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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No.: 2024-001162

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

vs.

South Carolina Department of Environmental Services and
Debordieu Colony Community Association, ……. Respondents,

RESPONDENT SOUTH CAROLINA DEPARTMENT OF ENVIRONMENTAL SERVICES' RETURN TO PETITION FOR WRIT OF CERTIORARI

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August 14, 2024

Charleston, South Carolina

QUESTIONS PRESENTED FOR REVIEW

WHETHER THE COURT OF APPEALS CORRECTLY AFFIRMED THE ALC'S DETERMINATION THAT THE GROIN PERMIT WAS PROPERLY ISSUED PURSUANT TO S.C. CODE ANN. § 48-39-290(A)(8) WHEN A THOROUGH ANALYSIS DEMONSTRATED THAT THE GROINS WOULD NOT CAUSE A DETRIMENTAL DOWNDRIFT IMPACT AND THAT THE PROJECT AREA HAD A HIGH EROSION RATE.

A. The Court of Appeals and the ALC correctly applied S.C. Code Ann. § 48-39-290(A)(8) to review the groin project as a whole in determining whether it would have a detrimental effect.

B. The Court of Appeals and the ALC correctly applied S.C. Code Ann. § 48-39-290(A)(8) in finding that there was a "high erosion rate" at the project area by considering all South Carolina shorelines and not just those shorelines with a long-term erosion rate as well as other evidence related to the erosional characteristics of the project area.

COUNTER-STATEMENT OF THE CASE

On November 10, 2017, Respondent Debordieu Colony Community Association (hereafter "DCCA") applied for a critical area permit to the Department of Health and Environmental control now the Department of Environmental Services ("the Department").[1] This application requested permission to renourish sand and construct erosion control structures on Debidue Beach. (R. pp. 001094-001095.) On January 24, 2019, the Department granted the critical area permit. (R. pp. 000063-000109.)

On April 3, 2019 and April 5, 2019, the Belle Baruch Foundation and the Coastal Conservation League (hereafter "League") timely submitted Requests for Contested Case, respectively, challenging the Department's issuance of the permits. On July 1, 2019, the Administrative Law Court (ALC) issued a Consolidation Order joining the League and Belle

[1] As of July 1, 2024, the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (OCRM) became the South Carolina Department of Environmental Services, Bureau of Coastal Management as a result of governmental agency restructuring pursuant to Act 60 of the South Carolina Code of Laws, §44-1-20.

Baruch cases. (R. pp. 000004-000005.)

On April 3, 2020, Belle Baruch's claim was dismissed after Belle Baruch entered into a settlement with the parties including terms that increased the protections to its property located downdrift from the proposed groin area. (R. pp. 000006-000018.) The Department then amended the initial permit pursuant to the terms of the settlement agreement and as directed by the ALC. (R. pp. 000407-000411).

On June 22, 2020, the League timely requested a contested case hearing challenging the Department's issuance of the amended permit. (R. pp. 000403-000406.) The Requests for Contested Case for the original permit and the amended permits were consolidated with consent of all the parties by Order of the ALC dated July 30, 2020. (R. pp. 000004-000005.)

On August 24-26, 2020, the case was heard before the ALC. The ALC issued a Final Order upholding the Department's issuance of the permit on January 15, 2021. (R. pp. 000019-000053.) On February 16, 2021, the League timely filed a Notice of Appeal. The South Carolina Court of Appeals heard the matter on March 7, 2024, and issued its opinion on May 1, 2024. Rehearing was denied on June 13, 2024.

STATEMENT OF FACTS

I. The Critical Area Permit

DCCA submitted a critical area permit application to the Department to request authorization to place up to 650,000 cubic yards of sand along about 9,000 feet of shoreline at the southern portion of Debidue Beach and to construct three groins on the beach. (R. p. 000472.) A groin is a structure that traps sand and prevents sand from going downdrift. (R. p. 000483.) The proposed groins in this case are known as "low-profile" groins, which are designed to sit below the beach surface, thereby allowing beachgoers to pass over them. (R. p. 000472.) These groins

are also semi-permeable, as they allow sand to pass through them to downdrift areas once their trapping capacity of 50,000 to 75,000 cubic yards has been reached. (R. pp. 000647, 000854-000856). The initial proposed renourishment that is to occur in conjunction with the installation of the groins will deposit sand in excess of the groins' trapping capacity. (R. p. 001041.) Once this trapping capacity is reached, excess sand will flow freely to downdrift areas as it normally would. The installation of the groins also places an ongoing renourishment obligation upon DCCA, so the downdrift areas will continue to receive excess sand. (R. pp. 000854-000856.) DCCA has no obligation of renourishment if the groins are not constructed. (R. p. 000487.)

Upon reviewing the permit application, the Department granted the permit on January 24, 2019. (R. pp. 000064-00065,) The Department issued an amended permit on April 15, 2020, pursuant to a settlement agreement with the Belle Baruch Foundation. (R. pp. 003885-003889; R. p. 000024.) This amended permit, among other things, significantly increased the amount and quality of the mitigation should it become necessary. (Id.) The amended permit also included earlier mitigation triggers. (Id.) Generally, the function of a mitigation trigger is to set a rate of erosion that, once observed on a downdrift tract, prompts a response from the permit holder to implement mitigation efforts. In this case, the amended permit set a mitigation trigger of -6.0 cubic yards per foot per year (-6.0 cy/ft/yr), which is less than the natural erosion rates at the site.[2] (R. p. 000574.) If an erosion rate of -6.0 cy/ft/yr or greater is observed on a tract downdrift from the project site, the mitigation trigger will take effect, requiring that the groins either be removed or that the downdrift tract be renourished. (R. p. 000576.) The amended permit also required that DCCA increase their financial commitment to carrying out mitigation measures. (R. p. 000932.)

[2] The original permit set a mitigation trigger of -8.1 cy/ft/yr. The amended value would trigger mitigation at an earlier juncture than the original number.

In response to this requirement, DCCA obtained a $1 million dollar letter of credit from South State Bank, increased from the $500,000 letter of credit that was obtained initially, for the purpose of removing the groins or restoring adversely affected beaches. (R. pp. 000478, 003957-003959.) DCCA further provided information relating to its Beach Preservation Fund which is an account funded through assessments collected from DCCA property owners. (R. pp. 000931-000932.) The collected funds are estimated to total approximately ten to twelve million dollars over the twelve years following the groin construction project. (R. pp. 001090.)

II. History of Debordieu Colony

DeBordieu Colony is located on Debidue Island in Georgetown County, one of the eight designated coastal counties under South Carolina's coastal management program. S.C. Code Ann. § 48-39-10. Pawleys Inlet to the north and North Inlet to the south draw sand rapidly from the south end of Debidue Beach. (R. p. 000788.) The erosion rate increases dramatically from the north to south end of the island. (R. p. 000787.) DeBordieu Colony's residents have been fighting the erosion on Debidue Beach since the area's development. A timber bulkhead was installed in 1981 to attempt to hold the shoreline in place.[3] (R. pp. 000745, 000789 & 000805.) In 1989, Hurricane Hugo eroded the beach from the north end to the south end and a lot of houses were lost. (R. p. 000746.) Developers and residents of DeBordieu Colony have also attempted to implement "soft" erosion solutions, such as beach renourishment to counter the erosion beginning in 1990 in response to Hurricane Hugo's decimation of Debidue Beach. (R. p. 000776.) Subsequent renourishment projects took place approximately every eight years occurring in 1998, 2006 and 2015. (R. p. 000565.) The first two projects (1990 & 1998) were smaller in scale,

[3] A bulkhead is a retaining wall that sits along a waterfront, protecting the landward side from erosion.

depositing approximately 100,000 cubic yards of sand on the beach. (R. p. 000565.) The latter projects (2006 & 2015) were larger, placing 500,000 to 600,000 cubic yards of sand each. (Id.)

Currently, the same bulkhead that was constructed in 1981 stands on Debidue Beach. (R. p. 00052). The bulkhead has recently been overtopped by a Category One hurricane that did not make landfall. (R. p. 000521.) The bulkhead was also overrun by Hurricane Isaias in 2020 and is frequently exposed. (R. pp. 000520 & 000789.) The beach surrounding the bulkhead is currently not walkable at high tide and the bulkhead will likely fail without renourishment. (R. pp. 000629, 000685-000686 & 000692.)

III. Erosion on Debidue Beach

Debidue Beach is currently experiencing chronic erosion and parts of it are classified as being "highly erosional" in South Carolina's Beachfront Management Plan, S.C. Code Ann. Regs. 30-21. Erosion occurs on a gradient at Debidue Beach, increasing from the north end of the island to the south end of the island. (R. p. 000787.) There is a higher erosion rate at the southern end where the project is proposed. (R. p. 000964.) Because of the gradient and influence of the inlets, waves tend to carry sand away from Debidue Beach more rapidly than sand can be deposited. (R. p. 000788.) The resulting effect is an absence of dry sand beach at the south end of Debidue Beach and in front of the bulkhead. (R. pp. 000789 & 000569-000570.)

Dr. Timothy Kana, who was qualified as an expert in beach erosion and coastal processes,[4] testified that he evaluated "erosion" by measuring volumetric sand loss, as opposed to linear shoreline change. (R. pp. 000789-000790.) Dr. Kana testified that the proposed project area ("Reach 3") is experiencing an erosion rate of -4.2cy/ft/yr. (R. pp. 000837; *also see* R. p. 004018),

[4] Dr. Kana was qualified as an expert in beach erosion, coastal geomorphology and processes, sediment budgets and transport, beach restoration, planning design and implementation, and tidal inlet sediment dynamics. (R. p. 000781.)

which equates to an approximately -5.5 ft/yr linear shoreline rate (R. p. 000027).[5] Although Dr. Kana classified this rate as "moderate to high" (R. p. 000838), he explained that the project area's rate is higher because the south end is losing at a higher rate than the north end. (Id.) Dr. Kana also emphasized in his testimony that the erosion rate at a project site must be determined in context with the site's historical and current erosional conditions. (R. pp. 000841, 000842, 000992.) He further testified that sand is drawn off rapidly by the adjacent inlet and that frequent nourishment is required to keep pace with Debidue's high rate of erosion. (R. p. 000787.)

Dr. Haiqing Liu Kaczkowski, who was qualified as an expert in coastal erosion assessments and beach restoration, opined that Debidue Beach "is in an unhealthy state currently" and that based on the conditions there that you have to "find a solution and do it as fast as possible before the condition gets even worse." (R. pp. 000947-000949 & 000995.) Dr. Kaczkowski also agreed with the Department and Dr. Kana that Debidue Beach has a high erosion rate. (R. p. 000995.)

Matt Slagel, a Beachfront Permitting Project Manager with the Department, testified that the Department considers any shoreline change rates above -3 ft/yr as "high." (R. p. 000487.) This number is not derived from statute or regulation but is based on analysis of the data repeatedly collected over decades from the Department's statewide network of beach monuments. (R. pp. 000488-000490.) Mr. Slagel further testified that the Department's managers have used a long-term erosion rate of -3 ft/yr or higher as the historic baseline for what is considered "high" erosion on South Carolina beaches since the creation of the Department's Office of Ocean and Coastal Resource Management.[6] (R. pp. 000490-000491.) Expert witness

[5] For this project, Debidue Island was divided into four different sections known as "reaches." (R. p. 000027.) Reach 3 is the area where the proposed project is to take place. (Id.) Reach 4 is comprised of downdrift properties from Debidue Beach, such as Hobcaw Beach. (Id.)

[6] The Office of Ocean and Coastal Resource Management was originally created by the General Assembly as the "Coastal Council" and is now the Bureau of Coastal Management.

and former Department employee, Bill Eiser[7] corroborated Mr. Slagel's testimony that a long-term erosion rate of -3 ft/yr or higher has historically been considered as a "high erosion rate" on South Carolina beaches. (R. pp. 001009-001010.) Mr. Slagel also looked at the long-term erosion rate data in reviewing the permit application in order to determine the validity of using -3 ft/yr as a threshold for high erosion and confirmed that it was "reasonable." (R. pp. 000490-000491.) Mr. Slagel also examined the results from the Department's most recent statewide shoreline change rate calculations from 2017 which showed an average shoreline change rate for South Carolina of approximately -1.5 ft/yr. (R. pp. 001069 & 000028.)

The Department converted the volumetric rate that DCCA submitted to a linear, shoreline change rate to determine whether there was a high erosion rate in the project area in accordance with the -3 ft/yr threshold. (R. pp. 000492-000496.) Using this conversion, the Department equated the -8.1 cy/ft/yr volumetric erosion rate submitted by DCCA to an approximately -10 ft/yr linear, shoreline rate. (R. p. 000495.) Mr. Slagel also testified that based on his site visits and experience with the Department since 2007, he was aware that this area of Debidue has a high erosion rate and that there are properties that are threatened by the erosion. (R. p. 000570.)

Dr. Rob Young, the League's expert, did not dispute the erosion rates submitted by the Department and Dr. Kana, but testified that the groin project area did not have a high erosion rate. (R. p. 000649.) Dr. Young cited to extremely high erosion on a few South Carolina beaches where "trees are falling over in the ocean" and "houses that are sitting in the ocean." (R. pp. 000663-000664.) In determining that the rate was not "high," Dr. Young did not conduct his own statewide coastal erosion assessment but relied on professional papers such as Dr. Chester Jackson's Report

[7] Bill Eiser was qualified as an expert in coastal zone processes and coastal zone management. (R. p. 001005.) Mr. Eiser worked for the Department from 1989 to 2015. (R. pp. 000998-001002.)

entitled "Mapping Coastal Erosion Hazards Along Shelter and Coastlines in South Carlina, 1849 to 2015 ("the Jackson Report). (Id.) Dr. Young testified that anything that is around six to seven feet per year is in the moderate category according to the report. (R. p. 000664.) Mr. Slagel testified that the numbers relied on by Dr. Young in the Jackson Study were for only those areas with a long-term erosion rate but not the full range of shorelines in the State, both accretional and non-accretional. (R. p. 001063.) Mr. Slagel testified that the information from the Jackson Study reflects that the average of all shoreline change rates in the state is approximately -0.46 feet per year. (R. p. 001064.) Mr. Slagel also testified that this report only used an endpoint analysis (just the change in the beginning and ending shoreline is averaged out over time) on three shorelines. (R. pp. 001065-001066.) Mr. Slagel testified that, in comparison, OCRM has seven to nine shoreline years to evaluate and uses linear regression to evaluate shoreline change rates because this uses more data sets and, thus, allows analysis of "each individual shoreline to get a more statistically sound erosion rate calculation." (R. pp. 001065-001068.)

Dr. Young also testified that the hazard vulnerability assessment on the Department's website confirmed his basic opinion regarding the six-to-seven-foot average erosion rate for South Carolina. (R. p. 000651.) However, Mr. Slagel testified that this assessment used the data from the Jackson Report so suffers from the same limitations. He further testified that it shows only individual transects and so there is no average number presented using that tool. (R. pp. 001067-001068.)

IV. Threatened Structures on Debidue Island

Residents of DeBordieu Colony consider homes located behind the bulkhead/seawall to be threatened by erosion. (R. p. 000452.) Up to eight homes at the southern end of DeBordieu Colony have had ocean water come very close to their front doors. (R. pp. 000453-000456.) Using NOAA

imagery, the Department observed that after major storms, the dunes protecting the landward homes had largely eroded away and erosion occurred landward of the bulkhead. (R. p. 000520.) The Department determined that approximately eighteen structures, six south of the bulkhead and possibly twelve landward of the bulkhead, are threatened by erosion. (R. pp. 000517-000519.) Respondent DCCA's expert Bill Eiser agreed that there are threatened structures at Debidue Beach, and that the structures south of the bulkhead are threatened due to its poor design. (R. p. 0001030.) Many homes south of the bulkhead have no "shoreline armory" for protection on a highly erosional section of the beach, where renourishment depositions and artificial dunes are quickly lost. (Id.)

V. Downdrift Impacts of Proposed Project

Property owned by the Baruch Foundation (hereafter "Baruch property") sits downdrift from the proposed project site. (R. pp. 000442-000444.) The Baruch property includes "Hobcaw Beach" that is designated as a National Estuarine Research Reserve (NERR). (Id.) As a part of the permit application, DCCA submitted a "Downdrift Impacts Report." (R. pp. 000110-000224.) This analysis reviewed erosion rate calculations and ran models to predict the impact of the groins' construction and project on Hobcaw Beach. (R. pp. 000470-000471.) The Downdrift Impacts Report found no significant impact on the NERR located on the Baruch Property. (R. pp. 000523-000524.) The report further found that the project's renourishment and mitigation components would over time increase the amount of sand flowing to the 1,500-foot area downdrift of the last groin by 50% compared to the expected loss of sand based on the historical rate of erosion if no groins are constructed. (R. p. 000975.)

The permit conditions require monitoring and mitigation before any detrimental effects from the groins occur. The background erosion rate at the site was determined to be -8.1 cy/ft/yr

of erosion per year and this was the trigger for the applicant to mitigate ("trigger rate") in the original permit. (R. p. 000473.) Special Condition 22 of the permit was amended to provide even more protection against any potential detrimental impacts from the groins by reducing the trigger rate from -8.1 cy/ft/yr of erosion to -6.0 cy/ft/yr. (R. p. 000477.) So, the trigger for mitigation is now lower than the historical erosion rate, allowing mitigation to occur before the historical rate of erosion is reached. (Id.) Special condition 22 also adds a land loss trigger above the mean high-water line so that the affected beach does not exceed the natural background rate of loss of .75 acres per year. (R. p. 000477.) This condition also provides that when mitigation is required it must be completed as soon as possible, normally within three months. (R. p. 000474.) Finally, the amended permit shifted the southernmost groin by about 25 feet to the north away from the downdrift property line. (R. p. 000478.)

During the permit review process, a concern was raised that certain downdrift areas of Hobcaw Beach would be disproportionately impacted, and that impacts at these smaller sites would not be reflected when analyzing and monitoring erosion rates on the entire tract. (R. pp. 000555-000556.) The Department recognized the validity of this concern, and added Special Condition 22 into the amended permit, which significantly decreased the spacing between monitoring points from every 500 feet to every 200 feet. (R. pp. 000555-000556.) The closer monitoring spacing ensures more robust monitoring and that disproportionate impacts on smaller areas of the downdrift area are accounted for. (Id.)

The groin project offers many benefits. The ALC found that Hobcaw Beach, the downdrift property, would receive a benefit from the project because of the guaranteed renourishment for the life of the groins. (R. p. 000034.) The proposed project will also stabilize Debidue Beach and allow the shoreline to move towards equilibrium, so that it is neither gaining nor losing sand. (R.

pp. 000800, 000901-000902.) This project is predicted to double the life of the renourishment efforts, (R. pp. 000487-000488), and provide a dry sand beach in this area, (R. p. 000789). Without a dry sand beach, waves more easily overtop the bulkhead and reach the existing development located behind the bulkhead. (R. p. 000789.) Extending the life of the renourishment efforts is not only more cost effective, (R. p. 000789), but will have the beneficial result of less frequent disturbances to the beach since the interval between renourishments will be longer (R. pp. 000074 & 000487-000488).

ARGUMENT

The Department requests that this Court deny the Petition for Writ of Certiorari.

Statutory Overview- Groins & The Coastal Tidelands & Wetlands Act, As Amended

In 1988, the South Carolina legislature enacted the Beachfront Management Act ("BMA"), Section 48-39-250, *et seq*., to expand the Coastal Tidelands and Wetlands Act, S.C. Code Ann. § 48-39-10, *et seq*. and to establish a comprehensive statewide beachfront management program. (The Coastal Tidelands and Wetlands Act as amended by the Beachfront Management Act will be referred to as the "Act" herein.) The Department has the power to grant and deny permits, promulgate and administer rules and regulations of the Act, and to "direct and coordinate the beach and coastal shore erosion activities among the various state and local governments." S.C. Code Ann. § 48-39-10, *et seq.* and § 48-39-50. The BMA set forth a policy to "encourage the use of erosion-inhibiting techniques which do not adversely impact the long-term well-being of the beach/dune system" and to "promote carefully planned nourishment as means of beach preservation and restoration where economically feasible." S.C. Code Ann. § 48-39-260(4) & (5). The Department is granted authority to issue permits for the construction of groins if certain conditions are met as set forth in Section 48-39-290(A)(8):

(A) No new construction or reconstruction is allowed seaward of the baseline except:

> (8) existing groins, which may be reconstructed, repaired, and maintained. New groins may be allowed only on beaches that have high erosion rates with erosion threatening existing development or public parks. In addition to these requirements, new groins may be constructed, and existing groins may be reconstructed, only in furtherance of an ongoing beach renourishment effort which meets the criteria set forth in regulations promulgated by the department and in accordance with the following:
>
> > (a) The applicant shall institute a monitoring program for the life of the project to measure beach profiles along the groin area and adjacent and downdrift beach areas sufficient to determine erosion/accretion rates. For the first five years of the project, the monitoring program must include, but is not necessarily limited to:
> >
> > (i) establishment of new monuments;
> >
> > (ii) determination of the annual volume and transport of sand; and
> >
> > (iii) annual aerial photographs.
>
> Subsequent monitoring requirements must be based on results from the first five-year report.
>
> > (b) Groins may be permitted only after thorough analysis demonstrates that the groin will not cause a detrimental effect on adjacent or downdrift areas. The applicant shall provide a financially binding commitment, such as a performance bond or letter of credit that is reasonably estimated to cover the cost of reconstructing or removing the groin and/or restoring the affected beach through renourishment pursuant to subitem (c).
> >
> > (c) If the monitoring program established pursuant to subitem (a) shows an increased erosion rate along adjacent or downdrift beaches that is attributable to a groin, the department shall require either that the groin be reconfigured so that the erosion rate on the affected beach does not exceed the preconstruction rate, that the groin be removed, and/or that the beach adversely affected by the groin be restored through renourishment.
> >
> > (d) Adjacent and downdrift communities and municipalities must be notified by the department of all applications for a groin project. …

The League primarily challenges the Permit on the basis that authorization of the groin project does not comply with Section 48-39-290(A)(8)'s requirements that there be a high erosion rate and Section 48-39-290(A)(8)(b)'s requirement that a thorough analysis demonstrates that the

groins will not cause a detrimental effect on downdrift areas.

The definition of groins is found in the Act's implementing regulations:

> (26) Groin - a structure designed to stabilize a beach by trapping littoral drift. Groins are usually perpendicular to the shore and extend from the shoreline into the water far enough to accomplish their purpose. …

S.C. Code Regs. 30-1(D)(26). In promulgating Section 48-39-290(A)(8) which allows the construction of new groins, the General Assembly has put many protections in place in to ensure that the shoreline is protected including requiring renourishment, monitoring, mitigation, and a financial commitment by the applicant. As determined by the Department, the ALC and the Court of Appeals, the amended permit in this case meets the requirements of Section 48-39-290(A)(8)'s conditions.

SCACR 242's Considerations Do Not Support Granting The League's Petition

South Carolina Appellate Court Rules provide:

> **(b) Considerations Governing Review.** A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:
>
> (1) Where there are novel questions of law.
>
> (2) Where there is a dissent in the decision of the Court of Appeals.
>
> (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
>
> (4) Where substantial constitutional issues are directly involved.
>
> (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242(b), SCACR. The League argues that the issue presented in its Petition for Writ of Certiorari "is a novel issue and the first appellate case challenging a groin construction permit since the 2002 BMA amendments." (Pet'r's Petition, p. 4.) The League advocates for a construction of Section 48-39-290(A)(8) that would nearly eliminate the Department's authority

to permit groins since the regulatory definition of groin recognizes that a groin will trap littoral sand drift resulting in a downdrift impact. S.C. Code Ann. Regs. 30-1(D)(26). Also, the League's interpretation that long-term erosion rates can only be used without regard to site conditions also would result in the Department's inability to permit groins on beaches that historically have been stable or accretional but are currently undergoing periods of erosion threatening existing development. The issue of whether the General Assembly granted the Department very restricted authority in the Act, so that the Department can rarely issue groin permits is not a novel issue as both the General Assembly and this Court have addressed this issue.

The Act's implementing regulations which were effective June 25, 1999, provided:

> (1)(d) Due to the impact of groins on the longshore transport of sand and to public access along the beach, *new groins may be permitted only in rare and extreme circumstances* and only if one or more of the following conditions apply:
>
> (i) groins are necessary to enhance the design life of an ongoing renourishment effort …

S.C. Code Ann. Regs. 30-13(N) (Supp. 2002.), effective June 25, 1999 (emphasis added). This provision was amended in June 2003 to remove groins from S.C. Ann. Regs. 30-13(N) and the General Assembly passed new amendments addressing groin construction in S.C. Ann. Regs. 30-15(G) which is the same language that is in the current S.C. Code Ann. Section 48-39-290(A)(8). Notably, the General Assembly removed the language that "new groins may be permitted only in rare and extreme circumstances," and has replaced it with the statutory framework cited above which allows groins to be permitted when certain requirements are met. Now the League argues that this Court should construe the groin language in such a way as to reinstate the threshold for groin permitting that the General Assembly expressly eliminated.

Although this Court has not construed this particular language in the statute that the League points to, the Court has addressed whether the Department had authority to issue groin

permits under the Act's former language by examining the legislative intent expressed through the Act's policies. In *South Carolina Coastal Conserv. League v. South Carolina Department of Health and Environmental Control,* 354 S.C. 585, 589, 582 S.E.2d 410 (2003), this Court determined that the Act did not prohibit the Department from issuing groin permits in furtherance of the State's policy "of encouraging certain types of erosion-inhibiting techniques and promoting beach renourishment where appropriate." *Id.* at 589, 582 S.E.2d at 413. *See Infra*, pp. 18 & 20 for a discussion of this case.

The League baldly asserts that the lower court's "twisted interpretations of this important law, which has heretofore never been interpreted by an appellate court, unravel the statue, lowering the threshold for qualifying for a groin permit to a practically negligible level." (Pet'r's Petition p. 5.) The League does not point to any testimony or other evidence in the record to support its assertion that the threshold will be lowered to a "practically negligible level." Furthermore, the League's assertion completely ignores the many other requirements that an applicant must comply with to obtain a permit to construct a groin including ongoing beach renourishment; stringent monitoring for the life of the project of the project area and the adjacent and downdrift areas; and the provision of a financially binding commitment to cover the cost of reconstructing or removing the groin and/or restoring the affected beach. § 48-39-290(A)(8)(a)-(c). The League also has failed to point to any evidence in the record that demonstrates that there are many other applicants who would be willing to and/or capable of taking on the time and financial commitments to meet these requirements. The Court and the General Assembly have already rejected the argument that the Act should be so narrowly construed as to support banning, or even nearly banning, groins on the beach given the Act's overall purpose and policies and this Court should deny the League's Petition for Writ of Certiorari.

The remaining considerations of SCRAC 242 also do not support granting Petitioner's Writ of Certiorari. In a unanimous decision, the Court of Appeals affirmed the ALC's decision affirming the Department's issuance of the groin permit. The Court of Appeal's decision did not conflict with this Court's prior decisions and no constitutional issues or federal questions are involved.

I. WHETHER THE COURT OF APPEALS CORRECTLY AFFIRMED THE ALC'S DETERMINATION THAT THE GROIN PERMIT WAS PROPERLY ISSUED PURSUANT TO S.C. CODE ANN. SECTION 48-39-290(A)(8) WHEN A THOROUGH ANALYSIS DEMONSTRATED THAT THE GROINS WOULD NOT CAUSE A DETRIMENTAL DOWNDRIFT IMPACT AND THAT THE PROJECT AREA HAD A HIGH EROSION RATE.

A. Whether The Court of Appeals and the ALC correctly applied S.C. Code Ann. § 48-39-290(A)(8) to review the groin project as a whole in determining whether it would have a detrimental effect.

S.C. Code Ann. Section 48-39-290(A)(8)(b) provides that "groins may be permitted only after thorough analysis demonstrates that the groin will not cause a detrimental effect on adjacent or downdrift areas." The League focuses exclusively on the word "groin" in determining whether there is a downdrift impact without considering any other language in that section or in the other provisions of the Act. The League argues that Section 48-39-290(A)(8)(b) should be construed so that a thorough analysis is only done regarding the groins' effects while ignoring the effects of the remainder of the permitted project which necessarily includes the renourishment, monitoring and mitigation requirements. The General Assembly recognized that groins would have a downdrift impact on the beach as it defines groins as structures that trap littoral drift of sand. S.C. Code Regs. 30-1(D)(26). Therefore, if a groin structure traps sand and keeps sand from moving down the beach to downdrift areas then a groin by its very definition has a detrimental impact to the downdrift areas and would not be allowed according to the League's construction of Section 48-39-290(A)(8)(b). The League's expert, Rob Young, was only able to identify one circumstance

where he believes there would not be a downdrift impact from a groin: if the groin is a "terminal groin" located at the end of a littoral cell (like an inlet). (R. p. 000692.) Had the General Assembly intended to ban groins except for "terminal groins" then the General Assembly could have expressed that in the statute. [8] The League's unduly restrictive construction of only assessing the groins' impact and not the project's impact would constrain DES's ability to issue groin permits to such a degree as to make the statute a nearly meaningless grant of authority by the General Assembly. The League's interpretation also would make the General Assembly's requirements of ongoing renourishment, monitoring, mitigation and notice to the downdrift property owner unnecessary. Such a statutory interpretation runs contrary to the presumption that "... the Legislature intended its statutes to accomplish something and did not intend a futile act." *Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 42, 659 S.E.2d 125, 128 (2008) (see also *Coyne & Delany Co. v. Blue Cross & Blue Shield of Va., Inc.*, 102 F.3d 712, 715 (4th Cir.1996) ("Absent clear congressional intent to the contrary, we will assume the legislature did not intend to pass vain or meaningless legislation.").

The League's overly restrictive construction also ignores the stated policies in the Act. The General Assembly has declared that one of the state's policies is to "encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone." S.C. Code

[8] The General Assembly uses the term "terminal groins" in Section 48-39-280(A)(1)(2) and (3) when setting forth how to set the baselines for stabilized and unstabilized inlet erosion zones. However, the General Assembly did not limit groin permits pursuant to Section 48-39-290(A)(8) to "terminal groins."

Ann. § 48-39-30(B). The General Assembly also declared that the State of South Carolina's policy is to "encourage the use of erosion-inhibiting techniques which do not adversely impact the long-term well-being of the beach/dune system" and to "promote carefully planned nourishment as a means of beach preservation and restoration where economically feasible." S.C. Code Ann. Section 48-39-260(4) & (5). This Court relied on these policies in holding that groins were not banned pursuant to the Act in *South Carolina Coastal Conserv. League v. South Carolina Department of Health and Environmental Control,* 354 S.C. 585, 589, 582 S.E.2d 410, 413(2003)(the Court held that the BMA authorized the Department to issue groin permits in furtherance of the State's policy of encouraging certain types of erosion-inhibiting techniques and promoting beach renourishment where appropriate.").[9] The Court in that case found that the Court of Appeals erred by examining Section 48-39-290 in isolation without consideration of the other statutory mandates. Although this case was decided prior to the amendments to Section 48-39-290 which added the language in question, those amendments did not alter the policies and other statutory provisions that support the Department's issuance of groin permits as a means of comprehensive beach erosion management.

The BMA's legislative findings also support assessing downdrift impacts of the groin project including the mitigation measures. Section 48-39-250 provides as follows:

> **(1)** The beach/dune system along the coast of South Carolina is extremely important to the people of this State and serves the following functions:
> (a) protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner; ….
> (c) provides habitat for numerous species of plants and animals, several of which are threatened or endangered. ….

[9] The Court in so holding also cited to "The Beach Restoration and Improvement Trust Act," S.C. Code Ann. § 48-40-20(3), which "specifically authorizes groin construction and maintenance." *Id.* at 589-590, 582 S.E.2d at 413.

The groins help to maintain a dry sand beach in this area. Without the groins, renourishment and mitigation requirements, there is no dry sand beach in much of the project area. (R. pp. 000569-000570.)

The League's unduly restrictive statutory construction of looking at the groins' impacts in isolation (which is not what is being permitted) would nearly eliminate the Department's ability to permit groins and would not be in keeping with the findings and policies expressed by the General Assembly. "The Supreme Court has stated that proper statutory interpretation should consider "not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law." *Whitner v. State*, 492 S.E.2d 777, 779 (S.C. 1997) (citing *South Carolina Coastal Council v. South Carolina State Ethics Comm'n*, 306 S.C. 41, 410 S.E.2d 245 (1991). "Language in a statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose." *Consumer Advoc. for State v. S.C. Dept. of Ins*., 725 S.E.2d 708, 710 (S.C. App. 2012) (citing *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Dunton v. S.C. Bd. of Exam'rs in Optometry,* 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987).

The League also points to the BMA's "expressed policy of severely restricting 'the use of hard erosion control devices to armor the beach/dune system" as a basis for such a strict construction of this provision. (Pet'r's Petition, p. 3.) However, this policy applies to "hard erosion control structures" which are expressly defined in the BMA and the definition does not include groins. The BMA's Definitions Section 48-39-270(1) provides "*As used in this chapter*: (1) Erosion control structures or devices include" and then lists out definitions for seawalls, bulkheads

and revetments. It also is clear from other regulatory provisions that groins are not considered to be a "hard erosion control structure or device" when used in the Act and its implementing regulations.[10] Also, the General Assembly separately defined "groins" in the implementing regulations as noted above. S.C. Code Regs. 30-1(D)(26). This is consistent with this Court's recognition in *South Carolina Coastal Conserv.* 354 S.C. at 587, 582 S.E.2d at 412, that "[t]here is no question that groins are not 'erosion control structures or devices' as defined by S.C. Code Ann. § 48-39-270(1)(Supp.2002)."[11] Therefore, the severe restrictions and findings related to "hard erosion control structures" or "hard erosion control devices" in the BMA were not meant to apply to groins according to the plain meaning of the statute. Rather groins were addressed in a separate section of the BMA and are allowed as long as the conditions in Section 48-39-290(A)(8) are met.

The Court of Appeals did not err in affirming the ALC's construction of the statute to include consideration of the mitigation requirements of the groins as this construction is in keeping with the BMA's plain language and with its stated policies. The League argues that "the Court of Appeals injected itself into a legislative role" by finding the groin project with the mitigation should be considered when determining whether there is a detrimental downdrift impact pursuant to Section 48-39-290. (Pet'r's Petition, p. 13.) This is simply untrue as the Court of Appeals has construed the statute consistent with the words used by the legislature in the requirements set forth

[10] For example, groins are listed separately than erosion control structures in S.C. Code Regs. 30-1(4)(a) which provides "…. In a standard erosion zone in which the shoreline has been altered naturally or artificially by the construction of erosion control devices, groins, or other man-made alterations…."

[11] The Court further stated "[a]ccordingly, all agree that the specific prohibition on the construction of new erosion control devices in S.C. Code Ann. § 48-39-290(2)(a) . . . do not apply to groins" *Id.* at 587, 582 S.E.2d at 412, further demonstrating that groins were not to be treated the same as other erosion control structures under the Act.

in that section as well as consistent with the policies of the Act. After hearing the testimony and evidence presented at the hearing, the ALC concluded "with the addition of the renourishment, the net result of the Project will be an overall reduction in the historic erosion rate. Indeed, Hobcaw will receive a benefit of the project…" and the ALC further stated that it was unlikely that Hobcaw would suffer an overall detrimental impact. (R. p. 000034.) Because of the project's ongoing renourishment and required mitigation measures for the project, the groin installation will not be harmful or damaging to the areas downdrift of the project site, thus satisfying the statutory requirement under S.C. Code Ann. §48-39-290(A)(8).

B. The Court of Appeals and the ALC correctly applied S.C. Code Ann. § 48-39-290(A)(8) in finding that there was a "high erosion rate" at the project area by considering all South Carolina shorelines and not just those shorelines with long-term erosion rates and other evidence related to the erosional characteristics of the project area.

S.C. Code Ann. Section 48-39-290(8) provides that "[n]ew groins may be allowed on beaches that have high erosion rates with erosion threatening existing development or pubic parks." The long-term erosion rates in the groin project area are undisputed in this case. (Pet'r's Petition p. 9.) However, the League argues that in determining what is "high" for purposes of permitting groins the Department should only be looking at beaches that have an overall long-term negative rate of erosion and ignore the rest of the beaches in South Carolina. (Pet'r's Petition pp. 15-16.) Based on this construction, the League further argues that there is no substantial evidence supporting the determination in this case of a "high" erosion rate.

(1) The Court of Appeals and the ALC correctly determined that all South Carolina beaches should be considered when determining what is a "high erosion rate."

The League's contention that only beaches with long-term erosion rates should be considered in determining whether erosion is high is not consistent with the plain meaning of the

statute or the BMA's overall purpose. "High" is defined as "of greater degree … than average, usual or expected." *High,* Merriam Webster's Unabridged Dictionary, August 7, 2024, https://www.merriam-webster.com/dictionary/high. It is impossible to determine what is "average, usual or expected" without comprehensively considering shoreline change on all beaches, including those that are stable or have long-term accretion rates. As the ALC opinion pointed out, "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. 000043.)

The League also fails to acknowledge the remainder of Section 48-39-290(A)(8) when construing "high erosion rate": "beaches that have high erosion rates threatening existing development …" The Court of Appeals affirmed the ALC's finding that erosion was threatening existing structures in the project area. *S.C. Coastal Conserv. League v. SCDHEC*, 443 S.C.80, 92-93, 901 S.E.2d 706, 713 (2024). The League's failure to acknowledge the threatening-existing-development language immediately following the "high erosion" requirement is contrary to the Supreme Court's canons of statutory construction. *Whitner v. State*, 492 S.E.2d 777, 779 (S.C. 1997) (proper statutory interpretation should consider "not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law.")

Finally, considering shoreline change rates on all the beaches in determining whether a project area has a high erosion rate is consistent with the General Assembly's mandate that "the Department shall develop a comprehensive beach erosion control policy." S.C. Code § 48-39-120. A construction that only looks at a portion of South Carolina's beaches is not comprehensive and is inconsistent with this mandate. *Hinton v. S.C. Dep't of Prob., Parole & Pardon Servs*., 357 S.C.

327, 332, 592 S.E.2d 335, 338 (Ct. App. 2004) (where the court stated that "[a] law must be interpreted reasonably and practically, consistent with the purpose and policy of the General Assembly.") The League asserts without citing to record support that "[a] stable beach is not experiencing any erosion." (Pet'r's Petition p. 16.) However, even a beach that is stable in the long-term likely experiences periods of both erosion and accretion in the short-term. The statutory language does not direct the Department to disregard the beaches with these short-term erosional periods just because they have long-term rates that are stable or accretional. The League has acknowledged that South Carolina beaches are dynamic. (Pet'r's Petition p. 9.) These considerations should be taken into account to implement a comprehensive beach erosion policy. As the Court of Appeals stated, "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 Conserv. League,* 443 S.C. at 92, 901 S.E.2d at 713.

(2) The Court of Appeals correctly affirmed the ALC's finding that there was a high erosion rate as this finding was supported by substantial evidence and was not clearly erroneous nor arbitrary or capricious.

The Department's robust methods used to determine that erosion on Debidue Island was "high" demonstrate that the determination was not erroneous, arbitrary or capricious. The Department, in part, relied upon a historic erosion threshold of -3 ft/yr that is standard for the Department. (R. p. 000490). To validate this threshold, Mr. Slagel evaluated beach monument data collected through time from across the state at approximately five hundred monuments. (R. pp. 000488-000489.) After looking at the data and relying upon his experience with coastal processes, Mr. Slagel determined that the -3 ft/yr figure was reasonable. (R. p. 000491.) Mr. Slagel

determined that the erosion rate at the project site (Reach 3) was six to eight feet per year and increases to eight to ten feet per year in the Hobcaw Tract. (R. pp. 000561-000562.) Mr. Slagel also compared CSE's data with the Department's data, and considered his site visits and experience and knowledge of high erosion on Debidue Beach that he acquired since he began working with the Department in 2007. (R. p. 000570.) He also factored in that there were a number of structures that were being threatened from the erosion. (Id.)

DCCA's experts' testimony also supported a finding that there was a high erosion rate in the project area. Dr. Kana testified that the erosion rate for the proposed project area (Reach 3) was -4.2 cy/ft/yr. (R. pp. 000837.) This equates to an approximately -5.5 ft/yr linear shoreline change rate, a rate almost twice the -3 ft/yr threshold historically used by the Department. (R. p. 000818.) This rate is also for the 4,000 linear feet of Debidue Beach and the south end, where the project is located, is eroding at a much more rapid rate than the north end. (R. p. 000838.) Both Dr. Kana and Dr. Kaczkowski corroborated the Department's determination and testified that the project area was experiencing "high" erosion rates. (R. pp. 000842 & 000995.)

The League's expert, Dr. Rob Young, testified that the erosion in the project area was not "high" citing to some of the highest long-term erosion rates in the State and factoring out any consideration of beaches that had long-term rates of accretion or that were stable. (R. pp. 000649 & 000663-000664.) Dr. Young testified that the undisputed erosion rate was "moderate" relying on his own qualitative observations and information in the "Jackson Report" and a Hazard Vulnerability Assessment website that used data from the Jackson Report. The ALC found that based on the evidence presented at trial the "Jackson Report is not as reliable or probative as other evidence introduced in this case…" (R. p. 000029.) The ALC based this determination on the fact that Dr. Young only cited to mean shoreline change rate for erosional areas only. The ALC further

based this determination on the fact that the testimony indicated the Jackson Report did not likely filter out the renourishment events, and only used data sets from three years to conduct an endpoint analysis. (R. p. 000029.) The Court further found that "because the Department's Coastal Hazard Vulnerability Assessment website suffers from the same limitations as the Jackson Report, [he] did not find it reliable either." (Id.) The ALC also found Dr. Young's testimony to be "less credible than the opposing evidence." (R. p. 000030.) The weight and credibility given to expert testimony is to be determined by the trier of fact. *Thomas Sand Co. v. Colonial Pipeline Co*., 349 S.C. 402, 411, 563 S.E.2d 109, 114 (Ct. App. 2002).

As the South Carolina Court of Appeals held, the ALC's evidentiary conclusion that there is a high erosion rate for purposes of issuing a groin permit pursuant to Section 48-39-290(A)(8) is based on probative, substantial, and reliable evidence in the record and is not arbitrary or capricious.

CONCLUSION

WHEREFORE, based on the foregoing, the Department respectfully requests that the Court deny this Petition for Writ of Certiorari.

Respectfully submitted,

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August 14, 2024

Charleston, South Carolina