

THE STATE OF SOUTH CAROLINA
In The Administrative Law Court

APPEAL FROM S. C. DEPARTMENT OF HEALTH & ENVIORN. CONTROL
Office of Coastal Resources

Catherine E. Heigel, Director

Appellate Case Number: 2017-000161
Case No. 2015-RFR-69, Sunset Cay, L.L.C.
DOCKET NO. 15-ALJ-07-0579-CC

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SC Court of Appeals

Sunset Cay, L.L.C., Appellant,

vs.

South Carolina Department of Health and Environmental Control,Respondent.

SUPPLEMENTAL RECORD ON APPEAL

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(January 4, 2017)

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Sunset Cay, LLC,

Petitioner,

vs.

South Carolina Department of Health and
Environmental Control,

Respondent.

Docket No. 15-ALJ-07-0579-CC

**SECOND AMENDED ORDER OF
DISMISSAL**

FILED

JAN 04 2017

STATEMENT OF THE CASE

SC ADMIN. LAW COURT

This matter comes before the South Carolina Administrative Law Court ("ALC" or "Court") on the South Carolina Department of Health and Environmental Control's (Department or "DHEC") motion to dismiss the portion of Sunset Cay, LLC's ("Sunset Cay" or "Petitioner") case relating to two Cease and Desist directives upon the ground that Petitioner failed to timely comply with procedural rules in respect thereto.

Further, Respondent seeks a ruling that the remaining portion of Petitioner's case involving DHEC's Declaration under Regulation 30-9 ("Declaration") is not ripe for determination.

For the reasons set forth below, the Court finds that Respondent is correct in respect to the Cease and Desist issue and grants the partial motion to dismiss of Petitioner's claim.

In considering the ripeness issue, the Court has found that it is without jurisdiction and dismisses the remaining portion of the case, without prejudice.

This Second Amended Order of Dismissal is being issued after both parties filed Motions to Reconsider and a hearing was held on December 14, 2016.¹

FACTUAL BACKGROUND

On April 9, 2003, DHEC issued Permit number 2002-1H-190-P ("Permit") to Petitioner authorizing a marina on the Folly River at Folly Beach, South Carolina. On December 14, 2005,

¹ A prior Amended Order of Dismissal was issued on October 21, 2016, to correct the previous Order of Dismissal, dated October 17, 2016, that was erroneously dismissed 'without prejudice', when it should have been dismissed 'with prejudice', as to the matter of the cease and desist directives, and 'without prejudice' as to the declaration.

the Department amended the Permit authorizing the placement of a 30'x29' building on an existing 50'x50' pierhead. The 30'x29' building contains restrooms on the first floor and a ship's store on the second floor.

On January 13, 2015, DHEC met with Petitioner's representative, Mr. Clark, to discuss an amendment to the Permit to allow a restaurant on the second floor.² On January 15, 2015, DHEC conducted a compliance inspection of the marina and found an unauthorized restaurant under construction on the second floor, an unauthorized third floor, and a number of unauthorized jet docks. After discussions with Petitioner regarding the unauthorized restaurant and unauthorized third floor, DHEC emailed a Cease and Desist directive to Mr. Clark on March 13, 2015, to stop all operations of the restaurant and unauthorized third floor. The Department served Mr. Clark with the Cease and Desist directive on March 16, 2015. Petitioner never sent a request for a Final Review Conference to DHEC on this Cease and Desist directive.

DHEC sent Petitioner another Cease and Desist directive on October 26, 2015 via certified mail. Again, Petitioner never submitted a request for a Final Review Conference to DHEC to contest this Cease and Desist directive.

On June 1, 2015, DHEC met with Petitioner to discuss a plan for the uses of each floor of the building to ensure compliance with regulations prior to submitting an amendment to the Permit. On July 6, 2015, Petitioner submitted proposed plans for each floor of the building. DHEC responded on August 4, 2015, concluding that the "[u]se of the third floor as a ship's store office and yacht sales office cannot be authorized by the Department."

On August 27, 2015, Sunset Cay filed a "Petition for Declaration under Regulation 30-9", requesting that DHEC declare that certain secondary uses "are all water dependent uses in conformity with the statutory definition contained in Regulation 30-1(52)."³ Petitioner additionally requested the Department "to provide a written list of all the proposed water dependent uses the Department concedes are 'water dependent' based on controlling definition of Regulation 30-1[.]"

² DHEC, on September 18, 2009, issued Petitioner a letter, which reads, in part:

The staff of SCDHEC/Ocean & Coastal Resource Management has reviewed the above referenced letter. Specifically, your request to ask if the serving of snacks and light food items as a part of the existing ships store is consistent with your permit. OCRM offers no objection to inclusion of food items as a component of the ships store and does not require any modification of the permit provided the store is not converted into a restaurant. Any conversion of the ships store to another use will be considered a "change of use" and would require a modification of the existing permit.

³ "Ship Store Office and Storage; Yacht Sales Office; Captain and Transient Lounge; Commodore Meeting Room; and Public Waterway Events."

The Department issued its Declaration on October 12, 2015, proclaiming that none of the secondary uses proposed by Petitioner were water dependent. Additionally, the Department responded to Petitioner's request for a list of water dependent uses. DHEC stated, "the regulations require the Department to determine what is water dependent based on a demonstration that the dependence on, use of, or access to coastal waters is essential to the facility's primary activity."

On October 12, 2015, Petitioner filed a Motion for Reconsideration of the Department's Declaration. The Department construed the Motion for Reconsideration as a written request for final review. DHEC, on December 2, 2015, informed Petitioner that it "will not conduct a Final Review Conference on the above-referenced matter."

After receipt of DHEC's denial for a Final Review Conference, Petitioner filed a Request for a Contested Case Hearing before the ALC on December 23, 2015. In its "Notice of Appeal," included in the Request for a Contested Case Hearing, Petitioner states that this Court has jurisdiction "under the *South Carolina Constitution*, Article I, § 22, the *Administrative Procedures Act*, § 1-23-380, S. C. Code, and Rule 33 of the *Administrative Law Court Rules of Procedure*." (emphasis in original).

DISCUSSION

Sunset Cay failed to exhaust administrative remedies as to the Cease and Desist directives.

Sunset Cay failed to properly invoke this Court's jurisdiction over its request to compel DHEC to withdraw the Cease and Desist directives dated March 3, 2015, and October 26, 2015. In accord with S.C. Code Ann. § 44-1-60(G) (Supp. 2015), Sunset Cay may file a request with the ALC for a contested case within thirty days after:

- (1) notice is mailed to the applicant, permittee, licensee, and affected persons that the board declined to hold a final review conference; or
- (2) the sixty calendar day deadline to hold the final review conference lapses and no conference has been held; or
- (3) the final agency decision resulting from the final review conference is received by the parties.

A staff decision of DHEC becomes a final agency decision fifteen days "after notice of the staff decision has been mailed to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department[.]" S.C. Code Ann. § 44-1-60(E)(2) (Supp. 2015). The statutory fifteen day deadline to file a request for final review for the March 16, 2015, Cease and Desist directive was April 2, 2015, and the statutory fifteen day deadline to file a request for review for the October 26, 2015, Cease and Desist directive was November 20, 2015.

Petitioner has never filed a request for Final Review Conference for either Cease and Desist directive issued by the Department. Accordingly, Petitioner has failed to exhaust administrative remedies prior to filing a request for a contested case on those issues. Petitioner has not satisfied the statutory prerequisites which would allow it to pursue this matter in this Court. Because Sunset Cay did not file a request for a Final Review Conference on either Cease and Desist directive, the Department never declined to hold a Final Review Conference, nor did the Department allow sixty days to lapse after a request for a Final Review Conference was submitted, nor did DHEC issue a final agency decision as a result of the Final Review Conference. Thus, this Court dismisses the claims raised by Petitioner regarding the two Cease and Desist directives for failure to exhaust administrative remedies. Hyde v. S.C. Dep't of Mental Health, 314 S.C. 207, 442 S.E.2d 582 (1994).

This Court lacks subject matter jurisdiction over the Petitioner's claim that arose from DHEC's Declaration.

The ALC can only exercise those powers which have been conferred upon it by the South Carolina General Assembly. Triska v. Dep't of Health & Envtl. Control, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987). "Administrative Law Judges...must follow the laws as written." Ward v. State, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000).

"The lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised sua sponte by the court." Town of Hilton Head Island v. Godwin, 370 S.C. 221, 223, 634 S.E.2d 59, 60-61 (Ct. App. 2006). "Lack of jurisdiction of the subject matter cannot be waived even by consent and therefore such lack can and should be taken notice of by this Court *Ex mero motu*." Harden v. S.C. State Highway Dep't, 266 S.C. 119, 124, 221 S.E.2d 851, 853 (1976).

Under the Administrative Procedures Act ("APA"), "persons aggrieved by an agency decision are entitled to seek review of the decision by means of a contested case hearing before the ALC. The ALC sits as the adjudicatory body in all contested cases involving DHEC." Berry v. S.C. Dep't of Health & Envtl. Control, 402 S.C. 358, 364, 742 S.E.2d 2, 5 (2013). S.C. Code Ann. § 1-23-600(A) (Supp. 2015) in part provides:

An administrative law judge shall preside over all hearings of contested cases as defined in Section 1-23-505 or Article I, Section 22, Constitution of the State of South Carolina, 1895, involving the departments of the executive branch of government as defined in Section 1-30-10 in which a single hearing officer, or an administrative law judge, is authorized or permitted by law or regulation to hear

and decide these cases...

Therefore, in order for this Court to have jurisdiction over this matter, the issue must fall under the requirement of a contested case as defined in S.C. Code Ann. 1-23-505(3) or under the requirements of S.C. Const. art. I, § 22.

S.C. Code Ann § 1-23-505(3) (Supp. 2015) defines "Contested Case" as:

a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law or by Article I, Section 22, Constitution of the State of South Carolina, 1895, to be determined by an agency or the Administrative Law Court after an opportunity for hearing.

Sunset Cay, in its Request for a Contested Case, cites S.C. Const. art. I, § 22, S.C. Code Ann. § 1-23-380 (Supp. 2015), and SCALC Rule 33 as granting jurisdiction to the ALC to hear this matter. As an initial matter, S.C. Code Ann. § 1-23-380 governs judicial review of a final decision in a contested case, and is therefore inapplicable here because a final decision in a contested case has not occurred. Further, SCALC Rule 33 also does not confer jurisdiction because if this matter were to be heard, it would be heard as a contested case and not under this Court's appellate jurisdiction. See Berry, 402 S.C. at 364, 742 S.E.2d at 5. The determination of jurisdiction under S.C. Const. art. I, § 22 will be discussed below.

Petitioner is contesting DHEC's Declaration. Pursuant to 2 S.C. Code Ann. Regs. 30-9(D) (2011), "Interested persons may petition to the Department for declaratory rulings. The Department shall rule on each petition, in writing, within 45 days of receipt." After receiving the Department's Declaration, Petitioner filed a Motion for Reconsideration. The Department construed the Motion for Reconsideration as a request for a Final Review Conference. The Department then proceeded to deny Sunset Cay's request for a Final Review Conference. The Department's decision to entertain what it considered a request for a Final Review Conference was incorrect because DHEC authority to accept or deny a Request for a Final Review Conference is found in S.C. Code Ann. § 44-1-60(F) (Supp. 2015). In order for the mechanisms of a Final Review Conference to be available, compliance with S.C. Code Ann. § 44-1-60(A) (Supp. 2015) is a prerequisite.

S.C. Code Ann. § 44-1-60(A) states "[a]ll department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, license, 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.” The “Petition for Declaration under Regulation 30-9” asked two questions: 1) whether certain uses qualified as water dependent; and 2) what uses in general qualify as water dependent. Neither of these two questions involve the issuance, denial, renewal, suspension, or revocation of a permit or license. Therefore, it was improper for the Department to follow the procedure outlined in S.C. Code Ann. § 44-1-60(F) in denying Petitioner’s request for a Final Review Conference. Further, as will be discussed below, neither question gives rise to a contested case.

There are no statutory or regulatory laws that grant this Court jurisdiction. 2 S.C. Code Ann. Regs. 30-9(D) does not provide a manner by which an interested party may appeal a Department Declaration. The Department’s Declaration does not involve the issuance, denial, suspension or revocation of permits. It is telling that 2 S.C. Code Ann. Regs. 30-9(D) allows the request and requires a written response within 45 days but pointedly fails to include a procedural mechanism making the process an adversarial one that would be followed by an appeal or a contested case. Instead it is similar to an Attorney General’s opinion. Additionally, the catch-all provision of S.C. Code Ann. § 44-1-60(A), “other actions of the department which may give rise to a contested case” is also not applicable here because, as discussed below, the Department’s Declaration does not fall under the definition of a contested case under S.C. Code Ann. § 1-23-505(3), nor does the South Carolina State Constitution require notice and an opportunity to be heard on DHEC’s Declaration because Petitioner is not “finally bound” by a decision affecting any private rights.

A contested case requires the ALC to determine the “legal rights, duties, or privileges of a party...after an opportunity for hearing.” S.C. Code Ann. § 1-23-505(3). Here, there are no legal rights, duties, or privileges that would be infringed if Petitioner was not provided with a contested case. Sunset Cay’s Petition for Declaration under Regulation 30-9 does not affect the legal rights, duties, or privileges of Petitioner. The Department’s Declaration is nothing more than an advisory opinion from DHEC.

This Court also does not have jurisdiction under S.C. Const. art. I, § 22. The South Carolina Supreme Court has interpreted S.C. Const. art. I, § 22 “as specifically guaranteeing persons the right to notice and an opportunity to be heard by an administrative agency, even when a contested case under the APA is not involved.” Ross v. Med. Univ. of S.C., 328 S.C. 51, 68, 492 S.E.2d 62, 71 (1997); see also Stono River Evtl. Prot. Ass’n v. S.C. Dep’t of Health & Evtl. Control, 305 S.C. 90, 93-94, 406 S.E.2d 340, 342 (1991); League of Women Voters of Georgetown Cty. v.

Litchfield-by-the-Sea, 305 S.C. 424, 409 S.E.2d 378 (1991) (overruled on other grounds by Brown v. S.C. Dep't of Health & Env'tl. Control, 348 S.C. 507, 560 S.E.2d 410 (2002)).

S.C. Const. art. I, § 22 reads:

No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

“In recognition of the increasing number of governmental powers delegated to administrative agencies, [S.C. Const. art. I, § 22] was added to the 1895 Constitution in 1970 ‘as a safeguard for the protection of liberty and property of citizens.’” Ross, 328 S.C. at 68, 492 S.E.2d at 71 (quoting Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, p. 21 (1969)). South Carolina courts have interpreted the protections provided by S.C. Const. art. I, § 22 as “equivalent of those afforded by the Due Process Clause of our state and federal Constitutions.” S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n. 389 S.C. 380, 391, 699 S.E.2d 146, 152 (2010).

Pointedly, S.C. Const. art. I, § 22, states that “no person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard[.]” (emphasis supplied). Here, Petitioner would not be “finally bound” by the Declaration. There are no rights that are affected by DHEC’s Declaration, as Petitioner can pursue an application for an amendment to its Permit, including an assertion that the five uses for which the amendment is sought are water dependent, which, after a final agency decision by DHEC, would give jurisdiction to this Court. See S.C. Code Ann. § 44-1-60.

Because there is no statutory or regulatory law, and no requirement for an opportunity to be heard under S.C. Const. art. I, § 22 that grants this Court jurisdiction over DHEC’s Declaration, this Court must dismiss this matter for lack of subject matter jurisdiction.

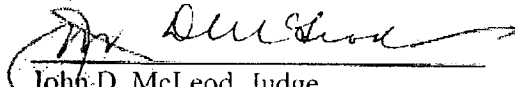
ORDER

IT IS THEREFORE ORDERED that this matter is **DISMISSED WITHOUT PREJUDICE** as to the declaration.

IT IS FURTHER ORDERED that his matter is **DISMISSED WITH PREJUDICE** as to the cease and desist directives.

AND IT IS SO ORDERED.

January 4, 2017
Columbia, S.C.

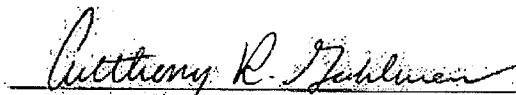


John D. McLeod, Judge
South Carolina Administrative Law Court

CERTIFICATE OF SERVICE

I, Anthony R. Goldman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

January 4, 2017
Columbia, S.C.



Anthony R. Goldman
Judicial Law Clerk

CERTIFICATE OF COUNSEL

I certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

October 30, 2017

A handwritten signature in black ink, appearing to read 'T.R. Goldstein', written over a horizontal line.

Thomas R. Goldstein

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