

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Kiawah Development Partners, II)
)
Petitioner,)
)
vs.)
)
South Carolina Department of Health and)
Environmental Control,)
)
Respondent.)
_____)

Docket No. 09-ALJ-07-0029-CC
(consolidated cases)

**Certified to be a true and correct copy
of the original record on file with the
South Carolina Administrative Law Court**

AMENDED FINAL ORDER AND
DECISION ON REMAND

yes
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South Carolina Coastal Conservation)
League)
)
Petitioner,)
)
vs.)
)
South Carolina Department of Health and)
Environmental Control, and Kiawah)
Development Partners, II,)
)
Respondents.)
_____)

Docket No. 09-ALJ-07-0039-CC

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APR 01 2016

SC Court of Appeals

FILED

March 22, 2016

SC ADMIN. LAW COURT

This matter is before the South Carolina Administrative Law Court (ALC or Court) on remand from the South Carolina Supreme Court (Supreme Court) for further consideration of certain issues where the Supreme Court found that this Court committed errors of law. *See Kiawah Dev. Partners, II v. S.C. Dep't of Health and Env'tl. Control, et al.*, 411 S.C. 16, 766 S.E.2d 707 (2014) (Opinion).

STATEMENT OF THE CASE

This matter involves two contested cases challenging a critical area permit issued by the South Carolina Department of Health and Environmental Control (DHEC) to Kiawah Development Partners, II (KDP). DHEC issued a permit for the construction of a 270-foot long and 40-foot wide articulated concrete block revetment and a vertical bulkhead system along the banks of the Kiawah River at Captain Sam's Spit (Spit), at Kiawah Island in Charleston County. Both KDP and Coastal filed requests for contested case hearings, with KDP challenging the denial

of 2,513 feet of the requested 2,783 foot revetment/bulkhead system and Coastal challenging the issuance of the 270 feet of revetment/bulkhead system and seeking to uphold the denial of the 2,513 feet of structure, respectively.

The Court consolidated the cases for the hearing which was conducted August 24-28, 2009. On January 22, 2010, this Court issued a Final Order and Decision authorizing the construction of 2,783 feet of bulkhead and revetment, with limiting conditions. Both KDP and Coastal filed motions for reconsideration. On February 26, 2010, this Court issued an Amended Final Order and Decision (Amended Final Order).

Coastal and DHEC filed appeals in the South Carolina Court of Appeals, after which Coastal successfully moved to transfer the case to the South Carolina Supreme Court. On November 21, 2011, the Supreme Court issued an Opinion reversing this Court's decision. KDP filed a petition for rehearing, which was granted and resulted in a second Opinion on February 27, 2013, this time upholding this Court's Order. Coastal successfully petitioned for rehearing, which resulted in a third and final Opinion, dated December 10, 2014, reversing this Court's Amended Final Order based on several errors of law and remanding the case to this Court.

In considering and addressing the matters returned to this Court by the Supreme Court on remand, this Court recognizes that the Supreme Court's holdings are the law of the case and cannot be altered on remand. *See Prince v. Beaufort Mem'l Hosp.*, 392 S.C. 599, 606, 709 S.E.2d 122, 126 (Ct. App. 2011) (“[T]he appellate court’s instructions circumscribe the trial court’s authority on remand. The trial court’s duty is to follow the instructions it received from the appellate court.”). With that in mind, this Court has again reviewed the record of testimony and exhibits that were admitted in the contested case hearing in light of the legal principles set forth in the Opinion.¹ The portions of the Amended Final Order that the Supreme Court did not hold were affected by legal error or without factual support stand. Those findings and conclusions remain as set forth in the Amended Final Order and will not be repeated herein since this Court was not directed to further consider them.

¹ This Court previously denied the motion of KDP to open the record in an Order dated April 8, 2015. Therefore, no new matter or subsequent information was considered in drafting this Order.

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As set forth in the Opinion, this Court is to consider the following:

1. Whether and to what extent the public, as distinct from KDP alone, would benefit from the proposed bulkhead and revetment, as opposed to leaving the tidelands in their natural state;
2. Whether the project, including the proposed residential development it will facilitate, meets the requirements of 2 S.C. Code Ann. Regs. 30-11 (2011), both as to the factors in S.C. Code Ann. § 48-39-150 (2008 & Supp. 2012) and as to the long-range cumulative impacts of the bulkhead and revetment on the upland; and
3. Whether the project meets the requirements of Reg. 30-12(C), in particular, whether KDP proved there are no feasible alternatives to the bulkhead and revetment under Reg. 30-12(C)(1)(d) when strong consideration is given to leaving the riverbank in its natural state.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and closely passed upon their credibility, taking into consideration the burden of persuasion of the parties, I make the following Findings of Fact by a preponderance of the evidence:

Public Benefit

In its reasoning for reversal of this Court's decision, the Supreme Court, in considering the application of Section 48-39-30(D) through Section 48-39-150, noted that "the ALC made no findings of any public benefit that would result from the bulkhead and revetment. . . ." *Kiawah*, 411 S.C. at 30, 766 S.E.2d at 716. Rather, the Supreme Court found that the ALC only considered the benefit to KDP. As the Supreme Court also noted in footnote 5 of its Opinion, though KDP is a member of the public, "the ALC erred in considering only the benefits to [KDP] to the exclusion of the public as a whole." *Id.* at 31, 766 S.E.2d at 716. The Supreme Court also held that the ALC erred in finding that erosion of the neck of the Spit had no positive benefit, and pointed out the benefits to the public resulting from the natural erosion process. However, the Supreme Court also pointed out in its conclusion that the benefits to the public of an untouched, "pristine sandy beach" with its "bounty of benefits to the people ranging from environmental to recreational[,] was "alone . . . not a valid reason to reverse the ALC's approval of a permit to construct a huge bulkhead and revetment there." *Id.* at 44, 766 S.E.2d at 723. The Supreme Court's opinion did not address whether the proposed bulkhead and revetment would also benefit the public because the ALC erred in not making any findings on that issue.

Therefore, the Supreme Court remanded the cases to this Court to consider both the benefit to the public, if any, and the extent of any such benefit of constructing the bulkhead and/or revetment. As the Supreme Court noted in its conclusion, "the ALC did not consider whether and to what extent the public would benefit from the proposed structure as opposed to leaving the tideland in their natural state." *Id.* Thus, in conducting its analysis of the public benefit, this Court is to also consider the public benefit, if any, of leaving the tidelands in their natural state. The following findings address the Supreme Court's charge to make further findings of fact on this issue.

Protection of Beachwalker Park

The Charleston County Park and Recreation Commission (PRC) operates Beachwalker Park (Park) to provide the general public access to the oceanfront beach on the west end of Kiawah Island. The Park consists primarily of a parking lot, changing facilities, a tiny snack bar, and a boardwalk to the beach. Approximately 50,000 members of the public use the Park on an annual basis. The use of the Park is not limited to residents of Kiawah Island but is used primarily by non-residents, as the Park provides the only public access to the beaches in this mostly private island community. Indeed, Beachwalker Park functions as a public park that provides the general public access to the beaches of Kiawah Island. Although the Park is along the bank of the Kiawah River, there are no stairs or other improved access from the parking lot down the escarpment to the bank of the Kiawah River. To the contrary, the public benefit to the use of the shoreline in the area immediately abutting Beachwalker Park is speculative.

Importantly, the general public use and benefit of the Park is dependent upon the parking lot of the Park, as parking spaces allow for greater utility of the park and increased access to the beach. However, the riverbank along Beachwalker Park has been eroding, creating a significant vertical escarpment against the bank holding the parking lot, imperiling some of the parking spaces. The Park's split rail fence at the edge of the parking lot on the riverbank has had to be moved inland to prevent people from falling down the escarpment and is now perched on the edge of the escarpment leaning outwards. The erosion has caused the loss of the land where the Park's gazebo was initially located. Erosion is jeopardizing the Park's infrastructure and is fairly severe up to the narrowest point on the neck, beyond which the erosion begins to decrease. Therefore, the Park provides a significant public benefit in granting the general public a means by which to

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access the beaches of Kiawah Island, and that benefit greatly exceeds impairment to any speculative use of the shoreline immediately abutting the Park.

PRC previously applied for a 270-foot bulkhead in this area but withdrew the application, opting for the protection of the bulkhead and revetment along the entire shoreline. In fact, DHEC approved 270 feet of both a bulkhead and revetment in the same location as the bulkhead shown on the withdrawn plan of PRC. These structures protect the portion of the eroding riverbank along the Park where the erosion is the worst. The stabilization of the river shoreline with the bulkhead and revetment across the front of the Park therefore furthers the public use.

Coastal argues that protecting the bank along the Park is not in the public interest because the location of the Park could change at some time in the future. However, the Court rejects this contention as conjectural. There was no proof of an agreement between KDP and PRC to move the location of the Park, even though some discussions had occurred. This Court affirms its finding that the bulkhead and revetment are clearly necessary to protect the Park's high ground and improvements from falling into the river in light of its current location and additionally finds that this benefits the general public.

Beach Parking for KICA

The terms of the Development Agreement, dated October 12, 2005, between the Town of Kiawah Island and KDP provide that the limited upland development allowed on the Spit that will be facilitated by the bulkhead-revetment shall include beach parking and beach access near the western end of the Spit for the members of Kiawah Island Community Association (KICA). The relevant provision provides as follows:

Property Owner shall provide to KICA (by quitclaim deed conveyance) 8 parking spaces at the western end of the road access authorized above upon completion of same and shall improve the spaces with pervious material. An easement to KICA shall be limited to its members' use for access along the road to the 8 parking space area. A beach access path from such parking area shall also be granted by Property Owner to KICA by quitclaim deed for its members' convenient usage.

All property owners on Kiawah Island are members of KICA and are, likewise, members of the general public who will benefit from this beach parking area and beach access.² KDP is obligated to provide and convey this beach parking and beach access upon completion of the road to the

² As with KDP, the members of KICA are included in "the people," and benefits to them are therefore considerations to take into account along with benefits to other members of "the people" when considering the benefit to the public as a whole, See footnote 5 of *Kiawah*.

western end of the Spit. The bulkhead and revetment are components of this road's construction. This beach parking and beach access west of the Park toward Captain Sam's Inlet does not now exist and constitutes a public benefit that will be realized through the construction of the bulkhead and revetment that will allow the limited development that includes this community facility.

Conservation Easement

The 2005 Development Agreement between KDP and the Town of Kiawah Island granted KDP the right to subdivide no more than fifty lots on a maximum of twenty acres. KDP obtained the right to this limited development from the Town of Kiawah Island in the 2005 Development Agreement. As part of that agreement, KDP relinquished the right under the prior Development Agreement to construct a 325-room hotel immediately to the east of the Park.

In addition to specifying numerous guidelines for an environmentally sensitive development, the 2005 Development Agreement requires KDP, upon completion of the limited development, to permanently encumber the remainder of the Spit with a restrictive covenant mandating that it remain in its natural state and to grant a conservation easement to Kiawah Island Natural Habitat Conservancy (KINHC) over that same acreage. The specific provision of the Development Agreement imposing this obligation on KDP upon completion of the limited development provides as follows:

Prior to the Termination Date, Property Owner also agrees to restrict all remaining highlands not devoted to the uses or purposes authorized herein, to non-developable, passive green space by restrictive covenant recorded in the Charleston County RMC Office. Property Owner shall grant an easement to KINHC (provided KINHC accepts) for any acreage not subject to Development, including such acreage as is to be conveyed, ultimately, to KICA.³

KDP is the fee simple owner of the entirety of the Spit. This ownership includes the entirety of the highland outside of the critical area – from above the mean high water mark on the oceanfront to the critical line along the Kiawah River. The Development Agreement describes the Spit as “approximately 118.3 acres of highland.” KPD's development of the Spit is limited to “no more than 20 acres” for single family detached dwellings plus the acreage necessary for the infrastructure for this limited residential development, such as road rights of way, utilities, beach

³ The Court shall refer to the restriction and easement mandated by this provision at the completion of development jointly as the “Conservation Easement.”

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access easements, community beach parking for beach access, and community dock⁴ access with associated parking. The only acreage excluded from permanent protection in a natural state by the conservation easement is the land subject to the limited development. At the hearing, the evidence revealed that the highland consisted of 150 acres with the conservation easement encompassing over 80% of the entirety of the Spit.

As the Supreme Court explained, the ALC must consider the impact of the upland development of the Spit in determining whether to approve the requested permits. Here, the owner's encumbrance of the vast majority of the highland of the Spit by a conservation easement preserving it in a natural state provides a significant public benefit. Even if the baseline on the Spit were to move seaward again, as it did in 1999, the new area above the setback line could not be developed. Dr. Kana's testimony at trial established that the ocean beach along the Spit, fed by sand from enormous shoals in the Stono River Inlet, has been accreting on the ocean side for decades and will continue to accrete for decades, if not centuries. The conservation easement would protect this additional "new" acreage from any development or man-made alteration. Since this protection is assured by legal restriction and a recorded easement, any changes to state or local laws that would allow further development would be of no effect, thus ensuring the permanency of this public benefit from the bulkhead and revetment.

Mr. Eiser, who testified on behalf of the Department to the rationale for the staff's decision, attested to the "extraordinary" value to the public if the entirety of the Spit, though owned by KDP and not the public, forever remained in a natural state for all the people of South Carolina to enjoy. The preservation of approximately 80% of the Spit in a natural state, and all land accreting to it in the future, bestows this same public benefit, albeit to a slightly less extent than if there was no development at all on the Spit. This public benefit can only be realized if the development that depends on the stabilization of the riverbank through the bulkhead and revetment occurs.

Though, as explained below, this benefit does not offset the impact to the public by extending the revetment beyond, it does factor into the efficacy of granting a permit to construct the bulkheads.

⁴ The Development Agreement allows KDP to construct up to two community docks along the Kiawah River.

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No-action Alternative

In addition to consideration of the public benefit resulting from the construction of a bulkhead and revetment, the Court must also consider the public benefit if the bulkhead and revetment are not constructed.

In its Opinion, the Supreme Court held that this Court erred in finding that erosion of the neck of the Spit had no positive benefit. The Supreme Court referenced S.C. Code Ann. § 48-39-20(F), in which the General Assembly made the following finding in support of the Coastal Zone Management Act (CZMA): "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." The Supreme Court also stated that there was "evidence that the repetitive accretion of Captain Sam's Spit, followed by the erosion of the neck of the spit[,] served as the supply of sand for Seabrook Island to the southwest." *Kiawah*, 411 S.C. 16 at 31, 44, 766 S.E.2d at 716, 723. The Supreme Court thus pointed out some potential benefits to the public resulting from natural processes like erosion, including the protection of "natural processes like the cyclical erosion, breach, and accretion of the spit"⁵ and a "pristine sandy beach," with its "bounty of benefits to the people ranging from environmental to recreational."⁶ *Id.*, 411 S.C. at 31, 44, 766 S.E.2d at 716, 723. While the public could still access the shore on the proposed concrete mat and pull their boats or kayaks onto it, their recreational enjoyment of a portion of the river shoreline would be lessened. However, the Court also noted that these benefits were "alone . . . not a valid reason to reverse the ALC's approval of a permit to construct a huge bulkhead and revetment there." *Id.* at 44, 766 S.E.2d at 723.

⁵ The evidence in the record indicates that the supply of sand for Seabrook Island did not come from repetitive accretion of the Spit and erosion of the neck and spit (i.e., natural systems), but rather from manmade alterations, such as the mechanical relocation of Captain Sam's Inlet to the east of its then-existing tip, opposite Captain Sam's Creek. This allowed the detached tip of the peninsula to provide sand for Seabrook Island and resulted in the significant accretion of sand on the shoreline on Captain Sam's Spit. This man-initiated process, rather than the historic process suggested by the Supreme Court, appears to be the dominant factor in the renourishment of the shoreline on Seabrook Island. Nevertheless, regardless of how the sand was supplied for the renourishment of Seabrook Island, this Court agrees with the Supreme Court that there is a public benefit to having a pristine sandy shoreline, which would occur if the Spit was left in its natural state. However, as the Supreme Court noted in its Opinion, this is not dispositive.

⁶ In remanding this case to the ALC, the Supreme Court pointed out both the public benefits that emanate from the use of the shoreline and its "pristine" condition. Ostensibly, the greater the public use, the less pristine the shoreline will be. This begs the question: which is of greater importance – the preservation of the shoreline in its natural state or the public benefit gained by its use?

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Considerations Under Section 48-39-150 and Regulation 30-11(C)(1)

The Supreme Court also concluded that “the ALC erred in finding the project met the requirements of regulation 30-11 both because that regulation requires consideration of the factors in section 48-39-150 and because the ALC’s consideration of upland impacts was flawed.” The Supreme Court held that the Court erred in not interpreting the general considerations and, in particular, the further guidelines in Reg. 30-11(C)(1) as applicable to the upland development facilitated by the bulkhead and revetment. The Supreme Court also held this Court erred in finding there would be no impact at all to the upland and in failing to sufficiently support the factual findings related to the upland development.

Section 48-39-150

Because the Supreme Court did not take issue with this Court’s findings and conclusions in its analysis of the general considerations applicable to the impacts in the critical area, with the exception of public access to tidal resources, the Court will not repeat them. Instead, the Court will consider and apply the general considerations as they apply to the future residential development of the upland. The pertinent general considerations under S.C. Code Ann. § 48-39-150(A), and the Court’s findings as to their application to the limited residential development, are as follows:

Section 48-39-150(A)(3) calls for consideration of:

The extent to which the applicant’s completed project would affect the production of fish, shrimp, oysters, crabs, or clams or any marine life or wildlife, or other natural resources in a particular area[,] including but not limited to water and oxygen supply.

The Court finds that based on the numerous precautions and environmentally aware development methods described and found below, the limited residential development of the upland will not adversely affect the production of fish, shrimp, oysters, crabs, or clams or any marine life or wildlife. In making this finding, the Court reaffirms its findings as to the lack of negative effect on wintering piping plovers and diamond back terrapins, the two species at issue in the hearing, which are covered in the Amended Final Order.

Section 48-39-150(A)(4) calls for consideration of:

The extent to which the activity could cause erosion, shoaling of channels or creation of stagnant water.

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The Court finds that the limited residential development of the upland will not cause erosion, shoaling of channels, or creation of stagnant water. Rather, the purpose of the bulkhead and revetment is to stop further erosion that is occurring at the riverbank, including along Beachwalker Park.

Section 48-39-150(A)(5) calls for consideration of:

The extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches[,] or other recreational coastal resources.

The Court finds that the limited residential development of the upland will not affect existing public access to tidal and submerged lands, navigable waters and beaches, or other recreational coastal resources. Indeed, there is currently no public access from the land owned by KDP that is to be developed. In fact, the public will benefit from the development because of the conservation easement that covers 80% of the Spit. The proposed revetment, not the limited residential development of the upland, will affect public access to the sandy riverbank at low tide.

Section 48-39-150(A)(6) calls for consideration of:

The extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable historic and archeological sites of South Carolina's coastal zone.

This Court found that limited residential development will not affect wintering piping plovers and diamond back terrapins, neither of which is endangered nor threatened. The limited residential development is far removed from the designated critical habitat for wintering piping plovers near Captain Sam's Inlet and is not a Geographic Area of Particular Concern.⁷ Also, there was no proof of irreplaceable historic and archeological sites on Captain Sam's Spit.

Section 48-39-150(A)(7) calls for consideration of:

The extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state.

KDP asserts that the limited residential development facilitated by the bulkhead and revetment will provide considerable economic benefits both to the developer and to the public by increasing the real property tax base. Though that assertion regarding the real property tax base appears reasonable, there was no evidence supporting that contention.

Section 48-39-150(A)(8) calls for consideration of:

⁷ "Geographic Area of Particular Concern" is coterminous with "critical habitat."

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The extent of any adverse environmental impact which cannot be avoided by reasonable safeguards.

As demonstrated by the findings below concerning Reg. 30-11(C)(1), the safeguards to be implemented by KDP will avoid any adverse environmental impacts.

Section 48-39-150(A)(9) calls for consideration of:

The extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project.

As substantiated by the findings below concerning Reg. 30-11(C)(1), KDP demonstrated that significant safeguards will be taken to avoid adverse environmental impact resulting from the limited residential development. There was also no proof of KDP failing to exercise any feasible safeguards.

Section 48-39-150(A)(10) calls for consideration of:

The extent to which the proposed use could affect the value and enjoyment of adjacent owners.

KDP is the adjacent owner. The limited residential development will not adversely affect the value and enjoyment of KDP.

Regulation 30-11(C)(1)

The Court now turns to the application of Reg. 30-11(C)(1), the focus of the Supreme Court's discussion in the Opinion. Regulation 30-11(C)(1) provides as follows:

C. Further Guidelines: In the fulfilling of its responsibility under Section 48-39-150, the Department must in part base its decisions regarding permit applications on the policies specified in Sections 48-39-20 and 48-39-30, and thus, be guided by the following:

1. The extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area.

By stabilizing the river shoreline in the neck, the proposed bulkhead and revetment will enable the limited residential development on Captain Sam's Spit allowed under the terms of the Development Agreement. This development will alter less than 20% of the total area of the Spit, converting it from a natural area to a residential development. There will thus be some impact from this limited residential development. But as stated in this Court's findings and conclusions associated with its analysis under the Coastal Zone Management Plan (CZMP), the CZMP does not prohibit the residential development of barrier islands. Residential development on barrier islands is consistent with the CZMP, as this Court found and concluded, when it complies with the

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CZMP's policies and conditions for such development. Additionally, the remainder of the Spit will be under a conservation easement and unable to be developed.

Since the upland development will have an impact on what is now an undeveloped natural area of the Spit, as the Supreme Court noted, this Court must assess those impacts under Reg. 30-11(C)(1). Because this development has yet to occur, the Court looks to the testimony and exhibits as to the plans and intent for this limited residential development. KDP offered considerable proof as to the precautions that will be taken in this upland development and the methods to be used. Based on that proof, as further explained below, the Court finds that the proposed development is not only consistent with the CZMP for reasons stated in the Amended Final Order, but also that the cumulative impacts from that development will not have a long-range negative effect and are in keeping with other developments on Kiawah Island and the general character of the island itself, including Captain Sam's Spit, and adjacent Seabrook Island.

The Spit itself is undeveloped. Yet, the Spit is part of Kiawah Island, which has been clearly developed in a manner consistent with the ecologically friendly development proposed in this case. Therefore, it appears from the record that the general character of the area around the Spit is residential, with some commercial development. Furthermore, the proposed development is approximately 20% of the Spit, and the residential development by the owners of the private property will be implemented in an environmentally sensitive manner that will be consistent with, if not more environmentally protective than, the existing development. In support of this Court's findings that the limited residential development will be done sensitively and not have long-term negative cumulative impacts, the Court finds the following:

KDP has a history of environmentally sensitive development and has developed many similar features on Kiawah Island, such as tidal islands and marsh peninsulas, in a minimally impactful manner. Also, the Development Agreement requires that KDP use care to minimize its impacts:

Such developable acreage shall be based on environmentally-sensitive approaches to Development, including limited and careful infrastructure construction. The Town will assist Property Owner in facilitating provision of access strategies that minimize impacts with narrow rights-of-ways to 20' widths or less and narrower road profiles to 16', provided such access is appropriate for emergency vehicles. Property Owner may use pervious material for same.

The environmentally sensitive approaches that will be implemented in the limited residential development on Captain Sam's include the following:

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- Eschewing the development of typical grass yards and focusing on native grasses, xeriscaping (zero-scaping);
- Imposing significant setbacks of the development from not only the ocean but the primary, secondary, and tertiary dunes, with four to six rows of dunes between the beach and the developed area;
- Prohibiting houses from being taller than one and a half stories;
- Placing the houses among the trees;
- Using pervious materials instead of asphalt on driveways and the road wherever practicable;
- Combining dune walkovers for access from the houses to the beach so there would be a reduced number across the dune field on the Spit;
- Eliminating individual docks and limiting the docks along the Kiawah River to no more than one or two community docks;
- Prohibiting development on more than 80% of the Spit through a restriction and conservation easement;
- Working with a number of experts and scientists to enhance, restore, and enlarge the habitat available for a variety of birds and animals on the Spit;
- Placing the development, generally, within the forest canopy;
- Furnishing public utility services of water and sewer and prohibiting wells and septic tanks; prohibiting the random cutting of vegetation;
- Prohibiting anyone from building on the dunes;
- Using natural building sites and making them as small as practicable;
- Keeping the land around the buildable site in as close to an existing state as possible, retaining natural vegetation;
- Featuring indigenous plant material rather than imported plants;
- Implementing the development with a light touch, erring on the side of less rather than more, with infrastructure improvements as narrow as practical and minimizing runoff;
- Implementing shared pervious driveways;
- Making the homes and structures less prominent, treating them more as background;
- Eliminating parking under houses since it increases the elevation of the houses;
- Trying to limit lot sizes to the developed area;
- Imposing strict restrictive covenants; and
- Limiting the development to a total of between twenty-five and fifty home sites on the twenty acres.

The extended period of development further reduces the potential for long-range cumulative impacts. The houses will be constructed over a long period of time, perhaps up to twenty to thirty years. Also, most of the houses probably will be second homes that are occupied on an infrequent basis, usually six to eight weeks over the course of a year.

As for the Department's concern that the upland development may impact wetlands, the Court finds that no wetlands have been identified on the upland at this time. If any wetlands are located, any proposed modification of them will be subject to the Department's separate permitting process, and KDP would abide thereby. However, the Court affirms its earlier findings in response to this purported concern.

Although the Department and Coastal did not have the burden of proof as to the cumulative effects of the project, including on the upland, neither presented any evidence suggesting that the method of development would not be environmentally sound. Indeed, the Department's witness, Mr. Eiser, acknowledged that the Department's decision was not based on the environmental effects of the development, but simply on the fact that a portion of a natural area was going to be developed.

The Court finds that the residential development of the portion of the upland intended to be developed will not have deleterious impacts for the reasons set forth above. In fact, the only evidence on this matter was that these environmentally sensitive development methods will not have an adverse effect. The only adverse effect in the estimation of the Department is that there will be development where now there is natural land and no development. However, there is no public policy against development of private property that has never been developed. In fact, the CZMP contemplates such development and provides guidelines, all of which will be satisfied by this proposed development. KDP has exercised considerable care to ensure that the limited residential development will be sensitively planned, responsive to the natural features of the site, and attentive to its flora and fauna, as previously determined in the Amended Final Order.

Regulation 30-12(C)

The Supreme Court determined that this Court erred in its factual findings and conclusions in the application of the project-specific standards in Reg. 30-12 (C). In particular, the Supreme Court held that this Court "erred in interpreting regulation 30-12(C) as only applying where there would be a substantial impact on public access, in finding there would be no adverse effect on

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public access, and in finding the public did not use the critical area where the bulkhead and revetment would be constructed.” *Kiawah*, 411 S.C. at 43, 766 S.E.2d at 722-23.

Coastal argues that the Supreme Court ruled that the uncontroverted evidence is that the impairment of public access would be substantial in this case. First, the Supreme Court rejected what it called a “substantiality” requirement for measuring adverse effects of public access and instead held that this Court should have applied a balancing test “of economic and environmental, and public and private considerations.” The Supreme Court specifically found:

“[Reg. 30-12(C)] does not prohibit outright any bulkhead or revetment that would adversely affect public access; rather, it balances the need for public access against the need for a bulkhead or revetment. It does so by providing that a bulkhead or revetment that affects public access may still be permitted where upland is being lost due to tidally induced erosion and no feasible alternative exists.”

Id., 411 S.C. at 39-40, 766 S.E.2d at 721. Thus, the simple finding that there would be an adverse impact on public access does not end the inquiry for the Court; otherwise, the permitting of a bulkhead or revetment would never be possible.

Based on the testimony of Dr. Greg VanDerwerker, Sidi Limehouse, Sophia McAllister, and Bill Eiser, this Court finds that the public uses the sandy riverbank that is exposed at low tide for recreational purposes, such as kayaking and fishing.⁸ The Court further finds that the revetment would adversely affect this recreational use where the sandy shore line would be replaced by an ACB mat. The Court finds, as it did in its previous order, that “the ACB mat degrades the public uses of the shoreline where the mat is approved.” However, the evidence did not establish that the bulkhead would adversely affect the recreational use of the sandy shore line.

Having determined again that public access would be adversely affected in those locations where the proposed revetment extends along roughly 1900 feet of the shore line, except for the marsh area on the northwestern end of Beachwalker Park, the Court must determine whether KDP proved that there are no feasible alternatives to the proposed bulkhead and revetment, as mandated by Reg. 30-12(C)(1)(d), which provides: “(d) Bulkheads and revetments will be prohibited where public access is adversely affected unless no feasible alternative exists.”

As the Supreme Court pointed out, Reg. 30-1(D)(23) addresses feasible alternatives for purposes of the analysis under the regulations:

⁸ The extent of this use, however, appears questionable.

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Feasible (feasibility) - As used within these rules and regulations (e.g., 'unless no feasible alternative exists'), feasibility is determined by the Department with respect to individual project proposals. Feasibility in each case is based on the best available information, including, but not limited to, technical input from relevant agencies with expertise in the subject area, and consideration of factors of environmental, economic, social, legal and technological suitability of the proposed activity and its alternatives. Use of this word includes, but is not limited to, the concept of reasonableness and likelihood of success in achieving the project goal or purpose. 'Feasible alternatives' applies both to locations or sites and to methods of design or construction, and includes a 'no action' alternative.

Reg. 30-1(D)(23). The Supreme Court directed this Court, in making its determination, to give serious consideration to the no-action alternative and not give it short shift. *Kiawah*, 411 S.C. at 43, 766 S.E.2d at 723. The Supreme Court emphasized the legislative finding in S.C. Code Ann. § 48-39-20(F) "that there is an 'urgent need to protect and to give high priority to natural systems in the coastal zone . . .'" *Id.* The Supreme Court added that "the accretion, erosion, and breach of the spit is a natural system." *Id.*

Allowing the riverbank to remain in its natural state would allow the existing quality of the recreational use of the river bank at low tide to continue because there obviously would be no manmade structure obstructing the sandy shoreline. The Court recognizes this as an important consideration, and agrees with the Supreme Court that it would benefit the public to protect the natural processes; however, as the Supreme Court also noted, this benefit alone is not enough to justify denial of the permit: "The area, particularly the pristine sandy beach, is undoubtedly one of this State's natural treasures. Admittedly, this alone is not a valid reason to reverse the ALC's approval of a permit to construct a huge bulkhead and revetment there." *Id.* at 44, 766 S.E.2d at 723. As the Supreme Court noted, environmental and public benefits must be balanced against other public, economic, and private benefits in order to determine the maximum benefit to the public.

In initially considering the natural processes of this river shoreline and the entire Spit, the expert testimony at trial clearly established that it is highly unlikely that the Spit will breach at the neck even if the bulkhead and revetment were not installed.⁹ Rather, the natural historical

⁹ As explained by Dr. Kana, the primary influence changing the historical cycle has been and will be the artificial relocations of Captain Sam's Inlet to the east of its natural location, thereby providing Seabrook Island with a source of sand from the end of Captain Sam's Spit and fortifying Captain Sam's Spit east of the relocated inlet. The first inlet relocation in 1983 was well after the 1974 Environmental Inventory of Kiawah Island relied upon by the League that references this historical cycle of breach of the Spit; so obviously, the 1974 Inventory could not have considered the effect of the first and subsequent inlet relocation.

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phenomenon of gradual elongation of Captain Sam's Spit followed by its breach has been interrupted and altered by engineered relocations of the inlet. Therefore, failing to construct the bulkhead and revetment would not result in the continuation of the natural cycle, nor would it interfere with a breach at the neck if there were ever a major hurricane. Whether the bulkhead and revetment are constructed is not a variable in determining the natural cycle of a breach.

On the other hand, allowing the erosion to continue unabated at Beachwalker Park, where the bulkhead and revetment were originally authorized, jeopardizes the parking lot of the popular public facility. This would be detrimental to the public, as access to the park would be more limited over time. Additionally, the evidence reflects that the Town of Kiawah Island, as expressed in Section 16(f) of the Development Agreement, specifically agreed to limited residential development of the Spit. The denial of the permit for the bulkhead and/or revetment contradicts that local legislative land use decision by making the residential development it sanctioned probably incapable of realization. It is unlikely that KDP can satisfy the Town of Kiawah Island's ordinances governing subdivision and road construction without stabilization of the riverbank and a protected right of way. Stabilization of the riverbank is thus most likely essential to the realization of the limited residential development, which further gives rise to the obligation to impose the conservation easement.

Giving serious consideration to the alternative of leaving the shoreline in a natural state without the bulkhead and revetment, the Court nonetheless finds that leaving the shoreline in its natural state is not a better alternative than stabilizing the bank at Beachwalker Park.¹⁰ The Supreme Court held that all "private economic development" involving the tidelands, which certainly includes KDP is "suspect" (*Kiawah*, 411 S.C. at 41, 766 S.E.2d at 722). It nevertheless held that KDP is still a component of the citizenry and thus its economic benefits are a consideration in determining whether there is a public benefit (*Id.* at 31 n.5, 766 S.E.2d at 716 n.5). Moreover, the Town of Kiawah clearly represents "the citizens of a particular jurisdiction." Therefore, the actions of the Town of Kiawah in approving the development is also a consideration in determining whether the development upon the Spit is in the "public interest."¹¹

¹⁰ It is noteworthy that the reason why the Court limits its present discussion of stabilization at the bank to that along Beachwalker Park is because the discussion at present is on the area that will be covered by both the bulkhead and revetment. The Court, will later discuss permitting the bulkhead alone to extend beyond Beachwalker Park.

¹¹ See *Kiawah*, 411 S.C. at 29, 41 766 S.E.2d at 715, 722 ("[T]he State enacted statutes and promulgated regulations which generally prohibit alterations to the tidelands except when the public interest requires otherwise. . . [P]ublic

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In short, the benefits to the public in general, to the Town of Kiawah's purposes of developing the Spit, and to KDP¹² from the stabilization of the shoreline via a bulkhead and revetment outweigh leaving the shoreline in a natural state. This determination, however, does not end the Court's inquiry. Rather, the Court must next consider whether there were any other feasible alternatives to the bulkhead and revetment that would stabilize the river bank in this location.

The record reflects that KDP considered a number of alternative methods of erosion control, including a bulkhead without revetment, riprap, and geo-tubes. However, these other methods were rejected, because the bulkhead and revetment structure was considered the "best solution" – the most environmentally sensitive solution that effectively dealt with the erosion of the bank. Professional engineer Mitchell Bohannon responded to questioning on this matter as follows:

Q: In this particular design, does the revetment part, which is the articulated concrete block matted over the bank, play into reflective wave energy?

A: Yes.

Q: How so?

A: Well, it prevents that reflected wave from causing erosion on the bottom.

Q: With respect to the bottom, does it help stabilize the bottom?

A: Yes.

Tr. p. 465, line 16 to 466, line 1. The revetment therefore "helps" to stabilize the bulkhead. As explained above, the Park provides a significant public benefit. Indeed, some of the area is covered by marsh grass and certainly is not "pristine" sandy beach. Given the importance of the Park to the public and the limited use and access of the public in that particular area, help in stabilizing the bulkhead is warranted.

Turning to the consideration of a bulkhead and/or revetment beyond the Beachwalker Park area, I find that the public benefit to the use of the shoreline in the area immediately abutting the

access is to be accorded great protection while private economic development is suspect and only permitted when in the public interest.").

¹² Just as the financial benefit to KDP alone cannot be considered a benefit to the public at large, as the Court noted in *Kiawah*, it also cannot be the lone consideration in the feasible alternative analysis under Reg. 30-1(D)(23). However, since the financial benefit to KDP is part of the benefit to the public at large (KDP being "included in 'the people'" according to footnote 5 in the Opinion), the financial benefit to KDP may also be considered as a factor for purposes of the feasible alternative analysis ("... consideration of factors of environmental, *economic*, social, legal and technological suitability of the proposed activity and its alternatives....") (emphasis added).

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Park is speculative. There is "some public use" of the riverbank at low tide. This limited use occurs when individuals occasionally land their boats or kayaks upon the shoreline and use the area.¹³ Notably, the Spit is privately owned, thereby precluding the public's access from the highlands. Therefore, permitting the installation of a bulkhead as previously approved by this Court is clearly supported by the evidence. The bulkhead will not cover the sandy shoreline and thus will have de minimus impact upon the public use of shoreline. Therefore the remaining issue is whether permitting the revetment outweighs the benefit of leaving the shoreline in a natural state.

KDP asserts that the bulkhead and revetment must be considered in tandem. Instead of contributing to erosion, the combination of a bulkhead with the revetment extending from its base, unlike the rejected alternative methods of erosion control, prevents erosion. Interestingly, though Coastal emphatically challenges the use of a revetment, Coastal, other than suggesting that the shoreline be left in its natural state, offered no expert testimony regarding the need of a revetment. Nevertheless, the stabilizing benefits of a revetment must be weighed against the environmental impact and other public benefits of the structure.

In this instance, as stated by the Supreme Court, the revetment would be laid upon a "pristine sandy" shoreline of the Kiawah River. However, all of the experts agree that the outside bank of this large bend in the Kiawah River at the neck of Captain Sam's Spit is eroding. This erosion is caused by a slow advance by the marsh point bar on the other side of the river and the high velocity of the water against the outside bank. If the revetment terminates in a high velocity zone, the shoreline may be susceptible to erosion around its terminus. Nevertheless, I find that the need to further protect the bulkhead along the remaining shoreline beyond the Park using a revetment is outweighed by the public benefit of protecting the use and nature of the shoreline. Consequently, the Court finds that a full revetment of forty feet in width should extend for only 270 feet, the length of Beachwalker Park, and that the bulkhead may extend not only the length of Beachwalker Park but the entire 2,783 feet. I further find that the ACB mat shall be covered with

¹³ Though Mr. Eisner explain that there is some public use of the shoreline, the Court nevertheless also noted in its Amended Decision that:

CCL entered into evidence pictures of a party of kayakers on the bank of the area of the proposed revetment. However, that evidence appears contrived. The persons depicted in the photographs were attending a planned event to raise funds to pay for CCL legal expenses to contest the granting of this permit. CCL also presented testimony by other individuals that used the river bank area on a limited basis.

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one foot of similar quality sand, so as to expedite the naturalization process of the mat being covered with sand.¹⁴

CONCLUSIONS OF LAW

Based on the above Findings of Fact, the Court concludes the following as a matter of law:¹⁵

General Conclusions

The ALC has jurisdiction over this case pursuant to the South Carolina Administrative Procedures Act, S.C. Code Ann. §§ 44-1-60; 1-23-600 et seq. (APA) and S.C. Code Ann. § 48-39-10 et seq. (Coastal Tidelands and Wetlands Act).

Both S.C. Code Ann. Section 48-39-150 and S.C. Code Ann. Regs. 30-11 instruct that the permitting decision shall be guided by the policy statements in Sections 48-39-20 and 48-39-30 in assessing the potential impacts of projects in critical areas. The Supreme Court ruled that this Court committed legal error in finding the proposed bulkhead and revetment complied with the policies of the Coastal Zone Management Act, S.C. Code §§ 48-39-10 et seq. Having reconsidered the proof and made findings in light of that ruling, the Court must reconsider its analysis of the statutory findings and policies, now applying the legal standard directed by the Supreme Court.

The pertinent portions of Section 48-39-20 and Section 49-38-30 are as follows:

48-39-20. Legislative declaration of findings.

The General Assembly finds that:

(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.

* * *

(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

¹⁴ This finding does not preclude the Department from reviewing the functioning of this stabilization system and expanding it in keeping with the need to protect the public usage of the shoreline.

¹⁵ The Court also confirms and adopts all findings of fact and conclusions of law in the Amended Final Order that were not determined to be in error in the Opinion of the Supreme Court.

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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.

48-39-30. Legislative declaration of state policy.

- (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;

* * *

- (5) To encourage and assist state agencies, counties, municipalities and regional agencies to exercise their responsibilities and powers in the coastal zone through the development and implementation of comprehensive programs to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values as well as to the needs for economic and social development and resources conservation.

* * *

- (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

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combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.

As this Court previously stated and the Supreme Court commented in *Kiawah*, these statutory findings and policies require a balancing of economic-development benefits on the one hand, and preservation of our natural coastal resources and processes on the other hand. As stated in legislative finding (F) of Section 49-38-20, there is an “urgent need to protect and to give high priority to natural systems in the coastal zone while balancing economic interests” The Supreme Court emphasized this “urgent need” to protect and give high priority to natural systems in the coastal zone when engaging in the necessary policy analysis.

The Supreme Court also underscored for this Court the policy of public benefit expressly stated in Section 48-39-30(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.” The Supreme Court ruled that in this context, where there is an impairment of the public’s access to and use of those tidelands, the benefit to be considered is the benefit to the public at large, not just the economic benefit to the proponent of the project in the critical area. The Supreme Court implied, if not held, that benefit to the public at large is an essential showing for a permit to be granted. Without it, the Department or this Court must find against the permit.

In determining how to achieve the maximum benefit to the public at large, both the legislative findings and policies prescribe consideration/balancing of natural/ecological systems and public access as well as economic, social, and other benefits. S.C. Code Ann. § 48-39-20(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 . . .*”) (emphasis added); *Id.* § 48-39-30(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.”) (emphasis added); *Id.* § 48-39-30(B)(1) (“[One of the s]pecific state policies to be followed in the implantation of this chapter [is] . . . [t]o *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

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coastal zone”) (emphasis added); *id.* § 48-39-30(B)(5) (“[One of the s]pecific state policies to be followed in the implementation of this chapter [is] . . . to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values *as well as to the needs for economic and social development* and resources conservation.”) (emphasis added).

With these maxims in mind, the Court first considers the natural processes. The proposed bulkhead and revetment will not have any material effect on what was described as the historical process of breach and accretion, nor on the sand supply for the beaches of Seabrook Island. Currently, there is a fence between the parking lot of the park and the vertical escarpment at the riverbank that impedes the public’s ability to reach the river. While a portion of the revetment would lessen the public’s access to the existing sandy shoreline for recreational use, denying the permit would not, in the long-term, preserve that sandy shoreline for continued use and enjoyment by the public. To the contrary, allowing the erosion in this stretch of the river to proceed unabated could ultimately turn the sandy shoreline into a steep escarpment inaccessible to kayakers and unsafe to anyone approaching from the land side.

The Court also finds and concludes that there will be public benefit if the shoreline is stabilized. The stabilization will protect the parking lot of the Park, allowing access west of the Park for the general public (at least 50,000 people a year) as well as the thousands of members of KICA. It will also allow the limited development to continue and trigger the creation of the conservation easement, which would result in the permanent and legally enforceable protection of around 80% of Captain Sam’s Spit in its natural state with no possibility of any further alteration or improvements other than the limited development allowed under the 2005 Development Agreement. These public benefits tip the balance in favor of granting the permit subject to certain conditions and limitations. Here, these benefits warrant extension of the revetment for the length of Beachwalker Park in order to further protect the bulkhead; but beyond the Park, the benefits of using a revetment are outweighed by the public benefit of protecting the use and nature of the shoreline. Consequently, the Court finds that though the bulkhead may run the entire 2,783 feet, the full revetment of forty feet in width should extend for only 270 feet, the length of Beachwalker Park.

The Court also concludes that KDP has taken a sufficiently environmentally sensitive approach, as discussed above in the Regulation 30-11(C)(1) section of the Findings of Fact. Additionally, the residential development will be subject to further permitting approvals that will

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afford a more precise look at specific development techniques and processes under the further local, state, and federal regulatory schemes.

Also important to concluding that the balance favors issuing the permit is the legislative land use determinations of the Town of Kiawah Island. While the town's policies and enactments are not binding, and certainly do not override the necessity that KDP prove that its project meets all the statutory and regulatory requirements for issuance of the permit, they are nevertheless entitled to consideration. Denying the permit will thwart the implementation of the local government's land planning; granting it will provide an opportunity for the local government's land planning to be accomplished.

Therefore, applying the principles instructed by the Supreme Court, this Court nevertheless again concludes that the issuance of the permit is consistent with the legislative findings and policies of the Coastal Zone Management Act as set forth in Sections 48-39-20 and 48-19-30. However, after reconsideration, the Court concludes that the balancing of these policies weighs in favor of issuance of the permit although on different terms from those in the Amended Final Order. Instead of approving both the bulkhead and revetment for 2,783 feet, the Court approves the bulkhead for 2,783 feet and the revetment for only 270 feet, finding that the need to further protect the bulkhead along the remaining shoreline beyond the Park using a revetment is outweighed by the public benefit of protecting the use and nature of the shoreline. I further find that the ACB mat shall be covered with one foot of similar quality sand as exists upon the shoreline, so as to expedite the naturalization process of the mat being covered with sand.

Having found and concluded the proposed permit is not in violation of the findings and policies in sections 48-39-20 and 48-39-30, respectively, the Court moves to consideration of the remaining general considerations of section 48-39-150, repeated in Reg. 30-11(B), as they apply to the proposed structure in the critical area. The only change from the Amended Final Order in the application of the general considerations concerns subsection (5): "The extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches, or other recreational coastal resources." The Court finds and concludes that the revetment will degrade public access to and use of the sandy shoreline; but, for the reasons previously explained, the Court finds and concludes that this alone does not warrant denial of the permit, as acknowledged by the Supreme Court in the conclusion of its Opinion, and is outweighed by other benefits to the public.

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As for the application of the general considerations to the upland development that the bulkhead and revetment will facilitate, the Court concludes, based on the findings previously made and the reasons stated, that the limited residential development does not run afoul of the general considerations; indeed, the Court concludes that they weigh heavily in favor of the permit with respect to the upland development.

Turning to the remaining analysis, Reg. 30-11(C)(1) requires consideration of "[t]he extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area." Looking first at the bulkhead and revetment, the Court concludes that the revetment will have a long-range negative impact on the sandy riverbank at low tide (the bulkhead will have no negative impact on recreational activity). However, this negative effect is not of such magnitude as to alone justify denial of the permit requested, particularly where the use of the shoreline is intermittent and there will still be a sandy riverbank for most of the area west of the termination of the ACB mat.

Considering the proposed future residential development of the upland in light of the guidelines of Reg. 30-11 (C)(1), the Court concludes that the permit as approved below will not have a negative long-range, cumulative effect. It appears that much of Kiawah Island is developed and that the proposed development will be implemented in an environmentally sensitive manner that will be consistent with, if not more environmentally protective than, the existing development. The developer will employ a panoply of precautions and methods to minimize the impacts from the residential development area. The numerous reasonable measures, techniques, and safeguards that KDP intends to utilize in its development of Captain Sam's demonstrate that this limited residential use would be sensitively planned, responsive to the natural features of the peninsula, attentive to its flora and fauna, and without significant negative effects on the critical area. On top of these precautionary measures, KDP will protect the remainder of Captain Sam's Spit in its natural state in perpetuity via a conservation easement.

Nowhere do the governing statutes and regulations prohibit the development of lawfully zoned real estate on highland parts of barrier islands above the critical line and landward of the ocean setback line in the coastal zone. Instead, they caution against "**ill-planned** development." See Reg. 30-11(D)(5) (emphasis added). Further, the CZMP specifically contemplates and allows residential development of barrier islands, provided the planned development is consistent with its

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policies and guidelines. As found and concluded in the Amended Final Order, the limited residential development complies with all the applicable precepts of the CZMA.

It also bears mentioning that Reg. 30-11(C) specifies that the Department “must **in part** base its decisions regarding permit applications on the policies specified in Sections 48-39-20 and 48-39-30, and thus be guided by the following” (Emphasis added). This regulation does not state that the sole consideration, or even the primary consideration, is “the extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area.” Rather, the cumulative effects are but one of many considerations to be taken into account.

Section 48-39-30(D) provides that “[c]ritical areas shall be used to provide the **combination of uses** which will insure the maximum benefit to the people.” (Emphasis added). Furthermore, as explained in *Kiawah*, “[Reg. 30-12-(C)] does not prohibit outright any bulkhead or revetment that would adversely affect public access; rather, it balances the need for public access against the need for a bulkhead or revetment.” 411 S.C. at 39—40, 766 S.E.2d at 721. Thus, “a bulkhead or revetment that affects public access may still be permitted where upland is being lost due to tidally induced erosion and no feasible alternative exists.” *Id.*

In this instance, that analysis involves four separate considerations:

- The use of a revetment to protect Beachwalker Park;
- The use of a bulkhead to protect Beachwalker Park;
- The use of a bulkhead to protect the remaining shoreline of the Spit;
- The use of a revetment to protect the remaining shoreline of the Spit;

Here, though public access for a limited area will be adversely affected, “upland is being lost due to tidally induced erosion”; so, pursuant to Reg. 30-12(C)(1)(c), these four enumerated considerations will be acceptable if no feasible alternatives exist. Therefore, the remaining analysis is whether there are feasible alternatives to the revetment or bulkhead, pursuant to Reg. 30-12(C)(1)(d). This consideration is also made in the context of the lodestar – the public's interests – and balancing those interests to determine the maximum benefit to the people of the particular jurisdiction. Regulation 30-12(C)(1) sets forth standards for the construction of bulkheads and revetments for erosion control. It provides as follows:

- C. Bulkheads and Revetments (Rip-rap) (Other than ocean front, as covered under R.30-13(N)):

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- (1) In an attempt to mitigate certain environmental losses that can be caused by these structures, the following standards are adopted:
 - (a) Structures must be designed to conform to the critical area line (upland boundary), to the maximum extent feasible, and constructed so that reflective wave energy does not destroy stable marine bottoms or constitute a safety hazard;
 - (b) Structures may be constructed up to 18 inches from the existing escarpment. In situations where this is not feasible, Department staff will determine the location of the bulkhead or revetment on a site by site basis;
 - (c) Bulkheads and revetments will be prohibited where marshlands are adequately serving as an erosion buffer, where adjacent property could be detrimentally affected by erosion or sedimentation, or where public access is adversely affected unless upland is being lost due to tidally induced erosion.
 - (d) Bulkheads and revetments will be prohibited where public access is adversely affected unless no feasible alternative exists.

The Court reaffirms its findings and conclusions as to Reg. 30-12(C)(1)(a)-(c) stated in the Amended Final Order, except as previously modified. The Court concludes that the public's use and access will be degraded in the limited location where the bulkhead and revetment are to be constructed. The Court also concludes that upland will be lost due to tidally induced erosion if the bulkhead and revetment are not employed.

As to subsection (d), "[f]easibility in each case is based on the best available information, including, but not limited to, technical input from relevant agencies with expertise in the subject area, and consideration of factors of environmental, economic, social, legal and technological suitability of the proposed activity and its alternatives. Use of this word includes, but is not limited to, the concept of reasonableness and likelihood of success in achieving the project goal or purpose." Reg. 30-1(D)(23).

Turning to the Park, based on this Court's previous findings concerning feasible alternatives, the Court concludes, even after giving strong consideration to a no-action alternative, that there is no feasible alternative but to stabilize the riverbank using a bulkhead and a revetment of forty feet in width. From 2002 to 2009, unabated erosion took more than an acre of KDP's highland. As found in the Amended Final Order, the erosion will continue unless the bank is

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stabilized. The Court further concludes that there is no feasible alternative to the bulkhead and revetment in order to accomplish the long-term stabilization of the shoreline while providing the opportunity for the growth of marsh grass and aquatic organisms.

In sum, the Court concludes that the proposed bulkhead and revetment at the Park meet all the specific criteria for bulkheads and revetments set forth in Reg. 30-12(C). Mr. Eiser came to this identical conclusion during his evaluation of the permit application, testifying that "there was nothing in 30-12(C) that would explicitly require me to deny the entire permit"

As to the remaining shoreline of the Spit stretching beyond Beachwalker Park, the Court concludes that there are no other feasible alternatives than to use a bulkhead, for the reasons mentioned above. In fact, using a bulkhead without a revetment affords a combination of uses that protects the use of shoreline beyond the Park and protects the uplands, as well as the public benefits gained from their development, by preventing erosion at these locations to the extent possible, thereby providing the maximum benefit to all the people in the jurisdiction of the area. Moreover, the bulkhead will have little, if any, impact upon public use. As noted above, the Spit is privately owned, thereby precluding the public's access from the highlands. The bulkhead will also not cover the sandy shoreline and thus will have de minimus impact upon the public use of shoreline.¹⁶ Therefore, regarding the remaining shoreline, the Court finds that there is no feasible alternative to stabilizing the shoreline other than the installation of a bulkhead.

ORDER

Based upon the above Findings of Fact and Conclusions of Law and those in the Amended Final Order, it is hereby:

ORDERED that the permit issued by the Department (KDP Exhibit 44) is approved except that the terms and conditions in the permit limiting the bulkhead and revetment to 270 feet in Special Condition No. 1 are deleted and the following shall be substituted for Special Condition No. 1:

¹⁶ Notably, it is a well-founded principle of law that

statutes or ordinances in derogation of natural rights of persons over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly within their scope and purpose. It follows that the terms limiting the use of the property must be liberally construed for the benefit of the property owner.


Purdy v. Moise, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953) (citations omitted).

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I. Provided:

- (i) that care is used in the installation of the requested erosion control structure near its eastern end, adjacent to Beachwalker Park, to avoid covering marsh grass, where practical, unless necessary to prevent significant highland erosion;
- (ii) that the full revetment of forty feet in width shall extend 270 feet, the length of Beachwalker Park;
- (iii) that the bulkhead shall extend the entire 2,783 feet;
- (iv) that the ACB mat shall be covered with one foot of similar quality sand as exists upon the shoreline, so as to expedite the naturalization process of the mat being covered with sand; and
- (v) that KDP shall submit final construction plans to the Department consistent with the permit requested, as modified and approved by Order of the Administrative Law Court, before commencing initial construction of the erosion control structure.

AND IT IS SO ORDERED.



Ralph King Anderson, III
Chief Administrative Law Judge

March 22, 2016
Columbia, South Carolina

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CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



E. Harvin Belser Fair
Judicial Law Clerk

March 22, 2016
Columbia, South Carolina

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