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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.

FINAL REPLY BRIEF OF APPELLANT SCDHEC

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Standard of Review

Respondent Kiawah Development Partners, II, Inc. ("Development Partners" or "Respondent") devotes its brief to arguing that some of the ALC's factual findings are supported by substantial evidence. However, the ALC's factual findings relating to regulations requiring feasible alternatives, discouraging projects that adversely impact public access, and compliance with the policies in §§ 48-39-20 and 48-39-30 and in the CMP are affected by error of law. Questions of law are reviewed *de novo*. Brownlee v. South Carolina Dept. of Health and Environmental Control, 382 S.C. 129, 142, 676 S.E.2d 116, 123 (2009) (holding that the ALC's findings relating to navigability were affected by error of law).

1. The ALC's Error In Failing To Give Any Deference To The Department Is Preserved And It Was Error For The ALC To Refuse To Give Deference To DHEC'S Interpretation Of Its Statute, Regulations, And CMP.

As a threshold matter, Development Partners claims that the Department's arguments regarding the ALC's error in failing to give any deference to the Department are not preserved. Resp. Br. at 66. In the Department's Initial Brief, the second and fifth statements of issues are directly relevant:

> 2. Did The ALC Err In Its Interpretation and Application Of The Act, The Regulations, And The CMP?
> 5. Did The ALC Err In Refusing To Give Any Deference To The Department's Interpretation Of Its Act And Regulations?

Dept. In. Br. at 1. Moreover, the Department included in and attached to its Notice of Appeal the ALC's Order on Motions To Reconsider dated February 26, 2010, where the Court addressed this issue. (R. p. 265C). The Department also argued the issue in the argument section of its brief. (DHEC Br. pp. 26-31). Accordingly, the ALC's erroneous

[1] The Department incorporates its Statement of the Case and Statement of the Facts from its Initial Brief.

failure to give deference to DHEC's interpretation of its statutes, regulations, and CMP is not the law of the case. Thus, the Department's arguments are preserved for review.

As to the merits of the Department's arguments that the ALC committed error of law and abuse of discretion in failing to give any deference to the Department's interpretation of its Act and Regulations, Respondent (and the ALC) misconstrue the Department's argument. The Department does not argue that Department staff is entitled to deference. Resp. Br. at 66 ("Appellant OCRM argues that OCRM's staff's interpretation is entitled to deference."). The Department argues that the Department is entitled to deference in its interpretation of statutes and regulations it administers.

That an agency is entitled to deference in its interpretation of a statute or regulation it administers is a very well settled principle of statutory construction. Brownlee v. S.C. Dept. of Health and Envtl. Control, 382 S.C. 129, 676 S.E.2d 116 (2009) ("Courts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ"); S.C. Coastal Conservation League v. S.C. Dept. of Health and Envtl. Control, 380 S.C. 349, 362, 669 S.E.2d 899, 906 (Ct. App. 2008) ("This Court, although not bound by the decision, will ordinarily defer to the opinion of the state agency as to the interpretation of a statute it is charged with the duty of enforcing"); Lloyd v. S.C. Dept. of Health and Envtl. Control, 328 S.C. 419, 428-29, 491 S.E.2d 592, 597 (Ct. App. 1990) ("It is well established that construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.").

This principle has been long recognized by the ALC in a multitude of decisions. See, e.g., White v. S.C. Dept. of Health and Envtl. Control, No. 04-ALJ-07-03570-CC,

2005 WL 3694238 at *3 (Dec. 30, 2005); Open MRI of Charlotte, Inc. v. S.C. Dept. of Health and Envtl. Control, No. 97-ALJ-07-0706-CC, 1999 WL 186848 (March 5, 1999) ("DHEC is the sole state agency responsible for implementation of the CON program, its interpretation of the Plan and regulations concerning administration of the Certificate of Need Program must be accorded great deference and will not be overruled absent compelling reasons"); Safety Disposal Systems, Inc. v. S.C. Dept. of Health and Envtl. Control, No. 01-ALJ-07-0122-CC, 2002 WL 1354623 at *26 (June 5, 2002); Joe's Custom Brickwork, Inc. v. S.C Dept. of Revenue, No. 05-ALJ-17-0112-CC, 2005 WL 2277955 at *4 (Aug. 23, 2005); Charlotte –Mecklenburg Hosp. Auth., et al., v. S.C. Dept. of Health and Envtl. Control, et al., 06-ALJ-07-0713-CC at p. 5-7 (Dec. 9, 2009); Richard B. Allen v. S.C. Dept. of Health and Envtl. Control, No. 09-ALJ-07-0039-CC (Nov. 23, 2009);[2] see also, Brownlee, 382 S.C. at 136, 676 S.E.2d at 120.

The ALC and Respondent rely on language taken out of context from this Court's decisions in Neal v. Brown, 383 S.C. 619, 682 S.E.2d 268, 270 (2009), and S.C. Coastal Conservation League v. S.C. Department of Health & Environmental Control, 363 S.C. 67, 75, 610 S.E.2d 484 (2005). Both Neale and Conservation League involved situations where Department staff interpreted a provision one way and the Appellate Panel disagreed with staff and interpreted a provision a different way. In otherwords, staff interpreted the law in a manner inconsistent with the Department's final agency decision. In this context, this Court has held that "an agency's appellate panel, not its staff, is typically entitled to deference in interpreting agency regulations." Id.

Here, there is no disagreement between staff and the Board. Compare R. pp. 243-249 with R. p. 1963-1969). To the contrary, when the Board declined to conduct a review

[2] This does not purport to be an exhaustive list of such cases.

conference, the staff decision became the final agency decision pursuant to S.C. Code Ann. § 44-1-60(F) (Supp. 2009[3]) ("If a final review conference is not conducted within sixty days, the department decision becomes the final agency decision and an applicant, permittee, licensee, or affected person may request a contested case hearing at the Administrative Law Court....[4]"). Neale and Conservation League do not hold that the deference doctrine goes out the window when the Board declines to conduct a review conference. Moreover, nothing in Act 387 indicates that the General Assembly intended for deference to hinge upon the Board conducting a review conference; to the contrary, the General Assembly specified that the staff decision becomes the final agency decision once the Board declines to conduct a review conference. Thus, it was error for the ALC to refuse to give any deference to the Department's interpretation of its Act, Regulations, and Coastal Management Program.

2. Development Partners Misinterprets The Specific Project Standards

Appellant Conservation League argues in its Brief that the revetment contravenes the specific project standard that generally requires bulkheads and revetments to be within 18" of the existing escarpment. Conservation League App. Br. at 20-21; S.C. Code Ann. Reg. 30-12(C)(1)(b). Development Partners argues in its Brief that the 18" limitation is applicable only to bulkheads. Resp. Br. at 30-34.

Development Partners' argument is contrary to the clear language of the regulation. The specific project standards at Reg. 30-12(C) are titled "**Bulkheads and**

[3] Notably, Neale and Conservation League both arose under the previous process for appeals from DHEC decisions, where the ALC's decision was subject to review by the Board before judicial review.

[4] In Act 287 of 2010, the General Assembly amended § 44-1-60. The previous version used staff decision, initial decision, and Department Decision interchangeably. § 44-1-60(F) (Supp. 2009). As amended by Act 287 of 2010, § 44-1-60 is consistent and even more clear: "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, and an applicant, permittee, licensee, or affected person requests pursuant to subsection (G) a contested case hearing before the Administrative Law Court."

Revetments..." (bold in original, underline emphasis added).[5] Paragraph (1) begins by explaining that "in an attempt to mitigate certain environmental losses that can be caused by these structures [referring to Bulkheads and Revetments as set forth in the caption], the following standards are adopted:" Id. (emphasis added). Paragraph (a) requires structures to be designed to conform to the critical line to the maximum extent feasible and to be constructed so that reflective wave energy does not destroy stable marine bottoms or constitute a safety hazard. Id. Paragraph (b) provides that "structures may be constructed up to 18 inches from the escarpment." Id. The term "structures" in paragraph (a), like the term "structures" in paragraph (1) is clearly referring to the bulkhead and revetment structures referenced in the caption. Likewise, the term "structures" in paragraph (b) is also not limited to bulkheads but is referencing bulkheads and revetments, as listed in the caption. Moreover, the following sentence in paragraph (b) specifically mentions both bulkhead and revetment structures: "in situations where this is not feasible, Department staff will determine the location of the bulkhead or revetment on a site by site basis." Id. (emphasis added). The term "structures" in paragraphs (1), (1)(a), and (1)(b) all refer to bulkheads and revetments without limitation, as expressed in the caption. Development Partners argues that if the General Assembly had intended the first sentence to apply to revetments, it could have inserted language to that effect. (Resp. Br. p. 34). To the contrary, had the General Assembly intended for the term "structures" in the first sentence of paragraph (b) to only apply to bulkheads, it could have so stated.

The Department did not determine that this provision was contravened and

[5] It is proper to look at the caption of a statute to discern legislative intent. See, e.g, Father v. S.C. Dept. of Social Services, 345 S.C. 57, 67, 545 S.E.2d 523, 528 (Ct. App. 2001) (citing Joytime Distrib. & Amusement v. State, 338 S.C. 634, 649, 528 S.E.2d 647, 655 (1999) ("[I]t is proper to consider the title or caption of an act in aid of construction to show the intent of the legislature[.]")(internal citations omitted)).

League challenged the bulkhead/revetment's compliance with the specific project standards. The ALC made a conclusion that the revetment is within 18" of the escarpment though it appears clear from the record that the revetment will not be within 18" of the escarpment. R. p. 9. The ALC did not make a finding that it is not feasible for the revetment to be constructed within 18" of the escarpment.[6] Development Partners' effort to circumvent this requirement contravenes the express language of the regulation.

Development Partners also argues that this Court's recent decision in Hill v. S.C. Dept. of Health and Envtl. Control, Op. No. 26873 (S.C. Sup. Ct. filed August 23, 2010) (Shearouse Adv. Sh. No. 34 at 25) determined that Reg. 30-12(C)(1)(b) does not apply to revetments. Resp. Br. pp. 31-32. Hill makes no determination about whether Reg. 30-12(C)(1)(b) applies to revetments—Hill did not even involve a revetment, much less, present that question. Hill was an appeal of a decision of Judge Breeden where the circuit court reversed the ALC's Order upholding an administrative enforcement order issued by the Department. Hill constructed a bulkhead too far into the critical area, in violation of a permit that required the bulkhead to be constructed within 18" of the existing escarpment. Hill reversed the circuit court for making improper new findings of fact and found that there was sufficient evidence in the record to support the ALC's order upholding the enforcement action. Simply put, Hill does not address the issues for which

[6] Development Partners argues that the regulation does not expressly limit the width of revetments; this is true. However, it does generally only allow structures to extend into the critical area 18" past the existing escarpment. Development Partners presented no evidence explaining why the 40' wide revetment cannot originate on its property and only extend 18" into the critical area. Additionally, no assessment has been done to discern whether such a structure would comply with the project standards and other regulations such as regulations that, for example, require assessment of whether the structure will cause erosion, shoaling of channels or creation of stagnant water, see Reg. 30-11(B)(4), and that prohibit structures that will destroy stable marine bottoms or cause safety hazards. Reg. 30-12(C)(A)(1). Development Partners' Bohannon testified that river velocities tend to cause erosion at the toe of revetments, which is why Development Partners' expert recommended the width of the revetment be extended to 60'. R. p. 606, lines 1-23.

Respondent cites it.

3. The ALC's Legal Error In Assessing Alternatives Is Not Harmless

In addressing the prohibition of projects that adversely affective public access unless no feasible alternatives exist, S.C. Code Ann. Reg. 30-12(C),[7] the ALC and Development Partners erroneously focus on whether there are other shorelines available for the public to access. Initial Resp. Brief at 36-37, R. p. 15. The ALC found that "the construction of the revetment will not unreasonably eliminate public access" and would not "unreasonably restrict public access." (R. pp. 15, 28). Nowhere in the Act, the Regulations, or the CMP is this standard enunciated. The ALC's conclusion that that the "revetment will not unreasonably eliminate public access" originates from the ALC's legal error in imposing a higher standard than the standard in the Act and Regulations. Regulation 30-12(c)(1) prohibits bulkheads and revetments which will adversely affect public access unless no feasible alternatives exist. "Adversely affects" is a much lower legal threshold than "that does not unreasonably eliminate."

Development Partners does not argue that the ALC applied the proper standard in the Amended Order. Rather, Development Partners assumes legal error but argues that such error was harmless because it believes there is substantial evidence in the record to support a finding that public access would not be adversely affected. Resp. Br. pp. 60-61. Importantly, the ALC did not find that the bulkhead/revetment would not adversely affect

[7] § 48-39-150(B)(8), (9) and Reg. 30-11(B)(8),(9) also effectively require an alternatives analysis. In Raymond M. Leonard, Jr. et al. vs. SCDHEC et al., 96-ALJ-07-0516-CC (Final Decision and Order, February 1998), Administrative Law Judge Stephen Bates concluded that "Given the probable resulting adverse environmental impacts of the proposed project, §§ 48-39-150(8) and (9) are acutely relevant. They relate to the availability and implementation of reasonable measures to avoid negative environmental impacts." And "I must review the evidence and consider alternatives to or variations of the proposed project and determine which, if any, appropriately address and resolve the inadequacies of the proposed plan. §§ 48-39-150(A)(8) and (9); § 48-39-150(B); R. 30-11(8) and (9)."

public access. The ALC found that public access "would not be unreasonably eliminated." R. p. 15. This finding, with its heightened standard, is not the equivalent of a finding that public access "will not be adversely affected."

Moreover, there is not substantial evidence in the record to support such a finding. To the contrary, the undisputed evidence is that the Kiawah River shoreline where the revetment is proposed to go is sandy and gently sloped, and is readily available for access and use by the public. R. p. 1353, line 23-1354, line 10. Development Partners' Long acknowledged that access will be adversely effected and that a half-mile long, forty foot wide concrete block mattress covering 2.68 acres of sandy shoreline would be unsafe to walk upon. (R. p. 361 line 11- p. 362, line 9, p. 390, line 8- p. 391, line 16). A review of Resp. Ex. 6, the only photographic evidence admitted into the record showing this type of structure reveals that the blocks are holes-up in rows on the ground. (R. pp. 2090-2094). Bohannon explained that as the velocities of the Kiawah River eat away at the toe of the revetment, the revetment will slope and the space between each row of blocks will increase just as shown in the Daniel Island Example on Resp. Ex. 6. (R. p. 464, line 21-465, line 25, p. 639, lines 3-24, pp. 2090-2094).

Along this vein, the ALC committed legal error in his determination that there are no feasible alternatives to converting a half-mile of the Kiawah River shoreline into a concrete block mattress. The ALC and Development Partners improperly narrow the scope of the analysis to alternatives "that will stabilize the Kiawah River shoreline"[8] to foreclose other alternatives. R. p. 9, Resp. Br., pp. 38-39. Development Partners' stated goal for the project is to preserve an access corridor for potential homesites on the spit.

[8] Ironically, the revetment is not proposed to withstand a major storm. The ALC found that it is designed to abate chronic erosion to provide a sense of security to possible purchasers. R. p. 8.

With that in mind, Long and Permar acknowledged that Development Partners may not develop homesites on the spit, (R. p. 282, lines 14-23, p. 416, line 25-p. 417, line 7, p. 482, line 23-p. 483, line 8, p. 483, line 16-p. 485, line 19); that it would be possible to develop homesites without a revetment, (R. p. 417 lines 12-14, R. p. 502, line 23-503, line 4); that it would be possible to have an access corridor without a revetment, (R. p. 507, line 22-p. 508, line 12); and that it would be possible to develop homesites without an upland access corridor. (R. p. 426, lines 11-18, 1618, lines 9-12). In addition, if Development Partners' fears that continued erosion along the Kiawah River would to encroach upon the setback area—which is subject to accretion at a higher rate than the river shoreline is eroding—then Development Partners would not be prohibited from applying for a permit to construct an access corridor in the setback area if necessary. Finally, Long and Permar acknowledged that the Development Agreement authorizes Development Partners to seek a narrower right of way. R. p. 427 lines 4-23.

In fact, no one who was qualified even testified that there is a need for this project. Bohannon, an engineer, testified that he does not assess need for structures but that he designs structures. R. p. 696 lines 4-9.[9] Dr. Kana, who the ALC found would have been eminently qualified to render such an opinion, testified that he did not assess the need for this revetment. R. p. 852 lines 14-17. Given the multitude of feasible alternatives acknowledged by Development Partners and the lack of any admissible testimony opining that there is a need for this structure, it was clear error to conclude that

[9] Despite admitting that he does not assess the need for structures, Bohannon testified, over objection, that he determined there to be a need for the structure because there is an existing escarpment. Since Mr. Bohannon was not qualified to render such an opinion it was error for the ALC to admit this testimony and this is no evidence to support a finding that there is a need for the structure. Watson v. Ford Motor Co., -- S.C.--, -- S.E.2d --, 2010 WL 3543725, 4 (S.C. S.Ct. Filed Sept. 13, 2010). Moreover, even if there is a need for the structure, Development Partners acknowledge that there are a multitude of feasible alternatives. Finally, as discussed below, the ALC found that there is not a need for the structure applied for by Development Partners and reviewed by OCRM. R. pp. 10-11.

a "no bulkhead/revetment" alternative is not a feasible alternative.

4. The Structure The ALC Designed Has Not Been Reviewed By The Department For Consistency With The Specific Project Standards; Once The ALC Determined That The Full Structure Applied For By Development Partners Was Unnecessary, The ALC Should Have Affirmed The Department's Decision.

Along this vein, the ALC actually made a finding that the structure applied for by Development Partners was not needed.[10] R. p. 10. Rather than affirm the Department's decision, the ALC undertook to design a structure himself, which he subsequently authorized. R. pp 10-11, 31.[11] There were no plans submitted to the Department or in the record at the ALC which show the structure designed by the ALC. Thus the structure designed and authorized by the ALC does not comply with S.C. Code Ann. § 48-39-140 and Regulation 30-2, which require that applications contain a plan or drawing showing the applicant's proposal and the method by which the proposal shall be accomplished. The statute and regulations require these drawings to be placed on public notice and that the public be afforded an opportunity to comment. The Department must review structures for compliance with the Regulations. S.C. Code Ann. §§ 48-39-140(c), 48-39-

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[10] Thus, the "no action" alternative is a feasible alternative.

[11] The Amended Order deleted special condition number of the permit, which limited the bulkhead and revetment to 270 feet, and substituted it for the following:

> 1. Provided:
> (i) that care is used in the installation of the requested erosion control structure near its eastern end, adjacent to Beachwalker Park, to avoid covering marsh grass, where practical, unless necessary to prevent significant highland erosion;
> (ii) that, for the portion of the proposed erosion control structure to be located west of survey point "F" on Petitioner KDP's Exhibit 77, a bulkhead shall not be used where the vertical face of the escarpment is less than 24 inches;
> (iii) that, for this same western section of the proposed erosion control structure, the ACB mat shall be no greater than eight (8) feet in width; and,
> (iv) that KDP shall submit final construction plans to the Department consistent with the permit requested, as modified and approved by Order of the Administrative Law Court, before commending initial construction of the erosion control structure, and, after initial construction, prior to commencing construction of any necessary extensions of the ACB mat (or bulkhead to the extent herein authorized but not originally constructed) authorized by this permit.

R. p. 31.

150 and Regulations 30-2(C)-30-2(G) and Regulation 30-4. The structure designed by the ALC has not been assessed for a determination of whether it is consistent with the regulations—including specifically for example the regulation requiring an assessment of the extent to which the activity could cause erosion, shoaling, or creation of stagnant waters, Reg. 30-11(B)(4), and the regulation requiring that structures be constructed so that reflective wave energy does not destroy stable marine bottoms or constitute a safety hazard. Reg. 30-12(C)(1)(a); (Compare with R. p. 464, line 21-465, line 25). Moreover, none of the witnesses who testified assessed whether the structure designed by the ALC complies with these provisions. Thus, there is no evidence in the record supporting a finding that the structure designed by the ALC complies with these regulations.[12]

The ALC and Development Partners give short shrift to the Department's arguments that the ALC exceeded its authority in designing a structure not applied for and that the ALC should have affirmed once it found and concluded that the structure applied for by Development Partners was not necessary. R. p. 35, Resp. Br. at 69-70. The ALC and Development Partners rely on the *de novo* standard of review in a contested case at the ALC as justification for the ALC undertaking to design a structure not applied for or reviewed by Department, not put on public notice, and not reviewed by any of the witnesses who testified.

The ALC and Development Partners misconstrue the import of the *de novo* standard of review. Marlboro Park Hosp. v. S.C. Dept. of Health and Envtl. Control, 358 S.C. 573, 595 S.E.2d 851 (Ct. App., 2004), is the case relied upon by the ALC and the case most oft-cited for the principle that the ALC utilizes a *de novo* standard of review when conducted a contested case hearing to review a Final Agency Decision. The ALC's

[12] In fact, the ALC did not even make such a finding.

reliance on Marlboro Park and the *de novo* standard of review in a contested case is misplaced. Marlboro Park concluded that the ALJ properly considered evidence not presented to DHEC because the evidence was related to issues presented during the staff hearing. Id. at 576, 595 S.E.2d at 852.[13] Marlboro Park is oft-cited for the principle that the ALC can consider new evidence not presented to the Department during the permit application process. Marlboro Park emphasized that the nature of a *de novo* review in a contested case and the need for the ALC to make sufficiently detailed findings of fact support the ability of the ALC to hear testimony and accept evidence. Marlboro Park does not open the door carte blanche for the ALC to consider new applications and issues that were never part of the Department's permit review process. To the contrary, Marlboro Park emphatically distinguishes between issues and evidence.

Put differently, the *de novo* standard of review does not change the nature of the issues before the ALC. Thus, while it is generally proper for the ALC to accept new evidence and hear new testimony in the contested case hearing to determine if the Department's decision was consistent with the governing statutes, regulations, and CMP, the *de novo* standard of review does not open the door for the ALC to design a new structure for which no application was submitted to or reviewed by DHEC. As the ALC properly concluded in first paragraph under "Conclusions of Law:"

> Because this case involves two requests for contested case hearings that were consolidated, KDP and CCL both have the burden of proof. **KDP bears the burden of proving that the 2783 foot bulkhead/revetment complies with the Coastal Wetlands and Tidelands Act, S.C. Code**

[13] Marlboro Park was decided before the process for appeals from DHEC decisions was restructured and streamlined in Act 387 of 2006. At the time of Marlboro Park, the ALJ served as the finder of fact for the agency before the Department's final agency decision was made and the ALJ's decision was subject to an appeal back to the agency, followed by a right of appeal to the circuit court and a subsequent appeal to the Court of Appeals (with the ability to petition the Supreme Court to issue a writ of certiorari to the Court of Appeals). After Act 387, the Department issues its Final Agency Decision prior to a contested case at the ALC. *See* S.C. Code Ann. § 44-1-60(F) (Supp. 2009); § 44-1-60(F) (As Amended in Act 287 of 2010).

Ann. §§ 48-39-10 *et seq.*, the regulations promulgated thereunder, 23A S.C. Code Reg. §§ 30-1 through 30-18, and the CZMP.[14] See Leventis v. S.C. Dept. of Health & Envtl. Control, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2001).

(R. p. 17)(emphasis added). The ALC found that Development Partners did not demonstrate a need for the 2,783 foot bulkhead/revetment applied for.[15] R. pp. 10-11. Rather than affirm the Department's decision as the ALC should have done given this finding, the ALC undertook to design and approve a new structure for which no plans or drawings had ever been submitted—either to the Department or at the ALC. In so doing, the ALC exceeded its authority and committed error of law.

5. Section 48-39-80 Gives The Department Authority To Review All State And Federal Permits For Consistency With The Coastal Management Program; The Statute Makes No Exception for Critical Area Permits.

Development Partners argues as an additional sustaining ground that the proposed revetment/bulkhead need not comply with the Coastal Management Program (CMP) because the Critical Area Regulations do not require a determination of consistency with the CMP. Resp. Br. p. 65. This argument is contrary to the express language of the Act and this Court's ruling in Spectre, LLC v. South Carolina Dept. of Health and Environmental Control, 386 S.C. 357, 364, 688 S.E.2d 844, 847 (2010).

In Spectre, the developer argued that the policies in the CMP could not be applied as binding norms because they were not promulgated as regulations. Spectre rejected the developer's Captain's Quarters based arguments and held that "[h]ad the General Assembly intended to require DHEC to promulgate regulations, it could have so specified." Id., at 371, 688 S.E.2d at 851 (distinguishing Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council, 306 S.C. 488, 413 S.E.2d 13 (1992)). Development Partners

[14] KDP did not file a cross appeal of this holding and it is the law of the case.
[15] Likewise, this finding was not appealed by Development Partners and is the law of the case.

argues that the Act requires regulations be developed for processing of permit applications for activities in the critical area, and because the regulations themselves do not require a determination that the activity is consistent with the CMP, the Department has no authority to review critical area permits for consistency with the CMP. (Resp. Br. p. 65).

The Department's authority to review state permits for consistency with the CMP is explicitly set forth in the Statute; there was no need for the Regulations to repeat this authority. As this Court held in Spectre, "§ 48-39-80 provides explicit statutory authorization to apply the CMP to state permits." Spectre, 386 S.C. at 371, 688 S.E.2d at 851; S.C. Code Ann. § 48-39-80 ("In developing the program the Department shall: (11) Develop a system whereby the Department shall have the authority to review all state and federal permit applications in the coastal zone, and to certify that those do not contravene the management plan.") (emphasis added). "Had the General Assembly intended [to create an exception for critical area permits,] it could have so specified." Id. Thus Development Partners' additional sustaining ground that it need not comply with the CMP fails as a matter of law.

Moreover, as articulated in the Department's Initial Brief, the ALC's blanket conclusory statement finding Development Partners' application consistent with the CMP is inadequate as a matter of law under Able Communications, *infra*. In addition, there is not substantial evidence in the record to support such a finding. For example, every witness who testified agreed that the Spit and the Kiawah River shoreline, both of which are clearly visible from the public beachwalker park, are pristine and that the conversion of this shoreline to a half-mile long concrete block mattress would significantly alter the

aesthetic characteristics of the area. This in and of itself contravenes the policies for public open space[16] and the erosion control policies and policies protecting and promoting public access to shorelines in the coastal zone. See Dept. Br. 34-40.

Moreover, the CMP requires a review of the "long range cumulative impacts of the project, when reviewed in the context of other possible development and the general character of the area." CMP, Guidelines for Evaluation of All Projects § I(7) [at p. III-14]. The only evidence Development Partners and the ALC rely on are the Development Agreement with the Town of Kiawah (R. pp. 1996-2039), Permar's conceptual sketch (R. pp. 2255-2256), and Development Partner's "track record" in developing Kiawah Island. The policies in the Development Agreement addressing environmental stewardship, while laudable, provide no requirements addressing the policies in the CMP for barrier islands, dune areas, open space, and erosion control. For example, though Development Partners' agreement to impose height limitations on homes, requirements of shared driveways, and protection of larger trees are laudable goals, they do not provide any assurances that dune ridges will be protected to the maximum extent feasible, or that run off will avoid critical areas to the maximum extent feasible, or otherwise provide any basis for reviewing the cumulative effects in the context of the policies set forth in the CMP.

6. The ALC's Findings Regarding 30-11(C) Are Affected By Error Of Law.

In its Initial Brief, the Department set forth several instances where the ALC

[16] See Dept. In. Br. 32-34. Regarding Development Partners argument that open space policies are limited to public open space, Beachwalker Park is a public open space, as is the Kiawah River shoreline. It is undisputed that the revetment (and homesites) will disrupt the character of these public open spaces, environmentally and aesthetically. CMP at III-73. Moreover, the majority of the spit has been and remains limited to use as park and open space. R. p. 485, lines 15-25, p. 1996-2039. Finally, "[f]or purposes of this section, public open spaces means state or local (county or municipal) parks or other open space areas. CMP, at p. III-73.

committed legal error, including in its findings and conclusions relating to Reg. 30-11(B), Reg. 30-11(C), § 48-39-20 and 48-39-30, and the CMP.[17] The Respondent only addresses the legal error in the ALC's interpretation of Regulation 30-11(C)(1), which requires the Department and the ALC to consider "the extent to which long range cumulative impacts of the project, in the context of other possible development, may result within the context of other possible development and the general character of the area." The ALC's interpretation of this regulation to only require consideration of the impacts of the revetment itself—and only impacts in the critical area—is contrary to the express language of the Regulation, and ignores the words "cumulative effects" and "other possible development" and "the general character of the area." In fact, the ALC recognized as much during argument on Development Partners' motion in limine seeking to exclude evidence of cumulative impacts. (R. p. 274D lines 5-11).

"Cumulative" is defined in Merriam Websters online as "made up of accumulated parts; increasing by successive additions. Merriam-Websters Online Dictionary, at http://www.merriam-webster.com/dictionary/cumulative. As the ALC recognized at the beginning of the hearing, the problem with the Development Partners' (and the ALC's ultimate) interpretation "'trying to limit it to the project,' the problem [the ALC had] with that theory is that...the project has to result in a cumulative impact by some other means..." (R. p. 274D lines 5-11). Moreover, the cumulative impacts are not limited to within the critical area—but rather, must be considered "in the context of ... the general character of the area." Had the General Assembly intended to limit the consideration of cumulative impacts to "in the context of... the critical area," it would have so specified.

[17] Most of which, as discussed in the Initial Brief and herein, are conclusory and insufficient as a matter of law under Able Communications and, in any event, without substantial evidentiary support in the record.

See Spectre, 386 S.C. at 371, 688 S.E.2d at 851 ("Had the General Assembly intended to require DHEC to promulgate regulations, it could have so specified.")

Development Partners argument that "the bulkhead-revetment does not cause the future upland development," Resp. Br. at 58, is disingenuous given Respondent's other arguments that the revetment is necessary to facilitate marketability of the homesites and that the denial of the revetment is an effective elimination of Development Partners' ability to develop homesites on the spit.[18] Development Partners is talking out of both sides of its mouth. If the revetment would not cause the future upland development, then there would be nothing to protect; the spit is not shrinking but rather is aggregating land due to the higher rates of accretion on the ocean side. Development Partners claims that it needs the revetment to facilitate development but then attempts to foreclose review of the revetment in the context of that development to assess the character of the development and whether it meets the criteria of the regulations, the statute, and the program.[19]

Development Partners' argument that the Department's interpretation has no bounds is without basis. The Development Partners and the ALC dismiss the Department's interpretation—which is consistent with the plain language of the act—based on the notion that DHEC could deny a critical area permit based on a determination that it could cause urban sprawl in Myrtle Beach. Resp. Br. pp. 57-58, R. p. 22. The ALC

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[18] In fact, Development Partners has filed an action in circuit court seeking upwards of one hundred million dollars ($100,000,000.00) from the Department based on the Development Partners argument that the Department's denial of the permit to construct the half-mile long revetment on the State's land is a taking of Development Partners' adjacent property. R. p. 368, lines 5-11.This accentuates the blatant incompatible arguments and conclusions in Development Partners' arguments and in the ALC's Order. Adding to the folly of Respondent's argument is the fact that it obtained a $50,000,000 million mortgage on the property without a revetment. This mortgage is being used to finance a resort on St. Kitts. R. p. 415, line 13-p. 416, line 12, p. 1618, lines 13-25).

[19] Moreover, this error is not harmless. The undisputed evidence is that the Spit and the Kiawah River shoreline are pristine and unfamiliar with human improvements. The revetment itself will drastically alter the character of the area, as will the homesites. This runs afoul both of the effects regulation, and the policies in the CMP relating to public open space.

and Development Partners overlook that Myrtle Beach is already replete with urban sprawl and that the regulation requires DHEC to take into account the potential cumulative effects of the project in the context of other possible development and the general character of the area. S.C. Code Ann. Reg. 30-11(C)(1) (emphasis added); Young v. S.C Dept. of Health and Envtl. Control, 383 S.C. 452, 462, 680 S.E.2d 784, 789 (Ct. App. 2009) (Affirming DHEC's determination that neighbors concerns about potential cumulative effects of a proliferation of boatlifts did not warrant denial of permit for boatlift where the area was not pristine and unfamiliar with human improvements, but rather, was already familiar with development and boatlifts). The ALC's and Development Partners' swing-and-a-miss effort to show an alleged absurdity in the Department's interpretation and the plain language of the regulation highlights the underlying flaw in their argument. The Department reviews permits like this Court reviews cases and controversies—on a case by case basis. And in reviewing this permit application, the law requires the Department to consider the potential cumulative effects of the revetment in the context of the possible homesites and the pristine general area around the Kiawah River and the Spit.

7. The Department's Interpretation Of The Act and Its Regulations In A Manner That Results In The Denial Of Development Partners' Application To Convert 2.63 Acres Of That State's Property Into A Concrete Block Revetment Is Not A Taking Of Development Partners' Adjacent Land.

Development Partners argues in its Brief that the Department's interpretation of Regulation 30-11(C)(1) would result in a taking. Resp. Br. p. 61. Though this question is not before the Court, as Respondent acknowledges, Development Partners states in its Brief that the ALC "noted in his Order that the CZMA specifically prohibits implementation of permitting decisions in a manner that takes property without just

compensation." Resp. Br. at 61; R. p. 23. Respondent goes on to state that "[w]hile the question of whether the permitting decision constituted an inverse condemnation of the Property was not before [the ALC], much less decided by him, the policy of [§] 48-39-30(C) indicates how askew OCRM's staff determination of cumulative impacts was." Resp. Br. p. 61.

Though Development Partners acknowledges in its brief that the takings issue is not before the Court, Development Partners argues in its brief that the Department's interpretation would constitute a taking by making unviable or unmarketable Development Partners' 'vested right' to develop homesites under the Development Agreement.[20] Resp Br. p. 61. Development Partners' applied for a permit to build a half-mile long bulkhead and a half-mile long by forty foot wide concrete block mattress revetment over 2.63 acres of the sandy shoreline of the Kiawah River. R. p. 2095. As Long acknowledged, the 2.63 acres the proposed revetment would be constructed on is not property owned by Development Partners, but rather property owned by the South Carolina. R. p. 375, lines 17-25.

As background and as discussed in the Department's Initial Brief, the ALC and Development Partners question whether the General Assembly intended to give the Department authority to review impacts outside of the critical area and issue critical area

[20] There was not any evidence in the record that the Development Agreement complies with the Local Government Development Agreement Act ("Development Agreement Act), S.C. Code Ann. § 6-31-10, et.seq. That question was not before the Department or the ALC. Assuming *arguendo* that the Development Agreement complies with the Development Agreement Act, and Development Partners does have vested rights, nothing in the Development Agreement Act vests a right in the granting of a state permit from a state agency charged with enforcing state statutes and regulations to promote the public health, safety and welfare. Whatever vested rights Development Partners may have under the Development Agreement are subject to applicable state laws and regulatory requirements. Moreover, nothing in the Development Agreement purports to guarantee a state permit for a revetment. The revetment is on state property not subject to the Development Agreement, and the Development Agreement is not binding on the State. Nor does the State have a right of enforcement under the Development Agreement.

permit decisions and coastal zone consistency decisions that may interfere with the marketability of possible upland development that has been approved by a local government through zoning or a development agreement. This forms the impetus of the ALC's and Development Partners' reliance on 48-39-30(c). The General Assembly expressly found "present state and local institutional arrangements for planning and regulating land and water uses in such areas [referencing "natural systems in the coastal zone"] are inadequate." S.C. Code Ann. § 48-39-20(F). With this finding in mind, the General Assembly declared it the policy of South Carolina "to protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations" as well as "...to encourage development of coastal resources with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the fragile and sensitive areas from inappropriate development and provide adequate safeguards with respect to the construction of facilities in the critical areas of the coastal zone" S.C. Code Ann. § 48-39-30(B)(1), (2). The Act defines "coastal zone" as all lands and waters in the eight coastal counties. Neither the definition of "coastal zone" nor the findings and policies in 48-39-20 and 48-39-30, which the Department is required by § 48-39-150 to consider when acting on critical area permits, are limited to the critical areas.

Putting aside the multitude of other problems with Development Partners' takings argument, which may or may not be litigated at some point in the future,[21] for there to be a taking, a government action must deprive a property owner of a right that he is entitled to do. McQueen v. South Carolina Coastal Council, 354 S.C. 142, 150, 580 S.E.2d 116, 120 (2003). Development Partners, like McQueen, is a littoral property owner whose

[21] Development Partners inverse condemnation action in circuit court has been stayed.

"ownership rights do not include the right to backfill or place bulkheads [or a half mile long by forty foot wide revetment] on [2.63 acres of] public trust land and the State need not compensate him for the denial of permits to do what he cannot otherwise do." Id. The Department's denial of Development Partner's request to convert 2.63 acres of state property into a concrete block mattress to stabilize one shoreline of its property so that the Spit experiences an even greater net gain in upland property is not a taking. The ALC's inadequate and conclusory findings in the order are affected by this legal error.

8. Able Requires More Than Just 31 Pages Of Discussion; The ALC's Order Does Not Contain Sufficient Factual Findings And The Bulkhead Revetment Is Inconsistent With The Act As A Matter Of Law.

Development Partners brushes aside in two paragraphs the Department's arguments that the ALC's backup findings of fact are conclusory and inadequate by surmising, also in a conclusory fashion, that since the ALC's Order is thirty one pages long with sixteen pages below the caption "findings of fact," "appellants cannot reasonably contend [the ALC's] Amended Final Order was, in any way, conclusory.[22] (Resp. Br. at 68-69). In criticizing the ancient documents exception to the hearsay rule, the ALC quoted Binder as commenting: "the drafters of the Federal Rules of Evidence have, I'm afraid, fallen prey to the pernicious Persian platitude, quote, the longer the beard, the greater the wisdom, end quote." R. p. 761, lines 1-9. It appears that the ALC and Development Partners have fallen to victim to a similar platitude of the longer the order, the less conclusory the findings.

This Court has repeatedly emphasized that conclusory findings of fact are insufficient to meet the requirement to provide sufficient findings of fact to provide for

[22] Similarly, Development Partners argues that because the trial lasted five days, there must be substantial evidence to support the findings of fact it implies into the Order.

appellate review. In Able Communications, this Court stated as follows:

> The 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. *Hill v. Jones,* 255 S.C. 219, 178 S.E.2d 142 (1970). Implicit findings of fact are not sufficient. Where material facts are in dispute, the administrative body must make specific, express findings of fact. *Aristizabal v. Woodside-Division of Dan River,* 268 S.C. 366, 234 S.E.2d 21 (1977). No particular format is required. *Airco, Inc. v. Hollington,* 269 S.C. 152, 236 S.E.2d 804 (1977). However, a recital of conflicting testimony followed by a general conclusion is patently insufficient to enable a reviewing court to address the issues.

Able Communications, Inc. v. S.C. Public Service Com'n 290 S.C. 409, 410-411, 351 S.E.2d 151, 152 (1986). This court has reiterated this requirement to the ALC Bench on multiple occasions. See Spartanburg Reg. Med. Center v. Oncology and Hematology Assocs. of South Carolina, LLC, 387 S.C. 79, 91, 690 S.E.2d 783, 789 (2010); Id. at 93-94, 690 S.E.2d at 790 - 791 (Toal, C.J., dissenting); Grant v. Grant Textiles, 372 S.C. 196, 203, 641 S.E.2d 869, 872 (2007) (internal citation omitted); Kiawah Property Owners Group v. Public Service Com'n of South Carolina, 338 S.C. 92, 96, 525 S.E.2d 863, 865 (1999); Hill, supra, at Fn. 9. As Development Partners points out in its brief, much of the ALC's sixteen pages of "findings of fact" are recitations of testimony followed by general conclusions, which is patently inadequate. Id.

For example, the ALC finds that the revetment "won't unreasonably eliminate public access." R. p. 15. The ALC does not set forth specific factual findings which support this conclusory finding. The ALC merely recites limited portions of Bill Eiser's testimony and states that kayakers can pull up on the concrete block mattress, and if the public does not want to pull up on the ACB mattress, then they can go somewhere else. R. p. 15. In addition to the legal errors in the standard applied, the ALC does not make

necessary findings to support the conclusion. There are no findings that the sandy shoreline is not already used by the public.[23] The ALC did not find that the concrete block revetment, will allow for safe access and use of the tidelands of the Kiawah River for walking, sunbathing, fishing, or other recreational use.[24]

The closest the ALC comes to making a supporting factual finding is his statement that "kayaks and small boats can still be pulled up on the ACB mat, the same as what might occur on concrete boat ramps or landings in South Carolina's waters." R. p. 15. But even this is conclusory and without evidentiary support, as the only substantiated testimony on this point was VanDerwerker's testimony that it is not suitable for landing a kayak or other boat. R. p. 1081, line 6-p. 1084, line 11. There was no evidence of kayakers actually utilizing a concrete block revetment. Common sense says that any person attempting to walk upon or otherwise utilize the concrete block mattress for any recreational purpose risks injury. Thus, the ALC's conclusory factual findings regarding public access are insufficient as a matter of law, and (to the extent the court deems them sufficient) not supported by substantial evidence in the record.[25]

The same is true for the ALC's conclusory statement that the revetment "will not substantially impair the recreational activities of boaters, kayakers, and others." R. p. 28. Discussing the public trust doctrine, the ALC merely recites the standards from the Sierra Club v. Kiawah Resort Associates, 318 S.C. 119, 456 S.E.2d 397 (1995) decision and makes a conclusion that purports to satisfy that standard without setting forth any

[23] This is because the undisputed evidence in the record established that the shoreline is regularly used by the public. Even Long acknowledged the regular use of the shoreline by the public and that it will be altered if the proposed revetment is constructed. R. p. 361, line 11-362, line 21.
[24] It is obvious from the only photographic evidence of this type of structure that it is unsafe for public access or use. R. pp. 2090-2094. Long acknowledged as much. R. p. 362
[25] Moreover, the ALC imposed the wrong standard. The standard is whether public access is adversely affected, not whether it is unreasonably eliminated. Supra § 3, Dept. In. Br. 37

underlying factual findings to support the conclusion. The conclusions relating to the policies in § 48-39-30 are even more conclusory. The ALC does not even make a finding that converting 2.63 acres of the sandy shoreline into a concrete block mattress is the best use of the critical area.

9. The ALC's Conclusion That The Bulkhead-Revetment Complies With 48-39-20 and 48-39-30 Is Controlled By Error Of Law.

The Act mandates that critical areas be used to "insure the maximum benefit to the people, but not necessarily a combination of uses which will generate the maximum dollar benefits." S.C. Code Ann. § 48-39-30(D). Significantly, the ALC did not make a finding that the bulkhead-revetment is the best use of the critical area for the People. [26]

As discussed in the Department's Initial Brief, the ALC's conclusion that the revetment-bulkhead is consistent with §§ 48-39-20 and 48-39-30 is based on his finding that the revetment would increase the marketability of homesites on the spit. R. p. 19. This evidence of pure economic benefit to Development Partners[27] is insufficient as a matter of law to satisfy the policies § 48-39-20 and § 48-39-30. "[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." South Carolina Wildlife Federation v.

[26] The public interest is defined in the regulations specifies that "public interest refers to the beneficial and adverse impacts and effects of a project upon members of the general public, especially residents of South Carolina who are not the owners and/or developers of the project." S.C. Code Ann. Reg. 30-1(D)(44). It is not the best use of the critical area to foster a sense of security for up to fifty potential purchasers on the spit, especially given the admitted value in the Spit without the revetment. In fact, Development Partners obtained a $50,000,000 mortgage on the property (which is being used to finance a resort in St. Kitts) without the aid of a revetment. The best use of that shoreline is to maintain its susceptibility to access and use by the public, for this and succeeding generations.

[27] Though Long testified multiple times that Development Partners had done no study to assess the economic benefit to Development Partners—either of homesites with or without a revetment, or of the spit with or without homesites. R. p. lines 5-12, p. 1615, line 20-p. 1616, line 8. This is likely because, as both Long and Permar acknowledged, Development Partners has not determined how many, if any, homesites will be developed on the Spit. R. p. 416, line 13-p. 417, line 7, p. 483, line 2-p. 485 line 4.

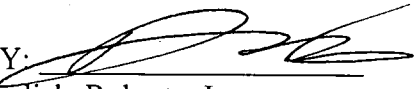
South Carolina Coastal Council, 296 S.C. 187, 190, 371 S.E.2d 521, 522-523 (1988). This public interest must counterbalance the goal of economic improvement. *See* S.C. Code Ann. § 48-39-30(B)(1) & (2) (1987) (citing S.C. Code Ann.§ 48-39-30(A) and (B).

Bill Eiser was the only witness to testify as to what combination of uses provides the maximum benefit to the people. Eiser testified that given the unique nature of the Spit as pristine coastal resource, there is considerable value to the public in maintaining the natural shoreline of the Kiawah River and the Spit. R. pp. 1265-1266, p. 1360, line 17-p. 1361, line 18, p. 1374, line 15-p. 1376, line 9, p. 1384, line 9-p. 1386, line 16. Development Partners' Long acknowledged this value. R. p. 1615 line 21-1616 line 8. There is no evidence in the record that conversion of 2.63 acres of the Kiawah River shoreline into a 2,783' by 40' concrete block mattress would be the best use of the state owned coastal waters and tidelands critical area or would provide maximum benefits to the people. The purpose of revetment is to increase marketability of homesites which will be developed in the same location as the channel during the 1994 breach. R. p. 852 line 18-856, line 4.. Use of the critical area to foster a false sense of security for prospective purchasers contravenes the primary policies set forth in § 48-39-30 to preserve and protect coastal resources for this and succeeding generations and to give high priorities to the natural systems of the coastal zone. This cannot be the use that provides the maximum benefit to the people. Thus, it was error of law for the ALC to authorize the construction of this half-mile long bulkhead and revetment.

CONCLUSION

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

SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL

BY: 

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October 6, 2010
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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,

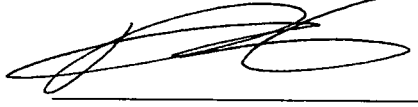
Of Whom

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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and Kiawah Development Partners, II, is Respondent,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date s/he served the ***Final Reply Brief of Appellant 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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