

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM ADMINISTRATIVE LAW COURT  
Ralph King Anderson, III, Administrative Law Court Judge

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Appellate Case No. 2019-000074

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South Carolina Coastal Conservation League ..... Appellant,

v.

South Carolina Department of Health and Environmental Control,  
KDP, II, LLC, and Kiawah Development Partners II ..... Respondents

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**INITIAL BRIEF OF RESPONDENTS  
KDP, II, LLC, AND KIAWAH DEVELOPMENT PARTNERS II**

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### Statement of Issues on Appeal

- I. Was there substantial evidence to support the Administrative Law Court's ("ALC") findings and conclusions that the proposed project was consistent with the pertinent CZMP policies on access to and use of Public Open Spaces that do not per se prohibit projects that may disrupt access or alter the use of tidelands if there is no other alternative?
  
- II. Did the ALC commit legal error in concluding S.C. Code Ann. §49-38-30 (D) did not apply to this consistency determination where the project did not include a permit to construct in the critical area and where the ALC nonetheless made findings that comport with the policy considerations in Section 49-38-30(D)?
  
- III. Did the ALC abide by the rulings of law of this Court in KDP-I and KDP-II?
  
- IV. Do the doctrines of collateral estoppel and judicial deference or allegations of agency inconsistency preclude the ALC from making findings and conclusions in his cumulative impacts analysis in this de novo proceeding and, instead, bind the ALC to the cumulative impacts assessment of the Department staff person who evaluated the bulkhead-revetment in 2008 in an entirely different permit proceeding?
  
- V. Was there substantial evidence to support the ALC's findings and conclusions that the project is consistent with the state policies and the CZMP with respect to whether Captain Sams is inappropriate for development and whether the project will most probably have a material adverse effect on diamondback terrapins and bottlenose dolphins?
  
- VI. Were the ALC's findings and conclusions that the project will not be constructed in the critical area and is still feasible supported by substantial evidence?

### Statement of the Case

Respondents KDP, II, LLC and Kiawah Development Partners II <sup>1</sup>(jointly “KDP”), accept the Statement of the Case set forth in the initial brief of the South Carolina Coastal Conservation League (the “League”).

### Statement of the Facts

This is the eleventh year of litigation for KDP in its efforts to realize the limited residential development on Captain Sams Spit that is assured to KDP under the terms of its development agreement with the Town of Kiawah Island (the “Town”).

The permits now before the Court do not involve construction in the critical area and are entirely different from the critical area permit that was the subject of this Court’s decisions in Kiawah Development Partners, II v. S.C. Department of Health & Environmental Control and South Carolina Coastal Conservation League, 411 S.C. 16, 766 S.E. 2d 707 (2014) (“KDP-I”) and Kiawah Development Partners, II v. S.C. Department of Health & Environmental Control and South Carolina Coastal Conservation League, 422 S.C. 632, 813 S.E.2d 691 (2018) (“KDP-II”).

On May 28, 2015, Respondent South Carolina Department of Health & Environmental Control (the “Department”) approved KDP’s stormwater pollution protection plan (“SWPPP”) and granted KDP permits authorizing the construction of the infrastructure and improvements to serve twenty-six residential lots, known as Cape Charles Phase 1, approved by the Town on a portion of Captain Sams Spit. **Joint Ex. 6.** The three Department permits are National Pollutant Discharge Elimination System (NDPES) General Permit Coverage for Stormwater Discharges from Construction Activities SCR100913, Water Supply Construction Permit Number 30395-WS, and

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<sup>1</sup> Kiawah Development Partners II was incorrectly shown as a Respondent on the Notice of Appeal. The correct Respondent is KRA Development, LP. The parties will be submitting a consent motion to correct this error by replacing Kiawah Development Partners II with KRA Development, LP.

Wastewater Construction Permits Number 38828-WW (collectively, the “Permits”).<sup>2</sup> **Joint Ex. 6.** The NPDES stormwater permit includes approval of plans that call for an in-ground steel sheet pile wall (“SSPW”) landward of the eroding shoreline in the bend in the Kiawah River on the back side of Captain Sams. **Joint Exs. 6 and 7.**

In conjunction with the issuance of the Permits, the Department issued Coastal Zone Consistency Certification Number CZC-13-0336 (the “CZCC”). **CZCC, Joint Ex. 6.** The CZCC constituted the Department’s determination that the construction and other activity authorized by the Permits are consistent with South Carolina’s Coastal Zone Management Program (“CZMP”).<sup>3</sup> The CZCC included eight conditions including a prohibition of any construction in the critical area or impacts in the critical area during construction. **CZCC, Joint Ex. 6.**

The League appealed the Department staff’s determinations to the DHEC board seeking a final review conference under the provisions of S.C. Code Ann. § 44-1-60 (E)(2). The DHEC Board declined to conduct a final review conference, thereby making the staff decision the final agency decision under S.C. Code Ann. § 44-1-60 (F). On August 5, 2015, the League timely appealed the Department’s final decision to the ALC under S.C. Code Ann. § 44-1-60 (G).

The Honorable Ralph King Anderson, III, chief judge of the Administrative Law Court (“ALC”), conducted a seven-day contested case hearing on August 21-August 25, and August 28 and 29, 2017. Judge Anderson issued his Final Order on September 24, 2018, upholding the Permits and determining that the proposed project authorized by the Permits is consistent with the CZMP. **Final Order.** On October 9, 2018, the League filed its Motion to Reconsider. On

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<sup>2</sup> The NPDES permit was issued to KDP, II, LLC; the water and wastewater permits were issued to KRA Development, LP. **Joint Ex. 6.**

<sup>3</sup> The Department is charged under S.C. Code Ann. § 48-39-80 (B)(11) with “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.”

December 14, 2018, Judge Anderson issued his Order Denying Motion for Reconsideration and his Amended Final Order again upholding the Permits and the CZCC. **Order Denying Motion for Reconsideration; Amended Final Order.**

The ultimate determinations made by the ALC in the Orders now under appeal were highly factual, involving the evaluation of testimony and credibility, the subjective application of policy considerations, and balancing of policies. In conducting this assessment, the ALC fully addressed all the arguments that the League makes to this Court in his 53-page Amended Final Order and his 20-page Order Denying Motion for Reconsideration. As is immediately evident from a review of these Orders, the ALC was painstaking in explaining his extensive findings of fact and the proof he relied upon. The ALC was equally as explicit in discussing his conclusions of law and the law supporting them. There was substantial evidence to support all his factual findings and there was no error of law.

Against this backdrop, KDP will add some of the important operative facts that are omitted or barely touched upon in the brief of the League.

The proposed subdivision for Cape Charles fully complies with the zoning ordinances of the Town and the Town's comprehensive plan. The Town's Planning Commission unanimously approved the preliminary subdivision plat for fifty lots on Cape Charles that includes the road and lots for Phase 1 of Cape Charles on August 3, 2011. **Tr. 1602:20-1603:13; Resp. Ex. 1.** It later re-approved the subdivision plat for the 50 lots that includes Phase 1 on September 4, 2013. **Resp Ex. 3.**

The Amended and Restated Development Agreement between the Town and KDP dated December 5, 2013 (the "Development Agreement") specifically calls for the development of up to 50 residential lots on 20 acres of Captain Sams Spit. **Resp. Ex. 4, ¶ 16(f), pp. 23-24.** In negotiations

with the Town in 2005, KDP gave up its right to build a hotel nearby, on the opposite side of Beachwalker Park, in return the right to develop this single-family residential development. **Tr. 1717:3-24; 1719:17-1720:5.** The Development Agreement specifies that the rights accorded KDP under its terms constitute vested rights for the development of the property. **Resp. Ex. 4, ¶ 10(b), p. 4.**

Under the terms of the Development Agreement, KDP must employ environmentally sensitive approaches to its development on Captain Sams Spit to minimize its impacts. **Resp. Ex. 4, ¶ 16(f), pp. 23-24.** The Development Agreement requires that KDP impose a permanent restriction or conservation easement prohibiting any alteration of the natural areas of Captain Sams Spit that are outside the lots and the rights of way of the roads and any other community improvements. **Id.** The permanent protection that KDP will place on the remainder of Captain Sams to preserve it in a natural state will cover more well over 80% of the highland of Captain Sams.

The Captain Sams peninsula was around 173 acres in 2016. **Joint Ex. 8.** Captain Sams is connected to the greater part of Kiawah Island by an isthmus often described as the “neck.” Up until 1999, there was no baseline and no setback line on Captain Sams, effectively preventing any development under the provisions of the Beachfront Management Act (“BMA”), S.C. Code Ann. §§48-39-250 et seq. In 1999, the Department extended the baseline and setback 4600 feet down the peninsula of Captain Sams towards Captain Sams Inlet, based on the previous forty-year record of accretion as required by the BMA. **Tr. pp. 1193:18-1194:24.** In so doing, the Department opened the door for development on the highland of KDP landward of the setback line, just the same as for any other beachfront property owner in the state with property behind the setback line.

Unlike the beaches of most barrier islands, Captain Sams and the rest of Kiawah Island have experienced long term accretion rather than long term erosion over many decades. Kiawah Island as a whole has been accreting over the last 50 to 100 years and advancing seaward largely due to the huge volume of sand moving southwesterly along the coast and coming ashore on its beach from enormous sand shoals in the mouth of the Stono River on the east end of Kiawah Island. **Tr. 1393:19-1394:3**. The coastal geologist called as an expert witness by the League agreed the beach of Kiawah Island has been accreting for a 100 years and that “Kiawah itself is unique along the east coast because it has been growing rather than shrinking dramatically over time.” **Tr. 835:19-24; 886:22-887:4**. This volume of accretion of Kiawah Island that has occurred over the last few decades is exceptional for the east coast and documented in the peer-reviewed literature. **Tr. 1394:13-18**.

Since at least 1949 Captain Sam’s Spit has been accreting and becoming larger. **Tr. 1404:13-17**. The ebb-tidal delta of Captain Sam’s Inlet functions similarly to a natural groin, trapping and directing the down-drift sand back to the beach of Captain Sam’s Spit. **Tr. 1417:21-1418:3**. The topographic survey measurements of the beach for the last 40 years substantiate this long-term trend of accretion of Captain Sams. **Tr. 1395:23-1396:17**. Because of the enormous volume of sand stored in the shoals at the mouth of the Stono River, the beach of Captain Sams Spit will continue to accrete over the next few decades, at a minimum. **Tr. 1420-1421-10**. The discovery of the enormous volume of downdrift sand feeding Captain Sams and data that provide “a much more quantitative evaluation of the stability of the Kiawah spit” are just some of the “better information” that has come to light in the forty years since the 1974 Kiawah Environmental Inventory relied upon by the League. **Tr. 1443:22-144:3; 1445:15-22; Pet. Ex. 6**.

The rate of accretion of Captain Sams is easily outpacing sea level rise of 2 to 3 millimeters per year. **Tr. 1458:16-18; 1460:5-10; 1473:1-1474:12.** Captain Sams has been getting wider and wider and moving seaward since Tim Kana, PhD., a coastal geologist who testified at trial, began monitoring it in the 1980s as illustrated by the plotting of the shorelines over time. **Tr. 1421:19-21; 1422:6-1424:21; Resp. Ex. 29.** Even with the erosion of the riverbank on the backside, the width of Captain Sams at the neck has not diminished because of the rate of the accretion of the front beach; its width in 2014 was the same as in 1979. **Tr. 1436:14-16; 1469:12-17; Resp. Ex. 29; Pet. Ex 38.** Between 1985 and 2006, the river shoreline in the bend of the neck eroded at the rate of 6.9 feet/year and the beachfront on the neck accreted at the rate of 10.6 feet/year. **Pet. Ex 38.**

The shape and elevation of the many oceanfront dune ridges on Captain Sams that run parallel to the beach as well as the tree line of the maritime forest on the river side of the Spit are indicative of the stability of Captain Sams over many decades. **Tr. 1395:3-1396:7.** Some of the dune ridges are as high as 14 feet above datum NGVD (National Geodetic Vertical Datum) that is approximately mean sea level. **Tr. 1425:25-1426:6.** Relatively high dunes in South Carolina such as these reflect the stability of the shoreline in the location over time. **Tr. 1479:10-13.**

The historical geologic information shows that Captain Sams also grows towards the southwest, moving Captain Sams Inlet towards Seabrook at a rate of roughly two hundred feet each year. **Tr. 1400:11-21.** Within the last 40 years this natural growth in the length of Captain Sams has been intentionally interrupted. Tim Kana, Ph. D., engineered the relocation of Captain Sams Inlet back towards Kiawah Island in 1983, 1996, and most recently in 2015. **(Tr. 1408:4-8).** The purpose of the manmade relocation of the inlet many hundreds of feet toward Kiawah Island is to detach the far end of Captain Sams and allow its accumulated sand to effectively renourish

the beach on Seabrook Island. **Tr. 1417:1-20; 1468:8-16; Resp. Exs. 24 and 28 (aerial photographs).**

This relocation is accomplished through the use of extensive heavy equipment that tears apart the beach at the end of Captain Sams to excavate a new inlet channel and uses the sand on the beach to close the existing inlet. **Tr. 1408:11-1409:8; 1465:17-1466:16; Pet. Ex. 45 (photos).** The far end of Captain Sams at the inlet that is destroyed in this process is a beach that is popular with the public who kayak there or gain access at Beachwalker Park. **Tr. 381:10-17; 390:7-391:3; Pet. Ex. 3 J.** It is also a location where dolphins strand feed. **Tr. 379:20-380:3; 1152:22-23.**<sup>4</sup>

The inlet relocations have helped fortify Captain Sams through increasing accretion and building up its multiple beach ridges; the relocations and continued accretion of the beach on Captain Sams have significantly reduced its vulnerability to breaching at the neck during a major hurricane. **Tr. 1419:4-23; 1420:2-6; 1443:19-1444:3; 1467:18-24.** The inlet relocation in June 2015 caused some erosion of the western end of the Captain Sams as the new inlet channel moved and sought to settle in its new location. **Tr. 1417:14-20; 1419:8-23; 1420: 2-12.**

The area next to the inlet was subject to the greatest erosion from Hurricane Matthew in October 2016, which was to be expected because the new channel was still equilibrating. **Tr. 1440:14-22; 1441:14-1442:7.** By the following August, at the time of the trial, accretion had already re-built the beach at the neck and moved the shoreline 58' seaward from its location immediately after Hurricane Matthew. **Tr. 1433:11-16; 1516:22-1517:7; Resp. Ex. 20.**

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<sup>4</sup> It is ironic that KDP is vilified for seeking to protect its valuable high ground from further erosion at possibly the expense of a portion of a sandy riverbank that has been created by KDP's eroding land, yet the mammoth intentional destruction of acres and acres of beach and tidelands at the end of Captain Sams within a federally designated habitat for endangered wintering piping plovers to renourish Seabrook Island's beach does not raise an eyebrow. **Tr. 1463:25-1465:6; Pet. Ex. 45; Resp. Exs. 24 and 28.**

The Kiawah River forms an elbow-like bend at the neck that has been eroding the river bank of the neck for the last 15-20 years. **Tr. 1403:24-1404:20**. The point bar of marsh on the opposite side of the Kiawah River has been growing towards the neck and forcing the channel of the river closer to Beachwalker Park and Captain Sams. **Tr. 1404:24-1405:3**. The sand that is eroding from the KDP's property and forming a riverbank on the back side of the neck does not contribute to accretion of the oceanfront beach. **Tr. 1405:4-25**.

The erosion of KDP's high land has created a high vertical escarpment of around ten feet next to Beachwalker Park in the beginning of the bend that tapers down towards the neck in the middle of the bend. **Tr. 1755:11-22; 1756:2-8; 1757:22-1758:4**. In the three years before the trial the erosion undermined trees and other vegetation on KDP's upland in the bend causing them to collapse onto the riverbank, as shown on the many photographs of the riverbank entered into evidence. **Tr. 1746:12-1766:19; Resp. Exs. 36, 38, 39, 40, and 41**. At Beachwalker Park, a very popular public park providing public access to the front beach, the erosion has recently undermined the park's fence and the edge of about a dozen paved parking spaces. **Tr. 1751:11-1753:15; Resp Ex. 36 photos 00003-0008**. Charleston County wrote KDP a letter putting it on notice that the erosion was degrading the parking spaces and creating a safety hazard. **Resp Ex. 13**. The erosion of the riverbank also required KDP to relocate the emergency beach access of the Town that was being undercut by the erosion in the bend. **1754:12-25**.

KDP began the long road for these Permits on August 8, 2011, when it submitted its application and construction plans to the Department for approval under the NPDES general permit for large and small construction activities that would also include approval of KDP's stormwater management plan for the road and utility improvements for the 26 lots. **Joint Ex. 3**. The initial plans did not include an erosion control measure. **Joint Ex. 3; Tr. 1616:17-24**. During the review

process the Department staff making the consistency determination was concerned about protecting the proposed infrastructure improvements from the ongoing erosion of the riverbank near Beachwalker Park and the neck. **Tr. 1616:2-1618:13.** In response to this concern, KDP had its engineering firm design a 2380' in-ground SSPW and incorporate it into the plans for the site improvements in late 2014. **Tr. 1616:2-1618:13.** KDP's engineers provided the Department with a report on the engineering sufficiency of the design of the in-ground SSPW. **Tr. 1625:9-1626:2.**

The in-ground SSPW that is part of the approved site improvements extends from the parking lot of Beachwalker Park southwest along the highland bank of the river bend to the fourth lot on the river side. **Resp. Ex. 7, Plan Sheets EC1.1-1.3, S1.0, and S2.0.** From the location where the in-ground SSPW terminates on the high ground, the sandy riverbank where the SSPW will not be extends another 1700 feet west to the marsh behind Captain Sams. **Tr. 1868:4-15.**

In KDP-II this Court modified the final decision of the ALC on remand and vacated its approval of a permit for the bulkhead without a revetment based on the lack of expert testimony that the bulkhead in that case would effectively function without the revetment at its toe. KDP-II, 813 S.E. 2d 691, 693. There is no similar question as to the effectiveness of the in-ground SSPW. The League stipulated to design sufficiency of the in-ground SSPW. **Tr.1368:16-19; Tr. 1371:6-11.** It is undisputed the in-ground SSPW will stabilize the bank in locations where the erosion may continue and expose portions of it.

The League also stipulated to the sufficiency of the SWPPP and stormwater improvements that were sensitively crafted to minimize or eliminate stormwater runoff. **Tr. 1361:11-20; 1362:1-16.** Similarly, the League agrees there is no design deficiency in the plans for the potable water system or the wastewater system. **Tr. 1358:21-23; 1359:5-9; 1362:1-16.**

The League is also not contending that KDP will not employ environmentally sensitive design and construction techniques for the limited residential development. **Tr. 1567:18-1568:18.** Instead, the League argues that any development at all on Captain Sams, regardless of how thoughtfully it may be done, is against the law because, according to the League, it is inconsistent with the CZMP. In the League's playbook it is of no consequence that KDP has proven ability and experience in responsible development throughout Kiawah Island on other environmentally sensitive locations including on marsh islands and along the long narrow "fingers" in the marsh on the eastern half of the island. **Tr. 1713:11-1714:15.**

In advocating its zero tolerance rule, the League ascribes no significance to the continued erosion of KDP's valuable land on the river side, the designation of Captain Sams as developable by the Department when it extended the jurisdictional lines in 1999, the zoning of the Town that specifically provides for this limited residential development, the two separate approvals of the preliminary plat that includes these 26 lots by the Planning Commission of the Town, the vested right of KDP to proceed with this limited development under the Development Agreement, and KDP's obligation and intent to preserve the remaining 80%+ of Captain Sams in a natural state in perpetuity with a conservation easement.

### **Scope of Review**

This matter came before the ALC as a result of Appellant's request for a contested case hearing pursuant to S.C. Code Ann. § 44-1-60(G).

Pursuant to the Administrative Procedures Act, the ALC is the finder of fact in contested case hearings related to Department certifications and permits. See Hill v. S.C. Dep't of Health & Envtl. Control, 389 S.C. 1, 9, 698 S.E.2d 612, 616 (2010). Accordingly, in this case the ALC presided as the fact-finder based on the evidence before him. See Brown v. S.C. Dep't of Health

& Env'tl. Control, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002). While the progression to the ALC for a contested case hearing is often referred to as an appeal, the ALC “was not sitting in an appellate capacity and was not restricted to a review of OCRM's permit decision.” Id. (citing Reliance Ins. Co. v. Smith, 327 S.C. 528, 489 S.E.2d 674 (Ct.App.1997). “Instead, the proceeding before [Judge Anderson] was in the nature of a de novo hearing with the presentation of evidence and testimony.” Id.

“A trial de novo is one in which the whole case is tried as if no trial whatsoever had been had in the first instance.” Reliance Ins. Co. v. Smith, 327 S.C. 528, 534, 489 S.E.2d 674, 677 (Ct. App. 1997) (quoting Blizzard v. Miller, 306 S.C. 373, 375, 412 S.E.2d 406, 407 (1991) (internal quotations omitted). The contested case hearing includes the presentation of evidence and testimony. Hill, 389 S.C. at 9, 698 S.E.2d at 616.

When a decision of the ALC is appealed to this Court, the Administrative Procedures Act (APA) provides the appropriate standard of review. See Abel v. South Carolina Department of Health and Environmental Control, 419 S.C. 434, 798 S.E.2d 445 (Ct. App. 2017). Under the provisions of the APA:

1. The review of the administrative law judge's order must be confined to the record.
2. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact.

S.C. Code Ann. § 1-23-610(B). A reviewing appellate court can reverse or modify the ALC's decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;

- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B).

The decision of the Administrative Law Court should not be overturned unless the appellant establishes its substantive rights have been prejudiced and that the “decision reached is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record or is affected by an error of law.” Original Blue Ribbon Taxi Corp., 380 S.C. 604, 605, 670 S.E.2d 674, 676 (internal quotations omitted). The ALC decision should be affirmed if this Court “find[s], looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion as the ALC.” Hill v. S.C. Dep't of Health & Env'tl. Control, 389 S.C. 1, 9–10, 698 S.E.2d 612, 617 (2010).

As the party asserting the affirmative issue in the contested case proceeding, the League had the burden to produce evidence and testimony that would prove its case by a preponderance of the evidence. See Amended Final Order at 23 (citing Nat'l Health Corp. v. S.C. Dep't of Health & Env'tl. Control, 298 S.C. 373, 380 S.E.2d 841 (Ct. App. 1989) and DIRECTV, Inc. & Subsidiaries v. S.C. Dep't of Revenue, 421 S.C. 59, 78, 804 S.E.2d 633, 643 (Ct. App. 2017), reh'g denied (Jan. 11, 2018)).

With regard to the evaluation of testimony, the final determination of credibility witnesses and the weight to be accorded evidence is reserved to the finder of fact. Gadson v. Mikasa Corp., 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006). It is the ALC, as the trier of fact, who determines the probative value of expert testimony; the appellate court may not judge the

credibility of witnesses or weigh the testimony on appeal. Small v. Pioneer Mach., Inc., 329 S.C. 448, 470, 494 S.E.2d 835, 846 (Ct. App. 1997).

### Argument

**I. The CZMP does not per se prohibit projects that may disrupt access or alter the use of a Public Open Space including critical areas. The ALC’s factual findings applying the considerations of the applicable CZMP policies are supported by substantial evidence.**

The CZMP policies applicable to Public Open Spaces do not contain a blanket prohibition of alteration of tidelands as argued by the League. Instead, the applicable CZMP policy requires a factual determination as to “other alternatives.” In applying this policy, the ALC fully discussed the benefits to the public from the project as weighed against the foreseeable loss to the public of some portion of the riverbank exposed at low tide, the same balancing encompassed in the policy expressed in Section 48-39-30(D) in assessing competing uses. Contrary to the contentions of the League, substantial evidence supports the ALC’s factual findings of lack of other alternatives and net public benefit.

In its brief the League refers to statements and policies in CZMP Policy IV.C.4.c.(2) and (3). **App. Brief, pp. 16-17.** The policies referenced by the League are from the CZMP Chapter IV.C titled “Erosion Control Program.” **CZMP IV.C.4, pp. IV-51 to IV-60.** This chapter addresses erosion control on the front beach and is not applicable to this project.<sup>5</sup> Judge Anderson’s finding and determination that this Chapter and its policies do not apply for this reason are legally correct and supported by substantial evidence. **Amended Final Order, p. 43.**

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<sup>5</sup> The BMA governs the “beach/dune” system of the oceanfront and has no application to the in-ground SSPW that may provide erosion control on the riverbank. Nothing in the CZMA or CZMP prohibits hard erosion control structures that are not on the front beach. S.C. Code Ann. 48-39-120(F) and S.C. Code Ann. Regs. 30-12(C) govern permits for in-shore erosion control structures that are constructed in the critical area.

The applicable CZMP Chapter is the one addressing Public Open Spaces. These policies that were considered and applied by the ALC state the following:

- 1) Project proposals which would restrict or limit the continued use of a recreational open area or disrupt the character of such a natural area (aesthetically or environmentally) will not be certified *where other alternatives exist*.
- 2) Efforts to increase the amounts and distribution of public open space and recreational areas in the coastal zone are supported and encouraged by the Coastal Council.

Public Open Spaces, CZMP Policy III.C.3.XII.D(1) and (2), at III-73 (emphasis added).

The ALC engaged in a thoughtful and comprehensive application of this policy and the other policies implicated by it. **Amended Final Order, pp. 40-43**. A reading of the ALC's discussion reveals the full extent of the ALC's deliberative analysis of these factual issues including application of the precepts of this Court in KDP-1 and KDP-II.

First, the ALC determined the League, as the party requesting the contested case hearing and having the burden of proof, failed to prove there were other alternatives that would permit the project to proceed by stabilizing the shoreline if the erosion advanced to portions of the in-ground SSPW. **Amended Final Order, p. 40**. In its brief the League argues that its opposition was premised on the "no-action" alternative. The League also contends KDP could build the 270' bulkhead-revetment in front of a portion of the riverbank adjacent to Beachwalker Park to keep the parking lot from being further undermined, if that was the sole benefit to the people from the in-ground SSPW.<sup>6</sup>

The ALC's deliberation included consideration of both of the "alternatives" suggested by the League in its brief. The ALC made the factual findings that neither of the two would result in

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<sup>6</sup> This Court did not issue its opinion in KDP-II that upheld a permit for the bulkhead-revetment for 270' of river shoreline adjacent to the Beachwalker Park parking lot until April 18, 2018, almost eight months after the close of the evidence in the contested case hearing in this case.

the maximum net public benefit. As is evident from the ALC's application of the CZMP policies for Public Open Space to the facts, consideration of the alternatives and their respective public benefit is necessarily intertwined:

Policy 1 prohibits certification of a project that restricts the use of a recreational open area or disrupts the character of a natural open area if an alternative to that restriction or disruption exists. Clearly, the riverbank is both a recreational and a natural open space area. Though the proposed project will not initially limit the use of any recreational or natural open space areas along the riverbank, eventually a portion of the riverbank adjacent to the SSPW will likely be eliminated due to erosion. This potential loss is clearly an important consideration under this policy. Nevertheless, this loss must be weighed in light of the whether other alternatives exist. Here, no evidence was presented on this specific issue and policy section of the CZMP by Coastal—including 'alternatives' of any nature. CZMP Policy III.C.3.XII.D.

Although the parties did not offer the alternative of a smaller erosion control structure that only protects the integrity of the park, the Court is mindful of this alternative because KDP was granted the authority to build a different erosion control structure to protect only the Park in Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env'tl. Control, 422 S.C. 632, 636, 813 S.E.2d 691, 693 (2018), but it did not do so. Thus, the Court recognizes the protection of the public's access at Beachwalker Park is unlikely to be accomplished unless KDP can also protect its property interest. Moreover, presuming, without finding, that the no alternative consideration is applicable to this policy, the alternative of doing nothing does not protect the public's interest in the continued use of Beachwalker Park as a recreational destination.

Therefore, following this analysis, the Court must weigh a public loss of the riverbank against the public gain of protecting Beachwalker Park. In weighing these factors, this Court is justly seeking to determine not what is in the best interest of the KDP or even Coastal, but what is in the best interest of the public in light of the legal and regulatory considerations. Viewing the case as a whole, the Court finds Beachwalker Park and the public trust resources on the Spit are a valuable public asset to protect. Dana Beach, the Executive Director of the Coastal Conservation League, testified that Beachwalker Park is 'heavily used' and that 'thousands of people all over Charleston County come to Beachwalker Park.' The public's access to the public trust resources on the Spit flows primarily from their literal access to the Spit via the Park. Some of the public access the Spit from the river instead of the Park, but it is clear this is not the primary way the public accesses and uses the Spit.

Acknowledging the importance of the Park, this Court cannot ignore the fact that the Park is eroding away and unlikely to be protected unless the entire

length of the SSPW is permitted to also protect KDP's interest. Due to the significant erosion along the riverbank adjacent to Beachwalker Park, some parking for the general public has been lost resulting in fewer people having access to the beach and the erosion of the Park is likely to continue. Therefore, the proposed project would greatly assist in preserving that important public benefit. However, the Court is mindful that the cost of protecting the Park could likely result in the loss of some portion of the riverbank, which is part of the public trust. Thus, the cost of protection access to these public trust resources is the foreseeable loss of some of those resources. In contrast, if access to Beachwalker Park is not protected, it is clear that a significant public use will be lost, but the public trust resources may remain intact.

With all these considerations in mind, the Court finds benefit to the public in protecting Beachwalker Park through installation of the SSPW outweighs the potential loss of some of the less-utilized riverbank along the Kiawah River. The SSPW will benefit the public by enhancing the safety and preserving the longevity of its access to public trust resources at the Spit. The public will further benefit from the conservation easement placed on the majority of the Spit in tandem with the development. Accordingly, when considering the portion of the affected space in the context of the overall amount of public open space on the Spit, the Court finds the public's use and enjoyment of the Spit will not be so disrupted such that the proposed development contravenes this policy. KDP will, obviously, also benefit because the SSPW will allow it to protect its property interest. This outcome is a compromise of public/conservation interests and private/economic interests, which this Court believes is in the spirit of the CZMA and CZMP.

Concerning the disruption of the aesthetic character of the shoreline which is an open area, as addressed above, the Court finds the preservation of Beachwalker Park is a greater benefit. If action is not taken, Beachwalker Park will continue to deteriorate, and the public's current access to the open spaces will be further jeopardized. Furthermore, it is important to recognize that the highland of the Spit is not an open space, but is privately owned property without restrictions at this point. ... Nevertheless, even if this aspect is considered, only a small part of the Spit will be transformed into a residential area. And, the portion that is proposed to be developed would be developed in an environmentally sensitive approach incorporating limited impact development practices to minimize the impact of development. When fully implemented, it will result in only about twenty acres of residential development leaving the remaining 150 acres of the Spit to be preserved in a natural state.

As to Policy 2, the public will benefit from the protection of Beachwalker Park, which facilitates the public's access to recreational open space on Kiawah Island. Furthermore, the public will be benefitted by the addition of a conservation easement that will protect the remaining undeveloped highland on the Spit, thus preserving and creating public open space in keeping with this policy.

In sum, this Court's decision concerning this difficult issue was made after much reflection. Nevertheless, in the end, Coastal failed to show by a preponderance of the evidence that the proposed project contravenes this policy section.

**Amended Final Order, pp. 40-43.**

The ALC further explained in footnote 28 his rationale why it is unlikely that the 270' permit granted to KDP would ultimately lead to the protection of the parking lot of Beachwalker Park:

Indeed, as this Court responded to Coastal's arguments for its Motion to Lift Stay, from a practical perspective, KDP has no incentive to protect the park if they cannot build an erosion control structure that also protects their investment. In this sense, KDP's ultimate goal in protecting the public's access at Beachwalker Park is almost certainly motivated, in part, by its need to protect its own interest. Nevertheless, protection of the park is a positive outcome of installing the SSPW that cannot be overlooked simply because KDP's motivation may not be completely altruistic.

**Amended Final Order, n. 28, p. 41.**

The ALC's fact-specific determination that the project is consistent with the two policies governing Public Open Spaces is fully supported by the substantial evidence the ALC enumerated.

The League contends there was no proof to support the finding that the use of the riverbank at low tide is occasional<sup>7</sup> or that the public use of Captain Sams from those parking at Beachwalker Park was far greater, but the record is otherwise.

The proof from which a reasonable person could conclude that the riverbank was less utilized than the beach of Captain Sams included testimony by a witness (Eiser) who observed some, but not much use of the riverbank, by another witness (Joyner) that he saw persons recreating in the river but not pulling their boats up on the riverbank, and by two other witnesses (Finlay and Meriwether) who testified they occasionally used the riverbank. (Tr.1191:17-21; Tr. 1253:7-16; 342:7-18; 365:11-20). The League refers to the testimony of Mark Permar that he sees people

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<sup>7</sup> "As the testimony indicated, the riverbank is only occasionally used by the public compared to the rest of the Spit." **Amended Final Order, p. 41, n. 29.**

using the riverbank. **App. Brief, p. 18.** The League neglects to refer to his whole answer: “I’ve seen it with no people and I have seen it with more people.” **Tr. 1771:24-25.** The ALC’s finding that the riverbank was occasionally used and less utilized than the beach of Captain Sams is supported by substantial evidence.

There was ample proof, in addition to common sense, that there are considerably more members of the public who walk the oceanfront beach of Captain Sams who arrive by car and park at Beachwalker Park than those who may pull up their kayaks or boats on the riverbank at low tide. This proof includes the testimony of Dana Beach, the League’s former executive director that “Beachwalker Park,...[is] very, very heavily used” and that “thousands and thousands of people all over Charleston County who come and boat over here or drive to Beachwalker Park.” **Tr. 133:14-15; Tr.146:2-6.** Another testified the Park is “very popular.” **Tr. 1737:2-3.**

The League also asserts the finding that KDP is unlikely to proceed with the significant cost to protect the shoreline of Beachwalker Park unless it is able to protect its other land as well is not supported by any testimony. KDP would not have had reason to introduce direct testimony to this effect at the contested case hearing. At that time this Court had not yet rendered its decision in KDP-II.

Putting aside the timing of this Court’s opinion in KDP-II, the ALC is entitled to draw reasonable inferences from the proof. It makes little economic sense for KDP to come out of pocket for the significant cost of installing 270 feet of bulkhead-revetment along a part of Beachwalker Park if it cannot receive the benefit of protecting its valuable land in the process. Despite a letter from Charleston County dated May 12, 2016, expressing concerns about the potential instability of portions of the parking lot from ongoing erosion of the riverbank, KDP has not proceeded. **Resp. Ex. 13.** KDP has always sought a complete solution rather than a partial erosion control structure

that would be vulnerable to exacerbated erosion around its ends. A fact finder is entitled to consider the reasonable inferences from the evidence and is not limited to the direct evidence alone. Johnson v. Rent-A-Ctr., Inc., 398 S.C. 595, 599, 730 S.E.2d 857, 860 (2012)(a reviewing court may reverse or modify only “[i]f the findings, inferences, conclusions, or decisions of that agency are ‘clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.’”) The ALC’s finding that it is unlikely KDP will construct an erosion control structure for the bank of Beachwalker Park alone is supported by substantial evidence.

Finally, the League argues that the ALC’s findings on the projected future erosion of the riverbank if the in-ground SSPW is installed are inconsistent and not supported by substantial evidence. A close reading reveals that it was the exact timing when the erosion would reveal the SSPW and the extent it would be revealed that were speculative. **Amended Final Order, p. 31.** The ALC did not find the loss of some part of the riverbank at some time to be speculative. What matters is that he found that it “is reasonably certain that the Kiawah River’s erosive forces will eventually cause the SSPW to be exposed to some degree, resulting in a loss of riverbank where the SSPW is exposed” and that “impact to the critical area and public open spaces along the riverbank where the SSPW will be installed is foreseeable.” **Amended Final Order, p. 31** The ALC assumed and fully considered the loss of this portion of the tidelands in his consistency review applying the pertinent policies of the CZMP. Any alleged contradiction or inconsistency in the findings of the ALC as to how much of the riverbank will be lost and when is immaterial. What matters is ALC assumed and considered the foreseeable loss of a portion of the sandy riverbank from the exposure of the SSPW sometime in the future.

The ALC's factual findings and conclusions when weighing the facts against the policies specified by the CZMP for limitation of access or disruption of the character of the riverbank are supported by substantial evidence.

**II. The ALC did not commit legal error in concluding S.C. Code §49-38-30 (D) did not apply to this consistency determination that did not involve a permit to construct in the critical area. Regardless, the ALC made findings that comport with the policy considerations in Section 49-38-30(D).**

The ALC did not specifically address Section 49-38-30 (D)<sup>8</sup> because this consistency review did not involve a request for a critical area permit. **Order Denying Motion for Reconsideration, p. 17.** The League contends the ALC's failure to specifically consider this policy section constitutes reversible legal error.

Contrary to the League's argument, the ALC correctly decided this subsection of the statute was not directly applicable to a consistency determination that does not involve a permit to conduct activity in the critical area. Even so, the ALC conducted the analysis specified by the policies in Section 49-38-30 and determined the proposed project complied with them.

**A. The CZMP does not incorporate Section 48-39-30(D) if the consistency review does not involve a critical area permit.**

KDP was not required to seek a critical area permit because the installation of the improvements will occur outside the critical area. The Office of Ocean and Coastal Resource Management ("OCRM") of the Department did not review the proposed activity under its direct authority for a permit to construct in the critical area but instead under its indirect authority under

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<sup>8</sup> "(D) Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter." S.C. Code Ann. § 48-39-30 (D).

S.C. Code Ann. §48-39-80 to determine the consistency of the Permits and the proposed project with the CZMP. See, Spectre, LLC v. S.C. Dept. of Health and Env'tl. Control, 386 S.C. 357, 688 S.E.2d 844, 847 (2010)(explanation of difference between OCRM's direct authority (i.e., permitting activity in the critical area) and indirect authority (i.e., review and certification of consistency of projects outside the critical area)).

Where an applicant seeks a permit to construct in the critical area, thereby invoking the direct permitting authority of the Department, the legislative policies set forth in Section 49-38-30 must be taken into account under the provisions S.C. Code Ann. Regs. 30-11(C)<sup>9</sup> and S.C. Code Ann. §48-39-150(A)<sup>10</sup> that apply to critical area permits and specifically draw in all the policies expressed in Sections 48-39-20 and 48-39-30.

At the risk of stating the obvious, a review for consistency with the CZMP is measured against the policies of the CZMP. The CZMP invokes *all* the policies of Section 48-39-30 *only when the consistency review involves a critical area permit under the Department's direct authority*: “In critical areas of the coastal zone, it is Council policy that, *in determining whether a permit application is approved or denied*, the Council shall base its determination on the individual merits of each application, the policies specified in Sections 1 and 2 (of the Act) [Sections 48-39-20 and 48-39-30], and be guided by the following general considerations ....” GUIDELINES APPLICABLE TO ALL PROJECTS, CZMP III.C.3.1(11), at III-15 (emphasis added).

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<sup>9</sup> “C. Further Guidelines: In the fulfilling of its responsibility under Section 48-39-150, the Department must in part base its decisions regarding permit applications on the policies specified in Sections 48-39-20 and 48-39-30, and thus, be guided by the following....” S.C. Code Ann. Regs. §30-11(C). This regulation was a principal focus of this Court's opinion in KDP-1 where KDP was seeking a critical area permit.

<sup>10</sup> “(A) In determining whether a permit application is approved or denied the department shall base its determination on the individual merits of each application, the policies specified in Sections 48-39-20 and 48-39-30 and be guided by the following general considerations....” S.C. Code Ann. § 48-39-150(A).

On the other hand, where the certification review does *not* involve an applicant seeking a permit to conduct activity in the critical area, the GUIDELINES APPLICABLE TO ALL PROJECTS invoke the policies of Section 48-39-30(B)(1)and(2) but *not* Section 48-39-30(D):

1. In review and certification of permit applications in the coastal zone, the Coastal Council [now OCRM] will be guided by the following general considerations (apply to erosion control and energy facility projects, as well as activities covered under Resource Policies):

1) The extent to which the project will further the policies of the South Carolina General Assembly which are mandated for the Coastal Council in implementation of its management program, these being:

a) "To promote the economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;

b) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations." (Sections 2(B)(1) and (2), S.C. Coastal Management Act of 1977).

GUIDELINES FOR THE EVALUATION OF ALL PROJECTS, CZMP III.C.3.1(1), at page III-14.

If the General Assembly intended the other policies of Section 48-39-30, namely those in subsections (B)(3)-(5), (C), (D), and (E), to apply to the consistency review where the applicant is not seeking a permit to conduct activity in the critical area, the legislature could have added them to the statement of guiding policies for consistency determinations but instead it purposely omitted them. KDP has been unable to locate, and the League does not cite to, any provision in the 200+ pages of the CZMP that states that Section 48-39-30 (D) must be considered in the consistency review for a project that does *not* involve a critical area permit.

In this case, the consistency review was to determine the consistency of the NPDES stormwater permit with the CZMP. **Tr. 1302:21-1303:12.** OCRM was not reviewing the project under its direct permitting authority. **Tr. 1303:24-1304:1.**

The ALC did not consider subsection 48-39-30(D) because the project does not include a request for a permit to conduct activity in the critical area. **Order Denying Motion for Reconsideration, p. 17.** For these reasons the ALC's ruling that Section 48-39-30(D) is inapplicable to the consistency determination for this project was not legal error. **Order Denying Motion for Reconsideration, p. 17.**

**B. The ALC conducted the policy assessment of Section 48-39-30(D) in his analysis under the Public Open Space Policies and certain subsections of Section 48-39-150.**

As the quoted excerpts from his Amended Final Order attest, the ALC's analysis and factual determinations clearly encompass the same comparative assessment expressed in Section 48-39-30(D):

(D) Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.

S.C. Code Ann. §48-39-30(D).

The ALC fully weighed the combination of uses in keeping with this policy in his analysis under the Public Open Space policies of the CZMP. After much wrestling with the comparative pluses and minuses, the ALC made the factual determination that the proposed project with the installation of the in-ground SSPW would provide more public benefit than leaving the bank unprotected and allowing the erosion to continue, even though the loss of a portion of the riverbank that is exposed at low tide will be lost over time.

The ALC also engaged in a similar balancing of the possible loss of a segment of the riverbank against the public benefit of the project when applying S.C. Code Ann. §48-39-150(A) that supplements and complements his weighing of competing uses applying the policies

applicable to Public Open Spaces.<sup>11</sup> The ALC conducted this judgmental determination in considering whether the project met the policies in subsections (5) and (7) of Section 48-39-150.<sup>12</sup> After recognizing the in-ground SSPW would likely eliminate a portion of the riverbank exposed at low tide, the ALC found that the SSPW will not eliminate the entire riverbank,<sup>13</sup> and that the most well-used portions of the Spit—the beach and southern tip of the Spit—will remain intact for the public to enjoy. **Amended Final Order, p. 46.** The ALC found that “the significant benefit to the public” to protecting public access to the beach at Beachwalker Park outweighed the loss of access to some of the riverbank. **Id.**

As to subsection (7) of Section 48-39-150(A), the ALC found the uncontradicted proof of public economic benefits of developing the upland area compared to the benefits of preserving the riverbank did not necessitate denial of the CZCC. **Id.** The public economic benefits from the development of the fifty homes are projected to generate real property tax revenues estimated at \$5 million per year with construction spanning around ten years, with the associated contracts precipitating increased spending, job creation, and economic activity in the surrounding area

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<sup>11</sup> The ALC assessed the project under the elements of S. C. Code Ann. §48-39-150. **Amended Final Order, pp. 47-49.** However, it should be noted that by its terms Section 48-39-150 applies in the Department’s exercise of its direct permitting authority rather than in the certification process of a project, like this one, that does not involve a critical area permit: “*In determining whether a permit application is approved or denied the department shall base its determination on the individual merits of each application, the policies specified in Sections 48-39-20 and 48-39-30 and be guided by the following general considerations:....*” S.C. Code Ann. § 48-39-150(A) (emphasis added).

<sup>12</sup> “(5) The extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources....

(7) The extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state.” S.C. Code Ann. §48-39-150(A)(5) and (7).

<sup>13</sup> There was also testimony the sandy riverbank continues for 1700’ beyond the location where the SSPW will terminate, as measured by GIS. **Tr. 1868:4-15.**

during that time.<sup>14</sup> **Id**; **Tr. 1784:17-1785:12**. The ALC commented that this significant public economic benefit alone did not justify the loss of a portion of the riverbank and further found noteworthy that a relatively small percentage of Captain Sams would be subject to residential development with the remainder preserved in perpetuity with a conservation easement. **Amended Final Order, p. 46**

The ALC wrapped up his findings by balancing the competing uses and determining the proposed project was consistent with the subsections of Section 48-39-150(A) the he found applicable:

The goals of the CZMP are to balance development with preservation and conservation. The Court finds the proposed project's disturbance of a relatively small area paired with the significant projected revenues, and considering that a significant portion of the Spit that will remain untouched, is an illustration of the type of balance the CZMP tries to achieve. The court thus finds the proposed project is thus consistent with this section.

**Amended Final Order, p. 47.**

Even though Section 48-39-30(D) is not one of the CZMP policies triggered in the review for consistency of projects that do not involve a critical area permit, the ALC engaged in the competing use analysis and estimation of comparative public benefit prescribed in Section 48-39-30(D) in those facets of his consistency determination previously described and found the project to be consistent with its tenets.

When the ALC rendered his final findings and conclusions on the entirety of Section 48-39-30, the ALC once again weighed the probable loss of a portion of the riverbank at low tide with the public benefits, inclusive of economic benefits. **Amended Final Order, pp. 48-49**. After reciting the public economic benefits, the conservation easement preserving the remainder of

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<sup>14</sup> Unlike this case, the record in KDP-I did not include any proof of public economic benefits, only proof of economic benefit to KDP.

Captain Sams in its natural state in perpetuity, and sensitive development techniques to be used by KDP, the ALC concluded his analysis under Section 48-39-30 by finding and concluding as follows:

Here, the evidence established that the installation of the SSPW will stabilize the neck, preventing the erosion of any potential road that is constructed to access the Spit that might otherwise render development unfeasible. Moreover, the public's access to this Spit and public trust lands will be enhanced and preserved by the SSPW, which will halt the erosion currently threatening the public's access at Beachwalker Park. Finally, these policies refer to the involvement of local municipalities.<sup>15</sup> The Town of Kiawah Island has worked extensively with KDP to ensure that the development is appropriate for the area and that certain conditions are in place to minimize any negative effects of the development. For all the reasons above, this Court finds the proposed project is not contrary to the state policies listed in section 48-39-30, but rather is in keeping with the competing goals of these policies.

**Amended Final Order, p. 49.**

In its arguments to the ALC and this Court, the League argues that economic benefit is irrelevant and cannot be considered in the balancing,<sup>16</sup> yet one of the foundational premises of the policies in Sections 48-39-20 and 48-39-30 is to foster economic development while adequately safeguarding coastal resources. The lead policy of Section 48-39-30(B)(1), repeated verbatim in the CZMP guidelines, is “[t]o promote economic and social improvement of the citizens of this State and to encourage the development of coastal resources... with due consideration for the environment...” S.C. Code Ann. §48-39-30(B)(1); CZMP III.C.3.1(1), III-14. This policy is in

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<sup>15</sup> The ALC is here referring to consideration 6 of the “Guidelines for Evaluation of All Projects”: “6) The extent to which the project is in compliance with local zoning and/or comprehensive plans.” GUIDELINES FOR EVALUATION OF ALL PROJECTS, CZMP III.C.3.1(6), at III-14.

<sup>16</sup> This Court referred to this balancing several times in KDP-1 when analyzing the public access consideration of S.C. Code Ann. Regs. § 30-12(C). 766 S.E. 2d 707, 721 (“Furthermore, reading regulation 30-12(C) as not containing a substantiality requirement and considering the entirety of the regulation, it presents a nuanced balancing of economic and environmental, and public and private considerations.. ... The balancing provided by regulation 30-12(C) is not only supported by the CZMA and the public trust doctrine foundation for the CZMA, but more closely comports with those policies than a substantiality requirement.”)

line with the legislative finding in Section 48-38-20(F): “(F) In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone *while balancing economic interests*, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate.” S.C. Code Ann. §48-39-20(F)(emphasis added).

Rather than committing legal error by considering public economic benefit, Judge Anderson would have committed legal error if he had refused to consider public economic benefit as the League argues.<sup>17</sup>

**III. The ALC abided by the rulings of this Court in KDP-I and KDP-II and did not violate their holdings or commit an error of law as contended by the League.**

The League argues that the ALC erred as a matter of law by allegedly rendering a decision that included findings and conclusions contrary to the rulings of this Court in KDP-I and KDP-II. The League asserts that the Court held in the prior two opinions that any erosion control structure that protects KDP’s property from further loss from erosion that also reduces or eliminates a part of the sandy riverbank at low tide violates the law and is inconsistent with the CZMP as a matter of law. With due respect to the League and this Court, KDP submits the League mischaracterizes the holdings. Its argument also does not take into account crucial differences between those two cases and this case.

KDP-I and KDP-II involved an application for a permit from the Department to construct a bulkhead-revetment in the critical area, triggering the Department’s direct authority and all the associated regulations and statutes. This bulkhead-revetment in the critical area is entirely

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<sup>17</sup> The ALC recognized that economic benefit *alone* is not enough to establish that a project bestows public benefit, citing South Carolina Wildlife Federation v. South Carolina Coastal Council, 296 S.C. 187, 190, 371 S.E.2d 521, 523 (1988). **Am. Final Order, p. 48.**

different from the in-ground SSPW that is part of the upland site improvements comprising the project now before the Court. Aside from the obvious differences, there is no question that the in-ground SSPW is properly designed and engineered to withstand erosive forces if the erosion of the bank continues. The League stipulated to the sufficiency of its design. **Tr.1368:16-19; Tr. 1371:6-11.**

Another critical difference is that the evidence of economic benefit and public benefit in this proceeding differs from that in the record in the proceeding involving the bulkhead-revetment. There was no proof of public economic benefit in the bulkhead-revetment case. The ALC also considered the other public benefits of protecting of Beachwalker Park and the conservation easement on the remainder of Captain Sams if the limited residential development proceeds. It was the ALC's prerogative to weigh the evidence and make findings. Those findings are conclusive since they are supported by substantial evidence.

The crux of the League's appeal is its argument that if the project will ultimately cause the loss of a portion of the riverbank adjacent to the location of the in-ground SSPW, then it is inconsistent with the CZMP as a matter of law, regardless of what the other proof showed, regardless of what the ALC found, and regardless of the balancing of the various considerations embedded in the CZMA and CZMP.

If the loss of a portion of the riverbank at low tide alone killed any project, then there would have been no need for this Court to have remanded the bulkhead-revetment proceeding to the ALC at the conclusion of its opinion in KDP-I. In the eyes of the majority, "the proposed bulkhead and revetment would ... cover 2,783 feet by 40 feet—over 9 football fields in length and an area of over 2.5 acres—of sandy beach with concrete" preventing the members of the public from being able "be able to walk or land a boat or kayak on it as they have done in the past." 766 S.E. 2d 707

at 722. Yet, the majority went on to state that the loss of use of “the pristine sandy beach .. alone is not a valid reason to reverse the ALC's approval of a permit to construct a huge bulkhead and revetment there.” 766 S.E. 2d 707 at 723.

The majority in KDP-I did not rule as a matter of law a project should not be permitted under DHEC’s direct authority if it resulted in the loss of a stretch of the sandy riverbank, as the League argues. Instead, the majority remanded the case to the ALC to determine whether there was substantial evidence of countervailing public benefit under Section 48-39-30(D), noting that solely economic benefit to the owner would not constitute benefit to the public. 766 S.E.2d 707 at 716. As stated earlier, Section 48-38-30(D) does not figure into the determination of whether a project that does not seek a critical area permit is consistent with the CZMP. But, even if it did, the ALC made factual findings of net public benefit from the project that are supported by substantial evidence.

The League also asserts as legal error that the ALC failed to adhere to the alleged finding by this Court in KDP-I that the “area” for purposes of the cumulative impacts analysis must be confined to the peninsula of Captain Sams. The League further asserts that the “Court in KDP 11 did not say that the ‘the area’ includes uplands surrounding the critical area impacts, as the ALC incorrectly states.” **App. Brief, p. 31.**

Again, with due deference to the League and this Court, KDP submits that the League is mistaken. This Court held the opposite of the League’s assertion: “Accordingly, the ALC erred in failing to give deference to DHEC's interpretation and construing regulation 30-11(C)(1) as not permitting consideration of upland impacts.” 766 S.E. 2d 707 at 719.

Further, contrary to what the League contends, this Court did not define a specific area that must be considered, an inherently factual question. This Court held the Department’s interpretation

of 30-11(C)(1) that “area” includes more than the critical area was entitled to deference because it “is neither arbitrary, capricious, nor manifestly contrary to the statute.” 766 S.E. 2d 707 at 719.

The ALC was correct in rejecting this assertion of the League:

[I]n Kiawah II, the Supreme Court did not make a finding as to the specific geographical area to be considered under this policy or the character of that geographical area. Rather, it endorsed the Department’s *interpretation* of the regulation, which was that the Department was authorized to consider the upland area in addition to the critical area, and concluded this Court should have deferred to the Department’s interpretation of this policy.

**Order Denying Motion for Reconsideration, p. 12; Amended Final Order, p. 28.**

In KDP-I this Court stated the CZMA and CZMP require the Department to “consider how projects within the critical area may affect the broader coastal zone.” 766 S.E. 2d 707 at 719. The coastal zone is defined as Beaufort, Berkeley, Charleston, Colleton, Dorchester, Horry, Jasper, and Georgetown Counties. S.C. Code Ann. § 48-39-10(B). Limiting the “area” to the Captain Sams prevents consideration of how a project may affect the broader coastal zone. This Court specifically held in KDP-I it is legal error to consider only the project area as contended by the League.

This determination of the “area” for purposes of the cumulative impacts assessment is inherently fact specific. As the ALC noted, Curtis Joyner, the OCRM staff member who conducted the consistency review, “explained, ‘for those of us who use and interact with the enforceable policies, they’re very broadly written.’” **Amended Final Order, p. 30; Tr. 1256:12-15.**

The fact-specific cumulative impacts analysis of the CZMP, which is a guideline for all projects that do not seek a critical area permit, states:

In review and certification of permit applications in the coastal zone, the Coastal Council [now OCRM] will be guided by the following general considerations (apply to erosion control and energy facility projects, as well as activities covered under Resource Policies):

\* \* \*

7) The possible long-range, cumulative effects of the project, when reviewed in the context of other possible development and the general character of the area.

GUIDELINES FOR EVALUATION OF ALL PROJECTS, CZMP III.C.3.1(7), at III-14.<sup>18</sup>

As the wording itself attests, the “area” must be distinct from the “project.” It is the effects of the “project” that are considered “in the context of other possible development and the general character of the area.”

The League makes the factual argument that the Department could not have possibly considered cumulative impacts because, according to the handwritten notes of one staff member, back in November 2011 the Department Board supposed told Department staff not to consider cumulative impacts with respect to applications associated with the development of the Spit. **Pet. Ex. 28.** But, Joyner did not consider the November 2011 notes in conducting his final consistency review in May 2018. **Tr. 1298:11-13.** As the testimony of Joyner and the Department’s written consistency review demonstrate, OCRM in fact conducted a cumulative impacts analysis in 2015. **Pet. Ex. 41.**

Joyner considered the “area” for purposes of the cumulative impacts analysis to be larger than the project site, just as this Court ruled in KDP-I. **Tr. 1256:9- 1257:9; Pet. Ex. 41, p. 6** (“The current general character of Kiawah Island is beachfront development consisting of both single-family and multi-family habitable structures. Across the Kiawah River from Captain Sams is Seabrook Island [that] also includes single and multi-family habitable structures.”). The ALC’s finding, consistent with Joyner’s, that the area in the coastal zone to be considered is Kiawah Island

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<sup>18</sup> This wording is slightly different from the wording of 30-11(C)(1) that was under review in KDP-I, but the differences are immaterial: “(1) The extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area.” S.C. Code Regs. 30-11(C)(1).

and the portion of Seabrook Island directly across from Captain Sams complies with rather than transgresses the holding of this Court in KDP-I.

Here, the ALC found facts that supported the Department's determination that the area "included parts of Seabrook and the rest of Kiawah" since "Seabrook is immediately across the Kiawah River from Captain Sam's Spit and Kiawah, parts of it are directly connected, too." **Amended Final Order, p. 21**. Consequently, the ALC found that "residential development for the Spit is in keeping with the general character of the area." **Amended Final Order, pp. 21-22, p. 30**. The ALC stated that "including the portion of Seabrook Island directly across from the Spit is also rational and logical considering their proximity." **Amended Final Order, p. 30**. The aerial photos show that the Seabrook peninsula directly across the Kiawah River on the inlet side of Captain Sams is fully developed as residential lots, most with docks. **Resp. Exs. 35 and 45; Pet. Exs. 1 and 44**. Additionally, the wooded land immediately to the East of Beachwalker Park is in the process of being developed as a condominium project. **Tr. 1561:22-1562:13**. This proof in the record supports the ALC's finding that the general character of the area is residential, just as the Department determined. **Amended Final Order, p. 30** ("Having defined the scope of the area, the Court also agrees with the Department's factual determination that the general character of the area is residential.").

The League contends the ALC improperly deferred to the Department's determination of the "area." Although the ALC rightly found that the Department's determination of the "area" was supported by the proof and rational, the ALC also made his own determination that the area as well as the general character of the area is residential. **Amended Final Order, pp. 21-22, p. 30**. The ALC's finding that "residential development for the Spit is in keeping with the general character of the area" is supported by substantial evidence. **Amended Final Order, p. 22**. In his

Conclusions of Law, the ALC expanded even further on his cumulative impacts analysis as to the limited residential development:

Obviously, transformation of a small portion of the Spit from a natural area to a residential area will inherently result in a long-range effect. But in the context of this case, the development of the proposed project, which is residential, will be consistent with the surrounding area, which is residential. Moreover, the transformation will not be without regard for the environment in which the homes will be placed. KDP offered considerable proof as to the environmentally sensitive nature of the proposed residential development and the extensive precautions it will take to avoid altering the landscape and vegetation to the extent possible. This sensitive development of the area is likewise consistent with the rest of the development on Kiawah Island. Further, the area to be transformed is a relatively small portion of the Spit. Therefore, this proposed development will be in keeping with other developments on Kiawah Island and the general character of the area, while preserving a sizeable portion of the Spit in its natural state.

**Amended Final Order, pp. 30-31.**

The ALC had an even more expansive analysis when discussing the potential future impacts of the in-ground SSPW:

Of greater concern are the long-range, cumulative effects of the SSPW. It is reasonably certain that the Kiawah River's erosive forces will eventually cause the SSPW to be exposed to some degree, resulting in a loss of riverbank where the SSPW is exposed. This is a long-range effect.... This Court will thus consider the impact on the riverbank in its review of the cumulative effects of the SSPW because the riverbank is part of the public trust and a public open space.

In Kiawah II, the Supreme Court stated that the public's interest in public trust lands must be "the lodestar" that guides the court's legal analysis. 411 S.C. at 29, 766 S.E.2d at 715. The Supreme Court also recognized in Kiawah II that "permitting alteration of the tidelands may be in the public's interest in limited circumstances" with the understanding that "the State enacted statutes and promulgated regulations [the CZMZ and CZMP] which generally prohibit alterations to the tidelands except when the public interest requires otherwise."

Here, it is clear the Spit is a very popular and well-used destination for public recreation of all kinds. The importance of access to the Spit via Beachwalker Park to the public is evident. Overall, the testimony indicated the public primarily utilizes the beachfront and the Kiawah River for recreation. Coastal provided testimony that some people 'occasionally' use the riverbank on the Spit, primarily as a place where kayakers can pull up their boats to rest or otherwise get out and see the area. However, the riverbank is, to a significant degree, the less utilized

public area of the Spit. And even where the riverbank along the Spit is used by the public, the greater use is primarily at the southern end of the Spit, which is the opposite end from where the SSPW is proposed to be installed. A marsh area prevents the public from walking all the way around the beach to the river bank, although it may be possible to reach the riverbank by crossing the dunes.

It is also clear that erosion caused by the Kiawah River is threatening the continued, safe public access at Beachwalker Park. Indeed, access to the Spit from the Park is via the beachfront because the tall natural escarpment along the Park currently prevents an adventurer from accessing the riverbank from the Park. Furthermore, the photographic evidence in the record shows the Park has already lost several parking spots due to the encroaching escarpment.

Considering the threat to public access that further erosion of the riverbank currently poses, the Court finds the installation of the SSPW will greatly benefit the public in that it will stop further erosion near the Park and stabilize the area, protecting the public's access to the Spit. Additionally, the substantial benefit the public will gain by having continued, protected access to the Spit with the installation of the SSPW outweighs the partial loss of a less-utilized riverbank in these limited circumstances. See Kiawah Dev. Partners, II, 411 S.C. at 29, 766 S.E.2d at 715 (recognizing "permitting alteration of the tidelands may be in the public's interest in limited circumstances"). Moreover, the SSPW will not run the entire length of the riverbank and it is speculative as to how much of the SSPW will eventually be exposed; therefore, public access to the river bank will remain.

The Court recognizes that the installation of the SSPW will likely halt the natural seaward migration of the riverbank where the wall is installed, and thus halt, to some degree, the natural erosive processes present at the Spit. However, based upon the evidence presented, it is unclear the extent of the effect halting migration in this limited area will have within the context of the general character of the area. In addition to the speculative nature of the effects of halting migration in a limited area, the Court cannot help but note that the Spit is already being heavily altered by the artificial relocation of Captain Sam's Inlet every few years. This relocation process involves detaching the entire end of the Spit from the rest of it, which most certainly impacts the natural erosion patterns and migration of the Spit and the public. The comparative the effects of the SSPW seem much less. Accordingly, the Court finds any long-term, cumulative effects on the area due to the SSPW's impact on the Spit's natural migration are unclear and less impactful than the periodic relocations of Captain Sam's Inlet.

**Amended Final Order, pp. 31-33.**

As is evident from the above excerpt, the ALC engaged in an extensive analysis of cumulative impacts resulting from the future exposure of portions of the in-ground SSPW. This

analysis is inherently factual and judgmental. Nothing in the ALC's consideration of cumulative impacts – both as to the area to be considered and the impacts of the future limited residential development and the in-ground SSPW – runs afoul of the legal rulings in KDP-1 and KDP-2.

**IV. The ALC correctly determined that neither the doctrine of collateral estoppel nor judicial deference binds the ALC to the cumulative impacts assessment of the Department staff person who evaluated the bulkhead-revetment in 2008 in a different proceeding.**

The League argues that the ALC was obligated to abide by the cumulative impacts assessment and consistency determination made by OCRM staff member Bill Eiser in 2008 in acting on the application for a permit for the bulkhead-revetment. The League argues that the ALC was bound by Eiser's factual analysis under the doctrines of collateral estoppel and deference to agency interpretation. The League also argues that because the Eiser's and Joyner's staff decisions are inconsistent, the one made by Joyner in this case is not entitled to deference. The ALC correctly rejected these arguments and determined that his hands were not tied, and he was free to make his own findings and determinations based on the record in this case.

In a contested case proceeding, the ALC hears the matter de novo. Brown v. S.C. Dep't of Health & Env'tl. Control, 348 S.C. 507, 515, 560 S.E.2d 410 (2002). The ALC is not bound by the factual assessments by a staff member. If it were otherwise, the ALC would be stripped of the power to make his own findings based on the evidence presented at the contested case hearing that may not comport with what was before the staff member who made the decision. The fundamental principle that the ALC hears the matter de novo, alone, defeats the League's assertion that the ALC was bound by staff member Eiser's decision on cumulative impacts in 2008.

The League asserts that the ALC committed a legal error in deferring to Joyner's staff assessment for this project and in failing to defer to Eiser's decision on KDP's application for the bulkhead-revetment. But, the doctrine of deference is not applicable here. It applies to an agency's

long-standing interpretation of a regulation or statute if the regulation or law is ambiguous and the agency's interpretation is not contrary to its clear wording. KDP-I, 766 S.E. 2d 707, 716-720.

In KDP-1 this Court held that the word "area" as used in the cumulative impacts assessment prescribed by 30-11(C)(1) was ambiguous and the agency's *interpretation of the regulation* was entitled to deference, namely that "area" in the context of applications for critical area permits is not limited to the critical area but also includes the uplands within the greater coastal zone. 766 S.E. 2d 707, 716-720. The doctrine of deference does not apply to *the application* of the regulation to particular facts. This Court did not hold that the ALC was required to defer to Eiser's cumulative impacts analysis, which was his judgmental decision applying the regulation to include more than the critical area.

Here the ALC gave deference to the agency's construction of the term "area" as used in Guideline 7 for the evaluation of all projects by considering more than the project area: "The possible long-range, cumulative effects of the project, when reviewed in the context of other possible development and the general character of the area." GUIDELINES FOR EVALUATION OF ALL PROJECTS, CZMP III.C.3.1(7), at III-14. The ALC considered the uplands and the vicinity surrounding Captain Sams, just as Department staff member Joyner had done in his cumulative impacts assessment – both in keeping with the agency's construction of the term "area." The determination of what was the "area" in this case was fact specific, to be determined based on the evidence presented in this case. The doctrine of deference does not force the fact finder in this case to accept Eiser's 2008 judgmental assessment of what constituted the "area" for purposes of the identical test under 30-11(C)(1) on a different application.

The League's unprecedented position on the deference doctrine not only undermines the ALC's role as fact finder but also divests the Department Board of its authority. The Department

Board refused to grant the League a final review conference in this case, thereby ratifying the staff decision finding the project was consistent with the CZMP including the staff's cumulative impacts assessment. The League's argument would turn things upside down and make the Department Board subservient to the decision of a former staff member.

Eiser's staff assessment in 2008 on an entirely different project also does not come close to satisfying the elements for collateral estoppel. "Under the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, relitigation of those issues actually and necessarily litigated and determined in the first suit is precluded as to the parties and their privies in any subsequent action based upon a different claim." Richburg v. Baughman, 290 S.C. 431, 351 S.E.2d 164, 166 (1986). Eiser's staff assessment in 2008 was not an adjudicated finding in a final judgment on the merits.

In fact, the opposite of Eiser's assessment was ultimately adjudicated. In his final order on remand, the ALC found that "that the general character of the area around the Spit is residential, with some commercial development." **Amended Final Order and Decision on Remand, p. 12.** The ALC further found that "the residential development of the portion of the upland intended to be developed will not have deleterious impacts for the reasons set forth above." **Amended Final Order and Decision on Remand, p. 14.** If anything, this essential factual finding that the upland development is consistent with the policies in the CZMP that the Court affirmed but modified in other respects collaterally estops the League in this case from arguing any development at all on Captain Sams is inconsistent with the CZMP.

Finally, the League advances an inconsistency argument that also does not provides a basis for relief, much less reversal. The League makes much of the difference between the findings in Eiser's staff assessment in 2008 acting on KDP's application for the bulkhead-revetment and those

in Joyner's staff assessment in 2015 making the consistency determination in this case. **Pet. Ex. 41.** The League argues that the two staff determinations are inconsistent. The League does not cite any precedent that holds that an agency staff cannot make inconsistent factual determinations on different applications. Nor does the League cite precedent on the legal significance of inconsistent staff determinations.<sup>19</sup>

The cases cited by the League are inapposite to the inconsistency issue raised by it. The cited cases address whether an agency's inconsistent *interpretation of a statute or regulation* is entitled to deference, which is a matter of statutory construction. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987); Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016). The alleged inconsistency here is not one involving construction of the meaning of a regulation but the application of the regulation to different facts by different staff members involving different projects seven years apart.

Moreover, the Department's alleged inconsistency is of no consequence because in both instances the staff decisions were superseded by de novo proceedings in the ALC resulting in findings and conclusions of the ALC that are completely consistent.

Finally, the ALC's conclusion that the League is barred from raising collateral estoppel and res judicata because it did not raise either one in its Prehearing Statement or at the contested case hearing is legally correct. **Order Denying Motion for Reconsideration, pp. 8-9.** The League argues that it raised issue and claim preclusion by asserting that the Department's staff decisions were inconsistent. Inconsistency may be an element of judicial estoppel but it is not an

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<sup>19</sup> The ALC noted this omission in the League's argument: "Furthermore, Coastal asks the Court to address a generic assertion that the Department's decision in this case is inconsistent with its last decision without presenting legal arguments as to what relief these inconsistencies demand." **Order Denying Motion for Reconsideration, p. 7.**

element of either collateral estoppel or res judicata. The fundamental principles of issue preservation bar the League from raising these issues for the first time in its motion to reconsider. See C.A.H. v. L.H., 315 S.C.389, 434 S.E.2d 268 (1993) and Anderson Memorial Hosp., Inc. v. Hagen, 313 S.C.497, 443 S.E.2d 399 (Ct. App. 1994) (Supreme Court and Court of Appeals ruling a party cannot raise an issue for the first time in a motion to reconsider).

V. **Substantial evidence supports the ALC's findings and conclusions that the project is consistent with the state policies and the CZMP with respect to whether Captain Sams is inappropriate for development and whether the project will most probably have a material adverse effect on diamondback terrapins and bottlenose dolphins.**

Section V. of Appellant's Brief asserts there was no substantial evidence to support the ALC's findings and conclusions that the future residential development on Captain Sams and the project's alleged impacts on diamond backed terrapins and bottlenose dolphins are consistent with state policies. Contrary to the League's contentions, there was abundant proof to support the factual findings of the ALC in these respects.

As to whether Captain Sams is appropriate for this limited residential development, the League contends the ALC did not assign proper weight to testimony from the League's experts. **See App. Brief at 45 (citing Am. Order, p. 48) and App. Brief at 48 (referring to the testimony of League expert Porcher)**. The League makes a similar contention as to the ALC's findings on impacts to coastal and marine resources, claiming the ALC assigned more weight and credibility to the testimony of KDP's expert than its experts on whether the project will impact terrapins and dolphins. **See App. Brief at 48** (proposing the ALC's reliance on KDP expert Folk, instead of upon the League's experts, creates an issue for review and reversal by this Court).<sup>20</sup>

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<sup>20</sup> As discussed, supra, the ALC may give expert testimony the weight and credibility that he determines it deserves. Florence County Dep't of Social Services v. Ward, 310 S. C. 69, 425 S. E.2d 61 (Ct. App.1992). However, an appellate court may not substitute its judgment for the

As the principles governing this appeal covered in the Scope of Review, supra, make abundantly clear, the ALC's findings must stand if there was any proof to support them even if there is evidence in the record contrary to the findings of the ALC. It is the ALC's prerogative to judge the credibility of the witnesses and decide what weight, if any, to give testimony. The ALC as the fact finder is not required to accept any testimony, not even that of an expert. Florence County Dep't of Social Services v. Ward, 310 S. C. 69, 425 S. E.2d 61 (Ct. App.1992); S.C. Cable Television Ass'n v. Southern Bell Telephone and Telegraph Co., 308 S. C. 216, 417 S. E.2d 586 (1992).

In the paragraphs introducing the discussion in Section V, Appellant's Brief references S.C. Code Ann. §§ 48-39-20 and 48-39-30, discussed previously, which include multiple broad policies potentially relevant to consideration of a particular project or permit. **App. Brief 44-45.** Beyond this general introduction, however, Appellant's Brief focuses only the ALC's rejection of the League's position that the Spit is "inappropriate for development" because it is "highly unstable." **App. Brief 45.** The League asserts the testimony of its witnesses is conclusory as to this consideration and ignores its own burden of proof as well as the deference accorded by law to the ALC's weighing of the evidence presented by expert testimony at trial. The ALC was not compelled as a matter of law to adopt the testimony of the League's experts. Further, even the League's experts with respect to the two species did not testify with sufficient certainty as to the alleged harmful impacts to them. The League "cannot sit back at trial without offering proof, then come to this Court complaining of the insufficiency of the evidence to support the [ALC's]

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judgment of the administrative law judge as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-610(B).

findings. Honea v. Honea, 292 S.C. 456, 458, 357 S.E.2d 191, 192 (Ct. App. 1987) (citing Cox v. Cox, 290 S.C. 246, 349 S.E.2d 92 (Ct.App.1986)).

**A. The ALC’s finding that the League did not establish the Spit “is inappropriate for development” is supported by substantial evidence.**

The one statutory expression of policy that refers to “inappropriate development” is Section 48-39-20(B)(1) that provides:

(B) Specific state policies to be followed in the implementation of this chapter are:

(1) To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from *inappropriate development* and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;...

S.C. Code Ann. §48-39-20(B)(1)(emphasis added).

The statutes and regulations do not define the meaning of “inappropriate development.” Instead, the CZMP contains numerous policies that apply to development. If it is determined that proposed project is consistent with the policies in the CZMP applicable to development, then the project is not inappropriate development.

Again and again, the League refers to Captain Sams with the terms “dynamic” and “fragile” implying that there is something very special and precious about it that sets it apart from anywhere else on the coast. What the League does not tell the Court is that *the CZMP refers to all 32 barrier islands on the South Carolina coast as being both fragile and dynamic:*

**A. BARRIER ISLANDS**

**Findings**

Barrier islands are elongated landforms of unconsolidated material (usually sand), situated seaward of the inland shoreline and parallel to the ocean. They are one of the most *dynamic* coastal ecosystems since they are constantly being reshaped by the forces of wind or waves. ...

These unique, *dynamic islands* perform a number of roles in the coastal system....

South Carolina has approximately 30 barrier islands,....

**Policies**

*Because of their fragile and dynamic nature* and their resource value, the Coastal Council will consider the following additional policies in review or permit proposals on barrier islands....

CZMP III.C.3.XII.A, at III-69 (*italics emphasis added; bold emphasis in original*).

Thus, there is nothing about Captain Sams or Kiawah Island that distinguishes them from all the other beachfront islands discussed in the CZMP, except the very positive feature that there have been decades of accretion when most other islands are eroding.

Another a prominent fact omitted by the League that, alone, refutes its contention that Captain Sams is inappropriate for development was the Department's extension of the jurisdictional lines across Captain Sams based on its 40+ years of accretion, thereby allowing construction and development landward of the jurisdictional lines.

As the Department's Joyner explained, the CZMP does not prohibit development on barrier islands, rather it serves as a guide to manage that development appropriately. **Tr. 1314:17-1315:19; 1321:5-1322:8.** Here KDP put up extensive testimony of its environmentally sensitive design of, and restrictions on, the limited residential development – houses of no more than one and a half stories that integrate into the natural setting in locations from 200 to 1000 feet from the beach, no lawns, shared driveways, minimization of pervious surfaces, a single community dock, roads with no curb and gutter, and the greenest stormwater system ever designed for any location on Kiawah Island. **Tr. 1612:17-1614:7; 1724:18-1731:5.** The ALC made extensive findings based on this proof of beneficial development methods. **Amended Final Order, pp. 9-10.**

The environmentally sensitive plan for the development, which the League does not challenge,<sup>21</sup> constitutes uncontradicted proof of appropriate development supporting the ALC's findings that the development complied with the policies governing residential development on barrier islands. **Amended Final Order, pp. 36-38.** The ALC further responded to the League's argument in the following:

While there was testimony that the Spit is a dynamic and fragile resource, Coastal did not show that it is inappropriate for development. To the contrary, Chris Joyner, explained that the purpose of the CZMP is not to prohibit development on barrier islands; rather, it is a collection of 'management techniques to manage the potential effects of development upon coastal resources.' Also, Coastal's own expert conceded that some limited development of the Spit in character with the area would be proper. This evidence certainly influences the determination of how much development is appropriate.

**Amended Final Order, p. 48.**

The League's real complaint is that Judge Anderson did not adopt the views of the League's witnesses. **See App. Brief at 45-46** (discussing League witnesses' testimony). The League first argues Judge Anderson erred in finding that the League "did not show that [the Spit] is inappropriate for development" by citing three statements of opinion from three different lay witnesses the League presented at trial **App. Brief at 45 (citing Am. Order at 48)**: (1) Dana Beach, who stated "[p]eople identify with this area because it is one of the great last refuges on the coast where you can go see these [birds]..." and "it also is highly inappropriate for development."<sup>22</sup> **App. Brief 45 (citing Tr. 147:7-8 and Tr. 134:4-5)**; (2) local farmer Sidi

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<sup>21</sup> The League stated at the hearing that it was not challenging KDP's development methods, including whether they were environmentally sensitive and appropriate, but instead challenging whether any development at all was appropriate. **Tr. 1566:22-1568:12.**

<sup>22</sup> In response to KDP's objection, these opinions were not admitted for the truth of the matter asserted; instead they were allowed only for "the reasons why Coastal Conservation League brought this matter, but none of the opinions that he's given are offered as expert opinions. So, if he testifies to anything in that regard then it would not be for the truth of it, it would just be for the reasons he's claiming it." **Tr. 127:14-21.**

Limehouse whom testified “[t]he spit changes and is vastly different every 5-10 years.” **App. Brief at 46 (citing Tr. 681)**; and (3) George Meriwether, a project manager at Blue Cross, who testified generally that “this particular spit is, you know, one of the few places left [on Kiawah] that's not dramatically developed.” **App. Brief 45 (citing Tr. 356, lines 6-7)**.

In addition, the League cites to select testimony of coastal geologist Robert S. Young, Ph.D. **App. Brief at 46**. What the Brief omits, however, is that Dr. Young’s focus in terms of describing the project as “unwise” was not because he believed the project threatens to destroy “[i]mportant ecological, cultural, natural, geological and scenic characteristics, industrial, economic [or] historical values in the coastal zone” per S.C. Code § 48-39-20(E). Instead, the “real issue here” to him was the cost to the federal government in the event of a catastrophic storm. **Tr. 858:7-18; 865:20-24**. Of course, Captain Sams would not be the only location on a barrier island that would be vulnerable if there were a catastrophic storm with a fourteen foot storm surge; the entire coast would be vulnerable. **1431:13-1432:1**. Dr. Young agreed that the extension of the jurisdictional lines onto Captain Sams in 1999 was an expression of the policy of the state that some development could occur there. **Tr. 900:18-902:8**. He also agreed that the zoning of the Town allowing development on Captain Sams was another expression of a public policy that some development could occur on Captain Sams. **Tr. 903:3-9**.

The second expert that the League asserts the ALC should have heeded was Richard Porcher, Ph.D, a biologist. It was up to the ALC as the fact finder to decide what weight to place on the testimony of Dr. Porcher. The ALC extensively discussed Dr. Porcher’s testimony and the reasons he did not find it persuasive. **Amended Final Order, pp. 12-13**. It was in the ALC’s discretion to weigh the testimony of Dr. Porcher and make findings as he saw fit.

Neither the testimony of the lay witnesses, Dr. Young, nor Dr. Porcher recited by the League can unseat the factual findings of the ALC determining that the Captain Sams was not inappropriate for the limited residential development and that the proposed development methods comply with the policies of the CZMP. The ALC's findings and conclusion that the project area is, in fact, suited for development in compliance with S.C. Code §48-29-20(E) is supported by substantial evidence.

**B. The ALC's finding that the League failed to prove that the project will most probably have a material adverse effect on diamondback terrapins and bottlenose dolphins is supported by substantial evidence.**

Section V.(B). of Appellant's Brief is entitled "The ALC's Findings on Impacts to Coastal and Marine Resources is Unsupported." **App. Brief at 48.**<sup>23</sup> Like the previous argument regarding the ALC's weighing of the evidence and findings of fact, this discussion is a fact argument that the ALC should have adopted the opinions of the League's witnesses. Once again, it was entirely up to Judge Anderson to decide what weight, if any, to give to the League's experts.

The ALC considered the League's evidence regarding terrapins and dolphins under two separate regulatory provisions:

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<sup>23</sup> Appellant's Brief only specifically raises alleged errors in Judge Anderson's Order relating to a lack of substantial evidence supporting His Honor's conclusions regarding the application of the provisions of S.C. Code §§ 48-39-20(D)-(F), 48-39-30(B)(2), and 48-39-150(A)(3). The Appellant's Brief never actually sets forth any argument regarding the evidence supporting the ALC's findings on the 4 CZMP sections originally raised by the League then addressed by the ALC's Amended Final Order. **See App Brief at 43 – 57.** As such, the League has not preserved for appeal any arguments regarding the ALC's findings as to the Permits and the CZCC's consistency with CZMP Policy III.C.3.I(7); CZMP Chapter IV.A.2.a.8; CZMP Chapter III.C3.XII.A, B & D; and CZMP Chapter IV.C.4. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 315, 594 S.E.2d 867, 876 (Ct. App. 2004) (quoting Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)).

[T]he Court finds it has jurisdiction to review the issue of the impact of the proposed project on non-threatened and non-endangered species such as diamondback terrapins and bottlenose dolphins because the impact on these species could be considered part of the long-range, cumulative effects of the project. **Amended Final Order, p 16 (citing CZMP Policy III.C.3.I(7))**

None of these species are produced commercially. However, to the extent [§ 48-39-150(A)(3)] includes the natural reproduction of ‘marine life or wildlife or other natural resources,’ the Court will consider the potential impact of this project on these species. **Amended Final Order, p. 44 (citing S.C. Code § 48-39-150(A)(3)).**

Applying these provisions, the ALC found the following as to CZMP Policy III.C.3.I(7):

... [A]ny long-range, cumulative effects on the surrounding wildlife as part of the general character of the area are speculative at this time. The testimony provided by Coastal failed to show by a preponderance of the evidence that the presence of the proposed development and SSPW would materially affect the populations of piping plovers, loggerhead sea turtles, diamond back terrapins, or bottlenose dolphins in the area.

**Amended Final Order, p. 33.** With regard to S.C. Code § 48-39-150, the ALC found:

Coastal failed to show that the proposed project will have a material adverse effect on the reproduction of either diamondback terrapins or bottlenose dolphins. While the SSPW would impact the diamondback terrapins’ ability to access the area behind the SSPW, the evidence established that the natural vertical escarpment present along much of the area where the SSPW will be installed is already too high for the terrapins to cross. Moreover, the SSPW will not extend the entire length of the river-side of the Spit. Accordingly, access areas on the river-side of the Spit will remain. In addition, the evidence did not establish whether terrapins are currently nesting in the area of the proposed installation of the SSPW or that the Spit is the only nesting area utilized by terrapins in the area. Therefore, any material adverse effects on the population, which is unknown, is speculative.

Similarly, although evidence was presented that bottlenose dolphins utilize the Spit for strand feeding, the evidence was speculative as to how the potential elimination of part of this strand feeding area due to the SSPW would impact the overall population. In other words, the evidence simply did not establish that the strand feeding that occurs along the portion of the Spit where the SSPW will be installed is a significant part of the dolphins’ diet. To the contrary, the evidence established that the dolphins may adapt without impact.

**Amended Final Order, p. 45.**

Judge Anderson devotes four full pages to his findings on diamondback terrapins and bottlenose dolphins. **Amended Final Order, pp. 17-21.** He explains at length the facts supporting his findings that the League failed to prove the in-ground SSPW and the proposed development will have a material adverse effect on diamondback terrapins or bottlenose dolphins based on his view of the evidence presented. **Id.** Although the ALC's findings differ from those the League hoped he would reach, the findings are supported by substantial evidence.

Further, even if the ALC had swallowed the testimony of the League's two experts hook, line, and sinker, there was a fundamental flaw in their testimony. Neither rendered their opinions to a sufficient degree of certainty and probability. The testimony supports the ALC's determination that the proof offered by the League did not arise above speculation that the project *might* or *possibly could* impact diamondback terrapins and bottle-nosed dolphins.

In matters of causation of this nature, it is axiomatic the expert is required to state his or her opinion to a reasonable degree of certainty that the action in question will most probably cause the result. See Clark v. Greenville County, 313 S.C. 205, 208, 437 S.E.2d 117, 119 (1993) (“[E]xpert testimony must state that the result ‘most probably’ came from the cause alleged.”); Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 111, 410 S.E.2d 537, 543 (1991). Further, it is up to the trial judge, not the litigant, to determine if expert scientific testimony is reliable. State v. Council, 355 S.C. 1, 20, 515 S.E.2d 508, 518 (S.C. 1999).

As he explained in his order, the ALC had good reason to find unreliable Dr. Gibbons testimony that the project will result in “close to none” of the area's diamondback terrapins nesting on Captain Sams. **App. Brief at 53 (citing Tr. 313, line 1).** Dr. Gibbons did not testify to any facts proving that diamondback terrapins nest on Captain Sams today. As a result, he did not (and testified he cannot) quantify in any way the number of terrapins, if any, that may still nest at the

Captain Sams. (Tr. 312). The ALC correctly found that there was no proof the 27-year-old study that Dr. Gibbons relied up reflected conditions today where the river shoreline is now a vertical escarpment terrapins would be incapable of climbing unlike 25 years ago. <sup>24</sup> **Amended Final Order, pp. 17-18.** When asked the ultimate question by the League’s counsel (“And have you formed any opinions with a reasonable degree of scientific certainty about what the -- how the proposed project will impact the diamondback terrapin population at Kiawah Island?”) Dr. Gibbons offered only that he “*thinks*” the project will have a detrimental effect which “*could* be very serious.” (Tr. 306)(**emphasis added**). Judge Anderson had a reasonable basis for concluding there were insufficient facts to support that Dr. Gibbons’ opinion and that he did not render an opinion to the requisite degree of certainty to establish causation.

Just as with their expert on terrapins, the League argues the ALC was required to accept the testimony of the League’s expert marine scientist Robert F. Young, Ph. D. This Dr. Young opined that the dolphins that strandfeed in the Captain Sams area “*could potentially* be losing a significant portion of their diet and *could quite possibly* be impacted to a level where they have to completely change their foraging tactics or move to a new location.” **App. Brief 56 (citing Tr. 483:6-484:3)(emphasis added)**. There is no level of certainty beyond speculation in this testimony. Dr. Young qualifies the entire opinion that some dolphins “could potentially and “could quite possibly” be subjected to a change in their behavior. **Tr. 483:6-484:3.**

The sum of the League’s expert testimony on bottlenose dolphins was that the project under certain circumstances “could potentially” and “could quite possibly” require the dolphins to adapt

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<sup>24</sup> KDP entered into evidence a series of photographs documenting a high vertical sand escarpment extends for most of the length of the eroding river shoreline in front of where the proposed in-ground SSPW is to be installed. Photographs from April 2014 (**Resp. Ex. 41**), June 2014 (**Resp. Ex. 40**), September 2015 (**Resp. Ex. 36**), October 2015 (**Resp. Ex. 38**).

their behavior. Clearly this proof does not meet the standard for proving causation. The ALC's findings and conclusions that the project's potential effects on bottlenose dolphins are supported by substantial evidence:

Similarly, although evidence was presented that bottlenose dolphins utilize the Spit for strand feeding, the evidence was speculative as to how the potential elimination of part of this strand feeding area due to the SSPW would impact the overall population. In other words, the evidence simply did not establish that the strand feeding that occurs along the portion of the Spit where the SSPW will be installed is a significant part of the dolphins' diet. To the contrary, the evidence established that the dolphins may adapt without impact.

**Amended Final Order, p. 45.**

**VI. The ALC's findings and conclusions that the project will not be constructed in the critical area and is still feasible are supported by substantial evidence.**

The League contends that the project cannot be constructed today as designed in 2015 without a portion of it being in the critical area. The ALC found that by the very terms of the CZCC the project is prohibited from being constructed in any part of the critical area:

1. The permittee must submit an updated Critical Area Line for review and approval 30 days prior to initiation of construction. Impacts to tidelands critical area associated with any aspect of construction or construction related activities is not authorized.

**Joint Ex. 6, CZCC, Condition no. 1.**

Thus, by its very terms, the CZCC does not allow construction in the critical area. The ALC also noted:

... Condition 1 of the CZCC in this case requires that KDP provide a current survey with certification of the critical line within thirty days of commencement of construction. Condition 1 further prohibits any construction or construction activities in the critical area. Because of the ongoing erosion, it is possible that the critical line may have moved oceanward enough to narrow the neck to a point where development is no longer feasible. However, based upon the current certified critical line from 2016, the Court finds the development will not take place in the critical area.

**Amended Final Order, p. 12, n. 13.**

KDP has been seeking to proceed with the improvements for Phase 1 of Cape Charles since submitting its application to DHEC in August 2011. During this entire time KDP has been pursuing some form of erosion control structure. It stands to reason that 2015 critical line that was incorporated into the plans that were approved as part of the CZCC in May 2015 would have moved during the more than two years until the contested case hearing in August 2017 because of the appeal of the League.

The Department fully anticipated and accounted for the movement of the critical line in the CZCC. Condition No. 1 to the CZCC, quoted above, requires a critical line certification within 30 days of commencing construction. Any adjustment to the critical line on the plans is likely to require some slight adjustment of those plans to account for the change. An engineer can design a project to only to current conditions. It is impossible to design to account for future conditions that might exist at the end of a multi-year appeal. It also cannot be the case that a party contesting an approval like this can defeat the approval simply by the duration of its appeal.

Despite the changes to the critical line on the river shoreline in the more than two years after the design was approved, the project can still be constructed outside the critical area with a very slight modification. According to the testimony of Rick Karkowski, the engineer who designed the improvements and stormwater system, the plans as permitted can easily be tweaked to be sure there is no interference with the current location of the critical line as determined by the ALC:

19 Q: Okay. So were you able to determine whether the  
20 road and associated infrastructure and  
21 stormwater system would fit? And I'm including  
22 in that the steel sheet pile wall in the limited  
23 area between the critical line of June 2016 and  
24 the OCRM setback line.

25 A: Yes. Yes, we were able to determine that given

1 some adjustments to the design as permitted we  
2 could make the project still work as intended.  
3 (Respondent's Exhibit Number 18 was introduced into  
4 the record at this time.)

5 Q: And what is 18? What is Exhibit 18? Is that --  
6 -

7 A: 18 is the -- 18 is the exhibit we produced to  
8 demonstrate that we could still make the project  
9 function as intended.

10 Q: Was this meant to be a construction drawing?

11 A: No. This is a -- an exhibit drawing and there  
12 would still be an amount of engineering that  
13 would have to go into the final engineering of  
14 this plan.

**Tr. 1809:19-1810:14; Resp. Ex. 18.**

There is substantial evidence to support the ALC's finding that "based upon the evidence in the record, installation of the road, storm water system, and in-ground SSPW are currently feasible within the critical line with some adjustments." **Amended Final Order, p. 11.**

The remainder of the League's argument is based on its contention that the ALC should have accepted the testimony of its expert Alan Wood and rejected the testimony of KDP's expert John Byrnes.<sup>25</sup> The issue in question is whether the critical line certified in 2016 was still accurate based on the river shoreline at the time of trial over a year later. **Joint Ex. 8.** Wood conducted a critical line delineation of the Spit in March of 2017. **Am. Order 11.** Mr. Wood identified six areas where "he believed the proposed road servicing the development would cross the critical line as he delineated it." **Am. Order 11.** KDP's expert, John Byrnes, testified that he determined only

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<sup>25</sup> The League takes a cheap shot at Byrnes by pointing out that in 2016 OCRM adjusted the critical line after he flagged that was used for the 2016 survey implying his delineation was unreliable. **App. Brief 25-26.** As Byrnes explained, the October 2015 rain storm (a/k/a 1000 year rain) occurred between the time he flagged the locations and OCRM inspected the site. The intervening rain events washed out several gullies that affected the location of the critical line. **Tr. 1531:21-1532:22.**

two areas of the six identified by Woods were actually included in the critical area.<sup>26</sup> **Tr. 1519:14-**

**1528:3; Am. Order 11.** The Court relied upon the testimony of Mr. Byrnes:

In resolving the conflict between the experts' testimony, I find Byrnes well-qualified in his field of expertise, having extensive experience with critical line delineations over his career. Furthermore, based upon this Court's review of the photos of the areas and testimony from both experts, Byrnes's testimony was more consistent with the photographic evidence depicting the areas in question. Consequently, the Court finds that the critical line should be adjusted to reflect the two changes in areas four and six. Nevertheless, based upon the evidence in the record, installation of the road, storm water system, and in-ground SSPW are currently feasible within the critical line with some adjustments. Therefore, modification of the critical line to include the two areas designated by Byrnes to be critical areas does not currently endanger the viability of the project and thus does not warrant denial of the permit.

**Amended Final Order, p. 11.**

The League's challenge fails because, once more, this contest as to whether to believe Byrnes or Wood was for the ALC to decide. His findings in this respect are fully explained. The ALC's determination that the project will not be constructed in the critical area is supported by substantial evidence.

### **Conclusion**

Probably no residential development in this state has received the attention of this small one, nor the scrutiny of this Court that conducted four rounds of oral argument and issued four opinions in the permit proceedings over the bulkhead-revetment. There has been much publicity. Sentiments run high. Yet, it is the record established in the contested case hearing in the ALC in this proceeding that matters, not the outside narratives.

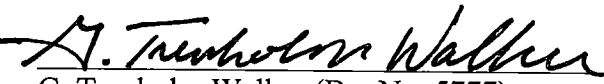
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<sup>26</sup> Karkowski's drawing (**Resp. Ex. 18**) showing the feasibility of the project with slight adjustments took into account the location where Byrnes testified the critical line had moved inland. **Tr. 1812:2-10.**

Applying the rules applicable to judicial review to that record, the ALC did not commit an error of law and his findings and conclusions are supported by substantial evidence.

For the foregoing reasons, KDP submits the Orders of the ALC should be AFFIRMED.

Respectfully Submitted,

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October 18, 2019

Charleston, South Carolina