

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Presiding Administrative Law Judge

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

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SC Court of Appeals

Sunset Cay, L.L.C.,Appellant

v.

South Carolina Department of
Health and Environmental Control,

.....Respondent

FINAL BRIEF OF RESPONDENT SCDHEC

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TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	i
Table of Authorities	ii
I. STATEMENT OF THE ISSUES ON APPEAL.....	1
II. STATEMENT OF THE CASE.....	2
III. STATEMENT OF THE FACTS.....	4
IV. ARGUMENT.....	9
I. The Administrative Law Court did not err in finding it lacked subject matter jurisdiction over the Appellant's claim arising from DHEC's Declaratory Ruling Response.....	11
A. Because S.C. Code Ann. § 44-1-60(G)(1) allows the DHEC Board to decline to hold a final review conference, it did not "duck" the issue and the ALC did not err by failing to exercise its discretion.....	13
II. The Administrative Law Court did not err in dismissing the action regarding the October 26, 2015 ¹ Cease and Desist directive, because Sunset Cay failed to exhaust its administrative remedies	14
A. Sunset Cay's August 27, 2015 Petition for Declaration is not a Request for Final Review Conference.....	16
B. Sunset Cay's November 12, 2015 letter is not a Request for Final Review Conference.....	17
V. CONCLUSION.....	18

¹ Sunset Cay did not appeal the ALC's *Second Amended Final Order* regarding the March 3, 2015 Cease and Desist Directive, so this Directive is not before this Court.

TABLE OF AUTHORITIES

Page

Cases

Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011)9

Hyde v. S.C. Dep't of Mental Health, 314 S.C. 207, 442 S.E.2d 582 (1994) 3, 4, 15

Town of Hilton Head Island v. Godwin, 370 S.C. 221, 223, 634 S.E.2d 59, 60-61
(Ct. App. 2006)6

Town of Sullivan's Island v. Felger, 318 S.C. 340, 457 S.E.2d 626 (Ct. App. 1995) 10

Statutes and Court Rules

S.C. Code Ann. § 1-23-380 14

S.C. Code Ann. § 15-77-300 2, 8

S.C. Code Ann. § 44-1-60 6, 14, 15, 16

S.C. Code Ann. § 44-1-60(E)(2)6, 8, 9, 15, 16, 17, 18

S.C. Code Ann. § 44-1-60(G) (Supp. 2015)..... 15

S.C. Code Ann. § 44-1-60(G) (1)8, 9, 13

S.C. Code Ann. Regs. 30-1..... 5

S.C. Code Ann. Regs. 30-1(D)..... 6

S.C. Code Ann. Regs. 30-4(I)..... 11, 13

S.C. Code Ann. Regs. 30-4(I)(3)..... 12

S.C. Code Ann. Regs. 30-9 6

42 U.S.C. § 1988(b)..... 2, 6

Article I, § 22, S.C. Constitution13, 14

Rule 208(b)(1)(B), SCACR..... 9

Rule 208(b)(4), SCACR 11
Rule 210 (C), SCACR 12

Statement of Issues on Appeal

- I. Did the Administrative Law Court err in finding it lacked subject matter jurisdiction over Sunset Cay's claim arising from DHEC's Declaratory Ruling Response?11**

- II. Did the Administrative Law Court err in dismissing the action regarding the October 26, 2015² Cease and Desist directive, because Sunset Cay failed to exhaust its administrative remedies?15**

² Sunset Cay did not appeal the Administrative Law Court's Second Amended Final Order regarding the March 3, 2015 Cease and Desist Directive, so this Directive is not before this Court.

Statement of the Case

This is an appeal from the Administrative Law Court's (ALC) *Second Amended Order of Dismissal* on January 4, 2017. (Supplemental R., pp. 1-8).

On December 23, 2015 Sunset Cay filed a Request for Contested Case before the ALC asking the Court to issue an Order

"compelling the Department of Health and Environmental Control, Division of Ocean and Coastal Resource Management (hereinafter referred to as "OCRM" throughout for convenience) to *withdraw 'Cease and Desist Letters' dated March 3, 2015, and October 26, 2015, and to approve the appellant's proposed five water dependent uses* as well as to provide objective criteria for primary and secondary water dependent uses as that term will be applied by OCRM to evaluate water-dependent uses in conformity with its regulations." (Emphasis added). (Request for Contested Case, p. 2 - captioned as "Notice of Appeal").

On June 1, 2016 the South Carolina Department of Health and Environmental Control ("The Department" or "DHEC" or "DHEC-ORCM" or "OCRM") filed a *Partial Motion To Dismiss For Lack of Jurisdiction and Lack of Ripeness*. The basis for this Motion was fivefold: (1) Sunset Cay failed to properly invoke the ALC's jurisdiction regarding the Cease and Desist Directives issued by DHEC; (2) the "fee shifting statute" (S.C. Code Ann. § 15-77-300) is inapplicable to this matter; (3) 42 U.S.C. § 1988(b) is inapplicable to this matter; (4) the ALC lacks jurisdiction to award damages to Sunset Cay; (5) Sunset Cay's proposed remedy regarding the water-dependency issue (i.e., ALC orders DHEC to issue a permit amendment allowing the requested uses) is not ripe for adjudication, because Sunset Cay has not applied for a permit amendment to include these uses. (R. pp. 127-151, *Partial Motion To Dismiss For Lack of Jurisdiction and Lack of Ripeness*).

On June 27, 2016, the ALC heard DHEC's *Motion to Dismiss*.

On October 17, 2016, the ALC issued an *Order of Dismissal* dismissing the entire case without prejudice. (R. pp. 1-8).

On October 21, 2016, the ALC issued an *Amended Order of Dismissal* (R. pp. 9-15) to correct the October 17, 2016 *Order of Dismissal* 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." (Supplemental R. p. 1, *Second Amended Order of Dismissal*, footnote 1).

On November 2, 2016, the Appellant filed a *Motion for Reconsideration* of the ALC's October 21, 2016, *Amended Order of Dismissal*. (R. pp. 205-234).

On November 3, 2016, DHEC filed a *Motion to Amend Order Vacating Previous Order and Amended Order Of Dismissal*. (R. pp. 179-204).

On December 14, 2016, the ALC heard both Sunset Cay's *Motion for Reconsideration* and DHEC's *Motion to Amend Order Vacating Previous Order and Amended Order of Dismissal*.

On January 4, 2017 the ALC issued a *Second Amended Order of Dismissal*. (Supplemental R. pp. 1-8). In that Order, the ALC dismissed *without prejudice* Sunset Cay's request for an Order directing DHEC (a) to approve its proposed five water dependent uses in an August 27, 2015 Declaratory Ruling Request and (b) to provide objective criteria for primary and secondary water dependent uses.

Furthermore, in the *Second Amended Order of Dismissal*, the ALC "dismiss[ed] [with prejudice] the claims raised by Petitioner regarding the two Cease and Desist directives [dated March 3, 2015 and October 26, 2015] 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)." (Supplemental R. p. 4, *Second Amended Order of Dismissal*, p. 4).

On January 23, 2017 Sunset Cay filed Notice of Appeal with this Court.

Statement of Facts

On April 9, 2003, DHEC issued Permit# 2002-1H-190-P ("Permit") to Sunset Cay authorizing a marina on the Folly River at Folly Beach, South Carolina.

One of the Special Conditions of this Permit was that "no food or beverage service ... are allowed on or across this marina facility." (R. p. 192, Department's November 3, 2016 *Motion to Amend Dismissal Order*, Exhibit F [Special Condition # 25 excerpt from Permit]).

Sunset Cay built the marina in 2006. (R. p. 186, November 12, 2015 letter from Tommy Goldstein).

The Sunset Cay marina is a new and completely different structure from a previous dock³ located on the Folly River at approximately the same location. (R. pp. 181 and 189, DHEC's November 3, 2016 *Motion to Amend Dismissal Order*, Exhibit B - aerial photographs of old dock and new marina).

The Permit amendment pertinent to this appeal was issued by DHEC on December 14, 2005. On that date, the Department amended the Permit authorizing the placement of a 30'x29'

³ Sunset Cay urges this Court to find that the structure depicted in the picture at the top of Exhibit B of DHEC's *Motion to Amend Dismissal Order* (R. p. 189) is a "marina." However, when the Folly River Seafood Company, Inc. applied to the U.S. Army Corps of Engineers for a permit on January 28, 1947 at the approximately same location as the Sunset Cay marina, the drawings submitted with the permit application (R. p. 63) cannot reasonably be described as a marina. (R. pp. 61-66, Sunset Cay Request for Contested Case, Exhibit B). These drawings, which were approved as part of the U.S. Army Corps of Engineers' February 11, 1947 permit, depict a commercial fishing dock, not a marina. (R. p. 63).

building on an existing 50'x50' pierhead. (R. p. 203 [OCRM permit amendment December 14, 2005, Exhibit H to DHEC's November 3, 2016 *Motion to Amend Dismissal Order*]).

On January 13, 2015 DHEC employees met with Sunset Cay representative, Butch Clark, because he (Mr. Clark) expressed a desire to amend Permit# 2002-1H-190-P to allow a restaurant to operate on the second floor. These DHEC employees told Mr. Clark that (1) the second floor could not be utilized as a restaurant and (2) that before any changes to the permit were made, they would do an inspection of the marina to ensure that it was in compliance with the permit. (R. pp. 128-129, DHEC's *Motion to Dismiss*).

On January 15, 2015, DHEC conducted a compliance inspection of the marina and found the following: (1) an unauthorized restaurant under construction on the second floor of the building; (2) an unauthorized apartment on the third floor of the building; and (3) a number of unauthorized jet docks. (R. p. 129 [DHEC's *Motion to Dismiss*], R. p. 146 [Exhibit 9, DHEC's *Motion to Dismiss*] and R. pp. 199-200 [Exhibit G (Notice of Violation and Admission Letter) to DHEC's November 3, 2016 *Motion to Amend Dismissal Order*]).

On August 18, 2015, DHEC-OCRM staff member Josh Hoke conducted a site inspection of the marina building and took photos of the renovated ship store and bar area. (R. pp. 138-145, DHEC's *Motion to Dismiss*, Photographic Exhibits 1-8).

On August 27, 2015, Sunset Cay submitted to DHEC a "Petition for Declaration under Regulation 30-9," (hereinafter "Petition for Declaration" or "Declaratory Ruling") requesting that DHEC declare that the following five proposed uses "are all water dependent uses in conformity with the statutory definition contained in Regulation 30-1(52):" (1) Ship Store Office and Storage; (2) Yacht Sales Office; (3) Captain and Transient Lounge; (4) Commodore Meeting

Room; and (5) Public Waterway Events. (R. pp. 54-57, Sunset Cay's Petition for Declaration Under Regulation 30-9, Exhibit A to Request for Contested Case).

On October 12, 2015, the Department responded to Sunset Cay's Petition for Declaration. In particular, the Department found that Sunset Cay's five proposed uses⁴ did *not* meet the regulatory definition of water dependent in that these five uses were not "essential to the functioning of its primary activity." S.C. Code Regs. 30-1.D(52). Sunset Cay Marina was originally permitted by the Department on April 9, 2003 for the primary purpose of temporary and permanent docking space and fueling. (R. p. 17 [Department's Declaratory Ruling response]; and R. p. 309 [Transcript, p. 29, lines 7-14]).

On October 23, 2015, Sunset Cay filed a Request for Final Review (RFR) of the Department's Declaratory Ruling response along with the proper filing fee seeking to exhaust its administrative remedies as required by S.C. Code Ann. § 44-1-60(E)(2). The DHEC Board processed this RFR in accordance with S.C. Code Ann. § 44-1-60, but when Sunset Cay filed a Request for Contested Case (RCC) thereafter, the ALC found *sua sponte* that it "lacks subject matter jurisdiction over the Petitioner's claim that arose from DHEC's Declaration" based on Town of Hilton Head Island v. Godwin, 370 S.C. 221, 223, 634 S.E.2d 59, 60-61 (Ct. App. 2006) ("[t]he 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"). (R. pp. 4 and 12; Supplemental R. p. 4, *Second Amended Order of Dismissal*, p. 4).

On October 26, 2015, the Department sent two certified mailings to Sunset Cay, LLC, Sunset Cay Social Club, and the Sunset Cay Marina Council of Co-Owners, Inc.: (1) Cease and

⁴ (1) Ship Store Office and Storage; (2) Yacht Sales Office; (3) Captain and Transient Lounge; (4) Commodore Meeting Room; and (5) Public Waterway Events.

Desist directive (R. p. 149 [October 26, 2015 Cease and Desist Directive, Exhibit 10 to Department's *Partial Motion to Dismiss*]); and (2) Notice of Violation and Admission Letter (NOV/AL).⁵ (R. pp. 193-202).

The Cease and Desist directive required Sunset Cay to "immediately cease and desist operation and/or utilization of the facility *providing beverage service* at the Site."⁶ (Emphasis added). (R. p. 149, October 26, 2015 Cease and Desist Directive, Exhibit 10 to Department's *Partial Motion to Dismiss*).

The NOV/AL included allegations that Sunset Cay, the Council and Mr. Clark are responsible (1) for "operation of a facility *providing beverage service* on the second floor of the commercial building[;]" and (2) for the *construction of a third floor* on the commercial building and the *placement of eleven floating boat storage structures* in and over the coastal waters critical area at the site *without authorization from the Department*." (Emphasis added). (R. pp. 199-200, NOV/AL, pp. 6-7). The Department's October 26, 2015 NOV/AL was accompanied by a cover letter scheduling an "enforcement conference" for November 18, 2015. (R. p. 193, Department's November 3, 2016 *Motion to Amend Order Vacating Previous Order and Amended Order of Dismissal*, Exhibit G).

⁵ The violations addressed by the Department in the Cease and Desist and NOV/AL are distinctly different from the five proposed water dependent uses in Sunset Cay's Petition for Declaration (i.e., [1] Ship Store Office and Storage; [2] Yacht Sales Office; [3] Captain and Transient Lounge; [4] Commodore Meeting Room; and [5] Public Waterway Events).

⁶ Sunset Cay asserts that the issue of *providing beverage service* mentioned in the October 26, 2015 Cease and Desist directive "has been laid to rest since September 2009, as may be seen by the Department's approval letter." (Appellant's Initial Brief, p. 8). Again, on page 18 of the Appellant's Initial Brief, Sunset Cay asserts that "[t]he issue over O.C.R.M.'s allegation that the Ship's Store is operating unlawfully as a bar appears to be resolved between O.C.R.M. and the owner of the Ship's Store. The owner of the Ship's Store attended the November 18th meeting, and as a result of that meeting, *they were able to resolve the controversy*." (Emphasis added). These assertions are not true. The Cease and Desist directive and NOV/AL were put on hold as a result of this litigation and the violations remain unresolved.

Despite Sunset Cay's demonstrated knowledge of the RFR process with its October 23, 2015 RFR (including proper filing fee), Sunset Cay *never* filed a request for a Final Review Conference or a filing fee⁷ with the DHEC Board regarding the Department's October 26, 2015 Cease and Desist directive or the NOV/AL.

On December 2, 2015, in response to Sunset Cay's October 23, 2015 RFR on the Declaratory Ruling, the DHEC Board informed Sunset Cay that it would not conduct a Final Review Conference of the Department's response to Sunset Cay's Petition for Declaration.⁸ (R. pp. 84-85, OCRM's December 2, 2015 Denial of Board Review, Exhibit F to Sunset Cay's Request for Contested Case).

On December 19, 2015, DHEC employee Mr. Sean Briggs conducted a site inspection and confirmed that the Sunset Cay Social Club was continuing to provide alcoholic beverage *service*. (R. p. 131, DHEC's *Motion to Dismiss*).

On December 23, 2015, after receipt of the DHEC Board's denial for a Final Review Conference of OCRM's Declaratory Ruling response, Sunset Cay filed a Request for a Contested Case Hearing before the ALC on both the Declaratory Ruling response (which it brought before

⁷ Opposing counsel attempts to characterize his November 12, 2015 letter to the undersigned counsel as an RFR that satisfies the "written request for final review" requirement of S.C. Code Ann. § 44-1-60(E)(2). However, opposing counsel's November 12, 2015 letter to the undersigned counsel does not request a review and was not accompanied by a filing fee.

⁸ Sunset Cay argues in its Initial Appellant's Brief that the DHEC Board's December 2, 2015 decision not to conduct a Final Review Conference of the Department's response to Sunset Cay's Petition for Declaration was error. Specifically, Sunset Cay states that

"appellant has not obtained a final decision in a contested case, but this is because, and only because, the D.H.E.C. Board *refuses to address appellant's Petition for Declaration*. See Order of D.H.E.C. Board dated December 2, 2015, at R.O.A. page ____." (Emphasis added). (Initial Appellant's Brief, pp. 14-15).

The DHEC Board did not act erroneously by issuing the December 2, 2015 letter, because S.C. Code Ann. § 44-1-60(G)(1) acknowledges that one of the options for exhausting administrative remedies is for "the board [to] decline[] to hold a final review conference."

the DHEC Board) and the Cease and Desist directives (which it never brought before the DHEC Board). (R. pp. 43 and 48, Appeal to Administrative Law Court, paragraph 19).

In the ALC's January 4, 2017 *Second Amended Order of Dismissal*, Judge McLeod ruled that Sunset Cay failed to exhaust its administrative remedies as to the Cease and Desist directive and that the ALC lacks subject matter jurisdiction over Sunset Cay's claim that arose from DHEC's response to Sunset Cay's Petition for Declaration. (Supplemental R. pp. 3-7, *Second Amended Order of Dismissal*) For those reasons, respectively, Judge McLeod ordered that this matter is dismissed *without* prejudice as to the Petition for Declaration and dismissed *with* prejudice as to the Cease and Desist directives. (Supplemental R. p. 8, *Second Amended Order of Dismissal*).

Argument

Unpreserved issues raised by Appellant that are beyond the scope of Appellate Review.

Before addressing the merits of Sunset Cay's error allegations, it is important to address two preliminary issues regarding Sunset Cay's equal protection argument.

First, Sunset Cay's equal protection argument was not preserved for appellate review.⁹ Rule 208(b)(1)(B), SCACR states that "[o]rdinarily, no point will be considered which is not set forth in the statement of issues on appeal." *see Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011) ("[A] general acknowledgment of a policy ... is a far cry from a specially articulated argument Appellants failed to present the issue to us"). In plain terms, to get an appellate court ruling on an issue, it must be included in the statement of issues on appeal. Sunset Cay is bound by its statement of issues on appeal and its failure to include an equal

⁹ Sunset Cay alleges disparate treatment of Sunset Cay Marina compared to Edisto Marina; St. Johns Marina; The Sand Castle; Fleet Landing; 2 Concord Street; Fripp Island Marina; and Lady's Island Marina.

protection argument in its statement of issues on appeal is a failure to preserve this issue. Town of Sullivan's Island v. Felger, 318 S.C. 340, 457 S.E.2d 626 (Ct. App. 1995).

Second, Sunset Cay's equal protection argument is beyond the scope of the procedural issue presented by the Department's Motion to Dismiss and by the ALC's *Second Amended Final Order*. The only hearing that occurred at the ALC was the hearing for the Department's Motion to Dismiss. *There was never a trial on the merits* of Sunset Cay's allegations, because the ALC correctly granted DHEC's Motion for Dismissal prior to trial. Despite this, Sunset Cay continues (both at the ALC and before this Court) to argue the alleged merits of its position that the Department has treated Sunset Cay disparately from a number of other marinas, restaurants and bars along the South Carolina coast in violation of the Equal Protection clause. Sunset Cay's equal protection allegation is far beyond the ALC's Order before this Court. Thus, while the Department strongly disagrees that its treatment of Sunset Cay amounts to an equal protection violation,¹⁰ DHEC asserts that this issue is neither preserved for appellate review nor is it even possible for this court to reach the merits since the ALC dismissed the case before an evidentiary hearing on the merits occurred.

¹⁰ As the Department argued in its November 3, 2016 *Motion to Amend Order Vacating Previous Order and Amended Order Of Dismissal*,

"Sunset Cay Marina is not a 'grandfathered' structure and thus not similarly situated to the other marinas referenced in opposing counsel's August 8, 2016 Supplemental Brief. As mentioned above, the Sunset Cay Marina permit was issued on April 9, 2003 and according to opposing counsel, the marina was constructed in 2006. (Exhibit A – November 12, 2015 letter from Tommy Goldstein). The currently-existing structure is not the same marina that existed in 1977 when the Coastal Tidelands and Wetlands Act went into effect. In the context of future equal protection litigation, counsel for **the Department cannot over-emphasize the importance of the distinction between the above-referenced 'grandfathered' marinas (i.e., Edisto Marina; St. Johns Marina, etc.) and the 'non-grandfathered' status of the currently-existing Sunset Cay Marina**. Exhibit B is very helpful in showing aerial imagery of the Sunset Cay Marina as it now exists compared to what existed in 1977. These are plainly two different structures." (Emphasis added). (R. p. 181, Department's November 3, 2016 *Motion to Amend Order Vacating Previous Order and Amended Order of Dismissal*). "Proving the 'grandfathered' status of these other marinas would obviously require another hearing to introduce evidence showing that these structures did exist in 1977." (R. p. 181, DHEC's November 3, 2016 *Motion to Amend Order Vacating Previous Order and Amended Order of Dismissal*, footnote 3).

I. The Administrative Law Court did not err in finding it lacked subject matter jurisdiction over the Appellant's claim arising from DHEC's Declaratory Ruling Response.

Sunset Cay's first argument purportedly identifies errors committed by the ALC in concluding it (ALC) lacked subject matter jurisdiction over Sunset Cay's Request for Contested Case arising from the Department's Declaratory Ruling response. However, page 10 thru page 14 of the Appellant's Brief identify no such errors by the ALC. Instead, Sunset Cay makes numerous assertions that are beyond the scope of the alleged ALC errors regarding DHEC's Declaratory Ruling Response. Despite the irrelevance of these assertions, the Department will briefly address pages 10 thru 14 of Appellant's Brief.

First, without identifying any document as required by Rule 208, SCACR(b)(4), Sunset Cay asserts on page 11 of Appellant's Brief that "the Ship's Store controversy [presumably the issue of serving alcohol in violation of Special Condition # 25 of the Permit] ha[s] been resolved between O.C.R.M. and the owner of the Ship's Store". This assertion is a red herring. The Appellant does not base this contention on anything in the record. The reality is that Sunset Cay has not complied and Sunset Cay's appeal of the Cease and Desist directive has stopped any resolution of the Department's enforcement process regarding providing beverage service.

Second, on page 11 of the Appellant's Brief, Sunset Cay raises what it alleges to be the wasteful consumption of "limited judicial resources" in this matter and points to the eleven still-unpermitted jet docks as an example of the "maddening Catch-22" the Department has created. DHEC has not created a Catch-22. S.C. Code Ann. Regs. § 30-4(I) prohibits the Department from even considering Sunset Cay's September 15, 2016 and September 16, 2016 after-the-fact permit applications to keep the third floor and eleven jet docks. Specifically, this regulation states that

“staff does not have authority to consider an after-the-fact application unless: (1) all fines are paid before application; (2) the permit would legitimize an activity that in the opinion of the Department appears to be a routine permitting matter that would meet all rules and regulations; (3) any portion of the activity or structure that is in violation of the Act or rules and regulations is corrected prior to the application; (4) an after-the-fact application cannot be made until conclusion of the administrative appeal, if taken.” (Emphasis added).

The Department has explained the regulatory restrictions that apply to after-the-fact permit applications to Sunset Cay and memorialized that explanation in a September 27, 2016 email.¹¹ (R. pp. 324-325). Until Sunset Cay's challenge to the Cease and Desist directive is resolved, the enforcement action is on hold (i.e., [1] eleven unpermitted floating boat storage structures in and over the coastal waters critical area; [2] construction of the third floor when only two floors were permitted;¹² and [3] beverage *service* on the second floor). Per S.C. Code Ann. Regs. § 30-4(I)(3), these unresolved violations of the Act must be resolved *before* an after-the-fact permit application can be considered. Resolution of these violations can occur in the enforcement process by either a Consent Order or an Administrative Order.¹³

Sunset Cay's exasperation (as expressed in its Brief) is analogous to someone sticking a broom stick into the spokes of a moving bicycle and then getting exasperated that the bicycle stopped and flipped the rider off the bike. Sunset Cay's challenge to the Cease and Desist directive is the "broom stick" that has stopped the enforcement process in accordance with S.C.

¹¹ This email was "presented to the lower court or tribunal" (R. p. 322) and is thus properly part of the Record on Appeal per Rule 210, SCACR(C).

¹² The Public Notice issued prior to the amendment and the affidavit of newspaper publication submitted to the Post and Courier by Sunset Cay both recognize the proposed modification as a *two floor structure*. (R. p. 204, Public Notice, Exhibit I to DHEC's November 3, 2016 *Motion to Amend Dismissal Order* and R. p. 75, DHEC's October 12, 2015 response to Sunset Cay's Declaratory Ruling Request). Butch Clark signed and accepted the "two floor" amendment to his marina permit on March 1, 2006. (R. p. 203, OCRM permit amendment December 14, 2005, Exhibit H to DHEC's November 3, 2016 *Motion to Amend Dismissal Order*).

¹³ As a collateral concern, the ALC's *Second Amended Dismissal Order* will not deprive Sunset Cay of its "day in court," because an Administrative Order is certainly appealable.

Code Ann. Regs. § 30-4(I). As such, the Department *has no authority* to consider Sunset Cay's after-the-fact permit applications.

Third, on pages 12 to 14 of the Appellant's Brief, Sunset Cay asserts its equal protection argument. Since the Department addressed the substantive deficiency of Sunset Cay's disparate treatment (equal protection) argument in footnote 10, there is no need to rehash that point.

As previously mentioned, none of these above issues mentioned in pages 10 to 14 of the Appellant's Brief have any bearing whatsoever on whether or not the ALC's Order is erroneous.

- A. Because S.C. Code Ann. § 44-1-60(G)(1) allows the DHEC Board to decline to hold a final review conference, it did not "duck" the issue and the ALC did not err by failing to exercise its discretion.**

The gist of Sunset Cay's challenge to the ALC's dismissal *without prejudice* of its appeal of the Declaratory Ruling response is at page 15 of Appellant's Brief. There, Sunset Cay asserted that "while *the Administrative Law Court correctly noted that the decision was not final as to the definition of water dependent uses*, it simultaneously failed to realize that the only reason it is not final is because, as the Court noted, the Board ducked the issue." (Emphasis added). (Appellant's Brief, p. 15). The Board did not duck this issue, but followed the guidance of S.C. Code Ann. § 44-1-60(G)(1). This section establishes that one of the options for exhausting administrative remedies is for "the board [to] decline[] to hold a final review conference."

Sunset Cay further asserts that the ALC "erred in not using its discretion" regarding the right to judicial review under Article I, § 22, S.C. Constitution. (Appellant's Brief, p. 15). However, Sunset Cay fails to allege any specific error in the ALC's analysis of Article I, § 22, S.C. Constitution in the *Second Amended Final Order*. In that ALC Order, the Court held that

"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." (Emphasis added). (Supplemental R. p. 7, *Second Amended Order of Dismissal*).

The ALC found that the Department's Declaratory Ruling response is "nothing more than an advisory opinion from DHEC" and "similar to an Attorney General's opinion." (Supplemental R. p. 6, *Second Amended Order of Dismissal*).

Sunset Cay concedes that it is not finally bound "as to the definition of water dependent uses." (Appellant's Brief, p. 15). Appellant has shown no error in the ALC's conclusion regarding the inapplicability of S.C. Const. art. I, § 22 (i.e., "[t]here are no rights that are affected by DHEC's Declaration"). Accordingly, Sunset Cay's allegation that the ALC erred must fail. Neither the ALC nor the DHEC Board can be compelled to hear a matter where no rights are affected by OCRM's declaration (or "advisory opinion" as described by the ALC).

II. The Administrative Law Court did not err in dismissing the action regarding the October 26, 2015¹⁴ Cease and Desist directive, because Sunset Cay failed to exhaust its administrative remedies.

S.C. Code Ann. § 1-23-380 states that "[a] party who has exhausted all administrative remedies within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article and Article 1." Sunset Cay asked the ALC for an Order compelling the Department to withdraw the October 26, 2015 Cease and Desist directive. (R. p. 43, Appeal to Administrative Law Court). However, S.C. Code Ann. § 44-1-60 establishes that the Appellant is required to first obtain a final agency decision and exhaust its

¹⁴ Sunset Cay did not appeal the ALC's *Second Amended Final Order* regarding the March 3, 2015 Cease and Desist Directive, so this Directive is not before this Court.

administrative remedies prior to seeking redress before the ALC. Sunset Cay is familiar with this requirement,¹⁵ but simply failed to follow the statutorily-required exhaustion-of-administrative-remedies procedures. Accordingly, because Sunset Cay did not exhaust its administrative remedies, the ALC properly dismissed the claims raised by Petitioner regarding the Cease and Desist directive under the authority of Hyde v. S.C. Dep't of Mental Health, 314 S.C. 207, 442 S.E.2d 582 (1994). (Supplemental R. p. 4, *Second Amended Order of Dismissal*).

In accord with S.C. Code Ann. § 44-1-60(G) (Supp. 2015), an Appellant 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.

S.C. Code Ann. § 44-1-60(E)(2) states that 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 by the applicant, permittee, licensee, or affected person.” In this case, the Cease and Desist directive that Appellant objects to was mailed to Sunset Cay, LLC on October 26, 2015. (R. p.

¹⁵ As mentioned in the Statement of Facts, on October 23, 2015, Sunset Cay filed a Request for Final Review (RFR) of the Department's response to the Petition for Declaration along with the proper filing fee seeking to exhaust its administrative remedies. This October 23rd RFR filing is significant because it undermines Sunset Cay's argument that a letter (without a filing fee) sent to the undersigned counsel (not to the DHEC Board) on November 12, 2015 amounts to an RFR of the Department's October 26, 2015 Cease and Desist directive. Importantly, by filing the October 23rd RFR, Sunset Cay demonstrated knowledge and understanding of the exhaustion of administrative remedies process established by S.C. Code Ann. § 44-1-60. (R. pp. 36-40, October 23, 2015 RFR). Specifically, Sunset Cay demonstrated that it understood the statutory requirement (1) to file the RFR with the DHEC Board; and (2) to tender a filing fee with the RFR.

149, October 26, 2015 Cease and Desist Directive, Exhibit 10 to Department's *Partial Motion to Dismiss* – p. 23). The ALC found that Sunset Cay did not comply with this statutory requirement.

Sunset Cay's initial failure to comply with this statutory mandate is in neglecting to submit a filing fee in connection with its so-called RFR challenging the Cease and Desist directive. Without the requisite filing fee, Sunset Cay's appeal of this portion of the ALC's *Second Amended Final Order* is fatally flawed and further analysis is unnecessary. Nonetheless, Appellant ignores this failure and argues on page 17 of its Brief that the ALC erred in finding it (Sunset Cay) did not exhaust its administrative remedies for the following two reasons: (A) "the appellant had already placed the same matter on the docket¹⁶ two months earlier, on August 19, 2016, by filing a Petition for Declaration as the Regulations permit. In other words, the issue was already pending" (Appellant's Brief, p. 17); and (B) "the appellant responded in writing on November 12, 2015, memorializing the parties' previous telephone conversation -- as set forth in the October 26th notice -- to appear at a review conference already scheduled on the cease and desist letter on November 18th." (Appellant's Brief, p. 17).

A. Sunset Cay's August 27, 2015 Petition for Declaration is not a Request for Final Review Conference.

Sunset Cay asks this Court to reverse the ALC's conclusion of law regarding its failure to exhaust administrative remedies based on the spurious assertion that Appellant's August 27, 2015

¹⁶ In an effort to make the November 18, 2015 *enforcement conference* seem like a Final Review Conference required by S.C. Code Ann. § 44-1-60(E)(2), Sunset Cay refers to a non-existent "docket." DHEC-OCRM does not maintain a docket for enforcement conferences. Staff simply schedule enforcement conferences with property owners and permittees to "provide the named party and DHEC the opportunity to discuss the alleged violations." (R. p. 193, Department's November 3, 2016 *Motion to Amend Order Vacating Previous Order and Amended Order of Dismissal*, Exhibit G).

Petition for Declaration satisfies the Request for Final Review Conference requirement by S.C. Code Ann. § 44-1-60(E)(2). This is a meritless assertion for the following reasons:

First, S.C. Code Ann. § 44-1-60(E)(2) makes no provision for a party to use a Petition for Declaration as a substitute or "placeholder" for an RFR.

Second, on August 27, 2015, the October 26, 2015 Cease and Desist directive had obviously not yet been issued, so it would be impossible for Sunset Cay to request review of this future Cease and Desist via the earlier Petition for Declaration.

Third, the Petition for Declaration sought an advisory opinion from the Department regarding Sunset Cay's five proposed water dependent uses,¹⁷ while the October 26, 2015 Cease and Desist addressed a distinctly different issue; namely the "operation and/or utilization of the facility *providing beverage service at the Site.*" (Emphasis added). (R. p. 149, October 26, 2015 Cease and Desist directive).

B. Sunset Cay's November 12, 2015 letter is not a Request for Final Review Conference.

Sunset Cay alternatively asks this Court to reverse the ALC's conclusion of law regarding its failure to exhaust administrative remedies based on the equally spurious assertion that Appellant's November 12, 2015 letter to the undersigned counsel satisfies the Request for Final Review Conference requirement by S.C. Code Ann. § 44-1-60(E)(2).

Sunset Cay asserts that it "appeal[ed] the cease of [*sic*] desist letter by letter to the Department dated November 12, 2015, on which the Department took up at its scheduled a review hearing on November 18, 2015." (Appellant's Brief, p. 23). This November 12, 2015

¹⁷ [1] Ship Store Office and Storage; [2] Yacht Sales Office; [3] Captain and Transient Lounge; [4] Commodore Meeting Room; and [5] Public Waterway Events.

letter could not reasonably be construed as a Request for Final Review as contemplated by S.C. Code Ann. § 44-1-60(E)(2). The November 18, 2015 enforcement conference was already scheduled by DHEC on November 12, 2015 (via cover letter accompanying the October 26, 2015 NOV/AL), so Sunset Cay did not "request" this November 18, 2015 enforcement conference. (R. p. 193, Department's November 3, 2016 *Motion to Amend Order Vacating Previous Order and Amended Order of Dismissal*, Exhibit G). In fact, counsel for Sunset Cay acknowledges this fact when he said on the second page of his November 12th letter that "I plan on attending your November 18th meeting" (Emphasis added). (November 12, 2015 letter).

In bypassing this final review process by the DHEC Board that is required by S.C. Code Ann. § 44-1-60, Sunset Cay has (a) failed to exhaust its administrative remedies, and (b) failed to obtain a final agency decision. Accordingly, the ALC correctly found that the Cease and Desist directive was not properly before it. Appellant has not satisfied the statutory prerequisites which would allow it to pursue this matter in the ALC. Thus, the Administrative Law Court properly dismissed the claims raised by Sunset Cay regarding the October 26, 2015 Cease and Desist directive for failure to exhaust administrative remedies.

Conclusion

The ALC did not err either in regard to its ruling on the Department's Declaratory Ruling response or the Cease and Desist directive. Based on the foregoing arguments, the Respondents respectfully request this Court affirm the Administrative Law Court's *Second Amended Order of Dismissal*.

Respectfully Submitted,



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December 7, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Appellate Case No. 2017-000161

Case No. 2015-ALJ-07-0579-CC

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SC Court of Appeals

Sunset Cay, LLC, Appellant,

v.

South Carolina Department of Health and Environmental Control Respondent.

CERTIFICATE OF COUNSEL

I certify that the Final Brief of Respondent complies with Rule 211(b), SCACR.



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