THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISRATIVE LAW COURT

Ralph K. Anderson, III, Chief Administrative Law Judge

Case No. 2014-000847

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SC Court of Appeals

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, ... Appellants,

v.

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

Initial Brief of Respondent South Carolina State Ports Authority

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Statement of the Issues

This appeal presents four main issues:

1. Standing requires a concrete, particularized, and imminent injury that is causally connected to the challenged conduct and that likely will be redressed by a favorable decision. There were no specific, admissible facts showing that Appellants' alleged injuries differed from those suffered by the general public, were causally connected to the license issued by DHEC, or would be redressed by denial of the license. Did the ALC err in determining Appellants lacked standing?

2. Appellants moved to vacate the license, essentially seeking summary judgment that DHEC did not make a required water quality certification. The ALC denied that motion even before finding a lack of standing, determining that the disputed water quality certification could be considered in a later hearing. May Appellants appeal from the denial of this order and, if so, did the ALC properly deny the motion?

3. Absent court approval, the ALC rules require completing discovery within 90 days after an ALJ is assigned. The ALC denied Appellants' Motion to Expand Discovery filed well after the 90-day period, but subsequently vacated the order and denied the motion as moot. May Appellants appeal from this discovery order and, if so, did the ALC abuse its discretion in denying the motion?

4. Appellants moved to remand the license, arguing that the DHEC Board was required to hold a final review conference even though S.C. Code Ann. § 44-1-60 recognizes that a conference is discretionary by specifying what happens if a conference is declined in writing or not held. After denying that motion, the ALC granted the Ports Authority's subsequent motion for sanctions, finding the motion frivolous. Did the ALC abuse its discretion?

Statement of the Case

This administrative matter began when the South Carolina State Ports Authority submitted a joint application to the United States Army Corps of Engineers and the South Carolina Department of Health and Environmental Control[1] in January 2012 for a license to engage in activities affecting the waters of the United States and critical areas of South Carolina. (R. pp.) The Ports Authority sought approval to install five additional pile clusters in the waters underneath Building 322, a warehouse located on the northern end of Union Pier Terminal, as part of a plan to relocate passenger cruise operations to that location from the southern end of the terminal. (R. p.)

A federal permit is required because, under Section 10 of the Rivers and Harbors Act, the Corps must approve any obstruction or alteration of a navigable water of the United States.[2] *See* 33 U.S.C.A. §§ 401, 403; *see also* 33 C.F.R. § 320.2(b). This federal permit also requires a water quality certification from DHEC or a waiver pursuant to section 401 of the Clean Water Act, 33 U.S.C.A. § 1341. *See* S.C. Code Ann. Regs. 61-101. A critical area permit and coastal zone consistency determination from DHEC arguably were required because the proposed relocation will take place in the "critical

[1] The Application was submitted to DHEC through its Office of Ocean and Coastal Resource Management (OCRM). (R. pp.)

[2] While the wharf has existed for over a century, it extends over the river's natural bank and thus is still considered work in a federal navigable water.

area"[3] of the coastal zone[4] of South Carolina. *See* Coastal Zone Management Act, S.C. Code Ann. §§ 48-39-10 to -360; S.C. Code Ann. Regs. 30-1 to -21; *see also* S.C. Code Ann. § 48-39-80(B)(11).

The Corps granted Section 10 authorization pursuant to Nationwide Permit 3 (NWP 3) on April 20, 2012.[5] (R. pp.) The state provided a general water quality certification when DHEC staff issued such a certification without conditions for all NWP 3 activities on April 23, 2012. (R. pp.) On December 18, 2012, DHEC issued a license for the project authorizing installation of the five pilings (License). (R. pp.)

On January 2, 2013, the Preservation Society of Charleston, Charleston Communities for Cruise Control, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Historic Charleston Foundation (Cruise Opponents) filed Requests for a

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[3] "Critical area" is defined as coastal waters, tidelands, beaches, and the beach/dune system. *See* S.C. Code Ann. § 48-39-10(J). "Coastal waters" are "the navigable waters of the United States subject to the ebb and flood of the tide and which are saline waters, shoreward to their mean high-water mark." S.C. Code Ann. § 48- 39-10(F). "Tidelands" are defined to include "all areas at or below mean high tide...." S.C. Code Ann. § 48-39-10(G).

[4] The "coastal zone" is defined as all coastal waters and submerged lands seaward to the State's jurisdictional limits and includes all lands and waters in Charleston County. *See* S.C. Code Ann. § 48-39-10(B).

[5] The Clean Water Act generally exempts maintenance activities from the requirement that a permit be obtained to discharge dredged or fill material. 33 U.S.C.A. § 1344(f). To this end, the Corps has issued a series of nationwide permits for these types of activities, among which is NWP 3.

Final Review Conference of the DHEC staff decision. (R. pp.) The DHEC Board unanimously denied those requests on January 10, 2013. (R. pp.)

Cruise Opponents filed a request for contested case hearing with the S.C. Administrative Law Court (ALC) on February 11, 2013,[6] contending that DHEC's issuance of the License was "made in violation of applicable statutes, regulations and rules contained in the S.C. Coastal Zone Management Act, S.C. Code Ann. §§ 48-19-10, *et seq.*, OCRM Regulations 30-1, *et seq.*, and the Coastal Management Program." (R. pp.) (Req. for Contested Case Hrg., p.8 ¶22). On February 27, 2013, Cruise Opponents filed a Motion to Remand to DHEC Board, arguing that the Board was required to hold a final review conference. (R. pp.) The ALC denied the motion to remand by order dated May 3, 2013. (R. pp.) Meanwhile, the parties engaged in discovery during the time periods provided in Rule 21.A, RPALC (allowing 90 days for discovery absent an order from the ALC).

On July 1, 2013, the Ports Authority filed two separate motions: a motion to dismiss for lack of standing and a motion for sanctions seeking dismissal and/or an award of attorneys' fees and costs expended in responding to Cruise Opponents' frivolous motion to remand. (R. pp.) In the motion for sanctions, the Ports Authority argued that Cruise Opponents' February 27, 2013 motion

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[6] On September 18, 2013, the Corps' authorization for the project to proceed under NWP 3 was remanded to the agency for reconsideration using a broader scope of analysis. Order, *Preservation Soc'y of Charleston v. U.S. Army Corps of Eng'rs*, 2013 WL 6488282 (D.S.C. Sept. 18, 2013).

to remand was frivolous because the final review conference was not mandatory and that this principle was well-established in the law and known to counsel for the Cruise Opponents. (R. pp.) After briefing by the parties and oral argument on September 6, 2013, the ALC granted the motion for sanctions by Order dated March 3, 2014 and awarded sanctions against Cruise Opponents in the amount of $9,300.[7] (R. pp.) The ALC denied the Ports Authority's request for fees and costs for the sanctions motion in the amount of $11,672.50, but nevertheless found "that the requested amount is reasonable." *Id.* The Cruise Opponents moved to reconsider that Order and the ALC affirmed its original imposition of sanctions in an Amended Order Granting Sanctions dated and filed April 11, 2014 (Sanctions Order), which is the order challenged on appeal. (R. pp.)

The parties filed several other pretrial motions with the ALC. Pertinent to this appeal, Cruise Opponents filed a Motion to Vacate dated November 1, 2013, again seeking to remand the matter to DHEC based on a different argument. (R. pp.) They also filed a Motion to Expand Discovery dated December 23, 2013, long after expiration of the 90-day period provided by Rule 21.A, RPALC. (R. pp.) The Ports Authority filed a Motion for Summary Judgment for Lack of Standing on December 27, 2013. (R. pp.)

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[7] The ALC denied the Ports Authority's motion to dismiss for lack of standing, by Order dated December 2, 2013.

The ALC denied the Motion to Vacate by order dated December 20, 2013 (Motion to Vacate Order) (R. pp.), and denied the Motion to Expand Discovery by order dated March 3, 2014 (Discovery Order). (R. pp.) The ALC granted the Ports Authority's Motion for Summary Judgment for Lack of Standing (Mot. Summ. J. Standing) by order dated April 11, 2014 (Standing Order).

On April 21, 2014, Cruise Opponents served a Notice of Appeal to this Court, challenging the Standing Order, the Sanctions Order, the Motion to Vacate Order, and the Discovery Order. (R. pp.) The Ports Authority moved on July 3, 2014 to dismiss the appeal from the Motion to Vacate Order and the Discovery Order, contending that neither order is appealable and, moreover, that Cruise Opponents may not appeal from any of the ALC's discovery rulings. This Court denied the motion to dismiss by Order filed September 11, 2014, simply stating that, "[a]fter careful consideration, the motion to dismiss is denied."

Statement of Facts

Union Pier Terminal, depicted in the accompanying photograph,[8] is a 63-acre property located along the Cooper River on the Charleston peninsula and is owned and operated by the Ports Authority as a fully operational marine terminal. In addition to accommodating more than 200 cargo ships annually in its present configuration, plus train and truck service to those

[8] Mot. Summ. J. Standing, Exh. 3. (R. pp.) The ship in the foreground is a car carrier and the ship in the background is a cruise ship.

ships, Union Pier is where cruise ships embark and disembark passengers in Charleston.[9] The terminal has accommodated passenger vessel calls for almost 100 years, with cruise vessels calling on the Union Pier cruise passenger terminal facility every year since its dedication in 1973.[10]

The demand for passenger cruises in Charleston has increased in recent years. Charleston serves as the home port for the passenger ships of some cruise lines, with Carnival Cruise Lines most recently designating Charleston as the Carnival Fantasy's home port. As reflected in the above photograph, and contrary to the Cruise Opponents' claim, the cruise ships that call at the Union Pier terminal are not disproportionate in size or scale to the cargo ships (such as car carriers) that have regularly called there for many years. The increase in maritime commerce through cruise vessel calls

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[9] Mot. Summ. J. Standing, Exh. 12, James I. Newsome, III Aff. ¶7 (Aug. 22, 2011). (R. pp.)

[10] *Id.*

has, in turn, contributed beneficially to the City of Charleston and the State of South Carolina in numerous ways, including increased local revenue.[11]

The Ports Authority has endeavored to promote and accommodate this demand for cruise passenger services at Union Pier as part of its continuing statutory mission to foster, stimulate, and increase water-borne commerce in South Carolina.[12] To this end, it has undertaken a capital improvement plan for Union Pier that involves transferring cargo operations to other terminals and moving cruise passenger operations to the northern end of the Union Pier terminal. The Ports Authority has presented a general concept plan to renovate existing buildings on Union Pier, demolish older structures, redevelop much of the existing terminal acreage (including public green spaces), restore areas of the natural waterfront, and undertake other public and private development, all subject to further study and validation at the appropriate time.[13] The plan for relocation and renovation of terminal facilities at UPT will ensure ongoing compliance with current terminal

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[11] *See* Mot. Summ. J. Standing, Exh. 13, Joseph P. Riley, Jr. Aff. ¶4 (Aug. 22, 2011) (noting that cruise industry has generated approximately $35 million and over 400 jobs). (R. pp.)

[12] *See* S.C. Code Ann. § 53-3-130.

[13] *See* Mot. Summ. J. Standing: Exh. 14, UPT Presentation of Riley and Newsome, SCPA 001281-225, (R. pp.); Exh. 15, Existing v. Proposed Drawing Comparison, SCPA 001217, (R. pp.); Exh. 16, Peter Lehman Aff. Exh. B, SCPA 001253-366 (Concept Plan for Union Pier Waterfront dated Sep. 2010), (R. pp.).

security features required by federal law.[14] But perhaps most important to the majority of residents and visitors in Charleston, relocating cruise passenger services to the northern end of Union Pier will, in conjunction with the voluntary adoption of a traffic management plan, reduce the periodic route congestion currently experienced by residents, visitors, and passengers near the southern end of Union Pier with no increase in traffic at the northern end. Moreover, these changes will decrease air emissions at and around Union Pier, including areas represented by Cruise Opponents.[15]

The Ports Authority applied for administrative approval of the capital improvement plan only because installing additional structural support underneath

Building 322 involves the navigable waters of the United States and a critical area of the coastal zone in South Carolina. But as shown in the above

[14] *See* Mot. Summ. J. Standing, Exh. 17, Ports Authority-U.S. Customs and Border Protection MOU (June 20, 2006), as amended. (R. pp.)

[15] *See* Mot. Summ. J. Standing, Exh. 18, OCRM Technical Review at 8, (R. pp.); Exh. 19, Trinity Consultants Study: Historical, Current and Future Criteria Pollutant Emissions at Union Pier Terminal (Dec. 23, 2013), (R. pp.).

photograph of the existing pilings under Building 322,[16] the capital improvement plan does not involve the first-time installation of structural support where none previously existed. Rather, it involves driving five additional pile clusters—amongst the approximately 1,008 pile clusters already there[17]—into the marl beneath Building 322 to support the installation of three elevators and two escalators. All remaining work for the capital improvement plan will take place on Union Pier Terminal itself.

The Ports Authority's capital improvement plan for Union Pier Terminal, therefore, is a positive development because it will aid economic development in Charleston, as well as improve the city's environment, with minimal impact on either the navigable waters of the United States or a critical area of South Carolina. Some of these benefits are being experienced now because, in anticipation of implementing the plan, the Ports Authority has already transferred most of its existing cargo operations from Union Pier to another Ports Authority terminal.[18] Despite all this, Cruise Opponents seek not only to eliminate the beneficial aspects of the capital improvement plan, but also to ultimately roll back the existing cruise passenger operations at Union Pier.

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[16] Mot. Summ. J. Standing, Exhibit 3. (R. pp.)

[17] *See* Mot. Summ. J. Standing, Exh. 10, Map of Pile Clusters. (R. pp.)

[18] The Ports Authority also adopted the Voluntary Cruise Management Plan limiting cruise vessel calls to 104 per calendar year. *See* Mot. Summ. J. Standing, Exh. 20, Voluntary Cruise Management Plan. (R. pp.) Adoption of the proposed plan will lead to a net reduction of large, ocean-going vessel traffic at Union Pier.

One of the many problems with their misguided attack upon the capital improvement plan is that, if the planned renovations to the northern portion of Union Pier do not come to fruition, it will return to being used for cargo operations as part of the Ports Authority's statutory mission to maintain and increase maritime commerce in South Carolina. This will include resumption of truck and rail traffic necessary to support cargo operations, along with the air emissions associated with those operations, and cruise passenger operations, as before, will continue in some form in their existing location.[19]

When compared side-by-side with the capital improvement plan, the negative ramifications of Cruise Opponents' opposition become manifest:

Comparison of the Positions of the Ports Authority and the Cruise Opponents	
OCRM AND PORTS AUTHORITY Relocation of Operations to Northern End of Union Pier Terminal (UPT)	OPPONENTS Status Quo and Projected Growth if Cruise Operations Maintained on Southern End
Cruise vessel calls voluntarily limited to 104 per calendar year, with a procedure for change.	Cruise vessel calls voluntarily limited to 104 per calendar year, with a procedure for change.
UPT will no longer receive cargo ships.	UPT resumes receiving over 200 cargo vessels per year, at an average of 4 per week.

[19] *See* Mot. Summ. J. Standing, Exh. 16, Lehman Aff. ¶¶ 8-11 (noting that cruise operations at UPT will continue—with greater or lesser size and frequency—regardless of the permitting decision in this contested case). (R. pp.)

Rail access to the northern end of UPT will cease.	Fully operational rail spur to UPT which causes daily, temporary vehicular blockage.
Implementation of an on-site traffic management plan, which more quickly facilitates and absorbs maritime cruise traffic from City streets.	Continued existing safety road closures due to location of cruise terminal operations at southern end of UPT.
Restoration and re-use of southern end of UPT.	Continued use of all of UPT for cruise vessel operations on the south and cargo on the north.

In other words, aside from the wholesale elimination of all maritime activity on the Charleston peninsula (which is Cruise Opponents' true objective), the practical result of Cruise Opponents' position is maintaining the status quo, which provides a worse outcome versus adoption of the Ports Authority's capital improvement plan.

Summary of Argument

Cruise Opponents sought to challenge the license issued by DHEC pursuant to S.C. Code Ann. § 44-1-60, which allows the filing of a contested case hearing challenging a final agency action by DHEC. The ALC correctly applied constitutional standing principles to find that Cruise Opponents are not "affected persons" under S.C. Code Ann. § 44-1-60 because they did not establish a genuine issue of material fact regarding their burden to prove injury-in-fact, causation, and redressability. Standing Order at 5. (R. pp.) The ALC also properly determined that none of the Cruise Opponents meets the requirements for associational standing because their members do not have

standing to sue in their own right and, with a single exception, the challenged license is not pertinent to their associational purposes. Standing Order at 14-17. (R. pp.) Finally, the ALC also correctly found that Cruise Opponents should not be afforded standing pursuant to the public importance exception because a ruling in this case is unnecessary for future guidance. Standing Order at 18. (R. pp.)

The Motion to Vacate Order is not appealable and, in any event, Cruise Opponents are not entitled to relief on any water quality certification issues. The Discovery Order also is not appealable based on the posture of the case and is a matter committed to the discretion of the trial court. Finally, in light of the pertinent statutory language, the ALC properly awarded sanctions against Cruise Opponents for their frivolous motion to remand. Sanctions Order. (R. pp.)

The decisions of the ALC should be affirmed.

Argument[20]

1. The ALC correctly entered summary judgment against Cruise Opponents because they failed to establish any genuine issue of material fact regarding their standing to challenge the license issued by DHEC.

Cruise Opponents have the burden of establishing standing. *Georgetown County League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 358, 713 S.E.2d 287, 292 (2011). Standing is conferred by statute; by the constitution;

[20] Any allegation contained in Cruise Opponents' brief that is not expressly addressed or rebutted in this brief is denied.

or by the public importance exception. *Bodman v. State*, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013). As associations, Cruise Opponents arguably have standing only if one or more of their individual members would have standing. *Sea Pines Assoc. for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 600-01, 550 S.E.2d 287, 291 (2001); *see also Baird v. Charleston County*, 333 S.C. 519, 530, 511 S.E.2d 69, 75 (1999). Because neither the associations nor these individual members are the object of the licensing decision, the Cruise Opponents' burden to prove standing is "'substantially more difficult.'" *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)). Finally, the public importance exception affords standing only if "'an issue is of such public importance as to require its resolution for future guidance.'" *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n,* 407 S.C. 67, 79, 753 S.E.2d 846, 852-53 (2014) (quoting *Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007)).

Standard of Review

This Court reviews a grant of summary judgment using the same standard applied by the ALC. *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 354, 650 S.E.2d 68, 70 (2007). Summary judgment must be granted if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. The

non-moving party cannot simply rest on allegations or denials but must identify facts establishing a genuine issue for trial. *Bennett v. Investors Title Ins. Co.*, 370 S.C. 578, 589, 635 S.E.2d 649, 654 (Ct. App. 2006). Affidavits proffered by the non-moving party must consist of more than conclusory or speculative allegations of fact or subjective beliefs to survive summary judgment. *Dawkins v. Fields*, 354 S.C. 58, 68, 580 S.E.2d 433, 438 (2003). The general rule for adjudging a summary judgment motion does not allow a court to transform a party's affidavit from what it submitted into what it wished it had submitted. *Shupe v. Settle*, 315 S.C. 510, 516-17, 445 S.E.2d 651, 655 (Ct. App. 1994) ("A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment.").

Analysis

A. This Court should affirm the ALC's determination that Cruise Opponents lack standing because they failed to meet their burden to come forward with evidence showing that they meet the *Lujan-Sea Pines* factors.

Cruise Opponents seek to challenge the license as "affected persons" under section 44-1-60 of the South Carolina Code. "[D]etermining whether a statute confers standing is an exercise in statutory interpretation." *Youngblood v. S.C. Dep't of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). Standing should be determined by application of constitutional principles if the statute does not adequately identify those who have standing. *See Smiley v. S.C. Dep't of Health & Envtl. Control*, 374 S.C. 326,

329, 649 S.E.2d 31, 32-34 (2007) (applying constitutional standing principles in determining whether Smiley was a "person adversely affected"). Because section 44-1-60 does not create a lesser standing threshold, Cruise Opponents must show (1) an injury-in-fact; (2) a causal connection between the injury and the challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (2001). Cruise Opponents have not met their burden. At bottom, Cruise Opponents' standing argument is based not on viewing facts in the light most favorable to the non-moving party, but on complaining that the ALC did not view their generalized grievances as specific allegations of concrete and particularized injuries.

(1) *The ALC correctly found that none of the affidavits proffered by Cruise Opponents establishes a genuine issue of material fact regarding the existence of an injury-in-fact.*

An injury-in-fact is "an invasion of a legally protected interest [that] is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291. There is no injury-in-fact when a party merely alleges harm indistinguishable from that suffered by the general public. *Id.* (holding that standing does not exist for "a general interest common to all members of the public"); *see also Warth v. Seldin*, 422 U.S. 490, 501 (1975). As the ALC explained in its comprehensive analysis of the affidavits, Cruise Opponents' affidavits do no more than allege

generalized injuries that are conjectural or hypothetical and not actual or imminent. Standing Order pp. 8-11. (R. pp.)

In their brief, Cruise Opponents do not make any serious argument that the ALC erred in finding no injury-in-fact. Beyond expressing dismay that the ALC actually disregarded the speculative injury allegations in the affidavits, they never come to grips with the evidentiary insufficiency of their response to the summary judgment motion. *See* Rule 56(e), SCRCP ("Supporting and opposing affidavits ... shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."). Perhaps the most fundamental flaw is that, without a single expert affidavit, Cruise Opponents try to connect existing and future operations at Union Pier to alleged present-day health issues. They repeatedly point to the affidavit of Tommie Robertson, who complained that soot from the existing cruise ships caused her throat to hurt and that prolonged exposure to this soot will exacerbate her injuries. (R. pp.) But there is nothing to tie Ms. Robertson's alleged injuries to cruise ships because both cargo and cruise ships call on Union Pier Terminal. And, moreover, nothing in Ms. Robertson's affidavit provides admissible evidence to establish that she will suffer an injury-in-fact directly related to the activity licensed by DHEC. *See* Standing Order p. 10 (R. pp.); Rule 56(e), SCRCP. She certainly is not qualified to opine about any alleged impact to her health from cruise terminal operations at Union Pier, and the

remainder of her affidavit does no more than articulate inadmissible conclusory opinions and generalized grievances. That does not establish standing.

The remaining affidavits proffered by Cruise Opponents are even more fundamentally flawed.[21] Christina Dodd complains that she is concerned about breathing pollution from cruise ships, but is not qualified to opine as to any connection between her inadmissible concerns and present or future cruise operations at Union Pier. *See* Christina Dodd Aff. at 2 (alleging current injuries with no admissible testimony connecting allegations to the license), (R. pp.); *see also* Standing Order at 8 n.9 & 9 n.12. Stephen Gates' affidavit consists of inadmissible personal opinion, legal conclusions, unsupported speculations, and hearsay repetition of purported medical opinions. Standing Order at 7-8, 10 & n.13, (R. pp.). Marty Morganello's complaints about cruise ship practices regarding waste are inadmissible personal opinion and unfounded speculation because there is nothing to show he is qualified to testify on these issues. Standing Order at 10-11 & n.15, (R. pp.). And Cruise Opponents mention the affidavit of Virginia Lane only in passing, probably because her testimony consists only of speculative harm to her and her business along with unfounded opinion testimony regarding

[21] The Ports Authority's extensive briefing to the ALC describes in detail the multiple deficiencies in the affidavits. *See* SPA Reply in Support of Motion to Dismiss for Lack of Standing (R. pp.); Reply in Support of Mot. Summ. J. Standing (R. pp.).

traffic issues and property valuation. *See also* Standing Order at 8 n.9, 9 & n.11, (R. pp.).

In sum, Cruise Opponents make no credible argument that the ALC erred in finding no injury-in-fact. Instead of seriously analyzing the affidavits, they argue—incorrectly, *see* discussion *infra*—that their threshold showing is so low as not to bar any claim.

(2) ***The ALC correctly found that none of the affidavits proffered by Cruise Opponents establishes a genuine dispute of material fact regarding a causal connection between their alleged injuries and the license.***

Cruise Opponents do not advance any substantive challenge to the ALC's finding that they failed to show a causal connection between the license and their alleged injuries. *See Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291. Their entire argument is that implementing the capital improvement plan will allow expansion of cruise activities at Union Pier and further injure their members, as opposed to demonstrating any correlation between their alleged injuries and the proposed addition of five pilings to the existing approximately 1,008 already beneath Building 322.

A similar case is *Bailey v. S.C. Department of Health & Environmental Control*, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010), in which the court found there was no causal connection between the grant of a modification permit and the alleged impairment of a landowner's use and enjoyment of his property "because the boats [that are the subject of the neighbor's challenge] had been docked there for years, and they would continue to be docked there

regardless of the permitting decision." *Id.*, 388 S.C. at 7, 693 S.E.2d at 429. Similarly, cruise ships have called on Union Pier continuously since 1973 and will continue to do so there and on the Charleston peninsula even if the cruise terminal is not moved to Building 322. Lehman Aff. at ¶¶9-10; *see Bailey*, 388 S.C. at 7, 693 S.E.2d at 430 (holding that "potential of having boats mooring at the dock would still exist" regardless of the permitting decision); *see also Beaufort Realty*, 346 S.C. at 303, 551 S.E.2d at 590.

To be sure, Cruise Opponents expend much energy complaining that their true issue is the possible exacerbation of their alleged injuries rather than the alleged injuries at present. But they failed to introduce expert testimony that would take their unsubstantiated assertions out of the realm of mere speculation. Moreover, this argument is undermined by *Bailey* because the landowner in that case did not have standing even though he argued the permit would facilitate ***increased*** commercial development in the area through the expected conversion of the dock into a marina. *Bailey v. S.C. Dep't of Health & Envtl. Control*, No. 07-ALJ-07-0583-CC (July 23, 2008) (Geathers, J.). Similarly, Cruise Opponents have not established a causal connection by alleging the license will result in increased passenger cruise activity at Union Pier, especially when there is no expert testimony or other evidence to take these allegations out of the realm of mere speculation.

Cruise Opponents fail to challenge the ALC's finding that their argument "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." Standing Order at 13, (R. pp.); *see Allen v. Wright*, 468 U.S. 737 (1984); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976). Just as the government is not liable for every traffic accident that takes place on its roads, or an airport is not liable for mistakes made by individual airlines, the collateral effects of independent actions taken by companies who use the Ports Authority's terminal facilities are neither attributable to nor caused by the Ports Authority when it installs the necessary infrastructure to accommodate cruise passenger vessels. *See, e.g.*, *Florida Audubon Soc. v. Bentsen*, 94 F.3d 658, 670 (D.C. Cir. 1996). Finally, because the Cruise Opponents do not challenge the ALC's finding on appeal regarding the conduct of third-parties as the origin of injuries allegedly suffered, that finding is the law of the case and requires affirming the ALC.

(3) ***The ALC correctly found that none of the affidavits proffered by Cruise Opponents establishes a genuine dispute of material fact regarding the inability of the ALC to redress their alleged injuries by denying or modifying the license.***

Cruise Opponents do not substantively challenge the ALC's finding that their alleged injuries would not be redressed by a denial of the license. Standing Order at 13, (R. pp.); *see Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (providing that it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision). Cruise Opponents misconstrue the ALC's finding, characterizing it as a finding that "'exacerbation' of an existing injury cannot support standing." *See* Br. of

Appellant at 37. The ALC made no such finding. Rather, it simply found that Cruise Opponents submitted no evidence, expert or otherwise, to demonstrate that approval of the license will cause any injury that they do not already suffer.[22] Standing Order at 13. (R. pp.)

Cruise Opponents try to argue that rejecting the license will alleviate their alleged injuries because even existing cruise terminal operations at Union Pier will cease. As explained above, however, this is wrong: both cruise and marine terminal operations of similar scope and size will continue on Union Pier if the license is denied. Mot. Summ. J. Standing, Exh. 16, Lehman Aff. ¶¶9-11. (R. pp.) Cruise Opponents do nothing to counter Mr. Lehman's affidavit beyond speculating that things would surely be worse if the license is approved because the proposed new terminal in Building 322 would be larger. Br. of Appellant at 34-35. The suggestion that there will be no further passenger cruise operations at Union Pier if the Ports Authority cannot build a larger cruise terminal is refuted by Mr. Lehman's affidavit. Lehman Aff. ¶¶9-11. (R. pp.) Thus, Cruise Opponents' citation to *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000), does not salvage their claim of standing because they did not come forward with evidence to show that denial of the license would lessen their aesthetic and

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[22] This failure to proffer evidence is particularly significant because Cruise Opponents did not offer expert testimony after the same allegations were rejected by the Supreme Court as insufficient to confer standing. Reply in Support of Mot. Summ. J. Standing, Exh. 35, *Carnival Corp. v. Historic Ansonborough*, 407 S.C. 67, 753 S.E.2d 846 (2014). (R. pp.)

recreational values in view of the existing and ongoing cruise terminal activities at Union Pier. *See Bailey*, 388 S.C. at 7, 693 S.E.2d at 430.

B. Section 44-1-60 does not establish a lesser standing threshold than that required by the *Lujan-Sea Pines* analysis.

Contrary to Cruise Opponents' argument, use of the term "affected" in section 44-1-60 does not, without more, confer standing on a person. *See Smiley*, 374 S.C. at 329, 649 S.E.2d at 32 (concluding that a person "adversely affected" by a permitting decision pursuant to former S.C. Code Ann. § 48-39-150 must satisfy the requirements of "constitutional standing" set forth in *Lujan*). In *Carnival*, the Supreme Court held that use of the term "specially damaged" in a zoning statute "incorporates the particularized injury requirement of general standing doctrine." 407 S.C. at 79, 753 S.E.2d at 852. Applying *Carnival*—which involved cruise operations in Charleston—and *Smiley*, the term "affected person" must be read to require a person to have standing under the *Lujan-Sea Pines* analysis. *See* S.C. Code Ann. Regs. 30-6.A (governing regulation for the license at issue and stating that a "[DHEC] decision involving the issuance, denial, suspension, or revocation of a permit or certification may be appealed by ***an affected person with standing*** pursuant to applicable law, including S.C. Code Title 44, Chapter 1; Title 1, Chapter 23; and Title 48, Chapter 39.") (emphasis added).

Cruise Opponents' argument appears to be that a person is "affected" if the person requests to be notified and to participate in the review process. *See* Br. of Appellant at 22. But that interpretation renders the term

"affected" meaninglessness and would determine standing based on a person's simple interest, not his personal stake in a permit.[23] *See CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("[W]e must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.'") (quoting *State v. Sweat*, 379 S.C. 367, 377, 665 S.E.2d 645, 651 (Ct. App. 2008)); *Sea Pines*, 345 S.C. at 600, 550 S.E.2d at 291 ("To have standing, one must have a personal stake in the subject matter of the lawsuit. In other words, one must be a real party in interest."). Cruise Opponents' argument appears to be based loosely on *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 390 S.C. 418, 702 S.E.2d 246 (2010). But that case only determined whether DHEC was required to give notice in those circumstances; it did not evaluate the showing a person must make to challenge issuance of a license in the ALC as an "affected person." *Id.* at 428, 702 S.E.2d at 251 ("In our view, the ALC's and the court of appeals' foray into the degree of 'formality' needed for § 44-1-60(E) 'affected person' status is ***not necessary for deciding this appeal.***") (emphasis added). In light of *Carnival* and *Smiley*, Cruise Opponents' argument fails.

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[23] Moreover, the term "affected person" appears in the statute as a recognition of DHEC's regulatory authority in the certificate of need program, in which an "affected person" is defined by statute. *See* S.C. Code Ann. § 44-7-130(1).

Perhaps recognizing this argument is unsupportable, Cruise Opponents contend that all they need show is that they are injured, arguing that the additional requirements of causation and redressability are inapplicable. Br. of Appellant at 25. But even here, they generally return to the theme that they are "affected" because "[t]hey participated in the process at every turn." Br. of Appellant at 26. This argument suggests that the submission of affidavits was unnecessary because they participated in the administrative process. *See* Br. of Appellant at 27. But the Supreme Court has not followed this line of reasoning. *See Carnival*, 407 S.C. at 79, 753 S.E.2d at 852; *Smiley*, 374 S.C. at 328-29, 649 S.E.2d at 32-33. Thus, as a matter of state law, the federal decisions cited by the Cruise Opponents regarding standing afforded to parties regarding procedural challenges do not assist in this argument.[24] *See, e.g., Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014) ("The requirements for standing differ where, as here, plaintiffs seek to enforce procedural (rather than substantive) rights.").

The Cruise Opponents' last argument assumes that the term "affected person" in section 44-1-60 requires a lesser showing than the *Lujan-Sea Pines* analysis and contends that the Cruise Opponents are indeed "affected persons." But even accepting their erroneous statutory interpretation, Cruise

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[24] Nor is the relief requested (*i.e.*, denying the license) procedural. It is substantive and intended to stop the project, in contrast to following a rulemaking or other process. *See, e.g.*, *Mendoza*, 754 F.3d at 1010 (involving federal Administrative Procedure Act claim for failing to follow proper notice-and-comment procedures).

Opponents failed even to show they were affected for the same reasons they did not suffer an injury-in-fact. *See* discussion *supra*. Accepting Cruise Opponents' position would allow the term "affected person" to operate as a vehicle for virtually any person to challenge any license issued by DHEC under section 44-1-60. To be sure, Cruise Opponents recognize this problem, arguing that "'affected persons' is a limited universe of citizens." Br. of Appellant at 28. However, Cruise Opponents fail to explain just how the term would be limited.[25] This argument should be rejected and the ALC affirmed.

C. The ALC correctly found that Cruise Opponents are not entitled to maintain this action through associational standing principles.

"An organization 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." *Beaufort Realty*, 346 S.C. at 301, 551 S.E.2d at 589 (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). Associational standing typically involves declaratory or injunctive relief because "'it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.'" *Hunt*, 432 U.S. at 343 (quoting *Warth*, 422 U.S. at 515); *see also Smith Land*, 393 S.C. at 360, 713 S.E.2d at 293 (dissenting

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[25] Of course, as previously noted, the legislative intent was for the term "affected person" to be limited to the certificate of need definition.

opinion). Of course, that is not the case here, further demonstrating the problems with the Cruise Opponents' case.

The first prong of the *Beaufort Realty-Hunt* analysis is not met based on the ALC's determination that the individual members lacked standing. *See Sea Pines*, 345 S.C. 600-01, 550 S.E.2d at 291; *see also Hunt*, 432 U.S. at 342; *Md. Highways Contractors Ass'n, Inc. v. Md.*, 933 F.2d 1246, 1250 (4th Cir. 1991). The second *Beaufort Realty-Hunt* prong also is not present because, for the reasons the ALC fully explains, none of the issues in this lawsuit is germane to any of the Cruise Opponents' organizational purposes. Challenging the license does not inspire respect for Charleston's material and cultural heritage[26]; protect any structure that adds to the architectural and cultural character of Charleston[27]; foster a spirit of community with the Historic Ansonborough neighborhood[28]; prevent harm to the state's natural resources and preserve quality of life, especially in light of the failure to establish any injury-in-fact arising from the license[29]; protect the 620 members living south of Broad Street in view of the proposal to move cruise

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[26] Preservation Society of Charleston. *See* Standing Order at 15. (R. p.)

[27] Historic Charleston Foundation. *See* Standing Order at 15. (R. p.) Ms. Lane's alleged business harm is not germane to her membership in the Historic Charleston Foundation. Standing Order p.9 n.11. (R. p.)

[28] Historic Ansonborough Neighborhood Association. *See* Standing Order at 14-15. (R. pp.)

[29] Coastal Conservation League. *See* Standing Order at 16. (R. p.) As the ALC noted, the League must be more specific because of this broadly stated purpose, unless it is to be afforded associational standing for any topic it wishes to address. *Id.*

operations approximately 600 yards further away[30]; or protect the world's oceans, waves, beaches, again especially in view of the failure to show any cognizable injury attributable to the license.[31] *See* Standing Order at 15-16. (R. pp.)

Even if the conclusory and self-serving allegations set forth in the submitted affidavits are taken as true, the third *Beaufort Realty-Hunt* factor is not present because the alleged injuries affect the individuals personally, rather than as members of the representative associations. *See* Standing Order at 16-17. (R. pp.) For example, the allegations by Virginia Lane about alleged impacts to her architecture business are personal to her and do not establish standing by the Historic Charleston Foundation of which she is a member. *See* Standing Order at 9, n.11. (R. p.) Similarly, the allegations by Tommie Robertson, even if accepted, involve personal injuries that do not assist the League in establishing standing for a matter germane to its organizational purposes. *See* Standing Order at 16-17 & nn.21-22. (R. pp.)

Cruise Opponents complain that, in analyzing the individual participation prong, the ALC erred in applying the dissenting opinion from *Georgetown*

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[30] Charlestowne Neighborhood Association. *See* Standing Order at 15 & n.19. (R. pp.) Cruise Opponents argue that the affidavit of Stephen Gates establishes associational standing through his conclusory testimony regarding the impact of the capital improvement plan on the organization. Br. of Appellants at 41-42. However, as noted above, Mr. Gates' affidavit is short on specifics and his unsupported statement that there is an impact does not compel the court to find that Charlestowne has standing.

[31] Charleston Chapter of the Surfrider Foundation. *See* Standing Order at 15-16. (R. pp.)

County League of Women Voters v. Smith Land Co. The Court need not reach this issue because, for the reasons set forth above, Ms. Robertson's affidavit does not adequately establish an injury for standing purposes. Moreover, Cruise Opponents do not explain why the ALC erred in applying the analysis in the dissent other than to argue that *Carnival* grants standing if one or more of an associations' members will suffer an individual injury. Br. of Appellant at 43 (citing *Carnival*, 407 S.C. at 76, 753 S.E.2d at 850-51). But *Carnival* does no more than cite to the general rule and the question of whether associational standing existed was not an issue before the Court.

The question therefore remains what, in circumstances like those presented here, an association must show to establish that participation of the individual members is not required. *See* Standing Order at 17 n.21 ("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."). In *Smith Land*, Justices Hearn and Kittredge conclude that, in order to satisfy the third prong of the *Hunt* test, the organization asserting its standing must show that the right it seeks to vindicate is common to the membership and that any alleged injuries derive from membership in the organization. *Id.*, 393 S.C. at 360, 713 S.E.2d at 293. Injury to one member does not extend to the rest of the organization. *Id.*, 393 S.C. at 361, 713 S.E.2d at 293. The third prong must be read to focus on

injuries that are common to the membership in order to ensure that the persons actually injured receive the benefit of any recovery. *See Hunt*, 432 U.S. at 343.

The ALC properly found that Ms. Robertson's affidavit did not establish associational standing because her alleged injuries, even if accepted, would require her individual participation in the lawsuit. Those injuries have nothing to do with her membership in the organization. Standing Order at 16-17. (R. pp.) Cruise Opponents essentially advance a standard that renders meaningless the third prong of the *Beaufort Realty-Hunt* analysis. *See Hunt*, 432 U.S. at 343 (focusing on benefit to membership in discussion of associational standing and relief sought). Moreover, Ms. Robertson's affidavit does not establish a cognizable injury to support standing for either her or the association. Therefore, the ALC's determination that Cruise Opponents lack associational standing should be affirmed.

D. The ALC correctly refused to apply the public importance exception.

The ALC correctly found that applying the public importance exception was not appropriate here because it found no need to resolve the issue for future guidance. Standing Order at 18 ("[T]he permitted activity will not change the existing footprint of [Union Pier], nor will it change the function of [Union Pier] as a marine terminal, and the permit cost is not representative of its public importance or the need for future guidance."). (R. p.) The ALC also found that Cruise Opponents did not show that resolution of the issue is needed for future guidance. *Id.*

There is no need for future guidance regarding the issues presented by this case. *See Carnival Corp.*, 407 S.C. at 79-81, 753 S.E.2d at 852-53. This matter deals with the routine question of whether DHEC properly issued a license to install five pilings underneath Union Pier Terminal. It is a permitting issue of the type that DHEC and the ALC deal with as a matter of course. The issues do not rise to a level of public importance requiring guidance merely because matters pertaining to cruise ships may impact the City of Charleston. *See Carnival Corp.*, 407 S.C. at 79-81, 753 S.E.2d at 852-53. Moreover, because the only issue in this case is whether the license was properly granted, there is no matter requiring resolution for future guidance. *See ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 199, 669 S.E.2nd 337, 341 (2008) ("For a court to relax general standing rules, the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance.").

Cruise Opponents argue that this case impacts a profound public interest. However, the interest implicated by this case is substantially the same as that at issue in *Carnival Corp.*, in which the Supreme Court refused to apply the public importance exception for challenges to cruise operations pursuant to zoning ordinances and "tort liability for a public and a private nuisance cause of action." (R. pp.) Cruise Opponents state that they should be afforded standing based on the ALC's finding that their alleged injuries were "shared by all of Charleston's residents and visitors." Br. of Appellant at 39. But if the

public importance exception is not implicated by claims of public and private nuisance, it is not implicated by alleged generalized harms resulting from long-standing operations at an existing cruise terminal.

Nor is public importance established by the legislature's adoption of a budget proviso regarding shore power, *see* Br. of Appellant at 39-40, because legislation alone does not support application of the public importance exception, especially when, as in the case of a budget proviso, the enactment is valid for only one year. That position appears to repackage the argument rejected in *Carnival Corp.*, where the petitioners attempted to argue that a matter of public interest automatically equates to a matter of public importance for purposes of applying the exception. *See Carnival Corp.*, 407 S.C. at 81, 753 S.E.2d at 853. Adoption of that argument also would be contrary to the Supreme Court's injunction that "standing cannot be granted to every individual with a grievance against a public official" because that would subject public officials "to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits." *Id.* at 80, 753 S.E.2d at 853 (quoting *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004)).

2. Cruise Opponents may not appeal from the denial of their motion to vacate, which was correctly denied by the ALC in any event.

Cruise Opponents filed their motion to vacate on or about November 1, 2013, contending that there was no required water quality certification for

the Project.[32] They based this contention on the Federal District Court's order vacating the Corps' NWP 3 authorization for the Project. Thus, according to Cruise Opponents, the license "should be immediately vacated" or, "[a]lternatively, proceedings in relation to the state permit should be remanded to DHEC." Cruise Opponents' Mot. to Vacate pp. 2-3, (R. pp.); *see also* Ports Authority Resp. to Mot. to Vacate.[33] (R. pp.) On December 27,

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[32] Before issuing any federal permit with respect to a project that may result in a discharge into navigable waters of the United States, the Corps is required to obtain either a water quality certification from the state in which the discharge is to take place or waiver of such water quality certification pursuant to Section 401 of the Clean Water Act, 33 U.S.C.A. § 1341 (401 Certification). *See* S.C. Code Ann. Regs. 61-101. The 401 Certification must be issued, denied, or waived by DHEC within one year after its receipt of the request for certification. If no action is taken by the state—DHEC in this instance—within one year after it receives the request, the state waives its right to act on the request for certification. *See* 33 U.S.C.A. § 1341(a)(1).

[33] At this point, the Motion to Vacate is in any event moot. DHEC issued the required 401 Certification for the Project within one year after it received the Application when it issued the 401 Certification for NWP 3 undertakings on April 23, 2013 or, alternatively, when it issued the License (which as a matter of law serves as a 401 Certification) on December 18, 2012. *See* S.C. Code Ann. Regs. 30-2(H); S.C. Code Ann. Regs. 61-101.A.8 ("The Department will not issue a separate 401 water quality certification for an activity which requires a direct permit for alteration of the critical area of the coastal zone ... The direct permit will serve as the 401 water quality certification for an associated Federal permit.").

The Cruise Opponents argue that no 401 Certification exists for the Project. However, in such event, DHEC's one-year period under Section 401 of the CWA to issue such 401 Certification closed in January 2013 (as the application was filed in January 2012). In that case, the 401 Certification has been waived as a matter of law. Under either scenario, the Project either has an affirmative 401 Certification (imposing no conditions) or it has a waiver from the requirements of Section 401 of the Clean Water Act (imposing no conditions). *See generally* Exh. 13, Ports Authority Resp. to Mot. to Vacate. (R. pp.)

2013, the ALC denied the motion to vacate, finding in pertinent part as follows:

> At this stage of the litigation, there is not sufficient evidence for this Court to determine the extent of DHECs review or the procedures that were followed in issuing the permit. Moreover, in presenting their challenge to DHEC's determination, Petitioners can certainly dispute whether review of this matter should be based, in part, on the 401 Certification associated with NWP3 or the critical area permit and CZC Certification. The ALC can then determine based upon the facts of this case in keeping with its de novo review what is the appropriate scope of review for this project and whether the project complies with the standards of that review. Thus, the motion to vacate must be denied at this stage of the litigation.

Order Denying Mot. to Vacate at 7 (emphasis added). (R. pp.)

A. The Motion to Vacate Order is not properly before this Court because it is the equivalent of the denial of a motion for summary judgment and, as such, is never appealable.

Although the Motion to Vacate Order denied a request for relief captioned as a motion to vacate, it is necessary to consider the substance of the relief sought in that motion to determine whether the Motion to Vacate Order may be appealed to this Court. *See Richland County v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (2002) ("Accordingly, because the relief sought was more in the nature of a request for an injunction than a mandamus, we will treat this action as an appeal from the denial of injunctive relief."); *see also, e.g., Fields v. Reg'l Med. Ctr. of Orangeburg*, 363 S.C. 19, 27, 608 S.E.2d 506, 510 (2005) (holding that appeal was timely because "[i]t is proper to treat Plaintiff's written motion as a Rule 59(e) motion even though it was erroneously captioned as a motion for new trial."); *Lucey v. Meyer*, 401 S.C.

122, 131-33, 736 S.E.2d 274, 279-80 (Ct. App. 2012) (holding that appeal was timely because Rule 59(a) motion was in substance a Rule 59(e) motion that stayed the time for appeal). Applying that analysis here requires a conclusion that the Motion to Vacate Order is not appealable because the motion to vacate actually was a motion for summary judgment.

In the motion to vacate, Cruise Opponents argued that they were entitled to judgment as a matter of law with respect to their claims. *See* Rule 56(b), SCRCP. In their request for contested case hearing, Cruise Opponents claimed that the ALC should reverse the decision to issue the license or, alternatively, remand the decision to DHEC to review additional issues. *See* Pet'rs' Req. Contested Case Hrg. p.13. (R. pp.) In the motion to vacate, Cruise Opponents argued that, because the Federal District Court "issued an order vacating the Corps' NWP 3 authorization" for the project, the License "should be immediately vacated" or, "[a]lternatively, proceedings in relation to the state permit should be remanded to DHEC." Exh. 12, Cruise Opponents' Mot. Vacate pp.2-3 (R. pp.); *see also* Exh. 13, Ports Authority Resp. to Mot. to Vacate. (R. pp.)

In other words, the motion to vacate in substance contends that "there is no genuine issue of material fact [with respect to their claims for relief] and that [they are] entitled to judgment as a matter of law." Rule 56(b), SCRCP. That makes the motion to vacate a motion for summary judgment. *Kaiser*, 351 S.C. at 94, 567 S.E.2d at 262 ("It is the substance of the requested relief

that matters regardless of the form in which the relief was framed.") (internal quotation marks omitted); *see Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 495-96, 685 S.E.2d 600, 607 (2002) (treating petition for writ of mandamus as request for injunctive relief for purposes of reviewing claims on appeal because "that is substantively what he is requesting").

The conclusion that the motion to vacate actually is a motion for summary judgment is further demonstrated by a review of the findings in the Motion to Vacate Order. An order denying summary judgment decides "nothing about the merits"; allows the moving party to raise the issues again at a later stage of the proceedings; and "simply decides the case should proceed to trial." *Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994). By denying the motion to vacate because it did not have sufficient evidence to render a decision at that time, the ALC determined that there was a genuine issue of material fact with respect to issues presented in the motion to vacate, that the challenge to the Permit could be raised later in the litigation, and that the ALC could make a final determination at that time based on the facts of the case. *See* Motion to Vacate Order. (R. pp.)

Consequently, because the motion to vacate in substance is a motion for summary judgment, the Motion to Vacate Order denying that motion is not appealable. *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 167-68, 580 S.E.2d 440, 443-44 (2003) ("The denial of summary judgment is not appealable, even after final judgment."); *Ballenger*, 313 S.C. at 476-78, 443

S.E.2d at 380 ("This Court has repeatedly held that the denial of summary judgment is not directly appealable."). The Motion to Vacate Order "does not finally determine anything about the merits of the case" and the issues presented in the underlying motion "may be raised again later in the proceedings." *Ballenger*, 313 S.C. at 477, 443 S.E.2d at 380. If Cruise Opponents prevail on their challenge to the Standing Order, they can raise on remand the same issues presented in the motion to vacate. *See id.* If they do not prevail in this challenge, the issues presented in the motion to vacate are irrelevant because Cruise Opponents never had standing to raise those issues in the first instance and should not be permitted to challenge them on appeal. Regardless, the Motion to Vacate Order is an order denying summary judgment and may not be appealed even though there is a final judgment in the case.

B. As a matter of law Cruise Opponents were not entitled to the relief they sought in the motion to vacate.

The project received all necessary licenses required by state law, including the state requirement under Section 401 of the Clean Water Act. Because the Project occurs in a "critical area" of the coastal zone in South Carolina, South Carolina law requires a critical area permit from DHEC, *see* S.C. Code Ann. § 48-39-130(A), as well as a coastal zone consistency determination (CZCD), *see* S.C. Code Ann. § 48-39-80. DHEC issued the permit within one year of the request, and that permit serves as the 401 Certification, the critical area permit, and the CZCD for the Project. *See* Mot. Summ. J. Standing, Exh. 6,

Permit, (R. pp.); *see* Order Denying Mot. to Vacate, filed Dec. 20, 2013, at 6.[34] (R. pp.)

Cruise Opponents continue to misunderstand the law surrounding the 401 Certification program generally, as well as its application to the Project specifically. While Cruise Opponents' argument that a different 401 Certification procedure is followed for projects qualifying for a Nationwide Permit is certainly novel, it is an argument borne out of convenience and is not only unsupported by any statute or case law, but is directly contradicted by the plain language of our state's regulations governing critical area permits. As the ALC correctly determined:

> Under state law, the critical area permit serves as the 401 Certification and the 401 Certification serves as the CZC Certification.... [W]ater quality issues were a part of DHEC's analysis in its critical area permit evaluation, *see* S.C. Code Ann. Regs. 30-2(H), and the critical area permit issued by DHEC for the Project also serves as the 401 Certification. Moreover, since the critical area permit is "project specific" and by law it "serves as the 401 water quality certification," it appears that the existing critical area permit document may serve as the 401 Certification as it was issued later in time and subsequent to DHEC's general certification for NWP 3.

Order Denying Mot. to Vacate, filed Dec. 20, 2013, at 6. (R. pp.) Thus, as a matter of law, the critical area permit is a 401 Certification for the Project.[35]

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[34] Pursuant to South Carolina law, the Project's critical area permit is the 401 Certification. S.C. Code Ann. Regs. 30-2(H), 61-101.A.8. Further, "the [CZCD] determination shall be issued as a component of, and concurrently with, the [401] certification" in accordance with the requirements of a CZCD under the CMP, and "the [401] certification will serve also as the [CZCD]." S.C. Code Ann. Regs. 61-101.A.7.

3. Cruise Opponents are not entitled to relief from the ALC's denial of their Motion to Expand Discovery.[36]

The 90-day discovery period allowed by the ALC rules of procedure expired on May 20, 2013. Rule 21.A, RPALC; *see* Discovery Order at 2 (R. pp.); Br. of Appellants at 52. Cruise Opponents served interrogatories and requests to produce during this 90-day period, ***but never asked the ALC to expand discovery before the period expired.*** Discovery Order at 2. (R. pp.) Cruise Opponents in fact did not file a Motion to Expand Discovery until more than seven months later, on December 23, 2013. (R. pp.) The ALC initially denied the motion in the Discovery Order, (R. pp.), but, after Cruise Opponents moved for reconsideration, it made the following determination in the Standing Order:

> Petitioners filed a Motion for Reconsideration of this Court's Order of March 3, 2014, denying Petitioner's 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

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[35] Alternatively, under Cruise Opponents' theory, no 401 Certification was issued within the one-year timeframe and thus certification has been waived. In either instance, the Project received the requisite decision to move forward under Section 401.

Moreover, Cruise Opponents never raised any challenge, issue, or allegation to the 401 Certification until the Motion to Vacate. They did not challenge the 401 Certification for the NWP 3, and did not raise the 401 Certification issue to the DHEC Board or the ALC in their request for contested case. Thus, Cruise Opponents have waived any challenge to the status of the 401 Certification.

[36] Because Cruise Opponents lack standing, the Court need not reach this discovery issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

> 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.

Standing Order at 19 n.23 (emphasis added). (R. pp.)

Standard of Review

The ALC's rulings on discovery issues are reviewed for abuse of discretion. *Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 380, 387, 692 S.E.2d 920, 924 (2010). These determinations are given deference "absent a clear showing of an abuse of discretion." *Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 353, 559 S.E.2d 327, 334 (Ct. App. 2001). An abuse of discretion occurs if there is an error of law or a lack of evidence to support any factual conclusions. *Id.* Cruise Opponents have the burden to show that the ALC abused its discretion. *Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989).

A. None of the ALC's discovery rulings are properly before this Court because the ALC vacated the Discovery Order and because Cruise Opponents failed to challenge the denial of their Motion to Expand Discovery as moot.

The Discovery Order is not appealable because the ALC vacated that order, rendering it null and void. *See Webster v. Clanton*, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972) (holding that custody order issued without notice "was clearly void, and of no effect whatever and no appeal therefrom was necessary to protect the rights of the father"); BLACK'S LAW DICTIONARY (9th

ed. 2009) (defining vacate as to "nullify or cancel; make void; invalidate <the court vacated the judgment>"). Cruise Opponents' attempted appeal from the Discovery Order therefore should be dismissed. *See Leviner v. Sonoco Products Co.*, 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000) (holding that the Court of Appeals should have dismissed an appeal from a void order); *see also Brennan's, Inc. v. Colbert*, 125 So. 3d 537, 541, *on reh'g* (Ct. App. La. Nov. 15, 2013) (holding there is no appeal "from an absolutely null order"); *cf. Hudson v. S.C. Dep't of Highways & Pub. Transp.*, 324 S.C. 245, 246, 478 S.E.2d 839, 840 (1996) (dismissing appeal from void order).

Cruise Opponents furthermore have waived their right to challenge the vacatur of the Discovery Order and the denial of their Motion to Expand Discovery as moot. Their third issue on appeal is directed to the initial Discovery Order alone and, thus, does not raise any other discovery arguments. Br. of Appellants at 1; *see* Rule 208(b)(1)(B), SCACR. Even if the issue as stated could be read as raising a challenge to the vacatur of the Discovery Order and denial of their motion as moot, Cruise Opponents have abandoned the issue by limiting their argument to the Discovery Order alone and failing to mention the subsequent actions by the ALC. *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court."). Finally, in light of Cruise Opponents' affirmative representation to the ALC regarding their need for

discovery only for trial, *see* (R. pp.),[37] any attempt to challenge discovery issues in relation to the summary judgment motion is waived.[38] *See Degenhart v. Knights of Columbus*, 309 S.C. 114, 118, 420 S.E.2d 495, 497 (1992) (holding that appeal of motion to compel discovery was not preserved where party did not request a continuance or ask the court to hold in abeyance any ruling on the motion for summary judgment); *see Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742-43 (Ct. App. 2001).

B. Even if the issue is properly raised, the ALC did not abuse its discretion in denying the Motion to Expand Discovery in the Discovery Order for failing to comply with the ALC's rules of procedure.

Cruise Opponents do not explain why, if discovery was so important, *see* Br. of Appellants at 55-57, they did not seek additional discovery until approximately a month before the original trial date in January 2014 and

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[37] Cruise Opponents are judicially estopped from taking a contrary position on appeal. *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997); *see Cothran v. Brown*, 357 S.C. 210, 216, 592 S.E.2d 629, 632 (2003) (evaluating elements of judicial estoppel by considering, among other things, a statement made by a party's counsel).

[38] Even if this Court determines that Cruise Opponents have standing, the nature and extent of any discovery should be left for the ALC to consider on remand. Because the initial Discovery Order was vacated and the motion to expand discovery denied as moot, the ALC would be required to make factual findings in the first instance in considering the motion to expand discovery. *See Hedgepath*, 348 S.C. at 353, 559 S.E.2d at 334 (abuse of discretion review includes consideration of evidentiary support). In this respect, Cruise Opponents' efforts to re-open discovery prior to the contested case hearing is similarly unripe for this Court's review; should this Court determine standing to bring this action exists, Cruise Opponents may revisit the discovery motion at the appropriate time.

only after the Ports Authority stated that it intended to file a motion for summary judgment. Discovery Order at 3. (R. p.) Their argument boils down to the proposition that the motion to expand should have been granted because the ALC's discovery rules are "observed mainly in the breach." Br. of Appellants at 53-54.[39] The issue is not, however, good cause for expanded discovery in response to a timely filed motion, but Cruise Opponents' failure to file any motion for more than seven months after discovery closed. Discovery Order at 3. (R. p.) Their selective characterization of the timeline, Br. of Appellant at 50-51, simply illustrates that there were many months in which they could have but did not file a motion to expand or otherwise seek additional discovery even after the 90-day discovery period expired. *See* Discovery Order at 2. (R. p.)

Without a justifiable explanation, Cruise Opponents attempt to explain-away their failure to comply with the rules of procedure by characterizing that failure as inconsequential. *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 609-10, 681 S.E.2d 885, 889 (2009) (holding that petitioner did not demonstrate good cause when it failed to explain why properly served

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[39] Cruise Opponents cite to the affidavit of Leslie Riley, which does not address Cruise Opponents' failure to make a timely motion. Leslie S. Riley Aff. at 2. But Ms. Riley's affidavit should not be considered in any event because Cruise Opponents first submitted it with their motion to reconsider the Discovery Order even though it clearly pertains to the issues raised in their original motion. *See* Rule 6(d), SCRCP. *Compare* Pet'rs' Mot. for Recons. at 5-6 & Exh. D (discussing need for discovery period beyond 90-days) *with* Pet'rs' Mot. to Expand Disc. at 2-3 (same). (R. pp.)

complaint was not answered). For example, they inappropriately characterize as "ludicrous" the finding that they had "ample opportunity to conduct discovery," Br. of Appellant at 52, while ignoring the rest of that finding: "Petitioners ... in no way have been hindered from seeking to expand the length and/or scope of discovery ***within the applicable ninety-day discovery period.***" Discovery Order at 3 (emphasis added). (R. pp.) And their claims of good cause for the ALC to expand discovery, Br. of Appellant at 53-57, miss the point because they do not address the fact that denial of their motion resulted in large part from their failure to timely comply with the rules of procedure. *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 253, 734 S.E.2d 161, 165 (2012) (holding that lower court properly denied motion for additional discovery filed two months after the deadline for discovery expired); *see Rivera-Almodovar v. Instituto Socioeconomico Comunitario, Inc.*, 730 F.3d 23, 26 (1st Cir. 2013) (holding that litigant must show excusable neglect rather than good cause for untimely motion to extend discovery deadlines); *see also Derrick v. Johnson Controls, Inc.*, 3:10-CV-3295-CMC, 2012 WL 2072782 (D.S.C. June 8, 2012) (unpublished) ("If a party was not diligent, the good cause inquiry should end.").

In the end, Cruise Opponents do not provide any adequate explanation for their failure to comply with the ALC's procedural rules. Characterizing the rules of procedure as suggestions and failing to act diligently under those rules does not constitute good cause, let alone excusable neglect. *See Hill v.*

Dotts, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001) (a layperson's "failure to understand the legal process is not excusable neglect under Rule 60(b)"); *Mauro v. Clabaugh*, 299 S.C. 184, 192, 383 S.E.2d 244, 249 (Ct. App. 1989) (mistaken belief that a counterclaim did not require a reply does not constitute good cause for allowing a late-filed reply); *cf. White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 12, 753 S.E.2d 537, 543 (2014) (losing and failing to answer a complaint does not constitute good cause for setting aside a default judgment). Cruise Opponents' attempted appeal of the Discovery Order therefore should be dismissed.

4. The ALC did not abuse its discretion in awarding sanctions against Cruise Opponents for filing a motion to remand the license to the DHEC Board on a basis unsupported by the pertinent statute.

The ALC did not abuse its discretion in awarding sanctions against Cruise Opponents for filing a frivolous motion to remand the case to the DHEC Board. Cruise Opponents contended that remand was necessary because S.C. Code Ann. § 44-1-60(F) *requires* the DHEC Board to conduct a final review conference in every case. But this contention was based on a single word in the statute considered in isolation and was contrary to the statutory language taken as a whole, prior ALC and appellate court interpretations of the statute, and—significantly—Cruise Opponents' own prior interpretation of that statute. The ALC awarded sanctions in the amount of the costs incurred by Respondents, including attorneys' fees, in responding to the motion. (R. pp.) Cruise Opponents do not dispute the ALC's findings, instead

contending that a more lenient version of the reasonable attorney standard should apply. The award of sanctions should be affirmed.

Standard of Review

The imposition of sanctions is reviewed on appeal as an equitable matter, subject to the discretionary authority of the lower court. *Ex parte Gregory*, 378 S.C. 430, 436-37, 663 S.E.2d 46, 50 (2008). The appellate court reviews the findings of fact of the lower court, taking its own view of the evidence; where the appellate court concurs in the findings of the lower court, the award of sanctions is reviewed under a discretionary standard and will not be disturbed absent a clear abuse of discretion. *Ex parte Gregory*, 378 S.C. at 437, 663 S.E.2d at 50 (citing *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996)). An abuse of discretion occurs only when the lower court's conclusions are without reasonable factual support. *Runyon*, 322 S.C. at 19, 471 S.E.2d at 162 (citing *Dunn v. Dunn,* 298 S.C. 499, 381 S.E.2d 734 (1989)).

Analysis

A. Cruise Opponents failed to appeal the Order denying the Motion to Remand.

Cruise Opponents have not appealed either the ALC's order denying the motion to remand or the propriety of the ALC's construction of S.C. Code Ann. § 44-1-60(F). The order denying the motion to remand expressly rejected the Cruise Opponents' construction of the statute and the strained argument that the statute is ambiguous. Order Denying Remand at 2-4. (R. pp.) Although the order denying remand was not immediately appealable, Cruise

Opponents were required to raise it in this appeal because the findings in that order formed the basis of the Sanctions Order that Cruise Opponents now challenge. *See Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002). In appealing the Sanctions Order and arguing they acted reasonably, Cruise Opponents rely principally upon their construction of the statute that the ALC rejected when denying the motion to remand.[40]

Because the order denying remand was not appealed, the findings in that order now are the law of the case and may not be reviewed by this Court. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case."). Cruise Opponents therefore cannot challenge the ALC's construction of S.C. Code Ann. § 44-1-60(F). *Langley v. Boyter*, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App. 1984) ("[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked."). Instead, they are limited to arguing that their remand argument was reasonable even though it had been rejected by longstanding case law and failed to employ the basic tenets of statutory construction. The ALC correctly rejected this argument.

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[40] In effect, Cruise Opponents have failed to appeal from the crucial finding of the ALC upon which it based its factual determination that the motion to remand was frivolous.

B. S.C. Code Ann. § 44-1-60(F) unambiguously establishes a discretionary standard for conducting final review conferences by the DHEC Board.

Regardless of Cruise Opponents' failure to appeal the order denying the motion to remand, S.C. Code Ann. § 44-1-60(F) is capable of only one construction. The statute provides in pertinent part:

> No later than sixty calendar days after the date of receipt of a request for final review, a final review conference must be conducted by the board, its designee, or a committee of three members of the board appointed by the chair. **If the board declines in writing to schedule a final review conference or if a final review conference is not conducted within sixty calendar days, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person requests pursuant to subsection (G) a contested case hearing before the Administrative Law Court....**

(Emphasis added). In seeking remand, the Cruise Opponents quoted only the first sentence and ignored the remainder of subsection (F), contrary to principles of statutory construction. *State v. Gordon*, 356 S.C. 143, 152, 588 S.E.2d 105, 110 (2003) ("[T]he court should not consider the particular clause being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law."); *see also Georgia-Carolina Bail Bonds, Inc. v. County of Aiken*, 354 S.C. 18, 25, 579 S.E.2d 334, 338 (Ct. App. 2003).

Even a cursory review of the statute demonstrates that S.C. Code Ann. § 44-1-60(F) makes the final review conference discretionary. Moreover, S.C. Code Ann. § 44-1-60(G)(1) further demonstrates that the final review conference is discretionary, stating that a contested case request may be filed

30 days after "notice is mailed to the applicant, permittee, licensee, and affected persons that the ***board declined to hold a final review conference.***" (Emphasis added.) Cruise Opponents' effort to escape this provision, through reference to a single word in a single sentence contained in the statute, taken out of context from the remaining statutory language, demonstrates not ambiguity but a frivolous effort designed to delay litigation and, ultimately, construction of the cruise terminal. *See Bank of Am. Nat. Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 461, 119 S. Ct. 1411, 1425 (1999) (Thomas, J., concurring) ("A mere disagreement among litigants over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply wrong."). This is especially so given that counsel for the Cruise Opponents previously affirmatively represented to the Supreme Court in another case that a final review conference is discretionary.[41] In short, the statute provides no support for the argument that Cruise Opponents made for remanding the case.

C. Filing the Motion to Remand was unreasonable.

The ALC also correctly found that filing the motion to remand was unreasonable based on three supporting factual findings: "[g]iven [1] the clear

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[41] Specifically, the League stated that the "***Board has the option of conducting a conference or not after a request for review is made.*** If the Board does not conduct a conference within 60 days, the staff decision becomes the 'final agency decision'... S.C. Code Ann. § 44-1-60(F)." *See* SPA Resp. to Motion to Remand, Exh. C, League Petition for Writ of Certiorari at 5 n.3, Case Nos. 07-ALJ-07-0107-CC, -0108-CC, dated Jan. 20, 2009 (emphasis added). (R. pp.)

statutory language, [2] the case law directly recognizing the discretionary nature of DHEC Board review and [3] prior affirmations by Petitioners, a reasonable attorney under these circumstances would not have filed the Motion to Remand." Sanctions Order at 6. (R. pp.) Each of the ALC's findings is supported by reference to the statute, case law, and other pertinent materials. The ALC also carefully considered whether Cruise Opponents' conduct was encompassed by Rule 72, referencing Black's Law Dictionary and Webster's New World Dictionary definitions of frivolous. Sanctions Order at 5 (defining frivolous as "lacking a legal basis or legal merit; not serious; not reasonably purposeful" and "of little value or importance ... or not properly serious or sensible," respectively). (R. pp.) None of these findings or definitions is challenged by Cruise Opponents on appeal. Accordingly, this Court may consider only whether the ALC abused its discretion in awarding sanctions based on the unchallenged facts. *See Runyon*, 322 S.C. at 19, 471 S.E.2d at 162 (citing *Dunn v. Dunn,* 298 S.C. 499, 381 S.E.2d 734 (1989)).

D. There is no "bad faith" finding requirement to the imposition of sanctions under Rule 72, RPALC.

Cruise Opponents misapprehend the ALC's standard for sanctions under Rule 72, RPALC. Rather than make the admittedly difficult argument that they acted reasonably in moving to remand, Cruise Opponents instead argue an inverse application: because their actions were not egregious (according to them, which implicitly acknowledges such actions may have been unreasonable), there was no bad faith. However, neither Rule 72 nor the

Sanctions Act requires a finding of bad faith as a basis for sanctions. *See* Sanctions Order at 2-3 (setting forth the standard under Rule 72, RPALC, including its reference to S.C. Code Ann. § 15-36-10 (Frivolous Civil Proceeding Sanctions Act ("Sanctions Act")) (citing Rule 72, RPALC, 2009 Revised Notes). (R. pp.) Therefore, Cruise Opponents' argument regarding the lack of "egregious behavior" present in other cases is beside the point. *See* Br. of Appellants at 61-63 (citing *Ex parte Bon Secours-St. Francis Xavier Hospital Inc.*, 393 S.C. 590, 713 S.E.2d 624 (2011); *Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm)*, 371 S.C. 91, 637 S.E. 316 (Ct. App. 2006); *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 633 S.E.2d 722 (2006); and *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 760 S.E.2d 399 (2014)). Moreover, the ALC found that "the law simply requires that the Court find the filing was 'frivolous.'" Sanctions Order at 5, and Cruise Opponents failed to appeal from this finding. (R. pp.)

Similarly, the ALC properly rejected the "reasonable attorney" affidavits submitted by the Cruise Opponents in opposition to the motion for sanctions. The ALC correctly found that neither affidavit was persuasive on the issue of the frivolity of the motion to remand. Sanctions Order at 5-6. (R. pp.) The first affidavit was biased because it was submitted by a member of the law firm representing Cruise Opponents. The other affiant had no demonstrable practice experience in the administrative arena before DHEC or the ALC. In sum, both affidavits are merely impermissible testimony on issues of law, *see*

Dawkins v. Fields, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003), with no attempt to aver that the opinions contained in the affidavits are based on personal knowledge, or that either affiant is an expert in this area of the law. The ALC was correct to reject the submitted affidavits out of hand.

E. Cruise Opponents fail to appeal the imposition and amount of attorneys' fees as a reasonable sanction.

Finally, in challenging the Sanctions Order, Cruise Opponents do not appeal from the ALC's determination that a monetary sanction in the form of an award of attorneys' fees and costs incurred by the Ports Authority is the appropriate remedy for their frivolous filing. Nor do they appeal from the amount—$9,300.00—of attorneys' fees awarded.[42] Accordingly, those rulings are the law of the case and beyond the scope of review. *See Atl. Coast Builders & Contractors,* 398 S.C. at 329, 730 S.E.2d at 285. Cruise Opponents' failure to appeal both the award and amount of attorneys' fees means that, should this Court agree that the ALC did not abuse its discretion in awarding sanctions, the sanctions inquiry is concluded and the imposition and amount of attorneys' fees must be sustained by the Court.

Regardless, the ALC's award of the attorneys' fees attributable to the Ports Authority's defense of the motion to remand is directly related to the sanctioned conduct. *See Balloon Plantation v. Head Balloons,* 303 S.C. 152,

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[42] Indeed, counsel for the Cruise Opponents represented to the ALC that "[w]e certainly will accept anything the court wishes to do" on the motion for sanctions. *See* September 6, 2013 Hrg. Tr. at 74:4-6. (R. pp.)

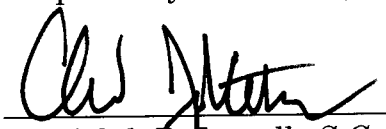
399 S.E.2d 439 (Ct. App. 1990) (holding that a sanction should be aimed at the specific misconduct of the party sanctioned). In fact, the Ports Authority requested additional attorneys' fees and costs of $11,672.50, representing the fees and costs incurred in seeking sanctions for the Cruise Opponents' frivolous motion to remand. Although the ALC limited the sanctions award to the costs attributable solely to defending the motion to remand, it found the additional request "has merit" and "is reasonable." Sanctions Order at 6 n.7. (R. pp.) Based on those findings, this Court would be justified in awarding the Ports Authority the full amount of fees and costs originally requested.

Conclusion

For the reasons explained above, the decisions of the ALC should be affirmed and the appeal should be denied.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



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