THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

Case No. 2014-000847

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 Department of Health and Environmental Control

Bradley D. Churdar, Associate General Counsel
SCDHEC
1362 McMillan Ave., Ste 400
North Charleston, SC 29405
(843) 953-0213

Attorney for Respondent

Table of Contents

Table of Authorities

Cases

South Carolina Statutes

South Carolina Regulations

Other Authorities

Statement of Issues on Appeal

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 critical area permit issued by DHEC, or would be redressed by denial of the critical area permit. Did the Administrative Law Court err in determining Appellants lacked standing?

2. Appellants moved to vacate the critical area permit, essentially seeking summary judgment that DHEC did not make a required water quality certification. The Administrative Law Court denied that motion even before finding the 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?

3. Absent court approval, the Administrative Law Court rules require completing discovery within 90 days after an Administrative Law Judge is assigned. The Administrative Law Court 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 Administrative Law Court abuse its discretion in denying the motion?

4. Appellants moved to remand the critical area permit, 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 Administrative Law Court granted the Ports Authority's subsequent motion for sanctions, finding the motion frivolous. Did the Administrative Law Court abuse its discretion?

Statement of the Case

The Department adopts and incorporates by reference Respondent South Carolina State Ports Authority's (SPA) Statement of the Case from their Initial Respondent's Brief.[1]

Statement of the Facts

The Department adopts and incorporates by reference Respondent South Carolina State Ports Authority's (SPA) Statement of the Facts from their Initial Respondent's Brief.

Summary of Argument

Appellants sought to challenge the critical area permit issued by the South Carolina Department of Health and Environmental Control's Office of Ocean and Coastal Resource Management ("the Department" or "DHEC") pursuant to S.C. Code Ann. § 44-1-60, which allows an "applicant, permittee, licensee, or affected person" to file a contested case hearing challenging a final agency action by DHEC. The Administrative Law Court ("ALC") correctly applied constitutional standing principles to find that Appellants are not an "affected person" 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. The ALC also properly determined that none of the Appellants meet all of 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 permit is not pertinent to their associational purposes. Finally, the ALC also correctly found that Appellants should not be afforded standing pursuant to the public importance

[1] With the exception of Respondent South Carolina State Ports Authority's reference to the critical area permit using a broader and more generic term (i.e., "license").

exception because a ruling in this case is unnecessary for future guidance. The Order Denying Petitioners' Motion to Vacate ("MTV Order") and the Discovery Order are unappealable, and sanctions were appropriate. The decisions of the ALC should be affirmed.

Argument

1. The Administrative Law Court correctly entered summary judgment against Appellants because they failed to establish any genuine issue of material fact regarding their standing to challenge the critical area permit issued by the Department.

The Department concurs with and incorporates by reference SPA's analysis for the first issue on appeal in its Initial Respondent's Brief at pages 15 to 32.

2. Appellants may not appeal from the denial of their motion to vacate, which was correctly denied by the ALC.

The Department contends that this Court can and should affirm the ALC's MTV Order without determining whether the Department either waived the 401 certification or issued the 401 Certification with its April 23, 2012 letter to the U.S. Army Corps of Engineers or with its December 18, 2012 critical area permit. Moreover, the insufficiency of evidence cited by the ALC at the bottom of page 6 and the top of page 7 of the MTV Order (pertinent language from MTV Order quoted below) should preclude this Court from addressing SPA's mootness argument in its Initial Respondent's Brief. In footnote 33 on page 33 of its Initial Respondent's Brief, SPA makes the following 401 waiver argument:

> "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(R); 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.)"

This Court need not address SPA's above-referenced mootness argument. In its Initial Respondent's Brief, SPA correctly asserts that the MTV Order is not properly before this Court because the Order is the equivalent of the denial of a summary judgment motion and, as such, is never appealable.[2] Given Appellants' argument in their Second Amended Initial Brief and previously in their Motion to Vacate,[3] the Department concurs with SPA's contention that the MTV Order is in reality a non-appealable interlocutory order denying Petitioners' summary judgment motion.[4] Like the

---

[2] 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). "This Court has repeatedly held that the denial of summary judgment is not directly appealable." Id., 313 S.C. at 476-78, 443 S.E.2d at 380.

[3] Petitioners argue in pertinent part that, because the Federal District Court "issued an order vacating the Corps' NWP 3 authorization" for the Project, the Permit "should be immediately vacated" or, "[a]lternatively, proceedings in relation to the state permit should be remanded to DHEC." Mot. Vacate pp. 2, 3. This argument by Petitioners is simply another way of stating 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." S.C. R. Civ. P. 56(b).

[4] The Petitioners' captioning their motion as a Motion to Vacate is not determinative. "It is the substance of the requested relief that matters regardless of the form in which the

characteristics of a summary judgment denial order articulated in Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379, (1994) (see footnote 2 above), the MTV Order in this case did not decide the merits of Appellants' arguments, but simply decided the case should proceed to trial. In particular, the ALC stated the following:

> Since the Project may still be eligible for general, NWP approval, it appears premature to dismiss this case upon the presumption that an analysis under NWP 3 is improper.[5]
>
> ...
>
> At this stage of the litigation, there is not sufficient evidence for this Court to determine the extent of DHEC's 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."[6]

MTV Order pp. 6-7. (emphasis added). The ALC thus determined that there *was* a genuine issue of material fact regarding when the Department issued its 401 Certification and denied the Appellants' motion to vacate in order to allow this matter to be resolved

---

relief was framed." Richland County v. Kaiser, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (2002)).

[5] Based on the ALC's language above, there is insufficient evidence for this Court to determine the extent of DHEC's review or the procedures that were followed in issuing the permit. Accordingly, the Department contends that the facts of this case do not preclude a future 401 analysis for an individual Corps permit, if such a 401 Certification is deemed necessary. The 401 Certification issued in conjunction with NWP3 was based on the parameters established in that general permit and may not cover new issues that arise from a new individual permit.

[6] "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." Ex parte Wilson, 367 S.C. 7, 13, 625 S.E.2d 205, 209 (2005) (citing Mid-State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 336, 426 S.E.2d 777, 780 (1993)). "As a general rule, only final judgments are appealable." Id., (citing Culbertson v. Clemens, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996)).

after evidence was presented at trial. Consequently, because the MTV Order is a non-appealable interlocutory order and because no evidence was ever submitted addressing when the Department issued its 401 Certification, it would be premature for this Court to decide whether the Department waived the 401 Certification per S.C. Code Ann. Regs. 61-101.A.6.

Rule 220(b), SCACR maintains that an appellate court's opinion must express in writing "every point distinctly stated in the case which is necessary to the decision of the appeal . . ." (emphasis added). In this case, deciding the 401 waiver issue is *not* necessary to this Court's decision per Rule 220(b). The fact that the MTV Order is unappealable and interlocutory is a sufficient basis to deny the Appellants' appeal of this order without addressing SPA's above-referenced 401 waiver argument. Such a course of action (i.e., denying the appeal of the MTV Order without addressing the 401 waiver issue) is consistent with the Supreme Court's long held position that an appellate court need not and should not address remaining issues on appeal where the determination of a prior issue is dispositive. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999); Whiteside v. Cherokee County School District No. One, 311 S.C. 335, 428 S.E.2d 886 (1993); Starnes v. S.C. Dep't of Public Safety, 342 S.C. 216, 222-23, 535 S.E.2d 665, 668 (Ct. App. 2000). To uphold the MTV Order, based in part on the 401 waiver issue when no evidence regarding this issue has been presented to the ALC, amounts to an unnecessary advisory opinion; particularly since proper grounds for affirming the order plainly exist (namely, the MTV Order is a non-appealable interlocutory order). This Court has consistently held that such advisory opinions are improper. See S.C. Labor Ltd., LLC v. E. Tree Serv., Inc., 362 S.C. 654,

658, 609 S.E.2d 305, 307 (Ct. App. 2005) ("We do not address this issue because we do not give advisory opinions."). Accordingly, affirmation of the MTV Order need not be based on a 401 waiver analysis.

3. Appellants are not entitled to relief from the Administrative Law Court's denial of their Motion to Expand Discovery.

The Department concurs with and incorporates by reference SPA's analysis for the third issue on appeal in its Initial Respondent's Brief at pages 39 to 45.

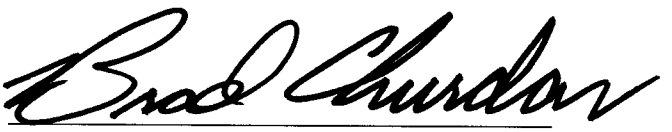
4. The Administrative Law Court did not abuse its discretion in awarding sanctions against Appellants for filing a motion to remand the critical area permit to the DHEC Board on a basis unsupported by the pertinent Statute.

The Department concurs with and incorporates by reference SPA's analysis for the fourth issue on appeal in its Initial Respondent's Brief at pages 45 to 53.

Conclusion

Based on the foregoing arguments and the well-reasoned decisions of Judge Anderson, DHEC respectfully requests that the Court of Appeals affirm all challenged Orders issued by Judge Anderson.

Respectfully submitted,



Bradley D. Churdar, Esquire
Associate General Counsel for
DHEC/OCRM
South Carolina Department of Health and
Environmental Control
1362 McMillan Ave., Ste 400
North Charleston, SC 29405
Tel.: (843) 953-0213
Fax: (843) 953-0201
churdabd@dhec.sc.gov

Attorney for Respondent

Charleston, South Carolina
February 19, 2015

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Case No. 2014-000847

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,

vs.

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

PROOF OF SERVICE

The undersigned hereby certifies that on this date she has served the ***Respondent DHEC's Initial Brief and Designation of Matter to be Included in the Record on Appeal*** in this matter upon the following, by placing copies of same in the United States Mail, first class postage prepaid, addressed to:

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Randolph Lowell, Esquire
Tracey C. Green, Esquire
Chad N. Johnston, Esquire
Willoughby & Hoeffer
Post Office Box 8416
Columbia, South Carolina 29202-8416

Philip L. Lawrence, Esquire
General Counsel
SC State Ports Authority
Post Office Box 22287
Charleston, South Carolina 29413-2287

Jefferson Leath, Esquire
Leath, Bouch & Seekings
92 Broad Street
Charleston, SC 29401

Amy Armstrong, Esquire
Jessie White, Esquire
SC Environmental Law Project
Post Office Box 1380
Pawley's Island, SC 29585

J. Blanding Holman, Esquire
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401

M. Denise Crawford

February 19, 2015
Charleston, South Carolina

D H E C
PROMOTE PROTECT PROSPER

W. Marshall Taylor Jr., Acting Director
Promoting and protecting the health of the public and the environment

February 19, 2015

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: *Preservation Society of Charleston v. S. C. State Ports Authority & SCDHEC;*
Appellate Case No. 2014-000847

Dear Ms. Kitchings:

Please find enclosed the original and one (1) copy of the Respondent DHEC's Initial Brief and Designation of Matter to be Included in the Record on Appeal in the above referenced case. I would appreciate your returning a clocked copy in the enclosed envelope.

By copy of this letter, I am serving all parties of the same.

Very truly yours,

Bradley D. Churdar
Chief Counsel

Enclosure
BDC/mdc
cc: Amy Armstrong, Esquire
Jessie White, Esquire
Jefferson Leath, Esquire
Randolph Lowell, Esquire
Tracey C. Green, Esquire
Chad N. Johnston, Esquire
Blanding Holman, Esquire
Phillip Lawrence, Esquire

orable Jenny Abbott Kitchings
uth Carolina Court of Appeals
ce Box 11629
a, SC 29211