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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Appellate Case No. 2021-000158

South Carolina Coastal Conservation League,

Petitioner,

vs.

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

Respondents.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals Erred in Affirming the Administrative Law Court's Opinion That the Project Area Qualifies for the Placement of Groins Even Though:

a. No Dispute Exists that the Groins Will Have Detrimental Downdrift Impacts, and S.C. Code 48-39-290(b) Prohibits Groins Where They Will Have Such Detrimental Downdrift Impacts?

b. Groins May Only Be Permitted in Areas Experiencing a "High Erosion Rate," and the Court Erroneously Relied on Accretion Rates and a Lack of Substantial Evidence When Determining Whether that Requirement was Satisfied?

STATEMENT OF THE CASE

Introduction

This case arises from the South Carolina Department of Health and Environmental Control ("DHEC") and its office of Ocean and Coastal Resource Management's ("OCRM") decision to issue Debordieu Colony Community Association ("DCCA") a critical area permit to construct three erosion control structures known as groins on Debidue Beach. Groins are rock, concrete and/or steel structures built perpendicular to the shoreline and extending out hundreds of feet into public trust waters. They are designed to trap and hold sand on a particular part of the beach and, as a consequence, may prevent sand from reaching other "downdrift" beaches in need of such sand. S.C. Code Reg. 30-1(D)(26) (defining groin as "a structure designed to stabilize a beach by trapping littoral drift").

The Coastal Conservation League ("CCL") appealed that permit by requesting a contested case hearing before the Administrative Law Court, which affirmed the permit decision. CCL then appealed the ALC's Final Order to the Court of Appeals. Counsel certifies that the Court of Appeals issued its Opinion on May 1, 2024 affirming the ALC, that CCL filed a petition for rehearing on May 16, 2024, and that petition was denied on June 13, 2024.

The statute governing this appeal is the 1988 Beachfront Management Act ("BMA"), which increased the protection that had been afforded the state's beaches under the 1977 Coastal Tidelands and Wetlands Act, S.C. Code Ann. § 48-39-10 et seq. As enacted and amended, the BMA has a consistently expressed policy of severely restricting "the use of hard erosion control devices to armor the beach/dune system" and encouraging the replacement of hard erosion control devices with "soft technologies" such as beach renourishment. S.C. Code Ann. § 48-39-260. The

General Assembly recognized that "[i]t is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle." S.C. Code Ann. §48-39-250(6). In 2002, the Legislature amended the Act to allow for the construction of some new groins, but, recognizing the inherent dangers of the structures, strictly limited the instances when they could be constructed, and only with necessary safeguards in place.[1] First and foremost, new groins are only allowed "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). Further, "[n]ew groins may be allowed only on beaches that have high erosion rates with erosion threatening existing development or public parks." Id. Even after an applicant has met all three of these criteria, the Act still requires that several safeguards be implemented to prevent neighboring beaches from being unduly impacted by the structures.

Notably, this is a novel issue and the first appellate case challenging a groin construction permit since the 2002 BMA amendments, yet it is unlikely to be the last. As sea levels rise, beachfront owners are increasingly desperate to stave off the impeding ocean by any means possible, even when illegal. These actions temporarily benefit the individual property owner, at the cost of public resources. The pressure facing South Carolina's beaches was reflected this summer when the legislature included two budget provisos that would have made it easier to construct hard structures on our beaches. Part 1B, Section 55, p. 415, Proviso 55.26, FY 2024-25 General Appropriations Act. Thankfully, Governor McMaster vetoed those provisos, referencing a previous veto of "an eleventh-hour effort to exempt certain erosion control devices from the

[1] Prior to 2002, OCRM permitted the construction of new groins on South Carolina beaches even though they were not among the exceptions to the prohibition of new construction seaward of the baseline. See South Carolina Coastal Conservation League v. South Carolina Dep't of Health and Envtl. Control, 354 S.C. 585, 588-89, 582 S.E.2d 410, 412 (2003) (citing S.C. Code Ann. § 48-39-290).

applicable permitting provisions" and explaining the importance of upholding the laws "designed to protect and preserve our state's pristine coastline." It is absolutely vital that our state's laws and policies against hard erosion structures be held firm, especially as the call for such structures becomes louder from a small group of desperate beachfront owners.

CCL asked the lower courts to use the same rationale in reviewing this groin permit; namely, to uphold the law as written, which is designed to protect our public trust beaches and to limit intrusions onto those beaches to very limited circumstances. The lower courts failed to apply the law as written. Instead, the lower courts read a new provision into the Act to allow groins even when they would knowingly cause downdrift harm, as long as the permit might trigger mitigation sometime in the future. The lower courts also failed to apply the plain language of the statute requiring comparison of "erosion rates," instead converting the term "erosion rate" in the statute to "shoreline change rate" which includes not only erosion rates but also accretion rates and stable shorelines. These twisted interpretations of this important law, which has heretofore never been interpreted by an appellate court, unravel the statute, lowering the threshold for qualifying for a groin permit to a practically negligible level.

History and Context for This Permit

Respondent DCCA is the entity that oversees DeBordieu Colony, which is a private community that includes some beachside residences in Georgetown County. DeBordieu Colony and DCCA are not to be confused with the island and beach where DeBordieu is situated. The island and beach are called Debidue, and several other entities or individuals own properties along Debidue Beach. DeBordieu Colony installed a wooden bulkhead on the oceanfront in 1981, prior to passage of the Beachfront Management Act, which has prohibited new bulkheads, aka seawalls,

since 1988. (R. p. 789 lines 1-3). Despite the obvious erosion issue that necessitated construction of the seawall, approximately four years after the seawall was installed, more similarly situated beachfront houses, in a section of DeBordieu called Ocean Green, were constructed to the south of the bulkhead. (R. pp. 745-746). In 1989 the bulkhead was damaged by Hurricane Hugo, leading to DCCA's first beach renourishment project[2] in 1990. (R. p. 746, line 12- p. 747, line 14). Since that initial project, DCCA has funded a beach renourishment project every 8 to 9 years with renourishments occurring in 1998, 2006 and 2015. (R. p. 851, lines 18-22; p. 915, line 25 - p. 916, line 6). It is in conjunction with its latest renourishment project that DCCA sought approval to construct three groins, each extending several hundred feet onto the public beach and into public trust waters.

Groins are "hard" erosion control structures that trap sand and prevent it from moving down the beach. When operating as designed, they can effectively starve the downdrift beach of sand, essentially moving the erosion problem from one beach to another.[3] (R. p. 483 lines 6-10; p. 853 lines 2-6).

Downdrift Impacts

All parties, including both OCRM and DCCA expect these groins to trap sand, which would necessarily increase erosion along downdrift beaches. DCCA undertook the required downdrift impacts analysis, which failed to demonstrate that the structures would have no

[2] Beach renourishment is the process of adding sand to an eroding beach to replace sand lost to erosion or longshore drift. This sand can come from a variety of sources, including dredging an offshore borrow site along the ocean floor, pumping from a nearby sandbar, or mining an inland location.

[3] S.C. Code Reg. 30-1(D)(26) defines a groin as "a structure designed to stabilize a beach by trapping littoral drift."

detrimental impacts on adjacent beaches. (R. p. 668, line 25-p. 669, line 8). Dr. Kaczkowski, DCCA's modeling expert, testified the modeling performed for this project indicated that "these three groins would increase the erosion to [the] downdrift" area. (R. p. 970, line 25- p. 971, line 1; p. 974, lines 8-15). Dr. Kana, President of Coastal Science and Engineering ("CSE") and DCCA's expert witness, confirmed that if there is no additional renourishment after the initial renourishment, the groins would "create a downdrift impact problem[.]" (R. p. 876, lines 2-10). Moreover, Dr. Kana stated that when areas near the groins become exposed, "you won't be able to walk directly across. You'll have to hop over the structure and it may be a one-foot hop or a three-foot hop or sometimes maybe a five-foot hop after a storm in -- in one area." (R. p. 877, lines 14-22).

OCRM's Matt Slagel admitted the clear purpose of a groin is to retain sand on its updrift side. Once any sand placed on the beach through renourishment is inevitably washed downdrift, the groins will prevent sand migration downdrift. (R. p. 483, lines 9-23). Specifically, Mr. Slagel stated that once the initial excess sand is exhausted "then yes, the structures would – would retain sand that might otherwise reach downdrift properties." (R. p. 483, line 9- p. 484, line 10).

As a result of this known and anticipated harm, both the Permit and the Amended Permit contain monitoring requirements and downdrift erosion thresholds that would trigger an obligation on DCCA's part to conduct additional future renourishment. (R. pp. 1089-1091, 3865-3866). Not only is increased erosion downdrift predicted, it is expected and, if these groins work as designed, it is inevitable.

Petitioner's witness, Dr. Robert Young, was qualified by the Court as an expert in coastal geology, coastal processes and coastal management policies. (R. p. 640, lines 2-24). Dr. Young

opined that the proposed project runs afoul of the Beachfront Management Act's requirement that new groins may only be installed if a thorough analysis demonstrates that the groin will not cause a detrimental effect on the adjacent or downdrift areas. (R. p. 667, lines 14-23). The basis for this conclusion is not in question. First, the proposed project would be in the middle of a littoral cell and that would necessarily deprive the downcoast areas of sand.[4] (R. p. 668, lines 3-25). Dr. Young testified that a groin is designed to "hold sand in one place on the updrift side of that [longshore] sediment transport. [] And the problem with constructing a structure like this is that any sand that you're holding on this one side was on its way some place. […] But if you halt that flow of sand, you're going to cause a deficit of sand on the other side of the groin." (R. p. 646, line 15- p. 647, line 2).

Even though Respondent DCCA planned to renourish the beach prior to the groins' installation, Dr. Young stated the obvious: "the statute doesn't say you can pre-mitigate the harm that a shore perpendicular structure is going to cause. It just says, you have to prove that the groin will not cause a downdrift impact." (R. p. 668, lines 16-25). Dr. Young explained that downdrift impacts are not experienced if the groin is at the end of a littoral cell (like at an inlet), as such alignment and "isn't going to have the same kind of detrimental downdrift impact to the shoreline." (R. p. 692 lines 10-16; p. 691, lines 2-5). A terminal groin (one at the end of a littoral cell) traps sand just like every other groin, but not sand that would otherwise replenish another section of beach.

[4] Coastal scientists and engineers divide the shoreline into littoral "cells," which are basically self-contained sections through which sand migrates. An inlet between coastal islands, for example, would be a natural dividing line between littoral cells, separate two different shoreline systems. "Littoral" was defined by Dr. Kana as a "zone over which waves break and move sediment in the cross shore direction between the dune and the low tide area, as well as mov[ing] sand along shore, down the beach[.]" (R. p. 778, lines 13-19).

Erosion Rates

South Carolina beaches are dynamic with some areas relatively stable while others erode at great rates and still others gain sand and grow through accretion. (R. p. 726, lines 1-13). Even among erosional beaches, there is a wide variance of erosion rates along our coast, as is documented in DHEC's own regulations. See S.C. Code Regs. 30-21, Table 7.

Although it was measured by different entities using different techniques, the erosion rate along Debidue beach where the groins are to be installed was undisputed in this case. Dr. Tim Kana, stated that the erosion rate for the project area, or Reach 3, was -4.2 cubic yards per foot per year and that multiplying this number by 1.3 would yield the average linear erosion rate for Reach 3. (R.. p. 818, lines 14-18; p. 841, lines 11-14). Altogether, the relevant section of Debidue beach is eroding at -5.46 ft/yr.

Dr. Kana characterized an erosion rate of -2- to -3 meters per year as moderate. (R. p. 841, line 23- p. 842, line 7). Although Dr. Kana stated that he doesn't "have a hard and fast rule as to what is defined in terms of [the] statute as high, medium, low, whatever[,]" (R. p. 842, lines 19-21), on cross-examination he confirmed prior testimony that a three meter (ten feet) per year rate of erosion is moderate, getting toward high. (R. p. 912 line 25- p. 913, line 4). Despite Dr. Kana's previous testimony that a moderate erosion rate could be up to -10 ft/yr, he also stated that the -5.46 ft/yr erosion rate at "DeBordieu south" is high due to an artificial gradient. (R. p. 842, line 23- p. 843, line 20).

Notably, the two areas in which Dr. Kana's firm had previously been involved with the installation of new groins in South Carolina (Hunting Island and the Folly Beach terminal groin) had erosion rates well in excess of those in the current project site. (R. p. 913, lines 5-25). Hunting

Island had erosion rates that were approximately -20 ft/yr, and the Folly Beach project area had an erosion rate well over -10 ft/yr prior to new groin installation. (R. p. 913, lines 10-25).

With regard to the erosion rate on Debidue Beach, Dr. Young opined to a reasonable degree of scientific certainty that the beach within the project area does not experience a high erosion rate compared to other beaches along the South Carolina coast. (R. p. 649, line 1-p. 650, line 20). In support of his opinion, Dr. Young compared the rates at the proposed project site to various beaches along the South Carolina coast, including those at Hunting Island, Folly Island and Pritchards Island, that experience erosion rates "that approach 15, 20 feet a year. Places that clearly have very high rates of erosion." (R. p. 650, lines 11-15). When Dr. Young was asked a hypothetical question as to whether erosion rates of -6.6 feet per year to -8.8 feet per year qualify as high erosion, Dr. Young stated that "[i]n a state that has shorelines that have extremely high erosion rates that are on the order of tens of feet, this --this would be moderate erosion in the State of South Carolina." (R. p. 665 lines 9-23).

In addition to relying on his own experience and knowledge of erosion rates and erosion "hot spots" along South Carolina's coast, Dr. Young also relied on "The United States Geological Surveys, National Shoreline Change Database" and "DHEC's own online information on their Coastal Hazard Vulnerability Assessment website" which is based upon Dr. Chester Jackson's "shoreline change assessment for the State of South Carolina that DHEC funded." (R. p. 651, lines 1-22). DHEC's Coastal Hazard Vulnerability Assessment classified the area throughout the Colony "as being moderate to low. The only place on the entire area of [Debidue] Island that is shown as having a higher rate of erosion is the very south end, the Barony property. And of course, the groins aren't being designed to protect that particular area." (R. p. 651, line 23- p. 652, line 10).

Dr. Young also relied on Dr. Jackson's underlying study entitled Mapping Coastal Erosion Hazards Along Sheltered Coastlines in South Carolina, 1849 to 2015 in which Dr. Jackson calculated the mean erosion rate for the South Carolina coast as -2.2 to -2.4 meters per year. (R. p. 655, lines 1-14; p. 663, line 8- p. 665, line 8). DHEC's Mr. Slagel confirmed Dr. Jackson's mean erosion rate. (R. p. 1068 line 5- p. 1070 line 19). Because "one meter is 3.28 feet," South Carolina's mean erosion rate along the coast is between -8.0032 and -6.9536 ft/yr. (R. p. 1049, lines 10-12).

Despite numerous erosion rates exceeding -10 ft/yr, as documented in DHEC's own regulations, and the mean erosion rate of up to eight feet calculated at DHEC's behest, DHEC's Mr. Slagel testified that the Department considers any erosion rate greater than -3 ft/yr as "high" for purposes of satisfying the statutory requirement for constructing a new groin. (R. p. 488, lines 23-24). Mr. Slagel admitted, however, that the -3 feet per year threshold is not contained in any statute, regulation, or even internal written guidance for project managers evaluating proposals. (R. p. 488, line 21- p. 489, line 21). According to Mr. Slagel, the Department's interpretation that -3 ft/yr constitutes a "high" erosion rate in South Carolina is based on a review that included not only erosional beaches "like at Hunting Island" but "also plenty of beaches where -- that are stable to accretional, where their -- their long-term rate is actually positive." (R. p. 489, lines 5-11). Thus, OCRM's assessment of erosion rates was not limited to actual erosion rates and instead included non-erosional beach measurements. (R. p. 491, line 22-p. 492, line 6).

It is noteworthy that Dr. Jackson, whom DHEC engaged to conduct what is effectively the definitive shoreline change assessment for the state, characterized the coastal erosion rate separately from the overall shoreline change rate—a figure that would incorporate stable and growing (accretional) beaches. (R. p. 1068, lines 9-12). Yet, in characterizing -3 ft/yr as a "high" erosion rate for South Carolina, DHEC did just the opposite, factoring in our state's beaches that

are not erosional at all. (R. p. 621, line 23 -p. 622, line 6; p. 1069, line17- p. 1070, line 9). The overall shoreline change rate is, as Dr. Jackson's calculations show, distinct from the erosion rate. (R. pp. 1068-1070).

ARGUMENT

Instead of the requisite legal analysis of the statutory requirements for obtaining a groin permit, the Court of Appeals focused its attention entirely on a review of the facts, ultimately affirming the ALC's findings based on the substantial evidence standard. The Court's fixation on the lengthy and complex factual record in the case was allowed to obfuscate the legal analysis that should have followed. Consequently, the Court of Appeals failed to apply the basic statutory requirements for obtaining a groin permit, clearing the way and setting a precedent for wide placement of these disfavored structures on South Carolina beaches.

I. It is Undisputed that the Groins Will Have Detrimental Downdrift Impacts, Which Precludes Issuance of a Critical Area Permit.

The lower courts should have taken the undisputed fact acknowledged in the record by all parties to this action—that the groins will have a detrimental impact on downdrift beaches by trapping and thus depriving them of sand—and applied the plain legal requirement that groins may only be permitted after 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(8)(b) (emphasis added). Instead, despite the undisputed testimony of downdrift impacts, the court effectively modified the statute by adding in the phrase "unless an applicant develops a plan for mitigating these downdrift impacts." This "mitigation loophole" to an unequivocal limitation is not in the

statute, and the lower court has impermissibly stepped into the shoes of the legislature in modifying this fundamental legal requirement for obtaining a groin permit.

The Court of Appeals posited that because the General Assembly "recognized the inherent impacts of groins," it was appropriate to allow for a groin with downdrift impacts to be permitted, so long as those impacts were mitigated. By reading into the statute a legislative allowance for mitigation, the Court of Appeals injected itself into a legislative role. While the Appellant agrees that many groins do have inherent downdrift impacts, it is this very reason why groins are disfavored and strictly limited under our coastal laws.

Further, this propensity for inherent downdrift impacts is precisely why the General Assembly created a tiered system for permitting such potentially harmful structures, such that:

1. If a pre-construction analysis demonstrates that the groins definitively *will have* detrimental downdrift impacts, the Department *cannot* permit the groins;
2. If the analysis demonstrates that the groins *will not* have detrimental downdrift impacts, the Department *may* permit them; however, if permitted, the Department must require:
    a. Monitoring of the groin area and adjacent and downdrift beaches to "determine erosion/accretion rates" S.C. Code 48-39-290(8)(a).
    b. A financially binding commitment to cover the cost of reconfiguring the groins or renourishing the beach. S.C. Code 48-39-290(b).
    c. Mitigation in the form of reconfiguring the groins or renourishing adjacent and/or downdrift beaches *if* the monitoring indicates that the groins are causing increased erosion rates. S.C. Code 48-39-290(8)(c).

Notably, even if the "thorough analysis" required prior to permitting indicates that downdrift impacts will not occur, post-construction monitoring is still required to confirm that conclusion.

Only if unexpected downdrift impacts occur does mitigation of those impacts then come into play. Groins that are fully expected to have downdrift impacts from the outset, as are the ones in this case, by plain statutory language, should never even cross the starting line.

Every single expert and witness testifying on this topic agreed the groins at issue in this case would trap sand in a manner to deprive downdrift beaches, creating a detrimental impact. S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't Control, Opinion No. 6058, 901 S.E.2d 706, 713 (Ct.App. 2024). Instead of ending its inquiry there, the Court of Appeals rushed forward into the statutory provisions requiring monitoring and remediation—provisions that are only applicable when thorough preconstruction analysis indicates a groin will not have detrimental downdrift impacts:

> The statute itself contemplates any party installing a groin will need to maintain downdrift beaches through renourishment and provides that if monitoring indicates unacceptable impact, the groins can be modified or even removed. The statute requires permittees to understand this and requires them to demonstrate financial responsibility to fund any or all of these efforts. Had the legislature not recognized the inherent impact of groins, it would not have provided for measures to mitigate such.

Id. at 713-14. Under the plain language of the statute, monitoring and mitigation are only implicated when there are unanticipated impacts from a seemingly safe groin. In situations like this, with known and identified impacts from the outset, groins are plainly prohibited. Under the Court of Appeals' reading of the statute, the downdrift impacts of any groin can be mitigated, and thus all groins can be permitted. This is a dangerous precedent that runs contrary to decades of sound coastal policy in the state.

Plainly, groins cannot be permitted if they are anticipated to cause a detrimental effect on downdrift areas. The court's inquiry should have started and ended at that point. Instead, the court weaved new language into the statute in holding that "any party installing a groin will need to

maintain downdrift beaches through renourishment." It is true that groins can only be constructed in conjunction with an ongoing renourishment program. See S.C. Code 48-39-290(8) ("new groins may be constructed . . . only in furtherance of an ongoing beach renourishment effort"). But that is an entirely separate requirement from establishing no detrimental downdrift impacts.

At the core of both lower courts' misapplication of law is a failure to grasp the extent to which groins are disfavored in our state. The Court of Appeals opinion, in particular, effectively says that the "mitigation loophole" it reads into the statute must be allowed, because otherwise very, very few groins would be permitted. On the contrary, the permitting of very, very few groins is exactly the point. The Act is designed to avoid downdrift impacts to public trust resources at all costs, first by not ever allowing groins when analysis shows those impacts will undoubtedly occur, and then by providing safeguards in the event that unanticipated impacts actually do occur. The lower court's misapplication and misinterpretation of this statute – which is a novel interpretation – would sanction *all* new groins, regardless of downdrift impacts, so long as an applicant provides financial assurance and a plan to (hopefully) mitigate that known, identifiable harm. That interpretation required the lower court to read in language that does not exist, rather than applying the plain language requirement that groins may only be permitted if a "thorough analysis demonstrates that there will be no detrimental downdrift impacts."

II. The Court Erred in Concluding that Overall Shoreline Change Rates Can be Substituted for "Erosion Rates" in Determining Whether a High Rate of Erosion Exists.

The permitting of a groin can only be considered on a beach with a "high erosion rate." S.C. Code 48-39-290. In applying this limitation, the lower courts chose to compare the erosion on Debidue not only to other erosive beaches, but to beaches that are stable and even growing. In

doing so, the lower courts effectively substituted the requirement for a high "erosion rate" with a high "shoreline change rate." The lower court's opinion on this point is inconsistent with the plain language of the Beachfront Management Act and relies on evidence that is not probative of the plain language reading of the term "erosion rate." The reliance on non-probative evidence also reveals a lack of substantial evidence on which to find this requirement satisfied.

The Court of Appeals concluded that: "An approach that focuses on the range of erosion rates, including accreting and stable beaches, as Slagel suggested, brings a more predictable approach to what would be considered high and does not exclude beaches with high erosion rates from the protections of the statute simply because some other beaches have higher rates." S.C. Coastal Conservation League, 901 S.E.2d at 712. Once again, the Court of Appeals seems to be straining against the fact that the very intent of South Carolina law is to allow groins on very few beaches. The Court of Appeals' endorsement of DHEC's consideration of accreting and stable beaches is inconsistent with the plain language of the statute which requires consideration *only of erosion rates.* An accretion rate is the opposite of an erosion rate. A stable beach is not experiencing any erosion. By comparing erosional beaches like Debidue to those that are stable or accreting, the lower courts open to the door to many more groins that have previously been permitted. Had the General Assembly wanted OCRM to consider overall shoreline change, as opposed to focusing solely on the rate of erosion, it could have provided for such in the Act.

The Court of Appeals concluded that the Appellant's argument "that the mean of negative-only erosion rates dictates what is high erosion . . . 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. Id. Once again, strictly limiting the construction of groins is by no means an

absurd result under South Carolina's consistent coastal laws and policies. The Court of Appeals' conclusion does not follow, because including non-erosion rates necessarily skews the data toward a conclusion that beaches experiencing almost any level of erosion have a high erosional rate. Only by comparing the erosion at Debidue beach to other eroding beaches in the state–an apples-to-apples comparison—can a proper determination be made as to the relative severity of Debidue's erosion.

Moreover, the Court of Appeals' 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 on accretional or stable beaches. Otherwise, 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).

In rejecting the Appellant's erosion-rate-only argument, the other concern expressed by the Court of Appeals is 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." South Carolina Coastal Conservation League, 901 S.E.2d at 712. First, there is no evidence in the record for the proposition that any particular coastline in South Carolina is experiencing or will experience extreme erosion such that it would shift the average across all of our state's erosional beaches. Regardless, should the rate of loss on our erosional beaches increase overall, such that a rate previously considered "high" becomes moderate, then the statute will be functioning exactly

as it was intended, in that the placement of groins will be limited to the most erosive of our erosive beaches, whatever that means at the time in question.

In refusing to adopt such a proposition, the Court of Appeals was yet again unable to come to terms with the fact that groins are generally not meant to be permitted in our state. 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 Generally 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.[5] In the absence of the shoreline change rate evidence, there is a lack of substantial evidence that supports the conclusion that the erosion rate where the new groins are proposed is sufficiently "high" to satisfy the statute. Instead, substantial evidence demonstrates that the erosion rate at the project area is moderate.

CONCLUSION

For the foregoing reasons, CCL respectfully requests that this Court grant its Petition for Writ of Certiorari and that the Court reverse the Court of Appeal's order affirming DHEC's issuance of the permit for anti-erosion control devices.

[5] "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 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." S.C. Code Ann. Regs. 30-11(D)(5).

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