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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III, Administrative Law Judge

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Appellate Case No. 2026-000221
Docket No. 24-ALJ-07-0232-CC

South Carolina Department of Environmental Services and
South Carolina
Coastal Conservation League, ... Respondents-Appellants,

v.

Rom Reddy, ... Appellant-Respondent.

APPELLANT-RESPONDENT ROM REDDY'S REPLY BRIEF

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Introduction

DES and SCCCL defend the same radical proposition: that § 48-39-120(C) grants the Department unconstrained authority to order removal of any erosion control structure anywhere in the coastal zone, untethered to any other law. Though offered in the name of plain meaning, that reading ignores the BMA's comprehensive jurisdictional scheme, treats the setback line as decorative, and leaves DES with standardless enforcement power. Neither brief explains why the Department promulgated a regulation making the setback line the boundary of its permitting jurisdiction on beaches if it always had jurisdiction landward of that line; why the Legislature would establish such a line; or why DES never once before exercised the authority it now claims it has always held. This Court should reject it.

The remaining arguments fare no better. Reddy's issues were squarely presented to the ALC in his reconsideration motion, and it was the ALC's own sua sponte reliance on a statutory provision absent from the charging document that denied him the opportunity to develop the record on those very issues. As for *Kiawah Development Partners* and *Captain Sam's Spit*, both decided which permitting standard governs a permit application; neither addressed § 48-39-120(C), removal authority, or the setback line.

Argument

I. Section 48-39-120(C) Does Not Provide Unlimited Removal Authority Untethered to the Act's Jurisdictional Framework.

A. DES and SCCCL Misread the Statutory Text by Isolating Subsection (C) from Its Context.

Both briefs argue that § 48-39-120(C)'s reference to "all erosion control structures which have an adverse effect on the public interest" imposes no geographic limitation. (DES Resp. Br. at 9–10; SCCCL Resp. Br. at 7–9.) But courts must construe statutes as a whole, reading individual subsections in light of the entire statutory scheme. *Hodges v. Rainey*, 341 S.C. 79, 88, 533 S.E.2d 578, 583 (2000) ("Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative."). The same rule governs the terms within a single section: "In interpreting a statute, the terms must be construed in context and their meaning determined by looking at the other terms used in the statute." *Gilstrap v. S.C. Budget & Control Bd.*, 310 S.C. 210, 214, 423 S.E.2d 101, 103 (1992).

Section 48-39-120 is titled "Development of beach erosion control policy; issuance of permits for erosion control structures; removal of structures; limitation on development of property." S.C. Code Ann. § 48-39-120. The first operative subsection, (B), establishes the prohibition against permitting erosion control structures "on or upon the tidelands and coastal waters." S.C. Code Ann. § 48-39-120(B). Subsection (C)'s removal authority follows immediately after this prohibition. Read in context, (C) authorizes removal of structures that violate the prohibition (B) establishes—structures on tidelands and coastal waters that adversely affect the public interest.

Every operative subsection of § 48-39-120 with a geographic referent is confined to the same domain. Subsection (D) authorizes the Department to accept federal erosion-control monies "in areas to which the public has full and complete access." Subsection (E) permits emergency state expenditures in those same areas. Subsection (F) authorizes permits for erosion and drainage structures "in or upon the tidelands, submerged lands and waters of this State below the mean high-water mark." S.C. Code Ann. § 48-39-120(D)–(F). Subsection (C) sits among them. Like its neighbors, it is concerned with public trust lands and publicly accessible beaches—not private upland landward of the setback line.

Reading (C) as a freestanding grant of authority detached from (B)'s context would make (B)'s geographic limitation meaningless. If the Department can order removal of any erosion control structure anywhere in the coastal zone, then the limitation in (B) to "tidelands and coastal waters" serves no purpose. But we must assume that the Legislature does not enact surplusage. *See State v. Sweat*, 386 S.C. 339, 350–51, 688 S.E.2d 569, 575 (2010). So if "any reasonable construction" exists that preserves meaning and operation for subsection (B), the Court should adopt it. *Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 124–25, 754 S.E.2d 486, 492–93 (2014); *accord S.C. Workers' Comp. Comm'n v. WestPoint Home, LLC*, 446 S.C. 625, 633, 922 S.E.2d 231, 235 (Ct. App. 2025).

SCCCL argues that the absence of express limiting language in (C) proves (C) is unlimited. (SCCCL Resp. Br. at 7–8.) But statutory silence does not create affirmative grants of authority. An agency possesses only those powers the

Legislature gives it. *Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991) (citing *City of Rock Hill v. S.C. Dep't of Health & Env't Control*, 302 S.C. 161, 394 S.E.2d 327 (1990)); *accord Spectre, LLC v. S.C. Dep't of Health & Env't Control*, 386 S.C. 357, 368, 688 S.E.2d 844, 850 (2010). But just as the exclusion of a limitation must be given effect, so too must an express *inclusion* of a limitation. *Cf. Vernon v. Harleysville Mut. Cas. Co.*, 244 S.C. 152, 157, 135 S.E.2d 841, 844 (1964) ("Where there is an express exception in a statute, all other exceptions which are not expressly set forth are e[x]cluded."). The absence of an express geographic limitation in (C) reflects that (C)'s scope is defined by (B)'s prohibition, not that (C) is unbounded.

B. DES's "Absurd Result" Argument Regarding Unpermitted Structures Proves Too Much.

DES argues that limiting § 48-39-120(C) to permitted structures on tidelands and coastal waters would produce an "absurd result" because someone who built without a permit would escape the Department's removal authority. (DES Resp. Br. at 12.) This argument proves too much. Were § 48-39-120(C) the only mechanism for removing unpermitted structures, DES would entirely lack a removal authority for unpermitted structures that do not have "an adverse effect on the public interest." That can't be—obviously, DES has the authority to remove unpermitted structures in areas within its permitting jurisdiction. *See, e.g.*, § 48-39-130(C) (critical-area permit requirement); § 48-39-170(C) (enforcement orders); § 48-39-50(I) (general enforcement power).[1]

The Act's structure confirms the point. The Legislature granted removal authority repeatedly, and each time tied it to a specific trigger and a specific place. Section 48-39-290(B)(2)(c) provides that erosion control devices destroyed beyond the statutory percentage "must be removed at the owner's expense." Section 48-39-290(D)(1) provides that a special-permit structure must be removed if "the beach erodes to the extent the permitted structure becomes situated on the active beach." Section 48-39-170(C) authorizes enforcement orders. A Legislature that drafted removal authority this carefully, and this often, did not simultaneously vest the Department with an unbounded removal power over eight counties in a single sentence of a tidelands permitting provision.

C. Section 48-39-290(B)(2)(d) Preserves Existing Scope; It Does Not Expand It.

Both briefs rely heavily on § 48-39-290(B)(2)(d), which states that § 48-39-290's provisions "do not affect or modify the provisions of Section 48-39-120(C)." (DES Resp. Br. at 11; SCCCL Resp. Br. at 10–12.) They read this as a preservation clause leaving § 48-39-120(C) to operate independently on the beachfront. It does not.

First, § 48-39-290(B)(2)(d) immediately follows § 48-39-290(B)(2)(c), which is itself a removal provision: erosion control devices destroyed beyond the statutory percentage "must be removed at the owner's expense." The saving clause performs an

[1] Indeed, DES itself implicitly acknowledges this when it argues in the alternative that the Court should affirm removal under § 48-39-130 and § 48-39-50(I). (DES Resp. Br. at 25–26.) If § 48-39-120(C) already provides unlimited removal authority anywhere in the coastal zone, DES would have no need for these alternative grounds.

obvious and narrow function—it confirms that (c)'s percentage-triggered removal regime does not cabin the Department's separate adverse-effect removal authority under § 48-39-120(C).

Second, subsection (B) governs only "[c]onstruction, reconstruction, or alterations between the baseline and the setback line." S.C. Code Ann. § 48-39-290(B). The saving clause is embedded within rules whose entire operation is confined to that band. DES therefore invokes a clause located *inside* the baseline-to-setback-line provisions to establish jurisdiction landward of the setback line.

Third, a non-derogation clause cannot enlarge what it preserves. A provision stating that one set of rules "do[es] not affect or modify" another necessarily presupposes that the other has fixed, independently determined content. DES's argument instead runs the clause backwards, treating a provision that preserves existing authority as the source of new authority.

SCCCL argues that Reddy's reading renders the clause surplusage because, on Reddy's theory, § 48-39-120(C) would have no independent beachfront role for § 48-39-290 to preserve. (SCCCL Resp. Br. at 11.) Not so. Section 48-39-120(C) has an important role within the beach/dune system: it authorizes removal of *permitted* structures on tidelands and coastal waters that later prove adverse to the public interest. The saving clause ensures that the BMA's new-construction rules do not implicitly repeal this removal authority.

D. DES's Reading Creates the Unbounded Authority the ALC Recognized Was Problematic.

If § 48-39-120(C) authorizes removal of any erosion control structure anywhere in the "coastal zone"—defined as "all lands and waters in the counties of the State which contain any one or more of the critical areas," § 48-39-10(B)—then the Department has authority to order removal of any erosion control device in eight counties based solely on its own determination that the device has "an adverse effect on the public interest." That is precisely the "undesirable result" the ALC warned about. (Am. Final Order, p. 28.)

That reading is also constitutionally problematic and should be avoided. In *Gilstrap*, the Supreme Court rejected the Budget and Control Board's reading of a statute that would have given it almost unlimited discretion over reducing appropriations because such "*an absolute, unregulated, and undefined discretion"* would "violate the separation of powers provision of the State Constitution." 310 S.C. at 216, 423 S.E.2d at 105 (quoting *Bauer v. S.C. State Hous. Auth.*, 271 S.C. 219, 233, 246 S.E.2d 869, 876 (1978)). The Court refused to construe the Act to do that which is unconstitutional." *Id.*

DES's reading presents the same defect in sharper form. It would permit the Department to compel removal of any structure it deems an "erosion control structure"—a term it has never defined by regulation—anywhere in eight counties, whenever it concludes the structure has "an adverse effect on the public interest"—another undefined term. The Department disclaims the one fixed boundary the Legislature did establish. That would be discretion "absolute, unregulated, and undefined." Because a construction limiting § 48-39-120(C) to the tidelands and coastal waters that subsection (B) governs is both available and reasonable, this Court should adopt it.

DES responds that it is "bound by the parameters of the CZMA" and that the ALC and appellate courts provide checks on the Department's discretion. (DES Resp. Br. at 20.) But the Supreme Court has already identified what the Department's coastal-zone authority outside the critical areas consists of, and it is not removal. In *Spectre*, the Court quoted the CZMP Document's own statement of the agency's jurisdiction. The CZMP describes the agency as having direct permit control over the critical areas—coastal waters, tidelands, beaches, and primary oceanfront sand dunes—and then states flatly: "*Direct permitting authority is specifically limited to these critical areas.* Indirect management authority of coastal resources is granted to the Council in counties containing one or more of the critical areas. This area is called the coastal zone." 386 S.C. at 364, 688 S.E.2d at 847–48 (emphasis added). Because the property there was "part of the coastal zone but … not located in a critical area," the Court applied only the indirect review-and-certification policies. *Id.*, 688 S.E.2d at 848; *see also S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't Control*, 434 S.C. 1, 11, 862 S.E.2d 72, 77 (2021) (making the same distinction).

DES's reading ignores this, converting a consistency-certification zone into a zone of direct enforcement and compelled removal. Under DES's reading, the only "parameters" are the its own assessment of "public interest" and the undefined concept of "erosion control structure." Post hoc appellate review does not cure the absence of statutory standards at the enforcement stage.

Nor does the repeal of former § 48-39-200 supply the missing authority. (*See* Am. Final Order, p. 29 n.48.) That provision stated: "Notwithstanding any other provisions of this chapter, the Council shall have no direct regulatory authority over area outside the critical areas in the coastal zone." *Grant v. S.C. Coastal Council*, 319 S.C. 348, 355 n.4, 461 S.E.2d 388, 392 n.4 (1995). Its removal cannot bear the weight placed on it. First, repealing a limitation does not create a grant of authority. *See Captain's Quarters*, 306 S.C. at 490, 413 S.E.2d at 14. Second, the repeal was accomplished by Act No. 181 of 1993—the restructuring act that abolished the Coastal Council itself and transferred its functions to DHEC. *See Spectre*, 386 S.C. at 363 n.2, 688 S.E.2d at 847 n.2. A provision framed in terms of "the Council" was removed alongside *the Council itself*. Third, and decisively, the Supreme Court has applied the direct/indirect distinction twice since the repeal—in *Spectre* in 2010 and in *Captain Sam's Spit* in 2021. Had the repeal worked the transformation the ALC posited, the Court would not have continued to describe direct permitting authority as "specifically limited to these critical areas."

II. The Response Briefs' Arguments on the Beaches Jurisdictional Question Fail.

Reddy incorporates by reference the arguments set forth in his Response Brief regarding the beaches jurisdictional question and addresses only the new or expanded arguments raised in DES's and SCCCL's response briefs.

The ALC made no finding of beaches critical area jurisdiction, not finding it "necessary" to decide the question.(Order Denying Recons., p. 2.) The ALC also found that DES's its vegetation line assessment was "subjective" and "dubious" (Am. Final Order, p. 12); its feature analysis had "de minimis" probative value (*id.* at p. 14); and its expert could not identify the beaches critical area boundary "with a reasonable degree of certainty" (*id.* at pp. 14–15). These findings dispel any notion that the ALC found in favor of DES on the jurisdictional question. Moreover, "coastal zone" under § 48-39-10(B) is a defined term requiring that the property be in a critical area. Reddy's property is not within the beach/dune system, which is bounded by the setback line. And despite extensive testimony, the ALC did not find it was in the "beaches" critical area. If the property is in neither of the two beachfront critical areas, it is not in the "coastal zone" as the statute defines that term.

Nor does § 48-39-210(B) language that critical areas are "dynamic and subject to change over time" alter the scope of DES's permitting authority. (DES Resp. Br. at 33.) Section 48-39-210(B) merely prevents property owners from arguing that a mapped critical-area boundary on their property *permanently* freezes DES's jurisdiction at that line. It does not transform "beaches" from a descriptive category into a roving jurisdictional concept.

A. ***Kiawah*** and ***Captain Sam's Spit*** Address Permitting Standards, Not Removal Jurisdiction.

The ALC grounded its § 48-39-120(C) analysis in *South Carolina Coastal Conservation League v. South Carolina Department of Health & Environmental Control*, 434 S.C. 1, 862 S.E.2d 72 (2021) (*Captain Sam's Spit*), reading it to hold that DES may regulate erosion control structures "even when built outside of the critical area." (Am. Final Order, p. 29.) That reading mistakes the case.

Captain Sam's Spit decided which *permitting standard* applied to a permit application—whether DHEC was required to apply § 48-39-30(D)'s critical-area policies when reviewing a permit for a structure sited on the upland. The Court held only that the ALC "erred in declining to apply section 48-39-30(D)." 434 S.C. at 12–13, 862 S.E.2d at 78. It did not address § 48-39-120(C), removal authority, or the setback line, and it expressly refused to announce any general rule. *Id.* at 13 n.7, 862 S.E.2d at 78 n.7.

The factual predicate there is the inverse of the record here. The Court emphasized that "all the expert witnesses agreed" the critical area would subsume the structure, and it reserved the cases "where the expert testimony diverges or where DHEC justifiably believes an upland structure will remain outside the critical area and not impact it." *Id.* at 12–13, 862 S.E.2d at 78.

The same is true of *Kiawah Development Partners, II v. South Carolina Department of Health & Environmental Control*, 411 S.C. 16, 766 S.E.2d 707 (2014). The "lodestar" the ALC invoked is expressly anchored to the public trust: "the basic premise undergirding our analysis must be the public trust doctrine which provides that those lands below the high water line are owned by the State and held in trust for the benefit of the public." *Id.* at 29, 766 S.E.2d at 715. The ALC quoted the tidelands qualifier and then applied the principle to private upland landward of the setback line. (Am. Final Order, p. 33.) A rule developed for the State's own trust lands cannot give DES authority over land the State does not hold in trust.

B. DES's Reliance on *Port Royal* Is Misplaced.

DES cites *South Carolina Coastal Conservation League v. South Carolina Department of Health & Environmental Control* (*Port Royal*), 354 S.C. 585, 582 S.E.2d 410 (2003), for the proposition that § 48-39-290 does not exclusively control the Department's authority on the beachfront. (DES Resp. Br. at 34–36.) But *Port Royal* involved groins—structures that by definition must be located in the active beach and coastal waters. 354 S.C. at 587–88, 582 S.E.2d at 412 ("Groins, by definition, must be located in 'critical areas' on the 'active beach.'" (footnote omitted)). The Supreme Court held that the Department's comprehensive beach erosion policy authority in § 48-39-120 authorized groin permits that § 48-39-290 did not specifically enumerate. *Port Royal*, 354 S.C. at 587–88, 582 S.E.2d at 412. The Court's footnote identifying "beaches" as a critical area was descriptive, not a holding on the scope of DES's direct permitting jurisdiction landward of the setback line. *State v. Addison*, 338 S.C. 277, 282, 525 S.E.2d 901, 904 (Ct. App. 1999), *aff'd as modified*, 343 S.C. 290, 540 S.E.2d 449 (2000) (dicta is not binding). The case did not involve enforcement against an unpermitted structure on upland property where no permit had been sought or had ever been required.

C. Section 48-39-330 Confirms the Setback Line's Jurisdictional Importance.

DES argues that § 48-39-330's reference to "jurisdictional lines" in addition to baseline and setback lines demonstrates that there are other jurisdictional boundaries beyond the setback line. (DES Resp. Br. at 29–30.) This argument actually supports Reddy. The BMA requires a seller to disclose that property "is or may be affected by the setback line, baseline, and the seaward corners of all habitable structures," together with the local erosion rate. S.C. Code Ann. § 48-39-330. What the BMA conspicuously does *not* require is any disclosure that the property may be subject to a case-by-case departmental determination that it lies in the "beaches" critical area. As the ALC observed, this undermines the Department's jurisdictional argument. (Am. Final Order, p. 29.) The ALC was correct: that the Legislature required sellers to disclose the setback line to purchasers confirms that property owners may rely on the setback line as the limit of the Department's direct permitting jurisdiction. (*Id.* at pp. 27–29.)

D. DES's CZMP Document Argument Fails on the Document's Own Terms.

DES cites the CZMP Document's definition of "beach" as including the area "up to the line of vegetation." (DES Resp. Br. at 36–37.) But the CZMP must be read "as a whole." *Spectre*, 386 S.C. at 364, 366, 688 S.E.2d at 847–48. Its own statement of the scope of the agency's authority—quoted with approval by the Supreme Court—is that "[d]irect permitting authority is specifically limited to … critical areas," with only "[i]ndirect management authority" in the balance of the coastal zone. *Id.* at 364, 688 S.E.2d at 847. And the CZMP states that "[f]or beaches and sand dune critical areas, the Council employs the definition found in the Act in making a case-by-case determination of the critical area boundary." (CZMP Document, Ch. III, p. III-3.) The CZMP does not independently define "beaches" as a jurisdictional category. The language in Chapter IV.D describes the physical characteristics of beaches, but does not establish jurisdictional boundaries for the Department's direct permitting authority.

The chronology reinforces the point. The CZMP was drafted in 1978—a full decade before the BMA established the setback line. It still uses pre-BMA terminology. (CZMP Document, Ch. III, p. III-3.) The BMA replaced "primary oceanfront sand dunes" with "beach/dune system," but the CZMP was never updated to reflect that change. Reddy does not contend the CZMP is unenforceable, but only that where descriptive CZMP language cannot be harmonized with the BMA's jurisdictional framework, the later-enacted statute controls. *Williams v. Town of Hilton Head Island*, 311 S.C. 417, 421, 429 S.E.2d 802, 804 (1993) ("where it is not possible to harmonize two sections of a statute, the later legislation supersedes the earlier enactment").

E. The 2024 Regulatory Amendment Confirms the Prior Regulation's Limitation.

DES argues that the 2024 amendment to Regulation 30-13(N)(3)(a) was a "clarification" consistent with existing authority. (DES Resp. Br. at 21–24.) DES's witness testified that the prior regulatory language referring to structures "seaward of the setback line" was "sufficient" until recently because the Beaches Critical Area was "almost always" seaward of the setback line. (Tr. 98:5–99:1.)

The ALC found that DES "did not produce any credible evidence that it has historically required a permit for the construction of an erosion control structure landward of the setback line nor could it confirm whether it has assessed a civil penalty for activity landward of the setback line." (Am. Final Order, p. 20.) The change confirms that even the Department did not claim jurisdiction landward of the setback line at the time of Reddy's conduct. *See Converse Power Corp. v. S.C. Dep't of Health & Env't Control*, 350 S.C. 39, 48, 564 S.E.2d 341, 346 (Ct. App. 2002) ("[W]e presume a regulatory agency, in adopting an amendment to a regulation, intended to make a change in the existing law.").

The promulgation point is independently dispositive. Section 48-39-130(B) directs the Department to "publish final rules and regulations" governing the evaluation of permit applications, "pursuant to the Administrative Procedures Act." In *Captain's Quarters*, the Supreme Court rejected the Coastal Council's attempt to apply a seawall damage-assessment test "without formalizing it by regulation." 306 S.C. at 491, 413 S.E.2d at 14; *see also Charleston Television, Inc. v. S.C. Budget & Control Bd.*, 301 S.C. 468, 392 S.E.2d 671 (1990) (failure to promulgate statutorily mandated regulations rendered agency action invalid). The Department's promulgated regulation identified the setback line. Its case-by-case delineation of "beaches" landward of that line was never promulgated. The Department's reading is not permissible.

F. DES's Nonuse Is Not "Unsupported" by the Record—It Is an ALC Finding.

DES argues that Reddy's claim of nonuse is "unsupported by any evidence in the record." (DES Resp. Br. at 20–21.) This is remarkable. The ALC found that there was no "credible evidence" that DES had "historically required a permit . . . [or] assessed a civil penalty for activity landward of the setback line." (Am. Final Order, p. 20.) This finding alone undermines DES's jurisdictional argument. *See Gilstrap*, 310 S.C. at 214–15, 423 S.E.2d at 104 (agency's failure to exercise a claimed power weighs against finding the power was actually conferred).

DES argues *Gilstrap* is distinguishable because the Board there had affirmatively applied the statute differently. (DES Resp. Br. at 21.) But DES did exactly that here. DES promulgated Regulation 30-21(H)(3), which states that DES's permitting jurisdiction on beaches is determined by the setback line. DES told Reddy himself that hard structures were prohibited "seaward of the [DES] OCRM setback line." (Am. Final Order, p. 20.) This is not a case of mere nonuse; it is a case of affirmative, repeated representations that the jurisdiction DES now claims did not exist. "Where an administrative agency has consistently applied a statute in a particular manner, its construction should not be overturned absent cogent reasons." 310 S.C. at 215, 423 S.E.2d at 104.

The Department's deference argument compounds the problem. The ALC declined to defer to the Department's asserted beaches interpretation precisely because "the Department failed to substantiate the adoption of a formal interpretation or longstanding policy," and because "it is the uniform interpretation adopted by the agency, not its staff, that is entitled to a degree of deference." (Am. Final Order, p. 24 n.44 (citing *S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't Control*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005)).) That reasoning cuts against DES, not for it. The only *formal* agency interpretation in this record is Regulation 30-21(H)(3)—promulgated through APA rulemaking, submitted to the General Assembly under § 1-23-120, and in force for decades. A construction "uniform for many years in administrative practice, and … acquiesced in by the General Assembly for a long period of time … is entitled to weight, and should not be overruled without cogent reasons." *Charleston Cnty. Assessor v. Univ. Ventures, LLC*, 427 S.C. 273, 289, 831 S.E.2d 412, 420 (2019). DES asks for deference to its litigating position while its own promulgated regulation says the opposite.

III. Reddy Was Denied Due Process Because § 48-39-120(C) Was Not the Basis for the Administrative Proceeding.

DES and SCCCL argue at length that Reddy had "notice" of § 48-39-120(C) because the NOAV/AL mentioned it, the Summary Judgment Order referenced it, and Reddy himself cited § 48-39-120(B) during trial. (DES Resp. Br. at 38–50; SCCCL Resp. Br. at 23–30.) These arguments conflate awareness of a statutory provision with notice that it would serve as the dispositive legal basis for the ALC's order.

A. The Distinction Between Awareness and Notice Is Dispositive.

The Administrative Order—the charging document—did not cite § 48-39-120(C). The ALC's hearing notices did not identify it. The case was tried as an enforcement action under § 48-39-130 (critical-area permit violation) and § 48-39-170 (civil penalty). That the NOAV/AL mentioned § 48-39-120(C) among other provisions does not establish that Reddy was on notice it would be the dispositive basis for the ALC's order. Due process requires notice of the issues the tribunal will decide, not merely awareness that a statute exists. *See Burdge v. State Board of Medical Examiners*, 304 S.C. 42, 46, 403 S.E.2d 114, 117 (1991) (citing *In re Ruffalo*, 390 U.S. 544 (1968)). In *Burdge*, the charging complaint included all standards that a physician had been charged with violating but did not reference "record falsification" as one potential component of those standards. The court reversed. The defect in *Burdge* was not that the physician was unaware the various standards of care existed, but that the charging document did not put him on notice that record falsification could constitute a violation of those protocols. So too, here.

DES's argument that Reddy used § 48-39-120(B) in his own case actually confirms the due process problem. Reddy cited § 48-39-120(B)—the provision addressing tidelands and coastal waters—to argue that the public's access rights are below the mean high-water mark. (Tr. 1253:19–1254:16.) But Reddy had no notice that the ALC might rely on subsection (C) as a freestanding enforcement tool independent of the charging document's theories.

B. SCCCL's Substantial-Prejudice Argument Misapplies the Standard.

SCCCL argues that Reddy cannot show "substantial prejudice" because his claimed prejudice is "legal, not factual." (SCCCL Resp. Br. at 28–29.) The argument fails at three levels.

First, harmless-error review does not apply to a defect of this kind. While "[a] demonstration of substantial prejudice is required to establish a due process claim," *Tall Tower, Inc. v. S.C. Procurement Review Panel*, 294 S.C. 225, 233, 363 S.E.2d 683, 687 (1987), a "'harmless error' analysis … is impossible and unnecessary to undertake where the structure of the proceeding under review was fundamentally unsound." *McIntyre v. Sec. Comm'r of S.C.*, 425 S.C. 439, 451, 823 S.E.2d 193, 199 (Ct. App. 2018); *see also Garris v. Governing Bd. of S.C. Reinsurance Facility*, 333 S.C. 432, 447–48, 511 S.E.2d 48, 56 (1998). Adjudicating a case under a statute that was never charged is such a defect: it means the elements the tribunal would apply, and the allocation of the burden of proving them, were never "calibrated in advance." *McIntyre*, 425 S.C. at 450, 823 S.E.2d at 198 (quoting *Santosky v. Kramer*, 455 U.S. 745, 757 (1982)). As this Court observed, "[i]t is hard to imagine how the opportunity to be heard can be meaningful if one does not know what to say." *Id.*

Second, Article I, section 22 of the South Carolina Constitution says 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." S.C. Const. art. I, § 22; *see Garris*, 333 S.C. at 444, 511 S.E.2d at 54 (§ 22 is "an additional guarantee of important due process rights"). In *Stono River Env't Protection Assoc. v. S.C. Dep't of Health & Env't Control*, the Supreme Court found that guarantee violated where a DHEC board decided a matter after departing from the noticed procedure: "Although all parties were present at the hearing before the board, the record shows no indication that they were informed of the issues to be considered by the board." 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991). The Court did not ask what additional evidence the objecting parties would have offered; it reversed and remanded. *Id.*

Third, and in any event, the prejudice here is factual, and it is visible on the face of the ALC's own order. Section 48-39-120(C) conditions removal on a finding that the structure has "an adverse effect on the public interest"—an element on which the Department bore the burden of proof. Rule 29(B), SCALCR. Because the case was tried as a permit-violation action under § 48-39-130 and a penalty action under § 48-

39-170, neither party developed the record on that element. The consequence appears in the Amended Final Order itself: instead of site-specific evidence isolating the structure's effects from the background erosion, the ALC rested its adverse-effect conclusion on the General Assembly's generalized findings about hard erosion control devices under § 48-39-250(5)–(6) (Am. Final Order, pp. 33–34). That is the gap Reddy identifies in Part IV below, and it exists because the element was never noticed for trial. Had it been, Reddy could have met it with site-specific proof. He would also have developed the Department's enforcement history under § 48-39-120(C) specifically, a question distinct from the Department's general practice landward of the setback line (Am. Final Order, p. 20) and directly relevant to whether the claimed power was ever conferred. *Gilstrap*, 310 S.C. at 214–15, 423 S.E.2d at 104.

None of this concedes that the *meaning* of § 48-39-120(C) turns on extrinsic evidence. It does not; that is a question of law this Court decides de novo. The prejudice lies in the elements the Department was required to prove and never squarely tried—not in the construction of the statute.

C. The Five-Day Hearing Does Not Cure the Notice Defect.

The briefs rely on *Leventis v. S.C. Dep't of Health & Env't Control*, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000), for the proposition that an exhaustive hearing cures procedural defects. (DES Resp. Br. at 47; SCCCL Resp. Br. at 28.) But *Leventis* involved a defect in the administrative process before the ALC hearing—an ex parte stipulated agreement between the Department and the permit applicant. The ALC's de novo hearing cured that defect because the hearing provided a full, independent review of the same issues. *Leventis*, 340 S.C. at 134, 530 S.E.2d at 652. Further, that hearing was followed by an *additional* review by the Department's board. *Id.* At both the administrative and board hearings, the complaining party had a full opportunity to present its positions relevant to the stipulated agreement, and the Court noted that several provisions were changed because of those objections. *Id.* Here, the defect is different: the ALC's order rested on a statutory provision that was not the basis for *that specific* proceeding.

Burdge forecloses the contrary rule. Dr. Burdge received a full adversarial hearing: he testified, experts testified on both sides, and the board's findings on the *charged* grounds were sustained as supported by substantial evidence. 304 S.C. at 45–46, 403 S.E.2d at 116. This did not cure the notice defect as to the uncharged ground. *Id.* at 46, 403 S.E.2d at 116–17. So too here. The five-day hearing was directed at critical-area jurisdiction under § 48-39-130 and the civil penalty under § 48-39-170. *Burdge* also confirms the available remedy: the Court remanded to the agency rather than sustaining the order on the uncharged ground. *Id.* at 46–47, 403 S.E.2d at 116–17.

IV. The Adverse-Effect Finding Is Not Supported by Substantial Evidence of the Kind § 48-39-120(C) Requires.

DES and SCCCL catalog the evidence of scour, public access impacts, and dry sand loss that the ALC relied upon. (DES Resp. Br. at 37–38; SCCCL Resp. Br. at 20–23.) Reddy does not dispute that erosion control structures can have effects on adjacent beaches. The question is whether the ALC's findings establish that Reddy's structure has "an adverse effect on the public interest" within the meaning of § 48-

39-120(C), as distinguished from the background erosion occurring in this "highly dynamic area." (Am. Final Order, p. 32.)

The ALC itself found that "the beaches adjacent to Respondent's property" are subject to "vacillating periods of accretion and erosion lasting anywhere from one to several years." (Am. Final Order, p. 6.) It found the area is subject to "cyclical periods of extensive erosion." (*Id.* at p. 32.) It acknowledged that the dynamic nature of the shoreline means future erosive cycles will occur irrespective of Reddy's structure. (*Id.*) But the ALC then relied on legislative findings regarding the general effects of hard erosion control structures rather than site-specific evidence isolating the structure's effects from background erosion. Legislative findings "are entitled to weight" but do not substitute for proof. *Bauer v. South Carolina State Housing Authority*, 271 S.C. at 229, 246 S.E.2d at 875 (citation omitted).

V. SCCCL's Alternative-Ground and Preservation Arguments Are Without Merit.

A. SCCCL's Request to Affirm Under § 48-39-130 Is Not a Proper Alternative Ground.

SCCCL invokes Rule 220(c), SCACR, and *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000), to argue the Court should affirm removal under § 48-39-130 as an alternative ground. (DES Resp. Br. at 25–26; SCCCL Resp. Br. at 18–20.) But affirming under § 48-39-130 would require this Court to make the "beaches" jurisdictional finding the ALC declined to make. The ALC is the factfinder, and this Court's review is limited to the ALC's findings. *See Bailey v. S.C. Dep't of Health & Env't Control*, 388 S.C. 1, 4, 693 S.E.2d 426, 428 (Ct. App. 2010). If the Court determines the ALC erred in not deciding the beaches question, the appropriate remedy is remand, not appellate fact-finding. *Baldwin v. James River Corp.*, 304 S.C. 485, 487, 405 S.E.2d 421, 422 (Ct. App. 1991).

I'On itself supplies the answer. While a respondent "may raise an additional sustaining ground that was not even presented to the lower court," the appellate court "is likely to ignore it." 338 S.C. at 421, 526 S.E.2d at 724; *see WestPoint Home, LLC*, 446 S.C. at 634 n.2, 922 S.E.2d at 236 n.2 (declining on that basis to consider an additional sustaining ground). The ALC did not merely fail to reach the beaches question—it expressly declined to decide it. (Order Denying Recons., p. 2.)

B. Reddy's Issues Are Preserved.

SCCCL argues that Reddy failed to preserve his appellate arguments because he did not file a Rule 29(D) motion for reconsideration directed specifically at the December 30, 2025, Amended Final Order. (SCCCL Resp. Br. at 30–33.) This argument fails for multiple independent reasons.

First, and dispositively, the Amended Final Order expressly recites and rejects the § 48-39-120(C) argument Reddy raised in his November 3 motion for reconsideration. After describing Reddy's argument, the ALC wrote "I disagree." (Am. Final Order, pp. 30–32.) An issue raised to and ruled upon by the tribunal below is preserved for appeal. *Risher v. S.C. Dep't of Health & Env't Control*, 393 S.C. 198, 208, 712 S.E.2d 428, 433 (2011).

In *Coward Hund*, the first ground on which that court rested was that the appellant "is not challenging a new ruling in its second motion." *Coward Hund Constr. Co. v. Ball Corp.*, 336 S.C. 1, 4, 518 S.E.2d 56, 58 (Ct. App. 1999). A further motion is required only where an amended order introduces a *new* ruling the appellant wishes to challenge. *Cf. Pelican Bldg. Ctrs. v. Dutton*, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993). The Amended Final Order introduced no new ruling on § 48-39-120(C). And once an issue has been properly raised by a motion for reconsideration, it is preserved even if the court does not specifically rule on it. *Coward Hund*, 336 S.C. at 4, 518 S.E.2d at 58 (quoting James F. Flanagan, *South Carolina Civil Procedure* 475 (2d ed. 1996)).

SCCCL's argument that the Amended Final Order was a "materially clarified" order (SCCCL Resp. Br. at 32) is mistaken. The Amended Final Order retained the identical § 48-39-120(C) removal ruling. Reddy's arguments against the removal ruling were fully raised in the ALC, and the ALC ruled on them. That is all that is necessary to preserve them. *Risher*, 393 S.C. at 208, 712 S.E.2d at 433.

Finally, in *High v. High*, 389 S.C. 226, 697 S.E.2d 690 (Ct. App. 2010), the family court rescinded its first order *ab initio* and replaced it with a supplemental order; the appellant then moved for reconsideration of the second order. The respondent argued the motion was untimely because the same issues had been addressed in the first order. *Id.* at 247, 697 S.E.2d at 701. But because the first order was rescinded *ab initio*, the second order "was the only order from which [the appellant] could have filed a motion to reconsider." *Id.* at 248, 697 S.E.2d at 701.

The posture here also differs from *High* in the one respect that matters. In *High*, the rescission was independent of any pending motion. Here, the ALC "rescinded its Final Order to give it more latitude to thoroughly consider and respond to the parties' Motions and responses." (Am. Final Order, p. 2.) Reddy's November 3 motion was not nullified by the rescission, rather the ALC itself later described the Amended Final Order as "the Court's Order on the parties' first Motion for Reconsideration." (Order Denying Recons., p. 3.)

Conclusion

For the foregoing reasons, and the reasons set forth in Reddy's Initial Brief and Response Brief, Appellant-Respondent respectfully requests that this Court reverse the ALC's order requiring removal of the erosion control structure under § 48-39-120(C); hold that § 48-39-120(C) does not authorize removal of erosion control structures on private property outside tidelands and coastal waters; hold that the statutory setback line established under § 48-39-280 marks the landward limit of DES's beachfront permitting jurisdiction; affirm the ALC's vacatur of the $289,000 civil penalty; and vacate Administrative Order AF-0000960 in its entirety.

In the alternative, this Court should remand for proceedings under the correct statutory framework.

Dated: August 3, 2026.

Respectfully submitted,

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III, Administrative Law Judge

Appellate Case No. 2026-000221
Docket No. 24-ALJ-07-0232-CC

South Carolina Department of Environmental Services and
South Carolina Coastal Conservation League .... Respondents-Appellants,
v.

Rom Reddy ....Appellant-Respondent.

PROOF OF SERVICE

This is to certify that I have this day served counsel for Respondents-Appellants South Carolina Department of Environmental Services and South Carolina Coastal Conservation League in the foregoing matter with a copy of ***Appellant-Respondent Rom Reddy's Reply Brief*** via electronic mail only, addressed as follows:

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August 3, 2026

VIA E-FILING
The Honorable Jenny Abbott Kitchings
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Re: South Carolina Department of Environmental Services and South Carolina Coastal Conservation League vs. Rom Reddy
Docket No.: 24-ALJ-07-0232-CC
Appellate Case No.: 2026-000221
MVA File No.: 047825.000002

Dear Ms. Kitchings,

With regard to the above-referenced matter, please accept the following for filing:

1. Appellant-Respondent Rom Reddy's Reply Brief; and

2. Proof of Service.

By copy of this letter, I am serving Respondents-Appellants' attorneys with a copy of Appellant-Respondent Rom Reddy's Reply Brief. Thank you for your assistance in this matter. If you should have any questions or concerns, please feel free to contact me.

Sincerely,

E. Brandon Gaskins

EBG/llp

Enclosures: As Stated.

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