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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Mikell R. Scarborough, Master-In-Equity

Appellate Case No. 2025-000636
Circuit Court Case No. 2024-CP-10-01327

The Vanderham Family Living Trust, Villa Las Palmas, LLC, Scout Beach House, LLC, Amy Oakes, MMH Property Holding, LLC and Black Ice Venture, II,

Appellants,

v.

City of Isle of Palms and
South Carolina Department of Environmental Services,

Respondents.

INITIAL BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF ENVIRONMENTAL SERVICES

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STATEMENT OF THE ISSUE ON APPEAL

Pursuant to Rule 208(b)(6), SCACR, DES[1] adopts the Statement of Issue on Appeal in the City's[2] brief.

STATEMENT OF THE CASE

Plaintiffs[3] own beachfront homes in the City of Isle of Palms, South Carolina. (Comp. ¶¶ 1–2.) They commenced this action on March 12, 2024, by filing a summons and complaint in the Charleston County Court of Common Please asserting two causes of action for declaratory judgment, one against the City and one against DES. (Summons & Compl.)

Against the City, Plaintiffs' complaint seeks a declaratory judgment that City Ordinance 5-4-15(B)[4] is preempted by S.C. Code Ann. §§ 48-39-250 et seq. (collectively, the "Beachfront Management Act").[5] The City timely answered, denying Plaintiffs' entitlement to relief and counterclaiming for declarations that City Ordinance 5-4-15(B) is valid, that Plaintiffs are subject to its terms, that Plaintiffs bought their properties with record notice of restrictions on building and possible changes to property lines, and that several Plaintiffs had released the City

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[1] "DES" refers to Defendant/Respondent South Carolina Department of Environmental Services.

[2] The "City" refers to Defendant/Respondent City of Isle of Palms.

[3] "Plaintiffs" refers to Plaintiffs/Appellants, The Vanderham Family Living Trust, Villa Las Palmas, LLC, Scout Beach House, LLC, Amy Oakes, MMH Property Holding, LLC and Black Ice Venture, II.

[4] In short, City Ordinance 5-4-15(B) regulates and restricts the use/alteration of land within the City that is landward of the critical area defined in S.C. Code Ann. § 48-39-10 and a 250-foot radius of the mean high-water mark of the Atlantic Ocean, Breach Inlet, or Dewees Inlet. (City Ordinance 5-4-15(B).) Among other things, City Ordinance 5-4-15(B) prohibits sea walls, revetments, bulkheads, groins, riprap, and any other hard erosion control devices. (City Ordinance 5-4-15(B).)

[5] Plaintiffs' complaint also seeks a declaration that City Ordinance 2024-01 is void, but that ordinance has expired, and Plaintiffs and the City agree the issue is now moot. (Pls.' Br. p. 1 n.1; City's Br. p. 2 n.1.)

from any claims in connection with any dune restoration or beach renourishment work. (City's Answer & Counterclaim, filed April 12, 2024.)

Against DES, Plaintiffs' complaint seeks a declaratory judgment that §§ 48-39-10(H)[6] and (J)(3)[7] are "unconstitutional as applied, as the definition of 'beaches' is vague and fails to provide affected homeowners with a reasonable standard to know which areas may and which areas may not be utilized." (Compl. p. 7 ¶ B.) DES timely answered, denying Plaintiffs' entitlement to relief. (DES's Answer, filed April 15, 2024.)

By motion initially filed April 26, 2024, and thereafter renewed on June 7, 2024, the City sought judgment on the pleadings or, in the alternative, summary judgment. (City's Mot. for J. on the Pleadings, filed April 26, 2024; City's Renewed Mot. for J. on the Pleadings or, in the alternative, for Summary J., filed June 7, 2024.) On May 20, 2024, DES moved for judgment on the pleadings. (DES's Mot. for J. on the Pleadings, filed May 20, 2024.) And on May 21, 2024, Plaintiffs moved for summary judgment. (Pls.' Mot. for Summary J. & Mem. in Support, filed May 21, 2024.)

On June 21, 2024, the case was referred by consent to the Honorable Mikell R. Scarborough, Master-In-Equity for Charleston County,[8] who heard the parties' respective motions on December 9, 2024, and denied them all by order filed January 27, 2025. (Order filed January 27, 2025.) On February 6, 2025, the City moved the master to reconsider, alter, or amend his decision,[9] and by order filed March 3, 2025, the master did so, granting judgment in

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[6] Section 48-39-10(H) defines "'Beaches'" to mean "those lands subject to periodic inundation by tidal and wave action so that no nonlittoral vegetation is established."

[7] Section 48-39-10(J)(3) defines "'Critical Area'" to include, among other things, "beaches."

[8] (Order Denying Pls.' Mot. for Temporary Restraining Order and Preliminary Injunction and Referring the Case to the Master-in-Equity, filed June 21, 2024.)

[9] (City's Mot. to Reconsider, Alter, or Amend, filed February 6, 2024.)

favor of the City on Plaintiffs' declaratory judgment claim against it and on the City's counterclaim for declaratory judgment, declaring (a) that City Ordinance 5-4-15(B) is valid and not preempted in whole or in part by the Beachfront Management Act and (b) that Plaintiffs purchased their properties with notice of the City's ordinances and are subject to City Ordinance 5-4-15(B). (Order Granting Mot. to Alter or Amend and Granting J. in Favor of the City, filed March 7, 2025.)

By notice served and filed April 3, 2025, this appeal by Plaintiffs follows.

STANDARD OF REVIEW

Pursuant to Rule 208(b)(6), DES adopts the Standard of Review in the City's brief.

ARGUMENT

I. The Court should affirm the master's judgment in favor of the City and, in so doing, reject Plaintiffs' misguided arguments that DES's jurisdiction is limited to the setback line and that the definition of the Beaches Critical Area is lacking in clarity.

DES agrees with the City that the master's judgment in its favor should be affirmed, and pursuant to Rule 208(b)(6), DES adopts the Argument in the City's brief (both Argument I, regarding City Ordinance 5-4-15(B) not being preempted by Beachfront Management Act, and Argument II, regarding the master correctly finding that Plaintiffs purchased their properties with record notice of the City's ordinances and are subject to City Ordinance 5-4-15(B)).

DES would also take this opportunity to rebut the arguments included in Plaintiffs' brief about DES's jurisdiction being limited to the setback line and the Beaches Critical Area being insufficiently defined, because these arguments are both misplaced, in that they have no bearing on the correctness of the master's judgment in favor of the City, and mistaken, in that they are erroneous.

Contrary to Plaintiffs' assertion, the Beachfront Management Act does *not* "only

provide[] [DES] with the authority to regulate the areas seaward of the setback lines . . . ." (Pls.' Br. p. 11; *see also id.* at p. 13 ("Thus, [the Beachfront Management Act] places a limit on [DES's] jurisdiction over beaches critical area and [DES] *only* has jurisdiction over areas *seaward of the setback lines* as established by S.C. Code Ann. § 48-39-280.") (emphasis in original); *id.* at p.14 ("Thus, a plain reading of the Beachfront Management Act clearly shows the Legislature's intent to limit [DES's] jurisdiction over beaches critical area to areas *seaward* of the setback lines as established by S.C. Code Ann. § 48-39-280 and excludes property *landward* of the setback line.") (emphasis in original).) Nor are Plaintiffs correct in their charge that the definition of Beaches Critical Area is lacking in clarity. (Pls.' Br. p. 12 ("[T]he Beachfront Management Act and its regulations do not explain or clarify the meaning of the beaches critical areas as defined in S.C. Code Ann. § 48-39-280 (B) & (C).").)

The provisions at issue clearly define the Beaches Critical Area, and expressly and unambiguously give DES jurisdiction over this area.

> When construing a statute, a court must seek to ascertain and effectuate legislative intent. The cardinal rule of statutory construction is that words used in a statute must be given their *plain and ordinary meaning* without resort to subtle or forced construction to *limit* or expand the operation of the statute. The language must be read in a sense which harmonizes with its subject matter and accords with its general purpose.

Koenig v. S.C. Dep't of Pub. Safety, 325 S.C. 400, 403–04, 480 S.E.2d 98, 99 (Ct. App. 1996) (emphasis added) (citations omitted). "If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction, and this Court has no right to look for or impose another meaning." *Enos v. Doe*, 380 S.C. 295, 303, 669 S.E.2d 619, 623 (Ct. App. 2008) (citing *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003)). The first step in interpreting statutes is to determine whether the language of the statute "directly speaks to the

issue. If so, the court must utilize the clear meaning of the statute or regulation." *Kiawah Dev. Partners, II, v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014) (citing *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) ("Where the terms of the statute are clear, the court must apply those terms according to their literal meaning.")).

In 1988, the South Carolina General Assembly enacted the Beachfront Management Act, to expand the Coastal Tidelands and Wetlands Act at S.C. Code Ann. §§ 48-39-10 et seq. Collectively, the Beachfront Management Act and the Coastal Tidelands and Wetlands Act are hereinafter referred to as the "South Carolina Coastal Zone Management Act" or the "Act." The Act defines the State's "coastal zone" as "all coastal waters and submerged lands seaward to the state's jurisdictional limits and all lands and waters in the counties of the State which contain any one or more of the critical areas." § 48-39-10(B). The General Assembly passed the South Carolina Coastal Zone Management Act to protect the "coastal zone" and its rich, important, but highly vulnerable, resources. § 48-39-20(A) & (D); § 48-39-30(B)(2). In passing the South Carolina Coastal Zone Management Act, the General Assembly further declared "the key to accomplishing this [protecting critical areas in the coastal zone] is to encourage the state and local governments *to exercise their full authority over the lands and waters in the coastal zone*." § 48-39-20(C) (emphasis added).

The Act directly speaks to the locations over which DES has permitting authority. Therefore, pursuant to the Supreme Court's holding in *Kiawah Development Partners* (cited above), the statute's clear meaning controls. Section 48-39-130 states, "no person shall utilize a *critical area* for a use other than the use the critical area was devoted to on such date unless he has first obtained a permit from the department." § 48-39-130(A) (emphasis added). More

specifically, § 48-39-130 states, "no person shall fill, remove, dredge, drain or erect any structure on or in any way alter *any critical area* without first obtaining a permit from the department." § 48-39-130(C) (emphasis added). Section 48-39-130 thus grants DES permitting authority in any critical area.

Section 48-39-10(J) sets forth four (4) types of critical areas:

> (J) "Critical area" means any of the following:
>
> (1) coastal waters;
>
> (2) tidelands;
>
> (3) beaches;
>
> (4) beach/dune system which is the area from the mean high-water mark to the setback line as determined in Section 48-39-280.

Pursuant to the plain meaning of this section, Beaches Critical Area is a separate and distinct critical area from the other three critical areas, including the Beach/Dune System Critical Area, which, it should be noted, is the only one of the four statutorily defined critical areas that is defined in reference to the setback line. Because the Beaches Critical Area is one of the four statutorily defined critical areas, § 48-39-130's grant of permitting authority clearly applies to the Beaches Critical Area. The Court must presume the General Assembly did not do a futile act in including "beaches" as a critical area and a specific definition for this critical area, which definition, again, does not include any reference to the setback line. *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002).

Beaches Critical Area is defined as "those lands subject to periodic inundation by tidal and wave action *so that no nonlittoral vegetation is established*." § 48-39-10(H) (emphasis added). A plain reading of this provision provides that the Beaches Critical Area extends where periodic inundation is occurring to the point on the beach where *nonlittoral vegetation is established*. If there is an absence of nonlittoral vegetation due to periodic inundation, then the

area is within the Beaches Critical Area and within the DES's jurisdiction. If nonlittoral vegetation is present, it is not the Beaches Critical Area but could still be the Beach/Dune System Critical Area, depending on where the setback line is located.

At the time the Beachfront Management Act was passed, the Beaches Critical Area was nearly always located seaward of the setback line, so that the Beach/Dune System Critical Area was the most landward critical area along the State's beachfront environment; however, the land itself is dynamic and has changed. In this case, the Beaches Critical Area is landward of the Beach/Dune System Critical Area. The General Assembly clearly and unambiguously gave DES jurisdiction over four critical areas. These critical areas expressly included the Beaches Critical Area, pursuant to §§ 48-39-10(H) & (J) and -130, which, again, is defined without reference and not limited to the setback line.

Indeed, to do as Plaintiffs suggest—and limit DES's jurisdiction to the setback line or require greater specificity in the definition of Beaches Critical Area despite the dynamic and changing nature of this critical area—would frustrate the Act's stated purpose and findings as well as other provisions of the Act. DES's application of §§ 48-39-10(H) & (J) and -130 is in keeping with the policy, intent, and general language of the Act as a whole. A statute should be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect. *Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 42, 659 S.E.2d 125, 127 (2008). Statutes which are part of the same legislative scheme should be read together to ascertain legislative intent. *Great Games, Inc. v. South Carolina Dep't of Rev.*, 339 S.C. 79, 529 S.E.2d 6 (2000). "A statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute." *A.O. Smith Corp. v. S.C. Dep't of Health & Env't Control*, 428 S.C. 189, 202, 833 S.E.2d 451, 458 (Ct. App. 2019)

(quoting *Lockwood Greene Eng'rs, Inc. v. S.C. Tax Comm'n*, 293 S.C. 447, 449, 361 S.E.2d 346, 347 (Ct. App. 1987)).

The policy and intent of the South Carolina Coastal Zone Management Act can be found, in part, in § 48-39-20, the "Legislative declaration of findings," which express the need for and importance of protecting the *coastal zone*. The Act defines the State's "coastal zone" as "all coastal waters and submerged lands seaward to the state's jurisdictional limits and all lands and waters in the counties of the State which contain *any one or more of the critical areas*." § 48-39-10(B) (emphasis added). The legislative findings include:

> (A) The coastal zone is rich in a variety of natural, commercial, recreational and industrial resources of immediate and potential value to the present and future well-being of the State.
>
> (B) The *increasing and competing demands upon the lands and waters of our coastal zone* occasioned by population growth and economic development . . . *have resulted in the decline or loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use and shoreline erosion.*
>
> (C) . . . South Carolina can only regain control of the regulation of its *critical areas* by developing its own management program. *The key to accomplishing this is to encourage the state and local governments to exercise their full authority over the lands and waters in the coastal zone.*
>
> (D) The coastal zone and the fish, shellfish, other living marine resources and wildlife therein, may be *ecologically fragile and consequently extremely vulnerable to destruction by man's alterations*.
>
> (E) Important ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historical values *in the coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values.*
>
> (F) In light of competing demands and the *urgent need to protect and to give high priority to natural systems in the coastal zone* while balancing economic interests, *present state and local*

> *institutional arrangements for planning and regulating land and water uses in such areas are inadequate*.

§ 48-39-20 (emphasis added). These findings are applicable to the critical areas (plural) and to the "coastal zone." They are not limited to the Beach/Dune System Critical Area.

Other provisions of the Act are also consistent with DES's authority in the Beaches Critical Area. For example, although § 48-39-250 contains legislative findings related to the Beach/Dune System Critical Area, these findings support DES's assertion of jurisdiction in the Beaches Critical Area located adjacent to the Beach/Dune System Critical Area as well. In § 48-39-250(3), the General Assembly finds that "many miles of South Carolina's beaches have been identified as critically eroding." In § 48-39-250(5), the General Assembly makes findings related to hard erosion control structures:

> (5) The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach has not proven effective. These armoring devices have given a false sense of security to beachfront property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beachfront property to damage from wind and waves *while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry.*

§ 48-39-250(5) (emphasis added). Most notably, the General Assembly finds:

> (6) Erosion is a natural process which becomes a significant problem for man only when structures are erected *in close proximity to the beach/dune system*. It is in both the public and private interests *to afford the beach/dune system space to accrete and erode in its natural cycle*. This space can be provided only by *discouraging new construction in close proximity to the beach/dune system.*

§ 48-39-250(6) (emphasis added). This finding relates to the Beaches Critical Area when it is landward of the Beach/Dune System Critical Area because it is in *close proximity to the Beach/Dune System Critical Area*. To accomplish the Act's goals in § 48-39-250 and prevent

the significant problem of erosion when structures are built in close proximity to the Beach/Dune System Critical Area, DES would necessarily have to have authority to prevent this development in the Beaches Critical Area.

Section 48-39-250(8) also finds that "[i]t is in the state's best interest to protect and to promote increased public access to South Carolina's *beaches* for out-of-state tourists and South Carolina residents alike." § 48-39-250(8) (emphasis added). In § 48-39-250(1)(b), the General Assembly makes findings related to the importance of the tourism industry to the state's economy and that the tourists come "to enjoy the ocean and the *dry sand beach*." (emphasis added). If DES does not have jurisdiction over Beaches Critical Area when it is located landward of the Beach/Dune System Critical Area, then it cannot protect and promote public access.

Section 48-39-250(11) also provides support for construing the statute in accordance with its plain meaning that DES has authority over the Beaches Critical Area:

> (11) A long-range *comprehensive beach management plan* is needed for the entire coast of South Carolina to protect and manage effectively the beach/dune system, thus *preventing unwise development and minimizing man's adverse impact on the system*.

§ 48-39-250(11) (emphasis added). If DES has no authority in the Beaches Critical Area landward of the setback line, then DES has no authority when the erosion has outpaced the Beach/Dune System Critical Area. If DES has no authority when erosion has outpaced the Beach/Dune System Critical Area, then DES cannot provide comprehensive beach management or prevent unwise development in some of the most dynamic and vulnerable areas of the coastline such as the unstabilized inlet erosion zone[10] at the southern end of Isle of Palms. Given

[10] South Carolina Code of Regulations 30-1(D)(29)(a) defines an Inlet Erosion Zone as "a segment of shoreline along or adjacent to tidal inlets which is directly influenced by the

the changing conditions, the Beaches Critical Area is an essential part of DES's comprehensive beach management plan.

The Act continues to emphasize the importance of protecting the coastal environment in § 48-39-30, where policies of the state of South Carolina are declared as follows:

> (A) The General Assembly declares the basic state policy in the implementation of this chapter is to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State.
>
> (B) Specific state policies to be followed in the implementation of this chapter are:
>
> (1) To promote economic and social improvement of the citizens of this State and 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;
>
> (2) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations;
>
> ***
>
> (4) To formulate a comprehensive beach erosion and protection policy including the protection of necessary sand dunes.
>
> ***

§ 48-39-30. Given the location of the Beaches Critical Area when it is landward of the Beach/Dune System Critical Area, if DES cannot exercise jurisdiction over the Beaches Critical Area, then the General Assembly's policy goals cannot be met in these areas of the coastline.

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inlet and its associated shoals." This regulation further defines Unstabilized Inlets as "inlets that have not been stabilized by jetties, terminal groins, or other structures."

Additionally, this section of the Act provides guidance for balancing competing interests in the coastal zone, stating:

> (D) Critical areas shall be used to provide the combination of uses which will insure the *maximum benefit to the people*, but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.

Ann. § 48-39-30(D) (emphasis added). The South Carolina Supreme Court's holding in the 2021 opinion of *South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control* ("*KDP 2021*") addresses § 48-39-30(D) and supports that DES has jurisdiction over the Beaches Critical Area even when it is landward of the Beach/Dune System Critical Area. 434 S.C. 1, 862 S.E.2d 72 (2021). This section was cited as the basis for holding that DES's predecessor, DHEC, should have applied permitting requirements *outside of the critical area* where DHEC knew the area *would become* critical area. *Id.* at 12–13, 862 S.E.2d at 77–78. The *KDP 2021* Court took issue with DHEC's failure to exercise critical area authority over a proposed sheet pile wall, even though "the steel wall [was] required to be constructed outside the critical area." *Id.* at 11, 862 S.E.2d at 77. The Court stated:

> there is no evidence to support a finding that the steel wall will not have an impact on the critical area. Certainly there may be cases where the expert testimony diverges or where DHEC justifiably believes an upland structure will remain outside the critical area and not impact it, but that is simply not the case here. Therefore, the ALC erred in declining to apply section 48-39-30(D).

Id. at 12–13, 862 S.E.2d at 77–78 (emphasis added). The likely future encroachment of the critical area onto the wall, combined with the likely 'effect' of the wall on the critical area, was sufficient for the *KDP 2021* Court to find that DHEC should have applied § 48-39-30(D) to the project. Further, it stated:

> Because the inquiry as to whether to apply the more rigorous critical area permitting analysis for a structure designed to be constructed outside the critical area depends on the facts of the case, we decline to adopt a bright line rule as to when DHEC must analyze section 48-39-30(D) for a non-critical area permit. However, we trust that in future cases DHEC will exercise its discretion appropriately in a manner consistent with upholding the basic premise that altering the tidelands remains the "exception to the rule."

Id. at 13, 862 S.E.2d at 78 n.7. If DHEC, and by extension DES, should assert jurisdiction that is completely *outside of* a critical area, then it follows that DES should assert jurisdiction *within* a critical area even when outside a different critical area. It is also difficult to imagine that a substantial structure built in the Beaches Critical Area so close to the Beach/Dune System Critical Area would not have an impact on that critical area as well.

Section 48-39-260 also supports DES's jurisdiction in Beaches Critical Area landward of the setback line. Section 48-39-260 contains policy statements for the 1988 Beachfront Management Act amendments, §§ 48-39-250 et seq., to the Coastal Tidelands and Wetlands Act, which declare the policies of South Carolina, among other things, to:

> (5) promote carefully planned nourishment as a means of beach preservation and restoration where economically feasible;
>
> (6) preserve existing public access and promote the enhancement of public access to assure *full enjoyment of the beach* by all our citizens including the handicapped and encourage the purchase of lands adjacent to the Atlantic Ocean to enhance public access[.]

§ 48-39-260(5) & (6) (emphasis added). These subsections are not limited to the Beach/Dune System Critical Area but speak to beach preservation and restoration and the public's enjoyment of the beach. There are many other findings in § 48-39-260 that specifically reference the Beach/Dune System Critical Area; however, these findings would apply equally to the Beaches Critical Area because they refer to protection of the valuable resources of the beach. For

example, § 48-39-260(1) refers to the valuable and important functions such as "protection of life and property by acting as a buffer," and "preservation of dry sand beaches which provide recreation and a major source of state and local business revenue." § 48-39-260(1)(a) & (b). Once the Beach/Dune System Critical Area is located seaward of the Beaches Critical Area, and sometimes even seaward of the hightide mark, these functions that the General Assembly has stated need protection are located within Beaches Critical Area.

The state policies contained in Section 48-39-260 also include to:

> (2) create a comprehensive, long-range beach management plan and require local comprehensive beach management plans for the protection, preservation, restoration, and enhancement of the beach/dune system. These plans must promote *wise use of the state's beachfront*;
>
> (3) 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 as approved by the department which *will provide for the protection of the shoreline without long-term adverse effects;*
>
> (4) encourage the use of erosion-inhibiting techniques *which do not adversely impact the long-term well-being of the beach/dune system*[.]

§ 48-39-260 (emphasis added). To accomplish the General Assembly's express policy goals, DES would need to regulate the Beaches Critical Area located landward of the Beach/Dune System Critical Area. Without that authority, it would be impossible for DES to comprehensively manage and prevent construction on South Carolina's beaches which would have detrimental impacts to these valuable coastal resources. Additional support for DES's Beaches Critical Area jurisdiction landward of the setback line is scattered throughout the South Carolina Coastal Tidelands and Wetlands Act. Section 48-39-280 supports DES's exercise of jurisdiction in the Beaches Critical Area:

> (A) A policy of beach preservation is established. The department must implement this policy and utilize the best available scientific and historical data in the implementation. The department must establish a baseline that parallels the shoreline for each standard erosion zone and each inlet erosion zone.

It is impossible to preserve the beach if DES is not asserting jurisdiction of the Beaches Critical Area when it has moved landward of the setback line due to periodic inundation by tidal and wave action. It also is impossible for DES to follow its mandate to "utilize the best available scientific and historical data in the implementation" of the beach preservation policy if DES cannot assess the Beaches Critical Area by considering *current conditions* set forth in the statutory definition of the Beaches Critical Area, but rather only the Beach/Dune System Critical Area which lines may have been established years ago (these lines are established every 7 to 10 years)[11] when the beachfront was in a very different condition.

In addition to establishing policies, findings, and instructions, the South Carolina Coastal Zone Management Act also sets forth specific powers granted to DES. In addition to the power to promulgate necessary rules and regulations, DES is granted the power "[t]*o administer the provisions of this chapter*;" "[t]o enforce the provisions of this chapter … and to compel compliance;" "[t]*o implement the state policies declared by this chapter*;" and "[t]*o exercise all incidental powers necessary to carry out the provisions of this chapter*." § 48-39-50(E), (F), (I), (M) & (O). DES is specifically given the powers and duties to implement the stated policies including a comprehensive beach erosion and protection policy. These powers support DES's jurisdiction in the Beaches Critical Area regardless of whether it is located landward of the Beach/Dune System Critical Area.

[11] "The baselines and setback lines must be established anew during establishment cycles that are not less than every seven years, but not more than every ten years following a

Additionally, the General Assembly, in § 48-39-210(B), which addresses the delineation of Coastal Waters and Tidelands Critical Areas, recognizes how dynamic critical areas are and that they are subject to change. That section requires the following disclosure: "critical areas by their nature are dynamic and subject to change over time. By delineating the permit authority of DES, DES in no way waives its right to assert permit jurisdiction at any time in any critical area on the subject property." § 48-39-210(B). Just as the Coastal Waters and Tidelands Critical Areas are dynamic and subject to change, so is the Beaches Critical Area. It is not consistent with this provision to construe the Act to exclude DES's Beaches Critical Area jurisdiction in dynamic areas where erosion has outpaced the Beach/Dune System Critical Area.

It is the General Assembly's clear, plain, ordinary, and express intention that DES should carry out the Act in a way that protects the public benefit and environmental quality of the coastal zone which includes all the critical areas. The repeated references to the delicate nature of coastal zone resources, and their vulnerability to development in the coastal area, strongly support DES's exercise of jurisdiction in the Beaches Critical Area.

Lastly, the plain meaning of The Coastal Zone Management Program Document in Part V, Section D. Beach and Shoreline Access, which defines "Beach" also supports a finding that "beaches" does not entirely lie within the Beach/dune system and that is a critical area distinct from the Beach/dune system Critical Area. This CZMP Document repeats the statutory definition of Beaches but adds clarifying language:

> 2. Definitions
> a. Beach
> The South Carolina Coastal Management Act (Act 123 of the 1977 South Carolina General Assembly) defines "beaches" as "those lands subject to periodic inundation by tidal and wave action so

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previous establishment cycle and must be based upon the best available data." S.C. Code Ann. § 48-39-280(C).

> that non-littoral vegetation is established." (Section 48-39-10(H)). *This definition includes that area of sand between mean low and spring high water, in other words, the foreshore and the dry sand beach up to the line of vegetation. Beaches are included in the management program as "critical areas," subject to OCRM's direct permitting authority.*

Coastal Zone Management Program Document, Chapter IV.D. Beach and Shoreline Access at IV-61 (emphasis added). Therefore, DES's contention that Beaches is a separate critical area subject to direct permitting authority is consistent with the plain meaning of the last sentence of the Beaches definition in the Coastal Zone Management Program Document that has "the full force of the law." *Spectre, LLC v. S.C. Dep't of Health & Env't Control*, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010) (the Coastal Zone Management Program Document is "valid" and has the full force of the law). Interpreting the law otherwise would eliminate DES's ability to protect the most highly erosional areas from manmade destruction and/or alteration.

CONCLUSION

For the foregoing reasons, the Court should affirm the master's judgment in favor of the City and, in so doing, reject Plaintiffs' misguided arguments that DES's jurisdiction is limited to the setback line and that the definition of the Beaches Critical Area is lacking in clarity.

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Respectfully submitted,

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