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THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Case No. 09-ALC-07-0069-CC

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown. Petitioners,

v.

South Carolina Department of Health and Environmental Control and Roper Pond, LLC Respondents.

**RESPONDENT ROPER POND, LLC'S REPLY BRIEF TO *AMICUS CURIAE*
BRIEF**

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Columbia, South Carolina
March 2, 2015

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March 2, 2015

Respondent Roper Pond, LLC (“Roper Pond”) submits this Reply Brief in response to Brief of Amicus Curiae South Carolina Wildlife Federation in Support of Petitioners’ Standing (“Amicus Brief”).

ARGUMENT

I. THE ARGUMENT THAT S.C. CODE ANN. § 44-1-60 CONFERS STATUTORY STANDING WAS NOT PRESERVED FOR APPEAL.

The arguments in the Amicus Brief focus solely on the purported statutory standing to bring a contested case as an “affected persons” under S.C. CODE ANN. § 44-1-60. As noted in Brief of Respondent Roper Pond, LLC, this argument was not preserved for appeal since the issue was not raised to and ruled on by the Administrative Law Court (“ALC”). *Brown v. S.C. Dep’t of Health & Envtl. Control*, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) (“[I]ssues not raised to and ruled on by the ALJ are not preserved for appellate consideration.”). In its Brief to this Court, Petitioners argued for the first time that Section 44-1-60 confers statutory standing on any person who meets the statutory definition of “affected person.” The ALC did not rule on this argument in the Final Order and Decision, nor was raised and ruled on by the Court of Appeals. (App. pp. 10-38). In its Reply in Support of Motion for Leave to File Brief of Amicus Curiae, the South Carolina Wildlife Federation (“Federation”) argues that this issue was raised to the ALC because “S.C. Code § 44-1-60 itself is cited on the first page of the ALC’s order, and page sixteen of the order cited to Section 44-1-60(F)(2), which provide jurisdiction in the ALC for an “affected person desiring to contest the final [DHEC] action.” (Reply in Support of Motion for Leave to File Brief of Amicus Curiae, p. 3) (emphasis added in Reply). However, while the ALC’s Final Order and Decision does cite to Section 44-1-60 twice, both citations were in support of subject matter jurisdiction--not standing.

Indeed, the Final Order and Decision does not address the applicability of Section 44-1-60 for purposes of standing--statutory or otherwise--and the term “affected persons” does not even appear in the Final Order and Decision.

Although the Final Order and Decision ruled that Petitioners had failed to satisfy the requirements of standing, Petitioners did not raise the applicability of statutory standing under Section 44-1-60 in its motion for reconsideration of the Final Order and Decision. *MRI at Belfair, LLC v. South Carolina Dep’t of Health and Envtl. Control*, 394 S.C. 567, 576, 716 S.E.2d 111, 115 (Ct. App. 2011) (holding that an issue is not preserved for review on appeal if the motion for reconsideration does not specifically raise the issue in the motion) (*See* Motion to Reconsider and for Stay, App. pp. 112-15). Indeed, the Petitioners did not raise this argument in its briefs to the Court of Appeals or the Petition for Rehearing of Appellants filed with the Court of Appeals. (*See* Final Brief of Appellants, App. pp. 000948-000999; Final Reply Brief of Appellants, App. pp. 001056-001082, and Petition for Rehearing of Appellants, App. pp. 001147-001174). Accordingly, Petitioners may not raise the argument that Section 44-1-60 confers statutory standing on “affected persons” even when such persons fail to meet the requirements for constitutional standing. Additionally, pursuant to Rule 312, SCACR, and this Court’s holding in *James v. Anne’s Inc.*, the brief of *amicus curiae* is limited to the issues properly presented by the parties on appeal. *James v. Anne’s Inc.*, 390 S.C. 188, 193-94, 701 S.E.2d 730, 733 (2010) (citing to Rule 312, SCACR, and finding that an *amicus curiae* brief is limited to issues raised by the parties). Since the Petitioners failed to preserve this issue for appeal, the Federation is therefore precluded from raising arguments regarding the statutory standing to bring a contested case as an “affected

persons” under S.C. CODE ANN. § 44-1-60.

II. THE FEDERATION’S ARGUMENT THAT CONTESTED CASE STANDING AND JUDICIAL REVIEW STANDING REQUIRE THE APPLICATION OF TWO SEPARATE AND DISCTINCT TESTS IS CONTRARY TO THE STATUTORY RIGHT OF JUDICIAL REVIEW UNDER THE APA AND CONTRARY TO THE INTERESTS OF JUDICIAL ECONOMY.

In its Amicus Brief, the Federation argues that “the distinction between administrative review by statute and judicial standing appears to be an area of ongoing confusion in South Carolina.” (Amicus Brief, p. 2). Contrary to this assertion, the test for standing to bring a contested case in the ALC has been clearly and definitively addressed by this Court. For example, in *Smiley v. South Carolina Dep’t of Health and Env’tl. Control*, 374 S.C. 326, 649 S.E.2d 31 (2007), this Court applied the test for standing adopted in *Sea Pines Association for the Protection of Wildlife, Inc. v. S.C. Department of Natural Resources*, 345 S.C. 594, 550 S.E.2d 287 (2001), in its review of a Court of Appeals decision upholding the ALCs dismissal of a permit appeal for lack of standing. The Federation contends that standing under Section 44-1-60 was not before the Court in *Smiley* because the contested case was filed prior to the enactment of S.C. CODE ANN. § 44-1-60 in 2006. However, the *Sea Pines* test for standing was subsequently applied in *Bailey v. South Carolina Department of Health and Environmental Control* which held that the ALC properly found the petitioner lack standing to challenge a dock permit issued by DHEC after the enactment of S.C. CODE ANN. § 44-1-60. *Bailey v. South Carolina Department of Health and Environmental Control*, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010), *cert. denied* Jul. 7, 2011. Moreover, Petitioners have consistently and repeatedly cited to *Sea Pines* and *Smiley* as the applicable case law on standing in this case.

The Federation urges this Court to adopt the “zone of interests” test to interpret the undefined term “affected persons” in Section 44-1-60. Specifically, the Federation argues that the General Assembly’s use of the undefined term “affected persons” in Section 44-1-60 conferred statutory standing on “persons injured by the challenged agency action, so long as those person’s interest is within the zone of interests protected by the statute.” (Amicus Brief, p. 1). While acknowledging that “affect persons” as used in Section 44-1-60 is an undefined term, the Federation urges this Court to look to the federal courts and state courts in other jurisdictions which have interpreted similar terms and adopt the “zone of interests” test. As a preliminary matter, the South Carolina appellate courts have never held that the “zone of interests” test is applicable to any right to appeal under the South Carolina Administrative Procedures Act, S. C. CODE ANN. §§ 1-23-10 *et seq.* (“APA”). Moreover, the “zone of interests” test is a not a substitute for constitutional standing in administrative appeals. For example, in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, the United States Supreme Court held that a person suing under the federal APA must satisfy constitutional standing and also demonstrate that the “interest he asserts must be ‘arguably within the zone of interests to be protected or regulated by the statute’ that he says was violated.” 132 S.Ct. 2199, 2210 (2012) (citing *The Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970)). As such, the standing test which the Federation advocates is inadequate to demonstrate standing in a contested case.

Additionally, and significantly, applying the “zone of interests” test alone at the ALC and then applying the constitutional standing test adopted in *Sea Pines* at the appellate level would create a conflict which would potentially deny a party the right to

appeal a decision of the ALC. In arguing that the standing test for “affected persons” to bring a contested case under S.C. CODE ANN. § 44-1-60 is separate and distinct from the well-established standing test under *Sea Pines*, the Federation contends that “[w]hether a party would later have standing sufficient to invoke judicial review of the administrative procedure is a distinct, but related question.” (*Amicus Curiae* Brief, p. 2). Pursuant to Section 1-23-380 of the APA, “[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review” by the Court of Appeals. S.C. CODE ANN. § 1-23-380. As the Federation acknowledges, a party could satisfy the more liberal “affected person” test for standing at the ALC, but then face the more restrictive *Sea Pines* constitutional standing test at the Court of Appeals. In such case, a party could be denied the right to appeal a contested case decision as expressly provided in the APA. Moreover, since the ALC is the finder of fact in a contested case hearing, applying a different test for standing at the ALC would require a party to invest substantial time and financial resources on a contested case with no guaranteed right of full judicial review. A party could litigate the appeal before the ALC and then be dismissed for lack of standing on judicial review at the Court of Appeals. As such, the “zone of interest” test advocated by the Federation is contrary to the interest of judicial economy--and more importantly, contrary to the appeal by right of a contested case under the APA.

III. THE GENERAL ASSEMBLY USE OF THE UNDEFINED TERM “AFFECTED PERSONS” IN SECTION 44-1-60 DOES NOT MANIFEST AN INTENT TO CONFER STATUTORY STANDING.

The Federation contends that the General Assembly has conferred on “affected persons” the right to appeal an administrative decision under other state statutes, and therefore, its use of the term “affected person” in Section 44-1-60 manifests a legislative

intent to confer such right under that statute. However, the South Carolina appellate courts have found statutory standing only when the General Assembly provides express criteria for determined persons entitled to exercise the right. For example, the Federation cites to the State Certification of Need and Health Facility Licensure Act, S.C. CODE ANN. §§ 44-7-110 *et seq.* (“CON Statute”), as an example of statutory standing to appeal to the ALC. However, contrary to Section 44-1-60, the CON Statute defines “affected person” as follows:

(1) “Affected person” means the applicant, a person residing within the geographic area served or to be served by the applicant, persons located in the health service area in which the project is to be located and who provide similar services to the proposed project, persons who before receipt by the department of the proposal being reviewed have formally indicated an intention to provide similar services in the future, persons who pay for health services in the health service area in which the project is to be located and who have notified the department of their interest in Certificate of Need applications, the State Consumer Advocate, and the State Ombudsman. Persons from another state who would otherwise be considered “affected persons” are not included unless that state provides for similar involvement of persons from South Carolina in its certificate of need process.

S.C. CODE ANN. § 44-7-130(1). Similarly, other statutes which confer statutory standing do so expressly by identifying with specificity the parties entitled to exercise the right to appeal a particular agency decision. Accordingly, had the General Assembly intended that the use of “affected persons” in Section 44-1-60 confer statutory standing, the statute would have similarly defined the persons entitled to such right. In *Taylor v. Aiken County Assessor*, the Court of Appeals held that the ALC improperly found that a taxpayer lacked standing to appeal a property tax assessment under the South Carolina Revenue Procedure Act, S.C. CODE ANN. §§ 12-60-10 *et seq.* (“SCRPA”). 402 S.C. 559, 741 S.E.2d 31 (Ct. App. 2013). Section 12-60-2510 of the SCRPA provides that “[i]n years when there is no notice of property tax assessment, the property taxpayer may

appeal the fair market value . . . and the property tax assessment of a parcel of property at any time.” *Id.* at 562, 741 S.E.2d at 33 (citing S.C. CODE ANN. §§ 12-60-2510). The Act defined “[p]roperty taxpayer” means a person who is liable for, or whose property or interest in property, is subject to, or liable for, a property tax imposed by this title.” *Id.* The Court of Appeals held that the ALC erred in finding that a property owner who acquired title at foreclosure could not appeal under SCRPA because he did not own the property at end of the applicable tax year:

Looking to the plain and ordinary meaning of the SCRPA’s provisions, we find that section 12–60–2510(A)(4) allows a property taxpayer to appeal the fair market value and resulting assessment of property at any time in years when a new countywide assessment is not taking place. Turning to the language of section 12–60–30(22), we interpret the definition of property taxpayer to include individuals fitting into two categories: (1) “a person who is liable for . . . any property tax imposed by this title”; and (2) “a person . . . whose property or interest in property[] is subject to . . . a property tax imposed by this title.” S.C. CODE ANN. § 12–60–30(22).

Id. at 563, 741 S.E.2d at 33. The Court of Appeals thus held that the property owner met the “or liable for” provision of the definition and therefore was entitled to file a contested case challenging the assessment. *Id.* Again, this statute provides clear and unequivocal criteria for determining the party entitled to statutory standing. Such is not the case with “affected persons” under S.C. CODE ANN. § 44-1-60. Yet the Federation contends that the legislative intent to confer statutory standing is clear in the plain and ordinary language of Section 44-1-60 even though the plain language lacks any attempt to define “affected persons” or establish any objective criteria by which a court could determine which persons are entitled to this purported statutory right to standing in a contested case.

Finally, the Federation’s identification of the statute purportedly creating the “zone of interests” to be protected further demonstrates that the General Assembly’s use of the undefined term “affected persons” in Section 44-1-60 is contrary to any purported

intent to confer statutory standing. Specifically, the Federation argues that the General Assembly's use of the undefined term "affected persons" in Section 44-1-60 conferred statutory standing on "persons injured by the challenged agency action, so long as those person's interest is within the zone of interests protected by the statute." (Amicus Brief, p. 1). The Federation contends that the Petitioners' interest "fall within the zone of interested protected by the South Carolina Pollution Control Act ('PCA'). . . ." (Amicus Brief, p. 11). The Federation further explains that the "PCA declares the 'public policy of the State to maintain reasonable standards of purity of the air and water resources of the State' for the benefit of the 'public health, safety and welfare of its citizens.'" *Id.* (citing S.C. CODE ANN. § 48-1-20). This argument presents the most fundamental flaw in the Federation's claim that "affected persons" in Section 44-1-60 confers statutory standing to challenge a DHEC decision. Under this argument, there would be no person in the State who was not entitled to the purported statutory standing. Indeed, this interpretation of the statute is contrary to well-established standing law which provides that an alleged injury cannot be common to the public at large.

This Court's recent decision in *Carnival Corporation v. Historic Ansonborough Neighborhood Association*, 407 S.C. 67, 753 S.E.2d 846 (2014), unequivocally holds that standing cannot be based on these potential harms to the community as a whole. In *Carnival Corporation*, four citizens' groups brought a suit seeking to enjoin a cruise ship operator alleged unlawful use of a Charleston terminal owned by the South Carolina State Ports Authority. The Court noted that the plaintiff associations alleged the following harms resulting from the cruise ship's operation at the terminal:

- "The crowds, pollution, and traffic associated with these unlawful operations create a nuisance for Charleston citizens. This lawsuit aims to

protect Charleston's neighborhoods, families and the environment by having Defendant Carnival play by the longstanding rules and norms that have made—and make—Charleston a wonderful place to work, live, and visit.”

- “[T]he *Fantasy* visually disrupts the historic skyline.”
- “The influx of thousands of passengers, crew, and support personnel (and associated traffic) ... cause major traffic congestion downtown and the closure of public roads.”
- “The vessels emit noise pollution, including broadcast announcements and music, and the burning of diesel fuel emits visible particulate soot from ship funnels—all adjacent to the Old and Historic District.”
- “Home-porting cruise operations at an industrial scale could jeopardize the integrity, setting, and context that led to National Register designation and place maintenance of National Register status at risk.”
- “On *Fantasy* embarkation and debarkation days, portions of Concord and Washington Streets—which are public streets—are closed for cruise business. Because of those closures, displacement of traffic, and the concentration of cruise traffic in a limited area for a limited time, cruise embarkations and debarkations cause increased congestion along the east side of the downtown Peninsula.”
- “Cruise ships such as the Defendant’s *Fantasy* also emit visible particulate soot and other pollutants, including nitrogen and sulfur oxides, which are harmful to human health when inhaled and are deposited into the surrounding waters and land.”
- “Defendant’s actions including noncompliance with zoning and environmental laws have injured the above Plaintiff organizations and their members by among other things reducing their use and enjoyment of the local environment and Charleston’s historic assets, including their homes, neighborhoods and protected structures.”
- “Cruise operations downtown and ineffective management of them cause, among other things, traffic congestion, pollution emissions, road closures, large crowds, loud noises, and obstructed views that are incompatible with the area’s historic setting, scale, and residential character and impact health and the environment.”

Id. at 76-77, 753 S.E.2d at 851 (emphasis added). These alleged injuries, including that allegation of harm to the plaintiffs’ aesthetic interest in viewing the city skyline, are similar to those alleged by Petitioners in this case. This Court held that none of the

alleged harms was a particularized harm to the plaintiff associations or their members, explaining:

All members of the public suffer from and are inconvenienced by traffic congestion, pollution, noises, and obstructed views, and Plaintiffs have not alleged they suffer these harms in any personal, individual way. In short, these allegations are simply complaints about inconveniences suffered broadly by all persons residing in or passing through the City of Charleston and therefore, Plaintiffs fail to establish the first element of standing.

Id. at 77, 753 S.E.2d at 851. Such is the case here. The allegations of harm which the Petitioners allege are common to all members of the public and therefore do not support standing to challenge DHEC's decision in this case.

Additionally, the Federation repeatedly states that Petitioners are entitled to statutory standing because of Petitioners' individualized injuries to their "use and enjoyment" of Roper Pond. (See, e.g., Amicus Brief, p. 3). However, Petitioners have obviously neglected to glean from the record that they have no right to use or enjoyment of Roper Pond which is entirely located on private property. Indeed, Petitioners interpret aesthetic interest so broadly as to confer standing on any party who has "enjoyed viewing" the property which is the general subject of the challenged action. Moreover, this Court has held that a person has no interests in view alone under South Carolina law. *Young v. South Carolina Dep't of Health and Env'tl. Control*, 383 S.C. 452, 461, 680 S.E.2d 784, 789 (Ct. App. 2009) (citing *Hill v. Beach Co.*, 279 S.C. 313, 315, 306 S.E.2d 604, 605 (1983) (noting prescriptive rights to ocean views, breezes, light, and air do not exist in South Carolina)). Again, Petitioners' alleged injury to their aesthetic interest in Roper Pond is common to the public at large and therefore fails to satisfy the requirement of a particularized injury in fact.

The Federation further contends that the "Court of Appeals also erred in requiring

the Petitioners to show some type of property interest in order to show an interest sufficient for standing.” (Amicus Brief, p. 14). Like the Petitioners, the Federation mischaracterizes the Court of Appeals’ consideration of the fact that Roper Pond and Cary Lake are privately owned in the context of specific findings that the Petitioners failed to demonstrate standing in this case. Citing to *Smiley*, the Federation notes that “use and enjoyment” of the beach in that case was sufficient to establish a particularized injury. (Amicus Brief, p. 16). However, *Smiley* can be easily distinguished from this case. The petitioner in *Smiley* challenging the beach renourishment project, alleging an injury based on the interruption of his use to a “public beach on the Isle of Palms.” *Smiley v. South Carolina Dep’t of Health and Envtl. Control*, 374 S.C. 326, 330, 649 S.E.2d 31, 33 (2007) (emphasis added). Such is not the case here. The ALC made the factual finding and the Court of Appeals correctly recognized that the Pond on the Roper Pond property is a man-made pond wholly within the boundaries of the Property. Citing to the holding in *Conservation Council of N.C. v. Costanzo*, 505 F.2d 498 (4th Cir. 1974), the Court notes that an injury in fact will not be assumed when property at issue is privately owned. In *Costanzo*, the Fourth Circuit held as follows:

To the extent that standing is predicated upon plaintiffs’ recreational use as either a licensee or a trespasser, this Court finds little difficulty in holding that they have suffered no injury due to any impairment of their use of the highlands. There is no indication that Carolina Cape Fear Corporation will permit a continuation of such use and without the possibility of future use, the challenged construction cannot harm the plaintiffs.

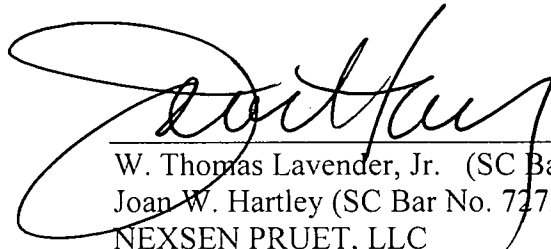
Id. at 502. Petitioners offered no evidence that they had previously used the Roper Pond property for recreational purposes and make no claim to have the right or expectation of permission to do so in the future. Accordingly, unlike the plaintiff in *Smiley*, Petitioners cannot claim a recreational injury resulting from the land-disturbing activities on the

Roper Pond property. For these reasons, Petitioners lack standing under any theory of standing--whether the well-established test in *Sea Pines* or under the “zone of interests” test advocated by the Federation.

CONCLUSION

For the forgoing reasons, Respondent Roper Pond, LLC respectfully requests that the Court affirm the Court of Appeals’ ruling in this matter.

Respectfully submitted,



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v.

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PROOF OF SERVICE

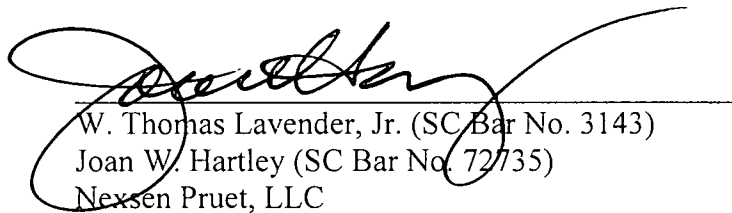
I certify that I have served the Respondent Roper Pond, LLC's Reply Brief to Amicus Curiae Brief on counsel of record for South Carolina Department of Health and South Carolina Environmental Law Project and on counsel for South Carolina Wildlife Federation by depositing a copy of it in the United States Mail, postage prepaid, on March 2, 2015, addressed to:

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U.S. Mail

The Honorable Daniel E. Shearouse, Clerk
Supreme Court of South Carolina
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Columbia, South Carolina 29211

S.C. Supreme Court

Re: *Town of Arcadia Lakes, et al v. South Carolina Department of Health
and Environmental Control and Roper Pond, LLC*
Appellate Case No. 2013-001521
Case No. 09-ALC-07-0069-CC

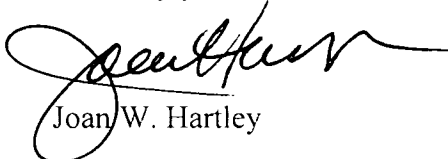
Dear Mr. Shearouse:

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach
Raleigh

Enclosed for filing please find the original and sixteen (16) copies of Respondent Roper Pond, LLC's Reply Brief to Amicus Curiae Brief in the above-referenced matter. By copy of the letter, Respondent is serving same on counsel for Petitioners and Respondent South Carolina Department of Health and Environmental Control. Please return a clocked-in copy via the enclosed postage paid envelope.

Thank you for your assistance in this matter.

Sincerely yours,



Joan W. Hartley

JWH/cb

cc: Amy E. Armstrong, Esquire
Stephen Hightower, Esquire
J. Blanding Holman IV, Esquire