

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**  
DEC 18 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.

**REPLY TO RETURN TO PETITION FOR REHEARING**

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The Court's Opinion deserves reconsideration because it overlooks and misapprehends several critical points raised by the Community Groups, and introduces new errors to the erroneous decision below. SPA's Return does nothing to address the central issues raised in the Community Groups' Petition for Reconsideration.

**I. Uncontroverted evidence shows that existing injuries to members of the Community Groups from existing cruise operations will be exacerbated by the larger cruise terminal that DHEC permitted.**

The Community Groups' affidavits detail existing concrete and particularized injuries to the groups' members caused by current cruise ship operations. The affidavits and additional record information also demonstrate that these injuries would be *exacerbated* by construction and operation of the much larger proposed new cruise terminal.

As demonstrated in our Petition, these affidavits and other proof more than suffice to show concrete injury of the type needed to qualify for "affected person" status entitled to invoke administrative review of DHEC's unlawful authorizations. The Opinion, however, gives no credit to the evidence demonstrating increased harm to the recreational, aesthetic, property, and personal interests of the affiant members, injuries directly caused by the challenged permits. That was error. In its Return, SPA fails to offer any grounds to justify or correct the Opinion's holdings, instead just repeating conclusory statements that nowhere actually engage the facts of this case.

For example, SPA argues that Tommy Robinson's affidavit "conveys nothing more than general grievances that allegedly exist today as a result of *current* operations, but have no established connection to a future cruise terminal or cruise ships...." SPA Ret. at 3 (emphasis in original). In fact, Mrs. Robinson testified not just to current injuries, including seeing "thick smoke move from the cruise ship toward [her] home, such that "within seconds of breathing the emissions, [her] throat began to hurt and [she] was forced to retreat indoors," R.002589, but also

specifically to her reasonable fear and concern that a new cruise ship terminal “closer to [her] home” with “larger and more frequent ships” will “significantly increase[]” the adverse effects she already experiences. R.002589. In other words, she testified that not only has her use and enjoyment of her home and property been impacted by current cruise ship operations, such “interference with use and enjoyment of [her] property *will be increased if SPA is allowed to construct the new cruise ship terminal as permitted by DHEC starting with the pilings.*” R.02590 (emphasis added). This is injury-in-fact directly traceable to DHEC’s issuance of the challenged permit. *See Friends of the Earth v. Laidlaw Env’tl. Svcs.*, 528 U.S. 167, 180 (2000) (requiring injury to be “fairly traceable” to defendant’s action).

So too with the other affiant members of the Community Groups. They have already suffered injuries as a result of current cruise ship operations, but they are also reasonably concerned that a larger terminal bringing bigger ships, larger diesel engines, and much more traffic will worsen their injuries. Because that expansion and intensification is attributable to the challenged DHEC permits, the exacerbation of existing injuries constitutes a cognizable injury-in-fact sufficient to merit standing. *See* R.002594–96 (Affidavit of Stephen Gates, detailing reasonable concern that new cruise terminal will result in more severe traffic congestion and additional pollution deposited on his home close to the new terminal); R.002577–78 (Affidavit of Christina Dodd, testifying that challenged permit “will only make worse” cruise-related air pollution and soot deposition, traffic congestion, and negative visual impacts on her home in Ansonborough, which is adjacent to the proposed terminal); R. 002583–85 (Affidavit of Virginia Lane, testifying that new expanded terminal will worsen traffic congestion proximate to her downtown home and business, degrade Charleston’s historic integrity, and reduce property values); R.002752 (Affidavit of M. Morganello, testifying that “larger and more frequent cruise

ships” will “exacerbate the dumping of contaminants” into local waters that he routinely uses for recreation).

These are specific facts in evidence, offered by persons with first-hand knowledge and experience, and they show particularized harm from the proposed project. SPA’s attempts to give them conclusory labels does not remedy the Opinion’s error in entirely discounting their evidentiary value, or the additional evidence found in the record showing that these property owners and business people have a reasonable concern that a much larger terminal home basing much larger vessels spewing more air and water pollution and causing hundreds of more car trips a day will injure them.

**II. The injuries to the members of the Community Groups are germane to the organizational purposes of these associations.**

As shown in the Petition, the Opinion errs in holding that the Community Groups’ overwhelming demonstration of particularized injury *undercuts* associational standing. The Opinion clearly errs in finding that these demonstrated injuries are unrelated to the purposes of the Community Groups.

SPA’s Return does nothing to remedy the error. While SPA half-heartedly asserts that Tommie Robertson’s “personal injuries [] do not assist Appellants in establishing standing for a matter germane to their organizational purposes,” Ret. at 9, it tellingly fails to explain what those purposes are, or how the demonstrated cruise-related injuries are not germane to them. In reality, Mrs. Robertson’s injuries – like those of the other individual affiants – are directly relevant to the organizational purposes of the Coastal Conservation League and Charleston Communities for Cruise Control (C4). Air pollution generated by cruise ships has impacted Mrs. Robertson’s daily activities and overall quality of life, injured her throat, and made her reasonably concerned about other health consequences of breathing noxious smoke; unsurprisingly, and reasonably,

she is concerned that these injuries will worsen due to a much larger cruise terminal home-basing much larger and more frequent cruise ships *closer to her home*. Protecting folks like Mrs. Robertson from this type of pollution-related harm is central to the Coastal Conservation League's mission, which specifically includes "enhanc[ing] health and the quality of life in our communities" and "protect[ing] the natural environment." R.002600. Further, the organization "seeks to reduce all air pollution from and caused by cruise operations on behalf of itself and its members." 002604. C4's "primary purpose" is "finding a more appropriate location for cruise operations and establishing legally binding limitations on those operations." R.002588. Thus, Ms. Robertson's cruise-ship related injuries are also directly pertinent to the organizational mission of C4.

Members of the other Community Groups similarly have injuries directly related to their respective organizational missions. *See* R.00259–96 (Affidavit of Stephen Gates, impacts on quality of life, traffic congestion, and soot deposition on his historic home in the Charlestowne Neighborhood directly related to organizational mission of Charlestowne Neighborhood Association, which promotes the "well-being of the historic neighborhood" where he lives); R. 002583–85 (Affidavit of Virginia Lane, worsening traffic congestion, a decline in Charleston's architectural integrity and historic character, and falling property values, directly related to mission of the Historic Charleston Foundation, which is "to preserve and protect the historical, architectural and material culture that make up Charleston's rich and irreplaceable heritage;" and the Preservation Society of Charleston, whose mission is to "protect the material and cultural heritage of Charleston" using "whatever steps may be necessary" to prevent the destruction or degradation of Charleston's uniquely well-preserved historic resources, R.002644), R.002752 (Affidavit of M. Morganello, impacts on water quality and waterborne recreational activities

directly related to the mission of Surfrider, an organization dedicated to the protection of the world's oceans, beaches, and waves); R.002577–78 (Affidavit of Christina Dodd, air pollution and soot deposition, traffic congestion, and negative visual impacts on her historic home and neighborhood directly related to respective organizational missions of the Historic Ansonborough Neighborhood Association, created to address “matters of importance to this historic residential neighborhood,” R.002356, the Preservation Society of Charleston, whose mission is to “protect the material and cultural heritage of Charleston,” R.002644, and C4, whose “primary purpose” is “finding a more appropriate location for cruise operations and establishing legally binding limitations on those operations,” R.002588.).

**III. Members of the Community Groups need not participate in the litigation beyond the standing inquiry.**

The Petition demonstrates that, in showing associational standing, the direct participation of the individual members in this litigation is *not* required:

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.” *Id.* (emphasis added).<sup>1</sup>

That said, the Community Groups have never asserted that they can establish associational *standing* without the participation of the individual members, as SPA’s Return implies. By definition, associational standing is representative, requiring the participation of individual members to establish individual standing for the organization. *See Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (U.S. 1977) (requiring an organization’s members to “otherwise have standing to sue in their own right” as element of

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<sup>1</sup> SPA’s fevered attempt to cast an obvious scrivener’s error as a critical misstatement, Ret. at 7, befits a party with nothing to say on the merits. As explained above, the Petitioners have consistently, and correctly, maintained that the merits of this case can be resolved *without* extensive participation of the Community Groups’ members.

associational standing). Thus, the Community Groups have offered affidavits from individual members showing they have standing “in their own right,” as an element of associational standing.

SPA attempts to conflate participation by individual members in establishing standing with participation in adjudicating the substantive claims or relief in the litigation. Ret. 7–8. The standing affidavits could not be clearer in being directed towards showing standing. SPA’s attempt to pretend these were filed as evidence for adjudicating the *merits* is baseless.

Also baseless is SPA’s attempt to use Community Groups’ statement that “testimony” would be used to support their merits case as a concession that the Community Groups would be relying solely on testimony *by the individual affiant members* in proving their merits case. To the contrary, such testimony could come from a variety of sources, including experts, DHEC officials, and indeed the agents and employees of SPA itself, which has misleadingly claimed that its new \$35 million terminal will change nothing at all with regards to SPA’s cruise operations, when in fact materials from its own files show otherwise.<sup>2</sup>

SPA attempts to twist our assertion that “landowners *can* testify as to property values” into an acknowledgment of “the *need* for their individual members’ testimony and participation” in the litigation. Ret. at 8 (emphasis added). But again, this evidence was submitted in support of standing, and SPA apparently has no response to our showing that landowners can indeed testify as to their property values, as these affiants did in expressing their reasonable fears that the proposed much larger cruise terminal would reduce them. That fact is undisputed. As discussed above, Community Groups’ *merits* challenge to the DHEC permit does not rest on “individualized proof” of harm to these particular members, *Hunt*, 432 U.S. at 344, and beyond

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<sup>2</sup> SPA desperately seeks to avoid having to make such testimony – which is why it sought the ALC’s retroactive closure of discovery before depositions could commence.

the standing inquiry, there is no basis for believing that participation of the individual members would be required in the litigation to resolve whether DHEC's authorizations were lawful or not.

**IV. SPA's assertion that no one can have standing to challenge permits for an unbuilt facility is wrong.**

To make the threshold showing of standing, SPA demands that the Community Groups provide "actual evidence" of injuries from an unbuilt facility, deeming "speculative" any allegations of harm which has not yet occurred. Ret. at 6. Such a standard would raise an impossible bar for any plaintiff challenging a permit needed for new development, and is not the law.

While SPA contends that this Court rejected application of the U.S. Supreme Court's *Laidlaw* standing test, 528 U.S. 167, "when claimed harm allegedly will occur in the future," Ret. at 6, in fact this Court merely found a lack of standing in *Beaufort Realty* where the plaintiffs had shown "only the *potential* for future harm," as opposed to the likelihood of such harm. *Beaufort Realty Co. v. Beaufort Cty.*, 346 S.C. 298, 303 (Ct. App. 2001) (emphasis added). *Beaufort Realty* affirmed that "actual or imminent" harm qualifies for standing under Article III, and that standard is easily met here. Construction of a new cruise terminal will increase in the size and frequency of cruise ships docking in Charleston, increasing pollution, traffic, and historic degradation in a small, concentrated area. Forcing neighboring property owners to wait until *after* the facility has been constructed and is operational before they may challenge the unlawful authorizations for the project would in fact guarantee that no one could challenge any DHEC permit anywhere for any project, since challenges must typically be filed *within 15 days of issuance*. S.C. Code Ann. 66-1-60.

**V. The Opinion ignores clear evidence and SPA admissions demonstrating that the challenged permits will lead to an expansion and intensification of cruise ship operations in Charleston.**

The Opinion seems to embrace the ALC's erroneous finding that the Community Groups failed to provide "evidence conclusively demonstrating (1) cruise activities will increase if the permit is granted" and (2) "reliable expert testimony" regarding the impacts of increased cruise activities. R.000085. This is error on several levels. The ALC's invention and application of a "conclusive evidence" standard for a threshold standing determination has no basis in law and is reversible error. Second, the holding completely overlooks record evidence demonstrating, overwhelmingly, that the new terminal is *intended and engineered* to handle larger and more numerous cruise ships than current facilities can accommodate. *See* Pet. at 4 (citing R.002438, R.002439, R.007493).

In its Return, SPA follows the Opinion's lead and completely ignores this argument and evidence. SPA completely fails to engage its own internal documents which show that the new terminal is engineered to not merely allow cruise operations to continue when they otherwise may have to cease due to security concerns, but to accommodate and facilitate the home-basing of larger and more polluting cruise ships in Charleston than have previously been based in the city. Thus, record evidence shows the new terminal will dramatically alter the impact of the cruise industry on downtown residents and the character of the historic city. Because SPA has offered no correction to the Opinion's failure to engage record facts on this point, the Court should grant rehearing on this point.

SPA's attempt to confuse the issue by intimating that the only action at issue for standing purposes is installation of five large piling clusters in Charleston Harbor, Ret. 3 n.1, is legally mistaken and also ignores SPA's *stated reason* for seeking this permit and installing these piling clusters: to enable construction of a new cruise ship terminal that home-bases much larger cruise

ships. The undisputed record shows the new terminal will generate more air pollution, more traffic, and more disruption than the limited cruise operations currently taking place at a terminal one-third the size of the proposed facility. The new terminal cannot be developed without this permit, so any injuries attributable to the new terminal are directly traceable to DHEC's issuance of the challenged permit. *See Laidlaw*, 528 U.S. 180 (requiring "fairly traceable" injury for standing).

**VI. Because Article III standing was actually litigated by, and decided against SPA, collateral estoppel barred the ALC and the Opinion's finding of no Article III standing.**

SPA has no meaningful response to our showing that collateral estoppel applies on the standing issue, and that the Opinion errs in resolving Article III standing against the Community Groups when an Article III court has already ruled they have standing.

To recap: (1) SPA filed a summary judgment motion in an Article III court; (2) in that motion, SPA asserted that the Community Groups' members lacked Article III standing to challenge authorizations for the exact same activities and project at issue here; and (3) the Article III court considered and rejected SPA's arguments and held that Article III standing was present.

All the elements of collateral estoppel are present. The Opinion's *sua sponte* holding that the Community Groups' standing was not "actually litigated" below, Op. at 11, is clear error. The Community Groups have repeatedly submitted, quoted, and cited to pleadings and the order from the federal court case showing that the same issue was actually raised by SPA, actually contested by the Community Groups, and actually decided squarely against SPA in Article III litigation.

SPA feebly contends that different "regulatory schemes" were at issue in the federal case. Ret. at 11. That conclusory assertion, backed up with zero explanation, deserves zero weight. At any rate, estoppel was not asserted regarding individual *elements* of the regulatory

approvals at issue, but to bar SPA from relitigating the Community Groups' *Article III standing* to contest approvals regarding the exact same project at issue in the prior federal litigation. Perhaps this is why SPA does not even attempt to explain how differing underlying "regulatory schemes" could possibly affect the Article III standing inquiry, since that inquiry was the same in both cases. At base, the same operative facts, issues, and law related to standing were presented to an Article III court, which rejected SPA's claim that the Community Groups and their members lacked Article III standing. This determination bars a contrary finding by the ALC and the Court of Appeals.

SPA also fails to remedy the Opinion's other *sua sponte* holding that, assuming the elements of estoppel are present, the narrow exception to that bar to prevent "unfairness or injustice" applies. The Community Groups have offered several reasons why fairness and justice weigh in favor of estoppel, not against it, including the fairness and justice of enabling citizens to avail themselves of available administrative review procedures – as directed by the General Assembly – to protect their property rights and health from unjust and unlawful government action. They have also shown how such review, and the underlying relief sought, are consonant with concerns of fairness and justice and indeed SPA's own organic statute, which directs the agency to consider environmental stewardship as part of its mission. S.C. Code Ann. § 54-3-70(A)(3)(D). To this, SPA has no answer at all.

**VII. SPA provides no basis to deny rehearing on clearly erroneous holdings regarding sanctions and discovery.**

The ALC abused its discretion when it sanctioned the Community Groups for interpreting the term "must" in S.C. Code Section § 44-1-60(f) as establishing a mandatory, rather than discretionary, duty. The Opinion should be reconsidered because the sanctions order was obviously unjustified. The best SPA can do to bolster the sanctions decision is to contend

(in a footnote) that counsel for one of the Community Groups, in a brief filed *years ago in a case where the mandatory versus discretionary nature of the term “must” was not at issue*, summarized the statute as giving the DHEC “the option” of conducting a review conference. Ret. at 15 n.6.

SPA fails to inform the Court, however, that the DHEC Board in that matter *did* conduct a review conference, and further that the South Carolina Supreme Court rejected SPA’s attempt to deny a subsequent administrative hearing to the Conservation League. If anything, its citation of that case shows that, alone among state agencies, SPA never passes up a chance to constrain and limit citizen rights and involvement, first in the ALC, then in the Court of Appeals, and then in the South Carolina Supreme Court. As with the present matter, SPA succeeded initially in shutting citizens out of the administrative process. But it did so on the basis of legal errors that were eventually corrected. *See S.C. Coastal Conservation League v. DHEC*, 390 SC 418 (2010) (reversing ALC and Court of Appeals decisions that deprived Coastal Conservation League of access to administrative review).

As noted above, the meaning of the term “must” in S.C. Code Section 44-1-60 was *not* at issue in that case. Even if it were, attorneys and parties are not precluded from evolving their understanding of the law, especially where they provide a reasoned basis for a new interpretation of ambiguous statutory language. Here, the Community Groups raised the meaning of the statutory term “must” for the first time; no court had ever previously resolved arguments over its meaning. The Community Groups contended that the term provided a mandatory duty to the DHEC Board and also provided jurisdiction in the ALC should the Board “decline” to undertake that duty – lest the Board’s failure to undertake its duty leave a party in jurisdictional limbo. To this day, SPA has offered no response to the Community Groups’

demonstration that their reading has a reasonable basis given the dictionary meanings of the relevant statutory terms. The Opinion likewise fails to engage or respond to that demonstration, and summarily affirms the sanctions order. Rehearing should be granted to allow for an actual inquiry into what the text at issue means, which if conducted would show that the sanctions order was a patent abuse of discretion.

Finally, rehearing should also be granted on the Opinion's affirmance of the ALC's retroactive closing of discovery in this case. The Opinion overlooks and otherwise fails to engage in the facts presented showing that all parties and the ALC understood discovery to extend well beyond the 90-day period that the ALC later announced had closed discovery. This was not a failure by the Community Groups to "timely comply" with the rules of procedure, Ret. at 16, but was, instead, a situation where all parties (including SPA) as well as the ALC acted with the understanding that discovery extended well beyond the 90-day period. SPA's motion to retroactively impose a deadline that expired before SPA itself had propounded discovery was nothing but deceitful tactical gamesmanship. The ALC clearly abused its discretion in going along for that ride, and the Opinion's affirmance should be reconsidered.

### **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 on standing, sanctions, and discovery.

Respectfully submitted,



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APPEAL FROM ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

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vs.

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 15, 2017, I caused to be served the foregoing *Reply to Return to Petition for Rehearing* on all counsel of record by placing copies of same in the U.S. Mail addressed to:

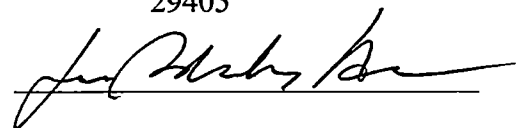
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December 15, 2017

*Via Certified Mail*

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

**RECEIVED**  
DEC 18 2017  
SC Court of Appeals

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

Dear Ms. Kitchings:

Enclosed for filing are the original and seven (7) copies of Appellants' Reply in Support of Petition for Rehearing and Proof of Service in the above-referenced matter. Also enclosed are the original and seven (7) copies of Appellants' Precautionary Motion to File Out of Time and a check for \$25.00 to cover the associated filing fee.

Please return file-stamped copies of the Reply and the Motion to our office in the enclosed self-addressed, stamped envelope.

By copy of this correspondence, I am serving the same upon all counsel of record. If you have any questions, please do not hesitate to contact me at 843-720-5270 or [bholman@selcsc.org](mailto:bholman@selcsc.org). Thank you for your assistance with this matter.

Sincerely,



J. Blanding Holman IV

JBH/arp  
Enclosures

cc: All Counsel of Record (via First Class Mail)