STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW 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.	)	Docket No. 13-ALJ-07-0056-CC **ORDER DENYING PORTS AUTHORITY'S MOTION TO DISMISS**

APPEARANCES: For the Petitioners: Amy E. Armstrong, Esquire
W. Jefferson Leath, Jr., Esquire
J. Blanding Holman, IV Esquire

For the Respondents: Randolph R. Lowell, Esquire
Chad N. Johnston, Esquire
Bradley D. Churdar, Esquire

This matter comes before the South Carolina Administrative Law Court (ALC or Court) on the Motion to Dismiss filed by the South Carolina State Ports Authority (Ports Authority) on July 1, 2013. In this Motion, the Ports Authority asserts this case should be dismissed on the grounds that Petitioners lack standing to challenge the permit in this case and, in the alternative, the issues presented amount to a non-justiciable political question. On September 6, 2013, this Court held a hearing on several motions, including this Motion to Dismiss. At the hearing, the Court asked the parties to file supplemental memoranda regarding the standard of review and applicable law.[1] After reviewing the filings by the parties and hearing oral arguments, the Court denies the Motion to Dismiss.

[1] This court will not consider Petitioners' additional argument that was included in their supplemental memorandum. Petitioners asserted that as a result of a decision issued in federal court after this court's hearing on

BACKGROUND

On December 18, 2012, the Department of Health and Environmental Control (DHEC) staff, through the Office of Ocean and Coastal Resource Management (OCRM), issued a Critical Area Permit and Coastal Zone Consistency Certification (Permit No. OCRM-12-054-B) authorizing the Ports Authority to make improvements to Building #322, an existing waterfront building in the Union Pier Terminal (UPT), for the purpose of relocating a cruise passenger facility. The permit authorizes the installation of five pilings within the existing footprint of Building #322 to support the installation of three elevators and two escalators. The permit also authorizes other structural changes to Building #322 as well as the construction of two covered staging areas designed to handle passengers, luggage, and the loading and unloading of ship supplies.

Petitioners filed a request for contested case hearing at the ALC to challenge DHEC's decision to issue the permit. Petitioners allege that DHEC's decision violates the South Carolina Coastal Zone Management Act, S.C. Code Ann. 48-39-10, et seq., the South Carolina Code of Regulations 30-1, et seq., and the Coastal Management Program (CMP).

On July 1, 2013, the Ports Authority filed a Motion to Dismiss on the grounds that Petitioners have failed to establish standing to challenge Permit No. OCRM-12-054-B. The Ports Authority asserts Petitioners have not suffered an injury-in-fact because the alleged injuries pertain to existing cruise operations and not the permitted activity to install five cluster piles. The Ports Authority further asserts that even if Petitioners have alleged an injury-in-fact, the alleged injuries are not traceable to or caused by the Permit and are not redressable by a favorable decision of this Court. Finally, the Ports Authority asserts Petitioners do not satisfy the associational standing requirement for bringing claims. As an alternative to the arguments regarding Petitioners' lack of standing, the Ports Authority argues that the case should be dismissed because the question of whether the State of South Carolina and the City of Charleston should adopt a policy favorable to cruise operations is a non-justiciable political question. The Ports Authority attached twenty exhibits to its Motion to Dismiss, including affidavits, newspaper and magazine articles, and other information related to the project to renovate the UPT.

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the Motion to Dismiss, the Ports Authority was collaterally estopped from challenging Petitioners' standing to litigate this case. This court's request for supplemental memoranda was very narrow and it was thus inappropriate for Petitioner to raise a new argument.

Petitioners filed a Response to Motion to Dismiss and also moved to strike the exhibits attached to the Ports Authority's Motion to Dismiss. Petitioners assert that when reviewing this Motion to Dismiss, the allegations made by Petitioners must be taken as true and those allegations sufficiently establish standing to proceed with this case at this time. Petitioners attached the affidavits of five individuals to support Petitioners' allegations. Moreover, Petitioners assert the Court should not only disregard but should strike the exhibits attached to the Ports Authority's Motion as there is no basis for consideration of exhibits offered by the Respondent at this stage of the proceedings. Finally, Petitioners dispute the Ports Authority's assertion that this case involves a non-justiciable political question.

DISCUSSION

This Court did not convert the Ports Authority's Motion to Dismiss to a Motion for Summary Judgment. All the parties asserted that they intended to treat this Motion solely as a Motion to Dismiss. Furthermore, at the time of the hearing, the parties were still in the process of conducting discovery. As such, it would not be appropriate to treat the motion as one for summary judgment. See Baird v. Charleston Cnty., 333 S.C. 519, 511 S.E.2d 69 (1999) ("summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery"). With this in mind, the Court first must rule on the propriety of considering evidence offered outside the pleadings prior to ruling on the Ports Authority's Motion to Dismiss.

In civil cases, the general rule is that a court will not consider evidence outside the pleadings when ruling on a motion to dismiss. See, e.g., Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987) ("A ruling on a 12(b)(6) motion to dismiss must be based solely upon the allegations set forth on the face of the complaint and the motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case."). In cases filed at the ALC, parties are not required to file traditional civil pleadings such as a complaint. In fact, in 2013, the ALC Rules of Procedure were amended to eliminate the rule regarding the filing of a Petition and an Answer, filings that resembled traditional civil pleadings. Compare ALC Rule 18 (eff. May 1, 2011) with ALC Rule 18 (eff. May 1, 2013). Nonetheless, generally in ALC contested cases, there are documents that are filed to initiate a case and set forth the core position of the parties. In this instance, Petitioners filed a Request for Contested Case which set forth, in part, who the Petitioners are and the relief

requested. More importantly, the Court thereafter issued an Order for Prehearing Statements. See ALC Rule 14. In that Order the Court requested that the parties set forth:

- Statutory provisions(s) conferring subject matter jurisdiction to the agency and other applicable statutes and regulations;
- The issues presented for determination, including any claims or defenses expected to be raised;
- The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citations;
- A brief summary of the facts to be presented at the hearing

The Request for Contested Case Hearing along with the Prehearing Statements establish a core statement of the facts and issues for determination that is comparable to the pleadings in a civil trial. Thus, since the Court's review is limited to the "pleadings," the Court must limit its review to the Request for Contested Case Hearing and Prehearing Statements to determine whether Petitioners have failed to state facts sufficient to state a claim unless otherwise provided by law.

While the general rule is that the court will not consider evidence outside the pleadings when ruling on a motion to dismiss, an exception applies when the motion to dismiss is based on lack of subject matter jurisdiction. Baird v. Charleston Cnty., 333 S.C. 519, 511 S.E.2d 69 (1999). A plaintiff may submit affidavits to show jurisdiction exists, Brown v. Investment Management & Research, Inc., 323 S.C. 395, 399, 475 S.E.2d 754, 756 (1996), while the defendant may submit affidavits or other evidence proving lack of jurisdiction, Baird, 333 S.C. at 529, 511 S.E.2d at 74.

Subject matter jurisdiction "refers to the court's power to hear and determine cases of the general class to which the proceedings in question belong." Bardoon Properties, NV v. Eidolon Corp., 326 S.C. 166, 169, 485 S.E.2d 371, 372 (1997). By statute, all DHEC decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions that may give rise to a contested case are subject to review by the ALC. S.C. Code Ann. § 44-1-60 (Supp. 2012); see also S.C. Code Ann. § 1-23-600(A) (Supp. 2012) ("[a]n administrative law judge shall preside over all hearings of contested cases as defined in Section 1-23-505…"); S.C. Code Ann. § 1-23-505(3) (Supp. 2012) (a contested case is a proceeding "in which the legal rights, duties, or privileges of a party are required by law. . . to be determined by an agency or the Administrative Law Court after an opportunity for hearing"). Regarding DHEC decisions,

Section 44-1-60 sets forth procedures, which include the opportunity for an applicant, permittee, licensee, or affected person to contest the final agency decision by filing a request for a contested case hearing before the ALC. S.C. Code Ann. § 44-1-60(F)(2), -60(G) (Supp. 2012). It is undisputed that this case is before the ALC pursuant to a request for review of a permit issued by DHEC, through its Office of Ocean and Coastal Resource Management. Therefore, there is no doubt that the ALC has jurisdiction to hear the subject matter of this case, i.e., a challenge to the issuance of a permit by an office of DHEC.

The question then is whether the Ports Authority's allegations that Petitioners lack standing, if true, deprive this Court of subject matter jurisdiction to hear this case. The Ports Authority asserts that under federal law, if a plaintiff fails to establish "constitutional standing," the federal court lacks subject matter jurisdiction to hear the plaintiff's case. According to the Ports Authority, it follows that because the South Carolina Supreme Court adopted the three elements of the "constitutional standing" test as set forth by the U.S. Supreme Court, a South Carolina court will also be deprived of subject matter jurisdiction when a plaintiff fails to meet the "constitutional standing" test.

Doctrines of Standing under Federal and State Law

Under federal law, there are two types of standing: Article III standing, derived from the U.S. Constitution's case-or-controversy requirement, and prudential standing, derived from the judicially self-imposed limits on a federal court's exercise of jurisdiction. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004); 25 Federal Procedure, Lawyers Edition § 59:1 (2013).[2] The U.S. Supreme Court's decision in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) set forth the elements of what is often called "Article III standing" or "constitutional standing." In Lujan, the Court sought to define the federal courts' judicial power by analysis of Article III of the U.S. Constitution. Quoting an earlier opinion, the Court explained that the case-or-controversy requirement of Article III, which "serves to identify those disputes which are appropriately resolved through the judicial process," Whitmore v. Arkansas, 495 U.S. 149, 155 (1990), is the basis for the doctrine of standing in federal courts. The Court concluded that "the core component of standing is an essential and unchanging part of the case-or-controversy

[2] In Elk Grove, the U.S. Supreme Court explained that even when cases are within the federal court's jurisdiction under Article III, the federal court may apply the prudential limitations on standing and decline to consider a case as a matter of judicial self-governance. Elk Grove, 542 U.S. at 11.

requirement of Article III." Lujan, 504 U.S. at 560. The Court then established that the "irreducible constitutional minimum of standing" consists of three elements:

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

Lujan, 504 U.S. at 560-561 (citations omitted). In federal court, it is critical that a party meet all three elements to establish that the party's case is a justiciable case or controversy. Absent this showing, the federal court's jurisdiction under Article III of the U.S. Constitution cannot be invoked. For this reason, a showing by a defendant that the plaintiff does not have standing to pursue his case in federal court, i.e., he has not properly invoked the jurisdiction of the federal court, deprives the federal court of the judicial power to hear the case. 6A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1542 (3d ed.) (when standing acts as an element of the case-or-controversy requirement, "it acts as a limitation on the subject-matter jurisdiction of the federal courts"). Thus, when standing is an element of the case-or-controversy requirement of Article III, objections to standing "cannot be waived and may be raised by a federal court sua sponte." Id. As a result, in federal court, the lack of standing can deprive the court of subject matter jurisdiction.

In 2001, the South Carolina Supreme Court adopted the three-part test of Lujan in Sea Pines Ass'n for Protection of Wildlife, Inc. v. S.C. Department of Natural Resources, 345 S.C. 594, 550 S.E.2d 287 (2001) without an explanation as to its reasoning. Since that decision, our state courts have analyzed standing by applying various tests including the Lujan test, often referring to it as the "constitutional standing" test. See, e.g., Smiley v. S.C. Dep't of Health & Envtl. Control, 374 S.C. 326, 649 S.E.2d 31 (2007) (held Smiley sufficiently alleged standing under the elements of the Lujan test); Charleston Trident Home Builders, Inc. v. Town Council of Summerville, 369 S.C. 498, 632 S.E.2d 864 (2006) (held Trident had standing under the elements articulated in Sea Pines); Sloan v. Dep't of Transp., 365 S.C. 299, 618 S.E.2d 876 (2005) (held Sloan had standing under the public importance exception); St. Andrews Pub. Serv. Dist. v. City Council of Charleston, 349 S.C. 602, 564 S.E.2d 647 (2002) (held special purpose

district lacked statutory standing to challenge annexation); Powell ex rel. Kelley v. Bank of America, 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008) (held Bank lacked standing according to the Lujan test); Commander Health Care Facilities, Inc. v. S.C. Dep't of Health & Envtl. Control, 370 S.C. 296, 634 S.E.2d 664 (Ct. App. 2006) (held Commander lacked standing according to the Lujan test); Sloan v. Greenville County, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003) (held Sloan, as a taxpayer, had standing under the Lujan test and also because the issue was of sufficient public importance).

In 2008, however, the South Carolina Supreme Court succinctly clarified the doctrine of standing under South Carolina law. In ATC South, Inc. v. Charleston County, 380 S.C. 191, 669 S.E.2d 337 (2008), Charleston County rezoned property owned by SCANA Communications, Inc. (SCI) to a classification that would permit SCI to construct a cell-phone tower. ATC, a competitor of SCI, challenged the rezoning by filing a declaratory judgment action. The circuit court dismissed the case finding ATC lacked standing to challenge the rezoning. On review, the Supreme Court explained that "[s]tanding may be acquired: (1) by statute; (2) through the rubric of 'constitutional standing;' or (3) under the 'public importance' exception." ATC, 380 S.C. at 195, 669 S.E.2d at 339. The Court first determined that no applicable statute provided a basis for ATC to assert statutory standing. The Court then determined that ATC did not meet the requirements of the Lujan test given that it failed to meet the first requirement of a concrete and particularized injury. Finally, the Court analyzed the public importance exception and concluded "ATC's efforts to cloak its zoning challenge as a matter of 'public importance' for the purpose of acquiring standing finds no traction in this record." ATC, 380 S.C. at 200, 669 S.E.2d at 341-342.

Since ATC, the Supreme Court has reiterated its three-part test in determining standing under South Carolina law.[3] In Freemantle v. Preston, 398 S.C. 186, 728 S.E.2d 40 (2012),

[3] The Court of Appeals issued a decision in 2010 involving a dock permit granted by DHEC in 2007. Bailey v. S.C. Dep't of Health & Envtl. Control, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010). In that case, Bailey was challenging DHEC's decision to approve modifications to a dock permit for a property upstream from Bailey's property. The ALC found Bailey lacked standing to challenge the permit because Bailey did not meet all three elements of the Lujan test. Neither the ALC's decision nor the Court of Appeals' decision mentioned or discussed whether Bailey had standing under a state statute or the public importance exception. However, in that case the Court was reviewing an order issued by the ALC on July 23, 2008, prior to the ATC decision.

In a later decision, the Court of Appeals acknowledged the three ways a party can acquire standing, as clarified in the ATC decision. Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control, 404 S.C. 515, 745 S.E.2d 385 (Ct. App. 2013). In that case, the Town along with various individuals challenged a DHEC decision authorizing certain land-disturbing activities under a state general permit. The ALC found that the Town and individuals lacked

Freemantle asserted a claim under the Freedom of Information Act to challenge the severance agreement entered between the county and its former administrator.[4] The circuit court dismissed the claim on the basis that Freemantle's status as a taxpayer did not establish standing to pursue his claim. The Supreme Court agreed that Freemantle did not meet the requirements of the Lujan test. The Court, however, found that Freemantle had standing to pursue his claim based on a specific provision in Section 30-4-100(a). The Court held that by virtue of enacting Section 30-4-100(a), the General Assembly "specifically conferred standing upon any citizen of South Carolina to bring a FOIA claim against a public body for declaratory or injunctive relief, or both." Freemantle, 398 S.C. at 195, 728 S.E.2d at 45. Because Freemantle properly pled that he was a citizen of South Carolina and that the Freedom of Information Act had been violated, the Court concluded he had satisfied the requirements to establish statutory standing and "[n]othing more is required." Id.

In Youngblood v. S.C. Department of Social Services, 402 S.C. 311, 741 S.E.2d 515, (2013), the Supreme Court again recognized that standing may be established in one of three ways. In that case, the Court considered whether former foster parents have standing to petition to adopt a child placed by the Department of Social Services (DSS) with a different family. The Court found that Section 63-9-60, the statute relied upon by the family court to find standing, actually deprived the Youngbloods of standing because the broad grant of standing in that statute specifically excluded situations where the child is placed for adoption by DSS. The Court next found that Section 63-9-310(D), which the Court of Appeals relied upon to find standing, did not confer standing because it did not apply to the Youngbloods and did not provide a right to judicial review. Because the Court found the Youngbloods lacked statutory standing, the Court analyzed "whether the denial of consent implicates a legal interest held by the Youngbloods, and thus whether due process requires judicial review and they possess constitutional standing." Youngblood, 402 S.C. at 321, 741 S.E.2d at 520. The Court ultimately found that the foster

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standing to challenge DHEC's decision. On appeal, the Court of Appeals presumed that no statute conferred standing, quoting the language from the Youngblood case, and noted that the ALC did not consider and Appellants did not raise the public importance exception. Town of Arcadia Lakes, 404 S.C. at 528, 745 S.E.2d at 392. Thus, while the Court recognized there were three ways a party could acquire standing, the Court only analyzed whether the Town and individuals met the elements of the Lujan test.

[4] Interestingly, in Freemantle, the Supreme Court referred to "constitutional standing" and the "public importance exception" as the "traditional standing principles" distinguishing those tests from standing acquired by statute.

parent relationship in and of itself is insufficient to create a legally protected interest in a child and, thus, does not create standing.

Most recently, in Bodman v. State, 403 S.C. 60, 742 S.E.2d 363 (2013), the Supreme Court heard an action in its original jurisdiction, wherein a taxpayer challenged the exemptions and caps on the State's sales and use tax and requested the Court strike them down as being unconstitutional. The Court first considered the State's argument that Bodman lacked standing to bring the action. The Court explained that "*[u]nder our current jurisprudence*, there are three ways in which a party can acquire this fundamental threshold of standing: (1) by statute; (2) through what is called 'constitutional standing'; and (3) under the public importance exception." Bodman, 403 S.C. at 66-67, 742 S.E.2d at 366 (citing ATC, 380 S.C. at 195, 669 S.E.2d at 339) (emphasis added). Because Bodman did not claim standing under any statute, the Court proceeded with its analysis under constitutional standing. The Court held that Bodman did not meet the first requirement of suffering a concrete and particularized injury because any harm he would suffer is shared by all taxpayers in the State. The Court, therefore, concluded that Bodman, as a mere taxpayer, did not have standing to proceed under the Lujan test. The Court then turned to the public importance exception. The Court explained that it had "tempered the application of the public importance exception somewhat in ATC" clarifying that "[t]he key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of 'future guidance' that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance." Bodman, 403 S.C. at 68, 742 S.E.2d at 367 (quoting ATC, 380 S.C. at 198-199, 669 S.E.2d at 341). The Court ultimately declined to analyze whether Bodman had standing under the public importance exception, instead finding that his claims failed on the merits.

This line of cases reflects that the doctrine of standing under South Carolina law has evolved from reliance on primarily one test to consideration of three distinct and separate ways a party can establish standing to pursue a claim in this State. Moreover, the ATC case in 2008 serves as a line of demarcation, at which point our state Supreme Court more comprehensively established "our current jurisprudence" regarding standing. As a result, for cases filed in South Carolina state courts, standing may be acquired: (1) by statute; (2) under the Lujan test; or (3) under the public importance exception.

It is important to note that even though the South Carolina Supreme Court adopted the Lujan test as a basis for analyzing a party's standing to pursue a claim in state court, the Court never opined that a party's failure to prove standing under the Lujan test would deprive a state court of subject matter jurisdiction.[5] In fact, since a statute can confer standing even though it does not exist via the constitutional test, logic would dictate otherwise. Furthermore, in what may be obvious yet profoundly significant, the Supreme Court's adoption of the Lujan test did not change the statutory means by which the ALC acquires subject matter jurisdiction. This Court, therefore, concludes that under South Carolina law, a party's lack of standing to pursue a claim does not deprive the ALC of subject matter jurisdiction to hear the case. Instead, it simply means that party is not the proper party to pursue the case.

Because standing is not a jurisdictional question in South Carolina, the Court may not consider evidence outside the pleadings in resolving a motion to dismiss based on lack of standing. Thus, for the purposes of considering the Ports Authority's Motion to Dismiss, this Court's review will be limited to those allegations set forth in Petitioners' Prehearing Statement.

Petitioners' Standing

"Standing to sue is a fundamental requirement in instituting an action." Bodman v. State, 403 S.C. 60, 66, 742 S.E.2d 363, 366 (2013) (quoting Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999)). The party seeking to establish standing has the burden of proving it. Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control, 404 S.C. 515, 529, 745 S.E.2d 385, 392 (Ct. App. 2013). Further, "'[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice' to withstand a motion to dismiss." Id. (quoting Lujan, 504 U.S. at 561). Standing must be proven "with the manner and degree of evidence required at the successive stage of the litigation." Id.; see also Beaufort County v. Trask, 349 S.C. 522, 563 S.E.2d 660 (Ct. App. 2002) (affirmed trial court's determination that County's failure to prove allegations supporting standing at the merits hearing ultimately defeated County's claim to standing).

For cases filed in South Carolina state courts, standing may be acquired: (1) by statute; (2) under the Lujan test; or (3) under the public importance exception. Bodman, 403 S.C. at 66-

[5] South Carolina's approach is not unlike other states' application of standing in state cases, including environmental disputes. See 2 State Environmental L. § 14:2 (2012) ("Unlike the federal law of standing, which is rooted in the Constitution's 'case or controversy' requirement, standing in the state courts is not normally viewed as a constitutional doctrine.").

67, 742 S.E.2d at 366 (citing ATC, 380 S.C. at 195, 669 S.E.2d at 339). "The traditional concepts of constitutional standing [Lujan test] are inapplicable when standing is conferred by statute." Freemantle, 398 S.C. at 194, 728 S.E.2d at 44; see Youngblood, 402 S.C. at 317, 741 S.E.2d at 518 ("When no statute confers standing, the elements of constitutional standing must be met."). "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, 402 S.C. at 317, 741 S.E.2d at 518.

In determining the meaning of a statute, the primary rule of statutory interpretation is to ascertain and give effect to the intent of the legislature. Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, 390 S.C. 418, 425, 702 S.E.2d 246, 250 (2010). In fact, when a statute's terms are clear and unambiguous on their face, there is no room for statutory construction. S.C. Coastal Conservation League, 390 S.C. at 425-426, 702 S.E.2d at 250 (citing Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007)).

In this case, Section 44-1-60 provides that an applicant, permittee, licensee, or affected person may contest a final agency decision of DHEC by filing a request for a contested case hearing before the ALC. S.C. Code Ann. § 44-1-60(F)(2), -60(G) (Supp. 2012). This remedy is available for all DHEC decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions. S.C. Code Ann. § 44-1-60(A), -60(G) (Supp. 2012). The statute is clear that if DHEC had denied the Ports Authority's application for a permit, the Ports Authority would have been able to establish statutory standing simply by alleging it was the applicant and it was challenging DHEC's decision to deny the Ports Authority's application. See Freemantle, 398 S.C. at 195, 728 S.E.2d at 45. Similarly, in the case at hand, Petitioners should be able to establish statutory standing by alleging they are affected persons and are challenging DHEC's decision to grant the permit to the Ports Authority.

The self-imposed moniker that a person is "affected" by a decision does not automatically confer standing. In some DHEC statutes, the General Assembly has defined the term "affected person" to specifically include certain individuals, and thereby exclude other individuals. See, e.g., S.C. Code Ann. § 44-7-130(1) (2002) (defining "affected person" for

purposes of the State Certification of Need and Health Facility Licensure Act to include, among others, the applicant, a person residing within the geographic area to be served by the applicant, persons located in the health service area and who provide similar services to the proposed project, and the State Consumer Advocate). In those instances, the General Assembly has specified those individuals who need not jump the hurdles of the Lujan test to establish standing but are able to establish that they have standing by simply alleging they meet one of the categories listed in the definition. Here, however, the General Assembly did not define "affected person" for purposes of the permit at issue. Nevertheless, though the Lujan test is separate from Petitioners' ability to establish standing under the statute, in this instance where a clear, specific definition of "affected person" is not available, the test provides a sufficient framework to determine whether the Petitioners have been sufficiently affected to have standing to survive this motion to dismiss.[6] Indeed, if Petitioners sufficiently allege an injury-in-fact, with a causal connection between the injury and the conduct complained of, which is redressable by a decision of this Court, it seems to follow that Petitioners will have sufficiently alleged that they are affected persons under the statute.

As referenced above, the first consideration to determine if a party has standing under Lujan test is whether the person has suffered an "injury in fact." An "injury in fact" is "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" Lujan, 504 U.S. at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). To be particularized, the injury must affect Petitioners "in a personal and individual way." Sea Pines, 345 S.C. at 602, 550 S.E.2d at 292. It is settled that "a private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom." ATC, 380 S.C. at 196, 669 S.E.2d at 339 (quoting Evins v. Richland Cnty. Historic Pres. Comm'n, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000)).

Our courts have found that "even those concerns reflecting aesthetic or recreational interests have been recognized as 'judicially cognizable injur[ies] in fact'." Town of Arcadia Lakes, 404 S.C. at 531, 745 S.E.2d at 394 (quoting Sea Pines, 345 S.C. at 602, 550 S.E.2d at 292); see also Hill v. S.C. Dep't of Health & Envtl. Control, 389 S.C. 1, 698 S.E.2d 612 (2010);

[6] If Petitioners wish to rely on statutory standing rather than the Lujan test at a later stage in this case, Petitioners must be prepared to argue how standing as an "affected person" under Section 40-1-60 differs from the Lujan test, in light of our Supreme Court's recent cases, and also how Petitioners qualify as affected persons under that statute.

Smiley v. S.C. Dep't of Health & Envtl. Control, 374 S.C. 326, 649 S.E.2d 31 (2007). In S.C. Wildlife Federation v. S.C. Coastal Council, 296 S.C. 187, 371 S.E.2d 521 (1988), a case cited with approval in Sea Pines, the Court held that where parties "alleged an individualized injury in the adverse effect of a specific decision of the Coastal Council on their members' use and enjoyment of the fish and wildlife of the wetlands" that would be affected by a Coastal Council certification, "these allegations are sufficient to show standing." 296 S.C. at 190, 371 S.E.2d at 523. In Smiley, the Court held that Smiley had standing where he alleged an adverse effect on his use and enjoyment of the beach at Isle of Palms from a permit that authorized the scraping of sand on that beach. In Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000), the Court found the plaintiffs had standing where affidavits and testimony asserted that "Laidlaw's discharges, and the affiant members' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests." 528 U.S. at 183-184. The Court explained that "[t]hese submissions present dispositively more than the mere 'general averments' and 'conclusory allegations' found inadequate" in Lujan v. National Wildlife Federation, 497 U.S. 871 (1990).

Here, Petitioners allege the permit will enable cruise ship home-basing operations to expand the number and size of the ships at the UPT. Petitioners allege that as a result of the expansion, there will be environmental and social impacts including increased air shed emissions, traffic volumes, traffic noise, and health impacts. Petitioners specifically express concern about emissions from docked cruise ships of nitrogen oxides and sulfur dioxide, which are known to negatively impact human health. Petitioners assert that in addition to increased emissions, there will be increased truck and car traffic, increased noise and congestion, decreased property values, and adverse health impacts. Petitioners have asserted they will suffer an injury to their aesthetic and recreational interests as well as their property interests. Petitioners, therefore, have alleged an injury-in-fact.

The second element of the Lujan test requires that "there must be a causal connection between the injury and the conduct complained of—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.'" Lujan, 504 U.S. at 560 (quoting Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 41-42 (1976)). In this case, the conduct complained of is the permit authorizing the construction of pilings in the critical area which are necessary for a new

cruise ship terminal at the UPT. Petitioners allege the new pilings are necessary for the relocation and expansion of the cruise terminal, which will result in the alleged injuries of increased emissions, increased traffic congestion and noise, and adverse health impacts. Petitioners, therefore, allege that without the permitted pilings to provide necessary structural support for the cruise terminal, the Ports Authority will not be able to expand cruise services or serve larger cruise ships. Petitioners have alleged sufficient facts to show a causal connection at this point.

The third and final element of the Lujan test is that "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Lujan, 504 U.S. at 561 (quoting Simon, 426 U.S. at 38, 43). Petitioners request this Court review the permit and issue an order reversing the decision to issue the permit or, in the alternative, remand the case to DHEC with instructions to conduct an analysis of alternative terminal locations, traffic impacts, noise impacts, air emissions, and impacts on the historic qualities of Charleston. Petitioners allege that the permit will allow the Ports Authority to relocate and expand the cruise ship terminal, resulting in increased emissions, increased traffic congestion and noise, and adverse health impacts. Petitioners, therefore, also allege that if the permit is denied, the Ports Authority will not be able to expand cruise services or serve larger cruise ships. While the existing injuries allegedly suffered by Petitioners will not be altered by the denial of the permit in this case, Petitioners allege that the exacerbation of those injuries will be redressed.

Organizational Standing

Where the petitioner is an organization, the organization has standing "only if it alleges that it or its members will suffer an individualized injury; a mere interest in a problem is not enough." Beaufort Realty Co. v. Beaufort Cnty., 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001). An organization has standing to bring suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right; (2) the interests at stake are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Id. (citing Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977)).

Here, Petitioners allege they represent diverse and broad interests, including seeking protection for Charleston's historic neighborhoods and residents; protection of air and water quality; protection of the architectural, historical, and cultural character of Charleston;

appropriate management of mass tourism downtown; appropriate location of the terminal to provide broad regional preservation and economic benefit; and protection of the quality of life in historic Charleston. At this stage of the proceedings, the Court finds that Petitioners have sufficiently alleged that the organizations have standing in that they assert their members will suffer an individualized injury and the protection of the members' interests is germane to the organizations. For example, the Historic Ansonborough Neighborhood Association (HANA) is an organization created to address matters of importance to this historic residential neighborhood. An individual who is a resident of the Ansonborough neighborhood would have standing on his own by making allegations of increased emissions, decreased property values, and adverse health impacts as a result of the permit allowing the relocation and expansion of the cruise terminal at UPT.[7] This Court finds that Petitioners have sufficiently alleged standing to proceed with this case at this time.

Non-justiciable Political Question

The Ports Authority alternatively argues that this case should be dismissed because Petitioners are not challenging the OCRM permit but rather are challenging the policy of the UPT serving as a home port for cruise ships. Petitioners assert that while cases involving environmental issues often touch on policy choices and involve conflicting opinions among different branches of government, this particular case involves the issue of whether OCRM's permitting decision complies with the applicable statute and regulations.

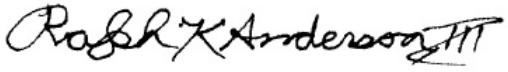
Courts will not rule on questions that are exclusively or predominantly political in nature rather than judicial. S.C. Pub. Interest Found. v. Judicial Merit Selection Comm'n, 369 S.C. 139, 632 S.E.2d 277 (2006). The case before this Court involves the discrete matter of whether the permit issued to the Ports Authority complies with state law. This Court's jurisdiction over this matter is both established and limited by statute, including Sections 1-23-600 and 44-1-60. Even if the Petitioners' motives are political in nature, this Court's review is restricted to consideration of whether the permit was lawfully issued in this case. The Court will not consider evidence of support for or opposition to the cruise industry in general. This Court is not the proper venue for airing such grievances and opinions. The Ports Authority's Motion to Dismiss on this basis, therefore, is denied.

[7] Our courts have not resolved the question of whether increased truck and car traffic as well as increased noise and congestion are legally sufficient to establish standing. This Court is not ignoring these allegations but rather is delaying any ruling on these until this question is resolved in this case or by the appellate courts.

ORDER

IT IS HEREBY ORDERED that the South Carolina State Ports Authority's Motion to Dismiss is **DENIED**.

AND IT IS SO ORDERED.



Ralph K. Anderson, III
Chief Administrative Law Judge

December 2, 2013
Columbia, South Carolina

CERTIFICATE OF SERVICE

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

E. Harvin Belser Fair
Judicial Law Clerk

December 2, 2013
Columbia, South Carolina