THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Presiding 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.*

FINAL BRIEF OF APPELLANTS

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February 28, 2012

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I. STATEMENT OF THE ISSUES ON APPEAL

A. Did the lower court err in granting Respondent's Motion to Dismiss, pursuant to Rule 12(b)(1) SCRCP, because it lacks jurisdiction to review the Department's *ultra vires* conduct concerning its improper issuance and/or unlawful revocation of the Appellants' Critical Area Permit (OCRM–07–509) based on the following:

1. Whether the lower court erred in misinterpreting the clear and unambiguous language of S.C. Code Ann. § 48-39-180 (2008) to conclude the statute does not govern the review of Appellants' revoked permit and civil claims.

2. Whether the lower court erred in concluding the Appellants are not members of the class of persons intended to be protected or for whose benefit S.C. Code Ann. § 48-39-180 (2008) was enacted.

3. Whether the lower court erred in concluding S.C. Code Ann. § 48-39-180 (2008) does not create a private right of action or legal duty of care, and, specifically, that the Appellants are not entitled to invoke the statute's protections and remedies.

4. Whether the lower court erred in concluding the Appellants' revoked permit had not been finally denied after the Board affirmed the Department's revocation of their permit under S.C. Code Ann. § 44-1-60(F) (2002).

5. Whether the lower court erred in dismissing Appellants' Complaint for lack of jurisdiction, pursuant to Rule 12(b)(1), SCRCP, based on lack of exhaustion of administrative remedies when such doctrine of exhaustion is not jurisdictional.

B. Did the lower court err in ruling the Administrative Law Court has exclusive jurisdiction under S.C. Code Ann. § 44-1-60 (2002) and Chapter 23, Title 1 to hear all Department decisions involving the issuance, denial, suspension, or revocation of critical area permits under the Coastal Zone Management Act to the jurisdictional exclusion of the circuit court?

C. Even if the Appellants failed to exhaust all of their administrative remedies, which is expressly denied, did the lower court err in ruling exhaustion before the Administrative Law Court was mandatory in this case since review of the agency's final decision would have been a futile effort, and not provided an adequate remedy?

D. Even if the Appellants had timely asserted their rights mistakenly in the wrong forum, which is expressly denied, did the lower court err in failing to consider Appellants' argument that the doctrine of equitable tolling applies to the particular and unique facts of this case?

II. STATEMENT OF THE CASE

This case originated with a Notice of Intent to Revoke letter issued on August 2, 2007, by the South Carolina Department of Health and Environmental Control (hereinafter "DHEC"), Ocean Coastal Resource Management (hereinafter "OCRM"), to the Appellants Berry. **(R. pp. 283–84)** Respondent's Notice of Intent to Revoke letter alleged the Appellants were in violation of the South Carolina Coastal Zone Management Act ("CZMA") for constructing their new replacement bulkhead out of compliance with their critical area permit (OCRM–07–509) issued by the agency on March 7, 2007. Respondent's Notice of Intent to Revoke letter further advised the Appellants' permit had been suspended pending the resolution of the agency's revocation action. **(R. pp. 283–84)**

On April 20, 2010, Respondent DHEC–OCRM issued an Order of Revocation letter to the Appellants informing them their permit was suspended because they had not constructed their replacement bulkhead according to the professional drawing attached to their permit. **(R. p. 12)**

On May 11, 2010, Appellants appealed Respondent DHEC–OCRM's Enforcement Order of Revocation (07M–012S) by requesting a final review conference with South Carolina Board of Health and Environmental Control (hereinafter the "Board"), and further asserted in their appeal that Respondent's findings of fact and conclusions of law were incorrect and without merit. **(R. pp. 285–93)**

On June 14, 2010, the Appellants were notified by letter that the Board declined to conduct a final review conference on June 10, 2010, regarding the revocation of their permit, and, thereby, affirmed the Respondent's Enforcement Order of Revocation as the "final agency decision" pursuant to S.C. Code Ann. § 44-1-60(F) (2002). **(R. pp. 294–95)**

Next, Appellants filed a Complaint on July 8, 2010 in circuit court instead of requesting a contested case hearing before the Administrative Law Judge (hereinafter "ALJ") under Chapter 23 of Title 1 of the Code of Laws of South Carolina (1976, as amended). Specifically, the Appellants contend their procedural and substantive due process rights have been violated concerning the Respondent's improper issuance and/or unlawful revocation of their critical area permit. **(R. pp. 44–60)**

In response to Appellants' civil action, Respondent DHEC–OCRM filed a Motion to Dismiss pursuant to Rule 12(b)(1), SCRCP, based on the circuit court's lack of subject matter jurisdiction. **(R. pp. 296–98)**

On March 7, 2011, the lower court heard arguments from counsel regarding Respondent DHEC–OCRM's Motion to Dismiss, and then took the matter under advisement. The lower court requested both parties submit proposed orders. **(R. p. 245, lines 10–22)**

On March 28, 2011, the lower court granted the Respondent's Motion to Dismiss for lack of subject matter jurisdiction on the ground that Appellants failed to exhaust all administrative remedies. **(R. pp. 4–7)**

On April 12, 2011, Appellants filed a Motion to Reconsider, pursuant to Rules 52 and 59, SCRCP, to vacate the lower court's Order and requested a hearing on the matter. **(R. pp. 299–318)** The lower court denied Appellants' Motion to Reconsider April 19, 2011, and declined to hold a hearing or receive additional argument on the matter. **(R. p. 8)**

On May 17, 2011, Appellants filed a Notice of Appeal with the South Carolina Court of Appeals in accordance with Rule 203(b)(1), SCACR. **(R. pp. 319–22)**

On May 17, 2011, Appellants filed a Notice of Request for a Contested Case Hearing before the Administrative Law Court (hereinafter "ALC") seeking to challenge Respondent DHEC–OCRM's Enforcement Order of Revocation revoking the Appellants' Critical Area Permit (OCRM–07–509). **(R. pp. 331–35)** In response, Respondent DHEC–OCRM served a Motion to Dismiss June 22, 2011 on the Appellants on the grounds their request for a contested case hearing before the ALC

was untimely and therefore the Court lacks subject matter jurisdiction under Rule 12(b)(1), SCRCP. **(R. pp. 296–98)**

Next, on July 26, 2011, the Appellants filed a Memorandum of Law in Opposition to the Respondent's Motion to Dismiss with the Court asserting that their request for a contested case hearing before the ALC is equitable tolled under South Carolina Law. Accordingly, if the ALC dismisses Appellants' request for a contested case hearing under Rule 12(b)(1), SCRCP, then there will be nothing to prevent the Appellants from suffering a gross wrong at the hands of Respondent DHEC–OCRM's *ultra vires* action concerning its improper issuance and/or unlawful revocation of their critical area permit.

III. STANDARD OF REVIEW

Pursuant to Rule 12(b)(1), SCRCP, the movant challenges the power of the court over the subject matter. "The question of subject matter jurisdiction is a question of law for the court." Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009) (citing Bargesser v. Coleman Co., 230 S.C. 562, 96 S.E.2d 825 (1957)). The appellate courts are free to decide questions of law with no deference to the trial court. Catawba Indian Tribe of S.C. v. State of South Carolina, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

IV. STATEMENT OF THE FACTS

Appellants Berry own Lot 17, Block "M-1" of the Cherry Grove Beach Development located at 317 49th Avenue North, North Myrtle Beach, Horry County, South Carolina (TMS No. 145-02-24-019).[1] The parcel is rectangular in shape, is bounded on the west by a man-made canal known as "M" Canal, and is bounded on the north by Williams Creek. **(R. pp. 260–62)**

On February 2, 2007, Respondent DHEC–OCRM received a permit application from Dr. H. Wayne Beam, the former Deputy Commissioner of DHEC–OCRM, on behalf of Appellants, for the alteration of the critical area pursuant to the Coastal Zone Management Act (Act 123) of the 1977 South Carolina General Assembly. The Appellants' critical area permit application, in relevant part, provided:

APPLICANT:	T. W. Berry c/o Dr. H. Wayne Beam P. O. Box 11863 Columbia, SC 29211-1863
LOCATION:	On and adjacent to a man-made canal off of Williams Creek at 317 49th Avenue North, North Myrtle Beach, Horry County, South Carolina.
WORK:	The work, as proposed and shown on the attached plans, consists of constructing a replacement bulkhead. A 155' long wooden bulkhead will be removed and replaced with a vinyl bulkhead to be built in the same location. The existing dock will be removed and reattached upon

[1] A survey of said property, prepared by C. B. Berry, R. L. S., dated May 24, 1974, and recorded on June 24, 1974 in Plat Book 57 at Page 74 in the Office of the Register of Deeds, Horry County, South Carolina.

> completion of construction. The purpose of the proposed activity is for erosion control.

(R. pp. 260–62)

Appellants' critical area permit application included the following attached professional drawings: (1) a plat of their home showing the affected property (and identifying the location for installation of the vinyl bulkhead), and an as-built survey for the installation of the new vinyl bulkhead. **(R. pp. 329–30)** Additionally, the Appellants' professional drawings were acknowledged by the agency's initial decision makers to be complete, and, also, correctly stamped, signed, and sealed by their professional engineer David R. Simms, P.E. **(R. p. 263)** The agency's initial decision makers never notified Appellants their professional drawings were inadequate, incorrect, or needed additional work. Further, the agency's initial decision makers never revoked the Appellants' critical area permit on the ground that fraudulent information had been submitted by the Appellants as prescribed by S.C. Code Ann. § 48-39-50(H) (2008 and Supp. 2010).

On March 7, 2007, Respondent DHEC–OCRM issued a Critical Area Permit (OCRM–07–509) to the Appellants for the removal and replacement of a one hundred fifty-five foot (155') wooden bulkhead with a new vinyl bulkhead. Specifically, the Appellants were required to install the new bulkhead along their northern property line extending twenty feet (20') channelward from the edge on the north-facing portion of their home. The permit required Appellants to install new bulkhead in the

same location as the previous one, concurrently with removal of the previous bulkhead. **(R. pp. 267–72)**

On June 22, 2007, Respondent DHEC–OCRM authorized Appellants to begin work on the removal of their wooden bulkhead to be replaced with a vinyl bulkhead. **(R. p. 106; R. p. 274)**

Work began on the new bulkhead on or about July 13, 2007 after the City of North Myrtle Beach issued Building Permit #BLD 2007–01191 to Appellants. **(R. pp. 275–76)** Sean M. Briggs ("Briggs"), the Enforcement and Compliance Project Manager of DHEC–OCRM inspected Appellants' property on July 19, 2007, and observed that the new bulkhead was being built approximately twenty feet (20') channelward of the alleged existing bulkhead along Appellants' northern property line, and further observed fill dirt behind the newly constructed bulkhead. **(R. pp. 277–78)** Unfortunately, Briggs determined these conditions were violations of Appellants' permit. **(R. pp. 277–78)** Contrary to these alleged permit violations, Appellants' professional drawings, together with a survey prepared by Pyramid Engineering & Surveying, Inc. and dated September 20, 2006, evidenced that the new bulkhead had been correctly constructed along the northern property line, at a distance of twenty feet (20') landward to the edge of the north-facing portion of their home. **(R. pp. 112–13; R. p. 150; R. p. 324; R. pp. 329–30)**

On July 25, 2007, Respondent DHEC–OCRM issued a Notice of Violation and Admission Letter by certified mail to the Appellants for the alleged unauthorized

activity observed by Briggs on July 19, 2007. **(R. pp. 279–82)** Respondent's Admission Letter required a written response from Appellants by August 14, 2007. **(R. pp. 280–82)**

On August 2, 2007, Respondent mailed a Notice of Intent to Revoke letter to Appellants alleging non-compliance with their permit (OCRM–07–509). **(R. pp. 283–84)**

On August 13, 2007, Respondent received a written response from the Appellants' attorney, Howell V. Bellamy, Jr. ("Bellamy"). **(R. pp. 17–18, ¶¶ 11–16)** This communication served as Appellants' response to DHEC–OCRM's Admission Letter mailed to them on July 25, 2007. **(R. p. 17, ¶ 11)** The letter contained a chronology of events from the Appellants' point of view. **(R. p. 17, ¶ 11)** Appellants indicated, to the best of their knowledge and with the assistance of surveys in their possession, they had removed and replaced the old bulkhead with a new vinyl bulkhead as required by the approved professional drawings attached to their critical area permit. **(R. pp. 47–48, ¶¶ 15–16)**

On February 25, 2009, an enforcement conference was held at the Myrtle Beach office of the Respondent DHEC–OCRM. **(R. pp. 17–18, ¶ 14)** During the meeting, Briggs argued the Appellants were only authorized to replace the alleged bulkhead located underneath the length of their home. **(R. p. 15, ¶ 3; R. p. 65, ¶ 3)** However, no permits, surveys, plats, or other documents were produced by Briggs that authorized the removal and replacement of the alleged bulkhead located underneath

the length of the Appellants' home to them nor their attorney Bellamy at the meeting. **(R. p. 48, ¶ 16; p. 51, ¶ 21)** In response, Appellants pointed out the new bulkhead had been constructed according to the approved professional drawings attached to the permit by DHEC–OCRM. **(R. pp. 17–18, ¶ 14)** Further, the Appellants explained that the previous bulkhead had existed at the same location as the new bulkhead. Finally, Bellamy argued to Briggs that the Appellants' neighbors could attest to the fact that the previous bulkhead had existed at the same location where the new vinyl bulkhead is approximately situated on the affected property. **(R. p. 18, ¶¶ 15–16; R. pp. 48–49, ¶¶ 16–17)**

On April 7, 2009, Briggs received from Bellamy four (4) letters from the Appellants' neighbors providing they, "[are] familiar with the [site]. **(R. p. 18, ¶ 15)** Prior to March 7, 2007, there was evidence of a previous bulkhead on the northwestern property line and on the property line facing Williams Creek." **(R. p. 18, ¶ 15)** Nonetheless, Briggs assigned no weight to the four (4) letters even though they clearly documented the existence of a previous bulkhead where the new bulkhead is currently placed. **(R. p. 18, ¶ 16; R. pp. 48–49, ¶ 17)**

On May 12, 2009, Appellants requested information and/or documentation regarding their critical area permit and affected property in the custody and control of Respondent DHEC–OCRM pursuant to S.C. Code Ann. §§ 30-4-10, *et seq.* (2007 and Supp. 2010), the Freedom of Information Act ("FOIA"). The information and

documentation requested from the Respondent, included, but was not limited to, the following:

a. The designation of the critical area line on and adjacent to Williams Creek and the Appellants' property established pursuant to S.C. Code Ann. § 48-39-210(B) (2008);

b. All delineations and/or certifications of the critical area line in relation to the proposed replacement of the existing wooden bulkhead on the Appellants' property prepared by professional surveyor on registered drawings for plan review and side view with affixed stamp and date in accordance with S.C. Code Ann. § 48-39-210(B) (2008);

c. All delineations and/or certifications of the critical area line in relation to the proposed replacement of the existing wooden bulkhead on Appellants' property prepared by OCRM on registered drawings for plan review and side view with affixed stamp and date in accordance with S.C. Code Ann. § 48-39-210(B) (2008);

d. All notices and correspondence from DHEC–OCRM to Appellants regarding Permit number (OCRM–07–509) to replace existing bulkhead;

e. Any and all documents and/or information, including, but not limited to, permit application, permit approval, affidavit of ownership or control, newspaper public notice, photographs, notices, correspondence, location map, registered drawings for plan view and side view (showing the critical line in relation to the proposed replacement of the existing bulkhead, and, also, adjacent to existing structures) certified plats or surveys of past improvements, complaints from adjoining property owners, and a site map prepared or submitted to DHEC–OCRM under Permit (No. 55533) dated September 25, 2006; and

f. Any and all documents and/or information, including, but not limited to, permit application, permit approval, affidavit of ownership or control, newspaper public notice, photographs, notices, correspondence, location map, registered drawings for

> plan view and side view (showing the critical line in relation to the proposed replacement of the existing bulkhead, and, also, adjacent existing structures), certified plats or surveys of past improvements, complaints from adjoining property owners, and a site map submitted to or in possession of DHEC–OCRM pertaining to Appellants' Permit numbered (OCRM–07–509) to replace existing bulkhead.

(R. pp. 49–51, ¶ 18)

On May 26, 2009, Respondent DHEC–OCRM answered Appellants' FOIA Request, but failed to respond with information and/or documents requested under Paragraphs a, b, and c. **(R. p. 51, ¶ 19)** Further, the Respondent only furnished portions of the information and/or documents requested under Paragraphs d, e, and f. **(R. p. 51, ¶ 19)**

On June 1, 2009, Appellants filed Civil Action No. 2009-CP-26-5436, asserting Respondent failed to comply with FOIA request pursuant to S.C. Code Ann. § 30-4-30(C) (1976). **(R. p. 51, ¶ 21)** Specifically, no documentation was produced establishing the location of the critical area line, or that the previous bulkhead was located underneath Appellants' home by either survey, plat, or other documentation. **(R. p. 51, ¶ 21)**

On April 27, 2010, Respondent DHEC–OCRM issued an Enforcement Order (07M–012S) of Revocation ("Enforcement Order") requiring Appellants to pay: (1) a civil penalty in the amount of Fifty-Four Thousand and No/100 ($54,000.00) Dollars to DHEC–OCRM; and, (2) to submit to DHEC–OCRM for review and approval, a restoration plan, including corrective action to return the alleged impacted critical area

at the site to pre-existing conditions including the removal of the new bulkhead and associated fill, as well as a planting schedule to replace marsh vegetation. **(R. pp. 13–14; R. pp. 20–21)**

V. ARGUMENT

A. The lower court erred in granting Respondent's Motion to Dismiss, pursuant to Rule 12(b)(1), SCRCP, because it lacks jurisdiction to review the Department's *ultra vires* conduct concerning its improper issuance and/or unlawful revocation of the Appellants' Critical Area Permit (OCRM–07–509) under S.C. Code Ann. § 48-39-180 (2008) based on the following:

The Fifteenth Judicial Circuit Court has subject matter jurisdiction to review the Department's improper suspension or, revocation, and final denial of the Appellants' critical area permit (OCRM–07–509).

1. The lower court erred in misinterpreting the clear and unambiguous language of S.C. Code Ann. § 48-39-180 (2008) to conclude the statute does not govern the review of Appellants' revoked permit and civil claims.

S.C. Code Ann. § 48-39-180 (2008) provides in pertinent part, "[a]ny applicant whose permit application has been *finally denied, revoked, suspended or approved subject to conditions of the department, ... or may file a petition in the circuit court* having jurisdiction over the affected land for a review of the department's action de novo." (Emphasis added.) S.C. Code Ann. § 48-39-180 (2008).

The cardinal rule of statutory interpretation is to ascertain and effectuate the legislature's intent. Chem-Nuclear Sys., LLC v. S.C. Bd. of Health and Envtl.

Control, 374 S.C. 201, 648 S.E.2d 601 (2007). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). Clear and unambiguous statutes require no statutory construction and should be applied by the court according to their literal meaning. Sloan v. Hardee, 371 S.C. 495, 640 S.E.2d 457 (2007). Under the "plain meaning rule," it is not the court's place to change the meaning of a clear and unambiguous statute. Vaughn v. Bernhardt, 345 S.C. 196, 547 S.E.2d 869 (2001). "The 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." Hitatchi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

Here, the language of S.C. Code Ann. § 48-39-180 (2008) is clear and unambiguous on its face, and therefore the lower court had no authority to interpret the statute and exclude the Appellants from its application and review. Specifically, the lower court's analysis in its Order granting the Respondent's Motion to Dismiss is flawed because it failed to, first, determine if the statute was ambiguous prior to unlawfully divesting the Appellants of all rights and remedies as they may be otherwise entitled to under the statute. See Sloan v. Hardee, supra; Vaughn v. Bernhardt, supra; and Hitatchi Data Sys. Corp. v. Leatherman, supra. Accordingly,

the lower court erred in excluding the Appellants from S.C. Code Ann. § 48-39-180's review without first determining if the statute was ambiguous and unclear.

The lower court's reliance on the decision of Hill v. S.C. Dep't of Health and Envtl. Control, 389 S.C. 1, 698 S.E.2d 612 (2010) for the proposition that S.C. Code Ann. § 48-39-180 (2008) does not govern the review of Respondent DHEC–OCRM's Enforcement Orders, or even Appellants' revoked permit and civil claims is misplaced for several reasons. First, the lower court failed to consider whether the statutory language of S.C. Code Ann. § 48-39-180 (2008) creates a private cause of action and/or a legal duty of care on the part of Respondent DHEC–OCRM as discussed in detail in subparagraph (b) of Paragraph one (1) below.

Second, Appellants' Complaint does not seek a determination whether they were in violation of the terms and conditions of their permit. Rather, Appellants' civil action arises out of the Respondent's *ultra vires* conduct concerning the Department staff's improper issuance and/or unlawful revocation of their permit. Consequently, the Appellants challenge the Respondent's *ultra vires* action described above on the grounds that it is in direct contravention of the expressed terms and conditions of their permit, and is, also, contrary to and in violation of the rules, regulations, and statutory provisions prescribed by the CZMA. See Responsible Econ. Dev. v. S.C. Dep't of Health & Envtl. Control, 371 S.C. 547, 553, 641 S.E.2d 425, 428 (2007) ("Any action taken by DHEC outside of its statutory and regulatory authority is null and void.") (citations omitted). Accordingly, "when a party challenges agency action as being

ultra vires, he may be excused from the requirement to exhaust administrative remedies before seeking judicial review." Randolf R. Lowell, South Carolina Administrative Practice and Procedure, 152 (2d ed. 2008). See Ex parte Allstate Ins. Co., 248 S.C. 550, 151 S.E.2d 849 (1966) (exhaustion will be excused when an agency action is plainly *ultra vires*, and the Plaintiff's claim does not involve any disputed facts).

In the instant case, the Respondent unlawfully switched the approved and permitted location of the Appellants' bulkhead without first providing them with notice and due process. **(R. p. 240, lines 7–19; R. p. 253, lines 1–16)** These facts are undisputed. Respondent is without legal authority to change the location of Appellants' bulkhead after its construction. Thus, exhaustion, if required, should be excused because Respondent's improper action is plainly *ultra vires*. **(R. p. 240, line 7–p. 241, line 5)**

Third, this lawsuit is factually distinguishable from Hill v. S.C. Dep't of Health and Envtl. Control, supra, because the Appellants did not violate the terms and conditions of the permit unlike the property owner in Hill. Moreover, Appellants did not request a hearing before the ALC, but instead sued the Respondent DHEC–OCRM, under S.C. Code Ann. § 48-39-180 (2008) for the violation of their procedural and substantive due process rights. Thus, Appellants' civil claims against Respondent, including the statutory relief requested, unlike Hill, follow judicial instead of administrative procedures. See Rushing v. City of Greenville, 265 S.C.

285, 217 S.E.2d 797 (1975) (holding the question of due process is a judicial inquiry). Accordingly, the lower court erred in classifying Appellants' civil action under S.C. Code Ann. § 48-39-180 (2008) as administrative instead of judicial in nature. **(R. pp. 4–7)**

2. The lower court erred in concluding the Appellants were not members of the class of persons intended to be protected or for whose benefit S.C. Code Ann. § 48-39-180 (2008) was enacted.

S.C. Code Ann. § 48-39-180 (as amended by Act No. 387, § 49 (2008)) concerns the circuit court's judicial review of any permit determinations made, in the first instance, by Respondent DHEC–OCRM. The statute, in pertinent part, provides:

> Any applicant whose permit application has been ***finally denied, revoked, suspended or approved subject to conditions of the department***, or any person adversely affected by the permit, ***may 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 for a review of the department's action "de novo"....

S.C. Code Ann. § 48-39-180 (2008) (emphasis added).

It is undisputed that Appellants, as revoked permittees, are applicants under the clear and unambiguous language of S.C. Code Ann. § 48-39-180 (2008), and are defined persons within the class of persons for whose benefit the statute was enacted. For example, S.C. Code Ann. § 48-39-10(A) (2008) defines an applicant as "any person who files an application for a permit under the provisions of this chapter." S.C. Code Ann. § 48-39-10(A) (2008); Guerard v. Whitner, 276 S.C. 521, 522, 280

S.E.2d 539, 540 (1981) (South Carolina Supreme Court interpreted section 48-39-180's expressed language to mean, "[a]ny person allegedly prejudiced by [DHEC]'s action relative to a [DHEC] permit may file a petition in the circuit court having jurisdiction over the affected land 'for a review of the [DHEC]'s action 'de novo' ...'") (emphasis added). Accordingly, the lower court erred in concluding Appellants, as applicants, were not members of the class of persons intended to be protected by the CZMA, and S.C. Code Ann. § 48-39-180 (2008).

3. The lower court erred in concluding that S.C. Code Ann. § 48-39-180 (2008) does not create a private right of action and/or legal duty of care and, specifically, that the Appellants were not entitled to invoke the statute's protections and remedies.

S.C. Code Ann. § 48-39-180 (2008) provides, in pertinent part as follows:

> . . . to determine whether the department's action so restricts or otherwise affects the use of the property as **to deprive the owner of its existing practical use and is an unreasonable exercise of the state's police power** because the action constitutes the equivalent of taking without compensation. If the court finds the action to be an unreasonable exercise of the police power it shall enter a finding that the action shall not apply to the land of the plaintiff, or in the alternative, that the department shall pay reasonable compensation for the loss of use of the land....

(Emphasis added.)

The main factor in determining whether a statute, like section 48-39-180, creates a private cause of action is legislative intent. Dorman v. Aiken Commc'ns, Inc., 303 S.C. 63, 398 S.E.2d 687 (1990). In Dorman, the Supreme Court stated:

> The legislative intent to grant or withhold a private right of action for violation of a statute or the failure to perform a statutory duty, is determined primarily from the language of the statute.... In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability.

Id. at 67, 398 S.E.2d at 689 (quoting Whitworth v. Fast Fare Markets of S.C., Inc., 289 S.C. 418, 420, 338 S.E.2d 155, 156 (1985)).

Here, the clear and unambiguous language of S.C. Code Ann. § 48-39-180 (2008) reveals the express intent of the General Assembly to create civil liability. Specifically, the statute provides in relevant part, "if the court finds the action to be an unreasonable exercise of the police power it shall enter a finding that the action shall not apply to the land of the plaintiff, or in the alternative, that the department shall pay reasonable compensation for the loss of use of the land." S.C. Code Ann. § 48-39-180 (2008). Accordingly, S.C. Code Ann. § 48-39-180 (2008) is primarily for the benefit and protection of the "applicant[s] whose permit application has been *finally denied, revoked, suspended or approved subject to conditions of the department*" and not the public generally. Thus, the lower court erred in concluding that it did not have jurisdiction under S.C. Code Ann. § 48-39-180 (2008) to consider Appellants' revoked permit and civil claims. **(R. pp. 4–7)**

Even if S.C. Code Ann. § 48-39-180 (2008) does not specifically create a private cause of action, which is expressly denied, Appellants assert that a private

cause of action and/or a legal duty of care should be implied because the legislation was enacted for the special benefit of a private party like the Appellants. See Citizens of Lee County v. Lee County, 308 S.C. 23, 416 S.E.2d 641 (1992). Further, in Rayfield v. South Carolina Dep't of Corrs., 297 S.C. 95, 374 S.E.2d 910 (1988), this Court stated:

> In order to show a duty of care arising from a statute, the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect.

In the instant case, the first element of the Rayfield test is satisfied because the essential purpose of S.C. Code Ann. § 48-39-180 (2008) is to prevent "department action [that] ... affects the use of [the Appellants'] property as to deprive [them] of [their] existing practical use and is an unreasonable exercise of the state's police power." S.C. Code Ann. § 48-39-180 (2008). Specifically, S.C. Code Ann. § 48-39-30(C) (2008), entitled "Legislative declaration of state policy," provides in pertinent part, "no government agency shall ... issue any order that is unduly restrictive so as to constitute a taking of property without the payment of just compensation in violation of the Constitution of this State or of the United States." S.C. Code Ann. § 48-39-30(C) (2008). Clearly, Appellants' loss of use and/or restricted use of their property is the same type of harm and injury that the CZMA seeks to protect against under the expressed language of sections 48-39-30(C) and § 48-39-180 (2008).

The second element of the Rayfield test is, further, also satisfied because the Appellants are members of the class of persons that S.C. Code Ann. § 48-39-180 (2008) seeks to protect as discussed previously in subparagraph (2) of Paragraph (A) above.

Thus, both elements for establishing a statutorily imposed duty of care exist. The lower court clearly erred in ruling that S.C. Code Ann. § 48-39-180 (2008) does govern the review of Respondent DHEC–OCRM's revocation orders, and the Appellants' revoked permit and civil claims. **(R. pp. 4–7)**

4. The lower court erred in concluding that the Appellants' revoked permit had not been finally denied after the Board affirmed the agency's revocation of their permit under S.C. Code Ann. § 44-1-60(F) (2002).

Although S.C. Code Ann. § 48-39-180 (2008) and the CZMA do not define the statutory term, "*finally denied*," the South Carolina Court of Appeals has recently expounded upon the exhaustion of administrative remedies with regard to an "agency's final decision" in the case of Brown v. James, 389 S.C. 41, 697 S.E.2d 604 (Ct. App. 2010). In Brown, the Board ruled to terminate a teacher's employment contract, which was the only issue before it. The Court found there was a *final agency decision* on the merits (even though an administrative hearing was not conducted), and, further, held the teacher had exhausted all of her administrative remedies. Id. at 54, 697 S.E.2d at 611. The Court in Brown, cited the decision of the United States Supreme Court in the case of Darby v. Cisneros, 509 U.S. 137, 113

S. Ct. 2539, 125 L. Ed. 2d 113 (1993) for the proposition, "*the finality requirement is concerned with whether the initial agency decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury....*" (emphasis added). Brown, supra at 53 n.11, 697 S.E.2d at 610 n.11. The Court of Appeals also cited the case of Idaho Watersheds Project v. Hahn, 307 F.3d 815, 825–28 (9th Cir. 2002)[2] and explained that, "when an agency has completed the process for reaching an initial agency decision that has *immediate legal effects* on the petitioner, the initial decision will be considered a final decision, even though the initial decision-maker may reconsider its decision or the initial decision is subject to review within the agency." Brown, supra at 53 n.11, 697 S.E.2d at 610 n.11(emphasis added).

In the instant case, Respondent's Notice of Intent to Revoke letter of August 2, 2007, may not have been a final revocation decision of Appellants' permit, but its Enforcement Order of Revocation dated April 27, 2010, certainly was. Further, Appellants sought review of Respondent's Enforcement Order by filing an Appeal with the DHEC Board. However, the Board affirmed the Enforcement Order in its letter dated June 14, 2010, citing S.C. Code Ann. § 44-1-60(F) (2002) which provides:

> [i]f the board declines in writing to schedule a final review conference or if a final review conference is not conducted within sixty calendar days, the staff decision becomes the final agency decision.

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[2] Holding that the decision of the Bureau of Land Management was "final" and therefore subject to judicial review under federal APA, despite plaintiffs' failure to exhaust administrative remedies, because of its immediate effect on the legal rights and on the environment.

The importance of the Respondent's Enforcement Order is far more than what the lower court describes as merely "an order assessing civil penalties and requiring other remedial actions." **(R. pp. 4–7)** Similar to the reasoning in Brown, Hahn, and Darby cases mentioned above, the Board's decision had an *immediate legal effect* on Appellants' property rights and caused them substantial monetary injury by affirming the Enforcement Order when it decided not to conduct a final review conference on June 10, 2011. Specifically, the Appellants were ordered to pay: (1) a civil penalty in the amount of Fifty-Four Thousand and No/100 ($54,000.00) Dollars; and, (2) to submit a restoration plan, including corrective action to return the alleged impacted critical area at the site to pre-existing conditions including the removal of their new vinyl bulkhead and associated fill, as well as a planting schedule to replace marsh vegetation. Accordingly, the lower court erred in concluding the Appellants' revoked permit was not "finally denied" on June 14, 2010, and not subject to judicial review under S.C. Code Ann. § 48-39-180 (2008).

Finally, the lower court's reliance on the decision of Oakwood Landfill, Inc. v. S.C. Dep't of Health and Envtl. Control, 381 S.C. 120, 671 S.E.2d 646 (Ct. App. 2009) for the proposition that a "final agency decision" has not been received because Appellants failed to request a contested hearing as required by S.C. Code Ann. § 1-23-380 (2005 and Supp. 2010) is misplaced for several reasons. First, the APA provisions under S.C. Code Ann. § 1-23-380 (2005 and Supp. 2010) are not the only relevant statutory provisions that address the exhaustion requirement. For example,

the statutory provisions of the CZMA make exhaustion optional, rather than mandatory, and allow Appellants to seek relief in the circuit court instead of the ALC under S.C. Code Ann. § 48-39-180 (2008). The statute in pertinent part provides, "Any applicant ... *may* obtain judicial review as provided in Chapter 23 of Title 1 of the Code of Laws of South Carolina (1976, as amended), or *may* file a petition in the circuit having jurisdiction over the affected land for a review of the department's action "de novo" ...." (Emphasis added.) S.C. Code Ann. § 48-39-180 (2008). Second, the 2008 Amendment to 23 S.C. Code Ann. Regs. 30-8(F)(4) (amended by 32 S.C. State Reg. (No. 4) (2008)) in pertinent part provides, "Any persons to whom an [enforcement] order is issued may appeal it pursuant to applicable law, including S.C. Code Title 44, Chapter 1; Title 1, Chapter 23; and Title 48, Chapter 39. [S.C. Code Ann. § 48-39-180 (2008)]." 23 S.C. Code Ann. Regs. 30-8 (Supp. 2010). See Byerly v. Connor, 307 S.C. 441, 415 S.E.2d 796 (1992) (The words of a regulation must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the regulation's operation). Clearly, under the unambiguous language of 23 S.C. Code Ann. 30-8(F)(4) (Supp. 2010), Appellants have the right to seek relief in the circuit court instead of the ALC which is consistent with the legislative intent of CZMA and S.C. Code Ann. § 48-39-180 (2008). See also Edge v. State Farm Ins. Co., 345 S.C. 136, 140, 546 S.E.2d 647, 648–49 (2001) (the Supreme Court found, "by using the word '*may*' instead of '*shall*,' the regulation allows, but does not *require*, an aggrieved party to exhaust [administrative remedies]

by appeal[ing] to the Commissioner.") (emphasis added). Third, S.C. Code Ann. § 1-23-380 (2005 and Supp. 2010) allows Appellants to file a civil action for damages in circuit court, in lieu of requesting for a contested case hearing in the ALC. **(R. p. 247, line 14–p. 248, line 1)** The statute "does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law."[3] S.C. Code Ann. § 1-23-380 (2005 and Supp. 2010) (emphasis added). **(R. pp. 4–7)**

In any event, judicial review under section 1-23-380 is a judicial, rather than an administrative remedy. See § 1-23-380 (Supp. 2010) ("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....") (emphasis added); S.C. Code Ann. § 1-23-310(2) (2005), as amended by Act No. 334, § 3, 2008 S.C. Acts 3301, 3303 (defining "agency" as "each state board, commission, department, or officer, **other than the legislature, the courts, or the Administrative Law**

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[3] "The APA probably should not be construed, however to make the exhaustion a prerequisite to all actions. Section 1-23-380 expressly disclaims that the exclusive means for judicial review of all agency action is contested cases: 'This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief or trial *de novo* provided by law.' S.C. Code Ann. Section 1-23-380. (Note, however, that this provision does not apply to contested case proceedings adjudicated at the ALC.) If a plaintiff has a right to review by 'other means' than that provided by the APA, the APA does not cause a plaintiff's failure to exhaust administrative remedies to preclude subject matter jurisdiction." Randolf R. Lowell, South Carolina Administrative Practice and Procedure, 92 (2d ed. 2008).

Court, authorized by law to determine contested cases") (emphasis added); see also Jean Hoefer Toal *et al.*, Appellate Practice in South Carolina, 48 (2d ed. 2002).

Lastly, a contested case hearing in the ALC is optional, rather than mandatory under the relevant statutory provisions of the CZMA for the reasons discussed above. Accordingly, Appellants do not have to exhaust administrative remedies under the expressed language of S.C. Code Ann. § 48-39-180 (2008). See Waites v. South Carolina Windstorm and Hail Underwriting Ass'n, 279 S.C. 362, 307 S.E.2d 223 (1983). In Waites, Vicki Lee Waites and Belva Waites ("Insureds") brought action against the South Carolina Windstorm and Hail Underwriting Association ("Association") for windstorm and rain damage to their beach house. Id. at 364, 307 S.E.2d at 224. "The Association alleged in its answer that the Insureds failed to exhaust administrative remedies set forth in S.C. Code Ann. § 38-39-110 (1976). The trial court later struck that defense on the ground that the language of S.C. Code Ann. § 38-39-110 (1976) is not mandatory." Id. at 364, 307 S.E.2d at 224. Specifically, S.C. Code Ann. § 38-39-110 (1976) provides in part:

> Any person insured pursuant to this chapter, or his representative, or any affected insurer, who may be aggrieved by an act, ruling, or decision of the Association, *may*, within thirty days after such ruling, appeal to the Commission. Any hearings held by the Commission pursuant to such an appeal shall be in accordance with the procedure set forth in the insurance laws of South Carolina. ... (Emphasis added.)

Waites at 364, 307 S.E.2d at 224.

The Association urged the South Carolina Supreme Court to interpret the word "*may*" to mean "*shall.*" To support its contention, the Association cites the overall scheme of Chapter 39 to create a special entity to be carefully supervised by a specialized administrative body. Waites at 364–65, 307 S.E.2d at 224. However, the Court found "nothing in the statute to indicate an intent on the part of the legislature to force the Insureds to pursue an administrative remedy." Id. at 365, 307 S.E.2d at 224. The Court explained, "[w]e agree with the trial court's ruling that the legislature used the word "may" in the statute as permissive and not mandatory." Id.; see also, Greenville Baptist Ass'n v. Greenville County Treasurer, 281 S.C. 325, 328, 315 S.E.2d 163, 165 (Ct. App. 1984) (The Supreme Court explained, "[w]e are constrained to hold, however, that the judicial policy of exhaustion of administrative remedies must give way in face of legislative intent to the contrary as revealed in the clear language of the statute.").

Therefore, the lower court's rationale for granting Respondent's Motion to Dismiss concerning Appellants' civil claims was erroneous because the relevant statutory provisions of the CZMA make exhaustion optional, rather than mandatory. **(R. pp. 4–7)**

5. The lower court erred in dismissing Appellants' Complaint under S.C. Code Ann. § 48-39-180 (2008) for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1), SCRCP, based on lack of exhaustion of administrative remedies when such doctrine of exhaustion is not jurisdictional.

Subject matter jurisdiction is defined as the power to hear and determine cases of the general class to which the proceedings in question belong. Skinner v. Westinghouse Elec. Corp., 380 S.C. 91, 93–94, 668 S.E.2d 795, 796 (2008); Ward v. State, 343 S.C. 14, 17, 538 S.E.2d 245, 246 (2000). This authority is distinct from the doctrine of exhaustion of administrative remedies, which "is generally considered a rule of policy, convenience and discretion, rather than one of law, and is not jurisdictional." This authority is distinct from the doctrine of exhaustion of administrative remedies, which "is generally considered a rule of 'policy, convenience and discretion, rather than one of law, and is not jurisdictional.'" Ward at 17 n.5, 538 S.E.2d at 246 n.5 (quoting Vaught v. Waites, 300 S.C. 201, 205, 387 S.E.2d 91, 93 (Ct. App. 1989). Consequently, a "failure to exhaust administrative remedies goes to the prematurity of a case, not subject matter jurisdiction." Ward at 17 n.5, 538 S.E.2d at 246 n.5.

In the present case, Appellants' procedural and substantive due process claims against Respondent DHEC–OCRM are part of the general class of cases which the court of common pleas has jurisdiction to hear. The mere fact that Appellants had been engaged in a prior administrative proceeding regarding Respondent's unlawful revocation of their permit did not divest the circuit court of its power to hear and

determine the violations of their procedural and substantive due process rights. Thus, the lower court had subject matter jurisdiction to hear these types of claims and erred in dismissing Appellants' Complaint pursuant to Rule 12(b)(1), SCRCP. **(R. pp. 4–7)**

Additionally, Appellants rely on the recent decision of the South Carolina Supreme Court in the case of Stinney v. Sumter School Dist., 391 S.C. 547, 707 S.E.2d 397 (2011). In Stinney, the Supreme Court explained "[w]hen an administrative remedy is not available for the injury suffered, the doctrine of exhaustion is not applicable." (quoting Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 412, 563 S.E.2d 109 (Ct. App. 2002)). In Stinney, the Plaintiffs initiated a lawsuit in the circuit court seeking damages and alleging negligence, violations of due process, and failure to follow procedures because no adequate administrative remedy existed for the injuries they suffered. Stinney, supra at 547, S.E.2d at 399.

Here, Appellants, like the plaintiffs in Stinney, initiated a lawsuit in the circuit court because no administrative remedy existed for the injuries they have suffered. Accordingly, the lower court erred in concluding the doctrine of exhaustion was applicable to this case since no adequate administrative remedy existed. There are monetary damages and injuries that were suffered by the Appellants; therefore, an administrative remedy is not sufficient. **(R. pp. 4–7)**

B. The lower court erred in ruling the Administrative Law Court has exclusive jurisdiction under S.C. Code Ann. § 44-1-60 (2002) and Chapter 23, Title 1 to hear all DHEC–OCRM decisions involving the issuance, denial, suspension, or revocation of critical area permits to the jurisdictional exclusion of all other rights and remedies under the Coastal Zone Management Act and S.C. Code Ann. § 48-39-180 (2008).

The lower court found the procedures for appealing DHEC–OCRM decisions set forth in S.C. Code Ann. § 44-1-60 (2002) and Chapter 23, Title 1 of the Code of Laws of South Carolina (1976, as amended) are the exclusive means of resolving all permitting disputes involving S.C. Code Ann. §§ 48-39-10, *et seq.* (2008 and Supp. 2010) of the CZMA. This was erroneous because the lower court has concurrent jurisdiction to hear permitting disputes arising under S.C. Code Ann. § 48-39-180 (2008) of the CZMA.

In determining whether the Legislature has given another entity exclusive jurisdiction over a case, a court must look to the relevant statute. Dema v. Tenet Physician Services–Hilton Head, Inc., 383 S.C. 115, 678 S.E.2d 430 (2009); citing Unisys Corp. v. South Carolina Budget and Control Bd. Div. of Gen. Servs. Info. Mgmt. Office, 346 S.C. 158, 175, 551 S.E.2d 263, 273 (2001) (examining the language of the statute to determine the legislative intent regarding exclusive jurisdiction).

S.C. Code Ann. § 44-1-60 (2002) provides, in relevant part:

> (A) All department decisions involving the issuance, denial, renewal, suspension, or revocation 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.
>
> ...
>
> (G) An applicant, permittee, licensee, or affected person may file a request with the Administrative Law Court for a contested case hearing within thirty calendar days after.

S.C. Code Ann.§§ 44-1-60(A) and (G)(1) (2002) (emphasis added).

Here, the statutory language of S.C. Code Ann. § 44-1-60(G) (2002) is clear and unambiguous; is permissive, rather than mandatory; and, does not vest the ALC with exclusive jurisdiction to hear "[a]ll department decisions involving the issuance, denial, renewal, suspension, or revocation of permits" that arise within the jurisdiction of CZMA. **(R. p. 251, line 2–p. 253, line 6)** For example, the Legislature's use of the term "may," instead of "shall" in S.C. Code Ann. § 44-1-60(G) (2002) evidences the Appellants' option rather than a mandate to file for a contested case hearing with the ALC. See Waites, 279 S.C. at 365, 307 S.E.2d at 224 (the statute did not require the insureds to pursue an administrative remedy since the legislature had used the word "*may*" in the statute, which is a permissive and not a mandatory term); Kennedy v. South Carolina Ret. Sys., 345 S.C. 339, 352–53, 549 S.E.2d 243, 250 (2001) (The "use of the word 'may' signifies permission and generally means that the action spoken of is optional or discretionary unless it appears to require that it be given any other meaning in the present statute."); Greenville Baptist Ass'n at 328–29, 315 S.E.2d at 165–66 (construing statutes as making exhaustion of administrative remedy optional in that case).

Further, S.C. Code Ann. § 44-1-60 (2002) does not use the term "exclusive jurisdiction," nor does its express terms exclude "all other rights and remedies" under other statutes, like the CZMA.[4] See Southern Ry. Co. v. Order of Ry. Conductors, 210 S.C. 121, 41 S.E.2d 774 (1947) (exhaustion of remedies will preclude original resort to courts where statute by express terms gives exclusive jurisdiction to administrative agency).

Accordingly, the lower court erred in ruling that the ALC has exclusive jurisdiction to hear all Department permitting decisions under the procedures of S.C. Code Ann. § 44-1-60 (2002) and Chapter 23, Title 1 to the jurisdictional exclusion of S.C. Code Ann. § 48-39-180 (2008). **(R. pp. 4–7)**

C. Even if the Appellants failed to exhaust their administrative remedies, which is expressly denied, the lower court erred in ruling exhaustion before the Administrative Law Court was mandatory in this case since review of the agency's final decision would have been a futile effort, and would not have provided the Appellants with an adequate remedy.

South Carolina, like most jurisdictions, recognizes exceptions to the exhaustion of administrative remedies requirement. The general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to

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[4] The South Carolina Supreme Court has used the terms "exclusive means," "exclusive remedy," and "exclusive jurisdiction" synonymously when discussing the Workers' Compensation Act. See S.C. Code Ann. § 42-1-540 (1985) (providing the rights and remedies provided under that Act "shall exclude all other rights and remedies)." See, e.g., Loges v. Mack Trucks, Inc., 308 S.C. 134, 417 S.E.2d 538 (1992) (exclusive means); Carter v. Florentine Corp., 310 S.C. 228, 423 S.E.2d 112 (1992) (exclusive remedy); McSwain v. Shei, 304 S.C. 25, 402 S.E.2d 890 (1991) (exclusive jurisdiction). Thus, the term "exclusive means" has been used to indicate exclusivity of jurisdiction.

application of the general rule. Andrews Bearing Corp. v. Brady, 261 S.C. 533, 536, 201 S.E.2d 241, 243 (1973); Ex parte Allstate Ins. Co., 248 S.C. 550, 567, 151 S.E.2d 849, 855 (1966). A commonly recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of administrative remedies would be a vain or futile act. Moore v. Sumter County Council, 300 S.C. 270, 273, 387 S.E.2d 455, 458 (1990); Ward, supra at 19, 538 S.E.2d at 247 (2000) (requiring a party to go before an agency or ALJ who cannot rule on the constitutionality of a statute would be a futile act); Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue, 342 S.C. 34, 39, 535 S.E.2d 642, 645 (2000). Any action taken by DHEC outside of its statutory and regulatory authority is null and void. Triska v. Dep't of Health & Envtl. Control, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987).

In the instant case, the "futile act exception" applies to the alleged exhaustion requirement argued by Respondent DHEC. Specifically, civil claims for violation of Appellants' procedural and substantive due process rights exist concerning the department's improper issuance and unlawful revocation of their critical area permit. **(R. p. 251, line 2– p. 253, line 16)** However, neither the expressed statutory provisions of Chapter 39 of the CZMA,[5] nor Sections 1-23-600(F) and 1-23-630(A)[6] of the

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[5] S.C. Code Ann. §§ 48-39-10, *et seq.* (2008 and Supp. 2010).

[6] S.C. Code Ann. § 1-23-600(F) provides "a state agency authorized by law to seek injunctive relief may apply to the Administrative Law Court for injunctive or equitable relief pursuant to Section 1-23-630." S.C. Code Ann. § 1-23-600(F) (Supp. 2009). S.C. Code Ann. § 1-23-630(A) provides that an administrative law judge "has the same power at chambers

Administrative Procedures Act grant the ALC and DHEC the statutory authority to hear and decide civil matters and award damages in permit dispute cases against the agency. See South Carolina Dep't of Consumer Affairs v. Foreclosure Specialists, Inc., 390 S.C. 182, 700 S.E.2d 468 (Ct. App. 2010) ("[R]egulatory bodies ... have only the authority granted them by the legislature."). As a creature of statutes, regulatory bodies like DHEC have only the authority granted them by the legislature. Med. Soc'y of S.C. v. Med. Univ. of S.C., 334 S.C. 270, 275, 513 S.E.2d 352, 355 (1999); see also, Randolf R. Lowell, South Carolina Administrative Practice and Procedure, 152 (2d ed. 2008) (The ALJ has no authority to decide civil matters or to award monetary damages in cases).

Furthermore, Respondent DHEC–OCRM's initial decision makers had reached a hard and fast position to revoke Appellants' permit, prior to the Board's decision on June 10, 2010, evidenced by the following:

a. in failing to produce any permit application, permit, location map, registered drawings, surveys submitted for plan review in response to the Appellants' FOIA request, under S.C. Code Ann. §§ 30-4-10, *et seq.* (2007 and Supp. 2010), documenting that the alleged wooden bulk-head to be replaced by Appellants was located underneath the their home;

b. in failing to assign any weight or even give consideration to survey completed by Pyramid Engineering & Surveying, Inc. dated September 20, 2006, which depicted an existing "sea wall" located along the north side property line, a distance of nineteen and nine-tenths feet (19.9') landward to the edge on the north-

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or in open hearing as do circuit court judges and to issue those remedial writs as are necessary to give effect to its jurisdiction." S.C. Code Ann. § 1-23-630(A) (2005).

facing portion of Appellants' home. This survey clearly depicts, and conclusively establishes as a matter of public record that the CZM certified Mean High Water mark, which in this 2006 survey covers only a small fraction of the northwest corner of the lot closest to the canal, and shows marsh grass only on the adjacent lot. Further, the Critical Area depicted on this survey, which was used to obtain a permit for the Knox fixed pier, was another thirty feet (30') north of the north side lot line;

c. in failing to assign any weight or even consider the four (4) letters received from Appellants' neighbors stating that they, "[are] familiar with the [site]. Prior to March 7, 2007, there was evidence of a previous bulkhead on the northwestern property line and on the property line facing Williams Creek"; and

d. in failing to consider, prior to issuing the Order of Revocation, that it had previously approved a critical area permit, in 2006, to Appellants' predecessor-in-title, Walter Knox, showing a critical line, that via the approval of the Knox permit, it fully accepted and certified the location of the critical area, which directly conflicts with its conclusions concerning the same lot now owned by the Appellants.

(R. pp. 48–49, ¶ 17; R. p. 51, ¶ 21; R. p. 150)

Here, the refusal of Respondent's initial decision makers to reverse the revocation of Appellants' critical permit for the reasons described in subparagraphs (a), (b), (c), and (d) above (notwithstanding the fact the Appellants' complied with the expressed terms and conditions of their critical permit) is clear and substantial evidence of the hard and fast position taken by the agency. See Law v. S.C. Dep't of Corr., 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006) ("Futility, 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.'") (citing Thetford Props. IV Ltd. P'ship v. United States Dep't of Hous. & Urban Dev., 907 F.2d 445, 450 (4th Cir.1990)).

Accordingly, the lower court erred granting Respondent's Motion to Dismiss since an exception to the exhaustion requirement applied to this case, and a contested case hearing in the ALC would prove to be a futile exercise, and not provide an adequate remedy at law. See S.C. Code Ann. 1-23-380 (Supp. 2010) (provides in pertinent part, "A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision [by the ALC] would not provide an adequate remedy."). **(R. pp. 4–7)**

D. Even if the Appellants had timely asserted their rights, mistakenly, in the wrong forum, which is expressly denied, the lower court erred in failing to consider the Appellants' argument that the doctrine of equitable tolling applies to the particular and unique facts of this case.

Although this Court need not reach the issue of equitable tolling because Appellants' timely asserted their rights in the right forum, the application of this doctrine nevertheless precludes the dismissal of Appellants' petition for judicial review under Chapter 23 of Title 1 of the Code of Laws of South Carolina, 1976, as amended.

In the case of Hooper v. Ebenezer Senior Servs. and Rehab. Ctr., 386 S.C. 108, 687 S.E.2d 29 (2009), the South Carolina Supreme Court held, "[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations." Id. at 114, 687 S.E.2d at 32. Specifically, in Hooper, the Court found,

"[t]he equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." (quoting Hausman v. Hausman, 199 S.W.3d 38, 42 (Tex. App. 2006)).

The Court, further, explained that equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it. Hooper, supra at 116–17, 687 S.E.2d at 33 (citing Rodriguez v. Superior Court, 176 Cal. App. 4th 1461, 98 Cal. Rptr. 3d 728 (2009)). "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.'" Hooper, supra at 114, 687 S.E.2d at 32 (quoting Rodriguez, 176 Cal. App. 4th at 1471, 98 Cal. Rptr. 3d at 736).

In Hooper, the Court, also, noted that other state and federal jurisdictions have considered equitable tolling in a variety of contexts and have developed differing parameters for its application. Hooper, supra at 116, 687 S.E.2d at 32. For example, some of the decisions cited by the Court were: Kaplan v. Morgan Stanley & Co. Inc., 186 Vt. 605, 987 A.2d 258 (2009) ("Equitable tolling applies either where the defendant is shown to have actively misled or prevented the plaintiff in some extraordinary way from discovering the facts essential to the filing of a timely lawsuit, or where the plaintiff has timely raised the same claim in the wrong forum.") (citing Beecher v.

Stratton Corp., 170 Vt. 137, 743 A.2d 1093 (1999)); cf. Machules v. Dep't of Admin., 523 So.2d 1132, 1134 (Fla. 1988) (stating the doctrine of equitable tolling, unlike equitable estoppel, does not require deception or misrepresentation by the defendant; rather, it serves to ameliorate the harsh results that sometimes flow from a strict, literalistic application of administrative time limits). See, e.g., Burnett v. New York Central R.R., 380 U.S. 424, 428–30, 85 S. Ct. 1050, 1054–55, 13 L. Ed.2d 941 (1965) (wrong forum).

Although there is no South Carolina decision on point concerning the application of equitable tolling to administrative proceedings, the considerations and reasoning discussed in the cases cited above support the doctrine's application to Appellants' case. For example, the Appellants, like the claimants in the cases of Machules, supra, and Burnett, supra, had only one claim, one right, and one remedy, which they timely filed, allegedly, in the wrong forum. In the present case, the Appellants, like the claimants in Machules, and Burnett, did not sleep on their rights but brought their action within the proscribed statutory time period under S.C. Code Ann. § 44-1-60(G) (2002) in the, allegedly, wrong forum. See Ross v. Ross, Op. No. 4854 (Ct. App. filed July 20, 2011(Shearouse Adv. Sh. No. 24 at 107) (Court of Appeals found that the family court erred in determining the physical violence and threats of violence by husband did not justify the application of equitable tolling regarding the wife's delay in seeking alimony for two and one-half years). **(R. pp. 299–318)**

Finally, Respondent DHEC–OCRM, as the party relying on the time limitation, clearly, cannot claim any undue prejudice by any delay or stale claims since it was aware the Appellants were actively pursuing their timely filed petition in the alleged wrong forum. See Burnett, supra at 428, 85 S. Ct. at 1054 ("Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" (quoting Order of R.R. Tel. v. Railway Express Agency, Inc., 321 U.S. 342, 348–49, 64 S. Ct. 582, 586, 88 L. Ed. 788)).

Applying the doctrine of equitable tolling to administrative proceedings, under the present circumstances, is consistent with the flexible application of the doctrine as suggested by our Supreme Court in Hooper. Accordingly, the lower court erred by failing to consider the application of the doctrine of equitable tolling to administrative proceeding for the reasons discussed above in order to prevent the Appellants from suffering a gross wrong at the hands of Respondent DHEC–OCRM's *ultra vires* action.

As a point of interest in this case, which necessarily goes to the credibility of the actions of Respondent DHEC–OCRM, the Appellants would like to point out to the Court that the record is clear in this matter: the agency issued a permit to place the

retaining wall on the northern boundary of the property. The Appellants' assert that the permit granted by was clear on its face and the Appellants placed the wall on the northern side of the property in the exact location designated in the permit. It is an interesting point to note in this case that Respondent DHEC–OCRM continues to assert that the permit did not in fact authorize the construction of the retaining wall at the designated location set out in the permit. To the contrary, Respondent has have ignored the clear language of the permit and seeks to impose rather substantial penalties upon the Appellants. In no way has Respondent offered to reimburse or any way absorb any of the costs imposed by their revocation order, ordering the following: (1) a civil penalty in the amount of Fifty-Four Thousand and No/100 ($54,000.00) Dollars; and, (2) to submit a restoration plan, including corrective action to return the alleged impacted critical area at the site to pre-existing conditions including the removal of their new vinyl bulkhead and associated fill, as well as a planting schedule to replace marsh vegetation.

VI. CONCLUSION

For these reasons, Appellants respectfully request this Court vacate the Order of the lower court and reinstate Appellants' Complaint for judicial review under S.C. Code Ann. § 48-39-180 (2008) of the CZMA.

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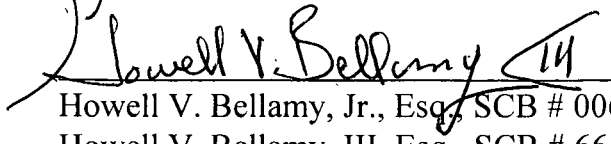
Respectfully submitted,



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February 28, 2012

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In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Presiding 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.*

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR. The undersigned further certifies that this Final Brief complies with the Supreme Court's Order of August 13, 2007 regarding personal identifiers and sensitive information.

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PROOF OF SERVICE

I certify that I have served copies of **Appellants' Final Brief** in the above-captioned appeal on the following individuals by United States Mail, with sufficient first-class postage affixed, addressed as follows:

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