

THE STATE OF SOUTH CAROLINA

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
Mikell R. Scarborough, Master-in-Equity

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Appellate Case No. 2015-001146

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Kiawah Resort Associates, L.P., a Delaware Limited Partnership, and  
Kiawah Development Partners II, Inc.,

Appellant/Respondents,

vs.

Kiawah Island Community Association, Inc., a South Carolina Not-  
for-Profit Corporation,

Respondent,

and

Kiawah Property Owners Group, Inc. and Inlet Cove Club Homeowners  
Association, Inc.,

Respondent/Appellants.

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**RESPONDENT'S FINAL REPLY BRIEF OF  
RESPONDENT/APPELLANTS**

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## ARGUMENT<sup>1</sup>

### *Summary of Argument*

In order to participate in this case Inlet Cove and Kiawah Island Property Owners' Group ("KPOG") must meet both the test for intervention and the test for standing. A proposed party could meet the test for standing, but not meet the test for intervention; however, a party cannot meet the test for intervention if she does not have standing. The Master issued an eleven (11) page Order Granting Intervention in which he carefully reviewed the test for intervention and determined that Inlet Cove and KPOG met this test because they have property rights in the use of the 4.62 acres and because they have distinct interests in the aesthetic and recreational values of the Property, particularly given Inlet Cove's proximity to the Property. (R. p. 7).

Kiawah Resort Associates, L.P. and Kiawah Development Partners II, Inc. (hereinafter "KRA") does not dispute that members of Inlet Cove and KPOG have property rights in the 4.62 acres of Common Property. KRA does not dispute that members of Inlet Cove and KPOG make aesthetic and recreational use of the disputed 4.62 acres. KRA also does not dispute that the Intervenors have a position that is separate and distinct from KRA and KICA. Indeed, the Master noted that the Intervenors had a "separate and distinct"

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The Intervenors note that KRA's brief contains a recitation of facts that directly contradicts the master's findings in both the Final Order and the Order on Motion to Amend, as discussed more fully in the Intervenor's response brief.

position in the case: that the 4.62 acres was intentionally conveyed as Common Property by KRA to KICA as part of the Beachfront strip.<sup>2</sup> (R. p. 10).

Instead, what KRA does is ask this Court to disregard the Lujan requirement for a “concrete and particularized injury” and replace it with a requirement for a “discrete claim” that is different from, and in addition to, the injury KPOG and Inlet Cove share with KICA.

The Master relied heavily on evidence presented by the Intervenor in both his Final Order and in his Order on Motion to Alter or Amend. Yet inexplicably the Master swiftly dismisses the Intervenor, providing no legal analysis as to how he arrived at this conclusion stating that the “Intervenor do not have standing separate from their capacity as KICA members[.]” (R. p. 53). KRA’s brief does nothing to shed light on the Master’s bare conclusion.

**I. KRA ADVOCATES, AND THE MASTER APPLIED, AN ERRONEOUS STANDARD FOR STANDING**

**A. KPOG and Inlet Cove Meet the South Carolina Test for Standing**

Both KPOG and Inlet Cove meet the South Carolina test for standing, which is based upon Lujan v. Defs. of Wildlife, 504 U.S. 555, 112 S.Ct. 2130 (1992). See Sea Pines Ass’n for Prot. of Wildlife, Inc. v. S.C. Dep’t of Natural Res., 345 S.C. 594, 550 S.E.2d 287 (2001). Where there are property interests at stake, South Carolina courts have recognized a presumptive injury in fact. Town of Arcadia Lakes v. S.C. Dep’t of Health & Env’tl. Control, 404 S.C. 515, 745 S.E.2d 385 (Ct.App.2013).

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<sup>2</sup>  
KRA/KDP II’s position is that there was a mutual mistake. KICA took no position on intent or mutuality of mistake.

KPOG and Inlet Cove, as the Master has noted in his Order Granting Intervention, alleged particularized, concrete injuries which were bolstered and explained through live testimony. The injuries are diminishment of aesthetic and recreational use and enjoyment from the 4.62 acres of Property and elimination of property rights. The causal relationship has been established: if the deed is reformed, then the 4.62 acres of Property will return to KRA, who will be able to develop the Property, and KPOG and Inlet Cove members will be excluded from using the property and experience the loss of a valuable HOA asset. If this Court denies reformation, then KPOG and Inlet Cove can continue to use and enjoy the Property in its natural state as these parties have done and continue to do, as well as maintain this valuable beachfront asset as Common Property.

**i. KPOG and Inlet Cove's Legally Protected Interests at Stake**

Upon purchasing property on Kiawah Island that property owner becomes a member of KICA. Under the Development Agreement entered between the Town of Kiawah Island and KRA, KRA must deed KICA certain designated lands as "Common Property" subject to KICA Covenants. (R. pp. 1456-65, 1944-2040, 2210-35). Thus, KICA members own a fractional interest in all Common Properties and a 3/4 super-majority vote of membership is required to dispose of Common Property. (R. pp. 1944-2040, 2217-20). Thus, the individuals who own property in Kiawah also own the Common Property and it cannot be deeded without their vote.

In addition to these property ownership rights in Common Property, the KICA Covenants also grant KICA members and their guests an easement for the use and enjoyment of Common Property. (R. p. 2217). The 4.62 acres in dispute is held by KICA, on behalf of

its members, as Common Property. Under the Master's standing ruling, KPOG and Inlet Cove's property rights could be given away without their vote and without their participation.

The fact that the testifying Intervenor has a fractional interest, along with every other property owner in Kiawah, of all Common Property, in addition to easement rights is more than enough to establish an injury if those property rights would be eliminated.<sup>3</sup> Any time an individual's property interest is affected, he or she has standing to protect that property interest. Glover v. Glover, 2007 WL 8327448 (Ct. App. 2007) (not reported in S.E.2d); see also Town of Arcadia Lakes, 404 S.C. 515.

Appellants' opening brief on pages 26-27 contains a review and citation to the trial testimony related to aesthetic and recreational interests.

**ii. KICA Cannot Represent KPOG and Inlet Cove's Interests**

Not every member of KICA uses and enjoys the Property in the same way. The Intervenor expressed a use and enjoyment of the Property that is different than that of KICA. (See Final Br. of Respondent/Appellants pp. 26-27). The suggestion that the injury is "specific to KICA," (Resp. Br. of Appellant/Respondents p. 10), ignores that KICA acts

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The testimony of Wendy Kulick is illustrative of the injury:

- A: As a member of KICA I can go walking on that property and enjoy the natural scenery.
- Q. And if the 4.62 acres, if this Court holds that it is not common property, how will that affect your use and enjoyment of the parcel?
- A. Well, my understanding is that if its private property – privately owned property, then unless I have permission from the property owner I don't have any authority to use – be on that property or use it in any way.

(R. p. 1313, line 24–p. 1314, line 8).

to serve its members, that the Inlet Cove and KPOG consist of KICA members and that those members have property ownership interests in Common Property, including the 4.62 acres.

Appellant/Respondents KRA and Respondent KICA mistakenly assume that harm to aesthetic and recreational use and enjoyment of the natural environment is not a sufficient and separate injury that can give rise to standing in this suit. In addition, the Master erred in ruling that, as a result of KPOG and Inlet Cove sharing the easement of use and enjoyment from the Property, KPOG and Inlet Cove's interest is adequately represented by KICA despite his contrary conclusion in the Order Granting Intervention. In that Order the Master recognized the differing positions of the Plaintiffs, Defendant and Intervenors.

The situation in this case is analogous to In re Sierra Club, 945 F.2d 776, 780 (4th Cir. 1991), where environmental groups intervened in cases between the South Carolina Department of Health and Environmental Control ("DHEC") and private entities seeking hazardous waste permits. The district court denied Sierra Club's intervention in the cases, holding that Sierra Club lacked standing. The Fourth Circuit was then tasked with deciding whether DHEC could adequately represent Sierra Club's interests, when DHEC and Sierra Club "share[d] some objectives." Id. Ultimately, the court found that Sierra Club could intervene as a matter of right, because the parties interests differed due to their respective relationships with the dispute. The court described DHEC's goal as "represent[ing] all of the citizens of the state, including the interests of those citizens who also may be . . . proponents of new hazardous waste facilities." Id. In contrast, the court found that Sierra Club, as a nonprofit membership organization, "appears to represent only a subset of citizens concerned with hazardous waste—those who would prefer that few or no new hazardous waste facilities

receive permits.” Id. While both parties presumably are interested in protecting the environment for the good of all citizens, their goals and hence respective injuries for the standing analysis are particularized and unique to them.

KICA is a governing homeowners association that all property owners on Kiawah Island become members of upon purchase of their property. Owners of property on Kiawah Island join KICA automatically, and KICA theoretically represents the interests of all persons owning property on Kiawah Island. When taken together, members of KICA, like individuals represented by DHEC, are diverse and include those who might not care if the 4.62 acres in dispute remain common property in their natural state. In contrast, KPOG has a different role and purpose: to represent its membership on issues that may affect the fundamental character of Kiawah Island; to support preservation of natural resources and beauty on Kiawah Island; and to support sustainable economic growth that does not endanger the natural environment or residents’ quality of life. Similarly, Inlet Cove represents a subset of KICA members – those who live closest to the 4.62 acres in dispute. Neither entity consists of every individual who will be affected by this litigation. Instead, KPOG is an independent property owners’ advocacy organization, of which membership is voluntary and consists of a subset of Kiawah Island residents who care about KPOG’s statement of purpose. Similarly, Inlet Cove membership only consists of those located in the Inlet Cove neighborhood, which is situated in close proximity to the 4.62 acres and, as such, has its own interests separate from KICA’s general membership.

The Intervenors understand why KRA considers their interest in this case “intermeddling,” (Resp. Br. of Appellant/Respondents p. 10); however, members of both

Inlet Cove and KPOG testified to their very serious concerns about KICA's ability to forcefully advocate to maintain ownership of the 4.62 acres of Common Property. (R. pp. 289-90, 294-99). Specifically, KICA sent an email to all of its members stating, in part, that "KICA's most substantive disagreement is whether the property in question is Common Property, and since that issue can only be determined by a court, **the association is pleased to see this matter resolved through the legal process.** . . . KICA will refrain from further comment until the matter is resolved." (R. p. 298) (emphasis added). KICA's announcement that it was pleased that it had been sued by the developer caused considerable concern among members of Inlet Cove and KPOG that it would forcefully defend ownership of the 4.62 acres of Common Property.<sup>4</sup> (R. p. 289-90, 294-99). KICA's continuing objection to intervention of parties that supposedly seek the same result as KICA is an obvious indicator that Inlet Cove and KPOG's interests are not aligned with KICA's and that they have separate and distinct interest, even though that requirement exceeds the test for standing.

**iii. The Test is a "Concrete and Particularized Injury," Not a "Discrete Claim"**

KRA starts by citing to the correct standard of "concrete and particularized" injury, but throughout its brief insistently asserts that the test is a "claim" that must be "discrete

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KRA makes an attack on counsel for Intervenors as having some particular motive other than providing zealous representation for their clients. (Resp. Br. of Appellant/ Respondents p. 4). There is simply no evidence to support such an accusation, rather the testimony and evidence demonstrates the motivation giving rise to Inlet Cove and KPOG's request to intervene.

from that asserted by KICA” in order to establish standing. (Resp. Br. of Appellant/Respondents p. 14).

There is no legal authority, and KRA cites to none, holding that “‘claim’ is commensurate with the word ‘injury.’” (Resp. Br. of Appellant/Respondents p. 9). Similarly there is no legal authority, and KRA cites to none, holding that “lack of a discrete claim is synonymous with lack of a particularized injury-in-fact.” (Resp. Br. of Appellant/Respondents p. 8). Finally, and most significantly, there is no legal authority for KRA’s assertion that the intervenors do not have standing because “they had no discrete claim separate from that of KICA.” (Resp. Br. of Appellant/Respondents p. 9). Not only is there a glaring failure to provide any legal support, but all of these assertions rest on the Master and KRA’s erroneous interpretation of well-established law on standing combined with KRA’s unsupported interpretation of the terms used.

In considering whether “discrete” can be equated with “particularized,” reference to the Dictionary is instructive. Discrete means “constituting a separate entity : individually distinct; consisting of distinct or unconnected elements.” <http://www.merriam-webster.com/dictionary/discrete>. KRA as much as acknowledges the injury that Intervenors share with KICA, but asserts that injury is not enough, that the Intevenors need something more, an “injury plus” to meet the “concrete and particularized” requirement.

On the other hand, particularize, which is the term used under Lujan, Sea Pines, Smiley, Beaufort Realty, and the plethora of South Carolina and Federal standing cases, means “to state in detail: specify.” <http://www.merriam-webster.com/dictionary/>

particularized. The Intervenors must “specify” or “state in detail” their injury, not show that their injury is distinct from the injury they share with other KICA members. Intervenors have specified their injury both by asserting (1) that they are members of KICA, they hold property rights in the disputed Property and they would no longer be able to use and enjoy that Property if it were no longer Common Property and (2) that they enjoy viewing the Property and their aesthetic interests would be harmed if the Property were conveyed back to the developer for its own use.

KRA misunderstands the test, which is meant to prevent speculative “‘some day’ intentions” to visit endangered wildlife species halfway around the world that the Court had held insufficient to show injury in fact in Lujan. 528 U.S. at 184, 120 S.Ct. at 705-706. Lujan requires that “for the injury to be “particularized,” it must affect the plaintiff in a personal and individual way.” Id. at 561, 2136. Far from the speculative “some day” intentions rejected by the Lujan court, KPOG and Inlet Cove members live in or own property on Kiawah Island and testified that they presently use and enjoy the 4.62 acres in various ways, as they are presently legally entitled to do.

As has been shown earlier in their opening brief, the Intervenors have demonstrated a particularized, concrete, actual and imminent invasion of their property rights as well as their right to aesthetic and recreational uses of the Property.

**iv. KRA Advocates, and the Master Adopted, a New “Injury Plus” Requirement**

A party can have a particularized injury – an injury that is specific to him – while many others still share that injury. Town of Arcadia Lakes, 404 S.C. 515 (citing Pye v. U.S.,

269 F.3d 459, 469 (4th Cir. 2001) (“So long as the plaintiff himself has a concrete and particularized injury, it does not matter that legions of other persons have the same injury.”)). KRA attempts to insert a new standard for particularized injury, a de facto “injury plus” rule that would require Inlet Cove and KPOG to show more than the injury they experience by way of their membership in KICA as holders of property rights (not to mention injury to aesthetic and recreational interests). The fact that they are members of KICA and some of their injuries derive from their KICA membership only goes to establish their injuries as holders of property rights.

In his Order on Motion to Alter or Amend, the Master found that KPOG and Inlet Cove “**do not have standing separate from their capacity as KICA members** and should be dismissed from the case.” (R. p. 53) (emphasis added). In so holding, the **Order explicitly recognizes that the Intervenor have standing**, but simply dismisses their injury because KICA is a party. (R. p. 53). The Master’s Order essentially sanctions a new rule – harm is not good enough if another party shares overlapping harm. The Order on Motion to Alter or Amend leaves the injury-in-fact test wholly undefined, to generate what perhaps may be analogous to the old pornography rule: we cannot define it, but we know a real injury when we see one, and what you claim, Inlet Cove and KPOG, is not a real injury.

The test for standing is not whether another party has the same or similar injury, although through the testimony of Wendy Kulick, Greg VanDerwerker and Peter Mugglestone the Intervenor asserted distinct injuries to their aesthetic and recreational interests in using and enjoying the 4.62 acres in its undisturbed state. (R. p. 1308, line 3–p. 1311, line 9) (R. p. 1313, line 13–p. 1314, line 8) (R. p. 1322, line 21–p. 1323, line 11) (R.

p. 1353, line 6–p. 1355, line 14) (R. p. 1356, line 18–p. 1358, line 19) (R. p. 1329, line 2–p. 1332, line 24) (R. p. 1349, lines 12-22). The test is whether a party has an injury in fact. Whether that injury is adequately represented by another party who shares an injury is a question under the intervention analysis.<sup>5</sup>

**B. KRA Misapplies Carnival and Beaufort Realty**

Appellant-Respondents wrongfully assert that KPOG and Inlet Cove have only a “mere interest in a problem,” relying on the “associational standing” holdings of Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n, 407 S.C. 67, 53 S.E.2d 846 (2014). That case involved a historic neighborhood association alleging nuisance and zoning causes of action due to “generalized grievances suffered by the public as a whole” generated from the operation of Carnival’s cruise ships. Id. at 76, 77. The private nuisance cause of action alleged in that case required “a special injury to his real or personal property” for standing purposes, and the zoning ordinance allegedly conferring standing required the adjacent property owner to be in ownership of “specially damaged, adjacent or neighboring” property. Under the particular facts of Carnival Corp. the association failed to meet the standing burden because the association did not own property that was directly affected and it also did not own specially damaged adjacent or neighboring property. In other words, the individual members of the association, as distinct from the organization itself, would have standing because of their property ownership interests.

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KPOG and Inlet Cove have consistently maintained that their interests are not analogous to those of KICA and hence are distinct and unrepresented.

This case differs from Carnival Corp., both in the basis of the Intervenor's action and key facts of ownership. Under Carnival, an association has standing if "one or more of its members will suffer an individual injury." Carnival Corp., 407 S.C. at 76, 53 S.E.2d at 850 (citing Sea Pines, 345 S.C. at 600-01, 550 S.E.2d at 291. KPOG and Inlet Cove are participating in an action challenging the reformation of a deed in which their members have property interests, in addition to aesthetic and recreational interests. The deed conveyed the Beachfront Strip, including the disputed 4.62 acres, to KICA as common property subject to the KICA covenants. The KICA covenants establish easement rights of use and enjoyment of the granted common property. If the deed to KICA is reformed to nullify the grant of the disputed 4.62 acres, KPOG and Inlet Cove will suffer an inevitable and imminent harm to, if not destruction of, their recreational and aesthetic enjoyment of the Common Property and loss of their fractional ownership interest and easement rights. They will also suffer a tangible financial loss due to the conveyance of 4.62 acres of valuable beachfront property. (R. pp. 294-95) ("The 4.62 acres of ocean front property is a valuable asset to KICA."). The Intervenor's have property rights, which KPOG and Inlet Cove are entitled to protect.

Additionally, KPOG and Inlet Cove, separate from KICA, meet the standing requirements that are well-established for cases in which harm to aesthetic and/or recreational enjoyment of the natural environment is alleged. Courts have sometimes found this harm inadequate to confer standing where plaintiffs' recreational use of disputed property was as a licensee or trespasser. See Conservation Council of N.C. v. Costanzo, 505 F.2d 498 (4<sup>th</sup> Cir. 1974). But that is not the case here, because the Intervenor's have property rights in the 4.62 acres of Common Property.

Next, Appellant-Respondent's reliance on Beaufort Realty Co. v. Beaufort Cnty., 346 S.C. 298, 551 S.E.2d 588 (Ct.App.2001), is misguided. The position of KPOG and Inlet Cove as intervening parties is different from the position of the S.C. Coastal Conservation League as an intervening party in Beaufort Realty. In Beaufort Realty, the Court of Appeals found that the League had no standing to challenge zoning decisions where (1) the League "did not call any of its members as a witness," and (2) the League had "shown only the potential for future harm." See Beaufort Realty, 346 S.C. at 302, 303. Neither of these findings would apply to KPOG and Inlet Cove.

First, both KPOG and Inlet Cove presented their members as witnesses who testified regarding their use and enjoyment of the property, as well as their membership in KICA. Second, KPOG and Inlet Cove did not merely show the "prospect of future harm." Instead, the intervening parties demonstrated that, absent the Master or this court refusing to reform the contract, both parties would suffer an imminent and inevitable injury. That injury would be in the form of elimination of property rights, as well as harm to aesthetic and recreational interests.

Beaufort Realty stands for the proposition that environmental groups cannot simply assert speculative concerns or fail to demonstrate a causal connection for purposes of standing. But just because development has not as of yet commenced on the 4.62 acres does not mean that KPOG and Inlet Cove are unable to meet their standing burden, because the first Lujan/Sea Pines prong requires injury "be actual *or imminent*." Smiley v. S.C. Dep't of Health & Env'tl. Control, 374 S.C. 326, 331, 649 S.E.2d 31 (2007).

Contrary to KRA's assertions, future injuries and the risk of future injuries have been held to be sufficient for standing on a consistent basis by the South Carolina Supreme Court and the United States Supreme Court. South Carolina's appellate courts have found standing in environmental permitting cases where appellants alleged potential future injury from challenged projects. See, e.g., S.C. Wildlife Fed'n v. S.C. Coastal Council, 296 S.C. 187, 371 S.E.2d 521 (1988); Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision), 332 S.C. 551, 505 S.E.2d 598 (Ct.App.1998) (rev'd on other grounds). These rulings echo decisions of the United States Supreme Court and the Fourth Circuit. See, e.g., Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 98 S.Ct. 2620 (1978); Natural Res. Def. Council v. Watkins, 954 F.2d 974 (4<sup>th</sup> Cir. 1992) (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464 (1982)); accord, Sierra Club v. Simkins Indus., Inc., 847 F.2d 1109, 1113 fn. 4 (4<sup>th</sup> Cir. 1988), (citing Valley Forge Christian Coll. for the proposition that "threatened rather than actual injury can meet minimum Article III standing requirements.").

KPOG and Inlet Cove testified about how the deed reformation would effect their use. Put into context, the testimony of Mr. Mugglestone that the impact would be "undetermined," resulted from a lack of knowledge of exactly what use KRA would make of the 4.62 acres, which prevented him from determining precisely how it would impact his use. However, he did indicate that if KRA prevailed he would be trespassing on property he now has a right to walk though.

- Q. And do you have occasion to see that 4.62 acres?  
A. Regularly, yes.  
Q. Can you give us the context for when you see that property?

A. Typically I run every morning, or at least 80 percent of the mornings. And I, weather permitting, run along the beach and leave the beach at Beachwalker Park boardwalk and run right through the middle of that property. So I see it very regularly. And we often walk in the afternoon, often out to the Spit, so we go sort of through that boardwalk.

...

Q. And as a member of KICA, how have you treated that parcel?

A. I can only walk through it because I didn't know that KICA owned it until – I actually don't – until recently.

Q. Okay. And do you derive any benefits from walking through that parcel and observing the wildlife, taking pictures and things like that?

A. Yeah, that is a benefit of retirement.

Q. Okay. And if KRA were to prevail in this suit, how would that affect the uses that you are talking about?

A. Again, undetermined. But one assumed if it was developed then clearly there would be – it would be less desirable in general.

Q. And if the Court ruled that it was not common property subject to the KICA covenants and including the easement rights of access, how would that affect you?

A. Clearly if the – there would need to be, I assume, an easement right for Beachwalker Park, someone could walk through that clearly, but would be trespassing if I went beyond that.

(R. p. 1330, line 23–p. 1332, line 24)

### C. KPOG's Dissolution Does Not Invalidate Its Standing

Appellant/Respondents KRA argue that KPOG's dissolution invalidates KPOG's standing for the purposes of this litigation. This argument is incorrect, as to both the statutory law governing dissolution and the particular dissolution plan adopted by KPOG. The Plan of Dissolution and Complete Liquidation of Kiawah Property Owners Group, Inc. ("KPOG's Plan of Dissolution") reads in relevant part:

On and after the Effective Date, *KPOG shall be continued* as a body corporate solely *for the purposes of prosecuting and defending suits, actions, proceedings, and claims of any kind or character by or against it*, and of enabling it gradually to settle and close its business, to collect and discharge obligations, to dispose of and convey its property, and to distribute its assets.

(R. p. 628).

South Carolina statutory law permits an extended “winding up” of a non-profit organization’s affairs and obligations. Dissolution does nothing to “prevent commencement of a proceeding by or against” such an organization, nor does it “abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution[.]” S.C. Code Ann. Sec. 33-31-1406(b)(4)-(5). In other words, KPOG is fully within its rights to continue in this litigation despite dissolution, and accounted for this possibility in its Plan of Dissolution.

Moreover, KRA’s citation to Davis v. Fed. Election Comm’n, 554 U.S. 724, 128 S.Ct. 2759 (2008) supports KPOG’s standing, rather than defeats it. KRA erroneously states the Davis holding as “standing must exist on the date the complaint is filed and throughout the action,” (Resp. Br. of Appellant/Respondents p. 11). Instead the language of Davis supports KPOG’s standing: “[t]he standing inquiry focuses on whether the party invoking jurisdiction had the requisite stake in the outcome **when the suit was filed**, see, e.g., Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 180, 120 S.Ct. 693, 145 L.Ed.2d 610.” Davis, 554 U.S. at 725, 128 S.Ct. at 2763 (emphasis added). KPOG’s dissolution allowing for the continuation of existing lawsuits is consistent with Davis and KPOG undoubtedly had standing “when the suit was filed,” as required by Davis.

## **II. KRA’S PROCEDURAL ARGUMENTS FAIL TO PREVENT KPOG AND INLET COVE FROM CHALLENGING THE MASTER’S ERRONEOUS RULING ON STANDING**

Appellant-Respondents KRA mischaracterize KPOG and Inlet Cove’s arguments to assert that KPOG and Inlet Cove have mistaken demonstrative evidence of the Master’s

errors as procedural grounds to overturn the Master's order. Furthermore, contrary to South Carolina law, KRA wrongfully asserts that Intervenors have failed to preserve any issue relating to standing for appellate review. Intervenors have consistently addressed the issue of standing before the Master as trial judge and the Master then erroneously ruled on the issue of standing. There is no procedural bar to contest the ruling on standing.

**A. The Inadequacy of the Portion of the Order Addressing Standing, as well as the Inconsistency with the Master's Other Findings, are Demonstrative of the Master's Error**

KRA characterizes Intervenors' argument that the Master's order on standing was in error as an argument that the Master did not comply with Rule 52, SCRPC. Although the Order does fail to provide an analysis of its conclusion, that was not the argument that KPOG and Inlet Cove were advancing. Instead, the discussion of the inadequacy of the Order is directly related to the actual issue on appeal: whether the Master misapplied the legal standard of standing when he dismissed KPOG and Inlet Cove from the case in his Order on the Motion to Alter or Amend.

In the short portion of the Order dismissing KPOG and Inlet Cove the Master found lack of standing because "neither KPOG nor Inlet Cove had a claim that was discrete from that asserted by KICA." (Resp. Br. of Appellant/Respondents (citing R. p. 53)). However, this legal conclusion was in error as a matter of law. Precedent has clearly upheld standing where members of organizations assert standing as a result of aesthetic and recreational harm. Friends of the Earth v. Laidlaw Env'tl. Servs. (TOC), Inc. 528 U.S. 167, 120 S.Ct. 693 (2000); Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361 (1972); Am. Canoe Ass'n v.

Murphy Farms, 326 F.2d 505 (4th Cir. 2003); Ogburn-Matthews, 332 S.C. 551; S.C. Wildlife Fed'n, 296 S.C. 187.

Furthermore, while it is true that standing requires a concrete and particularized injury, as differentiated from a common interest, KRA overlooks that no matter how many people share an injury, that injury can still give rise to standing, as long as the Intervenor are among the class of people injured. Pye v. U.S., 269 F.3d at 469 (“Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.”) The Master’s rejection of KPOG and Inlet Cove as parties because their standing or claim is the same as KICA’s is based on principles of intervention and not standing, which is clearly indicative of error. The Master’s Order reads in relevant parts: “KPOG and Inlet Cove members’ . . . sole basis for asserting any claim against the [4.62 acre parcel] is rooted in their easement of use and enjoyment resulting from the Property being conveyed as Common Property and subject to the KICA Declaration,” and “**Intervenor do not have standing separate from their capacity as KICA members.**” (R. p. 53) (emphasis added). This statement alone clearly acknowledges Intervenor’s standing, yet the Master dismisses their standing because KICA is already a party. This dismissal is inconsistent with a previous portion of the Amended Order, which states “**Testimony was presented at the trial of this matter as to individual KICA members’ use of that easement and reliance on same which has been in existence for nearly two decades. To disturb those rights now with no consideration given to the holders of those rights is something this Court**

is unwilling to do . . .” (R. p. 48) (emphasis added). In other words, the Master explicitly recognized the injury to property rights, but erroneously concluded, in the face of his multiple other findings, that because KICA is a party and the Intervenor’s property rights are through KICA, KICA will and can stand in the shoes of the Intervenor and represent their interests.

By comparison, Rule 24 governs intervention as a matter of right and permissive intervention. SCRCRCP Rule 24. The Master’s Order Granting Intervention cited the Sagebrush test, by which an intervenor must “(1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties.” See Berkeley Elec. Co-op, Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 189, 394 S.E.2d 712 (1990) (citing Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983)).

The South Carolina Supreme Court has adopted the Sagebrush test to determine whether a party can intervene as a matter of right. That test requires an interest relating to the property or interaction which is the subject of the action. But the intervention as of right inquiry is separate from that of standing. The Master had already granted Intervenor intervention, finding that KPOG and Inlet Cove met the applicable test for intervention as of right, as well as the test for permissive intervention under SCRCRCP Rule 24(b). (See R. p. 9). If the Master later changed his mind on the issue of intervention, he could not simply use an element of an intervention test as an alternative to conducting a standing inquiry and

dismissing for lack of standing. That is exactly what the Master did in this case, which was legal error and should be reversed.

**B. Intervenor were not Required to File a Motion to Alter or Amend to Preserve the Issue of Standing for Appellate Review**

Appellant-Respondent KRA argues that because KPOG and Inlet Cove failed to file a Motion to Alter or Amend, or a Rule 59(b) motion, KPOG and Inlet Cove are barred from asserting any issues of standing on appeal. However, this argument fails because all issues currently raised by Intervenor on appeal have previously been raised before the Master and have been ruled on by the Master at the trial court level.

The law in this state remains that the South Carolina Rules of Civil Procedure:

[C]ontemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772 (2004).

The import of this rule is that “when a trial court does not explicitly rule on an argument raised, and the appellate makes no Rule 59(e), SCRC, motion to obtain a ruling, the appellate court may not address the issue.” Smith v. NCCI, Inc., 369 S.C. 236, 631 S.E.2d 268 (Ct.App.2006) (internal citation omitted). However, the Rule 59(e) motion is only necessary to preserve an issue on appeal when the underlying issue is not addressed by the court, even if it was raised by a party. See, e.g., Spence v. Wingate, 381 S.C. 487, 489-90, 674 S.E.2d 169 (2009).

Standing has been explicitly addressed in the Order on Motion to Alter or Amend. Even if the Master botched the standard for standing by intermingling the standing test with the intervention test, he explicitly issued a ruling on the issue of standing, which had the wrongful consequence of dismissing KPOG and Inlet Cove from the case. The purpose of requiring an issue to be raised to and ruled on by the trial court before it can be appealed is to ensure that parties do not withhold arguments before the trial judge, only to use them at a court of appeal, but that risk is not present here. Instead, requiring Intervenors to have filed a Rule 59(e) motion to preserve the standing issue for appeal would have gone against the text of Rule 1 of the SCRPC (civil procedure rules “shall be construed to secure the just, speedy, and inexpensive determination of every action”), as well as the documented position of the South Carolina Supreme Court. See, e.g., Elam at fn. 5 (“An aggrieved party who is confident his issues and arguments were sufficiently raised to and ruled on by the trial court may wish to simply file and serve a timely notice of appeal.”).

Notably, on the preservation issue, KRA failed to appeal the Order Granting Intervention. The relevance of KRA’s failure to appeal the Order Granting Intervention is that the Order makes specific findings and conclusions that the intervention standard was met.<sup>6</sup> Those findings and conclusions related to intervention have not been disturbed by the lower court’s abrupt conclusion that KPOG and Inlet Cove do not have Article III standing. And the findings and conclusions related to intervention have not been appealed. The “law of the case” doctrine applies to a pending appeal where certain issues were not raised in the appeal

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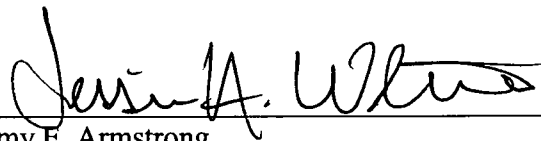
It bears noting that South Carolina courts have interpreted the rules to “permit liberal intervention.” Berkeley Elec. v. Town of Mt. Pleasant, 302 S.C. 186.

and thus the lower court's determination on those points is conclusive. The law of the case doctrine is not used to prevent the master from revisiting issues, but to prevent KRA from arguing findings and conclusions which it did not appeal. KRA tries, but fails, to find an excuse for its failure to appeal the Order Granting Intervention through which the Master found and concluded that KPOG and Inlet Cove have interests in aesthetic and recreational values and property rights and a different position in this litigation from the two other parties. (R. p. 7). KPOG and Inlet Cove do not dispute that the Master can modify his findings and conclusions, but assert that he did not do so for the intervention analysis contained in the Order Granting Intervention. The result is that those findings and conclusions are conclusive.

#### CONCLUSION

For the foregoing errors of law, the master's ruling dismissing KPOG and Inlet Cove in the Order on Motion to Alter or Amend the Final Order should be reversed, with the remainder of the order affirmed.

Respectfully submitted,



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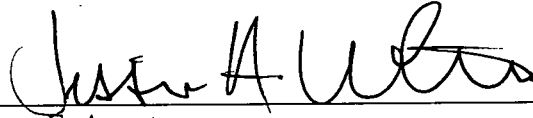
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SC Court of Appeals

Certificate of Counsel

The undersigned does hereby certify that this Final Reply Brief complies with Rule 211(b), SCACR.



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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Appellate Case No. 2015-001146

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Kiawah Development Partners II, Inc.,

Appellant/Respondents,

vs.

Kiawah Island Community Association, Inc., a South Carolina Not-  
for-Profit Corporation,

Respondent,

and

Kiawah Property Owners Group, Inc. and Inlet Cove Club Homeowners  
Association, Inc.,

Respondent/Appellants.

**CERTIFICATE OF SERVICE**

I hereby certify that on this date I served the foregoing Final Brief, Final Response Brief, and Final Reply Brief of Respondent/Appellants on counsel for the parties by placing copies of same in the U.S. Mail addressed to:

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