THE STATE OF SOUTH CAROLINA
In the Court of Appeals

ORIGINAL

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 REPLY BRIEF OF APPELLANTS

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February 28, 2012

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STATEMENT OF THE CASE

Appellants' property that is the subject of this civil action falls within the jurisdiction of the Coastal Zone Management Act ("CZMA"). **(Respondent's Initial Brief, p. 2)**

Appellants constructed their 155-foot vinyl bulkhead in an authorized location pursuant to their permit's approved plans, which is clearly evidenced by the Respondent's (hereinafter "Respondent" or "Department") administrative record. However, Respondent blatantly misrepresents to the Court that the Appellants have not complied with their permit's approved plans. **(R. p. 12; R. p. 15, ¶ 3; R. p. 65, ¶ 3; R. pp. 112–13; R. pp. 329–30)** Specifically, the Respondent illegally switched the approved location of the 155-foot vinyl bulkhead to an unauthorized location (underneath the length of Appellants' residence) after its substantial completion without authority or jurisdiction under the CZMA. **(R. p. 15, ¶ 3; R. p. 65, ¶ 3)** This probably explains why the Respondent has failed to include in their Designation of Matter to be included in the Record on Appeal Appellants' permit and approved drawings.

The facts are undisputed regarding the Respondent's *ultra vires* conduct against the Appellants for the reasons discussed below.

On February 2, 2007, Appellants' agent Dr. H. Wayne Beam, who was the former Deputy Commissioner with the Department, submitted a permit application with certified drawings pursuant S.C. Code Ann. § 48-39-140 (2008) for the alteration of the critical area pursuant to the CZMA. Respondent's Permit Application Public Notice, in relevant part, provided:

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

(Emphasis added.) **(R. p. 115)**

On March 7, 2007, critical area permit OCRM-07-509 was issued to Appellants authorizing the work as shown on their certified plans previously approved by the Department as follows: (1) the Approved Site Plan (registered survey) prepared by David R. Simms, P.E., dated January 25, 2007, shows: the removal and replacement of an existing 155-foot wooden (L shaped) bulkhead, concurrently with a 155-foot vinyl (L shaped) bulkhead at the same location on Appellants' property. **(R. p. 112; R. p. 329)** The Approved Site Plan clearly and unambiguously shows both bulkheads (previous and existing) being located along the easternmost 105-foot length of the northern property line and the entire 50-foot width of the western boundary line **(R. pp. 46–47; R. pp. 53–54; R. p. 112; R. p. 329)**; and, (2) the New vinyl (L shaped) Bulkhead Section designed by David R. Simms, P.E., shows the type of structure, its purpose, and identifies materials to be used for its construction. **(R. p. 113; R. p. 330)** For example, the permitted bulkhead shows a driven or jetted vinyl sheet piling having a maximum exposed height of 18 feet and corresponding minimum embedment of 10 feet. The vinyl sheet piling is to be anchored by two existing tieback anchors having at least 12 inches of soil cover. The tie back anchors consist of galvanized steel aircraft cable attached to concrete anchors with 1-inch diameter eye bolts. Weep holes are to be installed through the vinyl sheets 2-inches above the mean high water elevation and at 48 inches on center. **(R. p. 113; R. p. 330)**

It is undisputed that the Department's initial decision-makers never notified the Appellants by mail or otherwise, after March 7, 2007, or before July 19, 2007, that the previously approved plans were inadequate, incorrect, or needed additional work. Importantly, the Department's initial decision-makers never suspended and revoked the Appellants' critical area permit on the grounds that fraudulent information had been submitted by them on the approved plans as prescribed by S.C. Code Ann. § 48-39-50(H) (2008 and Supp. 2010). **(R. p. 133; R. p. 263)**

On June 22, 2007, the Department issued a Construction Authorization placard **(R. p. 106; R. p. 274)** and mailed it to the Appellants on June 25, 2007, thus authorizing "Appellants to begin replacing their 155-foot bulkhead as permitted." **(Respondent's Initial Brief, p. 3)**

However, on July 22, 2007, the Respondent inspected the Appellants' property and incorrectly observed and concluded "that the bulkhead, consisting of vinyl sheets, was being built approximately twenty (20) feet channelward of the existing bulkhead in the tideland critical area along the northern property line, and approximately ten (10) feet channelward on the western property line[,]" based on the following reasons. **(R. p. 16, ¶ 6; R. p. 66, ¶ 6)** First, the northern-facing boundary of the existing 155-foot vinyl bulkhead was required to be built only on Appellants' northern property line as authorized by the permit's Site Plan approved by the Respondent on March 7, 2007. **(R. p. 112; R. p. 329)** For example, David R. Simms, P.E. certified the location and construction of northern-facing boundary of the 155-foot vinyl replacement bulkhead was on the Appellants' northern property line. Further, per the approved Site Plan, **(R. p. 112; R. p. 329)** certified by David R. Simms, P.E.,

it is impossible for the western-facing boundary of the existing 155-foot vinyl bulkhead to be built "approximately ten feet channelward on the western property line[,]" because the bulkhead would be located in the water in the canal which is not the case. **(R. p. 16, ¶ 6; R. p. 66, ¶ 6; R. pp. 109–113; R. pp. 267–72)**

Second, a clear and unambiguous reading of David R. Simms, P.E.'s as-built survey's construction requirements make it totally impossible for this process to occur next to or underneath the Appellants' residence for the following reasons: (1) the installation of the vinyl sheet piling beneath the existing residence either driving, jetting or direct push methods would negatively impact performance of the building foundations; and (2) the installation of the design anchor system (galvanized aircraft cable and concrete anchors) would be prohibitive because extraordinary excavation would be required beneath the structure and in the immediate area of existing building foundations. Furthermore, existing building foundations would be expected to prohibit the installation of the tie back anchors at the design locations. **(R. p. 113; R. p. 330)**

Lastly, the Respondent has failed and refused to produce any documentation: notice, correspondence, surveys, plats, plans, and established critical area lines to confirm their authority to switch the approved location of the 155-foot vinyl replacement bulkhead (after its substantial completion) to the unauthorized location underneath the Appellants' residence. For example, in Paragraph thirteen (13) of the Enforcement Order, the Respondent asserts that the Appellants have improperly impacted approximately two thousand six hundred and thirty-nine (2,639) square feet of alleged tidelands critical area based on "calculations and measurements . . . obtained from satellite imagery, surveys, and field measurements," which they have refused and failed to produce this information notwithstanding Appellants' FOIA

lawsuit under Civil Action No. 2009-CP-26-5436 filed on June 1, 2009. **(R. p. 15, ¶ 3; R. pp. 49–52; p. 65, ¶ 3)**

REPLY ARGUMENTS

I. 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:

A. 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 the Appellants's revoked permit and civil claims.

S.C. Code Ann. § 48-39-180 (as amended by 2006 S.C. Act No. 387, § 49) concerns the circuit court's judicial review of any permit determinations made by Respondent. The statute, 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" or 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.** The use allowed by any permit issued under this chapter may, in the discretion of the court, be stayed pending decision on all appeals that may be taken. The circuit court may in its

> discretion require that a reasonable bond be posted by any person.

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

The language in S.C. Code Ann. § 48-39-180 (2008) is clear and unambiguous, yielding only one possible interpretation. Under the phrasing of the statute, the following parties are entitled to judicial review of the department's action: (1) the applicant for the permit; (2) the permittee, and persons adversely affected by the permit. For example, S.C. Code Ann. § 48-39-10(A) (2008 and Supp. 2010) 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 and Supp. 2010). Accordingly, "Section 48-39-180 expressly applies only to persons who have *actually applied* for a permit or those adversely affected by an *existing* permit." Grant v. South Carolina Coastal Council, 319 S.C. 348, 353 n.2, 461 S.E.2d 388, 391 n.2 (1995) (emphasis in original). In Grant, the Supreme Court held the statute was not applicable to plaintiff who had not applied for a permit in the first place. Grant at 353 n.2, 461 S.E.2d 391 n.2; see also Guerard v. Whitner, 276 S.C. 521, 522, 280 S.E.2d 539, 540 (1981) (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' . . .").

Accordingly, the lower court erred in concluding Appellants as applicants were not members of the class of persons intended to be protected from Department's unauthorized conduct under S.C. Code Ann. § 48-39-180 (2008) of the CZMA. **(R. pp. 5–7)**

Furthermore, Respondent's interpretation of the statute, along with lower court's holding that the "[statute] does not govern the review of administrative enforcement orders that assess civil penalties and require other remedial actions. . . [,]" S.C. Code Ann. § 48-39-180 (2008), is inconsistent with a common sense reading for the following reasons.

First, the expressed intent of S.C. Code Ann. § 48-39-180 (2008) is "to determine whether the department's action" is without authority (*ultra vires*) involving the issuance, final denial, suspension, or revocation of permits in violation of the law rather than focusing on whether the person seeking relief under the statute is either a permit applicant opposed to a revoked permittee, like Appellants, (under an enforcement order). See Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) ("In asserting the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole"). For example, S.C. Code Ann. § 48-39-180 (2008) provides, "[t]he use allowed by any permit issued under this chapter may, in the discretion of the court, be stayed pending decision on all appeals that may be taken." This statutory language indicates an expressed intent of not only applying to permit applications, but also permit revocations of aggrieved property owners from the Department's unauthorized conduct. See S.C. Code Ann. § 48-39-180 (2008).

Second, if both the permit applicant and revoked permittees have suffered the same harm under S.C. Code Ann. § 48-39-180 (2008) arising from the Department's unauthorized action, then is it a fair, just, and equitable reading of the statute to solely apply it to permit applicants, and not revoked permittees (like Appellants) as argued by the Respondent? The answer is no. See Hitatchi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (The language of a statute must be read in the sense which harmonizes with

its subject matter and accords with its general purpose.). Clearly, the Respondent's reading of S.C. Code Ann. § 48-39-180 (2008) to solely apply the statute to permit applications, and not permit revocations is misplaced, and does not accord with the statutes' general purpose to "determine whether the department's action" is without authority (*ultra vires*) in permitting cases under the CZMA. See S.C. Code Ann. § 48-39-180 (2008).

The Respondent and lower court's reliance on the decision of Hill v. South Carolina 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 Administrative Enforcement Orders is misplaced for several reasons. First, the facts in Hill, supra, are clearly distinguishable from this action for the following reasons: (1) Appellants constructed their 155-foot vinyl bulkhead as authorized by their permit's approved plans, unlike the property owner in Hill who "had constructed [his] bulkhead in the tidelands critical area too far channelward and out of compliance with the issued permit[,]" Hill, supra at 7, 698 S.E.2d at 615; (2) Appellants sought to challenge the Department's *ultra vires* conduct in illegally switching the approved location of their 155-foot vinyl bulkhead (to underneath the Appellants' residence) after its substantial completion which was inconsistent with approved plans, unlike the property owner in Hill who only "sought to challenge . . . [the] imposed . . . civil fine and required relocation of the bulkhead before DHEC sought to enforce it . . . in the circuit court," Hill, supra at 17, 698 S.E.2d at 621; (3) Appellants sought judicial relief, including damages, under S.C. Code Ann. § 48-39-180 (2008) regarding the Department's *ultra vires* conduct, alleging among other things, violation of their procedural and substantive due process rights, unlike the property owner in Hill who only "requested an administrative proceeding to determine [his] rights, duties, and privileges in a contested case hearing by the

ALJ as provided by S.C. Code Ann. § 1-23-600(B) (2005 and Supp. 2010]," Hill, supra at 18, 698 S.E.2d at 621; and, (4) in Hill, supra, the main issue argued by the property owner was that DHEC is not authorized to issue enforcement orders and that only the circuit court has jurisdiction over enforcement actions initiated by the Department under S.C. Code Ann. § 48-39-170 (2008). Hill at 15–18, 698 S.E.2d at 620–21. However, Appellants in this action challenge the Respondent's *ultra vires* conduct as described above, and not the Respondent's authority and jurisdiction over the action.

Also, the case of Hill, supra, is legally distinguishable, from this action, because the court's holding in Hill applied to an old review procedure under the APA[1] that was changed by 2006 S.C. Act No. 387, § 53, where "the General Assembly remodeled the appellate process for administrative agencies in the state and amended several statutes addressing the direction and flow of appeals." South Carolina Coastal Conservation League v. South Carolina 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 (2010). For example, 2006 S.C. Act No. 387, § 49 amended S.C. Code Ann. § 48-39-180 (2008) in the first sentence by deleting "by the Coastal Zone Management Appellate Panel" following "department," and inserting the language "may obtain judicial review as provided in Chapter 23 of Title 1, or may," without deleting "file a petition in the circuit court having jurisdiction over the affected land for a review of the department's action "de novo,"" is direct evidence of the General Assembly's expressed intent to not divest the circuit court of its concurrent jurisdiction to hear permitting cases

[1] "The review procedure under the APA was changed by 2006 South Carolina Laws Act No. 387, which eliminated the review of the ALJ's decision by the Appellate Panel." Hill, supra at 9 n.3, 389 S.E.2d at 617 n.3.

under the CZMA. But more importantly, the amendment to S.C. Code Ann. § 48-39-180 (2008) signals an expressed intent on the part of the legislature to make pursuit of an administrative remedy under the statute optional rather than mandatory if evidence of Department's *ultra vires* conduct exists under CZMA. 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."). Accordingly, the Appellants argue the Court's explanation in Hill that "review of the [Department's] enforcement order and its imposition of a civil fine is an administrative matter that falls within the ambit of a contested case as defined in the APA," (Hill, supra at 17, 698 S.E.2d at 621) is of limited application, and superceded by the General Assembly's expressed intent in the 2006 amendment to make pursuit of an administrative remedy optional rather than mandatory under S.C. Code Ann. § 48-39-180 (2008). Further, Respondent argued at the lower court hearing, "to the extent that they are relying on Section 1-23-380 under Hill, [supra,] . . . [Appellants' argument is misplaced because] . . . the facts of Hill were prior to the legislature's enactment of Act 387[,]" implying that Hill is not controlling in the present case, which is consistent with Appellants' interpretation of Hill under the Act. **(R. p. 257, lines 1–5)**

Because the underlying basis of the Appellants' circuit court action is to challenge the Respondent's *ultra vires* conduct in wrongfully switching the approved location of their 155-foot vinyl bulkhead (to underneath their residence) after its substantial completion without due process instead of seeking a "review of the agency's enforcement order and its imposition of a civil fine," Hill, supra at 17, 698 S.E.2d at 621, the lower court erred in not

applying S.C. Code Ann. § 48-39-180 (2008) to the Department's unauthorized conduct. **(R. pp. 5–7)** Furthermore, the lower court erred in classifying Appellants' civil action and the relief requested under S.C. Code Ann. § 48-39-180 (2008) as administrative instead of judicial in nature.

II. The lower court incorrectly applied S.C. Code Ann. § 1-23-380 (2005 and Supp. 2010) in holding that failure to exhaust administrative remedies is jurisdictional under the Administrative Procedures Act.

S.C. Code Ann. § 1-23-380 (2005 and Supp. 2010) 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," but the statute further provides:

> 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. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

Respondent's argument that S.C. Code Ann. § 1-23-380 (2005 and Supp. 2010) of the APA exclusively requires Appellants to seek review of the Department's "final decision" in a contested case hearing before the ALC and to have "exhausted all administrative remedies available within the agency," is an inaccurate interpretation of the statute because: First, "Section 1-23-380 expressly disclaims that the exclusive means for judicial review of all agency action in 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.'**" (Emphasis added.) Randolf R. Lowell, South Carolina Administrative Practice and Procedure 92 (2d ed. 2008) (citing S.C. Code Ann. § 1-23-380) (emphasis

added). "(Note, however, that this interpretation does not apply to contested case proceedings adjudicated at the ALC)." Randolf R. Lowell, supra at 92. For example, "judicial review of a final decision of an administrative law judge must be . . . filed with the court of appeals. . . ." instead of the circuit court. S.C. Code Ann. § 1-23-610 (2005 and Supp. 2010). Accordingly, "[i]f a plaintiff has a right to review by "other means" than 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, supra at 92. For example, the statutory provisions of S.C. Code Ann. § 48-39-180 (2008) make exhaustion optional, rather than mandatory, and allow the 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, 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). See Waites v. S.C. Windstorm and Hail Underwriting Ass'n, 279 S.C. 362, 307 S.E.2d 223 (1983) (The Supreme Court held that the Plaintiffs did not have to exhaust administrative remedies because the relevant statute made those remedies optional). Also, 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 [1976, as amended]; Title 1, Chapter 23 [1976 as amended]; and Title 48, Chapter 39 [1976, as amended]." 23 S.C. Code Ann. Regs. 30-8 (Supp. 2011).

Second, the Court of Appeals explained that:

> judicial review under section 1-23-380 is a judicial, rather than an administrative remedy. See § 1-23-380(A) (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 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).

Stinney v. Sumter School Dist. 17, 382 S.C. 352, 359, 675 S.E.2d 760, 764 (Ct. App. 2009), rev'd on other grounds, 391 S.C. 547, 707 S.E.2d 760 (2011).

Third, when the Board declined to conduct a final review conference on June 10, 2010, it affirmed the Respondent's Enforcement Order (07M-012S) **(R. pp. 15–41; R. pp. 65–91)** which became the "final agency decision" pursuant to S.C. Code Ann. § 44-1-60(F) (2002). This section in relevant part, provides:

> No later than sixty days after the date of receipt of a request for final review, a final review conference must be conducted by the board, its designee, or a committee of three members of the board appointed by the chair. **If a final review conference is not conducted within sixty days, the department decision becomes the *final agency decision*....**

(Emphasis added.) **(R. pp. 294–95)**

Further, the Respondent admits the "Appellants have received a final agency decision" under the requirements of S.C. Code Ann. § 1-23-380 (2005 and Supp. 2010) **(Respondent's Initial Brief, p. 21)** See Goodwine v. Dorchester Dep't of Soc. Serv., 336 S.C. 413, 417–18, 519 S.E.2d 116, 118 (Ct. App. 1999) (finding that Code section 1-23-380

provides for judicial review upon exhaustion of administrative remedies, DSS Regulation 114-110(M) states that upon a final decision rendered by a Fair Hearing Committee, a claimant has duly exhausted all administrative remedies; thus, the circuit court properly had subject matter jurisdiction over the appeal, even though there had been no appeal to [ALC]).

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. The case of Oakwood, supra, is distinguishable from the present action because the Appellants have already received a "final agency decision" unlike the petitioners in Oakwood where the Court found the Board's interlocutory order (in a DHEC permitting case) was inappropriate for judicial review. Oakwood, supra at 128–133, 671 S.E.2d at 651–54. Further, the Appellants have complied with the new procedures under S.C. Code Ann. § 44-1-60 (2002) in obtaining a "final agency decision" compared to the petitioners in Oakwood where an older APA review procedure was only used and later amended by 2006 S.C. Act No. 387. Moreover, 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. 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 Appellants complied with the provisions of the S.C. Code Ann. § 44-1-60 (2002), and 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 S.C. Code Ann. § 1-23-380 (2005 and Supp. 2010) to the jurisdictional exclusion of S.C. Code Ann. § 48-39-180 (2008) under the CZMA. **(R. pp. 5–7)**

III. S.C. Code Ann. § 48-39-180 (2008) was not repealed by implication due to the enactment of 2006 S.C. Act No. 387 as argued by the Respondent, and the lower court still has proper subject matter jurisdiction under the statute.

Respondent's arguments that the General Assembly failed to delete the language in S.C. Code Ann. § 48-39-180 (2008), as amended by 2006 S.C. Act No. 387, § 49, that purports to provide for judicial review in the circuit courts is misplaced for the reasons hereinbefore discussed and argued in subheading A of heading I. of Appellants' Final Reply Brief. **(Appellants' Final Reply Brief, pp. 5–11)** See Spectre, LLC v. S.C. Dep't of Health and Envtl. Control, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010) (Supreme Court held, "repeal by implication is disfavored, and is found only when two statutes are incapable of any reasonable reconcilement."). Moreover, the repugnancy must be plain, and if the two provisions can be construed so that both can stand, a court shall construe them. City of Rock Hill v. South Carolina DHEC, 302 S.C.161, 167, 394 S. E. 2d 327, 331 (1990). (Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect). Wilder v. South Carolina Highway Dep't, 228 S.C. 464, 90 S.E.2d 635 (1955); see also Wooten ex rel. Wooten v. S.C. Dep't of Transp., 333 S.C. 464, 511 S.E.2d. 355 (1999) (a specific statutory provision prevails over a more general one).

Here, the following statutes: S.C. Code Ann. § 48-39-180 (2008) of the CZMA, S.C. Code Ann. § 1-23-380 (2005 and Supp. 2010) of the APA, and S.C. Code Ann.

§ 44-1-60 (2002) are not plainly repugnant and are capable of reasonable reconciliation. The statutes can be harmonized since neither of the statutes have exclusive jurisdiction in resolving all permitting disputes involving S.C. Code Ann. Title 48, Chapter 39 (1976, as amended) of the CZMA for the reasons hereinbefore discussed and argued in subheading A of heading I., and heading II. of Appellants' Final Reply Brief. **(Appellants' Final Reply Brief, pp. 5–15)** For example, a "permit applicant" has a right to judicial review under either S.C. Code Ann. § 48-39-180 (2008) of the CZMA, or as provided in Chapter 23, Title 1 (1976, as amended) of the APA as admitted by the Respondent. **(Respondent's Initial Brief, p. 6)**

Next, the Respondent argues that the circuit court's review under S.C. Code Ann. § 48-39-180 is limited to a "substantial evidence" review and not a "de novo" review. Carter v. South Carolina Coastal Council, 281 S.C. 201, 203, 314 S.E.2d 327, 328 (1984). Appellants' acknowledge that a "substantial evidence" review standard governs the circuit court's review in this action. However, Respondent's argument misses the point because S.C. Code Ann. § 48-39-180 (2008) was specifically enacted for the benefit and protection of applicants, like the Appellants for the purpose of determining "whether the department's action" involving the issuance, final denial, revocation, suspension, and approval subject to conditions of the Department of permits is without authority (*ultra vires*), and in violation of the law. See S.C. Code Ann. § 48-39-180 (2008).

In the present case, the Department's Board's decision to affirm the Enforcement Order on June 10, 2010, had an *immediate legal effect* on the Appellants' property rights and caused them substantial monetary injury based on the diminution in value of their property

from that date and their inability to refinance the mortgage, or sell their property to the present date. **(R. pp. 279–82; R. pp. 294–95)**

Accordingly, even though S.C. Code Ann. § 48-39-180 (2008) is limited to a "substantial evidence" review, like the ALC and Court of Appeals, the circuit court is authorized to decide civil matters and award monetary damages **under this statute** compared to the ALC. See Randolf R. Lowell, supra at 152 (2d ed. 2008); State ex rel. McLeod v. Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964) ("In seeking the intention of the legislature, we must presume that it intended by its actions to accomplish something and not to do a futile thing.").

IV. Appellants' *ultra vires* claim against the Department's unauthorized conduct was adequately preserved to be argued on appeal.

Respondent's argument that "Appellants have failed to meet the fundamental requirements for preserving their *ultra vires* argument for appellate review" is without merit. **(Respondent's Initial Brief, p. 20)** Specifically, Respondent's asserts the "[*u*]*ltra vires* [conduct of the Department] was never raised by the Appellants in their Complaint or in argument in the lower court" **(Respondent's Initial Brief, p. 20)** is incorrect and contrary to the clear record on appeal for the reasons set forth below.

The term "*ultra vires*" is used to designate the acts of corporations beyond the scope of their powers as defined by their charters or by law. United States Rubber Prod., Inc. vs. Batesburg, 183 S.C. 49, 190 S.E. 120 (1937).

First, in response to Respondent's assertion that the *ultra vires* argument was never raised in the pleadings, the Appellants offer the following evidence to the contrary. For

example, under Appellants' Complaint's heading: I. NATURE OF THE PROCEEDING, the seeds for the Berrys' *ultra vires* argument against Respondent were planted by asserting:

> The reasons and grounds for this judicial review are that the [Department's] decision and findings set forth in its [Revocation] Order, attached hereto and marked as Exhibit "A," **are <u>not authorized by law</u> and are not supported by the competent, material, and substantial evidence on the whole record.**

Emphasis added. **(R. pp. 15–41; R. p. 44; R. pp. 53–60; R. pp. 65–91)**

Specifically, in their Complaint, Appellants objected to Respondent's unauthorized conduct and actions against them by challenging the Department's improper findings and conclusions used as basis to revoke the Appellants' permit in pertinent part as follows:

> c. in incorrectly finding and concluding of the Order's [Enforcement Order of Revocation] findings of fact **that the previously existing bulkhead (to be replaced) faced North and was located underneath the Berrys' house** notwithstanding the approval of the Berrys' certified drawings showing the replacement of their previously existing 155 foot bulkhead with a new vinyl bulkhead extending along the same northern property line, and, also, located approximately twenty (20) feet facing north from their home's side elevation line[.]
>
> . . .

(Emphasis added.) **(R. pp. 15–22; R. p. 54)**

Second, contrary to the Respondent's argument that Appellants' *ultra vires* argument was never raised at the lower court, a clear reading of the hearing record reflects that Appellants' counsel specifically raised and discussed this issue. For example, Appellants' counsel argued the Respondent improperly switched the location of the 155-foot vinyl bulkhead to underneath the Appellants' home (without prior notice) and authority under the CZMA. **(R. p. 242, line 2–p. 243, line 21; R. p. 250, lines 4–25; R. p. 251, lines 7–22;**

R. p. 252, line 2–p. 253, line 2) Additionally, Appellants' counsel argued the Appellants had already constructed 155-foot vinyl bulkhead according to the approved plans attached to the permit (OCRM-07-509) before receiving any notice of the Respondent's unauthorized location change to their substantial prejudice and damage. **(R. p. 240, line 20–p. 241, line 5)** Next, Appellants' counsel argued at the hearing that no permits, plans, surveys, and professional drawings were produced by Respondent in response to their FOIA request to substantiate Respondent's authority to switch the location of Appellants' 155-foot bulkhead after its substantial completion. **(R. p. 240, lines 4–19)** Lastly, the hearing record reflects the lower court granted Respondent's Motion to Dismiss despite Appellants' counsel argument that the Respondent switching the location of the 155-foot bulkhead to underneath the Appellants' home was contrary to the approved plans attached permit, and unauthorized by the CZMA. **(R. p. 250, line 4–p. 251, line 22; R. p. 252, line 2–p. 253, line 2; R. p. 256, line 20–p. 257, line 9)**

"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 Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301–302, 641 S.E.2d 903, 907 (2007) (citing Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002).

Because Appellants' *ultra vires* argument was raised in their Complaint and argued in the lower court with sufficient specificity, and timely raised on Appeal as discussed above, the Appellants have complied with the four basic fundamental requirements to preserving

their *ultra vires* agency action exception against Respondent for appellate review. Accordingly, this Court should entertain their preserved claim for review.

A. Appellants asserted *ultra vires* exception to the requirement of exhaustion of administrative remedies is applicable to this action.

Appellants cite Ex parte Allstate, 248 S.C. 550, 151 S.E.2d 849 (1966) as authority for their position that the exhaustion requirement, if applicable to their case, should be excused under the *ultra vires* exception recognized by our South Carolina Courts. In Ex parte Allstate, Allstate and another insurance company brought a lawsuit challenging the Insurance Commissioner's authority to investigate its lobbying efforts with the legislature. The Supreme Court affirmed the county court's grant of the injunction, and held the actions of the insurance companies in opposing proposed legislation "were not activities 'with respect to the business of insurance,'" within the meaning of [the section now codified at S.C. Code Ann. § 38-57-50 (2009)], which the Insurance Commissioner is authorized to regulate or investigate." Ex parte Allstate at 565, 151 S.E.2d at 854. The Court held the insurance companies did not first have to exhaust administrative remedies by finishing the proceedings before the Commissioner. The Court explained:

> The issue was solely one of law as to the statutory authority or jurisdiction of the Commissioner. The fasts in regard to that issue were undisputed. Under the undisputed facts, the Commissioner was obviously without such authority. These circumstances afforded a sound basis for the action of the lower court in excusing the failure of the companies to first seek relief in the administrative proceeding . . . .

Ex parte Allstate at 567–68, 151 S.E.2d at 855.

"[Ex parte Allstate] establishes that exhaustion will be excused when the plaintiff claims that agency action is plainly *ultra vires*, at least if that claim does not involve any

disputed facts." Randolf R. Lowell, supra at 83. Additionally, in the case of Brown v. James, 389 S.C. 41, 49, 675 S.E.2d 604, 697 (Ct. App. 2010), the Court of Appeals explains:

> In Adamson v. Richland County School District One, this Court stated: "S.C. Code Ann. § 1-32-380(6) (Supp. 1997) [an APA provision] gives the circuit court authority to reverse an agency decision 'made upon unlawful procedure' or in excess of 'statutory authority." 332 S.C. 121, 128, 583 S.E.2d 752 (Ct. App. 1998) (emphasis added).

Appellants argue the lower court was incorrect in not assuming jurisdiction of the case because, like Ex parte Allstate, the facts are undisputed as to the following: (1) "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" **(Respondent's Initial Brief, p. 3)**, (2) the Site Plan prepared by David R. Simms, P.E. **(R. pp. 112–13; R. pp. 329–30)** and approved by the Department did not authorize the removal and replacement of a 155-foot bulkhead (previous and existing) located allegedly underneath the length of Appellants' residence; the Site Plan approved by Respondent clearly and unambiguously authorized the removal and replacement bulkheads (previous and existing) located along easternmost 105-foot length of the northern property line and the entire 50-foot width of the western boundary line **(R. pp. 109–113; R. pp. 267–72; R. pp. 329–30)**, (3) the Department never notified the Appellants by mail or otherwise that their professional drawings were inadequate, incorrect, or needed additional work. **(R. p. 113; R. p. 263)** Further, the Department never revoked the Appellants' permit because fraudulent information had been submitted on the approved plans in violation of S.C. Code Ann. § 48-39-50(H) (2008 and Supp. 2010), (4) on June 22, 2007, the Department issued a Construction Authorization

placard to the Appellants allowing them "to begin replacing their 155 foot bulkhead as permitted" **(R. p. 106; R. p. 274; Respondent's Initial Brief, p. 3)**, (5) Paragraph three (3) of the Department's Enforcement Order provided that the previously existing north-facing portion of the bulkhead (to be replaced) was located underneath the length of Appellants' residence **(R. p. 15, ¶ 3; R. p. 65, ¶ 3)**, and (6) Appellants' permit was "revoked on the grounds that you [Appellants] failed to construct the bulkhead **according to plans attached to the Permit**. . . . " (emphasis added). **(R. p. 12; R. p. 64; R. pp. 112–13)**

Like Ex parte Allstate, the Appellants brought an action in circuit court under S.C. Code Ann. § 48-39-180 (2008) challenging the Respondent's *ultra vires* conduct: in illegally switching the approved location of their 155-foot bulkhead (after substantial completion) to underneath the Appellants' home without due process, and contrary to the permit's approved plans and requirements of the CZMA.

As a creature of statutes, regulatory bodies like DHEC have only the authority granted them by the legislature. Medical Soc'y of S.C. v. Med. Univ. of S.C., 334 S.C. 270, 513 S.E.2d 352 (1999). Any action taken by the Department outside of its statutory and regulatory authority is null and void. Triska v. Dep't of Health & Envtl. Control, 292 S.C. 190, 355 S.E.2d 531 (1987). Under S.C. Code Ann. § 48-39-50 (2008 and Supp. 2010) pertaining to powers and duties of the Department, the statute provides in pertinent part: "To revoke and suspend permits of persons who fail and refuse to carry out or comply with terms and conditions of the permit." S.C. Code Ann. § 48-39-50(H) (2008 and Supp. 2010). Clearly, under S.C. Code Ann. § 48-39-50 (2008), the Department has the authority to suspend and revoke a permit for non-compliance with its terms and conditions, and issue an enforcement order requiring compliance, but the Department does not have authority to

illegally switch the location of a bulkhead that is contrary to the permit's approved plans. See S.C. Code Ann. § 48-39-50 (2008 and Supp. 2010).

Accordingly, Appellants reliance on Ex parte Allstate is not misplaced as asserted by the Respondent. **(Respondent's Initial Brief, p. 20)** Like the Allstate action, the Appellants' action is solely one of law as to the statutory authority or jurisdiction of the Respondent under S.C. Code Ann. § 48-39-50 (2008) and the CZMA. It is clearly not within the Respondent's authority to improperly switch the location of the Appellants' 155-foot long bulkhead after its substantial completion (to underneath their home) without the required notice, and then unlawfully suspend and revoke the Appellants' permit even though the Appellants had removed and constructed their 155-foot bulkheads (previous and existing) according to their permits' approved plans. Thus, the lower court erroneously concluded the action was not within their jurisdiction.

V. Appellants' equitable tolling argument is relevant to this appeal.

Appellants admit their equitable tolling argument was neither raised to nor ruled upon by the lower court. But Appellants assert they attempted to include their equitable tolling argument in the record when they filed their Motion to Reconsider, pursuant to Rules 52 and 59, SCRCP, however, the lower court declined to hold a hearing to receive additional argument, and denied the Motion on April 19, 2011. On September 20, 2011, regarding Docket No.10-ALJ707-0270-CC, a hearing was held before Judge Carolyn C. Matthews of the ALC to address the parties pending motions: Respondent's Motion to Dismiss and Appellants' Motion to Stay. Judge Matthews heard arguments from counsel on both Motions including the Appellants' equitable tolling argument; but declined to rule on

Respondent's Motion to Dismiss at the present time, and granted the Appellants' Motion to Stay in accordance with Rule 241, SCACR, pending a decision by the South Carolina Court of Appeals.

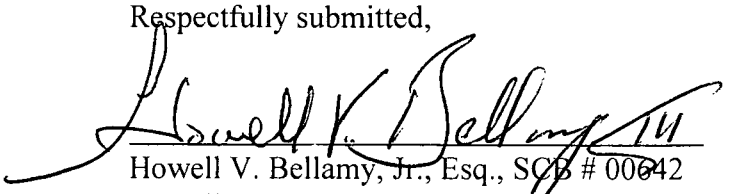
In the case of Hooper v. Ebenezer Senior Servs. and Rehab. Ctr., 386 S.C. 108, 687 S.E.2d. 29 (2009), the South Carolina Supreme Court noted that other state and federal jurisdictions have considered equitable tolling in a variety of contexts and have developed differing parameters for its application. Hooper, supra at 116, 687 S.E.2d 32. For example, one of the decisions cited by the Court was: 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). Machules, supra; see, e.g., Burnett v. New York Central R.R., 380 U.S. 424 85 S. Ct. 1050, 13 L. Ed.2d 941 (1965) (wrong forum) (emphasis added).

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 the Appellants' case. Respondent's argument before the circuit court as well as before this Court is not that Appellants failed to bring this action before the court in a timely manner. Rather, Respondent's argument is that Appellants' filing in circuit court was the incorrect forum to adjudicate such an action. **(Respondent's Initial Brief, p. 25)** Accordingly, if Appellants' lawsuit was brought allegedly in the wrong forum, the issue of equitable tolling is relevant to this action, and the Court should entertain such an argument. Hooper, supra at 115, 687 S.E.2d at 33.

CONCLUSION

Based on the foregoing arguments, the Appellants respectfully request this Court set aside the circuit court's Dismissal Order.

Respectfully submitted,



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February 28, 2012

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.*

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply 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 Reply 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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