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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 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.

REPLY BRIEF OF APPELLANT

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May 3, 2021

TABLE OF CONTENTS

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TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

ARGUMENT

I. The ALC failed to find the League would be adversely affected.

Respondent KDP agrees that the League must show it will be aggrieved or adversely affected by an adverse Final Order from the ALC pursuant to SCALC Rule 20(B)(1). KDP asserts that the League does not meet this standard because "it is clear that the League can fully protect its opposition to the roadway in its appeal to the Supreme Court in the final order in 15-ALJ-07- 0369-CC," (Respondent' Brief p. 15), and that the Leagues's "grievance about the potential for a road is specifically being addressed in another case."[1] (Respondent's Brief p. 18).

What KDP (and the ALC) fail to acknowledge is that if the jurisdictional lines at issue in this appeal are moved seaward, as KDP seeks, then KDP will secure more space to construct a road and other infrastructure than it presently has. KDP knows, as well as the League, that its ability to construct a road and other infrastructure to support development on the Spit is constrained by two lines: the critical area line on the Kiawah River side and the setback and baseline on the ocean side. Due to the persistent and significant erosion on the Kiawah River side of the Spit, KDP's ability to construct the road and infrastructure – should it prevail in the case before the Supreme Court – is undisputedly constrained by the beachfront jurisdictional lines at issue in the present case. Should KDP prevail in moving the beachfront jurisdictional lines seaward, it would undisputedly provide a wider corridor through which it could construct structures. In other words, even if the League

[1]Despite KDP's assertions that the road and development on the Spit are irrelevant to the issues in the present appeal, it nonetheless begins its brief by discussing that development, and addresses it elsewhere through its brief. (Brief pp. 2, 6 & 20).

prevails in the case on appeal to the Supreme Court, if KDP prevails in the instant case, a road, infrastructure and the development they support could still be constructed, resulting in the harm the League seeks to prevent will occur.[2]

KDP's recitation of the administrative permit appeals for construction on Captain Sams Spit and its attempts to characterize them as "entirely unrelated to the delineation of the two jurisdictional lines..." does nothing to undermine the League's status as affected or aggrieved by an adverse ruling in the present matter. (Respondent's Brief p. 6) In fact, the League's interest in the outcome of this contested case is **directly** linked to two other contested cases that similarly impact the outcome of the future development proposed on Captain Sams Spit. The ALC failed to consider the impacts of this case on the League's pending litigation over other permits issued to facilitate KDP's plans to develop the Spit, and the irrefutable connection among them, much less the implications of this case on the fate of the Spit: the jurisdictional lines dictate where and what type of construction can occur on the 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 a bulkhead combined with a sloping rock revetment along the Kiawah River side of the Spit. The League appealed the adverse decision of the Administrative Law Judge, which, after two rehearings, resulted in the Supreme Court's Opinion reversing and remanding the ALC's decision authorizing the bulkhead/revetment system.

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[2]It bears noting that the League undisputedly has standing to challenge the permits authorizing the road and other infrastructure at issue in the case pending before the Supreme Court. Kiawah Dev. Partners, II, Inc. S.C. Dept. Of Health & Env. Control, 422 S.C. 632, 813 S.E.2d 691 (2018).

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).

While the first contested case was again 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 50-house residential development on Captain Sams Spit. 2018 WL 4854113 (Admin. Law Judge Div. 2018, hereinafter "the 2018 ALC Order").[3] 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 174 acres of highland, and approximately 44.03 acres of that highland was buildable area above the baseline and critical line." Id. at 4.

KDP attempts to create a negative connotation surrounding the Appellant's challenges to the development on Captain Sams Spit.[1] Appellant does not dispute that it rightfully has been diligent in protecting its aesthetic and recreational interests from approvals for this development proposed in a highly dynamic and risky location, and has participated at every step of the administrative and judicial processes with respect to the proposed development on Captain Sams Spit. The League has

[3]The ALC cited to the 2018 Order in its Order denying intervention.

[1]"[a]s the League's Brief points out, the League has been the petitioner/appellant in every one of these cases." (Respondent's Brief p. 6) "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." (Respondent's Brief p. 6) "The League's efforts to connect this case with the ALC Docket No. 15-ALJ-07-0369-CC ... 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." (Respondent's Brief p. 14)

been particularly focussed on the loss of the public trust tidelands that will result should the development proceed as planned. Because the same interest is at stake here – namely that KDP is seeking to move the baseline and setback lines seaward to facilitate its development – it should have been permitted to intervene.

Indeed, League members presented nearly identical testimony that supported its standing to challenge the other permits authorizing development on Captain Sams Spit. Kiawah Development Partners, II, Inc. v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 766 S.E.2d 707 (2014). While KDP claims that the League's allegations are irrelevant because "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" (Respondent's Brief p. 7), no evidence exists to support such a statement. Because KDP is seeking to move the jurisdictional lines seaward through the instant action, it is entirely possible that such lines could be located seaward of the mean high water mark and thus on public trust property where the public, and League members specifically, recreate.

Under the Public Trust Doctrine, tidelands (areas between the high water mark and the low water mark), submerged lands and navigable waters are held in trust for and subject to public purposes and rights of navigation, boating, bathing, fishing, recreation and enjoyment. Sierra Club v. Kiawah Resort Associates, 318 S.C. 119, 456 S.E.2d 397 (1995); S.C. Opinion Attorney General 329 (Dec. 10, 1970). The public has the right to use public trust lands and waters for recreational purposes, including fishing, bathing, swimming and other recreational uses. Id.; Martin v. Waddell, 41 U.S. 367 (1842).

Despite the unambiguous ruling of the Supreme Court, KDP's (and the ALC's) characterization of this underlying contested case as one solely involving "privately owned" property

fails to account for the adjacent public property and public uses at stake. To proceed without the League's involvement places the League's interests in access to, and use and enjoyment of public trust property in jeopardy. 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. *See* S.C. Code Ann. §48-39-260(1) (protecting and enhancing the beach/dune system), (6) (preserving existing public access and promote enhanced public access). As stated above, the public trust resources that would be lost by the proposed development have been challenged on many levels and the League and the public must have the right to continue to fight to protect their interest in the beach and public trust resources of this State.

II. The League's motion was timely filed.

Contrary to the challenges of KDP (Respondent's Brief p. 8), the League is not disingenously denying knowledge of the contested case. The ALC alleged and KDP argues the League either knew or should have known of the pendency of KDP's initial appeal. KDP's cite to statements by the former executive director of the League, Dana Beach, made a year before the line review process was commenced about his concern about a landward movement of the line have no bearing on timeliness. (Respondent's Brief p. 23). Of course, the Leauge was aware of the jurisdictional line review process undertaken by DHEC in 2017. The jurisdictional lines are reviewed every seven to ten years pursuant to Section 48-39-280 and DHEC is required by this provision to hold multiple public hearings and place the proposed lines on public notice. However, the last notice that was issued by DHEC regarding the line review process was the notice published in November of 2017 that DHEC **was not finalizing the lines** before December 31, 2017. (KDP Request for Contested Case, 2018

p. 1) At that point, the League agreed with DHEC that the lines were not "final" for the purposes of giving rise to a contested case hearing.[2] The ALC agreed and ruled that KDP had not exhausted its administrative remedies, making the appeal unripe and premature. (ALC Order Denying Motion to Dismiss, n. 12). March 6, 2020 was the first time that KDP appealed a final agency action. Prior to that, the ALC had no jurisdiction, which would have made any motion to intervene unripe until DHEC issued its final agency decision.

The League filed its motion on May 26, 2020, just over two months after the ripe request for contested case hearing was filed. The ALC did not rule on the motion until July 10, 2020 – the same day as she set the merits hearing for March, 2021. Then, in November of 2020, the ALC issued a Second Amended Scheduling Order setting forth deadlines for discovery and extending the hearing date until August, 2021. Thus, the League filed its motion prior to the notice of hearing, prior to the initiation of discovery, and fifteen months before the actual hearing has been set. The League's motion was timely.

III. The League's Interest Will Not be Adequately Protected by DHEC.

KDP asserts that DHEC will adequately protect the League's interest before the ALC. (Brief p. 24) However, the presumption of adequate representation that arises when proposed intervenor and existing party have the same ultimate objective is rebutted where, as here, the existing party is a governing body obligated to represent the general, public interest which may differ from the particular interests of proposed intervenor. Utah Ass'n of Cntys. v. Clinton, 255 F.3d 1246, 1255-56

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[2]KDP recognizes that the 6-month review by DHEC after remand by the ALC was conducted because the lines were not finalized before the first request for contested case was filed (Respondent's Brief p. 4). This delay that was agreed to by Respondent KDP was not caused by Appellant.

(10th Cir. 2001); In re Sierra Club, 945 F.2d 776, 779-80 (4th Cir. 1991) (although would-be intervenor and government entity share objectives, entity not adequate representative due to obligation to represent interests of general public including those with conflicting views).

Here, KDP's assertion that DHEC is "protecting" the League's interests contravenes the statutory duties of the agency as they relate to the setting of the lines, and fails to contextualize the line locations within the larger picture of KDP's intentions to develop Captain Sams Spit. Section 48-39-280 requires the agency to focus on the location of the baseline through the review of historical shoreline data and the setting of the setback lines through the calculation of the erosion rates at the site, but that analysis is more narrow than what will protect the interests of the League.

Moreover, DHEC is the entity that authorized the construction of a road and other infrastructure to facilitate development on the Spit. The League challenged that authorization, and DHEC's stance on construction activities, which are dictated by the location of the jurisdictional lines, is clearly different from the League's.

The situation in this case is analogous to In re Sierra Club, 945 F.2d 776, 780 (4th Cir. 1991), where environmental groups intervened in cases between the South Carolina Department of Health and Environmental Control ("DHEC") and private entities seeking hazardous waste permits. The district court denied Sierra Club's intervention in the cases, holding that Sierra Club lacked standing. The Fourth Circuit was then tasked with deciding whether DHEC could adequately represent Sierra Club's interests, when DHEC and Sierra Club "share[d] some objectives." Id. Ultimately, the court found that Sierra Club could intervene as a matter of right, because the parties interests differed due to their respective relationships with the dispute. The court described DHEC's goal as "represent[ing] all of the citizens of the state, including the interests of those citizens who also may

be . . . proponents of new hazardous waste facilities." Id. In contrast, the court found that Sierra Club, as a nonprofit membership organization, "appears to represent only a subset of citizens concerned with hazardous waste–those who would prefer that few or no new hazardous waste facilities receive permits." Id. While both parties presumably are interested in protecting the environment for the good of all citizens, their goals and hence respective injuries for the standing analysis are particularized and unique to them.

Further, the issues in the contested case before the ALC involve broader policy implications that DHEC is not focused on, and policies that address unwise and risky development, which would impact the Appellant's members. The entire statutory scheme of the Beachfront Management Act and the beachfront jurisdictional lines centers around the purpose of regulating and limiting the type and level of development that a property owner can conduct in the beach/dune system. In §48-39-250(4), the Legislature found that "Chapter 39 of Title 48, Coastal Tidelands and Wetlands, prior to 1988, did not provide adequate jurisdiction to the South Carolina Coastal Council to enable it to effectively protect the integrity of the beach/dune system. Consequently, without adequate controls, development unwisely has been sited too close to the system." S.C. Code Ann. § 48-39-290 sets forth an extensive list of the restrictions on construction and/or reconstruction seaward of the baseline or between the baseline and the setback line. Of course the pending contested case, which seeks to move the lines to allow for more development on the Spit, is related to these other matters. The League has particular interests in the fulfillment of those policies, however, DHEC is not required to give them consideration in setting beachfront jurisdictional lines.

KDP attempts to characterize this case as a lengthy appeal, yet its own premature filing resulted in the long passage of time from its initial request for contested case hearing. As discussed

above, the League filed its motion with ample time to participate in discovery and trial preparations, and no evidence exists that the League would prolong the proceedings before the ALC. A basis for this conclusion cannot be the length of time the case has already been pending; KDP consented to the lengthy remand to DHEC (Consent Order, June 6, 2019), has spent months conducting discovery, and agreed to a movement of the trial date from March to August, a five-month extension. (Brief p. 12) KDP cites the Order stating that KDP had "been denied a final adjudication on the merits for more than thirty-two months. (Order Denying Intervention p. 5) This thirty-two month delay has occurred with the full consent of KDP and no evidence exists that KDP filed any motion to expedite the contested case. Instead, KDP has proceeded without any indication they have suffered a prejudicial delay.

Further, an appeal of a denial of intervention does not constitute an attempt to delay the proceedings. Though Appellant did seek a stay before the ALC, that motion was denied. (Motion to Stay, March 17, 2021; Response in Opposition to Motion to Stay, March 26, 2021; Order Denying Stay, April 16, 2021)

IV. The League Demonstrated Standing.

Appellants recognize that a party must have standing in order to intervene in a proceeding. Kiawah Development Partners, LLC v. Kiawah Community Assn., 808 S.E.2d 551, 421 S.C. 538 (Ct. App. 2017). 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. Freemantle v. Preston, 398 S.C. 186, 192, 728 S.E.2d 40, 43 (2012). "Statutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers 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 (2013). "The traditional concepts of constitutional standing are inapplicable when standing is conferred by statute." Freemantle, 398 S.C. at 194, 728 S.E.2d at 44.

KDP suggests that §48-39-280 only grants statutory standing to a landowner; however, that provision provides that "review is initiated by filing a request for a review conference with the department board via certified mail within one year of the establishment of the baseline or setback line and must include a one hundred-dollar-review fee per property." S.C. Code §48-39-280(E). Nothing in that Section limits who may intervene. The League suggests that the Supreme Court's recent interpretation of the Administrative Procedures Act, S.C. Code Ann. §1-23-10 et seq., is instructive for standing purposes. In that case, the Court ruled that under the APA the groups, including the League, met the standing test for an "affected person" to seek administrative review in the ALC. The Court looked to the definition of "affect" as '"[t]o act upon; influence; change; enlarge or abridge; often used in the sense of acting injuriously upon persons and things.'" Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control, 430 S.C. 200, 212, 845 S.E.2d 481, 487 (2020), reh'g denied (Aug. 7, 2020) (citing Black's Law Dictionary 53 (5th ed. 1979). The Court distinguished judicial action from the type of administrative challenge here, explaining that one only need to be an "affected person" to "seek administrative review of whether DHEC engaged in a proper environmental analysis in the first instance, including complying with all statutory and regulatory requirements." Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control, 430 S.C. 200, 215, 845 S.E.2d 481, 489 (2020), reh'g denied (Aug. 7, 2020)

KDP cites to cases on standing and interchanges them with the standard for intervention; however, if standing can be interchanged with intervention, the Supreme Court's recent ruling in

Preservation Society should resolve any doubt that the League has standing: it is an "affected person," as discussed in I.A. above.

The League also meets the standard of Constitutional Standing. KDP cites to Beaufort Realty Co. v. Beaufort Cty., 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001), a case decided 20 years ago, even though the law has changed through the South Carolina appellate court interpretations of standing over the twenty years since that case was decided.

> The Supreme Court has repeatedly reaffirmed that "**To have standing ... one must be a real party in interest**. A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." Charleston County Sch. Dist. v. Charleston County Election Comm'n, 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999) (emphasis added); Anchor Point, Inc. v. Shoals Sewer Co., 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992); Henry v. Horry County, 334 S.C. 461, 463 n. 1, 514 S.E.2d 122, 123 n. 1 (1999) ("To have standing, one must be a real party in interest."); Baird v. Charleston County, 333 S.C. 519, 530, 511 S.E.2d 69, 75 (1999). Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res., 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001) ("To have standing, one must have a personal stake in the subject matter of the lawsuit. In other words, one must be a real party in interest."); see also S.C. Lottery Comm'n v. Glassmeyer, 428 S.C. 423, 431, 835 S.E.2d 524, 527 (Ct. App. 2019), reh'g denied (Dec. 16, 2019), cert. granted (July 8, 2020)**.**

Beaufort Realty stands for the proposition that environmental groups cannot simply assert speculative concerns or fail to demonstrate a causal connection for purposes of standing. But just because development has not as of yet commenced does not mean that standing has not been met. Future injuries and the risk of future injuries have been held to be sufficient for standing on a consistent basis by the South Carolina Supreme Court and the United States Supreme Court. South Carolina's appellate courts have found standing in environmental permitting cases where appellants alleged potential future injury from challenged projects. See, e.g., South Carolina Wildlife Federation

v. South Carolina Coastal Council, 296 S.C. 187, 371 S.E.2d 521 (1988); Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998). These rulings echo decisions of the United States Supreme Court and the Fourth Circuit. See, e.g.,Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978); Natural Resources Defense Council v. Watkins, 954 F.2d 974 (4th Cir. 1992), quoting Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982); accord, Sierra Club v. Simkins Industries, Inc., 847 F.2d 1109, 1113 fn. 4 (4th Cir. 1988), citing Valley Forge Christian College for the proposition that "threatened rather than actual injury can meet minimum Article III standing requirements."

In addition, South Carolina courts have routinely held that a plaintiff's injuries may stem from a threat to aesthetic interests in viewing private property, similar to the testimony in the instant appeal. S.C. Wildlife Fed'n., 296 S.C. 187; Ogburn-Matthews, 332 S.C. 551. Those aesthetic and recreational interests are sufficient to allow a party to vindicate its rights, notwithstanding ownership or control over that property. For instance, in Ogburn-Matthews, the Court held that plaintiffs that live adjacent to a privately owned wetland had a sufficient interest at stake to confer standing to challenge the issuance of a permit to fill the wetland because the permit would adversely affect their use and enjoyment in viewing the wetland and surrounding wildlife on private property.

An interest in the use and enjoyment of property is a cognizable, legally protected interest. S.C. Wildlife Fed'n v. S.C. Coastal Council, 296 S.C. 187, 371 S.E.2d 521 (1988); Ogburn-Matthews, 332 S.C. 551. The South Carolina Supreme Court held that a plaintiff must make claims as to "use and enjoyment" of an affected area for purposes of standing. Smiley v. S.C. Dep't of

Health & Envtl. Control, 374 S.C. 326, 333, 649 S.E.2d 31, 34 (2007); see also Am. Canoe Ass'n v. Murphy Farms, 326 F.2d 505 (4th Cir. 2003). Thus, our courts have long held that precisely the type of aesthetic and recreational interests in use and enjoyment of the beach and dune system on Captain Sams Spit are sufficient to confer standing. The United States Supreme Court reaffirmed this principle: "We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 183, 120 S. Ct. 693, 705 (2000) (citing Sierra Club v. Morton, 405 U.S. 727, 735, 92 S.Ct. 1361 (1972); and, Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130 (1997)).

The ALC order states: "[h]ere, the League has no personal stake in the delineation of the base and setback line. 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." (Order p. 4).

Courts have never required that a person must wait until the damage is done, or even begun, to have standing to prevent harm; if the "perceived threat to [plaintiffs] is sufficiently real and immediate to show an existing controversy," standing is present. Blum v. Yaretsky , 457 U.S. 991, 1000 (1982); see also Sierra Club v. Simkins Industries, Inc., 847 F.2d 1109, 1113 fn. 4 (4th Cir. 1988), (citing Valley Forge Christian College for the proposition that "threatened rather than actual injury can meet minimum Article III standing requirements."). The question is whether the threat of harm is sufficiently real and immediate or imminent.

In this case, KDP is seeking to have the beachfront jurisdictional lines moved seaward – possibly even seaward of public trust property – for the sole purpose of allowing it to pursue construction of a road and other infrastructure to facilitate residential development on the Spit. It is this immediate threat which gives rise to the League and its members status as "affected persons" and "real parties in interest" because it would harm their aesthetic and recreational uses and enjoyment.

Therefore, Appellant respectfully requests that this Court reverse the Order of the ALC.

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

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the Reply Brief of Appellant by emailing a copy of same, on May 3, 2021, to the Attorney Information System provided email addresses below, via the attached E-mail:

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May 3, 2021

Ex Parte CCL

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Counsel,
Please find attached Appellant's Reply Brief in the above-referenced matter.
Thanks,
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