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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

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

South Carolina Coastal Conservation League, ...Appellant,

vs.

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES

STATUTES

REGULATIONS

ARGUMENT

"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).

"Questions of statutory interpretation are questions of law, which this Court is free to decide without any deference to the tribunal below." Duke Energy Corp. v. S.C. Dep't of Revenue, 415 S.C. 351, 355, 782 S.E.2d 690, 592 (2016). "[T]he Court may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law." Kiawah Development Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014)(citing Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue, 399 S.C. 313, 316, 731 S.E.2d 869, 870-71 (2012)).

I. The ALC erred in determining that the proposed permit does not violate S.C. Code Ann § 48-39-290(A)(8), which states that new groins are only allowed "on beaches that have high erosion rates".

A. The ALC committed an error of law in holding that § 48-39-290(A)(8)'s "high erosion rate[]" requirement was satisfied.

This issue is governed by S.C. Code Ann. § 48-39-290(A)(8) of the Beachfront Management Act ("BMA"), which limits the construction of new groins "only" to "beaches that have high erosion rates[.]" The South Carolina Legislature used the word "high" and not "moderate" or "median" and also used the phrase "erosion rate" as opposed to "long-term shoreline change [rate]" or "overall rate of shoreline change." The ALC's decision would allow for groins to be placed on beaches whose erosion rates are not high because the rationale for its conclusion is not based on a comparison of the erosion rate of the relevant area of the beach in question to other erosion rates throughout the State. This is prohibited by the statute and constitutes an error of law. See, e.g., Kiawah Development Partners, II, 411 S.C. at 30-31 (ALC committed an error of law in misinterpreting term "the people" in § 48-39-30(D)).

The ALC stated that "although the statute uses the term high 'erosion rate' and not a high 'shoreline change rate,' it does not instruct that when determining what a high erosional rate is, the change rates across the State, including accretional ones, cannot be considered." (R. p. 43). The plain language of the statute forbids this precisely. By using the term "high erosion rates," the statute expressly directs what type of shoreline change must be "high." If one considers accretional change or stable rates, then one is considering rates that are no longer erosional by definition. An erosional rate of -2 ft/yr may appear significant if it is being compared to an accretion rate of +6 ft/yr but comparing an erosion rate of -2 ft/yr to an erosion rate of -20 ft/yr reveals how minimal that rate actually is vis-á-vis erosion rates. The ALC's reasoning is directly contrary to the plain language of the statute.

Appellant's Initial Brief showed the expert testimony elicited by both Appellant and Respondent, Debordieu Colony Community Association ("DCCA") that assessed erosion rates throughout South Carolina was in agreement that the rate at the proposed project site is moderate.

Dr. Rob Young testified the erosion rate where the three groins are proposed is "moderate" based upon his knowledge of various erosion rates throughout South Carolina and on data gleaned from Dr. Chester Jackson's study, funded by Respondent, DHEC ("DHEC"), finding the median erosion rate for South Carolina beaches has varied between -6.9536 to -8.0032 ft/yr.[1] (R. p. 1068 ll. 6-8; R. p. 1070, ll. 10-19). This data is also incorporated into DHEC's hazard vulnerability assessment, which classifies this area of Debidue beach as moderate to low. (R. p. 651, l.17 - p. 651 l.5). Appellant has not "misappl[ied]" the data from Dr. Jackson's report simply by quoting from it and reciting testimony that relies on the data, as does DHEC by providing it to the public. (Resp. DCCA Brief, p. 27).

Dr. Tim Kana, DCCA's expert, stated that a moderate erosion rate ranges from -3 ft/yr to -10/yr both on direct examination, (R. p. 841 l.23 - p. 842 l.1)(a rate of two to three meters per year of erosion is moderate), and on cross examination, (R. p. 912 l.25 – p. 913 l.4)(moderate erosion is from -3 ft/ yr to -10 ft/yr). This opinion was based on Dr. Kana's knowledge of the various erosion rates throughout the State. (R. p. 842 ll.2-6)("I think in much of the South Carolina

[1] DCCA is again mistaken when it alleges that Dr. Young's testimony about whether the erosion rate at the project area is high or moderate "was not derived from his own modeling or analysis[.]" (Resp. DCCA Brief, p. 33). Instead, Dr. Young testified at length that his conclusions about what constitutes a "high erosion rate" in South Carolina was based on his "qualitative experience" of "25, 30 years" studying the South Carolina coast, the "United States Geological Surveys, National Shoreline Change Database[,]" DHEC's Coastal Hazard Vulnerability Assessment website" and Dr. Jackson's report and data. (R. p. 650, l.25 - p. 651 l.22; p. 663 l.12 – p. 665 l.8). As an expert who is familiar with Dr. Jackson's work, Dr. Young's reliance on Dr. Jackson's report for support of his opinion was also perfectly reasonable. (R. p. 653 ll.1-16; p. 654 l.19 - p. 655 l.8). Indeed, it is remarkable that none of the other experts in this litigation addressed the data in Dr. Jackson's report which includes the only statewide calculation of beachfront erosion rates that was presented to the ALC. (R. p. 655 ll.9-14). Instead, DHEC sought to undermine Dr. Jackson's data by having Mr. Slagel testify about the total shoreline change rate for all beaches in South Carolina which, admittedly, included "both erosional and accretional" beaches. (R. p. 1069 ll.4-12; p. 1070 ll.5-9). It was revealing that Mr. Slagel, despite purportedly calculating an overall change rate using recent DHEC setback lines, did not offer testimony about the mean or median erosion rate of the beaches of South Carolina which would have had to be included as a subset of this figure.

coasts, we have some sites that are eroding at 20 feet per year and I would certainly call that high. So, something in between.").

This is the only evidence submitted that compares the erosion rate at the proposed site with erosion rates at all of the beaches in the State.[2]

Determining what constitutes a "high erosion rate" by utilizing only erosion rates does not "distort[] the appropriate threshold for determination." (Resp. DCCA Brief, p. 27). Instead, using accretional change rates or rates of zero change in determining what constitutes a "high erosion rate[]" necessarily skews the numbers down because one is no longer comparing erosion rates. One need only compare the overall shoreline change rate, testified by DHEC's Mr. Slagel as "-0.14 meters per year or [-].46 feet per year" to the actual mean erosion rate calculated by Dr. Chester Jackson which was in one calculation, Mr. Slagel stated, "-6.96 feet per year" to see how substantially the inclusion of non-erosional rates skew the numbers. (R. p. 1068, ll.7-12).

An appropriate analogy might be familiar to one who wrangles with home or business finances. In a household with income and expenses, one wouldn't use income (or add the two together) to assess the magnitude of whether one expense, like internet, was higher or lower relative to another expense, like the water bill. The expenses are, by definition, a separate category.

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[2] DCCA is mistaken when it asserts that Appellant's failure to contest what the erosion rate is at the proposed site means that DHEC's "legal determination of a high erosion rate for the purposes of § 48-39-290(A)(8) is reasonable and entitled to deference." (DCCA Brief, p. 28). What the erosion rate is at the site and whether that rate qualifies as "high" within the State of South Carolina are two separate issues. Agreement on one fact does not necessitate agreement on the issue as is evident from Appellant's Initial Brief and this Reply.

Also contrary to DCCA's suggestion, Appellant's argument about the high erosion rate need not be based on "independent modeling[,]" (DCCA Brief, p. 27), both because what the erosion rate is at the project area is not disputed and because the modeling that was done in this case relates solely to how the proposed groins will alter erosion along Debidue beach.

Similarly, a business would not use revenue or add revenue to expenses and costs to compare the magnitude of its respective expenses. Instead, the total amount of revenue, costs and expenses would, by definition, be net income or net loss. The final tally of all of these will provide an overall picture of the respective finances but if one wishes to investigate which areas of expense are greater or smaller, one would review only the listings in the discrete category of expenses to make the assessment. If one wishes to know where business travel expenses fall on the continuum of expenses of a law firm, for instance, higher or lower than expenses for continuing legal education, one compares those respective expenses. In short, apples to apples, not apples to cornucopias.

The ALC found "the Department's long-standing interpretation of what constitutes a 'high' erosion rate [to be] significantly persuasive." (R. p. 30). DHEC's use of -3 ft/yr as a threshold for "high erosion rates" for new groins is mistaken and not entitled to any deference for several reasons. First, as discussed above, this practice is contrary to the plain language of the statute and contrary to the South Carolina's actual erosional rates. Second, as the interpretation, or practice, has never even been written down much less promulgated as a Regulation, it is not entitled to any deference. Third, as it was reached only by DHEC staff, it is not entitled to deference. Fourth, the "long-standing" practice has not been altered or reassessed despite the passage of intervening legislation on the issue and is therefore not entitled to deference.

Not affording any deference to this practice or interpretation is mandated by the decision in Captain's Quarters Motor Inn, Inc. v. South Carolina Coastal Council. 306 S.C. 488, 413 S.E.2d 13 (1991). In Captain's Quarters, DHEC's Office of Ocean and Coastal Resource Management's predecessor, South Carolina Coastal Council, had employed a test to determine whether certain portions of a seawall could be included in an overall assessment of damage for the purposes of

satisfying the rebuilding statute criteria. Id. at 489-90. The Supreme Court of South Carolina found that the Coastal Council had failed to promulgate any regulations which detailed how it would assess the various components of a damaged seawall for the purposes of the statute. Id. at 491. The Court held that "Coastal Council overstepped its statutory authority in formulating and applying this test for purposes of [critical area] permit evaluations without formalizing it by regulation." Id. (citing Charleston Television, Inc. v. South Carolina Budget and Control Bd., 301 S.C. 468, 392 S.E.2d 671 (1990)).

Here, DHEC's practice or test relating to what constitutes a "high erosion rate" for the purposes of critical area permit application evaluation has never been promulgated as a regulation. Therefore, it cannot be applied and must be rejected. See also, S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, 363 S.C. 67, 74, 610 S.E.2d 482, 486 (2005)("[a]llowing OCRM to exercise unrestrained discretion" in evaluating what constitutes a "small" island "is inconsistent with the statute requiring the agency to evaluate permit applications pursuant to regulation").

The conclusion that -3 ft/yr qualifies as a "high erosion rate" in South Carolina has been made only by DHEC staff. This conclusion has never been documented in a statute or a regulation or a departmental memorandum or any guidance or manual. (R. p. 489 ll.14-21). The Supreme Court of South Carolina has often noted that an agency's staff is not entitled to deference in interpreting statutes or regulations. See, e.g., Neal v. Brown, 383 S.C. 619, 624, 682 S.E.2d 268, 270 (2009)("as we have previously held, an agency's Appellate Panel, not its staff, is typically entitled to deference in interpreting agency regulations"); S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, 363 S.C. 67, 75, 610 S.E.2d 482, 286 (2005)("The Panel, not OCRM staff, is entitled to deference from the courts").

This is consistent with the Chevron doctrine, whose two-step analysis of whether to give deference to an agency interpretation was employed by the Supreme Court of South Carolina in Kiawah Development Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 33, 766 S.E.2d 707, 717 (2014)(citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.E.2d 694 (1984)). "Interpretations such as those in opinion letters--like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law--do not warrant Chevron-style deference." Christensen v. Harris County, 529 U.S. 576, 587, 120 S.Ct. 1655, 1662, 146 L.Ed.2d 621 (2000)(citations omitted). Here, DHEC's interpretation of what constitutes a "high erosion rate" has never been promulgated as a regulation or even written down anywhere such that it would be on par with a "policy statement[], agency manual[]," or "enforcement guideline[,]" none of which are entitled to Chevron deference.

Finally, the length of time DHEC staff have allegedly adhered to the practice of considering any erosion rate above -3 ft/yr as "high" does not weigh in favor of deference--in addition to those reasons for discarding it listed above. It is plain that DHEC staff allegedly concluded an erosion rate in excess of -3 ft/yr was "high" in the 1990s, or at the time the Coastal Council was still in existence. (Tr. p. 76, ll.9-10; p. 636, ll.1-2). Several years later, in 2002, the Legislature passed the amendment to the BMA that contained, for the first time, the limitation on construction of new groins to beaches with "high erosion rates[.]" S.C. Code Ann. § 48-39-290(A)(8); see also, South Carolina Coastal Conservation League v. S.C. Dep't Health & Envtl. Control, 354 S.C. 585, 588 n.6, 582 S.E.2d 410, 412 n.6 (2003)(recognizing the 2002 amendment of the BMA as it relates to groins). DHEC's prior regulation which authorized the use of groins, S.C. Code Ann. Regs. 30-13(N), did not contain any limitation of new groins to beaches with "high erosion rates." Thus,

the supposed "long-standing interpretation" of what constitutes a "high erosion rate[]" under the statute in actuality predates the language that it purports to interpret by many years.

The later enactment of this amendment and the failure of DHEC staff to address the import of this new statutory requirement, which specifically uses the phrase "high erosion rates," precludes any deference. The "interpretation" or, in reality, practice, pre-dated an intervening change in the law and there was no alteration or re-assessment of the practice to address this change. In addition to the lack of factual support and the confused reliance on shoreline change rates, the length of DHEC staff's practice does not weigh in favor of any deference because of the intervening change in the law.

The subsequent change in the law also relates to another of Respondents' arguments. Perhaps recognizing the lack of support for their position, Respondents resort to peddling the justification that was correctly rejected by the ALC. The ALC recognized that S.C. Code Ann. Reg. 30-21(D)(5)(b) states Debidue Island "is highly erosional in areas." This is of no moment and the ALC did "not find [this statement] to be very probative" as this excerpt from the Regulation "does not specify which areas of the island are 'highly erosional.'" (R. p. 30 n.8). Of course, the areas with the highest erosion rates on Debidue Island that are documented in Regulation 30-21 are all south of where the groins are proposed to be installed. S.C. Code Ann. Reg. 30-21, Table 7 (station 4105 -11.5 ft/yr, station 4100, -11.0 ft/yr, station 4115, -10.8 ft/yr, station 4120 -10.0 ft/yr). This is consistent with DCCA's expert's calculations of the highest erosion rate for Debidue Island being found in Reach 4, which is far higher than the erosion rates at the project site and is located south of the proposed project. (Resp. DCCA Brief, p. 13, Table 1).

Appellant is hopeful that the misstatements made in DHEC's Initial Brief concerning S.C. Reg. Ann. 30-21 were inadvertent. DHEC mistakenly characterizes the "highly erosional"

statement to apply to the entire island. (Resp. DHEC Brief, p. 8) ("Debidue beach ...is classified as highly erosional in South Carolina's Beachfront Management Plan."). In actuality, the statement reads: "the island is highly erosional in areas." Later, DHEC states that "DeBordieu is listed as 'highly erosional' in S.C. Code Ann. Regs. 30-21…." (Resp. DHEC Brief, p. 14). DeBordieu, which is the name of the community, has never been listed as "highly erosional" under Reg. 30-21 and there is no mention of what "areas" of the beach on Debidue Island the drafters considered to be "highly erosional." S.C. Code Ann. Regs. 30-21(D). What is clear is that the highest erosion rates recorded in Reg. 30-21 for Debidue Island are not adjacent to DeBordieu property.

Moreover, this Regulation, like the "high erosion rate" practice, pre-dated the enactment of the statutory amendment that added the "high erosion rate[]" requirement. In the face of this legislative change, the quoted language of Regulation 30-21 has not been amended or expounded upon to address the new statutory language. The quoted language of the Regulation does not support Respondents' position and was correctly disregarded by the ALC. Regulation 30-21, with its recitation of a host of erosion rates throughout the State that exceed -10 ft/yr, on the whole supports Appellant's arguments.

The ALC erred as a matter of law in holding that the critical area permit satisfied S.C. Code Ann. § 48-39-290(A)(8)'s limitation of new groins to "beaches that have high erosion rates[.]" The holding subverts the plain language of the statute and is contrary to all of the evidence that put the erosion rate at the proposed project site in the proper context as required by the statute--namely by comparing it to all South Carolina beach erosion rates. DHEC's interpretation, which the ALC found "significantly persuasive[,]" is not entitled to any deference. The decision of the ALC should be reversed.

B. The ALC's purported determination that the project site has a high erosion rate as a matter of fact is erroneous.

The ALC also concluded that the erosion rate at the proposed project site is "high" "because under the facts of this case, the Project is in the area of high erosion." (R. p. 43). This factual determination is unwarranted and unsupported. The only issue is whether the proposed project comports with S.C. Code Ann. § 48-39-290(A)(8)'s limitation as a matter of law and the actual erosion rate at the project site was not disputed. In support of its purportedly factual conclusion, the Court cited only "Dr. Kana's factual opinion that the Project was located in an area of high erosion" and found that opinion "to be persuasive." (R. p. 43). Yet Dr. Kana testified that he did not "have a hard and fast rule as to what is defined in terms of statute as high, medium, low, [erosion]." (R. p. 842 ll.19-21). Dr. Kana's opinion about whether the project is in an area of high erosion would only be relevant as it relates to the statute's limitation and his self-imposed circumscription of his testimony would preclude the Court's reliance. Regardless, the facts of this case do not support the Court's determination whatsoever.

DCCA argues that a factual determination of whether the project is located in an area of high erosion "must be based on the conditions existing in the Project area." (Resp. DCCA Brief, p. 30). This kind of subjective evaluation of what constitutes a "high erosion rate[]" would undermine the purpose of this prong of the statute, namely that an erosion rate be high. The only way to ascertain if an erosion rate, or anything else, is "high" is to compare it to like things. An erosion rate can only be considered high (or low or moderate) by comparing it to other erosion rates. In this case, when one compares the erosion rate at the proposed site to other erosion rates in South Carolina, the only objective evidence is that the erosion rate is moderate.

As referenced in the prior section, there is ample evidence that the erosion rate at the proposed project site is moderate when compared to erosion rates on beaches throughout South Carolina. The ALC's sole reliance on Dr. Kana's testimony in this regard, in addition to being unwarranted for the reasons stated above, is also unwarranted because Dr. Kana's rationale for subjectively opining that the erosion rate in the project area is "high" is the "gradient," which is an "artificial" inflation of the actual erosion rate caused by renourishments. (R. p. 843 ll.2-20). The ALC erred in relying on Dr. Kana's opinion in this regard.

DHEC's witness, Mr. Matt Slagel stated that DHEC's determination of what constitutes a high erosion rate for the purpose of the statute includes consideration of accretional and stable rates. (R. p. 489 ll.5-11; p.491 l.1; p. 492 l.6)("[i]t was looking at-- at long-term shoreline change"). Mr. Slagel did not, as DCCA avers, testify that "the erosion rate at the Project area is many feet higher than typical erosion rates experienced throughout the State." (DCCA Brief, p. 31). In the testimony cited by DCCA, Mr. Slagel actually states that the -3 ft/yr erosion rate threshold is "well above" the -.46 ft/yr number, which is not erosion rates but is a shoreline change rate for the State. (R. p. 1068 ll.18-20).

DCCA's other expert witness, Bill Eiser, basically reiterated his basis for concluding that -3 ft/yr was a high erosion rate while he worked for OCRM. (R. p. 1009 ll.13-16). The basis of his opinion in that regard was a non-peer-reviewed article from 1977 that did not provide any information about what constituted a low, moderate or high erosion rate in South Carolina but instead said that erosion rates, at least at that time, were "typically" between 30 centimeters to 1 meter per year. (R. p. 1010 ll.4-18). Similarly, Mr. Eiser relied on an article from 1988 in which Dr. Kana noted that 26 of 88 miles of South Carolina shoreline were eroding at more than one foot per year but did not characterize erosion rates beyond that. (R. p. 1011). Finally, Mr. Eiser relied

on his review of some State of the Beach reports from 2009 but these were only of developed beaches in South Carolina (with the minor exception of Waites Island) and did not encompass the totality of erosion rates throughout the State or purport to characterize erosion rates as low, moderate or high. (R. p. 1049 ll.4-9).

Dr. Kaczkowski's testimony about the "high erosion rate" at Debidue is limited to subjective observations about the beach itself. (R. p. 995 ll.12-24). She testified she thought the beach was in an unhealthy state and then stated that it was her opinion that "the erosion rate on DeBordieu [sic] beach" is high. (R. p. 995 ll.17-24). Dr. Kaczkowski offered no testimony that provided any indication of where on the beach of Debidue Island the erosion rate is "high" and she also offered no testimony about how she arrived at her opinion that the erosion rate is "high." Dr. Kaczkowski certainly offered no testimony that she arrived at her conclusion about the erosion rate by comparing the erosion rate of Debidue beach, much less the project area, to other erosion rates along the South Carolina coast. Id. Essentially, Dr. Kaczkowski offered her subjective opinion without support. This is not probative of the issue.

The remainder of DCCA's argument on this point is either a rehash justification of DHEC's flawed practice, discusses "property damage and flooding" which is more relevant to the other statutory limitation on new groin construction which requires "erosion threatening existing development" or evinces a circular logic that since erosion continues along the beach at Debidue and the erosion rate is higher at the project site than north of the project, the project area must have a high erosion rate. None of these arguments are availing.

The issue of whether the "high erosion rates" requirement was satisfied for this critical area permit is not a question of fact. The ALC committed an error of law in holding the evidence supported this determination. Even if one considers it a question of fact, the ALC based its

determination of this issue on the testimony of Dr. Kana. Dr. Kana stated that he did not have an opinion about what constituted a "high erosion rate[]" for the purpose of the statute and when he offered his opinion anyway, he testified that the basis of that opinion was the "gradient." The evidence shows that the gradient, and the erosion rates that Dr. Kana quoted to show the "gradient" were artificially inflated due to the renourishment sand. There is not a factual basis to support the ALC's ruling as a matter of fact either. The ALC's determination on this point was erroneous and should be reversed.

II. There was no evidence presented that any existing development is threatened by erosion.

In addition to demonstrating that the beach in question has a "high erosion rate[,]" new groin enthusiasts must also satisfy the second prong of S.C. Code Ann. § 48-39-290(A)(8), which requires that "erosion [be] threatening existing development or public parks." Appellant's argument regarding the "threaten[ed] existing development" prong is simple: the ALC's decision is wrong because there is no evidence that "erosion" is threatening existing "development" at the proposed site.[3] The evidence that was adduced, and that DCCA and DHEC have again recited in their respective briefs, shows that a few houses among the extensive residential development at Debordieu have been temporarily approached by water when there are storm events. There was no evidence that underlying or "background" erosion, which both DCCA's experts and DHEC staff used to determine what the actual erosion rates at this site are (R. p. 564 ll.16-20; p. 822 l.3 -

[3] The simplicity of Appellant's argument is not grounds for ignoring the issue as Respondent, DCCA would prefer. (Resp. DCCA Brief, p. 36). Appellant properly preserved the issue for appeal and properly cited a lack of record evidence for the satisfaction of a quoted statutory requirement. This is not equivalent to an expression of simple "dissatisfaction" with the ALC's ruling. Both DCCA and DHEC understood the issue or else would not have devoted significant time to arguing the point in their respective Briefs.

p. 823 l.12) and to set mitigation triggers in the permit accordingly, (R. p. 477 ll.7-23; p. 1029 ll.9-13), has threatened these homes.

There are no regulations, guidelines or standards DHEC has developed for determining when "erosion" is "threatening development[.]" (R. p. 517 ll.5-17). Nor are there any regulations, guidelines or standards for DHEC staff to assess how long or often "development" needs to be threatened, or how many structures need to be threatened for "development" to be threatened. Id. Instead, this staff decision, unguided by pertinent regulations, was based upon other considerations, namely the emergency order section of S.C. Code Ann. Regs. 30-15(H) that is designed to address "[e]mergency situations before or after a storm event[.]" (R. p. 517 ll.18-23). As it is a staff decision that is unguided by regulations related to the statute in question, DHEC's interpretation and rationale is entitled to no deference. Captain's Quarters Motor Inn, Inc., 306 S.C. at 491, 413 S.E.2d at 14-15 (no deference to DHEC interpretation of statute not contained in regulations); S.C. Coastal Conservation League, 363 S.C. at 75, 610 S.E.2d at 286 (OCRM staff opinion not entitled to deference). The ALC erred in relying on the Department's interpretation which employed a dissimilar regulation to inform its interpretation of this statutory provision. (R. p. 44) (citing S.C. Code Ann. Regs. 30-15(H)).

The ALC erred as a matter of law in construing the word "erosion" to include water or damage related to temporary storm events and in construing "development" to apply to the wooden bulkhead that is an erosion control structure. This error is manifest if one reviews the ALC's decision, which focuses on the words "threatened" and not on either "erosion" or "development." (R. p. 44) (citing Merriam-Webster's Online Dictionary for definitions of "threatened" and "imminent"). The Legislature used the word "erosion" to modify the phrase "threatening existing development[.]" This distinguishes general and consistent erosion experienced at the site from

transitory flooding from storm events. Doubtless, storm events may "threaten" houses along Debidue beach for a short period of time as they do other houses throughout the South Carolina coast, but threats from storms do not equate to threats from "erosion", as the statute requires, such that groins may be installed. As Dr. Young testified, "[I]f we're talking whether its [imminently] threatened by erosion, that's different than if the structure is threatened by storms, right? So, you know, all of those structures are potentially threatened by storms." (R. p. 703, ll.11-16). The distinction between flooding or high tides related to storms and regular erosion was also noted by the South Carolina Legislature who "recently told DHEC [] not to pay attention to storms when they're at the baseline." (R. p. 703 ll.20-22). The ALC's conclusion, which is based only upon evidence that water may approach certain development as a result of storm events, is not only an error of law but is also arbitrary, capricious and not supported by substantial evidence.

It is no accident that DCCA's argument on this issue is replete with pictures after or references to storm events. Its Initial Brief refers to Hurricane Humberto on p. 37, Hurricane Isaias on page 38, Hurricanes Dorian and Isaias on page 41 and Hurricane Dorian again on page 42. DCCA also includes testimony that refers to the effects of Hurricane Hugo, in Mr. Eiser's testimony, on page 40 and unidentified storms on pages 38 through page 40. (Resp. DCCA Brief, pp. 37-42). It is noteworthy that the testimony of Dr. Kana, cited on pages 39 and 40, about fall high tides and Nor'easters (storms) was not limited to Debidue beach but instead encompassed "causes of damage to properties all up and down the coast." (R. p. 918 l.21 - p. 919 l.4). And of the two pages of Argument on this issue in DHEC's initial Brief, both "storm events" and "post-storm satellite imagery" are referenced on the first page. (Resp. DHEC Brief, p. 21).

This type of permanent solution, groin installation, to a transitory problem, flooding associated with storms, is contrary to the plain language and intent of the statute. As Mr. Slagel

acknowledged, the remedies afforded by the emergency order regulation are "something that [is] temporary to address an immediate need." (R. p. 518 ll.12-17). After a storm passes, the beach will eventually return to its previous condition which is why the emergency remedies are temporary. Indeed, Dr. Kana even acknowledged that after a storm, there may be accretion on a beach, as there has been recently on the beach at Debidue in front of the bulkhead, "likely due to those long period swell[s] that came in. They actually will build up a small -- small beach." (R. p. 921 ll.11-17). No one would equate this temporary deposition of sand to accretion just as storm flooding does not equate to erosion.

The ALC recognized that "[s]ome of this evidence was procured while a storm passed by South Carolina, but some was not." (R. p. 44). The Court then discussed the bulkhead and the threat to "structures behind the bulkhead[.]" The only evidence that water approached any house behind the bulkhead, however, was tied to temporary storm events. (R. p. 520, ll.21-23; p. 615 l.4 - p. 616 l.12; p. 761 ll.1-6). The bulkhead's exposure to "wave action on a daily basis" does not mean the development behind it is "threatened" because there was no evidence that the bulkhead itself is "threatened." Mr. Slagel testified that to his knowledge, the wooden bulkhead "in its current form has not failed[.]" (R. p. 522 ll.6-12). Other experts opined that it may fail eventually, but decades from now. (R. p. 721 ll.2-16). Dr. Young noted that DCCA had been granted a permit to refurbish the bulkhead and that this would cause it to have a "multi-decade life span." Id.

The ALC then mistakenly concluded that "erosion is not only threatening structures behind the bulkhead but the structure of the bulkhead itself." (R. pp. 44-45). As mentioned above, the bulkhead is not "threatened" but the ALC's use of the word "structure" as opposed to the actual word in the statute, "development," reveals another error. The word "development" does not and cannot be properly construed to include the erosion control structure that is the wooden bulkhead.

The bulkhead is designed to be located in close proximity to the water. It is not "development" as that term is understood to connote residential, commercial or industrial development. No one resides in or does business upon the wooden bulkhead.

Indeed, the term "erosion control structure" is not only defined under the BMA, S.C Code Ann. § 48-39-270 (1)(a), (b), to include both "seawall[s]" and "bulkhead[s]", but is used repeatedly in the very statute that contains the provision that controls here, S.C. Code Ann. § 48-39-290 (passim). Meanwhile, the definitions section of the BMA also uses the term "development." Subsection 9 defines "Planned development" to include "multifamily or commercial projects," while Subsection 10 defines "Planned unit development" to include "residential, commercial or industrial development[.]." S.C Code Ann. § 48-39-270 (9), (10). The statute in question and the broader Act of which it is a part both reject the ALC's use of the term "development" to include the "erosion control structure." This is important because the two northernmost groins are designed to protect the bulkhead. (R. p. 473 ll.1-7; p. 1035 ll.9-14). The bulkhead is not "threatened" and is not "development" under the plain meaning of the statute.

Renourishment has proven to be an effective remedy on Debidue Beach to protect the residential development and the bulkhead. DHEC states in its Initial Brief that "the bulkhead on Debidue Beach will likely fail without renourishment and without the construction of the groins, renourishment is not required and unlikely to occur." (Resp. DHEC Brief, p. 11). This speculation is unsupported given DCCA's reliable track record of beach renourishment. Further, should the groin portion of the Permit be reversed, which is all Appellant seeks, it seems highly unlikely that a community association with a Beach Preservation Fund that will consist of over thirty million dollars, specifically funded through assessments on community members for purposes including renourishment and restoration, would halt its renourishment plans and see what happens to the

development. (R. p. 470 ll.1-3; p. 931 l.6- p. 932 l.11). There is no question about the motivation for the use of groins. As Dr. Kana stated, "the project would restore a dry sand beach and maintain it much longer and more cost effectively than simply nourishing the beach every few years." (R. p. 789 ll.16-20). Cost savings is not enough to justify the use of groins which are an exception to the ban on structures in S.C Code Ann. § 48-39-290 (A)("No new construction or reconstruction is allowed seaward of the baseline except…."). New groin proposal must satisfy the second prong of the statutory requirement of S.C. Code Ann. § 48-39-290(A)(8). As erosion is not threatening existing development at the project site, this prong has not been satisfied and the ALC ruling on this issue should be reversed.

III. Mitigating for evident detrimental downdrift effects of groins does not obviate the statute's requirements.

At the outset, DCCA misstates the clear and plain standard contained in the statute for obtaining a permit to construct groins:

> The statute further provides that "[g]roins may be permitted after thorough analysis demonstrates that the groin will not cause a detrimental or downdrift effect on adjacent or downdrift areas." Id. SCCCL challenges the findings of the ALC that the Project meets the statutory requirements for (1) high erosion rate, (2) threatened development, and (3) **alleviating any downdrift impact**." [emphasis added] (Resp. DCCA Brief, p. 24).

As the case law cited in this Reply makes clear, the plain language of the statute is controlling: "[g]roins 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(8)(b). See Avins Construction, supra. The statute clearly and plainly does not say that groins may be permitted only where downdrift impacts are alleviated.

DHEC acknowledges in its Initial Brief that the "models indicated that if the groins are constructed, it is possible that up to 7,000 cubic yards of sand may not reach downdrift tracts like Hobcaw Beach. This would result in a 1.6cy/ft/yr increase in erosion on Hobcaw Beach." (Resp. DHEC Brief, p. 11). DHEC and DCCA continue to argue, though, that despite all of the trial testimony, allowing for these groins does not run contrary to the plain language of the statute because there are mitigation (renourishment) requirements required by the critical area permit.

Each witness who testified about downdrift effects of the groins conceded there will be detrimental effects: DHEC's Matt Slagel (R. p. 483 ll.9 - p. 484 1.10); Dr. Rob Young (R. p. 646 l.15 – p. 647 l.2; p. 668 ll.3-25; p. 670 ll.1-8); Dr. Haiqing Kaczkowski (R. p. 970 l.25- p. 971 l.1; p. 974 ll.8-15); and Dr. Tim Kana (R. p. 876 ll.2-10). No testimony was offered to the contrary.

DHEC argues in its Initial Brief that denying a permit based on downdrift impact would render the statute meaningless by denying a Permit where there is a clear detrimental downdrift impact. (Resp. DHEC Brief, p. 18). In fact, there are at least two instances raised at the hearing where installation of a groin would not likely result in a detrimental downdrift impact, such as in the case of the groin at Folly Beach at the terminus of a littoral cell or where critical infrastructure is present. (R. p. 690 ll.9-13). The inverse, reading the statute to allow for a groin any time there is mitigation proposed, would render the no-downdrift-impact requirement a nullity and surplusage. This is not permitted by the canons of statutory interpretation. See, e.g., Matter of Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995)(citation omitted)("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous").

DCCA alleges this Court should ignore the clearly applicable policies in the BMA in determining the appropriate interpretation of the statute, such as S.C. Code Ann. § 48-39-260(3). (Resp. DCCA Brief, p. 48). Appellant cites to the policy of the Legislature in § 48-39-260(3)[4] as supportive of the plain language of interpretation of the BMA, which is that groins should not be permitted where there are adverse downdrift effects, even where is mitigation offered. Citation to this particular provision in support of Appellant's argument that mitigation should not obviate the need to avoid downdrift effects does not rise to the level of raising a separate issue that was not appealed. In fact, DCCA's Initial Brief brings to this Court's attention that the ALC's Final Order makes findings on § 48-39-260(1)(b), a distinct subsection from § 48-39-260(3). The issue of whether the permit should have been reversed based on § 48-39-260(1)(b) was in fact not appealed. Nevertheless, the policies in the BMA have direct bearing on how the statute should be interpreted. In interpreting a statute, "the statute as a whole must receive practical, reasonable and fair interpretation consonant with the purpose, design and policy of lawmakers." Rosenbaum v. S-M-S 32, 311 S.C. 140, 143, 427 S.E.2d 897, 898 (1993). Each provision "should be given a reasonable construction[] consistent with the purpose and policy of the Act." Jackson v. Charleston County Sch. Dist., 316 S.C. 177, 181, 447 S.E.2d 859, 861 (1994). The language requiring proof of absence of negative downdrift effects is not inconsistent with the policies in § 48-39-260, particularly subsection 3. Allowing for downdrift impacts whenever there is mitigation as a part of the package is.

[4] "[T]he policy of South Carolina is… (3) [to] severely restrict the use of hard erosion control devices to armor the beach/dune system and to encourage the replacement of hard erosion control devices with soft technologies… for the protection of the shoreline without long-term adverse effects[.]"

DHEC recognizes that "[l]language in a statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose." (Resp. DHEC Brief, p. 18, quoting Consumer Advoc. for State v. S.C. Dept. of Ins., 725 S.E.2d 708, 710 (Ct. App. 2012)). In this vein, this Court should consider the fact that the construction of groins was authorized by the Legislature by amending the BMA in 2002, specifically distinguishing groins from other hard erosion control structures that are prohibited on the beachfront and allowing their construction, but only under very specific circumstances. The policy in § 48-39-260(3) makes clear that hard erosion control structures should be "severely restricted" in favor of effective soft solutions, such as the renourishment that DCCA has regularly and consistently employed for erosion control.

IV. Respondents DHEC and DCCA improperly refer to exhibits in their initial briefs to support the truth of the matter asserted in contravention of the ALC ruling.

Early on in the evidentiary hearing, Respondent DHEC ("DHEC") offered the entire permitting file into evidence, which was marked as Respondent's Exhibit 29. The ALC admitted the exhibit under the following parameters:

> I'm going to let it in sub—based with the caveat again – and that's what I've told you earlier when I was discussing it with you that once you establish the foundation, I'm going to let it in, but not in a – we've got subjective opinions in there. … But so it's only offered to show the actions that the Department took and not anything for – regarding any subjective opinions, conclusions – what else? Judgments, at all. So, I would not antic – you should not anticipate relying upon anything in the document to verify the decisions that you make." (R. p. 538 l.12 - p. 539 l.4).

DHEC refers to Respondent's Ex. 29 throughout its Initial Brief in support of its arguments. As one example, DHEC asserts, "[i]n determining the validity of the submitted Downdrift Impacts Report, SCDHEC relied on input from the U.S. Bureau of Fish and Wildlife and the U.S. Army CORE [sic] of Engineers, **both of whom found the methodology of the study to be sound**."

[emphasis added] (Resp. DHEC Brief, p. 11). The ALC ruled that both the U.S. Fish and Wildlife and Corps of Engineers letters were admitted "to show that which he [Matt Slagel] received and – and only for those purposes." (R. p. 552 ll.16-19; see also R. p. 548 1.9 - p. 560 l.20). DCCA likewise refers to Exhibit 29 for the truth of the matter asserted even while acknowledging the ALC's ruling. (Resp. DCCA Brief, pp. 7, 10-11, 38). Given that neither DHEC nor DCCA appealed any ruling by the ALC, it is improper to cite to evidence that was not admitted for the truth of the matter asserted for that very purpose. It is axiomatic that an unappealed evidentiary ruling becomes the law of the case and is not preserved for review. Carolina Chloride, Inc. v. Richland County, 394 S.C. 154, 714 S.E.2d 869 (2011). Appellant objects to Respondents' utilization of Exhibit 29 that is contrary to the ruling of the ALC.

CONCLUSION

WHEREFORE, Appellant, South Carolina Coastal Conservation League respectfully requests this Court issue an Opinion reversing the Final order of the Administrative Law Court authorizing the Respondent DCCA's installation of groins on Debidue Beach.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

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

South Carolina Coastal Conservation League, ...Appellant,

vs.

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

CERTIFICATE OF COUNSEL

The undersigned does hereby certify that Appellant's Final Brief and Final Reply Brief comply with SCACR 211(b) in that all references to the Record on Appeal have been revised and only typographical errors have been corrected.

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