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STATEMENT OF THE ISSUES ON APPEAL

- A. Did the lower court correctly grant Respondent's Motion to Dismiss, pursuant to Rule 12(b)(1) SCRPC, because it lacks jurisdiction to review Administrative Order 07M-012S issued by the South Carolina Department of Health and Environmental Control, Bureau of Ocean and Coastal Resource Management (hereinafter "the Department") based on the following:
 1. Whether the lower court correctly applied S.C. Code Ann. § 48-39-180 (2008) in holding that it does not govern the review of an administrative order that assesses civil penalties and requires other remedial actions.
 2. Whether the lower court correctly applied S.C. Code Ann. §1-23-380 (1976) in holding that it does not bestow jurisdiction of this matter upon the court.
 3. Whether the lower court correctly held S.C. Code Ann. §44-1-60 (1976) governs the procedural process required by the appellants in appealing decisions made by the Department.
- B. If S.C. Code Ann. §48-39-180 is not the controlling authority due to the enactment of Act No. 387, whether the lower court still lacks proper subject matter jurisdiction.
- C. Whether Appellants' claim that the Department's conduct was *ultra vires* was adequately preserved to be argued on appeal.
 1. Whether Appellants' asserted *ultra vires* exception to the requirement of exhausting administrative remedies is applicable to this action.
- D. Whether the lower court correctly required the Appellants to exhaust all of their administrative remedies since review of the Department's actions by the Administrative Law Court would not have been a futile effort and if the Appellants prevailed would have provided an adequate remedy.
- E. Whether the Appellants' claim that their equitable tolling argument applies was adequately preserved to be argued on appeal.
 1. If the Appellants' adequately preserved their equitable tolling argument, is it even relevant to this appeal.

STATEMENT OF THE CASE

Appellants' property that is the subject of this civil action falls within the jurisdiction of the Coastal Zone Management Act.

Appellants constructed a bulkhead and concrete driveway, installed a fence and placed approximately 2,639 square feet of fill dirt in the tidelands critical area in violation of the Coastal Zone Management Act.

As a result of Appellants' unauthorized activities, the Department issued Administrative Order 07M-012S on April 26, 2010 which assessed a civil penalty and required Appellants to submit a restoration plan to return the impacted area to its condition prior to the unauthorized activities referenced in the Order. (R. pp. 13-41).

Appellants sought review of Administrative Order 07M-012S by the South Carolina Board of Health and Environmental Control ("Board"). (R. pp. 285-293).

On June 10, 2010, the Board denied Appellants request for a Final Review Conference. (R. pp. 295-296).

On July 8, 2010, the Appellants brought an action in the Court of Common Pleas, Fifteenth Judicial Circuit seeking judicial review of the Department's Administrative Order. (R. p. 44).

On March 28, 2011, Appellants' action was dismissed by the circuit court based on Respondent's Rule 12(B)(1) motion to dismiss for lack of subject matter jurisdiction in bringing this action before the circuit court. (R. pp. 4-7 and 296-298).

On May 17, 2011 Appellants filed a Notice of Appeal with the South Carolina Court of Appeals asserting that the lower court erred in dismissing their action in

accordance with S.C. Code Ann. § 48-39-180 and S.C. Code Ann. § 1-23-380 and that such court has subject matter and personal jurisdiction over this case.

STATEMENT OF THE FACTS

On February 2, 2007, Appellants applied for a critical area permit to replace an existing bulkhead on their property. (R. pp. 260-262).

On March 7, 2007, the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (“Department”) issued a critical area permit to Appellants authorizing the replacement of a 155 foot bulkhead. (R. pp. 267-272).

On June 22, 2007, the Department issued a Construction Placard and mailed it to the Appellants on June 25, 2007, thus allowing Appellants to begin replacing their 155 foot bulkhead as permitted. (R. p. 274).

On July 17, 2007, the Department received a complaint that Appellants were constructing their bulkhead twenty feet channelward of the existing bulkhead, in violation of their permit.

On July 19, 2007, Sean Briggs (Department employee) visited Appellants’ property. (R. pp. 30-31). Mr. Briggs noticed Appellants building their bulkhead in the tidelands critical area and informed Mr. Berry that he could not build anything beyond what permit #OCRM-07-509 authorized.

On July 23, 2007, the Department issued a Cease and Desist Directive to Appellants after they (Appellants) continued to alter the tidelands critical area despite Mr. Brigg’s directions. The Cease and Desist Directive instructed Appellants to stop building the bulkhead and stop altering the critical area. (R. pp. 277-278).

On July 25, 2007, the Department sent Appellants a Notice of Violation and Admission Letter for their permit violations. (R. pp. 279-282).

On July 31, 2007, Mr. Briggs conducted a follow up site inspection. (R. p. 33). Despite the issuance of the Cease and Desist Directive and the Notice of Violation, Appellants continued their construction of the bulkhead and continued to alter the tideland critical area.

On August 2, 2007, Tanitra Marshall (Department employee) sent Appellants a Notice of Intent to Revoke permit # OCRM-07-509. (R. pp. 283-284). Even after receiving this notice, Appellants completed construction of the bulkhead in the tidelands critical area; continued to fill in the critical area; landscaped and paved over the fill that was placed in the critical area; and expanded their second-story deck over the filled tidelands critical area with support structures anchored in the critical area. (R. pp. 37-41).

On April 26, 2010, the Department issued Administrative Order 07M-012S, assessing a civil penalty and requiring Appellants to submit a restoration plan to return the impacted area to its condition prior to the unauthorized activities referenced in the Order. (R. pp. 13-41).

Appellants sought review of the administrative order by the South Carolina Board of Health and Environmental Control ("Board"). (R. pp. 285-293). On June 10, 2010, the Board denied Appellants request for a Final Review Conference. (R. pp. 294-296).

On July 8, 2010, the Appellants brought an action in the Court of Common Pleas Fifteenth Judicial Circuit seeking judicial review of the Department's Administrative Order. (R. p. 42).

On March 28, 2011, Appellants' action was dismissed by the circuit court pursuant to Respondent's Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction in bringing this action before the circuit court. (R. pp. 4-7).

On May 17, 2011 Appellants filed a Notice of Appeal with the South Carolina Court of Appeals challenging the lower court's dismissal of the action based on lack of subject matter jurisdiction.

ARGUMENTS

A. The lower court was correct in granting Respondent's Motion to Dismiss, pursuant to Rule 12(b)(1) SCRPC, because that court lacks the jurisdiction to review Administrative Order 07M-012S issued by the Department based on the following:

1. The lower court correctly applied S.C. Code Ann. § 48-39-180 (2008) in holding that it does not govern the review of an administrative enforcement order that assesses civil penalties and requires other remedial actions.

S.C. Code Ann. §48-39-180 (2008) allows "[a]ny applicant whose *permit application* has been finally denied, revoked, suspended or approved...[to] obtain judicial review as provided in Chapter 23 of Title 1, or may file a petition in the circuit court having jurisdiction over the affected land." S.C. Code Ann. §48-39-180(2008) (emphasis added). Appellants are correct in the foundation of their argument in that "[t]he words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." (Appellants' Initial Brief p. 15) (citing Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992)). However, Appellants' argument is flawed in applying this foundation to their arguments.

S.C. Code Ann. §48-39-180 (2008) clearly and unambiguously applies solely to permit *applications*. The statute does not contemplate the circuit court exercising jurisdiction over administrative enforcement orders such as Administrative Order 07M-012S. Nonetheless, under the auspices of S.C. Code Ann. § 48-39-180 (2008), Appellants filed an action in circuit court seeking to overturn an administrative enforcement order issued by the Department against the Appellants for filling in critical area without a permit. (Appellants' Complaint at p. 16). (R. p. 59). In applying the clear and unambiguous words of S.C. Code Ann. §48-39-180 (2008), the lower court correctly found that this statute does not apply to administrative enforcement orders and subsequently that the circuit court lacked subject matter jurisdiction to entertain such an action. (R. p. 6).

The facts in Hill v. South Carolina Dept. of Health & Environmental Control are analogous to this action in that the petitioner is challenging the Department's issuance of an administrative enforcement order because "Hill had constructed a bulkhead in the tidelands critical area too far channelward and out of compliance with the issued permit." Hill v South Carolina Dept. of Health and Environmental Control, 389 S.C. 1, 7, 698 S.E.2d 612, 615 (2010). Though the court's decision in Hill involves a procedural analysis prior to the enactment of Act No. 387, the court's examination of S.C. Code Ann. §48-39-180 provides substantial guidance in actions such as this one, challenging an administrative enforcement order issued by the Department. In Hill, the court reasoned that the provisions of S.C. Code Ann. §48-39-180, "concern a landowner's challenge to DHEC's decision to deny a permit in the first instance, as well as to challenges by others who might be adversely affected by the granting of a permit application, such as

neighboring landowners.” Id. at 16, 698 S.E.2d at 620. After analyzing the applicable statutes, the court determined “the circuit court erred in concluding this administrative enforcement matter should have been brought in the circuit court and that the ALJ did not have jurisdiction to conduct a contested case hearing to review the propriety of the Administrative Enforcement Order.” Id. at 16-17, 698 S.E.2d at 620. The court found that “review of the *agency’s* enforcement order and its imposition of a civil fine is an administrative matter that falls squarely within the ambit of a contested case as defined in the APA.” Id. at 17, 698 S.E.2d at 621. The Court concluded as follows:

“Hill sought to challenge DHEC’s Administrative Enforcement Order that imposed a civil fine and required relocation of the bulkhead *before* DHEC sought to enforce it by means of a civil suit in the circuit court. Thus, this was an administrative proceeding in which Hill sought to have the parties’ rights, duties, and privileges determined in a contested case hearing by the ALJ as provided by S.C. Code Ann. §1-23-600(B). Accordingly the ALJ had jurisdiction to hear this matter and the circuit court’s ruling to the contrary is in error.” Id. at 17-18, 698 S.E.2d at 621.

Like the petitioners in Hill, the Appellants are also challenging the Department’s issuance of an administrative enforcement order which imposes civil penalties and remediation. Thus, under the holding in Hill, the Administrative Law Court (“ALC”) is the proper forum for such an action. Accordingly, the lower court was correct in concluding it lacked subject matter jurisdiction to entertain this challenge and that the ALC is the proper forum for the Appellants’ action, not the circuit court.

Appellants attempt to obfuscate their challenge of the administrative enforcement order by asserting that the Department’s issuance of the order is *ultra vires*. However, as discussed hereinafter, Appellants’ *ultra vires* assertion fails because it is flawed and because it was not adequately preserved for appeal. Before the Appellants even contemplated this appeal, they characterized their lawsuit in circuit court as “an action

seeking judicial review of a Final Administrative Order and Decision.” (Appellants’ Complaint, Paragraph 1) (R. p. 44) (see also Appellants’ Complaint, Paragraph 27, “[t]he Berry’s object to DHEC-OCRM’s decision and findings set forth in its Administrative Order 07M-012S.”). (R. p. 53). Because the underlying basis of the Appellant’s circuit court action is indisputable, the lower court correctly applied S.C. Code Ann. §48-39-180 in concluding that this statute does not extend subject matter jurisdiction to the circuit court for an action challenging the Department’s issuance of an administrative enforcement order. (R. p. 6).

2. The lower court correctly applied S.C. Code Ann. §1-23-380 (1976) in holding that it does not bestow jurisdiction of this matter upon the circuit court.

S.C. Code Ann. §1-23-380 states “[a] party who has *exhausted all administrative remedies* available within the agency *and* who is *aggrieved by a final decision in a contested case* is entitled to judicial review pursuant to this article and Article 1.” (emphasis added). Section 1-23-380 authorizes judicial review for a party who has exhausted all administrative remedies and who is aggrieved by a final decision in a contested case. Appellants have failed to meet the prerequisites clearly set forth in S.C. Code Ann §1-23-380 in order to be covered under this statute.¹

Despite this clear and unambiguous statutory language, Appellants inexplicably contend that the requirement of exhausting administrative remedies is optional. In support of this argument, Appellants provide an incomplete quote of S.C. Code Ann. §48-39-180 (Appellants’ Initial Brief, pg. 25). In particular, Appellants fail to include the following language from the statute: “... whose *permit application* has been finally

¹ Plaintiffs/Appellants asserted jurisdiction under S.C. Code Ann. § 1-23-380 for the first time at the Rule 12(b)(1) motion hearing; but not in their complaint.

denied, revoked, suspended or approved subject to conditions of the department, or any person adversely affected by the permit.” (emphasis added). These missing words in Appellants’ citation are precisely the reason why S.C. Code §48-39-180 does not apply in this action. This action challenges the Department’s issuance of Administrative Order 07M-012S, not a *permit application* that has been finally denied, revoked, suspended or approved.

Appellants erroneously rely on Stinney v. Sumter School Dist., 391 S.C. 547, 707 S.E.2d 397 (2011) in asserting exhaustion of administrative remedies is not required. Appellants attempt to argue they are similarly situated to the petitioners in Stinney. In footnote 1 of Stinney, the court states “[t]he doctrine of exhaustion of administrative remedies only applies when a litigant invokes the original jurisdiction of the circuit court to adjudicate a claim based upon a statutory violation for which the legislature has provided an administrative remedy.” Stinney v. Sumter School Dist., 391 S.C. 547 n. 1, 707 S.E.2d 397 n. 1, (2011). The footnote continues by further stating that the new suit brought by petitioners in Stinney “... was a tort claim, not a statutory violation for which the legislature has provided an administrative remedy.” Id. In contrast to Stinney, as previously mentioned, Appellants’ action in this case challenges the Department’s issuance of an administrative enforcement order; an agency action for which the legislature *has indeed* provided an administrative remedy. Thus, Appellants’ reliance on the court’s decision in Stinney is misplaced.

Appellants also rely on Ward v. State, 343 S.C. 14, 538 S.E.2d 245 (2000) and Skinner v. Westinghouse Electric Corp., 380 S.C. 91, 668 S.E.2d 795 (2008) in asserting the exhaustion requirement should not be applicable in this action. (Appellants’ Initial

Brief, pg 29). As discussed at length later in this brief, Appellants' reliance on Ward is flawed because Ward involved a narrow issue addressing whether the exhaustion of administrative remedies should be required when challenging the constitutionality of a statute. Ward v. State, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000). In Skinner, the issue centered on proper service of the notice of appeal on the Workers' Compensation Commission and the reversal of the lower court's dismissal for lack of subject matter jurisdiction. Skinner v. Westinghouse Elect. Corp., 380 S.C. 91, 668 S.E.2d 795 (2008). Skinner is distinguishable from the action at hand for two primary reasons. First, unlike Appellants' action, in Skinner the court notes that case was brought before the circuit court in its *appellate* capacity. Id. at 94, 668 S.E.2d at 796. Second, the court notes the appeal in Skinner falls under the previous appeal process which required an appeal of a Workers' Compensation Commission decision be submitted to the Court of Common Pleas. Id. at 93 n.1, 668 S.E.2d at 796 n.1 (2008) (see Pee Dee Regional Transp. v. S.C. Second Injury Fund, 375 S.C. 60, 61, 650 S.E.2d 464, 465 (2007)). Appellants' action was not brought to the lower court in its appellate capacity and does not involve the action being dismissed due to untimely service of its Notice of Appeal. Rather, Appellants chose to bring an original action in the circuit court in a *non-appellate* capacity challenging the Department's issuance of an administrative enforcement order. Accordingly, the lower court correctly concluded Appellants did not adhere to the procedures required under S.C. Code Ann. §1-23-380, as they have not requested a contested case hearing before the ALC. (R. p. 6).

3. The lower court correctly held S.C. Code Ann. §44-1-60 (1976) governs the procedural process required by the appellants in appealing decisions made by the Department.

Even if the circuit court had proper subject matter jurisdiction to entertain challenges to issued administrative enforcement orders (which Respondent denies), S.C. Code Ann. §48-39-180 requires the administrative enforcement order to be *finally* denied. In order for Appellants' to satisfy this prerequisite, they must adhere to the process set forth in S.C. Code Ann. §44-1-60 *before* they filed their Complaint in the circuit court (assuming *arguendo* the circuit court had subject matter jurisdiction). In failing to follow the procedures set forth in S.C. Code Ann. §44-1-60, Appellants have not exhausted their administrative remedies and the circuit court correctly ruled that, due in part to not meeting these requirements, that court lacked subject matter jurisdiction. (R. p. 6).

S.C. Code Ann. §44-1-60 puts forth that, “[a]ll department decisions involving the issuance, denial, renewal, suspension, or revocations of permits, licenses, *or other actions of the Department* which may give rise to a contested case *shall be made using the procedures set forth in this section.*” S.C. Code Ann. § 44-1-60(A) (emphasis added). Plainly, administrative enforcement orders qualify as “*other actions of the Department*” to be adjudicated before the ALC.

Exhaustion of administrative remedies requires the following: (a) a Department staff decision;² (b) a Department Board Decision;³ and (c) a contested case hearing

²S.C. Code Ann. § 44-1-60(C).

³S.C. Code Ann. § 44-1-60(D).

decision by the ALC.⁴ In order to exhaust their administrative remedies, Appellants must receive a Final Order from the ALC. No such Final ALC Order has ever been issued.⁵

Appellants reliance on Brown v. James, 389 S.C. 41, 697 S.E.2d 604 (Ct. App. 2010) in asserting they have exhausted their administrative remedies and that the administrative enforcement order was finally denied is misplaced. The underlying facts in Brown, coupled with the school board's failure to adhere to their procedural framework for reviewing decisions under the Employment and Dismissal Act renders the court's decision regarding exhaustion inapplicable to the action at hand.

In Brown, the court methodically examines the applicable statutes under the Employment and Dismissal Act. Specifically, S.C. Code Ann. §59-25-470 requires that "the Board must afford the adversely affected teachers a hearing based on the notice of dismissal [and] [a]fter the hearing is completed, the Board is required to either affirm or withdraw the notice and that action will translate to its final decision." Brown, at 53, 697 S.E.2d at 611. Such due process did not occur in Brown. In that case "the Board officially voted to terminate Brown's contract ... (unbeknownst to Brown) prior to affording her the opportunity for a hearing, and ... dismissed her appeal ... because she refused to submit to a deposition." Brown, at 50-51, 697 S.E.2d at 609. The Brown court found that "[t]he fact that an administrative hearing was not conducted below rests with the Board's failure to follow procedure as prescribed in the Employment and

⁴S.C. Code Ann. § 44-1-60(G).

⁵Nearly one year after receiving notice that the DHEC Board declined to hold a final review conference in this matter, the Appellants filed a request for a contested case before the ALC on May 11, 2011(Docket No. 11-ALJ-07-0270-CC). (R. p. 331). Respondents filed a Motion to Dismiss, because the Appellants' request for a contested case before the ALC was untimely. The ALC action has been stayed pending the outcome of this appeal.

Dismissal Act, and not in any failure of Brown to exhaust her administrative remedies.”
Id.

Appellants’ action is distinguishable from Brown in that the procedures under the Employment and Dismissal Act are different than those afforded under S.C. Code Ann. §44-1-60. To reinforce this distinction, the Brown court asserted that, “although the standards of the APA apply in this case, the application of the Employment and Dismissal Act primarily informs the analysis and renders its outcome.” Brown, at 50, 697 S.E.2d at 608. Specifically, the court in Brown noted that after the Board rendered their decision, “there was nothing left procedurally under the Employment and Dismissal Act for Brown to do except appeal to the court of common pleas pursuant to section 59-25-480.” Id., at 54, 697 S.E.2d at 611. In contrast to Brown, the Appellants in this case *did have* the opportunity to file a contested case hearing with the ALC appealing the Department’s decision to issue the administrative enforcement order. Unlike the school board in Brown, the Department has clearly followed its proscribed procedures. The Appellants’ decision to file this action in the wrong forum was not the Department’s fault, but rather a tactical choice by the Appellants.

Appellants’ reliance on Idaho Watersheds Project v. Hahn, 307 F.3d 815 (9th Cir. 2002) in support of their argument that exhaustion of administrative remedies should be excused is also misplaced for many reasons, not least of which is the obvious fact that the parties to that action were not governed by the South Carolina Administrative Procedures Act. In Idaho Watersheds Project, petitioners were challenging the issuance of grazing permits to cattle ranchers on federal lands. Idaho Watersheds Project v. Hahn, 307 F.3d 815, 820 (9th Cir. 2002). In analyzing whether exhaustion would be required, the court

concluded, “[i]f the regulations do not allow for the decision to be rendered inoperative pending administrative appeal, then exhaustion of administrative appeals is not required.” Id. at 825 (citing Darby v. Cisneros, 509 U.S. 137, 154, 113 S.Ct. 2539, 125 L.E.2d 113 (1993)). “[T]he administrative procedure would be as follows: first the BLM would grant a grazing permit; next the aggrieved party would file an appeal and a contemporaneous application for a stay; a hearing would be held and if the stay were granted grazing would still continue under the terms and conditions of the permit that was being appealed until the appeal was finally decided.” Id. at 826. The granting of the stay “does not render the permit decision inoperative but actually implements an unreviewed decision to renew grazing authorizations and at the same time allows grazing practices that are known to harm the environment.” Id. at 827. The Department’s issuance of Administrative Order 07M-012S has no *immediate* legal effects on the Appellants, because those legal effects are actually stayed while the administrative enforcement order is being challenged. The Department has chosen not to enforce the terms of the administrative enforcement order pending Appellants exhaustion of their judicial and administrative remedies.

Due to Appellants failure to request a contested case hearing, they have not exhausted their administrative remedies and there is no appealable final administrative decision for this court to judicially review. Oakwood Landfill, Inc v. S.C. Dept. of Health and Envntl. Control, 381 S.C. 120, 132, 671 S.E.2d. 646, 658 (Ct. App. 2009) (until the ALC ruled on the DHEC’s approval of landfill capacity there was no final agency decision on the merits in the case and Appellants had not exhausted all of their administrative remedies).

Regardless of how Appellants may characterize their circuit court cause of action, it is indisputable they are contesting the Department's issuance of an administrative enforcement order. (R. p. 44). This issuance by the Department is an action for which the legislature has provided an administrative remedy. In order to contest this administrative enforcement order, Appellants must follow the procedural framework set forth in the statutes and avail themselves of the administrative remedies clearly established by the legislature.

Appellants argue the ALC does not have exclusive jurisdiction to hear all Department permitting decisions under S.C. Code Ann. §44-1-60 because the statute is permissive rather than mandatory. Appellants' argument is flawed. S.C. Code Ann. §44-1-60, in referring to the actions an aggrieved party may take in securing a final decision, states that "[a]n applicant, permittee, licensee, or affected person *may* file a request with an Administrative Law Court for a contested case hearing within thirty calendar days." S.C. Code Ann. §44-1-60(G) (emphasis added). This statute is permissive only in that it obviously does not *require* the applicant, permittee, licensee, or affected person to take any action after the DHEC Board's decision. But if such action *is* taken, it must be before the Administrative Law Court, not the circuit court.

In summary, because Appellants failed to comply with the provisions of S.C. Code Ann. § 44-1-60, the circuit court properly held it was without jurisdiction to render the relief Appellants requested.

B. Even if S.C. Code Ann. §48-39-180 is not the controlling authority due to the enactment of Act No. 387, the lower court still lacks proper subject matter jurisdiction.

The South Carolina Legislature enacted Act No. 387, 2006 S.C. Acts & Joint Resolutions, which “substantially reformed the South Carolina Administrative Procedures Act in order ‘to provide a uniform procedure for contested cases and appeals from administrative agencies.’” Chem-Nuclear Systems, LLC v. South Carolina Board of Health and Environmental Control, 374 S.C. 201, 204, 648 S.E.2d 601, 602 (2007) (citing Act No. 387, §53).

Included in the list of statutes the General Assembly intended to amend for the purpose of uniformity was S.C. Code Ann. § 48-39-180 “so as to provide for appeal to the administrative law court and then the court of appeals.” Act No. 387, Preamble, 2006.

Despite the express purpose of Act 387 stated in the Preamble (particularly as applied to S.C. Code Ann. § 48-39-180), the General Assembly failed to delete the language in S.C. Code Ann. § 48-39-180 that purports to provide for judicial review in the circuit courts. Based on the appellate court’s reasoning in S.C. Coastal Conservation League v. S.C. DHEC below, the failure to delete this language was mere oversight by the General Assembly.

“If ... the statutes are incapable of any reasonable reconciliation, the last statute passed will prevail, so as to impliedly repeal the earlier statute to the extent of the repugnancy.” Chris J. Yahnis Coastal, Inc. v. Stroh Brewery Co., 295 S.C. 243, 247, 368 S.E.2d 64, 66 (1988). “[T]he Last Legislative Expression Rule requires that in instances where it is not possible to harmonize two sections of a statute, the later legislation

supersedes the earlier enactment.” Williams v. Town of Hilton Head Island, 311 S.C. 417, 421, 429 S.E.2d 802, 804 (1993) (citing South Carolina Electric & Gas Co. v. South Carolina Public Service Authority, 215 S.C. 193, 54 S.E.2d 777 (1949), Jolly v. Atlantic Greyhound Corp., 207 S.C. 1, 35 S.E.2d 42 (1945). Later legislation will supersede earlier laws dealing with the identical subject matter. Whiteside v. Cherokee County Sch. Dist. No. One., 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993).

“By enacting this legislation [Act 387], the General Assembly remodeled the appellate process for administrative agencies in the state and amended several statutes addressing the direction and flow of appeals.” S.C. Coastal Conservation League v. S.C. DHEC, 380 S.C. 349, 363, 669 S.E.2d 899, 906 (Ct. App. 2008), *rev'd on other grounds*, 390 S.C. 418, 702 S.E.2d 246 (Sup. Ct. 2010).

“Under the new appellate procedure, if a party wishes to challenge the issuance of a permit by the South Carolina Department of Health and Environmental Control, the aggrieved party first must comply with the relief process established by the Act and codified in Section 44-1-60 of the South Carolina Code.” Id. at 363-64, 669 S.E.2d at 906.

Under the former process for appeals of OCRM permit decisions, as set forth in former Regulation 30-6 (Supp. 2005), the first level of review of a staff permit decision was a contested case at the Administrative Law Court, followed by quasi-judicial review at the agencies Coastal Zone Management Appellate Panel, followed by judicial review at the circuit court, with a right of appeal to the Court of Appeals. Act 387 streamlined the appeals process and created a uniform process for appeals of OCRM permitting decisions. In order to challenge an OCRM staff decision pursuant to Act 387, a person

must first file a request for final review with the Board of Health and Environmental Control; the next step is an administrative appeal in the form of a contested case at the ALC to review the final agency decision of DHEC with a right of judicial review directly to the Court of Appeals. The Supreme Court has long held that a circuit court's review under S.C. Code Ann. § 48-39-180 is limited to a "substantial evidence" review; not a "de novo" review. Carter v. South Carolina Coastal Council, 281 S.C. 201, 203, 314 S.E.2d 327, 328 (1984). This is the very same standard of review exercised by the court of appeals when conducting judicial review of a final decision in a contested case under § 1-23-610. Thus, it is highly improbable that the General Assembly, in streamlining the appeals process and providing a uniform process that eliminated the circuit court stage of review as set forth in former Regulation 30-6 (Supp. 2005), would have enacted Act 387 to allow a party to instead seek judicial review in the circuit courts. To enact legislation that provides for a "substantial evidence" review of the DHEC Board decision at the circuit court and then again at the Court of Appeals makes no sense. In construing a statute, the Supreme Court recently held they "will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature." Beaufort County v. South Carolina State Election Commission, Op. No. 23066 (S.C. Sup. Ct. filed November 22, 2011) (Shearouse Adv. Sh. No. 42 at 25) (citing Lancaster County Bar Ass'n v. S.C. Comm'n on Indigent Defense, 380 S.C. 219, 670 S.E.2d 371 (2008)).

C. Appellants' claim that the Department's conduct was *ultra vires* was not adequately preserved to be argued on appeal.

Appellants argue the Department's action in issuance of the administrative enforcement order was *ultra vires* conduct; an argument Respondent's deny (see 23 S.C.

Code Ann. Regs. 30-8(F), “Pursuant to Section 48-39-170, the Department may issue administrative orders requiring persons to comply with any permit.”). Even if the Court finds merit in the Appellants’ *ultra vires* argument, the Appellants have failed to adequately raise and preserve this argument for appellate review.

“[A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration.” Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779 (2004). See Cudd v. John Hancock Mut. Life Ins. Co., 279 S.C. 623, 629, 310 S.E.2d 830, 834 (Ct. App. 1983) (citing Smith v. Smith, 264 S.C. 624, 216 S.E.2d 541 (1975) (“An issue not raised in the lower court cannot be presented for the first time on appeal; hence it may not be properly before us for decision”)); Tri-County Ice and Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 243, 399 S.E.2d 779, 783 (1990) (citing Hoffman v. Powell, 298 S.C. 338 n. 2, 380 S.E.2d 821 n.2, (1989) (“As the claim was not raised below, it will not be considered for the first time on appeal”). “It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and rule upon by the trial court.” Lucas v. Rawl Family Ltd. Partnership, 359 S.C. 505, 510-11, 598 S.E.2d 712, 715 (2004) (citing Holy Loch Distributors, Inc. v. Hitchcock, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000), Smith v. Phillips, 318 S.C. 453, 455, 458 S.E.2d 427.429 (1995).

“There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with

sufficient specificity.” South Carolina Dept. of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-302, 641 S.E.2d 903, 907 (2007) (citing Jean Hoefler Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002)). Appellants have failed to meet the fundamental requirements of preserving their *ultra vires* argument for appellate review. *Ultra vires* was never raised by the Appellants in their Complaint or in argument in the lower court and appears for the first time in their Initial Brief to this court. Due to the untimely and unspecified submittal of Appellants’ *ultra vires* claim, this court should not entertain such unpreserved claims.

1. Appellants asserted *ultra vires* exception to the requirement of exhausting administrative remedies is not applicable to this action.

Appellants assert under Ex parte Allstate, 248 S.C. 550, 151 S.E.2d 849 (1966) the exhaustion requirement should be excused because Appellants believe the Department’s issuance of the administrative enforcement order was “without legal authority” (Appellants’ Initial Brief, pg. 17) and that the facts regarding the Department’s issuance of the administrative enforcement order are undisputed. (Id.). As stated above, it is Respondent’s contention that the issuance of the administrative enforcement order was clearly within the Department’s authority. Though this court is reviewing a Rule 12(b)(1) motion to dismiss and such issues addressed with the lower court were purely procedural, Appellants are incorrect in asserting there are no facts in dispute.

Further, Appellants reliance on Ex parte Allstate is flawed in that the Allstate court noted the action brought by the insurance companies were “clearly original actions and not appeals.” Ex parte Allstate Ins. Co., 248 S.C. 550, 562, 151 S.E.2d 849, 852 (1966). In concluding the Richland County Court had proper jurisdiction, the court in Allstate concludes the petitioner “did not seek review of any administrative decision or

order, but were brought to challenge and restrain the investigation alleged to have been initiated without statutory authority.” *Id.* In contrast to the Allstate action, the Appellants’ action *is* an appeal of an administrative enforcement order issued by the Department. It is clearly within the Department’s authority to issue such orders⁶; thus the lower court correctly concluded the action was not within their jurisdiction.

D. Whether the lower court correctly required the Appellants to exhaust all of their administrative remedies since review by the Administrative Law Court of the Department’s actions would not have been a futile effort and if the Appellants prevailed would have provided an adequate remedy.

The Appellants have only satisfied one of the two requirements set forth in S.C. Code Ann. § 1-23-380. Though Appellants have received a final agency decision, S.C. Code Ann. § 1-23-380 requires Appellants to be “aggrieved by a final decision in a contested case.” Because Appellants have neither sought nor received a final decision from the ALC, which is the correct forum for adjudicating a contested case, this court lacks subject matter jurisdiction to entertain such an appeal.

“After an aggrieved party has exhausted all administrative remedies, the party is entitled to judicial review by the South Carolina Court of Appeals.” Terry v. South Carolina Dept. of Health and Environmental Control, 377 S.C. 569, 574, 660 S.E.2d 291, 294 (2008). “When the statute governing review of agency action addresses exhaustion, the statute—rather than judicially developed principles—controls.” Lowell and Bates, at 87 (citing Ward v. State, 538 S.E.2d at 247 (2000)).

⁶S.C. Code Ann. §48-39-170(C). “Any person who is determined to be in violation of any provision of this chapter by the department shall be liable for, and may be assessed by the department for, a civil penalty of not less than one hundred dollars nor more than one thousand dollars per day of violation. Whenever the department determines that any person is in violation of any permit, regulation, standard, or requirement under this chapter, the department may issue an order requiring such person to comply with such permit, regulation, standard, or requirement, including an order requiring restoration when deemed environmentally appropriate by the department; in addition, the department may bring a civil enforcement action under this section as well as seeking an appropriate injunctive relief under Section 48-39-160.”

Appellants reliance on Ward v. State 343 S.C. 14, 538 S.E.2d 245 (2000) in asserting the applicability of the futility exception is flawed in that this action and Ward are clearly distinguishable. Ward involved a very narrow issue in determining whether the exhaustion of administrative remedies were required when the party “is challenging the constitutionality of a statute.” Ward v. State, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000). The petitioners in Ward brought a “declaratory judgment action against the State alleging Act No. 189 is unconstitutional.” Id. at 16. The Court reasoned that because Administrative Law Judges (“ALJ”) come under the Executive Branch, compelling the exhaustion requirement in that case would be improper because “requiring the agency or ALJ to rule on the constitutionality of Act 189 would violate the separation of powers doctrine.” Id. at 19-20.

Appellants ineffectively try to further their futility argument by asserting “DHEC-OCRM’s initial decision makers had reached a hard and fast position to revoke Appellants’ permit, prior to the Board’s decision.” (Appellants’ Initial Brief, pg. 35). Even assuming Appellants’ contentions are correct, such assertions provide no basis for their conclusion that an appeal of the *Board’s* decision to the ALC would be a futile effort.

Appellants’ cite Law v. S.C. Department of Corrections, 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006)⁷ in further support of their futility argument, asserting “[f]utility, however, must be demonstrated by a showing comparable to the administrative agency taking ‘a hard and fast position that makes an adverse ruling a certainty.’” (Appellants’

⁷Law v. South Carolina Dept. of Corrections, 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006) (citing Thetford Props. IV Ltd. P’ship v. United States Dep’t of Hous. & Urban Dev. 907 F.2d 445, 450 (4th Cir. 1990).

Initial Brief, pg. 36.) Appellants' reliance on such an assertion is based on nothing more than wishful thinking.

Moreover, Appellants' belief that the Department took a hard and fast position, even if correct, has no bearing on their argument that adhering to the proper judicial procedures would be a futile effort. Appellant's assertion that filing a contested case before the ALC is a futile act is frankly an insult to that court. Such an assertion implies the ALC is a biased forum that will simply "rubber stamp" the Department's decision. To put it bluntly, arguing the futility of following the statutorily-prescribed appellate process is without any merit whatsoever.

Appellants' challenge to the Department's issuance of the administrative enforcement order is similar to the enforcement order imposed on the petitioners in Hill v. South Carolina Dept. of Health and Environmental Control, 389 S.C. 1, 698 S.E.2d 612 (2010), (i.e. civil penalty and relocation of the bulkhead). The court in Hill concluded that "review of the *agency's* enforcement order and its imposition of a civil fine is an administrative matter that falls squarely within the ambit of a contested case as defined in the APA." Hill v. South Carolina Dept. of Health and Environmental Control, 389 S.C. 1, 17, 698 S.E.2d 612, 621 (2010).

Accordingly, the proper legal procedure for challenging the Department's issuance of an administrative enforcement order is not a futile effort. The ALC, sitting as a neutral decision maker will provide the Appellants the proper forum to examine the

facts surrounding the issuance of the administrative enforcement order and will address the remedy sought in this action.⁸

E. Appellants' equitable tolling argument was not adequately preserved to be argued on appeal.

As discussed earlier in this brief, Appellants must adhere to certain requirements in order to adequately preserve issues at trial for review on appeal. "The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." South Carolina Dept. of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-302, 641 S.E.2d 903, 907 (2007) (citing Jean Hoefler Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002)).

Appellants bring their equitable tolling argument for the first time on appeal. Equitable tolling was neither raised to nor ruled upon by the trial court and consequently was not raised by the appellant in the lower court in a timely manner or with sufficient specificity. Their equitable tolling argument is not adequately preserved for appeal since the appellants have not adhered to the requisites for preservation and are raising the argument of equitable tolling for the first time on appeal.

1. Even if the Appellants' adequately preserved their equitable tolling argument, it is irrelevant to this appeal.

Appellants' equitable tolling argument (Appellants Initial Brief pgs. 37-41) is not relevant to this appeal. Respondent's argument before the circuit court as well as before

⁸ Appellant's arguments based on the issuance of the Administrative Order by the Department being outside of the Department's statutory and regulatory authority (Appellant's Initial Brief pg. 34-35) has been addressed throughout this Brief. Appellant's reference to Triska v. Dept. of Health & Environmental Control, 292 S.C. 190, 194, 335 S.E.2d 531, 533 (1987), South Carolina Dept. of Consumer Affairs v. Foreclosure Specialists, Inc. 390 S.C. 182, 700 S.E.2d 468 (Ct. App. 2010), and Med. Soc'y of S.C. v. Med. Univ. of S.C., 334 S.C. 270, 275, 513 S.E.2d 352, 355 (1999), is misplaced. The issuance of administrative orders, is clearly within the Department's authority when such a violation of the Coastal Tidelands and Wetlands Act has occurred.

this court is *not* that Appellants failed to bring this action before the court in a *timely manner*. Rather, Respondent's argument is that Appellant's filing in circuit court was the incorrect forum to adjudicate such an action.

“‘Tolling’ refers to suspending or stopping the running of a statute of limitation; it is analogous to a clock stopping, then restarting.” Hooper v. Ebenezer Sr. Services and Rehabilitation Center, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) (quoting 51 Am. Jur. 2d *Limitation of Actions* § 169 (2000)). “Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period ‘to ensure fundamental practicality and fairness.’” Id. (quoting Rodriguez v. Superior Court, 176 Cal.App. 4th 1461, 1471, 98 Cal. Rptr. 3d 728, 736 (2009)).

Respondents agree with Appellants' assertion that “this Court need not reach the issue of equitable tolling because Appellants' timely asserted their rights.” (Appellants Initial Brief, pg. 37). As mentioned above, Respondents' argument before the circuit court and before this court centers on Appellants' filing their action in the wrong forum, not that Appellants' failed to meet the statutorily-required time frame to file such action. The doctrine of equitable tolling involves the extension or suspension of the statutory time limitation based on equitable principles. With all due respect to opposing counsel, it makes no sense to assert an equitable doctrine to toll the statutory time limit to file an action when Respondent concedes this action was timely filed, albeit in the wrong forum. Accordingly, since the issue of equitable tolling is not relevant to this action, this court need not entertain such an argument.

CONCLUSION

Based on the foregoing arguments, the Department respectfully asks that this Court affirm the circuit court's Dismissal Order.

Respectfully Submitted,

April 20, 2012



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Presiding Circuit Court Judge

Case No. 2010-CP-26-6091

Tommy W. Berry, Sr. and Jo S. Berry,Appellants,

v.

South Carolina Department of Health and
Environmental Control, Office of Ocean and
Coastal Resource Management, Respondents.

PROOF OF SERVICE

I certify that I, on behalf of Respondent SCDHEC, have served the Initial Brief of Respondent SCDHEC and Designation of Matter to be Included in Record of Appeal on all counsel of record by depositing a copy of it in the United States Mail, postage prepaid, addressed as follows:

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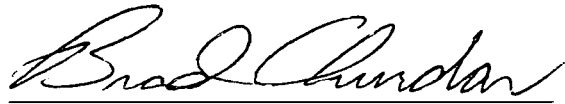
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South Carolina Department of Health and
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CERTIFICATE OF COUNSEL

The undersigned certifies that this *Final Brief of Respondent SCDHEC* complies
with Rule 211(b), SCACR.



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SC Court of Appeals

April 20, 2012



Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

April 20, 2012

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Re: *Tommy W. Berry and Jo S. Berry v. South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management*
Case Tracking #: 2011192812
C/A No.: 2010-CP-26-6091

Dear Ms. Gee:

Enclosed for filing, please find an original (unbound) and fifteen copies of the *Final Brief of Respondent SCDHEC*, including the *Certificate of Counsel*. Additionally, a *Proof of Service* for mailing this brief to fellow counsel is also enclosed. Please return a filed copy of each in the enclosed postage-paid envelope.

By copy of this letter, I am serving Mr. Bellamy, attorney for the Appellant, with a copy.

Very truly yours,

Bradley D. Churdar
Chief Counsel

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SC COURT OF APPEALS

BDC/mdc

cc: Mr. Howell V. Bellamy, III, Esquire