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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No. 2019-000074

South Carolina Coastal Conservation League Appellant,

v.

South Carolina Department of Health and Environmental Control, KDP II, LLC, and
KRA Development, LP..... Respondents.

**PETITION FOR REHEARING ON BEHALF OF RESPONDENTS
KDP II, LLC, and KRA DEVELOPMENT, LP**

Pursuant to Rule 221(a), SCACR, Respondents, Kiawah Development Partners, II, and KRA Development, LP (jointly “KDP”), hereby petition for rehearing of the Court’s decision in this appeal, Opinion No. 28031, filed June 2, 2021.¹ S.C. Coastal Conservation League v. S.C. Dept. of Health and Envntl. Control, Opinion No. 28031, 2019-000074, 2021 WL 2214218 (June 2, 2021)(the “Opinion”).

This appeal arises from the Administrative Law Court’s (ALC’s) decision upholding three permits and Coastal Zone Consistency Certification Number CZC-13-0336 (the “CZCC”) issued by the Respondent South Carolina Department of Health & Environmental Control (the

¹ Justice Hearn wrote for the Court with Chief Justice Beatty, Justice Few, and Justice James concurring. In a separate opinion, Justice Kittredge concurred in the result but joined only Section II of the majority opinion.

“Department”). **Joint Ex. 6, R. pp. 2962-2963.** The three Department permits are National Pollutant Discharge Elimination System (NPDES) General Permit Coverage for Stormwater Discharges from Construction Activities SCR100913, Water Supply Construction Permit Number 30395-WS, and Wastewater Construction Permits Number 38828-WW (collectively, the “Permits”).² **Joint Ex. 6, R. pp. 2952-2965.** The permits authorize the installation of the road, drainage features, water and sewer lines, and other site improvements for 26 lots on Captain Sams (the “Project”) as part of a subdivision approved by the Town of Kiawah Island. **KDP Ex. 3, R. pp. 3476-3482.**

The NPDES stormwater permit includes approval of an in-ground steel sheet pile wall (“SSPW”) landward of the eroding shoreline in the bend in the Kiawah River on the back side of Captain Sams. **Joint Exs. 6 and 7, R. pp. 2952-3005.** All of the site improvements are to be constructed outside the critical area.

In the Opinion the Court reversed the final ALC decision, thereby vacating the permits and CZCC of the Department. The Court premised its reversal on its determination that the ALC erred in concluding S.C. Code Ann. §48-39-30(D) did not apply to the consistency review of the Project and in his finding that the benefits of the Project outweighed the loss of a portion of the riverbank that is part of the critical area. The Court rejected the ALC’s consideration of the public benefit from the protection of Beachwalker Park and held the only remaining public benefit from the Project was economic benefit that is insufficient as a matter of law.

Respectfully, KDP asserts that the majority opinion of this Court overlooked and misapprehended certain aspects of the final decision under appeal, did not take into account factual

² The NPDES permit was issued to KDP, II, LLC; the water and wastewater permits were issued to KRA Development, LP. **Joint Ex. 6, R. pp. 2952-2965.**

findings of the ALC that were supported by substantial evidence, and mistakenly concluded the ALC committed prejudicial legal error.

SUMMARY OF GROUNDS FOR REHEARING

1. The ALC correctly reached the legal conclusion section 48-39-30(D) did not apply to this consistency determination under the Department's indirect permitting authority. By its clear and unambiguous terms, the Coastal Zone Management Program ("CZMP") specifies it does not apply to erosion control structures constructed outside the critical area and limits the application of 48-39-30(D) to applications for critical area permits.
2. In the ALC's analysis to determine the Project's consistency with the policies of the CZMP and to assess the public benefit from the Project, the ALC was entitled to consider the protection of Beachwalker Park. There is no qualified expert testimony that a 270' bulkhead/revetment along a portion of the river shoreline of Beachwalker Park will work in isolation. This reality is not specious, nor did KDP raise it for the first time in oral argument.
3. Even though the ALC determined the CZMP does not impose the policy considerations of section 48-39-30(D) on a consistency review of an application for a permit for construction outside the critical area, the ALC nonetheless engaged in the benefits analysis and balanced the relevant considerations addressed in section 48-39-30(D), which is inherently a factual analysis. His findings were supported by substantial evidence and not tainted by legal error.

4. The ALC considered more than economic benefit in his factual analysis of public benefit, did not commit legal error, nor run afoul of the holding of this Court in S.C. Wildlife Fed'n v. S.C. Coastal Council, 296 S.C. 187, 371 S.E.2d 521 (1988).

DISCUSSION

“Generally, the purpose of a rehearing on appeal is to afford to litigants, whose rights and interests are affected by the appellate court judgment, an opportunity to have an erroneous judgment corrected by the appellate court deciding the case.” 5 C.J.S. Appeal and Error § 798. “In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument.” Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001), citing Rule 221(a), SCACR.

I. The ALC correctly reached the legal conclusion section 48-39-30(D) did not apply to this consistency determination under the Department’s indirect permitting authority. By its clear and unambiguous terms, the Coastal Zone Management Program (“CZMP”) specifies it does not apply to erosion control structures constructed outside the critical area and limits the application of 48-39-30(D) to applications for critical area permits.

The ultimate question for the ALC was the factual determination of whether the Project was consistent with CZMP.³ The CZCC issued by the Department under appeal contained eight conditions including a prohibition of any construction in the critical area or impacts in the critical area during construction. **CZCC, Joint Ex. 6, R. pp. 2962-2963.**

In the Opinion the Court held the ALC committed error when he reached the legal conclusion that S.C. Code Ann §49-38-30(D) was not applicable to a consistency determination for construction activity outside the critical area. KDP submits that the Court overlooked that the CZMP, by its express terms, does not call for consideration of S.C. Code Ann §49-38-30(D) in the

³ The Department is charged under S.C. Code Ann. § 48-39-80 (B)(11) with “the authority to review all state and federal permit applications in the coastal zone, and to certify that these do not contravene the management plan.”

consistency determination for construction of erosion control structures outside the critical area and only applies the section when determining the consistency of construction in the critical area.

The consistency certification for the Project does not involve the direct authority of the Department that deals with applications for permits from the Department to conduct activities in the critical area. See, S.C. Code Ann. § 48-39-130. Instead, the Department’s consistency review was pursuant to its indirect authority under S.C. Code Ann. §48-39-80 to determine the consistency of the Permits with the CZMP. See, Spectre, LLC v. S.C. Dept. of Health and Env’tl. Control, 386 S.C. 357, 688 S.E.2d 844, 847 (2010)(explanation of difference between OCRM’s direct authority (i.e., permitting activity in the critical area) and indirect authority (i.e., review and certification of consistency of projects outside the critical area)). In Spectre, this Court held that the CZMP had been adopted by the General Assembly and, therefore, had the force and effect as a duly enacted regulation. 688 S.E.2d 844 at 850.

The CZMP divides the “GUIDELINES APPLICABLE TO ALL PROJECTS” into those applicable to construction outside the critical area, namely CZMP III.C.3.1(1)-(10), on the one hand, and those applicable to construction in the critical area, on the other, namely CZMP III.C.3.1(11)(1)-(10). **A copy of the Guidelines is attached as Exhibit 1 hereto.** The consistency review for this Project by its nature and the very terms of the Guidelines comes under CZMP III.C.3.1(1)-(10):

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

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

a) "To promote the economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve

such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;

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

CZMP III.C.3.1(1)(emphasis added).

As noted by the bolded wording, the CZMP, which has the same legal stature as a regulation, directly addresses the particular legislative policies that apply to *erosion control structures constructed outside the critical area*, such as the SSPW. These two sections - sections 2(B)(1) and (2), S.C. Coastal Management Act of 1977 - are codified at S.C. Code Ann. § 48-39-30 (B)(1) and (2). They are quoted verbatim in the CZMP. The CZMP does not make section 48-39-30(D) applicable to erosion control structures constructed outside the critical area. Under the canon of construction “*expressio unius est exclusio alterius*” or “*inclusio unius est exclusio alterius*,” the enumeration of the policy subsections of section 48-39-30 that apply means that the legislature intended to exclude the other subsections, including subsection (D). Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000).

Also directly pertinent to the decision of the Court in this case is that the CZMP does not trigger section 48-39-30(D) for a consistency review of an erosion control project in the coastal zone that is constructed outside the critical area that may end up in the critical area, like this one: “In review and certification of permit applications in the coastal zone, the Coastal Council will be guided by the following general considerations (apply to erosion control ... projects,....”

The CZMP Guidelines do, however, specifically require consideration of *all* the policies in S.C. Code Ann. §48-39-20 and §48-39-30 for a consistency review for permits for construction activity in the critical area:

11. *In critical areas* of the coastal zone, it is Council policy that, in determining whether a permit application is approved or denied, the Council shall base its determination on the individual merits of each application, *the policies specified in Sections 1 and 2 (of the Act)*, and be guided by the following general considerations:....

CZMP III.C.3.1(11)(emphasis added).

Sections 1 and 2 of the Act are codified at S.C. Code §48-39-20 and §48-39-30 and obviously include subsection (D) of section 48-39-30.

The Court's holding in this case that section 48-39-30(D) applies to the SSPW because portions of it will be in the critical area is directly at odds with the specific wording of the CZMP that does not impose this particular policy for erosion control structures built outside the critical area. In so ruling the Court misunderstood the applicable provisions of the CZMP that are specific to erosion control structures constructed outside the critical area. "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." Hodges v. Rainey, supra at 581. Nor, does this Court have the authority to overrule a regulation unless it was unconstitutional, adopted in excess of the authority of the legislature, or otherwise fatally defective. None of these apply to the CZMP.

Based on the clear and unambiguous provisions of the CZMP that were not considered by the Court (but were set forth in KDP's brief at pp. 22-24), the ALC was correct in his legal conclusion that section 48-39-30(D) does not apply to a consistency review of an erosion control project constructed outside the critical area that is designed ultimately to be effective in the critical area. Further, even if the CZMP imposed consideration of the policies in section 48-39-30(D) for

this upland construction, which it does not, the ALC's legal conclusion was harmless error because the ALC conducted the analysis required by this section.

II. In the ALC's analysis to determine the Project's consistency with the policies of the CZMP and to assess the public benefit from the Project, the ALC was entitled to consider the protection of Beachwalker Park. There is no qualified expert testimony that a 270' bulkhead/revetment along a portion of the river shoreline of Beachwalker Park will work in isolation. This reality is not specious, nor did KDP raise it for the first time in oral argument.

In the Opinion the Court held the ALC's benefits analysis was "fatally flawed because the court [ALC] once again focused on the public benefit of protecting the park as a justification for the entire 2,380-foot steel wall." The Court accused KDP of holding "the protection of the park hostage until it is permitted to construct the entire wall." KDP respectfully submits (i) that the Court engaged in fact finding rather than a legal determination in its chastisement of the ALC and KDP, (ii) that substantial evidence supports the ALC's finding that KDP is not likely to build the 270' bulkhead/revetment approved in the prior decision of this Court, and (iii) that the record is devoid of any qualified expert testimony the 270' bulkhead/revetment will be effective at protecting Beachwalker Park from continued erosion.

This Court released its decision in Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 422 S.C. 632, 813 S.E.2d 691 (2018) (KDP II) on April 18, 2018, eight months after the contested case hearing in this case but before the ALC issued his Amended Final Order on December 14, 2018. **R. pp. 2-55.** In KDP II this Court ruled that there was insufficient expert evidence that the bulkhead structure without the revetment approved by the ALC would work and vacated the permit approved by the ALC for the bulkhead alone, leaving intact the approval of 270 feet of a combined bulkhead/revetment along the bank of Beachwalker Park.

In his Amended Final Order in this case, the ALC determined that it was unlikely that KDP would proceed to build the 270' structure unless it were part of a larger structure that protected the

other portion of its land that is eroding as well. As the fact finder, the ALC is entitled to draw reasonable inferences from the proof. He did so in reaching this finding. It makes little economic sense for KDP to come out of pocket for the significant cost of installing 270 feet of bulkhead/revetment along a part of Beachwalker Park if it cannot receive the benefit of protecting its valuable land in the process. More important, KDP has always sought a complete solution rather than a partial erosion control structure that would be vulnerable to exacerbated erosion around its ends and accelerate the erosion at Beachwalker Park and on its land in the area of the terminus of the structure in the river bend that is subject to high energy water movement.

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

Additionally, in remonstrating the ALC for considering the public benefit from the protection of Beachwalker Park, the Court overlooked or misapprehended that just as this Court determined in KPD II, the record lacked any expert testimony that the bulkhead/revetment would properly function if the revetment were removed for over 2000 feet and the structure were a bulkhead alone, there was also a lack of expert testimony in the contested case hearing in KDP II that the bulkhead/revetment would properly function if only the northeastern-most 270’ were constructed and the structure were terminated in the middle of the high velocity zone where the erosion is severe leaving an escarpment of seven to ten feet. **R. p. 2450:11-16.**

The Court did not take into account the expert testimony was that a 270' structure in that location would not perform and would suffer from erosion around the edges and that the erosion control structure had to extend around high velocity area in the riverbank in the neck to afford adequate protection. This expert testimony came from Mitchell Bohannon, an engineer, who is the same expert this Court relied upon in KDP II in rejecting the ALC's approval of a bulkhead without a revetment:⁴

Q: All right. Now, let's talk about Captain Sam's. Do you recall when you were first contacted by KDP about any issue dealing with erosion on Captain Sam's?

A: I think it was late 2006, maybe early 2007.

Q: And what was your specific understanding of what you were to look into?

A: Well, there was concern that Charleston County PRC had applied for a permit and had gotten a permit to do a bulkhead along Beachwalker Park.

Q: Now, I'm going to stop you. You're saying they -- had they actually gotten the permit?

A: I'm not sure chronologically about that.

Q: I don't want you to testify to anything you

⁴ The League has never offered any proof on the sufficiency of a 270' structure to protect Beachwalker Park. In fact, the League opposes any protection of Beachwalker Park, and appealed the initial agency determination in December 2008 in the prior litigation involving the bulkhead/revetment because the Department allowed the permit for this 270' section. In this appeal, the League scorns the ALC for considering the protection of Beachwalker Park and describes erosion protection of its parking lot as of "dubious" public benefit. **Reply Brief at p. 3.**

aren't sure about.

All right. So there's an application by

Charleston PRC.

A: Correct.

Q: Was there any -- did you have any understanding about an access corridor? Were there any discussions about an access corridor in the neck of the spit?

A: I think there were, yes. In kind of developing that ongoing conversation, that the access corridor to the spit became one of the considerations. We certainly didn't want anything to happen -- *we were really concerned about end conditions on the PRC permit. If they put a bulkhead, there would have been probably -- there are usually some -- if you don't design it correctly and don't take -- aren't really careful, you'll have some adverse end conditions and we were worried that adverse end conditions would contribute to increased erosion in that area and actually narrow the spit even more.*

Q: Did you make any recommendation to KDP about

involving other consultants to work with you?

A: Oh, yes, certainly. *Again, I had grave concern about the PRC bulkhead and then when we were asked to design the bulkhead/revetment, I said, "What do we need to do to protect that?" I was concerned what would happen in -- not only in that area, but also other impacts.*

Q: Did you make any recommendations about involving other consultants?

A: Yes, I did. I suggested they hire Dr. Oertel and Dr. Basco.

Q: Did they do that?

A: Yes, they did.

Q: Did your firm work in conjunction with Drs. Oertel and Basco in addressing the issues there near the neck at the river bend on Captain Sam's?

A: Yes. Yes, we did.

R. pp. 823:18-825:22 of ROA in KDP-II (emphasis added).

Q: Did you believe that what you were proposing constituted a comprehensive solution?

A: Well, we did. You know, we looked at lots of things and we felt like it was a good

comprehensive solution, protecting all the way from the park down through the neck area where the zone of erosion was occurring.

R. pp. 830:24-831:5 of ROA in KDP-II.

Q: There's been some discussion about the length of the revetment. How is the length and the location of the revetment determined?

A: Well, we went out in the field. I mean, we've had survey data and a number of studies done. We've actually been in the field and located kind of the beginning and end the erosion zones and that's where the revetment -- we're asking to put a revetment. It's pretty clear when you go in the field where it starts and stops.

R. pp. 842:19-843:3 of ROA in KDP-II

(Attached as Exhibit 2 is a copy of these pages from the Record on Appeal in KDP-II).

In the Opinion, the Court refers to the application in 2006 by Charleston County Parks and Recreation Commission ("PRC) to the Department for a permit to construct a 270' bulkhead. This is the permit application referenced by Bohannon. He had grave concerns about it because of the erosion that would continue around the ends. Just because PRC applied for an erosion control structure does not mean the structure will work effectively. There is no expert testimony that it would have, nor that a 270' bulkhead/revetment will function effectively. The uncertainty and potential dangers from an erosion control structure that stops in the middle of the high velocity

erosion zone are compounded by the significant changes in the river shoreline over the 13 years at this location since the application for the bulkhead revetment was submitted. **R. pp. 2446:3-2449:7.** All one needs to do is look at photographs of the staggering erosion and high escarpment at the southwestern end of the parking lot of Beachwalker Park to understand that a structure that stopped at this point is going to be gradually compromised by continued and exacerbated erosion around that end. **R. pp. 3576-3583; 3596-3600; 3614-3617; 3630-3641.** Here is a sample photograph of the location (**R. p. 3596**) where the terminus of the 270' structure would be located:



The Court was mistaken in asserting that KDP raised the point for the first time in oral argument. This point is what precipitated the entire permitting process thirteen years ago. It is supported by expert testimony. It is not spurious. It is the result of the laws of nature that are oblivious to the laws of men.

The Court overlooked significant facts within the record when it concluded the “ALC relies on a largely illusory benefit [of the wall to protect Beachwalker Park] to support its public interest analysis.” The benefit is not illusory and can only be realized with an erosion control structure that is both designed by, and backed up by, the opinion of a qualified expert.

III. Even though the ALC determined the CZMP does not impose the policy considerations of section 48-39-30(D) on a consistency review of an application for a permit for construction outside the critical area, the ALC nonetheless engaged in the benefits analysis and balanced the relevant considerations addressed in section 48-39-30(D), which is inherently a factual analysis. His findings were supported by substantial evidence and not tainted by legal error.

In his final decision the ALC did the full assessment required by section 48-39-30(D) that provides as follow:

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

S.C. Code Ann. §48-39-30(D).

The ALC engaged in this analysis in applying Public Open Space policies embodied in III.C3.XII.D of the CZMP, quoted by this Court in the Opinion:

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

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

For the reasons discussed in Part II above, the ALC was entitled to consider the benefits from the SSPW's protection of Beachwalker Park in his factual assessment of the various benefits, detriments, and uses of the Project as compared to leaving the status quo in place.

The following excerpt from the ALC's decision leaves no question that he measured and weighed the various benefits and detriments from the Project, including future loss of a portion of the riverbank, in making his factual determination of what would be the maximum benefit the people in applying these policies, just as required by section 48-39-30(D):

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

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

Therefore, following this analysis, the Court must weigh a public loss of the riverbank against the public gain of protecting Beachwalker Park. In weighing these factors, this Court is justly seeking to determine not what is in the best interest of the KDP or even Coastal, but what is in the best interest of the public in light of the legal and regulatory considerations. Viewing the case as a whole, the Court finds

Beachwalker Park and the public trust resources on the Spit are a valuable public asset to protect. Dana Beach, the Executive Director of the Coastal Conservation League, testified that Beachwalker Park is ‘heavily used’ and that ‘thousands of people all over Charleston County come to Beachwalker Park.’ The public’s access to the public trust resources on the Spit flows primarily from their literal access to the Spit via the Park. Some of the public access the Spit from the river instead of the Park, but it is clear this is not the primary way the public accesses and uses the Spit.

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

With all these considerations in mind, the Court finds benefit to the public in protecting Beachwalker Park through installation of the SSPW outweighs the potential loss of some of the less-utilized riverbank along the Kiawah River. The SSPW will benefit the public by enhancing the safety and preserving the longevity of its access to public trust resources at the Spit. The public will further benefit from the conservation easement placed on the majority of the Spit in tandem with the development. Accordingly, when considering the portion of the affected space in the context of the overall amount of public open space on the Spit, the Court finds the public’s use and enjoyment of the Spit will not be so disrupted such that the proposed development contravenes this policy. KDP will, obviously, also benefit because the SSPW will allow it to protect its property interest. This outcome is a compromise of public/conservation interests and private/economic interests, which this Court believes is in the spirit of the CZMA and CZMP.⁵

Concerning the disruption of the aesthetic character of the shoreline which is an open area, as addressed above, the Court finds the preservation of

⁵ In the Opinion, this Court indicated that it was puzzled by the use of the word “compromise” in this sentence in the ALC’s Amended Final Order: “While the court recognized that KDP would also benefit, it stated, curiously and with little explication, that the outcome was a ‘compromise.’” **Opinion at 10.** KDP would submit that the ALC was using compromise to express the outcome of any analysis where competing considerations must be balanced and a result achieved. Balancing does not result in all one or the other.

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

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

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

Amended Final Order, R. pp. 41-44. (Footnotes omitted).

The ALC also engaged in a benefits analysis when applying S.C. Code Ann. §48-39-150(A) (5) and (7) ⁶ that supplemented and complemented his use and benefits analysis quoted above. After recognizing the in-ground SSPW would likely eliminate a portion of the riverbank exposed at low tide, the ALC found that the SSPW will not eliminate the entire riverbank,⁷ and that the most well-used portions of the Spit—the beach and southern tip of the Spit—will remain intact for the public to enjoy. **Amended Final Order, R. p. 47.** The ALC found that “the significant benefit to the public” to protecting public access to the beach at Beachwalker Park

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

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

⁷ There was also testimony the sandy riverbank continues for 1700' beyond the location where the SSPW will terminate, as measured by GIS. **R. p. 2563:4-15.**

outweighed the loss of access to some of the riverbank. **Id.**

As to subsection (7) of Section 48-39-150(A), the ALC found the uncontradicted proof of public economic benefits of developing the upland area compared to the benefits of preserving the riverbank did not necessitate denial of the CZCC. **Id.** The public economic benefits from the development of the fifty homes are projected to generate real property tax revenues estimated at \$5 million per year with construction spanning around ten years, with the associated contracts precipitating increased spending, job creation, and economic activity in the surrounding area during that time.⁸ **Id; R. pp. 2479:16-2480:12.** The ALC commented that this significant public economic benefit alone did not justify the loss of a portion of the riverbank and further found noteworthy that a relatively small percentage of Captain Sams would be subject to residential development with the remainder preserved in perpetuity with a conservation easement. **Amended Final Order, R. p. 47.**

The ALC wrapped up his findings as to the competing public benefits and uses under Section 48-39-150(A) with the following:

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

Amended Final Order, R. p. 48.

In stating that the ALC considered only the protection of Beachwalker Park and the economic benefit to KDP, this Court overlooked the full extent of the ALC's analysis. He also considered the public economic benefit (taxes and jobs) and the perpetual conservation easement

⁸ Unlike this case, the record in KDP-I did not include any proof of public economic benefits, only proof of economic benefit to KDP.

that would preserve well over 120 acres of Captain Sams in a natural state in perpetuity that the ALC found would not happen if KDP were prevented from proceeding with the Project. The benefits to consider, how they weighed against each other, and whether the maximum public benefit would be accomplished if the Project were allowed to proceed as compared to its not proceeding, were all inherently factual determinations for the fact finder whose findings must stand unless not supported by substantial evidence.

“Substantial evidence is not a mere scintilla; rather, it is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the agency.” Friends of Earth v. Pub. Serv. Commn. of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). Nothing could be more factual than the subjective analysis of what provides the maximum public benefit. This Court does not contest that this determination is factual and the province of the fact finder. The ALC’s analysis was thorough, thoughtful, and reasonable. This Court may disagree with some or all of the ALC’s findings and may have made different findings, but this different point of view of the evidence does not change that the ALC was the one charged with making the findings and those findings are supported by substantial evidence.

IV. The ALC considered more than economic benefit in his factual analysis of benefit, did not commit legal error, nor run afoul of the holding of this Court in S.C. Wildlife Fed’n v. S.C. Coastal Council, 296 S.C. 187, 371 S.E.2d 521 (1988).

In the final section of the Opinion, the Court determined that the only benefit the ALC considered to justify the SSPW was economic benefit. The Court made this statement after making the factual determination that the ALC should not have considered protection of Beachwalker Park because its protection was “illusory.” Putting aside that the protection of Beachwalker Park by the SSPW was a proper consideration for the reasons stated in Part II herein, the Court overlooked that the ALC also took into account the conservation easement that KDP will place on the

remaining 120 acres protecting it in a natural state in perpetuity. The ALC considered more than economic benefit and was entitled to consider the benefit from the conservation easement in making the factual determination weighing the public benefits and detriments from the Project.

Additionally, the Court misapprehended the application of S.C. Wildlife Fed'n v. S.C. Coastal Council, supra, to this case. There a permit was sought to dredge freshwater wetlands to create waterfront residential lots. The applicable policy of the CZMP required the applicant to demonstrate an “overriding public interest.” This Court held that “evidence of purely economic benefit is insufficient as a matter of law to establish an overriding public interest.” 371 S.E.2d 521.

In contrast, in this case the applicable policies of the CZMP do not require KDP to demonstrate “overriding public benefit.” As stated in Part I, supra, the CZMP dictates that the only state statutory policies applicable are those stated in S.C. Code §48-39-30 (B)(1) and (2), neither of which refers to an overriding public benefit. Further none of the CZMP policies associated with Residential Development, Barrier Islands, Dune Areas, and Public Recreation Areas (i.e., Public Open Spaces) that are implicated by the Project requires a showing of “overriding public benefit.”

Further, there is nothing in the CZMP provisions applicable to construction activities outside the critical area that says that economic benefit cannot be considered. The policy of Section 48-39-30(B)(1), repeated verbatim in the CZMP guidelines, is “[t]o promote economic and social improvement of the citizens of this State and to encourage the development of coastal resources... with due consideration for the environment...” S.C. Code Ann. §48-39-30(B)(1); CZMP III.C.3.1(1), III-14.

The ALC considered multiple benefits from the Project – private and public economic benefits, the protection of Beachwalker Park, and KDP’s imposing a conservation easement on the

remainder of Captain Sams – when comparing those against the benefits to leaving the status quo. He did not consider merely economic benefit. His benefit analysis constitutes a factual finding supported by substantial evidence that must be honored and should be honored. This appeal turns on the scope of judicial review established by statute and prior precedent even though the Court may be disenchanted with the outcome.

CONCLUSION

For the foregoing reasons, KDP requests the Court grant its Petition for Rehearing.

Respectfully Submitted,

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