

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable John D. McCleod, Administrative Law Judge

Opinion Number: 2020-UP-030
Appellate Case No. 2017-000161
Lower Court Docket No. 15-ALJ-07-0579-CC

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

v.

South Carolina Department of Health and Environmental Control Respondent,

**RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH
AND ENVIRONMENTAL CONTROL'S
RETURN TO APPELLANT'S PETITION FOR REHEARING**

RECEIVED

MAR 17 2020

SC Court of Appeals

Bradley D. Churdar (SC Bar No. 12829)
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*Attorneys for Respondent South Carolina
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Control*

At this Court's request in accordance with Rule 221(a),¹ SCACR, the South Carolina Department of Health and Environmental Control ("the Department" or "DHEC") submits this Return to the Appellant's Petition for Rehearing.

The ALC's *Second Amended Order of Dismissal* and this Court's Opinion affirming that Order both concluded that (1) Sunset Cay failed to exhaust its administrative remedies regarding the October 26, 2015 Cease and Desist Directive;² (ROA, p. 149) and (2) 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 the Administrative Law Court ("ALC") jurisdiction over DHEC's Declaration, the ALC properly dismissed this matter for lack of subject matter jurisdiction.

This Court properly affirmed the ALC's *Second Amended Order of Dismissal*. The Court of Appeals Opinion is correct and did not overlook or misapprehend anything per Rule 221(a), SCACR.

A. Dismissal of Sunset Cay's Appeal of the Cease and Desist Letter

In order to properly invoke the ALC's jurisdiction regarding the October 26, 2015 Cease and Desist Directive (ROA, p. 149), Sunset Cay was required to first obtain a final agency decision and exhaust its administrative remedies.

S.C. Code Ann. § 1-23-380 states that "[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article and Article 1." In the matter before the ALC, S.C. Code Ann. § 44-1-60 establishes the procedures the Petitioner must follow in order to exhaust

¹ Rule 221(a), SCACR states in pertinent part that "[a] petition for rehearing shall ... state with particularity the points supposed to have been overlooked or misapprehended by the court."

² 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.

its administrative remedies and obtain a final agency decision. Section (E)(1) of this statute states in pertinent part that “[n]otice of a department decision must be sent by certified mail, returned receipt requested to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified.” Section (E)(2) of this statute states that “[t]he staff decision becomes the final agency decision fifteen calendar 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 Sunset Cay objects to was mailed on October 26, 2015.³ (ROA, p. 149). In accordance with S.C. Code Ann. § 44-1-60(E)(2), before Sunset Cay could properly invoke the ALC’s jurisdiction over this Cease and Desist directive, it should have filed a request for final review (“RFR”) to the DHEC Board. The statutory fifteen day deadline to file an RFR for the October 26, 2015 Cease and Desist directive was November 20, 2015. Despite Sunset Cay’s efforts to explain that the August 27, 2015 Petition for Declaration was an RFR thereby satisfying the statutory requirement, Sunset Cay has *never* filed an RFR challenging the Cease and Desist directive nor did it ever submit the statutorily-required filing fee

³ S.C. Code Ann. Regs. 30-8B addresses Cease and Desist Directives. This regulation states that “[w]hen any person is ... in violation of the terms and/or conditions of a permit, the Department may issue a cease and desist directive. This directive shall inform the person that he is in violation of the Act and shall cease the unauthorized activity... If the person responsible for the unauthorized activity refuses to comply with the Department directive, the Department may then file suit in the appropriate circuit court as outlined in Section 48-39-160.”

As this regulation makes plain, Cease and Desist directives are one step in the enforcement process to bring a permit holder into compliance with the terms of its permit. The permit holder still has the opportunity to challenge the Department’s Administrative Order before the ALC or challenge any circuit court action the Department may file to enforce the terms of the Administrative Order.

per S.C. Code Ann. § 44-1-60(E)(2).⁴ This is a textbook case of failing to invoke the ALC's jurisdiction. Sunset Cay demonstrated in its October 23, 2015 Declaratory Ruling RFR (ROA, pp. 36-40) 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. In bypassing the final review process by the DHEC Board, the Petitioner (a) has failed to exhaust its administrative remedies, (b) has failed to obtain a final agency decision and (c) has not invoked this Court's jurisdiction regarding the Cease and Desist directive.

Any negative "effect" Sunset Cay complains of is an "effect" of its own making by attempting to by-pass the DHEC Board and go directly to the Administrative Law Court. This Court is not required to correct nor should it correct the Appellant's clear procedural failure. To do otherwise would impermissibly ignore the Administrative Procedures Act generally⁵ and S.C. Code Ann. § 44-1-60 particularly.

B. Declaratory Ruling Response

Before looking at the merits of Sunset Cay's argument, it is important to recognize that Sunset Cay does not challenge this Court's affirmation of the ALC's *Second Amended Order of Dismissal* finding that the ALC did not have subject matter jurisdiction over Sunset Cay's challenge to the Department's Declaratory Ruling Response. As such, this lack of subject matter

⁴ Without filing an RFR to the DHEC Board and submitting 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.

⁵ S.C. Code Ann. § 1-23-380 states that "[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article and Article 1."

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). S.C. Code Regs. 30-4(I). With Sunset Cay’s ongoing challenge of the October 26, 2015 Cease and Desist Directive (ROA, p. 149), the Department only refused to consider Sunset Cay’s after-the-fact permit applications in the sense that it did not have the authority to do so.

Furthermore, the consequences that Sunset Cay alleges in its *Petition for Rehearing* were not caused by the Department’s *refusal* to consider the after-the-fact permit request for the unpermitted third floor. Rather, any such stoppage of the administrative process is caused by Sunset Cay’s refusal to Cease and Desist from alcoholic beverage service at the marina in violation of Special Condition # 25 of Sunset Cay’s Critical Area permit (i.e., “No food or beverage service, vending machines, T-shirt sales, concessions, etc. are allowed on or across this marina facility.” – ROA, p. 200) and otherwise resolve its compliance issues.⁷ In the October 26, 2015 Cease and Desist Directive (ROA, p. 149), the Department noted that

“staff observed nonwater-dependent activity over the coastal waters critical area. Specifically, staff observed numerous mini-bottles of liquor and other items *indicative of beverage service* as well as S.C. Department of Revenue Alcohol Beverage Licenses posted on a wall in the second floor of the commercial building over the coastal waters critical area of the Folly River at the Sunset Cay Marina, 66 West 9th Street Extension, Folly Beach 29439.” (Emphasis added).

...

“You are hereby directed to immediately cease and desist operation and/or utilization of the facility providing beverage service at the Site and any other activity in violation of the S.C. Coastal Zone Management Act, Permit and/or Regulations.” (ROA, p. 149).

⁷ Exhibits 1 thru 8 from the Department’s *Partial Motion to Dismiss* (ROA, pp. 138-145) show Sunset Cay’s setup for serving alcohol on the second floor of the marina. Even though *color* photos were submitted to the ALC and used during the Motion Hearing, the black and white copies in the Record on Appeal are helpful.

jurisdiction is the law of the case⁶ and no further analysis of Sunset Cay's Declaratory Ruling Response argument is even necessary.

The Court of Appeals properly held that the Department's Declaratory Ruling response is not a decision that gives rise to a contested case. Sunset Cay states that "the Court may be correct that the decision is not 'final' in the sense that the Appellant can always apply for a permit modification" (*Petition for Rehearing*, page 6) and Sunset Cay even "concedes the point that the Court reaches in finding that the Agency's decision is not a denial of permit." (*Petition for Rehearing*, p. 9). Sunset Cay tries to get around its admission that the Department's Declaratory Ruling Response is not a permit denial by asserting, without reference to any legal authority, that the Department's response to the Petition for Declaration is the "procedural[] equivalent" to a finally binding judicial or quasi-judicial decision. (*Petition for Rehearing*, page 5). Such a "procedural equivalence" argument to the exhaustion-of-administrative-remedies requirement is an end run around S.C. Code Ann. § 1-23-380 and S.C. Code Ann. § 44-1-60 and would render these statutory procedural requirements meaningless.

Nonetheless, Sunset Cay tries to mitigate against its failure to obtain such a final decision in a contested case process "because the Agency refuses to give one." (*Petition for Rehearing*, p. 11). Respectfully, Sunset Cay's contention that it had not obtained such a final decision "only in a hyper-technical, fact-contorting sense" is without merit. (*Petition for Rehearing*, p. 11). The Department is following its regulations and "does not have authority to consider an after-the-fact application" unless the following four conditions are met: "(1) All fines are paid before application; (2) The permit would legitimize an activity that in the opinion of the Department

⁶ "An unappealed ruling is the law of the case and requires affirmance." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 564, 743 S.E.2d 778, 780 (2013).

Conclusion

This Court did not overlook or misapprehend anything per Rule 221(a), SCACR.

Accordingly, the *Petition for Rehearing* should be denied.

Respectfully Submitted,

Bradley D. Churdar by
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March 17, 2020

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable John D. McCleod, Administrative Law Judge

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

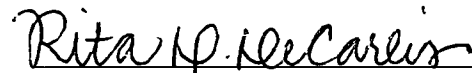
v.

South Carolina Department of Health and Environmental Control Respondent,

PROOF OF SERVICE

I certify that I have, on this 17th day of March 2020, served the Respondent South Carolina Department of Health and Environmental Control's Return to Appellant's Petition for Rehearing on all counsel of record by depositing a copy of it in the United States Mail, postage prepaid and addressed as follows:

Thomas R. Goldstein
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Attorneys for Respondent

March 17, 2020
Columbia, SC



Healthy People. Healthy Communities.

March 17, 2020

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

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SC Court of Appeals

Re: *Sunset Cay v. SCDHEC*
Appellate Case No. 2017-000161

Dear Ms. Kitchings:

In connection with the above -referenced matter, please find enclosed the original and seven (7) copies of the Respondent South Carolina Department of Health and Environmental Control's Return to Petition for Rehearing and Proof of Service. By copy of this letter, we are hereby serving counsel of record with a copy of the enclosed.

Please address all future correspondence in this matter to Bradley D. Churdar, Esq. at 1362 McMillan Avenue, Suite 400, Charleston, South Carolina 29405.

With kindest regards, I am

Sincerely,

Rita D. DeCarlis
South Carolina Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201

Enclosures (as stated)

cc: Thomas R. Goldstein, Esquire