

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Appellant Case No. 2014-000847

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SC Court of Appeals

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control Appellants,

vs.

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

APPELLANTS' PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, Appellants (the “Community Groups”) respectfully petition for rehearing and reconsideration of this Court’s October 18, 2017 Opinion (“the Opinion”) affirming the separate decisions of the Administrative Law Court (“ALC”). The Opinion upheld the ALC’s grant of summary judgment for lack of standing, imposition of sanctions, and denial of expanded discovery. The Opinion declined to reach the issue of whether the ALC erred in denying the Community Groups’ motion to vacate the Permits after the related federal permits were voided by the federal district court.

INTRODUCTION

The Court’s Opinion deserves reconsideration because it adds several new reversible errors to the erroneous decision affirmed below.

At base, the Opinion holds that Community Groups lack standing because their injury is both too general *and* too particularized. The Opinion finds that neighbors of a proposed large industrial facility may not contest pollution permits unlawfully granted for it if the facility’s impacts are widespread. It also finds that those neighbors may not contest unlawfully granted permits for the facility if their pollution impacts are too direct and acute. The result – that no affected party can challenge state-issued pollution permits for major polluting facilities sited adjacent to neighborhoods – is clearly erroneous and runs afoul of Article 22 of the South Carolina Constitution, which ensures due process for those affected by administrative decisions:

No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

While largely upholding the ALC decision, the Opinion provides new rationales and explanations for various holdings, and, in doing so, raises several issues *sua sponte* that were not

previously at issue before the ALC or this Court. The Opinion should be reconsidered for six primary reasons.

1. The Community Groups Have Standing to Challenge the Permits.

To show associational standing, the Community Groups must show that: (1) individual members would otherwise have standing to sue in their own right, (2) the interests at stake are germane to the organization’s purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Beaufort Realty Co. v. Beaufort Cnty.*, 346 S.C. 298 301, 551 S.E.2d 588, 589 (Ct. App. 2001) (citing *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977)). The Community Groups provided affidavits from numerous individual members, as well as numerous documents from SPA’s own files demonstrating that these requirements for associational standing are met and indeed surpassed. *E.g.*, R.002576–78 (Affidavit of Christina Dodd); R.002581–85 (Affidavit of Virginia Lane), R.002587–91 (Affidavit of Tommie Robertson), R.002593–97 (Affidavit of Stephen F. Gates); R.002599–2606 (Affidavit of Katherine Zimmerman); R.002643–52 (Declaration of Evan Thompson); R.002751–52 (Affidavit of Marty Morganello); Appellants’ Second Amended Initial Br. 30–37, 41–44; Appellant’s Final Reply Br. 5–13. In rejecting the Community Groups’ standing, the Opinion adopts some of the ALC’s errors and introduces wholly new ones.

A. Particularized Injuries to Individuals Support Associational Standing Even When Those Injuries Are Experienced by More than One Person.

The Opinion concludes that testimony establishing particularized adverse effects to the individual members from “pollution, traffic congestion, and the visual disruption of Charleston’s historic integrity and aesthetic beauty” were “only generalized grievances suffered by the public as a whole which are insufficient to establish standing.” Op. 9 (quoting *Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n*, 407 S.C. 67, 76 (2014)).

In fact, each of the individual members of the Community Groups that provided affidavits described concrete and particularized injuries that they would personally suffer. For example, Tommie Robertson testified to personal physical impacts from air pollution from the existing cruise terminal that would be exacerbated by construction and operation of a much larger terminal home-basing much larger polluting ships far closer to her home. Mrs. Robertson specifically testified to seeing “thick smoke move from the cruise ship toward [her] home,” such that “within seconds of breathing the emissions, [her] throat immediately began to hurt and [she] was forced to retreat indoors.” R.002589. She now refrains from opening her windows or using her home’s porch while cruise ships are at the existing terminal, and reasonably fears that her injuries will worsen if the new, much larger terminal is permitted and larger cruise ships – and their belching smokestacks – are moved to still closer, to within several hundred feet of her home. *Id*

Stephen Gates testified that he and the historic home that he owns have been directly affected by home-basing operations at the existing terminal, located about ten blocks from his domicile. He testified he found “heavier and more oily” soot deposited from the existing industrial cruise operation on his home, forcing him to scrub his home “more often and more vigorously” than ever before, and he reasonably fears that the much larger cruise terminal hosting much larger ships will result in more pollution fouling his home. R.002595–96. He testified that his daily life, including the “quiet walks and quick drives” that he previously enjoyed, have been significantly disrupted and degraded by existing cruise terminal operations, R.002595, while concentrated traffic in his neighborhood due to the Union Pier Terminal prevents him from accessing a nearby grocery store, instead forcing him to drive miles away to go get groceries. *Id*. Further, in light of the oily soot that quickly builds up on his property, Mr.

Gates testified that he had reasonable concerns regarding impacts to his personal health from air pollution from the new cruise terminal. R.002595. Mr. Gates also described how he reasonably fears all of these impacts will worsen if the new cruise terminal is permitted since the new terminal is engineered to handle larger cruise vessels and will lead to more frequent cruise ship calls. R.002594–96; *see* R.002438 (noting design objective for new terminal includes upgrades “necessary to support the resulting increases in passenger traffic loads”); R.002439 (anticipating home-basing a 3,500 passenger ship visiting twice a week); R.007493 (new terminal “designed to handle ships up to 3,500 passengers”).

Christina Dodd, another neighboring resident, testified that she also finds “oily soot” in and on her home, and that she is “obviously very concerned about that this residue from burned sulphur-heavy fuel is doing to my lungs and overall health, as I am breathing this pollution both inside and outside of my home.”¹ R.002577. Marty Morganello testified that he personally swims and kayaks in area waterways and that increased pollution levels associated with the larger cruise terminal would cause him to alter his recreational activities. R.002751–52. Virginia Lane’s testified via affidavit detailing individualized negative effects from existing cruise operations, which she reasonably fears would be made worse by a much larger terminal hosting much larger vessels and causing much more vehicular traffic in the cramped confines of

¹ The Community Groups provided specific evidence documenting health risks associated with air pollution from cruise ships, demonstrating the reasonableness of individual concerns regarding cruise ship emissions. *See* R.2608–13 (Claudia Copeland, Cong. Research Serv., RL32450, Cruise Ship Pollution: Background, Laws and Regulations, and Key Issues 6 (2008) (indicating that cruise ships rely on marine engines that burn high sulfur diesel fuel and produce large amounts of sulfur dioxide, nitrogen oxide, and particulate matter, in addition to carbon monoxide, carbon dioxide, and hydrocarbons)). For example, diesel exhaust is classified as a likely human carcinogen, and emissions from vessels contribute to adverse health effects associated with ambient concentrations of particulate matter and visibility, haze, and acid deposition. *Id.*; *see also* Control of Emissions from New Marine Compression-Ignition Engines at or Above 30 Liters per Cylinder, 75 Fed. Reg. 22,896, 22,903 (April 30, 2010) (describing the health and environmental impacts of marine diesel exhaust).

the lower Charleston peninsula. R002583–85. Mrs. Lane testified additionally to the degradation of her neighborhood’s historic and aesthetic character, which, as an architect working and living in the City’s historic center, injures her specifically and particularly. R.002583–84.

Each of these individual affiants has thus demonstrated injury from the cruise terminal “in a personal and individual way.” *Lujan*, 504 U.S. at 560 n.1. These individual injuries are grounded in the specific personal experiences and situations of the affiants, including residences in the small historic neighborhoods adjoining Union Pier, a geographically limited area. These injuries are not shared equally with the “general public,” or with residents in other Charleston neighborhoods.

The Opinion seems to take the view that because some of these injuries are shared by more than a handful of people, they are non-justiciable “generalized grievances.” Op. 9. That is clear error. “Standing has never required proof that the plaintiff is the *only* person injured by the defendant's conduct.” *Nw. Env'tl. Def. Ctr. v. Owens Corning Corp.*, 434 F. Supp. 2d 957, 965–66 (D. Or. 2006). While courts have denied standing “where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature – for example, harm to the common concern for obedience to law,” *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23-25, 118 S. Ct. 1777, 1785 (1998) (internal quotations and citations omitted), it is “the abstract nature of the harm – for example, injury to the interest in seeing that the law is obeyed – [which] deprives the case of the concrete specificity” required to establish standing. *Id.* But “where a harm is concrete, though widely shared, the Court has found ‘injury in fact.’” *Id.* (quoting *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449-50, 109 S. Ct. 2558, 2564–65 (1989)).

The Opinion’s reasoning implies the very opposite. It indicates that because impacts of a larger cruise terminal will be felt by more than a handful of people, the doors of the courthouse

must be closed to all. By extension, there could never be standing for any individual or citizen's group to challenge a permit for a large polluting project that impacts more than several people, be it a nuclear power plant or a toxic waste dump. This would be an absurd result that would provide the *most* standing for the *smallest* projects with the *least* amount of pollution. Indeed, under the Opinion, more people could challenge a corner store's liquor license application than could challenge an unlawful DHEC permit to spew toxins into a neighborhood's air and water. That is not the law, and the Court should grant rehearing and reconsideration to correct the Opinion's mistaken reasoning.

B. "Affected Persons" Need Not Prove Declining Future Property Values and Future Lost Business to Bring an Administrative Permit Challenge.

The Opinion holds that before South Carolina citizens can seek administrative review of an illegal DHEC pollution permit, they must produce "evidence of declining property values and business" attributable to the permit. Op. 9. But the permits at issue here, as with any DHEC environmental permit, are for *future* polluting activities. The Opinion thus requires persons seeking review to prove that their property or business has already declined due to future pollution enabled by a recently-issued permit. This is error on several levels.

As a practical matter, it will be difficult if not impossible for any property or business owner in South Carolina to "prove" – before any permitted activity has begun – that the activity has already resulted in "declining property values or business." This practical problem explains the legal one. In the Article III standing context (applied by the Court of Appeals here), the United States Supreme Court has squarely rejected the contention that "demonstrated proof of harm" to the environment" is needed to establish standing in environmental cases, finding that a plaintiff's "reasonable concern" of harm suffices. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 181, 120 S. Ct. 693, 704 (2000) (finding standing where

organization member who lived twenty miles from discharge facility and limited use of river due to reasonable concern “that the water contained harmful pollutants”).

By contrast, the Opinion’s approach erects not just a practical proof barrier to any citizens ever have standing, it further requires that a citizen – to even *seek* administrative review – must prove their merits case even before discovery is complete. That squarely conflicts with uniform caselaw holding just the opposite. As just one example, in *Pitt County v. Hotels.com L.P.*, 553 F.3d 308, 312 (4th Cir. 2009), the Fourth Circuit reversed the lower court noting that “the district court’s analysis improperly conflated the threshold standing inquiry with the merits of the County’s claim.” *Id.* A plaintiff need not prove the merits of the case in order to prove an injury-in-fact sufficient to establish standing. *Id.* (citing *Am. Library Ass’n v. FCC*, 401 F.3d 489, 493 (D.C. Cir. 2005)).

Even if evidence of decreased property value or business were required, South Carolina courts permit a property owner to “give his estimate of its value or the damage inflicted upon it even though he is not an expert.” *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 43-44, 691 S.E.2d 135, 146 (2010) (quoting *Barton v. Superior Motors, Inc.*, 309 S.C. 491, 494, 424 S.E.2d 524, 526 (Ct. App. 1992)); see also *Abercrombie v. Abercrombie*, 372 S.C. 643, 647, 643 S.E.2d 697, 699 (Ct. App. 2007) (recognizing general rule in South Carolina that a property owner is competent to offer testimony as to the value of his property). Given that property owners are permitted to offer testimony as evidence to support an award of monetary damages in a tort action, there is no basis for requiring a much more onerous showing establish the owner’s status as an “affected person” entitled to administrative review of an unlawful Governmental authorization of pollution. S.C. Code Ann. § 44-1-60.

Mr. Gates testified that severe traffic and soot accumulation at his historic property will increase with the proposed much larger terminal and larger vessels, and that this would negatively affect the value of his residential property. R.002594. Ms. Robertson testified that development of a large cruise terminal immediately adjacent to her home will negatively affect her investment. R.002589–90. As for business impacts, Mrs. Lane testified directly to complaints from her clients, contractors, and others regarding difficulties accessing her business when cruise ships at the existing terminal, and her reasonable concern that these business barriers would increase with a new terminal hosting larger vessels with more passengers using more vehicles. R.002584. *See* R.007461 (SPA stating that indicating traffic counts at existing terminal are “considerably lower” than projected levels at new terminal).

This evidence is more than sufficient to show that these property-owning and business-operating South Carolinians “affected persons” the General Assembly intended to be able to invoke administrative review of errant DHEC pollution permits. There is no legal or practical basis to require further evidence of future “declining property values and business” attributed to granting the permit. Op. 9. The import of the Opinion is to strip property owners of existing constitutional rights to protect their property from unlawful administrative permits by the State without an opportunity to be heard, independent adjudication, and judicial review.²

C. An Affiant’s Particularized Injury is No Barrier to Associational Standing.

The Opinion acknowledges that Tommie Robertson’s standing affidavit states that “(1) smoke emitted from the existing passenger terminal already physically impacts her to the extent

² SC Const. Art I, § 22:

No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

that she must retreat indoors when cruise ships are in town and (2) the proposed new terminal, which would be closer to her home than the existing terminal, would only increase these adverse impacts.” Op. 9. Rather than recognize this as particularized harm that shows standing, however, the Opinion postulates that this testimony defeats associational standing on the basis that the Community Groups “have not explained how the claims they have asserted or the relief they have requested can be adjudicated with the affiant’s participation in the lawsuit.” Op. 10.

In fact, the Community Groups squarely asserted and explained that the participation of the individual affiants is not required for the proper adjudication of the claims they have brought nor the relief they have sought. *See* R.002356–61 (CG Resp. to SPA Mot. Sum. J.) (reciting elements of associational standing and explaining that members participation not needed in substantive litigation); Appellants’ Final Reply Br. 12–13 (explaining that “where the organization seeks some other form of prospective relief than damages, like suits that seek to resolve a question of law, courts will find associational standing based on the standing of one member because the requested remedy – resolution of an issue of law – will benefit both the injured member and other injured members alike even though they don’t all participate” (internal quotations and citations omitted)). As recognized in the first sentence of the Opinion, this action is an administrative challenge to the validity of several DHEC authorizations given for a proposed cruise terminal. The claims asserted concern the unlawfulness of DHEC’s actions in issuing (and failing to issue) specific authorizations. *See* R.000237 (Community Groups prehearing statement filed with ALC) (identifying central issue as “whether DHEC properly applied the Critical Area Regulations, the Coastal Zone Management Act and Coastal Management Program in issuing a permit to construct a new cruise ship terminal by installing pilings in the critical area; building two covered staging areas and making structural changes to a

building located over the critical area”). For example, the Community Groups contend DHEC’s authorizations were unlawful because they did not include a Water Quality Certificate as directed by Section 401 of the federal Clean Water Act. *See* 33 U.S.C. § 3401. The requested remedy is vacatur of DHEC’s authorization. *See* R.000237 (Community Groups prehearing statement filed with ALC). No party has ever contended that adjudication of the *claims* or *relief* in this case requires participation of the Community Groups’ members.

Further, it is self-evident that claims concerning the validity of DHEC authorizations – i.e., whether they complied with applicable law – and the appropriate relief could be adjudicated without the participation of Mrs. Robertson. While her testimony does indeed bolster the importance of the Community Groups’ claim that DHEC’s authorization unlawfully failed to include air pollution controls, no party has claimed, or could claim, that her participation is *required* to show that the authorizations improperly failed to consider those options. The Community Groups are not seeking monetary damages in compensation for the injuries to Mrs. Robertson and the other individuals, but instead “prospective relief” in the form of setting aside unlawful DHEC authorizations. Appellants’ Reply Br. 13.

The Opinion’s citations to *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333 (1977), and *Warth v. Seldin*, 422 U.S. 490 (1975), only underscore the error of treating Mrs. Robertson’s testimony as a factor weighing against associational standing. While these cases establish that associational standing generally requires that “neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit,” *Warth*, 422 U.S. at 511, the decisions themselves show why, in the present case, Mrs. Robertson’s affidavit supports associated standing and does not defeat it.

In *Hunt*, the Washington State Apple Advertising Commission was found to have associational standing to challenge a North Carolina statute based on business impacts to individual apple growers in Washington State. 432 U.S. at 343-44. The complaint alleged harm to individual Washington apple growers and dealers – as needed to demonstrate injury-in-fact – but the merits claim was that the challenged statute violated the Commerce Clause. Further, the requested relief was not damages, but a declaratory judgment of unconstitutionality and an injunction against enforcement of the North Carolina statute. Therefore, beyond the need to demonstrate concrete and particularized injury to individual growers to establish associational standing, the participation of the individual members was not required, and the court affirmed the Commission’s associational standing. *Id.* at 345. Analogous facts require the same holding here.

In *Warth* by contrast, the Home Builders Association was denied associational standing because the association sought “relief in *damages* for alleged injuries to its members.” 422 U.S. at 515 (emphasis added). To establish damages, the Court found that “both the fact and extent of injury would require individualized proof,” thereby necessitating participation of the injured individual members. *Id.* at 515. The critical factor in *Warth* weighing against a finding of associational standing was that because the complaint sought monetary damages based on injury to individual members, the injured individuals would need to participate in the case. Hence, the Supreme Court concluded that the association had “no standing to *claim damages* on [the individual member’s] behalf.” *Id.* at 516 (emphasis added). As the Community Groups have previously explained, this lawsuit is not seeking economic damages based on the injuries to the individual members, but rather challenges the validity of the Permits with a remedy of vacatur or remand to OCRM for further analysis. Beyond the standing inquiry, there is no need for further participation of the individual members in the litigation.

2. The Community Groups' Article III Standing Was "Actually Litigated" and Determined by a Federal Court.

The Opinion recognizes that the ALC erred in failing to address the Community Groups' argument that the federal court "decided the issue of their standing to challenge *any* government permit issued in connection with SPA's plan" to construct a new expanded cruise terminal. Op. 10 n.11 (emphasis added). As the Opinion also recognizes, the proper question is whether an Article III court's holding that the Community Groups had Article III standing to challenge permits for SPA's cruise terminal acts as a bar to the ALC's subsequent holding that these groups did not have Article III standing to challenge permits for the same terminal. The Opinion presents two new rationales said to defeat collateral estoppel.

The Opinion contends, first, that no evidence shows that the issue of the Community Groups' standing was "actually litigated" in the federal proceeding. Op. 11. In fact, the record contains overwhelming evidence that the elements of Article III standing were directly litigated in federal court after SPA moved for summary judgment for lack of Article III standing. *See* R.002523–25 (Memorandum of State Ports Authority in Support of Motion for Summary Judgment, *Pres. Soc'y of Charleston v. U.S. Army Corps of Eng'rs*, No. 2:12-2942-RMG, (D.S.C. July 15, 2013) ("SPA MSJ – Federal") (arguing that the Community Groups failed to meet the three elements required for standing: injury-in-fact, causation, and redressability)); R.002540–42 (State Ports Authority Reply to Plaintiffs' Response to Defendants' Motions for Summary Judgment, *Pres. Soc'y of Charleston*, No. 2:12-2942-RMG (D.S.C. Aug. 5, 2013) (SPA arguments against redressability of Community Groups' injuries)). SPA's federal court briefs were provided to the ALC by the Community Groups and included in the Record on Appeal in support of the Community Groups' assertion that Article III standing was indeed litigated in an Article III court, and resolved against SPA.

The Opinion nevertheless posits that this issue was not “actually litigated” (for estoppel purposes) under the theory that SPA made a more limited standing argument in federal court than it did before the ALC. Op. 10 n.12 (surmising that SPA “limited its standing analysis” to the effects installation of piling clusters).

But “once an *issue* is raised and determined, it is the entire *issue* that is precluded, not just the particular arguments raised in support of it in the first case.” *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992) (emphasis in original). Thus, as a matter of law, where a party *could have* made arguments on an issue that was actually litigated in the earlier proceeding but failed to make such argument, collateral estoppel nevertheless applies, and the party is barred from relitigating the same issue using the new argument. *Securities Indus. Ass'n v. Board of Governors*, 900 F.2d 360, 364 (D.C. Cir. 1990) (plaintiff may not raise new argument in second proceeding even though it was never made in first proceeding; so long as argument could have been made, it is precluded). Were it otherwise, the doctrine would be useless to prevent infinite bites at the same apple by a losing litigant, and fail to prevent the needless waste of judicial and litigant resources.

Even if collateral estoppel turned on whether the same *arguments* on an issue were litigated before, SPA did, in fact, make essentially the same standing argument in the federal case as it did in the ALC. For example, in the federal case, SPA claimed (incorrectly) that the affiant members could not show injury-in-fact “because the injuries alleged pertain to existing cruise operations generally and not the permitted activity to install five cluster piles.” R.002524–25 (SPA MSJ – Federal). SPA made the same incorrect claim in the ALC, contending that the “injuries alleged pertain to cruise operations generally, rather than the permitted activity.” R.001127 (Port Authority’s Motion for Summary Judgment for Lack of Standing) (“SPA MSJ –

State”) (emphasis in original). SPA likewise argued (incorrectly) in federal court that the Community Groups’ “alleged injuries impact all citizens and visitors to Charleston and are not unique to Plaintiffs’ members,” R.002525 (SPA MSJ – Federal), while in the ALC it contended likewise, i.e., that Community Groups “fail[ed] to articulate a harm any different from what may be suffered by the public generally.” R.001129–30 (SPA MSJ – State). Finally, in both the federal case and in the state proceeding, SPA (incorrectly) claimed that the Community Groups had failed to show that approval of the SPA’s permit application will cause the cruise business to increase at Union Pier Terminal, and that the injuries were therefore not redressable because cruise ship activities would continue at the existing cruise terminal if the federal permits were denied.³

In summary, not only was the same issue actually litigated in the federal forum, the same arguments concerning it were presented, litigated, and resolved against SPA. At base, in rejecting SPA’s summary judgment motion contending that the Community Groups lacked Article III standing to challenge the federal permits, an Article III court actually and necessarily decided that the Community Groups have Article III standing. That determination is binding in any subsequent state tribunal where the Article III standing of the Community Groups to challenge permits for the cruise terminal project is litigated, and the ALC’s determination was precluded. The ALC erred, and the Opinion errs, in allowing relitigation of the same issue and entering summary judgment against Community Groups for lack of standing.

³ Compare R.0025225 (SPA MSJ – Federal) (arguing against redressability because “SPA will continue to utilize the existing passenger terminal at Building 325 and to provide berthing for cruise ships as it has done for the past forty years, [and] the embarkation and debarkation of cruise passengers will be on-going regardless of whether the SPA is able to fulfill its plans of moving the terminal”) with R.001154-55 (SPA MSJ – State) (“[T]he ‘injuries’ alleged by [the Community Groups] would not be redressed even if the challenged Permit were denied, because cruise ships and other marine container vessels call on Charleston today and will continue to call on UPT under its current configuration going forward.”).

The Opinion also introduces a second error by indicating, *sua sponte*, that collateral estoppel should not apply here even though the elements *are* met, for reasons of unfairness or injustice. *See* Op. 10 (quoting *Carolina Renewal, Inc. v. SCDOT*, 385 S.C. 550, 555, 684 S.E.2d 779, 782 (Ct. App. 2009)).

The Opinion does not mention, much less explain, what “unfairness or injustice” would result from application of collateral estoppel or “public policy” that would justify ignoring it. SPA never invoked this exception or presented grounds for it in its briefs. Nevertheless, disregarding collateral estoppel here would be an arbitrary slap in the face to South Carolina citizens who are attempting to protect themselves, their property, and their family from illegal government action that will pollute and degrade their homes and health. There is no “unfairness or injustice” worked by giving South Carolinians the right to be considered “affected persons” entitled to an administrative process whereby they can contest the legality of government action that impacts them directly. The statute gives them that right, and the Constitution of South Carolina enshrines it. Stripping it from them here works no fairness or justice at all, and is contrary to the public policy of giving citizens the right to petition the State to correct what they contend – and seek to prove – is an unlawful and arbitrary government approval of a needlessly damaging facility in close proximity to densely packed homes and businesses.

Certainly the desire of the quasi-public ports authority to build a bigger leisure cruise terminal is not sufficient countervailing “public policy” to justify erasure of the right of citizens to insist on legal permits for a state-owned facility. In fact, the “best interests” of the Ports Authority are statutorily defined to include “consideration given to diminish or mitigate any negative effect port operations or expansion may have upon the *environment . . . and quality of life* of residents in communities located near existing or proposed port facilities.” S.C. Code

Ann. § 54-3-70(A)(3)(D) (emphasis added). Thus, by definition it is in the “best interests” of SPA to mitigate negative impacts on the environment and citizens, which the Community Groups contend SPA and DHEC failed to do. Preserving the right of citizens to challenge unlawful DHEC permits for a large polluting facility next to neighborhoods is not just good public policy, but also vindicates SPA’s purposes as the legislature has defined them.

3. Statutory Standing for “[A]ffected persons” in Section 44-1-60 is Broader than the Three-Part Test for Constitutional Standing Set Forth in *Lujan*.

The Opinion begins its analysis of statutory standing by agreeing that the term “affected persons” is not defined by statute and should be afforded its usual and accustomed meaning. Op. 8. However, the Opinion then fails to inquire into the usual and accustomed meaning of those words. It does not look to a dictionary, for example, or cases that have construed the term “affected” generally. Instead the Opinion string cites a number of statutes other than the statute at issue in this case, as well as prior court decisions that concern other statutes. For example, the Opinion cites S.C. Code Ann. Regs. 30-6A (2011), a regulation which specifies that only those “affected persons with standing” may contest a permit, presumably, for the proposition that legislature intended “affected persons” to implicitly include the elements of federal Article III standing. But that reading makes the explicit term “with standing” meaningless, and violates the canon that each word in a law must be given meaning, as well as the canon that where a term is included in one place, but not in another, that absence must be given meaning. *See Matter of Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (citing 82 C.J.S. *Statutes* § 346) (“A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous....”); *McCollum v. Snipes*, 213 S.C. 254, 265, 49 S.E.2d 12, 16 (1948) (“Where there is no ambiguity, words must not be added to or taken from the statute.”); *cf. Bates v. United States*, 522 U.S. 23, 29–30, 118 S. Ct. 285, 290 (1997) (“Where Congress includes

particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”).

The statute in question in this case, S.C. Code Ann. § 44-1-60, provides for uniform administrative review of DHEC decisions, with specified parties given rights to participate in that process. After an initial DHEC staff permitting decision, notice must be sent to the permit applicants and “affected persons” who request notice. *Id.* § 44-1-60(E)(1). An applicant or “affected person” then has 15 days to request review by DHEC’s board. *Id.* § 44-1-60(E)(2). An “affected person” can seek further administrative review via a contested case before the ALC. *Id.* § 44-1-60 (G). Thus, the legislature has given “affected persons” a right to invoke the ALC’s administrative review. Where such statutory standing exists, there is no need to inquire whether Article III (“constitutional”) standing also exists, or, for that matter, public importance standing. *ATC South Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) (“Standing may be acquired: (1) by statute; (2) through the rubric of ‘constitutional standing;’ or (3) under the ‘public importance’ exception.”).

Contrary to the Court’s erroneous interpretation, *Smiley* does not hold that the legislature intended the term “affected person” in S.C. Code § 44-1-60 to require that a constitutional test be overlaid over the plain meaning of the term. In fact, *Smiley* did not concern S.C. Code § 44-1-60 at all. *See Smiley v. S.C. Dep’t of Health & Env’tl. Ctrl.*, 374 S.C. 326, 649 S.E.2d 31 (2007). Notably, when the Legislature subsequently enacted S.C. Code § 44-1-60, it did not include the term “with standing,” indicating that it did not intend to require that citizens of South Carolina seeking administrative review of unlawful DHEC permits that manifestly impact them also demonstrate federal Article III standing. *See Appellants’ Final Reply Br.* 3. The Opinion’s

construction of the South Carolina statutory term “affected person” to include multiple unstated elements of federal Article III standing doctrine is clear, reversible error.

4. The Community Groups Have Public Importance Standing.

In denying the Community Groups’ claim of public importance standing, the Court erroneously held that the Groups failed to provide “an explanation as to why resolution of the current controversy is necessary for future guidance. . . .” Op. 10. In fact, the Community Groups explained that “[t]his is a highly controversial and widely opposed public project that ‘transcend[s] a purely private matter,’ and ensuring that its impacts are minimized according to the law is of ‘wide concern.’” Appellants’ Final Reply Br., at 14 (quoting *S.C. Pub. Interest Found.*, 403 S.C. 640, 645-46, 744 S.E2d 521, 524 (2013)). More than a half-dozen different citizen groups representing thousands of citizens have brought this challenge to a massive cruise terminal in the heart of downtown Charleston. Further, this litigation challenges state-issued Permits for a public project that will involve a \$35 million expenditure of public funds by a state-owned entity, SPA. *Id.* As previously explained, future guidance is thus needed to ensure that significant amounts of public dollars are not spent without any opportunity for an evaluation of whether this publicly funded project meets the requirements of state law.

More broadly, future guidance is needed to clarify the extent of environmental review and analysis that DHEC is required to undertake in issuing Section 401 Water Quality Certifications, Critical Area Permits and Coastal Zone Consistency Certifications, an issue of widespread and ongoing relevance for state agencies, property owners, and citizens in South Carolina.

The Court denies public importance standing despite also holding the affiants have only suffered “generalized grievances suffered by the public as a whole.” Op. 9. If the impacts of the cruise terminal are so widely shared as to adversely affect the quality of life of “the public as a

whole” because of pollution, traffic congestion and visual disruption, then the matter is of sufficient public importance to support public importance standing.

5. Sanctions Are Unwarranted Against Litigants Who Contended that the Statutory Term “Must” Denotes a Mandatory, Not Discretionary Duty.

The ALC plainly abused its discretion by imposing sanctions upon the Community Groups for interpreting statutory language requiring that the DHEC Board “must” hold a Review Conference within sixty days of a request set forth a mandatory, not discretionary, duty to hold such a conference in such timeframe when requested. *See* S.C. Code Ann. § 44-1-60(F) (“No later than sixty calendar days after the receipt of a request for final review, a *final review conference must be conducted by the board*, its designee, or a committee of three members of the board appointed by the chair”) (emphasis added). The Opinion recognizes that the Community Groups “correctly argue” that the statute “provides that the DHEC Board ‘must’ conduct a final review conference ‘[n]o later than sixty calendar days after the date of receipt of a request for final review.’” Op 12 (quoting S.C. Code 44-1-60(F)). However, it faults the Community Groups for “disregard[ing]” additional language “indicating” that ALC review is available if the Board “declines” to hold said conference.

The Community Groups did not disregard, and have never disregarded, the additional language. As set forth in our brief, the provisions read in concert indicate that the Board “must” have a conference, but also provides an avenue for redress if the Board “declines” its duty to hold the conference within the allotted 60 days. Appellants’ Second Amended Initial Br. 58–59. We showed, through reference to the dictionary, that the undefined term “declines” includes a failure to undertake a mandatory duty, *id.*, and no party or court has refuted – or even attempted to refute – that demonstration.

The statute, accordingly, can be read as giving the Board a mandatory duty to hold a conference within 60 days, and providing that, should the Board fail to undertake such mandatory duty, jurisdiction lies in the ALC.

Since that is a permissible reading of the statute, it cannot be sanctionable for a party to suggest that the ALC has the power to remand a matter to the Board. The Opinion's claim that Community Groups "disregard" the rest of the statute's additional language is incorrect.

The Opinion also baselessly faults the Community Groups for their "apparent disregard of a settled rule of statutory construction." Op. 12. As the Community Groups have pointed out, however, the question of whether the term "must" in Section 44-1-60(F) sets forth a mandatory or discretionary duty has never been litigated, and does not represent an area of settled statutory construction. In effect, the Opinion endorses sanctioning a party for putting forth a plausible statutory reading – contending the term "must" is mandatory – because lawyers can, and one court did, take the view that this reading is impermissible. This puts counsel in an untenable position. On the one hand, they must zealously represent their client, which includes good faith extensions of the law. *See* SCRPC 3.1 (indicating that the assertion of "a good faith argument for an extension, modification or reversal of existing law" is not "frivolous"). On the other hand, they must (apparently) avoid the ire of judges who side with opposing attorneys on an unsettled question of statutory interpretation. The sanctions order was an extreme and arbitrary abuse of discretion. It should be reversed.

6. The ALC Abused Its Discretion in Prematurely Closing Discovery.

The Opinion does not dispute that the ALC and all parties continued proceeded in this case if discovery would continue for months after the 90-day period following assignment. Op. 11. In fact, it is uncontroverted that discovery did so proceed, which is indisputably standard practice in these types of administrative proceedings. *See* Appellants' Second Amended Initial

Br. 52–53. Since the ALC and all parties were proceeding in good faith along an agreed-upon course of discovery, there was no practical reason for the Community Groups to file a formal motion to expand discovery as is freely allowed under the ALC Rules. SCALC R. 21.

Since SPA had itself suggested a discovery schedule that went beyond the 90-day period and propounded discovery beyond that period, the Community Groups were understandably surprised at SPA’s abrupt change in position and claim that discovery had closed months earlier pursuant to a deadline that it (and the ALC) had treated as not in effect. Indeed, the ALC had previously acknowledged “the parties were still conducting discovery” long after the 90-day purported deadline had passed. Appellants’ Second Amended Initial Br. 51 (citing December 2, 2013 order). Since SPA had itself requested that discovery be extended for nine months past the purported 90 day deadline, *see* Appellants’ Second Amended Initial Br. 50–51, the Opinion’s finding of no “consent” to discovery past the 90-day deadline is wrong. SPA did not just consent; it proposed an extension beyond 90 days and then availed itself of that extension.

Given the usual course of discovery practice in the ALC⁴ and the actual ongoing discovery in this case, it was reasonable for the Community Groups to proceed with discovery in the absence of a formal consent motion expanding discovery. Once SPA abruptly and retroactively changed its position in response to the Community Groups’ request for depositions, the Community Groups promptly sought a formal order expanding discovery. The Community Groups met the “good cause” standard by establishing (1) a particularized harm based on the inability to conduct the requested depositions, and (2) that depositions would allow access to relevant information and allow for the presentation of admissible evidence. The ALC abused its

⁴ The Community Groups submitted testimony from an experienced practitioner before the ALC demonstrated that the 90-day deadline is rarely observed in environmental permitting cases. *See* Appellants’ Second Amended Initial Br. 52–53.

discretion in denying the motion to expand discovery, and the Opinion errs in affirming the ALC's decision.

CONCLUSION

For the foregoing reasons, the Community Groups respectfully request that their petition for rehearing and reconsideration be allowed and that the Court reverse the ALC's decisions granting summary judgment on the basis of standing, denying the motion to expand discovery, and granting sanctions against the Community Groups. Further, the Court should reverse the ALC's decision to deny the Community Groups' motion to vacate the Permits.

Respectfully submitted,



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Attorneys for the Appellants

Charleston, SC
November 1, 2017

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Appellant Case No. 2014-000847

RECEIVED

NOV 02 2017

SC Court of Appeals

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control..... Appellants,

vs.

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

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2017, I caused to be served the foregoing *Petition for Rehearing* on all counsel of record by placing copies of same in the U.S. Mail addressed to:

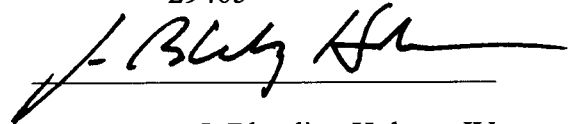
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November 1, 2017

VIA U.P.S. – PRIORITY OVERNIGHT

The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RECEIVED
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SC Court of Appeals

Re: Preservation Society of Charleston v. SCDHEC
Appellate Case No. 2014-000847

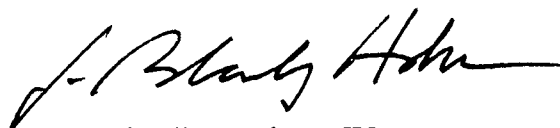
Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of Appellants' Petition for Rehearing and Proof of Service in the above-referenced matter. Also enclosed is a check for \$25.00 to cover the associated filing fee.

Please return a file-stamped copy to our office in the enclosed self-addressed, stamped envelope.

If you have any questions, please do not hesitate to contact me at 843-720-5270 or bholman@selcsc.org. Thank you for your assistance with this matter.

Sincerely,



J. Blanding Holman IV

JBH/arp
Enclosures

cc: All Counsel of Record