The Supreme Court of South Carolina

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August 7, 2020

The Honorable Jana E. Shealy
Clerk, Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia SC 29201

REMITTITUR

Re: Preservation Society of Charleston v. SCDHEC
Lower Court Case No. 2013ALJ070056CC
Appellate Case No. 2018-000137

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

DEPUTY CLERK

cc:
Amy Elizabeth Armstrong, Esquire
W. Jefferson Leath, Jr., Esquire
James Blanding Holman, IV, Esquire
Bradley David Churdar, Esquire
Tracey Colton Green, Esquire
Randolph Russell Lowell, Esquire
Chad Nicholas Johnston, Esquire
Michael J. Anzelmo, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

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

Appellate Case No. 2014-000847

Appeal From The Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Unpublished Opinion No. 2017-UP-403
Heard February 15, 2017 – Filed October 18, 2017

AFFIRMED

W. Jefferson Leath, Jr., of Leath Bouch & Seekings, LLP; and James Blanding Holman, IV, of Southern Environmental Law Center; both of Charleston; Amy Elizabeth Armstrong and Jessie Allison White, both of S.C. Environmental Law Project, of Pawleys Island; and

Michael Gary Corley, of S.C. Environmental Law Project, of Greenville; all for Appellants.

Tracey Colton Green, Randolph Russell Lowell, and Chad Nicholas Johnston, all of Willoughby & Hoefer, PA, of Columbia; and Bradley David Churdar, of Charleston; all for Respondents.

PER CURIAM: This is an appeal of several orders issued in a contested case proceeding arising from a citizens' challenge to various permits issued by the South Carolina Department of Health and Environmental Control (DHEC) for a proposed cruise ship terminal in downtown Charleston. The Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, and Charleston Communities for Cruise Control (collectively Appellants) argue the Administrative Law Court (ALC) erred in (1) finding as a matter of law Appellants lacked standing to contest the permits at issue, (2) refusing to vacate certain DHEC authorizations, (3) refusing to expand discovery, and (4) sanctioning Appellants for requesting a remand to the DHEC Board for a final review conference in the matter. We affirm.

FACTS AND PROCEDURAL HISTORY

Union Pier Terminal (UPT) is a fully operational marine terminal located along the Cooper River near the downtown portion of the Charleston peninsula. It is now owned and operated by the South Carolina State Ports Authority (SPA). UPT has hosted passenger vessels every year since its dedication in 1973. Currently, UPT accommodates cargo ships at its northern end and passenger vessels at its southern end.

In 2010, after Carnival Cruise Lines began home-basing a 2,500-passenger ship in Charleston for year-round cruises and Celebrity Cruise Lines made plans for a new service from Charleston, SPA announced a capital improvement plan that includes a cruise ship terminal in Charleston's downtown historic district. Under the plan, SPA will transfer its cargo operations to other terminals and move cruise passenger operations from the southern end of UPT to the northern end. SPA also intends to adopt a traffic management plan that will reduce the periodic route congestion at the southern end without increasing traffic at the northern end.

Although renovating Building 325, the existing passenger terminal, is possible, SPA decided against this option because of the age of Building 325 and the upgrades necessary to provide adequate service and comply with federal homeland security requirements. Instead, SPA targeted Building 322, an abandoned warehouse at the northern end of UPT that is more than three times larger than Building 325, as the site for a new cruise passenger terminal.

A structural support system with 1,008 concrete pilings is already in place under Building 322, but the project requires five additional pilings to support three elevators and two escalators. In 2012, because of anticipated environmental impacts from the additional pilings, SPA submitted a joint application to the United States Army Corps of Engineers (the Corps) and DHEC for permission to engage in activities affecting the waters of the United States and critical areas of South Carolina. In the application, SPA sought (1) a federal permit from the Corps under Section 10 of the Rivers and Harbors Act (Section 10 authorization),[1] (2) a South Carolina Section 401 Water Quality Certification (401 certification),[2] and (3) a South Carolina Critical Area Permit (CAP)[3] and a Coastal Zone Consistency Certification (CZCC).[4]

The Corps granted provisional Section 10 authorization pursuant to a nationwide permit (NWP 3) pending SPA's receipt of either a 401 certification or a CZCC. In April 2012, DHEC staff issued a 401 certification without conditions for all NWP 3 activities, thus eliminating the need for a separate 401 certification for the

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[1] 33 U.S.C.A. §§ 401 and 403 (2016).

[2] The 401 certification from DHEC is a prerequisite to the Section 10 authorization from the Corps. *See* 33 U.S.C.A. § 1341(a)(1) (2016) (requiring an applicant for a federal permit for activity that may result in a discharge into navigable waters to provide the permitting agency with a certification from the State in which the discharge will originate that the discharge will comply with that State's water quality standards).

[3] *See* S.C. Code Ann. § 48-39-10(J) (2008) (defining the term "critical area"); S.C. Code Ann. 48-39-130 (2008 & Supp. 2017) (setting forth permit requirements for utilization of critical areas).

[4] *See* S.C. Code Ann. § 48-39-80 (2008) (requiring DHEC to "develop a comprehensive coastal management program" with consideration of "all lands and waters in the coastal zone for planning purposes" and specifically authorizing DHEC to "[d]evelop a system whereby [DHEC] shall have the authority to review all state and federal permit applications in the coastal zone[] and to certify that these do not contravene the management plan").

proposed project. In December 2012, DHEC approved SPA's application for a CAP and CZCC.

On January 2, 2013, Appellants requested a final review conference of DHEC's decision.[5] The DHEC Board declined the request on January 11, 2013. On February 11, 2013, Appellants appealed this decision by requesting a contested case hearing with the ALC.[6]

The ninety-day period to complete all discovery in the matter commenced on February 19, 2013, when the clerk of the ALC issued a notice of assignment in the matter. Therefore, discovery in the matter was to be completed by May 20, 2013, absent either a motion for good cause shown or a motion initiated by the ALC to change the deadline.[7]

On February 27, 2013, while the contested case was pending, Appellants moved to remand the matter to the DHEC Board for a final review conference. Appellants contended a final review conference was mandated by section 44-1-60(F) of the South Carolina Code (2018). The ALC denied the motion on May 3, 2013.

On July 1, 2013, SPA filed two motions. First, SPA moved for dismissal of the proceeding on the ground that Appellants failed to establish standing to challenge the CAP and the CZCC. Second, SPA requested sanctions on Appellants for their motion to remand the matter to the DHEC Board for a final review conference. On September 6, 2013, the ALC held a hearing on SPA's motion to dismiss and took the matter under advisement.

On September 18, 2013, while SPA's motion to dismiss was pending, the United States District Court for the District of South Carolina voided the federal authorization granted by the Corps and remanded the project to the Corps for reconsideration under a broader scope of analysis. The order was issued in

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[5] *See* S.C. Code Ann. 44-1-60(F) (2018) (setting forth the procedure that follows a request for a final review conference).

[6] *See* S.C. Code Ann. § 44-1-60(G)(1) (2018) (allowing certain parties to file a request with the ALC for a contested case hearing within thirty days after the mailing of the notice that the DHEC Board declined to hold a final review conference).

[7] *See* SCALC Rule 21A ("All discovery shall be completed within 90 days of the date of the Notice of Assignment. Upon motion for good cause shown or upon [its] own motion, discovery may be expanded or curtailed by the [ALC].").

response to a motion by Preservation Society of Charleston and South Carolina Coastal Conservation League for a preliminary injunction against the installation of the pilings pending a full individual permit review that would include an environmental assessment or an environmental impact statement and consultation with the public. According to the District Court, "[t]he Army Corps' determination to limit the 'scope of analysis' to the impact of the five concrete pile clusters, rather than the new passenger terminal, dramatically and improperly constricted the assessment of the potential environmental and historic landmark impacts of the proposed activity." *Preservation Soc'y of Charleston v. U.S. Army Corps of Eng'rs*, Civil Action No. 2:12-2942-RMG, slip op. at 20 (D.S.C. Sept. 18, 2013). Based on this finding, the District Court found the Corps' authorization for the project was "unlawful and void" and remanded the matter to the Corps "to place within its 'scope of analysis' all activities within its jurisdiction . . . which the Court finds . . . must include, at a minimum, all activities concerning the Building 322 conversion project." *Id.* at 29.

Notably, in voiding the Corps' Section 10 authorization, the District Court also rejected an argument made by SPA, an intervenor-defendant in the proceeding, that the plaintiffs lacked standing to bring the action. The District Court found SPA advocated "an artificially narrow view of [the] controversy" by insisting that "the [District] Court limit its standing analysis to the installation of the five concrete pile clusters and ignore the renovation of Building 322 into a state-of-the-art cruise ship terminal." *Id.* at 27. Observing the plaintiffs included residents of the Ansonborough Neighborhood, which abutted the north side of UPT, where Building 322 is located, the District Court concluded its invalidation of the Corps' authorization "could potentially redress" "the alleged detrimental effects of the proposed new cruise ship terminal—including increased traffic congestion and airborne pollution from cruise ships." *Id.* at 27-28.[8]

Immediately after the District Court issued its opinion, Appellants filed a supplemental memorandum in response to SPA's motion to dismiss. Relying on the District Court's decision, Appellants argued the question of their standing had been fully litigated and decided in the federal court proceeding.

On November 1, 2013, Appellants moved to vacate the CAP and CZCC that DHEC issued to SPA. Appellants argued the District Court's voiding of the federal

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[8] The Fourth Circuit Court of Appeals dismissed an appeal of the District Court's decision. *Preservation Soc'y of Charleston v. v. U.S. Army Corps of Eng'rs*, No. 13-2280, slip. op. (4th Cir. Jan. 6, 2014).

authorization for the project "removed the predicate for exempting SPA from a separate individual 401 Water Quality Certification for the project."

On December 2, 2013, the ALC issued an order denying SPA's motion to dismiss. As to individual standing, the ALC found (1) Appellants alleged injuries in fact to their aesthetic, recreational, and property interests that would result from the proposed expansion of passenger operations at UPT; (2) Appellants' claim that SPA would not be able to relocate and expand the cruise terminal without the five additional pilings was an allegation of sufficient facts to show a causal connection; and (3) although withdrawal of the authorization for the pilings would not abate any injuries Appellants were currently suffering from the existing cruise ship operations, Appellants alleged it would prevent exacerbation of those injuries. As to organizational standing, the ALC ruled Appellants sufficiently alleged standing through their assertions that (1) their members would suffer individualized injuries and (2) protection of their members' interests was germane to their organizational objectives. The ALC further found the central issue in the case was whether "the discrete matter of whether the permit issued to [SPA] complie[d] with state law," and ruled this controversy was not a non-justiciable political question. In declining to dismiss the action, however, the ALC emphasized it was not converting SPA's motion into one for summary judgment.

On December 20, 2013, the ALC denied Appellants' motion to vacate the CAP and CZCC. Ultimately, the ALC ruled the motion "must be denied at this stage of the litigation" because "there [was] not sufficient evidence for [the ALC] to determine the extent of DHEC's review or the procedures that were followed in issuing the permit." The ALC further suggested Appellants could bring their motion again, at which time the ALC would "then determine based upon the facts of this case in keeping with its *de novo* review what is the appropriate scope of review for this project and whether the project complies with the standards of that review."

On December 23, 2013, Appellants moved to expand discovery in order to take additional depositions after the deadline for completion of all discovery in the matter. On December 27, 2013, SPA filed motions for (1) summary judgment based on Appellants' lack of standing and (2) partial summary judgment prohibiting Appellants from challenging the 401 certification issued by the DHEC staff.

On March 3, 2014, the ALC (1) ordered Appellants to pay SPA $9,300.00 in attorney's fees as a sanction for their motion to remand the matter to the DHEC

Board for a final review conference[9] and (2) denied Appellants' motion to expand discovery.

On April 11, 2014, the ALC issued an order granting summary judgment to SPA based on a finding that Appellants lacked standing to proceed with the contested case. The ALC found (1) in order to establish individual standing, Appellants had to satisfy the requirements set forth in *Lujan v. Defenders of Wildlife*,[10] (2) Appellants did not satisfy any of the required elements of the *Lujan* test, (3) Appellants did not satisfy the requirements necessary for associational standing, and (4) Appellants failed to establish standing under the public importance exception.

Appellants filed a notice of appeal on April 23, 2014, challenging the ALC's (1) grant of summary judgment to SPA based on the finding Appellants lacked standing, (2) denial of their motion to vacate the CAP and CZCC, (3) refusal to expand discovery, and (4) imposition of sanctions.

LAW/ANALYSIS

Associational Standing

When, as in the present case, the complaining parties are associations, they "may possess standing by virtue of associational standing on behalf of [their] members." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 75-76, 753 S.E.2d 846, 850 (2014). "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." *Id.* at 76, 783 S.E.2d at 851 (emphasis added).

The ALC's ruling that Appellants lacked standing to proceed with the contested case was in response to SPA's summary judgment motion. Therefore, the burden was on SPA to demonstrate "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

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[9] On April 11, 2014, the ALC amended its order granting sanctions. The two orders differ only in their respective discussions of a position taken by one of the appellants in an appeal of another case. The sanction imposed against Appellants was the same in both orders.

[10] 504 U.S. 555 (1992).

genuine issue as to any material fact and that [SPA was] entitled to a judgment as a matter of law." Rule 56(c), SCRCP. Nonetheless, elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Thus, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.*

We agree with Appellants that section 44-1-60 of the South Carolina Code (2018), does not specifically define the term "affected persons"; therefore, we should interpret the term according to its usual and customary meaning. *See Travelscape, LLC v. S.C. Dep't of Rev.*, 391 S.C. 89, 99, 705 S.E.2d 28, 33 (2011) ("When faced with an undefined statutory term, the [c]ourt must interpret the term in accordance with its usual and customary meaning."). However, "[c]ourts should consider not merely the language of the particular clause being construed, but the undefined word and its meaning in conjunction with the whole purpose of the statute and the policy of the law." *Id.* Based on our review of relevant statutory, regulatory, and case law, we conclude the legislature, in allowing an "affected person" to request a contested case before the ALC pursuant to section 44-1-60, intended to limit the class of such persons to those who are not only adversely affected by the controversy but also able to establish standing under the test set forth in *Lujan*. *See* S.C. Code Ann. § 48-39-150(D) (2008) (granting "a person adversely affected by the granting of [a] permit . . . the right of direct appeal from the decision of the [ALC]"); S.C. Code Ann. § 48-39-180 (2008) (granting the right of judicial review of a permit determination to "any person adversely affected by the permit"); S.C. Code Ann. Regs. 30-6A (2011) (allowing "an affected person with standing pursuant to applicable law" to appeal a departmental decision involving the issuance of a permit); *Smiley v. S.C. Dep't of Health & Envtl. Control*, 374 S.C. 326, 329-30, 649 S.E.2d 31, 32-33 (2007) (interpreting the phrase "person adversely affected," as used in section 48-39-150, as language conferring standing but also referencing the factors set forth in *Lujan* as the three components of the "irreducible constitutional minimum of standing").

As set forth in *Lujan*, the three requirements for the "irreducible constitutional minimum of standing" are (1) an injury in fact that is concrete and particularized and not conjectural or hypothetical, (2) a causal connection between the injury and the conduct at issue, and (3) a showing that it is likely as opposed to merely speculative that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. The Supreme Court of South Carolina has viewed these criteria as components of a "'stringent' test for standing." *Jowers v. S.C. Dep't of Health &*

Envtl. Control, Op. No. 27725 (S.C. Sup. Ct. filed July 19, 2017) (Shearouse Adv. Sh. No. 27 at 28, 33) (quoting *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001)). Furthermore, "[t]he party seeking to establish standing carries the burden of demonstrating each of the three elements." *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291.

As the ALC observed, Appellants made numerous allegations to the effect that the authorizations granted by DHEC would adversely affect their quality of life because of pollution, traffic congestion, and the visual disruption of Charleston's historic integrity and aesthetic beauty. We hold these injuries, even if actually suffered by individual complainants, are "only generalized grievances suffered by the public as a whole which are insufficient to establish standing." *Carnival*, 407 S.C. at 76, 753 S.E.2d at 851; *see also Lujan*, 504 U.S. at 560 n.1 ("By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.").

Appellants also presented affidavits from several individuals who expressed concern about the effect of the permitted activities on their property values and businesses. However, as the ALC observed, Appellants expressed only "[c]oncern[] without evidence of declining property values and business reasonably attributed to granting the permit," which, the ALC correctly concluded "does not constitute actual or imminent harm." *See Sea Pines* 345 S.C. at 601, 550 S.E.2d at 291 (stating "[t]he party seeking to establish standing carries the burden of demonstrating each of the three elements" of "the irreducible constitutional minimum of standing," which include "a causal connection between the injury and the conduct complained of," i.e., "the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court'" (quoting *Lujan*, 504 U.S. at 560)). We agree with the ALC that Appellants presented only speculative claims that the proposed passenger terminal would adversely affect their property values and businesses.

Finally, Appellants cite an affidavit from a member of the Coastal Conservation League who asserted (1) smoke emitted from the existing passenger terminal already physically impacts her to the extent 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. Even if this evidence is sufficient to confer individual standing, we agree with the ALC's conclusion that the injuries allegedly suffered by this affiant do not satisfy the third required element of associational standing, namely that "neither the claim

asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *see also Warth v. Seldin*, 422 U.S. 490, 511 (1975) ("[S]o long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction."). Appellants have not explained how the claims they have asserted or the relief they have requested can be adjudicated without the affiant's participation in the lawsuit. *See id.* at 515-16 (concluding that because "whatever injury may have been suffered is peculiar to the individual member concerned, . . . both the fact and extent of injury would require individualized proof" and therefore, "to obtain relief . . . , each member of [the association] who claims injury as a result of respondents' practices m[u]st be a party to the suit and [the association] has no standing to claim damages on [the individual member's] behalf").

Standing Under the Public Importance Exception

We affirm the ALC's rejection of Appellants' claim of standing under the public importance exception. As evidence of public importance, Appellants cited a budget proviso passed by the General Assembly requiring shore power in Charleston for cruise ships; however, their discussion lacks an essential element of the public importance exception, namely, an explanation as to why resolution of the current controversy is necessary for future guidance so as to justify the invocation of a sparingly applied exception. *See S.C. Pub. Int. Found. v. S.C. Dep't of Transp.*, Op. No. 27738 (S.C. Sup. Ct. filed Sept. 14, 2017) (Shearouse Adv. Sh. No. 35 at 21, 25) (recognizing that because many issues may be of public interest or public importance, "[t]he key . . . is whether a resolution is needed for future guidance" (quoting *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 198-99, 669 S.E.2d 337, 341 (2008))); *Jowers v. S.C. Dep't of Health & Envtl. Control*, Op. No. 27725 (S.C. Sup. Ct. filed July 19, 2017) (Shearouse Adv. Sh. No. 27 at 28, 39) (acknowledging that a party may have standing when an issue is of such public importance that its resolution is necessary for future guidance but also stating courts must be cautious in applying this exception).

Issue Preclusion

We disagree with the ALC's rationale for declining to find the order issued by the South Carolina District Court barred SPA from challenging Appellants' standing to

proceed in the contested case proceeding.[11] Nevertheless, the doctrine of collateral estoppel should not be rigidly applied even if all the elements are present. *See Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 555, 684 S.E.2d 779, 782 (Ct. App. 2009) ("[E]ven if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it."). Furthermore, we found no evidence in the record to support a finding that SPA "actually litigated" the issue of Appellants' standing within the expanded scope of analysis applied by the District Court in the federal court proceeding.[12] *See id.* at 554, 684 S.E.2d at 782 ("The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment."). Under these circumstances, we affirm as modified the ALC's rejection of Appellants' argument that SPA was collaterally estopped from raising the issue of standing in the contested case proceeding.

Motion to Vacate CAP and CZCC

Based on our determination that Appellants lacked standing to pursue the contested case proceeding, we decline to address their argument that the ALC erred in denying their motion to vacate the CAP and CZCC issued by DHEC. *See Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Comms., Inc.*, 397 S.C. 348, 377, 725 S.E.2d 112, 128 (Ct. App. 2012) (declining to address an issue because the resolution of another issue in the appeal was dispositive).

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[11] In rejecting Appellants' argument that SPA was collaterally estopped from relitigating the issue of standing, the ALC reasoned the District Court order addressed only the federal process and "did not negate the critical area permit and coastal zone certification at issue" in the contested case proceeding. This reasoning, however, does not address Appellants' argument that the District Court actually decided the issue of their standing to challenge any government permits issued in connection with SPA's plan to relocate passenger services to the northern end of UPT.

[12] In their brief, Appellants asserted "[t]he elements of Article III Standing were briefed by both sides, with SPA contending that [Appellants] lacked any injury traceable *to approval of the cruise terminal's federal permit* . . . ." (emphasis added). This language indicates SPA limited its standing analysis to effects of the installation of the five additional pilings, which the District Court rejected as artificially narrow.

Motion to Expand Discovery

We further disagree with Appellants' argument that the ALC erred in declining to expand discovery beyond the ninety-day deadline set forth in SCALC Rule 21A. We do not dispute Appellants' references to correspondence among counsel of record and communications with the ALC that suggest the ALC as well as all parties may have proceeded as if discovery would continue after the ninety-day period following the notice of assignment; however, we find no abuse of discretion in the ALC's refusal to extend the time for discovery when the motion for the extension was not made until seven months after the deadline. *See Hollman v. Woolfson*, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009) ("A trial judge's rulings on discovery matters will be not disturbed by an appellate court absent a clear abuse of discretion."). In so holding, we further note (1) although Rule 21 allows for discovery to be expanded by the ALC "[u]pon motion for good cause shown," Appellants failed to avail themselves of this means of having the deadline extended and (2) we found no evidence of an express assurance from SPA or DHEC that either would consent to discovery past the ninety-day deadline absent a timely motion for this relief.

Sanction

Finally, we affirm the order directing Appellants to pay SPA's attorney's fees incurred as a result of their motion to remand the matter to the DHEC Board for a final review conference. We hold the ALC did not abuse its discretion in imposing the sanction. *See Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008) ("[T]he abuse of discretion standard plays a role in the appellate review of a sanctions award.").

The DHEC Board had already declined to hold such a conference, and this decision prompted Appellants to seek relief in the ALC. Even if their motion for a remand to the DHEC Board was made in good faith, Appellants advocated a frivolous statutory interpretation "that a reasonable attorney would believe [was] not warranted under the existing law." S.C. Code Ann. § 15-36-10(A)(4)(c) (Supp. 2017); *see also* SCALC Rule 72 ("If the [ALC] determines that a . . . motion . . . is frivolous . . . , the [ALC] may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require."); 2014 Revised Notes to SCALC Rule 72 ("In determining whether a case or defense is frivolous, the [ALC] may refer to S.C. Code Ann. § 15-36-10, the Frivolous Civil Proceedings Sanctions Act.").

Although Appellants correctly argue the statutory provision at issue here, section 44-1-60(F) of the South Carolina Code (2018), provides 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," they disregard additional language in this section indicating the Board may "decline[] in writing to schedule a final review conference," in which case "the staff decision becomes the final agency decision." *See Beaufort Cty. v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011) ("[A] statute shall not be construed by concentrating on an isolated phrase."). Considering the clear language of section 44-1-60(F) and Appellants' apparent disregard of a settled rule of statutory construction, we find no abuse of discretion that would warrant reversal of the sanction imposed against them.

AFFIRMED.

HUFF, SHORT, and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The 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.

Appellate Case No. 2018-000137

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from the Administrative Law Court
Ralph King Anderson III, Administrative Law Judge

Opinion No. 27949
Heard June 11, 2019 – Filed February 19, 2020

REVERSED AND REMANDED

J. Blanding Holman IV, of Southern Environmental Law Center, of Charleston; Amy E. Armstrong and Jessie A. White, both of South Carolina Environmental Law Project, of Pawleys Island; and Jefferson Leath Jr., of

Leath, Bouch & Seekings, LLP, of Charleston, for Petitioners.

Bradley D. Churdar, of South Carolina Department of Health and Environmental Control, of North Charleston; Randolph R. Lowell, of Willoughby & Hoefer, PA, of Charleston; and Tracey C. Green and Chad N. Johnston, both of Willoughby & Hoefer, PA, of Columbia, for Respondents.

JUSTICE JAMES: Petitioners seek a contested case hearing in the administrative law court (ALC) to challenge the propriety of state environmental authorizations issued by the South Carolina Department of Health and Environmental Control (DHEC) for a project relocating and expanding the passenger cruise facility at the Union Pier Terminal (the Terminal) in downtown Charleston. Petitioners maintain they have standing to seek this hearing as "affected persons" under section 44-1-60(G) of the South Carolina Code (2018). The ALC concluded Petitioners did not have standing and granted summary judgment to Respondents. The ALC terminated discovery and also sanctioned Petitioners for requesting a remand to the DHEC Board. The court of appeals affirmed. *Pres. Soc'y of Charleston v. S.C. Dep't of Health & Envtl. Control*, Op. No. 2017-UP-403 (S.C. Ct. App. filed Oct. 18, 2017). This Court granted a petition for a writ of certiorari. Because we find Petitioners have standing, we reverse the grant of summary judgment and remand the matter to the ALC for a contested case hearing. We instruct the ALC to establish a reasonable schedule for the completion of discovery. We also reverse the sanction imposed by the ALC.

I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioners, consisting of several citizens groups and neighborhood associations, filed a request for a contested case hearing in the ALC in February 2013 against Respondents—DHEC and the South Carolina State Ports Authority (the Ports Authority). Petitioners seek to challenge DHEC's issuance of a Critical Area Permit and Coastal Zone Consistency Certification in December 2012 allowing the Ports Authority to construct a new cruise ship facility at the Terminal by renovating Building 322, a vacant warehouse. DHEC authorized structural changes to the building; the construction of two covered staging areas to handle passengers, luggage, and shipping supplies; and the installation of five clusters of concrete pilings to support adding three elevators and two escalators.

The Terminal is owned and operated by the Ports Authority and sits on a 63-acre property on the eastern side of the Charleston peninsula along the Cooper River. The site is near the Charleston Historic District, which has been designated a National Historic Landmark on the National Register of Historic Places. Because the project is planned for a statutorily defined critical area of South Carolina's coastal zone, the Ports Authority is required to obtain a permit from DHEC prior to taking any action in the critical area. In addition to the state permit, the Ports Authority is required to obtain a federal permit from the United States Army Corps of Engineers (the Army Corps). The Army Corps issued a federal permit, but, as noted below, the issuance of that permit was successfully challenged before the United States District Court for the District of South Carolina.

Petitioners are community organizations dedicated to preserving and protecting historic districts and neighborhoods and to maintaining historic resources that affect the quality of life. These organizations have members who are property owners in the neighborhoods very close to the proposed project. Petitioners contest both DHEC's permitting decision and its application of the critical area statutes and regulations. Petitioners contend they have standing as "affected persons" to obtain a contested case hearing in the ALC pursuant to section 44-1-60(G) of the South Carolina Code (2018), which provides "[a]n applicant, permittee, licensee, or affected person may file a request with the [ALC] for a contested case hearing" within a specified time frame. Determining whether Petitioners are "affected persons" pursuant to section 44-1-60(G) is the key to resolving the issue of standing.

Petitioners assert the new passenger facility would be several times larger than the existing facility and would be engineered to sustain larger cruise ships. The ships would also be located much closer to the properties of Petitioners' members, as the planned project relocates the passenger facility from one part of the Terminal to what is currently a "storage shed." Petitioners contend relocation and expansion of the facility would generate substantial increases in traffic, hazardous diesel soot emissions, and water pollution that would directly and adversely affect their nearby members. For example, Petitioners note in their request for a contested case hearing that the fuel burned by cruise ships was then "667 times dirtier than diesel fuel burned by 18-wheel trucks" (although new emission standards were being introduced). Petitioners also submitted affidavits from some of their individual members. The affiants state they have soot covering their homes that has to be cleaned regularly and they are forced to retreat indoors because of breathing problems caused by cruise ships utilizing the existing facility.

The affiants also claim these problems would increase with a closer, significantly expanded facility.

The Charleston Historic District and the Port of Charleston have been designated "Geographic Areas of Particular Concern" under DHEC's Coastal Management Program (CMP). State law requires that DHEC give areas with this designation heightened consideration when DHEC reviews activities for consistency with the CMP. Additionally, the National Trust for Historic Preservation has formally recognized the endangerment to Charleston's historic resources by placing Charleston on "Watch Status" on the National Trust's list of America's Most Endangered Places, and the World Monuments Fund has listed Charleston as a "Watch Site."

The United States District Court for the District of South Carolina issued an order ruling the federal permit for the project was void because the Army Corps failed to follow prescribed procedures in issuing the permit.[1] Petitioners then filed a motion in the ALC to vacate the state Critical Area Permit and Coastal Zone Consistency Certification issued to the Ports Authority by DHEC. In a December 20, 2013 order, the ALC denied Petitioners' motion to vacate the state permit and certification. The ALC found this case involved joint permitting applications filed with both state and federal regulatory bodies; however, the ALC further found jurisdiction of the permitting agencies was distinct and the federal district court's ruling did "not negate the [state] critical area permit and CZC Certification at issue in this case." The ALC stated, "At this stage of the litigation, there is not sufficient evidence for [the ALC] to determine the extent of DHEC's review or the procedures that were followed in issuing the permit."

The Ports Authority quickly moved for summary judgment, maintaining discovery had ended some seven months prior and contending Petitioners lacked standing to challenge the state permit and certification. In examining the issue of

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[1] *See Pres. Soc'y of Charleston v. U.S. Army Corps of Eng'rs*, No. 2:12CV2942-RMG, 2013 WL 6488282 (D.S.C. Sept. 18, 2013). District Court Judge Richard Gergel determined the challengers had constitutional standing under Article III to contest the federal permit, and he further ruled the federal permit was void because it was improperly issued by the Army Corps. In relevant part, Judge Gergel found the Army Corps did not properly consider the scope of the project, which he found involved more than just the five clusters of concrete pilings to be installed in the protected zone. Judge Gergel found this unduly limited view of the scope of the project affected the Army Corps' analysis of the procedures to be applied in reviewing the propriety of the federal permit.

standing, the ALC observed the South Carolina General Assembly did not define the term "affected person" as used in section 44-1-60 and found that, "where a clear, specific definition of 'affected person' is not available," the principles of constitutional standing set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), should be applied. Using the *Lujan* framework for its analysis, the ALC concluded Petitioners lacked standing to seek a contested case hearing. Consequently, on April 11, 2014, the ALC granted summary judgment to Respondents.

In a footnote to the summary judgment order, the ALC also ruled on Petitioners' motion seeking reconsideration of a discovery order filed March 3, 2014. The March 3 order denied Petitioners' motion to expand discovery on several grounds. The ALC vacated that order and denied the motion to expand discovery as moot in light of the grant of summary judgment.

In a separate order, the ALC granted the Ports Authority's motion for a sanction against Petitioners under SCALC Rule 72. The ALC found a sanction was warranted for what it deemed Petitioners' "frivolous" pursuit of a motion to remand the matter to the DHEC Board, and it required Petitioners to pay Respondents' attorney's fees ($9,300) as a sanction.

Petitioners appealed the ALC's rulings. The court of appeals affirmed.

II. DISCUSSION

A. STANDING

As noted above, the ALC granted summary judgment against Petitioners on the ground Petitioners lack standing to seek a contested case hearing, and the court of appeals affirmed. Petitioners contend this was error, and we agree. We will review the general concepts of standing before we examine the test for associational standing that applies to organizations pursuing actions on behalf of their members.

(1) Overview of Standing Principles

"Standing has been called one of 'the most amorphous [concepts] in the entire domain of public law.'" *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (alteration in original) (citation omitted). Standing in environmental cases has always been particularly problematic, and observers have noted that the results, even from the Supreme Court of the United States, have been variable. *See* Cassandra Barnum, *Injury in Fact, Then and Now (and Never Again):* Summers v. Earth Island

Institute *and the Need for Change in Environmental Standing Law*, 17 Mo. Envtl. L. & Pol'y Rev. 1, 7-8 (2009) (noting statutory standing and constitutional standing have become confused in our jurisprudence, especially in the realm of environmental law); Erwin Chemerinsky, *Constitutional Law Principles and Policies* 59 (4th ed. 2011) ("Standing frequently has been identified by both Justices and commentators as one of the most confused areas of the law."). The growth of administrative agencies since the last century has also complicated the standing analysis. *See* William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 226 (1988) (noting standing in the administrative context could refer to who may participate in agency rule-making or adjudicatory proceedings, who may bring original proceedings to challenge an agency's actions, or who may appeal from an agency's adjudicatory proceedings).

In its most basic sense, "[s]tanding refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." *S.C. Dep't of Soc. Servs. v. Boulware*, 422 S.C. 1, 7, 809 S.E.2d 223, 226 (2018) (quoting *Michael P. v. Greenville Cty. Dep't of Soc. Servs.*, 385 S.C. 407, 415, 684 S.E.2d 211, 215 (Ct. App. 2009)). "Standing to sue is a fundamental requirement in instituting an action." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). Standing may be acquired (1) by statute, (2) under the principle of "constitutional standing," or (3) via the "public importance" exception to general standing requirements. *Freemantle v. Preston*, 398 S.C. 186, 192, 728 S.E.2d 40, 43 (2012). Petitioners do not assert standing via the public importance exception. The concepts of statutory and constitutional standing are front and center in this appeal.

"Statutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation." *Youngblood v. S.C. Dep't of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). "The traditional concepts of constitutional standing are inapplicable when standing is conferred by statute." *Freemantle*, 398 S.C. at 194, 728 S.E.2d at 44; *see also ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 195-98, 669 S.E.2d 337, 339-40 (2008) (turning to constitutional standing only after first considering and rejecting the application of statutory standing); *Bevivino v. Town of Mt. Pleasant Bd. of Zoning Appeals*, 402 S.C. 57, 64, 737 S.E.2d 863, 867 (Ct. App. 2013) (holding it is unnecessary to address constitutional standing or the public importance exception when the basis for the independent concept of statutory standing exists).

Constitutional standing is based on Article III of the United States Constitution, which limits the jurisdiction of the federal courts to actual cases or

controversies. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016) (stating "[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing" (alteration in original) (citation omitted)). In *Lujan*, the Supreme Court of the United States stated "the irreducible constitutional minimum of [Article III] standing contains three elements": (1) the plaintiff must have suffered an "injury in fact," i.e., an invasion of a legally protected interest that is concrete and particularized, and actual or imminent; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely that the injury will be redressed by a favorable decision. 504 U.S. at 560-61.

The concept of Article III standing as applied in the federal courts does not limit a state's ability to statutorily formulate standing criteria. *See Duncan v. FedEx Office & Print Servs., Inc.*, 123 N.E.3d 1249, 1256 (Ill. App. Ct. 2019) (noting, for example, that a state court need not even define an "injury" the same way as in the federal forum); *see also Freemantle*, 398 S.C. at 194-95, 728 S.E.2d at 44-45 (observing South Carolina's FOIA statute legislatively grants standing to "any citizen of the State" to enforce a FOIA request and holding where the appellant asserted he was a citizen of South Carolina, "[n]othing more" was required for standing, i.e., the appellant did not have to show that he had a personal stake in the outcome of the matter). However, this Court has held that "[w]hen no statute confers standing, the elements of constitutional standing must be met."[2] *Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518.

Here, Petitioners are community and neighborhood organizations comprised primarily of members who own property near the proposed passenger cruise facility. As we will now discuss, an organization has associational standing to bring suit on behalf of its members when (1) at least one member would otherwise have standing (statutory, constitutional, or otherwise) to sue in his or her 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. *See Beaufort Realty Co. v. Beaufort Cty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001) (citing the three-part test set forth in *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

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[2] "[T]he public importance exception may [alternatively] provide standing where the elements of constitutional standing are not met . . . ." *Youngblood*, 402 S.C. at 317 n.5, 741 S.E.2d at 518 n.5. As noted previously, Petitioners do not assert the public importance exception to this Court.

Associational standing advances some important objectives: it promotes judicial economy and efficiency by avoiding repetitive and costly independent actions by individual members, and it allows members who would have standing in their own right to pool their financial resources and legal expertise to help ensure complete and vigorous litigation of the issues. *Save the Valley, Inc. v. Indiana-Kentucky Elec. Corp.*, 820 N.E.2d 677, 680-81 (Ind. Ct. App. 2005). An additional advantage noted in some jurisdictions is that organizations are generally less susceptible than individuals to retaliation by offices responsible for executing the challenged policies. *Id.* at 681.

(2) Application of Test for Associational Standing

(a) First Element

To establish associational standing, an organization must first show that at least one of its members has standing in his or her own right. *See Beaufort Realty*, 346 S.C. at 301, 551 S.E.2d at 589; *see also Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 600-01, 550 S.E.2d 287, 291 (2001) (stating a plaintiff that is an organization may possess associational standing if it alleges that "one or more of its members will suffer an individual injury by virtue of the contested act"). Here, for any given Petitioner to have standing, at least one of its members must be an "affected person" as contemplated by section 44-1-60(G); as noted above, section 44-1-60(G) provides "[a]n applicant, permittee, licensee, or affected person may file a request with the [ALC] for a contested case hearing."

Unfortunately, section 44-1-60 does not define the term "affected person." Ordinarily, when a term is not defined in a statute, "the Court must interpret the term in accordance with its usual and customary meaning." *Travelscape, LLC v. S.C. Dep't of Rev.*, 391 S.C. 89, 99, 705 S.E.2d 28, 33 (2011). "Courts should consider not merely the language of the particular clause being construed, but the undefined word and its meaning in conjunction with the whole purpose of the statute and the policy of the law." *Id.*

There is no dispute that Petitioners (and their individual members) are "persons" for the purposes of section 44-1-60(G). That brings us to the usual and customary meaning of the word "affected." *Black's Law Dictionary* 70 (11th ed. 2019) defines "affect" as "[m]ost generally, to produce an effect on; to influence in some way." *Black's Law Dictionary* 53 (5th ed. 1979) similarly defines "affect" as "[t]o act upon; influence; change; enlarge or abridge; often used in the sense of acting injuriously upon persons and things."

Petitioners argue that, instead of simply applying the usual and customary meaning of the term "affected person" per *Travelscape*, the ALC and the court of appeals erroneously evaluated Petitioners' status as statutory "affected persons" by applying the criteria used to evaluate Article III standing. Petitioners argue the ALC and the court of appeals compounded this error by finding Petitioners must prove not only that they are "affected persons" under the statute but also that they meet the *Lujan* test for constitutional standing. Petitioners argue the lower courts' approach renders the statutory term "affected person" meaningless and creates a heightened standard for statutory standing that could not have been the intent of the General Assembly.

In analyzing whether Petitioners have standing, the court of appeals acknowledged that section 44-1-60 does not define "affected persons." Citing *Travelscape*, the court of appeals agreed the term should be given its usual and customary meaning, but then found the *Lujan* test for constitutional standing should be applied. This was error. In concluding the *Lujan* test applies, the court of appeals relied on statutes and regulations governing *judicial* review, which set forth particularized requirements for invoking the jurisdiction of the appellate courts.[3] It also relied on *Smiley v. S.C. Dep't of Health & Envtl. Control*, 374 S.C. 326, 649 S.E.2d 31 (2007), a case in which this Court did not specifically rule on the issue of whether a constitutional standard should be applied to a statute allowing all "affected persons" to seek administrative review of an agency's permitting decision. *See generally Humane Soc'y of the U.S. v. Hodel*, 840 F.2d 45, 59 n.24 (D.C. Cir. 1988) (noting prior cases cannot serve as binding authority where particular objections as to a party's standing were never raised). We find these authorities are not controlling of the definition of "affected persons" in section 44-1-60.

Citing the *Lujan* test, the court of appeals found Petitioners had shown only potential injury to the public at large and had not shown that any of their members

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[3] A contested case hearing in the ALC is distinguishable from judicial review. "[T]he ALC conducts a de novo hearing in contested cases, complete with the presentation of evidence and testimony." *Engaging & Guarding Laurens Cty.'s Env't ("EAGLE") v. S.C. Dep't of Health & Envtl. Control*, 407 S.C. 334, 344, 755 S.E.2d 444, 449 (2014). "[T]he ALC is authorized to make a final determination—after a final agency decision and subject to judicial review—as to whether an administrative agency should have granted or denied a particular permit." *Id.* The ALC acts as the fact-finder and is not bound by an agency's factual findings or permitting decision. *Id.*

had sustained an injury in fact from the proposed Terminal expansion project. The court of appeals relied on *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 753 S.E.2d 846 (2014), in which this Court applied *Lujan* and found several organizations lacked standing to bring nuisance and zoning claims in the circuit court. In *Carnival Corp.*, we held the organizations lacked standing because the allegations of injury in fact advanced by the plaintiffs were insufficient. As to the nuisance claim, we cited the absence of allegations that any of the organizations' members had personally and individually suffered any of the asserted harms. As to the zoning claim, we found the organizations did not allege that any of their members were adjacent or neighboring property owners as required by the statute allowing a private action for violation of a zoning ordinance.

Here, the court of appeals acknowledged Petitioners presented affidavits from individual members expressing concern over their reduced quality of life arising from the effects upon them *individually*, such as pollution and health effects, traffic congestion, property values, effects on their businesses in the area, and effects on the historical integrity of the area where they resided. For example, a member of the Coastal Conservation League stated in her affidavit that smoke emitting from cruise ships already physically impacted her and required her to retreat indoors when the ships were in town and that a larger facility, which would be much closer to her home, would only increase this adverse effect. Others attested to soot on and in their homes. Nevertheless, the court of appeals, relying on *Carnival Corp.*, agreed with the ALC that the claims of possible environmental and personal harm were purely speculative or were merely generalized grievances equally affecting the public as a whole.

Our approach in *Carnival Corp.* is not applicable here because *Carnival Corp.* involved nuisance and zoning claims initiated in the circuit court, not the statutory grant of administrative review in the ALC that is at issue here. Further, the plaintiffs in *Carnival Corp.* did not submit affidavits regarding individualized harm. We find Petitioners' allegations of potential harm to members in nearby neighborhoods, through affidavits and other filings, are not speculative.

The courts below essentially, and erroneously, required Petitioners to prove the existence of an environmental impact on their members and the surrounding neighborhoods as part of establishing standing. The ALC and the court of appeals failed to consider that the purpose of Petitioners' action is to seek administrative review of whether DHEC engaged in a proper environmental analysis in the first instance, including complying with all statutory and regulatory requirements,

before issuing the permit for the Terminal project.[4] *Cf. City of Davis v. Coleman*, 521 F.2d 661, 670-71 (9th Cir. 1975) ("Were we to agree with the district court that a NEPA plaintiff's standing depends on 'proof' that the challenged federal project will have particular environmental effects, we would in essence be requiring that the plaintiff conduct the same environmental investigation that he seeks in his suit to compel the agency to undertake." (footnote omitted)); *Palm Beach Cty. Envtl. Coal. v. Fla. Dep't of Envtl. Prot.*, 14 So. 3d 1076, 1078 (Fla. Dist. Ct. App. 2009) ("The ALJ's standing analysis essentially boils down to a finding that the petitioners lacked standing because the petitioners failed to prevail on the merits, *i.e.*, they had failed to establish that the injected wastewater would migrate and impact water quality. This analysis 'confuse[s] standing and the merits such that a party would always be required to prevail on the merits to have had standing' . . . ." (alteration in original) (citation omitted)); *United Copper Indus., Inc. v. Grissom*, 17 S.W.3d 797, 803 (Tex. App. 2000) ("United Copper confuses the preliminary question of whether an individual has standing as an affected person to *request* a contested-case hearing with the ultimate question of whether that person will *prevail* in a contested-case hearing on the merits. In essence, United Copper suggests that Grissom should be required to prove that he will *prevail* in a contested-case hearing just to show that he has the standing necessary to *request* such a hearing. We reject this argument . . . .").

The underlying action here is an administrative proceeding in which Petitioners seek a contested case hearing in the ALC to determine whether the proper procedures were followed by DHEC in issuing an environmental permit. The General Assembly surely intended DHEC to receive input from all persons affected by a project with potentially harmful environmental impacts. Such input, which continues until the administrative review process concludes with a contested case hearing, allows the agency's permit review process to fully assess the project's impact.

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[4] Petitioners note these considerations include the extent to which all feasible safeguards were taken to avoid adverse environmental impacts, the project's effect on the value and enjoyment of surrounding landowners, the extent to which the development could affect irreplaceable historic and archeological sites in South Carolina's coastal zone, air and water quality impacts, and whether certain permit conditions should be imposed to lessen the effects of the project on the homes and health of nearby homeowners.

The purpose of this administrative process is to discover and evaluate harm to the surrounding environment and to persons who would be affected by the proposed project. Those living near the project are most likely to be impacted in ways that are distinguishable from the impacts generally falling upon the public at large, and some jurisdictions have emphasized the significance of this geographic proximity in cases involving the assessment of a project's environmental consequences. *Cf. City of Davis*, 521 F.2d at 671 ("The procedural injury implicit in agency failure to prepare an EIS[—]the creation of a risk that serious environmental impacts will be overlooked[—]is itself a sufficient 'injury in fact' to support standing, provided this injury is alleged by a plaintiff having a sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences the project may have. This is a broad test, but because the nature and scope of environmental consequences are often highly uncertain before study we think it an appropriate test."). While geographic proximity may not be a determinative factor in every case, it is highly relevant to our analysis in this case. Here, members would suffer the environmental consequences Petitioners allege the project will create, such as breathing problems and other adverse health effects; increases in hazardous diesel soot; and increases in noise, traffic, and water pollution. Therefore, the members fall within the scope of any reasonable, ordinary definition of "affected persons." Accordingly, we hold Petitioners have established the first element of associational standing.

(b) Second and Third Elements

We find Petitioners have also established the second and third elements of associational standing. As for the second element (the interests at stake are germane to the organization's purpose), numerous jurisdictions have emphasized "that the germaneness requirement is undemanding." *See St. Louis Ass'n of Realtors v. City of Ferguson*, 354 S.W.3d 620, 625 (Mo. 2011) (en banc) ("Requiring otherwise would undermine the primary rationale of associational standing, which is that organizations are often more effective at vindicating their members' shared interests than would be any individual member."). Here, the interests Petitioners seek to protect through the review process—impacts on noise and soot pollution, traffic, human health, and the historic neighborhoods in which their members reside—clearly are germane to the purposes of these organizations. *Cf. White Plains Downtown Dist. Mgmt. Ass'n v. Spano*, 833 N.Y.S.2d 868, 874 (Sup. Ct. 2007) (holding "[t]he interests BID seeks to protect—existing patterns of population concentration, distribution or growth, existing community or neighborhood character, human health and economic interests—are germane to its purpose").

The third element requires Petitioners to establish that neither the claim asserted nor the relief requested requires the participation of Petitioners' individual members. Petitioners do not seek monetary damages on behalf of their members for specific instances of environmental harm; rather, Petitioners seek administrative review of the agency's permitting process. Although affidavits of individual members have been submitted in support of Petitioners' request for administrative review, administrative review of DHEC's permitting process does not require the individual members' substantial participation. *See generally Winnebago Cty. Citizens for Controlled Growth v. Cty. of Winnebago*, 891 N.E.2d 448, 457-58 (Ill. App. Ct. 2008) (observing an association's standing to sue on behalf of its members "depends in substantial measure on the nature of the relief sought" and finding while individual testimony might be taken from nearby property owners to establish some facts in the case, this did not establish a substantial need for the individual members' participation and did not bar associational standing, particularly in light of the fact that the only relief sought by the associations did not involve monetary damages (citation omitted)); *White Plains Downtown Dist. Mgmt. Ass'n*, 833 N.Y.S.2d at 874 (holding the organization did not seek compensatory damages on behalf of its members, so the action did not require the individual participation of its members for the relief sought).

To conclude our discussion of Petitioners' status as "affected persons," we note section 44-1-60 provides for the participation of "affected persons" during other stages of the agency's permitting process; for example, an "affected person" is entitled to receive notice of the staff decision pursuant to section 44-1-60(E) and is entitled to request a final review conference pursuant to section 44-1-60(F). *See* S.C. Code Ann. § 44-1-60(E), (F) (2018). There is no dispute that Petitioners were considered "affected persons" with regard to these other stages of the permitting process. The dispute over their status arose only when Petitioners requested a contested case hearing. *See, e.g., S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 390 S.C. 418, 431, 702 S.E.2d 246, 253 (2010) (holding "the [South Carolina Coastal Conservation] League was an affected person who asked to be notified" of the permitting decision under section 44-1-60).

If nearby property owners who have made individualized assertions of real, anticipated harm cannot satisfy the statutory standard in section 44-1-60 to acquire "affected person" status, it does not appear that anyone in this state could qualify to seek review of permits for the Terminal expansion project. This could not have been the intent of the General Assembly. We find at least one of Petitioners' members would have standing to sue in his own right, the interests the action seeks

to protect are germane to the purposes of Petitioners' organizations, and neither the claim asserted nor the relief requested requires the participation of Petitioners' individual members in the action. Consequently, we hold Petitioners have established associational standing. We reverse the grant of summary judgment and remand the matter to the ALC for a contested case hearing.[5] However, we emphasize that our decision as to standing should in no way be construed as a signal of our view of the merits of the issues to be examined in either the contested case hearing or any other part of the permitting process.

B. TERMINATION OF DISCOVERY

Petitioners next argue the court of appeals erred in upholding the ALC's ruling denying their motion to expand discovery and imposing a retroactive date for its termination. Petitioners assert the issue of discovery is not moot if summary judgment is reversed. We agree.

SCALC Rule 21(A) provides that in ALC matters, discovery shall generally be completed within 90 days of the date of the Notice of Assignment. However, discovery may be expanded or curtailed upon either (1) a motion for good cause shown, or (2) *sua sponte* by the ALC. *Id.*

The ALC denied Petitioners' motion to expand discovery pursuant to SCALC Rule 21(A) on the basis the motion was untimely (having been made after the 90-day default period) and because Petitioners had not shown additional discovery was warranted. Petitioners filed a motion for reconsideration. At that time, the Ports Authority's motion for summary judgment was still pending. The ALC issued an order granting summary judgment based on Petitioners' lack of standing. In a footnote included in the summary judgment order, the ALC vacated its original order regarding discovery and stated Petitioners' motion to expand discovery was denied as moot in light of the grant of summary judgment.

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[5] Because we find Petitioners have statutory standing, we need not address Petitioners' argument that the Ports Authority was collaterally estopped from disputing Petitioners' standing to challenge the state permit based on the fact that Judge Gergel previously found some of Petitioners' organizations had Article III standing to challenge the federal permit. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (explaining an appellate court need not address any issues remaining if another issue is dispositive).

On appeal, the court of appeals stated it did not dispute Petitioners' assertion that there was correspondence among counsel of record, as well as communications with the ALC, that suggested the ALC and all parties proceeded as if discovery would continue after the 90-day period following the Notice of Assignment. However, the court of appeals ultimately upheld the ALC's determination, citing, *inter alia*, Petitioners' failure to move earlier for an extension under SCALC Rule 21(A). The court of appeals did not address the issue of mootness, although it also upheld the grant of summary judgment.

Petitioners contend the court of appeals erred in upholding the ALC's discovery determination, and they maintain Respondents have fabricated procedural arguments on appeal in an effort to insulate the discovery issue from review. We reject Respondents' assertions that none of the discovery rulings are reviewable. Although the ALC held the discovery issue was moot after it granted summary judgment, common sense dictates that the issue of discovery is no longer moot if summary judgment is reversed. In addition, Petitioners did not waive the ability to challenge the discovery issue by stating they sought expanded discovery for the contested case hearing, not summary judgment. Petitioners were simply stating expanded discovery was not a critical component in evaluating Petitioners' standing to seek a contested case hearing, which was the sole subject of the summary judgment motion.

Having reversed the order granting summary judgment in Part A of this opinion, we find the issue of discovery is no longer moot. We further find Petitioners' motion to expand discovery was not untimely, as the parties informed the ALC of their need for expanded discovery, and the parties continued discovery well after the 90-day period, all with the ALC's knowledge and tacit approval. Under SCALC Rule 21(A), the ALC can *sua sponte* grant expanded discovery, which is effectively what occurred here. In addition, Petitioners' explanations as to why the parties delayed taking depositions until most of the discovery documents had been received and their need for additional time to take depositions in this complex case satisfied the good cause standard. Consequently, we reverse the rulings regarding discovery and instruct the ALC to issue a reasonable scheduling order for concluding discovery.

C. SANCTION FOR FILING REMAND MOTION

Petitioners contend the court of appeals erred in upholding the ALC's imposition of a sanction under SCALC Rule 72 after the ALC found Petitioners'

motion to remand the case to the DHEC Board for a final review conference was frivolous. We agree and reverse the imposition of a sanction.

"If the presiding administrative law judge determines that a contested case, appeal, motion, or defense is frivolous or taken solely for purposes of delay, the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require." SCALC Rule 72. "In determining whether a case or defense is frivolous, the administrative law judge may refer to S.C. Code Ann. § 15-36-10, the Frivolous Civil Proceedings Sanctions Act [FCPSA]." 2014 Revised Notes to SCALC Rule 72. "The amount and type of sanction to be imposed is within the discretion of the presiding administrative law judge." *Id.*

The ALC indeed referred extensively to the FCPSA in reaching its decision to impose a sanction on Petitioners. While the Revised Notes to SCALC Rule 72 recognize that the "amount and type of sanction to be imposed" are matters for the sound discretion of the administrative law judge, a judge's threshold decision to apply sanctions under the FCPSA sounds in equity rather than at law. *See Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 167, 758 S.E.2d 483, 499 (2014). Therefore, we review the ALC's findings of fact with respect to its threshold decision to grant sanctions under the FCPSA by taking our own view of the preponderance of the evidence. *See id.*

The FCPSA provides an attorney or a pro se litigant in a civil or administrative action may be sanctioned for filing a frivolous motion or document if "a reasonable attorney presented with the same circumstances would believe the [item filed] is frivolous, interposed for merely delay, or merely brought for any purpose other than . . . adjudication of the claim or defense . . . ." S.C. Code Ann. § 15-36-10(A)(4)(a)(iv) (Supp. 2019). A sanction may also be imposed for "making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law or if there is no good faith argument that exists for the extension, modification, or reversal of existing law." § 15-36-10(A)(4)(c). While subsection (A)(4) speaks only in terms of an attorney or pro se litigant being subject to sanctions under this act, subsections 15-36-10(C) and (E) extend the specter of a sanction to a party to the action. In determining whether to impose a sanction, a court must consider such factors as the explanation offered for the filing, the complexity of the case, any prior violations, and such other factors the court deems appropriate. § 15-36-10(E).

Here, DHEC issued a staff decision granting a Critical Area Permit and Coastal Zone Consistency Certification to the Ports Authority on December 18,

2012. Petitioners requested a final review conference from DHEC, asserting DHEC staff did not engage in a full analysis of the proper considerations in evaluating the permit application. After DHEC notified the parties that it had decided not to conduct a final review conference, Petitioners submitted a request for a contested case hearing with the ALC.

Petitioners thereafter filed a motion with the ALC requesting a remand to the DHEC Board for a final review conference. Petitioners argued the DHEC Board's failure to conduct a final review conference violated the mandatory language in section 44-1-60 imposing a duty on DHEC to conduct a review of the staff decision upon timely request by an "affected person" to ensure the decision was consistent with agency policy and supported by the administrative record. *See* S.C. Code Ann. § 44-1-60(F) (2018) ("No later than sixty calendar days after the date of 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)). Petitioners asserted a final review conference would enable additional information to be supplied, if needed, and allow DHEC to apply its statutorily recognized "'specialized knowledge' in an evidence-based setting" so that "the agency's rationale (as opposed to [the] staff's rationale)" would be reviewed by the ALC.

The ALC found that although the word "must" initially could lead to the conclusion that whenever a request is made, the DHEC Board is required to conduct a conference, other language in the statute clarified that the DHEC Board has the discretion to "decline" to hold a final review conference. *See id.* ("If the board declines in writing to schedule a final review conference or if a final review conference is not conducted within sixty calendar days, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person [may request] pursuant to subsection (G) a contested case hearing before the [ALC]."). The ALC found the use of the word "must" in section 44-1-60(F) means that in instances in which the DHEC Board actually *elects* to hold a conference, it must do so within the statutorily prescribed time. The ALC noted this meaning is further recognized in section 44-1-60(G)(1) of the South Carolina Code (2018). The ALC analyzed the statutes referring to DHEC's "specialized knowledge"[6] cited by Petitioners and found they applied to evidence presented by DHEC in the ALC hearing and did not impact the procedure for requesting a final review conference.

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[6] *See* S.C. Code Ann. § 44-1-60(F)(2) (2018); *see also* S.C. Code Ann. § 1-23-330(4) (2005).

The Ports Authority subsequently sought the imposition of a sanction against Petitioners pursuant to SCALC Rule 72, including dismissal of the action, on the ground Petitioners' motion for a remand to the DHEC Board was a frivolous filing that was unsupported by any reasonable legal theory and interposed solely for purposes of delay. After a hearing, the ALC issued an order sanctioning Petitioners for making the remand motion and directing Petitioners to pay $9,300 to the Ports Authority for attorney's fees incurred in opposing the motion. The ALC found the motion was frivolous because Petitioners erroneously relied upon a single word ("must") in section 44-1-60(F) while ignoring other language in the statute and administrative rulings and appellate cases recognizing the DHEC Board's discretion. The court of appeals affirmed the ALC, finding Petitioners disregarded a settled rule of statutory construction by failing to consider the statute as a whole.

The Ports Authority contends Petitioners have not preserved this issue for review because Petitioners did not appeal the ALC's order denying Petitioners' motion for remand. We disagree. The ALC's order denying the remand motion analyzed the statutory language and ruled solely on the issue of a remand to the DHEC Board for a final review conference. Petitioners did not appeal the remand order but did appeal the ALC's subsequent order finding their motion frivolous and imposing a sanction. While the remand order interpreting the statute is the law of the case, Petitioners' failure to appeal the remand order does not preclude them from appealing the order finding their motion frivolous and imposing a sanction.

Petitioners argue they did not disregard the additional language in the statute indicating ALC review is available if the DHEC Board "declines" to hold a conference. Rather, they read the provisions together (1) to mean the DHEC Board "must," in fact, hold a review conference, and (2) to provide an avenue for redress in the ALC if the Board fails to fulfill this statutory obligation. Petitioners acknowledge there are cases referring to the DHEC Board's discretionary authority to hold a conference; however, Petitioners assert they are not conclusive because the statements in those cases were made in general recitations about the facts or the permitting process, and the mandatory-versus-discretionary nature of a final review conference was not disputed. *See Ex parte Goodyear Tire & Rubber Co.*, 248 S.C. 412, 418, 150 S.E.2d 525, 527 (1966) ("It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision." (quoting *Cohens v. Virginia*, 19 U.S. 264, 399 (1821))). Petitioners argue they have a duty to diligently advance their

members' interests, and courts have routinely rejected sanctions for far more aggressive advocacy. Petitioners maintain the imposition of a sanction in these circumstances suppresses the vigorous representation that is needed to protect the public interest.

In upholding the sanction, the court of appeals cited no cases directly on point and relied instead on general authority holding a statute shall not be construed by concentrating on an isolated phrase. We agree with Petitioners that the cases cited by the ALC are not controlling because they did not involve a dispute over the particular point pertaining to a remand advanced by Petitioners. While Petitioners were incorrect on the law, our review of the preponderance of the evidence leads us to conclude their filing of the remand motion was not frivolous; we therefore reverse the ALC's imposition of a sanction.

III. CONCLUSION

Because we find Petitioners have standing, we reverse the grant of summary judgment and remand the matter to the ALC for a contested case hearing, at which time the ALC shall establish a reasonable schedule for the completion of discovery. In addition, we reverse the order imposing a sanction on Petitioners.

REVERSED AND REMANDED.

BEATTY, C.J., KITTREDGE and HEARN, JJ., concur. FEW, J., dissenting in a separate opinion.

JUSTICE FEW: The majority finds Petitioners have "associational" standing because at least one member of each Petitioner has "statutory" standing under subsection 44-1-60(G) of the South Carolina Code (2018). The finding of statutory standing depends on whether the person is "affected." To understand what the Legislature meant by "affected," it is necessary to consider context. No person *positively* affected by government action would sue to challenge the action. A person will sue only when *negatively* affected. Being negatively affected is the same as being injured as we define constitutional standing. Therefore, the ALC and the court of appeals correctly understood the subsection 44-1-60(G) requirement of "affected person" to be the equivalent of having suffered an "injury in fact" under constitutional standing.

Constitutional standing requires a party challenging government action to allege an injury different in character—not merely by degree—from the manner in which the action will "affect" the general public. The majority appears to agree Petitioners do not have constitutional standing. Even under subsection 44-1-60(G), Petitioners are no more "affected" than I am, and thus do not have standing. The effects alleged by Petitioners are of the same character members of the general public will see from the DHEC permit. As a recent resident of Greenville County and a current resident of Berkeley County, I too will experience increased noise and traffic, air pollution, and water pollution when I visit the City of Charleston peninsula. In addition, *if* there are soot and breathing concerns—a very serious scientific question Petitioners should be required to answer with scientific proof—when I park my truck to walk the streets of the City, I too will find soot on my truck when I return, and I will suffer breathing issues while I walk. The manner in which the issuance of DHEC's permit will affect me is different only by degree from the manner in which it will affect the South of Broad residents driving this challenge.

I respectfully dissent.