STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

Appellate Case No. 2020-001090

Ex Parte: Coastal Conservation League,.....Appellant,

In Re:

KDP, II, LLC, ...Respondent,

v.

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

INITIAL BRIEF OF RESPONDENT KDP, II, LLC

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A. S.C. CODE § 48-39-280 LIMITS STANDING TO AN AGGRIEVED LANDOWNER WHO WISHES TO CHALLENGE PER THE STATUTE; AND

B. THE LEAGUE DOES NOT HAVE STANDING UNDER LUJAN V. DEFENDERS OF WILDLIFE, 504 U.S. 555, 560–61, 112 S.CT. 2130 (1992), AS PREVIOUSLY APPLIED BY THIS COURT IN FINDING THE LEAGUE DID NOT HAVE STANDING IN BEAUFORT REALTY CO. V. BEAUFORT CTY., 346 S.C. 298, 551 S.E.2D 588 (CT. APP. 2001).

STATEMENT OF THE CASE

The Respondent, KDP II, LLC ("KDP"), owns beachfront property on the western end of Kiawah Island. Generally referred to as Captain Sams Spit, the property consists of over 150 acres of upland (hereinafter "Captain Sams" or the "Property"). (KDP Updated Prehearing Statement at 2.) KDP has a vested right to develop the property pursuant to the terms of its Development Agreement with the Town of Kiawah. Id. The Development Agreement limits KDP to no more than fifty lots on no more than 20 of the 150 upland acres. Id. The Development Agreement also requires that KDP use low impact development techniques. Under additional terms of the Development Agreement, the remainder of the land outside the lots, roads, utilities, and beach-parking area, will be protected by a conservation easement that will preserve the land in its natural state in perpetuity. Id.

The Respondent, Department of Health and Environmental Control ("the Department"), has jurisdiction to establish baselines and setback lines on oceanfront properties like Captain Sams. The standards and procedures the Department must use to delineate these jurisdictional lines for beachfront properties are set forth in S.C. Code Ann. § 48-39-280.

In October of 2017, the Department released its preliminary delineation of the jurisdictional lines (the proposed baseline and setback line) under SC Code § 48-39-280 on the Property. (See DHEC's Proposed New Jurisdictional Lines, dated October 6, 2017.) Prior to this proposed delineation, the Department had last set the beachfront jurisdictional lines on Kiawah Island in 2009 based on a preliminary determination made in 2008. (KDP Updated Prehearing Statement at 2.)

KDP appealed the preliminary determination of the baseline to the DHEC Board and requested a Final Review Conference on November 20, 2017. (KDP Req. for Final Review

Conference.) KDP's Request was made pursuant to the version of S.C. Code Ann. § 48-39-280 in effect in October 2017. Id. The statute then provided:

> A landowner claiming ownership of property affected who feels that the final or revised setback line, baseline, or erosion rate as adopted is in error, upon submittal of substantiating evidence, must be granted a review of the setback line, baseline, or erosion rate, or a review of all three.

S.C. Code Ann. § 48-39-280(E) (effective June 3, 2016, to May 2, 2018). Pursuant to amendment effective May 2018, the statute now reads:

> A landowner [or his appointee] claiming ownership of property adversely affected by the establishment of a baseline or setback line, upon submittal of substantiating evidence, must be granted a review of the baseline or setback line.

S.C. Code § 48-39-280(F)(1). As indicated, the statutory right to review remains limited to the landowner. Id.

Via letter dated January 5, 2018, the Department denied KDP's Request for Final Review Conference. (Dept. Denial of Final Review Conf.) On February 5, 2018, KDP filed a Notice of Request for Contested Case Hearing in the South Carolina Administrative Law Court ("ALC"). (Req. for Contested Case Hrg.) The matter was assigned to the Honorable Shirley G. Robinson, South Carolina Administrative Law Judge and captioned as KDP, II, LLC v. South Carolina Department of Health & Environmental Control, ALC Docket No. 18-07-0047-CC.

On October 24, 2018, the Department filed a motion to dismiss KDP's Request for Contested Case Hearing. (Dept. Mot. Dismiss.) The Department filed the same Motion in multiple baseline delineation cases and asserted that an additional final decision of the Department was required because the October 6, 2017, jurisdictional lines published by the Department were only "proposed" lines that were never finalized. (Order Mar. 28, 2019, at p.7) On November 15, 2018, KDP filed its Response to the Motion to Dismiss. (KDP Ret. To Resp. Mot. Dismiss.) By Order

dated March 29, 2019, the ALC denied the Department's Motion to Dismiss. (Order Mar. 28, 2019.) In so ruling, the ALC also commented in a footnote that KDP had not exhausted its administrative remedies because the Department had not yet issued a final decision *on the merits* of KDP's reasons for requesting the seaward adjustment of the jurisdictional lines. (Id., n. 12.) With the ALC's concurrence, KDP and the Department agreed to stay the proceedings for the matter to be remanded to the Department staff to consider the full merits of KDP's request for jurisdictional lines to be located seaward of the proposed lines published October 6, 2017. (Consent Order, June 6, 2019.) Pursuant to the Consent Order and without waiver of the positions asserted in its prior filings, over the next six months KDP met with Department staff and counsel to discuss KDP's positions.

On December 6, 2019, the Department issued its Final Decision on Remand that left unchanged the Department's 2017 preliminary delineation. (Dept. Final Decision on Remand.) KDP timely filed a second written Request for Final Review Conference with the DHEC Board on December 23, 2019, seeking reconsideration of the December 6, 2019, decision to leave the preliminary delineation in place. (Req. Final Rev. Conf.) On January 16, 2020, the Department filed its Staff Response to the Request for Final Review Conference. (Dept. Staff Resp. RFRC.) The DHEC Board officially declined Petitioner's request for review, by letter dated February 10, 2020. (DHEC Letter Feb. 10, 2020.)

On March 6, 2020, KDP renewed its request for a contested case hearing and to lift the stay. (KDP Renewed RFCC Hrg.) By Order dated June 10, 2020, the ALC lifted the stay and requested the parties file updated prehearing statements. (Order June 20, 2020.) On June 30, 2020, KDP and the Department filed their respective updated/amended prehearing statements. (KDP and Dept. Prehrg. Stmts.)

On July 10, 2020, the ALC issued its Notice of Hearing setting trial of the matter from Tuesday, March 9, 2021, to Friday, March 12, 2021. (Notice Hrg.) KDP and the Department exchanged written discovery and consented to a slightly later trial date. The parties are now operating under the Second Amended Consent Scheduling Order entered on November 18, 2020. (Order Nov. 18, 2020.) Pursuant to that Order, the ALC has scheduled four days for trial of this matter, from Tuesday, August 24, 2021, to Friday, August 27, 2021. (Id. at p. 2.)

In accord with the Second Amended Consent Scheduling Order, KDP and the Department have engaged in written discovery, produced between them thousands of documents as well as an extensive set of electronic files and data including .GBD files, ARC GIS data, .GMW files, .DBF files, and LIDAR data. (KDP's Responses to Department's First Request for Production (referencing production of 150 gigabytes of data)) The parties are currently engaged in expert discovery and pursuant to the Second Amended Consent Scheduling Order discovery is to be completed no later than June 18, 2021. (Id. p. 1)

On May 26, 2020, the South Carolina Coast Conservation League ("the League") filed a Motion to Intervene. (CCL Mot. Intervene) KDP opposed the Motion, filing Petitioner's Opposition to Motion to Intervene on June 15, 2020. KDP Opp. Mot. Intervene.) On June 24, 2020, the League filed Proposed lntervenors' Return to Opposition to Motion to Intervene. CCL Ret. To Opp. Mot. Intervene.) By Order dated July 10, 2020, the ALC denied the League's Motion to Intervene on multiple grounds. (Order Jul. 10, 2020). On August 3, 2020, the League filed its Notice of Appeal in this Court. (Notice Appeal). The appeal was assigned Appellate Case No. 2020-001090.

SUPPLEMENTAL STATEMENT OF FACTS

Appellant, South Carolina Coastal Conservation League (the "League"), has been a habitual opponent to any permitting or approvals sought by KDP, II, LLC ("KDP") involving the development of Captain Sams (as approved by the Town of Kiawah Island which has also approved the subdivision plat for Cape Charles). These cases that are entirely unrelated to the delineation of the two jurisdictional lines are numerous and include:

- ALC Docket No. 09-ALJ-07-0029-CC;
- ALC Docket No. 09-ALJ-07-0039-CC;
- South Carolina Supreme Court Appellate Case No. 2016-000707;
- ALC Docket No. 15-ALJ-07-0369-CC; and
- South Carolina Supreme Court Appellate Case 2019-000074.

The League's litigation against KDP has resulted in four Supreme Court opinions and another case was argued before the Supreme Court on March 23, 2021: Kiawah Development Partners, II, Inc. v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 766 S.E.2d 707 (2014) ("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) ("KDP II"); and S.C. Coastal Conservation League v. SCDHEC & Kiawah Development Partners II, Appellate Case No. 2019-000074; 2018 ALC Order, 2018 WL 4854113. As the League's Brief in this case points out, the League has been the petitioner/appellant in every one of these cases. (App. Brief at 3)

Continuing its efforts, the current appeal before this Court is the result of yet another attempt by the League to prevent any construction or development at Captain Sams. (App. Brief at 14) This time, however, the underlying case is completely and clearly unrelated to any activities of the League's members on the beach or in the public trust tidelands, as noted by the ALC in the Order on appeal.

Despite the narrow scope of this administrative case and the limitation in S. C. Code § 48-39-280, of the right to appeal a baseline determination to a "landowner," more than two years after the Department's final decision on the jurisdictional lines at Captain Sams, the League filed a Motion to Intervene on May 26, 2020. (Mot. Intervene.) As determined by the ALC, the League's minimal Motion fails to establish the necessary basis for intervention, relying mostly on generalized assertions such as the following:

> Members of the League live on Kiawah Island and use and enjoy the waters, wetlands, and other natural resources of Kiawah, and Captain Sam's Spit in particular. Members of the League boat and otherwise recreate in the waters, wetlands and beaches surrounding Kiawah Island, including the spit on which Petitioner seeks to develop a 26-lot subdivision known as Cape Charles Phase I.

(Id. at ¶4)

The irrelevance of this assertion to the pending ALC case is that none of these areas are on the highland owned by KDP where the baseline and setback line are located and proposed to be re-located. Furthermore, the correct determination of these jurisdictional lines does not affect in any manner the League's members who reportedly use the beach and public trust tidelands.

The Motion to Intervene acknowledges the applicable analysis is supplied by SCALC Rule 20, asserting that the League's interest(s) ***may*** be adversely affected by the ALC decision on where to locate the jurisdictional lines on KDP's Property, that the League's interest(s) may not be protected by DHEC's ongoing efforts as a party to the case, and that League's last minute intervention will not prolong or delay the case. (See Mot. Intervene at ¶8, ¶9, and ¶11) The Motion also references the timing requirement of SCALC Rule 20(C). As to timeliness, the Motion states, "The League became aware of this appeal only recently since the Petitioner requested to have the stay lifted and has taken this step as expediently as possible." (Id. at ¶11)

KDP asserted that the Motion should be denied because S.C. Code § 48-39-280 does not

permit intervention into administrative appeals of the Department's delineation of these jurisdictional lines by non-property owners like the League. KDP further asserted the League failed to establish sufficient grounds for intervention under the applicable statute and Rules, specifically SCALC Rules 20(B) and (C). (See KDP's Opposition to Motion to Intervene at 4-6 (citing S.C. Code § 48-39-280(E) and A.O. Smith Corp. v. S.C. Dep't of Health & Envtl. Control, 428 S.C. 189, 201, 833 S.E.2d 451, 458 (Ct. App. 2019) ("The General Assembly has the authority to limit the subject matter jurisdiction of a court it has created; therefore, it can prescribe the parameters of the ALC's powers.")) and at 7-14 (citing SCALC Rules 20(B) and 20(C)).

Regarding SCALC Rule 20(C)'s requirement that a motion 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," KDP challenged the accuracy of the League's assertion that it "became aware of this appeal only recently … and has taken this step as expediently as possible." (Motion at ¶11) KDP cited and attached copies of newspaper articles and the League's own publications as proof that years prior to filing its Motion to Intervene, the League was, in fact, specifically aware of DHEC's delineation of the jurisdictional lines at Captain Sams. Two articles contained the same quote from League executive director Dana Beach:

> [A]t least as of November 8, 2016, the League's executive director Dana Beach was confident that "'Setting it [the baseline on Captain Sams] next year will put the setback line in the river and the baseline 100 feet back in the former dunes."

Hurricane confirms instability of Capt. Sam's Spit, Post and Courier, October 16, 2016[1] and *A Wedge in the Sand: Nature Intervenes in Construction Line Controversy: Hurricane Matthew moved the battle lines on Kiawah Island's controversial Captain Sam's Spit*, The Journal of Light

[1] See Exhibit C and Exhibit D to KDP Response (R. pp.__)

Construction, November 8, 2016. KDP also supplied additional documents prepared by the League itself demonstrating that the League has been aware of the baseline redelineation at Captain Sams for a very long time. For example, in November of 2015, the League's Program Director of Air, Water and Public Health, Katie Zimmerman, published the following:

> For eight years, the Coastal Conservation League ... has challenged numerous permits issued to Kiawah Development Partners (KDP) and its affiliates.
>
> ***
>
> KDP has shown that it is not only willing to sacrifice the Spit itself, but also the protections of our entire coastline. To that end, the developers have sought to amend a beachfront management bill in our state legislature this session, and actually managed to convince a senator from Berkeley County to defend its proposal (the "Kiawah Amendment"). The bill in question would set a permanent baseline along our entire coast, defending taxpayers, homeowners and natural resources from development too close to the ocean. The "Kiawah Amendment" would delay setting that baseline, allowing road and other construction to occur even closer to the ocean on Captain Sams Spit.
>
> We plan to fight the "Kiawah Amendment" to the beachfront management bill as the legislative session continues....

Captain Sams Spit Back in Development Headlines, by Katie Zimmerman, S.C. Coastal Conservation League, November 23, 2015 and Captain Sams in the Legislature (discussing legislation dating back to 2008 and the League's efforts to fight the same regarding the baseline at Captain Sam's).[2]

On July 10, 2020, the ALC entered its Order Denying Motion to Intervene with the ALC's findings as to SCALC Rules 20(B) and 20(C). The ALC concluded that the League failed to meet its burden. The ALC summarized its conclusions as follows:

> As the Court has concluded that: (1) the League's motion is untimely; (2) the League has failed to show that it will be aggrieved or adversely affected by the final order; (3) and that the League's intervention will unduly prolong the proceedings and otherwise prejudice Petitioner, the Court need not address whether the League's interests will be adequately represented by the Department.

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[2] See Exhibit D and Exhibit E to KDP Response (R. pp.__).

> **IT IS THEREFORE ORDERED** that the Coastal Conservation League's Motion to Intervene in the above-captioned matter is **DENIED.**

Order Denying Intervention at 6 (emphasis in original).

STANDARD OF REVIEW

SCALC Rule 20 "contains the avenue by which a person may become named or admitted as a party in pending proceedings as well as the standard for intervention" in cases before the South Carolina Administrative Law Court. Roberts v. SCDHEC and Trebor Investments, LLC, Docket No. 12-ALJ-07-0129-CC (McLeod, J.) at p. 6. The Rule permits intervention when a party seeking to join a contested case hearing establishes:

> (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; and
>
> (3) that intervention will not unduly prolong the proceedings or otherwise prejudice the rights of existing parties.

SCALC Rule 20(B). Additionally, SCALC Rule 20(C) requires that a motion 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."

The burden is solely upon a party seeking to intervene to demonstrate to the ALC that intervention is proper and on appeal. See In re Horry Co. State Bank, 361 S.C. 503, 508, 604 S.E.2ed 723, 725 (Ct. App. 2004).

When reviewing a pretrial decision of the ALC denying intervention under SCALC Rule 20, this Court is to defer to the ALC unless the appellant establishes the ALC abused its discretion in denying the motion to intervene. See Ex parte Cordero, No. 2016-000593, 2017 WL 4619214, at *1 (S.C. Ct. App. May 24, 2017) (reference citation only).

On appeal, an ALC decision denying intervention under Rule 20(B) or (C) should not be overturned by this Court absent some "error of law ... so opposed to the trial court's sound

discretion 'as to amount to a deprivation of the legal rights of the party.'" Ex parte Builders Mut. Ins. Co., 431 S.C. 93, 98–99, 847 S.E.2d 87, 90 (2020) (quoting Jeter v. S.C. Dep't of Transp., 369 S.C. 433, 438, 633 S.E.2d 143, 145 (2006)). "Moreover, the error of law must be so opposed to the trial court's sound discretion "as to amount to a deprivation of the legal rights of the party." Id. (citation omitted); see also In re Horry Cty. State Bank, 361 S.C. at 513, 604 S.E.2d at 728 (finding trial judge did not abuse his discretion by denying motion to intervene). See Thomasson v. Ocean Point Golf, Inc., 300 S.C. 29, 33, 386 S.E.2d 282, 285 (Ct. App. 1989). Further, "[b]ecause the South Carolina Rules of Civil Procedure closely parallel the Federal Rules of Civil Procedure, it is [also] appropriate to look to the Federal Rules in interpreting Rule 24." S.C. Tax Comm'n v. Union Cty. Treasurer, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988). As this Court has held, "Commonwealth of Virginia v. Westinghouse Electric Corp., 542 F.2d 214 (4th Cir.1976) teaches that the standard for review of a Rule 24(a)(2) motion is whether the judge abused his discretion in granting or denying the motion." Id.

ARGUMENT

I. THE ALC DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE SOUTH CAROLINA COASTAL CONSERVATION LEAGUE'S LATE ATTEMPT TO INTERVENE BASED ON THE ALC'S FINDINGS.

A. THE ALC PROPERLY FOUND THE LEAGUE FAILED TO SHOW IT WILL BE AGGRIEVED OR ADVERSELY AFFECTED BY THE FINAL ORDER PER SCALC RULE 20(B)(1).

A party is not entitled to intervene in a matter pending before the ALC unless that party can establish, among other things, that he or she "will be aggrieved or affected by the final order." SCALC Rule 20(B)(1). The League's Motion to Intervene in this matter included only one statement in support of this required showing:

> The League seeks intervention in this case because an order moving the beachfront jurisdictional lines seaward on the Spit ***will create the opportunity for Petitioner to construct a road to access the proposed lots to be developed*** and thereby will injure the members of the League who use and enjoy the Spit.

(Motion at ¶8 (emphasis added)). That assertion, however, is hypothetical and speculative; it does not establish the League will be aggrieved or affected by the final order.

The road referenced by the League is part of a permitted infrastructure that is the subject of an entirely separate proceeding decided by Chief ALJ Ralph King Anderson, III. See South Carolina Coastal Conservation League v. DHEC, KDP II, LLC & KRA Dev., LP, No. 15-ALJ-07-0369-CC. The location for the site improvements for that proposed road previously permitted by the Department is the subject of an appeal of the ALC's decision by the League to the Supreme Court. That case and the related appeal are not relevant in any way to the determination of the jurisdictional lines on the beachfront side of the Captain Sams. This other case involves an entirely different Department determination involving entirely different regulatory criteria that are unrelated to the delineation under appeal in this administrative proceeding. (See Brief of

Respondents KDP, LL, LLL et al., Appellate Case No. 2019-000074, at p. 1)(identifying the six issues on appeal, none of which are related to S.C. Code Ann. § 48-39-280 by which KDP seeks review of the Department's 2017 delineation of the oceanfront jurisdictional lines on the ocean side of the Captain Sams)).

The League's efforts to connect this case with the ALC Docket No. 15-ALJ-07-0369-CC, South Carolina Coastal Conservation League v. DHEC, KDP II, LLC & KRA Dev., LP, demonstrates only the League's view that all things Captain Sams are related and that the League will go to any length to oppose them. That is the League's true objection – to stop any development on Captain Sams. The Motion itself admits that the "interest" the League really seeks to protect is not an interest at all but simply its ongoing commitment to oppose any proceeding in any way related to KDP's efforts to accomplish its vested rights to a limited residential development on a small portion of Captain Sams. The Motion frankly admits:

> [KDP] has for many years, pursued development of the Spit and has sought permits from DHEC, including a critical area permit to construct a vertical bulkhead and sloping revetment and an NPDES stormwater permit and coastal zone consistency certification. ***The League has challenged each and every permit*** approval authorizing impacts in furtherance of development of the Spit.

(Motion at ¶5 p. 6) (citing Kiawah Development Partners, II v. South Carolina Department of Health & Env. Control, 813 S.E.2d 691 (2018); South Carolina Coastal Conservation League v. DHEC, KDP II, LLC & KRA Dev., LP, Docket No. 15-ALJ-07-0369-CC) (emphasis added). The League asserts that since it has consistently appealed every approval or permit of the Department related to Captain Sams, it has some "interest" in everything related to the Property even if it has nothing to do with the critical area, beach, or the public trust tidelands. Inherent in this argument is a dangerous suggestion; if the League litigates long enough in separate cases that can arguably be related to a common parcel of land or to some broadly stated goal of the League,

then the League automatically has a right to participate in any administrative proceedings in any way involving that land.

Unwinding the League's attempt to combine this case with ALC Docket No. 15-ALJ-07-0369-CC, it is clear that the League can fully protect its opposition to the roadway in its appeal to the Supreme Court of the final order in 15-ALJ-07-0369-CC. The ALC recognized the League's glib conflation of the two cases in an effort to concoct an "interest" in this administrative proceeding. In ruling against the League, the ALC stated "Whether a road can or cannot be built is not at issue in this case but rather, the application of the statutory criteria to the facts that govern the setting of jurisdictional lines on beachfront property that is privately owned." Order at p. 3-4.

Therefore, the League's opposition to a Department permit to allow the site improvements for the road that is being litigated in another case does not establish an interest of the League in need of protection in this case. The ALC's determination that the League did establish an interest that will be affected by the determination of the jurisdictional lines is fully supported, was not an abuse of discretion, and should be affirmed.

i. THE LEAGUE ADMITS IT IS NOT AN "AGGRIEVED PARTY" PER SCALC RULE 20(B)(1).

The ALC's determination that the League is not an "aggrieved party" as required under SCALC Rule 20(B)(1) is also fully supported. Even the League's Motion to Intervene admits it does not qualify as an "aggrieved party." The Motion admits:

> The League seeks intervention in this case because an order moving the beachfront jurisdictional lines seaward on the Spit [in this case] ***will create the opportunity for Petitioner to construct a road to access the proposed lots to be developed*** and thereby will injure the members of the League who use and enjoy the Spit.

(Motion at 3)(double emphasis added)

A person will be "aggrieved by a judgment or decree when it operates on his or her rights

of property or bears directly on his or her interest." Beaufort Realty Co. v. Beaufort Cty., 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001)(citing Cisson v. McWhorter, 255 S.C. 174, 178, 177 S.E.2d 603, 605 (1970); Bivens v. Knight, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (1970). "The word 'aggrieved' refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation." Id.

In Beaufort Realty Co., 346 S.C. 298, 551 S.E.2d 588, this Court affirmed the trial court's finding that the League lacked standing to appeal a zoning administrator's decision to the Zoning Board because the League was not (as it is not here) an "aggrieved" party. Justice Hearn analyzed the League's position and sought to identify "a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation." Beaufort Realty Co., 346 S.C. at 301, 551 S.E.2d at 589. Justice Hearn concluded the League failed to establish it was aggrieved because its allegations (like here) were based only on possible future events. This Court's analysis and conclusion are dispositive here:

> The League has not alleged that it or its members have suffered or will suffer an individualized injury as the result of the filing of the subdivision plats. Although the League alleges its members will suffer injury if the islands are developed, the injury is purely conjectural and hypothetical. There is no evidence in the record that either the League or its members have suffered any actual injury by the filing of the subdivision plats.

Id. at 302, 590.

The filing of the plat in Beaufort Realty Co. merely created the potential for other events that ***might*** have followed and ***possibly*** could have cause some future harm to a current or perhaps future member of the League. Likewise here, the League alleges it is aggrieved because a ***potential*** change in the jurisdictional lines ***might*** allow some future development on Captain Sams that, ***if other hypothetical events occur,*** has the possibility of harming a person who is also a member of

the League ***in the future***.

SCALC Rule 20(B)(1) only permits intervention if the movant demonstrates and the ALC finds that "the movant will be aggrieved or adversely affected by the final order." The ALC here properly found the League's allegations of potential harm were hypothetical and based on conjecture:

> Here, the League has no personal stake in the delineation of the base and setback lines. The injury about which the League and its affiant complain (that the possibility of a seaward movement of the jurisdictional line "will create the opportunity for Petitioner to construct a road"), is neither actual nor imminent but rather conjectural or hypothetical. See generally, Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1991); Sea Pines Ass 'nfor the Protection of Wildlife, Inc. v. S.C. Dep't of Natural Resources, 345 S.C. 594, 550 S.E.2d 287 (2001). The League has presented no evidence that a decision by the Court establishing the jurisdictional lines will result in any individualized or particularized harm.

(Order at p. 4)

The ALC correctly found that the League does not have a proper or sufficient interest in this limited administrative proceeding to justify intervention, nor has it shown how its interests will be adversely affected. Yes, the League has hypothesized and wondered about *potential* impacts depending on multiple other events totally unrelated to this proceeding, but it did not demonstrate anything more than the League is really concerned about one thing – that KDP may in the future "construct a road to access the proposed lots to be developed" on the Spit. (Motion at ¶8)

Judge Robinson analyzed the Affidavit of Rich Thomas submitted by the League in support of its Motion and correctly found it failed to provide any support beyond the hypothetical and speculative allegations of the Motion:

> The League submitted the affidavit of an individual who resides three miles from the Property and regularly engages in recreational activities either on the beach at or in the vicinity of the Property.
>
> The individual states that he testified in a contested case hearing at this Court wherein another judge granted Petitioner a permit to install a sheet pile wall for purposes of erosion control (his affidavit did not mention that the order in that case which is on appeal also authorized the construction of a roadway, stormwater management system, utility lines, gravity sewer, manholes, a pump station, a force main, and water lines in connection with a twenty-six lot residential development on the Property) and that his understanding is that is the location of the jurisdictional lines in this matter would provide additional room to allow for the construction of the road.
>
> He concludes that the construction of an access road along with development would diminish his enjoyment of the area and deter the existing wildlife habitat that exists in the area of the Property.
>
> Again, the issue in this case does not pertain to the construction of an access road or any permit that would allow for development

(Order at p. 4, Note 2)

The ALC properly found that this case is not about whether a road can be built under a series of potential and hypothetical scenarios (all of which depend on the permits that are the subject of another case); this case is solely about "the application of the statutory criteria to the facts that govern the setting of jurisdictional lines on beachfront property that is privately owned [by KDP]." (Order at 3-4) Therefore, the League has no actual, personal stake in the location of the jurisdictional lines being debated in this case. The League's grievance about the potential of a road is specifically being addressed in another case. The ALC correctly found that the potential adverse impact relied upon by the League "is neither actual nor imminent but rather conjectural or hypothetical." (Order a 4) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1991); Sea Pines Ass'n for the Protection of Wildlife, Inc. v. S.C. Dep't of Natural Resources, 345 S.C. 594, 550 S.E.2d 287 (2001)).

The ALC did not abuse her discretion in finding that the League "presented no evidence that a decision by the Court establishing the jurisdictional lines will result in any individualized or particularized harm." (Order at 4) Accordingly, the ALC also did not abuse her discretion in finding that the League failed to establish, per ALC Rule 20(B)(1), that it will be "aggrieved or adversely affected by the final order." The ALC's order should be affirmed.

B. THE ALC PROPERLY FOUND THE LEAGUE'S INTERVENTION WILL UNDULY PROLONG THE PROCEEDINGS AND OTHERWISE PREJUDICE PETITIONER PER SCALC RULE 20(B)(3).

The ALC correctly found that allowing intervention by the League at this stage of the case (currently over three years since KDP's filing for a contested case hearing), would unduly prolong this already protracted proceeding. After noting that at the time of the League's Motion KDP had already "been denied a timely final adjudication on the merits for more than thirty-two months," the ALC realistically examined the impact of the League's request and found that League intervention would necessarily "introduce new attorneys and witnesses and added discovery (written and depositions) thereby prolonging the proceedings which have already been unduly delayed through no fault of Petitioner." Order at 5. The Order demonstrates the ALC fully considered the legal as well as practical issues involved, including the fact that League intervention "would also serve to exponentially increase the time and costs incurred by Petitioner in preparing for and trying this contested matter where any possible interest the League may have is speculative at best." (Order at 5)

Nothing in the League's briefing to this Court demonstrates the ALC's recognition that League intervention would unduly prolong the case was in any away an abuse of discretion. The only case-specific allegation made by the League is an unsupported conclusion that its intervention

will not make the litigation "more complicated, as burdens of proof remain unaltered and the League is ready to meet all deadlines set by the court." (App. Brief at 15) Of course, this statement is simply not accurate and is not consistent with the League's other assertions. For example, in its Motion to Intervene the League boasted of its many years of successfully delaying KDP's use and/or development of any portion of Captain Sams Spit:

> [KDP] has, for many years, pursued development of the Spit and has sought permits from DHEC, including a critical area permit to construct a vertical bulkhead and sloping revetment and an NPDES stormwater permit and coastal zone consistency certification. **The League has challenged each and every permit approval authorizing impacts in furtherance of development of the Spit.** *See Kiawah Development Partners, II v. South Carolina Department of Health & Env. Control,* 813 S.E.2d 691 (2018); *South Carolina Coastal Conservation League v. DHEC, KDP II, LLC & KRA Dev., LP,* Docket No. 15-ALJ-07-0369-CC.

(Motion at p.2) (emphasis added); see also discussion, supra, at p. 2 (regarding League's sole goal of stopping development on the Spit).

The League cannot reasonably expect this Court to reverse the ALC on the grounds that the ALC abused her discretion in failing to conclude that - for the first time in this particular proceeding - the League suddenly intends to take a more relaxed role or that the League will not pursue all available legal and factual claims available to further its goal of prolonging all proceedings and preventing KDP's exercise of its vested rights to a limited residential development on less than 20% of Captains Sams. The League's brief acknowledges that it intends to extend the case as long as possible. (See App. Brief at 14) ("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.").

The current state of the underlying case is also important to consideration of Rule 20(B)(3)'s requirement that requested "intervention will not unduly prolong the proceedings or

otherwise prejudice the rights of existing parties." This matter has already been significantly delayed. See Order at p. 5 ("Petitioner has been denied a timely final adjudication on the merits for more than thirty-two months. The addition of the League as a party at this late stage would [improperly prolong] the proceedings which have already been unduly delayed through no fault of Petitioner."). The contested hearing is set for August 24, 2021, less than five months from now. Allowing intervention at this late date would slow these proceedings and add an exponential amount of unnecessary work for the parties and their counsel.

KDP is entitled to a timely determination of the correct location of the baseline and setback line on the Property in this administrative proceeding between it and the appropriate regulatory agency.

The ALC's finding and conclusion that the intervention by the League will unduly prolong the proceedings and otherwise prejudice Petitioner per SCALC Rule 20(B)(3) is fully supported:

> The addition of the League as a party at this late stage would introduce new attorneys and witnesses and added discovery (written and depositions) thereby prolonging the proceedings which have already been unduly delayed through no fault of Petitioner. Intervention by the League would also serve to exponentially increase the time and costs incurred by Petitioner in preparing for and trying this contested matter where any possible interest the League may have is speculative at best.

Order at 5.

The ALC decision on the League's failure to establish the necessary element for intervention under SCALC Rule 20(B)(3) does not constitute an abuse of discretion. Accordingly, this Court should affirm the ruling of the ALC.

C. THE ALC PROPERLY FOUND THE LEAGUE'S MOTION WAS UNTIMELY PER SCALC RULE 20(C).

In order to intervene in an ALC matter, a party must establish the requirement for timeliness set forth in SCALC Rule 20(C), which mandates:

> **Time for Motion for Intervention.** 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 importance of timeliness is repeated through cases analyzing SCALC Rule 20(C), such that the League readily admits that the "ALC Rules place special emphasis on the issue of timeliness." Brief at 6.

As part of the intervention analysis, the ALC is to make findings on this element and those findings are not disturbed on appeal unless they demonstrate a clear abuse of discretion by the lower court. Here, the ALC correctly found that the League's Motion to Intervene failed to meet the timeliness requirements of SCALC Rule 20(C) and was not a "manifest abuse of discretion" required for the reversal. See Ex parte Builders Mut. Ins. Co., 431 S.C. 93, 98–99, 847 S.E.2d 87, 90 (2020) (An appellate court reviewing a decision on intervention "will not disturb the trial court's decision absent a manifest abuse of discretion that results in an error of law.").

Analyzing the timeliness of the League's Motion to Intervene, the ALC wrote, "SCALC Rule 20(C) provides that a motion 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.' Order at 5. Then, addressing head-on the League's position that it did not know about this proceeding and had, therefore, moved timely to intervene, the ALC stated:

> The League asserts that "it was unaware of the existence of this particular appeal" and that even if it had been so aware, it maintains that it would not have been appropriate to intervene during the pendency of a motion to dismiss.
>
> This case has been pending with the Court since February 5, 2018 and is a matter of public record. Thus, even if the League did not have actual knowledge of this pending case, the League should have known by the exercise of reasonable diligence that a request for a contested case hearing had been filed and sought to intervene in a timely manner so as to not prejudice existing parties to the litigation.

(Order at 5)

Firmly rejecting the League's professed ignorance of this proceeding based on the contrary facts, the ALC continued by addressing the actual knowledge of the League:

> Moreover, other facts indicate that the League was aware as early as 2016 that the baseline for the Property would be set in 2017. An article in the Post & Courier quoted Dana Beach, the League's executive director as stating, "setting it [the baseline] next year will put the setback line in the river and the baseline 100 feet back in the former dunes."[3]
>
> Mr. Beach's comments were reiterated on November 8, 2016.[4]

(Order at 5).

The League's Motion also boasted that the League has been monitoring all events at the Captain Sams over the past ten years and has challenged "each and every permit approval authorizing impacts in furtherance of development of the Spit." (Motion at p.2) The record does not contain a single credible statement or fact to contradict the League's own statements. Further, the League did not contest that this proceeding is currently scheduled for trial in August 2021 and

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[3] Citing to Hurricane Confirms Instability of Capt. Sam's Spit, Post and Courier, October 16, 2016, available online at https://www.postandcourier.com!opinionleditorials/hurricane-confirmsinstability-of-capt-samsspit/article_1cba2d94-9643-11e6-8d44-974a15f79888.html

[4] Citing to A Wedge in the Sand: Nature Intervenes in Construction Line Controversy: Hurricane Matthew moved the battle lines on Kiawah lsland's controversial Captain Sam Spit, The Journal of Light Construction, November 8, 2016, available online at: https://www.jlconline.comlcoastal-contractor-news/nature-intervenes-in-construction-line-controversy_o.

that its intervention would require the trial be postponed indefinitely, imposing considerable prejudice on KDP that has been trying for more than three years to proceed with the contested case hearing.

The ALC's finding that the League's Motion to Intervene was untimely under SCALC Rule 20(C) was not an abuse of discretion and should be affirmed.

II. THE LEAGUE FAILED TO MAKE THE REQUIRED SHOWING UNDER RULE 20(B)(2) THAT THE DEPARTMENT WOULD NOT ADEQUATELY PROTECT ITS INTERESTS IN SUSTAINING THE DEPARTMENT'S DETERMINATION OF THE JURISDICTIONAL LINES, ONE OF THE NECESSARY SHOWINGS TO INTERVENE AS A MATTER OF RIGHT.

Because of the ALC's findings and conclusions regarding the League's failure to meet the requirements of SCALC Rules 20(B)(1), 20(B)(2), and 20(C), the ALC was not required to make a determination whether the League established the Department will not adequately protect its interests in advocating for its delineations of the baseline and setback line, an essential prerequisite for intervention pursuant to Rule 20(B)(2). The League completely failed to meet this requirement for intervention as well. Analysis of SCALC Rule 20(B)(3) likewise justifies the ALC's denial of intervention.[5]

It is essential to note that neither the League's Motion to Intervene nor its Brief claims that the Department's defense of KDP's appeal of the delineation is or was insufficient, legally or

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[5] Respondent KDP submits Argument II as additional sustaining grounds. This Court may affirm the ALC's decision "for any reason appearing in the record, [and] the prevailing party may—but is not required to—raise additional sustaining grounds to support the lower court's decision. Dreher v. S.C. Dep't of Health & Envtl. Control, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015) (citing Rule 220(c), SCACR); see also I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 417, 420, 526 S.E.2d 716, 722, 723 (2000) ("In raising an additional sustaining ground in an appeal, the party who prevailed in the lower court urges an appellate court to affirm the lower court's ruling for a reason other than one primarily relied upon by the lower court.").

factually. Significantly, the League does not contend that it would advocate for the location of the baseline in a location that is different in any respect from the location being advanced by the Department. The League makes no mention of any claimed shortcoming in the Department's advocacy for its delineation of these two jurisdictional lines. The League does not say what it would do that the Department has not done or will not be doing if it was permitted to intervene. The League does not put forward any affidavits of experts or any other witnesses related to the location of the lines, much less ones that advance facts, opinions, or positions that are not being advocated by the Department.

In its Brief the League relies on caselaw involving South Carolina Rule of Civil Procedure 24(a), Intervention of Right. This Rule provides for intervention "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest," except in circumstances where "the applicant's interest is adequately represented by existing parties." SCRCP 24(a)(2). Intervention as a matter of right thus depends on a showing that the League's interests are not adequately represented by the Department.

Because the League is a mere stranger and not an affected landowner, it has no interest at stake in KDP's appeal of the baseline and it has no remedy available to it in this proceeding. Nevertheless, the League asserts its interests in this case 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." Brief at 10. "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." (Id.)

As to the first of the two claimed interests, the ALC's determination of the appropriate

location of these two jurisdictional lines *on the private property of KDP* does not have any effect whatsoever on the public's use and enjoyment *of the beach.* The League conveniently omits noting that the public's rights (and its members' rights) to recreational use of the beach stop at the mean high water line. The League and the public have absolutely no recreational interest in the dunes on KDP's private property.

Just as important for the analysis of whether the League established a basis for intervention as a matter of right, the League completely fails to demonstrate how or why the Department cannot properly protect the public's interest in the use of the beach. This protection is a statutory responsibility of the Department under the Coastal Zone Management Act and the Beachfront Management Act.

Furthermore, the League has admitted that it wants exactly what the Department wants – it has no different interests. (KDP Opposition to Mtn at p. 9 and Exhibit A) According to the website for the League's attorneys, the Motion to Intervene seeks an order "upholding DHEC's 2017 jurisdictional line determination and preventing it from moving seaward." Advocates Propose to Intervene in Effort to Revise Jurisdictional Lines on Captain Sams Spit, SCELP Press Release, posted May 26, 2020, available online at: https://scelp.org/posts/view/184.[6] Here, the League admits the Department is asserting the positions that the League wants advanced. There is no conflict between the positions of the League and the Department.

The League's second alleged interest also does not support this needed basis for intervention. The League's members' claimed recreational use of the river tidelands in other litigation is irrelevant. This case does not involve public trust tidelands. It involves locating the

[6] See Exhibit A KDP Response (R. pp.__)

baseline and setback line on KDP's upland outside the critical area. The League's argument that it is committed to preventing KDP from impairing the public's use of tidelands is completely unrelated to showing that the Department cannot adequately represent the public's interest in its delineation of the baseline and setback line on KDP's upland.

The ALC correctly found that "The League has presented no evidence that a decision by the Court establishing the jurisdictional lines will result in any individualized or particularized harm." (Order at 4) So, even if it was proper for the League to somehow link these proceedings, the ALC correctly found that the League cannot even articulate a possible harm, much less a harm that is not being addressed by the Department.

Because the League failed to demonstrate the Department is incapable or deficient in its prosecution of the proof supporting its delineation of these two jurisdictional lines, the ALC's order denying intervention should be affirmed on this separate, independent basis. properly found within Her Honor's discretion that there is no justification for intervention.

III. THE LEAGUE FAILED TO ESTABLISH IT HAS STANDING TO INTERVENE ON BEHALF OF ITS MEMBERSHIP.

"In its most basic sense, '[s]tanding refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control, 430 S.C. 200, 209–10, 845 S.E.2d 481, 486 (2020), reh'g denied (Aug. 7, 2020) (quoting S.C. Dep't of Soc. Servs. v. Boulware, 422 S.C. 1, 7, 809 S.E.2d 223, 226 (2018). It is well established across all types of actions that "[s]tanding to sue is a fundamental requirement in instituting an action." Id. (citing Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999)). Standing may be acquired (1) by statute, (2) under the principle of

"constitutional standing," or (3) via the "public importance" exception to general standing requirements. Id. (quoting Freemantle v. Preston, 398 S.C. 186, 192, 728 S.E.2d 40, 43 (2012)).

The League never addressed standing before the ALC – not in its Motion to Intervene and not in its Return to KDP's Response to the Motion to Intervene. Nevertheless, standing is an essential jurisdictional matter that may be raised at any time including on appeal. See Davidson v. Randall, 912 F.3d 666 (4th Cir. 2019). As set forth below, this Court should affirm the decision of the ALC based upon the additional grounds that S.C. Code § 48-39-280 limits standing to an aggrieved landowner who wishes to challenge a Department delineation per the statute and the League does not have standing under Lujan, 504 U.S. at 560–61, 112 S. Ct. 2130, as previously applied by this Court to reject the League in Beaufort Realty Co., 346 S.C. 298, 551 S.E.2d 588.[7]

A. S.C. CODE § 48-39-280 LIMITS STANDING TO AN AGGRIEVED LANDOWNER WHO WISHES TO CHALLENGE PER THE STATUTE.

Statutory standing exists when a statute confers upon a party the right to sue; determining whether a statute confers such standing is an exercise in statutory interpretation. Youngblood v. S.C. Dep't of Soc. Servs., 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2020); see also Pres. Soc'y of Charleston , 430 S.C. at 210, 845 S.E.2d at 486.

This proceeding is a landowner's appeal of the Department's establishment of the oceanfront jurisdictional lines on its land in accordance with specific provisions of S.C. Code Ann. § 48-39-280. KDP owns the property subject to the delineation. The statute permits "A ***landowner*** claiming ownership of property affected who feels that the final or revised setback line, baseline, or erosion rate as adopted is in error, must be granted a review of the setback line, baseline, or

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[7] Respondent KDP submits Argument III as additional sustaining grounds. See also FN5, supra.

erosion rate, or a review of all three" S.C. Code Ann. § 48-39-280(E) (double emphasis added). Per the plain language of the statute, the General Assembly granted this right of appeal solely to the landowner. The General Assembly did not extend that right to any other person who might claim to be potentially aggrieved by the delineation. In accord with this reasoning, this Court explained in Home Health Servs., Inc. v. S.C. Dep't of Health & Env't Control, 298 S.C. 258, 379 S.E.2d 734 (Ct. App. 1989) that when a statute creates a remedy of seeking judicial review to be carried out pursuant to the APA, S.C. Code § 1-23-380, a person who would not qualify for review of the agency decision likewise cannot participate in judicial review.

In its Motion the League admits that KDP is the landowner and, therefore, admits KDP is the only party entitled to participate in this case. See Motion at p. 2 (conceding KDP "is the owner"). Because the League is a mere stranger and not an affected landowner, it has no right to partake in the appeal of the landowner, nor is the ALC authorized to permit the League to participate in KDP's claim filed pursuant to this specific and limited statutory remedy. See A.O. Smith Corp. v. S.C. Dep't of Health & Envtl. Control, 428 S.C. 189, 201, 833 S.E.2d 451, 458 (Ct. App. 2019) ("The General Assembly has the authority to limit the subject matter jurisdiction of a court it has created; therefore, it can prescribe the parameters of the ALC's powers." (quoting Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control, 403 S.C. 576, 585, 743 S.E.2d 786, 791 (2013)).

The plain language of S.C. Code § 48-39-280 creates a pathway to the ALC for a "landowner claiming ownership of property affected who feels that the final or revised setback line, baseline, or erosion rate as adopted is in error." S.C. Code Ann. § 48-39-280(E). There is no provision in the statute conferring standing on persons who are not property owners. The General Assembly has prescribed the parameters for review. Applying traditional statutory interpretation

maxims, where the terms of the statute are clear, the court must apply those terms according to their literal meaning. See Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995). Accordingly, not only does S.C. Code Ann. § 48-39-280(E) not grant standing to the League, it stands as a specific bar to the League's participation given the lack of statutory authority for the ALC to entertain the League's claims.

To read S.C. Code Ann. § 48-39-280 as granting standing to the League leads to the absurd results that anyone generally asserting an interest in the location of the delineated lines on someone else's property could intervene and totally disrupt a procedure intended to resolve only questions of the delineation between the landowner and the Department. That is surely not what the legislature intended, given that it used only the term "landowner." A court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute. Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (citing Berkebile v. Outen, 311 S.C. 50, 426 S.E.2d 760 (1993)).

Also, as the ALC has recognized, the South Carolina's Administrative Law Court is "an administrative body with limited jurisdiction" and, as such the court cannot extend its geographic or subject matter reach without authorization. See S.C. Dep't of Revenue, Petitioner, No. Docket No.: 19-ALJ-17-0110-IJ, 2019 WL 2576507, at *2 (June 11, 2019) (Hon. Shirley C. Robinson, S. C. Administrative Law Judge).

Allowing intervention in this proceeding would allow the League to utilize a procedure the General Assembly only authorized for landowners and it would impermissibly expand the General Assembly's specifically limited jurisdiction for access to the ALC in delineation disputes.

B. THE LEAGUE DOES NOT HAVE STANDING UNDER LUJAN v. DEFENDERS OF WILDLIFE, 504 U.S. 555, 560–61, 112 S.CT. 2130 (1992) AS PREVIOUSLY APPLIED BY THIS COURT IN FINDING THE LEAGUE DID NOT HAVE STANDING IN BEAUFORT REALTY CO. v. BEAUFORT CTY., 346 S.C. 298, 551 S.E.2D 588 (CT. APP. 2001).

Even though standing in this case is determined under the applicable provision of Section 48-39-280, the League also does not have constitutional standing. See Pres. Soc'y of Charleston, 430 S.C. at 210, 845 S.E.2d at 486 (citing ATC South., Inc. v. Charleston Cty., 380 S.C. 191, 195-98, 669 S.E.2d 337, 339-40 (2008) (turning to constitutional standing only after first considering and rejecting the application of statutory standing). As set forth below, the League's lack of associational standing, including its lack of status as a real party in interest, is yet another additional ground for this Court to affirm the decision of the ALC.

As the United States Supreme Court explained in Lujan, 504 U.S. at 560 n. 1, 112 S.Ct. 2130, a claimant cannot rely on generalized injuries. The Court ruled, "'[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not possess standing." Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014) (quoting Lujan, 504 U.S. at 573–74, 112 S.Ct. 2130)).

There are three elements to constitutional standing. First, the party must have "suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest." Youngblood, 402 S.C. at 317–18, 741 S.E.2d at 518 (quoting ATC South, 380 S.C. at 195, 669 S.E.2d at 339; see also Lujan, 504 U.S. at 560, 112 S.Ct. 2130. Second, there must exist a "causal connection … between the injury and the challenged conduct." Id. Third, "it must

be likely that a favorable decision will redress the injury." Id. "When an organization is involved, the organization has standing on behalf of its members if one or more of its members will suffer an individual injury by virtue of the contested act." Sea Pines, 345 S.C. at 600-601, 550 S.E.2d at 291.

An organization may possess standing by virtue of associational standing on behalf of its members. An organization has associational standing "if one or more of its members will suffer an individual injury by virtue of the contested act." Sea Pines, 345 S.C. at 600–01, 550 S.E.2d at 291. "The three part test for associational standing requires that an association's members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Carnival Corp., 407 S.C. at 75–76, 753 S.E.2d at 850–51 (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000), see also Beaufort Realty Co., 346 S.C. at 301, 551 S.E.2d at 589 (applying that test).

This Court previously rejected the League's assertion of standing under similar circumstances where the League relied solely on conjectural and hypothetical harm alleged as possibly occurring in the future, just as in this case, because the League failed to make any showing of actual or imminent harm. See Beaufort Realty Co., 346 S.C. at 303, 551 S.E.2d at 590 ("Therefore, we hold the League does not have standing under the three-pronged Lujan test or under Rule 201, SCACR, since neither it nor its members are aggrieved parties who have suffered injury in fact. Accordingly, we affirm [the circuit court's finding that the League lacked

standing].")[8]

In Beaufort Realty Co., this Court recognized that the League did not have standing because all the League offered as supposed injury were cobbled together "prospective concern" about the future and what-ifs regarding its members' alleged fear of "the prospect of future harm" from possible future development. 346 S.C. at 303, 551 S.E.2d at 590. The importance of this ruling cannot be overstated because it is recognition by this Court that allegations of associational standing must be parsed to their most basic allegations to be certain the association has established facts that meet "the standard of 'concrete and particularized and ... actual or imminent' harm" rather than merely "prospective concern" which is insufficient and which does not establish standing. Id.

As this Court reminded the League in Beaufort Realty Co., the arguments made by "the League's attorney" regarding any alleged injury-in-fact "are not evidence." Beaufort Realty Co., 346 S.C. at 302, 551 S.E.2d at 590 (citing McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."); Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct.App.1991); Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 184 (Ct.App.1986).

The ALC Order disposed of the single affidavit submitted by the League in the following:

> The League submitted the affidavit of an individual who resides three miles from the Property and regularly engages in recreational activities either on the beach at or in the vicinity of the Property.
>
> The individual states that he testified in a contested case hearing at this Court wherein another judge granted Petitioner a permit to install a sheet pile wall for purposes of erosion control (his affidavit did not mention that the order in that case

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[8] Beaufort Realty Co. v. Beaufort Cty., 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001) is also discussed at length in Section I.A.i., supra. ("The League admits it is not an "aggrieved party" per SCALC Rule 20(B)(1).").

> which is on appeal also authorized the construction of a roadway, stormwater management system, utility lines, gravity sewer, manholes, a pump station, a force main, and water lines in connection with a twenty-six lot residential development on the Property) and that his understanding is that is the location of the jurisdictional lines in this matter would provide additional room to allow for the construction of the road.
>
> He concludes that the construction of an access road along with development would diminish his enjoyment of the area and deter the existing wildlife habitat that exists in the area of the Property.
>
> Again, the issue in this case does not pertain to the construction of an access road or any permit that would allow for development.

(Order at p. 4, Note 2)

The Affidavit submitted by the League in this case also referred to the areas at Captain Sams that the individual uses: riding his bike to Beachwalker Park; riding on the beach; sitting on the beach at Captain Sams to observe the wildlife; observing many other people enjoying this area.[9] (League Reply, Affidavit at 1-2) However, none of these areas ison the highland owned by KDP where the baseline and setback line are located and proposed to be located, nor will use of the beach and public trust tidelands by the League's members be impaired in any manner by the location of these two jurisdictional lines.

As noted, all of the League's supposed fears are not injuries; instead they are *hypothetical* and *potential* scenarios. These speculative assertions do not provide standing, as this Court previously ruled in rejecting the League's attempt to use the same arguments in Beaufort Realty Co., 346 S.C. 298, 551 S.E.2d 588.

The League's failure to demonstrate standing constitutes another additional ground for affirming the determination of the ALC denying the League's Motion to Intervene.

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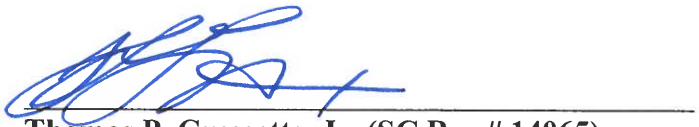
[9] Only one affidavit was submitted.

CONCLUSION

For the reason stated herein, this Court should AFFIRM the Order of the ALC denying the late request of the South Carolina Coastal Conservation League seeking to intervene in the proceeding below.



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April 2, 2021

Charleston, South Carolina

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

Appellate Case No. 2020-001090

Ex Parte: Coastal Conservation League,.....Appellant,

In Re: KDP, II, LLC, ...Respondent,

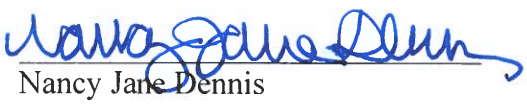
v.

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

PROOF OF SERVICE

I, Nancy Jane Dennis, a paralegal with Walker Gressette Freeman & Linton, LLC, hereby certify that I have served this **2nd day of April 2021**, **RESPONDENT'S INITIAL BRIEF AND DESIGNATION OF MATTER**, on all counsel of record by electronic mail only to the following:

Amy E. Armstrong, Esq. amy@scelp.org Leslie S. Lenhardt, Esq. leslie@scelp.org SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT P.O. Box 1380 Pawleys Island, SC 29585 *Attorneys for Appellant Coastal Conservation League*	Bradley D. Churdar, Esq. churdabd@dhec.sc.gov Sallie P. Phelan, Esq. phelansp@dhec.sc.gov Office of General Counsel SCDHEC-OCRM 1362 McMillan Avenue, Suite 400 Charleston, SC 29405 *Attorneys for Respondent South Carolina Department of Health and Environmental Control*



Nancy Jane Dennis
Paralegal

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April 2, 2021

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Hon. Jenny Abbott Kitchings
ctappfilings@sccourts.org
Clerk of Court for S.C. Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Ex Parte: Coastal Conservation League v. KDP, et al.
Appellate Case No. 2020-001090
WGFL File 2338.042

Dear Ms. Kitchings:

Attached for filing with the Court please find Respondent, KDP, II, LLC's Initial Brief, Designation of Matter, and Proof of Service by electronic mail only.

Thank you very much for your courtesies in this matter

Sincerely,

WALKER GRESSETTE FREEMAN & LINTON, LLC

Thomas P. Gressette, Jr.

c: Amy E. Armstrong, Esq. (Email only)
Leslie S. Lenhardt, Esq. (Email only)
Bradley D. Churdar, Esq. (Email only)
Sallie Page Phelan, Esq. (Email only)