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 Apr 19 17 **ORDER GRANTING MOTIONS FOR CLARIFICATION AND DENYING MOTIONS FOR RECONSIDERATION**
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 RECEIVED APR 01 2016 SC Court of Appeals

This matter is before the South Carolina Administrative Law Court (ALC or Court) upon Petitioner Kiawah Development Partners II, LLC's (KDP) Motion to Alter or Amend for Clarification, Respondent South Carolina Coastal Conservation League's (Coastal) Motion for Reconsideration and for Clarification of Final Order and Decision on Remand, and Respondent South Carolina Department of Health and Environmental Control's (DHEC) Motion for Reconsideration and for Clarification (collectively, Motions) of this Court's December 2, 2015 Final Order and Decision on Remand (Order on Remand). This case is 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 Envtl. Control, et al.*, 411 S.C. 16, 766 S.E.2d 707 (2014) (Opinion).

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SC ADMIN. LAW COURT

On February 26, 2010, this Court issued an Amended Final Order and Decision authorizing the construction of 2,783 feet of bulkhead and revetment, with limiting conditions, at Captain Sam's Spit (Spit), at Kiawah Island in Charleston County. Following the Supreme Court's December 10, 2014 reversal, this Court was 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.

On December 2, 2015, this Court issued the Order on Remand. On December 16, KDP, Coastal, and DHEC filed their respective motions. On January 7, 2016, Coastal and KDP filed Responses to the other parties' respective Motions.[1] Based on the arguments made in the Motions and Responses, I agree that clarification of the Order on Remand is warranted and thus grant all of the parties' Motions for Clarification. Accordingly, I am issuing an Amended Final Order and Decision on Remand (Amended Order on Remand) to provide clarity for the parties. The remaining arguments for reconsideration, made by Coastal and DHEC, will be addressed below. Additionally, the findings and conclusions in this Order are incorporated as findings and conclusions in the Amended Final Order and Decision on Remand in this case.

DISCUSSION

Coastal's Reconsideration Arguments

Application of S.C. Code Ann. § 48-39-30(D)

Coastal first argues that the Court misapplied S.C. Code Ann. § 48-39-30(D) (2008), because it failed to consider public benefits in the critical area. Coastal places great emphasis on the fact that Section 48-39-30(D) focuses on combinations of uses within the critical area and

[1] DHEC declined to file a Response to the other parties' Motions. Also, on January 27, 2016, the Court issued an Order suspending its Final Order and Decision until the Court reached a decision on the Motions.

alleges that the Court considered only the public benefits to lands "outside and beyond the critical areas" (emphasis removed).[2] Coastal also reads into the language of Section 48-39-30(D) a requirement that the "combination of uses" of critical areas be "existing" instead of "proposed." Coastal's position is that "[i]t is the use of the critical areas that is to provide the maximum public benefits, not other activities that will flow from an applicant's use of that critical area." (emphasis removed).

However, Coastal fails to explain how Section 48-39-30(D) limits consideration of public benefits to only benefits within critical areas and how those uses are limited to only presently existing activities. Indeed, in distinguishing how private docks and bulkheads would still be allowed under the Supreme Court's decision, Coastal, in its Brief on Public Benefits dated March 23, 2015, explained that:

> Section 48-39-30(D) does not impose a requirement that a project must provide a public benefit in order to be permitted. The fact that the League (and the Department) take the position that there is nothing left for this Court to decide does not in any way mean that a permit must actively benefit the public at large. The language of 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 maximum measurable dollar benefits,' requires an assessment of the existing combination of uses compared to the proposed combination of uses. See S.C. Code Ann. § 48-39-30(D).
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> Undertaking an assessment of the existing combination of uses versus proposed combination of uses would allow the Department to continue authorizing permits for private recreational docks, **bulkheads for individually owned property**, private boat lifts, as well as a host of other activities authorized under the Coastal Zone Management Act. . . .
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> * * *
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> Section 48-39-30(D) **does not impose a requirement that a project must provide a public benefit in order to be permitted**, but ensures protection of public uses threatened by a proposed project.

(emphasis added). Thus, Coastal concedes that though public benefits may be considered among a combination of uses to ensure that public use is not impaired, a permit does not have to "actively benefit the public at large." The consequence of Coastal's own reasoning is that bulkheads for individually owned property, such as at issue in this case, are authorized by the Coastal Zone

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[2] Coastal disagrees with DHEC's assertion in its Motion for Reconsideration and for Clarification that 270 feet of structure to protect Beachwalker Park is warranted.

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Management Act and allowed under the Supreme Court's opinion. Coastal erosion control structures, such as bulkheads and revetments, are designed to benefit the uplands in the larger coastal zone, not the critical area, and the Supreme Court required this Court to consider upland impacts that would result from projects within the critical area. Coastal proposes a requirement that this Court consider Section 48-39-30(D) in isolation. However, this Court cannot follow Coastal's reasoning and focus solely on benefits resulting within the critical area; otherwise, provisions such as Section 48-39-120(F) (2008)[3] and 2 S.C. Code Ann. Regs. 30-12(C) (2011), which authorize the construction of bulkheads, revetments, and other erosion control structures, would be obviated.

Moreover, the Supreme Court flatly rejected this Court's conclusion, which Coastal attempts to now assert in the context of public benefits, that "the pertinent inquiry is the cumulative impacts of the project *within* the critical area . . . ." Rather, the Supreme Court held that this Court should have deferred to DHEC's interpretation of Reg. 30-11(C)(1) that it must "consider not only a proposed project's impact on the critical area, but also the project's impacts on upland areas within the larger coastal zone." *Kiawah*, 411 S.C. at 32, 766 S.E.2d at 717. Coastal asserts that the Court "confus[ed] the requirement that critical areas be used to provide maximum benefits with the requirement to consider the long-range and cumulative impacts of a project, including those impacts outside the critical area." However, it would defy logic to require this Court to consider cumulative impacts both outside and inside the critical area, but only consider benefits within the critical area. Additionally, the Supreme Court never required this Court to limit its consideration of public benefits to only those occurring within the critical area and to only existing activities. Indeed, such a requirement would lead to absurd results, such as dock permits (or any other private-use structure) always being rejected since docks do not benefit the public's use in the critical areas in which they are installed. Rather, benefits to the public can occur either within the critical area or can flow outside the critical area from a project within the critical area.

Furthermore, the Supreme Court stated in footnote 5 of the Opinion, that the developer is considered part of the "the people" in determining public benefit. But a developer would scarcely,

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[3] "The department, for and on behalf of the State, may issue permits not otherwise provided by state law, for erosion and water drainage structure in or upon the tidelands, submerged lands and waters of this State below the mean high-water mark as it may deem most advantageous to the State for the purpose of promoting the public health, safety and welfare, the protection of public and private property from beach and shore destruction and the continued use of tidelands, submerged lands and waters for public purposes." S.C. Code § 48-39-120(F).

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if ever, derive a direct benefit from use within the critical area. Therefore, under Coastal's theory, the Court would hardly, if ever, consider the benefits to the developer as a member of the public. However, in this Court's view, the Supreme Court did not intend to exclude the developer's benefits but rather opposed focusing "only [on] benefits to the developer . . . ."

Consideration of the Natural State and Public Benefits

Natural State

Coastal next argues that the Court erred in not giving a "strong consideration" to the public benefits of leaving the area in its natural state, i.e. allowing the cyclical erosion, beach and accretion processes on the Spit to continue. Coastal asserts that this Court instead made findings of public benefits that were unsupported by any evidence and were erroneous. First, though construction of a bulkhead or revetment in the critical area may "hardly [be] 'leaving the area in its natural state," this Court is not required to conclude that the area should be left in its natural state. The Court is to give the no-action alternative serious consideration, which it did. The Court simply found other factors to be more compelling after it weighed the public benefits of leaving the riverbank in its natural state versus other public, economic, and private benefits to arrive at the maximum benefit to the public.

Parking at Beachwalker Park

Among these public benefits, the Court considered parking spaces and beach access near the western end of the Spit for the members of Kiawah Island Community Association (KICA). Coastal argues that members of KICA "do not constitute 'the public at large,' and that "[e]ight (8) parking spaces for members of a private, gated community does not provide sufficient 'public benefit' to override the benefit to the millions of citizens of this state for whom the General Assembly declared benefit from the area remaining in a natural state." Finally, Coastal argues that no KICA members testified that they drive their cars to Beachwalker Park, cannot presently find parking spaces, or otherwise lacked access to the public trust lands at Captain Sam's Spit.

First, I disagree with Coastal that the Court cannot consider the benefits to members of KICA as part of its overall determination as to the benefit to the public as a whole. If the developer, KDP, is included in "the people" and therefore benefits to it are to be taken into account along with benefits to other members of "the people" in considering the benefit to the public as a whole,

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then certainly members of KICA are to be accorded the same consideration.[4] *See* footnote 5 of the Opinion. However, the Court agrees that the eight parking spaces for members of KICA, though beneficial to thousands of members for purposes of access to Beachwalker Park and to the beach at the western end of the Spit, would not **alone** be benefits to the general public. But in this case, the Court did not just consider the benefits yielded by those eight spaces, nor were those spaces what primarily swayed the Court in favor of finding a general public benefit to installing the bulkhead and revetment. Rather, the Court was primarily swayed by its consideration of the threat of erosion to the infrastructure of Beachwalker Park, which is a public park that provides the general public with access to the beaches of Kiawah Island, and its other parking spaces, which are available to the general public and provide access Beachwalker Park. (*See, e.g.*, Tr. 91:7-15; 1128:12-1129:4; KDP Ex. 5, KDP 0563-0567, 0569, 0582-0584). The benefit that KICA members would receive from the bulkhead and revetment was an additional reason to allow the installation of those structures.[5]

Conservation Easement

Similar to the argument concerning the parking spaces, Coastal argues that the conservation easement pursuant to an agreement between KDP and the Town of Kiawah Island should not be considered in the public benefit analysis because is not in the critical area. Coastal also asserts that "[t]here is no evidence that the placement of a conservation easement is contingent upon, or even relevant to, the construction of the bulkhead or revetment."

First, as already addressed, there is no requirement that benefits be limited to within the critical area. Second, according to the Development Agreement between KDP and the town of Kiawah Island, which is in the record, KDP agreed to give up most of its property (98.3 acres out of the Spit's 118.3 acres) on the Spit via the conservation easement if it could develop the other twenty acres. The bulkhead and revetment ensure that such development can occur by protecting its access corridor. Therefore, it is reasonable to infer and conclude the conservation easement given in exchange for development requiring the bulkhead and revetment would benefit the public by preventing further development on the Spit.

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[4] It is noteworthy that KDP owns Captain's Sam's Spit, not KICA members; but KICA will receive the benefit of access to and the right to use Captain's Sam's Spit if the access road is built and the parking spaces constructed.

[5] Additionally, since the revetment is being approved for only 270 feet, there will be little to no impairment of available kayak landing areas over the half-mile bank east of Beachwalker Park.

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Coastal further asserts that there was no evidence to suggest that a privately held conservation easement would benefit the public, "certainly as it pertains to the tidelands which would be covered with concrete blocks."[6] Obviously, the conservation easement will only apply to the land owned by KDP, not to the critical area. Second, the very nature of a conservation easement is that it benefits the public. *See* S.C. Code Ann. § 27-8-20(1) (2007) (providing that the purposes of a "conservation easement" include such public benefits as "retaining or protecting natural, scenic, or open-space aspects of real property; ensuring the availability of real property for agricultural, forest, recreational, educational, or open-space use; protecting natural resources; maintaining or enhancing air or water quality; and preserving the historical, architectural, archaeological, or cultural aspects of real property").[7]

Coastal further asserts that "there will be fifty (50) mansions covering 20% of the Spit" that will be "a substantial encroachment and disturbance from the Spit's present condition." However, the record reflects that up to twenty acres (which is actually less than 20% of the 118.3 acres on the Spit) will be subdivided into no more than fifty **lots**, which will be conveyed to purchasers. In addition, the record reflects that the home sites will be limited to a small portion of the lots, that the houses will be no more than a story and a half tall, and that every effort will be made to make them less prominent than the surrounding trees and landscape – all in an attempt to ensure that the development is environmentally sensitive and attentive to the natural conditions of the Spit.

Coastal then argues that the Supreme Court in the Opinion precluded this Court from making any findings of public benefits. Coastal reasons that because the Supreme Court found that this Court had not made such findings initially, the law of the case precludes this Court from making such findings now. However, simply because the Supreme Court found that this Court did not make findings of public benefits does not mean that the Supreme Court found that no public benefits existed. Had the Court concluded that no public benefits flowed to the public at large based on the entire record, the Supreme Court would presumably not have remanded the case to

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[6] The revetment will be limited to 270 feet and will not extend for the remaining 2,513 feet requested by KDP.

[7] Coastal also states, "No conservation easement is required by the DHEC permit." However, there is no statutory or regulatory requirement that the benefits from a project in the critical area flow from the conditions of the permit itself. In assessing the effects of a project in the critical area, consideration is given to all the effects that flow from the project in the critical area, including those on the upland, as recognized by the Supreme Court in the Opinion.

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this Court but would instead have vacated the permit. But the Supreme Court remanded the case to this Court to make further findings of fact, as this Court is the sole finder of fact.

Application of S.C. Code Ann. § 48-39-150(A)(7), (10)

Coastal first argues that this Court gave only "passing treatment" to Section 48-39-150(A)(7)'s requirement to balance the economic benefits compared with the benefits of preserving the area in its natural state. To the contrary, the Court gave thoughtful consideration to this issue. It also contends that there is only "minimal evidence, if that, of economic benefit" but substantial evidence of public benefit to leaving the area unaltered. The evidence in the record reflects that KDP will receive economic benefits from the residential development that the bulkhead and revetment will allow, based on the $50 million mortgage that KDP's lender placed on Captain Sam's Spit. As Mr. Long testified, "[T]hat shows the level of interest and maybe level of value we placed in—and the bank placed in the property." And the project is obviously lucrative enough for KDP to enter into a development agreement with the Town of Kiawah Island, which, logically, would also stand to benefit economically from additional residents at the development and from the tourism that Beachwalker Park would continue to generate. In fact, the Supreme Court did not dispute this Court's finding of an economic benefit of the project to the developer, KDP, but indeed acknowledged it. However, economic benefit versus the benefits of leaving the area in its natural state is only one of ten considerations under Section 48-39-150, as well as the policies in Sections 48-39-20 and -30, and applicable regulations. Simply because KDP and not the general public would be the **primary** economic beneficiary of the project does not mean that there are not other benefits inuring to the general public from the project that, taken into consideration with all of the other factors, would result in the project bringing the maximum benefit to the public as a whole; in short, economic benefit to KDP does not end the inquiry.

Coastal next argues that the Court erred in stating that Coastal's position was that the public is the adjacent owner to the Spit by virtue of Beachwalker Park. Coastal instead argues that though the public is not the owner of the land side of the Spit or of the Park, the public is the owner of the critical areas (lands below the mean high water mark) on the three sides of the Spit pursuant to the Public Trust Doctrine.

First, I agree that the Court misstated Coastal's position with respect to the public being the adjacent owner by virtue of Beachwalker Park. Therefore, the Court has amended the Order on Remand accordingly. As to Coastal's position concerning the public ownership of the lands

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below the high water mark, Coastal has provided no authority to support its position that the "value and enjoyment of adjacent owners" under Section 48-39-150(A)(10) encompasses the public as an adjacent owner under the public trust doctrine. Moreover, based on the reasoning of prior South Carolina Supreme Court cases in similar situations, it would appear that Coastal lacks standing to challenge the proposed use's effects on the value and enjoyment of the public on these lands, assuming that the public can even be considered an "adjacent owner" under 48-39-150(A)(10). *See Ex parte State ex rel. Wilson*, 391 S.C. 565, 574, 707 S.E.2d 402, 407 (2011) (rejecting private party appellants' argument of standing to challenge annexation of marshlands held in trust by the State) (citing *St. Andrews Pub. Serv. Dist. v. City Council of City of Charleston*, 349 S.C. 602, 564 S.E.2d 647, (2002) (holding that "the only non-statutory party which may challenge a municipal annexation is the State . . . 'acting in the public interest.'").[8] Therefore, the Court rejects Coastal's argument.

Application of Regulation 30-11(C)(1)

Coastal next argues that this Court erred in finding that the "'general character of the [greater] area'[9] is 'residential, with some commercial development,' [because this] is inconsistent with all of the testimony and evidence describing the character and nature of the Spit." (emphasis removed). Coastal asserts that by referring to the "greater area" instead of "area," this Court changed the standard under 2 S.C. Code Ann. Regs. 30-11(C)(1) (2011). I disagree.

Regulation 30-11(C)(1) requires the Court to base its decision in part on "(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." As the Supreme Court noted in its Opinion, "area" under the provision is ambiguous. The Supreme Court also rebuked the ALC for not deferring to the Department's interpretation of the provision "as requiring it to consider not only a proposed project's impact on the critical area, but also the project's impacts on upland areas within

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[8] Indeed, in *Wilson*, the Supreme Court also rejected the private party appellants' argument that they would suffer individualized harm because their enjoyment of the annexed property would "be harmed by the development of the property into commercial and residential units." The Court reasoned that "[t]his alleged harm is shared by all, and like Appellants' public trust claim, this argument, if accepted would effectively overrule [the Court's] decision in *St. Andrews Public Service District*." 391 S.C. at 574, 707 S.E.2d at 407.

[9] Coastal apparently meant that the Court found that the "general character of the **greater** area" (emphasis added) is "residential, with some commercial development." This is what the Court actually said, which is why "greater" is included in brackets in the misquote above.

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the larger coastal zone." *Kiawah*, 411 S.C. at 32, 766 S.E.2d at 717. More specifically, the Supreme Court stated that this Court "erred in failing to give deference to DHEC's interpretation and construing regulation 30–11(C)(1) as not permitting consideration of upland impacts." The Supreme Court did not find that the cumulative negative effects were such that the permit could not be sustained. Thus, the fact that this Court is now considering the "greater area" around the critical area where the project will be located (i.e., the coastal zone, which includes the uplands) is consistent with the Supreme Court's directive and defers to the very "specialized knowledge" of the Department that Coastal accuses this Court of ignoring.

Further, the record supports the Court's finding that this greater area includes mostly residential development with some commercial development. The proposed structure would run from the northeastern end of Beachwalker Park southwesterly on the bank of the river along the isthmus, or neck, of the Spit. Further, the master development plan for Kiawah Island embodied in the Development Agreement (KDP Exhibit 2) treats the Spit as part of the overall development of the island. The Spit is identified as "Parcel 12B" and addressed at length in section 16(f) of the Development Agreement. (KDP Exh. 2 at 21-23).

Consistent with the Opinion, this Court recognized that the upland that is immediately adjacent to the western end of the proposed structure that is now undeveloped will be developed. This Court then fully assessed the long-range, cumulative effects of this proposed limited residential development. This assessment is exactly what the regulation and the Opinion require. This Court, as fact finder, had to determine the "extent to which long-range, cumulative effects of the project [the erosion control structure] may result within the context of other possible development and the general character of the area [the coastal zone outside the project]."

The findings in the Order on Remand regarding the effects of the proposed residential development are fully supported by the evidence. The record shows that the only analysis of the proposed future residential development conducted by DHEC was a comparison of the Spit in its natural, undeveloped state with its developed state. DHEC sought no information on the specifics of the future residential development. Consequently, DHEC did not assess or critique the development methods, did not evaluate the impacts from the specific development planned by KDP, and did not determine whether those specific development measures were consistent with the CZMP.

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Coastal also alleges that "[m]ost of the new findings in the Order on Remand are unsupported by the evidence . . . ." In support of this allegation, Coastal provides in footnote 4 of its motion examples of findings that it claims is unsupported by evidence in the record. Specifically, these findings are as follows: "most of the houses probably will be second homes"; these homes would be "occupied on an infrequent basis, usually six to eight weeks" per year; and the houses on the Spit would be constructed over "twenty to thirty years." However, the following pages of the transcript reflect support for those findings: pertaining to second homes, *see* 171:25-172:14 (specifically, 172:11-14); pertaining to six to eight weeks of occupancy, *see* 174:19-176:2 (specifically, 175:15-17); and pertaining to houses being constructed over twenty to thirty year, *see* 1580:7-18. As to the remainder of Coastal's general and unsubstantiated allegation that the Court's new findings are unsupported by evidence in the record, the Court stands by its findings as supported by the record on appeal.

Finally, Coastal argues that the Court would have to have ignored its and the Department's testimony in order to conclude that they did not present evidence of cumulative impacts. The Court will modify the wording in the Amended Order on Remand, but this Court **did not** ignore evidence presented by Coastal's or the Department's witnesses; the Court just gave more weight to KDP's, which the Court is entitled to do as the finder of fact in this *de novo* contested case hearing. *See Risher v. S.C. Dep't of Health and Envtl. Control*, 393 S.C. 198, 207, 712 S.E.2d 428, 433 (2011) ("the ALC acts as the fact-finder in reviewing permitting decisions and is not restricted by the findings of the administrative agency"); *see also Estate of Hicks*, 284 S.C. 462, 466, 327 S.E.2d 345, 348 (1985) ("It is the duty of the trier of facts to evaluate witness testimony and assign to it such weight as he determines proper.").

Authorization of the Bulkhead

Coastal argues that the Court's authorization of the bulkhead beyond the revetment is not supported by evidence of the bulkhead's viability without a supporting revetment. It asserts that "[n]o evidence supports the finding that a bulkhead without a supporting revetment would be technically possible, feasible, or advisable, much less whether it would serve the project purpose."

First, bulkheads do not require revetments in order to be viable erosion control structures. Indeed, a stand-alone bulkhead is one of the types of erosion control structures listed in S.C. Code Ann. Regs. 30-1(D)(22)(b) that may be permitted. According to the testimony of Mr. Long, "The bulkhead . . . [is] oftentimes not combined with a revetment." (Tr. 110:4-7). Bulkheads have been

approved for use without an accompanying revetment throughout coastal South Carolina. In short, there is nothing revolutionary or unusual about a bulkhead being an erosion control device in and of itself. In fact, DHEC previously approved a stand-alone bulkhead for the 270 feet adjacent to Beachwalker Park.

As to the viability of the stretch of bulkhead without a revetment, KDP's Exhibit 44 shows the bulkhead retaining wall extending for a significant length below the top of the revetment. Mr. Bohanon testified that the top of the bulkhead would be installed just below the top of the escarpment ". . . . so it would stop the erosion." (Tr. 475:13-14). As the Coastal notes, the revetment helps retard erosion at the toe of the bulkhead, i.e. where the vertical face of the bulkhead penetrates the riverbank. However, the absence of a revetment does not eliminate the erosion control qualities of the bulkhead that is designed to retain the highland behind it.

Moreover, Coastal **never** raised the issue of viability of the bulkhead alone. Permitting the bulkhead without the revetment for any length is less than what was sought in the application. Because the application sought a bulkhead **and** a revetment for the full 2,783 feet, and Coastal knew or should have known that this Court could grant all or part of that which was applied for, Coastal could have argued that the bulkhead was not viable by itself, but instead provided no evidence to that effect.[10]

Coastal further argues that there is no evidence that the bulkhead alone would have, in the Court's words, "de minimus impact upon the public use of the shoreline." Coastal opposes any kind of protection of the Spit against erosion, arguing instead in favor of the public benefit from leaving it in its natural state. However, as addressed below, I find that the benefit of KDP's development of its property outweighs the benefit of leaving the property in its natural state. Furthermore, the public benefit that Coastal's evidence primarily sought to protect is the use of the shoreline ensuing from leaving the area in its natural state, and there is no evidence that a bulkhead will deter that use. As Coastal argued in its Brief on Public Benefits, "Section 48-39-30(D) . . . **ensures protection of public uses threatened by a proposed project**." (emphasis added). Coastal further explains that:

> In this case, the existing combination of uses of the critical area that would be impacted by the proposed project include: members of the public walking along the sandy shoreline; members of the public launching from and pulling kayaks up onto

[10] Coastal also strongly objected to the reopening of the Record to present any additional evidence.

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> the sandy shoreline; members of the public fishing and crabbing from the sandy shoreline; members of the public enjoying picnics on the sandy shoreline; and members of the public just sitting on the sandy shoreline watching birds, dolphins and the pristine environs. . . .

However, the bulkhead does not affect these uses. Moreover, the limited impact of the bulkhead is in keeping with the analysis proposed by Coastal. Indeed, in distinguishing how private docks and bulkheads would still be allowed under the Supreme Court's decision, Coastal explains that:

> As to a bulkhead on a private individual's lot, bulkheads and revetments can only be constructed up to 18 inches from the escarpment or critical area line. S.C. Code Ann. Reg. 30-12(C)(1)(b) ("Structures may be constructed up to 18 inches from the existing escarpment."); See also Hill v. DHEC, 389 S.C. 1 (2010). This 18 inch limitation provides assurance that such structures will have limited encroachment on critical areas.

Here, the bulkhead will be located on a private individual's lot and thus will be no greater than 18 inches from the escarpment or critical area line. Consequently, the bulkhead at issue "will have limited encroachment on critical areas," which will protect the public interest that Coastal asserts it wishes to protect. Moreover, the existing erosion has already reached the location where the bulkhead would be, as is evidenced by the escarpment. Furthermore, the bulkhead does not extend over the riverbank. In fact, the exposed portion of the bulkhead would be against the exposed vertical escarpment. Individuals accessing the shoreline from the river would have full use of the riverbank.[11]

Additional Findings

Local Zoning, Land Use Decisions, and Development Approval

Coastal further argues that in determining whether the permitting requirements were satisfied, it is irrelevant whether denial of the permit "contradicts [a] local land use decision" and "whether 'KDP can satisfy the Town['s] ordinances . . . without stabilization of the riverbank[.]'" Coastal also argues that there is no evidence to support the fact that the Town of Kiawah Island has a goal of developing the Spit or that the Town's approval of the Spit's development is a public benefit.

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[11] Even had the erosion not reached where the bulkhead would be, regardless of whether a bulkhead were installed, the erosion would still occur and the sandy beach would be lost, leaving either the bulkhead (if installed) or an escarpment (if the bulkhead is not installed). At least with a bulkhead, the public could still enjoy the beach while it exists **and** property owners within the development can protect their property from being lost to erosion. And either way, people will still be able to walk the riverbank.

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The Court mentioned the frustration of the zoning and land use determinations of the Town of Kiawah Island in its calculus of the comparative merits of leaving the shoreline in a natural state versus stabilizing the location of the riverbank with an erosion control structure. There is nothing in the statutes or regulations that prohibits the agency or this Court from taking zoning into account as one of the considerations when determining the pros and cons of allowing the erosion to continue. The zoning also may be considered in the feasibility analysis under Reg. 30-11(D)(23) ("... consideration of factors of environmental, **economic**, social, legal and technological **suitability of the proposed activity and its alternatives**....") (emphasis added).

Moreover, this Court is entitled to consider the local government's zoning of the adjacent upland, especially as pertains to "the context of other possible development and the general character of the area" under Reg. 30-11(C)(1). Further, the Court's observation is appropriate under the policy set forth in S.C. Code §48-39-30(B)(5): "To encourage and assist . . . municipalities . . . 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."

The finding that KDP cannot satisfy the ordinances of the Town of Kiawah Island that govern subdivisions without stabilization of the riverbank is pertinent to KDP's need for the erosion control structure. Without the erosion control structure, the evidence establishes that KDP cannot stabilize the shoreline, and without stabilizing the shoreline, KDP cannot comply with the town's development ordinances. If KDP cannot comply with these ordinances, then there will be no additional beach parking (and thus increasingly limited access to Beachwalker Park), and therefore no attending economic benefits to KDP, the Town, and the rest of the general public.

Finally, as mentioned in the Order on Remand, there is evidence in the record, as reflected in Section 16(f) of the Development Agreement between KDP and the Town of Kiawah Island that the Town agreed to KDP's limited residential development of the Spit. It is reasonable for this Court, as the finder of fact, to infer from that agreement that the Town will benefit from that development and that the Court should consider the Town's agreement to the plan in determining whether the development of the Spit is in the "public interest." Indeed, the Town's assent to the Development Agreement would be an even greater consideration because it represents the citizens of that jurisdiction. *See Kiawah*, 411 S.C. at 31 n.5, 766 S.E.2d at 716 n.5.

Effects of the Bulkhead and Revetment on Erosion, Breach, and Accretion

Coastal next argues that the Court's finding that the "bulkhead and revetment will not have any material effect on . . . the historical process of cyclical erosion, breach, and accretion" is not supported by the evidence. Coastal contends that because bulkhead and revetment would stop erosion, then they would necessarily affect the natural erosion cycle along the Kiawah River shoreline. I agree that the bulkhead and revetment would affect the natural erosion cycle, but not installing the bulkhead and revetment will not ultimately prevent the sandy shoreline from naturally eroding into an escarpment inaccessible to kayakers and unsafe to anyone approaching from the land side. Accordingly, the Court has clarified its language in the Amended Order on Remand. However, the Court's findings that the bulkhead and revetment will not have a material effect on the previous historical process of elongation, breach, and accretion is fully supported by the testimony of Dr. Kana and Dr. Young.

Dr. Kana testified that the periodic relocations of Captain Sam's Inlet eastward have both added to the accretion of the beach and made it highly unlikely the Spit would breach. In effect, the historical natural elongation-and-breach cycle no longer exists. Rather than nature moving the inlet east every hundred years or so, the inlet is relocated east by engineering design every ten to fifteen years. Dr. Kana testified that the adjoining inlet provides an outlet for storm surge. With the periodic man-made relocations of the inlet that rapidly increase the sand accumulation on Captain Sam's Spit, Dr. Kana expects the neck of the spit to get wider and stated the chances of the spit breaching are very small.

Dr. Young's testimony as to the vitality of the Spit did not vary in substance from Dr. Kana's. Dr. Young testified that the beach and dune ridges on the Spit are extremely robust, even at the neck, and that he has "not seen an area with that volume of sand and that elevation breach." He posited that the risk of the Spit breaching would be "pretty low" unless it took a direct hit of a category five hurricane that "was the mother of all storms" that could "rip the island in two."

The Court's finding that allowing erosion to proceed unabated could ultimately turn the shoreline into a steep escarpment is also supported by the evidence, contrary to Coastal's argument otherwise. The photographs admitted into evidence show various locations where the escarpment is extremely high and steep. (KDP Ex. 5). The Court did not find that allowing the erosion to proceed unchecked would necessarily eliminate the sandy shoreline, only that it **could** turn the shoreline into a steep escarpment (as the photographs suggest), making it inaccessible to kayakers

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and unsafe. If this were to occur, Coastal's position of allowing the natural process to take place would ultimately prove antithetical to the public's use of the shoreline, which is the primary evidentiary impetus for Coastal's case.

Contrary to Coastal's implication that this Court ignored the "undisputed evidence of public benefit in leaving the shoreline unarmored and allowing the natural process to take place," this Court did acknowledge that public benefit; this Court honored the Supreme Court majority's determination in the Opinion that the revetment would have a substantial adverse effect on public access. For this reason, the Court limited the revetment to no more than 270 feet adjacent to Beachwalker Park and required it be covered with a foot of sand. The effect on public access is essentially one tenth of the effect as the permit originally approved by this Court in early 2010. But the Court is still allowing the bulkhead and the revetment (in part) because the Court, as the finder of fact, gave greater weight to other uses that, in combination, provided the maximum benefit to the public.

Authorization of a Structure Beyond What Was Approved by DHEC

Coastal "maintains its position that the combination of uses that provides the maximum public benefit to the people of South Carolina is to leave the banks of the Kiawah River in their natural and unaltered state without any hard erosion control structure." However, Coastal does concede at least that the Supreme Court's Opinion could possibly be interpreted as allowing for erosion control structures for the 270 feet adjacent to Beachwalker Park, i.e., viewing them as providing the source of maximum benefits to the public.

The Court, for the reasons discussed above and in the Amended Order on Remand, disagrees with Coastal's position. However, the Court agrees with Coastal that the Supreme Court's Opinion allows for 270 feet of revetment adjacent to Beachwalker Park; but the Court believes that the bulkhead is allowable for the full 2,783 feet applied for, and for the reasons stated herein and in the Amended Order on Remand.

DHEC's Reconsideration Arguments

As Coastal acknowledges in its Response to DHEC's Motion for Reconsideration and for Clarification, nearly all of DHEC's reconsideration arguments are identical to Coastal's, except as to the public benefit of protecting Beachwalker Park and its parking lot. DHEC and Coastal

disagree on whether even 270 feet of bulkhead and revetment will benefit the public.[12] As such, the Court declines to address the Department's arguments again and instead responds to them with the responses stated above. Moreover, though the Court agrees with the Department about the need for a revetment for the originally permitted 270 feet, the Court disagrees with the Department that the bulkhead should be limited to 270 feet and instead believes that the bulkhead is allowable for the full 2,783 feet applied for, and for the reasons stated herein and in the Amended Order on Remand.

ORDER

IT IS THEREFORE ORDERED that KDP's, Coastal's, and DHEC's Motions for Clarification are, in part, **GRANTED**, and this will be reflected in the Amended Final Order and Decision on Remand.

IT IS FURTHER ORDERED that Coastal's and DHEC's Motions for Reconsideration are **GRANTED IN PART AND DENIED IN PART**, in keeping with this Order.

IT IS FURTHER ORDERED that all additional factual findings in this Order are incorporated into the Amended Final Order and Decision on Remand as findings of fact.

IT IS FURTHER ORDERED that all additional legal conclusions in this Order are incorporated into the Amended Order Final Order and Decision on Remand as conclusions of law.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

March 22, 2016
Columbia, South Carolina

[12] DHEC agrees with the Court that the bulkhead and revetment for 270 feet will benefit the public as a whole, because "it will protect the heavily-used Beachwalker Park parking lot from damage caused by erosion along the Kiawah River."

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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