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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

Docket No. 15-ALJ-07-0369-CC
Appellate Case No. 2019-000074

South Carolina Coastal Conservation League . . . . Appellant,

v.

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

RETURN TO PETITION FOR REHEARING

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The Coastal Conservation League requests that this Court deny KDP II, LLC, and KRA Development, LP's petition for rehearing because the petitioners have failed to identify any points misapprehended or overlooked by this Court   This Court's opinion properly applied the statutory provisions, consistent with its prior decisions related to petitioners' proposal to seal off the Kiawah River shoreline, and this Court need not revisit its sound ruling.

ARGUMENT

I. Section 48-39-30(D) is a Policy of the Coastal Zone Management Act And Nothing in the Act Limits its Applicability to Only Critical Area Permits

KDP raises the identical arguments included in its briefing: that Section 48-39-30(D) does not apply because the Coastal Management Program ("CMP") document does not specifically direct DHEC to consider that state policy in its consistency review. (Compare Petition, p. 4 with Brief, pp. 22-24). KDP again argues that the CMP, which is a binding norm and the equivalent of a regulation, be used to disregard an unambiguous statutory requirement. (Petition, pp. 4-5). But simply because the CMP does not specifically reference this statutory provision does not allow DHEC, the ALC or this Court to disregard that requirement. The Act sets forth the policies and findings of the State, which are designed to apply to the entire coastal zone. See, e.g., S.C. Code Ann. §§ 48-39-20 & 30 (referring consistently to "the coastal zone" in establishing findings and policies). Nothing in the Act, and specifically nothing in § 48-39-80 (coastal zone consistency determinations) or § 48-39-130 (direct critical area permits) indicates that the legislature intended to restrict the applicability of policy in § 48-39-30(D) to only critical area permits.

The CMP policies were promulgated in furtherance of the Coastal Zone Management Act ("CZMA"), and an interpretation of the CMP that § 48-39-30(D) is inapplicable is contrary to

language and intent of the Act. The statute is controlling and regulations (or, in this case, the CMP) cannot be interpreted to write out a statutory provision. While the Legislature has the right to vest in the administrative officers and bodies of the state a large measure of discretionary authority to make rules and regulations, an agency may not make rules that conflict with, or change in any way, the statute conferring such authority. Ahrens v. State, 392 S.C. 340, 709 S.E.2d 54 (2011). Administrative agencies are authorized to promulgate regulations which have the force of law; however, these regulations cannot conflict with, add to, or alter the statute conferring authority. See Fisher v. J.H. Sheridan Co., Inc., 182 S.C. 316, 326, 189 S.E. 356, 360 (1936); Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984). KDP's argument that the CMP can alter the statutory requirements of 48-39-30(D) runs afoul of this state's long-standing jurisprudence.

KDP's suggestion that the legislative "intent" in promulgating the CMP was to exclude consideration of the policy in 48-39-30(D) is misguided. (Petition, p. 6). The legislature passed the Act, which contains the policies of the State, as well as explicit instructions for DHEC (then the Coastal Council) to prepare the Coastal Zone Management Program, which is then "approved" by the Governor and General Assembly. S.C. Code Ann. § 48-39-90, see also Spectre, LLC v. DHEC, 386 S.C. 357, 688 S.E.2d 844 (2010). Thus, legislative intent is best evidenced by the Act itself.

Moreover, this Court previously held that § 48-39-30(D) embodies the public trust doctrine, which requires that "any use of tidelands must be to the public benefit." KDP I, 411 S.C. 16, 41, 766 S.E.2d 707, 722 (2014).

Under the public trust doctrine "the control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public

therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995) (citing Illinois Central R. Co. v. Illinois, 146 U.S. 387, 453, 13 S.Ct. 110, 118, 36 L.Ed. 1018, 1042 (1892). "When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties." Sax, Joseph, "Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," 68 Mich. Law Rev. 471, 490 (1969-1970).

KDP's interpretation would prevent DHEC from using the Act to implement the public trust doctrine because it is not allowed to consider impacts to critical areas. Such an interpretation would violate the public trust doctrine by allowing KDP to subject public uses of the 2,110 feet of shoreline beyond the Park to it's private use.

Not even the ALC bought into KDP's reasoning that the CMP excludes consideration of § 48-39-30(D). Rather, the ALC held that Section 48-39-30(D) is "inapplicable to the proposed project. This subsection deals with the use of critical areas." (Order on Reconsideration, p. 17, R. p. 71). The ALC did not agree that the CMP limits the applicability of the statute, but it nonetheless erroneously constrained the application of this policy – an error which this Court corrected. Nothing in Section 48-39-30(D), or anywhere else in the Coastal Zone Management Act, suggests that DHEC should not consider the maximum beneficial public uses of critical areas when reviewing a project for consistency with the CMP.[1]

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[1]KDP cites to §§ 48-39-80 and -130 which discuss the direct and indirect permitting authority, but neither of those provisions limit the Act's policies which are of broad applicability. (Petition, p. 5).

The ALC's findings and conclusions, particularly as they related to S.C. Code Ann. § 48-39-30(D), failed to accord the proper weight to the public trust resources at stake.[2] Thus, the ALC's error here is identical to its error in the prior decision: the "ALC's misapprehension about public use and the failure to accord it the importance it deserves is fundamentally at odds with the public nature of the tidelands at issue here." KDP I, 411 S.C. 16, 43, 766 S.E.2d 707, 722 (2014). On the question of public benefit to leaving this shoreline unaltered, this Court held:

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

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

The only opportunity that DHEC will ever have to review and consider – and the public have a chance to comment on – the direct, foreseeable and undisputed impacts to the critical area resulting from this project *is this case*. The law does not require an applicant to return to DHEC for a permit to alter critical area resulting from a previously-permitted structure. This project is the one and only time where the state can weigh in to prevent loss of public trust critical area *before* such loss occurs. In that regard, KDP's suggestion that the permit conditions prohibit critical area impacts during construction rings hollow. (Petition, p. 4).

As a practical matter, if KDP were correct that § 48-39-30(D) does not apply to all

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

agency decisions within coastal zone, then an applicant could evade the statutory requirement that critical areas be used to provide maximum public benefit simply by moving a project a few feet landward. Such maneuvering to side-step a key provision of the law should be soundly rejected, as this Court's opinion did.

II. KDP's Attempt to Relitigate the 2018 Case is Collaterally Estopped and KDP Improperly Cited to Evidence Outside the Record and from a Separate Proceeding

In 2018 this Court affirmed DHEC's decision which "granted a 270-foot portion [of the bulkhead/revetment system] to protect public access to Beachwalker Park." KDP II, 422 S.C. 632, 635, 813 S.E.2d 691, 692 (2018). KDP misinterprets that holding and misapplies the testimony from the 2018 case. Contrary to KDP's assertion (Petition, p. 9), this Court's 2018 ruling did not find that "there was insufficient expert evidence" that the bulkhead without a revetment would work. Rather, this Court found that, according to KDP's own expert, the vertical wall without a revetment would surely fail. Id. at 637, 694 ("all of the evidence in the record indicated the revetment was critical to protect the toe of the bulkhead from increased erosion. Without the revetment, the expert testimony established that a bulkhead alone would exacerbate erosion in the long run, ultimately making the bulkhead itself susceptible to collapse. Thus, the ALC's authorization of the bulkhead only was contrary to the reliable, probative evidence contained in the record.").

The 270' structure was permitted by DHEC and as the party challenging that decision, the burden was on KDP to prove that the structure would fail as permitted, not on DHEC (or the League as suggested by KDP, Petition, p. 10, n. 4) to prove that the permitted structure would

function properly.[3] KDP failed to carry its burden of proof and it cannot now use its failure in the prior case to claim that the decision was improper. The permit authorizing the 270' structure has been subject to roughly 9 years of litigation, has been finally adjudicated, and is binding. KDP cannot come in now and collaterally attack the adjudicated permit decision from 2014/2018. "This Court has repeatedly held that, under the doctrines of res judicata and collateral estoppel, the decision of an administrative tribunal precludes the relitigation of the issues addressed by that tribunal in a collateral action." Dozier v. Am. Red Cross, 411 S.C. 274, 290, 768 S.E.2d 222, 230 (Ct. App. 2014). KDP is bound by the prior permitting decision, which has been finally adjudicated, including that it is a viable and feasible structure.

As to its burden of proof in this case, KDP presented no evidence on whether or not it would build the 270' bulkhead/revetment initially authorized by DHEC. The ALC reached that conclusion well after the close of evidence in the case. But even if the ALC permissibly drew a reasonable inference regarding KDP's unstated plans regarding the 270' wall, the fact remains that DHEC, utilizing its specialized expertise in issuing the critical area permit that was the subject of this Court's 2014 and 2018 decisions, determined that the 270' wall would be sufficient and viable to protect the parking lot at the Park. And this Court affirmed that permit. The suggestion that testimony is now needed to justify the 270' is an affront to DHEC, who permitted the structure, and this Court, which affirmed that permit.[4] In any case, KDP is legally

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[3]Indeed, as KDP points out, the League actually challenged the issuance of the 270' of structure; however, the League abides by this Court's final decisions on the merits of that permit, which is valid and in effect. KDP also points out that the Charleston County Parks and Recreation Commission applied for a permit for an erosion control structure only along the Park, which evidences PRC's belief that such structure would be sufficient. (Petition, p. 10).

[4]It should go without saying, but the burden of proof lies with KDP and any lack of evidence is a failure KDP must accept. KDP cannot now cite testimony from a prior case to

permitted to build the 270' wall or, under R. 30-9(C) transfer that permit to an entity willing to do so, such as PRC.

KDP attempts to make an end-run around the rules of evidence, and its burden of proof, by coming in at this late stage to assert that the structure permitted in 2009 would be insufficient based on testimony from another case and its own predictions based on photographs. (Petition, pp. 10-14). Because that testimony was not in evidence, and thus not part of the record in the present case, KDP's submission is highly improper. (Petition, pp. 10-13). The League requests that such extra-record evidence be stricken or disregarded by the Court. But if the Court indulges KDP in presenting extra-record evidence from a separate appeal that has been fully adjudicated, the Court should also consider testimony and evidence *from this pending case* that KDP has been in negotiations with PRC to relocate the Park's parking lot. KDP's Ray Pantlik testified that KDP had prepared drawings showing different locations for the Park. (R. p. 2379). Specifically, the drawings were to "look at alternatives to where the park – the parking area could be located," which would entail moving the parking area to a new, internal location that would still have beach access. (R. p. 2379, lines 13-14). And the League could, similar to KDP, draw a conclusion from the photograph in KDP's Petition: the land along the River is more valuable than internal land not bordering any water body, which is why KDP wants to swap this more valuable property for something internal. KDP's objective remains the same: it is trying to use the Park as leverage to secure authorization for a steel wall not for any public benefit reason, but solely to facilitate its residential development which it estimates will generate $319 million in gross revenue. (Amended Order, p. 13, R. p. 14).

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make arguments against a permit that has been finally determined as valid.

While it is obvious yet again from KDP's Petition for Rehearing that it is doing exactly what this Court found – holding the Park hostage in order to secure authorization for the entire 2,380' structure – the Court's ruling does not rest on such a conclusion. Instead, the conclusion rests on this Court's application of § 48-39-30(D)'s requirement that a critical areas shall be used to provide the maximum public beneficial uses. As reflected in photographs imbedded in KPD's Petition, the area in front of the Park has a mix of marsh vegetation and steep embankment. The sandy stretch beyond the Park is the area that the testimony and evidence (R. 856 & 859; R. pp. 869-72; R. pp. 1050-53; Pet. Ex. 3, R. pp. 3013-22) indicate are most widely used by the public, and it is those public trust tidelands that would be lost if the full length of the 2,380' structure is built. Even if KDP opts not to construct the erosion control structure previously authorized, this Court committed no error in concluding that the public benefits of a 270' wall in front of Beachwalker Park does not translate into a public benefit for the remaining 2,110' of wall beyond the Park that would solely benefit KDP while completely eliminating public access and use along that shoreline. Whether KDP is likely to construct the 270' wall is not a legally relevant consideration when evaluating a proposed project that would eliminate a significant stretch of tidelands for compliance with the CZMA, the CMP and the public trust doctrine.

KDP's regurgitation of the ALC's Opinion is not noteworthy. This Court is obviously quite familiar with that opinion and KDP fails to show how or what this Court misapprehended through its cut-and-paste job. This Court did not overlook the ALC's analysis or override the ALC's factual findings, as KDP states. (Petition, p. 19-20). Rather, this Court noted that the ALC relied on economic benefits in the form of taxes and jobs, and ruled as a matter of law that such economic benefits cannot provide "sufficient justification for eliminating the public's use of

protected tidelands." Coastal Conservation League v. DHEC, 2021 WL 2214218, at *7 (S.C. June 2, 2021). Such conclusion is consistent with this Court's 2014 opinion, which held that "an elevation of economic development over the importance of public access would also be inconsistent with the significance the CZMA accords to public access." KDP I, 411 S.C. 16, 40, 766 S.E.2d 707, 721 (2014). It would also be inconsistent with the public trust doctrine and this Court's ruling in S.C. Wildlife Federation v. S.C. Coastal Council, 296 S.C. 187, 371 S.E.2d 521 (1988).

To the extent that this Court's opinion can be said to overrule findings of the ALC, it is entitled to do so when those facts are not supported by the substantial evidence.[5] (Petition, p. 20). "'Substantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (quoting Law v. Richland County School Dist. No. 1, 270 S.C. 492, 243 S.E.2d 192). No evidence exists regarding how an as-of-yet unexecuted conservation easement on private property would provide any public benefit. The ALC never provides any rationale for

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[5]KDP's assertion that the ultimate question before the ALC was a "factual determination" of whether this project is consistent with the law (Petition, p. 4) highlights a key flaw in its arguments: the ALC is certainly required to make factual determinations, but the ultimate question is a actually a legal determination. In other words, the ALC must make factual findings and apply the legal requirements to those facts to arrive at a legal conclusion on whether the agency properly issued its decision. Indeed, the ALC is required to make separate findings of fact and conclusions of law. S.C. Code Ann. § 1-23-350. While ignoring the legal requirements and focusing on the ALC's factual findings is certainly advantageous to KDP, such an approach improperly constrains the administrative review process set forth in the APA in § 44-1-10, et seq.

how or why a conservation easement to a private entity on private property would provide any benefit to the public, and this finding is erroneous for lack of evidentiary support. Because no evidence exists to support the ALC's determination, this finding fails to meet the substantial evidence standard. This Court was correct in rejecting the ALC's meager attempt to justify eliminating a significant stretch of tidelands for KDP's private economic benefit. (Order, p. 42; R. p. 43: Joint Ex. 6; R. pp. 2952-65).

III. The ALC's Public Benefits Analysis Improperly Bootstrapped the Supposed Benefits of the full 2,380' Structure to the Benefits in Protecting the Parking Lot

As is abundantly clear from the Charleston County Parks and Recreation Commission ("PRC") application for a 270' bulkhead/revetment in front of the parking lot, to DHEC's issuance of a permit solely for 270' of bulkhead/revetment and this Court's affirmance of that permit, no real dispute exists that such a structure can be accomplished. Even if KDP elects not to construct the permitted 270' bulkhead/revetment because it desires to build a structure nearly 10 times that in length, the permit was litigated extensively and conclusively and KDP is collaterally estopped from challenging its validity.

As with his prior decision, the ALC again attempted to use the public benefits of protecting the 270' of shoreline adjacent to the parking lot to justify a much larger structure. For a second time this Court found that the ALC's failure to accord the public trust tidelands the weight they deserve violated § 48-39-30(D)'s requirement that critical areas be used to provide the maximum public beneficial uses. This Court recognized a benefit for protecting the Park, but not at the expense of loss of the remaining over 2,000' of sandy shoreline. Again, as a matter of law, this Court properly corrected the ALC's legal error in ruling that sacrificing 2,000' of public trust tidelands violates the law.

One thing that KDP does get right is that "the laws of nature . . . are oblivious to the laws of men." (Petition, p. 15). Indeed, the law of nature – in this case erosion along the Kiawah River – is oblivious as to whether KDP's application is for a wall in the critical area or one that will be in the critical area in short order. Both walls would have the same ultimate result, and the law applies equally to both. To hold otherwise would be to allow applicants to evade statutory requirements simply by shifting their project by a mere couple of feet.

IV. The CMP Policies Preclude This Project and Provide Additional Sustaining Grounds for This Court's Opinion

KDP reverses course from prior briefing to suggest that erosion control policies apply to this project. (Compare Petition, p. 6 with KDP's Brief, p. 14-15, asserting that the CMP's Erosion Control policies do not apply to this project; see also ALC Amended Order, p. 43, declaring that the Erosion Control policies do not apply). If this is an erosion control structure, the CMP requires that erosion control "structures must not interfere with existing or planned public access unless other adequate access can be provided" and that "structures shall not impede public use of beaches below the mean high water line." CMP Policies IV.C.4.(c)(2) & (3). DHEC authorized a steel wall that will both interfere with existing public access to the Kiawah River shoreline and impede public use of it.

KDP focuses its argument on what is not in the CMP, while ignoring the provisions that specifically prohibit this structure: "project proposals which would restrict or limit the continued use of recreational open area or disrupt the character of such a natural area (aesthetically or environmentally) will not be certified where other alternatives exist" (CMP Policy III.C.3.XII.D.(1)). Collectively, these CMP requirements provide additional sustaining grounds for this Court's conclusion.

CONCLUSION

WHEREFORE, the Appellant respectfully requests that this Court deny KDP II. LLC and Kiawah Resort Associates, LLC's petition for rehearing.

Respectfully submitted,

_s/Amy E. Armstrong____________________________

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