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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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
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
SOUTH CAROLINA COASTAL CONSERVATION LEAGUE**

Amy E. Armstrong
SOUTH CAROLINA ENVIRONMENTAL
LAW PROJECT
Post Office Box 1380
Pawleys Island, SC 29585
Telephone: (843) 527-0078

Attorney for the Appellant South Carolina
Coastal Conservation League

November 4, 2010
Georgetown, South Carolina

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ARGUMENT

Despite its seventy-one page brief, the Respondent does little to actually respond to the issues of law raised by the Appellant S.C. Coastal Conservation League. Instead of responding to these issues, the Respondent claims that those issues were not preserved; claims that the rules do not mean what they say; argues the substantial evidence standard, rather than addressing the legal error; re-argues the *Spectre* case; misinterprets a recent decision of this Court; and claims a taking without just compensation.

The key legal error in the ALC Order was failure to apply the bulkhead and revetment regulations' prohibitions on structures that adversely affect public access and structures that extend more than eighteen (18) inches into the critical area, except in very limited circumstances. It is uncontested that there is going to be an adverse impact on public access. It is uncontested that the bulkhead portion of the structure is going to extend forty (40) feet from the escarpment into the critical area. It is uncontested that KDP's land has grown and accreted for a gain of sixty-four (64) acres over the last 35 years. It is uncontested that other islands in South Carolina are developed without mainland road access. And it is uncontested that open space and park uses are still viable uses for Captain Sam's Spit.¹

The ALC also committed legal error in concluding that marine life would not be adversely affected without any evidentiary support for its conclusions. It is uncontested that Diamondback Terrapins will be unable to access nesting grounds and reproduce, ultimately leading to elimination of the Kiawah Island population of the species . It is uncontested that

¹

In fact, Development Partners obtained a \$50 million mortgage on the property without any revetment being present on the property.

dolphins will be unable to strand feed and will be prohibited from accessing productive feeding grounds.

I. The ALJ Made an Error of Law in Concluding that the Project Complies with Regulation 30-12.C.(1)

Public Access

The ALC made an error of law in allowing a bulkhead/revetment structure that would have adverse impacts on public access. The ALC simply failed to apply the plain language of Regulation 30-12.C.(1)(c) & (d), which prohibit bulkheads and revetments when there is *any* adverse affect on public access.² The ALC acknowledged that public access would be affected, but he brushed it aside in finding that the revetment will not “unreasonably eliminate public access” – as if some elimination of public access is acceptable. (R. p. 15). In so ruling, the ALJ erred in applying the legal standard of Regulation 30-12.C.(1), which clearly prohibits bulkheads and revetments where there is any adverse affect on public access, except in very limited circumstances.³

Respondent’s argument goes beyond the ALC Order in stating that “public access is not adversely affected.” (Resp. Brief, p. 36). The ALC **never** found that public access would not be adversely affected, rather the Order finds that those adverse affects on public access

²

“(c) Bulkheads and revetments will be prohibited . . . where public access is adversely affected unless upland is being lost due to tidally induced erosion; . . . (d) Bulkheads and revetments will be prohibited where public access is adversely affected unless no feasible alternative exists.” 23A S.C. Code. Ann. Regs. 30-12.C.(1).

³

As discussed thoroughly in the League’s brief, the limited circumstances when public access may be adversely affected are when there are “no feasible alternative” and when “upland is being lost.” 23 A S.C. Code Ann. Regs. 30-12.C.(1)(c) & (d).

were “limited” and “insignificant.” Later the Respondent does admit that “the public’s recreational use of the area would be slightly modified.” (Resp. Brief, p. 38). The League disputes that the affects of the structure would only slightly modify use, but even this “slight modification” is an adverse impact on public access, which is prohibited by R. 30-12.C.(1).

The “evidence” that the ALC relies on for his findings to support the opinion that there will not be “significant” adverse effects on public access is a conclusory statement made by Bill Eiser, rather than any member of the public who has actually made recreational use of the area and testified to that use.⁴ (R. p. 15 & Resp. Brief, p. 52). But when Eiser was asked specifically about his observations he testified that:

“at the time that I’ve done my site visits . . . I have seen people walking along that section, I’ve seen kayaks pulled up, I’ve seen people either fishing or crabbing, I can’t remember which. So I think that there is definitely some public access and use in that area. I can’t really, you know, quantify how many people a day or a month go back there, but I think that it’s certainly true that if this articulated concrete block structure were built that it would effectively remove the public’s ability to use that half-mile long shoreline.”

(R. pp. 1353-1354, lines 22-10).

KDP erroneously suggests that the League members’ access is not affected because navigability and its members’ use of the Kiawah River will not be impacted. (Resp. Brief, p. 37). That suggestion mistakes the League’s concern: VanDerwerker and McAllister stated that they would not be able sit on, picnic on, lay out on or make use of the shoreline of the

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The Respondent cites to R. pp. 619-620, lines 24-12 as support that there will be no significant impacts. This testimony of Mitchell Bohannon says absolutely nothing about public access.

river as they do regularly right now. (R. pp. 1077-1078 & 1141-1142). None of the League's testimony regarding affects on access and use of those sandy banks was contradicted.

The suggestion that the public can simply go somewhere else if they do not want to picnic and lay out on concrete blocks is irrelevant to the question of whether public access would be affected – without a doubt access to the 2.63 acres of sandy shoreline at issue in this appeal would be affected, and that adverse affect is a violation of R. 30-12.C.(1)(c) & (d).

KDP cites to Bill Eiser's testimony claiming that "nothing in the regulation compelled OCRM to deny KDP's permit request" in support of compliance with R. 30-12.C.(1). (Resp. Brief, p. 28). KDP then continues to cite OCRM's Technical Summary of Review's conclusions as to Regulation 30-12.C.(1), that the "specific regulatory criteria do not bar this project." (Resp. Brief, p. 28, citing OCRM Ex. 2, Tr. 1963). Reliance on Eiser and his decision document for a conclusion of law is legal error.

The issue of interpretation of a statute is a question of law for the court. *Catawba Indian Tribe of SC v. The State of SC*, 372 S.C. 519, 642 S.E.2d 751 (2007). The question of whether the specific regulatory criteria have been met is a legal question left for the court. *O'Quinn v. Beach Associates*, 272 S.C. 95, 249 S.E.2d 734 (1978). Eiser's testimony regarding compliance with the specific standards in the bulkhead and revetment regulations is irrelevant and carries no weight because the question of compliance is a question of law for the Court.

KDP apparently faults the League for not asking Eiser about his conclusions; however, Eiser's conclusions about compliance with the regulations are conclusions of law

left to the Court. Eiser testified that the structure would effectively remove the public's ability to use the shoreline, and the League had no reason to question Eiser any further. The League raised the issue of compliance by presenting evidence that the revetment structure would be constructed at the critical area line/escarpment and would extend 40 feet into the critical area. (R. pp. 659-662).

Furthermore, the Technical Summary of Review is the decision document that is on appeal. The decision that is being appealed cannot be cited in support of itself. The agency's findings cannot be used to support of those findings, the agency's findings must be supported by other evidence at the Administrative Law Court. Reliance on the technical summary of review – the document in which the agency explains its findings – is not substantial evidence to support the findings contained therein.

The purpose of the contested case hearing is to determine whether the department erroneously applied the statute and regulations in arriving at its decision. The S.C. Coastal Conservation League presented evidence that, in fact, the project does not comply with the bulkhead and revetment regulations. And the ALC made findings that, when applied to the regulatory standards for bulkheads and revetment, lead to the inevitable conclusion that the project does not comply with the specific regulatory criteria.

The ALC made an error of law by creating a new, heightened standard that some elimination of public access is acceptable, as long as it is not "unreasonable." The regulatory standard is whether public access is adversely affected at all, and both Respondent and the ALJ acknowledge that the revetment will adversely affect public access. Failure to apply the

“adversely affected” standard, and imposition of a burden requiring a showing that access will not be “unreasonably” eliminated constitutes an error of law.

Because public access will be adversely affected, Respondent must establish both that there are no feasible alternatives and that upland is being lost to construct the proposed structure. Respondent has failed to meet either requirement.

Feasible Alternatives

The ALJ erroneously applies the legal standard of “feasible alternatives” by narrowly viewing the project in terms of “stabilizing the shoreline,” rather than the purpose of the project, which is residential development. (R. p. 8). The critical area regulations define “feasible (feasibility)” as follows:

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

23 A S.C. Code Ann. Regs. 30-1.D.(23) (emphasis added).

The definition of feasibility and feasible alternatives requires reviewing the alternatives in the context of the project goal or purpose. In this case, the project goal is to construct a residential development on Captain Sam’s Spit. Yet the ALJ erred by misapplying his feasibility analysis in a manner that foreclosed the legal definition of feasibility by looking at the project goal narrowly as “to stabilize the shoreline,” without

regard to the goal and purpose of stabilizing the shoreline, which is to facilitate residential development. The ALJ erred by failing to apply the regulation's definition of feasibility.

In addition, the ALJ ignored the testimony relating to the best available information on the drastic historic changes at Captain Sam's, data relating to the instability of the Spit and its lack of suitability for development, and the resource agencies' recommendations that the project be denied because of the environmental consequences – each of which should be included in a feasibility analysis. The ALJ failed to consider alternative “locations or sites” for the proposed development, even though KDP owns all of Kiawah Island and there are still undeveloped areas, even on the beachfront. (R. pp. 274D & 274K).

Finally, the ALJ erred by rejecting the “no action” alternative by narrowly construing the project goal or purpose, despite uncontested evidence that other islands are developed without road access. In rejecting the “no action” alternative, the ALJ limited the goal or purpose of the project as “to stabilize the river shoreline” and failed to apply the definition of feasibility in R. 30-1.D.(23). (R. pp. 9 & 27).

No Loss of Upland

The ALJ erroneously applied R. 30-12.C.(1)(c) in concluding that upland is being lost. The uncontested evidence is that the upland is being gained, not lost. In fact Captain Sam's Spit has gained over 64 acres of highground since 1974. (R. pp. 564-565). As Bill Eiser explained, the typical revetment would be constructed on a lot bordered by land on three sides and water on the fourth. (R. p. 1521). But Captain Sam's Spit is bordered on three sides by water and land on the fourth, and a conclusion of whether upland is being lost must necessarily include an assessment of what is happening on the three sides of the

property surrounded by water. That assessment shows that upland is being gained. The ALJ thus failed to apply the regulatory requirement of loss of uplands.

The Eighteen (18) Inch Rule

Regulation 30-12.C.(1)(b) states that bulkheads and revetments “may be constructed up to 18 inches from the existing escarpment. In situations where this is not feasible, Department staff will determine the location of the bulkhead or revetment on a site by site basis.” 23 A S.C. Code Ann. Regs. 30-12.C.(1)(b).

The Respondent argues that “the bulkhead and revetment structure would conform to the critical area line to the maximum extent feasible.” (R. p. 605 & Resp. Brief, p. 29). Such reliance is misplaced. The ALJ did not make a finding on the feasibility of constructing the structures on the critical area line. The ALC made a finding that the bulkhead would be within 18 inches of the escarpment, and that the revetment would extend 40 feet past the escarpment. Then the ALJ concluded that both structures complied with R. 30-12.C.(1)(b). The ALJ’s conclusion failed to apply the law to his findings and is an error of law.

Respondent purports to point to the plain language, except when its application results in a conclusion that it does not desire. Respondent tries to add new language to Regulation 30-12.C.(1)(b), in stating that “the two sentences of this regulatory criterion merely state that if it is not feasible to locate the vertical portion of the structure within 18 inches, the structure may be located on a site by site basis.” (Resp. Brief, p. 31). That is not what the regulation says. It refers to “structures” covered under that regulations, i.e., bulkhead **and** revetments, and it says that OCRM must make that site by site determination when construction within 18 inches is not feasible. S.C. Code Ann. Regs. 30-12.C.(1)(b).

This “18 inch rule” applies equally to bulkheads and revetments. Had the General Assembly intended for the “18 inch rule” to apply only to bulkheads, it could have set forth separate standards for these structures. It did not. The “18 inch rule” applies to “structures” identified in R. 30-12.C. – bulkheads **and** revetments.

Rather than adhering to the plain language of the “18 inch rule,” Respondent attempts to give Regulation 30-12.C.(1)(b) a new meaning by stating that it “is intended to apply to the vertical bulkhead portion of the structure, not the sloping revetment portion,” based on the definition of revetments. (Resp. Brief, p. 32). But the definition of “revetment” only states that it is a “sloping structure built along an escarpment of in front of a bulkhead,” and nothing in the regulations requires bulkheads to be constructed on the escarpment or critical area line. And the regulations say that where it is not feasible to construct the structure within 18 inches of the escarpment, “Department staff will determine the location of the bulkhead **or revetment** on a site by site basis.” S.C. Code Ann. Regs. 30-12.C(1)(b) (emphasis added).

Respondent’s statement that “revetments . . . necessarily extend more than 18 inches from the escarpment” is without any evidentiary support. (Resp. Brief, p. 32).

KDP’s reliance on *Hill v. S.C. Department of Health & Environmental Control*, 389 S.C. 1, 698 S.E.2d 612 (2010), is misplaced and its interpretation misapplied for two reasons. First, *Hill* did not involve a revetment of any width, only a vertical bulkhead, and the Respondent erroneously cites this opinion for the proposition that the 18-inch rule applies only to bulkheads. Nothing in the *Hill* case places a limitation on the “18 inch rule” such that it does not apply to revetments. Second, this Court’s ruling was based on whether *Hill*, in

fact, constructed the bulkhead in compliance with the permit and the “18 inch rule.” KDP’s attempt to limit this Court’s ruling to a holding that the 18 inch rule was intended only to prevent “gaining high highland property” is inconsistent with the decision and with the regulations, which is clearly intended to “mitigate certain environmental losses,” including destruction of marine bottoms and loss of public access that can occur when constructing bulkheads and revetments in critical areas, as well as converting critical areas into high ground lots. S.C. Code Ann. Regs. 30-12.C.(1) & 30-12.G.(2)(a).

Interestingly, in its discussion of *Hill*, KDP points out that the import of the 18-inch rule is to “prevent the applicant from unnecessarily converting a portion of the critical area by backfilling.” (Resp. Brief, p. 32). Yet KDP wants to convert a much greater portion of critical area than *Hill* had converted (albeit by covering it with concrete blocks rather than filling it in) because, it argues, revetments are not subject to the same rules as bulkheads. Given the accretion on the front of the Spit, the Respondent is seeking to use the bulkhead/revetment in the critical area to create an even greater net gain in upland property.

II. Appellant Properly Preserved the Issues on Appeal

The issue of whether the proposed project complies with the standards applicable to bulkheads and revetments, and specifically Regulation 30-12.C.(1), has been properly raised to and ruled upon. Recently the Court of Appeals affirmed that the general preservation rule – that an issue must be raised to and ruled upon in order to be preserved for review – applies to cases in Administrative Law Court. *Sierra Club v. S.C. Dept. of Health and Environmental Control & Chem-Nuclear Systems*, 387 S.C. 424, 693 S.E.2d 13 (2010), *petition for cert. pending* (citing *Brown v. S.C. Dept. of Health and Environmental Control*,

348 S.C. 507, 519, 560 S.E.2d 410, 417 (“[I]ssues not raised to and ruled on by the AL[C] are not preserved for appellate consideration.”).

In *Chem-Nuclear*, the Court found that even though Sierra Club did not mention specific sections in its prehearing statement, Sierra Club nonetheless properly preserved compliance with specific sections of the applicable regulations governing radioactive waste when it raised overall compliance with regulation in its prehearing statement. *Sierra Club v. S.C. Dept. of Health and Environmental Control & Chem-Nuclear Systems*, at 433. The Court ruled that Sierra Club properly raised the issue of compliance with specific regulatory criteria when it included in its prehearing statement, under “issues to be presented for determination, including any claims or defenses expected to be raised: . . . Whether the proposed renewal license would violate state and federal environmental law and regulations....” The Court ruled that since Sierra Club specifically mentions the applicable sections of the regulations, even though it did not mention each of the particular sections, “we construe these statements broadly to include the applicable sections of [the] regulation [at issue].” *Id.* at 433.

Likewise, in the instant case, the League raised overall compliance with the critical area regulations, S.C. Code Ann. Reg. 30-1, *et seq.* in its Request for Final Review Conference before the DHEC Board, its Request for Contested Case Hearing and its Prehearing Statement. (R. pp. 88-91, 107-111 & 138-145). Instead of presenting any real response, KDP has fallen back on highly technical arguments about pleadings.

The issue of whether the bulkhead complied with the specific standards of Regulation 30-12.C.1.(b), (c) and (d) was raised to and ruled upon by the Administrative Law Court.

Kiawah Development Partners, II, was fully aware of the issues being argued by the League during the hearing and had full opportunity to address each of them. Witnesses for Kiawah Development Partners were thoroughly questioned concerning the width and other dimensions of the proposed structure, and had notice of the arguments and opportunity to respond. (R. pp. 377-378, 402, 659-662 & 668-669). The League questioned KDP witnesses who testified that the structure would be 2,784' long and 40' wide, that the structure would begin at the critical area line or escarpment and extend 40' into the Kiawah River below the mean high water line, and that the structure would cover 2.63 acres of sandy banks of the River below the critical area line. (R. pp. 659-662). All of this testimony goes directly to the issue of whether the revetment portion of the structure complies with the specific standards set forth in Regulation 30-12.C.(1)(a), (b), (c) and (d). The Final Order and Decision of the Administrative Law Judge also shows that the bulkhead and revetment issues raised before this Court were presented to and ruled upon by the Administrative Law Court.

The ALJ found that the bulkhead would be 2,783' long and that the revetment would be 2,783' long and 40' wide. (R. pp. 8-9). The ALJ found that the revetment or ACB mat would be constructed "over sloping river shoreline, extending from the bottom of the bulkhead at the base of the shoreline escarpments, or scarps, toward the river to a point just below the river's waterline at low tide. The revetment structure would be 2,783' long by 40' wide and cover 111,320 square feet of the banks of the Kiawah River, or 2.63 acres." (R. pp. 8-9).

In its Conclusions of Law, the Order cited the entirety of Regulation 30-12.C.(1), including section (b) that "Structures may be constructed up to 18 inches from the existing escarpment. In situations where this is not feasible, the Department staff will determine the

location of the bulkhead or revetment on a site by site basis.” Then the ALJ concludes that “the proposed revetment meets all the specific criteria for bulkheads and revetments set forth in S.C. Code Ann. Regs. 30-12.(C).” (R. pp. 26-27). A review of the hearing testimony, together with the ALJ’s findings and conclusions, clearly demonstrates that the issue of whether the revetment complied with the specific standards applicable to bulkheads and revetments found at S.C. Code Ann. Regs. 30-12.C.(1), and in particular section 30-12.C.(1)(b) was both raised to and ruled upon by the ALC.

Because the ALC ruled on the issue of compliance with Regulation 30-12.C.(1) in the Amended Final Order & Decision, the S.C. Coastal Conservation League was not required to raise the issue in a separate motion to reconsider. Administrative Law Court Rules, Rule 29(C) & (D).

Similarly, the issue of compliance with S.C. Code Ann. § 48-39-150.(A)(3), the extent to which the project would result in adverse impacts on the marine species the bottlenose dolphin is properly preserved. The League raised the issue before the ALC when it presented evidence that the dolphins use the area to “strand feed” and that if the sandy shoreline is covered with concrete blocks, the dolphins will no longer strand feed in the area of the proposed revetment. (R. p. 1085). KDP did not object to this testimony, and did not present any contradictory evidence.

The ALJ expressly ruled upon the issue by concluding that the proposed structure would not have any “material adverse effect on wintering Piping Plovers, Diamondback Terrapins, the habitat for either, **or other marine life or wildlife.**” (R. p. 19). The issue was thus raised to and ruled upon before the ALC. The ALC committed an error of law in

concluding that there would be no adverse effect on marine life, specifically Bottlenose Dolphins, because there is no evidentiary support for this conclusion and all of the uncontested evidence is that the proposed structure will have adverse impacts on the dolphins by eliminating a productive feeding ground. (R. pp. 1085 & 1136-1137).

Finally, the League preserved its arguments challenging the ALC's failure to give deference to the DHEC Board's interpretation of the Coastal Management Program policies. In its Notice of Appeal, the League specifically appealed the ALC's Order on Motions for Reconsideration, dated February 26, 2010. It was in that Order that the ALC ruled that the Board is not entitled to deference, thus there is no procedural defect, as suggested by the Respondent. (Resp. Brief, p. 66).

III. The CMP is Valid and Enforceable and the DHEC Board's Interpretation of the CMP is Entitled to Deference

Respondent attempts to re-argue the case of *Spectre v. DHEC, et al*, 386 S.C. 357 (2010). In *Spectre*, this Court ruled that the policies of the Coastal Management Program are binding and enforceable, and must be applied in OCRM's review of all state and federal permits in the coastal zone. Yet Respondent claims that "Neither the applicable statutes nor the governing regulations require a determination of consistency with the CZMP, although the General Assembly could have imposed this requirement," citing *Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 413 S.E.2d 13 (1991). (Resp. Brief, p. 65). This Court did not buy that argument in *Spectre*, and it should not buy it now. S.C. Code Ann. § 48-39-80 requires that all state and federal permits in the coastal zone must be reviewed for consistency with the Coastal Management Program. A critical area permit is a state permit and the Act makes no exception for critical area permits.

In considering the language of the CMP, in particular the language of CMP policy [REDACTED], the DHEC Board's interpretation is entitled to deference. The Respondent erroneously points to case law that **staff interpretations** are not entitled to deference. That argument misses the mark. The DHEC Board is entitled to deference for all the reasons stated in the League's brief.

IV. The CMP Requires Review of Impacts Outside of the Critical Areas

Even under KDP's argument that the "project" is limited to the revetment/bulkhead structure itself, R. 30-11.C.(1) requires a look at the cumulative effects of "the project." In this case, the cumulative effects flowing from the construction of the revetment/bulkhead, include residential development. Nothing in R. 30-11.C.(1) limits the review of the long-range and cumulative impacts to critical area impacts, as the ALC held and KDP argues. Rather, the regulation authorizes a broad review of all of the expected impacts that would flow from the project authorized by regulation.

The Respondent's suggestion that OCRM could deny a critical area permit in Myrtle Beach is misplaced, as is the suggestion that a dock permit could be denied based on a conclusion that the house is too big. (Resp. Brief, pp. 57 & 58). We are talking about a half-mile long forty foot wide structure covering public trust sandy shoreline, not a single private use dock.

The point is that the regulatory authority extends outside the critical area, which is clearly evidenced by the fact that critical area Regulation 30-11.C.(1) and CMP Policy III.C.3.I(7) contain identical language and require a review of the "long-range and

cumulative impacts of the project.” By its very nature of being contained within the CMP, this policy applies to areas that are outside of the critical area.

V. There is No Taking Without Just Compensation

The Respondent’s suggestion that the agency is implementing its cumulative impacts analysis in a manner that results in a taking of property without just compensation is misplaced and there is no legal support for its assertion. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992) the United States Supreme Court established a new *per se* rule that applies when a regulation deprives an owner of “all economically beneficial uses” of her land. *Lucas v. South Carolina Coastal Council* 505U.S. at 1019, 112 S.Ct. at 2886. This rule is known as the “total taking” rule.

Even if this Court were to consider that Respondent had demonstrated that they would suffer a total loss of their property, given that Respondent has no improvements to lose, the “total taking” inquiry as provided in *Lucas v. S. C.* is inapplicable here. There is no basis upon which to conclude that the inability to construct an erosion control device will result in a total taking of their property.

The deliberations of the Court of Appeals of North Carolina in *Shell Island Homeowners Association, Inc. et al., v. North Carolina Coastal Resources Commission, et al.*, 134 N. C. App. 217, 517 S. E. 2d 406 (1999), provide some useful guidance. There the Plaintiffs challenged regulations of the North Carolina Coastal Resources Commission restricting the construction of “hardened structures” to combat beach erosion. Plaintiffs alleged that the regulations effected a taking of their property. The Court of Appeals of N. C. held:

Plaintiffs have failed to identify, on the face of the complaint, any cognizable property interest which has been taken by defendants. The invasion of property and reduction in value which plaintiffs allege clearly stems from the natural migration of Mason's Inlet, and plaintiffs have based their takings claim on their need for a 'permanent solution to the erosion that threatens its property,' and the premise that 'the protection of property from erosion is an essential right of property owners...' These allegations in plaintiffs' complaint have no support in the law, and plaintiffs have failed to cite to this Court any persuasive authority for the proposition that a littoral or riparian landowner has a right to erect hardened structures in statutorily designated areas of environmental concern to protect their property from erosion and migration. The courts of this State have considered natural occurrences such as erosion and migration of water to be, in fact, natural occurrences, a consequence of being a riparian or littoral landowner, which consequence at times operates to divest landowners of their property.

Similarly, in the present case, Respondent does not allege that the migration of Captain Sam's Inlet and the resulting erosion of Respondent's property have been caused by any regulatory action taken by the State, and these naturally occurring phenomena are the primary causes of any loss sustained by Respondent. Like the plaintiffs in *Shell Island*, the prospect of a migrating property line on three sides of Respondent's property is a risk inherent in KDP's ownership of littoral property. DHEC's denial of the permit, consistent with its statutory powers, is merely incidental to these naturally occurring events. *Shell Island Homeowners Association, Inc. et al., v. North Carolina Coastal Resources Commission, et al.* at 20-21.

In *Shell Island*, the N. C. Court recognized the inevitability of shoreline changes due to erosion and accretion. This recognition is shared by the South Carolina Supreme Court in *Horry County v. Tilghman*, 283 S. C. 475, 322 S. E. 2d 831 (1984) and *Horry County v. Woodward*, 282 S. C. 366, 318 S. E. 2d 584 (1984).

South Carolina recognizes the general common law rule that accretions by natural alluvial action to riparian or littoral lands become the property of the riparian or littoral owner whose lands

are added to. ... Conversely, lands gradually encroached upon by water cease to belong to the former riparian or littoral owner. ...The rule rests on the impossibility of identifying at any given moment the imperceptible additions to or subtractions from riparian land caused by the constant natural action of water. It ensures that riparian land will remain riparian, whatever changes may take place in the adjacent watercourse or shoreline by accretion or reliction. **The law gives the riparian proprietor the benefit of additions to his land caused by accretion or reliction. However, it also requires him to bear the corresponding risk that land will be lost by gradual erosion or submergence.** The rule is said to rest on the principle of natural justice that one who sustains the burden of losses imposed by the contiguity of waters shall be entitled also to whatever benefits they bring.

Horry County v. Woodward at 586 (emphasis added).

The common law principles of erosion and accretion are background principles of law which attached and inhered to Respondent's title. Based on those principles, Plaintiffs should have expected that their property would experience erosion and that property would be lost. Additionally, the public trust doctrine, and the fact that the public owns the property below mean high water, is a background principle of law which attached and inhered to Respondent's title. Based on this principle, Respondent should have no reasonable expectation that they can take measures to protect their property at the expense of the public's property.

In fact, the Respondent expects to benefit from the law of accretion and erosion by both gaining land accreted on the oceanfront side, and locking in the riverside to increase its gain all at the expense of the public.

IV. The ALJ's Conclusion on Marine Life is Unsupported by Any Evidence

An abuse of discretion occurs when the ruling is based on an error of law or a

factual conclusion that is without evidentiary support. *Altman v. Griffith*, 372 S.C. 388, 642 S.E.2d 619 (Ct. App. 2007); *Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991); *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

Under the substantial evidence rule, a reviewing court overturns a finding of fact made by an administrative agency if “there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.” *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981) (citing *Independent Stave Co. v. Fulton*, 251 Ark. 1086, 476 S.W.2d 792, 793 (1972) (internal quotations omitted)).

The ALC erred in concluding that the proposed revetment/bulkhead would not have any adverse impacts on marine life because this conclusion of law is unsupported by **any** evidence.

Neither the Order nor KDP point to any testimony that contradicts Dr. Dorcas’ opinions that the proposed bulkhead/revetment would adversely impact the Diamondback Terrapin. The only known nesting site for the terrapins is the dunes area above the bank along the Kiawah River in the location of the proposed revetment. (R. pp. 1565-1566). There is no evidence that the terrapins will nest in other areas closer to the inlet, and the ALJ’s finding on that point is unsupported. (R. p. 15). In fact, KDP cites only to the ALC’s Order to support its claim that the terrapin can nest somewhere else. (Resp. Brief, p. 49).

Second, the uncontested testimony is that it would be impossible for the terrapins to climb a vertical wall, as proposed by the Respondent, and therefore they could not gain access to their nesting grounds. (R. p. 1570). Dr. Dorcas said that if the terrapins cannot

gain access to their nesting grounds “there’s no reproduction to replace them, eventually they’re going to die and **the population would disappear.**” (R. p. 1571, lines 10-13). One can hardly imagine a more unequivocal statement than Dr. Dorcas’ that ultimately the population would disappear as a result of the proposed structure. This testimony was not contradicted.

VII. The ALJ Failed to Ensure that Critical Areas be Used to Provide the Maximum Benefit to the People

The Coastal Zone Management Act states that “**Critical areas shall be used to provide the combination of uses which will ensure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits.**” S.C. Code Ann. §48-39-30(D). The ALJ erred by failing to implement this mandate that the 2.63 acres of critical area be used in a manner that ensures maximum benefit to the people. The uncontested evidence is that the people – the citizens of South Carolina whose use of critical areas the Act is designed to protect – are benefitting and will continue to benefit at the maximum level from a sandy shoreline. It is undisputed in the evidence, as indicated in the ALJ’s order, that the benefits to the public – the recreational use of the sandy shoreline – will be adversely affected and decreased by the proposed project.

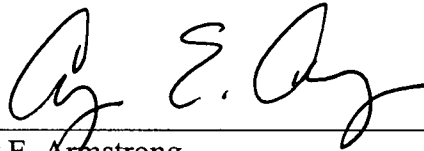
Despite the Act’s language to the contrary that maximum dollar benefit should not override the benefits to the people, the ALJ’s ruling sanctions a reading of the Act that the economic benefit to KDP outweighs the public benefit in the public’s use of the 2.63 acres of critical area. The Judge turned a blind eye to the beneficial public uses and found that lining KDP’s pockets met the requirement of providing a combination of uses that ensures

maximum benefit to the people. This conclusion fails to implement the mandate of ensuring the maximum benefit to the people and is reversible error of law.

CONCLUSION

WHEREFORE, the Appellant, the South Carolina Coastal Conservation League seeks an Order reversing the Amended Final Order and Decision of the Administrative Law Court and Order Denying Motions for Reconsideration, and reversing the issuance of the permit as authorized by that Order and the permit as authorized by DHEC.

Respectfully submitted,



Amy E. Armstrong
SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

Mailing address: Post Office Box 1380
Pawleys Island, SC 29585

Office address: 430 Highmarket Street
Georgetown, SC 29440

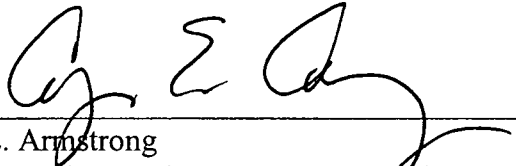
Telephone (843) 527-0078

FAX (843) 527-0540

Attorney for the Appellant South Carolina Coastal
Conservation League

Certificate of Counsel

The undersigned does hereby certify that this Final Reply Brief complies with SCRAP Rule 211(b).



Amy E. Armstrong
South Carolina Environmental Law Project
Mailing Address: Post Office Box 1380
Pawleys Island, SC 29585
Office Address: 430 Highmarket Street
Georgetown, SC 29440
Telephone: (843)527-0078
Fax: (843)527-0540

Attorney for the Appellant South Carolina Coastal
Conservation League

Georgetown, South Carolina

November 2, 2010

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

S.C. Supreme Court

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
Kiawah Development Partners, II,

Of Whom

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

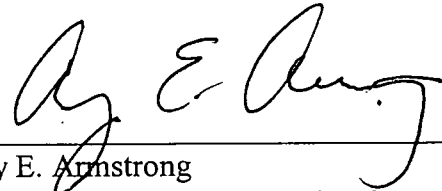
and Kiawah Development Partners, II, is, Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served copies of the Appellant South Carolina Coastal Conservation League's Final Brief and Final Reply Brief on counsel for all parties by placing copies of same in the United States Mail, first-class postage prepaid, addressed to:

Trenholm Walker
Pratt-Thomas/Walker
P.O. Drawer 22247
Charleston, SC 29403

Davis Whitfield-Cargile, Esquire
SC DHEC/OCRM
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

A handwritten signature in black ink, appearing to read "Amy E. Armstrong". The signature is written in a cursive style with a large, sweeping "A" and "M".

Amy E. Armstrong
Attorney for the South Carolina Coastal
Conservation League

November 4, 2010