

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Preservation Society of Charleston, Historic)
Charleston Foundation, Historic)
Ansonborough Neighborhood Association,)
South Carolina Coastal Conservation)
League, Charlestowne Neighborhood)
Association, Charleston Chapter of the)
Surfrider Foundation, and Charleston)
Communities for Cruise Control,)

Docket No. 13-ALJ-07-0056-CC

Petitioners,)

v.)

South Carolina Department of Health and)
Environmental Control and South Carolina)
State Ports Authority,)

Respondents.)

**ORDER GRANTING SUMMARY
JUDGMENT FOR LACK OF STANDING**

FILED

April 11, 2014

SC ADMIN. LAW COURT

APPEARANCES: For the Petitioners:

Amy E. Armstrong, Esquire
W. Jefferson Leath, Jr., Esquire
J. Blanding Holman, IV, Esquire

For the Respondents:

Randolph R. Lowell, Esquire
Chad N. Johnston, Esquire
Bradley D. Churdar, Esquire

This matter comes before the South Carolina Administrative Law Court (ALC or Court) on the Motion for Summary Judgment (Motion) filed by the South Carolina State Ports Authority (Ports Authority) on December 27, 2013. In this Motion, Ports Authority asserts Petitioners lack standing to proceed with this contested case. After reviewing the filings by the parties, the Court grants the Motion.

BACKGROUND

On December 18, 2012, the Department of Health and Environmental Control (DHEC) staff, through the Office of Ocean and Coastal Resource Management (OCRM), issued a Critical Area Permit and Coastal Zone Consistency Certification (Permit No. OCRM-12-054-B) authorizing Ports Authority to make improvements to Building #322, an existing waterfront

building in the Union Pier Terminal (UPT), for the purpose of relocating a cruise passenger facility. The permit authorizes the installation of five pilings within the existing footprint of Building #322 to support the installation of three elevators and two escalators. The permit also authorizes other structural changes to Building #322, as well as the construction of two covered staging areas designed to handle passengers, luggage, and the loading and unloading of ship supplies.

Petitioners filed a request for a contested case hearing at the ALC to challenge DHEC's decision to issue the permit. Petitioners allege DHEC's decision violates the South Carolina Coastal Zone Management Act, S.C. Code Ann. 48-39-10, *et seq.*, the South Carolina Code of Regulations 30-1, *et seq.*, and the Coastal Management Program (CMP). In July 2013, Ports Authority filed a Motion to Dismiss asserting Petitioners lacked standing to challenge the permit at issue in this case. After reviewing the filings by the parties and hearing oral arguments, the Court denied the Motion to Dismiss, concluding Petitioners had made sufficient allegations in the pleadings before this Court to survive the motion. *See Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987) ("A ruling on a [Rule] 12(b)(6)[, SCRCP,] motion to dismiss must be based solely upon the allegations set forth on the face of the complaint and the motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case.").

On December 27, 2013, Ports Authority filed this Motion asserting Petitioners lack standing to proceed with this contested case at this stage of the litigation. On January 21, 2014, Petitioners filed a Response to the Motion for Summary Judgment. The next day, the South Carolina Supreme Court issued a decision in a separate case brought in that court's original jurisdiction. *Carnival Corp. v. Historic Ansonborough Neighborhood Assoc.*, 407 S.C. 67, 753 S.E.2d 846 (2014). Subsequently, Ports Authority filed its Reply to Petitioners' Response with the benefit of the Supreme Court's analysis in *Carnival Corp.* Petitioners thereafter filed a Surreply to address what it argued was a significant new argument by Ports Authority based on *Carnival Corp.*¹ Ports Authority filed a Response to the Surreply on March 10, 2014.

¹ Ports Authority consented to a surreply limited to the discrete argument made in Ports Authority's Reply regarding the Supreme Court's decision in *Carnival Corp.*, but it challenged the proposed surreply on the basis that it is beyond the scope of that discrete argument. In an order dated March 3, 2014, this Court granted Petitioners' Motion to File a Surreply and accepted those portions of its Surreply responding to Ports Authority's contentions regarding the implications of *Carnival Corp.*

DISCUSSION²

The Rules of Procedure for the Administrative Law Court provide “[t]he South Carolina Rules of Civil Procedure . . . may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these rules.” ALC Rule 68. Rule 56(c) of the South Carolina Rules of Civil Procedure provides that summary judgment is properly granted when the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” In determining whether summary judgment is proper, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. *Byers v. Westinghouse Elec. Corp.*, 310 S.C. 5, 7, 425 S.E.2d 23, 24 (1992). Although the evidence and inferences drawn therefrom generally must be construed against the moving party, “the nonmoving party may not rest upon the mere allegations or denials of the pleadings, but a response by affidavit or otherwise . . . must set forth specific facts creating a genuine issue for trial.” Rule 56(e), SCRCF. Affidavits proffered by the non-movant must consist of more than conclusory or speculative allegations of fact or subjective beliefs to survive a summary judgment motion. *See, e.g., Shupe v. Settle*, 315 S.C. 510, 516-17, 445 S.E.2d 651, 655 (Ct. App. 1994); *see also*, 49 C.J.S. *Judgments* § 332 (“[S]tatements made in an affidavit . . . in opposition to, the motion for summary judgment, must be statements of fact, and not mere conclusions or opinions.”).

In the context of a challenge to standing, although “general factual allegations of injury resulting from the defendant’s conduct may suffice” at the pleading (and motion to dismiss) stage, “[i]n response to a summary judgment motion, however, the plaintiff can no longer rest on such ‘mere allegations,’” but, instead, must provide specific facts, whether by affidavit or other evidence. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 889 (1990); *Arcadia Lakes v. S.C. Dep’t of Health and Envtl. Control*, 404 S.C. 515, 745 S.E.2d 385 (Ct. App. 2013) (finding that neither the Town nor its residents had standing to challenge DHEC’s decision and noting that the elements of standing

² Petitioners argue Ports Authority’s Motion regarding lack of standing is precluded by collateral estoppel because the issue was litigated in federal court and directly decided against Ports Authority. However, as explained in the Order Denying Petitioners’ Motion to Vacate, issued December 20, 2013, the federal court order addressed the federal process, and it did not negate the critical area permit and coastal zone consistency certification at issue in this case.

“are not mere pleading requirements but rather an indispensable part of the plaintiff’s case; therefore, ‘each element must be supported . . . with the manner and degree of evidence required at the successive stage of the litigation’” (quoting *Lujan*, 504 U.S. at 561)). Thus, Petitioners must provide sufficient evidence of standing in order to proceed with this contested case.

For cases filed in South Carolina state courts, standing may be acquired: (1) by statute; (2) through what is called constitutional standing;³ or (3) under the public importance exception. *Bodman v. State*, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013) (citing *ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008)).⁴ “The traditional concepts of constitutional standing are inapplicable when standing is conferred by statute.” *Freemantle v. Preston*, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012); see also *Youngblood v. S.C. Dep’t of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013) (“When no statute confers standing, the elements of constitutional standing must be met.”). “Statutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation.” *Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518. Nevertheless,

[i]f . . . a statute does not clearly and specifically address who may bring suit pursuant to it . . . case law seems to suggest that the traditional constitutional standing analysis still applies. Thus, the specificity of a statutory standing provision may be critical to determining whether statutory standing exists and, if not, whether a constitutional analysis is appropriate.

Richard H. Seamon, Paige J. Gossett, & John D. Geathers, *Administrative Agencies – General Concepts and Principles*, in South Carolina Administrative Practice and Procedure 1, 76-77 (Randolph R. Lowell ed., 2013).

³ In *Sea Pines Association for Protection of Wildlife, Inc. v. South Carolina Department of Natural Resources*, 345 S.C. 594, 550 S.E.2d 287 (2001), the South Carolina Supreme Court adopted the federal test for “constitutional standing” as set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The three elements of the test are:

First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”

Lujan, 504 U.S. at 560-561 (citations omitted).

⁴ An association may also have standing to bring suit on behalf of its members under certain circumstances. See discussion *infra*.

In this case, section 44-1-60 provides that an “applicant, permittee, licensee, or affected person” may contest a final agency decision of DHEC by filing a request for a contested case hearing before the ALC. S.C. Code Ann. § 44-1-60(F)(2) & (G) (Supp. 2010). This remedy is available for all DHEC decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions. § 44-1-60(A) & (G). Petitioners thus may establish statutory standing by establishing they are “affected persons” and are challenging DHEC’s decision to grant the permit to Ports Authority. Here, however, the General Assembly did not define “affected person” for purposes of the permit at issue.⁵ Therefore, Petitioners may not establish standing simply by adopting the self-imposed moniker that they are “affected persons.” Furthermore, in this instance, where a clear, specific definition of “affected person” is not available, the *Lujan* test provides a sufficient framework to determine whether the Petitioners qualify as affected persons for the purpose of establishing standing.⁶ Petitioners thus must satisfy the elements of the *Lujan* test to sufficiently establish standing, defeat this motion for summary judgment, and proceed to the next stage of litigation.

Standing under the *Lujan* Test

Injury in Fact

The first element of the *Lujan* test requires Petitioners to show an “injury in fact,” which is “an invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). To be particularized, the injury must affect Petitioners “in a personal and individual way.” *Sea Pines*, 345 S.C. at 602, 550 S.E.2d at 292. It is settled that “a private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom.” *ATC*, 380 S.C. at 196, 669 S.E.2d at 339 (quoting *Evins v. Richland Cnty. Historic Pres. Comm’n*, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000)).

Furthermore, in a recent opinion evaluating the standing of many of Petitioners’ organizations to bring an action seeking an order permanently enjoining cruise operations at the

⁵ Cf. S.C. Code Ann. § 44-7-130(1) (2002) (defining “affected person” for purposes of the State Certification of Need and Health Facility Licensure Act to include, among others, the applicant, a person residing within the geographic area to be served by the applicant, and persons located in the health service area).

⁶ The South Carolina appellate courts have followed this approach in application. See *Carnival Corp.*, *supra*; *Town of Arcadia Lakes*, 404 S.C. at 529, 745 S.E.2d at 392; *Smiley v. S.C. Dep’t of Health & Envtl. Control*, 374 S.C. 326, 329, 649 S.E.2d 31, 33 (2007).

UPT, the Supreme Court of South Carolina rejected the allegations of injury-in-fact advanced by Petitioners as insufficient to satisfy their burden of proving standing. *See Carnival Corp.*, 407 S.C. at __, 753 S.E.2d at 849-53. Although the Supreme Court's decision was based upon a nuisance claim, which is not the legal issue before this Court, the allegations of injury-in-fact in this case, as well as the parties advancing them, are quite similar, if not the same.⁷ For instance, the allegations include the same injuries to person and property as asserted in this contested case, including complaints that "vessels emit noise pollution . . . and burning diesel fuel emits visible particulate soot from ship funnels," traffic problems related to cruise passengers embarking and debarking ships, and pollution to surrounding waters.

Nevertheless, Petitioners suggest that the Supreme Court's injury-in-fact analysis should not be applied to this case because the nuisance and ordinance causes of action required a "special injury." That argument ignores the clear parallel drawn by the Supreme Court between the "special injury" requirement and particularized harm. In setting forth the level of proof required to allege a "special injury," the Supreme Court applied the same test as it did in *Lujan* for determining whether the plaintiff has suffered a concrete and particularized harm under the constitutional injury-in-fact analysis:

A special injury is "individual or specific damage in addition to that suffered by the public," *Brown [v. Hendricks]*, 211 S.C. [395,] 400, 45 S.E.2d [603], 605 [(1947)], and must be "of a special character, distinct and different from the injuries suffered by the public generally," *Bowlin v. George*, 239 S.C. 429, 433-34, 123 S.E.2d 528, 530 (1962). In other words, the public nuisance cause of action does not obviate the requirement of a particularized injury. Rather, for a private party to bring a public nuisance cause of action, the private party must have suffered a particularized injury.

Carnival Corp., 407 S.C. at __, 753 S.E.2d at 852.⁸ Therefore, because the test for "special injury" and "affected person" under the facts of this case are the same —*i.e.*, the "particularized injury" requirement under *Lujan/Sea Pines*—the Supreme Court's evaluation and rejection of the

⁷ Compare Request for Contested Case, with Ports Authority Motion for Summ. Judg., Ex. 73, Petitioners' First Am. Compl., *Carnival Corp. v. Historic Ansonborough*, No. 2011-197468 (S.C. Sup. Ct. Original Jurisdiction Granted Jan. 11, 2012).

⁸ Petitioners suggest the Supreme Court's analysis in this regard is *dicta* and was not necessary to support the Supreme Court's dismissal of Petitioners' claims. *See* Surreply at 3-4 (stating that the Supreme Court's "findings were not a 'necessary' basis for its decision"). This unusual approach appears to be an attempt to establish a doctrine akin to a reverse "two-issue rule" argument, suggesting that where a court makes multiple dispositive holdings, neither a party nor a reviewing court may rely upon any individual holding. However, Petitioners cite no case law for this novel approach to rejecting dispositive holdings.

same allegations of harm, advanced by many of the *same parties*, applies to the analysis of Petitioners' standing in this case.

Finally, Petitioners also contend that, since the Supreme Court evaluated the allegations of injury-in-fact at the motion to dismiss stage, the procedural posture of that dismissal prevents this Court from employing the Supreme Court's analysis here. However, the burden of proof to demonstrate standing is not stagnant; it changes as the litigation progresses, becoming progressively more difficult for Petitioners to demonstrate. *See Town of Arcadia Lakes*, 404 S.C. at 529, 745 S.E.2d at 392-93 ("Elements of standing, however, 'are not mere pleading requirements but rather an indispensable part of the plaintiff's case'; therefore, 'each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stage of the litigation.'" (quoting *Lujan*, 504 U.S. at 561)). The Supreme Court dismissed Petitioners' claims at the motion to dismiss stage, where the bar is at its lowest point to clear. Consequently, the Supreme Court's analysis suggests this Court's review at the motion for summary judgment stage be one of greater scrutiny.

Having determined the Supreme Court's reasoning in *Carnival Corp.* is instructive, we now turn to the specific facts of this case and evaluate Petitioners' claims under *Lujan*. Petitioners must demonstrate an injury-in-fact derived from DHEC's review and issuance of the permit. In applying *Lujan*, it is evident Petitioners have failed to show an "injury in fact," which is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560. Petitioners provided several affidavits from members of their organizations to support their standing in this case. In the affidavits, the members complain about several alleged injuries, including a reduced quality of life, diminished property values, aesthetic and health effects of air pollution, and water pollution. The Court will address each allegation of injury in turn.

Quality of Life

First, Petitioners allege the permit will result in a decrease in their quality of life. For example, Stephen F. Gates, a resident of 59 Meeting Street and President of the Charlestowne Neighborhood Association, provided an affidavit in which he asserts the cruise ships at the UPT have resulted in unbearable and unmanageable traffic congestion in the historic downtown. He further contends Charleston's historic integrity and aesthetic beauty is being eclipsed by the

presence of the disproportionately large cruise ships next to the historic district. Mr. Gates complains that on the days the cruise ships are in port he has reduced access to a convenient grocery store, and he is forced to waste his time, energy, gas, and peace of mind to endure or attempt to avoid cruise traffic. While the Court has sympathy for Mr. Gates' difficulties in navigating downtown traffic, these alleged injuries are not personal or individual to him.⁹ All downtown citizens or visitors are equally affected by traffic and visual impairments generated by the presence of the cruise ships. *See Carnival Corp.*, 407 S.C. at ___, 753 S.E.2d at 849-50 (holding visual disruptions of Charleston's historic skyline and major traffic congestion as a result of cruise ships in port are "generalized grievances suffered by the public as a whole" and do not constitute a "particularized harm"); *Sea Pines Ass'n for Prot. of Wildlife, Inc.*, 345 S.C. at 600, 550 S.E.2d at 291 ("[Injury] must be of a personal nature to the party laying claim to standing and not merely of general interest common to all members of the public.").

Furthermore, Petitioners have failed to show the injury to their quality of life is "actual or imminent." *Lujan*, 504 U.S. at 560. As demonstrated by the affiants' complaints, Petitioners complain of traffic congestion and aesthetic issues that have been affecting their quality of life since the *Carnival Fantasy* made Charleston its home port in 2010. The harms Petitioners describe are pre-existing; therefore, they are not pertinent to whether the permit at issue will cause a particularized injury to Petitioners. Rather, Petitioners rely on speculation that the permit will increase cruise activities to argue the existing injuries they are suffering will be exacerbated by the permitted activity. Essentially, the injury Petitioners assert is the exacerbation of pre-existing injuries. However, Petitioners' affiants' conclusory statements and opinions in support of this alleged injury are not sufficient to create a genuine issue of fact to survive summary judgment.¹⁰ *See Germann v. New York Life Ins. Co.*, 286 S.C.34, 39, 331 S.E.2d 385, 388 (1985) ("A conclusory statement as to the ultimate issue in a case is not sufficient to create a

⁹ Indeed, the affidavits of Christina Dodd and Virginia Lane also complain of increased traffic congestion in the Charleston peninsula area on days the *Fantasy* is in port, and of the effects of the cruise ship's presence on Charleston's aesthetic beauty.

¹⁰ An affidavit of a fact witness "shall set forth facts as would be admissible in evidence" and is prohibited from offering opinion testimony which would also be inadmissible at trial. Rule 56(e), SCRCP; *see also Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) (holding "a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training" (citing Rules 602 and 701 of the South Carolina Rules of Evidence)). The information offered by Mr. Gates and the other affiants is of limited evidentiary value because much of it relies on hearsay and consists of conclusory statements of the affiants' personal opinions and speculations.

genuine issue of fact for purposes of resisting summary judgment.”). Petitioners fail to provide evidence conclusively demonstrating (1) cruise activities will increase if the permit is granted and (2) reliable expert testimony to support their contention that the increased cruise activities will result in increased traffic congestion and aesthetic degradation. Without expert testimony or evidence presenting a foundation for the affiants’ claims, any effect the permit will have on Petitioners’ quality of life is conjecture.

Effects on Property Values and Businesses

Next, Petitioners express *concern* that the permit will have deleterious effects on their property values and businesses. Virginia Lane, a member of the Board of Trustees for the Historic Charleston Foundation, stated in her affidavit that the new terminal *would likely* impact her architecture business and reduce the value of her property; however, she provided no evidence to support these speculative claims.¹¹ Mr. Gates stated he was *concerned* the new terminal would result in more and/or bigger cruise ships calling in Charleston, and therefore more soot would damage his house, effectively decreasing the value of his property. Concern, without evidence of declining property values and business reasonably attributed to granting the permit, does not constitute actual or imminent harm. Moreover, in reviewing a permit request, DHEC is charged with considering “the extent to which the proposed use could affect the value and enjoyment of *adjacent* owners.” S.C. Code § 48-39-150(A)(10) (2008); S.C. Code Ann. Regs. 30-11(B)(10) (2011) (emphasis added); *see also L. E. Winget v. Winn-Dixie Stores, Inc.*, 242 S.C. 152, 164, 130 S.E.2d 363, 369 (1963) (“[A] use of property which does not create a nuisance cannot be enjoined or a lawful structure abated merely because it renders neighboring property less valuable.” (quoting 66 C.J.S. *Nuisances* § 19d)). None of Petitioners’ members own property adjacent to the UPT. Furthermore, Petitioners provide no evidence linking diminishing property values to the proposed permitted activity.¹² Thus, diminished property values and diminished business prospects are not injuries-in-fact, but purely hypothetical injuries.

¹¹ Moreover, any potential impact to Ms. Lane’s architecture business is personal to her and may not be used to establish standing on behalf of the Foundation.

¹² Petitioners did not submit evidence of real estate appraisals or another probative measure of real estate values even though one of the affiants, Christina Dodd, sold her home in the Ansonborough neighborhood during the pendency of this case.

Emissions from Ships

Several of Petitioners' affiants further complain they have been injured by oily soot on the window sills and piazzas of their homes. Mr. Gates asserted he was concerned about the real and substantial risks posed by increased soot and air emissions from expanded cruise activities as a result of the permit.¹³ Similarly, Tommie Robertson claimed she has been on her porch when the *Fantasy* has docked and, within seconds of breathing in the ambient air, experienced a sore throat and difficulty breathing as a result of the ship's emissions. Robertson contends the permit will exacerbate this issue. However, Petitioners' provided no expert medical testimony substantiating their claims, nor did they provide any evidence linking the proposed permit with the alleged potential harm. While air pollution is certainly a concern for the public at large, Petitioners have failed to demonstrate that their affiants are affected any differently from any other downtown Charleston resident. Moreover, the case before this Court is based on a DHEC permit related to water quality, not air quality. Thus, the allegations of possible air pollution are not relevant to the issue before this Court and cannot establish an injury in fact sufficient to confer standing upon the Petitioners.

Water Pollution

Finally, Petitioners allege the permit will injure them because it will increase water pollution and, therefore, exacerbate related health and safety issues. Katherine Zimmerman, who is a Program Director for the Coastal Conservation League, discussed the issue of water quality in her affidavit. Ms. Zimmerman described and attached several reports discussing issues involving water quality and the cruise industry as a whole. However, the hearsay¹⁴ reports offer no discussion of, or connection with, the cruise industry in Charleston. Reports discussing the cruise industry in general do not satisfy the personal and particularized requirement of an injury-in-fact, which Petitioners are required to demonstrate. Likewise, Marty Morganello's¹⁵ affidavit asserting he is concerned the permitted activity is a precursor to expanded cruise ship operations,

¹³ Specifically, Mr. Gates contends he must scrub his porch and windows more often and more vigorously as a result of purportedly imminent soot deposition. Ms. Dodd also complained of soot deposition on her window sills and piazzas, but she has since sold her home. Accordingly, her concerns in this regard are now moot.

¹⁴ See Rule 56(e), SCRPC (requiring affidavits to be "made on personal knowledge" and "set forth facts . . . admissible in evidence").

¹⁵ Morganello is the President of the Charleston Chapter of the Surfrider Foundation. He resides at 1620 Oak Island Drive, which is several miles from Charleston's historic district. He enjoys Charleston and its surrounding waterways.

which will result in increased water pollution, does not constitute a particularized injury. Even if Mr. Morganello's speculations are true, they remain unsubstantiated speculations without evidence showing how the permit will result in increased cruise activities, and increased cruise activities will result in increased water pollution. The Court is not concerned with predictions of general future harm based on conjecture. Accordingly, Petitioners fail to show potential increases in water pollution is an injury-in-fact.

Identifiable Trifle

Petitioners also contend the injury required for standing purposes need not be a substantial injury but an "identifiable trifle" is enough. This Court's conclusions, however, are not based on an analysis of whether the injuries are substantial or an "identifiable trifle." Rather, this Court's analysis is based on whether the injuries are "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560. Here, as in *Carnival Corp.*, Petitioners' alleged injuries do not affect them in a personal and individual way different from the way they affect the general public. Petitioners' affidavits do not provide material facts to establish a concrete and particularized injury distinguishable from the harm suffered by the general public. Further, Petitioners fail to show how their allegations are not conjectural or hypothetical, given that they are tied to current conditions with existing cruise operations as opposed to any actual or imminent injury deriving from the permitted activity. Accordingly, this Court finds Petitioners have failed to show an injury-in-fact under *Lujan* for the purpose of establishing standing.

Causal Connection

Even if Petitioners were able to show an injury-in-fact, this Court finds they cannot satisfy the second element of the *Lujan* test, which requires "a causal connection between the injury and the conduct complained of—the injury has to be 'fairly...trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). In this case, the conduct complained of is the permit authorizing the construction of pilings in the critical area which are necessary for relocating the cruise ship terminal to the northern end of the UPT. Petitioners allege the relocation of the cruise ship terminal under the permit will result in more and/or bigger cruise ships docking at Charleston,

which will, in turn, exacerbate the alleged injuries Petitioners are already suffering.¹⁶ Petitioners cite to *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978) in support of their claim, arguing *Duke Power* stands for the principle that causation can be proven by a “but for” test. In this case, Petitioners claim that but for the granting of the permit, the alleged harms to Petitioners would not be exacerbated. However, *Duke Power* is inapplicable here for two reasons. First, in *Sea Pines*, South Carolina adopted the test for standing as provided in *Lujan*, not *Duke Power*. Second, even if *Duke Power* was applicable, Petitioners have provided no evidence, in the form of expert testimony or otherwise, to prove a “but for” causal connection between the permit and the alleged potential harms.

Applying the correct, stricter standard under *Lujan*, Petitioners’ claim of a causal connection fails. The facts of this case are analogous to the situation in *Bailey v. S.C. Dep’t of Health & Envtl. Control*, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010). In *Bailey*, the petitioner contested DHEC’s decision to grant a nearby property owner a permit to change part of his fixed dock to a floating dock. *Id.* at 2, 693 S.E.2d at 427. The petitioner expressed “concern” that the dock would become a marina, and the Court of Appeals upheld this Court’s determination that his concern was “conjectural and speculative.” *Id.* at 7, 693 S.E.2d at 429. Moreover, the Court of Appeals upheld this Court’s finding of no causal connection between the petitioner’s alleged injury and the permitted conversion of the fixed dock into a floating dock because the neighbor’s boats had been docked there for years, and they would continue to be docked there regardless of the permitting decision. *Id.* Here, like in *Bailey*, Petitioners raise concerns about potential future harms. Petitioners’ complaints are merely based on speculation that the permit will exacerbate the existing alleged harms related to the cruise ships porting at the UPT. Petitioners, however, have provided no expert testimony connecting the permitted activities with the alleged exacerbation of harm. Further, like *Bailey*, even if this Court denied the permit, the UPT will remain an operational marine terminal servicing cruise ships.¹⁷

¹⁶ Petitioners also contend that without the permitted pilings to provide structural support for the relocated cruise terminal, Ports Authority will be forced to cease all cruise ship operations. However, cessation of current cruise ship operations is not at issue in this case. Moreover, Petitioners have failed to provide any evidence substantiating their claims that cruise operations would cease if the permit were denied.

¹⁷ In fact, if the permit is denied, the Ports Authority represents that not only will UPT continue to service cruise vessels, but also cargo ships, which have already been moved to another terminal in anticipation of the renovation of the cruise terminal, will return to UPT, along with their associated rail and truck traffic.

Moreover, Petitioners' contention that the permit will increase cruise ship operations at the UPT relies on assumptions about the decisions of third parties, like Carnival Cruise Lines, who is not part of this action, and who must initially decide to expand the size of its fleet in Charleston. *See Simon*, 426 U.S. at 41-42 (“[T]he ‘case or controversy’ limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.”). Thus, there is no evidence before this Court that the permitted activities at issue in this case are causally connected with the potential alleged injuries.

Redressability

The third element of the *Lujan* test requires that “it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” *Lujan*, 504 U.S. at 561 (quoting *Simon*, 426 U.S. at 38, 43). Petitioners request this Court review the permit and issue an order reversing the decision to issue the permit or, in the alternative, remand the case to DHEC with instructions to conduct an analysis of alternative terminal locations, traffic impacts, noise impacts, air emissions, and impacts on the historic qualities of Charleston. Although Petitioners allege that the existing complaints will be exacerbated as a result of the permit at issue in this case, Petitioners provided no evidence, particularly no expert testimony, to support those claims. Therefore, not only is it speculative that the permit will exacerbate Petitioners' alleged injuries, it is also speculative that a denial of the permit will redress the alleged harms.

Petitioners also argue the denial of the permit will redress existing injuries to its members from current cruise operations. Nevertheless, existing injuries from current cruise operations which are not connected to the proposed permitted activities are not at issue in this case. Petitioners further claim their injuries would be redressed if this Court denied the permit and instructed DHEC to conduct its permitting in a “legal manner,” which would “allow for identification of specified historic, health and environmental impacts and adoption of measures to reduce them, such as shore power, standards for cruise operation and discharges, terminal redesign (e.g., less impervious parking) and terminal relocation away from the most congested and historically intact part of Charleston.” However, this Court cannot address the issue of whether DHEC properly issued the permit unless Petitioners establish standing. Accordingly, there is no evidence before this Court that the denial of the permit in this case would redress Petitioners' alleged potential injuries.

Associational Standing

Where the petitioner is an association, the association has standing to bring an action on behalf of its members, but it is “substantially more difficult.” *Beaufort Realty Co. v. Beaufort Cnty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001). An association has standing “only if it alleges that it or its members will suffer an individualized injury; a mere interest in a problem is not enough.” *Id.* Specifically, an association has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests at stake are germane to the organization’s purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Id.* (citing *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977)). As previously discussed, Petitioners have failed to provide evidence proving their members individually meet the elements of *Lujan*, particularly the requirement of an injury-in-fact. Because Petitioners cannot show their individual members have suffered an injury-in-fact, Petitioners likewise cannot show the members have standing to sue in their own right to satisfy the first element of associational standing under *Beaufort Realty*. *See id.* at 301, 551 S.E.2d at 589 (holding an organization has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right); *see also Carnival Corp.*, 407 S.C. at ___, 753 S.E.2d at 851 (“[T]o possess standing, either Plaintiffs alone must have suffered a concrete, particularized injury or their members must have suffered such an injury and the other elements of associational standing must be satisfied.”). This finding mirrors that of the Supreme Court in *Carnival Corp.*, which held plaintiffs, in an almost identical position as Petitioners,

fail[ed] to allege a particularized injury either to themselves or their members. Rather, they assert[ed] only generalized grievances suffered by the public as a whole which are insufficient to establish associational standing.

Carnival Corp., 407 S.C. at ___, 753 S.E.2d at 851. Thus, Petitioners fail to meet the first requirement for organizational standing.

Next, Petitioners, with the exception of Charleston Communities for Cruise Control (Cruise Control), also fail to satisfy the second element of *Beaufort Realty* because Petitioners fail to show the permitted activity is germane to Petitioners’ associational purposes. For example, the Historic Ansonborough Neighborhood Association (HANA) states its purpose is to “address matters of importance to the historic residential neighborhood designated as Ansonborough . . . and to foster a spirit of community and cooperation with the Ansonborough

Neighborhood.” While HANA has provided the affidavit of one of its members who alleges the permitted activity has injured her individually, it has not provided any evidence showing how the permitted activity is germane to addressing matters of importance to all members of the Ansonborough neighborhood.¹⁸ Furthermore, HANA does not assert any of its members own property adjacent to the UPT. HANA thus presents no more than a mere interest in the permitted activity, which does not establish standing. *See Beaufort Realty*, 346 S.C. at 301, 551 S.E.2d at 589 (holding “a mere interest in a problem” is not sufficient to establish standing). The Charlestowne Neighborhood Association (CNA) fails to satisfy the second element of organizational standing for similar reasons.¹⁹

The Preservation Society of Charleston (PSC) asserts its mission is to “inspire the involvement of all who dwell in the Lowcountry to honor and respect our material and cultural heritage.” PSC fails to show how the permitted activities will hinder its ability to “inspire involvement” in its preservation activities. Similarly, the Historic Charleston Foundation (HCF) is “dedicated to preserving and protecting the architectural, historical and cultural character of Charleston and its Lowcountry environs, and educating the public about Charleston’s history and the benefits that are derived from preservation.” HCF argues the addition of five pilings and the relocation of the terminal will adversely impact Charleston’s architectural, historical, and cultural heritage. However, HCF fails to specify what that impact is, particularly considering Charleston is a port city and has undeniably derived its cultural heritage from the maritime industry, to which the UPT has contributed for over one hundred years. Like HANA and CNA, PSC and HCF fail to present anything more than a “mere interest” in the permitted activity. *See Beaufort Realty*, 346 S.C. at 301, 551 S.E.2d at 589 (holding “a mere interest in a problem is not enough” is not sufficient to establish standing).

The Charleston Chapter of the Surfrider Foundation (Surfrider) states it is an “environmental organization dedicated to the protection and enjoyment of the world’s oceans, waves and beaches for all people, through conservation, activism, research and education.”

¹⁸ Furthermore, HANA’s individual member who submitted an affidavit, Christina Dodd, no longer lives in the Ansonborough neighborhood. Accordingly, the concerns expressed in her affidavit are now moot, and her affidavit may not be relied upon to confer standing upon the Petitioner, Historic Ansonborough Neighborhood Association.

¹⁹ CNA’s membership is limited to residents living south of Broad Street, which is located many blocks south of the UPT.

Surfrider has not presented evidence showing how the permitted activity will affect its ability to protect and enjoy the world's oceans, waves and beaches. Furthermore, Surfrider's affiant, Mr. Morganello, provided no admissible or substantiated evidence useful to this Court. Accordingly, Surfrider fails to satisfy the second element of organizational standing.

The permitted activity arguably is germane to CCL's broadly stated purpose to "protect the natural resources and quality of life in South Carolina communities, to promote appropriate development and to prevent projects that would excessively harm the state's natural resources and interfere with its residents' quality of life." However, CCL, like the other associations, does not specifically state how the permitted activity hinders its purpose, other than speculating about potential future harms. In light of its broad purpose, it is more important for CCL to show the permitted activity is germane to its purpose, its members, and is not merely of interest to it. This Court finds CCL failed to show it has more than a mere interest in the permitted activity. Furthermore, to the extent CCL rests its claim for standing on the affidavit of Zimmerman, her testimony is largely inapplicable or inadmissible.²⁰ Similarly, Robertson asserts that CCL represents her interest in the "use and enjoy[ment of] the aesthetic, historic, cultural and natural resources of the City of Charleston and the greater coastal zone in which it sits." CCL's broadly stated purpose does include the protection of the "quality of life in South Carolina communities" which arguably includes the use and enjoyment of "aesthetic, historic, cultural and natural resources." However, Ms. Robertson did not provide any evidence showing how the permitted activity is germane to addressing matters of importance to all members. Rather, as discussed above, her allegations relate to interests which are not distinguishable from any other downtown Charleston resident.

Moreover, even if Robertson's claims relating to the emissions from cruise ships and their effect on her health and property could be connected to the permitted activity, those claims are personal to her and cannot be used to establish standing on behalf of CCL. An organization lacks standing where the claim asserted and the relief requested requires the participation of individual members in the lawsuit. *See Beaufort Realty*, 346 S.C. at 301, 551 S.E.2d at 589 (holding an association has standing if neither the claim asserted nor the relief requested requires

²⁰ Zimmerman's affidavit purported to give opinions on the air and water quality impacts of the permitted activity. Zimmerman did not establish her expertise to give an opinion regarding these issues. Accordingly, her statements are mere speculation. Furthermore, the study she quoted on the use of shore-side power is hearsay and thus insufficient to establish a genuine issue of material fact.

the participation of individual members in the lawsuit). Furthermore, the recent decision of the South Carolina Supreme Court in *Georgetown County League of Women Voters v. Smith Land Co., Inc.*, 393 S.C. 350, 358, 713 S.E.2d 287, 292 (2011), points out the flaws in Petitioners' use of Robertson's claims to establish standing. The dissenting opinion in *Smith Land*,²¹ which was authored by Justice Hearn and joined by Justice Kittredge, concluded that, in order to satisfy the third prong of the *Beaufort Realty/Hunt* test, "the organization must show that the right it seeks to vindicate is common to the membership and the interest of the harmed members in the proceedings derives from their membership." *Id.* at 358, 713 S.E.2d at 293. The dissent recognized that while the League of Women Voters alleged that its members suffered and would continue to suffer harm as a result of the permitted activity, the evidence presented by the League of Women Voters was limited to harm alleged by only one member.²² Pertinent to the issues at hand, the dissent recognized that injury as to one member of an organization does not extend to the rest of the organization. *Id.* at 361, 713 S.E.2d at 293 ("With harm occurring to only one member of the League [of Women Voters] and a cause of action thereby inuring only to that one member, the right the League is pursuing under the Act is not a common one."). Further, the dissent emphasized that the harm suffered by the individual does not, in and of itself, satisfy the associational standing requirement unless the injury suffered flows from the membership in the organization. *Id.* Applying that reasoning to this case reveals a similar disconnect between the injuries alleged and CCL's purpose. The experiences of Robertson regarding the effects of cruise ships' soot upon her personal property and breathing do not establish the third prong of the *Beaufort Realty/Hunt* test.

Therefore, this Court finds none of Petitioners satisfy all three requirements for associational standing.

²¹ The *Smith Land* majority found the issue of standing to be unpreserved for its appellate review; therefore, it took no position on the issue. *Smith Land*, 393 S.C. at 352 n.1, 713 S.E.2d at 288 n.1. The dissent, believing the majority had misapplied the rules of preservation, addressed the issue of associational standing in a manner that is problematic for Petitioners. *Id.* at 357-58, 713 S.E.2d at 291. Thus, to date, the only two Justices to have evaluated the *Beaufort Realty/Hunt* test under similar circumstances came down on the side of the Ports Authority's argument in this case, while the remaining three Justices have taken no position on the issue.

²² Evidence was also presented by two other neighboring property owners; however, those neighbors were not members of the League of Women Voters. *Smith Land*, 393 S.C. at 360-61, 713 S.E.2d at 293.

Standing under the Public Importance Exception

In the alternative, Petitioners assert they have standing under the public importance exception. Where a court determines a case presents issues of important public interest, standing may be conferred “without requiring the plaintiff to show he has an interest greater than other potential plaintiffs.” *Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007). However, “[t]he key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of ‘future guidance’ that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance.” *Bodman*, 403 S.C. at 68, 742 S.E.2d at 367 (quoting *ATC South, Inc.*, 380 S.C. at 198-199, 669 S.E.2d at 341). Petitioners argue this Court should find they have standing under the public importance exception because the permitted activity will result in a “[thirty five] million [dollar] cruise terminal in the heart of the most historic area in all of South Carolina and impact that area for generations to come.” However, the permitted activity will not change the existing footprint of the UPT, nor will it change the function of the UPT as a marine terminal, and the permit cost is not representative of its public importance or the need for future guidance. The core issue in this case is whether DHEC complied with state law when issuing the Critical Area Permit and Coastal Zone Consistency Certification authorizing the Ports Authority to make improvements to Building #322. Petitioners have not shown, and this Court fails to see, how the resolution of this case is needed for future guidance. Accordingly, this Court finds Petitioners fail to establish standing under the public importance exception.

Conclusion

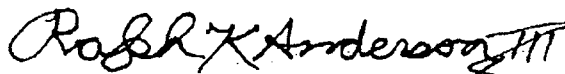
In response to a summary judgment motion, Petitioners can no longer rest on “‘mere allegations,’ but must ‘set forth’ by affidavit or other evidence ‘specific facts,’ which for purposes of the summary judgment motion will be taken to be true.” *Lujan*, 504 U.S. at 561; *see* Rule 56(e), SCRPC (providing “the nonmoving party may not rest upon the mere allegations or denials of the pleadings, but a response by affidavit or otherwise . . . must set forth specific facts creating a genuine issue for trial”). Petitioners have made many allegations and conclusory statements, but have failed to set forth specific, admissible facts to support their allegations and

statements. Consequently, Petitioners have failed to show they satisfy the elements of standing under any theory presented so as to defeat this summary judgment motion.²³

ORDER

IT IS HEREBY ORDERED that Ports Authority's Motion for Summary Judgment for lack of standing is **GRANTED**.

AND IT IS SO ORDERED.



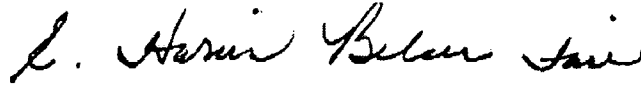
Ralph K. Anderson, III
Chief Administrative Law Judge

April 11, 2014
Columbia, South Carolina

²³ Petitioners filed a Motion for Reconsideration of this Court's Order of March 3, 2014, denying Petitioners' Motion to Expand Discovery on March 13, 2014. In response to the Court's e-mail inquiry on March 24, 2014, counsel for Petitioners represented to the Court that Petitioners sought expanded discovery in order to prepare for the hearing on the merits and not for purposes of responding to the Motion for Summary Judgment. Therefore, the Order denying Petitioners' Motion to Expand Discovery is vacated. Nevertheless, in light of the disposition of the summary judgment motion, the Motion for Expanded Discovery is moot and is thus denied. Likewise, all remaining outstanding motions are moot and are also denied.

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, 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).



E. Harvin Belser Fair
Judicial Law Clerk

April 11, 2014
Columbia, South Carolina