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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

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

Docket No. 09-ALJ-07-00029-CC

Kiawah Development Partners, II, Respondent,

v.

South Carolina Department of Health and Environmental Control, Appellant.

Docket No. 09-ALJ-07-00039-CC

South Carolina Coastal Conservation League, Appellant,

v.

South Carolina Department of Health and Environmental Control and and Kiawah Development Partners, II,

Of Whom

South Carolina Department of Health and Environmental Control is, Appellant,

and Kiawah Development Partners, II, is Respondent.

APPELLANT'S FINAL BRIEF OF SCDHEC

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STATEMENT OF THE CASE

This case involves a critical area application by Kiawah Development Partners, II ("Development Partners") to the Department of Health and Environmental Control (the "Department") for a Critical Area Permit to construct a 2,783' bulkhead and 2,783'x 40' articulated concrete block revetment along the sandy shoreline of the Kiawah River at Captain Sam's Spit on Kiawah Island. The Department's Ocean and Coastal Resource Management (OCRM) issued a permit that authorized a 270' bulkhead and revetment immediately adjacent to the Beachwalker Park parking lot, where park facilities are being threatened by chronic erosion along that portion of the Kiawah River shoreline; the Department denied the remaining 2,513' bulkhead and 2'513 x 40' revetment.

Development Partners appealed the Department's decision to deny the remaining 2,513' bulkhead and 2'513' x 40' revetment to the Administrative Law Court. The South Carolina Coastal Conservation League (the "Conservation League") also requested a contested case hearing at the ALC, appealing the Department's decision to authorize 270' bulkhead/revetment adjacent to the Beachwalker Park parking lot. The Conservation League supported the Department's decision to deny the remaining 2,513' requested by Development Partners. The ALC consolidated the contested cases.

Following a five day hearing at the Administrative Law Court (the "ALC") the week of August 24, , the ALC, Judge Ralph King Anderson, III,[1] issued a Final Order and Decision dated January 22, 2010 ("Order") which deleted the condition imposed by the Department limiting the bulkhead/revetment to 270'. The ALC affirmed the Department's authorization of the 270' structure, and agreed that the entire 2,783'

[1] The contested case was originally assigned to Judge John D. McLeod, who recused himself one week before the hearing. (R. p. 72).

bulkhead and 2,783' by 40' revetment applied for by the Development Partners was not necessary. Rather than affirming the Department's decision, the ALC designed an erosion control structure which it authorized. The ALC authorized the full structure for the first approximately 1000' feet; for the structure after survey point "F" on Exhibit 77, "a bulkhead shall not be used where the vertical face of the escarpment is less than 24 inches" and "the ACB mat shall be no greater than eight feet in width." The Conservation League and the Department filed Motions to Reconsider or Alter and Amend. The Court issued an Order On Motions For Reconsideration ("Motions Order") and an Amended Final Order and Decision ("Amended Order") on March 1, 2010.

The Conservation League filed a Notice of Appeal on March 26, 2010 and a Petition for Order of Supersedeas. The Department filed a Notice of Appeal on March 29, 2010. On June 10, 2010, this Court issued an Order transferring the appeal from the Court of Appeals to the Supreme Court on motion of the Conservation League. By order dated July 22, 2010, this Court granted the Conservation League's Petition for Supersedeas and issued an expedited briefing schedule.

FACTS

Development Partners[2] purchased Kiawah Island in 1988. (R. p. 274D). Captain Sam's Spit (the "Spit") is on the southwestern tip of Kiawah Island adjacent to Beachwalker County Park ("Beachwalker Park" or "the Park"). At the time of purchase, the Spit was designated as "not suitable for development" and was zoned for use as park space and open area. The previous development agreement between the Town and Development Partners limited its use to park space and open area. Until 2005,

[2] Development Partners as used herein refers also to Kiawah Resort Associates and other companion entities that own land at Kiawah. (R. p. 274A, line 24-p. 274B, line 4).

Development Partners had no expectation of developing the Spit. (R. p. 419, line 24-p. 420, lines 3). In 2005 the Development Partners and the Town renegotiated the Development Agreement to authorize Development Partners to develop up to fifty home-sites on the Spit in exchange for Development Partners giving up rights to construct a 325 room hotel adjacent to the Spit. (R. p. 282, lines 7-19, p. 489 line 18-p. 490, line 15, p. 499, line 10-p. 500, line 25).

The Spit is surrounded on three sides by coastal tidal waters subject to the daily ebb and flood of the tide; the "front side" faces the Atlantic Ocean, the "backside" is bordered by the Kiawah River and the western side is separated from Seabrook Island by Captain Sam's Inlet. As a littoral property owner, the boundary of Development Partners' upland property is the mean high water mark. (R. p. 333, line 20-p.334, line 5). The property boundary is not fixed, but meanders with gradual erosion or accretion of the adjacent tidal water bodies. (R. p. 721, lines 8-17). On the front (ocean) side, the Spit has experienced years of steady accretion for well over a decade. (R. p. 720 line 21-721 line 17). On the back (river) side, the Spit has experienced years of gradual erosion as the Kiawah River migrates southwestwardly. The erosion on the backside is at a lower rate than the front side is accreting. (R. p. 912, lines 19-25). As a result, Development Partners' upland property has grown in size while shifting towards the Ocean. (R. p. 720, line 21-p.721 line 17, p. 1347, line 21-p.1368 line 21).

The Park is operated by Charleston County Parks and Recreation Commission ("PRC") on lands leased from Development Partners. (R. p. 1211, line21-p. 1212, line 1). The Park, which has public parking spaces and facilities for visitors, is the only public beach access on Kiawah Island. In recent years the southwestward migration of the

Kiawah River has caused upland to slough off into the river, threatening the parking lot. (R. p. 388, line 20-p. 390, line 7). As a result, PRC submitted a critical area permit application to the Department for a 270' long erosion control structure immediately adjacent to the park where erosion was most severe. (R. p. 1289 lines 19-22, p. 1367 lines 5-13). The PRC request was held in abeyance at the joint request of PRC and Development Partners and subsequently withdrawn. (R. p. 1289 line 19-p. 1290 line 25).

Development Partners subsequently submitted a critical area permit application to the Department seeking to fix the location of the Kiawah River shoreline (Development Partners' property boundary) for a length of 2,783'. (R. p. 2095-2111). The application proposed a 2,783' vertical bulkhead and a 2,783' x 40' Articulated Concrete Block revetment, to be constructed of concrete blocks, laid on its side, holes-up, and linked together—referred to as a concrete block mattress. (R. p. 653 line 1-654, line 4, p. 660, lines 12-16, p. 1289 lines 5-12). The proposed length of the structure far exceeds (triples) the length of any other erosion control structure for which an application has been sought from the Department. (R. p. 377 lines 10-25, p. 1396 line 18-p. 1397, line 10). Development Partners' stated purpose for the revetment proposal is facilitate and increase the marketability of potential homesites on the Spit. (R. p. 346, lines 11-19, p. 348, line 19-p. 349, line 13).

Currently, the Kiawah River shoreline is gently sloped, sandy, and readily used by the public. (R. pp. 2271-2276). The adjacent spit is pristine and unfamiliar with human improvements. (R. p. 425, lines 8-20). It is one of only three such spits in South Carolina. (R. p. 1361, lines 6-18). Development Partners' Ex. 6 shows the use of a similar concrete block revetment in another setting—on Daniel Island. (R. p. 290, line 8-

291, line 18, pp. 2090-2094). The space between the rows of blocks, as well as the holes in the blocks themselves, poses an obvious safety hazard for any person desiring to utilize the shoreline. As Mr. Long acknowledged, should any grass grow in the voids,[3] this would make utilization of the shoreline even more dangerous. (R. p. 390, line 8-p. 391, line 16). In addition, the revetment would facilitate upland development on the adjacent Spit. (R. p. 417).

The Department denied the application. The Department relied primarily on Regulations 30-11(C)(1) and the policies in §§ 48-39-20 and 30. The Department determined that the proposed revetment would be contrary to the statutory requirement that the critical areas of the coastal zone be used in a manner that is most beneficial to the Public and contrary to state policies against siting development in the fragile and sensitive areas of the coastal zone. (R. p. 1963-1969, 2231-2241). The Department determined that the revetment would have substantial adverse cumulative effects—by itself and particularly when viewed in the context of possible future development and the general character of the area.

STANDARD OF REVIEW

This Court's review of the ALC's Order is governed by the Administrative Procedures Act, which provides that the Court may reverse the decision of the ALC if the ALC's Order is "(a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial

[3] Mr. Eiser testified and opined that grass is not likely to grow in the voids between the blocks because of the high energy environment. (R. p. 1273, line 19-p. 1274, line 9). This testimony was not rebutted. Mr. Bohannon would only go so far as to say they hoped grass would grow, but he acknowledged its a high velocity area and grass isn't growing now. (R. p. 670, line 16-p. 672, line 16).

evidence on the whole record; or (f) arbitrary and capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380(5); S.C. Code Ann. § 1-23-610; *Bailey v. South Carolina Dept. of Health*, 388 S.C. 1, 5, 693 S.E.2d 426, 428 (Ct. App. 2010).

ARGUMENT

The ALC's Order is based on the ALC's flawed interpretation and application of the Coastal Zone Management Act[4] (the "Act") and the Coastal Zone Management Program (the "CMP") administered by the Department. The ALC's narrow interpretation of the Act to preclude the Department from considering impacts outside of the critical areas when acting on critical area permit applications is inconsistent with the Act. The ALC erroneously curtails the cumulative effects review that the Department is required to consider. The ALC's conclusions that the fragile and sensitive nature of the adjacent Spit and the false sense of security the revetment will for prospective homebuyers are irrelevant are also errors of law. The ALC also disregards the policy of the state to give high priority to natural systems of the coastal zone. Additionally, the ALC's cursory treatment of the CMP is affected by error of law. At the crux of the ALC's legal errors is the erroneous holding that the Department is not entitled to any deference in its interpretation of the statutes and regulations it administers. Finally, the ALC's alternative conclusory findings of fact are insufficient as a matter of law, are arbitrary and capricious, and lack substantial evidence in the Record.

I. The ALC's Interpretation Of The Act and Regulations Is Erroneous

Despite clear language in the Act requiring the Department to "protect and

[4] The Coastal Zone Management Act collectively refers to the Coastal Tidelands and Wetlands Act (S.C. Code Ann. § 48-39-10 through 48-39-220) and the Beachfront Management Act (S.C. Code Ann. § , codified at S.C. Code Ann. §§ 48-39-10 et. seq.

preserve the natural resources of the coastal zone for this and successive generations," the ALC spends a significant portion of the 31 page order attempting to obfuscate the Department's authority. Development Partners' application to the Department sought approval to convert 2.63 acres of the sandy shoreline of the Kiawah River—2.63 acres public trust tidelands—into a concrete block mattress to protect the marketability of potential homesites on The Spit. (R. p. 348, line19-p. 349, line 13). The ALC's holdings that the Department can only consider impacts within the critical area and not outside the critical area, that the Department cannot consider the suitability of the highland for residential development, that the Department can only consider direct impacts of the activity and not cumulative impacts directly flowing from the activity such as future development, and that the Department may not discourage interference with natural coastal processes are all inconsistent with the Act and thus controlled by error of law.

A. The ALC Erroneously Concludes That The Department Lacks The Authority To Consider Impacts Outside The Critical Areas When Reviewing Applications To Alter Or Utilize Critical Areas.

The ALC's conclusion that the Department's review of critical area permit applications is limited to assessing impacts to the critical areas is directly contrary to the Coastal Zone Management Act, OCRM's enabling statute. When the General Assembly passed South Carolina's Coastal Zone Management Act, the "Coastal Tidelands and Wetlands Act" in 1977, it declared the policy of the state with regards to activities in the coastal zone. When acting on critical area permit applications, the Department is required to review the proposed activities in the context of these policies. S.C. Code Ann. § 48-39-150(A) ("In determining whether a permit application is approved or denied the Department shall base its determinations on the individual merits of each application, the policies specified in Sections 48-39-20 and 48-39-30...")

Specifically, the General Assembly found that:

> (A) The **coastal zone**[5] is rich in a variety of natural, commercial, recreational and industrial resources of immediate and potential value to the present and future well being of the state.
> (B) The increasing and competing demands on the **lands and waters of our coastal zone** occasioned by population growth and economic development [...] have resulted in the decline or loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use and shoreline erosion.
> (C) [...] South Carolina can only regain control of the regulation of its critical areas by developing its own management programs. **The key to accomplishing this is to encourage the state** and local **governments to exercise their full authority over the lands and waters in the coastal zone.**
> (D) The **coastal zone** and the fish, shellfish, other marine resources and wildlife therein, may be ecologically fragile and consequently extremely vulnerable to destruction by **man's alterations**.
> (E) Important ecological, cultural, natural, geological, and scenic characteristics, [...] **in the coastal zone** are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values.
> (F) In light of competing demands and the urgent need **to protect and give high priority to natural systems in the coastal zone** while balancing economic interests, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate.

S.C. Code Ann. § 48-39-20 (emphasis added). The declarations in § 48-39-20, which the Department is required to consider when acting on permit applications, clearly envision that the Department has the authority—and the obligation—to consider impacts not just within the critical area, but outside of the critical areas as well.

The Department's obligation to consider impacts both within and outside of the critical area in the coastal zone is similarly elucidated from § 48-39-30:

> (B) Specific State Policies to be followed in the implementation of this chapter are:

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[5] The "Coastal Zone" is defined as all coastal waters and submerged lands seaward to the State's jurisdictional limits and all lands and waters in the counties of the state which contain any one or more of the critical areas. These counties are Beaufort, Berkeley, Charleston, Colleton, Dorchester, Horry, Jasper, and Georgetown. S.C. Code Ann. § 48-39-10(B).

> (1) To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to to **protect the sensitive and fragile areas from inappropriate development** and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;
> (2) **To protect and, where possible, to restore or enhance the resources** of the State's **coastal zone** for this and succeeding generations;
> (3) To formulate a comprehensive tidelands protection program;
> (4) To formulate a comprehensive beach erosion and protection policy including the protection of necessary sand dunes;
> [...]
> (D) **Critical Areas shall be used to provide the combination of uses which will insure the maximum benefit to the people**, but not necessarily a combination of uses which will generate maximum dollar benefit. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.

S.C. Code Ann. § 48-39-30 (emphasis added). A review of the declarations in this Section indicates the General Assembly's intent that the Department, when acting on critical area permit applications, would not just protect and restore or enhance the critical areas, but rather that the Department would protect and restore or enhance all of the resources within the coastal zone.[6] The ALC vitiates this intent by declaring that the Department shall only consider the impacts within the critical area. The policies in § 48-39-20 and 48-39-30, which the General Assembly requires the Department to consider when acting on critical area permits[7] are not as limited as the ALC erroneously held.

Multiple opinions of the Attorney General have reached similar conclusions. *See, e.g.,* Opinion of Assistant Deputy Attorney General Robert Cook, 2006 WL 1207276 (April 18, 2006) ("In our view, DHEC is empowered to regulate not only activities in the

[6] It also bears pointing out that § 48-39-200, which purported to limit the Department's permitting jurisdiction to the Critical Areas, was repealed. Though direct permits are only required for activities in the coastal zone, once a permit is required, the General Assembly clearly intended that the Department review the impacts of the activity within and outside the critical area.
[7] *See* S.C. Code Ann.§ 48-39-150(A); Reg. 30-11(B).

"critical areas," but also activities outside the critical areas when such activities adversely affect those critical areas"); Opinion of Attorney General Henry McMaster, 2006 WL 1207263, 16 (April 3, 2006) ("Obviously, such provision may well require regulation beyond the critical area boundaries in order to insure that the 'beneficial use of the critical area' is protected and preserved;" "These provisions further reinforce the conclusion that DHEC is not limited to regulation of the 'critical areas' only."). Though opinions of the general assembly are not binding on the Courts, the opinions of the Attorney General "should not be disregarded without cogent reason." Marchant v. Hamilton, 279 S.C 497, 502, 309 S.E.2d 781, 784 (Ct. App. 1983) (finding no cogent reason to disregard the AG opinions at issue in that case); Etiwan Fertilizer v. S.C. Tax Commn., 217 S.Ct. 354, 60 S.E.2d 682 (1950).

The ALC failed to read the CMP and the CZMA as a whole, and by so failing, erroneously limited the scope of DHEC's review of permit applications to only considering impacts within the critical area. See Spectre, LLC v. South Carolina Dept. of Health and Environmental Control, 386 S.C. 357, 364, 688 S.E.2d 844, 847 (2010) ("Because the site Spectre proposes to develop is unconnected to open water and is not subject to the jurisdiction of the Army Corps of Engineers, the ALC concludes that the CMP does not apply to the site. We find the ALC's interpretation inconsistent with the CMP when read as a whole.") (emphasis added).

B. The ALC Misconstrues Regulation 30-11(C)(1)

Regulation 30-11(C)(1)[8] requires the Department to consider "the extent to which long-range, cumulative effects of the project may result within the context of other

[8] A similar provision is enunciated in the CMP, Guidelines for Evaluations of all projects: "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, p. III-14.

possible development and the general character of the area." The ALC erroneously declared that the Department's review under this provision is limited to impacts of the project itself (R. p. 35), and limited only to impacts within the critical areas:

> [CCL and the Department] argue that the bulkhead/revetment will allow homes to be built upon Captain Sam's which will change the character of the **upland** area. Instead, the pertinent inquiry is the cumulative impacts of the project **within** the critical area, not the cumulative impacts of future development on the high ground **outside** the critical area. In other words, the area for which the Department has regulatory authority is the critical area, not the high ground **outside** the critical area"

(R. p. 22) (emphasis in original). The ALC's interpretation is inconsistent with plain language of the Regulation itself. The error is even clearer when the Regulation is read in the context of the declarations in §§ 48-39-20 and 48-39-30.

It is clear from the words of the regulation that the Department is to consider the effects of the project within the context of other possible development[9] and the general character of the area. Given that Development Partners' own representatives conceded at the hearing that the purpose of the bulkhead/revetment is to facilitate homesites on the adjacent Spit, it is clearly proper for the Department to examine the cumulative effects of the revetment in the context of this "possible development." Moreover, nothing in the regulation limits the scope of the Department's review to cumulative impacts **within the Critical Area** as erroneously declared (and emphasized) by the ALC. Rather, the Regulation dictates that the Department review the cumulative effects in the context of possible future development and the general character of the area. If the General Assembly had intended to confine the "area" to the "critical area", it could have so defined. However, such a limitation would not have been consistent with the expressed

[9] Or, as the CMP states, "when reviewed in the context of." Note 8, supra.

policy of the General Assembly in §§ 48-39-20 and 48-39-30[10].

Even Development Partners' witnesses conceded that the general character of the area—both the Kiawah River shoreline and the adjacent Spit—is a pristine area unfamiliar with human improvements. (R. p. 425, lines 8-20). The adjacent spit is dynamic in nature and subject to tidal and wave action on three sides—the Atlantic Ocean, Captain Sam's Inlet, and the Kiawah River. (R. p. 717, line 17-p. 721, line 21, p. 1517, line 12-p. 1519, line 19). Mr. Eiser testified that it is very unique from a natural resource perspective, as it is one of only three undeveloped spits in the State. (R. p. 1361, lines 9-18). This was not rebutted.

All of the evidence indicates without question that the general character of the area will change with the conversion of 2.63 acres of the sandy intertidal shoreline into a concrete block mattress. Moreover, it is not disputed that the general character of the area will be significantly altered with the addition of homesites on the adjacent upland. *See, Young v. South Carolina Dept. of Health and Environmental Control*, 383 S.C. 452, 462, 680 S.E.2d 784, 789 (Ct. App. 2009) ("As noted by the ALC, the area surrounding Young's property is not a 'pristine wilderness, unmarked by docks and piers, but is a creek familiar with development, including docks with boatlifts and other boat storage methods.'). The ALC simply erred by concluding that the Department could not look at the change in character of the immediately adjacent upland area.

The ALC questions whether DHEC has the authority "through coastal permitting to deny upland development even against the Town's approval of that development

[10] Even in the context of other possible activities in the critical area, it appears that there's a possibility that training jetties will be applied for, or that they will apply for a wider revetment. (R. p. 675, line7-p. 679, line 25, p.1982). Mr. Bohannon testified that such a structure would be "ugly as sin" but could not rule out the possibility of applying for training jetties in the future. (R. p. 674, line 18, p. 680, line 17).

through its zoning process"[11] (R. p. 22). The ALC misses the point. The Department has not denied Development Partners from developing its upland. Rather, the Department has denied Development Partners an application to convert 2.63 acres of public trust tidelands into a concrete block mattress to facilitate increasing the marketability of potential homesites on the adjacent pristine highland.

Just because a town or local government approves an upland area for development through zoning does not necessitate that the Department authorize an alteration to the critical area to make otherwise ill-advised development in a fragile and sensitive area more marketable. To the contrary, the General Assembly recognized that existing local land use controls were insufficient to protect the sensitive and fragile areas from ill-planned development, S.C. Code Ann. § 48-39-20(F), and as a result, tasked the Department with management of the Critical Areas "to ensure the maximum benefit to the People". S.C. Code Ann. § 48-39-30(D).

The upland development on the adjacent pristine Spit—a relatively new geologic feature that has been at least twice eroded and redeposited in the last two hundred years (R. p. 754, line 1-16, p. 1829-1832)—is exactly the impact the General Assembly intended the Department to take into account when it required the Department to consider

[11] The ALC continued this same misplaced analysis on the following page:

> "Thus, the governmental consideration of whether residential uses are appropriate above the critical line and landward of the setback line for [the Spit] is a zoning matter within the province of the Town of Kiawah Island. To the contrary, the Department's actions in this case appear to be colored by its mistaken belief that it may, simultaneously, trump local zoning and development agreements and decree that privately owned upland property remain permanently undeveloped and in a natural state without any suggestion of fair compensation to the owner...However, nowhere do the statutes and regulations prohibit lawful, zoned real estate development on highland parts of barrier islands above OCRM critical lines and landward of OCRM setback lines in the coastal zone.

(R, p. 23). Again, DHEC is not overriding the Town's Zoning or prohibiting development. Rather, DHEC declined to authorize the Development Partners to convert 2.63 acres of tidelands into a concrete block mattress to make otherwise undesirable homesites more marketable. Moreover, the ALC's rationale would posit that local zoning takes precedence over substantive state laws that might interfere with an activity that would otherwise be consistent with local zoning.

the cumulative effects of the project in the context of possible future development and the general character of the area. Contrary to the ALC's contrite discussion, the Department is not overruling local zoning. The Department is simply exercising its obligation to ensure that the critical areas be utilized for the maximum benefit for the people rather than to facilitate construction on an adjacent pristine and fragile spit. The ALC's erroneous interpretation of Regulation 30-11(C)(1) constitutes error of law.

Moreover, contrary to arguments by Development Partners and the insinuation by the ALC in footnote 20,[12] the Department has the authority to deny and has on multiple times denied applications based on potential cumulative effects. *See, e.g., Terry v. South Carolina Dept. of Health and Environmental Control*, 377 S.C. 569, 576, 660 S.E.2d 291, 295 (Ct. App. 2008) (upholding Department's denial of permit based on cumulative impacts); *DuRant v. South Carolina Dept. of Health and Environmental Control*, 361 S.C. 416, 423, 604 S.E.2d 704, 708 (Ct. App. 2004) ("[OCRM] concluded the construction of the dock would permanently disrupt the ability of the Department to utilize the State Park for recreational and educational opportunities along the Oaks Creek marsh."); but see *Young*, 383 S.C. at 462, 680 S.E.2d at 789.

C. The ALC Erroneously Concluded That The General Assembly Did Not Intend For DHEC To Review Upland Impacts When Acting On Critical Area Permit Applications.

The ALC concluded that:

> "the Department avers that it has the authority through coastal permitting to deny upland development even against the Town's approval of that

[12] The ALC states "it also bears pointing out that this regulation specifies that OCRM must **in part** base its decisions regarding permits applications on the policies specified in Sections 48-39-20 and 48-39-30 and thus be guided by the following." R. p. 25, n.20 (underlined emphasis added, bolded in original). The ALC focused on the language "in part" and appears to ignore and/or negate the word immediately preceding—"must."

> development through its zoning process.[13] If the General Assembly had intended to authorize such a considerable expansion of the Department's authority it is inconceivable that it would have done so with such general language.[14]

(R. p. 22). Although the Department has not denied the Development Partners the use of its upland, it has denied the Development Partners' request to convert 2.63 acres of state-owned public trust tidelands to a concrete block mattress based in part on the potential long range cumulative effects of the 2,783' bulkhead and 2,783' by 40' revetment, when viewed in the context of the possible future development and the general character of the area.

Contrary to the ALC's conclusion, the General Assembly expressly intended the Department to look not only at the impacts of the project in the critical area, but also at long range and cumulative impacts of the project when viewed in the context of upland development that the bulkhead/revetment is intended to facilitate/make more marketable. The General Assembly specifically declared that "existing state and local arrangements for planning and regulating land and water uses" in the coastal zone is **"inadequate."** S.C. Code Ann. § 48-39-20(F) (emphasis added). The first specific policy declared by the legislature is "to promote the economic and social improvement of the citizens of this State and to encourage development of coastal resources ... within the framework of a coastal planning program that is designed **to protect the sensitive and fragile areas from inappropriate development...**" S.C. Code Ann. § 48-39-30(B)(1).

Contrary to the ALC's conclusion that it would be "inconceivable" that the

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[13] The ALC misconstrues the nature of the Department's permitting decision. The Department has not denied any upland development. Rather, the Department denied the Development Partners request to use state-owned public trust resources to make more marketable the potential homesites on the unstable, fragile, and pristine upland spit of sand. Long testified they can construct homesites without a revetment.
[14] The ALC failed to look at the language in the Act as a whole and misconstrued the Department's argument to solely rely on 30-11(C)(1).

General Assembly intended to weigh in on land use determinations for upland property, the General Assembly specifically found that existing arrangements for land use regulation was inadequate and tasked DHEC with creating a coastal management program designed to protect sensitive and fragile areas from inappropriate development. The General Assembly has given the Department express authority to consider the appropriateness of upland development and other cumulative effects when determining whether to grant a request to alter or utilize the critical areas of the coastal zone. S.C. Code Ann. § 48-39-30; Reg. 30-11(C)(1).

In fact, many of the specific project standards impact upland development decisions. For example, the regulations limit docks to one structure per parcel and limit docks for parcels subdivided and recorded after 1993 to 75 minimum feet of marsh frontage. Compare 23A S.C. Code Ann. Regs. 30-12(A)(1)(a) and 30-12(A)(1)(o). Though local zoning and land use regulations may authorize lots with much greater density than the 75' marsh frontage requirements, the regulations certainly have the effect of limiting the density of upland development adjacent to tidal creeks. Along this same vein, on coastal islands for which a bridge or dock permit is obtained, the critical area regulations require assessment of the density of development on the island. 23A S.C. Code Ann. Reg. 30-12(N). One of the ten general considerations explicitly requires the Department to consider upland impacts. *See e.g., Too Tacky Partnership v. South Carolina Dept. of Health and Environmental Control*, 386 S.C. 32, 42, 686 S.E.2d 194, 199 (Ct. App. 2009) (concluding that there was substantial evidence in the record supporting the ALJ's finding that the Department properly considered the ten general considerations, and that the dock would not have an impact on the adjacent **upland**

property") (emphasis added). Likewise, the specific project standards for marinas look at upland activities associated with the marina activity in the critical area. *See* 23A S.C. Code Ann. Reg. 30-12(E). In addition, the Regulations prohibit the filling of wetlands to create residential lots for private gain. 23A S.C. Code Ann. Reg. 30-12(G). Though not directly applicable to the permit at issue, it is illustrative of the general policy that critical areas be used in a manner that provides maximum benefit to the people—and that conversion of the sandy shoreline of the Kiawah River into a concrete block mattress to make homes more marketable is inconsistent with this requirement.

In fact several cases have affirmed Department decisions that had the effect of reducing the likelihood of residential development. *See, e.g., Beard v. South Carolina Coastal Council*, 304 S.C. 205, 207, 403 S.E.2d 620, 621 (1991)(affirming denial of bulkhead permit that violated the policies of the Act); *South Carolina Wildlife Federation v. South Carolina Coastal Council*, 296 S.C. 187, 188, 371 S.E.2d 521, 522 (1988) ("affirming denial of project dredge canal through freshwater wetlands in order to create waterfront residential lots and provide access to the Waccamaw River").

Thus, the Department is indeed possessed with the express authority to deny a permit to alter and utilize critical area where the alteration of the critical area—here, conversion of a sandy shoreline to a 2.63 acre concrete block mattress—will facilitate development of homesites on a ecologically fragile and sensitive spit of sand that is extremely vulnerable and subject to dynamic wave action on three sides.

D. The ALC Erroneously Concludes That "Stability of The Adjacent Highland" Is Not An Appropriate Consideration When Reviewing An Application To Construct A Bulkhead Or Revetment In The Critical Area

The ALC concludes that "stability of the adjacent highland" is not an appropriate consideration when considering an application to construct a bulkhead or revetment in the

critical area. (R. p. 23-24). To the contrary, in tasking the Department with "protect[ing] and, where possible restoring or enhancing the resources of the State's coastal zone for this and succeeding generations," the General Assembly recognized that "important ... natural, geological and scenic characteristics...in the coastal zone are being irretrievably damaged or lost by ill-planned development that threaten these values." S.C. Code Ann. § 48-39-20. One of the fundamental policies declared by the General Assembly was "to promote economic and social improvement of the citizens of this State and to encourage development of coastal resources ... within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to construction of facilities in the critical areas of the coastal zone..." S.C. Code Ann. § 48-39-30(B)(1). The Department is required to consider these policies when acting on applications to alter or utilize critical area. S.C. Code Ann. § 48-39-150(A). The ALC's ruling that the stability of adjacent high ground is not an appropriate consideration is blatantly inconsistent with this policy.

E. The ALC Disregards The General Assembly's Declaration of An Urgent Need To Give High Priority To Natural Systems In The Coastal Zone

The ALC erroneously concludes that "no regulation or statute prohibits construction of a bulkhead or revetment that retards the process of shoreline change, another argument made by OCRM and CCL in opposition to this permit" and that "the General Assembly specifically recognized a fundamental need to protect upland from destruction from the natural process of erosion on tidal rivers." (R. p. 24). Though there is no outright prohibition on interfering with natural processes, the General Assembly has declared an "urgent need to protect and to give high priority to natural systems in the

coastal zone." S.C. Code Ann. § 48-39-20(F) (emphasis added).[15] The ALC's finding that there is a fundamental need to stop this natural process (R. pp. 7-8, 19) is in direct conflict with this declaration by the General Assembly and misinterprets § 48-39-120(F).

This high priority for natural processes is iterated in the policies in the CMP addressing erosion control activities.[16] Though the ALC is correct that there are specific project standards for bulkheads and revetments in the critical areas, compliance with the specific project standards does not negate the Department's obligation to consider the application in the context of the policies in 48-39-20 and 48-39-30, the ten general considerations, and the cumulative effects regulation. Rather, the specific project standards in Regulation 30-12(C) are in addition to the general considerations applicable to the review of all permit applications.

In addition to instructing the Coastal Council[17] to develop a regulatory system which the Department shall use in providing for the orderly and beneficial use of the critical areas, (S.C. Code Ann. §§ 48-39-80(A); 48-39-130(B); *Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 491, 413 S.E.2d 13, 14 (1991)), the General Assembly required the Department to take into account the ten general considerations and the policies set forth in §§ 48-39-20 and 48-39-30 when acting on permits to alter or utilize critical area. S.C. Code Ann. § 48-39-150. The requirement to take into account the policies in § 48-39-20 and 48-39-30 in addition to the specific project standards in Regulation 30-12 is enunciated in Reg. 30-11(B) and (C). 23A S.C.

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[15] It was in part in light of this urgent need that the General Assembly declared existing state and local institutions for planning and regulating land uses in the coastal zone inadequate. *Id.* (emphasis added).

[16] See, e.g., (CMP p. IV-57, "except under special circumstances, such as critically eroding shorelines that have a direct measurable effect on the economic well-being of an applicant or are a threat to the public safety, [the Department] will promote use of natural features of the dune and beach system rather than artificial protection."

[17] The Coastal Council preceded the Department's as the agency charged with administering the Act.

Code Ann. Reg. 30-11(B),(C) (2008). Thus, while an application for a critical area permit to construct a bulkhead and revetment must satisfy the specific project standards set forth in 30-12(C), the activity must also be consistent with the ten general considerations and the policies set forth in § 48-39-20 and 48-39-30, including the policy giving high priority to the natural systems in the coastal zone.

The ALC's conclusion that the General Assembly recognized a "fundamental need" to protect upland from destruction is based on a misinterpretation of § 48-39-120(F). This Section provides:

> The Department, for and on behalf of the State, may issue permits not otherwise provided by law[18], for erosion and water drainage structure in or upon the uplands, submerged lands and waters of this State below mean high-water marks as it may deem most advantageous to the State for the purpose of promoting the public health, safety and welfare, the protection of public and private property from beach and shore destruction and the continued use of tidelands, submerged lands and waters for public purposes.

S.C. Code Ann. § 48-39-120(F). Like §§ 48-39-30 and 48-39-20, this section requires the Department to first determine what is most advantageous to the State for the purpose of promoting the public health, safety and welfare, the protection of public and private property from beach and shore destruction and the continued use of tidelands, submerged lands and water for public purposes. The ALC erroneously concludes that this section establishes a fundamental need to protect upland from erosion. Quite to the contrary, this section, like § 48-39-30, requires a consideration of what the best use of the critical areas

[18] "Not otherwise provided by law" means subject to other state laws. See Coastal Conservation League v. Dept. of Health & Environmental Control, 345 S.C. 525, 537-538, 548 S.E.2d 887, 893 (Ct. App. 2001) (Interpreting this very provision and concluding that "not otherwise provided by law" means limits the Department's authority to issue permits for erosion structures to situations where no other provision of law would operate to prohibit the structure—i.e., "subject to the constraints contained in other ...other state laws"—and emphasizing that if the General Assembly had intended to use the phrase "notwithstanding any other provision of state law," it would have.) (reversed on other grounds)

is for the State before the Department can issue a permit for an erosion structure in the tidelands critical area pursuant to this section.[19] And the policy of the state dictates that the best use is not the one that makes ill-suited development more marketable, but rather the use that allows the sandy shoreline to remain a publically accessible tidal beach.

F. The ALC Erroneously Concluded That The False Sense Of Security This Revetment Would Foster Is Not A Relevant Consideration

The ALC found that there is a need for the bulkhead and revetment because it is necessary to create a sense of security for potential buyers to make the potential home sites more marketable:

> Moreover, as to the Department's and CCL's argument that KDP "can still sell lots on Captain Sam's without the revetment," the Court finds that the developable land on the peninsula would not likely be readily marketable if the bank was not stabilized and the erosion were allowed to continue unabated into the future. The bulkhead/revetment's stabilization of the bank is essential to being able to market and sell the riverside homesites, especially given today's informed buyers."[20]

(R. p. 8). Development Partners' representative, Mr. Long, testified that the purpose of the revetment is to create a sense of security for prospective homebuyers:

> Long: There's reticence of buyers who look at 2700 feet or 2400 feet of eroding shoreline for 20 to 40, 50 years and say that'd probably be a good place for me to buy a homesite.

(R. p. 417, lines 16-19). He continued during Development Partners' rebuttal case:

> Long: It makes it practicable and feasible. You can't have 2800 feet of erosion continuing and have people feel comfortable that their road and their access, as well as their property that they buy along the river, for example, is secure.

Given the Development Partners' concession that the structure is not intended in

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[19] There is no dispute—and in fact Mr. Long acknowledged (R. p. 375, line10-p. 376, line 2)—that the State is the owner, in *jus publicum and jus privatum,* of the land over which the revetment is proposed to be constructed. *See Lowcountry Open Land Trust v. State* 347 S.C. 96, 105, 552 S.E.2d 778, 783 (Ct. App. 2001) (internal citations ommitted).

[20] Despite that it was conceded that the revetment is not designed to prevent a breach. In fact, the Development Partners' representative stated that it had no intent of designing such a structure. (R. p. 418, lines 1-3, p. 1036, line 12-1037, line 4).

any way to prevent against a breach of the Spit, as has happened as recently as 1949,[21] it is clear that the only way the revetment makes the potential homesites "more readily marketable" is by fostering a false sense of security.

The ALC erroneously summarily concludes that whether the revetment fosters a false sense of security is irrelevant. (R. p. 3, n.5). The ALC completely disregards the Findings and Policies set forth in §§ 48-39-250 and 48-39-260.[22] This was error of law. As discussed above the findings in §§ 48-39-20 and 48-39-30 set forth the General Assembly's findings that the fragile and sensitive resources of the South Carolina's coastal zone have been irretrievably lost to ill planned development and the requirement that the Department ensure that the Critical Areas are committed to the best use for the People of the State. S.C. Code Ann. §§ 48-39-20, 48-39-30(B),(F), 48-39-120(F).

In §§ 48-39-250 and 48-39-260, the General Assembly further declared:

> (4) Chapter 39 of Title 48, Coastal Tidelands and Wetlands, prior to 1988, did not provide adequate jurisdiction to the South Carolina Coastal Council to enable it to protect the integrity of the beach/dune system. Consequently, without adequate controls, development unwisely has been sited too close to the system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and private interests to protect the system from this unwise development.
>
> (5) The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach as not proven effective. These armoring devices have given a false sense of security to beachfront property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beachfront property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry.

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[21] In fact, as a comparison of the 1949 Aerial (R. p. 1937) and Permar's conceptual sketch (R. pp. 2255-2256) reveals, the homesites will be positioned directly over the channel that was shown in the 1949 aerial. R. p. 855, line 10-p. 856, line 4.

[22] The Beachfront Management Act, enacted into law in 1988 and the Coastal Tidelands and Wetlands Act are referred to collectively as the Coastal Zone Management Act.

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

S.C. Code Ann. § 48-39-250(4),(5),(6). Likewise, "in recognition of its stewardship responsibilities," the declared the policy of South Carolina is to:

> (1) protect, preserve, restore, and enhance the beach/dune system, the highest and best uses of which are declared to provide:
> (a) protection of life and property by acting as a buffer from high tides, storm surge, hurricanes, and normal erosion;
> (b) a source for the preservation of dry sand beaches which provide recreation and a major source of state and local business revenue;
> (c) an environment which harbors natural beauty and enhances the well-being of the citizens of this State and its visitors;
> (d) a natural habitat for indigenous flora and fauna including endangered species;
> [....]

S.C. Code Ann. § 48-39-260(1).

In determining what the legislature intended in requiring that the critical areas be committed to the best use for the people, S.C. Code Ann. § 48-39-30(D); 48-39-120(F), it is certainly appropriate to look elsewhere in the Act for guidance in determining the policy of the State. *See Searcy v. South Carolina Dept. of Educ., Transp. Div.*, 303 S.C. 544, 547, 402 S.E.2d 486, 488 (Ct. App. 1991) (quoting 73 Am.Jur.2d *Statutes* § 189 at 388 (1974) ("Statutes which are parts of the same general scheme or plan, or are aimed at the accomplishment of the same results and the suppression of the same evil, are ... considered as in pari materia."); *In re Asbestosis Cases 78-CP-06-105*, 274 S.C. 421, 426, 266 S.E.2d 773, 775 (1980) (reversed on other grounds) (where there are different statutes in *pari materia,* though enacted at different times, and not referring to each other,

they are to be taken and construed together as one system, and as explanatory of each other") (quoting *Fishburne v. Fishburne*, 171 S.C. 408, 172 S.E. 426 (1934)). Thus, it was error for the ALC to completely disregard the policy statements set forth in § 48-39-250; the ALC's conclusion that whether the revetment fosters a false sense of security is irrelevant to determining the policy of the state was wrong as a matter of law.

Moreover, Development Partners' property is very unique. The potential homesites which Development Partners seeks to make more readily marketable by way of this bulkhead/revetment are indeed beachfront lots.[23] In fact, the entirety of Development Partners' upland on Captain Sam's is one single parcel, most of which is seaward of the setback line and within the Department's beachfront jurisdiction. (R. p. 280, line 21-p. 281, line 2, p. 2039). Moreover, as Development Partner's expert geologist, Tim Kana, explained, the biggest threat of a breach during a storm is from the backside of the spit where the revetment is proposed to go. (R. p. 779, line 22-p. 780, line 22). The initial storm surge when a hurricane comes ashore causes the water level to rise, over wash the top of the dunes, and flood the marsh estuary on the backside of the barrier island.[24] The biggest threat of a breach[25] is the water receding after a storm surge, as the water will find the quickest way to the ocean rather than follow the Kiawah River around the spit to the inlet. (R. p. 781, line5-p. 788, line20). A single layer of concrete blocks laid on their side

[23] In fact, the ALC apparently believes that §§ 48-39-250 *et seq.* is applicable to review of this permit, as the ALC purports to declare that the CMP has been superseded by the Beachfront Management Act as it relates to this property. (R. p. 28, n.22). Though the ALC's conclusion that the CMP is superseded by the BMA is erroneous, the ALC appears to agree that the BMA is applicable.

[24] In determining that Captain Sam's is "stable and suitable for development," the ALC gives weight to the fact that no overwash has been noted by Kana over the last thirty years and that the Spit did not experience any overtopping of the dunes during Hugo. But, as Kana explained, the Spit has not been exposed to any hurricanes or strong storms over the last thirty years. Hurricane Hugo, which the ALC seemed interested in, hit land in McLellanville, well north of Charleston. R. p. 798, line 20-p. 799, line 25. Captain Sam's is far south of Charleston and even further south of where Hugo came ashore.

[25] See, e.g., the 1949 Aerial (R. p. 1937).

is certainly not going to prevent a breach from occurring. With this in mind, and given the location of the upland adjacent to the beach/dune system and the General Assembly's findings that the pre-1988 laws were not effective in assuring that the critical areas were committed to their best use, balancing competing demands, and protecting natural systems, it is certainly appropriate to consider the findings and policy in §§ 250 and 260 as explaining the policies in §§ 20 and 30.

Regardless of whether the Court construes §§ 48-39-20 and 48-39-30 in collaboration with § 48-39-250, it is readily discernable the General Assembly did not envision that the "best" use of critical area could be to facilitate a false sense of security for potential home buyers on a spit of sand that has come on gone numerous times in recent history.[26] Thus the ALC's conclusion that the fact the construction of the bulkhead/revetment in the public trust tidelands is intended foster a false sense of security for prospective home buyers is irrelevant was clear error of law.

G. The ALC's Erroneous Interpretations Of The Act Are, In Part, A Result Of The ALC's Refusal To Afford Deference To The Department's Interpretation Of Its Own Statute And Regulations.

In the Order On Motions For Reconsideration ("Motions Order"), the ALC concludes that the Department was not entitled to any deference in its interpretation of the Statute and Regulations (and CMP) administered by the Department. (R. p. 32-35). The ALC concluded that because the Board did not affirmatively enunciate its agreement with the Staff Decision by conducting a final review conference in this matter, the staff decision was not entitled to any deference. (R. p. 3) (relying on *S.C. Coastal Conservation League v. S.C. Department of Health & Environmental Control*, 363 S.C.

[26] Even the ALC agreed—finding both that without the revetment/bulkhead, the homesites would not likely be readily marketable (R. p. 8), and that "Captain Sam's is a relatively new landmass in geological time." (R. p. 3).

67, at 75, 610 S.E.2d 484 (2005) ("The Panel, not OCRM staff, is entitled to deference from the courts.")). The Supreme Court most recently repeated this language in *Neal v. Brown*, 383 S.C. 619, 682 S.E.2d 268, 270 (2009) ("as we have previously held, an agency's Appellate Panel, not its staff, is typically entitled to deference in interpreting agency regulations.").[27]

The ALC's conclusion disregards § 44-1-60(F) and narrows the agency deference far beyond what *Neal* and *Coastal Conservation League* intended. *Neal* and *Coastal Conservation League*, which arose out of the former convoluted process for appeals of agency decisions, both involved situations where the Coastal Zone Management Appellate Panel (the "Panel") and OCRM staff had inconsistent interpretations of the regulations. In *Neal*, OCRM staff determined that a dock could be issued from a 5' wide easement based on an interpretation of the words "platted and recorded" that imputed a reconfiguration requirement. The Panel—and the Supreme Court—ultimately disagreed and concluded that the plain language of the regulation prohibited a dock on the property because the regulation, as it was written at the time, required a minimum of 75' of frontage for lots "platted and recorded." *Id.* Similarly, in *Coastal Conservation League*, the Court of Appeals gave deference to the testimony of Richard Chinnis that the small island regulations governed over the Panel's conclusion that the transportation project regulations governed. The Supreme Court ruled that it was error for the Court of Appeals to give staff deference over the Appellate Panel. 363 S.C. at 75-76, 610 S.E.2d at 486.

Neither *Neal* nor *Coastal Conservation League* imposes a requirement that the Board affirmatively enunciate an interpretation of the Department's regulation consistent

[27] *Neal* was decided on the eve of the hearing in this matter and, though not cited in the ALC's Orders, was discussed by the Parties and the ALC during the hearing.

with staff for the Department to be entitled to deference in its interpretation of the regulation. To the contrary, the General Assembly determined that the staff decision becomes the final agency decision where the Board declines to conduct a review conference.[28] S.C. Code § 44-1-60 (F).

As this Court is well aware, the process for appeals of Department decisions was altered significantly by the General Assembly in Act 387 of 2006. The ALJ used to conduct its review prior to appellate review by the Board (or the Panel). Act 387 did away with the Panel and imposed a requirement that the Board be given the opportunity to review the staff decision before a party can request a contested case at the ALC. The initial decision on a permit application is the staff decision, referred to as the "Department Decision." *See* S.C. Code Ann. § 44-1-60(C),(D) (2009).[29] If the Board conducts a review conference, it issues a Final Agency Decision.[30] S.C. Code Ann. § 44-1-60(F). Nothing in Act 387 indicates that the General Assembly intended for the agency

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[28] Moreover, the Board has enunciated its agreement with the Staff's interpretation of the Act, the Regulations, and the CMP. (R. p. 243-249) (Final Agency Decision), Docket No. 09-RFR-94 (Board of Health and Environmental Control, January 8, 2010) ("F.A.D."). The ALC denied the joint motion of CCL and the Department to reopen to record for admission of this F.A.D., based on his conclusion that the "F.A.D. does not establish facts." (R. p. 33). The ALC committed an abuse of discretion in refusing to consider the ruling of the Board, which set forth its interpretation of the statutes, and regulations, and CMP administered by the Department. Though he did not specifically rule on the Motion, to the extent he considered the post hearing Affidavit of Doug DeWolf, it was abuse of discretion to consider one and not the other. In the FAD, the Board specifically enunciated its agreement with the Department's interpretation of the Act, Regulations, and CMP in this matter. (R. p. 243-249). Despite the ALC's error in refusing to reopen the record, this Court could take judicial notice of FAD, as it sets forth the Board's interpretation of the Act, Regulations, and CMP. *See generally, e.g., Koon v. State,* 358 S.C. 359, 364, 595 S.E.2d 456, 458 (2004)("In his order denying relief on the subject matter jurisdiction issue, the PCR judge took judicial notice of an unpublished Court of Appeals decision) and *In re November 4, 2008 Bluffton Town Council Election,* 385 S.C. 632, 637, 686 S.E.2d 683, 686 (2009); *Massey v. War Emergency Co-op. Ass'n,* 209 S.C. 292, 304, 39 S.E.2d 907, 909 (1946)("I am taking judicial notice of the rules, regulations and orders of the Interstate Commerce Commission so far as they 'have the same effect as law.'); *but see Steinberg v. South Carolina Power Co.,* 165 S.C. 367, 163 S.E. 881 (1932).

[29] *See also,* S.C. Code Ann. § 44-1-60(F) (2010), as clarified by 2010 Act 278. ("If the board declines in writing to schedule a final review conference or if a final review conference is not conducted within sixty calendar days, the staff decision becomes the final agency decision").

[30] Thus, whereas the Final Agency Decision used to come after the contested case at the ALC, the Final Agency Decision now comes before the contested case appeal at the ALC. § 44-1-60(F).

deference doctrine to go out the window if the Board declines to conduct a review conference. To the contrary, "if a final review conference is not conducted, the department decision becomes the final agency decision." S.C. Code § 44-1-60(F) (2009).

In reaching the conclusion that the Department is not entitled to deference in its interpretation of the Act, Regulations, and CMP, the ALC focuses on "the staff's interpretation." (R. p. 34). The ALC's conclusion overlooks that, in accordance with § 44-1-60(F), staff's interpretation became the final agency decision when the Board declined to conduct a review conference.

The ALC expresses concerns over the possibility of "irresolute interpretation" if the Department is entitled to deference without the Board conducting a review conference. The ALC's concerns are addressed by principles inherent in the agency deference doctrine itself. For example, the Department is not entitled to deference if its interpretation is inconsistent with the plain wording of the regulation. *Fox v. Moultrie*, 379 S.C. 609, 613-614, 666 S.E.2d 915, 917 (2008) ("If the statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' ... The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress.") (quoting *Bd. of Governors, FRS v. Dimension Fin. Corp.*, 474 U.S. 361, 368, 106 S.Ct. 681 (1986) (internal citations omitted)); *accord*, *Brown v. South Carolina Dept. of Health and Environmental Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 415 (2002) ("While the Court typically defers to the Board's construction of its own regulation, where, as here, the plain language of the regulation is contrary to the Board's interpretation, the Court will reject its interpretation").

Moreover, the deference doctrine does not hinge on resolute interpretation of a statute or regulation by the Agency. *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778 (1984) ("The fact that the EPA has from time to time changed its interpretation of the term "source" does not lead to the conclusion that no deference should be accorded the EPA's interpretation of the statute.") Moreover, limiting deference to the agency to matters where the Board affirmatively enunciates a position does not necessarily guarantee resolute interpretation by the Department. Like Department staff, the membership of the Board is subject to change. Thus, even the ALC's new limitation on the deference doctrine would not guarantee resolute interpretations of the regulations administered by the Department. The possibility of changing interpretations by the Department does not negate the deference doctrine, but rather, is inherent in the doctrine itself. *Chevron U.S.A.*, 467 U.S. at 842-43.

The Department does agree with the ALC that it is the Department's interpretations of the Act, Regulations, and CMP that is entitled to deference, rather than factual findings by the Department. However, this is tempered by the requirement that the ALC "shall give considerations to the provisions of § 1-23-330 regarding the Department's specialized knowledge." S.C. Code Ann. § 44-1-60(F)(2). The ALC here disregarded the Department's interpretation of—and the plain language of—§§ 48-39-20 and 48-39-30 and Regulation 30-11(C)(1), as well as the CMP. This was error of law.

II. The ALC's Cursory Treatment Of The CMP Overlooks Several Policies Which Development Partners' Proposal Contravenes, Is Affected By Error Of Law, And Is Arbitrary And Capricious.

Despite initially questioning the enforceability of the CMP[31], the ALC did not

[31] The Final Order and Decision was filed January 22, 2010, after oral argument in the *Spectre* decision, but before this Court issued its Order in *Spectre* on February 2, 2010.

find that the revetment "is contrary to the [CMP] even if it has the force and effect of law." (R. p. 68, n. 21). The ALC bases this conclusory finding in part on his ambiguous conclusion that the CMP has been superseded by the BMA. (R. p. 68, n.21) ("The provisions of the BMA, including in particular those establishing the baseline, setback line, and the standards for construction in relation to them, take precedence as legislation over any provisions of the CZMP that may conflict therewith, even if the Supreme Court determines that the CZMP[32] is enforceable."). His findings that the policies are not contravened are conclusory and insufficient, affected by error of law, and contrary to the substantial evidence on the whole record.

A. The CMP Is Valid And Enforceable, And Not Superseded By Statute.

First, the CMP is enforceable. *Spectre, LLC v. South Carolina Dept. of Health and Environmental Control*, 386 S.C. 357, 371, 688 S.E.2d 844, 851 (2010) ("Moreover, the stringent requirements for enactment of the CMP, as outlined above, suggest that the General Assembly did not believe it was meant to be an unenforceable document.").

Second, the ALC's conclusion that the setting of a baseline and setback line across the front of the Spit supersedes and conflicts with applying the CMP to this project is contrary to the law. Nothing in the BMA evinces intent to supersede the policies in the CMP.[33] Though the ALC does not specify which policies he thought to be in conflict with the BMA, it is clear that the purpose of the BMA was not to supersede the CMP but rather to provide additional direct permitting jurisdiction to the Department. When the General Assembly passed the BMA, it found that the Department's existing jurisdiction under the Coastal Tidelands and Wetlands Act prior to 1988 was insufficient to

[32] This Brief may use "CMP" and "CZMP" interchangeably to refer to the Coastal Zone Management Program document.

[33] Notably, if the ALC believes that the provisions of the BMA apply here, then this is easily resolved—the bulkhead and revetment would be prohibited outright.

effectively protect the integrity of the beach/dune system—in other words, the opportunities to require a direct permit were not sufficient. S.C. Code Ann. § 48-39-250(4). Thus, the General Assembly passed the BMA to increase the Department's critical area jurisdiction to protect the integrity of the beach/dune system. It did nothing to decrease the Department's obligation to ensure that activities that require a state or federal permit in the Coastal Zone are consistent with the CMP.

Development Partners argued at the hearing, and the ALC's ambiguous holding in footnote 21 appears to agree, that the setting of a baseline and setback line automatically renders property suitable for development despite its dynamic nature.[34] There is no conflict between setting the baseline and setback line and applying the policies in the CMP. The baseline and setback line set the landward extent of the Department's beach/dune system critical area jurisdiction. Nothing more, nothing less.[35] Contrary to Development Partners' argument and the ALC's apparent conclusion, the setting of the baseline and setback lines, which follows a statutorily prescribed formula, does not involve passing upon the suitability of adjacent upland property for development or in any way supersede or conflict with the provisions of the CMP.

B. The Activity Clearly Contravenes the Policies for Public Open Space And It Was Clear Error For The ALC To Hold Otherwise.

Public Open Spaces are considered an Area of Special Resource Significance. (CMP, p. III-73). The CMP defines "public open space" as "state or local (county or

[34] The question posed in this matter is not whether Development Partners II can build on the land, but whether the policies in the Act and the CMP support conversion of 2.63 acres of public trust tidelands critical area to a concrete block mattress to facilitate development on a dynamic, unstable spit of land.

[35] The provisions in 48-39-290 do generally prohibit the construction of some structures seaward of that line. However, they do not establish the suitability or stability of property landward of the setback line. The lines certainly create no "vested rights" from the state landward of the line.

municipal) parks or other open space areas, other than those designated as GAPCs." *Id.* Regarding the significance of these areas, the CMP explains:

> The values of public recreational and open space areas throughout the coastal zone cannot be overemphasized. They provide recreational and aesthetic opportunities and amenities which are both desired and needed by the people. With increasing populations and continued growth and development, these limited resources become even more precious, as increasing numbers of people seek to find recreational opportunities within more urbanized areas and from fewer available open spaces.
>
> Open space is not only the basic resource necessary for development or recreational activities, it also serves numerous other valuable functions. It can provide corridors for preservation of wildlife and may preserve unique natural areas and historic or archeological resources. Open space can serve as a buffer between incompatible types of development activity, and oftentimes open space increases the value of adjacent land.

CMP, p. III-73 (emphasis added). For activities located in or which would directly affect public open space areas, the CMP sets forth the following policy:

> "proposals which would restrict or limit the continued use of a recreational open area or disrupt the character of such a natural area (aesthetically or environmentally) will not be certified where other alternatives exist."

CMP, Ch. III(C)(3)(XII)(D)(1), p. III-73 (emphasis added). Though the ALC mentions this policy, it provides no findings that the activity is consistent with this policy.

It is undisputed that Beachwalker Park, much of the Spit,[36] and the Kiawah River shoreline is public open space. The revetment itself violates these policies. Making the pristine sandy shoreline a 2800' concrete block mattress undoubtedly disrupts the natural character of the area—aesthetically and environmentally. The inconsistency is increased when the impacts of the project are reviewed in the context of the possible future development and the general character of the area—which the CMP requires the

[36] The entirety of Spit is designated as open space and park space for the Kiawah Island Community Association in the original Development Agreement and, save 20 acres, in the 2005 development agreement. R. p. 406, lines 10-16, pp. 2016-2018, 2039).

Department to do. (CMP, General Provision 7 at III-14). Long testified that it is possible to develop homesites without a revetment. (R. p. 1618, lines 9-12).

Beachwalker Park is listed as a "top ten beach in the World" by "Dr. Beach." Development Partners acknowledge this. (R. p. 418, lines 2-6; p. 1361, line 23-p. 1362, line 3). The picture on the Dr. Beach website actually shows the entire spit. (R. p. 356, line 10-13). **It is undisputed that conversion of the sandy shoreline into a 2.6 acre field of concrete blocks turned on their side with holes facing up will disrupt the character--aesthetically and environmentally--of the natural area.** (R. p. 362, lines 9-25).

C. The ALC Findings With Respect To The Policies For Barrier Islands, Dune Areas (Outside The Critical Area), Erosion Control, And Beach and Shoreline Access Are Affected By Error Of Law And Lack Substantial Support In The Record

(1) *Policies For Barrier Islands*

Barrier Islands are considered "Areas of Special Resource Significance because "they are one of the most dynamic coastal ecosystems since they are constantly being reshaped by the forces of wind or waves.[37] CMP, p. III-69. The policies applicable to Barrier Islands require Development Partners to demonstrate that any construction or development on the barrier islands will "retain to the extent feasible the existing dune ridges, drainage patterns and natural vegetation in landscaping and construction plans in order to maintain the value of the island as a storm buffer." The policies for barrier islands also require there to be a demonstration of "reasonable precautions to prevent or limit any direct negative impact on adjacent critical areas." CMP III(C)(3)(XII)(A) (Resource Policies, p. III-69-70). As is discussed below, Development Partners presented no evidence from which the ALC could conclude that the residential

[37] A more detailed discussion of their geologic characteristics is provided in Chapter I of the CMP

development would be consistent with these policies. Rather, because the CMP does not contain an outright prohibition on residential development for barrier islands, the ALC—and Development Partners—assume that any residential development is consistent therewith. This is certainly not the standard.

(2) *Policies For Dune Areas (Outside The Critical Areas)*

Like Barrier Islands, Dune Areas (Outside the Critical Areas) are also an area of special resource significance under the CMP. (CMP, p. III-71). The CMP explains that:

> The dunes which fall landward of the beach zones are also an active area, comprised of sands which are only partially stabilized and subject to the effects of winds and the waves. Dunes serve as valuable physical storm buffers, as wildlife habitats and as recreational and aesthetic resources. They are also linked with the beach areas as a reservoir of sand to replace that which is lost from the beach on severe tides or storms. Because of this interdependence with the beach system, and their fragile structure an susceptibility to disruption because of indiscriminate building or alteration, the primary ocean-front dunes are considered 'critical areas' under the South Carolina Coastal Management Act. [...]
>
> Of concern in this section are the dunes upland from or behind the primary sand dune. While not as crucial as the first dune adjacent to the Atlantic, the dune fields or landward ridges of unconsolidated sand are still valued as part of the overall storm protection and sand reserve system.

CMP, p. III-71. The testimony of Kana and Young unequivocally establishes that the entire spit is a dune area, (R. p. 721 line 18-p. 722 line 18), and that any development will have impacts to the dune areas, as will the utility and access corridor that the revetment is designed to facilitate. Permar's conceptual sketch shows homesites in the dune areas. (R. pp. 2255-2256). The policies require "project proposals in secondary sand dunes must demonstrate reasonable precautions to prevent or limit any direct negative impacts on the adjacent critical areas," and require special attention to prevent loss of protective dune formations due to unnecessary destruction of or encroachment onto stable dunes. CMP, III(C)(3)(XI)(B)(1),(2), p. III-71-72. As discussed below, Development Partners

presented no evidence from which the Department or the ALC could have concluded that the impacts of revetment, when viewed in the context of possible development, would be consistent with these policies.

(3) *Erosion Control Policies*

Contrary to the ALC's conclusion that the Department lacks the authority to deny a permit for a bulkhead or a revetment that retards the process of shoreline change, the Erosion Control Policies, like the Policies in the Statute require the Department to "promote the use of the natural features of the dune and beach system rather than artificial protection." IV-57; § 48-39-20(F). The only exception to this is "under special circumstances, such as critically eroding shorelines that have a direct measurable effect on the economic well being of an applicant or are a threat to the public safety[38]." Exhibit 48, DeWolf's analysis of the shoreline, the only evidence submitted by Development Partners showing the purported erosion rates and shoreline movements, shows that the shoreline was either stable or accretional for most of the length of the area of the proposed revetment. (R. p. 583, line 24-584, line 10, 2242). Moreover, there was no evidence of a direct measurable effect on the economic well being, only conjecture that a revetment would make potential homesites on the spit (if they are ever developed) more marketable. The general considerations in the erosion control program require the Department to consider, among other things, "the economic justification of the proposed project in comparison with available erosion control alternatives including consideration of the anticipated damage and economic loss due to failure."

Finally, "the structures shall not impede public use of beaches below the mean

[38] There is not a shred of evidence tending to support that Development Partners' economic wellbeing is dependent upon this revetment/bulkhead.

high water line." CMP, p. IV-57. As discussed below, there was no evidence supporting a finding that the project is consistent with these findings. It is undisputed that this concrete block revetment would be unsafe to walk on, and that it would impede public uses of the beaches below mean high tide. R. p. 361, line 11-p. 362, line 9. The structure will impact the public use of the Kiawah River shoreline by bathers, fishermen, swimmers, boaters, kayakers, and other persons utilizing the Kiawah River Shoreline. Thus, it was error for the ALC to find the activity consistent with these policies.

(4) *Beach and Shoreline Access Policies*

Likewise, the Beach and Shoreline Access Policies discourage structures that would negatively affect public access to tidal and submerged lands, navigable waters, and beaches or other recreational coastal resources. It was error for the ALC to disregard that the revetment/bulkhead violates these policies.

Currently the Kiawah River Shoreline is accessed by the public for fishing, walking, picnicking, bathing, landing boats, and all of the other uses associated with sandy shorelines of tidal creeks in the coastal zone. It's currently sandy, people walk barefoot, and it's safe. (R. p. 361, line 3-p.362 line 10). None of that is in dispute. Development Partners' proposal to lay 2.63 acres worth of concrete blocks—holes up—will render the shoreline unsafe for walking, wading, swimming, sunbathing, and the other uses. (R. p. 362, lines 5-9).

The ALC's conclusion that this impact on public access is insignificant because there are other sandy beaches up near the inlet[39] is not the standard in the Regulations,[40]

[39] Long acknowledges the currents are much stronger and its not safe to boat or swim near the inlet. (R. p. 1621, line 9-p. 1622, line 2).

[40] Similarly, the ten general considerations require considering impact on public access, and the specific project standards for bulkheads and revetments prohibit those that will impair public access.

and is bereft of the public trust doctrine—the underpinnings for much of the Coastal Zone Management Act. *See Sierra Club v. Kiawah Resort Associates,* 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995)("[t]he legislation creating the Coastal Council and defining its duties, while not explicit, implicitly charges the Coastal Council with administering the Public Trust lands in connection with coastal waterways.").[41] If "there are other sandy shorelines," was the standard then *Brownlee* and a lot of other public trust/navigable waters cases would have been decided differently[42]. Moreover, a review of the aerial photography of Kiawah Island shows that most of the river is abutted by significant stretches of marsh and there are, in fact, very few sandy shorelines. (R. p. 2040). Mr. Long agreed that the Kiawah River is primarily bordered by marsh and plough mud. (R. p. 379 line 23-380, line 24). Thus the ALC's conclusory findings, even if sufficient, are affected by error of law and are not supported by substantial evidence.

(5) *The "Development Agreement" And Kiawah's Tract Record Do Not Provide An Adequate Basis To Conclude That The Upland Development Will Be Consistent With These Policies In CMP.*

Though the ALC, in a conclusory fashion that violates the requirements for

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[41] *See also, McQueen v. South Carolina Coastal Council*, 354 S.C. 142, 149-150, 580 S.E.2d 116, 119-120 (2003), which included the following discussion:

> As a coastal state, South Carolina has a long line of cases regarding the public trust doctrine in the context of land bordering navigable waters. Historically, the State holds presumptive title to land below the high water mark. As stated by this Court in 1884, not only does the State hold title to this land in *jus privatum,* it holds it in *jus publicum,* in trust for the benefit of all the citizens of this State. *State v. Pacific Guano Co.,* 22 S.C. 50, 84 (1884); *see also State v. Hardee,* 259 S.C. 535, 193 S.E.2d 497 (1972); *Rice Hope Plantation v. South Carolina Pub. Serv. Auth.,* 216 S.C. 500, 59 S.E.2d 132 (1950), *overruled on other grounds, McCall v. Batson,* 285 S.C. 243, 329 S.E.2d 741 (1985).
>
> The State has the exclusive right to control land below the high water mark for the public benefit, *Port Royal Mining Co. v. Hagood,* 30 S.C. 519, 9 S.E. 686 (1889), and cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access. *Sierra Club v. Kiawah Resort Assocs.,* 318 S.C. 119, 456 S.E.2d 397 (1995);

Id. In fact, McQueen held that "**McQueen's ownership rights do not include the right** to backfill or **place bulkheads on public trust land...**" *Id.* at 150, 580 S.E.2d at 120. (emphasis added). Similarly, Development Partner's ownership of the Spit does not include the right to place bulkheads and a 40' wide revetment over the sandy shoreline of the Kiawah River.

[42] *Brownlee v. Dept. of Health & Envmntl. Control* 382 S.C. 129, 138, 676 S.E.2d 116, 121 (2009).

specific findings of fact set forth in *Able Communications* and its progeny, purports to find the proposed revetment and the upland development consistent with the CMP, there was no evidence from which this conclusion could be found. The ALC relied on the Development Agreement between the Development Partners and the Town of Kiawah Island, Permar's conceptual sketch, and Development Partners' past development history in finding that the revetment and the future development to be consistent with the policies of the CMP. [43] None of this evidence provides a sufficient basis to support the ALC's findings. The Development Agreement has zero provisions that are germane to the policies of the CMP with respect public open space, activities in dune areas, beach and shoreline access, erosion control, and GAPCs. Development Partners offered no evidence from which the Department or the Court could find that the possible future development would conform to these policies in the CMP.

Moreover, as Long acknowledged, the Development Agreement is an easily modifiable document whose restrictions have already been modified once.[44] When the Development Partners acquired Kiawah Island, they had no expectations of developing the Captain Sam's and entered into a development agreement which committed the entirety of the spit to open space. (R. p. 420, lines 1-3). These restrictions were lifted in 2005 and can be again. (R. p. 414, line 22-p. 258 line 3).

Moreover, Development Agreement's terms are in no way germane to the policies in the CMP. While the Town and the Development Partners' agreement to keep preserve

[43] The Decision by the Board agreed that this evidence does not afford a sufficient basis to demonstrate compliance with the CMP. (R.p.243-251, Final Agency Decision, Docket No. 09-RFR-94 (Board of Health and Envtl. Control, January 8, 2010). The Development Agreement has been amended before and can easily be amended again. Moreover, it addresses none of the standards in the applicable CMP Policies.
[44] Furthermore, the Development Agreement is not binding on the Department and the Department has no right of enforcement.

trees, and to share drive ways, and to set limits on square footage and building heights may be laudable, these goals do not address the policies in the CMP. The Development Agreement contained nothing which could possibly provide the required assurance regarding existing dune ridges, drainage patterns, and natural vegetation and impacts to critical areas and other policies in the CMP. Rather, the development agreement speaks towards limited number of lots (50) and other measures designed to limit impacts to the environment—none of which speak to the requirements for the policies for Barrier Islands, the policies for Dune Areas, the Policies for Public Open Space, the policies for Erosion Control, or the policies for Beach and Shoreline Access.

The applicant's history of environmentally sensitive development does not obviate or circumvent the requirement in the CMP that the applicant provide assurances that the policies therein will not be contravened. Moreover, the conceptual study prepared by Permar showed that the homesites would be within the dune fields and in the area where the fledgling maritime forest is beginning to grow. (R. pp. 2256-2257). It is clear from the aerial photography and the conceptual sketches that the homesites are slated to go in close proximity to the critical area tidelands and marsh on the western end of the spit. Finally, at the hearing, Development Partners and its agent acknowledged that they have no present plans for development (though the stated purpose of the revetment is to support an access corridor for development), and did not know what development, if any, they would put on the spit. (R. p. 425, lines 4-7). Therefore there is no way that they could have provided the necessary information that would allow an evaluation of the cumulative impacts on these issues. Moreover, a ruling on that basis would essentially delegate OCRM's statutory responsible to a private developer. As such, that constitutes

an error of law.

III. The ALC's Conclusory Findings Regarding § 48-39-20 and 48-39-30 Are Insufficient As A Matter Of Law, Are Affected By Error of Law, Are Without Evidentiary Support And Arbitrary And Capricious In Light Of The Substantial Evidence On The Whole Record.

Perhaps sensing that the order might be affected by error of law, the ALC made alternative findings of facts in an effort to cover the bases. However, the ALC's conclusory findings of facts are not sufficient factual findings, are the result of application of erroneous legal standards, and are not supported by substantial evidence.

A. Evidence Of Pure Economic Benefit Is Not Sufficient To Meet The Requirement That Critical Areas Be Utilized In A Manner That Provides The Maximum Benefit To The People.

The ALC, in a very conclusory fashion, concludes that Kiawah's application to convert the sandy shoreline of the Kiawah River into a concrete block mattress is consistent with § 48-39-30. This Statute provides that "Critical Areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate maximum dollar benefit." The requirement that the utilization of the critical areas be in a manner that provides "the maximum benefit to the people" is similar to, but stronger than, the common legal requirement that a project be "in the public interest."

The Supreme Court has held that:

> "[E]vidence of purely economic benefit, however, does not support the stated purpose of the Coastal Management Program to protect, restore, or enhance the resources of the State's coastal zone for present and succeeding generations. This public interest must counterbalance the goal of economic improvement. *See* S.C.Code Ann. § 48-39-30(B)(1) and (2) (1987). **We hold evidence of purely economic benefit is insufficient as a matter of law to establish an overriding public interest.**"

South Carolina Wildlife Federation v. South Carolina Coastal Council, 296 S.C. 187, 190, 371 S.E.2d 521, 522 - 523 (1988) (emphasis added).

After a discussion giving short rift to the policies in the Act, the ALC finds in a conclusory fashion, without any discussion or support, that "neither the project or the potential residential development are in violation of the relevant policies set forth in Sections 48-39-20 and 48-39-30. (R. p. 21). Presumably, this is based on his finding that the revetment "is needed" to make potential homesites on the spit more readily marketable. (R. p. 8). However, as a matter of law, this is not sufficient to satisfy the General Assembly's requirement that "maximum benefit to the People" test; the Act specifies that this does not mean the use that "will generate measureable maximum dollar benefits." Id.; S.C. Code Ann. § 48-39-30(D).

It is clear from a review of the other policies and the substantial evidence on the whole record regarding the public use of this shoreline and the pristine nature of the area that the best use of the shoreline is not as a concrete block mattress to facilitate homesites on a dynamic spit of sand, but rather as a publically accessible and useable pristine, sandy shoreline, protected and preserved for this and succeeding generations. South Carolina Wildlife Federation, 296 S.C. at 190, 371 S.E.2d at 522-23.[45]

B. Development Partners Did Not Present Any Evidence Assessing The Economic Benefits Of The Project

Notwithstanding that economic benefits are not sufficient to meet the standard in § 48-39-30(D), the ten general considerations do authorize the Department to consider "the extent of economic benefits as compared with the benefits of preservation in its unaltered state." 23A S.C. Code Ann. Reg. 30-11(B)(7).[46] However, the Development

[45] It bears pointing out that the mortgage on the spit is being used to finance a resort in St. Kitts. (R. p. 1618, line 12-p. 1619, line 8). Certainly the policies of § 48-39-30(D) do not support conversion of 2.63 acres of South Carolina's public trust tidelands to make development on St. Kitts more financially viable. A finding that this utilization of the Critical Areas would provide the maximum benefit to the People of the South Carolina must fail as a matter of law.

[46] Accord, the CMP only allows erosion control structures if there is a direct measurable effect on the economic well being of the applicant. CMP p. IV-57.

Partners presented no evidence of the economic benefits that this revetment would produce. To the contrary, Leonard Long testified that no studies have been undertaken:

Question:	Have you calculated the economic benefit of the revetment?
Long:	No.
Question:	So we don't know what the economic benefit of the revetment is?
Long:	I haven't calculated it.
Question:	Okay. Have you had anybody calculate it?
Long:	No.

(R. p. 415, lines 5-12).

Mr. Long and Mr. Permar acknowledged that in terms of development of the potential homesites, no decisions have been made, and it is possible that no homesites will be developed on the Spit. (R. p. 416, line 13-p. 417, line 7). The only evidence was speculation that prospective home buyers would be less reticent to buy a homesite on the spit if there's a revetment hiding the susceptible Kiawah River shoreline.

Development Partners did recognize that the Spit has values without the revetment (and without homesites):

> Long: You asked me did the spit have value as open space and, of course, I think it does. If we, you know, have just a piece of land that has trees and dunes on it, I certainly don't think its valueless. And I told you later on in the deposition that an MAI or somebody would have to evaluate it if that's all you could do with it, what it would be worth. It would be hard for me to say. It's not the business I'm in to know what kind of value. But it has value; it's beautiful.

R. p. 1615, line 23-p. 1616, line 8. Thus, Long acknowledges the lack of evidence showing economic benefit from the revetment and that the property is valuable without it.

C. The Conclusory Factual Findings Are Insufficient As A Matter Of Law

This Court has made clear that "[t]he findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to

those findings." *Able Communications, Inc. v. S.C. Pub. Serv. Comm'n,* 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986); *Spartanburg Regional Medical Center v. Oncology and Hematology Associates of South Carolina, LLC*, 387 S.C. 79, 91-92, 690 S.E.2d 783, 789 (2010); *Hill v. Dept. of Health & Envntl. Control*, Op. No. 26873 (S.C. S.Ct. filed August 23, 2010) (Shearouse Adv.Sh. No. 34 at 41, n.9). In *Able,* the order contained no findings of fact at all and a conclusory finding that the proposed paging service rates were reasonable. *Id.* The *Able* Court held that appellate review was "impossible" because all it could do was speculate as to "the reasons underlying the decision." *Id.* "This Court will not accept an administrative agency's decision at face value without requiring the agency to explain its reasoning." *Kiawah Prop. Owners Group v. Pub. Serv. Comm'n of S.C.,* 338 S.C. 92, 96, 525 S.E.2d 863, 865 (1999); *Spartanburg Regional Medical Center*, 387 S.C. at 93, 690 S.E.2d at 790 (Toal, C.J., dissenting).

Here, although the ALC pens a sixteen page section entitled "findings of fact," with multiple subsections (e.g., "Background," "Kiawah Island and Captain Sam's Spit," "Erosion of Captain Sam's Bank at the Kiawah River," "The Bulkhead/Revetment's Design," "Cumulative Impacts"—with the subheadings "Piping Plovers," "Diamond Back Terrapins," and "Public Use of the Riverbank at Low Tide"—and "Development upon Captain Sam's"), the Amended Order contains mostly discussion with inconsistent apparent findings. Most of the findings included are not germane to resolution of the policies contained in the Act, the Regulations, and the CMP. When it comes to addressing the policies in the Act and in the CMP, the ALC's findings of fact are merely conclusory and insufficient as a matter of law.

The findings are also inconsistent and irreconcilable. For example, on page 6 of

the Order, the ALC appears to find that "While the river channel has moved in a southerly direction toward Captain Sam's peninsula for several decades, the erosion along the river's southern bank has become particularly pronounced over the last several years." (R. p. 6) (emphasis added). In the very next paragraph, the ALC states that "though the rate of erosion has been less in recent years, the change is not predictive of future events..."). (R. p. 7) (emphasis added). In reality, Development Partners' own expert surveyor, Doug DeWolf, prepared an exhibit that showed no erosion—and some accretion—along the area where the revetment was proposed over the ten month period preceding the hearing. R. p. 583, line 24-584, line 10, p. 2242. Similarly, the ALC finds that the Spit is migrating and growing but also losing highland. (R. pp. 5-6). Which is it? If the Spit is accreting on the ocean side at a higher rate than it is eroding on the river side, then contrary to the ALC's apparent finding on page 6, it there is no net loss of any upland.[47] The ALC fails to sufficiently articulate his findings of fact, but rather has a lengthy discussion containing a smorgasbord of inconsistent statements followed by a conclusory statement that ALC needs the revetment. This is exactly the lack of specificity which Able Communications and its progeny hold insufficient to afford meaningful review by the appellate courts. Id.

The ALC's larger inconsistency—which highlights the arbitrary and capricious

[47] Rather, like other littoral property owners, its property boundaries are migrating with the River. *See Coburg Dairy, Inc. v. Lesser*, 318 S.C. 510, 512, 458 S.E.2d 547, 548 (1995)("Where a tidal navigable waterway is a boundary in a grant, the area below the usual high water mark remains in the State absent specific language conveying it.") (internal citations omitted); *Hilton Head Plantation Property Owners' Ass'n, Inc. v. Donald*, 375 S.C. 220, 224, 651 S.E.2d 614, 617 (Ct. App. 2007) ("artificial accretions which are caused solely by the act of the upland owner should not inure to his benefit, for the upland owner should not be permitted to enlarge his own estate at the expense of the State.") (quoting *Horry County v. Tilghman,* 283 S.C. 475, 481, 322 S.E.2d 831, 834 (Ct.App.1984) (internal citations omitted).

Unlike most littoral properties, which are only bordered by water on one side, however, the Spit is bordered on three sides by water. Whereas most properties abutting tidal waters have a net loss of upland during erosion events, the Spit has a net gain in total upland property despite erosion on the Kiawah River side because it is experiencing higher rates of accretion on the front beach, as the ALC recognized.

result—is his conclusion on the one hand that the Spit is a stable geologic feature ripe for residential development (R. p. 6) contrasted with his conclusion—and Development Partners' pervasive arguments[48]—that erosion is so severe that the revetment is necessary to protect an access corridor for homesites and to render the potential homesites more marketable "in light of the reality that most homebuyers will be reticent to buy on such an unstable spit of sand." Leonard Long testified that "anybody who would build a road, as I've heard described, out there of any consequence or try to sell property to any significant degree, without the revetment would be foolish." (R. p. 1619, line 24-p. 1620, line 2). This inconsistency highlights the ALC's legal error in applying 48-39-20 and 48-39-30 and concluding that Development Partners is entitled to a revetment to facilitate the marketability of otherwise unmarketable homesites.

D. The ALC's Findings Disregard The Spit's Inclusion In The John H. Chaffee Coastal Barrier Resources System

In 1982, Congress passed the Coastal Barrier Resources Act (CBRA), codified at 16 U.S.C. §§ 3501-3510 (2003). Therein, Congress established the John H. Chaffee Coastal Barrier Resources System (CBRS). 16 U.S.C. § 3503(a). Congress found that:

> (2) Coastal barriers[49] contain resources of extraordinary scenic, scientific, recreational, natural, historic, archaeological, cultural, and economic importance; **which are being irretrievably damaged and lost due to development on, among, and adjacent to such barriers;**
> (3) Coastal barriers serve as natural storm protective buffers and are generally unsuitable for development because they are vulnerable to

[48] In opposing the Petition for Supersedeas and Motions for Extensions to file the Initial Brief, Development Partners ardently argue that any delay in resolution of this matter could render the dispute moot because erosion is so rampant that the access corridor could be lost any day. How the Development Partners can concomitantly state that the spit is stable and not a fragile and sensitive defies logic.

[49] Defined as a depositional geologic feature (such as a bay barrier, tombolo, **barrier spit**, or barrier island) that is subject to wave, tidal, and wind energies and protects landward aquatic habitats from direct wave attack, and all associated aquatic habitats, including adjacent wetlands, marshes, estuaries, inlets, and nearshore waters; but only if such feature and associated habitats contain few manmade structures and these structures, and man's activities on such feature and within such habitats, do not significantly impede geomorphic and ecologic processes.16 U.S.C. § 3502(1).

> hurricane and other storm damage and because natural shoreline recession and the movement of unstable sediments undermine manmade structures (4) certain actions and programs of the federal government have subsidized and permitted development on coastal barriers and the result has been the loss of barrier resources, threats to human life, health and property, and the expenditure of millions of tax dollars each year; and

16 U.S.C. § 3501(a). Congress declared its purpose in passing CBRA to be:

> ... to minimize the loss of human life, wasteful expenditure of Federal revenues, and the damage to fish, wildlife and other natural resources associated with the coastal barriers along the [Atlantic Coast] by restricting future Federal expenditures and financial assistance **which have the effect of encouraging development of coastal barriers**, by establishing the [CBRS] and by considering the means and measures by which the long-term conservation of these fish, wildlife, and other natural resources may be achieved.

16 U.S.C. § 3501(b). The Act then provides a process for coastal barriers to be included in the CBRS and generally prohibits expenditure of federal funds that would for any purpose within the CBRS, including: (1) the construction or purchase of any structure, appurtenance, facility, or related infrastructure; (2) the construction of or purchase of any road, airport, boat landing facility or other facility on, or bridge or causeway to any unit; or (3) the carrying out of any project to prevent the erosion of, or to otherwise stabilize, any inlet, shoreline, or inshore area. 16 U.S.C. § 3504(a).

Development Partners conceded that the Spit is included in the CRBS. R. p. 493, 19-24. The ALC completely discounted the relevance of the Spit's inclusion in the CBRS. The Spit's inclusion in the CBRS further supports the Department's conclusion that the spit is a fragile and sensitive area that should be protected from inappropriate development, and that given this, it is inappropriate to allow Development Partners to utilize the critical areas of the coastal zone—state owned submerged tidal lands—to facilitate development on a fragile spit of land that is subject to dynamic wave action on

three sides. Just as the federal government prohibits the expenditure of federal funds to encourage the development of these fragile and sensitive features, the Policies of § 48-39-20 and 48-39-30 preclude the Department from authorizing the conversion of 2.63 acres of critical area into a concrete block mattress to facilitate residential construction on the Spit.

E. The ALC's Factual Findings Are Arbitrary and Capricious In Light Of The Substantial Evidence On The Whole Record

The mere fact that Development Partners is applying for and arguing that there is an urgent need for this gargantuan structure and claiming that lots on the spit would not be marketable without the revetment underscores and highlights the arbitrariness of the ALC's findings. The spit has an undisputed history of a 40-80 year cycle of growth, elongation, migration, and breach—the same history that Kana acknowledged and incorporated into every report he has published and which underscores and forms the basis of all of the published reports admitted into the record. (R. p. 830, line 8-p. 834 line 19, p. 837, line 15-p.841,line6, p. 864, line 18-866, line 24, pp. 1751-1936,). Kana only questioned the soundness of his published theories when testifying in this case.[50] Moreover the common testimony of Eiser, Young, and Kana was that the spit is a unique feature, very new in geologic time, that is subject to dynamic wave action on three sides, and that is pristine in nature with no human improvements.

Finally, as evinced by Development Partners' incessant arguments in opposing motions for extensions, the Petition for Supersedeas, and the Motion for a Stay,

[50] On page 9 of the Order, the Court acknowledges Development Partners' expert's analysis which shows that there has been no erosion in the last 10-12 months, but bases its finding of a need for the structure on the long term history of shoreline erosion on the riverbend. (R. p. 9). If the Court is looking at the long term history of the spit to establish a need for the structure despite the accretional and stable trend over the last year, then it should also look to the long term history of the spit rather base its finding that the spit is stable on the most recent thirty years—a very short amount of time in geologic history, especially given the 40-80 year cycle incorporated by Kana in his published works. This is especially true given, as Kana and Young agreed, we are still in the middle of a 40-80 year cycle.

Development Partners asserts that the ability to develop homesites is threatened by something as little as a mere 30-day extension of time. Development Partners should be judicially estopped from asserting that this spit is anything but unstable, dynamic, fragile, and sensitive. This highlights the arbitrariness of the ALC's inconsistent and conclusory findings to the contrary. While the Development Partners may desire to develop homesites on the spit, the Government has no obligation to facilitate the destruction of this pristine resource by allowing Development Partners to convert the sandy Kiawah River shoreline into a concrete block mattress.

F. The ALC Exceeded Its Authority By Designing An Erosion Control Structure Himself And By Permitting An Activity For Which No Application Had Been Submitted; When the ALC Determined That The Structure Applied For By Development Partners Was Not Necessary He Should Have Affirmed.

The ALC correctly agreed with Department that the revetment applied for by Development Partners was not warranted. (R. p.10) ("The full extent of both of the structures (i.e., the bulkhead and the ACB mat) depicted in the sketch drawing submitted with the permit application are not currently necessary.") At this point, the ALC should have affirmed the Department's decision, because, as the ALC held, the burden was on Development Partners to prove that the Department's decision to deny the 2,513' of the structure beyond Beachwalker Park was in error.

After determining that the structure applied for by Development Partners was not necessary, rather than affirming the Department's decision, the ALC went on to design an erosion control structure for Development Partners himself. (R. p. 11). In so doing, the ALC exceeded its authority and committed error of law. Development Partners did not apply for the structure authorized by the ALC. There was no evidence submitted showing plans for any less of a structure than the plans submitted to the Department, or

the Court for that matter.[51] (R. pp. 2095-2139; pp. 2231-2241). The ALC relied upon off-the-cuff testimony of Mitchell Bohannon in redesigning the proposed structure. (R. p. 691, line 13-p. 693, line 23). This testimony was neither submitted to nor considered by the Department (or other state and federal resource agencies or the public) and does not meet the requirements of 48-39-140(B) and Reg. 30-2(B) for a permit application. The law contains minimum requirements for a permit application, including a requirement that the applicant submit "a plan or drawing showing the applicant's proposal and the manner or method by which the proposal shall be accomplished." S.C. Code Ann. 48-39-140(B)(2).

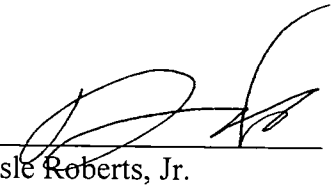
The Development Partners presented no such plan or drawing of the structure designed by the ALC to either the Department or the ALC. Moreover, it is not clear from the wording what the structure the ALC designed will actually entail. If the structure designed by the ALC were to be constructed, neither the Department nor interested members of the public would be able to determine whether it is constructed in accordance with the permit, as it is unclear what the ALC authorizes. This highlights the error resulting from ALC's abuse of discretion and exceeding its authority. Moreover, because the ALC found that the structure applied for by Development Partners was unnecessary, it was error for the ALC to do anything but affirm the Department's decision.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Appellant SCDHEC respectfully requests that this Court reverse the decision of the ALC.

SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL

[51] Plans were submitted to the Department by PRC for a 270' structure at Beachwalker Park.

BY: 

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

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Kiawah Development Partners, II, Respondent,

v.

South Carolina Department of Health and Environmental Control, Appellant.

Docket No. 09-ALJ-07-00039-CC

South Carolina Coastal Conservation League, Appellant,

v.

South Carolina Department of Health and Environmental Control and and Kiawah Development Partners, II,

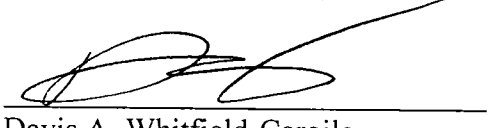
Of Whom

South Carolina Department of Health and Environmental Control is, Appellant,

and Kiawah Development Partners, II, is Respondent,

CERTIFICATE OF COUNSEL

I certify that this Final Brief complies with Rule 211(b), SCACR.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date s/he served the ***Department's Appellant's Final Brief of SCDHEC*** in this matter upon the Parties or their counsel, by placing copies of same in the United States Mail, first class postage prepaid, addressed to:

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