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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2022-001179

KDP II, LLC.....Appellant,

v.

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

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

STATEMENT OF THE ISSUE ON APPEAL

WHETHER THE ALC'S FINAL DECISION ADOPTING THE BASELINE POSITION OF THE DEPARTMENT IN ITS FINAL DECISION AFTER REMAND WAS BASED UPON ERRORS OF LAW AND FINDINGS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE THAT REQUIRE THE DECISION TO BE REVERSED AND THE BASELINE TO BE SET AT THE MOST LANDWARD POINT OF EROSION DURING THE PREVIOUS 40 YEARS LOCATED BY APPELLANT'S COASTAL GEOLOGIST?

STATEMENT OF THE CASE

This is an appeal from the final decision of the Administrative Law Court determining the location of the baseline and setback line on beachfront property on the western end of Kiawah Island, owned by Appellant, KDP II, LLC ("KDP") and generally referred to as Captain Sams Spit.

The Respondent, Department of Health and Environmental Control, Office of Coastal and Resource Management ("the Department"), has the statutory responsibility to set the locations of the baseline and setbacks lines on beachfront property along the South Carolina Coast under S.C. Code Ann. § 48-39-280(C) of the Beachfront Management Act, S.C. Code Ann. §§ 48-39-250, et seq. On October 6, 2017, the Department released its preliminary delineation of the jurisdictional lines (the proposed baseline and setback line) under for the South Carolina coast including Captain Sams.

In accordance with S.C. Code Ann. § 44-1-60(D)(2) KDP appealed the Department's preliminary determination of the baseline to the DHEC board and requested a final review conference on November 20, 2017. (**R. p. 0092**) KDP's Request was made pursuant to the version of S.C. Code Ann. § 48-39-280 in effect in October 2017. (**Id.**) The statute then provided:

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

S.C. Code Ann. § 48-39-280(E) (effective June 3, 2016, to May 2, 2018).[1]

[1] Pursuant to amendment effective May 2018, the statute now reads: "A landowner [or his appointee] claiming ownership of property adversely affected by the establishment of a baseline or setback line, upon submittal of substantiating evidence, must be granted a review

By letter dated January 5, 2018, the Department's Board denied KDP's Request for Final Review Conference. (**R. p. 0001**) On February 5, 2018, KDP filed a Notice of Request for Contested Case Hearing in the South Carolina Administrative Law Court ("ALC") in accordance with S.C. Code Ann. § 44-1-60 (G). (**R. p. 0122**) The appeal was assigned to the Honorable Shirley G. Robinson, South Carolina Administrative Law Judge, and captioned as KDP, II, LLC v. South Carolina Department of Health & Environmental Control, ALC Docket No. 18-07-0047-CC.

By Order dated March 29, 2019, the ALC denied the Department's Motion to Dismiss filed on October 24, 2018. (**R. p. 0005**) In that Order, the ALC commented in a footnote that KDP had not exhausted its administrative remedies because the Department had not yet issued a final decision *on the merits* of KDP's reasons for requesting the seaward adjustment of the jurisdictional lines. (Id., n. 12 (emphasis added))

With the ALC's concurrence, KDP and the Department agreed to stay the proceedings and remanded the matter to the Department staff to consider "the merits" of KDP's contention that the Department did not abide by the clear terms of S.C. Code Ann. § 48-39-280 in its preliminary delineation of the baseline. (**R. p. 0023**)

On December 6, 2019, the Department issued its Final Decision on Remand that "essentially left the Department's preliminary delineation of the jurisdictional lines unchanged [from the 2017 proposed lines] except for a minor adjustment in one small location." (**R. p. 0048**)

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of the baseline or setback line." S.C. Code Ann. § 48-39-280(F)(1). (See also, infra, Motion to Intervene by Unrelated Parties)

KDP timely filed a second written Request for Final Review Conference with the DHEC Board on December 23, 2019. (**R. p. 0158**) The DHEC Board officially declined KDP's request for review, by letter dated February 10, 2020. (**See R. p. 48**)

On March 6, 2020, KDP renewed its earlier request for a contested case hearing and sought to lift the stay. (**R. p. 0186**) By Order dated June 10, 2020, the ALC lifted the stay and requested the parties file updated prehearing statements. (**R. p. 0043**) On June 30, 2020, KDP and the Department filed their respective updated/amended prehearing statements. (**R. p. 0193 and R. p. 0204**)

The ALC conducted the contested case hearing on the merits from August 24, 2021, through August 27, 2021.

On June 24, 2022, the ALC issued its final Order on the merits and denied any relief to KDP (hereinafter the "Order"). Instead, the ALC ruled the baseline should be set at the position delineated by the Department in its December 6, 2019, Final Decision on Remand that again essentially left unchanged the Department's 2017 preliminary delineation. (**R. p. 0041**).

On July 5, 2022, KDP filed its Motion for Reconsideration and to Alter or Amend. (**R. p. 0214**) The Department filed its Return to KDP's Motion for Reconsideration on July 15, 2022. (**R. p. 0245**) On July 25, 2022, the ALC issued an Order Denying KDP's Motion for Reconsideration. (**R. p. 0089**)

On August 24, 2022, KDP filed its Notice of Appeal.

STATEMENT OF THE FACTS

The primary basis for KDP's appeal to this Court is that the ALC committed errors of law in deciding the proper location of the baseline on Captain Sams in the Order and further that specific "findings" that were critical to the ALC's ruling were based on speculation, not supported by substantial evidence, or improper under the controlling legal standard.[2]

On October 6, 2017, the Department released its preliminary delineation of the jurisdictional lines (the proposed baseline and setback line) under SC Code Ann. § 48-39-280 on Captain Sams as well as the rest of the oceanfront along the South Carolina coast. Prior to the 2017 delineation, the Department had previously set the beachfront jurisdictional lines on Captain Sams in 1999 and again in 2009. (**R. p. 0194; R. p. 0350, line 9-p. 0351, line 2; R. pp. 1330-1331**)

The baseline the Department set in 2009 "was virtually the same as it was in 1999." (**R. p. 0048**; **see also R. p. 0350, line 9-p. 0351, line 2; R. pp. 1330-1331**) In its October 2017 delineation, the Department again "placed the [base]line in essentially the same location as the two prior delineations" in 1999 and 2009. (**R. p. 0047; R. pp. 0361-0362; R. p. 1392**).

The locations the Department selects for baselines and setback lines are vitally important to beachfront landowners because no new construction or reconstruction is allowed seaward of

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[2] KDP does not contest the Department's and the ALC's determination that the setback line should be set 20 feet landward of the baseline, which is the shortest distance allowed by statute: "(B) To implement the beach preservation policy provided for in subsection (A), a setback line must be established landward of the baseline a distance which is forty times the average annual erosion rate or not less than twenty feet from the baseline for each erosion zone based upon the best historical and scientific data adopted by the department as a part of the State Comprehensive Beach Management Plan." S.C. Code Ann. §48-19-280(B), as amended eff. May 3, 2018. Its precise geographic location therefore depends on the location of the baseline.

the setback line and baseline except under very limited circumstances. See S.C. Code Ann. § 48-39-290(A). In the case of undeveloped land like Captain Sams, the location of these jurisdictional lines has tremendous impact on potential uses for the land. (**R. p. 0350**) (KDP witness Ray Pantlik testifying "Practically speaking, one has to develop above the setback line, landward of the setback line, and be above the critical line on the river marsh side.")

Both in its October 2017 determination and in its Final Decision on Remand in December 2019, "the Department arrived at the baseline's placement by reviewing a 1988 aerial photograph" to select what it called the 1988 vegetation line. (**R. p. 0045**) The Department derived its opinion of the location of this vegetation line from its visual review of the 1988 aerial photograph which it deemed "to be the most landward point of erosion in the last 40 years." (**R. pp. 0026-0042**)

S.C. Code Ann. § 48-39-280(A) sets forth two separate tests for determining the location of the baseline that depend on whether the beachfront in question is in the standard erosion zone or an inlet erosion zone. Captain Sams is within an inlet erosion zone (next to an inlet at the end of a barrier island) (S.C. Code Ann. § 48-39-280(A)(2)).

At the contested case hearing both parties asserted that the location of the baseline is controlled by S.C. Code Ann. § 48-39-280(A)(2) for unstabilized inlet erosion zones and that the language of the statute in effect in 2017, the time of the Department's preliminary delineation, should apply. (**R. p. 0047**) While the other subsections of S.C. Code Ann. § 48-39-280, were amended in 2018, those changes did not alter the General Assembly's mandate for determining the location of the baseline in this case: "The baseline for inlet erosion zones that are not stabilized by jetties, terminal groins, or other structures must be determined by the department ***as the most landward point of erosion at any time during the past forty years***." See

S.C. Code Ann. § 48-39-280(A)(2) (Supp. 2017) (double emphasis added); S.C. Code Ann. § 48-39-280(A)(2) (Supp. 2018); and S.C. Code Ann. § 48-39-280(A)(2) (Supp. 2021); (see also Final Order at fn. 1 (**R. p. 0046**) (discussing the amendments)) Notably, S.C. Code Ann. § 48-39-280(C) further requires that "the Department must review and establish new jurisdictional lines [a baseline and a setback line] not less than every seven years but not more than every ten years." (See Final Order at fn. 2) (**R. p. 0048**).

Although the Department agreed S.C. Code Ann. § 48-39-280(A)(2) mandates that the baseline be set "at the most landward point of erosion at any time during the last forty years," the Department contends that the baseline should actually be set at "the most landward shoreline over the last forty years." (**R. p. 0848**) Department witness Jessica Boynton testified that the Department looks beyond the statute and turns to the wording in S.C. Code Reg. 30-21 that refers to the baseline in the inlet zone instead as "the most landward shoreline," which the Department asserts provides "clarity" regarding the plain language of the statute. (**R. p. 0853, line 20-p. 854, line 6**) Further, Boynton testified, "the Department uses vegetation lines as the landward position – the landward shoreline" and "[t]he Department looks for two features, the first is the line of stable natural vegetation. And then the second is an escarpment line." (**R. p. 0855, lines 10-13**) The Department identifies these "vegetation lines" in its Staff's review of "aerial photography" or sometimes in a field visit "with a GPS unit." (**R. p. 0856, lines 3-8**)

KDP asserts, and has asserted throughout, that the most landward point of erosion means exactly what it says. If the legislature had intended the baseline be set at the most landward shoreline, then the legislature would have said so in the statute. The legislature did not do that. Further, the legislature has never modified this wording of the statute since its passage even though adopting extensive modifications to it in 2018.

As explained by KDP's expert John Hodge, a shoreline is not a point of erosion. It is the shoreline. Nonetheless, the Department persists in setting the baseline in unstabilized inlet zones at what it believes to be the most landward shoreline over the last 40 years. The Department's baseline review committee analyzed only vegetation and shoreline locations over the last 40 years rather than determining the most landward point of erosion in locating the baseline on Captain Sams in 2017. The Department witnesses testified that they plotted all the available vegetation lines and shorelines from the previous forty years, projected them on a screen, and selected the most landward of all of them. (**See R. pp. 0936-0937**)

Both in 2017 and later on remand, the Department located the baseline on Captain Sams along a broken line of mature vegetation near the bank of the Kiawah River based on its visual observation and interpretation of the 1988 black and white aerial photograph. (Final Decision on Remand dated December 6, 2019, (**R. pp. 0037-0040; R. p. 1488-1495**)). As previously stated, this location is virtually the same location where the baseline was established in 1999 and 2009. (See Pet. Ex. 2 (**R. pp. 1328-1329**) (with testimony at **R. pp. 0385-0392**) and see also Pet. Ex. 4 (**R. p. 1330**) (with testimony at **R. pp. 0392-0394**))

In contrast, KDP put forward proof at the hearing through its expert, John Hodge,[3] that the most landward point of erosion over the last 40 years was manifested by dune escarpments left after the surge of Hurricane Irma in 2017. Hodge walked the beach of Captain Sams in October 2017, soon after that hurricane and flagged these locations for its entire length. These points were then surveyed and plotted by a licensed surveyor. (**R. pp. 0387-0392; R. pp. 1328-1329**).

[3] The ALC qualified Hodge as an expert in the fields of geology, coastal geology, and coastal processes. (See Order at fn. 19 **(R. p. 0056**))

In his testimony Hodge explained the difference between a shoreline and an erosional feature. (**See R. pp. 0534-0538**) An escarpment is a geomorphic expression of erosion. (**See R. pp. 0646-0647**) A dune is a depositional feature and a geomorphic expression of accretion. (**See R. p. 0466**) A shoreline is not necessarily a geomorphic expression of erosion. The shoreline on an accreting beach is instead a depositional, or accretional, feature. (**See R. pp. 0534-0535**)

Hodge conducted separate series of measurements based on rectified aerial photography and the Department's beach monument survey data[4] from the last 30 years to determine if the shoreline of Captain Sams was accreting or retreating. (**See R. pp. 0502-0533**) (Hodge testifying regarding monument data, on-site investigation, and aerial photography; Hodge testifying his use of imagery and profile data for each "as a check against the other" for confirmation.) He determined that the shoreline of Captain Sams was consistently accreting except for a brief period of intense storm and hurricane activity between 2015 and 2017. (**R. p. 0532, line 24-p. 0533, line 22**) (Hodge testifying "To a reasonable geological certainty, the beach at Captain Sam's is accreting and has been accreting over the last 40 years.")

Even considering the effect of those storms, Hodge calculated that the annual average rate of accretion on Captain Sams was 5.8 feet per year on average. (**See R. p. 0525; see also R. p. 1346 (Pet. Ex. 9d))** Hodge also testified that the Department's own published data documents accretion of 5.22 feet per year at Monument 2625 and 6.15 feet per year at Monument 2620**.** (**See R. pp. 0531-0532; see also Pet. Exs. 9g and 9h** (**R. p. 1344; R. p. 1349**))

[4] S.C. Code Ann. § 48-39-280(E)(1) requires the Department to conduct beach profile surveys: "In order to locate the baselines and the setback lines, the department must establish monumented and controlled survey points in each county fronting the Atlantic Ocean…."

KDP also presented the expert testimony of Andy Tolleson, a licensed professional engineer and licensed professional GIS (geographic information system) surveyor who is a diplomate in the Academy of Geo-Professionals. The Court found Tolleson qualified as an expert in civil engineering, professional GIS surveying, and remote sensing.[5] (**R. p. 0063**) Tolleson testified to the accuracy of various aerial photographs of Captain Sams and Kiawah Island, the specific features evident on those aerials using photogrammetry and professional sensing techniques, and other aspects of certain aerials that were offered into evidence. Of particular note, Tolleson testified that his standard, accepted scientific analysis of the 1988 aerial relied upon by the Department unquestionably confirmed that there was a significant field of established vegetation that extended well seaward of the Department's vegetation line.

Q: What did you do?
A: I took the image that was available and applied algorithms, mathematical filters, to try to delineate and extract if there was content -- featured content in the vicinity seaward and landward of the 1988 OCRM veg line.
Q: And what did you conclude from that exercise?
A: That seaward of the blue 1988 vegetation line is vegetated.
Q: And how is that represented on this Exhibit 6b-08?
A: Okay. What you see between the blue and yellow is shades of grey. Shades of grey. And those shades of grey would have digital signature in a black-white domain or spectrum indicative of not barren earth, and more consistent than not with vegetation is probably the way I'd say it.
Q: And do you hold that opinion to reasonable

[5] "Remote sensing is the process of detecting and monitoring the physical characteristics of an area by measuring its reflected and emitted radiation at a distance (typically from satellite or aircraft). Special cameras collect remotely sensed images, which help researchers 'sense' things about the Earth." https://www.usgs.gov/faqs/what-remote-sensing-and-what-it-used (via U.S. Geological Survey (USGS) – U.S. Dept. of Interior).

21 degree of GIS surveying certainty?
22 A: Yes. With those qualification, yes.

(**R. p. 0727, lines 1-22; see also Pet. Ex. 06a-001 at R. p. 1340**).

The Department called a single expert, Chris Jones, whom the Court approved as an expert in coastal engineering, coastal management, and, more specifically, consideration of storm impacts and coastal processes. (**R. p. 1005**) Jones agreed with Hodge that the shoreline of Captain Sams is accreting over the long term except for occasional storm events at approximately the same average accretion rate as Hodge determined. (**R. p. 1060, lines 18-19**) (Jones testifying "accretion rate is 5.8 feet per year")

Over the objection of KDP, the Court allowed Jones to testify to the changes in the shoreline of Captain Sams over the last 250 years and admitted historical navigation charts as well as aerial photographs taken more than 40 years ago as exhibits. (**R. pp. 1021-1028; R. p. 1512**) Despite the standard in the statute that the baseline be set at the most landward point of erosion of the beach over the last 40 years, the ALC allowed Jones to testify to the erosion of the bank of the Kiawah River over the last 35 years in the immediate vicinity of the isthmus on the northeast end of Captain Sams connecting it to the remainder of Kiawah Island that is often called the "neck." (**R. pp. 1060-1061**)

Jones also testified to measurements from aerial photographs over the last four decades made by Department staff. Up until the storms between 2015 and 2017, the figures showed that the width of the dune field of the neck had been relatively constant and had even expanded from 322' in 1982 to 344' in 2015. (**See Resp. Ex. 93-002 at R. p. 1575**)) From 2017 to 2021, the dune field expanded from 222' to 235', again demonstrating the capacity of the dune field and the beach to recover. (**Id.**)

Significantly, Jones did not conduct an analysis to determine the most landward point of erosion over the last 40 years, nor to determine the most landward shoreline. Nor did Jones opine that the Department properly followed the statute. He only opined that the Department used a "method" that he determined to be "sound and acceptable" and "consistent with the requirements of the Act." (**R. p. 1079, lines 17-21**)

Jones acknowledged that actual surveys of the beach after erosional events to determine the location of a storm escarpment, such as the one conducted by Hodge in October 2017 after Hurricane Irma, would be a more accurate or preferred method for determining the most landward point of erosion than reviewing aerial photographs with the naked eye to determine the location of the shoreline. (**R. p. 1043, line 16-p. 1045, line 2**)

The setback line was not a disputed issue. Both sides agreed that because of the long-term accretion of the beach of Captain Sams over the last 40 years, the baseline should be placed 20 feet landward of the baseline that is the minimum distance specified under S.C. Code Ann. §48-39-280(B). (**R. p. 0050)** (Final Order citing S.C. Code Ann. § 48-39-280(B) (Supp. 2021) and S.C. Code Ann. Regs. 30-21(H)(2) (2011))

Following the contested case hearing, at the request of the ALC both parties submitted proposed orders to the ALC.

In her final Order of June 24, 2022, the ALC found that the baseline on Captain Sams should be located in the same location determined by the Department Staff in its Final Decision on Remand dated December 6, 2019. The ALC decided that the most landward shoreline over the last 40 years was ultimately the same thing as the most landward point of erosion over the last 40 years. The ALC disregarded most of the expert testimony of Hodge and rejected the

expert testimony of Tolleson in favor of the speculative testimony of the two Department employees who testified at the hearing.

As set forth below, the ALC committed legal errors in her application of the applicable statute and regulations. Further, the ALC's findings that were critical to her ultimate ruling were not supported by substantial evidence. For these reasons, KDP respectfully submits this Court should reverse the Order and rule that the record establishes the location of the baseline as the surveyed line of the most landward point of erosion as determined by Hodge.

STANDARD OF REVIEW

When a decision of the ALC is appealed to this Court, the Administrative Procedures Act (APA) provides the appropriate standard of review. See Abel v. South Carolina Department of Health and Environmental Control, 419 S.C. 434, 798 S.E.2d 445 (Ct. App. 2017). Under the provisions of the APA, this Court, as the reviewing appellate court, can reverse or modify the ALC's decision if the substantive rights of KDP have been prejudiced because the finding, conclusion, or decision is:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B).

The decision of the Administrative Law Court should be overturned when the appellant establishes its substantive rights have been prejudiced and that the "decision reached is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record or is affected by an error of law." Original Blue Ribbon Taxi Corp., 380 S.C. 604, 605, 670 S.E.2d 674, 676 (internal quotations omitted).

ARGUMENT

I. THE ALC'S ADOPTION OF THE BASELINE POSITION SET BY THE DEPARTMENT IN ITS FINAL DECISION AFTER REMAND WAS BASED UPON ERRORS OF LAW AND FINDINGS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE THAT REQUIRE THE DECISION TO BE REVERSED AND THE BASELINE TO BE SET AT THE MOST LANDWARD POINT OF EROSION DURING THE PREVIOUS 40 YEARS LOCATED BY APPELLANT'S COASTAL GEOLOGIST.

A. The ALC's failure to follow the plain language of S.C. Code Ann. § 48-39-280(A)(2) for locating the baseline that conflicts with Regulation 30-21 was erroneous as a matter of law.

The location of the baseline for Captain Sams is determined by S.C. Code Ann. § 48-39-280(A)(2), that applies to beachfront property in the unstabilized inlet erosion zone and provides as follows:

> The baseline for inlet erosion zones that are not stabilized by jetties, terminal groins, or other structures must be determined by the department as ***the most landward point of erosion at any time during the past forty years***, ***unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position***. In collecting and utilizing the best scientific and historical data available for the implementation of the beach preservation policy, the department, as part of the State Comprehensive Beach Management Plan provided for in this chapter, among other factors, must consider historical inlet migration, inlet stability, channel and ebb tidal delta changes, the effects of sediment bypassing on shorelines adjacent to the inlets, and the effects of nearby beach restoration projects on inlet sediment budgets.

S.C. Code Ann. § 48-39-280(A)(2) (double emphasis added).

However, in an effort to support its interpretation that the "most landward point of erosion at any time during the past forty years" means " the most landward shoreline at any time during the past forty years," the Department points to Regulation 30-21(H)(2) of the South Carolina Code of Regulations. (**R. p. 0048**) (citing S.C. Code Ann. Regs. 30-21 (2011)) Regulation 30-21(H)(2) which was enacted in 1993 states that "in Unstabilized Inlet Erosion Zones the baseline is simply the most landward position of the shoreline in the most recent 40

years." Regulation 30-21(H)(2) continues by stating the most landward position of the shoreline is to be determined using representative aerial photography. The Department argued that the regulation is "a natural amplification of the statute and that its interpretation should be given deference." (**R. p. 1684**)

In its Order the ALC correctly rejected the Department's reading of S.C. Code Ann. § 48-39-280(A)(2) and S.C. Code Regs. 30-21, because of their obvious conflict – the statute says, "the most landward point of erosion at any time during the past forty years" but the regulation says "most landward shoreline". (**R. p. 0071**) (Order further stating "…the 'most landward point of erosion' is not synonymous with the 'most landward shoreline.' Under the plain meaning rule, it is not the Court's place to change the meaning of a clear and unambiguous statute." (citing Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000)) The ALC discussed the applicable legal principles that command that the wording of a statute controls where the wording of a regulation conflicts with it:

> Courts generally defer to an administrative agency's interpretation of an applicable statute or its own regulation. Sierra Club v. S.C. Dep't of Health and Envtl. Control, 426 S.C. 236, 256, 826 S.E.2d 595, 607 (2019) (citing Brown v. Bi-Lo, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003)).
>
> [. . .]
>
> "Nevertheless, where ... the plain language of the statute [or regulation] is contrary to the agency's interpretation, the Court will reject the agency's interpretation." Brown, 354 S.C. at 440, 581 S.E.2d at 838.
>
> Here, subsection 48-39-280(A)(1) specifically and unambiguously addresses placement of the baseline….
>
> [. . .]
>
> The statute unequivocally states in an unstabilized inlet erosion zone, the baseline must be set "at the most landward point of erosion at any time during the past forty years." While regulation 30-21(H)(2) purports to set forth a methodology to discern the most landward point of erosion, it actually substitutes the statutory mandate of setting the baseline at the most landward point of erosion for "the most landward position of the shoreline." "[T]he most landward point of erosion" set forth in subsection 48-39-280(A)(2) is not equivalent to "the most landward position of the shoreline." Regulation 30-21(H)(2) is not a natural amplification of subsection 48-

39-280(A)(2) but instead, alters it. See Society of Prof'l. Journalists, supra. As such, Subsection 48-39-280(A)(2) is controlling.

(**R. pp. 0081-0082**) KDP concurs with the ALC's analysis.

However, in an error of law, the ALC proceeded to ignore the distinction and succumbed to the Department's argument that the most landward shoreline over the last 40 years is the same as the most landward point of erosion over the last 40 years. The ALC erroneously dismissed the critical difference stating, "Nevertheless, the outcome is the same and the conflict is not of any consequence under the facts of this case." (**R. p. 0082**) The ALC's reasoning that rendered the distinction between the two to be meaningless was an error of law.

In testimony that was unrefuted by the Department, KDP's expert coastal geologist, Hodge, who testified to the considerable difference between a shoreline and point of erosion:

Q: In coastal geology is a beach, an accreting sand beach like the one at Captain Sam's, considered a point of erosion?
A: No. Because it's accreting, it cannot be a point of erosion. A point of erosion refers to some -- in other words, there has to be some history; that, in other words, the vegetation is not moving seaward, the dunes aren't moving seaward, it's actually going in the reverse direction and there's a -- and you would have some evidence of that. And so I think that an accreting beach in it of itself does not indicate a point of erosion at all.

(**R. p. 0535, lines 2-15**) Hodge addressed this phenomenon in his testimony and illustrated it in hand-drawn profiles of an eroding beach as compared with an accreting beach. (**See R. p. 0469 and pages following**) On an accreting beach like Captain Sams, the vegetation line will follow and move seaward with the shoreline. This growth of the vegetation seaward does not in any

way signify whether there has been erosion. Quite the opposite, the movement seaward of the vegetation under these circumstances is proof of accretion without erosion.

As the Court found, the presence of stable vegetation means the location of that vegetation is above the tidal wash of the beach. It does not mean that there is necessarily an escarpment at that location. This distinction is recognized in the definition of "active beach" in the Beachfront Management Act ("BMA"): "Active beach is that area seaward of the escarpment ***or*** the first line of stable natural vegetation, whichever first occurs, measured from the ocean." S.C. Code Ann. § 48-39-270(13) (emphasis added).

The cardinal rule of statutory interpretation is to ascertain and effectuate the legislature's intent. See Chem–Nuclear Sys., LLC v. S.C. Bd. of Health and Envtl. Control, 374 S.C. 201, 205, 648 S.E.2d 601, 603 (2007); Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 62, 504 S.E.2d 117, 121 (1998); Peake v. S.C. Dep't of Motor Vehicles, 375 S.C. 589, 597, 654 S.E.2d 284. (Ct.App.2007); Shealy v. Doe, 370 S.C. 194, 199, 634 S.E.2d 45, 48 (Ct.App.2006). Likewise, the legislative intent should be derived primarily from the plain language of the statute. See Bass v. Isochem, 365 S.C. 454, 470, 617 S.E.2d 369, 377 (citing State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct.App.2004); Stephen v. Avins Constr. Co., 324 S.C. 334, 339, 478 S.E.2d 74, 77 (Ct.App.1996)); Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct.App.2005); see also Peake, 375 S.C. at 597–598, 654 S.E.2d at 289 ("With any question regarding statutory construction and application, the court must always look to legislative intent as determined from the plain language of the statute.") The statute's text is the best evidence of legislative intent or will. See Peake, 375 S.C. at 598, 654 S.E.2d at 289 (citing Jones, 364 S.C. at 231, 612 S.E.2d at 724 (citing Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 122, 542 S.E.2d 736, 740 (Ct.App.2001)).

As previously noted, the General Assembly made important amendments to section 48-39-280 in 2016 and then again in May 2018. Although it made extensive revisions to many provisions in the statute, the legislature left in place the wording of subsection (A)(2) that the baseline must be established in the unstabilized inlet zone as the most landward point of erosion. The legislature did not change the location to the most landward shoreline over the last 40 years, the standard used by the Department and adopted by the ALC. There is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects. Whitner v. State, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997). Here, the legislature had the opportunity to change the standard to the most landward shoreline but chose not to.

S.C. Code Ann. 48-39-280(A)(2) requires that the baseline in an unstabilized inlet zone "***must*** be determined by the department as the most landward point of erosion at any time during the past forty years." S.C. Code Ann. 48-39-280(A)(2)(double emphasis added). Therefore, the Court must utilize the clear meaning of the statute. See Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014). No deference is due the Department's interpretation of the statute because its interpretation is contrary to the plain language of the statute. See Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014) ("We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation. Nevertheless, where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." (quoting Brown v. Bi–Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003)).

Instead of applying the plain language of the statute, the ALC applied the test in the conflicting regulation. The ALC simply tried to explain away the conflict between the statute and the regulation by finding the Department's use of a "line of stable natural vegetation as a proxy or indicator for both the most landward point of erosion" was proper. What the agency proposed and what the ALC adopted is contrary to the plain language of S.C. Code Ann. § 48-39-280. To approach the determination in any other manner constitutes as error of law. As the lynchpin of the ALC's entire decision, this legal error permeates the ALC's entire Order and requires reversal.

B. The ALC's use of the most seaward line of vegetation as a proxy for the most landward point of erosion constitutes an error of law by ignoring the plain language of S.C. Code Ann. § 48-39-280(A)(2), and further is unsupported by any testimony in the record.

The ALC erroneously found that "because a vegetation line may be used as a proxy for the most landward position of the shoreline, a shoreline may then also be used as a proxy for the most landward point of erosion." (**R. p. 0074**) Or, stated differently, the ALC found that a vegetation line can be substituted for the standard described in the Regulation ("***the most landward shoreline***"), and can also be substituted for the standard set by the statute ("***the most landward point of erosion***"). That conclusion is based on an unsupported circular analysis.

First, the Order states the erroneous conclusion: "As will be discussed more fully below, a vegetation line is not only an appropriate proxy to be used to establish a shoreline, but also, the most landward point of erosion." (**R. p. 0071**) As previously discussed, a shoreline is not the equivalent to a point of erosion, nor is the most landward shoreline freely interchangeable with the most landward point of erosion as the ALC found.

The ALC restates this false syllogism that is the crux of her decision several times throughout the order:

> "The Court acknowledges the most landward vegetation line in the last forty years is not synonymous with the most landward point of erosion in the last forty years. However, when an escarpment line or other geographical sign of erosion is not visible on a photograph or otherwise available, a line of stable natural vegetation is a sound and appropriate proxy for the most landward point of erosion. This is particularly the case whereas here, there is an absence of continuous and ongoing survey information for the last forty years. A vegetation line will always be at or seaward of the last escarpment which is actually more favorable to the property owner." (**R. pp. 0082-0083**)
>
> "When an escarpment line or other geographical sign of erosion is not visible (including on a photograph) or otherwise available, a line of stable natural vegetation is a sound and appropriate proxy for the most landward point of erosion." (**R. p. 0082**)
>
> "A vegetation line will always be at or seaward of the last escarpment. In some instances, the vegetation line and escarpment line will coincide." (**R. p. 0082**)

In addition to ignoring the General Assembly's distinctions, the ALC's conclusion is contrary to the testimony in the record. None of the qualified experts in this arena, Hodge for KDP or Jones for the Department, testified that the vegetation line is an accepted proxy for a *point of erosion*. To the contrary, both experts testified that the vegetation line is an accepted proxy for locating the *shoreline*, not the statutorily required *point of erosion*.

Hodge testified specifically about the relationship of a vegetation line to a shoreline, not to the statutorily required point of erosion. "The vegetation is what we call a proxy. It's an indicator for the shoreline. The actual shoreline is right down here." (**R. p. 0504, line 16-p. 0505, line 3**) He went on to explain, "But the important thing is that this is a proxy for the shoreline." (**R. p. 0504, line 24-p. 0505, line 2**) By proxy, Hodge explained that the vegetation line will reflect the relative seaward or landward movement of the shoreline but it is not the equivalent to the shoreline itself; scientists do not equate a shoreline with a vegetation line because there are many multiple factors that impact the location of a shoreline. (**<u>See</u> R. pp. 0505-0506** (Hodge testifying that there are two tides a day every day, each one is different, and

factors like gravity, waves, temperature all impact each tides location)) He explained that locating shorelines, as the ALC ultimately determined it could do, has

> bedeviled coastal scientists for many, many years to say, okay, well, where can we pick a position for the shoreline? We really can't. [. . .] But essentially you can't pick out one spot and say -- on the beach that's wet/dry and say this is the shoreline. So what -- this is a very useful indicator, the vegetation is a very useful indicator.

(**R. p. 0505, line 18-p. 0506, line 4**)

The layers of error in the ALC analysis are many: the Order improperly focuses on shoreline, instead of the statutory requirement of point of erosion, then attempts to identify a shoreline the ALC used a proxy (i.e., not the precise line), despite the fact that none of the experts testified that a line of vegetation is a proxy for the most landward point of erosion. The following conclusion of the ALC is not supported by any evidence much less substantial evidence: "a line of stable natural vegetation as a proxy or indicator for both the most landward point of erosion (in the absence of historical discernable evidence of erosion such as an escarpment line) and the most landward position of the shoreline makes the two essentially indistinguishable." The two cannot be conflated because they are, in fact, distinguishable in plain language and in geology.

The ALC's finding and conclusion that the vegetation line is a proxy for the point of erosion are premised on a legal error and not supported by any expert testimony at trial. As the Supreme Court has held, a finding of an administrative judge on a subject that involves expertise that is not supported by expert testimony constitutes grounds for reversal. See Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control, 422 S.C. 632, 637, 813 S.E.2d 691, 694 (2018). This principle likewise requires reversal here where the ALC determined without any expert support that a vegetation line is an accepted proxy for a point of erosion.

In Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control, supra, the Supreme Court reversed the ALC. The Court held the ALC "impermissibly" made findings and

conclusions on engineering matters "that lacked any evidentiary support [because] [t]he parties did not present *any* testimony that could serve as a basis for the ALC's [decision]." 813 S.E.2d at 694. Here, there was also an absence of expert testimony to support the ALC's finding and conclusion that the most landward shoreline is a proxy for the most landward point of erosion.

The ALC did not apply the proper statutory standard and the Order's merger of two separate coastal geological concepts in a manner totally unsupported by the expert testimony at trial requires reversal. The ALC's determination of the location of the baseline was based entirely on its erroneous substitution of the most landward shoreline for the most landward point of erosion.

C. The ALC's improper use of the most seaward line of vegetation as a proxy for the most landward point of erosion led to a finding that is contrary to the undisputed evidence of seaward accretion of the beach of Captain Sams between the first delineation of the baseline on Captain Sams in 1999 and the delineation of the baseline in 2017 that is under appeal.

Because Captain Sams has continually been accreting over the last forty years, proper application of S.C. Code Ann. § 48-39-280(A) results in a baseline located significantly landward of location set by the Department that the ALC adopted. Both Hodge and Jones testified to this accretion over the long term. (**See R. p. 0525; R. pp. 0531-0533; and R. p. 1060**) Nonetheless, the ALC accepted the Department's baseline, leaving the baseline virtually unmoved from its location in 1999. Not only was this conclusion legally erroneous for using a vegetation line as a proxy for the most landward point of erosion, but the finding is also unsupported by substantial evidence.

It is undisputed that the locations of the baselines set by the Department in the neck of Captain Sams in 1999, 2009, and 2017 did not vary in any material way despite the significant movement of the beach seaward during these 18 years. (**See R. pp. 1330-1331; R. p. 0047** ("The

baseline proposed by the Department on October 6, 2017, placed the line in essentially the same location as the two prior delineations."))

The seaward expansion of the beach of Captain Sams is substantiated by the Department's own data. The Department is required by statute to monitor the changes to beaches along the coastline through "monumented and controlled survey points in each county fronting the Atlantic Ocean."[6] "A monitoring program must be developed to periodically survey beach profiles along the coast. Each station will be surveyed at least twice each year." S.C. Code Regs. 30-21(B)(7)(a)(i). The two monuments on Captain Sams in the vicinity of the neck are assigned monument numbers 2620 and 2625. Station 2620 is slightly to the southwest of the neck; Station 2625 is to the northeast of the neck, on the far side of Beachwalker Park. (**See R. pp. 0947-0950**)

Based on his interpretation of rectified aerial photographs, Hodge calculated that the annual average rate of accretion on Captain Sams was 5.8 feet per year on average. (**R. p. 0525, lines 4-7; see also R. p. 1346 (Pet. Ex. 9d**)) Hodge also testified that the Department's own published data documents accretion of 5.22 feet per year at Monument 2625 and 6.15 feet per year at Monument 2620. (**R. pp. 0531-0532; see also Pet. Exs. 9g and 9h at R. p. 1344 and R. p. 1349**) The Department published on its website an accretion rate of 5.22 ft./yr. at monument 2625 in 2015. (**See R. p. 1344**) The Department calculated and published an annual average accretion rate of 6.15 ft./yr. at monument 2620 in 2015. (**See R. p. 1349**) The Department's published profile survey information for monument 2625 showed an average

[6] See S.C. Code Ann. § 48-39-280(E)(1) ("In order to locate the baselines and the setback lines, the department must establish monumented and controlled survey points in each county fronting the Atlantic Ocean. The department must acquire sufficient surveyed topographical information on which to locate the baselines."); see also S.C. Code Ann. § 48-39-280(E)(2) (requiring the surveyed information also be used "for computing the forty-year erosion rate").

annual accretion rate of 5.8 ft/yr. from 1988-2017 for monument 2620. (**See R. p. 1345 and R. p. 1346**, **Pet. Ex. 9c and 9d**)

Moreover, the Department's surveyor's guide for Kiawah Island issued on October 9, 2009, stated that **the average *annual* rate of accretion at stations 2620 and 2625 was 8.50 feet per year and 5.22 feet *per year*, respectively**. (**R. p. 1224, Joint Ex. 03** (emphasis added))

The Department's expert, Jones, also concurred that the beach of Captain Sams is accreting:

16 Q: We have heard a lot about long term accretion
17 rates in this case. Do you agree that there
18 was a trend of long term accretion on Captain
19 Sam's spit?
20 A: There is.

(**R. p. 1029, lines 16-20**) Mr. Jones also testified that he calculated a specific rate of accretion on the ocean side of Captain Sams:

16 […] On the
17 ocean side of the dune edge, it's accretional
18 with some periods of erosion. And the
19 accretion rate is 5.8 feet per year. And
20 those are both using linear regression.

(**R. p. 1060, lines 16-20**) This long-term accretion rate of 5.8 ft/yr. is consistent with Hodge's calculation.

Most important, in addressing how the impact of individual storm events should be addressed in a scientific approach to accretion analysis, Jones unequivocally testified that the erosive forces of a storm event does not mean that the beach is not an accretional beach:

8 Q: Mr. Jones, can there be periods of high
9 erosion rates even though there is a trend of
10 long-term accretion?
11 A: There can. And usually what we see is
12 erosion associated with storms. We may see
13 periods of relative stability of the

shoreline where it doesn't move much. We may see periods of accretion where the shoreline advances. We usually see rapid erosion as a result of storms and then gradual recovery of the shoreline after those storms. But when we plot out all the swings in the shoreline and then draw the trend line through it, that gives us the long-term trend, the long-term rate.

(**R. p. 1034, lines 8-22**)

Similar to Hodges' calculations, the ALC noted Jones found that long-term accretion rate at Monument 2620 was 6.2 feet per year on average. (**R. p. 0053**)

The accretion of the beach at an average of 6.2' per year means that the shoreline is moving seaward at the rate of 6.2' per year. For the 18 years between the first delineation in 1999 and recent delineation in 2017, this average annual accretion rate means the shoreline moved 111.6' seaward (i.e., 18 years x 6.2'/year). Yet, the determinations of the Department and the ALC to locate the baseline in essentially the same location as in 1999 ignore this proof and would only be supported if the shoreline did not advance at all during this period or the previous forty years, which it in fact certainly did.

A holistic review of the evidence demonstrates that even though the evidence and published information of the Department establish the beach of Captain Sams is accreting seaward at an average annual rate of five to eight feet, the Department has not moved the baseline any appreciable distance seaward since 1999. (**See R. p. 1224 (Joint Ex. 3); R. pp. 1330-1331 (Pet. Ex. 4); and R. pp 0350-0362 (Hodge testimony)**). Viewing the Department's baseline delineation in light of this undisputed fact renders the ALC's conclusion --and therefore its methodology-- fundamentally flawed and not supported by substantial evidence. Even if the shoreline somehow was tantamount to the baseline, which it is not, the baseline cannot remain

in the same position over 18 years when the shoreline has consistently moved seaward during that time; yet, that is exactly what the ALC ultimately ruled when it endorsed the Department's baseline, as virtually unchanged since 1999.

The immutable fact that the shoreline has consistently advanced seaward during the last 40 years was plainly demonstrated by Respondent's Exhibit 139 which superimposed Hodge's determination of the most landward point of erosion after Irma on the 1988 aerial photograph. (**R. pp. 1605-1610**) The ALC appears to have been in part persuaded by this exhibit by remarking in the Order that, "When the Department plotted the location of Petitioner's 2017 post-Irma line on the 1988 orthoimagery, Petitioner's line appeared below the high-tide mark and in the water, which is below (seaward of) the active beach." (**R p. 0074**) All that exhibit proved, though, was that the beach accreted considerably between 1988 and 2017 (even after withstanding the storm erosion of Hurricanes Matthew and Irma) and the shoreline moved considerably seaward with the accretion of the beach.

The ALC's ruling situating the baseline in 2017 at virtually the same location as in 1999 despite the undisputed accretion of the shoreline during the intervening 18 years is both contrary to the statutory criterion, arbitrary and capricious, and not based on substantial evidence.

D. The ALC committed legal error in determining that the shoreline was unlikely to return to its former position when it was not an issue in dispute, and in inventing a standard for locating the baseline under those circumstances when the General Assembly did not specify one.

In its Order the ALC embarked on an analysis of whether the shoreline was unlikely to return to its former position even though neither of the parties presented the issue to the Court for determination:

> As such, both parties submit the test to be utilized in setting the baseline is the most landward point of erosion at any time during the past forty years for the reason that the shoreline is 'not unlikely' to return to its former position. The Court disagrees.

(**R. p. 0052**).

The ALC's determination of this question was legal error in two respects. First, the issue was not before the ALC at the time of the hearing. Second, the ALC had no legal basis for its holding that the proper location of the baseline was the most landward shoreline over the last 40 years if "the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position."

E. The ALC committed legal error in deciding the question since the parties agreed that the standard for determining the baseline in this case was the most landward point of erosion at any time during the previous 40 years.

The ALC's insistence on determining whether the shoreline was unlikely to return to its former position was legal error.

KDP notified the Department before the hearing and the ALC at the commencement of the hearing that it was not contending the shoreline was unlikely to return to its former position and that the baseline should be set at the most landward point of erosion during the previous 40 years. (**See R. pp. 0314-0316**). As the hearing opened, counsel for KDP explained that KDP was no longer seeking a ruling on that issue and KDP would be focused solely on a single issue – the most landward point of erosion. Counsel for KDP explained:

> We are not going to have our expert testify to whether the best available scientific and historical data of the inlet and adjacent beaches, right here, indicate the shoreline is unlikely to return to its former position. And why are we doing that? Because it doesn't change at all, where the baseline should be. The baseline should be -- we are agreeing that the baseline should be the most landward point of erosion. In every single publication, filing, line report, the Department has asserted that the baseline should be just as stated here, the most landward point of erosion at any time during the past 40 years.

(**R. p. 0314, line 17 -p. 0315, line 7**) The ALC acknowledged this fact in its Order, "Just prior to the hearing, KDP argued the only issue to be adjudicated was determining the most landward point of erosion in the last forty years for purposes of establishing the baseline and setback lines."

(**R. p. 0048**; **see also R. p. 0052** (ALC finding "KDP initially took issue with this but on the eve of the contested case hearing, withdrew this contention."))

The Department's counsel and its witnesses agreed that S.C. Code Ann. § 48-39-280(A)(2) mandates that the baseline must be located at "the most landward point of erosion at any time during the past forty years." (**See R. p. 0480; R. p. 0793** (Department Counsel); **R. p. 0842** (Boynton); **R. p. 1093** (Jones); **R. p. 1128** (Slagel))

Yet, despite the parties' respective declarations that the baseline should be located at the most landward point of erosion, the ALC proceed to determine whether the shoreline was unlikely to return to its former position. This determination was entirely unnecessary under the clear wording of the statute if the parties agreed the test was the most landward point of erosions. "The baseline for inlet erosion zones that are not stabilized by jetties, terminal groins, or other structures must be determined by the department as the most landward point of erosion at any time during the past forty years, unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position". S.C. Code Ann. § 48-39-280(A)(2)(emphasis added).

This Court has held that "the court should confine the jury instructions to the issues made by the pleadings and supported by the evidence." Fairchild v. S.C. Dep't of Transp., 385 S.C. 344, 350–51, 683 S.E.2d 818, 822 (Ct.App.2009). Even in a court of equity where the factual issues are not submitted to a jury, "the incidental or auxiliary relief granted must be within the limits of the issues made by the pleadings and be of the same general nature." Parker Peanut Co. v. Felder, 207 S.C. 63, 68-69, 34 S.E.2d 488, 490 (S.C. 1945). "A judgment or decree, whether in law or equity, must conform to both the pleadings and the proofs, and be in

accordance with the theory of the action upon which the pleadings are framed and the case was tried." *Id*

Because the parties agreed that the appropriate standard for the location of the baseline was the most landward point of erosion over the previous forty years, the ALC committed an error of law in unilaterally introducing and deciding the question of whether the shoreline was unlikely to return to its former position.

1. The ALC committed legal error in considering evidence of the historical position of the shoreline over the last 250 years instead of the last 40 years as specified in the statute.

The statute leaves two important open questions in the event the shoreline is unlikely to return to its former position. The statute does not identify which shoreline it is referring to when using the term "former position." Is it any former position, or the former position 40 years ago, or the most seaward shoreline over the last 40 years? The second commanding omission is the statute does not specify a standard for locating the baseline if it is unlikely the shoreline will return to its former position. (**<u>See</u> Final Order p. 35 at R. p. 0078; see also Final Order at p. 40, fn. 58 at R. p. 0084** ("As discussed herein, subsection 48-39-280(A)(2) does not set forth the methodology for setting the baseline when the shoreline is unlikely to return to its former position."))

The Court did not directly answer the first question. Instead, the Court erroneously considered the locations of the shoreline of Captain Sams over the last 250 years instead of over the last 40 years as the statute commands. The legislature titled § 48-39-280 as "Forty-year retreat policy." Consistent with the title, section 48-39-280(A) expressly implements a forty-year lookback: "A forty-year policy of retreat from the shoreline is established. The department must implement this policy and utilize the best available scientific and historical data in the

implementation..." The Court committed legal error in considering historical data from the last 250 years and not confining its review to the last 40 years.

Clear and unambiguous statutes require no statutory construction and should be applied by the court according to their literal meaning. See Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007); Croft v. Old Republic Ins. Co., 365 S.C. 402, 412, 618 S.E.2d 909, 914 (2005); Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). The analysis of the best historic and scientific evidence relates to the last 40 years. Nothing in the statute suggests that the determination should consider the shoreline position hundreds of years ago. The Court erred in considering information outside the forty-year look back prescribed in the statute.

2. The ALC's ruling that the baseline should be set at the most landward shoreline over the last 40 years because the shoreline was unlikely to return to its former position is not supported by the wording of the statute. Further, in making this decision, the ALC improperly relied on information that is not pertinent to legislative intent.

The legislature did not specify in the statute where the baseline should be set if the shoreline is unlikely to return to its former position. Consequently, the ALC was left to improvise a standard. In so doing, the ALC exceeded the role of the judiciary and strayed into the legislative:

> It is perhaps unnecessary to say that Courts have no legislative powers, and in the interpretation and construction of statutes their sole function is to determine, and within the constitutional limits of the legislative power to give effect to, the intention of the Legislature. They cannot read into a statute something that is not within the manifest intention of the Legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret. The responsibility for the justice or wisdom of legislation rests with the Legislature, and it is the province of the Courts to construe, not to make, the laws

Barnwell v. Barber-Colman Co., 301 S.C. 534, 538, 393 S.E.2d 162, 163–64 (1989).

There is nothing in the statute that states that if the shoreline is unlikely to return to its former position, the baseline is the most landward shoreline over the last forty years, the standard the ALC extracted from S.C. Code of Regs. 30-21 (H)(2). To the contrary, subsection (H) states that "in Unstabilized Inlet Erosion Zones the baseline is simply the most landward position of the shoreline in the most recent 40 years. This is determined by the Coastal Council staff using representative aerial photography." S.C. Code Ann. Regs. 30-21(H)(2). Again, as the ALC recognized, the regulation does not say this is the standard to use if it is unlikely the shoreline will return to its former position. (Order 35, 40 fn. 58) (**R. p. 0079, R. p. 0084** ("As discussed herein, subsection 48-39-280(A)(2) does not set forth the methodology for setting the baseline when the shoreline is unlikely to return to its former position.")).

The ALC also mistakenly relied upon the reports of Coastal Science and Engineering from 1988 and 1990 to determine the standard to be applied where it is unlikely the shoreline will return to its former position. (**R. p. 0059**) As stated in the above excerpt from Barnwell v. Barber-Colman Co., supra, a court's role is to determine the intent of the legislature. Comments in a consultant's report are not pertinent to the analysis of the intent of the legislature. Further, even the ALC recognized that the "report does not specifically set forth the methodology to be utilized if the shoreline is unlikely to return to its former position." (**R. p. 0059**) The ALC's reasoning results in two legal errors: referring to a private consultant's report to determine legislative intent and using a methodology in the report that the consultant never stated was to apply if the shoreline is unlikely to return to its former position.

Further, the ALC's standard would render meaningless the distinction between whether the shoreline is, or is not, unlikely to return to its former position meaningless. The ALC used the same benchmark -- the most landward vegetation line over the last forty years -- for locating

the baseline if it is unlikely the shoreline will return to its former position and if it is not unlikely the shoreline will return to its former position. A court should not construe a statute in a way which leads to an absurd result or renders it meaningless. Tempel v. S.C. State Election Commn., 400 S.C. 374, 378, 735 S.E.2d 453, 455 (2012). While the ALC recognized the most landward point of erosion is different from the most landward shoreline, it nonetheless used the most landward shoreline to set the baseline both when the shoreline was unlikely to return to its former position and when it was not unlikely to return to its former position. The ALC's construction of Section 49-38-280(A)(2) where the shoreline is unlikely to return to its former position renders meaningless the distinction the legislature intended.

Moreover, the ALC's decision to determine whether the shoreline was unlikely to return to its former position brought into play the various factors listed in the second half of section 48-39-280 (A)(2)[7] that have nothing to do with the strict analytic exercise of determining the most landward point of erosion over the last 40 years.

Further, the Department is incorrect in its assertion that the general legislative findings contained in S.C. Code Ann. § 48-39-250 are part of the calculus in determining the most landward point of erosion. Following the Department's logic, the Department could set a baseline at the most landward point of erosion over the past forty years but then adjust it according to the Department's own subjective application of the authority conferred on it by this general statute. The statute in no way indicates the legislature intended the Department to set baselines in a location that the Department somehow *feels* would better protect a dune system or more properly

[7] "…The department, as part of the State Comprehensive Beach Management Plan provided for in this chapter, among other factors, must consider historical inlet migration, inlet stability, channel and ebb tidal delta changes, the effects of sediment bypassing on shorelines adjacent to the inlets, and the effects of nearby beach restoration projects on inlet sediment budgets." S.C. Code Ann. § 48-39-280(A)(2).

influence development, or somehow advance tourism interests. The ALC should not have adopted the Department's reading of the statute in this instance where the clear and unambiguous wording of the statute establishes the baseline must be set at the most landward point of erosion over the previous 40 years.

In asserting the ALC should expand its analysis to determine the location of the baseline to include inlet stability and the general provisions of S.C. Code Ann. § 48-39-250, counsel for the Department argued that these additional considerations were necessary so that the Department could "*characterize* the shoreline change and associated hazards." (**R. p. 1034** (emphasis added)) That is not the factual analysis established by the legislature, and the ALC cannot rewrite the statute to fit the Department's interpretation. Surely the legislature did not intend for the Department to have authority to use clearly subjective factors to overcome the plain language of Section 48-39-280 and instead fix a baseline in the same location for 20 years on a beach that the evidence clearly establishes has been consistently accreting throughout the same period.

The general legislative findings contained in S.C. Code Ann. § 48-39-250 cannot be appended to the specific test for locating the baseline. S.C. Code Ann. § 48-39-280 (A)(2). The more specific statute controls. See State v. Taub, 336 S.C. 310, 317, 519 S.E.2d 797, 801 (Ct. App. 1999) ("The general rule of statutory construction is that a specific statute prevails over a more general one.") (quoting Wooten v. South Carolina Dep't of Transp., 333 S.C. 464, 511 S.E.2d 355 (1999); see also Atlas Food Sys. & Serv., Inc. v. Crane, 319 S.C. 556, 462 S.E.2d 858 (1995)).

S.C. Code 48-39-280(A)(2) requires that the baseline in an unstabilized inlet zone "must be determined by the department as the most landward point of erosion at any time during the

past forty years." There is no suggestion that this objective test is subject to modification through the Department's or ALC's consideration of other factors such as historical inlet migration, inlet stability, channel and ebb tidal delta changes that are only considered if "the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position."

For these reasons, the ALC committed legal error in addressing the question of whether the shoreline was unlikely to return to its former position when it was no longer an issue, committed legal error in its analysis, and made findings that are unsupported by substantial evidence.

3. The mature vegetation line selected by the Department from the 1988 aerial as the location of the most landward shoreline over the last 40 years, adopted by the ALC, was not supported by substantial evidence.

In adopting the Department's location of the most landward shoreline during the last forty years from the 1988 aerial as the location of the baseline, the ALC committed legal error not only in <u>not</u> setting the baseline at the most landward point of erosion over the past 40 years as required by the statute but also in ignoring the compelling evidence that demonstrated the shoreline on the 1988 aerial was seaward of the location selected by the Department.

The applicable legal standard is the most landward point of erosion over the last 40 years. Boynton testified, "the Department uses vegetation lines as the landward position – the landward shoreline" and "[t]he Department looks for two features, the first is the line of stable natural vegetation. And then the second is an escarpment line." (**R. p. 0855**) A review of the 1988 photograph reveals no visible evidence of an escarpment. (**<u>See</u> Resp Exs. 16 and 17 at R. pp. 1487-1500**).

As to vegetation, the Department testified that it tracked a line of vegetation in the dunes and set the baseline in that location. (**<u>See</u> R. pp. 0915-0916**) The Department admitted that the

line of vegetation was neither the shoreline nor the most landward point of erosion. Instead, the Department testified that this vegetation line was a *proxy* for the shoreline rather than the shoreline itself. (**R. pp. 0953-0954**) The Department described this vegetation line as an "indicator" of the most landward shoreline which is an "indicator" of the most landward point of erosion. (**R. p. 0954, lines 1-5; R. p. 0955, lines 14-17**) The Department further testified that the shoreline for purposes of determining the baseline would be the vegetation on the edge of the "active beach," such that the seaward side of the vegetation line there is seawater inundation "sufficient … to prevent that vegetation from forming, and on this side the vegetation is able to form and become stable and dense and all of that." (**R. p. 0956, lines 1-21**)

KDP presented the expert testimony of Andrew Tolleson, P.E., D.GE to provide his analysis of aerial photographs and the features in those photographs. Mr. Tolleson "is a licensed professional engineer and licensed GIS surveyor. He is also admitted as a diplomate in the Academy of Geo-Professionals. Tolleson was qualified as an expert in civil engineering, professional GIS surveying, and remote sensing." (Final Order at 19, fn 30) (**R. p. 0061**).

Tolleson testified regarding his analysis of the 1988 photograph and described his work in this case included creating maps and other rectified images, providing tools for vegetation assessment and/or the presence of vegetation using aerial imagery, and some ancillary engineering and technical support. (**R. p. 0712**)

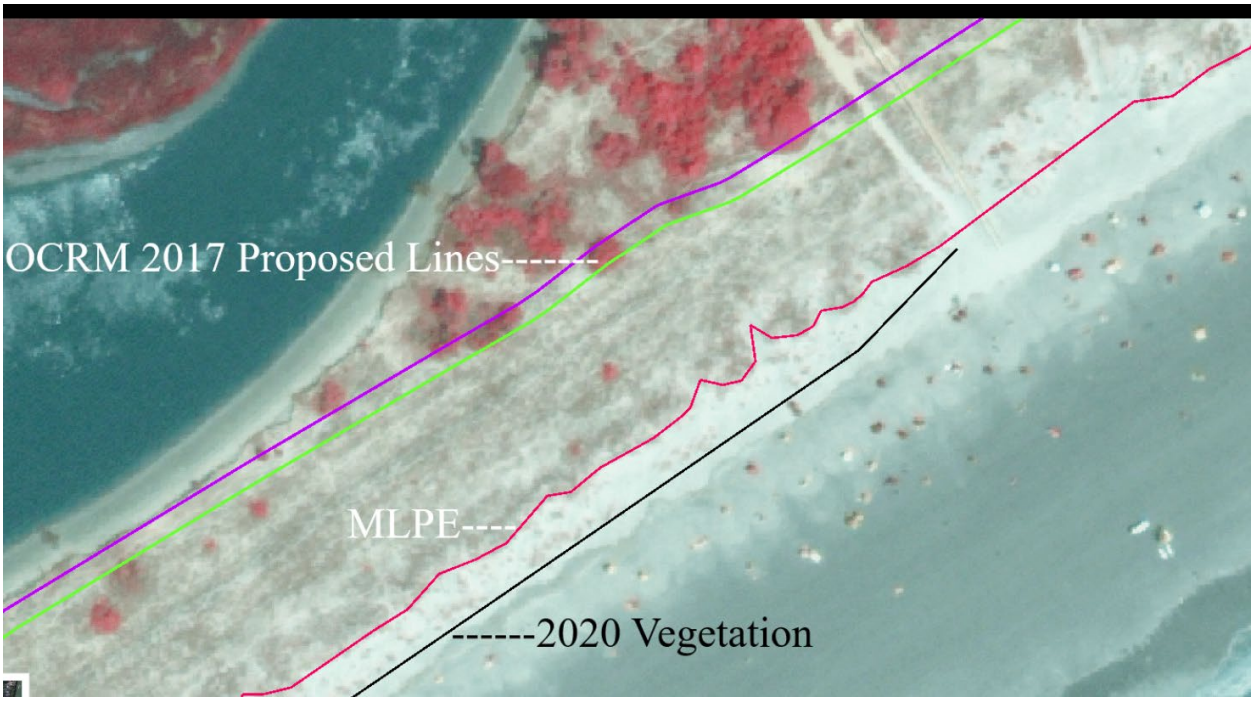
Tolleson explained that heavy vegetation can certainly be detected on the 1988 photo as DHEC did by casual visual examination without technical assistance. (**R. p. 0722**) However, such unassisted analysis only has a certain amount of "confidence" and for that reason Mr. Tolleson investigated whether there were tools he "could leverage to mine information out of areas of interest." (**R. p. 0722**)

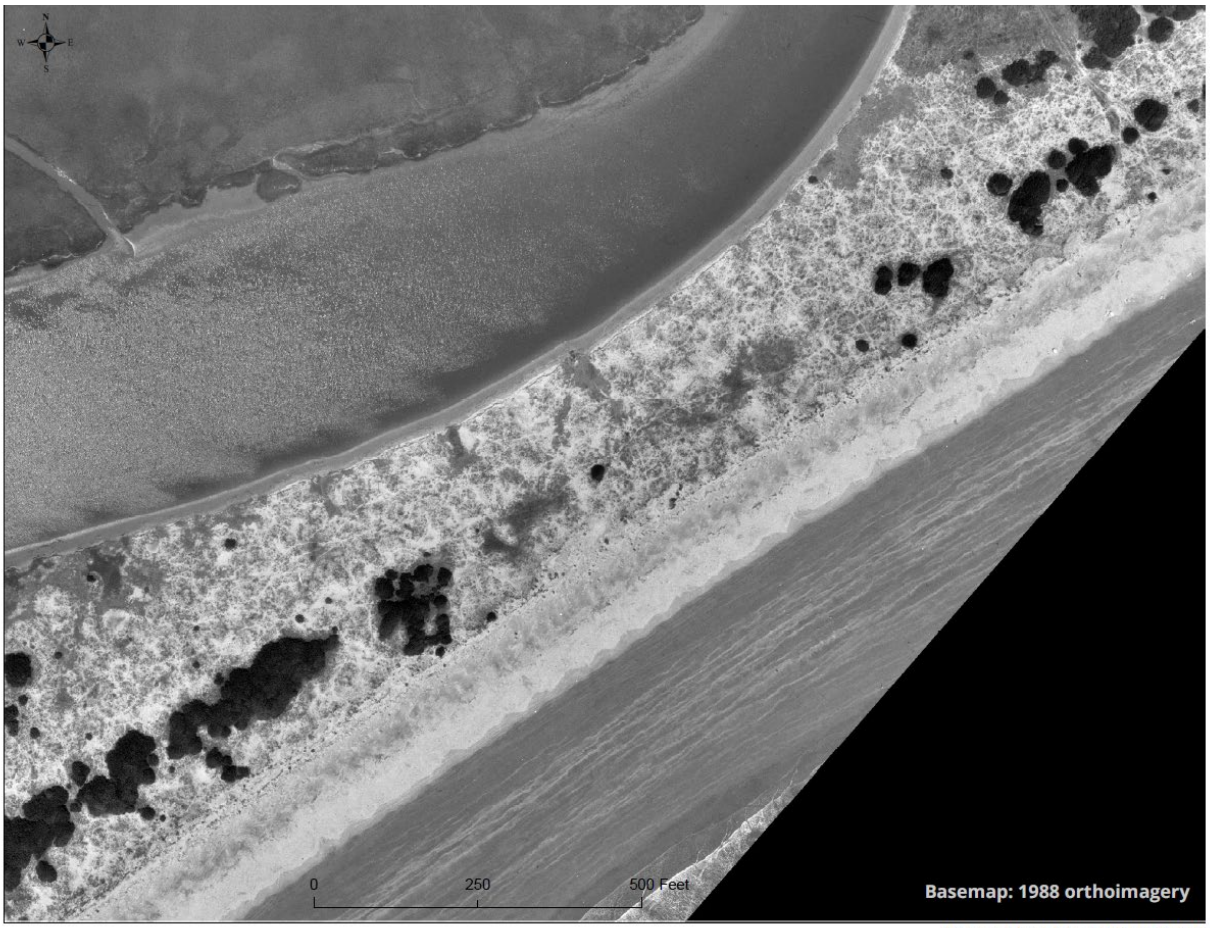
Tolleson testified that by using accepted scientific methods he attempted to improve the 1988 black and white photograph's usability. Specifically, Tolleson explained that he took the images that were available and applied algorithms, mathematical filters to identify more detailed content in the vicinity seaward and landward of the 1988 OCRM vegetation line as marked on the photo. Tolleson stated unequivocally: "seaward of the blue 1988 vegetation line [shown on Exhibit 6B-08] is vegetated." (**R. p. 0727**) Tolleson explained that in the area between the blue and yellow lines on Pet. Ex. 6B-08 (**R. p. 1341**), the shades of grey depicted are the result of a "digital signature in a black-white domain or spectrum indicative of not barren earth, and more consistent than not with vegetation." (**R. p. 0727**) Tolleson confirmed that he holds that opinion to a reasonable degree of GIS surveying certainty.

As all the witnesses testified, the important fact is that if vegetation is present, then it is above the tidal wash of the beach. If the vegetation was established enough to be detected by aerial photogrammetric analysis, it was necessarily stable. All the definition of active beach in section 48-39-270(13) requires is that the vegetation above it be stable: "(13) Active beach is that area seaward of the escarpment or the first line of stable natural vegetation, whichever first occurs, measured from the ocean." This statute does not require that the vegetation be mature like the kind relied upon by the Department, only that it be stable. If the stable vegetation detected by Tolleson and Hodge on the 1988 aerial was above the active beach, then the shoreline was seaward of that vegetation, not landward. Otherwise, no vegetation would be present. Vegetation cannot occur on the active beach.

Additionally, the photographic comparison of the nature of the shaded area in the 1988 aerial and the 2020 aerial attested by Hodge was compelling. Hodge presented on-the-ground photographs of established stable vegetation that he surveyed in August 2020 and that Tolleson

superimposed on a 2020 aerial. See Pet. Ex. 9k (**R. p. 1361**); see also Tr. (**R. pp. 0594-0600; R. pp. 0611-0612**) The comparison showed that the stable emergent vegetation above the active beach appeared on the 2020 aerial as shading identical in appearance to the shading on the 1988 photograph seaward of the line of established vegetation adopted by the Department and the Court. Here are the aerial photographs (Petitioner's Exhibit 9k at p. 09-0047 vs. respondent's Exhibit 16a-003) (**R. p. 1362 vs. R p. 1489**):





Respondent Exhibit 016(a)-003

This comparison is convincing visual proof that the "smudged" area below the Department's vegetation line on the 1988 aerial is indeed stable vegetation and therefore above the active beach and above the shoreline. Far from being clumps, the area that is shaded is extensive and, more important, forms a relative line bordering the active beach which is evident as the area with no shading. None of this vegetation would exist if it were on the active beach as contended by the Department. S.C. Code Ann. § 48-39-270 (13) defines the active beach as that "area seaward of the escarpment or the first line of stable natural vegetation, whichever first occurs, measured from the ocean."

The evidence established that the green line on Joint Exhibit 14 represents the edge of the active beach and should have been determined by the Court to be the most landward shoreline

if the ALC was going to use that as the benchmark for setting the baseline from the 1988 aerial. The ALC 's finding that the most landward vegetation line in the 1988 aerial is the line depicted by the Department as the baseline is not supported by substantial evidence and ignores the wording of S.C. Code Ann. § 48-39-270 (13).

F. The ALC's finding that the 1982 aerial depicted an escarpment is not supported by the evidence and was speculative. Further, there was no proof as to when the escarpment was created even if the hypothetical marking was an escarpment, which is entirely speculative.

In footnote 3, the Order states: "The Court notes, however, that subsequent to the issuance of the final determination on remand, the Department located a 1982 aerial photograph that indicates an escarpment line that is nearly in the same location as the 1988 vegetation line (reviewed)." Yet, the only reference to this line was in the testimony of Slagel and Boynton referenced in the Order. (**R. p. 0062**)

Department employee Slagel testified to his visual examination of the 1988 aerial photograph as well as a 1982 aerial photograph he obtained shortly before the hearing in an effort to respond to Mr. Tolleson's deposition testimony. (**R. p. 1149, lines 12-19**) Slagel testified that he interpreted a visual marker on the 1982 photograph to be an escarpment. (**R. p. 1149, line 20-p.7, line 7**) However, there was no proof whatsoever that Slagel had the professional education, experience, and training to determine if a feature on an aerial photograph displayed an escarpment. In fact, the Department did not even attempt to qualify him as an expert in this field. Any testimony by Slagel that his simple visual review of the 1988 aerial photography and the 1982 aerial photography disclosed escarpments in each was not credible and was entirely speculative.

Furthermore, as Tolleson testified, an escarpment is a vertical feature that cannot readily be discerned from an aerial photograph:

Q: Mr. Tolleson, to a reasonable degree of remote sensing certainty, is there any way that one could detect an escarpment with the naked eye from this photograph?
A: Not in -- in my opinion, no.
Q: Why not?
A: Well, a couple things. You got to understand, horizontally -- we talked about scanning and these things with the images. This is a flat piece of media, so it's scanned in a two-dimensional form. But when we talk an escarpment, from the definitions that I've heard in this courtroom, that involves like a vertical displacement, like a cut or an erosion of some kind. And the vertical resolution in an image like this is actually absent. It's not intended for stereographic or topographic interpretation. So ironically, if you wanted to see something

Page 904

with elevational or contour relief, instead of being directly over the object with the aircraft, you'd actually be off to the side.
Q: Based on your many years of experience and based on what you just told us, to reasonable degree of certainty is there an escarpment that's visible from that photograph?
A: Not that I can see.

(**R. p. 1188, line 7-p. 1189, line 8**)

The ALC's finding that the 1982 aerial (**Resp. Ex. 15 at R. pp. 1481-1486**) depicted an escarpment is premised on entirely speculative testimony from Slagel and Boynton which was rebutted by Mr. Tolleson. Finally, as to the 1982 aerial, even if a qualified person were able to determine to a reasonable degree of scientific certainty --the standard for opinion testimony of this nature-- that it most probably showed an escarpment, there is no scientific or other proof *when* it was created (i.e., no testimony as to whether it was created within the 40-year lookback or outside of it). Any finding or conclusion that the 1982 aerial depicted an escarpment caused by an erosional event in the 40 years before 2017 was speculative for this further reason.

Similarly, the ALC's recitation that there were tire tracks in the shaded area in the 1988 aerial that disproved that this area was vegetation was also based on improper, speculative testimony of Slagel. (**R. p. 0066**) First, Slagel *assumed* these tire tracks were not on the dunes because if someone was driving on the dunes then it would have necessarily been reported and he would have known about it. (**See R. p. 1139; R. p. 1175**)) Not only does Slagel have no personal knowledge of whether anyone reported to any agency or person that someone had been driving above the active beach, his testimony is also blatant negative hearsay that has no probative value. Smith v. Korn Industries, Inc., 274 S.C. 182, 183, 262 S.E.2d 27, 27–28 (1980) ("To corroborate his allegation that prostatitis diagnosed approximately one week after a collision with one of respondent's trucks resulted from the collision, appellant offered a friend's testimony that he had never heard appellant complain of any prostate or urinary problems prior to the collision. This type of testimony is commonly known as 'negative hearsay' and is inadmissible to show the condition did not in fact exist").

G. Hodge provided the sole credible proof of the most landward point of erosion over the last 40 years and his post-Irma line tracking the most landward escarpment for the length of Captain Sams should be the location of the baseline under Section 48-39-280(A)(2).

"The baseline for inlet erosion zones that are not stabilized by jetties, terminal groins, or other structures must be determined by the department as the most landward point of erosion at any time during the past forty years…." S.C. Code Ann. § 48-39-280 (A)(2). The sole erosional feature attested to at the hearing was an escarpment. The only landward escarpment that was identified with certainty by a qualified witness as occurring during the preceding 40 years was the escarpment marked by Hodge and surveyed by Byrnes soon after named-storm Irma in October 2017.

The Department and the ALC were dismissive of the Hodge line because it supposedly did not mark a solid line of unbroken vegetation and instead marked "clumps." Petitioner would point out that stable vegetation above the active beach or on emergent dunes is not like a field of corn but is necessarily randomly dispersed. The Department's only two field surveys for determining the vegetation line at the top of the active beach on Captain Sams in 2016 and 2019 showed a similar irregular or jagged line just like that marked by Hodge after Hurricane Irma. (**Resp. Ex. 18 at R. pp. 1501-1503**) The vegetation marked by Hodge would not exist at all if it were inundated by the tidal cycle of the ocean. It was above that area. The vegetation was stable vegetation existing before the storm that was brought closer to the shoreline by the erosion of the storm. The proof was that it was approximately 100' above the shoreline before Hurricane Matthew.

The ALC overlooked that a continuous line of stable vegetation is just one of two alternative standards for establishing the edge of the active beach: "Active beach is that area seaward of the escarpment ***or*** the first line of stable natural vegetation, whichever first occurs, measured from the ocean." S.C. Code Ann. § 48-39-270 (13)(emphasis added). An escarpment is the other locator. Hodge marked the escarpment that was left by the storm and, hence, the edge of the active beach.

More significantly, the line that he marked was the landward point of erosion, regardless of the extent of stable vegetation landward of his line. The most landward point of erosion is the statutory standard. His line, plotted with coordinates, was the only beach-long escarpment created during the last 40 years that was validly identified and accurately located.

CONCLUSION

For the reasons set forth, the Order of the ALC should be reversed and the baseline set at the most landward point of erosion over the last 40 years that was flagged by Hodge and surveyed.

Respectfully submitted,

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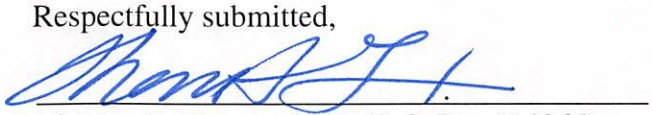
CERTIFICATE OF COMPLIANCE

By signing below, I hereby certify that this Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,



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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2022-001179

KDP II, LLC..... Appellant,

v.

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

PROOF OF SERVICE

I certify that I have served the **Appellant's Final Brief,** by regular and electronic mail on May 22, 2023, addressed to the attorneys of record:

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