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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

Docket No. 15-ALJ-07-0369-CC
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 KRA Development, LP, . . . . . Respondents.

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# REPLY BRIEF OF APPELLANT SOUTH CAROLINA COASTAL CONSERVATION LEAGUE

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## *Summary of Argument*

At stake here is whether DHEC is willing to sacrifice public trust property for the economic benefit of a private developer; whether DHEC must apply the laws consistently in exercising its regulatory authority; and whether the ALC must both adhere to prior rulings of this Court as well as make findings that have evidentiary support.

## I. The Permitted Structure Will Eliminate Public Access to and Use of Critical Area Public Trust Tidelands and Public Open Space in Violation of State Laws

### A. The State Failed to Uphold its Duty to Protect Public Trust Property

This Court recognized that the public trust doctrine undergirds the Coastal Zone Management Act ("CZMA") and should guide the analysis for projects impacting tidelands. Kiawah Devel. Partners II, Inc. v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 766 S.E.2d 707 (2014) (hereinafter "KDP I"). Under the public trust doctrine "the control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995) (citing Illinois Central R. Co. v. Illinois, 146 U.S. 387, 453, 13 S.Ct. 110, 118, 36 L.Ed. 1018, 1042 (1892). "When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties." Sax, Joseph, "Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," 68 Mich. Law Rev. 471, 490 (1969-1970).

KDP, DHEC and the ALC all recognize that the Kiawah River shoreline is part of the public trust and that some of this public trust resource would be eliminated by the steel wall, resulting in a permanent loss of the public's use of those tidelands. (Am. Order, p. 41; R.p.42).

DHEC, and the ALC, should have put the public trust resources first and foremost in their the analysis. Instead, DHEC's position is that its hands are tied and it must facilitate development of barrier islands, and Captain Sams in particular, (DHEC Brief, pp. 10-11, "Kiawah Island will be developed") – a position which is simply not supported by the Public Trust Doctrine or the CZMA. Rather, the law requires that **if** fragile areas like barrier islands are to be developed, such must occur with certain limitations. Specifically, DHEC must ensure "reasonable precautions" to "prevent or limit any direct negative impacts on adjacent critical areas," which are public trust resources. CMP Policy III.C.3.XII.(A)(2). Here it did not. Instead, DHEC authorized the steel wall recognizing full well that it would become located in the critical area and result in "adverse consequences" to that critical area. (Brief, p. 18; R. p. 1955).

And while KDP is correct that the Act does not outright prohibit any and all development of barrier island spits like this, it certainly does not require the Department to facilitate such development by permitting structures that will eliminate public trust property in violation of the Public Trust Doctrine.

The Department's (and ALC's) presumption that it is authorized and required to sacrifice public trust resources for development is flawed and fails to consider the risks and resources at stake, and its role in protecting those resources for the public's beneficial uses. More importantly, it fails to account for the state's role in safeguarding public trust resources.

### i. The Kiawah River Shoreline is a Public Trust Resource, the Parking Lot is Not

KDP and the ALC assert that the sacrifice of public trust resources is necessary in order to protect the parking lot at Beachwalker Park, which provides a means for accessing Captain Sams Spit. Protection of "the Park"[1] is dubious in light of the facts that 1) the vast majority of the parking spaces are not impacted by the erosion (KDP Exs. 19, 37 & 41; R. pp. 3562-65, 3595-3613 & 3631-44); 2) KDP has proposed that "the Park" be relocated to an inland location; 3) the parking lot is not public trust property; and 4) the wall in front of the Park would not be constructed until Phase II, after Phase I which covers KDP's proposed residential development (Am. Order, p. 10; R. p. 11).

KDP's Ray Pantlik testified that KDP had prepared drawings showing different locations for the Park. (R. p. 2379). Specifically, the drawings were to "look at alternatives to where the park – the parking area could be located," which would entail moving the parking area to a new, internal location that would still have beach access. (R. p. 2379, lines 13-14). Thus, an alternative would be to relocate the parking lot such that no parking spaces are in danger. Importantly, the parking lot which provides a means to access public trust tidelands[2] can be relocated, but the public trust tidelands themselves cannot be as this Court recognized in KDP I.

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[1]To be clear, Beachwalker Park consists of a parking lot and related facilities, including shower, restroom and concession stand, all on upland property owned by KDP and leased to the Charleston Parks and Recreation Commission. (R. pp. 2256-57; KDP Ex. 13, R. p 3535). The Park does provide a means for the public to access the sandy shorelines on the ocean and river side of the Spit, albeit not the only means. Public perception may be that Beachwalker Park contains the Spit itself, but the Park property itself is primarily a large parking lot and related facilities. (KDP Exs. 19, 37 & 41; R. pp. 3562, 3595 & 3631).

[2]Other means to access these public trust tidelands include on foot from the mainland of Kiawah, by boat, by kayak, by paddle board, and swimming, to name a few.

at 22, 710 ("tidelands are a finite resource"). Once they are lost, they are gone forever. (R. pp. 1574-78).

The fact that KDP is seeking this structure, and not the Charleston County Parks and Recreation Commission ("PRC") who runs Beachwalker Park, is telling. Not one person testified from PRC or as a user of Beachwalker Park (or Captain Sams Spit for that matter) that their use is dependent on the steel wall fixing the shoreline. Not one person tetified that loss of parking spaces would eliminate, much less minimize or deter, their use of public trust resources. In other words, no evidence exists regarding "public gain" in protecting a handful of parking spaces, when the remainder of the parking lot remains available. And certainly no evidence exists that access to Beachwalker Park would be eliminated without the wall, which is the premise of the ALC's holding (Order, p. 42, R. p. 43: "if access to Beachwalker Park is not protected, it is clear that a significant public use will be lost" and "the public will benefit from" the wall). Aside from a lack of any evidence to support the ALC's holding that "significant public use will be lost" if the wall is not built, once the public trust tidelands are eliminated they cannot be replaced, unlike a parking lot on highground owned by KDP (not PRC).

Similarly, no evidence exists to support the ALC's determination that the public will benefit from a conservation easement that has not even been placed on the Spit, despite a permit condition requiring it. (Order, p. 42; R.p. 43: Joint Ex. 6; R.p.2952-65).

### B. § 48-39-30(D) is a CZMA Policy And Nothing in the Act Limits its Applicability to Only Critical Area Permits

Section 48-39-30(D) is a statutory requirement that DHEC assess how critical areas will be used in the context of the permitting and certification programs established under the Act,

including the Coastal Management Program ("CMP") policies: "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 that will generate measurable maximum dollar benefits." S.C. Code Ann. § 48-39-30(D). This Court explained that Section 48-39-30(D) embodies the public trust doctrine, which requires that "any use of tidelands must be to the public benefit." KDP I, 411 S.C. 16, 41, 766 S.E.2d 707, 722 (2014). DHEC "shares SCCCL's concerns regarding the Kiawah River eroding into the sheetpile wall and the probable adverse consequences thereafter," noting the "admittedly-realistic concern that the erosion . . . will place portions of the sheetpile wall in the critical area" (Brief, p. 18), as its witnesses testified at trial. (R. p. 1955). Yet DHEC asserts, and KDP agrees, that its hands are tied because it is not allowed to consider impacts to critical areas resulting from this project under § 48-39-30(D).

The ALC, DHEC and KDP err in selectively construing the policies of the Act as only applicable to critical area permits because the CMP does not specifically reference this statutory provision. Yet the Act sets forth the policies and findings of the State, and is clearly designed to apply to the entire coastal zone. S.C. Code Ann. §§ 48-39-20 & 30. And nothing in the CZMA limits the applicability of policy in Section 48-39-30(D) to only critical area permits.

The CMP policies were promulgated in furtherance of the CZMA, and an interpretation of the CMP that Section 48-39-30(D) is inapplicable is contrary to language and intent of the CZMA. The statute is controlling and regulations (or, in this case the CMP) cannot be interpreted to write out a statutory provision. While the Legislature has the right to vest in the administrative officers and bodies of the state a large measure of discretionary authority to make rules and regulations, an agency may not make rules that conflict with, or change in any way, the

statute conferring such authority. Ahrens v. State, 392 S.C. 340, 709 S.E.2d 54 (2011). Administrative agencies are authorized to promulgate regulations which have the force of law; however, these regulations cannot conflict with, add to, or alter the statute conferring authority. See Fisher v. J.H. Sheridan Co., Inc., 182 S.C. 316, 326, 189 S.E. 356, 360 (1936); Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984). Thus, KDP and DHEC's arguments that the CMP can alter the statutory requirements of 48-39-30(D) are legally unsupported.

Moreover, the undisputed evidence is that the authorized structures will undoubtedly impact critical area (even if they could be built outside of the critical area, which the League contends they cannot). (R. pp. 157-78, 1868-73, 1955). Indeed, the SSPW permit itself contains conditions directly pertaining to the critical area because this project cannot be isolated – geographically or legally – from the adjacent critical area.

To the extent that the ALC did utilize Section 48-39-30(D), as argued by KDP (Brief, p. 24), that analysis fails to apply the holdings of this Court, which recognize the significance and value of the natural shoreline of the Kiawah River. As with its previous decision the "ALC's misapprehension about public use and the failure to accord it the importance it deserves is fundamentally at odds with the public nature of the tidelands at issue here." KDP I, 411 S.C. 16, 43, 766 S.E.2d 707, 722 (2014).

In an apparent effort to insulate itself from addressing compliance with Section 48-39-30(D), the ALC casts the extent of exposure of the steel wall in the critical area as "speculative." DHEC and KDP echo the ALC's error, even though no evidence supports that finding. (DHEC Brief, p. 13). Instead the uncontradicted testimony is that the steel wall will eventually be completely exposed in the critical area and the sandy shoreline in front of the wall will

completely disappear: "the public use of that beach . . . .will be diminished and then eventually lost." (R. p. 1869, lines 1-11); "the shoreline will shift until the river is right up against the structure and the beach and the sand and all those physical environments along the structure are going to disappear, so it'll be just sheet pile bulkhead and the river." ( R. p. 1574, lines 18-24); "it's an undisputable fact" that the "intertidal zone and beach that we've seen . . . will be gone." (R. p. 1578, lines 1-3).

KDP does not dispute that loss of the sandy shoreline and exposure of the steel wall is "foreseeable" and "reasonably certain." (Brief, p. 20, citing Order, p. 31, R. p. 32). And DHEC "shares SCCCL's concerns regarding the Kiawah River eroding into the sheetpile wall and the probable adverse consequences thereafter." (DHEC Brief, p. 18). Despite this acknowledgment, DHEC fails to avert those adverse consequences on public trust resources and use thereof, and the ALC compounds the error in precluding any relief.

**i. To the Extent that the ALC Considered § 48-39-30(D), Economic Benefit Does Not Outweigh the Public's Beneficial Uses of Critical Area Here**

KDP claims that "public benefit" means a "public economic benefit" which can be satisfied by adding to the County's property tax revenues. The League submits that the public benefit must derive from the **use of** the critical area, and cannot be satisfied by generating property taxes. Property taxes go to paying for County services that will be needed as a result of the development: firefighters, educators, schools, water treatment facilities, etc. See Davis v. Greenville County, 313 S.C. 459, 443 S.E.2d 383 (1994) (taxpayers are paying for the services used by their property).

No legal support exists for the notion that property taxes meet the "public benefits" test, nor that temporary construction jobs do either. Any successful development project is necessarily going to result in jobs and tax revenues, yet this Court held that "an elevation of economic development over the importance of public access would also be inconsistent with the significance the CZMA accords to public access." KDP I, 411 S.C. 16, 40, 766 S.E.2d 707, 721 (2014). And this Court has previously rejected economic benefit as meeting the public interest requirements:

> evidence of purely economic benefit, however, does not support the stated purpose of the Coastal Management Program to protect, restore, or enhance the resources of the State's coastal zone for present and succeeding generations. This public interest must counterbalance the goal of economic improvement. See S.C. Code Ann. § 48-39-30(B)(1) and (2) (1987). We hold evidence of purely economic benefit is insufficient as a matter of law to establish an overriding public interest.

S.C. Wildlife Fed'n v. S.C. Coastal Council, 296 S.C. 187, 190, 371 S.E.2d 521, 522–23 (1988). Thus, only those benefits which inure to the public as a whole may satisfy section 48–39–30(D). KDP I at 31, 716. And those public benefits must be viewed within the context of public trust tidelands and the public's interest therein.

KDP seems to recognize that tax revenues and temporary jobs are not enough to allow destruction of public trust shoreline, adding that a conservation easement would be recorded. The ALC never provides any rationale for how or why a conservation easement to a private entity on private property would provide any benefit to the public, and this finding is erroneous for lack of evidentiary support.

Finally, the ALC failed to undertake any comparison of benefits of leaving the shoreline unaltered[3] versus hardening it, instead focusing singularly on trying to identify any public

[3]The ALC, and KDP, misunderstand and misconstrue the testimony regarding public use in claiming that the river shoreline is less used by the public than other parts of the beach. KDP

benefits from allowing the project to proceed while wholly failing to consider the testimony and evidence supporting benefits to the public from preservation of the area in an unaltered state as required under Section 48-39-150(7) ("The extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state.").

On the question of public benefit to leaving this shoreline unaltered, this Court held:

> the CZMA provides that it is to the public's benefit to protect natural processes like the cyclical erosion, breach, and accretion process of the spit. This is borne out by the evidence that the repetitive accretion of Captain Sam's Spit, followed by the erosion of the neck of the spit served as the supply of sand for Seabrook Island to the southwest. As recognized by the General Assembly, there is often great value in allowing nature to take its course, rather than having our coast become an armored, artificial landscape.

KDP I, 411 S.C. 16, 31–32, 766 S.E.2d 707, 716–17 (2014).[4]

The ALC committed the same error as identified by this Court in 2014 that "the use of the bank by the public is limited" and that the effect on public access "is not substantial." KDP I, 411 S.C. 16, 26–27, 766 S.E.2d 707, 714 (2014). The ALC again erred by "inserting a substantiality requirement" on the extent of public use. Id at 411 S.C. 16, 39, 766 S.E.2d 707,

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cites Tr. 381, 390-91; R.p. 1077, 1086-87 to claim that the portion of Captain Sams where the inlet relocation occurs "is a beach that is popular with the public," (Brief, p. 8) but the testimony of Captain Hayes on those pages is more broadly about the public's use of the beachfront, the inlet, the Kiawah River shoreline and the Kiawah River itself; it is not specific to the inlet relocations area. In addition, Captain Hayes specifically testified that dolphins are strand feeding more and more along the neck in the location of the proposed steel wall. (R. pp. 1075-77, 1082-84). When Dana Beach testified about Beachwalker Park being "heavily used" and "very popular," he was clearly talking broadly about Captain Sams Spit, and not the parking lot or the beachfront. No other conclusion makes sense because one cannot "boat over" to the Park since there is no boat dock or landing associated with the Park. (KDP brief, p. 19). The only logical conclusion is that he was talking about users who access the Spit via the Kiawah River as heavy users of the Spit.

[4]KDP incorrectly characterizes this Court's opinion as determining that there was simply a lack of proof of public benefits in constructing the bulkhead/revetement. (Brief, p. 29). Rather, this Court held that the only benefit would be economic benefit to the developer.

720 (2014) (noting that a "substantiality requirement would improperly favor private interests over public interests in contravention of the CZMA and the public trust doctrine." at 40, 721).

### C. The Project Will Impede, Limit and Restrict the Continued Use of Public Open Spaces in Violation of the CMP

"The values of public recreational and open space areas through the coastal zone cannot be overemphasized . . . these limited resources become even more precious, as increasing numbers of people seek to find recreational opportunities within more urbanized areas and from fewer available open spaces." ). CMP Policy III.C.3.XII.D. at III-73. The CMP policies are specifically designed to ensure that public access to coastal resources and open spaces is protected. The CMP requires that "project proposals which would restrict or limit the continued use of recreational open area or disrupt the character of such a natural area (aesthetically or environmentally) will not be certified where other alternatives exist." CMP Policy III.C.3.XII.D.(1). The CMP further requires that "structures shall not impede public use of beaches below the mean high water line." CMP Policies IV.C.(4)(c)(2) & (3).

DHEC's brief contains a section heading that states that the ALC did not err in applying the CMP policies on public access to open space, but makes no arguments to support that statement. (Brief, p. 19). Because DHEC failed to present any arguments to support that conclusory heading, it has conceded the League's arguments regarding the ALC's error in applying CMP Policy III.C.3.XII.D.(1). Smith v. Tiffany, 799 S.E.2d 479 (2017), First Union Nat. Bank of South Carolina v. FCVS Communications, 469 S.E.2d 613 (Ct. App. 1996); Broom v. Jennifer J., 742 S.E.2d 382 (2013); Savannah Bank, N.A. v. Stalliard, 734 S.E.2d 161 (2012); First Sav. Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994).

In considering CMP Policy III.C.3.XII.D.(1), KDP (Brief, p. 15) and the ALC narrowly look only for "other alternatives" to stabilize the shoreline when, in fact, KDP applied for the development permits without any wall and in the face of evidence and law that bridging would be an alternative. (R. pp. 1971, 2500, 2502; see also S.C. Code Regs. 30-12(N)). KDP's submission of a permit application that did not seek an erosion control structure evidences a feasible alternative. (KDP Brief, p. 9; Joint Ex. 3; R. pp. 2694-2943). As with KDP I, the ALC gave "short shrift" to the "feasibility of taking no action and permitting natural processes to continue" rather than giving it "serious consideration." KDP I at 43.

In addition, this Court affirmed the previously permitted 270' of bulkhead which is an alternative that would address the ALC's concern over lost parking spaces. As this Court recognized, DHEC "granted a 270-foot portion [of the bulkhead/revetment system] to protect public access to Beachwalker Park." KDP II, 422 S.C. 632, 635, 813 S.E.2d 691, 692 (2018). Simply because KDP cannot build the structure it desires does not mean it cannot build a structure that protects a parking lot for which it has authorization and on land which it owns.[5]

Finally, the ALC erroneously placed the burden on the League of proving that "other alternatives" exist. (Order, p. 40, R. p. 41). When the law creates a presumption against permitting a structure which will adversely affect use of a public open area or disrupt the character of such an area, the duty to show that the structure fits within an exception to the prohibition falls on the applicant. Otherwise, the analysis is skewed "in favor of the private

[5]Neither the ALC nor KDP point to any testimony that would allow the ALC to arrive at a "reasonable inference" that KDP would be unlikely to build a structure that only protected the Park, which it owns. (Brief, p. 20). Accordingly, this Court should reject the ALC's all-or-none determination regarding the construction of a partial wall at the Park, particularly in light of DHEC's issuance and this Court's affirmance of a 270' structure only at the Park.

interest, treating public lands as if they are held in trust waiting for private development, rather than held in trust for the public to use as they truly are." KDP I, 411 S.C. 16, 40, 766 S.E.2d 707, 721. In that regard, the ALJ erred in placing the burden on the League, when it was KDP's duty as the applicant to show that no other alternatives exist. And by virtue of its permit application, which did not include a request for a sheetpile wall, KDP demonstrated that building the road and infrastructure without the wall was indeed at least one alternative.

**D. The CMP's Erosion Control Policies Apply**

The CMP requires that erosion control "structures must not interfere with existing or planned public access unless other adequate access can be provided" and that "structures shall not impede public use of beaches below the mean high water line." CMP Policies IV.C.4.(c)(2) & (3). DHEC authorized a steel wall that will both interfere with existing public access to the Kiawah River shoreline and impede public use of it.

DHEC and KDP and do not dispute that the steel wall will interfere with and impede public use of lands below the mean high water line. Instead, DHEC and KDP contend that the CMP's erosion control policy only applies to the oceanfront and not to this erosion control structure. Such assertion is unsupported by the plain language of the CMP. Policies IV.C.(4)(c)(2) and (3) are the only policies in the CMP that pertain directly to erosion control. Indeed, CMP Policy III.C.3.X "Erosion Control" specifically incorporates by reference that the "planning process, policies, and management authority for this element are contained in Chapter IV(C), Erosion Control Program." See CMP at p. III-68. Further, the erosion control policies specifically state that the critical area regulations for bulkheads (S.C. Code Ann. Regs. 30-12(C))

will be applied and, for the most part, such structures are not located in traditional "front beach" areas.

Moreover, the CZMA prohibits any new erosion control structures on the oceanfront, which would render portions of the CMP's erosion control policies meaningless if they only applied to the oceanfront. S.C. Code Ann. § 48-39-290(B)(2)(a) ("No new erosion control structures or devices are allowed seaward of the setback line except to protect a public highway which existed on the effective date of this act.")

DHEC's assertion that erosion control policies would not apply to an erosion control structure that would be pile-driven into sand dunes adjacent to a sandy shoreline is arbitrary and defies logic and common sense.

## II. The Project Cannot be Constructed as Permitted Without Impacting Critical Area

By the time the ALC held the *de novo* hearing in this case (and indeed as early as Alan Wood's deposition on August 24, 2017), the Department was alerted to the fact that the critical line had moved in a way that jeopardized the viability of its authorization. At the time of the hearing, the Department heard uncontradicted testimony that the line had moved to a location where the project could not be constructed as permitted without impacting the critical area in two places. (R. pp. 1329-36; Am. Order, p. 11, R. p. 12). The on-site reality had changed drastically – and indeed is constantly changing – yet while recognizing this serious "regulatory challenge" which is "exacerbated . . . by a particularly dynamic environment" (DHEC Brief, p. 14 & 16), DHEC (and the ALC) hold tight to a reliance on outdated and inaccurate data, and a now obsolete decision. (DHEC Brief, pp. 20-21). The permit condition was drafted as an "if, then" requirement: if the project becomes located in the critical area, then no impacts to critical area

can occur. (Joint Ex. 3; R. pp. 2694-2943). The ALC determined that the "if" had happened but failed to address what happens next, i.e., how critical area impacts will be avoided, allowing DHEC's decision to stand even though the facts on-the-ground have changed dramatically. DHEC's inability to accept and incorporate updated and current information into its decision, and the ALC's failure in allowing the project to proceed despite this new, updated information is arbitrary and capricious.

Neither KDP nor DHEC address the glaring flaw in the ALC's Order: the ALC recognizes that the steel wall cannot be constructed in the critical area, but also that the project as designed and permitted will be in the critical area as it existed at the time of the *de novo* hearing. The ALC summarily concluded that some "adjustment" to the project as permitted and designed could be made to avoid the critical area. KDP characterized the design "adjustments" needed as "slight," but no evidence supports its contention that the adjustment would be "slight" and only needing a "tweak." (Brief, p. 51). KDP presented no evidence of what those adjustments might be and how it could still construct the road and steel wall without impacting the critical area. The ALC relied on a mere scintilla of evidence – a sum of three lines of testimony from KDP's Rick Karkowsi – that the project would still be "feasible," notwithstanding all of the evidence to the contrary. (Am. Order, p. 11, R. p. 12). The ALC's decision effectively closes the door on the League's (and the public's) ability to obtain relief.

## III. DHEC and the ALC Erred in Arriving at Decisions that are Inconsistent with the Supreme Court's Ruling in KDP I and KDP II and Thus Are Barred by Collateral Estoppel

The circumstances under which this appeal arises are highly unusual: KDP is the same party proposing the same 50-house residential development on the same parcel with a nearly identical erosion control structure serving the same purpose as one that was denied by this Court in 2014 and 2018. This Court need not apply the law of KDP I and KDP II to a new and different set of facts: the facts are, for all practical purposes, the same. That the ALC's result was not also the same is an error of law.

KDP and DHEC's arguments both overlook this Court's mandate that "any use of tidelands must be to the public benefit." KDP I, 411 S.C. 16, 41, 766 S.E.2d 707, 722 (2014). Because this project would lead to the exact same result as in KDP I and KDP II, namely that the public could no longer walk or land a boat or kayak or otherwise recreate on the public trust shoreline, the result must be the same.

In particular, this Court held that a structure fixing the Kiawah River shoreline would "affect the ability of the inlet and the beach/dune system to migrate, as it has been known to do in the recent past." It also affirmed DHEC's findings that the structure and the proposed development that the structure would facilitate would "have long-range and cumulative effects on [sensitive areas] and on the general character of the area."KDP I, at 25, 713; See also CMP Policy III.C.3.I.(7).

Thus, while the League has not asserted that the CMP *per se* prohibits all development that may disrupt public access and use of critical areas, with respect to this project – a 50-

housexv residential development on Captain Sams Spit facilitated by an erosion control structure – this Court has already ruled that the public benefit and use of the area outweigh the private economic benefit to the developer.[6] This Court fully explained what the Act meant when it requires that critical areas "shall be used" to provide the maximum public benefit, but the ALC failed to apply it.

KDP and DHEC perpetuate the ALC's error in applying the CMP's cumulative impacts policy. The agency should have considered the impacts flowing from the project, and specifically in this case the upland effects of 50 homes, and how those effects may impact the character of the area as it did in 2008. This Court affirmed the 2008 agency decision that "the development the structure would facilitate would 'have a significant impact on the general character of the area.'" KDP I, 411 S.C. 16, 25, 766 S.E.2d 707, 713 (2014). Indeed, "the *upland area of the spit* is to be transformed from a completely *natural area* into a residential development." Id, 411 S.C. 16, 37, 766 S.E.2d 707, 720 (2014) (emphasis added).

It is KDP that, with all due respect, misconstrues this Court's opinion. This Court did not hold that the "area" for purposes of assessing its character includes more than the critical area or that only the project area should be used to determine the character of that area. (Brief p. 30-31).

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[6]KDP cites no authority for its belief that if a project "is consistent with the policies in the CMP . . . then the project is not inappropriate for development." (Brief, p. 42). That is not what the law says. Indeed, the CZMA presumes that some development is inappropriate because of the fragility and vulnerability of systems, many of which have been irretrievably damaged by ill-planned development. S.C. Code Ann. § 48-39-20(B). The distinction that evades KDP (Brief, p. 43), is that Captain Sams Spit is one of three publicly-accessible, undeveloped barrier island spits in the State that has been completely underwater three times in recorded history. That is what makes it very different from nearly every other developed beachfront in the State. It should go without saying, but if an area is this dynamic and fragile, then perhaps it is inappropriate for development as recommended when the first and only comprehensive environmental study was conducted in the 1970s. (Pet. Ex. 6, R. pp. 3025-3212).

At the risk of stating the obvious, the Department's 2008 determination regarding the character of the area as a dynamic, pristine, undeveloped, natural barrier island spit[7] necessarily encompassed the entirety of Captain Sams Spit and not just the critical area.

The League agrees with KDP that the project is distinct from the area,[8] (Brief, p. 32) but the cumulative effects of the project are also distinct from the character of the area. As the DHEC Board's direction to DHEC staff lays bare: the Board wanted the agency to arrive at a different result when applying the cumulative impacts requirement to the Captain Sams development project. That is exactly what happened, and entirely explains how the Department on the one hand determined that the effects of the project would be to change the character of the area from pristine and untouched to residential and developed in 2008, but that the effects of the project would be no change since the character of the area is residential development in 2015. The ALC (and KDP) rationalize this new determination that the character of the area is residential notwithstanding this Court's opinion which was supported by Bill Eiser's testimony

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[7]Even KDP admits that the Spit is highly dynamic moving seawards towards Seabrook. (Brief, p. 7). The fact that it is accreting by moving closer to the ocean underscores the moving, shifting nature of this land mass, as opposed to being "stable." Id.

[8]Neither KDP nor the ALC offer an explanation as to how "the area" in this case could be any different than in KDP I, where both permits involve hard erosion control structures to fix the Kiawah River shoreline in order to facilitate a 50-house development on the Spit, insisting that *de novo* review allows that result. (Brief, p. 37). Under KDP's theory that the agency must consider the "broader coastal zone" in determining the character of the area this would lead to the absurd result that the character of the area is always developed because most of the coastal zone is already developed. (Brief, p. 31).

DHEC's assertion that this Court held that the "'area' includes more than the critical area" (Brief, p. 23) and that the "area" is "larger than the project site" (Brief, p. 25) are incorrect characterizations of the opinion. Rather, this Court held that the agency properly considered impacts beyond the critical area impacts in looking at how the upland of Captain Sams Spit would be transformed, i.e., how the character of the area would be transformed.

at trial that he "characterize[d] the general area as pristine, undeveloped portion of a barrier island." (R. pp. 1836, lines 19-21). The fact that the Department arrived at a different determination here is the basis for this Court to collaterally estop DHEC and the ALC from an inconsistent decision.

While it is true that the ALC is not bound by the Department's determination (KDP brief, p. 36),[9] when an appellate court affirms that determination with the same parties, the same facts and the same legal question, the ALC cannot arrive at a contrary and inconsistent decision. Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App.2009). "This Court has repeatedly held that, under the doctrines of res judicata and collateral estoppel, the decision of an administrative tribunal precludes the relitigation of the issues addressed by that tribunal in a collateral action." Dozier v. Am. Red Cross, 411 S.C. 274, 290, 768 S.E.2d 222, 230 (Ct. App. 2014).

The League litigated the issue of the character of the area, and this Court affirmed DHEC's determination that the area is undeveloped and completely natural. KDP I at 721. If the ALC's ruling is affirmed, this determination would be changed to residential. The League is hard pressed to find another explanation for why this Court would consistently refer to the Captain Sams Spit as pristine, undeveloped, and a natural area if Captain Sams Spit were not "the area" squarely at issue in the appeal. This Court spoke about "the area" throughout its opinion using the agency's own 2008 determination that the character of the area was a pristine, undeveloped barrier island spit. Id at 711, 719 (fn. 10), 723. The agency's 2008 decision included both a

[9]. KDP's suggestion that DHEC's decisions are "superseded by de novo proceedings" effectively makes DHEC an agency of one: the Administrative Law Judge.

determination regarding the character of the area, which is that it was pristine, natural and undeveloped, as well as the nature and extent of the long-range and cumulative impacts, which was to transform this pristine, undeveloped natural area into a development. Thus, the Department concluded that the development would be a significant impact that would change the character of the area.

For the agency to make inconsistent determinations on the same project is the definition of arbitrary and capricious. KDP is right that the ALC's findings and conclusions in this case are consistent with its findings and conclusions in the prior case (KDP Brief, p. 39). The problem is that this Court reversed the ALC in many respects, and specifically in rejecting Eiser's determination that effects of the project would be to transform a pristine, natural, undeveloped area into development which is a significant change to the character of the area, i.e., the Spit.

KDP mischaracterizes this Court's modification of the ALC's approval of a permit for a bulkhead without a revetment. This Court did not conclude that the structure was unwarranted based on a *lack* of expert testimony (Brief, p. 10), but, rather that the structure was contrary to the expert testimony of KDP's engineer, Mitchell Bohannon, who testified that a bulkhead alone would fail. As this Court held, KDP's Bohannon "testified a vertical bulkhead alone, without anything to protect the toe against reflective wave energy, would cause 'even more exacerbated erosion.'" KDP II, 422 S.C. 632, 637, 813 S.E.2d 691, 693 (2018). That issue was raised, litigated and conclusively determined in KDP II. While the League stipulated to the technical design of the wall which was permitted to be *built in the dunes*, the League emphasized that it intended to and did present evidence regarding the impacts that will occur when the wall is exposed in the critical area, from elimination of the shoreline to exacerbation of erosion at the

base of the wall. (R. pp. 1176, 2064-67, 1774). Even KDP admitted that the river is going to scour to the point it reaches the wall. (R. p. 2059).

Neither DHEC's nor the ALC's determination of "the area" are "in keeping with the agency's construction of the term." (DHEC Brief, p. 27). Rather, both are inconsistent with this Court's ruling in KDP I in how that term was applied to this particular development project on this particular parcel. Indeed, the League litigated extensively over the character of the area and how the cumulative and long-range impacts of the development would change that character.[10] DHEC's assertion that this issue was not litigated or determined is meritless.

DHEC's claim that the League did not raise the issue of collateral estoppel and res judicata is erroneous. In order to preserve an issue for appellate review, a party must both raise the issue to the trial court and obtain a ruling." Foster v. Foster, 393 S.C. 95, 99, 711 S.E.2d 878, 880 (2011). Pursuant to Rule 59(e), if the trial judge fails to rule on a raised issue, a party may bring a motion to amend or alter the judgment in order to preserve the issue for appellate review. Pye v. Fox, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006).

Most states do not have a formulaic process by which parties raise res judicata or claim preclusion, South Carolina included. When raising res judicata or claim preclusion as an affirmative defense, a party just needs to set forth the defense. SCRCP, Rule 8(c). The rule does

[10]At no point in the prior proceeding did DHEC claim that the development would be consistent with the character of the area because it is residential. Instead, DHEC found that the area would be transformed from pristine to developed, and this Court affirmed the agency on that determination.

not set forth a formula or a specific way by which to plead. See Id. No other South Carolina rules direct the pleading of res judicata or claim preclusion.[11]

The League raised the issue of inconsistent agency decisions, and specifically that the agency erred in applying the requirement that the agency consider the long-range and cumulative impacts of a project differently to the present appeal, inconsistent with the Supreme Court's holding in KDP I. The League adequately preserved the issue of collateral estoppel by 1) raising the inconsistency in the 2015 staff decision and this Court's ruling in KDP I (PHS); 2) presenting evidence regarding the basis for the Department's determination in 2008 (R. pp. 1829-1883); and 3) when the ALC failed to rule on it, raising the issue in a post-trial motion (R. 549-52).

## IV. The ALC Viewed Evidence Blindly From One Side, Rather Than Considering the Substantial Evidence on the Whole Record

KDP's assertion that "any proof" of "causation" meets the standard is erroneous: the ALC's findings can stand only if supported by "substantial evidence," which is evidence that reasonable minds could find to support them.[12] "'Substantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the

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[11] In re Marriage of Write, a Colorado court follows the trend to reject a formulaic construction of pleading res judicata or claim preclusion and determined res judicata was sufficiently pled without being specifically mentioned. In re Marriage of Write, 841 P.2d 358, 360 (Colo. App., 1992). Parties were simply required to give notice that a prior judgment had bound them. Id. Similarly, Wyoming does not require the use of the specific term res judicata. Barrett v. Town of Guernsey, 652 P.2d 395, 398 (Wyo., 1982). Fair notice is the prerequisite for an adequate pleading. Id.

[12] In Lark v. Bi-Lo, Inc. this Court explained that the "any evidence" and substantial evidence" standards are different, and that the Administrative Procedures Act's "substantial evidence" rule "is a grant of greater appellate authority to the courts, and that the two are to a great degree inconsistent." Lark v. Bi-Lo, Inc., 276 S.C. 130, 133, 276 S.E.2d 304, 305 (1981).

administrative agency reached or must have reached in order to justify its action." Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (quoting Law v. Richland County School Dist. No. 1, 270 S.C. 492, 243 S.E.2d 192); Gibson v. Spartanburg School Dist. No. 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000). The League does not suggest that the ALC is compelled to adopt the testimony of its experts (KDP Brief, p. 41), but rather that when the only testimony on an issue is from the League, the ALC cannot make findings out of thin air: impacts of the inlet relocation "seem much less" that this project (Am. Order, pp. 32-33; R. pp. 33-34); its "speculative" that the shoreline will be lost (Am. Order, p. 32; R. p. 33). Here the ALC viewed the evidence blindly from one side of the case, and failed to consider the whole of the evidence and particularly the evidence – including the uncontradicted evidence – from the League.

The suggestion that the League "sat back at trial without offering proof" is absurd. (KDP Brief, p. 41). The League presented extensive testimony on impacts to Diamondbacked Terrapins from Dr. Whit Gibbons (R. pp. 948-1028); on impacts to Dolphins from Dr. Rob Young and Captain Chad Hayes (R. pp. 1063-1091 & 1122-1181); and that portions of the project will be underwater and/or in the critical area from Dr. Rob Young, Dr. Richard Porcher and Cecelia Daily (R. pp. 1391-1517 & 1611-1813).

Equally absurd is KDP's claim that Dr. Gibbons needed to quantify the number of terrapins that nest in the area. (Brief, p. 48). Dr. Gibbons testified that the shoreline of the Kiawah River along the location of the proposed steel wall is the "prime nesting area" and "ideal nesting habitat." (R. pp. 981 & 986). Because Dr. Gibbons framed his opinion as something he "thinks . . . could be very serious," the ALC and KDP entirely reject that opinion.

The League's complaint is not that the ALC must accept its experts opinions "hook, line

and sinker" (KDP Brief p 48), but rather that its findings must be supported by the "substantial evidence," including the evidence on the whole record and not blindly from one side. That is not what happened here.

### A. Terrapins and Dolphins are Relevant

DHEC's suggestion that it should not and cannot consider impacts to marine life in reviewing permits and certifications pursuant to the CZMA is incredible. The CZMA is replete with provisions that require consideration of the effects of increasing and competing demands upon the lands and waters of the coastal zone from population growth and economic development, including "the decline or loss of living marine resources, wildlife, nutrient-rich areas," S.C. Code Ann. § 48-39-20(B), and that the living marine resources and wildlife of the coastal zone "may be ecologically fragile and consequently extremely vulnerable to destruction by man's alterations." S.C. Code Ann. § 48-39-20(D). The Act explicitly requires consideration of the "extent to which the applicant's completed project would affect the production of fish, shrimp, oysters, crabs or clams or any marine life or wildlife or other natural resources in a particular area including but not limited to water and oxygen supply." S.C. Code Ann. § 48-39-150(A)(3).

Undoubtedly marine life such as bottlenose dolphins and diamondback terrapins are among the coastal resources contemplated by the Act in declaring the state policy: "To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations." S.C. Code Ann. § 48-39-30(B)(2). DHEC's conclusion otherwise is unreasonable and leads to a result that runs afoul of the underlying purposes of the CZMA and the policies and regulations promulgated thereunder.

Likewise misplaced is the Department's assertion that the policies governing non-endangered and threatened wildlife species are inapplicable. The CMP directs DHEC to consider the qualitative and quantitative effects of a project on valuable coastal resources such as unique natural areas, including destruction of significant marine species. CMP Policy III.C.3.I.(9)(I). More specifically, the CMP contains policies that pertain directly to state and federally threatened and endangered species, see, e.g., CMP Policy IV.A.(8), as well as to those species and habitats that have not been designated with such classification, declaring that consistency certification will not be approved for projects that have "a significant negative impact on wildlife and fisheries resources, whether it be on the stocks themselves or their habitat" unless the applicant can demonstrate overriding socio-economic considerations are involved. CMP Policy III.C.3.VII.(A)(1)(a). The wildlife resource policies further require that wildlife stocks and populations "should be maintained in a healthy and viable condition and these resources should be enhanced to the maximum extent possible" as well as that critical wildlife and fisheries habitat "should be protected and enhanced to the extent possible." CMP Policies III.C.3.VII.(A)(1)(b), (c).

Nothing in the plain language of the wildlife resource policies supports DHEC's assertion that they are only applicable to projects seeking to actively manage wildlife and wildlife habitat for particular purposes. (DHEC Brief pp. 28-29). Such an interpretation would leave a large swath of coastal resources and wildlife outside of the Department's review and manifestly contravenes the clear intent of the CZMA.

### B. The ALC Turned a Blind Eye to Evidence that Part of the Road and Some Lots Would be Inundated by Tides

DHEC (and the ALC) entirely miss the point of Dr. Richard Porcher and Cecelia Dailey's testimony. The focus is not on whether project areas identified by Porcher and Dailey are critical areas as defined in the regulatory framework. But rather the point is that some of those project areas would be built in locations that are inundated with water during king high tides.[13] Porcher and Dailey visited sites which they identified as being specifically within the project boundaries and that contained a variety of wetland vegetation. Whether or not the vegetation is salt water or freshwater, and thus whether the areas are wetlands or critical areas, is beside the point that they will in any case be flooded. The fact that DHEC has no concern about whether permits and certifications it authorized will allow structures to be inundated by water defies common sense and its mandate as a public agency.

## V. DHEC's Takings Arguments Are Not Preserved and a Separate Issue from This Appeal

The agency decision in this case cannot "redefine property rights" as suggested by DHEC.[14] (Brief, p. 14). And DHEC's suggestion that it must facilitate development of the Spit lest it would be taking KDP's property is incredible. Counsel is unaware of another instance

[13]This Court can take judicial notice that our Governor has created a Floodwater Commission specifically to address roads, houses, and infrastructure that are subject to periodic flooding. That flooding problems have been identified as a priority area by our Governor, yet the Department turns a blind eye to permitting roads and lots that will be underwater – even if only during very high tides – is, at a minimum, contrary to our Governor's priorities.

[14]DHEC does acknowledge that its changes to the setback line on Captain Sams Spit in 1999 did not mean that the property becomes designated for development, as claimed by KDP. (DHEC Brief, p. 17; KDP Brief, p. 11). The jurisidictional lines simply tell the public about erosion rates over the past 40 years and how high the water has come. Likewise, simply because a local government has approved a preliminary plat or entered a Development Agreement that permits development to occur, this does not usurp DHEC's important role in ensuring that such development is permissible under the CZMA and applicable regulations. (KPD Brief, p. 4-5).

when the State argued that it must issue a permit otherwise it would be liable for a regulatory taking. This case is not a referendum on whether KDP can build a development on the Spit; it is about whether DHEC is mandated to facilitate that development in a manner that eliminates public property and public access thereof. In this way, DHEC's takings assertions are misguided and misplaced.

This case is about whether DHEC is required to facilitate development in a "particularly dynamic environment" at the expense of the public. (DHEC Brief, p. 16). Moreover, KDP does indeed bear the risk that its property boundaries will change and has no absolute right to permanently fix its property boundaries. lands gradually encroached upon by water cease to belong to the former riparian or littoral owner. Horry Cty. v. Woodward, 282 S.C. 366, 370, 318 S.E.2d 584, 586 (Ct. App. 1984). DHEC misreads Woodward to imply that property owners have an absolute right to protect against that loss through the permitting process. Woodward did not address what measures an owner may or may not take, and certainly no legal support exists for the suggestion that any littoral owner has an absolute right to permanently fix their property boundaries.

In any case, the issue of whether permit denial would result in a taking is not an issue raised before or ruled on by the trial court (nor identified as an issue on appeal) and is thus not preserved. Foster v. Foster, 393 S.C. 95, 99, 711 S.E.2d 878, 880 (2011).

## CONCLUSION

WHEREFORE, the Appellant respectfully requests that this Court issue an Opinion reversing the Amended Final Order and Decision on Remand and Order on Reconsideration of the Administrative Law Judge authorizing an erosion control structure along the banks of the Kiawah River at Captain Sams Spit.

Respectfully submitted,

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Certificate of Counsel

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

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