

**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 DENYING PETITIONERS'
MOTION TO EXPAND DISCOVERY AND
GRANTING PETITIONERS' MOTION
TO FILE A SURREPLY**

APPEARANCES: For the Petitioners:

Amy E. Armstrong, Esquire
W. Jefferson Leath, Jr., Esquire
J. Blanding Holman, IV Esquire
Randolph R. Lowell, Esquire
Chad N. Johnston, Esquire
Bradley D. Churdar, Esquire

For the Respondents:

This case is before the South Carolina Administrative Law Court (ALC or Court) on Petitioners' request for contest case hearing to challenge the Critical Area Permit and Coastal Zone Consistency Certification (Permit No. OCRM-12-054-B) issued by the Department of Health and Environmental Control (DHEC) staff, through the Office of Ocean and Coastal Resource Management (OCRM) on December 18, 2012. The Permit authorizes the South Carolina State Ports Authority (Ports Authority) to make improvements to Building #322, an existing waterfront building in the Union Pier Terminal.

Motion to Expand Discovery

Petitioners filed the request for contested case hearing on February 11, 2013. The Notice of Assignment was issued on February 19, 2013. The Rules of Procedure for the Court provide

FILED

March 3, 2014

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[d]iscovery shall be conducted according to the procedures in Rules 26-37, SCRCF, except that only the standard interrogatories provided by SCRCF 33(b), as applicable to the pending contested case, are permitted; there shall be no more than three (3) depositions per party under Rule 30, SCRCF; and no more than ten (10) requests to admit per party, including subparts under Rule 36, SCRCF. All discovery shall be completed within 90 days of the receipt of the Notice of Assignment and Request for Information. Upon motion for good cause shown or upon his own motion, discovery may be expanded or curtailed by the administrative law judge.

ALC Rule 21(A). Thus, according to the ALC Rules, the discovery period in this case ended on or about May 20, 2013. The parties indeed participated in discovery during this period. While the parties discussed possibly expanding the discovery period, no party filed a motion with this Court to expand discovery until Petitioners filed this motion on December 23, 2013, more than seven months after the discovery period ended.

This Court finds disingenuous Petitioners' argument that it was not practical or cost effective to conduct discovery during the original discovery period due to the dispositive nature of the Ports Authority's Motion to Dismiss for lack of standing. The Ports Authority filed its Motion to Dismiss for lack of standing on July 1, 2013. Given that the discovery period under Rule 21(A) ended in May 2013,¹ the Petitioners could not have decided to postpone discovery based on the Ports Authority's Motion to Dismiss and the possibility that the Court's ruling on that motion could have disposed of this case. Furthermore, as Petitioners point out in their motion, both parties filed motions that could have been dispositive in this case. In fact, within days of filing the request for contested case hearing, Petitioners filed a Motion to Remand this case to the DHEC Board for review. In July 2013, the Ports Authority filed two Motions to Dismiss and in November 2013, Petitioners filed a Motion to Vacate. As a result of the extensive briefing of these motions by both parties as well as a motions hearing and a status conference to discuss at least six pending motions, there has been a dispositive motion pending in this case for most of the time this case has been pending with this Court. If the Court accepts Petitioners' argument that a dispositive motion effectively stays discovery until resolution of that motion by this Court, then the parties would have barely begun discovery at this stage of the litigation.

¹ In the Order Denying Ports Authority's Motion to Dismiss, this Court referenced that discovery was ongoing at the time of the motions hearing in September 2013. This finding was based on statements made at the motions hearing that, upon reflection, only referred to the fact that the parties were continuing to supplement responses to discovery requests that were made during the original discovery period that ended May 20, 2013.

The Court also does not accept Petitioners' argument that all parties knew that discovery was ongoing beyond May 20, 2013. There was no scheduling order in this case to expand or curtail the discovery period set forth in ALC Rule 21(A).² Although the parties have continued to supplement responses to discovery beyond the May 20 deadline, it appears no party attempted to initiate additional discovery, including noticing depositions, after that deadline. Petitioners have been afforded ample opportunity to conduct discovery and in no way have been hindered from seeking to expand the length and/or scope of discovery within the applicable ninety-day discovery period.

In sum, Petitioners are seeking to extend discovery on the eve of the filing of a Motion for Summary Judgment. Their request at this stage of the proceeding is simply unjustified and would unfairly prolong the advancement of this case.

Motion to File Surreply

On December 27, 2013, the Ports Authority filed a Motion for Summary Judgment asserting Petitioners lack standing to proceed with this case. Petitioners filed their response on January 21, 2014. 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.*, Opinion No. 27355, 2014 WL 229894 (S.C. Sup. Ct. filed Jan. 22, 2014). In that case, the Historic Ansonborough Neighborhood Association, Coastal Conservation League, and Preservation Society of Charleston brought suit against the Ports Authority, *inter alios*, alleging unlawful use of the Union Pier Terminal by the Carnival Corporation's cruise ship. The Supreme Court concluded those parties did not have standing to bring that particular action alleging nuisance and zoning claims.

² Originally, the Court scheduled a hearing on the merits for November 12-18, 2013, and served the Notice of Hearing on the parties on May 31, 2013. After receiving the Hearing Notice, attorney for the Petitioner emailed the Court about rescheduling the hearing due to a scheduling conflict and noted a need for additional time for discovery. In response, the Court's Law Clerk in an e-mail requested dates and times for a rescheduled hearing, noting that:

As the scheduled date provided over four months for discovery, the Court was hopeful the parties could complete discovery within the time period.

Petitioners argue that this response by the Court's Law Clerk showed that no one understood discovery to have closed on May 20, 2013. However, that comment did not indicate that the Court was extending discovery. Clearly, the parties may have informally agreed to a discovery schedule. More importantly, the response emphasized that the Court believed that a hearing beginning on November 12, 2013 more than adequately provided sufficient time for discovery. Furthermore, if Petitioners believed that extending the date of the trial would have extended the discovery period, the Petitioners should have taken steps to protect their position by filing a Motion to Extend Discovery or requesting a Scheduling Order.

On February 5, 2014, the Ports Authority filed its Reply to Petitioners' Response in this case, including arguments regarding the analysis contained in the Supreme Court's decision. Petitioners thereafter filed a Motion to File Surreply and a proposed surreply, asserting the Ports Authority included a significant new argument regarding the Supreme Court's decision. In response, the Ports Authority consented to a surreply limited to the discrete argument made in the Ports Authority's Reply regarding the Supreme Court's decision but challenged the proposed surreply on the basis that it is beyond the scope of that distinct argument.

This Court will accept those portions of the Surreply that address the implications of the Supreme Court's holding in *Carnival Corp. v. Historic Ansonborough*, Op. No. 27355, 2014 WL 229894, (S.C. Sup. Ct. filed Jan. 22, 2014). Nevertheless, arguments that exceed the parameters of that holding will not be considered. For example, the argument in Petitioners' Surreply in Opposition to Motion for Summary Judgment that are stricken in Exhibit 3 of the Port's Authority's response to Petitioner's Surreply relating to the argument of collateral estoppel will not be considered.³

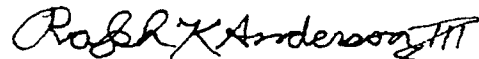
ORDER

IT IS HEREBY ORDERED that the Petitioners' Motion to Expand Discovery is **DENIED**.

IT IS FURTHER ORDERED that the Petitioners' Motion to File a Surreply is **GRANTED IN PART**. The Court will consider the arguments in the proposed surreply as filed by Petitioners distinguishing the decision of *Carnival Corporation*.

IT IS FURTHER ORDERED that the Ports Authority's Response to Surreply is due no later than March 10, 2014.

AND IT IS SO ORDERED.



Ralph King Anderson, III
Chief Administrative Law Judge

March 3, 2014
Columbia, South Carolina

³ This Court does not find that the holding in the *Carnival Corporation* case collaterally estops this case any more than the holding in the federal court case of *Preservation Society of Charleston v. United States Army Corps of Engineers*, C/A No. 2:12-CV-02942-RMG (Sept. 18, 2013).

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

E. Harvin Belser Fair
Judicial Law Clerk

March 3, 2014
Columbia, South Carolina