RECEIVED
Dec 01 2020
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley C. Robinson, Administrative Law Judge

Docket No. 18-ALJ-07-0047-CC
Appellate Case No. 2020-001090

Ex Parte: South Carolina Conservation League …….……..…….Appellant,

In Re:

KDP, II, LLC, Respondent, ……..…….……Respondent,

v.

South Carolina Department of Health and Environmental Control …..…….…....Respondent.

INITIAL BRIEF OF APPELLANT

Leslie S. Lenhardt
Amy E. Armstrong
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
P.O. Box 1380
Pawleys Island, SC 29598
(843) 527-0078

Attorneys for Appellant

Charleston, SC

December 1, 2020

TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE ALC ERRED IN DENYING THE COASTAL CONSERVATION LEAGUE'S MOTION TO INTERVENE BECAUSE:

A. THE LEAGUE'S MEMBERS USE AND ENJOY THE BEACH/DUNE SYSTEM WHICH THE BEACHFRONT MANAGEMENT ACT IS DESIGNED TO PROTECT AND THEY WOULD BE ADVERSELY AFFECTED AND AGGRIEVED BY A DECISION TO MOVE THE BEACHFRONT JURISDICTIONAL LINES, AND THUS ANY DEVELOPMENT, SEAWARD.

B. THE CASE IS IN ITS EARLY STAGES AND THE LEAGUE WOULD COMPLY WITH COURT DEADLINES, THUS INTERVENTION WOULD NOT UNDULY DELAY THE PROCEEDING NOR PREJUDICE THE EXISTING PARTIES; AND

C. THE LEAGUE'S MOTION WAS FILED TWO MONTHS AFTER KDP'S REQUEST FOR CONTESTED CASE HEARING AND WAS TIMELY.

II. WHETHER THE ALC ERRONEOUSLY READ § 48-39-280 AS A LIMITATION ON THE LEAGUE'S ABILITY TO INTERVENE, WHEN THE STATUTE AS A WHOLE CONFERS CERTAIN RIGHTS AND PROTECTIONS TO THE LEAGUE AS MEMBERS OF THE PUBLIC WHO USE AND BENEFIT FROM A HEALTHY BEACH/DUNE SYSTEM.

STATEMENT OF THE CASE

This case arises from the Administrative Law Court's denial of the Appellant, Coastal Conservation League's ("the League") Motion to Intervene in a contested case proceeding. The underlying contested case arises from the Department of Health and Environmental Control's (DHEC) proposed new beachfront jurisdictional lines which were issued on October 6, 2017, pursuant to S.C. Code Ann. § 48-39-280, and its Notice extending the comment period and final determination for those proposed lines which was issued on November 3, 2017. (R.pp. ___).

As a result of DHEC's proposed lines and notice, Respondent KDP II, LLC (KDP) submitted a Request for Final Review Conference before the DHEC Board on November 20, 2017. (R.pp. ___). That request was denied on January 5, 2018. (R.pp. __). KDP then filed a Notice of Request for Contested Case Hearing in the South Carolina Administrative Law Court (ALC) on February 5, 2018, seeking to have DHEC's proposed beachfront jurisdictional lines be moved seaward. (R.pp. ___). DHEC filed a motion to dismiss, alleging that KDP failed to exhaust its administrative remedies, that its appeal was moot and that it lacked standing. (R.pp. ____). The ALC denied the motion on March 28, 2019. (R.pp. ____). KDP filed a motion for reconsideration, which was not ruled on. Instead the Court entered a Consent Order of Stay and Remand on June 6, 2019, wherein the contested case was remanded to DHEC in order "to allow it to make a considered determination in accordance with the applicable statutes and regulations" and receive additional information from KDP. (R.pp. ___).

Pursuant to the Consent Order, the Department was to issue its final determination no later than August 15, 2019; however, the parties consented to additional time and DHEC issued its decision on remand on December 6, 2018. (R.pp. ___). KDP filed a Request for Final Review

Conference before the DHEC Board on December 23, 2018, which was denied on February 10, 2019. (R.pp. ___). KDP then filed a Renewed Request for Contested Case Hearing After Remand and Request to Lift Stay on March 6, 2020. (R.pp. ___). Appellant filed its motion to intervene on May 26, 2020. The ALC denied the motion by Order dated July 10, 2020.

STANDARD OF REVIEW

This Court may affirm the ALC or remand the case for further proceedings; or, it may reverse or modify the 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. §1-23-380(5). The standard of review for a motion to intervene is whether the court abused its discretion in denying the motion. *S.C. Tax Comm'n v. Union Cty. Treasurer*, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988).

ARGUMENT

Factual and Legal Overview

Respondent, KDP II, LLC, (KDP) owns land on Kiawah Island in Charleston County, South Carolina, which includes an area known as Captain Sams Spit. The Spit is an approximately 174-acre land mass attached to Kiawah Island by a narrow strip of land called "the neck." *S.C. Coastal Conservation League v. SCDHEC & Kiawah Development Partners II,* 2018

WL 4854113 at *4 (Admin. Law Judge Div. 2018, hereinafter "the 2018 ALC Order"). KDP has proposed a 50-house development on the Spit, which has been at the heart of an ongoing controversy involving the same parties to the present case. In order to accomplish its development plans, KDP must run infrastructure through the narrow neck of the Spit, and because of the significant erosion on the Kiawah River side of the Spit, it has sought to fix that shoreline with an erosion control structure. *Id.* The controversy has resulted in two Supreme Court opinions overturning permits to facilitate that proposed development. *Kiawah Development 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"*); *Kiawah Development Partners, II, Inc. v. S.C. Dep't of Health & Envtl. Control*, 422 S.C. 632, 813 S.E.2d 691 (2018) (hereinafter "*KDP II*"). Another case challenging development permits for the 50-house development on the Spit is now pending before the Supreme Court.[1] *S.C. Coastal Conservation League v. SCDHEC & Kiawah Development Partners II*, Appellate Case No. 2019-000074; 2018 ALC Order, 2018 WL 4854113. The League has been the Petitioner/Appellant in each of these cases.

The League is a non-profit membership corporation representing its members who regularly use and enjoy the public trust beaches and other natural resources of the South Carolina coastal zone. (Motion to Intervene, R.p. __). The League's mission is to protect the threatened resources of the South Carolina coastal plain — its natural landscapes, abundant wildlife, clean water, and quality of life — by working with citizens and government on proactive, comprehensive solutions to environmental challenges. (R.pp. ___). Members of the League

[1]The League's affiant, Rich Thomas, also provided testimony in this case.

boat, kayak, fish and otherwise recreate on the public trust lands and waters surrounding Kiawah Island. *Id*. Rich Thomas, a member of the League, submitted an Affidavit describing his frequent visits to Captain Sams Spit, both by kayak and by bike, to fish and observe the abundant wildlife and natural beauty of the Spit. (*Affidavit of Rich Thomas, Return to Opposition to Motion to Lift Stay,* R. p. __) His enjoyment of this valuable natural resource would be diminished if the access road and infrastructure are constructed, along with the development of 50 houses. *Id*. Mr. Thomas testified that moving the jurisdictional lines seaward, as requested by KDP, would facilitate this construction by providing additional space in the narrow access corridor. *Id*. Because of the League's desire for maintaining access to and use of the public trust tidelands surrounding Captain Sams Spit, and in maintaining a dry sand each without structures located too close to the beach/dune system, it has an interest in DHEC's regulatory authority over these areas. (Motion to Intervene, R.p. __).

Section 48-39-280 of the Beachfront Management Reform Act requires DHEC to set beachfront lines, called the setback and base lines, which establish the agency's regulatory authority over certain activities pursuant to the Act. The Act has recently been amended twocie, once in 2016 and once in 2018. 2016 Act No. 197 prohibited the baseline from ever moving seaward from its position on December 31, 2017. 2018 Act No. 174 amended that section to provide that:

> A baseline established pursuant to this section must not move seaward from the most seaward location of the following:
>
> > (a) the location of the baseline as established during the 2008 through 2012 establishment cycle;
> >
> > (b) the location of the baseline as proposed by the department on October 6,

2017; and

(c) the location of the proposed October 6, 2017, baseline as revised by the department pursuant to a review or an appeal initiated before January 1, 2018.

S.C. Code Ann. § 48-39-280(A)(4). It also provided a process for administrative review.

On October 6, 2017, the Department of Health and Environmental Control (DHEC) proposed new beachfront jurisdictional lines pursuant to S.C. Code Ann. § 48-39-280. On November 3, 2017, DHEC issued a Notice extending the comment period and final determination for those lines until April 6, 2018. (R.pp. ___). The Notice explicitly stated that the agency would begin issuing final jurisdictional line determinations in May, 2018, and concluding on December 31, 2018. *Id*.

In reaction to DHEC's Notice, Respondent KDP II, LLC (KDP) submitted a Request for Final Review Conference before the DHEC Board on November 20, 2017, which was denied. (R.pp. ___). Thereafter, KDP filed a Request for Contested Case hearing in the ALC. (R.pp. ___). KDP asserted that the agency's Notice extending the comment period and final determinations was a *de facto* denial of its desire to move the baseline seaward of the October 6, 2017 proposed lines.

DHEC filed a motion to dismiss alleging that KDP failed to exhaust its administrative remedies and that its appeal has become moot as a result of the statutory time frames. (R.pp. ___). The ALC denied the motion, but recognized that DHEC had not issued a final agency decision on the merits contemplating seaward movement of the line, and found that KDP had thus not exhausted its administrative remedies. (Order, R.pp. ___). Ultimately, the contested case was remanded back to DHEC to make such final determinations by consent of the parties.

(Order, R.pp. ___).

I. The League Has Met the Standard for Intervention

The South Carolina Administrative Law Court Rules create a permissive standard for intervention, allowing any person to intervene so long as three conditions are met:

> (1) The movant will be aggrieved or adversely affected by the final order; (2) the interests of the movant are not being adequately represented by existing parties, or that it is otherwise entitled to intervene; (3) that intervention will not unduly prolong the proceedings or otherwise prejudice the rights of existing parties.

SCALC Rule 20(b). The ALC Rules place special emphasis on the issue of timeliness: "The motion for leave to intervene shall be filed as early in the proceedings as possible to avoid adverse impact on the existing parties or the disposition of the proceedings." SCALC Rule 20(C).

The ALC ruled that Appellant failed to meet this standard and may not intervene in the pending contested case because it will not be aggrieved or adversely affected by the decision in the case; intervention would cause undue delay and prejudice to KDP; and Appellant's motion was untimely. However, the ALC's findings and conclusions fail to apply South Carolina rules on intervention and legal precedent. First, Appellant has an important interest in the outcome of this case – protecting South Carolina's beaches for the benefit of the public- that existing parties cannot adequately defend on their own. Second, Appellant's intervention will meet the Court's deadlines and will not cause harm to KDP. Third, Appellant's motion is well within time limits established by South Carolina courts. Appellant has met the standards outlined in the statute, as discussed below.

A. The League Will Be Adversely Affected and Aggrieved

In *Smiley v. S.C. Dep't of Health & Envtl. Control*, the Supreme Court interpreted the language "adversely affected" or "aggrieved" as "a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, ... a $5 fine and costs, ... and a $1.50 poll tax.... [W]e see no reason to adopt a more restrictive interpretation of 'adversely affected' or 'aggrieved.'" 374 S.C. 326, 332, 649 S.E.2d 31, 34 (2007) (citing *U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973). Though *Smiley* involved constitutional standing, the court's interpretation of what it means to be "adversely affected or aggrieved" should be applied here, particularly as no appellate court has interpreted those terms in the context of SCALC Rule 20(B).

South Carolina Courts have interpreted intervention under SCRCP Rule 24, which contains a slightly different standard than ALC Rule 20, to require that the intervenor must prove it has an interest in the case and that its interest will be harmed without its intervention:

> SCE&G must: (1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties.

Berkeley Elec, Co-op., Inc. v. Town of Mount Pleasant, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990) (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983)).

While not binding, the ALC has relied on SCRCP Rule 24's impairment/impediment standard and held that "[f]or intervention purposes, a person 'will be aggrieved or adversely

affected by the final order' if final disposition of a matter may impair his ability to protect his interests." *S.C. Coastal Conservation League & Michael Storen v. S.C. Dep't of Health & Envtl. Control & Tony A. Berenyi*, 1998 WL 229742, at *2 (S.C. Admin. Law Judge Div. 1998) (citing ALC Rule 20(B)).

Importantly, the Supreme Court held that **the question of a party's interest "must be determined in relation to the overall subject matter of the action and not in relation to the particular issue that is before the Court**." *Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 190, 394 S.E.2d 712, 714 (1990) (emphasis added) (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983)). The Sagebrush test further requires that the prospective intervenor demonstrate that without its intervention, the disposition of the case may impair or impede its ability to protect its interest. To meet that requirement, a party need not prove that it would be bound in a res judicata sense by the judgment, only that it would have difficulty adequately protecting its interests if not allowed to intervene. *Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 190–91, 394 S.E.2d 712, 715 (1990) (citing *Spring Construction Co., Inc. v. Harris*, 614 F.2d 374 (4th Cir.1980)). Although not a per se rule, a governmental entity is likely to be an inadequate representative of private party's interests. *Berkeley*, 394 S.E.2d at 716 (1990); *see also In re Sierra Club,* 945 F.2d 776 (4th Cir. 1991).

It is worth noting that the Coastal Conservation League is a public interest organization that has routinely been permitted to intervene in cases involving DHEC's interpretation and application of the Coastal Zone Management Act. *Summer House Horizontal Prop. Regime v. SCDHEC*, 1998 WL 268396 (S.C. Admin. Law Judge Div. 1998); *Wedgefield Plantation Homeowners Ass'n v. SCDHEC*, 2005 WL 1520475 (S.C. Admin. Law Judge Div. 2005); *City*

of N. Myrtle Beach v. SCDHEC, 2009 WL 1744571 (S.C. Admin. Law Judge Div. 2009); *See, e.g., Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 698 S.E.2d 612 (2010); *Risher v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 198, 712 S.E.2d 428 (2011); *Spectre, LLC v. S.C. Dep't of Health & Envtl. Control*, 386 S.C. 357, 688 S.E.2d 844 (2010)**.**

In this case, the League's interests are twofold.

First, the Beachfront Management Act established a statutory scheme designed to protect the public's use and enjoyment of the beach, among other things. Specifically, the General Assembly found that:

> The **beach/dune system along the coast of South Carolina is extremely important to the people of this State** and serves the following functions:
>
> > (a) protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner;
> >
> > (b) provides the basis for a tourism industry that generates approximately two-thirds of South Carolina's annual tourism industry revenue which constitutes a significant portion of the state's economy. The tourists who come to the South Carolina coast to enjoy the ocean and dry sand beach contribute significantly to state and local tax revenues;
> >
> > (c) provides habitat for numerous species of plants and animals, several of which are threatened or endangered. Waters adjacent to the beach/dune system also provide habitat for many other marine species;
> >
> > (d) **provides a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being**.

S.C. Code Ann.§ 48-39-250(1)(emphasis added).

The General Assembly also found that "without adequate controls, **development unwisely has been sited too close to the system**. This type of development has jeopardized the

stability of the beach/dune system, accelerated erosion, and endangered adjacent property. **It is in both the public and private interests to protect the system from this unwise development**." S.C. Code Ann § 48-39-250(4) (emphasis added).

The General Assembly went on to adopt a policy to:

> **protect, preserve, restore, and enhance the beach/dune system, the highest and best uses of which are declared to provide**:
>
> (a) protection of life and property by acting as a buffer from high tides, storm surge, hurricanes, and normal erosion;
>
> (b**) a source for the preservation of dry sand beaches which provide recreation and a major source of state and local business revenue;**
>
> **(c) an environment which harbors natural beauty and enhances the well-being of the citizens of this State and its visitors;**

S.C. Code Ann. § 48-39-260(1) (emphasis added).

Thus, the Act itself is designed to protect public use of the beach/dune system, including use by League members like Rich Thomas (R.pp.___), and to prevent unwise development too close to that system. This goal is accomplished, in part, through the establishment of jurisdictional beachfront lines pursuant to § 48-39-280, which govern the types of construction which may occur within these jurisdictional lines. *See generally* S.C. Code Ann. § 48-39-290.

Second, the League's interest in the outcome of this contested is directly linked to the other contested cases that similarly impact the outcome of the proposed future development on Captain Sams Spit. In the first contested case filed in early 2009, the League challenged DHEC's issuance of a critical area permit that would have authorized construction of 270' of a vertical bulkhead combined with a sloping rock revetment along the Kiawah River side of the Spit. *KDP I*, 411 S.C. 16, 766 S.E.2d 707 (2014). KDP challenged DHEC's denial of the remaining 2,513'

of bulkhead/revetment system. *Id.* The ALC reversed DHEC's denial, authorizing the entire 2,783' of bulkhead/revetment system. *Id.* The League appealed that decision, which, after two rehearings, resulted the Supreme Court's Opinion reversing and remanding the ALC's decision to issue the permit for the bulkhead/revetment. *Id*. KDP sought the bulkhead/revetment to permanently fix the location of the eroding shoreline "in order to facilitate a residential development on the adjacent highland area." *Id*. at 22, 711.

While *KDP I* was pending before the Supreme Court following the ALC's Order on Remand, the ALC conducted a second contested case hearing on the League's challenge to a new set of permits authorizing the construction of an access road, water and sewer lines, and a 2,370' steel sheet pile wall along the Kiawah River, also to facilitate the proposed residential development on Captain Sams Spit. *S.C. Coastal Conservation League v. SCDHEC & KDP, II*, 2018 WL 4854113 (Admin. Law Judge Div. 2018, hereinafter "the 2018 ALC Order").[2] In the steel wall appeal, the ALC found that Captain Sams Spit is "an undeveloped, drumstick-shaped piece of land that is connected to Kiawah Island by a narrow strip of land referred to as 'the neck.'" *Id*. The ALC found that to "stabilize the neck and facilitate development on the Spit, KDP proposes to install a 2,380-foot steel sheet pile to stop erosion along the Kiawah River." *Id*. at 6.

Importantly, the ALC found that in "1999, the Department established a baseline and set-back line on the Spit, effectively opening the Spit for development. The last critical line on the Spit was certified by the Department in June 2016. As of 2016, the Spit had approximately

[2]The ALC cited to the 2018 Order in its Order denying intervention and the League relied on the 2018 Order in its motion to intervene.

174 acres of highland, and approximately 44.03 acres of that highland was buildable area above the baseline and critical line." *Id*. at 4. The ALC found that the "Kiawah River is currently eroding the backside of the Spit," and as a result the riverbank is "collapsing" in the location of the proposed steel wall. *Id*. at 5. The erosion on the river side has been interfering with KDP's plans to develop the Spit for over eleven years. Because of the river-side erosion, the amount of buildable land between the critical line on the river side and the beachfront jurisdictional lines is narrowing, making it more challenging for KDP to construct the steel wall, road and other infrastructure.

Also relevant to this appeal, the ALC found that "[a]lthough the Kiawah River is eroding the backside of the Spit, the neck and the Spit have been steadily accreting on the oceanfront side, moving seaward. In fact, the rate of accretion along the beach is equal to or greater than the rate of erosion along the riverbank." *Id*. at 5. Yet the ALC's 2018 Order found that "**because the baseline is affixed the buildable width of the neck has narrowed as the neck and Spit have moved oceanward. In August 2006, the buildable width at the narrowest location on the neck was 97.52 feet. In contrast, in August 2010, this same location measured 64.43 feet; in June 2011 it measured 60.26 feet; in October 2014 it measured 39.41 feet; in June 2015 it measured 37.06 feet; and in May 2016, when the most recent Department critical line was certified, it measured 29.25 feet.**" *Id*. at 5 (emphasis added). The fixed location of the baseline and setback line are limitations on KDP's ability to undertake construction within the narrow access corridor at the neck, which has motivated KDP to move DHEC's beachfront jurisdictional lines seaward.

As if foreshadowing KDP's pending contested case over the jurisdictional lines, the ALC

explained that:

> The proposed project will be accessed through the neck of the Spit by way of an "access corridor." The access corridor will be used to accommodate the access road, stormwater system, and underground utilities. However, the width of the access corridor is constrained by the critical line on the river side of the Spit and the set-back line on the ocean side. As previously mentioned, the **width of the access corridor has been steadily shrinking as the critical line moves oceanward due to the erosion of the riverbank while the set-back line remains fixed**. . . . Rick Karkowski, the project engineer, explained that "given some adjustment to the design as permitted we could make the project still work as intended" based upon the Department's most recent critical line certified in June 2016.

Id. at 6 (emphasis added). The ALC's 2018 Order explains exactly why the League has a significant stake in the out come of this appeal: "Coastal contends that due to the instability of the neck and continued movement of the critical line oceanward, the proposed location of the SSPW and road as of April 10, 2015, now falls within the critical area." *Id*. at 6. In other words, the League has argued that KDP does not have enough space in the "access corridor" to build a road, a steel wall and other infrastructure given the location of the critical line and the baseline. As is abundantly clear from the Supreme Court and the ALC's orders, the critical line is moving landward as the river erodes, so, naturally, KDP wants the jurisdicitonal baseline and setback line on the beachfront side to move seaward in order to give itself more space to build the road, steel wall and infrastructure.

The ALC is correct that the issue in the instant appeal is not whether or not the access road can be built – an issue which is being litigated in an appeal pending before the Supreme Court. But the ALC cannot simply put on blinders to the facts and circumstances which underlie the League's interests at stake, and instead must consider the interest "in relation to the overall subject matter." *See Berkeley* at ____. Yet that is what the ALC did, even while specifically

citing to the 2018 ALC Order authorizing the steel wall whose location is constrained by the jurisdictional lines at issue in the present case. (RR. p. ___, Order, 3, 4). In other words, while the underlying issue in the instant case is whether the agency properly determined the baseline and setback lines for Captain Sams Spit, the ALC cannot ignore how the outcome of the contested case, should Petitioner prevail, will impact the League. The impacts of that outcome – which would be to move the jurisdictional lines further seaward and thus provide more space for, and facilitate the construction of, an access road – would adversely affect League members' use and enjoyment of the pristine, undeveloped barrier island spit over which the League has been working to protect for approximately eleven years.

The League has participated at every step of the administrative and judicial processes with respect to the proposed development on Captain Sams Spit, and in particular the loss of the public trust tidelands that will result, and should have been permitted to intervene in a proceeding where these same interests are clearly at stake.

CCL cannot stand by and risk the chance of an unfavorable outcome. For instance, the case could result in a settlement that harms the interests of Proposed Intervenor. *See Defs. of Wildlife v. N.C. Dep't of Transp.*, 281 F.R.D. 264, 269 (E.D.N.C. 2012) (finding that the proposed intervenor "satisfied its minimal burden of showing that representation of its interests, absent intervention, may be inadequate" where the proposed intervenor argued that the defendant "could settle this case in a matter that would harm [proposed intervenor's] interests"). Similarly, DHEC may choose not to pursue an appeal of an adverse ruling, whereas Proposed Intervenor might. Proposed Intervenor's interests therefore are inadequately represented by DHEC. Additionally, DHEC is charged with representing a broader constituency than Plaintiffs' more

narrow interests. Therefore, the League has met its "minimal" burden to show a possibility that the government's representation "may be" inadequate under *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10. (1972).

B. Intervention Would Not Unduly Delay the Proceedings or Prejudice the Parties

With practically no evidentiary support, the ALC held that intervention would cause undue delay and prejudice. Any intervenor has the potential to slightly lengthen the proceedings. Therefore, courts have held that some real damage must accrue to parties in order to dismiss a motion to intervene for undue delay or prejudice. Examples include: a delay in settlement of a case; delaying environmental decontamination procedures, thereby threatening the public health; and causing complications by altering the burden of proof and causing a conflict of interest. See *Gould v. Alleco, Inc.*, 883 F.2d 281, 287 (4th Cir. 1989); *Ex parte Reichlyn*, 310 S.C. 495, 500, 427 S.E.2d 661, 664 (1993); *Ex parte Builders Mut. Ins. Co.*, No. 2019-000238, 2020 WL 2464838, at *3 (S.C. May 13, 2020).

In all of the above examples, intervention would have caused specific damage to the parties. In this case, a non-specific assertion, applicable to any intervenor, that litigation will take longer because of proposed intervenor's involvement is insufficient to find undue delay or prejudice. This extra time must cause some sort of harm, and in this case, no such harm exists. Litigation will not become more complicated, as burdens of proof remain unaltered and the League is ready to meet all deadlines set by the court. And no harm to the public would result from Appellant's intervention. In fact, the League has the public interest in the protection and wise use and management of the beach/dune system – which are at the heart of the Beachfront

Management Act – as the basis for its intervention. Any minimal delay resulting from Appellant's involvement in this case will not result in prejudice. No hearing had been set and discovery had only just begun, with significant discovery still needed. In fact, the ALC ordered amended prehearing statements, which occur at the outset of the litigation, to be filed on June 30, 2020 – after the League filed its motion to intervene. In other words, the initial pleadings were not due until a month after the League filed its motion to intervene. At the time the League moved to intervene, the case was in its initial stages, and intervention would not have caused undue delay in moving the case toward a merits hearing.

In determining delay, the Court emphasized the length of time this matter was pending initially, during the pendency of DHEC's motion to dismiss, and then a remand to DHEC, *by consent,* to review and consider information from KDP and issue a final decision. Somehow the "delay," which has been perceived by the ALC as being prejudicial, was caused by the existing parties and had absolutely nothing to do with the League. The time this case has been pending prior to the League's motion is irrelevant to the consideration of undue delay caused by that motion. Appellant should not be penalized for KDP's decision to file a request for contested case hearing in 2018 because the court cannot hold a potential intervenor accountable for delay it did not cause. *See Hoyler v. State*, 428 S.C. 279, 304, 833 S.E.2d 845, 858 (Ct. App. 2019), reh'g denied (Oct. 17, 2019), cert. dismissed (Jan. 29, 2020) ("Hoyler himself unnecessarily delayed the case by seeking review of two unappealable interlocutory orders.") The League had no role in the negotiations with DHEC, and should not be kept out of the case because of delays in which it had no hand. The intervention would most certainly not cause any delay going forward.

The ALC's March 29, 2019 Order denying DHEC's motion to dismiss concluded that

though DHEC essentially made a final decision giving rise to a contested case, the Court's jurisdiction was limited because Petitioner did not exhaust their administrative remedies. The ALC essentially held that KDP's appeal was "preserved" yet unripe. This ruling still stands for the pendency of this contested case, at least. In that regard, the League could not intervene in an unripe controversy prior to a final agency decision. Why was preservation of the appeal so important that KDP filed its request prior to a final agency decision? The answer is found in the recent amendments to the Beachfront Management Reform Act, which specifically provide that an appeal of the baseline and setback line must be initiated before January 1, 2018, if a landowner seeks to have those lines moved further seaward. S.C. Code Ann. § 48-39-280(4)(c). KDP's initiation of the instant appeal, by filing a request for final review conference by the DHEC Board on Novemeber 20, 2017, was clearly calculated to allow it to seek seaward movement of the jurisdictional line, even though no final agency decision had been issued. It was the savings clause of Section 48-39-285(B) that motivated the appeal initiated in 2017, not an actual final agency decision. In sum, the League filed its motion at an appropriate time, two months after KDP filed its request for contested case of a final agency decision and prior to even the prehearing statement deadline.

C. The League's Motion Was Timely

The ALC rejected Appellant's motion as untimely, apparently faulting the League for failing to intervene while a motion to dismiss the appeal was pending and then while the case was on a lengthy remand to the agency. The ALC's reliance on the League's knowledge of when KDP first initiated its request for a contested case hearing, though not until 2020, is irrelevant. The relevant inquiry is whether the League could and should have intervened at an earlier point. It is

true that the League could have moved to intervene immediately after the first contested case hearing was sought in February of 2018; however, the fact that 1) DHEC filed a motion to dismiss for mootness and failure to exhaust administrative remedies on October 24, 2018 and 2) thereafter the case was remanded back to DHEC on June 6, 2019, would have made intervention unripe. As aforementioned, it was unclear whether this was a viable appeal prior to the ALC's denial of the motion to dismiss. At the time DHEC filed its motion to dismiss, discovery had not commenced and the court's jurisdiction was called into question making intervention premature, at best. It wasn't until December 6, 2019, that DHEC issued a final agency decision in accordance with the statute, leading KDP to file an appeal in March of 2020.

Moreover, the League's motion would not have been appropriate prior to the renewed request for contested case hearing filed on March 6, 2020. It must be noted that the League did not receive notice of the contested case until mid-2020. However, even if it had been aware of the appeal earlier, between the time the appeal was initiated in December of 2018 and the time that the case was remanded to DHEC, the issues before the court solely focused on the tortured procedural posture. Due to DHEC's handling of the situation, it was not and still is not settled as to whether there was a final agency decision and whether KDP has exhausted its administrative remedies. It certainly was unclear as to whether the case would proceed on the merits once DHEC's motion to dismiss was filed. Now that the case has been restored after remand failed to lead to KDP's desired seaward movement of the baseline, the case is proceeding on the merits. These are the issues that are of concern to the League.

Federal courts have held that whether a potential intervenor had notice of an action is important in intervention decisions. *See Nat'l. Ass'n for Advancement of Colored People*, 413 U.S. at 366;

Alt, 758 F.3d at 591. However, notice should be less important in courts' consideration than the consequences of disallowing intervention. *See Ex parte State ex rel. Wilson*, 391 S.C. 565, 578-79, 707 S.E.2d 402, 409-10 (2011) ("On balance, while we recognize the State's lack of actual notice of the annexation, we assign greater importance to the policy of finality of an annexation, with its attendant consequences.")

In the present case, the ALC asserts that Appellant should have known about the case earlier. However, this assertion fails to account for the procedural posture of this contested case and whether the ALC would have had jurisdiction to consider the intervention motion prior to March 2020. Jurisdiction is generally defined as "the authority to decide a given case one way or the other. Without jurisdiction, a court cannot proceed at all in any cause; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause." *Broad River Elec. Co-op., Inc. v. Bd. of Pub. Works of City of Gaffney*, 319 S.C. 230, 232, 460 S.E.2d 386, 387 (1995) (citing 32A Am.Jur.2d Federal Courts § 581 (2007) (footnotes omitted)). An order of remand deprives a court of subject matter jurisdiction. *Broad River Elec. Co-op., Inc. v. Bd. of Pub. Works of City of Gaffney*, 319 S.C. 230, 232, 460 S.E.2d 386, 387 (1995)

On June 6, 2019, the ALC entered a Consent Order remanding the case back to the agency. (R.pp. __). On August 29, 2019, KDP and DHEC requested an extension of the stay and remand in order to allow KDP to submit more data to DHEC. It wasn't until December 6, 2019, that DHEC issued its Final Decision on Remand to KDP. (Staff Response to RFR, R..pp. ___).

Even though the initial contested case was filed in 2018, during the remand period the agency's initial decision could have changed, which would have changed the League's posture

in the initial contested case. Simply put, it would have been premature, and argument not possible, to intervene once the contested case was on remand back to the agency. Only after the Petitioner filed its Renewed Request for a Contested Case Hearing on March 6, 2020, did the League's interests in this matter become ripe for its motion. (R.p.__).

It similarly would not have been appropriate for the League to intervene during the remand. The ALC likely did not have jurisdiction to consider such a motion while the case was on remand, though the Order does not make that clear, and the remand was for the purpose of considering a resolution to the case. It is reasonable that the League, even if it had been aware of the appeal, would not have moved to intervene at that time.

The error in the ALC's reliance on the initial 2018 contested case request is best understood by considering whether a party can move to intervene in an agency decision-making process before the agency has issued a final agency decision and while the matter is still being reviewed by the agency. Clearly such intervention would not be ripe, and would not be possible because the ALC does not retain jurisdiction when a matter is on remand to the lower court.

Finally, the League made its motion well within time limits established by the applicable case law. In determining timeliness to intervene, the U.S. Supreme Court has held that, besides a mere recital of how much time has passed, the unique circumstances of each case are important. *See Nat'l Ass'n for Advancement of Colored People v. New York*, 413 U.S. 345, 365-66 (1973) ("Although the point to which suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances.") Similarly, the Fourth Circuit has held that courts must not only consider how far the suit has progressed, but also whether prejudice will result and why the proposed intervenor is acting now. *Alt v. U.S.*

Envtl. Prot. Agency, 758 F.3d 588, 591 (4th Cir. 2014). Therefore, an examination of all the circumstances of intervention is warranted, which the ALC failed to conduct.

South Carolina courts consistently allow intervention when such intervention falls within the time limit established by the jurisdictional court. *See Thomas v. Andino*, No. 3:20-cv-01552-JMC, 2020 WL 2306615, at *4 (D.S.C. May 8, 2020) ("The SCRP persuasively argues the timeliness of its Motion and contends that its intervention would not unduly delay or prejudice the adjudication of the original parties' rights, because it is ready to meet the expedited briefing deadline of May 11, 2020 and be ready for a hearing on May 15, 2020."); *Maxum Indem. Co. v. Biddle Law Firm*, 329 F.R.D. 550, 553-54 (D.S.C. 2019) (internal citations omitted)("Most of the deadlines in the current scheduling order have not yet expired, and therefore any resulting delay due to intervention is minimal. Accordingly, the Court finds the motion to intervene is timely.") Like the cases noted above, Appellant filed for intervention before the court-ordered time limit ran out, before the prehearing statements were due, before any hearing had been set (and agreed to comply with all court deadlines) making its motion timely. The ALC erred in rejecting the motion as untimely.

When a motion to intervene is denied for being untimely, it is usually because it has been filed after the entry of final judgment. *See Hous. Gen. Ins. Co. v. Moore*, 193 F.3d 838, 840 (4th Cir. 1999) ("When Beaumont filed its motion to intervene more than 60 days after the entry of final judgment, there was no pending litigation in which Beaumont could intervene. Therefore, the motion was untimely."). Indeed, sometimes intervention is permitted even after the entry of final judgment. *See Black v. Cent. Motor Lines, Inc.*, 500 F.2d 407, 408 (4th Cir. 1974)("Appellants argue that in a number of cases intervention has been allowed even after entry

of judgment. Admittedly those cases involved unique factual situations."). In this case, no hearing has been set, much less a final judgment entered, leaving plenty of time for the League to intervene in a timely manner.

Alternatively, motions to intervene are sometimes denied because a complicated case has been ongoing for a very long time, and courts do not want to block the case's momentum. For example, a motion to intervene was denied when seven other parties had already intervened, several months of settlement negotiations had transpired, a motion to dismiss had already been denied, the case has been stayed once, the court's scheduling order had been extended twice, and summary judgment proceedings had already commenced. *Alt*, 758 F.3d at 591-92. Additionally, the Fourth Circuit denied a motion to intervene that was offered almost four months after the parties presented a settlement proposal to the court. *Gould v. Alleco, Inc*., 883 F.2d 281, 286 (4th Cir. 1989). In the present case, the case was pending before DHEC on remand for some time, but litigation within the ALC has barely begun. The case has been stayed once, but even pretrial motions have yet to begin in earnest. Furthermore, the parties have not presented a resolution to the Court, leaving the matter far from settled. In short, actual litigation is still in its early stages, and the ALC's determination that the League's motion was untimely is arbitrary and capricious.

II. The Statute is Not a Bar to Intervention

The ALC turned to the statute giving rise to this contested case hearing as a basis for denying intervention. While the statute only allows a landowner who believes the jurisdictional lines are in error to seek review of that decision, it is silent on the question of who may intervene. S.C. Code Ann. 48-38-280. Like every other case where a party has intervened in a contested case over a DHEC permitting decision, the statute does not speak to intervention and does not limit

the rights of any party to intervene in such proceeding. Indeed, the ALC recognizes that 48-39-280 is "not determinative" of whether intervention in this case should be granted, as the statute only directs who may seek a contested case hearing, not who may intervene.

In that regard, the ALC erroneously interpreted the statute as *limiting* the rights of the public to participate as an intervenor to a jurisdictional line determination. It is a safe assumption that any landowner challenging the lines would be seeking to move the lines further seaward because the lines determine what types of construction activities may or may not occur seaward of those lines. *See* S.C. Code Ann. § 48-39-290. In that same vein, it is hard to fathom a citizen ever desiring to see the agency's regulatory authority over beachfront property constrained/restrained in a manner that would allow construction closer to the ocean than the agency's scientific analysis dictates. Thus, intervention to maintain the full extent of the agency's regulatory has practical and logical appeal.

Also, it bears noting that KDP is not simply challenging how the jurisdictional baseline was established; it is attempting a collateral attack on the agency's classification of Captain Sams Spit as an unstabilized inlet erosion zone. Section 48-39-280 allows the landowner to challenge the location of the baseline, but not the agency's classification of various erosion zones. The statute sets forth those erosion zones and no mechanism exists for a landowner or the public to challenge such determination.

As with its erroneous application of the intervention standard, the ALC ignores the **public property** at stake here – the lands below the high water mark which are adjacent to and abut the Petitioner's property and the inherent nature of the property as subject to changes in its boundaries.

> **The law gives the riparian proprietor the benefit of additions to his land caused by accretion or reliction. However, it also requires him to bear the corresponding risk that land will be lost by gradual erosion or submergence.** The rule is said to rest on the principle of natural justice that one who sustains the burden of losses imposed by the contiguity of waters shall be entitled also to whatever benefits they bring.

Horry County v. Woodward, 282 S. C. 366, 318 S. E. 2d 584, 586 (1984) (emphasis added).

In this way, characterizing the underlying contested case as one solely involving "privately owned" property fails to account for the adjacent public property and public uses at stake. More importantly, it fails to account for the League's distinct interests established by the General Assembly in maintaining the public's dry sand beach and preventing structures from being located too close to the beach/dune system.

CONCLUSION

WHEREFORE, the Appellant respectfully requests that this Court issue an Opinion reversing the Order Denying Motion to Intervene of the Administrative Law Judge and allowing the League's intervention.

s/ Amy E. Armstrong
Amy E. Armstrong
Leslie S. Lenhardt
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Mailing address: Post Office Box 1380
Pawleys Island, SC 29585
Office address: 407 Church Street, Unit E
Georgetown, SC 29440
Telephone (843) 527-0078

Attorneys for the Appellant

Georgetown, South Carolina
December 1, 2020

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley C. Robinson, Administrative Law Judge

Docket No. 18-ALJ-07-0047-CC
Appellate Case No. 2020-001090

Ex Parte: South Carolina Conservation League …….……..…….Appellant,

In Re:

KDP, II, LLC, Respondent, ……..…….……Respondent,

v.

South Carolina Department of Health and Environmental Control …..…….…....Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served Appellant's initial brief and designation of matter on all parties by emailing a copy of same, on December 1, 2020, to the Attorney Information System provided email addresses below, via the attached E-mail:

Trenholm Walker
walker@wgflaw.com

Tom Gressette
gressette@wgfllaw.com

Sallie Phelan
phelansp@dhec.sc.gov

s/ Amy E. Armstrong
Amy Armstrong

Charleston, SC
December 1, 2020

Ex Parte CCL; Appellate Case No. 2020-001090

From: Amy Armstrong <amy@scelp.org>

To: Tom Gressette <Gressette@WGFLLAW.com>, Trenholm Walker <Walker@WGFLLAW.com>, Bradley Churdar <CHURDABD@dhec.sc.gov>, Sallie Phelan <phelansp@dhec.sc.gov>

Cc: Leslie Lenhardt <leslie@scelp.org>

Subject: Ex Parte CCL; Appellate Case No. 2020-001090

Date: Tuesday, December 01, 2020 5:46 PM

Size: 1.6 MB

Dear Tom, Trenholm, Brad and Sallie,

As permitted by part (g)(3) of Supreme Court Order 2020-05-29-02, I am herewith serving via E-mail the Appellant's initial brief and designation of matter in the above-captioned appeal. Shortly, I will be filing these documents with the Court of Appeals electronically as permitted by part (c)(5) of the Order, and will attach this E-mail to the certificate of service of same.

Thank you,
Amy

Amy E. Armstrong
South Carolina Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585
Phone: (843) 527-0078
amy@scelp.org

Initial Brief.pdf 740 KB

Designation of Matter.pdf 192 KB

Cert of Service initial brief.pdf 254 KB