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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Kiawah Development Partners, II,.....Respondent,

v.

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

and

South Carolina Coastal Conservation League, ...Petitioner,

v.

South Carolina Department of Health and Environmental Control and
Kiawah Development Partners, II,

Of Whom

South Carolina Department of Health and Environmental Control is,.....Appellant,

and Kiawah Development Partners, II, is, ...Respondent.

SOUTH CAROLINA COASTAL CONSERVATION LEAGUE'S RETURN TO SAVANNAH RIVER MARITIME COMMISSION'S AMICUS BRIEF

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The Petitioner South Carolina Coastal Conservation League ("the League") submits this Return to the Savannah River Maritime Commission's ("SRMC") *amicus curiae* brief.

Summary of Argument

SRMC's brief reveals the existence of the confusion that the League has argued has been caused by this Court's February 2013 Opinion. SRMC characterizes the legal analysis of three members of the Court (Plecoines and Hearn, dissenting; Kittredge, concurring in result, but adopting legal analysis of dissent) as "*dicta*," which "creates uncertainty within the practice of administrative law and environmental law in the State." (Brief, p. 1, n. 1). Three votes of this Court squarely and explicitly adopting a legal interpretation in the course of rendering an opinion do not constitute "dicta." They constitute law. SMRC's attempt to confuse this basic and fundamental point is emblematic of a brief that touches on many topics and elucidates none. SMRC's brief simply proves that the lack of a consensus legal analysis or interpretation of the questions presented has resulted and will continue to result in confusion to the regulated community, practitioners, and decision-makers alike.

SRMC requests clarification of "the applicable framework for addressing agency deference due in *de novo* contested case hearings before the ALC, at the appellate level, and the scope of agency authority . . ." (Brief, p. 2). SRMC's request for "further guidance" 1) seeks a ruling on issues that are not central to the disposition of this case and 2) exemplifies the confusion and ambiguity identified by the League in its Petition for Rehearing before this Court.

I. Deference to Agency Interpretation of Statutes and Regulations

This Court has articulated the law on deference to agency interpretation as it relates to this case. Here the S.C. Department of Health and Environmental Control ("DHEC"), is entitled to deference in its interpretation of the law, unless there is a "compelling reason to differ." *Kiawah Dev. Partners, II v. SCDHEC*, Op. No. 2705 (filed Nov. 11, 2011) (Shearouse Adv. Sh. No. 41) (rehearing granted); *Kiawah Dev. Partners, II v. SCDHEC*, Op. No. 27065 (filed Feb. 27, 2013) (Shearouse Adv. Sh. No. 9). A majority of this Court has twice concluded that DHEC's interpretation of Regulation 30-11.C.1. is proper and should be upheld. SRMC seems to ask this Court to give the ALC's interpretation of DHEC's statutes and regulations deference *over* DHEC's conflicting interpretation (Brief p. 10-12). In SRMC's view, it makes sense, somehow, for the ALC to give deference to DHEC, but for appellate courts to then ignore that deference completely and only give deference to the ALC. This would of course render deference to DHEC largely meaningless and emplace the ALC as an agency-of-one, free to ignore the executive agency staff who develop detailed and technical regulatory programs on the taxpayers dime. Why have an agency at all?

The proper standard of review is far simpler and more sensible. The ALC must defer to the agency's reasoned interpretation unless it has a "compelling reason" to differ, for instance if the agency's interpretation is contrary to the plain language, exceeds the agency's authority, materially alters or adds to a statute, or contains other error of law. *See S.C. Coastal Conservation League v. SCDHEC*, 363 S.C. 67, 610 S.E.2d 482 (2005); *Savannah Riverkeeper v. SCDHEC*, 400 S.C. 196, 733 S.E.2d 903 (2012); *Society of*

Professional Journalists v. Sexton, 283 S.C. 563, 567, 324 S.E.2d 313 (1984). By concluding that the ALC's interpretation was an error of law, a majority of the members of this Court has twice determined that none of these circumstances exist. *KDP, II v. SCDHEC*, Op. No. 2705 (filed Nov. 11, 2011) (Shearouse Adv. Sh. No. 41) (rehearing granted); *KDP, II v. SCDHEC*, Op. No. 27065 (filed Feb. 27, 2013) (Shearouse Adv. Sh. No. 9). Simply because the ALC "disagreed with" the agency's interpretation is not a "compelling reason" to differ, as suggested by this Court's Opinion of February, 2013. *KDP, II v. SCDHEC,* Op. No. 27065 (filed Feb. 27, 2013) (Shearouse Adv. Sh. No. 9). In fact, four Justices in 2011 and three Justices in 2013 agreed that there is no "compelling reason" to differ from DHEC's interpretation of Regulation 30-11.C. because that interpretation is consistent with the statutory scheme of the S.C. Coastal Zone Management Act.

SRMC relies on several cases in a thinly-veiled attempt to re-challenge what this Court has twice determined: that DHEC's review authority under Regulation 30-11.C. extends to consideration of impacts beyond the critical area. Putting aside questions of why a state agency such as SRMC – with a recent tradition of exerting its own regulatory power to the broadest extent possible – would be seeking to limit another agency's authority, none of the cases cited by SRMC is applicable to the matter before the Court or instructive for its reasoning. Rather, all three of the cases cited relate to appeals of dock permits constructed *to provide access to critical areas.* By their very nature, the structures in those cases do not implicate broader impacts on uplands. By contrast, KDP's proposed bulkhead and revetment structure would *cover over and*

eliminate access to critical area in order to facilitate the development of Captain Sams Spit by increasing its "marketability." Moreover, in each of the cases cited by SRMC, the ALC actually gave the deference due to DHEC's interpretation and application of the regulations. The ALC gave no such deference here.

If it is true that the ALC "decides the issue without regard to the decisions made by the agency," as SRMC suggests in footnote 6 of its brief, then there is no need for DHEC to conduct any permit review and the General Assembly's delegation of authority to DHEC to hire qualified staff to undertake technical and scientific reviews of permit applications becomes meaningless. But those things are not meaningless. Nor is the accountability provided by having an executive agency make executive decisions. Under SRMC's view, if the ALC can simply ignore the agency's decision, then applicants for permits may as well apply to the ALC rather than to DHEC. The SRMC's confused arrangement has no basis in law, and is anathema to the statutory system put in place by the State's elected leaders.

II. The Authority of the Administrative Law Court and Appropriateness of Remand

SRMC acknowledges that there may be instances "when all parties . . . to a contested case proceeding fail to offer evidence on particular matters or new issues may arise and be brought to light during the course of the contested case proceeding that may weigh in favor of the ALC exercising discretion in remanding the proceeding back to the licensing agency for additional consideration and evaluation." (SRMC brief, p. 7, n. 7, citing *Charlotte-Mecklenburg Hosp. Auth. v.* SCDHEC, 387 S.C. 265, 692 S.E.2d 894

(2010)). Here no party offered evidence in support of the permit modification reducing the width of the revetment structure and eliminating portions of the bulkhead that was adopted by the ALC. The scant, hypothetical and diffident testimony that Mr. Bohannon offered was simply insufficient to support the ALC's decision. The questions the ALC asked of Mr. Bohannon were answered so warily that it was clear that he had not given thought to a structure smaller than what he had designed. In fact, his confident opinion to KDP was that there is a "need to protect the toe against reflective energy or it will cause more exacerbated erosion."[1] (R. p. 606). That opinion was further bolstered by KDP's experts David Basco, Ph.D. in Coastal Engineering, and George Oertel, Ph.D. in Coastal Geology, who conducted a study and prepared a report concluding that the structure as designed by Mr. Bohannon would cause scour (erosion) at toe, which would cause the concrete wall to drop 10 feet, which would further exacerbate erosion at the toe. (R. pp. 1977-1989). Drs. Basco and Oertel recommended that the concrete block wall be ***increased*** from 40 feet to 60 feet. (R. p. 1982). The ALJ authorized just the opposite – despite record evidence indicating that the "ALJ-issued" permit is unsound and will increase scouring.

The League also did not request that the ALC remand the matter to DHEC, as SRMC suggests. The League requested that the ALC overturn the agency's authorization of 270 feet of revetment and bulkhead and uphold the agency's denial of 2,500 feet of

[1] The "toe" is the portion of the revetment that extends below the mean low water mark. KDP's experts explained that one would protect the "toe" by *extending* the width of the revetment so that it goes even further into the channel below the mean high water line in order to diffuse the wave energy. (R. pp. 1977-1989).

revetment and bulkhead. In its Final Brief before this Court the League asked the Court to reverse the decision of the ALC, reverse the permit as authorized by its order, and reverse the permit issued by DHEC. (Brief of Appellant, p. 48). The League continues to assert that the grounds for reversal are based on the project's failure to meet a key policy of the Act, namely that "critical areas shall be used to provide the maximum benefit to the people, not necessarily the use that will generate maximum dollar benefits." S.C. Code Ann. § 48-39-30.D.[2]

III. DHEC's Statutory Authority

The ALC's opinion lacks any analysis of how KDP's project complies with Section 48-39-30.D. There is no evidence that the proposed project provides any benefit to the people, and the ALC made no findings of any such public benefit. Similarly, there is no evidence of economic benefit to the developer, only the ALC's finding that the structure is "needed" to make the lots "marketable" to prevent "reticence of buyers." Indeed, KDP's Leonard Long testified that he had not calculated the economic benefit of the revetment. (R. p. 415).

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[2] The SRMC's discursive footnote musing on the motivations of parties seeking remand is baseless and at odds with its own reasoning. Remand to the agency only results where there agency error *is determined by the ALC*. SRMC's hostility to allowing a regulatory agency to correct its errors is, in a word, strange, coming, as it does, from a regulatory agency. But then the SRMC is not a typical executive agency with clear accountability to the chief executive. Also strange is the SRMC's attempt to denigrate the League's legal strategies. As this Court is no doubt aware, the party that petitioned this Court in its original jurisdiction to have the SRMC's authority concerning the Savannah River deepening project clarified *viz.* DHEC's authority was not the SRMC – it was the Coastal Conservation League and others. Moreover, it was the League that articulated the legal parameters of the SRMC's power which this Court adopted in that case, not the overly broad limits offered by SRMC (as an intervenor).

By contrast, there was evidence of *harm* to the public in the form of elimination of access to the banks of the Kiawah River and harm to marine species and wildlife.[3] While the extent of that public use and benefit may be subject to debate, at a minimum, it is instructive that seven groups, ranging from an educational group, to kayak businesses, to tourism industry groups, established that they are members of the public who would be adversely affected by the proposed structure.[4] Their statements represent the very public interest factors that DHEC found significant:

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[3] In addition to the harm to public access identified in the ALC's Order, he also found that there would be at least some adverse impacts to wildlife, even though he felt it was not "significant." (ALC Order, pp. 14-15, 21). The collective findings related to harm, which are quickly brushed aside, are what the ALC *should have considered* if he had truly conducted a "cumulative impacts" analysis.

[4] Regulation 30-12.C. further implements the public interest goals of the Act by prohibiting bulkheads and revetments that effect public access, except in limited situations. Those situations are when upland is being lost to erosion or where there are no feasible alternatives. The 2011 opinion addresses application of 30-12.C.1.(d), noting that section "creates a presumption that structures adversely affecting public access will be prohibited unless no feasible alternatives and recognizing that the duty to prove lack of feasible alternatives is on applicant. The new opinion provides no explanation for reversal of this legal conclusion, and the League can discern no legal basis for this departure.

In addition to improperly shifting the burden on the League to prove the existence of feasible alternatives, the ALC's opinion errs on two other points. First, the ALC made a conclusory finding that there are no feasible alternatives without providing any evidentiary support or explaining his finding. In the four sentences addressing feasible alternatives, the ALC said that because there is erosion, there is a "need" to stop this erosion. Then he concluded that there are no feasible alternatives to stabilizing the bank. The ALJ erred in this finding and conclusion. This Court has made clear that the "findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings." *Able Communications, Inc. v. S.C. Public Services Com'n,* 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986).

The other error is that the ALC equated the consideration of feasible alternatives with an "environmentally sensitive design." His consideration was premised on his determination that there is a "need" for the structure. The "need" identified by the ALC is the "marketability" of the lots. But the need must be looked at within the context of

> I've seen people walking along that section. I've seen kayaks pulled up, I've seen people either fishing or crabbing, I can't remember which. So I think that there is definitely some public access and use in that area. . . . I think it's certainly true that if this articulated concrete block structure were built, that **it would effectively remove the public's ability to use that half-mile-long shoreline.**

R. pp. 1353, line 24 – 1354, line 10.

The ALC concluded that the harm to the public was not "significant" enough to warrant denial, but the fact is that the public interest will be harmed and there was no evidence of any benefit to the public or the developer.[5] In other words, no balancing between the public and private interests occurred. The ALC found a "need" to make lots "marketable" and used that determination to override the public interest in accessing the spit, viewing dolphins and other wildlife. The Act authorizes DHEC to make the

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the purpose of the project, which is to facilitate residential development. Effectively, the opinion allows loss of public access in order to make lots more marketable – all without making the necessary findings to support conclusion regarding feasible alternatives and improperly shifting the burden to the League.

[5] The five amicus parties submitted briefs, four of which provide examples not only of public use of the coastal resource that would be impacted by the revetment system, but also of economic harm to those interests that rely on the ability to access the banks of the Kiawah River below the mean high water mark. These amicus parties provide a deeper understanding of the breadth and depth of the adverse impacts on the public's interest. The paddlesports industry, for example, representing 25 groups explained how the project would threaten some of its member groups because they take paying customers to the area that will be covered by the proposed structure. FKR takes school children on boat trips to the spit to show them what a pristine barrier island spit looks like, pulling up onto the shore where the structure would be built. And Kayak Charleston explains the financial detriment it will suffer in decreased quality of tours, leading to decreased requests for tours, and decreased revenue. (Amicus brief, p. 8).

These groups bring into focus that the Spit and sandy banks of the Kiawah River are the resources that the Act is designed to protect for the public's benefit. It is these resources that enhance the quality of life for South Carolinians, and attract tourists and new residents alike. As our population grows, there will be more demand for accessible, attractive coastal resources like Captain Sams, but rather than protect for future generations, this public resources and the public uses it supports will be gone forever.

assessment of public interest factors, for example, DHEC may authorize erosion control permits "as it deems most advantageous to the State" for "promoting public health, safety, and welfare, the protection of public and private property from beach and shore destruction and the continued use of tidelands, submerged lands and waters for public purposes." S.C Code Ann. § 48-39-120. Here, there was no evidence of any benefit to the public; there was only evidence of adverse impacts to the public in the nature of harm to public access, marine species and wildlife.

While the ALC is not "restricted by the findings of the administrative agency," T*erry v. SCDHEC*, 377 S.C. 569, 573, 660 S.E.2d 291, 293 (Ct. App. 2008), neither is it entitled to disregard those findings entirely as it did in this case. *See* S.C. Code Ann. § 44-1-60.G.(2); S.C. Code Ann. § 1-23-330(4). Specifically here, DHEC utilized its specialized knowledge and technical expertise and made findings that:

-Captain Sam's Spit is "one of three tracts of oceanfront land in the entire state where the public has good access, where you can drive and park and walk out and see what a pristine undeveloped piece of oceanfront property looks like, and . . . there is an extraordinary value to the people of South Carolina in preserving that." (R. p. 1361, lines 11-18);

-the Spit is part of a one of the most dynamic marine systems in South Carolina and is constantly being reshaped (R. 1964);

-the structure would affect ability of inlet and beach/dune system to migrate, as it has done in recent past (R.1964);

-historical information indicates that Captain Sams Inlet has been reformed approximately seven times (R. 1967);

-that project will prevent inlet migration and/or formation (R. 1967); and

-that the Spit has been completely eroded as recently as 1948 or 1949 (ALC Order, p. 3).

IV. The Scope of Agency Authority

The League agrees with SRMC's statement that "delineating the limits of agency deference is not an easy one." (Brief p. 3, n. 3). The League also agrees with SRMC that judicial review is complicated by the agency's duty to "weigh and implement public policy" as they "implement statutory schemes." (Brief p. 13, citing Charles H. Koch, 4 *Admin. Law & Practice* § 11:31 (3d ed. 2013)). Here, the pertinent public policy is the public interest in coastal resources. The Act creates a presumption in favor of the public's interest. The Act is filled with explicit statements regarding protection of coastal resources in furtherance of that public interest,[6] and proof that a project is consistent with the policies favoring the public interest is a threshold requirement for any project. The

[6] "The increasing and competing demands on lands and waters of our coastal zone occasioned by population growth and economic development . . . have resulted in decline or loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use .. ." S.C. Code Ann. § 48-39-20.B; the coastal zone is "ecologically fragile and consequently extremely vulnerable to destruction by man's alterations," S.C. Code Ann. § 48-39-20.D; the goal is "to protect and, where possible, to restore and enhance the resources of the State's coastal zone for this and future generations," S.C. Code Ann. § 48-39-30.B.(2); we must "give high priority to natural systems in the coastal zone," S.C. Code Ann. § 48-39-20.F.; and "[c]ritical 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. S.C. Code Ann. § 48-39-30.D.

General Assembly authorized DHEC to make that public interest determination – to weigh and implement public policy in making permitting decisions. This approach not only has practical appeal, but also comports with the statutory scheme of DHEC's broad authority over coastal resources that a majority of the members of this Court recognized in both the 2011 and 2013 decisions. Under that authority, DHEC here took into account a variety of factors implicated by its permitting decision and properly looked broadly at what is at stake in this case.

SRMC also points to the general rules that "social legislation is liberally construed in favor of those intended to benefit from it" (Brief, p. 13, citing Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 65:3 (7th ed. 2013)), and that only when statues impinge on freedoms, including "long-established property rights," will they be construed strictly. *Id.* Those rules do not apply here. KDP simply has no property rights, "long-established" or otherwise, in the critical area tidelands over which it seeks to construct a bulkhead and revetment. As an owner of property abutting tidal waters, KDP has only littoral rights. [7] *See Lowcountry Open Land Trust v. State*, 347 S.C. 96, 109, 552 S.E.2d 778, 785 (Ct. App. 2001) (*citing Black's Law Dictionary* 1327 (6th ed. 1990). While the "common law of England afforded a littoral owner *access* from his land to the water, this right was not a title in the soil below high-water mark, *nor a right to build thereon,* but a right of access only, analogous to that of an abutter upon a

[7] In this case, the owner of lands under the tidal waters is the State of South Carolina, who holds title to those lands below the mean high water mark in trust for the citizens of the State. *McQueen v. S. Carolina Coastal Council*, 354 S.C. 142, 149, 580 S.E.2d 116, 119 (2003) ("not only does the State hold title to this land in *jus privatum,* it holds it in *jus publicum,* in trust for the benefit of all the citizens of this State").

highway." *Id.* The South Carolina Court of Appeals has held that "an owner whose property abuts tidal waters possesses no littoral right to wharf out to a navigable stream, and therefore must obtain permission from the underlying landowner before erecting a dock, pier or comparable structure." *Id.* at 110. Simply stated, KDP has no inherent right to construct the proposed structure on State-owned lands, rather must obtain State permission. In turn, the State must consider whether to grant permission by taking into account the public policy of protecting coastal resources, and specifically providing that this critical area be utilized for the maximum benefit for the people, not the maximum dollar benefit to the developer. S.C. Code Ann. § 48-39-30.D.

The ALC's Order and this Court's 2013 Opinion ignored the latitude the General Assembly has accorded DHEC to implement this essential public policy by failing to give consideration to the public's interest in protecting coastal resources, specifically Captain Sams Spit and its environs. The ALC's Order contains no any analysis at all of how the public's interest was considered or balanced with "economic interests." As a result, the ALC's review of the evidence and the nature of its analysis were severely distorted. By affirming the ALC's decision to stand, despite the conclusion of three members of this Court that the ALC erred in its application of the law, the Court will effectively obscure the clear guidance inherent in the 2011 Opinion and leave regulators, applicants, reviewing courts, and the public with no reliability or certainty as to the proper legal test or its applicability.

Because three members of this Court believe that the ALC's interpretation is error as a matter of law and that DHEC's interpretation is proper, the agency's specialized

knowledge and experience comes into play. The Administrative Procedures Act and the ALC's enabling statute require consideration of that knowledge and experience. However, the ALC effectively ignored that requirement because it concluded that it could not consider impacts outside of the "critical area" under Regulation 30-11.C. Because the ALC's interpretation is error, then the nature of the ALC's analysis was necessarily flawed because it misapprehended the scope of the inquiry. This misapprehension of the scope of inquiry infected the nature of the ALJ's entire analysis, leading to a distorted and incomplete review of the evidence. Indeed, the ALC said that "[e]ven if the Court were to consider the effects of potential development," thus starting with a recognition that it did not consider the effects of the potential development, but if it did, it would have concluded that there was no evidence of any material adverse environmental impacts on upland, citing only KDP's evidence and ignoring completely DHEC's expertise regarding, among other things, stability of the spit, the dynamic nature of the system, and the change in general character of the area from pristine to developed.

Because the ALC used an erroneous legal standard, the only proper remedy is a remand to the ALC to apply the evidence and make factual findings and conclusions based on application of the proper legal standard, giving due consideration to the agency's technical and specialized knowledge.

CONCLUSION

WHEREFORE, the Petitioner, the South Carolina Coastal Conservation League, respectfully requests this honorable Court reversethe Administrative Law Court's conclusion that the proposed project complies with § 48-39-30.D; to reverse the

Administrative Law Court's conclusion that the proposed project complies with Regulation 30-11.C.(1), and to remand the matter to apply the proper legal standard; and to reverse the Administrative Law Court's conclusions that the project complies with Regulation 30-12.C., and to remand this matter to impose the proper burden of proof and to require sufficient findings to enable the reviewing court to determine whether the conclusions concerning compliance with 30-12.C. are supported by the evidence.

Respectfully submitted,

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The undersigned does hereby certify that this Final Brief complies with SCRAP Rule 211(b).

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