

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**Jun 26 2020**

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S.C. SUPREME COURT

The Honorable John D. McLeod, Administrative Law Judge

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Opinion Number: 2020-UP-030  
Appellate Case No. 2020-000800  
Lower Court Docket No. 15-ALJ-07-0579-CC

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

vs.

South Carolina Department of Health and Environmental Control..... Respondent.

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SOUTH CAROLINA DEPARTMENT OF HEALTH  
AND ENVIRONMENTAL CONTROL'S RETURN  
TO PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS

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Bradley D. Churdar, SC Bar # 12829  
South Carolina Department of Health  
and Environmental Control  
1362 McMillan Avenue, Suite 400  
North Charleston, SC 29405  
[churdabd@dhec.sc.gov](mailto:churdabd@dhec.sc.gov)  
*Attorney for Respondent SCDHEC*

Other Counsel of Record:

Thomas R. Goldstein  
Belk, Cobb, Infinger & Goldstein, P.A.  
P.O. Box 711121  
N. Charleston, South Carolina 29415-1121  
(843) 554- 4291  
[tgoldstein@cobblaw.net](mailto:tgoldstein@cobblaw.net)  
*Attorney for Appellant*

Respondent South Carolina Department of Health and Environmental Control (DHEC) opposes the *Petition for Writ of Certiorari to the Court of Appeals* ("Petition" or "Petition for Writ of Certiorari") filed by Petitioner for the following reasons:

- I. The Court of Appeals did not err in dismissing the Sunset Cay's appeal of the Department's Cease and Desist letter.
- II. The ALC and the Court of Appeals correctly found that Article I § 22 of the South Carolina Constitution did not grant either court subject matter jurisdiction to hear Petitioner's case.

### **COUNTER-STATEMENT OF THE CASE**

On April 9, 2003, South Carolina Department of Health and Environmental Control ("The Department" or "DHEC" or "DHEC-ORCM" or "OCRM") issued Permit# 2002-1H-190-P ("Permit") to Sunset Cay authorizing a marina on the Folly River at Folly Beach, South Carolina with the limitation that "no food or beverage service ... are allowed on or across this marina facility." (R. p. 192).<sup>1</sup>

Sunset Cay built the marina in 2006. (R. p. 186). The Sunset Cay marina is a new and completely different structure from a previous dock<sup>2</sup> located on the Folly River at approximately the same location. (R. pp. 181 and 189).

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<sup>1</sup> Because the documents comprising Sunset Cay's Appendix were not bound and re-numbered as a new Appendix Volume, in an effort to avoid confusion, in this *Return*, the Department refers to documents in the Record on Appeal by that designation (i.e., R. p. \_\_\_\_). For this same reason, the Department also refers to the other Appendix documents by their designated title (i.e., Final Brief of Appellant; Final Brief of Respondent, etc.)

<sup>2</sup> On page 3 of its *Petition for Writ of Certiorari*, 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" (or viewing that page from the "Landscape Orientation," the aerial picture on the left side of Exhibit B [R. p. 189] shows the so-called "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).

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' building on an existing 50'x50' pierhead. (R. p. 203).

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. The 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. 128-29).

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; R. p. 146; R. pp. 199-200). 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. 138-45).

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).

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 uses<sup>3</sup> did not meet the regulatory definition of water dependent in that these five uses were not "essential to the functioning of its primary activity."<sup>4</sup> S.C. Code Ann. 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; R. p. 308, line 22- p. 309, lines 1-8).

On October 23, 2015, Sunset Cay filed a Request for Final Review (RFR) of the Department's Declaratory Ruling response. On December 2, 2015, the DHEC Board informed

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

<sup>4</sup> Sunset Cay asserts on page 15 of its *Petition for Writ of Certiorari* that "it can demonstrate without contradiction that the Agency has permitted all five of the Petitioner's proposed water-dependent uses at similarly situated marinas." This assertion is incorrect. 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).

Sunset Cay that it would not conduct a Final Review Conference of the Department's Declaratory Ruling. (R. pp. 84-85).

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 Desist directive (R. p. 149); and (2) Notice of Violation and Admission Letter (NOV/AL).<sup>5</sup> (R. pp. 193-202).<sup>6</sup>

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."<sup>7</sup> (Emphasis added). (R. p. 149).

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

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<sup>5</sup> 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).

<sup>6</sup> On page 8 of its *Petition for Writ of Certiorari*, Sunset Cay incorrectly asserts that "[o]n March 16, 2015, O.C.R.M. issued its first cease and desist letter to the Petitioner, *which it then modified and reissued* on October 26, 2016. (Appendix pages 149 and 193)." (Emphasis added). The two documents Sunset Cay references on Appendix (or Record on Appeal) pages 149 and 193 are not two versions of the same Cease and Desist directive. Rather, the two above-referenced documents mailed on October 26, 2015 are the Cease and Desist directive (R. p. 149) and the Notice of Violation and Admission Letter (R., p. 194). The March 2015 Cease and Desist directive that Sunset Cay mentioned on page 8 of its *Petition for Writ of Certiorari* is not before this Court, because Sunset Cay did not appeal that part of the ALC's *Second Amended Final Order* regarding the March 2015 Cease and Desist Directive.

<sup>7</sup> 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." (*Sunset Cay's Petition for Writ of Certiorari*, p. 14). This assertion is 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. In the OCRM Project Manager's (Adam Page's) December 13, 2016 Affidavit, he confirmed this by stating that "I did not tell him [Mr. Butch Clark] or the other attendees [at the November 18, 2015 enforcement conference] that the 'cease and desist' letter had been resolved." (R. p. 276).

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).

Sunset Cay *never* filed a request for a Final Review Conference or a filing fee<sup>8</sup> with the DHEC Board regarding the Department's October 26, 2015 Cease and Desist directive or the NOV/AL.

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).

On December 23, 2015, Sunset Cay filed a Request for a Contested Case Hearing before the ALC on both the Declaratory Ruling response (which it brought before the DHEC Board) and the Cease and Desist directives (which it never brought before the DHEC Board). (R. pp. 43, 48; Appeal to Administrative Law Ct., paragraph 19).

On June 1, 2016 the Department filed a *Partial Motion to Dismiss For Lack of Jurisdiction and Lack of Ripeness*.

On June 27, 2016, the ALC heard DHEC's *Motion to Dismiss*, and on October 17, 2016, the ALC issued an *Order of Dismissal* dismissing the entire case without prejudice. (R. pp. 1-8).

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<sup>8</sup> 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.

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." (Suppl. R. p. 1, 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. 205-34).

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*. (Suppl. R. pp. 1-8). In that Order, the ALC ruled that (1) Sunset Cay failed to exhaust its administrative remedies as to the Cease and Desist directive and (2) 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. (Suppl. R. pp. 3-7; *Second Amended Order of Dismissal* pp. 3-7). For those reasons, respectively, Judge McLeod again ordered that Sunset Cay's case be dismissed *without* prejudice as to the Petition for Declaration and dismissed *with* prejudice as to the Cease and Desist directives. (Suppl. R. p. 8; *Second Amended Order of Dismissal* pp. 8).

On January 23, 2017, Sunset Cay filed a Notice of Appeal with the Court of Appeals.

On January 29, 2020, the Court of Appeals affirmed the ALC's decision and issued an unpublished opinion. (Ct. of Appeals Op. p. 1-2).

On February 12, 2020, the Petitioner filed a Petition for Rehearing.

On February 19, 2020, the Clerk of the Court of Appeals requested that DHEC file a Return to Petition for Rehearing.

On March 17, 2020, DHEC filed a Return to Petition for Rehearing.

On March 27, 2020, Sunset Cay filed a Reply to DHEC's Return to Petition for Rehearing.

On April 23, 2020, the Court of Appeals denied the Petition for Rehearing.

The Petitioner is now asking this Court to grant a *Petition for Writ of Certiorari*.

### **ARGUMENT**

This Court should deny the *Petition for Writ of Certiorari* because none of the five factors listed in Rule 242(b)<sup>9</sup>, SCACR, have been satisfied to justify the issuance of the writ by this Court. It is noteworthy that the Petitioner makes no reference to Rule 242(b), SCACR in its *Petition*.

**I. The Court of Appeals did not err in dismissing Sunset Cay's appeal of the Department's Cease and Desist letter.**

In order to properly invoke the ALC's jurisdiction regarding the October 26, 2015 Cease and Desist Directive (R. 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

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<sup>9</sup> Rule 242(b), SCACR states that "[a] writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court."

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 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.<sup>10</sup> (R. 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 10, 2015. Despite Sunset Cay’s efforts to explain that the August 27, 2015 *Petition for Declaration* was an RFR

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<sup>10</sup> 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.

thereby satisfying the statutory requirement,<sup>11</sup> Sunset Cay has *never* filed an RFR challenging the Cease and Desist directive nor did it ever submit the statutorily-required filing fee per S.C. Code Ann. § 44-1-60(E)(2).<sup>12</sup> Instead, Sunset Cay previously attempted to convince the Court of Appeals<sup>13</sup> and now attempts to convince this Court that the November 18, 2015 *enforcement conference* was in reality a Final Review Conference as required by S.C. Code Ann. § 44-1-60(E)(2).<sup>14</sup>

This is a textbook case of failing to invoke the ALC's jurisdiction. 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 the ALC's jurisdiction regarding the Cease and Desist directive.

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<sup>11</sup> Sunset Cay's assertion that the *Petition for Declaration* was actually a Request for Final Review Conference is fatally flawed for the following three reasons: (1) 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*; (2) 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; and (3) the *Petition for Declaration* sought an advisory opinion from the Department regarding Sunset Cay's five proposed water dependent uses, 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).

<sup>12</sup> Without filing an RFR to the DHEC Board and submitting the requisite filing fee, Sunset Cay's appeal of the Court of Appeals Opinion affirming this portion of the ALC's *Second Amended Final Order* is fatally flawed and further analysis is unnecessary.

<sup>13</sup> On page 17 of its *Appellant's Final Brief* to the Court of Appeals, Sunset Cay refers to a non-existent OCRM "docket" in its effort to re-cast the staff-level enforcement conference as a process that is equivalent to the statutorily-required Final Review Conference by the DHEC Board. DHEC-OCRM does not have a "docket" for enforcement conferences.

<sup>14</sup> On page 13 of its *Petition for Writ of Certiorari*, Sunset Cay asserts that "O.C.R.M. set the date, time, and place of its *review hearing* on November 18<sup>th</sup>." (Emphasis added). A staff-level enforcement conference and a Final Review Conference before the DHEC Board serve two fundamentally different purposes.

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 Sunset Cay’s clear procedural failure. To do otherwise would impermissibly ignore the Administrative Procedures Act generally<sup>15</sup> and S.C. Code Ann. § 44-1-60 particularly.

**II. The ALC and the Court of Appeals correctly found that Article I § 22 of the South Carolina Constitution did not confer subject matter jurisdiction to the ALC to hear Petitioner’s challenge to the Department’s Declaratory Ruling Response.**

Neither Sunset Cay’s November 28, 2017 *Final Appellant’s Brief*<sup>16</sup> nor Sunset Cay’s February 12, 2020 *Petition for Rehearing* challenged the Court of Appeal’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.<sup>17</sup> As such, this lack of subject matter jurisdiction is the law of the case<sup>18</sup> and no further analysis of Sunset Cay’s Declaratory Ruling Response argument is necessary.

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<sup>15</sup> 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.”

<sup>16</sup> Sunset Cay mentions the ALC’s subject matter jurisdiction over its (Sunset Cay’s) challenge to the Department’s Declaratory Ruling Response for the first time in its November 28, 2017 *Final Reply Brief*. However, “an argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief.” *Zinn v. CFI Sales & Mktg.*, 415 S.C. 93, 113, 780 S.E.2d 611, 622 (Ct. App. 2015).

<sup>17</sup> In the *Second Amended Order of Dismissal*, Judge McLeod held that “[b]ecause 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.” (Suppl. R. p. 7). The Court of Appeals affirmed the ALC holding that “[w]e find the ALC properly dismissed Sunset Cay’s request for it to review the Declaration because the ALC did not have subject matter jurisdiction over Sunset Cay’s claim.” *Sunset Cay v. S.C. Dep’t of Health & Env’tl. Control*, No. 2020-UP-030, 2020 S.C. App. Unpub. LEXIS 29, at \*1 (Ct. App. Jan. 29, 2020).

<sup>18</sup> “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).

Further, the Court of Appeals properly affirmed the ALC's holding that Sunset Cay "would not be 'finally bound'<sup>19</sup> by the [Department's] Declaration." (*Second Amended Order of Dismissal*, Suppl. R. p. 7). Judge McLeod reasoned that "[t]here 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." (*Second Amended Order of Dismissal*, Suppl. R. p. 7). Sunset Cay concedes that "[a] careful review of the record demonstrates the absence of the required 'final agency decision.'" (*Petition for Writ of Certiorari*, page 11).<sup>20</sup> This admission should end any further analysis. Nonetheless, 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 "logically equivalent to a 'final decision.'" (*Petition for Writ of Certiorari*, page 27). The ALC correctly determined that the Department's Declaratory Ruling Response per S.C. Code Ann. Regs. 30-9(D) is "similar to an Attorney General's opinion." (Suppl. R. p. 6, *Second Amended Order of Dismissal*, p. 6). Thus, no Constitutional Article I § 22 issue is raised for this Court to address.

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<sup>19</sup> Judge McLeod's Order cites S.C. Const. Ann. Art. I, § 22 which states that "[n]o 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." (*Second Amended Order of Dismissal*, Suppl. R. p. 7). (Emphasis added).

<sup>20</sup> Sunset Cay's contention that it had not obtained such a final decision only "in an illogical sense" is without merit. (*Petition for Writ of Certiorari*, p. 17). 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 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).

**CONCLUSION**

WHEREFORE, based on the foregoing, DHEC respectfully requests that the Court deny  
Sunset Cay's *Petition for Writ of Certiorari*.

Respectfully submitted,



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Bradley D. Churdar  
Associate General Counsel  
South Carolina Department of Health  
and Environmental Control  
1362 McMillan Avenue, Suite 400  
North Charleston, SC 29405  
(843) 953-0213  
(843) 953-0201 (fax)  
[churdabd@dhec.sc.gov](mailto:churdabd@dhec.sc.gov)

June 26, 2020  
Charleston, South Carolina

*Attorney for Respondent South Carolina  
Department of Health and Environmental  
Control*