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**May 16 2024**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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

ALC Docket No. 19-ALJ-07-0089-CC

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South Carolina Coastal Conservation League, .....Appellant,

vs.

South Carolina Department of Health and Environmental Control and Debordieu Colony  
Community Association,  
..... Respondents.

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**PETITION FOR REHEARING**

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Pursuant to Rule 221(a), SCACR, Appellant, South Carolina Coastal Conservation League (the “League”) respectfully petitions for rehearing and reconsideration of this Court’s May 1, 2024 Opinion (“the Opinion”) affirming the decision of the Administrative Law Court (“ALC”) to affirm the South Carolina Department of Health and Environmental Control’s (“DHEC”) issuance of a critical area permit to Debordieu Colony Community Association (the “Association”) for the construction of groins on the public beach.

### **INTRODUCTION**

The Court’s Opinion deserves reconsideration because the legal conclusion that the Debordieu Beach has a high erosion rate and that the groins would not detrimentally impact the downdrift of sand to other beaches overlooks and misapprehends the applicable statutory standards. “Generally, the purpose of a rehearing on appeal is to afford to litigants, whose rights and interests are affected by the appellate court judgment, an opportunity to have an erroneous judgment corrected by the appellate court deciding the case.” 5 C.J.S. Appeal and Error § 798. “In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument.” *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (citing Rule 221(a), SCACR).

At base, the Opinion holds that “the ALC’s decision, based on the probative, substantial, and reliable evidence in the record, is not clearly erroneous nor is it arbitrary or capricious.” *S.C. Coastal Conservation League v. S.C. Dep’t of Health & Env’t Control*, No. 6058, 2024 S.C. App. LEXIS 33, \*13-20 (May 1, 2024). This Court concludes that the ALC did not err in finding that the permit was for an area with a high erosion rate. This Court also concludes that the League’s argument that the groin will cause downdrift impact is without merit. Respectfully, these

conclusions are inconsistent with the plain language of the Beachfront Management Act and rely on evidence that is not probative of the plain language reading of the relevant provisions.

**I. This Court incorrectly reached a legal conclusion that is inconsistent with the plain language of the statute and erroneously relied on evidence that is not probative of what a high erosion rate is in South Carolina.**

The statute in question in this case expressly states, “new groins may be allowed only on beaches that have high erosion rates with erosion threatening existing development or public parks.” S.C. Code Ann. § 48-39-290(A)(8). “In construing a statute, [the] primary goal is to ascertain and effectuate the intent of the Legislature.” *Abraham v. Palmetto Unified Sch. Dist. No. 1*, 343 S.C. 36, 48, 538 S.E.2d 656, 663 (Ct.App. 2000)(citing *Jackson v. Charleston County Sch. Dist.*, 316 S.C. 177, 447 S.E.2d 859 (1994))(additional citation omitted). To that end, “[t]he legislature’s intent should be ascertained primarily from the plain language of the statute.” *Stephen v. Avins Construction Co.*, 324 S.C. 334, 339, 478 S.E.2d 74, 76 (Ct.App. 1996). “Thus, when a statute contains ‘clear and unambiguous’ terms, this Court ‘must apply those terms according to their literal meaning.’” *Abraham*, 343 S.C. at 49 (citing *Adkins v. Varn*, 312 S.C. 188, 191, 439 S.E.2d 822, 824 (1993))(additional citation omitted).

The plain language of the statute limits the installation of new groins only to beaches with high erosion rates. It does not permit the installation of new groins on beaches that are simply experiencing some erosion. Nor does it allow new groins to be installed on beaches that are experiencing low or even moderate erosion. The Court’s decision, however, will allow precisely that in contravention of the General Assembly’s intent.

The import of the General Assembly’s use of “high erosion rates” separate from and in addition to the phrase “erosion threatening existing development or public parks” in S.C. Code Ann. § 48-39-290(A)(8) is noteworthy because that means the limitation should not allow for new

groins to be installed only when some “erosion” is threatening existing development. Instead, other, non-groin alternatives must be explored such as renourishment and/or the installation of jetties or breakwaters if appropriate. S.C. Code Regs. 30-13(N).

The Court relied on testimony from Dr. Kana and Dr. Kazckowski but neither witness provided probative evidence that the erosion rate in the project area is high compared with other erosion rates in South Carolina. Instead, Dr. Kana testified that the erosion rate at the project site is moderate when compared to erosion rates in South Carolina. While Dr. Kana also characterized the project area as experiencing high erosion, he tied this conclusion to the gradient which he acknowledged was an artificial erosion rate caused by renourishment. (R. 843, 920). The “gradient” testimony was that after a renourishment, the sand was eroding at a rate of -19 cubic yards per year and, after a different renourishment, the erosion rate was -37 cubic yards per year which would, undoubtedly, be a high erosion rate if it was the actual erosion rate of the beach, but it was not. (R. 843). Dr. Kana also disclaimed having an opinion of what constituted a high erosion rate for the purposes of the statute. (R. 842).

Dr. Kazkowski’s opinion was that the project area was in an unhealthy state and her opinion as to whether it experienced a high erosion rate was not related to a comparison with any other erosion rate in South Carolina. (R. 995).

Mr. Eiser’s testimony does not support the Court’s conclusion either. The fact that a portion of South Carolina’s coast was typically eroding at a rate of -1 meter circa 1977 does not mean that is an average erosion rate now much less that this is a threshold for what is a high erosion rate. (R. 1010). Similarly, the fact that a certain portion of the South Carolina coast is eroding at more than 1 foot per year is not probative of what a high erosion rate is for the coast. (R. 1010-11). This is evidence of erosion taking place but what may be high or moderate or low is not

derivative from that data. To find that answer one must make comparisons, as Dr. Young did when he concluded that the project area erosion rate is moderate by comparing it to other erosion rates in South Carolina that are much greater and DHEC's own data that characterizes the shoreline erosion rate as moderate. (R. 650-655). Dr. Kana, similarly, concluded that a moderate erosion rate is one of -2 to -3 meters per year (which is what the project area experiences) by comparing that rate to others throughout South Carolina. (R. 841-842).

The Court stated that Dr. Young and the League's argument "that the mean of negative-only erosion rates dictates what is high erosion to its conclusion could produce an absurd result," and that using the range of shoreline change rates, including accreting and stable beaches, would yield to a more predictable approach. *S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't Control*, No. 6058, 2024 S.C. App. LEXIS 33, \*16 (May 1, 2024). This conclusion does not follow because including non-erosion rates necessarily skews the data on erosion along the South Carolina coast which does not increase predictability. Moreover, this approach necessarily circumvents the plain language of the statute which requires a comparison using only erosion rates and then mandates a conclusion using erosion rates about whether that rate is "high[.]" The statute's use of "high erosion rates" precludes the use of non-probative information such as shoreline change rates, accretion rates or stable beaches. Alternatively, relying on such information effectively re-writes the statute itself either by allowing new groins in areas experiencing erosion or erosion relative to overall shoreline change rates. The misconstruction of a statute is an erroneous conclusion of law. *See Thompson v. Ford Motor Co.*, 200 S.C. 393, 21 S.E.2d 34, 50 (1942)(erroneous construction of the meaning of a statute is an error of law).

The Opinion states that if erosion mitigation techniques cause lower erosion at any site this could result in a lower rate of erosion but no evidence in the record exists to support this conjecture.

The evidence in the record is that renourishment may artificially inflate erosion rates for a short time before they return to normal and also that these artificial rates are temporary. (R. 724-725). There was no evidence that erosion mitigation techniques are occurring on a scale that would affect the average erosion rate calculations—particularly as the mean erosion rates were calculated over many years without any artificial mitigation techniques being employed. Also there are methods, which were used here, to calculate background erosion rates so that any artificial influences are excluded.

The other example provided by the Opinion is a worry that “if certain locales begin experiencing extreme rates of erosion, then a mean rate of erosion is increased and what was once considered high is now in the moderate range.” There is no evidence in the record for the proposition that any particular coastline in South Carolina is about to experience extreme erosion such that it would affect statewide erosion rates. Nor is there evidence that, as stated above, temporary, artificially inflated erosion rates affect an overall erosion rate calculation. Finally, and respectfully, if a statewide event such as this ever did occur, then the statute in question would allow new groins on the beaches with the high erosion rates provided the other criteria are met or erosion issues could be addressed by other means. If the General Assembly wished to allow new groins on beaches with more moderate erosion rates, then it could have done so. It did not. If the General Assembly wished to allow new groins where the overall shoreline change rate was high, it could have done so. It did not. The General Assembly was very clear on the criteria to be used in determining the narrow circumstances when groins could be permitted. The accompanying regulation reinforces this narrow interpretation by advocating for minimal development on fragile beach/dune systems.<sup>1</sup>

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<sup>1</sup> “The Department shall be guided by the prohibitions against construction contained in Section 48-39-290 and Section 48-39-300 which are based upon the conclusion that ill-planned development, whether habitable

Petitioner respectfully submits that the Court misinterpreted the portion of the statute in question and relied on evidence that is not probative of whether the project area in question experiences a high erosion rate as compared to other erosion rates in South Carolina. Petitioner requests that the Court reconsider its Opinion on this point.

**II. The Court Erred in Interpreting the Statute to Mean Downdrift Impacts are Allowed if Mitigated.**

Petitioner also respectfully requests that this Court revisit and alter its ruling regarding the portion of the statute that precludes new groins unless a “thorough analysis demonstrates that the groin will not cause a detrimental effect on adjacent or downdrift areas.” S.C. Code Ann. § 48-39-290(A)(8)(b).

The Opinion’s interpretation disregards the statute’s unequivocal language and clear intent, which allows groins only in specific circumstances, not as broad approval so long as mitigation is included. The Court acknowledges that “groins would trap sand and therefore impact the downdrift beaches,” yet it creates a rationale that groins are permissible because mitigation is provided for in the statute. *S.C. Coastal Conservation League v. S.C. Dep’t of Health & Env’t Control*, No. 6058, 2024 S.C. App. LEXIS 33, \*20 (May 1, 2024). If mitigation may dispel any negative downdrift impacts, then any groin would be permissible because mitigation is always available and would render the portions of the statute superfluous. The Opinion states that the statute contemplates that a party installing a groin will need to maintain the downdrift beach through renourishment. It is true that a new groin can only be constructed in conjunction with an ongoing

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structures, recreational amenities, erosion control devices or other manmade structures, will now and in the future adversely impact the fragile beach/dune system. These structures interfere with the natural system and impact the highest and best uses of the system. In order to protect the highest and best uses of the beach/dune system, the Department, in its management capacity, shall encourage minimal development therein.” Regulation 30-11(D)(5).

renourishment project, but a prospective permittee only gets to that question if it establishes that there will be no downdrift impacts. In other words, the inclusion of renourishment in the project is not a workaround for the downdrift impacts requirement, but as a separate and mandatory statutory requirement if and when the other criteria for receiving a groin permit are met. The statute reads, “groins may be permitted **only after** thorough analysis demonstrates that the groin will not cause a detrimental effect on adjacent or downdrift areas.” S.C. Code Ann. § 48-39-290(A)(8)(b)(emphasis added). The statutory scheme contemplates a thorough analysis at the outset and the later monitoring is to ensure that any unexpected or unpredicted negative effects are mitigated. The plain language of the statute controls and precludes groins if the initial analysis shows a detrimental downdrift effect. It is undisputed that the groins would create a detrimental effect on the downdrift beach so this Court’s analysis should have ended there and the decision to affirm the permit issuance should be reversed.

### CONCLUSION

For the foregoing reasons, the League respectfully requests that its Petition for rehearing and reconsideration be granted and that the Court reverse the ALC’s order affirming DHEC’s issuance of the permit for anti-erosion control devices for the reasons stated herein and in Petitioner’s briefs.

[SIGNATURE BLOCK FOLLOWS]

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