

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph K. Anderson, III, Chief Administrative Law Judge
Case No. 13-ALJ-07-0056-CC

Appellate Case No. 2018-000137

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S.C. SUPREME COURT

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,.....Petitioners,

v.

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

**Petition for Rehearing by the
South Carolina Department of
Health and Environmental Control**

Bradley D. Churdar, SC Bar# 12829
Associate General Counsel
South Carolina Department of Health
and Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, SC 29405
(843) 953-0213
(843) 953-0201 (fax)
Attorney for Respondent SCDHEC

April 27, 2020
Charleston, South Carolina

Pursuant to Rules 221(a) and 240, SCACR, the South Carolina Department of Health and Environmental Control (SCDHEC or the Department) respectfully supplements the South Carolina State Ports Authority's Petition for Rehearing of Opinion No. 27949 issued in this case on February 19, 2020 (Opinion).

The Department concurs with the Ports Authority's assertion in its Petition for Rehearing that this Court's Opinion erred in concluding that Petitioners have standing to challenge the permit in this case. SCDHEC agrees that S.C. Code Ann. § 44-1-60(G) (the statute) does *not* create a "statutory standing" rule that rejects the recognized three-part analysis for constitutional standing, nor does it contain a legislative intent to do so. In this Opinion, the Court drastically alters the practice of administrative law by rejecting this Court's prior established jurisprudence. The Opinion results in a new test for standing that overturns the standard employed in SCDHEC permit cases by the South Carolina Administrative Law Court (ALC) for nearly 15 years, while providing no guidance to litigants, the bench, or the bar with respect to its implementation. The issues and claims in this contested case do not warrant this solution. SCDHEC joins the Ports Authority in urging the Court to reconsider the Opinion's sweeping holding on statutory standing that is contrary to "the statute" and the intent of General Assembly

SCDHEC agrees the Opinion improperly confers statutory standing on Petitioners even though the General Assembly did nothing to indicate an intent to extend the ability to challenge a permit to anyone who claims to be "affected" but does not meet the test for standing laid down by many years of "standing jurisprudence."

On page 8 of the Opinion, the Court recognized that "[u]nfortunately, section 44-1-60 does not define the term 'affected person'." SCDHEC agrees with the Ports Authority's argument that "[i]f the Court is forced to look beyond the text of the statute to supply a definition in accordance

with the Court's view of its usual and customary meaning, then the General Assembly has not 'unmistakabl[y] inten[ded]' to confer statutory standing." Contra Freemantle v. Preston, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012). (Ports Authority's *Petition for Rehearing*, p. 12). And that if the Court adapts its own interpretation through reliance on dictionary definitions, as it did here,¹ then the Court is no longer following the General Assembly's guidance.

Moreover, if the Court determines to look outside the statutory text, the Court should have looked to the agency's specific regulation governing the permit before the Court. Specifically, the Department maintained during oral arguments that S.C. Code Regs. 30-6(A)² requires that only an "affected person **with standing**" may appeal the issuance, denial, suspension, or revocation of a Critical Area permit or Coastal Zone Consistency Certification. Pursuant to the clear provisions of the regulation, merely being an "affected person" is insufficient to pursue an appeal of a Critical Area permit. It is necessary for a Petitioner to satisfy the well-established three-prong Lujan test. This is SCDHEC's (and specifically the Office of Ocean and Coastal Resource Management's) application of S.C. Code Regs. 30-6(A) regarding an "affected person with standing." This interpretation is entitled to deference. As this Court previously held in Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env'tl. Control, "the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation." Kiawah, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014). This Court further stated in Kiawah that, regarding the deference doctrine, "[t]he construction given to a statute by those charged with the duty of exercising it is

¹ On page 8 of the Opinion, the Court looked to *Black's Law Dictionary* 70 (11th ed. 2019) to determine the meaning of "affected person".

² This regulation states that "[a] Department decision involving the issuance, denial, suspension, or revocation of a permit or certification 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." (Emphasis added).

always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons.” Id., 766 S.E.2d at 718 (quoting United States v. Moore, 95 U.S. 760, 763, 24 L. Ed. 588, 13 Ct. Cl. 542 (1877)). The rationale for the rule is that “[t]he officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are . . . called upon to interpret.” Id., 766 S.E.2d at 718 (quoting Moore, 95 U.S. at 763). In reliance on Chevron, this Court held that “[w]e defer to an agency interpretation unless it is ‘arbitrary, capricious, or manifestly contrary to the statute.’” Id., 766 S.E.2d at 718 (quoting Chevron, 467 U.S. at 844). It is not “arbitrary, capricious, or manifestly contrary to the statute” to apply S.C. Code Regs. 30-6(A) so as to conclude that “affected person” status by itself is insufficient to confer standing. Accordingly, this court should have upheld the ruling of the ALC and the Court of Appeals.

Conclusion

For the above-stated reasons, as well as the arguments set forth in the State Ports Authority’s Petition for Rehearing, the Court should reconsider the Opinion and affirm the decision of the Court of Appeals.

Respectfully submitted,
SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL

By: 

Bradley D. Churdar, SC Bar# 12829
Associate General Counsel
South Carolina Department of Health
and Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, SC 29405
(843) 953-0213
(843) 953-0201 (fax)
Attorney for Respondent SCDHEC

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