

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League,

Docket No. 15-ALJ-07-0405-CC

Petitioner,

vs.

FINAL ORDER

South Carolina Department of Health and
Environmental Control and DBBO, LLC,

RECEIVED

SEP 26 2017

Respondents.

SC Court of Appeals

APPEARANCES

For the Petitioner: Amy E. Armstrong, Esquire
Jessie A. White, Esquire
For the Department: Bradley D. Churdar, Esquire
For DBBO, LLC: Mary D. Shahid, Esquire
Angelica M. Colwell, Esquire

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to a Request for Contested Case Hearing filed by the South Carolina Coastal Conservation League (Petitioner or SCCCL). Petitioner contests the decision of the South Carolina Department of Health and Environmental Control (Department or DHEC) to permit DBBO, LLC (DBBO or Respondent) to build a replacement seawall along a portion of Debidue Beach. This permit was issued pursuant to a budget proviso passed by the General Assembly pertaining only to this specific project.

In a previous order, dated March 22, 2016, this Court ruled on cross motions for summary judgment. The Court determined that SCCCL established a genuine issue of material fact as to standing, that this Court is not empowered to hear facial constitutional challenges to existing law, and that the General Assembly granted the Department discretion when issuing the permit. The order also stayed proceedings pending the outcome of related litigation. On February 22, 2017, an order was issued lifting that stay and scheduling a hearing. A hearing on the merits was held May 24-26, 2017 at the ALC in Columbia, South Carolina. In lieu of proposed orders, and pursuant to Rule 29(A)(8), SCALC, the parties filed post-trial briefs at the request of the Court on July 12, 2017.

FILED

August 23, 2017

SC ADMIN. LAW COURT

ISSUES PRESENTED

Whether Petitioner has standing to bring this contested case and whether a permit should be issued to DBBO to build a replacement seawall along a portion of Debidue Beach.¹

FINDINGS OF FACT

Based upon the evidence and stipulations presented, I make the following findings of fact, considering the burden on the parties to establish their respective cases by a preponderance of the evidence and considering the credibility of the witnesses:

Background

This case concerns a seawall² on Debidue Island in Georgetown County, South Carolina. Debidue Island encompasses an area of shoreline running from below Pawley's Island to the Debidue Spit at the North Inlet. The island is primarily occupied by the DeBordieu Colony, a private gated community, and the Hobcaw Tract, an undeveloped piece of land used for research. Presently, there exists an approximately 4,500-foot long bulkhead along a portion of Debidue Beach. This largely wooden structure was built in approximately 1981 and is past its useful lifespan. The seawall protects a number of shorefront homes in DeBordieu Colony, an exclusive oceanfront community. Homeowners at the DeBordieu Colony are members of the DeBordieu Colony Community Association, or DCCA. The DCCA collects funds to privately maintain the beach at DeBordieu Colony. To date, this has included several costly renourishment projects. A smaller group of homeowners with property located immediately behind the seawall formed the DeBordieu Beach Bulkhead Organization, LLC, or DBBO. The purpose of the group is to obtain permission to rebuild a portion of the seawall that is in need of replacement. This section consists of the most southern end of the wall—approximately 1,800 feet of the 4,500-foot wall. The more northern portions of the wall are buried under sand, while the 1,800-foot section in question is partially exposed.

¹ The standard of review in this matter should be noted. In this contested case, the Court stands in the shoes of the agency, reviews the case *de novo* with a clean evidentiary slate, and issues a final agency decision as a trial court. See Engaging & Guarding Laurens Cty.'s Env't (EAGLE) v. S.C. Dept. of Health & Envtl. Control, 407 S.C. 334, 344, 755 S.E.2d 444, 449 (2014); Bailey v. S.C. Dept. of Health, 388 S.C. 1, 4, 693 S.E.2d 426, 428 (Ct. App. 2010). As discussed in the summary judgment order, this means that the Court does not apply the appellate standard of review contained in South Carolina Code Section 1-23-380. Compare S.C. Code Ann. § 1-23-600(A) (giving the ALC jurisdiction over certain contested cases) with S.C. Code Ann. § 1-23-600(D) (giving the ALC jurisdiction over certain appellate cases) (Supp. 2016). For this reason, whether the Department abused its discretion in issuing a permit to DBBO *is not* an issue before this Court.

² The terms seawall, bulkhead, and erosion-control device may be used interchangeably throughout the order.

Behind the subject 1,800-foot section of wall, there are twenty-two affected residential lots with eighteen homes. Because of the key-shaped, tessellated shape of the lots, nine of these homes are more seaward than the others on the beachfront lots. In order to maximize the space, lots with houses in the front have one hundred feet of shoreline, while rear-positioned houses have fifty feet. The houses closest to the shore (marked in red on a map in the permit application) are seaward of, or on, the 2010 OCRM Baseline. These homes are at high risk of damage if the beach were to erode further. The houses marked in yellow are seaward of, or on, the OCRM Setback line, beyond which no new erosion control structures are generally permissible. The most threatened home is the Dunlap house at the southern end of the wall. Depending on the condition of the beach at a given time, waves can be seen reaching past the front of the house on the other side of the wing wall at the terminus of the bulkhead. Even though the beach was renourished in 1990, 1998, 2006, and 2015, it is clear from the images in evidence that the Dunlap home would be at risk of catastrophic damage were it not for the protection of the existing seawall.

Because of the importance and condition of the seawall, DBBO lobbied the South Carolina State Legislature (Legislature) for authorization to rebuild the wall. Seawall repair is strictly regulated³ and complete replacement is not allowed without a special legislative exemption. In the past, other beaches have received statutory exemptions for erosion control projects. See, e.g., S.C. Code Ann. § 48-39-290(B)(2)(e) & (E) (Supp. 2016) (applying to Fripp Island and Folly Beach, respectively). DBBO successfully obtained an exemption via budget proviso. The budget proviso pertains exclusively to the Debidue project and was contained in the 2014–15 and 2015–16 appropriations acts. The budget proviso gives the Department the authority to grant a permit to DBBO for the purpose of rebuilding the existing seawall. Like any other budget proviso, it suspends any preexisting and inconsistent law for the applicable fiscal year.

(DHEC: Seawall Reconstruction/Repair) In the current fiscal year, the Department of Health and Environmental Control may issue a special permit for the

³ The regulation is based on a stated policy against seawalls:

The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach has not proven effective. These armoring devices have given a false sense of security to beachfront property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beachfront property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry.

S.C. Code Ann. § 48-39-250(5) (2008). This policy and the related statutes and regulations notwithstanding, approximately 25% of the South Carolina coastline is armored in some fashion—either through maintained, grandfathered structures, or structures built under the authority of a legislative exception.

reconstruction or repair of an existing erosion control device of at least four thousand contiguous linear feet that is located landward of an area which the department has granted a permit authorizing a renourishment project that does not qualify for public funding and the permit is active as of July 1, 2014. The department may only issue the permit if the seawall will be reconstructed or repaired with like material and the footprint of the replacement is no more than two feet from the footprint of the original. The department may charge a permit fee equal to the actual cost of issuing the permit.

2014 Act No. 286, Part IB, § 34.55; see also 2015 Act No. 91, Part IB, § 34.52.

Based on the budget proviso, DBBO filed a detailed permit application with the Department on March 16, 2015. Petitioner actively opposed the issuance of the permit and submitted public comment. Several other persons commented during the permitting process. The Department worked with DBBO's engineer, Fran Way, to address some of the concerns.⁴ When it granted the permit, the Department also added special permit conditions to address some of the concerns. For instance, one special condition limits construction times to protect nesting sea turtles. After the Department issued the permit, SCCCL followed the procedure in Section 44-1-60 and filed a contested case with the ALC.

Standing Testimony

Petitioner is a statewide non-profit consisting of over 4,000 members. Petitioner's aims are to promote environmental protection and conservation. Petitioner called its first witness, Nancy Cave, to establish standing. She is a current member and former full-time employee of SCCCL. Cave currently works for Petitioner as a part-time consultant. Overall, I found Cave to have a sincere interest in the environment. However, her credibility as a witness was called into question by her intentionally evasive answers. It was clear, when Cave was cross-examined with her prior deposition statements, that she was intentionally obfuscating her answers in order to avoid an undesired result. Cave is articulate with a strong corporate and environmental background. Her protestations of confusion were not credible.

Cave resides in a home located approximately one mile inland at DeBordieu Colony and is a member of the DCCA. She believes that erosion control devices do not work and harm the natural environment. On behalf of SCCCL, Cave lobbied the Legislature against allowing a statutory amendment for the Debidue project. Cave testified that she enjoys walking on the

⁴ Way noted during his testimony that none of the property owners immediately down-drift of the project site sent any objection to the Department. Some did request a hearing.

Debidue Beach four to five times a month. Her walks do not always take her along the 1,800-foot portion of the beach at issue in this case. She did not testify as to how often she walks on that portion of the beach. Other parts of the Debidue Beach are equally, if not more, accessible to inland DeBordieu residents. Based on her understanding of the project, she believes that she would lose access to two feet of already-narrow public beach due to replacing the seawall along the 1,800-foot section. This is a questionable claim.⁵ Presently, there are wooden walkways with stairs extending out from the current seawall in some places. It would be highly unlikely that a person could walk unimpeded directly along the current seawall in the two feet under contention as it currently exists.

In fact, on direct examination, Cave stated that the replacement seawall would make no difference in her ability to walk the beach because, without renourishment, the beach is already too eroded to walk on. On cross-examination Cave conceded that, after installation of the new wall, she would be able to walk along the beach because the new wall will be backfilled and buried, assuming storms do not remove too much of the new sand. If the Debidue project is completed as designed, there will be more walkable beach than there is now or has often been in recent years.

On redirect, Cave testified that her use of the beach would be hindered by the temporary construction equipment. Cave testified that she was not opposed to renourishment, *i.e.*, the addition of non-native sand, and that SCCCL considers it an acceptable method of beach preservation. The planned project includes both a replacement seawall and continued renourishment. Indeed, renourishment will continue regardless of whether the wall is replaced. Beach renourishment also requires heavy equipment. There will be construction equipment on the beach whether there is a replacement seawall put in front of the current one or not. Indeed, without the permit, the homeowners will have to continue making frequent repairs to the current wall. This would also involve construction on the beach.

Cave testified that she is opposed to all beach armoring and that her enjoyment of the beach would be hindered by the knowledge that she was walking on an unnatural beach. This is not a concrete injury. Because Cave will gain walkable beach, not lose it; because there will be heavy equipment on the beach whether the seawall replacement is built or not; and because there will be

⁵ I note that the project plan includes strengthening of the dune system on the beach. DBBO's engineer testified that any incursion into the two-foot space would be from the placement of new vegetation above grade.

a seawall on the beach regardless of whether the replacement one is permitted, Cave has no redressible injury that grants her or SCCCL standing to challenge the permit.

Department Testimony

Petitioner contends in this case that the Department failed to utilize the applicable laws and regulations when reviewing the permit application. To discuss the Department's review process for this case, Petitioner called Christopher Stout, a project review manager with the Department. Stout works in the Myrtle Beach location of the Department's Office of Ocean and Coastal Resource Management (OCRM). Because Georgetown County is part of the region to which he is assigned, Stout processed DBBO's application. Stout had never processed an application filed under a budget proviso before and he and his supervisor, Blair Williams, gave the application heightened review due to its unusual nature. The Department's position on the laws governing the application is that the proviso sets the specific project standards and that general standards still apply, as long as they do not conflict with the proviso. For instance, the Department considered the impact of the proposed construction on endangered species.⁶ A condition was added to the permit in cooperation with the Department of Natural Resources for the protection of nesting sea turtles. When asked why he did not consider additional regulations, Stout stated that no other regulations would apply since there is no normal regulatory provision for the rebuilding of a seawall. Stout agrees that the Department has some discretion in approving the permit, within the specific parameters of the proviso.

Petitioner also called Blair Williams, Stout's supervisor at the Department, to discuss the permitting process. Williams confirmed that Stout was the primary reviewer of the permit application. He stated that they had discussed the unusual legal posture of the application created by the proviso. Williams confirmed that the Department considered the specific project parameters from the proviso, general regulatory considerations, and public comments when issuing the permit. He also confirmed that the Department considers the proviso to have created an exception to otherwise applicable regulatory requirements.

Homeowner Testimony

DBBO called Price Sloan to testify about his experiences as a member of DBBO and a homeowner affected by the seawall. Sloan owns the home next to the Dunlap property. His house

⁶ This derives from Regulation 30-11(B)(6). Subsection (B) contains a list of general considerations for permitting in all critical areas.

is slightly less threatened because it is located on the larger, rear portion of his key-shaped lot. Nevertheless, the failure of the seawall still poses a significant danger to his house. Sloan spends approximately six weeks per year in the home, sometimes working remotely in his role as Vice President of TD Bank. His primary residence is in Pennsylvania. I found Sloan to be a credible witness, concerned about the safety and usability of his and his neighbors' homes.

Seawall repair is regulated by property lines of the individual lots. If more than 50% of an individual homeowner's section of the wall is compromised, then the whole wall must be taken down.⁷ Sloan testified that he and his neighbors must keep a daily watch on their portions of the seawall, because even a small breach can have disastrous results. The current wall is in very bad condition: the wood is rotting and insect-ridden, metal tiebacks and hardware are rusting, sections are bowing out or caving in, and whole portions have breached. Shoddy or hurried repairs have been made to hold the wall together. Construction workers are concerned about the safety of continued repair projects.

When there has been no recent renourishment, the waves come up to, and beat on, the current wall. On Christmas Day 2014, Sloan discovered a breach where sand was rapidly washing out behind the seawall. Hurried repairs had to be made to prevent total loss of the wall. Although homeowners along the wall are vigilant and try to maintain the decaying wall, waves still come over the wall, threatening the structures and dunes behind it. During particularly strong tides, high winds, or storms, the wave impacts make the houses shudder.

Because of these pressing issues, Sloan has been actively involved in trying to rebuild the wall and restore the beach. In addition to being a member of DBBO, Sloan has been involved in planning the funding of beach renourishment projects through the DCCA. The DCCA has recently amended its bylaws to create a funding program for the continued periodic renourishment of the beach. No public funds are used for renourishing the Debidue Beach. The funding provided by the new bylaws will provide a funding source to alleviate delay in beach renourishment related to funding. The last renourishment, in 2015, cost thirteen million dollars and the next one is anticipated to cost sixteen million. Renourishment alone is not a reliable option for maintaining the Debidue beach in front of the seawall, however. Aside from the expense involved, it is often

⁷ See S.C. Code Ann. § 48-39-290(B)(2) & S.C. Code Ann. Reg. § 30-13(N)(3) (Supp. 2016). Given that some lots, like Sloan's, have only 50 feet of shoreline, destruction of twenty-five feet of the wall could lead to the failure and removal of the entire wall.

difficult to obtain the necessary equipment and permitting is not always a smooth process⁸. The renourishment sand can be washed away by hurricanes or smaller storms, leaving the current seawall exposed and in danger of further breaches. Therefore, the homeowners have committed to a plan that includes both the replacement of the wall and periodic beach renourishment.

Expert Testimony

To discuss the impact of erosion control devices like seawalls, Petitioner called Robert Young as an expert witness. Young has a Bachelor's and Master's degree in geology and a doctorate degree in Coastal Geology from Duke University. He is currently a professor of geology at Western Carolina where he directs the Program for the Study of Developed Shorelines, a research and policy institute. Young is a licensed professional geologist with South Carolina and two other states. The Court qualified him as an expert witness in coastal geology, coastal management and policy, and the evaluation of structures on the beach.

Young testified that shorelines are dynamic in nature and should not be expected to remain in one place. He stated that without erosion control, you do not lose beach, instead, the beach moves or changes position. Young explained that the beach environs will naturally shift, so that there is always dry sand beach, dunes, and so forth. However, when you draw a line in the sand with a road, or a revetment, or a seawall, sand is washed away in front of the structure. This is called passive loss. When the waves come so close to the structure that they bounce off of it, thereby increasing the sand loss, it is active loss. The structure will also hold sand behind it. This is called placement loss because the trapped sand is unavailable to the natural processes, termed the longshore transport system, that carry sand to other portions of the coast. However, in this case, new sand will be brought in to backfill the section between the old and new walls and to renourish the beach. Therefore, I find that there will be little to no additional loss of sand currently on the beach due to the placement of the new wall.

Young testified that the general effects of seawalls are well known. Immediately in front of the seawall, sand can wash away but the beach will not recede, leaving little to no dry sand beach. At the end of a seawall, additional scouring of the sand will occur and wave patterns will

⁸ Sloan testified that renourishment can be challenging not only because of the required funding, but also because of the permitting process and limited access to equipment. A recent Debidue renourishment project was delayed because all available dredgers were already being utilized for projects like hurricane recovery in other states. Fran Way testified that the Jones Act prevents foreign dredgers from working in the U.S., which limits available equipment to a finite number of dredgers.

change. The lack of sand available to the longshore transport system will negatively affect the accumulation of sand down-drift of the wall. Young testified that these effects are consistent with stated findings in the Beachfront Management Act. The policies are motivated in part by a desire to maintain dry sand beach for recreational and economic purposes.⁹

Young reviewed aerial photos of Debidue, studies and permit requests, and some general shoreline activity data maintained by his program in order to form an opinion about the project at issue. He concluded that Debidue is clearly an eroding shoreline. He stated that the shoreline is out of equilibrium with the natural line of the coast. Put in simple terms, there is some noticeable deviation if you draw a straight line between points on the coast higher and lower than the bulkhead. When a beach is out of equilibrium, it is difficult to keep renourishment sand in place because of the increasing steepness of the shore face. In Young's opinion, rebuilding the seawall at Debidue is bad long-term coastal management, especially in light of documented rising sea levels. Young's proposed solution for Debidue is to simply continue renourishment.

It should be noted that Young's testimony was based on a broad scientific knowledge of shorelines, but not on a strong familiarity with Debidue specifically. He extrapolated, based on generally accepted shoreline principles and aerial photographs, what the impacts of a replacement seawall on Debidue would be.

To discuss the specific conditions on Debidue and the homeowners' plan for the project, DBBO called Fran Way. Way has a Bachelor's degree from Boston College and a Master's degree in Ocean Engineering from Texas A & M. He is a licensed engineer in South Carolina and is a senior coastal engineer with Applied Technology and Management (ATM) in Charleston, South Carolina. ATM does beach renourishment and preservation projects up and down the southeastern coast. ATM is qualified by the Department to conduct "damage beyond repair," or DBR, assessments of erosion control devices on the beach. The Court qualified Way as an expert in coastal engineering.

Way has been involved in beach preservation at Debidue for several years and is very familiar with the island and the bulkhead. He acted as the agent and permitting consultant for DBBO for the new seawall project. Way does not personally design erosion control structures;

⁹ Young acknowledged on cross-examination that significant property tax revenue might be lost by Georgetown County if the homes behind the 1,800-foot section of the wall were destroyed. Sloan testified to paying thirty thousand per year in property taxes on his house.

rather he focuses on understanding all of the forces that would affect the structure and then works with a structural engineer, Dr. Tim Mays, to design the whole project. He does this, in part, by creating complex wave models that take into account the various different processes at work on the shoreline.

Parts of Debidue are stable, or even accretional, while the portion protected by the current seawall is erosional. Working with specific shoreline erosion rates, Way accounts for the anticipated distribution of sand from the project site. ATM has been collecting quantitative sand and wave data at Debidue for more than a decade. Way testified that, in his professional opinion, the erosion patterns at Debidue are attributable to natural activity that began long before the installation of the current seawall. Utilizing historic National Oceanic and Atmospheric Administration shoreline data, Way determined that there used to be an open channel south of DeBordieu Colony. This channel began closing in the 1930s, changing the natural shape of the shoreline. The remains of the channel can be seen in Petitioner's 8N, in a straight line, seaward of the words "Sea Creek Bay." The island becomes very thin at this point and a much wider swath of dry sand beach is visible. The erosional trend is due to the realignment of the portion of the beach above this former channel, as it moves seaward to form a straighter line.

Way testified that islands near inlets like the one that used to be at the south end of Debidue typically have a "drumstick" shape. That is, the shore near the inlet is more swollen and curved. When a channel closes, the shoreline slowly begins to shift toward a straighter line, or equilibrium, as Young characterized it. The current bulkhead is placed toward the section of the island that used to be curved. In decades past, the shoreline extended much farther seaward from the seawall than it does now, all the way down to the defunct channel. In the process of shaving off and readjusting this former curve, or drumstick shape, strong erosion patterns have developed. In Way's opinion, the erosion along the southern part of the beach at DeBordieu Colony is attributable to this larger phenomenon. This significant erosion pattern has been evident there long before the current seawall was installed.

The primary concern expressed by Young was that erosion control structures can cause greater erosion down-drift of the coastline the structure is designed to protect. This assertion is based on general principles of shoreline study. However, Way's testimony, based on research specific to Debidue, proves that the erosional trend at the beach predates the seawall and therefore is not attributable to the seawall. Presently, the beach at the seawall is in better condition than it

was in 1985. The sand placed as part of this project, in addition to sand placed in past and planned future renourishment projects, more than compensates for the active and passive loss of sand in front of the revetment and the placement loss of sand behind the revetment.

After review of all the evidence, I find that the current seawall is past its useful life and currently in a state of deterioration. This seawall is essential to the protection of several home from erosion. There is no quantifiable evidence that the seawall itself has caused any negative down-drift effects. Rather, the erosion at the site of the seawall is attributable to the effects of the channel closing and the shoreline seeking a new equilibrium. There is no demonstrated harm from the replacement of the seawall; the subsequent state of the beach will be much improved due to the renourishment sand to be placed as part of the project.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I conclude, as a matter of law, the following:

This matter is before the Court pursuant to South Carolina Code Section 44-1-60(G) for a contested case hearing. The first issue that must be addressed is whether Petitioner has standing. In the prior summary judgment order, I ruled that Petitioner had stated a genuine issue of material fact as to whether it had standing. After considering the evidence put forth at the hearing, I conclude that Petitioner does not have standing to bring this case. The United States Supreme Court has established the following test for determining whether a party has standing to bring suit.

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

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 2136 (1992) (internal punctuation, footnote, and citations omitted); see also Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dept. of Nat. Res., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001).

The concept of standing is grounded in the constitutional requirement that there must be a justiciable controversy before a court will hear an action. See Jowers, et al. v. S.C. Dept. of Health & Envtl. Control, --- S.E.2d ---, 2017 WL 3045982, at *3 (S.C. filed July 19, 2017), petition for rehearing (filed Aug. 3, 2017). Standing is the doctrine concerned with whether a party has sufficient interest in the outcome of the litigation to warrant consideration of their position by a

court. See Bank of Am., N.A. v. Draper, 405 S.C. 214, 219, 746 S.E.2d 478, 480 (Ct. App. 2013). The standing test in Lujan sets forth the irreducible minima that a plaintiff or petitioner must prove to have a justiciable controversy. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 2136 (1992) (citations omitted). Justice Scalia wrote for the Court that a plaintiff who is the object of a government action typically will not have difficulty demonstrating standing; however, when a plaintiff's asserted injury stems from the government's allegedly unlawful regulation of *someone else*, a stronger showing must be made. See *id.*; see also Beaufort Realty Co. v. Beaufort Cty., 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001) (citation omitted).

In this case, Petitioner has failed to establish standing under the tripartite test. To meet element one, a plaintiff must establish a particularized injury. "In order for an injury to be particularized, it must affect the plaintiff in a personal and individual way." Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014) (citations omitted). Consequently, allegations about inconveniences suffered by all residents in an area without evidence of personal harm are not sufficient to establish injury. *Id.*, 407 S.C. at 77, 753 S.E.2d at 851. However, an injury may still be particularized even if suffered by large numbers of other people. See Town of Arcadia Lakes v. S.C. Dept. of Health & Env'tl. Control, 404 S.C. 515, 531, 745 S.E.2d 385, 393–94 (Ct. App. 2013). In this case, Petitioner's witness asserted that the permit would affect her walks on a public beach. However, she did not testify specifically that she walks along the portion of the beach affected by this permit on a regular basis. Indeed, she noted that the affected portion of the beach is too eroded to walk on. Cave is asserting a generalized injury based upon a vague assertion rather than a particular injury based upon her use of the specific section of beach at issue in this case.

Additionally, to have an injury, concrete harm must be asserted, and to have standing, that concrete harm must be redressible. In a prior case, our state Supreme Court ruled that a man who used a public beach for almost daily rehabilitative exercise had an injury, where the Department permitted the scraping and removal of large amounts of sand from the beach over a five-year period. See generally Smiley v. S.C. Dept. of Health & Env'tl. Control, 374 S.C. 326, 649 S.E.2d 31 (2007). Petitioner asserts that the facts in this case are similar to Smiley, and therefore SCCCL has standing on the basis of Cave's testimony. I disagree. The facts in this case are distinguishable from Smiley and are, in fact, closer to the type of circumstances present in Bailey v. South Carolina Department of Health, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010). In Smiley, the permit allowed

for the removal of up to 25,000 cubic yards of sand per month for six months of the year for five years. There is no question that this could be injurious to the beach upon which Smiley exercised and interfere with his routine.

Conversely, in this case, the homeowners are attempting to maintain the status quo of the coastline and improve the width and condition of the beach. In the Bailey case, the Court of Appeals found no standing where the irritations Petitioner complained of would stay the same, with or without the issuance of a permit to rebuild a dock. Bailey was concerned about a number of issues related to his neighbor's dock, including the nature of its use and the position of the dock's boats. Bailey, 388 S.C. at 6, 693 S.E.2d at 429. He claimed that the usage of the dock interfered with the use and enjoyment of his own property. Id. However, the permit issued by the Department merely allowed the dock owners to change its structure to floating and did not change any aspect of the dock's usage or footprint. Id., 388 S.C. at 7, 693 S.E.2d at 430. Because the harms that Bailey complained of existed before, and would continue after, the issuance of the permit for changing the structural aspects of the dock, the ALC and the Court of Appeals found no standing. See id., 388 S.C. at 8, 693 S.E.2d at 430. Bailey suffered no injury directly attributable to the dock conversion and his complaints would not be redressed by a decision to deny the permit because the complained of actions and issues would continue regardless of whether the permit was issued.

The Bailey case is instructive in the matter at hand because many of the grievances that Cave asserts do not directly correspond to the permit activity at issue. For instance, Cave asserted that she will lose beach upon which to walk. Instead, the evidence demonstrates that she will gain beach.¹⁰ Indeed, the beach's dune system will be improved, new sand will be added, and the new seawall will be buried. There is simply no loss of walkable beach. The only injury that Cave can allege under element one is the presence of heavy equipment on a portion of the beach. However, that injury is not particularized, nor does it satisfy elements two and three.

In Smiley, the Court held that the law does not exclude a temporary injury like heavy equipment when establishing standing. Smiley, 374 S.C. at 332, 649 S.E.2d at 34. However, in

¹⁰ Petitioner also alleges "aesthetic" injury, a concept that has been recognized by courts under certain circumstances. See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 183, 120 S. Ct. 693, 705 (2000). Here, however, the facts do not support a finding there will be a visible aesthetic injury: the beach will be wider and with a more developed dune system when the project is complete. The seawall will be buried—more buried than the current one is now. There will be no visible injury. Cave also testified she will be injured based on her feelings about the use of armoring. Her philosophical objections to the project are not a concrete injury that will support standing.

this case there will be heavy equipment on the beach regardless of whether the permit is granted. This calls into question the causal connection required by element two. Without the seawall replacement, construction equipment will be required for repairing the current wall and beach renourishment. The new wall is intended to prolong the life of the renourishment projects, *lessening* the amount of equipment on the beach over the years to come. Without the wall, more frequent repairs and renourishment with their attendant equipment will be required.

Because there will periodically be heavy equipment on the beach for preservation purposes regardless of whether this permit is issued, Petitioner cannot meet element three—the requirement that a favorable decision would address Petitioner’s injury. In Sea Pines, *supra*, the Court found that a group of environmentalists who asserted injury based on the reduction of a white tail deer population did not prove redressability because they objected to the *method* of herd thinning used, not the actual thinning. Where the same result, or alleged injury, would result regardless of the Court’s ruling, redressability is unlikely. See Sea Pines Ass’n for Prot. of Wildlife, Inc. v. S.C. Dept. of Nat. Res., 345 S.C. 594, 603, 550 S.E.2d 287, 292 (2001). In this case, SCCCL considers preservation by renourishment an acceptable outcome. That is, they are not opposed to preservation of the beach, merely the method that DBBO intends to utilize. Indeed, whether this Court grants the instant permit, the DCCA and the homeowners will continue to put in considerable resources and effort to preserve the status quo of the shoreline. If, as Petitioner requests, this Court denies the permit, SCCCL’s desired result of a “natural beach” will not be achieved. Therefore, Petitioner has also failed to prove the third element of the Lujan test.¹¹

Having addressed constitutional standing, I now reach statutory standing. Our courts have held that “[s]tanding may be acquired: (1) by statute; (2) through the rubric of “constitutional standing”; or (3) under the “public importance” exception.” Vicary v. Town of Awendaw, 417 S.C. 631, 636, 790 S.E.2d 787, 790 (Ct. App. 2016) (citation omitted), reh’g denied (Sept. 23, 2016), petition for cert. filed (Oct. 21, 2016). Petitioner asserts that it may claim standing on the

¹¹ The Department has also filed a Motion for Summary Judgment on the issue of associational standing. “An organization has associational standing ‘if one or more of its members will suffer an individual injury by virtue of the contested act.’” Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n, 407 S.C. 67, 76, 753 S.E.2d 846, 850–51 (2014) (citations omitted) (“The three part test for associational standing requires that an association’s members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”). Because Petitioner has not met the core three elements of standing, it is unnecessary to address the issue of whether Petitioner has associational standing.

basis of Section 44-1-60, the procedure by which Department cases reach the ALC.¹² Section 44-1-60 provides the procedure for all “department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of the department” that give rise to a contested case. S.C. Code Ann. § 44-1-60(A) (Supp. 2016). Contested case is defined as “a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law or by Article I, Section 22, Constitution of the State of South Carolina, 1895, to be determined by an agency or the Administrative Law Court after an opportunity for hearing.” S.C. Code Ann. § 1-23-505 (Supp. 2016); see also S.C. Code Ann. § 1-23-310 (Supp. 2016). Section 44-1-60 allows “affected persons” to request written notification of a Department decision, and gives a deadline for filing with the ALC once that agency decision is final. S.C. Code Ann. § 44-1-60(E)(1) & (G) (Supp. 2016).

There is no definition provided for “affected person” and the statute does not address causes of action or discuss the substantive nature of what might allow an affected person the right to a contested case at the ALC. However, based upon the plain language of the statute, I agree with Petitioner that affected person means someone who is injuriously acted upon. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 35 (1993). This means that the requirement that a party be an affected person is very similar, if not synonymous with the requirements of constitutional standing. This is consistent with Regulation 30-6, which provides: “A Department decision . . . 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.” S.C. Code Ann. Regs. 30-6(A) (2011). Indeed Title 1, Chapter 23 limits judicial review of an agency decision to one who is “aggrieved.” S.C. Code Ann. § 1-23-380 (Supp. 2016). These terms are like those in the federal administrative procedures act. The United States Supreme Court has noted:

Respondents also claim standing by reference to the Administrative Procedure Act, . . . which authorizes judicial review at the instance of any person who has been “adversely affected or aggrieved by agency action within the meaning of a relevant statute.” Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III.

Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 487 n.24, 102 S. Ct. 752, 767 n.24 (1982) (citations omitted). In fact, the Court “has

¹² Petitioner has not argued standing under the public importance exception.

long held that a person suing under the APA must satisfy not only Article III's standing requirements, but an additional test: 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." Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak, 567 U.S. 209, 224, 132 S. Ct. 2199, 2210 (2012) (quoting Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153, 90 S. Ct. 827, (1970)).

Because Petitioner does not have standing, Petitioner also does not qualify as an affected person in this case. The United States Supreme Court has stated that "a mere 'interest in a problem,' no matter how long-standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA." United States v. Richardson, 418 U.S. 166, 177, 94 S. Ct. 2940, 2946-47 (1974) (citation omitted). In a case finding that SCCCL did not have standing to pursue an administrative appeal, the Court of Appeals noted that "[a] party cannot appeal from a decision which does not affect his or her interest, however erroneous and prejudicial it may be to some other person's rights and interests." Beaufort Realty Co. v. Beaufort Cty., 346 S.C. 298, 301, 551 S.E.2d 588, 589-90 (Ct. App. 2001). "The word 'aggrieved' refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation." Beaufort Realty Co. v. Beaufort Cty., 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001). As discussed above, Petitioner has not demonstrated any injury that is causally connected to the permit in question and redressible by this decision. Petitioner has asserted no substantial, concrete grievance and therefore, is not an affected person.

Petitioner seems to be asserting standing on the basis that it took an interest in, and participated in, the administrative review process. Petitioner points to a prior SCCCL case, stating that it was previously found to be an "affected person" under Section 44-1-60. See generally S.C. Coastal Conservation League v. S.C. Dept. of Health & Envtl. Control, 390 S.C. 418, 702 S.E.2d 246 (2010). That case merely addressed the notification procedure in Section 44-1-60 and did not address standing in any deeper context. The Court's ruling was based on a concession from the Department and the Court declined any further analysis. Id., 390 S.C. 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."). There is a considerable difference between the procedural issue raised by the notification process and the

substantive issue raised by whether a party has standing. Cf. Lennon v. S.C. Coastal Council, 330 S.C. 414, 417–18, 498 S.E.2d 906, 907–08 (Ct. App. 1998) (recognizing that standing acts as a subject-matter jurisdiction limitation in federal courts and that South Carolina courts, like federal courts, require a justiciable case or controversy). In this case, Petitioner has proven no substantive claim to be an affected person for whom the law dictates judicial or agency determination.

Moreover, assuming *arguendo* that Petitioner had standing to pursue this matter, the respondents prevail on the merits. After considering the arguments and evidence of the parties, I conclude that the seawall replacement should be permitted. The budget proviso applicable¹³ to this case provides:

(DHEC: Seawall Reconstruction/Repair) In the current fiscal year, the Department of Health and Environmental Control may issue a special permit for the reconstruction or repair of an existing erosion control device of at least four thousand contiguous linear feet that is located landward of an area which the department has granted a permit authorizing a renourishment project that does not qualify for public funding and the permit is active as of July 1, 2014. The department may only issue the permit if the seawall will be reconstructed or repaired with like material and the footprint of the replacement is no more than two feet from the footprint of the original. The department may charge a permit fee equal to the actual cost of issuing the permit.

2014 Act No. 286, Part IB, § 34.55; see also 2015 Act No. 91, Part IB, § 34.52. The end of the enacted budget contains the following critical language: “All acts or parts of acts inconsistent with any of the provisions of Parts IA or IB of this act are suspended for Fiscal Year 2014–15.”

As a member of the executive branch of government, a judge of the ALC must follow the law as written. Video Gaming Consultants, Inc. v. S.C. Dept. of Revenue, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000). Therefore, I do not reach the constitutionality of the provisos, but rather apply the plain language of the law as enacted by the General Assembly. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citation omitted) (where the language of the law is “plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning”). Based upon the plain language of the Appropriations Act, I conclude that any provision of law that would foreclose the Department’s ability to permit the seawall replacement as defined by the proviso is suspended for the purposes of this case. It is quite clear from the language of the proviso that the General Assembly intended for the homeowners of DBBO to be able to replace their seawall, so long as it

¹³ DBBO submitted its permit request on March 16, 2015.

is completed “with like material and the footprint of the replacement is no more than two feet from the footprint of the original.” Id. (citation and quotation marks omitted) (“What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.”); Bruning v. S.C. Dept. of Health & Env’tl. Control, 418 S.C. 537, 545–46, 795 S.E.2d 290, 295 (Ct. App. 2016), reh’g denied (Jan. 20, 2017) (citation omitted) (“When interpreting a law, courts must presume a futile act was not intended and that the law intends to accomplish something.”).

The language of the proviso includes the word “may” and I have previously concluded that this grants the Department, and thus the Court, with some discretion in deciding whether, or how, to issue a permit to DBBO. I agree with the Department’s employees, who testified on their review process, that all applicable guidelines that do not conflict with the proviso, should be considered. However, it must be noted that the Department’s review process is not discussed here under an abuse of discretion standard. Petitioner incorrectly asserts that it has preserved the issue of review under Section 1-23-380(5). As explained in footnote 1, *supra*, this is a contested case and the decision to grant or deny a permit is made after *de novo* review. Therefore, Section 1-23-380(5) does not apply at this stage of the case.

In determining which provisions of law apply to deciding whether to issue the instant permit, certain rules of construction are useful. “A specific statutory provision prevails over a more general one.” Wooten ex rel. Wooten v. S.C. Dept. of Transp., 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999) (citation omitted). The Fourth Circuit has noted that this rule is particularly applicable where lawmakers have “deliberately targeted specific problems with specific solutions.” D.B. v. Cardall, 826 F.3d 721, 735 (4th Cir. 2016) (citation omitted). “The law clearly provides that if two statutes are in conflict, the latest statute passed should prevail so as to repeal the earlier statute to the extent of the repugnancy.” Hair v. State, 305 S.C. 77, 79, 406 S.E.2d 332, 334 (1991) (citation omitted). Implicit repeal is necessary where more recent amendments would otherwise be meaningless. See Bolin v. S.C. Dept. of Corrs., 415 S.C. 276, 283, 781 S.E.2d 914, 917 (Ct. App. 2016), reh’g denied (Feb. 24, 2016).

Petitioner asserts that the following statutes and regulations apply and warrant denial of the permit: the Coastal Zone Management Act, specifically the prohibition on erosion control devices in Section 48-39-290; Regulation 30-13.N regarding erosion control; and Regulation 30-15.F regarding special permits. After review of these provisions I do not find that they warrant

denial of the permit. Section 48-39-290(B)(2) is entitled “Erosion control devices.” S.C. Code Ann. § 48-39-290(B)(2) (2008 & Supp. 2016). Subsection (B)(2)(a) states “[n]o new erosion control structures or devices are allowed seaward of the setback line except to protect a public highway which existed on the effective date of this act.” Id. The remainder of Subsection (B)(2) governs repairs to damaged walls and contains an exception for “a private island.” Id. Similarly, Regulation 30-13.N(3) is entitled “Erosion Control Structures of Devices.” The regulation provides that “[n]o new erosion control structures or devices are allowed seaward of the setback lines except to protect a public highway which existed as such on June 25, 1990.” S.C. Code Ann. Reg. 30-13.N(3)(a) (Supp. 2016). The remainder of subsection (3) addresses constraints on repairs. The proposed seawall is seaward of the setback line, does not protect a public highway, and replaces more than the allowable percentage of the structure. Nevertheless, the Department has been authorized by the General Assembly to issue a permit for the seawall. I therefore conclude that the operation of Subsection (B)(2) and Regulation 30-13.N(3) are in direct conflict with the budget proviso and are suspended for its limited purposes for the 2014–15 fiscal year.

Regulation 30-15.F concerns the issuance of “special permits.” The governing budget proviso states that the Department may issue a “special permit.” The regulation provides, “Special permits are to be issued only in situations where without such a permit, the property owner would have no reasonable use of his property, or when an overriding public benefit can be demonstrated.” S.C. Code Ann. Regs. 30-15.F (Supp. 2016). The regulation goes on to provide guidelines for the issuance of special permits, including, “[a] structure cannot be constructed or reconstructed on a primary oceanfront dune or on the active beach” Id. at 30-15.F(1). Additionally, “[t]here shall be no adverse impact on the stated policies of the Beachfront Management Act, including the policies protecting the sand dunes and preservation of the dry sand beach.” Id. at 30-15.F(2). Because the budget proviso allows for a structure to be reconstructed on the beach and because this contravenes the general stated policy of the legislature in the Beachfront Management Act, I conclude that these provisions are suspended for the 2014–15 fiscal year for the proviso’s limited purposes.

The only portion of Regulation 30-15.F that potentially applies in this case is subsections (3) and (4). These subsections provide that a special permit should not be issued where it would create a situation contrary to the public health, safety, or welfare. Id. at 30-13.F(3). Considerations related to this concern are whether the proposed structure would be constructed on renourished

beach, the erosion rate at the site, how soon the structure will be located on the active beach, whether or not the proposed structure meets building standards, and the potential cumulative effect that similar structures will have upon the beach/dune system. Id. at 30-13.F(4). These guidelines are intended for permissible structures, and not erosion control devices. However, after considering the plans for the proposed structure and the circumstances of its location, I conclude that there is no situation created that is contrary to the public health, safety, or welfare.

Although the specific project guidelines for erosion control devices in Regulation 30-13 do not apply in this case, I agree with the Department that the general considerations in Regulation 30-11.B are, to the extent relevant, still applicable in this case. Particularly germane are those related to the impact of a project on protected species, erosion rates, recreational access, economic benefits, and value and enjoyment of adjacent owners. See, e.g., S.C. Code Ann. Reg. 30-11.B(4)–(7), (10) (2011). Additionally, the project-specific guidelines for this permit are contained in the budget proviso. Specifically, the seawall must be reconstructed or repaired with like material and the footprint of the replacement must be no more than two feet from the footprint of the original. 2014 Act No. 286, Part IB, § 34.55. The plans submitted by DBBO comport with the specific project guidelines enacted by the legislature. The reconstructed bulkhead will be timber like the original. The replacement wall will be built slightly in front of the existing wall, no more than two feet from the original footprint. The Department of Natural Resources has indicated that the location is potential nesting ground for sea turtles. Therefore, it is appropriate to include a special condition in the permit imposing construction restrictions to protect this species. This project will provide additional recreational beach and will be of great benefit to the adjacent homeowners. This project will also protect a source of tax revenue for the county and help sustain property values for the DeBordieu Colony and the nearby area. For these reasons, I conclude that the replacement seawall will have both public and private benefit.

In considering erosion rates, I reiterate the findings above. Petitioner presented assertions of exacerbated erosion based on general shoreline principles. Young's testimony did not establish a strong familiarity with the specific factors affecting erosion and accretion at Debidue. Conversely, Respondent's witness has both strong technical knowledge and extensive experience with Debidue. He has conducted historical research into the island and has concluded that the erosion pattern on this particular portion of the beach is due to the closure of an earlier channel and is not attributable to the seawall. Weighing this evidence, I conclude that the benefits of

permitting this seawall reconstruction within the parameters set by the General Assembly far surpass any speculative concerns about the down-drift effect of the seawall. The completed project will protect homes, reinforce property values, add recreational beach, and improve the dune system. Therefore, exercising the discretion granted by the Legislature, I conclude that the seawall reconstruction should be permitted.

I acknowledge that this determination, favorable to the reconstruction of the existing bulkhead, may be an aberrance from the general policy of the General Assembly and state courts. The South Carolina Supreme Court has written that “simply because the State permits alterations in limited circumstances does not change the fact that altering tidelands remains the exception to the rule.” Kiawah Dev. Partners, II v. S.C. Dept. of Health & Env'tl. Control, 411 S.C. 16, 29, 766 S.E.2d 707, 715 (2014). This case represents such an exception. Respondent has demonstrated specific circumstances that support the rebuilding of the wall. The General Assembly has clearly dictated that this wall may be rebuilt. Taking into consideration all of the evidence presented and the applicable law, I find and conclude that the permit application should be approved with the conditions included in the June 11, 2015 permit issued by the Department.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Department's permit issued to Respondent, DBBO, LLC, for the reconstruction of the southernmost 1,800-foot section of the seawall at Debidue Beach is upheld.

AND IT IS SO ORDERED.



Deborah Brooks Durden, Judge
S.C. Administrative Law Court

August 23, 2017
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

August 23, 2017
Columbia, South Carolina

FILED

August 23, 2017

SC ADMIN. LAW COURT