was afforded a meaningful opportunity to be heard during the Board of SCDES's review process as a result of its timely Requests for Final Review. (R. pp. 36 – 1560.) Having availed itself of the process it claims is due, SCCCL asks this Court to find that its due process rights were violated.

"Due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." *See Clear Channel Outdoor v. City of Myrtle Beach,* 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007). Due process does not, however, require a trial-type hearing in every conceivable case of government impairment of a private interest. *See Kurschner v. City of Camden Plan. Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (finding landowners' due process rights were not violated where they were provided with a meaningful opportunity to be heard at hearing on the planning commission's decision and the ability to present evidence). The ALC correctly found that SCCCL's due process rights were met in the contested case hearing and that SCCCL failed to demonstrate substantial prejudice by SCDES' lack of public notice when it submitted forty-four Request for Review. (R. p. 10.)

SCCCL takes issue with the fact there is no statutory or regulatory requirement that SCDES provide public notice of septic tank permits and cites concerns about losing the ability to challenge

future septic permits due to an imperfectly timed FOIA request. In this case, SCCCL's concerns are purely hypothetical. However, to the hypothetical extent that due process requires public notice of septic tank applications and permits, SCCCL fails to prove it was substantially prejudiced by the failure to issue public notice of the Permits.

A. SCCCL Failed to Preserve for Appellate Review the Issue of Whether the Lack of Public Notice of the Permits Violates S.C. Code § 48-6-30.

SCCCL argues that SCDES is required to send notice of its decisions by certified mail to "affected person who had requested notification" and the lack of public notice of Small Onsite Wastewater System permits violates S.C. Code § 48-6-30(B) (formerly, S.C. Code § 44-1-60(E)).[4] (Appellant's Initial Br. p. 27.) *See* S.C. Code § 48-6-30(B). However, this issue was not raised to the ALC in the contested case hearing nor did SCCCL seek reconsideration of the Order on the basis that the lack of public notice violates S.C. Code § 48-6-30(B) (or S.C. Code § 44-1-60 (E)). (R. pp. 2076 – 2091, 2111 – 2116, 2119 – 2125.) In the contested case hearing, SCCCL argued that the lack of public notice relating to septic tank applications constitutes a violation of SCCCL's constitutional rights to due process. (R. pp. 2087 – 2090.) SCCCL's cross-motion for summary judgment in the contested case hearing includes a single reference to Section 44-1-60(E) , which is cited for the proposition that administrative agencies are required to meet the minimum standards for due process. (R. p. 2088.) However, SCCCL did not argue that the lack of public notice was a violation of S.C. Code § 48-6-30(B). As such, SCCCL failed to preserve this argument for appellate review. *See I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (recognizing the "long-established preservation requirement that the losing party

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[4] Section 44-1-60 was recodified as Section 48-6-30 as of July 1, 2024, to effect the restricting of DHEC and the creation of the Department of Public Health and Department of Environmental Services. *See* SC LEGIS 60 (2023), 2023 South Carolina Laws Act 60 (S.399).

generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments”).

B. SCCCL Requested and Received Notice of the Permitting Decision and an Opportunity to be Heard.

In addition to being unpreserved, SCCCL’s argument that the failure to provide public notice of every septic permit constitutes a violation of S.C. Code § 48-6-30(B) is based on misinterpretation of South Carolina law. Section 48-6-30(B) provides as follows:

> The department shall comply with all requirements for public notice, receipt of public comments, and public hearings before making a decision. To the maximum extent possible, the department shall use a uniform system of public notice of permit applications, opportunity for public comment, and public hearings.

See S.C. Code § 48-6-30(B). SCCCL suggests that each of the 4,000+ members of SCCCL are an “affected person” under Section 48-6-30(B) as to every single permit application and therefore, entitled to notice and an opportunity for public comments on every application for a permit to construct a Small Onsite Wastewater System. SCCCL seeks to bind SCDES to an obligation in a manner that is contrary to South Carolina law. SCCCL’s purpose is to position itself as a challenge factory to oppose ordinary land use permits, as opposed to vindicating constitutionally protected rights.

In accordance with the authority delegated to it by the Legislature, SCDES promulgated regulations pertaining to Onsite Wastewater Systems. *See* S.C. Code Ann. Regs. 61-56. Under these regulations, public notice is not required for permits involving Small Onsite Wastewater Systems, which is the classification of the Permits at issue in this appeal. Regulation 61-56 establishes a comprehensive framework of system standards, permit procedures, minimum conditions, and other requirements that advance the purposes set forth in the Wetlands Act. *See McNickel’s Inc. v. S.C. Dep’t of Revenue*, 331 S.C. 629, 634, 503 S.E.2d 723, 725 (1998) (“An

administrative regulation is valid as long as it is reasonably related to the purpose of the enabling legislation.") Although there is no statutory requirement that SCDES issue public notice for each septic tank permit application, members of the public may request notice of permitting decisions by submitting a request to SCDES through its freedom of information office. (R. p. 1560.) After requesting and receiving notice of a permitting decision, a member of the public may then seek a review of the decision in accordance with the statutory procedures set forth in S.C. Code § 48-6-30. (R. pp. 740, 1560.)

As the record demonstrates, SCCCL successfully invoked this process relating to the issuance of the Permits. On January 2, 2024, SCDES provided notice to counsel for SCCCL relating to the Permits that had been issued that same day. (R. pp. 36 – 739, 1558.) On January 17, 2024, SCCCL filed "timely" Requests for Final Review. (R. pp. 36 – 739, 1558.) On January 22, 2024, the Clerk of the Board of Health and Environmental Control acknowledged receipt of the Requests and advised SCCCL of the procedures regarding SCDES decisions set forth in S.C. Code § 48-6-30 (formerly S.C. Code § 44-1-60). (R. pp. 740 – 1556.) In accordance with the applicable procedures, SCDES provided notice of the Staff Decision to SCCCL on February 4, 2024, thereby enabling SCCCL to seek contested case hearings before the ALC for each of the Permits. (R. pp. 1557 – 1560.) Based on the record in the contested case hearing, the ALC found that SCCCL failed to prove its due process claim. (R. pp. 6 – 15.) Having availed itself of every meaningful opportunity to be heard since the time that the Permits were issued, SCCCL presents no valid basis for reversing the ALC's Orders. *See Jones v. SC Dep't of Health & Env't Control*, 384 S.C. 295, 317, 682 S.E.2d 282, 294 (Ct. App. 2009) (finding the plaintiffs' due process claim failed when they received notice of the agency actions enabling them to obtain a hearing before the ALC thereby providing them with the opportunities required by due process).

Because SCCCL's argument has not been preserved for appellate review, the Court does not need to reach this hypothetical issue to resolve the instant appeal.

C. There is no Basis for Reversing the Orders Where SCCCL Has Failed to Demonstrate Substantial Prejudice as Required to Establish a Due Process Violation.

As the ALC correctly determined, SCCCL has suffered no substantial prejudice to establish a due process violation relating to its challenge of SCDES's issuance of the Permits to Pulte. (R. p. 10.) In an administrative proceeding, a showing of "substantial prejudice" is required to establish a due process of claim. *See Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 73, 492 S.E.2d 62, 74 (1997). SCCCL failed to meet its burden. As discussed above, SCCCL: (1) received adequate notice of SCDES's issuance of the Permits; (2) was afforded a meaningful opportunity to participate and be heard in the Staff review process and in the contested case hearing; (3) was provided the opportunity to present arguments and introduce evidence relating to the issuance of the Permits; and (4) had the right to confront and cross-examine witnesses, which SCCCL waived, as the parties agreed to the disposition of the contested case through summary judgment motions and agreed that there were not material facts in dispute. (R. pp. 2070, 2190 – 2191.)

Having failed to demonstrate substantial prejudice to prove a due process violation, SCCCL asks this Court to entertain hypothetical questions relating to the sufficiency of SCDES public notice procedure. SCCCL hypothesizes that SCDES's policy of not issuing public notice for applications and permits involving Small Onsite Wastewater System could "create a system whereby affected persons and the public at large are unable to engage in decision making processes that affect their rights." *See Appellant's Initial Br*. p. 23. However, SCCCL's hypothetical concern of "a real risk of missing the 15-day appeal window" does not excuse its failure to demonstrate substantial prejudice in the contested case hearing. *See Appellant's Initial Br*. p. 25. (R. p. 10.)

Furthermore, the cases cited by SCCCL in this appeal do not support the proposition that SCDES must provide public notice of every permit application. *See S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't Control*, 390 S.C. 418, 428, 702 S.E.2d 246, 252 (2010) (finding that "under the facts of [the] case," SCCCL asked to be notified regarding permits, which DHEC had acknowledged, and specifically declining "to set forth a process of how a party asks to be notified in all cases falling under § 44-1-60(E) "); *see also Pickens Cnty. v. S.C. Dep't of Health & Env't Control*, 435 S.C. 99, 866 S.E.2d 537 (2021) (finding that ALC erred in not first deciding whether the modification was major, requiring public notice and comment procedure, or minor to which the public notice and comments provisions do not apply, before ruling on statutory timeliness). For example, SCCCL affirmatively states that the "public is in fact entitled to public notice of septic tank permits under the Due Process Clause" based on a recent decision by the circuit court. (Appellant's Initial Br. p. 24.) In support of this proposition, SCCCL cites a portion of an unpublished order of the circuit court entered on July 14, 2025, while SCCCL's appeal to this Court was pending, and 208 days after the ALC's Order was issued in the contested case. *See S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't Control*, No. 2022-CP-10-5192, Order Granting Partial Summary Judgment (S.C. Ct. Com. Pl. July 14, 2025). (R. pp. 28 – 35.) The unpublished order on which SCCCL relies as establishing the "fact" that the public is entitled to notice of all septic applications was apparently authored by SCCCL's counsel. As indicated in the Form 4 Order entered April 29, 2025, the circuit court instructed SCCCL's counsel, Leslie Lenhardt, Esq., to "prepare a formal order as to the notice issue."[5] (R. p. 18.)

Also, in that same case, SCCCL asserted the same argument it raises to this Court in this appeal, *i.e.*, "the language in Section 48-39-80 which requires DES to review all state and federal

[5] Ms. Lenhardt is counsel of record for SCCCL in the present appeal to this Court.

permits and certify that any given permit does not contravene the CMP" and "that, by exempting septic systems with a capacity of less than 1,500 gallons from inspection prior to approval, DES is in violation of the mandatory provisions of this section." (R. p. 17.) The circuit court found SCCCL's argument "without merit" because "[p]lainly there is no conflict between S.C. Code § 48-39-80(B)(11) and CMP V-5." (R. p. 25.) The circuit court's findings pertaining to that issue are conveniently omitted by SCCCL in this appeal.

SCCCL failed to prove its due process claim in the contested case hearing and fails to present a reversible error in this appeal. Therefore, the Court should affirm the ALC's Order and Order Denying Reconsideration.

CONCLUSION

For these reasons, the Court should affirm the ALC's Orders, as no basis warranting reversal has been presented.

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April 28, 2026
Charleston, South Carolina

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THE 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 Environmental Services and
Pulte Homes, LLC .... Respondents

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that this Final Brief of Respondent Pulte Homes, LLC complies with Rule 211(b), SCACR.

April 28, 2026

Respectfully submitted,

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