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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Case No. 11-ALJ-07-0425-CC

RECEIVED  
OCT 10 2012  
SC Court of Appeals

South Carolina Coastal Conservation League and  
Save the Angel Oak . . . . . Appellants,

vs.

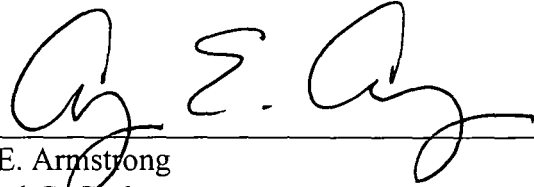
South Carolina Department of Health and Environmental Control and  
Angel Oak Village, LLC, . . . . . Respondents.

**NOTICE OF APPEAL**

South Carolina Coastal Conservation League and Save the Angel Oak hereby appeal the Final Order and Decision issued by the Honorable John D. McLeod, Administrative Law Judge, dated and filed July 25, 2012. A copy of the decision was received by counsel for the South Carolina Coastal Conservation League and Save the Angel Oak on July 25, 2012.

The South Carolina Coastal Conservation League and Save the Angel Oak timely filed a Motion to Alter or Amend and to Reconsider pursuant to South Carolina Administrative Law Court Rule 29.E.(1) and South Carolina Rules of Civil Procedure Rule 59(e) on August 6, 2012. The Administrative Law Judge did not file an Order on Appellants' Motion and it was thus deemed denied on September 5, 2012, pursuant to South Carolina Administrative Law Court Rule 29.D.(2). This appeal is being filed thirty (30) days after the motion was deemed denied.

Clocked-in copies of the Final Order and Decision and the Motion to Alter or Amend and to Reconsider are being submitted to the Court together with this Notice of Appeal in accordance with ACR Rule 203(d)(2)(B).



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PROJECT

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October 5, 2012

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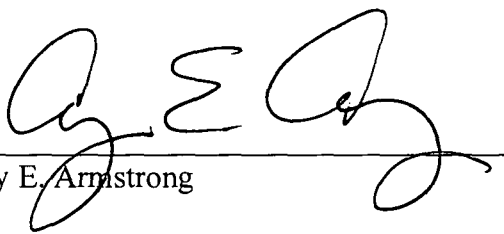
**CERTIFICATE OF SERVICE**

I hereby certify that on this date I served the foregoing Notice of Appeal upon counsel for the Respondents, by placing copies of same in the United State Mail, addressed to:

Honorable Jana Shealy, Clerk  
S.C. Administrative Law Court  
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Amy E. Armstrong

Georgetown, South Carolina

October 5, 2012

# South Carolina Environmental Law Project

*Lawyers for the wild side of South Carolina*

a 501c3 non-profit  
organization

October 5, 2012

**Amy E. Armstrong**  
*President*

**Michael G. Corley**  
*Staff Attorney*

Honorable Jenny Abbott Kitchings  
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RE: *South Carolina Coastal Conservation League & Save  
the Angel Oak vs. South Carolina Department of  
Health and Environmental Control and Angel Oak  
Village, LLC*  
Case No. 11-ALJ-07-0425-CC

## **BOARD OF DIRECTORS**

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Dear Ms. Kitchings:

Enclosed for filing please find a Notice of Appeal, copy of the decision on appeal and my certificate of service, along with the filing fee. I have also enclosed a copy of the letter I submitted to the Clerk of the Administrative Law Court indicating that I am simultaneously filing a copy of the Notice of Appeal in the ALC.

Kindly have your staff return a clocked-in copy in the envelope provided.

Yours very truly,

  
Amy E. Armstrong

## **OUR MISSION**

*To protect the natural  
environment of South  
Carolina by providing  
legal services and advice  
to environmental  
organizations and  
concerned citizens  
and by improving the  
state's system of  
environmental  
regulation.*

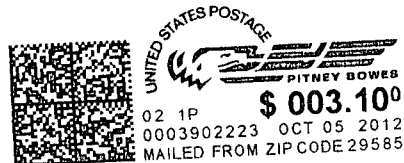
cc: Stephen Hightower, Esquire  
Mary D. Shahid, Esquire  
Honorable Jana Shealy, Clerk, ALC  
Dana Beach  
Samantha Siegel

**RECEIVED**

OCT 10 2012

**SC Court of Appeals**

S.C. Environmental Law Project  
Post Office Box 1380  
Pawleys Island, SC 29585



Jenny Abbott Kit  
Clerk, S.C. Court  
P.O. Box 11629  
Columbia, SC 292

SAVED  
OCT 05 2012

STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League and )  
Save the Angel Oak, )  
)  
Petitioners, )

vs. )

South Carolina Department of Health and )  
Environmental Control and Angel Oak Village, )  
LLC, )  
)  
Respondents. )

Docket No. 11-ALJ-07-0425-CC

**MOTION  
TO  
ALTER OR AMEND  
AND TO  
RECONSIDER**

TO: ADMINISTRATIVE LAW JUDGE RALPH KING ANDERSON, III, AND THE  
RESPONDENTS

PLEASE TAKE NOTICE that the Petitioners South Carolina Coastal Conservation League and Save the Angel Oak hereby move the Court, pursuant to Administrative Law Court Rule 29(D) and S.C. Rules of Civil Procedure Rule 59(e), for an order reconsidering the Order of July 25, 2012, and altering or amending that Order.

The grounds for this motion are that the Order makes findings without any evidentiary support, makes an error of law by failing to apply the proper regulatory definition, and fails to address multiple errors of law pressed by the Petitioners.

***Errors in Findings of Fact***

First of all, the Order gave significant weight to Dr. Ham's reliance on opinions of James Gregory, PhD., the hydrologist assessing the project. (Order, pp. 23-24, Findings of Fact # 26, 39, 40 & 42). Findings of Fact 39, 40 and 42 rely on Dr. Gregory's opinions related to hydrology and drainage patterns to conclude that the project would not have adverse impacts. The weight given to Dr. Gregory's opinions is misplaced given the unreliability of his opinions. The

**FILED**

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SC ADMIN. LAW COURT

undisputed fact is that Gregory concluded that the onsite wetlands were “isolated” and that these 6.466 acres of wetlands did not flow into Church Creek. (Day 1, Tr. 208; Pet. Ex. 29). The U.S Army Corps of Engineers deemed the wetlands “non-jurisdictional” based on Dr. Gregory’s assessment, which meant that no Clean Water Act permit or 401 Water Quality Certification was required.

The Order fails to acknowledge that it was Dr. Jean Everett’s review of the soil maps and a site inspection which determined that the wetlands, in fact, drained into Church Creek. (Day 1, Tr. 175-76). Dr. Everett’s analysis was transmitted to the Corps of Engineers, who made a site inspection and agreed with Dr. Everett that the wetlands did flow into Church Creek and were thus subject to Clean Water Act jurisdiction. (Day 1, Tr.175-76; Pet. Ex. 29). The Order errs in giving significant weight to the opinions of Dr. Gregory – a witness not present at trial – despite the undisputed fact that the Corps rejected Dr. Gregory’s assessment of the wetlands and their connection to Church Creek. (Day 1, Tr. 209).

Secondly, the Order finds that Dr. Everett could not confirm that the Angel Oak would be negatively affected by the proposed development and that Dr. Everett could not project hydrologic influences. (Order, FF # 43). The Order finds Dr. Everett’s testimony unreliable because she did not state that the development would “definitely have a negative effect on the tree.” (Order, FF # 46). These findings are contrary to Dr. Everett’s opinions and are thus in error. 32A C.J.S. Evidence § 727, at 82-83 (“the triers of the facts cannot . . . arbitrarily or lightly disregard, or capriciously reject, the testimony of experts or skilled witnesses, and make an unsupported finding contrary to the opinion.”).

Dr. Everett opined that the loss of the trees<sup>1</sup> would result in the water table rising, decreasing the infiltration capacity for rainfall events, and causing water to be transported offsite. (Day 1, Tyr. 210 & 212-213). Dr. Everett testified that the Angel Oak's root system is integrated across the currently forested site, and this project will be a significant change to the system. (Day 1, Tr. 213). Dr. Everett believes that the Angel Oak may not be able to survive such an abrupt change, and that the change would be negative in terms of the health of the Angel Oak. (Day 1, Tr. 213 & 219). The proposed development would sever the below ground mycorrhizal networks abruptly at the edge. (Day 1, Tr. 221). With its extensive root system, there would be a significant negative impact on the Angel Oak. (Day 1, Tr. 221). If the Angel Oak loses its mycorrhizal networks through severing, Dr. Everett is absolutely certain that the Angel Oak will suffer injury. (Day 1, Tr. 256). Dr. Ham, on the other hand, recognized there would be some effect, but did not have any opinions on how removal of the surrounding forest would affect nutrient transfer through these mycorrhizal networks. (Day 3, Tr. 125).

While significance of the impacts may be in dispute, there is no question but that Dr. Everett's opinion is that the Angel Oak will be significantly negatively affected by the proposed development because of the loss of mycorrhizal networks.

As to the hydrologic consequences, Dr. Ham agreed that when groundwater infiltration is reduced as a result of the construction process, the groundwater table would rise. (Day 3, Tr. 123). And if the groundwater table rises, the root system of the Angel Oak could become flooded and it would not be able to get sufficient oxygen, according to Dr. Ham. (Day 3, Tr. 123). If the flooding lasts long enough the entire root system and the whole tree could die. (Day

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<sup>1</sup>The project site contains 1,682 protected trees. (Day 3, Tr. 62). The developer is retaining 361 trees. (Day 3, Tr. 62). Thus, 80% of the trees on the project site will be removed.

3, Tr. 123). Even the Environmental Protection Agency expressed concern that the “development will surround the preserved areas with impervious surfaces which will greatly alter the current hydrologic and chemical functions performed by the wetlands.” (Pet. Ex. 35; Day 2, Tr. 246).

Finding of Fact #43 should be amended to reflect the undisputed testimony related the loss of mycorrhizal networks and hydrologic alteration.

Third, the Order recognizes that Church Creek is on the 303(d) list and currently restricted for shellfish harvesting because fecal coliform bacteria levels are too high for human consumption. (Final Order & Decision, pp. 11-12). Yet, the Order fails to recognize the undisputed fact that the cause of this high level of fecal coliform is nonpoint source stormwater runoff from the surrounding development, as there are no point source discharges into Church Creek. (Day 1, Tr. 92; Day 2, Tr. 51).

Fourth, the Order finds that “Petitioners offered no credible evidence, from a design professional, that the access road, interior roads, and parking could feasibly be moved into upland areas.” (Order, FF # 59). The Order continues that the Petitioners “failed to demonstrate that there are feasible alternatives to the project as proposed.” (Order, FF # 62). These findings completely overlook the testimony of “design professional” and City of Charleston Planner Tim Keane, who testified that “you could design the road through the site in a lot of different ways” and meet City requirements of connectivity through the site. (Day 3, Tr. 315, lines 17-19). He even admitted that the project could have fewer exits, and thus less wetland impacts, and still comply with City requirements. (Day 3, Tr. 317). This testimony that entry points to and from the site could be decreased – testimony from AOV-AOD’s witness – clearly demonstrates that the road crossings through wetlands could be decreased, thereby decreasing wetlands impacts.

The League asked the head of the City of Charleston's Planning Department to review the permitted plans. (Day 1, Tr. 155-56). The planner opined that there were modifications that could be made to the plans to reduce the impacts to the permitted 2.23 acres of wetlands. (Day 1, Tr. 155). The Corps of Engineers and the EPA told Mr. DeMoura that if Phase II was "conceptual," then it would be practicable to shift some of the Phase I development into Phase II, and avoid the wetlands impacts. (Pet. Ex. 35). There are no wetlands on Phase II. The League presented evidence and testified that there is sufficient acreage on the tract to avoid filling the wetlands. (Day 1, Tr. 168).

The Order bases its findings and conclusions on feasibility on assertions related to financial feasibility made by the developer. Finding of Fact # 59 is contrary to the testimony that the League presented on financially feasible alternatives. The League attempted to work with the developer to "come up with a solution that both sides agree on" and to "work with the developer to financially make it possible to change the project." (Day 1, Tr. 150, lines 20-25). The League had an appraisal conducted of Phase II of the project, and offered to help find funds to for the appraised value. (Day 1, Tr. 84). If Phase II were purchased and protected, the density would be reduced, the amount of impervious surfaces would be reduced; and the public land base would be increased, which would be a win-win-win opportunity. (Day 1, Tr. 83).

***Errors in Conclusions of Law and Points of Law Overlooked***

The Order concludes that "there is no definition of 'feasible alternatives' in the State's regulations, and then goes on to cite the Army Corps of Engineers definition of "practicableness." (Conclusion of Law # 9). This conclusion overlooks the definition of "feasibility" in State Regulation 30-1.D.(23). State regulations define feasibility as follows: "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.” S.C. Code Ann. Regs. 30-1(D)(23). The Order should be amended to reflect the State’s regulatory definition of feasibility.

Regulation 61-101.F.(3) requires DHEC to address and consider several water quality criteria, including whether the project is water dependent, consideration of “all potential water quality impacts of the project, both direct and indirect, over the life of the project,” “the effect on circulation patterns and water movement” and all “physical, chemical, and biological impacts.” R.61-101.F(3). While the Order concludes that Regulation 61-101.F.(3) applies and cites the applicable language, it fails to make any conclusion that the project is in compliance with the criteria set forth in R. 61-101.F(3). (Conclusion of Law # 7). Specifically, the Order fails to find and conclude that the project is not water dependent and fails to conclude that DHEC did not consider the physical, chemical, and biological impacts, including cumulative impacts; the effect on circulation patterns and water movement; and the cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others. And the Order fails to rule on whether Regulation 61-101 requires DHEC to consider impacts to the Angel Oak and Angel Oak Park.

The Order finds and concludes that Regulation 61-101.F.(5)(a) and (b) are applicable, citing the language of the regulations. (Order, FF # 52, CL # 8). But the Order fails to make conclusions that the project complies with or is inconsistent with R. 61-101.F.(5)(a), which requires DHEC to deny certification if “the proposed activity permanently alters the aquatic

ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired.” R. 61-101.F(5)(a).

Dr. Holland explained that the aquatic ecosystem in the vicinity of the project includes the creek network of the onsite wetlands, Church Creek, Bohicket Creek and smaller tidal creeks. (Day 2, Tr. 119). DHEC’s Erin Owen agreed with that assessment, and was the only other witness to testify regarding the aquatic ecosystem. Holland and Owen agree that the aquatic ecosystem includes groundwater under Regulation 61-101. (Day 2, Tr. 295). Dr. Holland explained that the ecosystem is one of the most used by residents for fishing and shellfishing. (Day 2, Tr. 119). The aquatic ecosystem as it stands today is cleansing our water, treating our waste, providing a nursery for commercial and recreational fisheries, processes pollutants, and protects us from storm surges. (Day 2, Tr. 121). Dr. Holland’s undisputed testimony is that all of these functions will be impaired or lessened by the proposed project. (Day 2, Tr. 121-22). If you fill in the two acres of wetlands, that will impair the wetlands, but it will also lead to lower oxygen and higher level of fecal coliform, which would “be a worsening of conditions” within the aquatic ecosystem. (Day 2, Tr. 208, line 12). Finally, Dr. Holland opined that the proposed development will impair the indigenous aquatic community in the vicinity of the project. (Day 2, Tr. 119). Dr. Holland suggested that water quality impacts could be decreased by minimizing impervious surfaces and decreasing density of the project. (Day 2, Tr. 199).

Mr. Karkowski did not consider the wetland or ecosystem impacts in his water quality analysis. (Day 3, Tr. 270). DHEC acknowledged that the project would result in the permanent impairment to the aquatic ecosystem. But Ms. Owen felt that this impairment was justified because the fill was compensated for by the purchase of offsite mitigation credits. (Day 2, Tr. 242-43).

The Order errs in failing to conclude that the aquatic ecosystem in the vicinity of the project would be permanently altered and impaired and should be corrected to so conclude.

The Order fails to make conclusions related to Regulation 61-68(A)(2). Regulation 61-68(A)(2) directs DHEC to maintain and improve water quality standards. Specifically, “waters which do not meet standards shall be improved wherever attainable to achieve those standards.”

S.C. Code Ann. Reg. 61-68(a)(2). Church Creek is classified as a Shellfish Harvesting water.

Regulation 61-68(E)(10) mandates that “Discharge of fill into waters of the State is not allowed unless the activity is consistent with department regulations and **will result in enhancement of classified uses** with no significant degradation to the aquatic ecosystem or water quality.”

DHEC concluded that the project would not improve the impaired condition of Church Creek.

(Day 2, Tr. 240). Mr. Karkowski agreed that the Church Creek would not be enhanced. Dr.

Holland testified that the impairment would be worsened. The undisputed evidence is that the project will not enhance the classified uses of Shellfish Harvesting in Church Creek, and thus the project violates R. 61-68.E.(10). The Order fails to address the applicability of this regulation, and specifically fails to conclude that the project is inconsistent with R. 61-68.E(10) because it will not enhance the Shellfish Harvesting uses of Church Creek.

Regulation 61-101.F(5)(d) requires DHEC to deny certification if “the proposed activity adversely impacts special or unique habitats, such as National Wild and Scenic Rivers, National Estuarine Research Reserves, or National Ecological Preserves, or designated State Scenic Rivers.” The Order fails to apply Regulation 61-101.F(5)(d) and conclude that the Angel Oak and the Angel Oak Park are special and unique habitats, and that these habitats will be adversely impacted by the proposed project. The Staff Assessment concludes that consideration of the effect of the project on the Angel Oak tree is not within the scope of DHEC’s 401 certification

review. (Day 2, Tr. 214; Pet. Ex. 30). Similarly, DHEC did not consider impact to the Angel Oak Park resulting from the proposed project. (Day 2, Tr. 216; Pet. Ex. 30). DHEC did not consider impacts to the Angel Oak Park. (Day 2, Tr. 221). In fact, DHEC did not give the Angel Oak any more weight than it would any other offsite tree. (Day 2, Tr. 250). The Order fails to conclude that consideration of the Angel Oak is within the scope of DHEC's 401 certification.

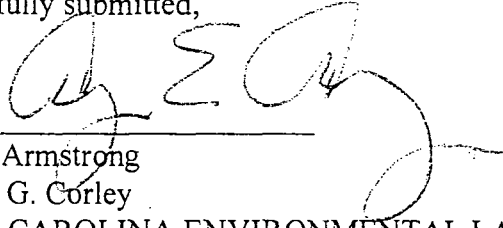
Similarly the CMP requires consideration of a project's impact on "unique natural areas," "public recreational lands," and "historical or archeological resources." See CMP Guidelines for Evaluation of All Projects, p. III-14 at I(9). The CMP requires DHEC to consider "the possible long-range, cumulative effects of the project, when reviewed in the context of other possible development and the general character of the area." CMP Guidelines for Evaluation of All Projects, p. III-14 at I(7). The CMP provides DHEC authority to consider impacts to the tree and park. The Order fails to apply the CMP and conclude that DHEC failed to consider impacts to the tree and park.

The CMP requires DHEC to consider protection of coastal resources for succeeding generations. See CMP Guidelines for Evaluation of All Projects, p. III-14 at I(1)(b). The Order fails to conclude that DHEC has the authority to consider impacts to the tree and park in its Coastal Zone Consistency Certification and that DHEC erred in failing to give this policy proper weight in relation to the tree and park in granting Coastal Zone Consistency Certification.

## CONCLUSION

For the above reasons, the Petitioners respectfully request that the Administrative Law Judge issue an amended Final Order and Decision consistent with this relief requested in this motion.

Respectfully submitted,



---

Amy E. Armstrong  
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SOUTH CAROLINA ENVIRONMENTAL LAW  
PROJECT

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Georgetown, South Carolina

August 6, 2012

STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League and )  
Save the Angel Oak, )

Petitioners, )

vs. )

South Carolina Department of Health and )  
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LLC, )

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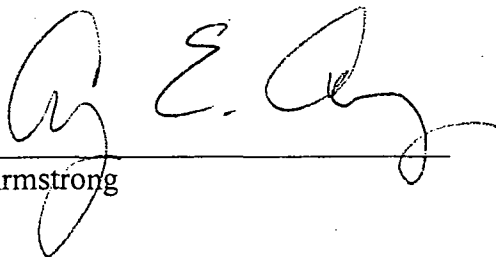
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**CERTIFICATE OF SERVICE**

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Stephen Hightower  
DHEC Legal Office  
2600 Bull Street  
Columbia, SC 29201

Mary Shahid  
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Amy E. Armstrong

Georgetown, South Carolina

August 6, 2012

STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

SOUTH CAROLINA COASTAL  
CONSERVATION LEAGUE AND SAVE  
THE ANGEL OAK,

Petitioners,

vs.

SOUTH CAROLINA DEPARTMENT OF  
HEALTH AND ENVIRONMENTAL  
CONTROL AND ANGEL OAK VILLAGE,  
LLC,\*

Respondents.

Docket No.: 11-ALJ-07-0425-CC

FINAL ORDER AND DECISION

Appearances

Counsel for Petitioner South Carolina Coastal  
Conservation League and Save the Angel Oak:

Amy E. Armstrong, Esquire  
Michael G. Corley, Esquire

Counsel for Respondents South Carolina Department  
Esquire  
of Health and Environmental Control:  
Control:

Stephen P. Hightower,

AOV-AOD, LLC:

Mary D. Shahid, Esquire  
Angelica M. Colwell, Esquire

STATEMENT OF THE CASE

This matter comes before the Administrative Law Court ("ALC" or "the Court") pursuant to a Request for Contested Case Hearing filed by Petitioners South Carolina Coastal Conservation League ("SCCCL") and Save the Angel Oak, challenging the decision of the South Carolina Department of Health and Environmental Control ("DHEC" or "the Department") to

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\* Angel Oak Village-AOD, LLC (Sea Island Phases 1A, 1B and 1C is incorrectly identified as Angel Oak Village, LLC)

**FILED**

JUL 25 2012

issue a water quality certification pursuant to Section 401 of the Clean Water Act and coastal zone consistency certification pursuant to the South Carolina Coastal Zone Management Program ("CZMP") to Angel Oak Village-AOD, LLC (Sea Island Phases 1A, 1B and 1C) ("AOV-AOD"). The three and one-half day hearing was held April 3-6, 2012, before the Administrative Law Court in Columbia, South Carolina.

### **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

Respondent AOV-AOD owns property consisting of 42.41 acres ("the AOV-AOD property") located within the corporate limits of the City of Charleston, on Johns Island, S.C., near the intersection of Maybank Highway and Bohicket Road. AOV-AOD proposes a mixed-use multi-family and commercial development on the property, which includes affordable housing available for rental and sale.

Development on Johns Island was impacted by the adoption of Charleston County's comprehensive land planning effort. The City of Charleston participated in adoption of the plan. Through the comprehensive planning process the County and City agreed upon the establishment of an Urban Growth Boundary line on Johns Island. Tim Keane, the Director of Planning for the City of Charleston, testified for Respondent AOV-AOD regarding the Urban Growth Boundary. Mr. Keane explained that "it's a legislative decision of the municipalities and the county, Charleston County. It is a geographic boundary that creates a land use separation between urban and suburban densities on one side of that boundary and rural and, you know, rural type uses and densities on the other side of the boundary." Tr. Vol. 3, p. 289:5-16. The AOV-AOD property is located within the portions of Johns Island that are designated as urban. According to Keane, "[t]he rural side of the boundary in Charleston County encompasses most of Johns Island. ... [T]he suburban area is much smaller."

In addition to adoption of the Urban Growth Boundary, the City of Charleston developed the "Johns Island Community Plan," adopted by City of Charleston City Council in November of 2007. AOV Ex. 5. Within the context of the Johns Island Community Plan, the AOV-AOD property was designated as one of three identified Gathering Place Districts ("GPD"). AOV Ex. 5, p. 9. "These areas are intended for compact, mixed-use, walkable neighborhoods employing an interconnected and complete network of streets. Further, these areas should accommodate a mix of uses including civic uses (school, library, satellite government offices) that complement existing home-grown businesses rather than displace them during the evolution of Johns Island." AOV Ex. 5, p. 7. The Johns Island Community Plan also addresses the need for affordable housing on Johns Island. The City of Charleston seeks "no less than 30% of new housing on Johns Island to be affordable/workforce." AOV Ex. 5, p. 16.

Importantly, the designation of the Urban Growth Boundary through the Charleston County Comprehensive Plan Process and the adoption of the Johns Island Community Plan with the designation of GPD were accomplished through public processes with the participation of Petitioner SCCCL. Tr. Vol. 3, p. 295-296, 300.

Of the three sites where GPD development is possible, the AOV-AOD property is clearly superior for purposes of development based on its proximity to schools, a County recreational park, the largest grocery store on Johns Island (the Maybank Highway Piggly Wiggly), the library, health care providers (Sea Island Comprehensive Health Care) and multiple churches. According to the City Planning Director, Tim Keane, the AOV-AOD property "really is kind of a neighborhood center of Johns Island. You have where people go to get groceries, you know, other shopping in that zone. The city built a fire station there. You know, there's not just the Angel Oak Park but the city also built a larger recreational park in that area. You know, there's

already multi-family housing. There at that time, you know there had already been planned a new public library. There's a school across the street. ... [I]t's an area where there's a lot existing services. Those are areas we would like to promote. The whole idea was that you promote, you know, further development in areas where you have services so that you can protect those rural areas." Tr. Vol. 3, p. 297-298.

AOV-AOD purchased the property from Sea Island Comprehensive Health Care Corporation ("SICHCC"), a nonprofit entity that owns a health care facility adjacent to the AOV-AOD property and provides health services to low income residents of Johns Island and other near-by sea islands. Tr. Vol. 3, p. 289-290. At the time of the purchase, in 2006, SICHCC was in financial distress. Tr. Vol. 3, p. 12. AOV-AOD entered into a participation agreement with SICHCC through which SICHCC shared in AOV-AOD's profits and revenues from development of the AOV property. In addition, Robert DeMoura, principal of AOV-AOD, testified that he made a \$66,000.00 donation to SICHCC and that AOV-AOD sponsored a fund raising event for SICHCC. Tr. Vol. 4, p. 18-19.

AOV-AOD negotiated a Planned Unit Development "PUD" with the City of Charleston which established allowable density for development of the AOV-AOD property and determined the percentage of affordable housing to be included in the development. The PUD authorized a maximum of 630 multi-family units and 80,000 square feet of retail/commercial space. Development is proposed in two phases and plans for Phase I initially depicted 324 units with Phase II consisting of 300 units. Based on reductions to the project as a result of avoidance and minimization requirements imposed through the Department's review of the permit application, Phase I now includes 274 units and all proposed commercial development in Phase I has been

eliminated.<sup>1</sup> In accord with the PUD, if AOV-AOD develops up to 550 units then it is required to sell or rent 10% of those units as affordable units. The percentage increases to 15% if the developer proposes more than 550 units. Presently, at 274 units, AOV-AOD is required to provide a minimum of 28 affordable units in Phase I. Tr. Vol. 3, p. 305-306, p. 333.

In 2006, AOV-AOD commenced the process of obtaining an approved development plan consistent with the GPD designation from the City of Charleston. The project triggered controversy because of the proximity of development to a notable ancient oak tree known as the “Angel Oak” and because of general opposition from residents of Johns Island and Wadmalaw Island<sup>2</sup>, and from the Petitioner advocacy groups. However, the City of Charleston purchased 2.2 acres of land surrounding the Angel Oak tree and operates a City Park, known as Angel Oak Park, allowing visitors access to the Angel Oak tree. In addition, and as a requirement for obtaining its permit from the United States Army Corps of Engineers (“the Corps”), AOV-AOD sold an additional 6.49 acres of land surrounding the Angel Oak tree to the City. And, AOV-AOD recorded a conservation easement protecting an additional 0.75 acres contiguous to the 6.49 acres sold to the City, substantially increasing the size of Angel Oak Park. Presently there are 9.44 acres of land – Park land and protected land – surrounding the Angel Oak tree. Tr. Vol. 1, p. 96. The objective for increasing the size of the Park that surrounds the Angel Oak tree is to insure that the tree is adequately buffered from surrounding proposed development and remains accessible to the viewing public. AOV Ex. 130.

Since 2006, AOV-AOD has been involved in a lengthy process of obtaining approvals from the City of Charleston and from the Department. The AOV-AOD property includes 6.466 acres of wetlands. By way of letter dated August 7, 2008, AOV-AOD was advised by the Corps

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<sup>1</sup> Phase I is the only phase of the development before the Court. Tr. Vol. 4, p. 45-46.

<sup>2</sup> Wadmalaw Island is a sea island contiguous and connected to Johns Island.

of Engineers that this wetland acreage was not jurisdictional and, therefore, not subject to regulation by the Corps.<sup>3</sup> AOV Ex. 135. Based on the Corps' determination that the wetland areas were not subject to regulation under the Clean Water Act, AOV-AOD submitted a "Notice of Intent ("NOI") for Stormwater Discharges from Large and Small Construction Activities" to DHEC seeking NPDES permit coverage for the project identified as "Angel Oak Village." In response to information requested on the NOI, AOV-AOD advised DHEC that there were "[n]on-jurisdictional wetlands" ("NJW") on the AOV-AOD property and that AOV-AOD intended to impact 4.23 acres of the NJW. AOV Ex. 134. DHEC's Office of Ocean and Coastal Resource Management ("OCRM") reviewed the NOI for consistency with the South Carolina Coastal Zone Management Program Document and issued a coastal zone consistency certification for the project proposed in the NOI on March 23, 2010. On March 24, 2010, DHEC authorized construction in accord with the NOI, granting stormwater permit coverage. *See* AOV-AOD's Motion to Dismiss, filed October 7, 2011.

Petitioners here attempted a challenge to the issuance of NPDES permit coverage and the granting of a coastal zone consistency certification for the project described in the NOI by filing a contested case with the S.C. ALC, Docket No. 10-ALJ-07-0409-CC. However, that case was

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<sup>3</sup> The Corps had also determined in 2002, before AOV-AOD acquired the property, that the wetlands on the AOV-AOD property were non-jurisdictional. Tr. Vol. 2, p. 382:11-25. Robert Demoura, principal of AOV-AOD, testified that the decision to purchase the property from Sea Island Health Care Corporation was "a very, very educated and well-informed decision on property that had not one but two subsequent determinations that the wetlands that are in question were non-jurisdictional, and I had what I thought was a binding letter from the Army Corps based on multiple site visits that they had to the site that said the wetlands in question were non-jurisdictional wetlands and I moved forward based on that federal decision ... ." Tr. Vol. 4, p. 53. Samantha Seigel, representative of Save the Angel Oak, testified that there were two prior determinations by the Corps that the wetlands were non-jurisdictional. Tr. Vol. 2, p. 382:11-25. Pet. Ex. 29 includes the Corps' documentation of its decision to assert jurisdiction over the wetland areas on the AOV-AOD property. The Corps explained in Pet. Ex. 29 that it had issued two previous jurisdictional determinations for the property, one in 2002 and one in 2008, and in each instance determined the wetland areas to be non-jurisdictional. The Corps further stated that the decision to reverse its two previous jurisdictional determinations was a result of observations of the property between December 2009 and mid-February 2010 when over 19 inches of rain fall occurred in that 8 week period which, the Corps observed, was a regional historic high rain fall period.

dismissed by the ALC by the Honorable Deborah Durden, ALJ, based on lack of subject matter jurisdiction, as Petitioners had failed to file a timely challenge to these approvals. Pursuant to S.C. Code Ann. § 44-1-60, the contested case was dismissed by Order filed on September 13, 2010. No appeal was taken of Judge Durden's Order. *See* AOV-AOD's Motion to Dismiss, filed October 7, 2011.

However, Petitioner was further delayed in implementing the approvals that were ultimately upheld by Judge Durden's dismissal. On March 14, 2010, the Corps of Engineers revised its earlier jurisdictional determination and concluded that the 6.466 acres of freshwater wetlands located on the property were jurisdictional.<sup>4</sup> AOV Ex. 135. Consequently, AOV-AOD was required to obtain approval for the proposed impacts within these wetland areas from the Charleston District, Corps of Engineers. AOV-AOD submitted a permit application with the Corps of Engineers in accord with 33 U.S.C.A. § 1344. Pursuant to 33 U.S.C.A. § 1341, this application triggered review by DHEC under S.C. Code Regs. 61-101 et seq., governing water quality certification procedures. In an effort to demonstrate the required avoidance and minimization of wetland impacts, AOV-AOD reduced impacts from 4.23 acres previously approved by DHEC in its review of the NOI to 3.4 acres. AOV Ex. 130.

Importantly, while a permit application submitted to the Corps of Engineers triggers a requirement for a coastal zone consistency certification undertaken by DHEC-OCRM in accord with S.C. Code Ann. § 48-39-80(11), in this instance OCRM responded to DHEC's Bureau of

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<sup>4</sup> AOV-AOD questioned Petitioner SCCCL's representative, Dana Beach, regarding an email communication between Mr. Beach and the SCCCL's expert Dr. Jean Everett. Dr. Everett performed a site inspection of the AOV-AOD property and advised Beach that she believed the wetlands to be jurisdictional. Beach replied to Everett, with a copy to SCCCL's counsel Mike Gruenloh, "Mike may want to press the case that the Corps should have reviewed this and the delineation is incorrect. **That could gum things up.**" Tr. Vol. 1, p. 133-134, emphasis added, AOV Ex. 59. When asked to clarify what "gum things up" means, Beach responded: "Well I mean it could gum things up. If the Corps takes jurisdiction over a wetland, it has to go through the 404 process, as you know." Tr. Vol. 1, p. 134:14-17.

Water (“BOW”) with a letter dated August 9, 2010, stating that the project described in the Corps’ public notice had already been reviewed and determined to be consistent. OCRM did not conduct a new coastal zone consistency review. *See* Ex. A, AOV-AOD Notice of Motion and Motion to Dismiss, filed October 7, 2011.

DHEC’s BOW issued its Notice of Proposed Decision and Staff Assessment granting a water quality certification on June 6, 2011. AOV Ex. 130. The Staff Assessment includes information that the project was determined to be consistent with the Coastal Zone Management Program. Erin Owen, a BOW employee who was assigned as project manager to review the AOV-AOD application, testified that the BOW received two communications from OCRM regarding coastal zone consistency certification. The first communication was the letter referenced above, received from Jeff Thompson dated August 9, 2010 and referencing the earlier certification of the stormwater permit. The second letter, dated May 26, 2011, followed notification by AOV-AOD of reductions in wetland impacts. This letter was also authored by Jeff Thompson of OCRM. Thompson expresses recognition that “project plans will reduce wetland impacts by 1.4 acres ... This revision is consistent with our previous consistency determination and the SCCZMP.” Tr. Vol. 2, p. 280, DHEC Ex. 2.

In issuing its 401 water quality certification, DHEC concluded that AOV-AOD demonstrated avoidance and minimization of wetland resources and could not identify any feasible alternatives that would serve the project purpose and reduce impacts to wetland resources. AOV-AOD is mitigating wetland impacts by adding wetland preservation and buffer acreage to the two central wetlands where the environmental benefit is most pronounced and by purchasing appropriate mitigation credits. In addition, the proposed development serves an important public policy in that it provides much-needed affordable housing and is a source of

revenue for the non-profit SICHCC. AOV Ex. 98. The SCDHEC staff concluded that the requirements of 25A S.C. Code Ann. Reg. 61-101 (2011) (“R. 61-101”) had been satisfied and that the project could be certified.

Upon receipt of SCDHEC’s Water Quality Certification, on June 16, 2011, the Petitioners filed a request that the Board of Health and Environmental Control (“the Board”) conduct a final review conference. On July 8, 2011, the Board decided not to conduct a final review conference and provided written notice of its decision on July 14, 2011. Petitioners timely filed their Request for Contested Case on August 15, 2011.

### DISCUSSION

33 U.S.C.A. § 1341 provides that:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate...that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1316, 1317 of this title. ... If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if the certification has been denied by the State, interstate agency, or the Administrator as the case may be.

In conducting this review, DHEC implements the procedures and policies set forth in Reg. 61-101. Material to disposition of this contested case are the requirements of Reg. 61-101(F), which requires the Department to assess the water quality impacts of the project and to determine whether there are feasible alternatives to the project that would have less damaging consequences. Moreover, in accord with Reg. 61-101(F)(6), “[c]ertification will not be issued unless the department is assured appropriate and practical steps including stormwater

management will be taken to minimize adverse impacts on water quality and the aquatic ecosystem.” This water quality certification is enforceable by the Corps of Engineers, in accord with Reg. 61-101(H).

Here Petitioners challenge: 1) whether DHEC properly evaluated the water quality impacts of the proposed project in accord with Reg. 61-101(F); 2) whether DHEC properly evaluated the water quality impacts to the Angel Oak tree located on the adjacent Park land; 3) whether the applicant demonstrated that there were no feasible alternatives to the project; and, 4) whether DHEC properly evaluated the impacts to the receiving water of the State, Church Creek. Petitioners also raised challenges regarding the Department’s coastal zone consistency review and implementation of policies and procedures of the Coastal Zone Management Program Document. *See* Petitioners’ Pre-Hearing Statement.

### **DESCRIPTION OF WETLAND IMPACTS**

AOV-AOD’s initial permit application, dated April 26, 2010, and submitted to the Corps, depicted 3.4 acres of impact. AOV-AOD revised its application to avoid and minimize wetland impacts and submitted new plans dated January 31, 2011. These new plans depicted 2.23 acres of impact to the wetlands. AOV Ex. 10. The main access road, which connects the proposed development to Maybank Highway and to Bohicket Road, impacts the wetlands. 0.89 acres of the 2.23 acres of impact result from this road crossing. In addition, the stormwater system, which includes the excavation of ponds and the construction of a bio-pond,<sup>5</sup> causes 0.12 acres of

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<sup>5</sup> AOV-AOD’s engineering expert, Richard Karkowski, explained that the stormwater system currently planned for the AOV property includes two main types of best management practices: rain gardens and bio-ponds, which are also known more traditionally as bio-retention. Tr. Vol. 3, 205:20. He explained that both of these structures are “retention-type facilities.” Tr. Vol. 3, p. 206:13. However, “a rain garden is an area that has been excavated but the soil underneath it has not been adjusted or amended ... you just excavate a hole, you shape it the way you want it ... and then you would do some plantings in there ...” Tr. Vol. 3, p. 205:22. Bio-ponds are “a bit different in that you would over excavate that site and you would bring in material on the bottom of it that helps filter the runoff as it goes into the ground.” Tr. Vol.

impact. Construction of one of the multi-family residential structures results in 0.21 acres of impact. And, the required parking necessary for the multi-family development accounts for the remaining 1.01 acres of impact. Tr. Vol. 2, p. 255-256.

AOV-AOD's development is located in the vicinity of the wetlands by necessity. As DHEC recognized, protection of the Angel Oak, which was of paramount concern to the commenting public, pushed development into northern portions of the AOV-AOD property where the wetland area was located. "To provide protection to this City park and significant natural area, the applicant has agreed to protect 7.64 acres of uplands as a protective buffer around the Angel Oak site. ... Avoidance of this area greatly restricts the use of remaining lands." AOV Ex. 125 (Part D Consistency Determination.) Jeff Thompson testified that "[t]he fact that they are losing almost seven acres of land, uplands, upland property that they will not develop in order to stay away from the Angel Oak tree also pushed the development more towards the wetlands. So, by identifying and trying to minimize impacts to the park and to the Angel Oak tree, it does push their development more towards the wetlands on the site." DHEC Ex. 36, p. 42:18-25.

### WATER QUALITY CONCERNS

DHEC noted that the receiving water body, Church Creek, is on the 303(d) list<sup>6</sup> as impaired for fecal coliform ("FC") and for dissolved oxygen ("DO"). Consequently, DHEC

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3, p. 206:7. Series of these bio-retention facilities are planned for use on the AOV property with wet detention ponds, which are a type of treatment. The entire system is called a "treatment train." Tr. Vol. 3, p. 207:8. The treatment train involves retention, in which the runoff is captured and retained onsite, i.e., not released, and detention, in which the runoff is initially detained to be slowly released off the site. Tr. Vol. 3, p. 207:11.

<sup>6</sup>33 U.S.C.A. § 1313(d) requires that "[e]ach State shall identify those waters within its boundaries for which the effluent limitations required ... are not stringent enough to implement any water quality standard applicable to such waters." In accord with Reg. 61-68(G), standards have been developed for Shellfish Harvesting Waters, the water quality classification held by Church Creek. Monitoring data maintained by the Department indicates that the standards for dissolved oxygen (no less

required further inquiry and analysis into the impact of post-development stormwater run-off from the AOV-AOD property. As is noted in the staff's water quality assessment:

Due to the proximity of the project to Church Creek, the SCDHEC was concerned that the stormwater runoff from the proposed activity could have the potential to contribute to impairment by adding to the elevated FC levels in the waterbody. To alleviate this concern the applicant was required to submit a detailed stormwater report and modeling demonstration. This report showed how stormwater will be conveyed through the site, and gave a description of how the Best Management Practices (BMPs) will function to treat stormwater. The report also included a modeling demonstration to predict fecal coliform levels in runoff leaving the site.

AOV Ex. 130.

AOV-AOD hired Rick Karkowski, P. E., from Thomas and Hutton Engineering, Inc., to prepare a Water Quality Study for AOV-AOD and DHEC. AOV Ex. 54. Karkowski reviewed the stormwater plans prepared by AOV-AOD's design engineer, HLA, Inc. Karkowski predicted performance of the stormwater system designed by HLA, using an industry-standard water quality model known as the IDEAL model. "The IDEAL model determines sub-watershed pollutant loadings and the trapping efficiencies of a variety of stormwater best management practices (BMPs) for a number of common stormwater pollutants (including sediments, bacteria, total nitrogen and total phosphorus). The model routs flows (hydrographs) and pollutant loads (pollutographs) through the drainage system and BMPs allowing for the detailed analysis of the existing and proposed pollutant loads of a given site." AOV Ex. 54, p. 2.

Karkowski's recommendations and conclusions and the IDEAL model out-puts are discussed more fully in the factual findings below, but Karkowski provided assurances to DHEC

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than 5.0 mg/l) and fecal coliform (not to exceed geometric mean of 14/100 ml) are not being met. AOV Ex. 130.

that post-development discharge from the AOV-AOD property would not cause or contribute to further impairment of Church Creek, in accord with Reg. 61-101(F)(6).<sup>7</sup>

### **STORMWATER MANAGEMENT PLAN**

DHEC noted in its water quality assessment that the stormwater management plan relies “substantially on filtration. ... The stormwater treatment system for the project will treat runoff by utilizing landscaped bio-retention areas, infiltration areas, and wet detention ponds.” AOV Ex. 130. In developing the stormwater management plan, HLA relied on a series of geotechnical reports prepared by Wright Padgett Christopher Engineering (“WPC”). As is noted in HLA’s “Stormwater Report for Sea Island Phase 1 (previously named ‘Angel Oak Village’),” AOV Ex. 6, “the soils are predominantly sandy and have infiltration rates generally ranging from 8.5 in/hr to 18.8 in/hr ....” “[N]early all of the on-site soils have rapid infiltration and shows the typical water table depth to be about 4 feet.”

A wet detention pond “has a permanent pool ... some of the storm flow resides in the permanent pool after the storm flow has ceased and settling of sediment and nutrients, as well as attenuation of bacteria, continues between storms in the permanent pool for the wet detention.” Pet. Ex. 14 *A Model for Assessing the Impact of BMPs on Water Quality*. Infiltration is “the process of water entering soil at the ground surface.” Pet. Ex. 20 *International Stormwater BMP Database*. As previously stated, the stormwater system currently planned for the AOV property is a “treatment train” involving retention, in which the runoff is captured and retained onsite, i.e., not released. Detention is runoff that is initially detained and then slowly released off the site. Tr. Vol. 3, p. 207:11. The “bio-retention areas” referenced in DHEC’s water quality assessment

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<sup>7</sup> “Certification will not be issued unless the Department is assured appropriate and practical steps including stormwater management will be taken to minimize adverse impacts on water quality and the aquatic ecosystem.”

include bio-swales and bio-ponds, which are the retention-type facilities discussed by AOV-AOD's expert Richard Karkowski. *supra*, p. 10, FN 5. AOV Ex. 6, p. 8. A bio-swale is a linear bio-retention area. Tr. Vol. 3, p. 201:23.

The stormwater system was described as a "treatment train" of multiple BMP's by both Petitioners' expert, Dr. Fred Holland, and AOV-AOD's expert Karkowski. Karkowski recommended, and the applicant agreed, to modify the stormwater system designed by HLA to change the control structure, or outfall, so that the system captured the "run-off from rainfall up to a certain level ... termed the 95<sup>th</sup> percentile rainfall event." Tr. Vol. 3, p. 204.

For the Charleston area, a daily (24-hour) rainfall of 1.98 inches represents the 95% percentile rainfall event. In other words, 95% of the daily rainfall events that fell in the area were less than this amount and 5% were more. Further, when considering the number of days in the period of record, the 95% rainfall event (and greater) represents approximately 1% of the days (99% of the days rainfall was less than 95% rainfall amount, including no rainfall). For the purposes of this study, a rainfall amount of 2.0 inches has been used as the 95<sup>th</sup> rainfall event.

AOV Ex. 54, p. 7.

### **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:

#### **General**

1. Notice of the time, date, place and subject matter of the hearing was given to the Petitioners and Respondents. All parties were present at the scheduled hearing which commenced on April 3, 2012, and were represented by counsel.
2. Petitioners timely filed their Request for Contested Case hearing with the Court on August 15, 2011.
3. All parties filed their Prehearing Statements on October 7, 2011, identifying the

issues before the Court.

4. All parties participated in full discovery prior to commencement of this hearing.

5. Respondent AOV-AOD filed a Motion to Dismiss Petitioners claims related to the coastal zone consistency certification issued by DHEC-OCRM on October 7, 2011. Respondent DHEC joined in AOV-AOD's Motion. Arguments were conducted on this Motion, and other Motions, on November 21, 2011. This Court initially requested that the Respondent AOV-AOD prepare an Order dismissing the coastal zone consistency claims, but the parties agreed to hold the ruling on this Motion in abeyance, and to have the Motion addressed as part of this Court's Final Order and Decision.

#### **Project History**

6. AOV-AOD's property is designated as urban, not rural, as a result of the location of the urban growth boundary on Johns Island which was established through a highly public process in which Charleston County and the City of Charleston considered the input of Johns Island residents and local advocacy groups including the Coastal Conservation League. Tr. Vol. 3, p. 296:1

7. Moreover, through the development of the Johns Island Community Plan, AOV Ex. 5, the property was selected as appropriate for high density development as one of the three areas on Johns Island, along Maybank Highway, designated as Gathering Place Districts. The AOV-AOD property is the preferable location for a GPD, based on the development surrounding the AOV-AOD property and the proximity to a "neighborhood center" of Johns Island, i.e., a major intersection at which a grocery store, fire station, public library, school and city park are already present. Tr. Vol. 3, p. 298:1

8. The principal of AOV-AOD, Robert DeMoura, initially became involved with the

project through his membership in Angel Oak Village, LLC, the entity that purchased the property from SICHCC in 2006, with other investors. Tr. Vol. 4, p. 8:13

9. Development rights were already established on the property when it was purchased by Angel Oak Village, LLC, through a Planned Unit Development (“PUD”) that had been approved by the City of Charleston in 2001 for SICHCC. Tr. Vol. 4, p. 11:12

10. The initial PUD obtained by SICHCC had three components: a “big box” development, a multifamily component and office/retail space. Tr. Vol. 4, p. 11:4

11. When Mr. DeMoura became involved in acquiring the AOV-AOD property in 2005 he approached the City of Charleston planners about moving forward with the project. At that time, the City expressed a view that an alternative design that would be predominantly residential would be a better plan for the property. Tr. Vol. 4, p. 6:20

12. The City also expressed a desire that any alternative design provide for further protection of the Angel Oak tree and proposed the involvement of an arborist consultant. Tr. Vol. 4, p. 12:1.

13. Mr. DeMoura hired an arborist, Dr. James McGraw, and also began working with the Coastal Conservation League to formulate an alternative design that developed Phase I as a multi-family rental while also possibly decreasing the amount of wetland fill, 5.43 acres, that was initially proposed. Tr. Vol. 4, p. 14:4, AOD Ex. 65.<sup>8</sup>

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<sup>8</sup> James McGraw is an internationally renowned arborist that was hired by Mr. DeMoura based on his prior consultations on trees at sites such as the White House and Mount Vernon. Tr. Vol. 4, p. 32:16. While Dr. McGraw provided an initial recommendation regarding protection of the Angel Oak, the City of Charleston requested that Mr. DeMoura work with other arborists, and provided him with a list of potential candidates including Donald Ham, Ph.D. Tr. Vol. 4, p. 33:5. In addition to Drs. McGraw and Ham, Dr. Kim Coder, an arborist from the University of Georgia and the former President of the National Society of Arborists, and Dr. James Skiera, the Director of the International Society of Arborists, also evaluated the construction plans and indicated satisfaction that the Angel Oak tree would be adequately protected. Tr. Vol. 4, p. 33:10.

14. The initial alternative design that was proposed retained the “big box” development but decreased the amount of wetland fill to 4.23 acres. Tr. Vol. 4, p. 14:7.

15. Mr. DeMoura obtained approval of an amendment to the original PUD to accommodate the alternative design plan. Tr. Vol. 4, p. 17 l. 16-23.

16. In January 2007, the Office of Coastal and Resource Management issued a coastal zone consistency certification for this design, which included impacts to 4.23 acres of wetlands. Tr. Vol. 4, p. 15:10, AOV Ex. 72.

17. Subsequently, Mr. DeMoura formed Angel Oak Village Development and purchased 7/12<sup>th</sup> of Angel Oak Village, LLC’s partnership and gained sole control of the project. Tr. Vol. 4, p. 8:19. Mr. DeMoura assumed full responsibility for the project in 2007 and presently is the sole partner that has been actively involved in taking this project to completion. Tr. Vol. 4, p. 9:3.

18. Mr. DeMoura then worked with Josh Martin, the City of Charleston’s then-Planning Director, to transition the alternative design and abandon the big box development concept. Tr. Vol. 4, p. 17:13

19. On July 15, 2008, Charleston City Council gave final approval to an Ordinance, or Planned Unit Development (“PUD”), entitled “Amended Development Guidelines for the Sea Island Comprehensive Health Care Corporation Planned Development District.” AOV Ex. 4. The development is described as a “mixed use and diverse community, including both market rate and affordable residential units and supporting commercial uses. After substantial discussion with the Low Country Housing Trust and other consultants, the goal will be to provide affordable housing in the range of 15% of the total residential units in the Sea Island PUD community.” The PUD Ordinance includes a sliding scale to incorporate the requirement

to provide affordable housing. The minimum number of units proposed is 550 and at 550 units 10% are required to be affordable. The percentage increases incrementally up to 15% at the maximum allowable units of 630. AOV Ex. 4 p. 10.

20. In 2008, Mr. DeMoura presented and was denied approval of the alternative design by the City of Charleston's Commercial Corridor Design Review Board ("CCDRB"). The CCDRB requested a reduction in height, scale and mass of the design of the project. Tr. Vol. 4, p. 21-22. Mr. DeMoura then hired Tim Keane and Keane and Company<sup>9</sup> and formulated a redesign that incorporated the same set of uses previously contemplated for the site but laid it out differently and more fitting with the city and community vision for the site. Tr. Vol. 4, p. 22 and Tr. Vol. 3 p. 311:6.

21. The redesign ultimately resulted in elimination of 90% of the commercial space previously planned which allowed for a concomitant decrease in parking space and a reduction in wetland impacts. Tr. Vol. 4, p. 26:18.

22. On March 24, 2010, SCDHEC-OCRM issued Coastal Zone Consistency and a Stormwater Discharge Permit to Mr. DeMoura. Tr. Vol. 4, p. 24:12; AOV Ex. 125, 134. The approved development plan included impacts to 3.42 acres of non-jurisdictional wetlands. In issuing its coastal zone consistency certification OCRM staff noted that the applicant demonstrated no feasible alternatives and an overriding public interest for the project. OCRM staff concluded that "this project provides benefits to the Sea Island Comprehensive Health Care Corporation, a non-profit organization providing needed health care services for minority and indigent persons in this area that are not provided by any other agency or group at this time."

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<sup>9</sup> Tim Keane testified at the contested case hearing as an employee of the City of Charleston. Keane was Director of Planning for the City of Charleston from 1999-2005. From 2005-2009, Tim Keane had his own consulting practice. In January, 2010, Keane returned to the City of Charleston as the Director of Planning, Preservation and Sustainability. Tr. Vol. 3, p. 286-287.

AOV Ex. 125.

23. Just prior to issuance of the coastal zone consistency certification and the stormwater permit, the United States Army Corps of Engineers (“USACE”) reversed its determination that the wetlands on the AOV-AOD property were non-jurisdictional. This reversal was noted in the decision document supporting the coastal zone consistency certification. “This project is consistent with the SCCZMP per revised project plans dated July 24, 2009, from Mr. Barry Whalen, and final alternatives analysis dated March 3, 2010, and revised jurisdictional determination from the USACOE dated March 15, 2010. Impacts have been reduced from an original 5.43 acres to 3.42 acres. No other alternative to construct the development can be identified. In addition, the development promotes public open space and recreational use of an area of special resource significance.” Tr. Vol. 4, p. 22:1, AOV Ex. 125.

#### **Protection of the Angel Oak Tree**

24. The Angel Oak Tree, an ancient live oak tree, is located on the parcel adjoining the AOV-AOD property. The Tree and the surrounding land are owned by the City of Charleston. OCRM noted that the Tree “is not a national register property.” The Corps of Engineers noted that the Tree is “not a Traditional Cultural Property.” OCRM also noted that the Tree is not a geographic area of particular concern or “GAPC” which would have afforded it heightened status. Petitioners presented no evidence upon which to conclude that the Tree has special status for regulatory purposes, aside from being subject to the City of Charleston’s Tree Ordinance. Despite the fact that the Angel Oak Tree did not trigger specific regulatory requirements, both the BOW and OCRM acknowledged that AOV-AOD demonstrated that the proposed development would have no negative impact on the Tree. OCRM did not seek specific protection of the Tree but considered Angel Oak Park to be a public open space, for purposes of

application of the policies and procedures of the Coastal Zone Management Program Document. The BOW concluded that impacts to the Tree were not within the scope of its water quality certification, but confirmed the measures that AOV-AOD had taken to insure the protection of the Tree. AOV Ex. 125-127. DHEC Ex. 36. Tr. Vol. 2, p. 216-217.

25. AOV-AOD has consulted several arborists regarding the Angel Oak Tree, pursuant to the desire expressed by the City of Charleston in 2005 that any alternative design provide for further protection of the Angel Oak tree. Tr. Vol. 4, p. 11:18.

26. The initial protection proposed by AOV-AOD was to expand the buffer from 75 feet to 150 feet and to further set this land aside for future Angel Oak Park expansion. Tr. Vol. 4, p. 12:17. As was noted in the Ordinance approved by the development, "[i]n order to ensure that the development of the Site does not harm the Angel Oak located in the adjacent city Park, the City and the owner of the undeveloped portion of the Site retained a hydrologist (James Gregory, Ph.D.) and a tree specialist (Donald Ham, Ph.D.). These two consultants established development recommendations to ensure the continued health of the Angel Oak. The current plan reflects those recommendations and includes a 150 foot additional natural buffer area around the three sides of the Park that lie within the Site." AOV Ex. 4 p. 4. These three sides are the northerly, easterly and westerly sides.

27. After initially consulting with Dr. James McGraw, AOV-AOD agreed with the City of Charleston's suggestion that Dr. Donald Ham would provide consultation on protection of the Angel Oak tree. Tr. Vol. 4, p. 33:7.

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28. Dr. Ham established qualifications to be considered an expert in forestry with an emphasis in arboriculture. Tr. Vol. 3, p. 39:18.

29. Dr. Ham had initially consulted with AOV-AOD on the evaluation and protection

of the trees that would be required to be retained on the development site under the City of Charleston tree ordinances. Having been consulted by the City of Charleston over approximately twenty years during his employment as an extension agent for Clemson University, Dr. Ham was familiar with the Angel Oak tree. Tr. Vol. 3, p. 40:5, 46:9.

30. Dr. Ham's considerations and discussions with the City of Charleston up to that point included the condition of the Angel Oak, the overall health of the tree, what could be done to better protect the tree from traffic over the root system, and soil compaction around the tree. Tr. Vol. 3, p. 46:9.

31. Dr. Ham determined that the greatest threat to the health of the Angel Oak Tree was the activity associated with access to the Tree. He noted that soil compaction over the roots of the Tree was a potential problem based on "the [existing] driveway that leads to the parking area, the parking area itself, and the area around the concession stand and of course, Angel Oak Road." He recommended that the City close off the road to Angel Oak Road where the current drive entrance is into the Angel Oak Park and move the concession stand parking and drive into that area to the west. Tr. Vol. 3, p. 52: 4-24, 55:12.

32. AOV-AOD's recent sale of 6.49 acres of land to the City of Charleston for expansion of Angel Oak Park and conservation of an additional 0.75 acres abutting the Angel Oak Park provides an opportunity to implement Dr. Ham's recommendations. Tr. Vol. 4, p. 30:5. The current plan for the development retains more trees than are required by the tree ordinances enacted by the City of Charleston and applicable to the AOV-AOD property. Tr. Vol. 3, p. 62-63. The buffer area and the land sold to the City of Charleston will not be developed, i.e., neither the trees nor the root systems would be disturbed, which would provide approximately 9.44 acres of tree canopy around the Angel Oak tree. Tr. Vol. 3, p. 53:6-16, 63:4.

33. Retention of tree canopy, particularly the contiguous tree canopy, is beneficial because it provides groups of trees for wildlife and improves rain interception. Tr. Vol. 3, p. 62:2. The retained trees within the expanded City Park will continue to provide evapotranspiration at the site and have intact root systems.

34. Dr. Ham testified that a tree can be harmed by soil compaction and damage to the root system. A tree protection zone is an area that is established around a tree where no disruption occurs to the soil and root zone. Tr. Vol. 3, p. 56. By the method, Dr. Ham typically uses to calculate recommended tree protection zones, i.e., the minimum area that should remain undisturbed around the base of a tree trunk for protection of the root system, 1.5 feet for every one inch of trunk diameter at 54 inches off the ground minimum,. The recommended zone for the Angel Oak is 150 feet. The buffer area currently planned provides for minimum zone of 300 feet, or double the minimum recommendation. Tr. Vol. 3, p. 74:6, 75:1. Dr. Ham's expert opinion is that this protection zone will protect the Angel Oak Tree. Tr. Vol. 3, p. 76:1-4.

The mathematical formula utilized by Dr. Ham is a standard formula utilized in arboriculture and by urban foresters. This formula is published by the International Society of Arboriculture and by the South Carolina Forestry Commission. Tr. Vol. 3, p. 80: 15-25. It is a recognized industry standard. Dr. Ham has utilized the formula to establish tree protection zones hundreds of times and has personally observed that the formula is protective of the trees for which the protective zone is calculated. Tr. Vol. 3, p. 88-89.

35. Other methods exist for predicting the expanse of tree roots. Typically root expanse is estimated by multiplying the height of the tree by factors between 1.5 and 3. Dr. Ham typically uses twice the height of the tree to predict the extent of the roots. The Angel Oak Tree is 65 feet high so the current buffer exceeds this standard formula with regard to estimation

of root expanse and protection of roots. Tr. Vol. 3, p. 93-94.

36. Petitioners' expert, Dr. Jean Everett, predicted that the Angel Oak Tree could be harmed by the tree removal contemplated on the AOV-AOD property, based on the negative impacts to existing "fungal bridges" and the mycorrhizal networks. According to Dr. Ham, the mycorrhizal network "enables native trees to typically outperform exotic trees...they are definitely real relationships that are mutually beneficial to both the fungi involved as well as the trees." Tr. Vol. 3, p. 96-97. However, Dr. Ham "has never seen anything that says the various trees are dependent on the connection from tree to tree. What they are benefitting from is the relationship of the fungus on – on their roots." Tr. Vol. 3, p. 98. Dr. Ham is not concerned about any potential disruption of the mycorrhizal relationship that might occur outside of the tree protection zone because in his experience, if roots are severed then new roots will generate and "in an extremely short period of time, probably days at the most, new mycorrhizal relationships would be developed." Tr. Vol. 3, p. 98.

37. The overriding recommendation within a tree protection zone is to maintain the zone in its natural state. This is accomplished with the acquisition of additional property by the City of Charleston which is protected by a conservation easement. Tr. Vol. 3, p. 106:7-11.

38. It is Dr. Ham's expert opinion that the buffer area currently planned will be more than adequate to protect the tree. Tr. Vol. 3, p. 74:3. This opinion is based on his many years of experience in protecting trees and his observations and findings regarding the efficacy of the buffers typically utilized to insure the protection and viability of trees.

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39. Dr. Ham discussed his concerns regarding hydrology and the possible effects of water distribution on the future growth of the Angel Oak tree with Dr. Jim Gregory, a Ph.D. hydrologist consulted by AOV-AOD regarding handling of the stormwater on the development

site. Tr Vol. 3, p. 69:17. With Dr. Gregory's input, Dr. Ham concluded that if any stormwater created post-development was retained on site, or primarily retained on site, and allowed to infiltrate into groundwater, that it should not negatively influence the health of the Angel Oak. Tr. Vol. 3, p. 70:22. As Ham noted in his letter to the City of Charleston dated August 14, 2008, "Dr. Gregory is working with the planning and design team to implement an innovative stormwater management system that will promote retention and infiltration of stormwater to maintain the pre-construction water table regime and soil water availability to the Angel Oak and other trees to be conserved on the development site. I concur with his assessment that the system, as designed and proposed in the Stormwater System management Plan completed by HLA and the Angel Oak Village development team, will meet our objective." AOV Ex. 38.

Consistent with Dr. Ham's comments above, HLA noted in its Stormwater Report, dated 11/16/2011, that "[b]ecause of the project's location near Angel Oak, measures will be taken to avoid impact to the tree. The project will preserve a large portion of the property, particularly near the Angel Oak property. ... Dr. Gregory recommended using infiltration practices to provide a more natural drainage pattern and prevent the rainwater from being diverted from the Angel Oak root system." AOV Ex. 6, p. 8.

40. In order to incorporate Dr. Gregory's recommendations, the stormwater management system designed for the proposed development "insures maximum infiltration of stormwater into the sandy soils to maintain the groundwater table and provide adequate hydration of the wetlands." This is accomplished through the use of numerous BMPs which include "bio-swales, bio-ponds, infiltration ponds, and pervious pavement areas." AOV Ex. 6, p. 8.

41. In addition, the stormwater management system is designed to "[m]aintain as

close to 100% of the 1-year storm event rainfall onsite to infiltrate into the soil.” Finally, the system provides for “at least 66% and 40% volume retained onsite for infiltration, evaporation, and transpiration for the 10-year and 100-year storm events respectively.” AOV Ex. 6, p. 8.

42. The incorporation of Dr. Gregory’s recommendations into the design of the stormwater management system is intended to “provide a more natural drainage pattern and prevent the rainwater from being diverted from the Angel Oak root system.” AOV Ex. 6, p. 8.

43. Petitioners’ expert, Dr. Jean Everett, was unable to contradict Dr. Gregory’s opinion. She could not specifically confirm that the Angel Oak would be negatively affected by construction of the development. She could not project how any changes from the construction would influence the hydrology. Tr. Vol. 1, p. 212:25. She was only able to state an opinion that there would be some change to the Angel Oak but could not say exactly what effect that change might have. Tr. Vol. 1, p. 213:7. Dr. Everett is a forest ecologist. Dr. Everett’s opinions are based on observations she made during a single visit that she made to the AOV property. Tr. Vol. 1, p. 259:14. She did not do any actual sampling of the soils present on the AOV property during this visit. Tr. Vol. 1, 259:16. She has no firsthand experience with stormwater systems and admitted that she does not work in this area. Tr. Vol.1, 263: 25. She did not do any physical testing of infiltration rates of the soils. Tr. Vol. 1, p. 264:9. She did not perform any studies to assess the amount of evapotranspiration that might be lost to the Angel Oak, if any, as a result of the construction currently planned for the AOV property. Tr. Vol. 1, p. 258:4.

44. Dr. Everett acknowledged that she is not an arborist. Tr. Vol. 1, p. 190:6. She confirmed that she does not teach or work in the area of care and maintenance of individual trees as Dr. Ham does. Tr. Vol. 1, p. 190:19, 192:5. As such, she is not experienced in the calculation or application of tree protection zones and has not observed successes in the use of such zones.

45. Dr. Everett admitted being personally opposed to dense developments on Johns Island and being “in general opposed to developing any land that is either in forest or farmland.” Tr. Vol. 1, p. 230:7. She does not believe that any development should have ever happened on Johns Island. Tr. Vol. 1, 230:19. Dr. Everett has been involved with the Coastal Conservation League nearly since its inception. Tr. Vol. 1, p. 230:23.

46. I find Dr. Everett’s testimony regarding potential impacts of the development to the Angel Oak Tree unreliable. Dr. Everett raised concerns about the tree and theorized that the development would result in changes in the environment around the tree but did not testify as to any specific studies or testing performed to analyze the effect of these changes. She was unable to state that the changes would definitely have a negative effect on the tree. She also demonstrated bias in her testimony regarding her personal opinions against any development whatsoever of any property on Johns Island which damages her credibility.

47. I find by a preponderance of the evidence that the buffer between the Angel Oak Tree and the AOV-AOD property, consisting of 9.44 acres of land, the majority of which is preserved in its natural state, is sufficient to protect the Tree. Indeed, on three (3) sides (the northerly, easterly and westerly sides) the buffer is approximately 300 hundred feet or the length of a football field. I further find that the applicant’s stormwater design, which incorporated the recommendations of a hydrologist, is protective of the Angel Oak Tree in that the stormwater design allows for infiltration of rainwater to recharge groundwater resources. I further find that while Petitioners, through the testimony of Dr. Everett, voiced numerous concerns regarding potential impacts to the Angel Oak Tree, the evidence presented was speculative in nature and does not provide a basis to contradict the opinions of Dr. Ham.

### Water Quality Certification

48. Reg. 61-101(A) states, in pertinent part, that “[a]ny applicant for a Federal license or permit to conduct any activity which during construction or operation may result in any discharge to navigable waters is required by Federal law to first obtain a certification from [SCDHEC]. ... Federal law provides that no Federal license or permit is to be granted until such certification is obtained. Federal permits or licenses for which certification is required as determined by the Federal agency include but are not necessarily limited to: (a) individual or general Federal permits issued pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344 ...”

49. Reg. 61-101(F)(2), Scope of Review of Application Decisions, provides that “[a] certification shall be issued if the applicant has demonstrated that the project is consistent with the provisions of these regulations, the State Water Quality Standards, Reg. 61-68; and the Federal Clean Water Act, 33 U.S.C. § 1341, and regulations promulgated thereunder by the U.S. Environmental Protection Agency [EPA].”

50. The EPA regulations referenced in Reg. 61-101(F)(2) are referred to as the 404(b)(1) Guidelines, promulgated as regulations in 40 C.F.R. 230. These regulations require a permit applicant to demonstrate that there is no “practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse consequences. ... An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” 40 C.F.R. 230.10(a).

51. Pursuant to Reg. 61-101(F)(3), the BOW staff must assess whether there are feasible alternatives to the proposed activity and must consider “all potential water quality

impacts of the project, both direct and indirect, over the life of the project.”

52. The regulations further state that certification will be denied if “the proposed activity permanently alters the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired” or if “there is a feasible alternative to the activity, which reduces adverse consequence on water quality and classified uses.” Reg. 61-101(F)(5)(a) and (b).

53. “Certification will also not be issued unless the Department is assured appropriate and practical steps...will be taken to minimize adverse impacts on water quality and the aquatic ecosystem.” Reg. 61-101 (F)(6). Here, SCDHEC required AOV-AOD to demonstrate the absence of feasible alternatives with less water quality impacts during the 401 permitting process. Tr. Vol. 2, p. 227:19.

54. Erin Owen is a 401 water quality certification project manager in the Bureau of Water at DHEC and was the main reviewer of AOV-AOD’s application for the 401 water quality certification. Tr. Vol. 2, p. 209:1; 211:7. Ms. Owen noted that the Angel Oak Tree and surrounding park had no specific regulatory designation or status under Reg. 61-101. Tr. Vol. 2, p. 220-221. Within the context of her review she did not consider the potential for hydrological impacts to the Angel Oak Tree nor require protection for the Tree, but she was cognizant in her review of the information provided by the applicant that protection of the Tree was addressed. Tr. Vol. 2, p. 226-227.

55. Ms. Owen concluded that the reduction in wetland impacts from the initial proposal of 3.4 acres of fill to the final proposal of 2.23 acres of fill constituted sufficient avoidance and minimization of wetland impacts. AOV Ex. 130. Owen testified that the initial plans that were submitted to the Department indicated that some portion of the 3.4 acres of

impact were the result of construction of a clubhouse and pool within the development. In addition, two residential buildings, consisting of 40 units were partially located in wetland areas. Certain commercial out parcels were partially located in wetland areas. AOV-AOD eliminated two buildings (40 units) from the plans to avoid and minimize wetland impacts, eliminated impacts associated with the commercial out parcels, and moved the pool and clubhouse entirely into the uplands. Tr. Vol. 2, p. 268-269. The efforts at avoidance, minimization, and reduction to wetland impacts are reflected on AOV Ex. 143 through the use of an overlay depicting the before and after wetland impacts.

56. As a consequence of the further avoidance and minimization demonstrated when AOV-OAD reduced impacts from 3.4 acres to 2.23 acres, the S.C. Department of Natural Resources (“DNR”), the United States Fish and Wildlife Service (“USFWS”) and the Environmental Protection Agency (“EPA”) withdrew all objections to the permit application. DNR, USFWS, and the EPA had all previously commented that the applicant had failed to avoid and minimize wetland impacts with the initial proposal of 3.4 acres of impact, but were later satisfied by the reduction to 2.23 acres of impact. Tr. Vol. 2, p. 247, 249, 272, AOV Ex. 122, 123, 130 and 136. The EPA specifically noted that the avoidance and minimization measures taken by AOV-AOD were consistent with the 404(b)(1) guidelines administered by EPA.

57. Owen testified that the remaining wetland impacts consisted of road crossings, construction of a bio-pond as part of the stormwater system, a small portion of a residential building, and parking areas adequate to support the 274 proposed residential units. AOV-AOD provided information to BOW to support the impacts associated with the construction of the main access road through the development, including the fact that the road has to connect, on either end of the development, with existing access points. While the location of the road is

dictated by existing conditions, the construction of the road at that location bisects the wetland. In Ms. Owen's experience, a wetland area bisected by a road slowly degrades over time. Tr. Vol. 2, p. 257-258:1-9. According to Owen, "resource agencies have even said that they would prefer the mitigation over bisecting wetlands, and leaving small isolated pockets." Tr. Vol. 2, p. 259:2-4. The total impacts from the road crossing and the construction of one of the residential buildings is 1.1 acres ( $0.89+0.21=1.1$ ). Tr. Vol. 2, p. 255-259:1-5.

58. The single largest impact, 1.01 acres, is associated with parking and interior access roads. As was noted by the League's representative, Mr. Beach, the Petitioner SCCCL has traditionally had no objection to impacts associated with road crossings. Tr. Vol. 1, p 61:19-25. Mr. Keane testified that the City requires a minimum of 1.5 parking spaces per unit which would dictate that the parking areas serving the proposed development provide parking for at least 411 vehicles. In addition, the City ordinance by way of a Planned Unit Development required parking to be no farther than 400 feet from the dwelling units. AOV Ex.4, p. 6.

59. Petitioners presented no evidence to suggest that design with less than 2.23 acres of impact would be feasible for the development. Petitioners offered no credible evidence, from a design professional, that the access road, interior roads, and parking could feasibly be moved into upland areas.

60. Moreover, AOV-AOD provided information to the BOW demonstrating that the economic impact from the reduction in impacts from 3.4 acres to 2.23 acres, which caused the loss of 40 residential units, results in AOV-AOD operating at a loss on Phase 1. Ex. 129, p. 7.

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The 404(b)(1) guidelines are the "regulations promulgated ... by the Environmental Protection Agency" referenced in Reg. 61-101(F)(2). The guidelines include the following language regarding a determination of whether these are feasible alternatives that result in less damaging

impacts: “An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” I find that “feasible” equates to “practicableness” in the context of this proceeding. Here the costs and logistics of eliminating additional multi-family residential units renders the project infeasible.<sup>10</sup>

61. AOV-AOD demonstrated to the BOW that it was not feasible to shift the project away from the wetland acreage, based on the overwhelming public concern associated with protection of the Angel Oak Tree, and the desire to provide as much of a buffer as possible and to increase the size of the City Park. DHEC recognized that protection of the Angel Oak Tree, which was of paramount concern to the commenting public, by necessity pushed development into that portion of the site where the wetland area was located. “To provide protection to this city park and significant natural area, the applicant has agreed to protect 7.64 acres of uplands as a protective buffer around the Angel Oak site. ... Avoidance of this area greatly restricts the use of remaining lands.” AOV Ex. 125 (Part D Consistency Determination.) Jeff Thompson testified that “[t]he fact that they are losing almost seven acres of land, uplands, upland property that they will not develop in order to stay away from the Angel Oak tree also pushed the development more towards the wetlands. So, by identifying and trying to minimize impacts to the park and to the Angel Oak tree, it does push their development more towards the wetlands on the site.” DHEC Ex. 36, p. 42:18-25.

62. I find that AOV-AOD demonstrated sufficient avoidance and minimization of wetland impacts in the reduction to 2.33 acres of impact. I find that Petitioners failed to demonstrate that there are feasible alternatives to the project as proposed, as Petitioners did not

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<sup>10</sup> Erin Owen testified that the financial information that was submitted “did not receive any weight in [her] feasibility consideration.” Tr. Vol. 2 p. 228:22-25.

provide alternative designs that eliminated the impacts associated with the road crossing, interior roads, and parking areas. I further find that based on the design constraint of providing a substantial natural buffer between the proposed development and the Angel Oak Tree, AOV-AOD is, by necessity, pushed into the area of the site where the wetlands are located. In addition, based on the economic information provided by AOV-AOD, it is undisputed that further reductions in the AOV-AOD project could render it economically unfeasible.

### **Water Quality Assurances**

63. Reg. 61-101(F)(6) includes a requirement that “appropriate and practical steps including stormwater management ... be taken to minimize adverse impacts on water quality and the aquatic ecosystem. “ BOW noted the following specific water quality concerns in its assessment of water quality impacts of the project: “Church Creek is classified as Shellfish Harvesting (SFH) and an Outstanding Resource Water (ORW) and is listed on the 2010 303(d) list for impaired uses of shellfish harvesting due to FC and DO.” AOV Ex. 130.

64. BOW staff interpret Reg. 61-101(F)(6) as imposing a requirement that “the applicant must provide reasonable assurance that this project will not cause or contribute to further impairment of an impaired waterbody.” BOW staff imposed a requirement that the applicant “submit a detailed stormwater report and modeling demonstration.” AOV Ex. 130

65. Erin Owen testified that “[w]e required a stormwater demonstration which the results of that stormwater demonstration is reviewed by our modeler Wayne Harden. ... Wayne Harden ... stated that after reviewing the results of the stormwater model, that it provided reasonable assurance that there would be no further impairment to Church Creek.” Owen, who is not a computer modeler, relied on Harden for review of the stormwater demonstration, Tr. Vol. 2, p. 235-236.

66. Harden prepared a memo for Owen entitled "Assessment of Sea Island Phase 1 Stormwater Demonstration." Harden concluded that "[t]he project has been designed to maintain, in general, the flow patterns through the site and to control the volume of runoff. Infiltration rates for the site range from 1.7 in/hr to 18 in/hr. The depth of seasonal high groundwater in the upland areas ranges from 42 to 66 in. These infiltration rates with the substantial depth to groundwater makes infiltration based BMPs feasible for this project. The treatment system, relying substantially on filtration, is designed to retain all runoff from all storm events up to 2 in per 24 hours or the 95<sup>th</sup> percentile of storms of 0.1 in. or greater. On average runoff there should be discharged from the site on about 4 days a year, thus minimizing the loading of pollutants to Church Creek." AOV Ex. 124.

67. Not only did Harden conclude that the applicant was minimizing pollutant loading into Church Creek, but also that the post-development site conditions improved water quality in Church Creek. "Comparison of loading from the post-development site with loading from the pre-developed site, based on results of the IDEAL model, indicates a significant reduction of sediments, nitrogen, phosphorus, and fecal coliform bacteria from the proposed project. ... In the final analysis the stormwater demonstration for Sea Island PUD Phase 1 indicates the project will not cause or contribute to the impairment of Church Creek." AOV Ex. 124.

68. AOV-AOD hired Richard Karkowski at Thomas and Hutton Engineering Co., Inc., to analyze the proposed stormwater system designed by HLA, Inc. and to provide the requested demonstration to DHEC. Tr. Vol. 4, p. 37:22. Tr. Vol. 3, p. 163:7. Karkowski established qualifications to be considered an expert in civil engineering with an emphasis on water management including stormwater management, analysis of stormwater systems, rate, volume, water quality, flood control. Tr. Vol. 3, p. 162:21, 160:12.

69. Karkowski reviewed the stormwater report that was prepared by HLA and the project design. HLA utilized a computer model known as HydroCad to predict pre- and post - development discharge. The HydroCAD model simulates runoff, volumes and rates. Tr. Vol. 3, p. 243:5-7. Karkowski is familiar with the HydroCad model as a standard hydrograph model. Tr. Vol. 3, p. 157-158.

70. Karkowski reviewed HLA's inputs in the HydroCad model to determine if the assumptions made by HLA about pre-development and post-development conditions were reasonable. Karkowski testified that "I kind of satisfied myself that they used the proper, you know, assumptions and coefficients in designing the project." Tr. Vol. 3, p. 182-183.

71. In modeling pre-development conditions HLA subdivided the site into six sub-basins and determined the existing pathways for stormwater flow. Karkowski opined that the decision to identify and model six sub-basins, and any other assumptions made, are based on the professional judgment of the engineer in attempting to mimic the actual pre-development and post-development conditions. Tr. Vol. 3, p. 189-190.

72. Karkowski further confirmed that in pre-development conditions there wasn't significant run-off from the site, due in part to the high infiltration rates of the soils. Tr. Vol. 3, p. 195. In addition, the Corps of Engineers concluded that the off-site flow was only intermittent. Pet. Ex. 29.

73. Karkowski described the post-development stormwater management system. There are two post-development discharge points – one outfall in the north-western portion of the site at Maybank Highway where the majority of the drainage discharges and a smaller outfall at the southern portion of the site. The system connecting to the outfall in the north-western portion of the site includes a rain garden, wet detention pond, a linear bio swale, and a bio-pond.

Each of these BMPs allows for infiltration of stormwater back into the soils and groundwater. Flows that are directed to the southern discharge point also flow through bioretention structures and rain gardens which allow for infiltration rather than an off-site release. Tr. Vol. 3, p. 199-203.

74. Karkowski recommended one modification to the system, which was incorporated into the final design. Karkowski eliminated the stormwater discharge from a wet detention pond, at the outfall, and instead pumps the water back through the site for irrigation. According to Karkowski, “there’s some guidance that’s come out of the EPA to – for the design of modern systems, to try and mimic natural hydrology and their suggestion was you would design a site to not discharge or to capture the rainfall up to or the runoff from rainfall up to a certain level that they termed the 95<sup>th</sup> percentile rainfall event.” With HLA’s original design there was the possibility of a small release outside of the 95<sup>th</sup> percentile rainfall event, but that possibility was eliminated by the design change recommended by Karkowski. Tr. Vol. 3, p. 204-205.

75. In order for rain gardens and bio-ponds to function best, these bio-retention structures should be located in soils with high infiltration rates. Karkowski studied the reports prepared by AOV-AOD’s geotechnical firm, WPC, and determined that all the soils on site had good infiltration, thus promoting the efficiency of the bio-retention that is part of the stormwater design. Tr. Vol. 3, p. 207-208. Karkowski characterized the infiltration rates as “excellent” and “off the chart infiltration rates for bio-retention ponds.” Tr. Vol. 3, p. 209:8-9.

76. Karkowski calculated that there are statistically 120 events a year that have rainfall, and only 5%, or six of these, may be big enough to have some sort of discharge to Church Creek. In the event of a discharge, however, the bio-retention treatment train that collects and conveys the stormwater operates to filter out fecal coliform bacteria and reduce

bacteria loading to Church Creek. Tr. Vol. 3, p. 211:3-8.

77. Karkowski used the IDEAL model to simulate pre and post-development pollutant loading. Karkowski has experience in using a variety of water quality models including the IDEAL model. Karkowski has personally been retained for purposes of modeling water quality impacts from development approximately 30-50 times. Tr. Vol. 3, p. 155-156. The IDEAL model includes a feature that allows the modeler to construct actual BMPs rather than assume BMP efficiency. The IDEAL model can determine the efficiency of a BMP by allowing the user to design the BMP to meet a particular removal goal. Tr. Vol. 3, p. 212, AOV Ex. 53. Karkowski explained the difference between the model's function of determining actual efficiency as contrasted with Petitioners' expert's, Dr. Holland, method of assuming efficiencies by relying on literature values. Tr. Vol. 3, p. 214-215. According to Karkowski, it is not proper to rely on assumed efficiencies, as Dr. Holland did, when modeling water quality impacts. More importantly, Karkowski testified that in his experience DHEC wouldn't accept a model out-put based on assumed efficiencies. "They would require more sophisticated analysis." Tr. Vol. 3, p. 215-216.

78. Karkowski's modeling results showed a significant decrease in post development pollutant loading for fecal coliform bacteria for every storm event up to the ten year event and on an annualized basis. "The system's been designed to not have an increase and to have actually a significant decrease." Tr. Vol. 3, p. 222- 223.

79. Karkowski performed a sensitivity analysis of his modeling to detect parameters that would influence results. Tr. Vol. 3, p. 223. This analysis was significant due to questions raised by Dr. Holland, in reviewing HLA's assumptions that were incorporated into the IDEAL model. Dr. Holland questioned an assumption that five acres of wooded areas previously

classified as “fair” pre-development were classified as “good” post-development. This resulted in decreasing the curve number, or run-off coefficient, from 36 to 30 in post-development calculations. Based on Karkowski’s sensitivity analysis, a reduction by 6 in the run-off coefficient for five acres “hardly changed the findings.” Tr. Vol. 3, p. 228:17, p. 248. In addition, Dr. Holland expressed concern over the values assumed as event mean concentration in Karkowski’s modeling. He confirmed that the values he used were appropriate literature values, but he reduced them and re-ran the model, and it didn’t change the results of a large reduction in fecal coliform loading in Church Creek. Tr. Vol. 3, p. 229.

80. Dr. Holland expressed concern over HLA’s assumptions that post-development soils maintained their classification as Class A soils, based on construction impacts and compaction. However, Karkowski pointed out that TR-55, the hydrological model that Holland used in his analysis, recommends that urbanized soils, post-development, maintain the classification of Class A if the soils are generally sandy, as they are on the AOV-AOD property. Tr. Vol. 3, p. 274.

81. Petitioners’ expert Holland placed reliance on certain publications addressing BMP efficiency. However, the studies referenced by Dr. Holland looked at the efficiency of bio-retention with under-drains. The multiple bio-retention structures proposed in the HLA design, with the exception of the structure identified as Bio-swale #10, do not have any form of drain or underdrain. Karkowski considered the BMP’s depicted in the design for the stormwater system on the AOV-AOD property to be significantly different from the structures evaluated for efficiency in the publications that Dr. Holland relied upon. Tr. Vol. 3, p. 281-282.

82. Petitioners relied upon the testimony of Dr. Holland, qualified as an expert witness in hydrology with the specific emphasis on land-use impacts and water quality. Holland

acknowledged that he only had a “crude” understanding of the IDEAL model. Tr. Vol. 2, p. 62:19. Holland questioned the accuracy of the information that HLA used, which was incorporated into Karkowski’s modeling. His concerns were that pre-development areas were shown as “gravel roads” when there were no gravel roads on the site. He was also concerned about five acres of woods classified as “Fair” for modeling purposes pre-development and “Good” for modeling purposes poste development. Holland acknowledged that Karkowski corrected the error, found in Appendix A to Karkowski’s report. In addition, while Appendix A was inaccurate and needed revisions, both HLA and Karkowski modeled pre-development combined woods of 44 acres, not as gravel roads. Tr. Vol. 2, p. 16:4-15. Consequently the error reflected in the Appendix developed by Karkowski did not effect and was not reflected in the modeling.

83. Holland did his own water quality calculations, utilizing TR-55 and assuming BMP efficiencies at different levels. If he predicted BMP efficiency less than 75 – 80% then he was unable to replicate Karkowski’s results, but he could replicate them if he assumed high BMP efficiency. Tr. Vol. 2, p. 65-68.

84. Dr. Holland believed that the BMP’s proposed for the AOV-AOD property “would be very effective initially. Over time they would become less and less effective.” Tr. Vol. 2, p. 73.

85. Dr. Holland is a resident of Wadmalaw Island and an officer in the Wadmalaw Planning Committee. The Wadmalaw Planning Committee sent a letter to the Mayor of the City of Charleston objecting to the AOV-AOD project. Additionally, Dr. Holland submitted a personal letter to OCRM objecting to the development proposed for the AOV-AOD property. In that letter Dr. Holland advised OCRM that “there is no doubt in my mind as an ecologist that the

current development plans of the County and the City of Charleston adjacent to and around the Angel Oak will ultimately result in its demise.” Dr. Holland acknowledged that when he wrote that letter he hadn’t reviewed Karkowski’s modeling effort or HLA’s design. Tr. Vol. 2, p. 133-134. AOV Ex. 121.

86. The U.S. Soil Conservation Service developed TR-55. Dr. Holland acknowledges that there is no reference in the information provided by the Soil Conservation Service and by the successor agency the Natural Resource Conversation Service to TR-55 having the capability of calculating pollutant loads. Instead, “TR-55 presents simplified procedures to calculate storm runoff, volume, peak rate discharge, hydrographs in storage volumes.” Tr. Vol. 2, p. 152:14-25.

87. AOV Ex. 115 is a summary of the technical features and capabilities of TR-55 and compares TR-55 to other hydrograph models. For the category “pollutant loading” it is noted that TR-55 has no capability to calculate pollutant loads.

88. Dr. Holland expressed concern over the infiltration test results performed by AOV-AOD’s geotechnical firm WPC. He believed that infiltration rates should have been calculated in the wetland areas. Dr. Holland did no soil sampling or soil testing on the site. However, Karkowski noted that infiltration tests were performed in all the areas on site where BMPs would be installed. Tr. Vol. 2, p. 208:5-20.

89. I find that AOV-AOD satisfied the requirement of Reg. 61-101(F)(6) by providing assurances that the measures have been taken to minimize potential adverse impacts on water quality in Church Creek resulting from the proposed development. I find that while Petitioners have expressed, through the testimony of Dr. Holland, concerns over certain assumptions and inputs in both the HLA stormwater model and the IDEAL model, AOV-AOD has demonstrated by a preponderance of the evidence that either the correct data was used in

modeling, or that if the data is subject to question, it is not significant enough to change the outcome of the modeling based on sensitivity analysis conducted on the IDEAL model. I find that while Petitioners' expert cannot replicate the modeling results that Karkowski derived unless high BMP efficiencies are assumed, this is not sufficient basis upon which to challenge the IDEAL model predictions. The model is designed to calculate BMP efficiency and assumed efficiencies are not valid inputs into the IDEAL model. I further find that Petitioners rely on their expert's modeling to challenge AOV-AOD's expert's conclusions that the proposed development will not impact water quality, yet Petitioners' expert used a computer model that doesn't have the capability of determining pollutant loads.

90. I find that AOV-AOD has demonstrated by a preponderance of the evidence that the soils on the AOV-AOD property have sufficient infiltration rates upon which to conclude that the BMP's will perform as predicted. I further find that the measures taken by Karkowski and HLA, to limit the frequency of any stormwater discharge from the site provide reasonable assurances that pollutant loading will decrease post-development. Reg. 61-101(F)(6) contemplates no increase in pollutant loading but AOV-AOD has exceeded that requirement and demonstrated that pollutant loading will decrease on an annualized basis.

#### **Dismissal of Coastal Zone Consistency**

91. Respondents sought dismissal of the challenge to the coastal zone consistency certification issued by OCRM based on timeliness. As is demonstrated in DHEC's Ex. 36, Jeff Thompson's<sup>12</sup> deposition, OCRM issued an initial coastal zone consistency certification for this project on January 10, 2007, as certification of an NPDES stormwater permit application identified as 10-05-11-07. DHEC Ex. 36, p. 11:4-16. AOV Ex. 72. OCRM issued a second

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<sup>12</sup> Jeff Thompson is an employee of DHEC-OCRM and conducted the Coastal Zone certification review for the AOV-AOD proposed development.

coastal zone consistency certification on March 23, 2010 for a different project. (As is discussed in paragraphs 17-22 above, the project changed considerably between 2007-2010 with the abandonment of the big box development concept.) Thompson testified that no additional coastal zone consistency review was conducted after March 23, 2010. The only review conducted was confirmation that the project under review by the BOW staff was the same project that Thompson had reviewed in 2010. DHEC Ex. 36, p. 15-16. Thompson testified that the "Coastal Zone Management Program directs us to only do one consistency determination for a project unless there's significant changes, and that's not usually going to be decreases in impacts. It's going to be increases in impacts that would key us to start a new certification review process." DHEC Ex. 36, p. 61-62. Thompson's position is so long as wetland impacts "stay the same or decrease" then it is not a significant change. DHEC Ex. 36, p. 67:20-23.

92. Section V.C. of the CZMP contains the following regarding consistency procedures: "Within ten days after receipt of notification from a State agency of a State permit requiring coastal zone management consistency certification, [SCDHEC] will notify the public of the commencement of the consistency certification determination review through the issuance of a public notice. The public notice will contain the name of the project or activity requiring the permit, the location of the project (county, street or road address), type of activity (i.e., subdivision development, mine, manufacturing expansion), type of permit, name of agency issuing permit, an announcement that information on the project is available for public inspection at a [SCDHEC] office, and a request that comments be submitted to [SCDHEC] within ten days. Where possible, a joint public notice issued with the issuing agency will meet the above requirements. In those instances where more than one permit is required for a project, as long as no components of the project change, [SCDHEC] will only place the first permit received on

public notice. [SCDHEC] will take identical action on all sequential permits.” (emphasis added.)

93. Therefore, Petitioners opportunity to challenge the coastal zone consistency certification was in the initial contested case that was filed by Petitioners, and then dismissed by the ALC, the Honorable Deborah Durden, on September 13, 2010, as untimely.

94. Petitioners argue that Department’s June 29, 2010, Public Notice indicates that DHEC was undertaking new coastal zone consistency certification and that Reg. 61-101(A)(7) would require a new consistency certification. Reg. 61-101(A)(7) provides that “[f]or Federal permits that require both a water quality certification and a coastal zone consistency certification, the coastal zone consistency certification determination shall be issued as a component of, and concurrently with, the water quality certification, according to the administrative procedures set forth in this regulation and **in accordance with the management policies of the S.C. Coastal Management Program** and applicable law and regulations. In these instances, the water quality certification will serve also as the coastal zone consistency certification.” (emphasis added.) Here, the applicable policies would dictate that no additional certification review or decision was necessary after the decision issued in March 23, 2010.

95. The policies of the CZMP related to fill or alteration of wetlands for residential development allow fill in wetlands for residential development provided that no feasible alternatives exist and an overriding public interest can be demonstrated. Here, the applicant demonstrated no feasible alternatives to the placement of fill material in 2.33 acres of wetlands. In addition, OCRM concluded that a public need was served by the project in that the project benefitted SICHCC. AOV Ex. 125, 93. Moreover, this project serves a public need as identified by the City of Charleston for affordable housing on Johns Island. AOV Ex. 5. Program

Document Chapter III, p. 16.

96. OCRM also found that the project served the policies in CZMP related to Open Space, in that AOV-AOD was increasing the public park area around the Angel Oak Tree and enhancing existing public recreational opportunities. AOV Ex. 125. Chapter III, Section XII.D Program Document.

97. I find that the proposed development of the AOV-AOD property, including the proposal to fill 2.23 acres of wetlands in furtherance of residential development, is consistent with the policies and procedures of the CZMP. I grant Respondents' Motion to Dismiss, and find that OCRM did not take additional action, nor does the Program Document require additional action, on the permit application submitted to the Corps of Engineers. Consequently, there is no subject matter upon which to base a contested case, other than the BOW's action of issuing a water quality certification. OCRM's certification, issued March 23, 2010, clearly states on its face that it is applicable to the "revised jurisdictional determination from the Corps date March 15, 2010." AOV ex. 125.

98. While Petitioners have presented no evidence to challenge the adequacy of the mitigation offered by AOV-AOD, I find that the mitigation proposal of preservation of the remaining 4.23 acres of wetlands on site, the dedication of upland buffers, and the purchase of 24.6 mitigation credits at Pigeon Pond mitigation bank is consistent with and satisfies DHEC's mitigation requirements.

### **CONCLUSIONS OF LAW**

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The Court concludes the following as a matter of law:

#### **Jurisdiction and General Principles**

1. The ALC has jurisdiction over this case pursuant to the South Carolina

Administrative Procedures Act, S.C. Code Ann. §§ 1-23-310, 1-23-370, 1-23-600 et seq. (APA), and the S.C. Pollution Control Act, S.C. Code Ann. § 48-1-10 et seq. (Rev. 2008 and Supp. 2011) and its regulations, 25A S.C. Code Regs. 61-101.

2. In reviewing this matter, the Court serves as the finder of fact and makes a de novo determination regarding the matters in controversy. See S.C. Code Ann. § 1-23-600(B) (Supp. 2010); Brown v S.C. Dep't of Health and Env'tl. Control, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002); see also Marlboro Park Hosp. v. S.C. Dep't of Health and Env'tl. Control, 358 S.C. 573, 595 S.E.2d 851 (2004).

3. The proper standard of proof to be applied in a contested case before the ALC is a “preponderance of the evidence” standard. Anonymous (M-156-90) v. State Bd. Of Medical Examiners, 329 S.C. 371, 375-76, 496 S.E.2d 17, 19 (1998).

4. “It is generally recognized that the trier of fact, who has the opportunity to observe the witnesses and listen to their testimony in person, is in the best position to determine issues of witness credibility.” Dixon v. Dixon, 336 S.C. 260, 263, 519 S.E.2d 357, 358 (Ct. App. 1999). The weight and credibility assigned to evidence presented at the hearing of a matter is within the province of the trier of fact. See S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992). The moving party bears the burden of proof in a contested case hearing. S.C. Code Ann. § 44-7-21(e)(Supp. 2010); see also 2 Am Jr. 2d Administrative Law § 360 (1994); Alex Sanders, et al., South Carolina Trial Handbook § 9:3 Party With Burden, Civil Cases (1999) (In civil cases, generally, the burden of proof rests upon burden of proving that the Department erred in its issuance of the Certification. Here, Petitioner failed to demonstrate by a preponderance of the evidence that the proposed construction is inconsistent with the requirements of S.C. Code Regs. 61-101.

5. With regard to expert testimony, it is generally recognized that “expert opinion evidence is to be considered or weighed by the triers of the facts like any other testimony or evidence” and that “the triers of the facts cannot, and are not required to, arbitrarily or lightly disregard, or capriciously reject, the testimony of experts or skilled witnesses, and make an unsupported finding contrary to the opinion.” 32A C.J.S. Evidence § 727, at 82-83 (1996). However, the trier of fact may give an expert’s testimony the weight he or she determines it deserves, Florence County Dep’t of Soc. Servs. V. Ward, 310 S.C. 69, 72-73, 425 S.E.2d 61, 63 (Ct. App. 1992), and may accept the testimony of one expert over that of another, S.C. Cable Television Ass’n v. S. Bell Te. & Tel. Co., 308 S.C. 216, 417 S.E.2d 586 (1992). In weighing such expert testimony, the general principles for determining whether evidence warrants a finding remain applicable; accordingly, “an expert’s opinion which is based on guess, surmise, or conjecture has little evidentiary value, and expert opinion evidence lacks probative force where the conclusions are contingent, speculative, or merely possible.” 32A C.J.S. Evidence § 730, at 87 (1996).

6. In South Carolina, scientific evidence is considered admissible only where the trial judge finds that such evidence will (1) assist the trier of fact, (2) the expert witness is qualified and (3) the underlying science is reliable. State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508 (1999). When examining the third factor, “reliability”, a court is to determine, “the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom.” *Id.* at 19 quoting State v. Jones, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979).

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**Water Qualification Certification**

7. Pursuant to Reg. 61-101(F)(3):

In assessing the water quality impacts of the project, the Department will address and consider the following factors:

- Whether the activity is water dependent and the intended purpose of the activity;
- Whether there are feasible alternatives to the activity;
- All potential water quality impacts of the project, both direct and indirect, over the life of the project including:
  - Impact on existing and classified water uses;
  - Physical, chemical, and biological impacts, including cumulative impacts;
  - The effect on circulation patterns and water movement;
  - The cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others.
- 25A S.C. Code Regs. 61-101(F)(3) (Supp. 2010)(emphasis added).

8. The regulations further state that certification will be denied if:

The proposed activity permanently alters the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired; or, if there is a feasible alternative to the activity, which reduces adverse consequence on water quality and classified uses. 25A S.C. Code Regs. 61-101(F)(5)(a) and (b)(Supp. 2010). A certification will also not be issued “unless the Department is assured appropriate and practical steps...will be taken to minimize adverse impacts on water quality and the aquatic ecosystem.” 25A S.C. Code Regs. 61-101 (F)(6)(Supp. 2010).

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9. A review of the provisions of Reg. 61-101 shows that there is no definition of “feasible alternatives” in the State’s regulations. Therefore, it is within the Court’s role as finder of fact to determine the meaning of this undefined term. The interpretation by an agency of its

own regulation is given great deference. Earl v. HTH Assocs., Inc./Ace USA Ins. Co. of N. Am., 368 S.C. 76, 81, 627 S.E.2d 760, 762 (Ct. App. 2006). Murphy v. SCDHEC and District 5 of Lexington and Richland Counties, 2012 WL 718623 (S.C.)

10. Based upon the vagueness of the regulation which arises from a lack of regulatory definition of the term “feasible alternative,” I look to previous decisions of this court concluding, as a matter of law, that the meaning of “feasible” is equivalent to “practicableness,” a term utilized by the Corps of Engineers and by the EPA in its 404(b)(1) Guidelines. Scott McNair and the S.C. Coastal Conservation League v. S.C. Dep’t of Health and Env’tl. Control and Bindon Plantation, Docket No. 08-ALF-07-0393-CC (October 13, 2009). Murphy v. SCDHEC and District 5 of Lexington and Richland Counties, 2012 WL 718623 (S.C.)

11. Additionally, it is compelling that, due to the numerous constraints at the AOV-AOD project site arising from requirements of the City of Charleston and from the need to move the development away from the Angel Oak Tree and City Park, AOV-AOD’s planners and engineers were limited as to the design and placement of the roads and residential buildings within the project. Further, Petitioners failed to propose any alternative designs that could meet the project’s stated purposes. Finally, it was not practicable, given that AOV-AOD had demonstrated that the project could only be undertaken at a loss to AOV-AOD, to require further reductions in the number of residential units.

12. Finally, AOV-AOD has agreed to mitigate the unavoidable wetland impacts by preserving in perpetuity the 4.23 acres of wetlands remaining on site, the dedication of upland buffers, and the purchase of 24.6 mitigation credits at Pigeon Pond mitigation bank

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**Coastal Zone Consistency Certification**

13. The CZMP requires that OCRM only conduct a coastal zone consisting

certification one time, and that certification is applicable to all other permits for a project provided that no components of the project change. Here, Petitioners challenge the consistency certification issue for this project, although their challenge was dismissed as untimely. This Court has no subject matter jurisdiction to hear Petitioner's challenge to the consistency certification in the context of this contested case. Respondents' Motion to Dismiss the challenge to the coastal zone consistency certification is granted.

### CONCLUSION

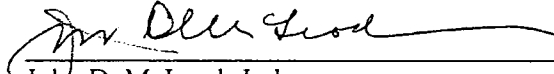
Upon hearing all of the testimony and reviewing the exhibits pertinent to the feasible alternative analysis, I find that the Department correctly determined that there were no feasible alternatives that address the needs of AOV-AOD and the overall project purpose. I find that AOV-AOD has demonstrated sufficient avoidance and minimization in reducing wetland impacts to 2.23 acres. I find that AOV-AOD has provided the necessary assurances that water quality in Church Creek will not be negatively or adversely impacted by the proposed development. I find that AOV-AOD has also taken significant measures to ensure the continued viability of the Angel Oak Tree located on the adjacent City Park.

Based on the Findings of Fact set forth herein and the applicable legal requirement discussed above, I find and conclude that AOV-AOD has fully complied with the requirements of Reg. 61-101. Therefore, I affirm the Department's decision to issue a 401 water quality certification. I also find and conclude that AOV-AOD has satisfied the requirements set forth in the Coastal Zone Management Program Document governing proposals to fill wetlands for residential development. Finally, I conclude that this Court lacks subject matter jurisdiction to hear a challenge to DHEC-OCRM's coastal zone consistency certification, since the certification was issued on March 23, 2010, a contested case filed, and that case dismissed as untimely.

**IT IS, THEREFORE, ORDERED**, that the Department's issuance of a 401 water quality certification to Respondent AOV-AOD be, and it is hereby, **AFFIRMED**.

**AND IT IS SO ORDERED.**

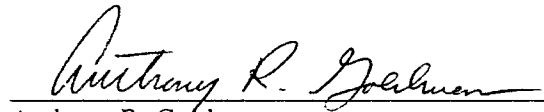
July 25, 2012  
Columbia, SC

  
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John D. McLeod, Judge  
S.C. Administrative Law Court

**CERTIFICATE OF SERVICE**

I, Anthony R. Goldman, 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).

July 25, 2012  
Columbia, SC

  
\_\_\_\_\_  
Anthony R. Goldman  
Judicial Law Clerk