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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Appellate Case No. 2016-000707

Kiawah Development Partners, II, Respondent,

v.

South Carolina Department of Health and Environmental Control, Appellant,

and

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.

RECORD ON APPEAL
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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Kiawah Development Partners, II, Petitioners, vs. South Carolina Department of Health and Environmental Control, Respondents.	)	Docket No. 09-ALJ-07-0029-CC **FINAL ORDER AND DECISION**
South Carolina Coastal Conservation League, Petitioners, vs. South Carolina Department of Health and Environmental Control and Kiawah Development Partners, II, Respondents.	)	Docket No. 09-ALJ-07-0039-CC

APPEARANCES:

Trenholm Walker & Gedney Howe for Petitioner Kiawah Development Partners, II, Inc.

Amy E. Armstrong & James S. Chandler, Jr., for Petitioner S.C. Coastal Conservation League

Davis Whitfield-Cargile for Respondent S.C. Department of Health and Environmental Control

STATEMENT OF THE CASE

This matter comes before the Court pursuant to S.C. Code Ann. § 1-23-600(A) and S.C. Code Ann. § 44-1-60 upon requests for a contested case hearing by Kiawah Development Partners, II (KDP) and the South Carolina Coastal Conservation League (League). Respondent South Carolina Department of Health and Environmental Control (OCRM or DHEC or Department) issued a permit to Petitioner/Respondent KDP authorizing them to construct a 270' bulkhead/revetment at Beachwalker Park on Kiawah Island but denied the remainder of KDP's

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application, which requested authorization to construct a 2783' bulkhead/revetment along the Kiawah River. KDP challenges the Department's decision to only authorize 270' of the 2783' structure applied for by KDP. The League challenges the Department's decision to authorize 270' of bulkhead/revetment and supports the Department's decision to deny the remainder of the request. A hearing was held before the Administrative Law Court on August 24 – 28, 2009.[1]

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and taking into consideration the burden of persuasion and the credibility of the witnesses, I make the following findings of fact by a preponderance of the evidence:

Background

Kiawah Island is a barrier island fronting on the Atlantic Ocean with over 10 miles of beachfront. It is bounded on the south by the Atlantic Ocean, on the east by the Stono River inlet, on the north by the Kiawah River, and on the west by the Kiawah River where it enters the Atlantic through Captain Sam's Inlet. Captain Sam's Spit is adjacent to Captain Sam's Inlet at the Southwest end of Kiawah. The Spit is a sandy land formation and is surrounded on three sides by water – the Atlantic Ocean, the inlet and the Kiawah River. KDP owns Captain Sam's peninsula which encompasses roughly 150 acres of highland above mean high water (MHW).

In 1999, OCRM established its baseline and building setback line twenty feet landward based on the most reliable information which indicated that the oceanfront beach on Captain Sam's Spit had accreted and **not** been subject to any significant, measurable erosion between 1959 and 1999.[2] The movement of the baseline prompted KDP to consider development of Captain Sam's Spit. As a result, in 2005 KDP and the Town amended the development agreement for Captain Sam's Spit. Thus, on February 29, 2008, KDP submitted a joint application to the United States Army Corps of Engineers (Corps) and the Department for a permit to construct a combination bulkhead and revetment in the "critical area." The application sought authorization to construct a 2,783' bulkhead and 2,783' by 40' articulated concrete block

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[1] The Court left the record open to receive the deposition testimony of Jeff Mollenhauer, an expert witness for CCL, who was unable to attend the trial. His deposition was taken on September 1, 2009.

[2] "To implement the retreat policy provided for in subsection (A), a setback line must be established landward of the baseline a distance which is forty times the average annual erosion rate or not less than twenty feet from the baseline for each erosion zone based upon the best historical and scientific data adopted by the department as a part of the State Comprehensive Beach Management Plan." S.C. Code Ann. § 48-39-280(B).

revetment on the shoreline of the Kiawah River beginning at Beachwalker Park[3], and continuing around the bend of the river, along the neck of the Captain Sam's Spit for 2,783 feet.

On December 18, 2008, the Department issued the conditional permit approving the construction of the erosion control structure for a distance of 270 feet adjacent to the parking lot of Beachwalker Park.[4] The park is adjacent to Captain Sam's peninsula and adjacent to the extreme eastern end of the proposed bulkhead/revetment. The Department refused the permit request for the remaining 2,513 feet requested based on its concerns about cumulative negative impacts, including interference with natural inlet formation and possible adverse effects on wintering piping plovers. The Department also determined that the project was contrary to the policies set forth in the Coastal Zone Management Program Document (CZMP).

Kiawah Island and Captain Sam's Spit

Captain Sam's is a relatively new land mass in geological time. Very old maps and surveys indicate that over the last three hundred years or more a smaller or different version of this peninsula was formed and then either eroded, breached, or washed over at least two times. Though the cause is not known, the last time was probably sometime shortly before 1949 when the peninsula was much smaller. The Department and CCL emphasize that the Spit has been completely eroded and redeposited at least two times in the past 200 years, to create the perception that that the spit is unstable and inappropriate for human development. The Department extends that argument even further by suggesting this Court should conclude that "the proposed revetment would facilitate a false sense of security and a perception of protection for prospective home buyers on Captain Sam's Spit."[5] However, as Dr. Kana[6] explained, in the

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[3] Beachwalker Park consists essentially of changing rooms and a 150 space parking lot under a long term lease for $1.00 by KDP to Charleston County.

[4] Charleston County Park and Recreation Commission (PRC) operates Beachwalker Park under a 99 year lease entered around 1976 with Charleston County on oceanfront land now owned by KDP.

[5] The Department avers that this consideration in determining whether an applicant should receive a permit is supported by S.C. Code Ann. §§ 48-39-20 and 48-39-30. I do not find any support for this reasoning. In fact, such arguments support Petitioner's questioning the Department's motives in this case.

[6] Dr. Tim Kana testified as an expert in coastal geology and geomorphology. Dr. Kana, a long time University of South Carolina faculty member, has extensively studied and researched barrier islands along the coast of South Carolina for more than thirty years, concentrating much of his work on the geomorphology of Seabrook Island and Kiawah Island. He has written numerous reports on the coastal processes shaping Kiawah and Seabrook Islands. Dr. Kana has served as a consultant to the Towns of Seabrook Island and Kiawah Island, as well as certain private property owners on both islands, including the Seabrook Island Property Owners Association, on large beach projects undertaken by them.

last thirty years there have not been washovers anywhere along the neck portion of the spit. None of the dune ridges show any signs of storm water washover during the last thirty years, even when subjected to hurricane forces including Hurricane Hugo in 1989.

Kiawah Island has one of the "healthiest" beaches in terms of positive sand supply among barrier islands on the east coast. According to Dr. Kana, the shoreline along Kiawah Island, unlike many other beaches in South Carolina or the East Coast, has actually accreted on average over the last 100 years. Some parts of Kiawah have built out nearly a mile at the east end. Sand from these enormous bar formations at the mouth of the Stono River Inlet detach over time and drift southwesterly along the coastline, thus supplying millions of cubic yards of sand to Kiawah Island's growing beachfront all the way to Captain Sam's Inlet. Additionally, the ebb tidal delta on the ocean side of Captain Sam's Inlet contributes to the deposit of sand along the beach of Captain Sam's. This ebb tidal delta, formed by a build-up of underwater sand in the ocean at the

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Among other things, Dr. Kana is the principal "architect" of two successful manmade re-locations of Captain Sam's Inlet in 1983 and 1996. The two re-locations of the inlet separating Seabrook and Kiawah Islands used the farthest tip of Captain Sam's Spit as a source of sand for Seabrook Island's partially eroding beach. Dr. Kana has also been the primary coastal geologist in numerous other projects involving the "management" of beaches in South Carolina.

I found Dr. Kana eminently qualified to explain the coastal processes affecting Captain Sam's Spit. In fact, his expertise was simply more persuasive than that of CCL's expert, Dr. Young. Accordingly, when referencing Dr. Kana's testimony, I am citing evidence that I found to be distinctly persuasive.

To the contrary, throughout the hearing OCRM and CCL referred to opinions and recommendations, contained in the chapter titled "Coastal Processes and Geomorphology" of Kiawah Island that was part of a 1975 report titled "Environmental Inventory of Kiawah Island" prepared by Environment Research Center for the original developer of Kiawah Island (Environmental Inventory). CCL and OCRM urges the Court to consider the recommendations in this report in evaluating the suitability of granting a permit in this case. Interestingly, CCL and the Department did not call any of the authors of the chapter to testify. Instead, CCL and the Department had various witnesses read excerpts, focusing on the authors' recommendation that certain parts of Kiawah Island, including Captain Sam's, should not be developed because they were geologically too unstable.

It is notable that the information in the Environmental Inventory was compiled thirty-four years ago. It doesn't appear to reflect independent research as much as catalogue certain prior data. As Dr. Kana testified, coastal morphologists now know much more about the coastal processes affecting Kiawah Island and have had the benefit of more than thirty years of close observation that undermine many of its assumptions, projections, and recommendations found in the report. For instance, they now know that:

- The enormous sand shoals of the Stono Inlet are the main source of sand for Kiawah Island, not downdrift sand from Folly Beach and Morris Island;
- Captain Sam's has been growing bigger and bigger throughout this time;
- There have been no known overwashes of any of the dune ridges, even the primary dune ridge, on Captain Sam's in any violent storms or hurricanes over the last thirty years.

Furthermore, the conclusions and assumptions of the chapter have not withstood the test of time. For example, the report concluded that several miles of the east end of the island were too unstable for development. That same area has been not only stable but is now the location of the Osprey Beach community, the most upscale beachfront development on Kiawah Island, and other subdivisions as well. Also, the Ocean Course Golf Course which hosted the 1991 Ryder Cup matches was built there. I therefore find that the coastal geological chapter of the 1975 Environmental Inventory is of little to no probative value, and that the testimony of Dr. Kana is more credible.

mouth of the inlet, serves as a natural groin or jetty that impairs the southwesterly drift of sand in the ocean along the Kiawah beachfront, as explained by Dr. Kana. It thereby redirects sand drifting "down" the coastline to Captain Sam's peninsula. As this large spit grows in length in a generally southwest direction, Captain Sam's Inlet is said to "migrate" southwesterly towards Seabrook Island.

The island's accretion is reflected in Captain Sam's Spit. Continuous, significant accretion in the area of the Spit has occurred in the 60 years since 1949. The average rate of accretion ranges from four to ten feet per year anywhere along the spit for just about any period of time in the last 40 years. In fact, probably about four or five rows of dunes have been formed on Captain Sam's Spit within the last 30 years. Its dune ridges are some of the highest on Kiawah Island, some cresting above 15 feet MSL. In sum, the condition of Captain Sam's peninsula today is probably as healthy as it's ever been in historic times. Indeed, CCL's expert characterized the peninsula's strength as robust even at the neck

Captain Sam's Spit is now almost a mile and one-third long. At its narrowest point at the neck, adjacent to the main part of Kiawah Island, Captain Sam's peninsula is approximately 450 feet in width, measured from the critical line on the bank of the Kiawah River on the north side, to the mean high water line of the Atlantic Ocean on its opposite or southern side. Captain Sam's western end that extends towards Captain Sam's Inlet (i.e., which separates Kiawah Island from Seabrook Island) reaches a high ground width of over 1,600 feet. Today Captain Sam's has unbroken rows of continuous, high dune ridges for its entire length. Their number varies from four or five at the neck to up to seven at the western end next to Captain Sam's Inlet. On the side next to the river, Captain Sam's has a young and growing maritime forest. Captain Sam's peninsula is thus stable and growing. It will most probably continue to grow for many decades to come, given the enormous remaining sand supply from the shoals of the Stono Inlet and the east end of Kiawah Island

Because of its substantial width and high dune ridges from decades of uninterrupted growth, there is very little chance that the neck of Captain Sam's would ever breach unless perhaps subjected to the forces of a Category V hurricane. A hurricane of that magnitude, however, would obviously severely damage and inundate all parts of Kiawah and other adjacent islands. Moreover, the barrier islands along the South Carolina coast suffer few breaches in comparison to barrier islands in other states because, on average, there are inlets every five miles

or so on the South Carolina coast that serve as an outlet for receding storm surges. Notably, in this case the proximity of Captain Sam's Inlet serves as an outlet for receding surge waters making it more unlikely that the neck would breach. Additionally, even though the suitability of the upland for residential development is not one of the stated regulatory considerations for determining whether to issue a permit for a bulkhead/revetment, OCRM and CCL have raised it as an issue. I nonetheless find that Captain Sam's is suitable for the limited, low-density residential development described in the 2005 Development Agreement with the Town of Kiawah Island.[7]

Erosion of Captain Sam's Bank at the Kiawah River

Captain Sam's Spit is connected to the main body of Kiawah Island by a narrow strip of land, often referred to as the "neck" of the Spit. The Kiawah River forms an elbow-like bend at the "neck" of a peninsula which has been the source of erosion. The Department maintains that erosion in the area of Beachwalker Park along the Kiawah River warranted the erosion control devices proposed by KDP. However, it disagrees that the westernmost 2,513' of the bulkhead/revetment is needed. CCL contends that no bulkhead or revetment is needed for the entire 2,783' for which KDP seeks to install those erosion control devices. I find that denial of the permit would likely result in the loss of more upland and the access corridor at the neck.

At the same time the beach of Captain Sam's has been growing and moving seaward (*i.e.*, toward the south), the northern side of the bend in the Kiawah River, at the neck of Captain Sam's Spit, has been eroding (albeit at a slower rate per year) to the south. The erosion is accelerated as a result of the growth of the river's marsh edge on its northern side (referred to as a "point bar") which has driven the river channel toward Captain Sam's peninsula and eroded the river bank in the bend along the peninsula. The erosion of the bank has been most prominent along Captain Sam's in the immediate vicinity of Beachwalker Park and all along approximately 2,000 feet of the peninsula's river edge extending from the Beachwalker Park area. While the river channel has moved in a southerly direction toward Captain Sam's peninsula for several decades, the erosion along the river's southern bank has become particularly pronounced over the last several years. This erosion is plainly evident from the escarpments along the riverbank where land, in some places with vegetation and trees, has sloughed off into the river.

[7] In making this finding, I specifically conclude that the opinions of CCL witness Josh Martin were not probative.

The intensity of erosion is not uniform over the entire length of the proposed revetment area. The escarpment is much steeper with a higher reveal in the vicinity of the Beachwalker Park parking lot, where there is visible evidence of portions of the upland vegetation and bluff sloughing off into the river. In general, the erosion decreases as you move in the westerly direction along the river shoreline from Beachwalker Park and it significantly decreases at the most westerly thousand feet of the proposed revetment. Furthermore, though the rate of erosion has been less in recent years, the change is not predictive of future events but rather more likely indicative of varying weather patterns. Nevertheless, the long-term trend of erosion will most probably continue to occur along the peninsula's river bank as reflected by the current escarpment.[8]

A further consequence of the erosion of the riverbank is the migration of the OCRM jurisdictional critical line in a southerly direction in the peninsula's neck in the direction of the ocean. It moves as the river erodes into the bank at the neck. The distance between the river shoreline and the oceanfront setback line at the neck of Captain Sam's was 104 feet in September 2002, 90 feet in April 2005, and 66 feet in August 2009. The dimension has thus decreased 38 feet in nine years, or an average of just over four feet per year.

The width of the neck is significant because for development to occur on the Spit there must be sufficient space to place the access road with underground utilities, road shoulders and other improvements. To reach the peninsula's residential use acreage allowed under the zoning and road codes and vested under the Development Agreement, the right of way should be approximately sixty feet wide. However, even though the beach is accreting at the neck at approximately the same rate as the bank is eroding, the setback line has remained static. In other words, it is the setback line, not the beach, that determines the seaward limit of the buildable high ground, and hence the available area (or corridor) for installation of the road and improvements to Captain Sam's from the rest of Kiawah Island to the east.

The Court thus finds that KDP has a legitimate need for the bulkhead/revetment. The bulkhead/revetment will prevent its high land from being lost and assure that there is sufficient distance between the critical line and setback line in the neck of the peninsula to install a road.

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[8] A comparison of surveys of the river shoreline of Captain Sam's over the last thirty-five years demonstrates without question the migration of the river channel in a southerly direction into the Spit. Even though a comparison of the shoreline surveys of October 2008 and August 2009 does not clearly indicate advancement of the erosion during that very short period, there is a definite, long-term trend of erosion that is unmistakable. It is undisputed that over an acre of highland on Captain Sam's along the bank of the Kiawah River has eroded since 2002.

underground utilities, landscaping, and improvements.[9] In fact, it is unlikely that KDP could satisfy the Town of Kiawah Island's ordinances governing subdivision and road construction without stabilization of the river bank and a protected right of way. Moreover, as to the Department's and CCL's argument that KDP "can still sell lots on Captain Sam's without the revetment," the Court finds that the developable land on the peninsula would not likely be readily marketable if the bank was not stabilized and the erosion were allowed to continue unabated into the future. The bulkhead/revetment's stabilization of the bank is essential to being able to market and sell the riverside homesites, especially given today's informed buyers.

CCL also argued that the permit for the bulkhead/revetment for the 270 feet adjacent to Beachwalker Park was unnecessary because the Park is moving to another location. The area known as Beachwalker Park is owned by Kiawah Resort Associates. Charleston County Park and Recreation Commission holds a 100 year lease of the Park from Kiawah Resort Associates. Though the Park Commission does not own the land, it believes it would be best for the citizens of Charleston County if the County had a permanent deed. Nevertheless, it has also had discussions with Kiawah Resort Associates about relocating the Park. However, there is no agreement to move the Park to another location and the bulkhead/revetment is clearly necessary to protect the Park's highground and improvements from falling into the river in light of its current location.

The Bulkhead/Revetment's Design

KDP's application proposes an erosion control structure composed of two distinct elements. The first component would authorize a vertical bulkhead for a distance of up to 2,783 feet along the shoreline of the Kiawah River on Captain Sam's Spit adjacent to Beachwalker Park and KDP's land on the southwestern end of Kiawah Island. The height of the bulkhead will vary to follow the differing elevational contours of the adjacent highland scarps along the river, extending to just under their peaks. The purpose of this vertical bulkhead is to stabilize the river's high ground shoreline in the location at the time of construction.

The other erosion control feature is a flexible "mat" comprised of interconnected articulated concrete blocks (ACB). The ACB mat would be installed over the sloping river shoreline, extending from the bottom of the bulkhead at the base of the shoreline escarpments, or

[9] The Department has routinely granted permits for other revetments on Kiawah Island for the protection of roads including revetments such as this with an ACB mat.

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 would cover 111,320 square feet of the banks of the River, or 2.63 acres. Most, if not all, of the mat would be covered by water at high tide.

The ACB mat is made of a series of blocks with large holes in between the blocks. It is a preferable (yet more expensive) method of reducing shoreline erosion because aesthetically the concrete can be colored to blend in with the color of the bank and because the blocks have multiple openings that would allow the growth of marsh grass and other vegetation through them. The ACB mat could also serve as habitat for other marine life including oysters. To the contrary, the evidence did not establish that the ACB mat would significantly imperil the habitat of any marine animals, organisms, or plants. It most probably will provide new habitat for oysters and other organisms. Additionally, the bulkhead portion of the structure is designed to be installed on the critical line or no more than eighteen inches behind the critical line.

The combination bulkhead and ACB mat over the sloping river shoreline, covered by water at high tide, will diffuse wave action more than a structure comprised solely of a vertical bulkhead. The proposed structure is sufficiently engineered to stabilize the riverbank and prevent erosion from the ongoing movement of the channel caused by the advance over time of the marsh point bar on the opposite side. To the contrary, the evidence did not establish that the ACB mat or the bulkhead will destroy a stable marine river bottom or constitute a safety hazard. It is nonetheless notable that the proposed structure is not designed for the purpose of preventing a breach of the riverbank in the event of a massive hurricane, and that such propensity is not relevant here. Very few bulkhead/revetments in the world are designed to withstand these forces.

Moreover, evidence did not establish that there was a feasible alternative to the bulkhead/revetment that would stabilize the river shoreline and prevent the continued erosion of KDP's upland. CCL urged that the "alternative" is to do nothing and leave the property at *status quo* since, they suggested, little erosion may have occurred in the last 10-12 months. However, the testimony of Dr. Kana clearly established a trend of continuous and significant shoreline erosion along the riverbank for several decades. That evidence clearly establishes a need for erosion control along the disputed shoreline.

CCL and OCRM raise issues as to the revetment's long term success without training jetties or a wider mat. Petitioner asserts that the proposed structures should first be implemented

and if "hot spots" (meaning locations on the revetment that are susceptible to high energy forces that result in considerable scour or instability at that location) develop it can implement a remedial plan for those locations and seek permission from the Department to proceed. I nonetheless find that in light of the nature of the riverbank and its limited use discussed below, it is much more reasonable to implement a solution that has the least environmental impact and require KDP to seek further approval if a more comprehensive approach is needed.[10]

As noted above, the extent and rate of erosion varies along the riverbank over the length of the proposed revetment. The erosion is greatest adjacent to Beachwalker Park and along what Mitchell Bohannon[11] described as the "bite" on the outside, that is the Captain Sam's side, of the bend on the Kiawah River, up to approximately 1,000 feet from the western terminus of the proposed revetment. Moving from the east end to the west end of the proposed structure, the severity of the erosion and height of the escarpments diminish in a westerly direction towards the inlet at approximately survey point "F" on Petitioner KDP's Exhibit 77. This location is approximately 900 feet from the western terminus of the proposed revetment (the riverbank where the revetment is proposed west of point "F" is referred to hereinafter as the "western section").

The full extent of both of the structures (*i.e.*, the bulkhead and the ACB mat) depicted in the sketch drawing submitted with the permit application are not currently necessary to stabilize the bank for the western section. In many locations along the western section, the bulkhead may

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[10] I recognize that there is credible evidence that the Department has been uncooperative during the permitting process of this case. As asserted by KDP, it appears that the desire of certain permitting officials to preserve the upland of Captain Sam's forever in a natural state, a goal beyond their regulatory purview, took precedence over their objective application of the clear wording of the controlling statutes and regulations. For instance, because the project did not involve dredging, the application qualified as a minor activity under S.C. Code Ann. Regs. 30-1 (34) and the Department was required to act on a completed application within 30 days. S.C. Code Ann. § 48-39-150(C). Rather, the Department took quite the opposite approach. By letter dated June 25, 2008, the Department attempted to cancel KDP's application because the project engineer had not provided an affidavit of publication for the published newspaper public notice within 30 days of its publication. Though the Department's staff received this affidavit June 26, 2008, it did not reinstate the application until mid-July 2008. That delay is further exacerbated by the fact that there was no provision in the regulations allowing cancellation of a permit for failure to furnish this affidavit within thirty days. Moreover, by August 28, 2008, the Department had prepared a draft decision denying the permit application. All that then remained was internal review of the draft decision. Nonetheless, the Department waited more than three months before rendering its decision. Despite this evidence (and other concerns in the record), it is the Court's hope and belief that the Department will treat all parties in the case fairly in the future and conduct its important responsibilities in accordance with the standards and parameters prescribed by the General Assembly in a diligent, timely manner.

[11] Mr. Bohannon is a professional engineer with extensive experience in the design and implementation of bulkheads and revetments. I found his testimony to be persuasive.

not be necessary and an ACB mat much shorter in width than forty feet may well suffice to stabilize the riverbank according to Bohannon. More specifically, the western section is best suited now and perhaps permanently to the "soft" approach described by Bohannon that would involve limited use of the bulkhead to locations where the reveal/scarp is greater than two feet. There is no need at the current time for the ACB mat on the western portion of the revetment to be greater than eight (8) feet in width.[12] Furthermore, the ACB mat on the far eastern end of the revetment adjacent to Beachwalker Park, where there is some marsh grass below and adjacent to the escarpment, should be adjusted in the field during initial installation to avoid unnecessarily placing the ACB mat over marsh grass. I do not find that this approach is a piecemeal approach but is rather a sound attempt to limit the impact to the environment until facts warrant otherwise.

Cumulative Impacts[13]

Piping Plovers

The Department and CCL argue that the proposed bulkhead/revetment will have adverse effects on piping plovers.[14] Piping plovers are a "threatened" species under the federal

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[12] In the event that post-construction monitoring of the western section of the constructed bulkhead/revetment reflects a need for the extension of the ACB mat beyond eight (8) feet in width, KDP shall be allowed to seek the Department's approval to extend the ACB mat as is determined necessary to prevent further erosion at such location(s). Nonetheless, recognizing the Department's dilatory treatment of KDP's permit, I note that any unnecessary delays should subject the Department to sanctions.

[13] Two other issues were raised by the parties that warrant only cursory treatment. OCRM and CCL contend that one possible negative long-term impact of residential development on Captain Sam's is the debris from the potential destruction of the houses and improvements if the peninsula takes a direct hit from a very powerful hurricane. No evidence was offered concerning impact of debris as a result of a hurricane. Furthermore, a storm of sufficient magnitude to breach Captain Sam's at the neck would cause widespread devastation across Kiawah Island and other nearby barrier islands. Moreover, the "impact" resulting from potential residential development that may occur as a result of the permitting of a bulkhead and revetment is simply too conjectural to probative and does not appear to be a pertinent inquiry for this Court in this context.

Similarly, OCRM included in its reasons for denying the permit that the potential residential development may result in impacts to freshwater and saltwater wetlands. Even if this were an issue before this Court, no evidence indicated that any wetlands will be impacted by any residential development upon Captain Sam's Spit or even the existence of any wetlands anywhere on the Spit. Thus, the evidence did not prove that there probably would be any long range impacts on freshwater or saltwater wetlands from the proposed development. Moreover, if there is ever any proposed impact to any discovered wetlands, the Department can certainly evaluate them carefully when it decides that future permit application.

[14] In analyzing this issue, I find the testimony of Lee Walton to be credible and persuasive. Mr. Walton has experience studying not just shorebirds, but specifically piping plovers for the U.S. Fish & Wildlife Service. Moreover, his experience has been identifying areas that were suitable for **wintering** piping plovers, which is a specific issue before this court. In fact, the United States Fish & Wildlife's designation of the wintering habitat is based upon his recommendations.

On the other hand, though the ornithologists presented by the Department and CCL seem knowledgeable (particularly Dr. Hughes), neither had any specific information as to the **current** level of activity on the beach from

Endangered Species Act. However, the piping plovers that visit South Carolina and Kiawah Island are wintering piping plovers. The migratory piping plovers that visit Kiawah Island are wintering rather than nesting or breeding piping plovers - a salient distinction. These birds "winter" on Kiawah Island for a few months. A wintering piping plover doesn't have a small territory. The birds begin arriving on Kiawah Island in July and into August with the biggest "push" in September. Some stop on the island temporarily and then continue migrating while others stay for the winter. They begin migrating back north to their breeding grounds as early as April.

Though the piping plovers do "winter" upon Kiawah Island, their habitat is significant. There has never been a single sighting of a piping plover according to the data in the proposed revetment area on the Kiawah River or above the dune line on Captain Sam's. As explained by Mr. Walton, those areas are not critical habitat for piping plovers. Furthermore, the Court takes judicial notice of 50 C.F.R. pt. 17, "Final Determination of Critical Habitat for Wintering Piping Plovers; Final Rule," propounded by the United States Fish and Wildlife Service establishing the boundaries of critical habitat for wintering piping plovers. The text description of S.C. Unit-10, which controls over the associated illustration, specifies that the critical area of habitat includes the beach along Seabrook Island and extends 0.1 mile north of Captain Sam's Inlet. S.C. Unit-10 does **not** extend above the building setback line on Captain Sam's. Federal Register, Vol. 66, No. 132 at pp. 36042 (Col.3), 36045 (Col.3), and 36069 (Col. 2).

Nevertheless, the Department and CCL argue that the adverse effect to the piping plover emanates not from the proposed project, itself, but from the future residential development that would occur as a result of the project. However, as noted above, the designated habitat does not extend into the limited developable acreage under the Development Agreement. The potential residential development will not occur in critical plover habitat, nor will it occur in close proximity. The Department and CCL assert that the proposed project will nonetheless adversely affect the piping plover because the structure will facilitate residential development and with that residential development a greater number of people and animals will use the beach. That use is

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the Park's 50,000 annual visitors or from property owners and their guests from the thirty-five years of development over much of the island. Nor were they able to provide a reasonable approximation of increase in future activity on the beach if up to fifty houses, about 1% of the island's residential dwellings, were ultimately constructed on Captain Sam's.

The gist of their opinions was that any increase at all in use of the beach might be detrimental, yet they provided no credible factual support for this theory. In fact, the studies on disturbance of piping plovers Dr. Hughes and Mollenhauer referred to dealt with "breeding and nesting" piping plovers, not wintering piping plovers.

not necessarily problematic. The Department and CCL further aver that the people and their animals will disturb the piping plovers on the beach in front of their homes and that the disturbance will be so significant that it will adversely affect the birds' health upon returning to their nesting grounds.

I find the evidence supporting the Department's and CCL's contention conjectural. Neither Dr. Hughes nor Mollenhauer advocated that recreational activity on the beach should be prohibited. Instead, they both advocated that beachgoers use "reasonable" behavior as the best way to avoid or reduce any possible disturbance of these birds. There was no proof that any persons on the beach from the up-to-50 houses[15] would engage in unreasonable behavior that would increase any theorized frequency or intensity of disturbance of these wintering piping plovers on Kiawah Island. Additionally, Kiawah is primarily a second home community in which eighty percent of the home owners spend an average of only 6 to 7 weeks at their home per year. That time is primarily during the summer months.

In fact, the mere existence of the piping plovers on Captain Sam's Spit is questionable. In 2007, only one piping plover was seen at Captain Sam's though fourteen were seen on the east end of Kiawah Island. In 2008, eleven birds were seen on Kiawah Island and no birds were seen at Captain Sam's. Furthermore, the evidence did not establish that wintering piping plovers shy away from the beach in front of the miles of developed areas on the Kiawah Island beachfront where there may be suitable mudflats or beaches, nor that Kiawah Island's beachgoers have ever been harmful to them. Wintering piping plovers have been documented on the beach for the entire length of Kiawah Island, where over 4,150 properties have been sold. Beachwalker Park has more than 50,000 visitors annually, and the Sanctuary Hotel is situated on the front beach. S.C. Unit-10 also includes the fully developed beachfront on Seabrook Island.

The Court also notes that OCRM issued a permit in 2006 to the Town of Kiawah Island to scrape and alter sizeable stretches of ocean beach and tidal flats adjacent to The Ocean Course Golf Course that were located within designated habitat for wintering piping plovers that is identified as S.C. Unit-9. Even though that project directly altered the critical habitat, OCRM permitted the activity under a mitigation plan approved by the United States Fish & Wildlife Service. Here, neither the project nor the potential residential development will alter critical

[15] The development upon Captain Sam's will be limited to no more than fifty homes.

habitat, as occurred with the permitted project adjacent to the Ocean Course at the opposite end of Kiawah Island.

Therefore, I find that that neither the proposed bulkhead/revetment nor potential future residential development will have a material or adverse effect on the wintering piping plovers or their critical habitat.

Diamond-back Terrapins

CCL argues that the proposed bulkhead/revetment will have an adverse impact on diamond-back terrapins. These particular terrapins have not been listed as an endangered or threatened species in South Carolina. Furthermore, even if these terrapins were a protected species, whether denying this permit would protect the species in the area of Captain Sam's is dubious. Mr. Limehouse testified that diamond-back terrapins used to be in the river by the hundreds, now they are rarely seen.[16] The accuracy of the nesting data relied upon by Dr. Dorcas is also questionable. The data was gathered more than 15 years ago before the sharp decline in the terrapin population in the several tidal creeks monitored behind Kiawah Island. Additionally, CCL's expert, Michael Dorcas, Ph.D., indicated that untended or forgotten crab traps, mostly commercial, are the primary cause of premature mortality of terrapins. Neither the bulkhead or revetment will have any bearing on the number of crab traps that are in the river now and may be placed there in the future, nor on the tendency of some to ignore the traps they have set in rivers and creeks.

It is even more unclear whether the nesting occurs in the area where significant erosional escarpment has taken place. CCL's expert, Michael Dorcas, testified that the vertical bulkhead "could" affect terrapins that were seeking to nest in the upland area on Captain Sam's. He did not testify that the proposed structure, to a reasonable degree of certainty, most probably **would** have a significant negative effect on terrapins. Moreover, the **vertical** bulkhead portion of the proposed structure is intended to stabilize the existing **vertical** escarpments created by erosion. The bulkhead follows the contours of those elevations. The bulkhead should not increase the vertical face that might confront nesting terrapins beyond current vertical escarpment conditions resulting from erosion.

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[16] Though that fact lessened the need to take steps to protect these animals who are not considered endangered, I was especially struck by the sincerity of the testimony of Mr. Limehouse regarding the terrapins and the need to preserve Captain Sam's.

The evidence also did not demonstrate that the terrapins will sustain any significant adverse effects from the revetment (or the potential residential development, if that were a proper consideration). For instance, though CCL's expert testified that the terrapins display fidelity to previous nesting areas, he acknowledged that it is unknown whether a terrapin that is unable to nest at a particular location will seek another location. To the extent that terrapins seek possible upland nesting sites on Captain Sam's peninsula, they will still have access for the more than 3,000 feet of the peninsula's river shoreline between the western end of the proposed revetment area and Captain Sam's Inlet.[17]

Public Use of the Riverbank at Low Tide

The erosion of the river shoreline has contributed to the creation of a sloping sandy river bank adjacent to Captain Sam's. Kayakers and other boaters occasionally pull up on this bank. Much of this bank in the river's bend would be covered with the ACB mat and subsequently by marsh grass which is intended to grow up through its holes. However, the use of the bank by the public is limited.[18] As explained by the Department's project manager on KDP's permit application, there is "some public use" of the riverbank at low tide, but it is not "heavily used by the public." Accordingly, though "there might be some minimal adverse effect on public access," that impact is "not strong enough to bar the permit from being issued."

The Court therefore finds that construction of the revetment will not unreasonably eliminate public access and use. In fact, 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. Furthermore, if a boater or kayaker does not desire to land on the ACB mat (regardless of whether it is exposed concrete or covered by sand, spartina, or other vegetation), then the remaining riverbank shoreline in the immediate and general vicinity will remain available. Moreover, Captain Sam's Inlet and Seabrook Island on the opposite side have sandy shorelines offering varied landing sites for river boating and kayaking enthusiasts.

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[17] That is not to mention the many dozens of miles of Kiawah's other marsh shorelines and Seabrook shorelines.

[18] CCL entered into evidence pictures of a party of kayakers on the bank of the area of the proposed revetment. However, that evidence appears contrived. The persons depicted in the photographs were attending a planned event to raise funds to pay for CCL legal expenses to contest the granting of this permit. CCL also presented testimony by other individuals that used the river bank area on a limited basis. Though that use is a consideration in limiting the permit, as explained above, it does not establish a basis to deny the permit. Notably, Ms. McAllister who now lives upon Kiawah Island, which was once pristine, now wishes that a permit which would allow others to live upon the island be denied because it will interfere with her enjoying a pristine area of the island.

Development upon Captain Sam's

The large scale development of Kiawah Island as a resort residential community began in the mid-1970s. KDP and its related companies have been the master developer of Kiawah Island since June 1988, and Kiawah Island became an incorporated municipality the same year. The zoning ordinances of the Town of Kiawah Island (the "Town") and a development agreement entered by the Town in 2005 (Development Agreement) provide for the development of no more than 50 home sites on Captain Sam's peninsula on the thirty-one or more highland acres that lie between the critical line on the river side and the OCRM set back line on the ocean side. The Development Agreement provides that KDP can convey a maximum of twenty of these acres as home sites to purchasers, or about 14% of the total highland of the peninsula. The Development Agreement requires that the remainder of Captain Sam's peninsula be preserved in a natural state, with limited exceptions (*e.g.*, the entry road which may be pervious material and a few boardwalks) in perpetuity through encumbrance by a conservation easement to the Kiawah Island Natural Habitat Conservancy.

The Development Agreement also requires that this green space be conveyed to the Kiawah Island Community Association. KDP and its related entities have a history over the last twenty years of developing projects on Kiawah Island responsibly and in an environmentally sensitive manner with due regard for the natural setting. KDP and its related development entities have obtained approximately 500 permits from OCRM during this time and accomplished all of the permitted work in accordance with these permits, without violation or citation. In fact, these KDP entities have responsibly developed small islands and narrow peninsulas in marshlands and along tidal creeks on and adjacent to Kiawah Island.

Furthermore, the planned future development of detached single family dwellings on Captain Sam's will occur behind the State's setback line; be served by appropriate utilities; be separated by four to seven rows of established, high dunes well back from the beach; be placed primarily within the trees and other evolving vegetation on the northern side of Captain Sam's; be implemented in an environmentally sensitive manner by an experienced developer that has historically abided by its permits; and the development is both limited and accommodating to the natural features of Captain Sam's peninsula.

Mark Permar, the island's principal land planner for 25 or more years, plainly explained the many mitigating measures that will likely be employed by KDP to tailor the residential

development to the site, such as limiting the elevation of houses to no more than one and a half stories, limiting lawns, using natural landscaping schemes, utilizing shared driveways, minimizing the number of beach access paths and boardwalks, and having no more than two docks along more than a mile of river edge and marsh shoreline. It is worth noting here that about 86% of the 150 acres of highland on Captain Sam's will be preserved as "green space" under the strict Development Agreement terms and a conservation easement to be granted the Kiawah Island Natural Habitat Conservancy. This undevelopable acreage will be owned by the Kiawah Island Community Association, and will remain in its natural state. Only a maximum of twenty acres will be available for sale as home sites.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, I conclude the following as a matter of law:

General Findings

The proposed bulkhead/revetment is located in a critical area pursuant to S.C. Code Ann. § 48-39-10 (Supp. 2008). S.C. Code Ann. § 48-39-130(C) (Supp. 2008) requires a person or entity to obtain a permit for any alteration of the "critical area" of the coastal zone. The Administrative Law Court has contested case jurisdiction over those issues pursuant to S.C. Code Ann. § 1-23-600(A)(Supp. 2008) and S.C. Code Ann. § 44-1-60(F)(2)(Supp. 2008). Because this case involves two requests for contested case hearings which were consolidated, KDP and the 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 Ann. §§ 48-39-10 *et seq.*, the regulations promulgated thereunder, 23A S.C. Code Reg. §§ 30-1 through 30-18, and the CZMP. See Leventis v. S.C. Dep't of Health & Envtl. Control, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2001). CCL, as the party challenging the Department's decision to authorize 270' of revetment, has the burden of proving that the Department's decision was contrary to the Act, Regulations and CZMP and that the bulkhead/revetment should have been denied. Id. The standard of proof in weighing the evidence and making a decision on the merits at a contested case hearing is a preponderance of the evidence. Nat'l Health Corp. v. S.C. Dep't of Health & Envtl. Control, 298 S.C. 373, 380 S.E.2d 841(Ct. App. 1989). In addition, the Court "shall give consideration to the provisions of § 1-23-330 with regards to the Department's specialized knowledge." S.C. Code Ann. § 44-1-60(F)(2) (Supp. 2008).

Where an expert's testimony is based upon facts sufficient to form the basis for an opinion, the trier of fact determines its probative weight. Berkeley Elec. Coop. v. S.C. Pub. Serv. Comm'n, 304 S.C. 15, 20, 402 S.E.2d 674 (1991). A trier of fact is not compelled to accept an expert's testimony, but may give it the weight and credibility he determines it deserves. Florence County Dep't of Social Servs. v. Ward, 310 S.C. 69, 425 S.E.2d 61 (Ct. App. 1992). The trier of fact may also accept the testimony of one expert over another. S.C. Cable Television Ass'n. v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 417 S.E.2d 586 (1992).

General Considerations of Section 48-39-150

S.C. Code Ann. Section 48-39-150 sets forth the general considerations to be taken into account for every critical area permit application. See also S.C. Code Ann. Regs. 30-11 (Supp. 2008). The pertinent considerations set forth in S.C. Code Ann. § 150 (A) for this application are:

> In determining whether a permit application is approved or denied the department shall base its determination on the individual merits of each application, the policies specified in Sections 48-39-20 and 48-39-30 and be guided by the following general considerations:
>
> * * *
>
> (3) The extent to which the applicant's completed project would affect the production of fish, shrimp, oysters, crabs or clams or any marine life or wildlife or other natural resources in a particular area including but not limited to water and oxygen supply.
>
> (4) The extent to which the activity could cause erosion, shoaling of channels or creation of stagnant water.
>
> (5) The extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources.
>
> (6) The extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable historic and archeological sites of South Carolina's coastal zone.
>
> (7) The extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state.
>
> (8) The extent of any adverse environmental impact which cannot be avoided by reasonable safeguards.
>
> (9) The extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project.
>
> (10) The extent to which the proposed use could affect the value and enjoyment of adjacent owners.

Here, neither the proposed bulkhead/revetment nor the possible future residential development will have a material adverse effect on wintering piping plovers, diamond back terrapins, the habitat for either, or other marine life or wildlife. Specifically, as to diamond backed terrapins, the Court additionally concludes they are not a protected species and that the law allows individuals to possess up to two terrapins at a time provided they are not possessed for commercial purposes. See S.C. Code Ann. § 50-5-2300 (Supp. 2008). In fact, with respect to habitat concerns, the ACB mat likely will, instead, provide additional habitat for oysters and perhaps other marine life associated with marsh grass habitat that may spring through the mat's multiple holes. The ACB mat will thus have a limited effect on public access to tidelands because it covers a sandy river shore. However, that impairment is not substantial.

Furthermore, the project will clearly reduce and likely stop erosion rather than precipitate any erosion. The elimination of that erosion will further provide an economic benefit to KDP. In fact, the benefit from protection of its upland through stabilization of the riverbank is considerable when compared with the benefit of leaving the riverbank in its unaltered state and allowing the erosion to continue unabated into the forested highland and dune areas along the river. This erosion has no positive benefit for anyone and clearly is a detriment to the landowner. Likewise, the proposed revetment will not have an adverse effect on the value and enjoyment of adjacent owners. KDP is the only adjoining highland owner (including owning the land used for Beachwalker Park at the eastern end of the Spit). The Court cannot agree with the suggestions made by CCL that the public is the adjoining owner as a result of its "right of access" across KDP land to the beach from the Beachwalker Park leased area. KDP is the fee simple owner of the park parcel and seaward therefrom to the MHW line. No evidence was offered refuting this. Additionally, O'Rourke testified that Charleston County PRC, which operates the park, fully supports the entire revetment permit.

The proposed project, through its mat over the sloping surface of the bank and its bulkhead against the vertical scarps, also provides reasonable safeguards against adverse environmental impacts. These and other types of revetments have been historically approved by the Department, including on Kiawah Island for these same protective purposes. Accordingly, the revetment will not have adverse environmental impacts.

As set forth above, Section 48-39-150 also instructs the Department to be guided by the policy statements in S.C. Code Ann. §§ 48-39-20 and 48-39-30 in assessing the potential impacts

of projects in critical areas. See also S.C. Code Ann. Regs. 30-11 (Supp. 2008). The pertinent portions of Section 48-39-20 are as follows:

> The General Assembly finds that:
>
> (A) The coastal zone is rich in a variety of natural, commercial, recreational and industrial resources of immediate and potential value to the present and future well-being of the State.
>
> * * *
>
> (D) The coastal zone and the fish, shellfish, other living marine resources and wildlife therein, may be ecologically fragile and consequently extremely vulnerable to destruction by man's alterations.
>
> (E) Important ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historical values in the coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values.
>
> (F) In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone while balancing economic interests, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate.

The pertinent portions of Section 49-38-30 provide as follows:

> (A) The General Assembly declares the basic state policy in the implementation of this chapter is to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State.
>
> (B) Specific state policies to be followed in the implementation of this chapter are:
>
> > (1) To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;
> >
> > (2) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations;
> >
> > * * *
> >
> > (5) To encourage and assist state agencies, counties, municipalities and regional agencies to exercise their responsibilities and powers in the coastal zone through the development and implementation of comprehensive programs to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values as well as to the needs for economic and social development and resources conservation.

* * *

(D) Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.

These policy statements require a balancing of economic-development benefits and environmental preservation. Even though the focus of the inquiry is on the effects of the project, neither the bulkhead/revetment nor the potential limited residential development will result in any significant harm to the public resources or marine or other plant or animal life, nor significantly impair public access to critical areas. As previously found, the potential residential development is not ill-planned and will be implemented in a low density, environmentally sensitive manner. It will also be subject to local, state, and possibly federal permitting requirements. Neither the proposed bulkhead/revetment nor the potential limited residential development transgresses the policies set forth in these two statutes.

Additionally, the Court notes that these policies refer to the role of local municipalities. Here, the Town of Kiawah Island has implemented measures to safeguard the environment in the restrictions it imposed on the potential residential development. These safeguards include the legal preservation through a conservation easement of almost all but twenty acres of the peninsula in a natural state in perpetuity. This salient requirement is certainly in furtherance of the policies in favor of protecting coastal resources. The twenty acres also appear to be not only behind several rows of high dunes but also more than 3,000 feet from the inlet.

KDP thus established that there are no significant negative impacts from either the bulkhead/revetment or the potential future residential development under S.C. Code Ann. Section 48-39-150 (A) and S.C. Code Ann. Regs. 30-11 (B). Further, neither the project nor the potential residential development are in violation of the relevant policies set for in Sections 48-39-20 and 48-39-30.

Regulation 30-11(C)

S.C. Code Ann. Regs. 30-11(C) sets forth additional guidelines to be considered when making permitting decisions regarding activities in the critical areas.

30-11(C)(1)

The first of the guidelines in Regulation 30-11 (C)(1) requires consideration of "[t]he extent to which long-range, cumulative effects of the project may result within the context of

other possible development and the general character of the area." S.C. Code Ann. Regs. 30-11(C)(1) (Supp. 2008). It is this provision which constitutes the underlying objection to this permit by CCL and, in particular, the Department. They argue that the bulkhead/revetment will allow homes to be built upon Captain Sam's which will change the character of the **upland** area. However, the controlling statutes and regulations for critical area permits do not require a determination of whether high land outside the Department's critical area jurisdiction is "suitable" for residential development. Instead, the pertinent inquiry is the cumulative impacts of the project **within** the critical area, not the cumulative impacts of future development on the high ground **outside** the critical area. In other words, the area for which the Department has regulatory authority is the critical area, not the high ground **outside** the critical area. Construing this provision otherwise would lead to a substantial expansion of the Department's authority to regulate the development of entire communities. Conceivably, the Department could deny critical area permits near towns or cities simply because it believes the permits would facilitate upland sprawl and general over-development. In fact, the Department's project manager testified that he denied the revetment at all locations on Captain Sam's Spit, other than adjacent to Beachwalker Park, because he believed potential residential development would destroy the pristine nature of Captain Sam's. Thus, the Department avers that it has the authority through coastal permitting to deny upland development even against the Town's approval of that development through its zoning process. If the General Assembly had intended to authorize such a considerable expansion of the Department's authority it is inconceivable that it would have done so with such general language. See Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council, 306 S.C. 48, 413 S.E.2d 13 (1991) (administrative agencies are possessed of only those powers expressly conferred or necessarily implied for them to effectively fulfill the duties with which they are charged); 3 Sutherland Statutory Construction § 65:2 (6th ed.) (statutes authorizing administrative agencies to exercise powers tending to interfere with established or traditional property rights are strictly interpreted).

Furthermore, the regulations or statues granting the Department authorization to use its permitting power do not govern "highland uses." The authority to determine appropriate land uses has, over the history of our State's law, been relegated to the municipalities and counties having planning and zoning jurisdiction and expertise to best determine such planning matters. See, e.g., Bear Enterprises v. County of Greenville, 319 S.C. 137, 459 S.E.2d 883 (Ct. App.

1995); Rushing v. City of Greenville, 265 S.C. 285, 217 S.E.2d 797 (1975). Thus, the governmental consideration of whether residential uses are appropriate above the critical line and landward of the setback line for Captain Sam's is a zoning matter within the province of the Town of Kiawah Island. To the contrary, the Department's actions in this case appear to be colored by its mistaken belief that it may, simultaneously, trump local zoning and development agreements and decree that privately owned upland property remain permanently undeveloped and in a natural state without any suggestion of fair compensation to the owner. See e.g., S.C. Code Section 48-39-30(c)("In the implementation of the chapter, no government agency shall ... issue any order ... so as to constitute a taking of property without the payment of just compensation in violation of the Constitution of this State or of the United States"). However, nowhere do the governing statutes and regulations prohibit lawful, zoned real estate development on highland parts of barrier islands above OCRM critical lines and landward of OCRM ocean setback lines in the coastal zone. Instead, they caution against "ill planned development." S.C. Code Ann. § 44-39-20(E) ("E. Important ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historical values in the coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values.").

Likewise, the focus is on whether the proposed structure satisfies the applicable South Carolina regulations and statutes governing the permitting of bulkheads and revetments in critical areas. None of these controlling regulations and statutes establish "stability of the adjacent highland" as a consideration in acting on a critical area permit to construct a bulkhead or revetment or a river bank.

No regulation or statute prohibits construction of a bulkhead or revetment that retards the process of shoreline change, another argument made by OCRM and CCL in opposition to this permit. Every bulkhead or revetment, by its very nature, must "interfere with the natural process of erosion" to do its intended job. If the General Assembly had sought to create an exception for the permitting of revetments and bulkheads where the structure might interfere with the erosion in certain instances, the legislature could have so specified. It did not. Instead, the General Assembly specifically recognized the fundamental need to protect upland from destruction from the natural process of erosion on tidal rivers. Indeed, it authorized the

Department to issue permits for the construction of bulkheads and revetments in locations other than the front beach:

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

S.C. Code Ann. § 48-39-120 (E) (emphasis added). See also, S.C. Code Ann. Regs. 30-12 (C)(1)(c) ("Bulkheads and revetments will be prohibited where marshlands are adequately serving as an erosion buffer, where adjacent property could be detrimentally affected by erosion or sedimentation, or where public access is adversely affected **unless upland is being lost due to tidally induced erosion.**")(emphasis added).

Additionally, in this instance, the potential residential development will not have deleterious impacts even if the Court were to consider the effects of the potential residential development. OCRM and CCL do not challenge KDP's history of environmentally sensitive development methods, permit adherence record, or any of the specific strategies, methods, and approaches that KDP will use in its limited residential development of Captain Sam's. Rather, they urge that **any** residential development at all, regardless of safeguards and protections, on the now-undeveloped Captain Sam's highland peninsula along the ocean and river, is **per se** "ill-planned." The Court concludes that the numerous measures and safeguards KDP intends to utilize in its development of Captain Sam's demonstrate that this limited residential use would be sensitively planned, responsive to the natural features of the peninsula, attentive to its flora and fauna, and without significant negative effects on the critical area. Even though consideration of the effects of the upland is beyond the purview of the regulation, the Court concludes that there was no evidence adduced that the residential development would have any material adverse environmental effects on the upland. The development team also has a twenty-two year unblemished "track record" for compliance with all OCRM permits.[19]

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[19] It also bears pointing out that this regulation specifies that OCRM "must **in part** base its decisions regarding permit applications on the policies specified in Sections 48-39-20 and 48-39-30, and thus be guided by the following...." R. 30-11 (C) (emphasis added). This regulation does not state that the sole consideration, or even the primary consideration, is "extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area."

30-11 (C)(2)

The second guideline of Regulation 30-11 (C) provides that:

> Where applicable, the extent to which the overall plans and designs of a **project** can be submitted together and evaluated as a whole, rather than submitted piecemeal and in a fragmented fashion which limits comprehensive evaluation.

S.C. Code Ann. Regs. 30-11 (C)(2) (emphasis added). The Department and CCL contend that this application was piecemeal because (i) the revetment plan submitted by KDP did not include the final construction drawings, and (ii) KDP did not submit plans for the future residential development on Captain Sam's. However, KDP submitted sufficient design plans for the proposed revetment. KDP submitted the application for the project, i.e. the revetment, as a whole.[20] The evidence reflected that it is customary practice with a project of this nature, for the Department to base its permitting decision on conceptual renderings, such as those supplied with this application, rather than requiring the applicant to incur the substantial expense of full blown construction and bid drawings. If the permit is granted, the customary and practical course is that the applicant then submits construction drawings for conformance and final approval, seeking to work out any details then. Likewise, the failure to request training jetties cannot be considered an omission in the application, as suggested by counsel for CCL and OCRM, as KDP has no intent to pursue them at this time. Obviously, it would be unreasonable to require that a permit request provide an alternative design element for every contingency that may arise.

Additionally, if the Department had truly believed the application to be incomplete, presumably it would have so informed KDP at the time of submission of the application. It did not do so. To the contrary, throughout the application process, KDP repeatedly offered to provide any additional information that the Department desired for purposes of its determination. The Department never requested any further information from KDP. Indeed it never responded to the several offers of more data by KDP as to either the design of the revetment or the possible future residential use on the upland on Captain Sam's Spit.

Moreover, as to the failure to submit a specific residential plan, the "project" under consideration is the bulkhead/revetment, not the future residential use of the upland. The applicant testified to valid reasons for not having a specific development plan for this moderate

[20] In fact, in an effort to assure that the project was submitted as a whole, KDP requested that Charleston County PRC withdraw an earlier application it had filed with OCRM to construct solely a bulkhead of 270 feet in front of Beachwalker Park. This allowed KDP, utilizing Thomas and Hutton and other experts, to develop a single engineering solution.

sized "neighborhood." Detailed plans fixing the precise locations and number of homesites and the exact location of the infrastructure improvements were not necessary to gauge the cumulative effects of the bulkhead/revetment.

I therefore conclude that the permit application does not violate Regulation 30-11 (C).

Regulation 30-12 (C)

S.C. Code Ann. Regs. 30-12 (C) (Supp. 1999) sets forth standards for the construction of bulkheads and revetments erosion control structures. It provides that for bulkheads and revetments which are not ocean front:

> (1) In an attempt to mitigate certain environmental losses that can be caused by these structures, the following standards are adopted:
>
> > (a) Structures must be designed to conform to the critical area line (upland boundary), to the maximum extent feasible, and constructed so that reflective wave energy does not destroy stable marine bottoms or constitute a safety hazard;
> >
> > (b) Structures 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;
> >
> > (c) Bulkheads and revetments will be prohibited where marshlands are adequately serving as an erosion buffer, where adjacent property could be detrimentally affected by erosion or sedimentation, or 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.

S.C. Code Ann. Regs. 30-12(C).

Here, although public access to the riverbank at low tide may be affected on a very limited basis, Regulation 30-12 (C) specifically allows some adverse effect where "upland is being lost due to tidally induced erosion." Clearly, KDP's upland is being lost due to tidally induced erosion, and there is no feasible alternative that will stabilize this eroding riverbank. Additionally, although the ACB mat degrades the public uses of the shoreline where the mat is approved, it does not eliminate all public access. Nevertheless, there are other sandy landing spots at low tide in the immediate vicinity in general and specifically as a result of the reduction in the mat as ordered below.

The Court further concludes that despite the arguments of the Department and CCL that the design of the revetment is insufficient and that the revetment may fail, the design is adequate

to stabilize the bank under normal conditions, its intended purpose. Its intended purpose is not to prevent a breach of the peninsula in the event the catastrophic hurricane. In sum, the Court 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).

Public Trust Doctrine

CCL argues further that this bulkhead/revetment should be denied for violating the public trust doctrine. The premise of CCL's argument is that the public has the right to use public trust lands and waters for recreational purposes, including fishing, bathing, swimming and other recreational uses. Specifically, the public has a right to pull up kayaks and boats on the sandy banks of the Kiawah River, and to swim, fish and crab on the banks of the river in the location of the proposed revetment. Accordingly, if the revetment/bulkhead structure were constructed as requested, these public rights would be eliminated in violation of the public trust doctrine.

Clearly, the above laws set forth the parameters of when coastal public trust land may be used for private purposes. In Sierra Club v. Kiawah Resort Associates, 318 S.C. 119, 456 S.E.2d 397 (1995), the Supreme Court expounded on the public trust doctrine in implementing these laws and outlined the test for determining whether a particular project violated it. The Court held that:

> The legislation creating the Coastal Council [now OCRM] and defining its duties, while not explicit, implicitly charges the Coastal Council with administering the Public Trust lands in connection with coastal waterways. See S.C. Code Ann. § 48-39-10, et. seq.
>
> > The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.
>
> Illinois Central R. Co. v. Illinois, 146 U.S. 387, 453, 13 S.Ct. 110, 118, 36 L.Ed. 1018, 1042 (1892). Clearly, under the South Carolina Coastal Management Act, the State through the Coastal Council maintains control over the public trust lands. See e.g. Caminiti v. Boyle, 107 Wash.2d 662, 732 P.2d 989 (1987). Coastal Council's Regulations specifically state that "[n]o permit shall convey, nor be interpreted to convey, a property right in the land or water in which the permitted activity is located." 24A S.C.Code Ann.Regs.R. 30-4(E). Since no interest in the land or water within the public trust is conveyed by the permit, the relevant inquiry is whether the docks **substantially impair** the public interest in the public trust lands and waters. As there was testimony that the docks would not

substantially impair marine life, water quality, or public access to the area, we hold that the permits at issue do not violate the public trust doctrine. We affirm.

Sierra Club, 456 S.E.2d at 402 (emphasis added). Here, the bulkhead/revetment will not substantially impair the recreational activities of boaters, kayakers, and others, nor will it substantially impair or unreasonably restrict their use of the public trust tidelands including a portion of the southerly bank of the Kiawah River.

Coastal Zone Management Plan[21]

The Department and CCL contend that the proposed bulkhead/revetment will violate the several policies in the CZMP, including the policies for:

- Activities in Areas of Special Resource Significance for Barrier Islands (Chapter III(C)(3)(XII)(A));
- Dune Areas (Other Than Critical Areas). (Chapter III(C)(3)(XII)(B));
- Public Open Space, (Chapter III(C)(3)(XII)(D));
- Geographic Areas of Particular Concern (Chapter IV(A)(2)(a)(8)).[22]

Chapter III (C) of the CZMP discusses "Residential Development" in the coastal zone. It provides that "[o]f primary concern is adequate treatment and disposal of domestic sewerage from residences...," and that "[u]ncontrolled development patterns can also degrade water quality and impact marine and aquatic species." CZMP, p. III-16. The polices enumerated in this section are to "provide guidance on reaching and maintaining a balance between development and conservation of coastal resources." Id.

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[21] KDP also argues that the policies in the CZMP cannot be imposed as binding norms by the Department and that the Department lacks the authority to deny a project based on policies contained in the CZMP. The Court recognizes based upon the record before it that these issues may soon be determined by the Supreme Court of South Carolina. There is however no need for this Court to await that clarification upon that issue in this case because I do not find the proposed project is contrary to the Coastal Zone Management Plan even if it has the force and effect of law. Nevertheless, I do recognize that the General Assembly adopted the Beachfront Management Act, S.C. Code Ann. §§ 48-39-250 et seq. (BMA) well after the Department compiled the CZMP. The provisions of the BMA, including in particular those establishing the baseline, setback line, and the standards for construction in relation to them, take precedence as legislation over any provisions of the CZMP that may conflict therewith, even if Supreme Court determines that the CZMP is enforceable. See I'On, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (generally, the most recent legislation will take precedence over earlier enactments).

[22] The Department also argued that this project triggered the CZMP Erosion Control Policies contained in Chapter IV(C)(4) and the Beach and Shoreline Access Policies in Chapter IV(D)(3)(c). Neither KPD nor CCL addressed these issues in their Proposed Orders. Nevertheless, as to the Erosion Control Policies the project is to be made of more than acceptable materials. Moreover, the evidence clearly established the economic justification for the project that will have only limited effect upon the public use of the area. The discussion above regarding the public use of the shoreline reflects that the Beach and Shoreline Access policies will not be violated.

The CZMP classifies barrier islands as an area of special significance. The policies for development of those islands include the following:

1) Construction and development on barrier islands shall retain to the extent feasible existing dune ridges, drainage patterns and natural vegetation in landscaping and construction plans in order to maintain the value of the island as a storm buffer. Intensive or high-density development may not be suitable on some barrier islands with are less stable or more prone to erosion or other hazard risks; these factors must be taken into consideration when alternative development plans are formulated;

2) Because of their proximity to and strong ecological relationship with the critical areas of the coastal zone, project proposals for barrier islands must demonstrate reasonable precautions to prevent or limit any direct negative impacts on the adjacent critical areas (beaches, primary dunes, coastal waters and wetlands).

3) New road or bridge projects involving the expenditure of public funds to provide access to previously undeveloped barrier islands will not be approved unless an overwhelming public interest can be demonstrated, for example, provision of access to a public recreation area or other facility. Preference will be given to ferry access in those instances where public funds cannot be expended for road access.

4) The extension of public services, such as sewer and water facilities, to barrier islands should only be proposed in a comprehensive approach which considers the natural "carrying capacity" of the island to support development and which integrates these facilities to parallel the level of access which is available to the island.

5) The Coastal Council encourages and supports State, local and private efforts to acquire coastal barrier islands for inclusion in preservation and protection programs. Public recreational benefit should be one primary motivation for these efforts, and where appropriate, barrier islands should be maintained for recreational use, based on the capacity of individual areas to accommodate human activity.

CZMP Chapter III (C)(3)(XII)(A) p. 70-71. The CZMP also treats dune areas which fall landward of the beach zones as areas of "special resource significance." The enumerated policies in the CZMP regarding these areas include the following:

> Because of their proximity to and strong physical and ecological relationship with the beach and primary sand dune critical areas of the coastal zone, project proposals in the secondary sand dunes must demonstrate reasonable precautions to prevent or limit any direct negative impacts on the adjacent critical areas.

CZMP Chapter III (B) p. 71-72. Concerning open spaces, the CZMP seeks to restrict projects which would "limit the continued use of a recreational open area or disrupt the character of such

a natural area" unless other alternatives exist. CZMP Chapter III (D) p. 73. On the other hand, the CZMP seeks to "increase the amounts and distribution of public open space and recreational areas in the coastal zone." Id. Finally, the CZMP sets forth that areas in which endangered and threatened species inhabit are Geographic Areas of Particular Concern.

The development techniques and safeguards KDP intends to implement are consonant with the policies in the CZMP. More specifically, I find that the low-density development described by Long and Permar that would be employed in the residential development of Captain Sam's, entail reasonable precautions. No evidence was offered to alter this important point. The many rows of dunes seaward of the setback line would remain essentially intact on a permanent basis to enjoy for their beauty and protection, thereby preserving the strong natural protections deemed desirable by the policies in the CZMP. Accordingly, the proposed limited, residential development several rows of dunes behind the primary dune, will not violate the policies of CZMP Chapter III (C)(3)(XII)(A).

Furthermore, the CZMP contains no policies that would prohibit the potential residential development of Captain Sam's and the potential residential development is consistent with its terms. The policies dealing with barrier islands and the dunes system specifically contemplate residential development on barrier islands. These policies do not prohibit residential development that occurs landward of the primary dune if reasonable precautions are taken. The potential residential development on private property will also not impair public open space at Beachwalker Park or along the beach. Finally, the developable area of Captain Sam's peninsula is well **outside** Unit-10's boundaries of designated critical habitat for wintering piping plovers. It is thus not a Geographic Area of Particular Concern under the CZMP.

Therefore, I find that neither the bulkhead/revetment nor the possible future residential development is contrary to the policies of the CZMP.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby:

ORDERED that the permit issued by the Department is approved except that the terms and conditions in the permit limiting the bulkhead and revetment to 270 feet in Special Condition No. 1 are deleted and the following shall be substituted for Special Condition No. 1:

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 commencing 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.

AND IT IS SO ORDERED.

Ralph King Anderson III
Chief Administrative Law Judge

January 22, 2010
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 22nd day of January, 2010

By: Trish M. Scott
Judicial Law Clerk

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Kiawah Development Partners, II. Petitioners, vs. South Carolina Department of Health and Environmental Control. Respondents.	Docket No. 09-ALJ-07-0029-CC **AMENDED FINAL ORDER AND DECISION**
South Carolina Coastal Conservation League. Petitioners, vs. South Carolina Department of Health and Environmental Control and Kiawah Development Partners, II. Respondents.	Docket No. 09-ALJ-07-0039-CC

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APPEARANCES:

Trenholm Walker & Gedney Howe for Petitioner Kiawah Development Partners, II, Inc.

Amy E. Armstrong & James S. Chandler, Jr., for Petitioner S.C. Coastal Conservation League

Davis Whitfield-Cargile for Respondent S.C. Department of Health and Environmental Control

STATEMENT OF THE CASE

This matter comes before the Court pursuant to S.C. Code Ann. § 1-23-600(A) and S.C. Code Ann. § 44-1-60 upon requests for a contested case hearing by Kiawah Development Partners, II (KDP) and the South Carolina Coastal Conservation League (League). Respondent South Carolina Department of Health and Environmental Control (OCRM or DHEC or Department) issued a permit to Petitioner/Respondent KDP authorizing them to construct a 270' bulkhead/revetment at Beachwalker Park on Kiawah Island but denied the remainder of KDP's

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application, which requested authorization to construct a 2783' bulkhead/revetment along the Kiawah River. KDP challenges the Department's decision to only authorize 270' of the 2783' structure applied for by KDP. The League challenges the Department's decision to authorize 270' of bulkhead/revetment and supports the Department's decision to deny the remainder of the request. A hearing was held before the Administrative Law Court on August 24 – 28, 2009.[1]

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and taking into consideration the burden of persuasion and the credibility of the witnesses, I make the following findings of fact by a preponderance of the evidence:

Background

Kiawah Island is a barrier island fronting on the Atlantic Ocean with over 10 miles of beachfront. It is bounded on the south by the Atlantic Ocean, on the east by the Stono River inlet, on the north by the Kiawah River, and on the west by the Kiawah River where it enters the Atlantic through Captain Sam's Inlet. Captain Sam's Spit is adjacent to Captain Sam's Inlet at the Southwest end of Kiawah. The Spit is a sandy land formation and is surrounded on three sides by water – the Atlantic Ocean, the inlet and the Kiawah River. KDP owns Captain Sam's peninsula which encompasses roughly 150 acres of highland above mean high water (MHW).

In 1999, OCRM established its baseline and building setback line twenty feet landward based on the most reliable information which indicated that the oceanfront beach on Captain Sam's Spit had accreted and **not** been subject to any significant, measurable erosion between 1959 and 1999.[2] The movement of the baseline prompted KDP to consider development of Captain Sam's Spit. As a result, in 2005 KDP and the Town amended the development agreement for Captain Sam's Spit. Thus, on February 29, 2008, KDP submitted a joint application to the United States Army Corps of Engineers (Corps) and the Department for a permit to construct a combination bulkhead and revetment in the "critical area." The application sought authorization to construct a 2,783' bulkhead and 2,783' by 40' articulated concrete block

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[1] The Court left the record open to receive the deposition testimony of Jeff Mollenhauer, an expert witness for CCL, who was unable to attend the trial. His deposition was taken on September 1, 2009.

[2] "To implement the retreat policy provided for in subsection (A), a setback line must be established landward of the baseline a distance which is forty times the average annual erosion rate or not less than twenty feet from the baseline for each erosion zone based upon the best historical and scientific data adopted by the department as a part of the State Comprehensive Beach Management Plan." S.C. Code Ann. § 48-39-280(B).

revetment on the shoreline of the Kiawah River beginning at Beachwalker Park[3], and continuing around the bend of the river, along the neck of the Captain Sam's Spit for 2,783 feet.

On December 18, 2008, the Department issued the conditional permit approving the construction of the erosion control structure for a distance of 270 feet adjacent to the parking lot of Beachwalker Park.[4] The park is adjacent to Captain Sam's peninsula and adjacent to the extreme eastern end of the proposed bulkhead/revetment. The Department refused the permit request for the remaining 2,513 feet requested based on its concerns about cumulative negative impacts, including interference with natural inlet formation and possible adverse effects on wintering piping plovers. The Department also determined that the project was contrary to the policies set forth in the Coastal Zone Management Program Document (CZMP).

Kiawah Island and Captain Sam's Spit

Captain Sam's is a relatively new land mass in geological time. Very old maps and surveys indicate that over the last three hundred years or more a smaller or different version of this peninsula was formed and then either eroded, breached, or washed over at least two times. Though the cause is not known, the last time was probably sometime shortly before 1949 when the peninsula was much smaller. The Department and CCL emphasize that the Spit has been completely eroded and redeposited at least two times in the past 200 years, to create the perception that that the spit is unstable and inappropriate for human development. The Department extends that argument even further by suggesting this Court should conclude that "the proposed revetment would facilitate a false sense of security and a perception of protection for prospective home buyers on Captain Sam's Spit."[5] However, as Dr. Kana[6] explained, in the

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[3] Beachwalker Park consists essentially of changing rooms and a 150 space parking lot under a long term lease for $1.00 by KDP to Charleston County.

[4] Charleston County Park and Recreation Commission (PRC) operates Beachwalker Park under a 99 year lease entered around 1976 with Charleston County on oceanfront land now owned by KDP.

[5] The Department avers that this consideration in determining whether an applicant should receive a permit is supported by S.C. Code Ann. §§ 48-39-20 and 48-39-30. I do not find any support for this reasoning. In fact, such arguments support Petitioner's questioning the Department's motives in this case.

[6] Dr. Tim Kana testified as an expert in coastal geology and geomorphology. Dr. Kana, a long time University of South Carolina faculty member, has extensively studied and researched barrier islands along the coast of South Carolina for more than thirty years, concentrating much of his work on the geomorphology of Seabrook Island and Kiawah Island. He has written numerous reports on the coastal processes shaping Kiawah and Seabrook Islands. Dr. Kana has served as a consultant to the Towns of Seabrook Island and Kiawah Island, as well as certain private property owners on both islands, including the Seabrook Island Property Owners Association, on large beach projects undertaken by them.

last thirty years there have not been washovers anywhere along the neck portion of the spit. None of the dune ridges show any signs of storm water washover during the last thirty years, even when subjected to hurricane forces including Hurricane Hugo in 1989.

Kiawah Island has one of the "healthiest" beaches in terms of positive sand supply among barrier islands on the east coast. According to Dr. Kana, the shoreline along Kiawah Island, unlike many other beaches in South Carolina or the East Coast, has actually accreted on average over the last 100 years. Some parts of Kiawah have built out nearly a mile at the east end. Sand from these enormous bar formations at the mouth of the Stono River Inlet detach over time and drift southwesterly along the coastline, thus supplying millions of cubic yards of sand to Kiawah Island's growing beachfront all the way to Captain Sam's Inlet. Additionally, the ebb tidal delta on the ocean side of Captain Sam's Inlet contributes to the deposit of sand along the beach of Captain Sam's. This ebb tidal delta, formed by a build-up of underwater sand in the ocean at the

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Among other things, Dr. Kana is the principal "architect" of two successful manmade re-locations of Captain Sam's Inlet in 1983 and 1996. The two re-locations of the inlet separating Seabrook and Kiawah Islands used the farthest tip of Captain Sam's Spit as a source of sand for Seabrook Island's partially eroding beach. Dr. Kana has also been the primary coastal geologist in numerous other projects involving the "management" of beaches in South Carolina.

I found Dr. Kana eminently qualified to explain the coastal processes affecting Captain Sam's Spit. In fact, his expertise was simply more persuasive than that of CCL's expert, Dr. Young. Accordingly, when referencing Dr. Kana's testimony, I am citing evidence that I found to be distinctly persuasive.

To the contrary, throughout the hearing OCRM and CCL referred to opinions and recommendations, contained in the chapter titled "Coastal Processes and Geomorphology" of Kiawah Island that was part of a 1975 report titled "Environmental Inventory of Kiawah Island" prepared by Environment Research Center for the original developer of Kiawah Island (Environmental Inventory). CCL and OCRM urges the Court to consider the recommendations in this report in evaluating the suitability of granting a permit in this case. Interestingly, CCL and the Department did not call any of the authors of the chapter to testify. Instead, CCL and the Department had various witnesses read excerpts, focusing on the authors' recommendation that certain parts of Kiawah Island, including Captain Sam's, should not be developed because they were geologically too unstable.

It is notable that the information in the Environmental Inventory was compiled thirty-four years ago. It doesn't appear to reflect independent research as much as catalogue certain prior data. As Dr. Kana testified, coastal morphologists now know much more about the coastal processes affecting Kiawah Island and have had the benefit of more than thirty years of close observation that undermine many of its assumptions, projections, and recommendations found in the report. For instance, they now know that:

- The enormous sand shoals of the Stono Inlet are the main source of sand for Kiawah Island, not downdrift sand from Folly Beach and Morris Island;
- Captain Sam's has been growing bigger and bigger throughout this time;
- There have been no known overwashes of any of the dune ridges, even the primary dune ridge, on Captain Sam's in any violent storms or hurricanes over the last thirty years.

Furthermore, the conclusions and assumptions of the chapter have not withstood the test of time. For example, the report concluded that several miles of the east end of the island were too unstable for development. That same area has been not only stable but is now the location of the Osprey Beach community, the most upscale beachfront development on Kiawah Island, and other subdivisions as well. Also, the Ocean Course Golf Course which hosted the 1991 Ryder Cup matches was built there. I therefore find that the coastal geological chapter of the 1975 Environmental Inventory is of little to no probative value, and that the testimony of Dr. Kana is more credible.

mouth of the inlet, serves as a natural groin or jetty that impairs the southwesterly drift of sand in the ocean along the Kiawah beachfront, as explained by Dr. Kana. It thereby redirects sand drifting "down" the coastline to Captain Sam's peninsula. As this large spit grows in length in a generally southwest direction, Captain Sam's Inlet is said to "migrate" southwesterly towards Seabrook Island.

The island's accretion is reflected in Captain Sam's Spit. Continuous, significant accretion in the area of the Spit has occurred in the 60 years since 1949. The average rate of accretion ranges from four to ten feet per year anywhere along the spit for just about any period of time in the last 40 years. In fact, probably about four or five rows of dunes have been formed on Captain Sam's Spit within the last 30 years. Its dune ridges are some of the highest on Kiawah Island, some cresting above 15 feet MSL. In sum, the condition of Captain Sam's peninsula today is probably as healthy as it's ever been in historic times. Indeed, CCL's expert characterized the peninsula's strength as robust even at the neck

Captain Sam's Spit is now almost a mile and one-third long. At its narrowest point at the neck, adjacent to the main part of Kiawah Island, Captain Sam's peninsula is approximately 450 feet in width, measured from the critical line on the bank of the Kiawah River on the north side, to the mean high water line of the Atlantic Ocean on its opposite or southern side. Captain Sam's western end that extends towards Captain Sam's Inlet (i.e., which separates Kiawah Island from Seabrook Island) reaches a high ground width of over 1,600 feet. Today Captain Sam's has unbroken rows of continuous, high dune ridges for its entire length. Their number varies from four or five at the neck to up to seven at the western end next to Captain Sam's Inlet. On the side next to the river, Captain Sam's has a young and growing maritime forest. Captain Sam's peninsula is thus stable and growing. It will most probably continue to grow for many decades to come, given the enormous remaining sand supply from the shoals of the Stono Inlet and the east end of Kiawah Island

Because of its substantial width and high dune ridges from decades of uninterrupted growth, there is very little chance that the neck of Captain Sam's would ever breach unless perhaps subjected to the forces of a Category V hurricane. A hurricane of that magnitude, however, would obviously severely damage and inundate all parts of Kiawah and other adjacent islands. Moreover, the barrier islands along the South Carolina coast suffer few breaches in comparison to barrier islands in other states because, on average, there are inlets every five miles

or so on the South Carolina coast that serve as an outlet for receding storm surges. Notably, in this case the proximity of Captain Sam's Inlet serves as an outlet for receding surge waters making it more unlikely that the neck would breach. Additionally, even though the suitability of the upland for residential development is not one of the stated regulatory considerations for determining whether to issue a permit for a bulkhead/revetment, OCRM and CCL have raised it as an issue. I nonetheless find that Captain Sam's is suitable for the limited, low-density residential development described in the 2005 Development Agreement with the Town of Kiawah Island.[7]

Erosion of Captain Sam's Bank at the Kiawah River

Captain Sam's Spit is connected to the main body of Kiawah Island by a narrow strip of land, often referred to as the "neck" of the Spit. The Kiawah River forms an elbow-like bend at the "neck" of a peninsula which has been the source of erosion. The Department maintains that erosion in the area of Beachwalker Park along the Kiawah River warranted the erosion control devices proposed by KDP. However, it disagrees that the westernmost 2,513' of the bulkhead/revetment is needed. CCL contends that no bulkhead or revetment is needed for the entire 2,783' for which KDP seeks to install those erosion control devices. I find that denial of the permit would likely result in the loss of more upland and the access corridor at the neck.

At the same time the beach of Captain Sam's has been growing and moving seaward (*i.e.*, toward the south), the northern side of the bend in the Kiawah River, at the neck of Captain Sam's Spit, has been eroding (albeit at a slower rate per year) to the south. The erosion is accelerated as a result of the growth of the river's marsh edge on its northern side (referred to as a "point bar") which has driven the river channel toward Captain Sam's peninsula and eroded the river bank in the bend along the peninsula. The erosion of the bank has been most prominent along Captain Sam's in the immediate vicinity of Beachwalker Park and all along approximately 2,000 feet of the peninsula's river edge extending from the Beachwalker Park area. While the river channel has moved in a southerly direction toward Captain Sam's peninsula for several decades, the erosion along the river's southern bank has become particularly pronounced over the last several years. This erosion is plainly evident from the escarpments along the riverbank where land, in some places with vegetation and trees, has sloughed off into the river.

[7] In making this finding, I specifically conclude that the opinions of CCL witness Josh Martin were not probative.

The intensity of erosion is not uniform over the entire length of the proposed revetment area. The escarpment is much steeper with a higher reveal in the vicinity of the Beachwalker Park parking lot, where there is visible evidence of portions of the upland vegetation and bluff sloughing off into the river. In general, the erosion decreases as you move in the westerly direction along the river shoreline from Beachwalker Park and it significantly decreases at the most westerly thousand feet of the proposed revetment. Furthermore, though the rate of erosion has been less in recent years, the change is not predictive of future events but rather more likely indicative of varying weather patterns. Nevertheless, the long-term trend of erosion will most probably continue to occur along the peninsula's river bank as reflected by the current escarpment.[8]

A further consequence of the erosion of the riverbank is the migration of the OCRM jurisdictional critical line in a southerly direction in the peninsula's neck in the direction of the ocean. It moves as the river erodes into the bank at the neck. The distance between the river shoreline and the oceanfront setback line at the neck of Captain Sam's was 104 feet in September 2002, 90 feet in April 2005, and 66 feet in August 2009. The dimension has thus decreased 38 feet in nine years, or an average of just over four feet per year.

The width of the neck is significant because for development to occur on the Spit there must be sufficient space to place the access road with underground utilities, road shoulders and other improvements. To reach the peninsula's residential use acreage allowed under the zoning and road codes and vested under the Development Agreement, the right of way should be approximately sixty feet wide. However, even though the beach is accreting at the neck at approximately the same rate as the bank is eroding, the setback line has remained static. In other words, it is the setback line, not the beach, that determines the seaward limit of the buildable high ground, and hence the available area (or corridor) for installation of the road and improvements to Captain Sam's from the rest of Kiawah Island to the east.

The Court thus finds that KDP has a legitimate need for the bulkhead/revetment. The bulkhead/revetment will prevent its high land from being lost and assure that there is sufficient distance between the critical line and setback line in the neck of the peninsula to install a road,

[8] A comparison of surveys of the river shoreline of Captain Sam's over the last thirty-five years demonstrates without question the migration of the river channel in a southerly direction into the Spit. Even though a comparison of the shoreline surveys of October 2008 and August 2009 does not clearly indicate advancement of the erosion during that very short period, there is a definite, long-term trend of erosion that is unmistakable. It is undisputed that over an acre of highland on Captain Sam's along the bank of the Kiawah River has eroded since 2002.

underground utilities, landscaping, and improvements.[9] In fact, it is unlikely that KDP could satisfy the Town of Kiawah Island's ordinances governing subdivision and road construction without stabilization of the river bank and a protected right of way. Moreover, as to the Department's and CCL's argument that KDP "can still sell lots on Captain Sam's without the revetment," the Court finds that the developable land on the peninsula would not likely be readily marketable if the bank was not stabilized and the erosion were allowed to continue unabated into the future. The bulkhead/revetment's stabilization of the bank is essential to being able to market and sell the riverside homesites, especially given today's informed buyers.

CCL also argued that the permit for the bulkhead/revetment for the 270 feet adjacent to Beachwalker Park was unnecessary because the Park is moving to another location. The area known as Beachwalker Park is owned by Kiawah Resort Associates. Charleston County Park and Recreation Commission holds a 100 year lease of the Park from Kiawah Resort Associates. Though the Park Commission does not own the land, it believes it would be best for the citizens of Charleston County if the County had a permanent deed. Nevertheless, it has also had discussions with Kiawah Resort Associates about relocating the Park. However, there is no agreement to move the Park to another location and the bulkhead/revetment is clearly necessary to protect the Park's highground and improvements from falling into the river in light of its current location.

The Bulkhead/Revetment's Design

KDP's application proposes an erosion control structure composed of two distinct elements. The first component would authorize a vertical bulkhead for a distance of up to 2,783 feet along the shoreline of the Kiawah River on Captain Sam's Spit adjacent to Beachwalker Park and KDP's land on the southwestern end of Kiawah Island. The height of the bulkhead will vary to follow the differing elevational contours of the adjacent highland scarps along the river, extending to just under their peaks. The purpose of this vertical bulkhead is to stabilize the river's high ground shoreline in the location at the time of construction.

The other erosion control feature is a flexible "mat" comprised of interconnected articulated concrete blocks (ACB). The ACB mat would be installed over the sloping river shoreline, extending from the bottom of the bulkhead at the base of the shoreline escarpments, or

[9] The Department has routinely granted permits for other revetments on Kiawah Island for the protection of roads including revetments such as this with an ACB mat.

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 would cover 111,320 square feet of the banks of the River, or 2.63 acres. Most, if not all, of the mat would be covered by water at high tide.

The ACB mat is made of a series of blocks with large holes in between the blocks. It is a preferable (yet more expensive) method of reducing shoreline erosion because aesthetically the concrete can be colored to blend in with the color of the bank and because the blocks have multiple openings that would allow the growth of marsh grass and other vegetation through them. The ACB mat could also serve as habitat for other marine life including oysters. To the contrary, the evidence did not establish that the ACB mat would significantly imperil the habitat of any marine animals, organisms, or plants. It most probably will provide new habitat for oysters and other organisms. Additionally, the bulkhead portion of the structure is designed to be installed on the critical line or no more than eighteen inches behind the critical line.

The combination bulkhead and ACB mat over the sloping river shoreline, covered by water at high tide, will diffuse wave action more than a structure comprised solely of a vertical bulkhead. The proposed structure is sufficiently engineered to stabilize the riverbank and prevent erosion from the ongoing movement of the channel caused by the advance over time of the marsh point bar on the opposite side. To the contrary, the evidence did not establish that the ACB mat or the bulkhead will destroy a stable marine river bottom or constitute a safety hazard. It is nonetheless notable that the proposed structure is not designed for the purpose of preventing a breach of the riverbank in the event of a massive hurricane, and that such propensity is not relevant here. Very few bulkhead/revetments in the world are designed to withstand these forces.

Moreover, evidence did not establish that there was a feasible alternative to the bulkhead/revetment that would stabilize the river shoreline and prevent the continued erosion of KDP's upland. CCL urged that the "alternative" is to do nothing and leave the property at *status quo* since, they suggested, little erosion may have occurred in the last 10-12 months. However, the testimony of Dr. Kana clearly established a trend of continuous and significant shoreline erosion along the riverbank for several decades. That evidence clearly establishes a need for erosion control along the disputed shoreline.

CCL and OCRM raise issues as to the revetment's long term success without training jetties or a wider mat. Petitioner asserts that the proposed structures should first be implemented

and if "hot spots" (meaning locations on the revetment that are susceptible to high energy forces that result in considerable scour or instability at that location) develop it can implement a remedial plan for those locations and seek permission from the Department to proceed. I nonetheless find that in light of the nature of the riverbank and its limited use discussed below, it is much more reasonable to implement a solution that has the least environmental impact and require KDP to seek further approval if a more comprehensive approach is needed.[10]

As noted above, the extent and rate of erosion varies along the riverbank over the length of the proposed revetment. The erosion is greatest adjacent to Beachwalker Park and along what Mitchell Bohannon[11] described as the "bite" on the outside, that is the Captain Sam's side, of the bend on the Kiawah River, up to approximately 1,000 feet from the western terminus of the proposed revetment. Moving from the east end to the west end of the proposed structure, the severity of the erosion and height of the escarpments diminish in a westerly direction towards the inlet at approximately survey point "F" on Petitioner KDP's Exhibit 77. This location is approximately 900 feet from the western terminus of the proposed revetment (the riverbank where the revetment is proposed west of point "F" is referred to hereinafter as the "western section").

The full extent of both of the structures (*i.e.*, the bulkhead and the ACB mat) depicted in the sketch drawing submitted with the permit application are not currently necessary to stabilize the bank for the western section. In many locations along the western section, the bulkhead may not be necessary and an ACB mat much shorter in width than forty feet may well suffice to

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[10] I recognize that there is credible evidence that the Department has been uncooperative during the permitting process of this case. As asserted by KDP, it appears that the desire of certain permitting officials to preserve the upland of Captain Sam's forever in a natural state, a goal beyond their regulatory purview, took precedence over their objective application of the clear wording of the controlling statutes and regulations. For instance, because the project did not involve dredging, the application qualified as a minor activity under S.C. Code Ann. Regs. 30-1 (34) and the Department was required to act on a completed application within 30 days. S.C. Code Ann. § 48-39-150(C). Rather, the Department took quite the opposite approach. By letter dated June 25, 2008, the Department attempted to cancel KDP's application because the project engineer had not provided an affidavit of publication for the published newspaper public notice within 30 days of its publication. Though the Department's staff received this affidavit June 26, 2008, it did not reinstate the application until mid-July 2008. Moreover, by August 28, 2008, the Department had prepared a draft decision denying the permit application. All that then remained was internal review of the draft decision. Nonetheless, the Department waited more than three months before rendering its decision. Despite this evidence (and other concerns in the record), it is the Court's hope and belief that the Department will treat all parties in the case fairly in the future and conduct its important responsibilities in accordance with the standards and parameters prescribed by the General Assembly in a diligent, timely manner.

[11] Mr. Bohannon is a professional engineer with extensive experience in the design and implementation of bulkheads and revetments. I found his testimony to be persuasive.

stabilize the riverbank according to Bohannon. More specifically, the western section is best suited now and perhaps permanently to the "soft" approach described by Bohannon that would involve limited use of the bulkhead to locations where the reveal/scarp is greater than two feet. There is no need at the current time for the ACB mat on the western portion of the revetment to be greater than eight (8) feet in width.[12] Furthermore, the ACB mat on the far eastern end of the revetment adjacent to Beachwalker Park, where there is some marsh grass below and adjacent to the escarpment, should be adjusted in the field during initial installation to avoid unnecessarily placing the ACB mat over marsh grass. I do not find that this approach is a piecemeal approach but is rather a sound attempt to limit the impact to the environment until facts warrant otherwise.

Cumulative Impacts[13]

Piping Plovers

The Department and CCL argue that the proposed bulkhead/revetment will have adverse effects on piping plovers.[14] Piping plovers are a "threatened" species under the federal

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[12] In the event that post-construction monitoring of the western section of the constructed bulkhead/revetment reflects a need for the extension of the ACB mat beyond eight (8) feet in width, KDP shall be allowed to seek the Department's approval to extend the ACB mat as is determined necessary to prevent further erosion at such location(s). Nonetheless, recognizing the Department's dilatory treatment of KDP's permit, I note that any unnecessary delays should subject the Department to sanctions.

[13] Two other issues were raised by the parties that warrant only cursory treatment. OCRM and CCL contend that one possible negative long-term impact of residential development on Captain Sam's is the debris from the potential destruction of the houses and improvements if the peninsula takes a direct hit from a very powerful hurricane. No evidence was offered concerning impact of debris as a result of a hurricane. Furthermore, a storm of sufficient magnitude to breach Captain Sam's at the neck would cause widespread devastation across Kiawah Island and other nearby barrier islands. Moreover, the "impact" resulting from potential residential development that may occur as a result of the permitting of a bulkhead and revetment is simply too conjectural to probative and does not appear to be a pertinent inquiry for this Court in this context.

Similarly, OCRM included in its reasons for denying the permit that the potential residential development may result in impacts to freshwater and saltwater wetlands. Even if this were an issue before this Court, no evidence indicated that any wetlands will be impacted by any residential development upon Captain Sam's Spit or even the existence of any wetlands anywhere on the Spit. Thus, the evidence did not prove that there probably would be any long range impacts on freshwater or saltwater wetlands from the proposed development. Moreover, if there is ever any proposed impact to any discovered wetlands, the Department can certainly evaluate them carefully when it decides that future permit application.

[14] In analyzing this issue, I find the testimony of Lee Walton to be credible and persuasive. Mr. Walton has experience studying not just shorebirds, but specifically piping plovers for the U.S. Fish & Wildlife Service. Moreover, his experience has been identifying areas that were suitable for **wintering** piping plovers, which is a specific issue before this court. In fact, the United States Fish & Wildlife's designation of the wintering habitat is based upon his recommendations.

On the other hand, though the ornithologists presented by the Department and CCL seem knowledgeable (particularly Dr. Hughes), neither had any specific information as to the **current** level of activity on the beach from the Park's 50,000 annual visitors or from property owners and their guests from the thirty-five years of development over much of the island. Nor were they able to provide a reasonable approximation of increase in future activity on

Endangered Species Act. However, the piping plovers that visit South Carolina and Kiawah Island are wintering piping plovers. The migratory piping plovers that visit Kiawah Island are wintering rather than nesting or breeding piping plovers - a salient distinction. These birds "winter" on Kiawah Island for a few months. A wintering piping plover doesn't have a small territory. The birds begin arriving on Kiawah Island in July and into August with the biggest "push" in September. Some stop on the island temporarily and then continue migrating while others stay for the winter. They begin migrating back north to their breeding grounds as early as April.

Though the piping plovers do "winter" upon Kiawah Island, their habitat is significant. There has never been a single sighting of a piping plover according to the data in the proposed revetment area on the Kiawah River or above the dune line on Captain Sam's. As explained by Mr. Walton, those areas are not critical habitat for piping plovers. Furthermore, the Court takes judicial notice of 50 C.F.R. pt. 17, "Final Determination of Critical Habitat for Wintering Piping Plovers; Final Rule," propounded by the United States Fish and Wildlife Service establishing the boundaries of critical habitat for wintering piping plovers. The text description of S.C. Unit-10, which controls over the associated illustration, specifies that the critical area of habitat includes the beach along Seabrook Island and extends 0.1 mile north of Captain Sam's Inlet. S.C. Unit-10 does **not** extend above the building setback line on Captain Sam's. Federal Register, Vol. 66, No. 132 at pp. 36042 (Col.3), 36045 (Col.3), and 36069 (Col. 2).

Nevertheless, the Department and CCL argue that the adverse effect to the piping plover emanates not from the proposed project, itself, but from the future residential development that would occur as a result of the project. However, as noted above, the designated habitat does not extend into the limited developable acreage under the Development Agreement. The potential residential development will not occur in critical plover habitat, nor will it occur in close proximity. The Department and CCL assert that the proposed project will nonetheless adversely affect the piping plover because the structure will facilitate residential development and with that residential development a greater number of people and animals will use the beach. That use is not necessarily problematic. The Department and CCL further aver that the people and their

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the beach if up to fifty houses, about 1% of the island's residential dwellings, were ultimately constructed on Captain Sam's.

The gist of their opinions was that any increase at all in use of the beach might be detrimental, yet they provided no credible factual support for this theory. In fact, the studies on disturbance of piping plovers Dr. Hughes and Mollenhauer referred to dealt with "breeding and nesting" piping plovers, not wintering piping plovers.

animals will disturb the piping plovers on the beach in front of their homes and that the disturbance will be so significant that it will adversely affect the birds' health upon returning to their nesting grounds.

I find the evidence supporting the Department's and CCL's contention conjectural. Neither Dr. Hughes nor Mollenhauer advocated that recreational activity on the beach should be prohibited. Instead, they both advocated that beachgoers use "reasonable" behavior as the best way to avoid or reduce any possible disturbance of these birds. There was no proof that any persons on the beach from the up-to-50 houses[15] would engage in unreasonable behavior that would increase any theorized frequency or intensity of disturbance of these wintering piping plovers on Kiawah Island. Additionally, Kiawah is primarily a second home community in which eighty percent of the home owners spend an average of only 6 to 7 weeks at their home per year. That time is primarily during the summer months.

In fact, the mere existence of the piping plovers on Captain Sam's Spit is questionable. In 2007, only one piping plover was seen at Captain Sam's though fourteen were seen on the east end of Kiawah Island. In 2008, eleven birds were seen on Kiawah Island and no birds were seen at Captain Sam's. Furthermore, the evidence did not establish that wintering piping plovers shy away from the beach in front of the miles of developed areas on the Kiawah Island beachfront where there may be suitable mudflats or beaches, nor that Kiawah Island's beachgoers have ever been harmful to them. Wintering piping plovers have been documented on the beach for the entire length of Kiawah Island, where over 4,150 properties have been sold. Beachwalker Park has more than 50,000 visitors annually, and the Sanctuary Hotel is situated on the front beach. S.C. Unit-10 also includes the fully developed beachfront on Seabrook Island.

The Court also notes that OCRM issued a permit in 2006 to the Town of Kiawah Island to scrape and alter sizeable stretches of ocean beach and tidal flats adjacent to The Ocean Course Golf Course that were located within designated habitat for wintering piping plovers that is identified as S.C. Unit-9. Even though that project directly altered the critical habitat, OCRM permitted the activity under a mitigation plan approved by the United States Fish & Wildlife Service. Here, neither the project nor the potential residential development will alter critical habitat, as occurred with the permitted project adjacent to the Ocean Course at the opposite end of Kiawah Island.

[15] The development upon Captain Sam's will be limited to no more than fifty homes.

Therefore, I find that that neither the proposed bulkhead/revetment nor potential future residential development will have a material or adverse effect on the wintering piping plovers or their critical habitat.

Diamond-back Terrapins

CCL argues that the proposed bulkhead/revetment will have an adverse impact on diamond-back terrapins. These particular terrapins have not been listed as an endangered or threatened species in South Carolina. Furthermore, even if these terrapins were a protected species, whether denying this permit would protect the species in the area of Captain Sam's is dubious. Mr. Limehouse testified that diamond-back terrapins used to be in the river by the hundreds, now they are rarely seen.[16] The accuracy of the nesting data relied upon by Dr. Dorcas is also questionable. The data was gathered more than 15 years ago before the sharp decline in the terrapin population in the several tidal creeks monitored behind Kiawah Island. Additionally, CCL's expert, Michael Dorcas, Ph.D., indicated that untended or forgotten crab traps, mostly commercial, are the primary cause of premature mortality of terrapins. Neither the bulkhead or revetment will have any bearing on the number of crab traps that are in the river now and may be placed there in the future, nor on the tendency of some to ignore the traps they have set in rivers and creeks.

It is even more unclear whether the nesting occurs in the area where significant erosional escarpment has taken place. CCL's expert, Michael Dorcas, testified that the vertical bulkhead "could" affect terrapins that were seeking to nest in the upland area on Captain Sam's. He did not testify that the proposed structure, to a reasonable degree of certainty, most probably **would** have a significant negative effect on terrapins. Moreover, the **vertical** bulkhead portion of the proposed structure is intended to stabilize the existing **vertical** escarpments created by erosion. The bulkhead follows the contours of those elevations. The bulkhead should not increase the vertical face that might confront nesting terrapins beyond current vertical escarpment conditions resulting from erosion.

The evidence also did not demonstrate that the terrapins will sustain any significant adverse effects from the revetment (or the potential residential development, if that were a proper

[16] Though that fact lessened the need to take steps to protect these animals who are not considered endangered, I was especially struck by the sincerity of the testimony of Mr. Limehouse regarding the terrapins and the need to preserve Captain Sam's.

consideration). For instance, though CCL's expert testified that the terrapins display fidelity to previous nesting areas, he acknowledged that it is unknown whether a terrapin that is unable to nest at a particular location will seek another location. To the extent that terrapins seek possible upland nesting sites on Captain Sam's peninsula, they will still have access for the more than 3,000 feet of the peninsula's river shoreline between the western end of the proposed revetment area and Captain Sam's Inlet.[17]

Public Use of the Riverbank at Low Tide

The erosion of the river shoreline has contributed to the creation of a sloping sandy river bank adjacent to Captain Sam's. Kayakers and other boaters occasionally pull up on this bank. Much of this bank in the river's bend would be covered with the ACB mat and subsequently by marsh grass which is intended to grow up through its holes. However, the use of the bank by the public is limited.[18] As explained by the Department's project manager on KDP's permit application, there is "some public use" of the riverbank at low tide, but it is not "heavily used by the public." Accordingly, though "there might be some minimal adverse effect on public access," that impact is "not strong enough to bar the permit from being issued."

The Court therefore finds that construction of the revetment will not unreasonably eliminate public access and use. In fact, 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. Furthermore, if a boater or kayaker does not desire to land on the ACB mat (regardless of whether it is exposed concrete or covered by sand, spartina, or other vegetation), then the remaining riverbank shoreline in the immediate and general vicinity will remain available. Moreover, Captain Sam's Inlet and Seabrook Island on the opposite side have sandy shorelines offering varied landing sites for river boating and kayaking enthusiasts.

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[17] That is not to mention the many dozens of miles of Kiawah's other marsh shorelines and Seabrook shorelines.

[18] CCL entered into evidence pictures of a party of kayakers on the bank of the area of the proposed revetment. However, that evidence appears contrived. The persons depicted in the photographs were attending a planned event to raise funds to pay for CCL legal expenses to contest the granting of this permit. CCL also presented testimony by other individuals that used the river bank area on a limited basis. Though that use is a consideration in limiting the permit, as explained above, it does not establish a basis to deny the permit. Notably, Ms. McAllister who now lives upon Kiawah Island, which was once pristine, now wishes that a permit which would allow others to live upon the island be denied because it will interfere with her enjoying a pristine area of the island.

Development upon Captain Sam's

The large scale development of Kiawah Island as a resort residential community began in the mid-1970s. KDP and its related companies have been the master developer of Kiawah Island since June 1988, and Kiawah Island became an incorporated municipality the same year. The zoning ordinances of the Town of Kiawah Island (the "Town") and a development agreement entered by the Town in 2005 (Development Agreement) provide for the development of no more than 50 home sites on Captain Sam's peninsula on the thirty-one or more highland acres that lie between the critical line on the river side and the OCRM set back line on the ocean side. The Development Agreement provides that KDP can convey a maximum of twenty of these acres as home sites to purchasers, or about 14% of the total highland of the peninsula. The Development Agreement requires that the remainder of Captain Sam's peninsula be preserved in a natural state, with limited exceptions (*e.g.*, the entry road which may be pervious material and a few boardwalks) in perpetuity through encumbrance by a conservation easement to the Kiawah Island Natural Habitat Conservancy.

The Development Agreement also requires that this green space be conveyed to the Kiawah Island Community Association. KDP and its related entities have a history over the last twenty years of developing projects on Kiawah Island responsibly and in an environmentally sensitive manner with due regard for the natural setting. KDP and its related development entities have obtained approximately 500 permits from OCRM during this time and accomplished all of the permitted work in accordance with these permits, without violation or citation. In fact, these KDP entities have responsibly developed small islands and narrow peninsulas in marshlands and along tidal creeks on and adjacent to Kiawah Island.

Furthermore, the planned future development of detached single family dwellings on Captain Sam's will occur behind the State's setback line; be served by appropriate utilities; be separated by four to seven rows of established, high dunes well back from the beach; be placed primarily within the trees and other evolving vegetation on the northern side of Captain Sam's; be implemented in an environmentally sensitive manner by an experienced developer that has historically abided by its permits; and the development is both limited and accommodating to the natural features of Captain Sam's peninsula.

Mark Permar, the island's principal land planner for 25 or more years, plainly explained the many mitigating measures that will likely be employed by KDP to tailor the residential

development to the site, such as limiting the elevation of houses to no more than one and a half stories, limiting lawns, using natural landscaping schemes, utilizing shared driveways, minimizing the number of beach access paths and boardwalks, and having no more than two docks along more than a mile of river edge and marsh shoreline. It is worth noting here that about 86% of the 150 acres of highland on Captain Sam's will be preserved as "green space" under the strict Development Agreement terms and a conservation easement to be granted the Kiawah Island Natural Habitat Conservancy. This undevelopable acreage will be owned by the Kiawah Island Community Association, and will remain in its natural state. Only a maximum of twenty acres will be available for sale as home sites.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, I conclude the following as a matter of law:

General Findings

The proposed bulkhead/revetment is located in a critical area pursuant to S.C. Code Ann. § 48-39-10 (Supp. 2008). S.C. Code Ann. § 48-39-130(C) (Supp. 2008) requires a person or entity to obtain a permit for any alteration of the "critical area" of the coastal zone. The Administrative Law Court has contested case jurisdiction over those issues pursuant to S.C. Code Ann. § 1-23-600(A)(Supp. 2008) and S.C. Code Ann. § 44-1-60(F)(2)(Supp. 2008). Because this case involves two requests for contested case hearings which were consolidated, KDP and the 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 Ann. §§ 48-39-10 *et seq.*, the regulations promulgated thereunder, 23A S.C. Code Reg. §§ 30-1 through 30-18, and the CZMP. See Leventis v. S.C. Dep't of Health & Envtl. Control, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2001). CCL, as the party challenging the Department's decision to authorize 270' of revetment, has the burden of proving that the Department's decision was contrary to the Act, Regulations and CZMP and that the bulkhead/revetment should have been denied. Id. The standard of proof in weighing the evidence and making a decision on the merits at a contested case hearing is a preponderance of the evidence. Nat'l Health Corp. v. S.C. Dep't of Health & Envtl. Control, 298 S.C. 373, 380 S.E.2d 841(Ct. App. 1989). In addition, the Court "shall give consideration to the provisions of § 1-23-330 with regards to the Department's specialized knowledge." S.C. Code Ann. § 44-1-60(F)(2) (Supp. 2008).

Where an expert's testimony is based upon facts sufficient to form the basis for an opinion, the trier of fact determines its probative weight. Berkeley Elec. Coop. v. S.C. Pub. Serv. Comm'n, 304 S.C. 15, 20, 402 S.E.2d 674 (1991). A trier of fact is not compelled to accept an expert's testimony, but may give it the weight and credibility he determines it deserves. Florence County Dep't of Social Servs. v. Ward, 310 S.C. 69, 425 S.E.2d 61 (Ct. App. 1992). The trier of fact may also accept the testimony of one expert over another. S.C. Cable Television Ass'n. v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 417 S.E.2d 586 (1992).

General Considerations of Section 48-39-150

S.C. Code Ann. Section 48-39-150 sets forth the general considerations to be taken into account for every critical area permit application. See also S.C. Code Ann. Regs. 30-11 (Supp. 2008). The pertinent considerations set forth in S.C. Code Ann. § 150 (A) for this application are:

> In determining whether a permit application is approved or denied the department shall base its determination on the individual merits of each application, the policies specified in Sections 48-39-20 and 48-39-30 and be guided by the following general considerations:
>
> * * *
>
> (3) The extent to which the applicant's completed project would affect the production of fish, shrimp, oysters, crabs or clams or any marine life or wildlife or other natural resources in a particular area including but not limited to water and oxygen supply.
>
> (4) The extent to which the activity could cause erosion, shoaling of channels or creation of stagnant water.
>
> (5) The extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources.
>
> (6) The extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable historic and archeological sites of South Carolina's coastal zone.
>
> (7) The extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state.
>
> (8) The extent of any adverse environmental impact which cannot be avoided by reasonable safeguards.
>
> (9) The extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project.
>
> (10) The extent to which the proposed use could affect the value and enjoyment of adjacent owners.

Here, neither the proposed bulkhead/revetment nor the possible future residential development will have a material adverse effect on wintering piping plovers, diamond back terrapins, the habitat for either, or other marine life or wildlife. Specifically, as to diamond backed terrapins, the Court additionally concludes they are not a protected species and that the law allows individuals to possess up to two terrapins at a time provided they are not possessed for commercial purposes. See S.C. Code Ann. § 50-5-2300 (Supp. 2008). In fact, with respect to habitat concerns, the ACB mat likely will, instead, provide additional habitat for oysters and perhaps other marine life associated with marsh grass habitat that may spring through the mat's multiple holes. The ACB mat will thus have a limited effect on public access to tidelands because it covers a sandy river shore. However, that impairment is not substantial.

Furthermore, the project will clearly reduce and likely stop erosion rather than precipitate any erosion. The elimination of that erosion will further provide an economic benefit to KDP. In fact, the benefit from protection of its upland through stabilization of the riverbank is considerable when compared with the benefit of leaving the riverbank in its unaltered state and allowing the erosion to continue unabated into the forested highland and dune areas along the river. This erosion has no positive benefit for anyone and clearly is a detriment to the landowner. Likewise, the proposed revetment will not have an adverse effect on the value and enjoyment of adjacent owners. KDP is the only adjoining highland owner (including owning the land used for Beachwalker Park at the eastern end of the Spit). The Court cannot agree with the suggestions made by CCL that the public is the adjoining owner as a result of its "right of access" across KDP land to the beach from the Beachwalker Park leased area. KDP is the fee simple owner of the park parcel and seaward therefrom to the MHW line. No evidence was offered refuting this. Additionally, O'Rourke testified that Charleston County PRC, which operates the park, fully supports the entire revetment permit.

The proposed project, through its mat over the sloping surface of the bank and its bulkhead against the vertical scarps, also provides reasonable safeguards against adverse environmental impacts. These and other types of revetments have been historically approved by the Department, including on Kiawah Island for these same protective purposes. Accordingly, the revetment will not have adverse environmental impacts.

As set forth above, Section 48-39-150 also instructs the Department to be guided by the policy statements in S.C. Code Ann. §§ 48-39-20 and 48-39-30 in assessing the potential impacts

of projects in critical areas. See also S.C. Code Ann. Regs. 30-11 (Supp. 2008). The pertinent portions of Section 48-39-20 are as follows:

> The General Assembly finds that:
>
> (A) The coastal zone is rich in a variety of natural, commercial, recreational and industrial resources of immediate and potential value to the present and future well-being of the State.
>
> * * *
>
> (D) The coastal zone and the fish, shellfish, other living marine resources and wildlife therein, may be ecologically fragile and consequently extremely vulnerable to destruction by man's alterations.
>
> (E) Important ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historical values in the coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values.
>
> (F) In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone while balancing economic interests, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate.

The pertinent portions of Section 48-39-30 provide as follows:

> (A) The General Assembly declares the basic state policy in the implementation of this chapter is to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State.
>
> (B) Specific state policies to be followed in the implementation of this chapter are:
>
> > (1) To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;
> >
> > (2) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations;
> >
> > * * *
> >
> > (5) To encourage and assist state agencies, counties, municipalities and regional agencies to exercise their responsibilities and powers in the coastal zone through the development and implementation of comprehensive programs to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values as well as to the needs for economic and social development and resources conservation.

* * *

(D) Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.

These policy statements require a balancing of economic-development benefits and environmental preservation. Even though the focus of the inquiry is on the effects of the project, neither the bulkhead/revetment nor the potential limited residential development will result in any significant harm to the public resources or marine or other plant or animal life, nor significantly impair public access to critical areas. As previously found, the potential residential development is not ill-planned and will be implemented in a low density, environmentally sensitive manner. It will also be subject to local, state, and possibly federal permitting requirements. Neither the proposed bulkhead/revetment nor the potential limited residential development transgresses the policies set forth in these two statutes.

Additionally, the Court notes that these policies refer to the role of local municipalities. Here, the Town of Kiawah Island has implemented measures to safeguard the environment in the restrictions it imposed on the potential residential development. These safeguards include the legal preservation through a conservation easement of almost all but twenty acres of the peninsula in a natural state in perpetuity. This salient requirement is certainly in furtherance of the policies in favor of protecting coastal resources. The twenty acres also appear to be not only behind several rows of high dunes but also more than 3,000 feet from the inlet.

KDP thus established that there are no significant negative impacts from either the bulkhead/revetment or the potential future residential development under S.C. Code Ann. Section 48-39-150 (A) and S.C. Code Ann. Regs. 30-11 (B). Further, neither the project nor the potential residential development are in violation of the relevant policies set for in Sections 48-39-20 and 48-39-30.

Regulation 30-11(C)

S.C. Code Ann. Regs. 30-11(C) sets forth additional guidelines to be considered when making permitting decisions regarding activities in the critical areas.

30-11(C)(1)

The first of the guidelines in Regulation 30-11 (C)(1) requires consideration of "[t]he extent to which long-range, cumulative effects of the project may result within the context of

other possible development and the general character of the area." S.C. Code Ann. Regs. 30-11(C)(1) (Supp. 2008). It is this provision which constitutes the underlying objection to this permit by CCL and, in particular, the Department. They argue that the bulkhead/revetment will allow homes to be built upon Captain Sam's which will change the character of the **upland** area. However, the controlling statutes and regulations for critical area permits do not require a determination of whether high land outside the Department's critical area jurisdiction is "suitable" for residential development. Instead, the pertinent inquiry is the cumulative impacts of the project **within** the critical area, not the cumulative impacts of future development on the high ground **outside** the critical area. In other words, the area for which the Department has regulatory authority is the critical area, not the high ground **outside** the critical area.[19] Construing this provision otherwise would lead to a substantial expansion of the Department's authority to regulate the development of entire communities. Conceivably, the Department could deny critical area permits near towns or cities simply because it believes the permits would facilitate upland sprawl and general over-development. In fact, the Department's project manager testified that he denied the revetment at all locations on Captain Sam's Spit, other than adjacent to Beachwalker Park, because he believed potential residential development would destroy the pristine nature of Captain Sam's. Thus, the Department avers that it has the authority through coastal permitting to deny upland development even against the Town's approval of that development through its zoning process. If the General Assembly had intended to authorize such a considerable expansion of the Department's authority it is inconceivable that it would have done so with such general language. See Captain's Quarters Motor Inn, Inc. v. S.C. Coastal

[19] The decision of the South Carolina Supreme Court in Spectre v. S.C. Dep't of Health and Envtl. Control, Op. No. 26764 (S.C. Sup. Ct. filed Feb. 1, 2010)(Shearouse Adv. Sh. No. 5 at 35) does not alter this conclusion. In Spectre, the Supreme Court held that the Coastal Zone Management Plan (CZMP) had the force and effect of law; its reach extended beyond the critical areas in the eight coastal counties; and it could be applied to isolated freshwater wetlands that were not subject to the jurisdiction of the Army Corps of Engineers. Spectre did not involve a critical area permit; instead the applicant was seeking a permit to fill isolated freshwater wetlands for a commercial development. This type of activity was expressly addressed – and discouraged—in the CZMP, which specifically provides that upland wetlands play an important role in the ecosystem and prohibits most commercial construction requiring fill of freshwater wetlands. Accordingly, the adverse effects in Spectre arose from the immediate impact of the project itself, not from some later development which might have arisen if the permit had been granted. In this case, to the contrary, the Department denied the permit for the revetment based not upon immediate adverse impacts on the critical area, but upon the assumption that the construction of the revetment would lead to the residential development of the upland portion of Captain Sam's Spit. Nowhere in Spectre did the Supreme Court rule that the CZMP authorizes the Department to deny critical area permits because of the effects of later foreseeable development on upland. Moreover, as is further discussed herein, I find that the proposed development is consistent with the CZMP.

Council, 306 S.C. 48, 413 S.E.2d 13 (1991) (administrative agencies are possessed of only those powers expressly conferred or necessarily implied for them to effectively fulfill the duties with which they are charged); 3 Sutherland Statutory Construction § 65:2 (6th ed.) (statutes authorizing administrative agencies to exercise powers tending to interfere with established or traditional property rights are strictly interpreted).

Furthermore, the regulations or statues granting the Department authorization to use its permitting power do not govern "highland uses." The authority to determine appropriate land uses has, over the history of our State's law, been relegated to the municipalities and counties having planning and zoning jurisdiction and expertise to best determine such planning matters. See, e.g., Bear Enterprises v. County of Greenville, 319 S.C. 137, 459 S.E.2d 883 (Ct. App. 1995); Rushing v. City of Greenville, 265 S.C. 285, 217 S.E.2d 797 (1975). Thus, the governmental consideration of whether residential uses are appropriate above the critical line and landward of the setback line for Captain Sam's is a zoning matter within the province of the Town of Kiawah Island. To the contrary, the Department's actions in this case appear to be colored by its mistaken belief that it may, simultaneously, trump local zoning and development agreements and decree that privately owned upland property remain permanently undeveloped and in a natural state without any suggestion of fair compensation to the owner. See e.g., S.C. Code Section 48-39-30(c)("In the implementation of the chapter, no government agency shall ... issue any order ... so as to constitute a taking of property without the payment of just compensation in violation of the Constitution of this State or of the United States"). However, nowhere do the governing statutes and regulations prohibit lawful, zoned real estate development on highland parts of barrier islands above OCRM critical lines and landward of OCRM ocean setback lines in the coastal zone. Instead, they caution against "ill planned development." S.C. Code Ann. § 44-39-20(E) ("E. Important ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historical values in the coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values.").

Likewise, the focus is on whether the proposed structure satisfies the applicable South Carolina regulations and statutes governing the permitting of bulkheads and revetments in critical areas. None of these controlling regulations and statutes establish "stability of the

adjacent highland" as a consideration in acting on a critical area permit to construct a bulkhead or revetment or a river bank.

No regulation or statute prohibits construction of a bulkhead or revetment that retards the process of shoreline change, another argument made by OCRM and CCL in opposition to this permit. Every bulkhead or revetment, by its very nature, must "interfere with the natural process of erosion" to do its intended job. If the General Assembly had sought to create an exception for the permitting of revetments and bulkheads where the structure might interfere with the erosion in certain instances, the legislature could have so specified. It did not. Instead, the General Assembly specifically recognized the fundamental need to protect upland from destruction from the natural process of erosion on tidal rivers. Indeed, it authorized the Department to issue permits for the construction of bulkheads and revetments in locations other than the front beach:

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

S.C. Code Ann. § 48-39-120 (E) (emphasis added). See also, S.C. Code Ann. Regs. 30-12 (C)(1)(c) ("Bulkheads and revetments will be prohibited where marshlands are adequately serving as an erosion buffer, where adjacent property could be detrimentally affected by erosion or sedimentation, or where public access is adversely affected **unless upland is being lost due to tidally induced erosion.**")(emphasis added).

Additionally, in this instance, the potential residential development will not have deleterious impacts even if the Court were to consider the effects of the potential residential development. OCRM and CCL do not challenge KDP's history of environmentally sensitive development methods, permit adherence record, or any of the specific strategies, methods, and approaches that KDP will use in its limited residential development of Captain Sam's. Rather, they urge that **any** residential development at all, regardless of safeguards and protections, on the now-undeveloped Captain Sam's highland peninsula along the ocean and river, is **per se** "ill-planned." The Court concludes that the numerous measures and safeguards KDP intends to utilize in its development of Captain Sam's demonstrate that this limited residential use would be

sensitively planned, responsive to the natural features of the peninsula, attentive to its flora and fauna, and without significant negative effects on the critical area. Even though consideration of the effects of the upland is beyond the purview of the regulation, the Court concludes that there was no evidence adduced that the residential development would have any material adverse environmental effects on the upland. The development team also has a twenty-two year unblemished "track record" for compliance with all OCRM permits.[20]

30-11 (C)(2)

The second guideline of Regulation 30-11 (C) provides that:

> Where applicable, the extent to which the overall plans and designs of a **project** can be submitted together and evaluated as a whole, rather than submitted piecemeal and in a fragmented fashion which limits comprehensive evaluation.

S.C. Code Ann. Regs. 30-11 (C)(2) (emphasis added). The Department and CCL contend that this application was piecemeal because (i) the revetment plan submitted by KDP did not include the final construction drawings, and (ii) KDP did not submit plans for the future residential development on Captain Sam's. However, KDP submitted sufficient design plans for the proposed revetment. KDP submitted the application for the project, i.e. the revetment, as a whole.[21] The evidence reflected that it is customary practice with a project of this nature, for the Department to base its permitting decision on conceptual renderings, such as those supplied with this application, rather than requiring the applicant to incur the substantial expense of full blown construction and bid drawings. If the permit is granted, the customary and practical course is that the applicant then submits construction drawings for conformance and final approval, seeking to work out any details then. Likewise, the failure to request training jetties cannot be considered an omission in the application, as suggested by counsel for CCL and OCRM, as KDP has no intent to pursue them at this time. Obviously, it would be unreasonable to require that a permit request provide an alternative design element for every contingency that may arise.

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[20] It also bears pointing out that this regulation specifies that OCRM "must **in part** base its decisions regarding permit applications on the policies specified in Sections 48-39-20 and 48-39-30, and thus be guided by the following...." R. 30-11 (C) (emphasis added). This regulation does not state that the sole consideration, or even the primary consideration, is "extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area."

[21] In fact, in an effort to assure that the project was submitted as a whole, KDP requested that Charleston County PRC withdraw an earlier application it had filed with OCRM to construct solely a bulkhead of 270 feet in front of Beachwalker Park. This allowed KDP, utilizing Thomas and Hutton and other experts, to develop a single engineering solution.

Additionally, if the Department had truly believed the application to be incomplete, presumably it would have so informed KDP at the time of submission of the application. It did not do so. To the contrary, throughout the application process, KDP repeatedly offered to provide any additional information that the Department desired for purposes of its determination. The Department never requested any further information from KDP. Indeed it never responded to the several offers of more data by KDP as to either the design of the revetment or the possible future residential use on the upland on Captain Sam's Spit.

Moreover, as to the failure to submit a specific residential plan, the "project" under consideration is the bulkhead/revetment, not the future residential use of the upland. The applicant testified to valid reasons for not having a specific development plan for this moderate sized "neighborhood." Detailed plans fixing the precise locations and number of homesites and the exact location of the infrastructure improvements were not necessary to gauge the cumulative effects of the bulkhead/revetment.

I therefore conclude that the permit application does not violate Regulation 30-11 (C).

Regulation 30-12 (C)

S.C. Code Ann. Regs. 30-12 (C) (Supp. 1999) sets forth standards for the construction of bulkheads and revetments erosion control structures. It provides that for bulkheads and revetments which are not ocean front:

> (1) In an attempt to mitigate certain environmental losses that can be caused by these structures, the following standards are adopted:
>
> > (a) Structures must be designed to conform to the critical area line (upland boundary), to the maximum extent feasible, and constructed so that reflective wave energy does not destroy stable marine bottoms or constitute a safety hazard;
> >
> > (b) Structures 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;
> >
> > (c) Bulkheads and revetments will be prohibited where marshlands are adequately serving as an erosion buffer, where adjacent property could be detrimentally affected by erosion or sedimentation, or 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.

S.C. Code Ann. Regs. 30-12(C).

Here, although public access to the riverbank at low tide may be affected on a very limited basis, Regulation 30-12 (C) specifically allows some adverse effect where "upland is being lost due to tidally induced erosion." Clearly, KDP's upland is being lost due to tidally induced erosion, and there is no feasible alternative that will stabilize this eroding riverbank. Additionally, although the ACB mat degrades the public uses of the shoreline where the mat is approved, it does not eliminate all public access. Nevertheless, there are other sandy landing spots at low tide in the immediate vicinity in general and specifically as a result of the reduction in the mat as ordered below.

The Court further concludes that despite the arguments of the Department and CCL that the design of the revetment is insufficient and that the revetment may fail, the design is adequate to stabilize the bank under normal conditions, its intended purpose. Its intended purpose is not to prevent a breach of the peninsula in the event the catastrophic hurricane. In sum, the Court 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).

Public Trust Doctrine

CCL argues further that this bulkhead/revetment should be denied for violating the public trust doctrine. The premise of CCL's argument is that the public has the right to use public trust lands and waters for recreational purposes, including fishing, bathing, swimming and other recreational uses. Specifically, the public has a right to pull up kayaks and boats on the sandy banks of the Kiawah River, and to swim, fish and crab on the banks of the river in the location of the proposed revetment. Accordingly, if the revetment/bulkhead structure were constructed as requested, these public rights would be eliminated in violation of the public trust doctrine.

Clearly, the above laws set forth the parameters of when coastal public trust land may be used for private purposes. In Sierra Club v. Kiawah Resort Associates, 318 S.C. 119, 456 S.E.2d 397 (1995), the Supreme Court expounded on the public trust doctrine in implementing these laws and outlined the test for determining whether a particular project violated it. The Court held that:

> The legislation creating the Coastal Council [now OCRM] and defining its duties, while not explicit, implicitly charges the Coastal Council with administering the Public Trust lands in connection with coastal waterways. See S.C. Code Ann. § 48-39-10, et. seq.

> The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

Illinois Central R. Co. v. Illinois, 146 U.S. 387, 453, 13 S.Ct. 110, 118, 36 L.Ed. 1018, 1042 (1892). Clearly, under the South Carolina Coastal Management Act, the State through the Coastal Council maintains control over the public trust lands. See e.g. Caminiti v. Boyle, 107 Wash.2d 662, 732 P.2d 989 (1987). Coastal Council's Regulations specifically state that "[n]o permit shall convey, nor be interpreted to convey, a property right in the land or water in which the permitted activity is located." 24A S.C.Code Ann.Regs.R. 30-4(E). Since no interest in the land or water within the public trust is conveyed by the permit, the relevant inquiry is whether the docks **substantially impair** the public interest in the public trust lands and waters. As there was testimony that the docks would not substantially impair marine life, water quality, or public access to the area, we hold that the permits at issue do not violate the public trust doctrine. We affirm.

Sierra Club, 456 S.E.2d at 402 (emphasis added). Here, the bulkhead/revetment will not substantially impair the recreational activities of boaters, kayakers, and others, nor will it substantially impair or unreasonably restrict their use of the public trust tidelands including a portion of the southerly bank of the Kiawah River.

Coastal Zone Management Plan[22]

The Department and CCL contend that the proposed bulkhead/revetment will violate the several policies in the CZMP, including the policies for:

- Activities in Areas of Special Resource Significance for Barrier Islands (Chapter III(C)(3)(XII)(A));
- Dune Areas (Other Than Critical Areas). (Chapter III(C)(3)(XII)(B));
- Public Open Space, (Chapter III(C)(3)(XII)(D));
- Geographic Areas of Particular Concern (Chapter IV(A)(2)(a)(8)).[23]

[22] KDP also argues that the policies in the CZMP cannot be imposed as binding norms by the Department and that the Department lacks the authority to deny a project based on policies contained in the CZMP. This issue was recently determined by the Supreme Court of South Carolina in the case of Spectre v. S.C. Dep't of Health and Envtl. Control, Op. No. 26764 (S.C. Sup. Ct. filed Feb. 1, 2010)(Shearouse Adv. Sh. No. 5 at 35) in which the Court held that the CZMP has the force and effect of law. Nonetheless, I do not find the proposed project is contrary to the Coastal Zone Management Plan. Moreover, I do recognize that the General Assembly adopted the Beachfront Management Act, S.C. Code Ann. §§ 48-39-250 et seq. (BMA) well after the Department compiled the CZMP. The provisions of the BMA, including in particular those establishing the baseline, setback line, and the standards for construction in relation to them, take precedence as legislation over any provisions of the CZMP that may conflict therewith, even though the CZMP is enforceable. See I'On, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (generally, the most recent legislation will take precedence over earlier enactments).

Chapter III (C) of the CZMP discusses "Residential Development" in the coastal zone. It provides that "[o]f primary concern is adequate treatment and disposal of domestic sewerage from residences...," and that "[u]ncontrolled development patterns can also degrade water quality and impact marine and aquatic species." CZMP, p. III-16. The polices enumerated in this section are to "provide guidance on reaching and maintaining a balance between development and conservation of coastal resources." Id.

The CZMP classifies barrier islands as an area of special significance. The policies for development of those islands include the following:

1) Construction and development on barrier islands shall retain to the extent feasible existing dune ridges, drainage patterns and natural vegetation in landscaping and construction plans in order to maintain the value of the island as a storm buffer. Intensive or high-density development may not be suitable on some barrier islands with are less stable or more prone to erosion or other hazard risks; these factors must be taken into consideration when alternative development plans are formulated;

2) Because of their proximity to and strong ecological relationship with the critical areas of the coastal zone, project proposals for barrier islands must demonstrate reasonable precautions to prevent or limit any direct negative impacts on the adjacent critical areas (beaches, primary dunes, coastal waters and wetlands).

3) New road or bridge projects involving the expenditure of public funds to provide access to previously undeveloped barrier islands will not be approved unless an overwhelming public interest can be demonstrated, for example, provision of access to a public recreation area or other facility. Preference will be given to ferry access in those instances where public funds cannot be expended for road access.

4) The extension of public services, such as sewer and water facilities, to barrier islands should only be proposed in a comprehensive approach which considers the natural "carrying capacity" of the island to support development and which integrates these facilities to parallel the level of access which is available to the island.

5) The Coastal Council encourages and supports State, local and private efforts to acquire coastal barrier islands for inclusion in preservation and protection programs. Public recreational benefit should be one primary

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[23] The Department also argued that this project triggered the CZMP Erosion Control Policies contained in Chapter IV(C)(4) and the Beach and Shoreline Access Policies in Chapter IV(D)(3)(c). Neither KPD nor CCL addressed these issues in their Proposed Orders. Nevertheless, as to the Erosion Control Policies the project is to be made of more than acceptable materials. Moreover, the evidence clearly established the economic justification for the project that will have only limited effect upon the public use of the area. The discussion above regarding the public use of the shoreline reflects that the Beach and Shoreline Access policies will not be violated.

> motivation for these efforts, and where appropriate, barrier islands should be maintained for recreational use, based on the capacity of individual areas to accommodate human activity.

CZMP Chapter III (C)(3)(XII)(A) p. 70-71. The CZMP also treats dune areas which fall landward of the beach zones as areas of "special resource significance." The enumerated policies in the CZMP regarding these areas include the following:

> Because of their proximity to and strong physical and ecological relationship with the beach and primary sand dune critical areas of the coastal zone, project proposals in the secondary sand dunes must demonstrate reasonable precautions to prevent or limit any direct negative impacts on the adjacent critical areas.

CZMP Chapter III (B) p. 71-72. Concerning open spaces, the CZMP seeks to restrict projects which would "limit the continued use of a recreational open area or disrupt the character of such a natural area" unless other alternatives exist. CZMP Chapter III (D) p. 73. On the other hand, the CZMP seeks to "increase the amounts and distribution of public open space and recreational areas in the coastal zone." Id. Finally, the CZMP sets forth that areas in which endangered and threatened species inhabit are Geographic Areas of Particular Concern.

The development techniques and safeguards KDP intends to implement are consonant with the policies in the CZMP. More specifically, I find that the low-density development described by Long and Permar that would be employed in the residential development of Captain Sam's, entail reasonable precautions. No evidence was offered to alter this important point. The many rows of dunes seaward of the setback line would remain essentially intact on a permanent basis to enjoy for their beauty and protection, thereby preserving the strong natural protections deemed desirable by the policies in the CZMP. Accordingly, the proposed limited, residential development several rows of dunes behind the primary dune, will not violate the policies of CZMP Chapter III (C)(3)(XII)(A).

Furthermore, the CZMP contains no policies that would prohibit the potential residential development of Captain Sam's and the potential residential development is consistent with its terms. The policies dealing with barrier islands and the dunes system specifically contemplate residential development on barrier islands. These policies do not prohibit residential development that occurs landward of the primary dune if reasonable precautions are taken. The potential residential development on private property will also not impair public open space at Beachwalker Park or along the beach. Finally, the developable area of Captain Sam's peninsula

is well **outside** Unit-10's boundaries of designated critical habitat for wintering piping plovers. It is thus not a Geographic Area of Particular Concern under the CZMP.

Therefore, I find that neither the bulkhead/revetment nor the possible future residential development is contrary to the policies of the CZMP.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby:

ORDERED that the permit issued by the Department is approved except that the terms and conditions in the permit limiting the bulkhead and revetment to 270 feet in Special Condition No. 1 are deleted and the following shall be substituted for Special Condition No. 1:

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 commencing 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.

AND IT IS SO ORDERED.

Ralph King Anderson III
Chief Administrative Law Judge

February 26, 2010
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 26th day of February, 2010

By: Judicial Law Clerk

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Kiawah Development Partners, II, Petitioners, vs. South Carolina Department of Health and Environmental Control, Respondents.	Docket No. 09-ALJ-07-0029-CC **ORDER ON MOTIONS FOR RECONSIDERATION**
South Carolina Coastal Conservation League, Petitioners, vs. South Carolina Department of Health and Environmental Control and Kiawah Development Partners, II, Respondents.	Docket No. 09-ALJ-07-0039-CC

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A hearing was held in this matter on August 24 – 28, 2009. This Court thereafter issued a Final Order and Decision (Final Decision) in which it approved a modified permit for a bulkhead/revetment upon Captain Sam's Spit. Both the Department and South Carolina Coastal Conservation League thereafter filed a timely Motion for Reconsideration of that decision. Some of the arguments warrant clarification of the original Final Decision. Accordingly, I am issuing an Amended Final Decision in this case addressing those issues. The remaining arguments will either be addressed below or are found to be completely without merit; therefore they will not be addressed.

DISCUSSION

Reopening the Record

Recently, the Department's Board issue a decision in a separate proceeding involving whether a request to construct a below-ground sheet pile wall on upland above the critical line on

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the "neck" area of Captain Sam's Spit denying the staff's determination to approve a stormwater management plan and a National Pollution Discharge Elimination System (NPDES) general permit. CCL contends that the Board's determination in that case that the staff failed to adequately consider the "possible long-range, cumulative effects of the project," warrants the reopening of the record in this to consider the Board's determination as evidence." CCL cites to Rule 60, SCRCP, as a basis for the request in its motion. Rule 60(b)(2), SCRCP, provides that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." However, "after-discovered evidence refers to evidence of facts existing at the time of trial of which aggrieved party was excusably ignorant." State vs. Haulcomb, 260 SC 260, 195 S.E.2d 601 (1973). "Generally, only facts or evidence in existence when the trial occurred, but undiscovered despite the due diligence of the moving party, may properly form the grounds for ... a Rule 60(b) motion based upon the newly discovered evidence." Republican Party of North Carolina vs. Hunt, 77 F. 3d 470 (4th Cir. 1996).

Additionally, in S.C. Coastal Conservation League v. S.C. Department of Health and Environmental Control, 380 S.C. 349, 669 S.E.2d 899 (Ct. App. 2008), the appellant raised new issues in a motion for reconsideration that could have previously been brought to the attention of the Administrative Law Judge. The Court held that "[i]f an issue could have been initially presented to the trial court, a party cannot raise that issue for the first time in a post-trial motion." 669 S.E.2d at 915. Furthermore, "[a] party cannot use a Rule 59(e) motion to present an issue to the court that could have been raised prior to judgment but was not so raised." Id.

Moreover, even if it was proper to reopen the record, this so-called "evidence" would not change the result. Notably, the Board's decision on the sheet pile permit request is not evidence. It is not a "fact," other than in the limited sense that a Final Decision was made. It is an administrative ruling. Nonetheless, the Board's decision is not material and will not change the result in this case. Here, this Court considered a volume of evidence regarding the effects of the potential future residential development of Captain Sam's. The Court's findings that the potential residential development was consistent with the CZMP are supported by the evidence.

Deference to Administrative Construction

The DHEC staff argues that their interpretation of "the policies contained in the CZMP" is entitled to the propriety of legal deference. In Conservation League, the court recognized that "[c]ourts 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 & Environmental Control, 363 S.C. 67, 70, 610 S.E.2d 482, 486 (2005). Nevertheless, this deference has limits.[1] For instance, it is the interpretations of DHEC's Board, not its staff, which is entitled to deference from the courts. Cf. id. ("The Panel, not OCRM staff, is entitled to deference from the courts."); Neal v. Brown, 682 S.E.2d 268, 270 (2009). Additionally, in Etiwan Fertilizer Company v. S.C. Tax Commission, 217 S.C. 354, 60 S.E.2d 682 (1950) the Supreme Court stated that:

> We have held in many cases that where the construction of the statute has been uniform for many years in administrative practice, and has been acquiesced in by the General Assembly for a long period of time, such construction is entitled to weight, and should not be overruled without cogent reasons.

60 S.E.2d at 684. Thus, an underlying requirement to draw upon the agency deference doctrine is that the construction of the statute has been uniform for many years so as to lead to the conclusion the General Assembly has acquiesced to that construction. To find otherwise would allow an agency to construe it regulations on a case by case basis and grant deference to that irresolute interpretation.

CCL also seeks its version of agency deference again based upon the Board's recent decision denying the staff's determination to approve a stormwater management plan and NPDES permit. CCL again contends that the Board's determination in that case that the staff failed to adequately consider the "possible long-range, cumulative effects of the project" warrants reopening of this case and granting deference to that factual interpretation. Deference does not apply to factual findings, only to legal interpretations of ambiguities. "[T]he court generally gives deference to an administrative agency's **interpretation** of an applicable statute or its own regulation." Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (S.C. 2003) (emphasis added). CCL, however, is arguing that the court is bound by the **findings** on the consistency of upland development made by the DHEC Board in a **separate** proceeding. This

[1] See Randolph R. Lowell and Stephen P. Bates, South Carolina Administrative Practice and Procedure 15-18 (2004).

Court is not bound by the Board's factual findings, much less the factual findings in a separate case based on a separate record. Moreover, as discussed in the Final Decision, the law is clear that this court determines factual matters *de novo* based on the evidence in the record in this proceeding. Deference to factual findings would eviscerate the *de novo* standard of review of this court in contested case proceedings.

CCL also argued that the Board's interpreted CMP policy 1.7 applies not just to the critical area but also to areas outside the critical area. The extension of CCL's reasoning is that in deciding this case, the ALC must also give deference to a factually different case interpreting a different regulation that may or may not be upheld upon review. For instance, the deference principle does not apply where "the plain language of the statute is contrary to the agency's interpretation." Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (S.C. 2003). Here, as noted in the Final Decision, Regulation 30-11(c)(1) plainly states that the effects to be considered are those of the project. The project is the revetment, not the possible later residential development. Additionally, as explained above, this Court did ultimately consider whether the potential future residential development was consistent with the CZMP, and made factual findings supporting this consistency determination. Hence, the board's recent decision adds nothing and would not change the outcome of this case.

Modification of Proposed Permit

Quizzically, the Department argues that the ALC's modification of the permit to **reduce** the size of the structure thereby limiting the impact to the environment is outside of its standard of review. "A trial *de novo* is one in which 'the whole case is tried as if no trial whatsoever had been had in the first instance.'" Marlboro Park Hosp. v. S.C. Dept. of Health & Envtl. Control, 358 S.C. 573, 579, 595 S.E.2d 851, 854 (Ct. App. 2004) quoting in part Blizzard v. Miller, 306 S.C. 373, 375, 412 S.E.2d 406, 407 (1991). Obviously, the department had and exercised its right to modify the permit in its initial review. But, now it argues that no such modifications may be made after a full five day presentation of all the evidence regarding the efficacy of this permit. I find the Department's position to be absurd.[2] See Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (when construing a

[2] I do recognize that this is the position of the Department's representative in this case and not necessarily the position of the Department overall.

statute, the Court will reject meaning that would lead to an absurd result not intended by the legislature).

Consideration of CMP Policies

The Department argues that the evidence does not support the issuance of the permit under the policies of the CZMP. The Department maintains that the development agreement contains nothing that could possibly provide the required assurance regarding the "existing dune ridges, drainage patterns, and natural vegetation and impacts to the other critical areas." However, in addition to the development agreement, the evidence demonstrated KDP intends to implement all the specific precautionary steps outlined in the CZMP (e.g., public water and sewer) and other protective measures that go well beyond those mentioned in the CZMP. More specifically, the evidence established that KDP requires setbacks so that the homes built upon the development will be located well within the trees. KDP also requires the use of pervious materials in construction which will aid in retaining the drainage patterns upon the spit. Tr. p. 98 line 24 to p. 99 line 4. The natural vegetation will also be retained as close as possible to the existing state. Tr. p. 171 line 14 to 24; Tr. p. 318 line 22 to p. 319 line 1. The development upon Captain Sam's spit would not impact the existing dune ridges. Mr. Long testified that:

> [W]e don't build on dunes. As I've said, for 22 years, we don't allow people to build on dunes, except with the most minimal, little pieces of, say, a pool, a boardwalk to beach, a little tiny piece of a house, and usually they require vegetation to cover even those things.

Tr. p. 185 line 19 to 25. Likewise, Mr. Permar responded as follows:

> Q: So the development would be well behind the secondary dune?
>
> A: Absolutely. It would be -- in this stretch right here, it would be behind the fourth dune and actually there's the beginnings of another dune over here (indicating). So, today, it would be behind the -- four dunes systems behind the primary dune. And we don't -- the proposed development doesn't reach this area down in here (indicating). So in an area right in there, there's probably a row of five dunes before it grows to be a greater dimension.
>
> Q: Your ultimate thinking is, it's going to be behind all five.
>
> A: Yes. Right. And then you begin to see – I don't know if I can zoom in here. But you begin to see what happens in the evolution of the dunes to the vegetated area here (indicating), is that you see traces of vegetation -- they're starting to propagate behind these dunes, because they're more protected from the salt air and so forth. That's the beginnings of what happened, you know, many years ago with this (indicating). So, by

observation, that's, as I said, the beginnings of a dune field that's propagating as opposed to going the opposite direction

Tr. p. 304 line 17 to p. 305 line 19. Finally, the development upon the Spit would be quite limited (at most fifty home sites) rather than "intensive or high-density." Long also explained that:

> We have maximum 150 people or probably about 120 people that would live in ten -- excuse me, that would live in 50 homes at the most. The average household has two and a half people at Kiawah. Almost all of them at Kiawah -- we're unusual, say, compared to Seabrook or Isle of Palms or Sullivan's Island, where I live. It's a second home community. The people are generally from the Northeast and the Midwest and they spend on average six to eight weeks at Kiawah.
>
> * * *
>
> Kiawah's very unusual in that about 90 percent of our property owners historically and today are
> second homeowners, which means they aren't there but six or eight weeks a year and -- unlike, say, Seabrook, which is almost all permanent residents and -- probably 80 percent, anyway, permanent residents. So we've got people who, at our neighborhoods around the island, and there's 3500 or so dwellings, are 90 percent second homeowners who are there six or eight weeks. That shows a different intensity.

Tr. p. 172 line 4 to 14; Tr. p. 1580 line 7 to 20.

The Department also argues that the court should deny the revetment permit because it is physically possible to commence residential development on Captain Sam's without a revetment. The question, however, is whether there are alternatives to protect the shoreline, not whether KDP could proceed with a development without a revetment. As explained in the Final Decision, the statutes and regulations specifically authorize the installation of bulkheads to protect an owner's high ground from eroding. Here, the evidence established that the riverbank has progressively and regularly eroded over the last 10 years and will continue to erode. The revetment was the only device attested by the witnesses that would prevent this erosion. Insofar as OCRM argues that it might grant a permit for an access road seaward of the setback line, this assertion is unconvincing, especially in light of Mr. Eiser's testimony that OCRM is adamantly opposed to any residential development on Captain Sam's, regardless of whether it is authorized by local zoning and a development agreement.

The above facts (which are incorporated as additional findings of fact by this Court) and the Findings of Fact set forth in the Amended Final Decision support the issuance of the permit under the CZMP. In sum, neither OCRM nor CCL introduced any evidence about the specifics

of the potential future development on Captain Sam's. On the other hand, Messrs. Long, and Permar testified in great detail about numerous elements of the potential future development, all the precautions that would be taken, and the history of KDP's sensitive development of other similar areas on Kiawah Island, among other things. Accordingly, the Department's contention is without merit.

Stay

CCL requests that the "effectiveness" of the Final Decision in this case be stayed until "all appeal opportunities have been exhausted or concluded."[3] In support of this motion, CCL cited ALC Rule 29 (E); SCRP 65 and SCACR Rule 225. Since this case has not been appealed the controlling rule is 29 (E) which provides that:

> An administrative law judge who issues a final order subject to judicial review may in the order stay its effect. At any time prior to the filing of a petition for judicial review, and upon the motion of any party, with notice to all parties, the administrative law judge may stay the final order upon appropriate terms. The filing of a motion for a stay does not alter the time for filing a petition for judicial review.

Nevertheless, though SCACR Rule 225 is not controlling it is certainly applicable since the result of granting a stay would essentially operate as a supersedes under that provision. See ALC Rule 68 ("[T]he South Carolina Appellate Court Rules may, in the discretion of the presiding administrative law judge, be applied in proceedings before the Court to resolve questions not addressed by these rules."). Rule 241(c) (2) provides that:

> In determining whether an order should issue pursuant to this Rule, the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.

Here, as long as construction of the revetment is postponed, erosion will continue. Though Captain Sam's Spit overall is accreting in size, the ongoing erosion is reducing the width of the access corridor and jeopardizing the potential future residential development. Accordingly, KDP will be significantly prejudiced and harmed by staying the permit it has waited two years to obtain so as to protect its land from sloughing off into the river. Additionally, though CCL asserts several interests that could be harmed as a result of the decision, the evidence did not support those occurrences. Moreover, if KDP proceeds with constructing the revetment, it does so realizing that if the decision of this court is reversed, it

[3] In making this request I assume CCL presumes that their Motion for Reconsideration is denied.

may have to remove the structure. I therefore find that the balance of the hardships weighs in favor of denying the stay.

IT IS THEREFORE ORDERED that the Motions for Reconsideration and Motion for Stay are DENIED.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

February 26, 2010
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the uncersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 26th day of February, 2010

By: Judicial Law Clerk

The Supreme Court of South Carolina

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Kiawah Development Partners, II, Respondent,

v.

South Carolina Department of Health and Environmental Control, Appellant.

and

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.

ORDER

The South Carolina Coastal Conservation League (SCCCL) has filed a petition for a writ of supersedeas, pursuant to Rule 241(c), SCACR.

We grant SCCCL's petition for a writ of supersedeas, and expedite the appeal.

The Appellants' initial briefs and Designations of Matter to be Included in the Record on Appeal (DOM) shall be served and filed within fifteen (15) days of this Order. Respondent shall serve and file its initial brief and DOM within fifteen (15) days after service of Appellants' initial briefs and DOM. Any reply briefs must be served and filed within five (5) days after service of Respondent's initial brief. Appellants shall serve a copy of the Record on Appeal on all parties who have served a brief within fifteen (15) days after service of the last brief. Within ten (10) days after service of the Record on Appeal, each party shall serve a copy of its final brief(s) on every other party to the appeal, and shall file fifteen (15) copies of the final brief(s) with the Clerk of Court. Appellants shall file the Record on Appeal no later than the date the final briefs are due. No extensions will be granted.

IT IS SO ORDERED.

C. J.

J.

J.

J.

Kaye G. Hearn J.

Columbia, South Carolina

July 22, 2010

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kiawah Development Partners, II, Respondent,

v.

South Carolina Department of Health and Environmental Control, Appellant,

and

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.

Appellate Case No. 2010-155629

Appeal from the Administrative Law Court
Ralph K. Anderson, III, Administrative Law Judge

Opinion No. 27065
Heard June 5, 2013 – Refiled December 10, 2014

REVERSED AND REMANDED

Jacquelyn Sue Dickman, of Columbia, Bradley D. Churdar, of Charleston, Amy E. Armstrong, of the South Carolina Environmental Law Project, of Pawleys Island, and Robert T. Bockman, of Columbia, for Appellants.

G. Trenholm Walker, of Pratt-Thomas Walker, PA, and Gedney M. Howe, III, of Gedney M. Howe III, PA, both of Charleston, for Respondent.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Solicitor General Robert D. Cook, and Assistant Attorney General T. Parkin Hunter, and C. Mitchell Brown and A. Mattison Bogan, both of Nelson Mullins Riley & Scarborough, LLP, all of Columbia, for Amicus Curiae, Savannah River Maritime Commission.

Frank S. Holleman, of the Southern Environmental Law Center, of Chapel Hill, NC, and J. Wesley Earnhardt, Michael P. Addis, and Margaret B. Hoppin, all of Cravath, Swaine & Moore, LLP, of New York, for Amicus Curiae, The South Carolina Nature-Based Tourism Association.

Jordan R. Israel, of Washington, D.C., for Amicus Curiae, Inlet Cove Homeowners Association, Kayak Charleston, LLC, South Carolina Paddlesports Industry Association, and Friends of the Kiawah River.

James B. Richardson, Jr., of Columbia, for Amicus Curiae, South Carolina Manufacturer's Alliance.

Michael Robert Hitchcock, of Columbia, for Intervenors.

JUSTICE HEARN: Our State's tidelands are a precious public resource held in trust for the people of South Carolina. While the tidelands are a finite

resource, a bevy of competing environmental, economic, and social uses seek to lay claim to them. The legislative branch has made the policy decisions as to how those uses should be balanced in order to maximize the benefit to the people of South Carolina and enacted statutes and delegated to executive agencies the power to promulgate regulations to fulfill those policy decisions. The task falls to the courts to ensure that those statutes and regulations are correctly applied in carrying out that policy.

At issue here is the correct application of those statutes and regulations to an invaluable—in environmental, economic, and social terms—stretch of tidelands located on the edge of a spit of land along the South Carolina coast. A landowner and real estate developer seeks a permit to construct a bulkhead and revetment stretching 2,783 feet in length and 40 feet in width over the State's tidelands, thereby permanently altering 111,320 square feet or over 2.5 acres of pristine tidelands. The landowner seeks to halt ongoing erosion along that stretch of tidelands in order to facilitate a residential development on the adjacent highland area. DHEC denied the majority of the requested permit and granted a small portion to protect an existing county park. An administrative law court (ALC) disagreed and found a permit should be granted for the entire structure, and this appeal followed. We conclude the ALC committed several errors of law and therefore, we reverse and remand.

FACTUAL/PROCEDURAL BACKGROUND

Kiawah Island is a barrier island approximately one mile wide and stretching approximately ten miles along South Carolina's coast. At the island's eastern end it is separated from Folly Beach by Stono Inlet where the Stono River empties into the Atlantic Ocean. The Island is separated from John's Island and the mainland to the north by the Kiawah River. At the island's western end, the Kiawah River turns to the south and travels along the Island's western edge. From the western tip of the Island, Captain Sam's Spit extends along the coast in a southwesterly direction towards Seabrook Island. The Spit consists of a narrow "neck" where it extends away from the Island and then grows into a large, bulbous end. At the point at which the Kiawah River meets the Spit where it extends from the end of the Island, the Kiawah River turns to the west, wraps around the bulb of the Spit, and then turns to the south. There the River passes through Captain Sam's Inlet between the Spit and Seabrook Island and empties into the Atlantic Ocean.

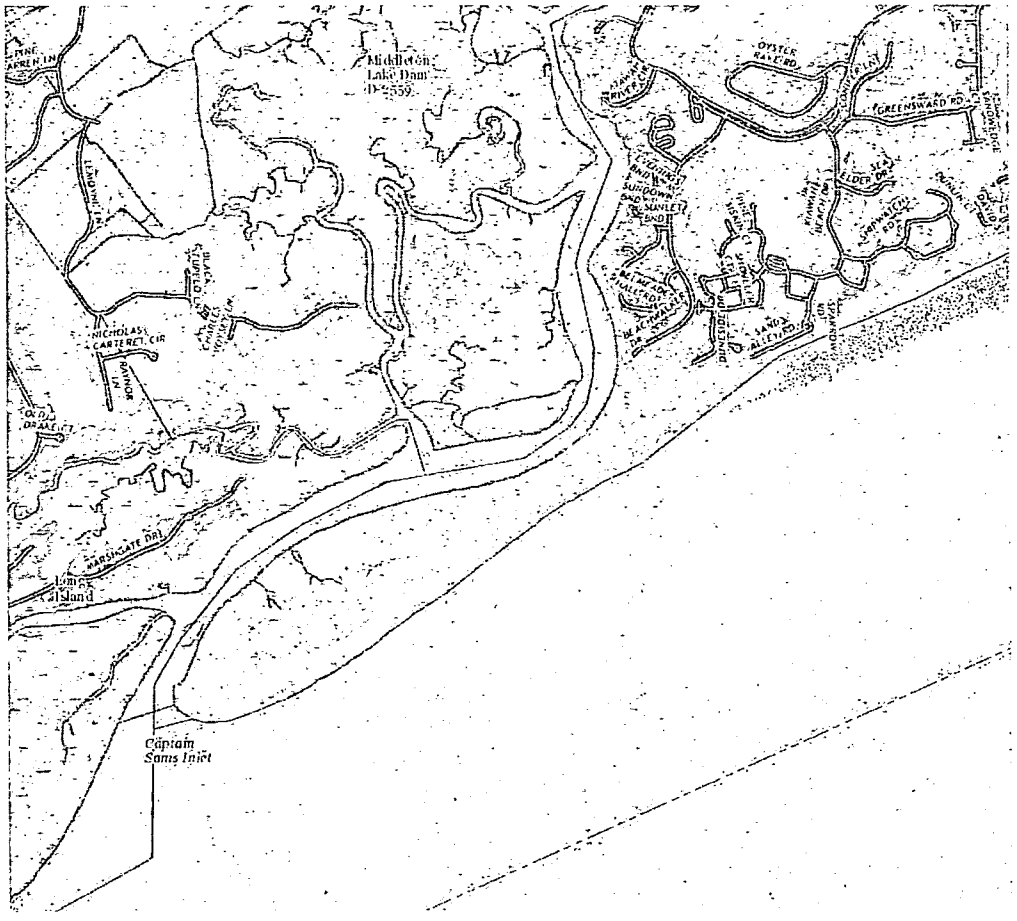


Fig. 1: Captain Sam's Spit

At the present time, where the Spit meets the larger island and Kiawah River turns to travel along the Spit—the neck—the Spit is approximately 450 feet wide measured from the critical line on the River side to the mean high water line on the Atlantic Ocean side. At its widest part the Spit has a high ground width of more than 1,600 feet. The Spit has a number of high dune ridges running its entire length, and, on the river side of the bulbous end, a young and growing maritime forest. When the tide recedes in the River, a soft, sandy beach is exposed on the Spit along the area where the River bends. The portion of the Island at the western end immediately upriver of the Spit's neck is occupied by a Charleston County park which the County leases from Kiawah Development Partners, II, Inc. (Kiawah). The Spit's neck and the adjacent area where the county park is located are eroding. At points along the bend in the river, a vertical escarpment as high as

ten to twelve feet exists. While a portion of the river side of the Spit is eroding, on the ocean side the Spit has steadily accreted over the past several decades.

While the River side of the Spit is experiencing erosion, the Spit as a whole is growing. The ocean side of the Spit has steadily accreted sand for the past sixty years and at present the accretion is occurring at a faster rate than the rate of erosion on the River side. Over the past three hundred years, however, at least twice a version of the Spit has formed, followed by the breach of the Spit's neck, and the disappearance of the Spit. The present Spit began to reform around 1949.

In 1988, Kiawah purchased the Island including the Spit; the same year the Town of Kiawah Island was incorporated. Prior to 1999, there was no building setback line on the Spit and therefore the Spit could not be developed.[1] Accordingly, in 1994, the Town and Kiawah entered into a development agreement which limited the uses of the Spit to green space and parkland and thereby prohibited development of the Spit. In 1999, due to continued accretion on the ocean side of the Spit and the Spit's resulting growth, the State established a setback line on the Spit thereby permitting development on the Spit landward of the setback line. In 2005, the Town and Kiawah entered into a new development agreement which permits development of up to fifty home sites and two community docks on the Spit.

In order to facilitate development of the Spit, Kiawah hired an engineering firm to design an erosion control structure to stop the erosion occurring along the bend in the Kiawah River. The firm recommended the combination of an articulated concrete block mat[2] and a bulkhead and prepared a permit application on Kiawah's behalf. The application sought approval from the South Carolina Department of Health and Environmental Control (DHEC) to construct a combination bulkhead and articulated concrete block revetment beginning at the

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[1] Section 48-39-280(B) of the South Carolina Code (2008) requires DHEC to establish a "setback line . . . landward of the baseline a distance which is forty times the average annual erosion rate or not less than twenty feet from the baseline . . . ." At that time, the width of the Spit was not sufficient for the creation of a setback line.

[2] An articulated concrete block is a rectangular block of concrete with a hole in the middle, and an articulated concrete block mat is a mat of those blocks linked together.

county park and extending for 2,783 feet along the Spit around the bend in the River.[3] The mat would extend a width of forty feet from the bulkhead down into the River and would cover the entire beach.

DHEC staff issued a permit to Kiawah but only for construction of a bulkhead and revetment to extend 270 feet along the shoreline adjacent to the county park. It denied the remainder of the requested 2,783 feet of bulkhead and revetment. The staff found the structure would "affect the ability of the inlet and the beach/dune system to migrate, as it has been known to do in the recent past." They also found the structure and the proposed development that the structure would facilitate would "have long-range and cumulative effects on [sensitive areas] and on the general character of the area." The staff found the proposed structure would contravene Section 48-39-150(A)(6) of the South Carolina Code (2008) due to its effect on rare and endangered species. The staff found Regulation 30-11 of the South Carolina Code of Regulations (2011) implicated because the structure would "prevent the normal shoreline migration and the cycle of creation and subsequent in-fill of a tidal inlet" and because the development the structure would facilitate would "have a significant impact on the general character of the area."

Kiawah and the South Carolina Coastal Conservation League (League) both requested a final review conference before the DHEC Board, and the Board denied the request for a final review conference. Kiawah then requested a contested case hearing before the ALC challenging DHEC's denial of the remainder of the permit. The League also filed a request for a contested case hearing challenging DHEC's decision to authorize the 270 feet of bulkhead and revetment adjacent to the county park. The ALC held a contested case hearing at which the parties presented witnesses and exhibits in support of their positions.

The ALC ruled in favor of Kiawah, granting the permit for the full 2,783 feet of bulkhead and revetment, but modifying the requested permit in several ways. In so concluding, the ALC found the structure would not contravene any of the applicable statutes and regulations asserted by DHEC and the League. As to

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[3] The County previously submitted its own permit request for an erosion control structure to extend only along the shoreline adjacent to the county park. Kiawah convinced the County to withdraw that permit application and allow it to submit the permit application at issue here to cover both the land leased to the County for the park and the larger extent of the Spit.

section 48-39-150, the ALC found its provisions satisfied because "there are no significant negative impacts" from the structure. Specifically, the ALC found "neither the bulkhead/revetment nor the potential limited residential development will result in any significant harm to the public resources or marine or other plant or animal life, nor significantly impair public access to critical areas." The ALC also found: "the project will clearly reduce and likely stop erosion rather than precipitate any erosion" and "[t]he elimination of that erosion will further provide an economic benefit to [Kiawah]" whereas the "erosion has no positive benefit for anyone."

The ALC found DHEC misconstrued its powers under regulation 30-11(C)(1) by interpreting the regulation as allowing it to consider a proposed structure's impacts outside the critical area. The ALC interpreted regulation 30-11(C)(1) as only permitting DHEC to consider impacts within the critical area. The ALC concluded there would be no material adverse effects from the structure and added: "Even though consideration of the effects of the upland is beyond the purview of the regulation, the Court concludes that there was no evidence adduced that the residential development would have any material adverse effects on the upland."

Considering whether the structure would contravene Regulation 30-12(C) of the South Carolina Code of Regulations (2011) because it would adversely affect public access, the ALC found that "the use of the bank by the public is limited" and that the effect on public access "is not substantial." Accordingly, the ALC concluded:

> [A]lthough public access to the riverbank at low tide may be affected on a very limited basis, Regulation 30-12(C) specifically allows some adverse effect where the "upland is being lost due to tidally induced erosion." Clearly, [Kiawah's] upland is being lost due to tidally induced erosion, and there is no feasible alternative that will stabilize this eroding riverbank. Additionally, although the [revetment] degrades the public uses of the shoreline where the mat is approved, it does not eliminate all public access.

Finally, the ALC also found the structure complies with regulation 30-11(C)(2), the public trust doctrine, and the Coastal Zone Management Plan. Accordingly, the ALC approved the permit issued by DHEC but deleted from the permit the limitation of the structure to 270 feet, thereby permitting the entire

2,783 feet of bulkhead and revetment as requested by Kiawah. The ALC also modified the permit by inserting the following special conditions in order to reduce the structure's size and minimize its impacts:

> 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 [Kiawah'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 [revetment] shall be no greater than eight . . . feet in width; and,
>
> (iv) that [Kiawah] shall submit final construction plans to [DHEC] consistent with the permit requested, as modified and approved by the [ALC's order], before commencing initial construction of the erosion control structure, and, after initial construction, prior to commencing construction of any necessary extensions of the [revetment] (or bulkhead to the extent herein authorized but not originally constructed) authorized by this permit.

DHEC and the League moved for reconsideration and the ALC denied their motions. DHEC and the League then appealed to this Court.

ISSUES PRESENTED

I. Did the ALC err in finding the bulkhead and revetment would not contravene the Coastal Zone Management Act?

II. Did the ALC err in finding the bulkhead and revetment would not contravene regulation 30-11?

III. Did the ALC err in finding the bulkhead and revetment would not contravene regulation 30-12(C)?

STANDARD OF REVIEW

In an appeal from an ALC decision, the Administrative Procedures Act provides the appropriate standard of review. S.C. Code Ann. § 1-23-610(B) (Supp. 2012). This Court confines its analysis of an ALC decision to whether it is:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

Id. In determining whether the ALC's decision was supported by substantial evidence, the Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion as the ALC. *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 9–10, 698 S.E.2d 612, 617 (2010). However, the Court may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law. *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 316, 731 S.E.2d 869, 870-71.

LAW/ANALYSIS

Before delving into the particular grounds for appeal, we need acknowledge that the basic premise undergirding our analysis must be the public trust doctrine which provides that those lands below the high water line are owned by the State and held in trust for the benefit of the public. *Estate of Tenney v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 100, 106, 712 S.E.2d 395, 398 (2011) ("Under the public trust doctrine, the State holds presumptive title to tidal land below the

high water mark to be held in trust for the benefit of all people of South Carolina."). While all citizens may use and enjoy these lands subject to the State's control, no citizen has an inherent right to take possession of or alter these lands.[4] Accordingly, the public's interest must be the lodestar which guides our legal analysis in regards to the State's tidelands. Recognizing that permitting alteration of the tidelands may be in the public's interest in limited circumstances, the State enacted statutes and promulgated regulations which generally prohibit alterations to the tidelands except when the public interest requires otherwise. *See* The Coastal Zone Management Act (CZMA), Title 48, Chapter 39 of the South Carolina Code (2008 & Supp. 2012); Chapter 30 of the South Carolina Code of Regulations (2011); The Coastal Zone Management Program (CZMP), South Carolina Department of Health and Environmental Control, http://www.scdhec.gov/environment/ocrm/czmp.htm. However, simply because the State permits alterations in limited circumstances does not change the fact that altering tidelands remains the exception to the rule. The State, through the General Assembly, has adopted the policy that the public interest is usually best served by preserving tidelands in their natural state. *See* S.C. Code Ann. §§ 48-39-20 to -30 (2008).

I. THE COASTAL ZONE MANAGEMENT ACT

We hold the ALC erred as a matter of law in finding the proposed bulkhead and revetment comply with the requirements of the CZMA. Pursuant to Section 48-39-150 of the South Carolina Code (2008 & Supp. 2012), in determining whether to grant or deny a permit to alter the critical area, DHEC must find the project complies with the policies set forth in sections 48-39-20 and 48-39-30, as well as with ten "general considerations" set forth in section 48-39-150.

Specifically, section 48-39-30(D) provides:

> Critical areas shall be used to provide the combination of uses which will insure [sic] the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or

[4] Of course, an exception to the rule exists for citizens who have ownership of tidelands based on a grant from the sovereign. *See Hobonny Club, Inc. v. McEachern*, 272 S.C. 392, 396, 252 S.E.2d 133, 135–36 (1979).

> a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.

While section 48-39-30(D), as applied through section 48-39-150, explicitly requires that tidelands be used in a way that provides maximum public benefit, the ALC made no findings of any public benefit that would result from the bulkhead and revetment. Quite to the contrary, it was clear that only the developer, not the *public*, would benefit from the construction of this enormous bulkhead and revetment.

The ALC found section 48-39-30(D)'s public benefit requirement satisfied through the financial benefit to be realized by Kiawah. In our view, the ALC's analysis of this issue represents a basic misinterpretation of the term "the people" in section 48-39-30(D) because it failed to identify any benefit flowing to the public at large, instead stating only that "elimination of [the] erosion will further provide an economic benefit to [Kiawah]." Kiawah is not synonymous with "the people." When that term is correctly construed, any benefit to Kiawah is irrelevant to whether section 48-39-30(D) is satisfied. "The people," as used here, is a term meaning the citizens of a particular jurisdiction. That interpretation derives from the commonly understood definition of "the people" as "[t]he mass of ordinary persons; the populace." *The American Heritage Dictionary* 919 (2d College ed. 1982). Additionally, the use of the article "the" before "people" indicates that "the people" is a single, unified thing. *See Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 142, 750 S.E.2d 65, 70 (2013) ("The word '*the*' is a word of limitation—a word used before nouns, with a specifying or particularizing effect, opposed to the indefinite or generalizing force of 'a' or 'an.'" (quoting *People v. Enlow*, 310 P.2d 539, 546 (Colo. 1957))). Reading the provision in light of the public trust doctrine—the legal bedrock upon which the statute rests—bolsters the conclusion that "the people" should be construed as the public at large rather than a single developer. The public trust doctrine provides that tidelands are to be held in trust for the benefit of "*all* people of South Carolina." *Estate of Tenney*, 393 S.C. at 106, 712 S.E.2d at 398 (emphasis added). To allow the benefits to a private developer to override the interests of the people of South Carolina undermines the

statute and defeats the very purpose of the public trust doctrine. Thus, only those benefits which inure to the public as a whole may satisfy section 48-39-30(D).[5]

Compounding this error is the fact that the ALC wrongly found that "[t]his erosion has no positive benefit for anyone."[6] To the contrary, undisputed evidence presented before the ALC established that the accretion of a spit followed by the erosion of the neck of the spit and the formation of a new inlet is a natural process that has occurred repeatedly at Captain Sam's Inlet for centuries. In fact, as recently as the 1940s, the spit had breached and did not exist. The legislature codified in the CZMA its finding that in South Carolina there is an "urgent need to protect and to give high priority to natural systems in the coastal zone." S.C. Code Ann. § 48-39-20(F). Thus, the CZMA provides that it is to the public's benefit to protect natural processes like the cyclical erosion, breach, and accretion process of the spit. This is borne out by the evidence that the repetitive accretion of Captain Sam's Spit, followed by the erosion of the neck of the spit served as the supply of sand for Seabrook Island to the southwest. As recognized by the General Assembly, there is often great value in allowing nature to take its course, rather than having our coast become an armored, artificial landscape. *See id.*; Meg Caldwell & Craig Holt Seagall, *No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access Along the California Coast*, 34 Ecology L.Q. 533, 539–40 (2007) (explaining why "[a] fortified coast comes with major financial, social, and ecological costs"). For those reasons, the ALC erred in finding section 48-39-30(D)'s public benefit requirement satisfied.

II. REGULATION 30-11

In determining whether to grant a permit for alteration of a critical area, regulation 30-11(C)(1) requires DHEC to consider: "The extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area." DHEC has

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[5] Contrary to the dissent's characterization, we do not exclude the developer from being included in "the people." Rather, our point is that the ALC erred in considering only the benefits to the developer to the exclusion of the public as a whole.

[6] Similarly and also erroneously, the ALC held "the General Assembly specifically recognized the need to protect upland from destruction from the natural process of erosion on tidal rivers."

interpreted this regulation as requiring it to consider not only a proposed project's impact on the critical area, but also the project's impacts on upland areas within the larger coastal zone.

The ALC rejected DHEC's interpretation, concluding

> [T]he pertinent inquiry is the cumulative impacts of the project *within* the critical area, not the impact of future development on the high ground *outside* the critical area. In other words, the area for which [DHEC] has regulatory authority is the critical area, not the high ground *outside* the critical area.

In reaching this conclusion, the ALC erred by failing to give deference to DHEC's interpretation of its regulation. Interpreting and applying statutes and regulations administered by an agency is a two-step process. First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation. *See Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation. Nevertheless, where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." (citations omitted)); *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) ("Where the terms of the statute are clear, the court must apply those terms according to their literal meaning."). If the statute or regulation "is silent or ambiguous with respect to the specific issue," the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *see also Brown v. Bi-Lo*, 354 S.C. at 440, 581 S.E.2d at 838.[7]

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[7] In *Chevron*, the landmark administrative law case, the United States Supreme Court summarized the two-step process as:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter,

The language of regulation 30-11(C)(1) is ambiguous in terms of the scope of the "area" DHEC may consider in making permitting decisions. Therefore, the ALC should have proceeded to the second step and determined whether DHEC's interpretation is entitled to deference.

Advancing to the second step, we must first consider the scope of South Carolina's deference doctrine. In this State, the doctrine can be traced back to *Read Phosphate Co. v. South Carolina Tax Commission*, 169 S.C. 314, 168 S.E. 722 (1933), where this Court adopted the deference doctrine from United States Supreme Court precedent, stating: "'The construction given to a statute by those charged with the duty of exercising it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons.'" *Id.* at 330, 168 S.E. at 728 (quoting *United States v. Moore*, 95 U.S. 760, 763 (1877)). The Court, again relying on federal case law, stated the rationale for the rule as: "'The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are . . . called upon to interpret.'" *Id.* (quoting *Moore*, 95 U.S. at 763). Thus, we give deference to agencies both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations.

> for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842–43; *see also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (holding that "if the meaning of the words used [in a regulation] is in doubt," "a court must necessarily look to the administrative construction of the regulation," and the agency's interpretation of its own regulation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation").

As repeatedly stated in our decisions, our deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations "unless there is a compelling reason to differ." *S.C. Coastal Conservation League*, 363 S.C. at 75, 610 S.E.2d at 486; *see also, e.g., Barton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 404 S.C. 395, 415, 745 S.E.2d 110, 121 (2013) (stating that an agency's interpretation "will not be overruled absent compelling reasons" (quoting *Dunton*, 291 S.C. at 223, 353 S.E.2d at 133)); *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 77, 716 S.E.2d 877, 882 (2011) (same); *Buist v. Huggins*, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (same); *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. at 515, 560 S.E.2d at 414 (same); *Glover by Cauthen v. Suitt Constr. Co.*, 318 S.C. 465, 469, 458 S.E.2d 535, 537 (1995) (same); *Faile v. S.C. Employment Sec. Comm'n*, 267 S.C. 536, 540, 230 S.E.2d 219, 222 (1976) (stating that an agency's interpretation will not be overruled "without cogent reasons"); *Hadden v. S.C. Tax Comm'n*, 183 S.C. 38, 48, 190 S.E. 249, 253 (1937) (stating that an agency's interpretation "will not be overruled without cogent reasons").

Accordingly, the deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons. We defer to an agency interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute."[8] *Chevron*, 467 U.S. at 844.

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[8] While we take this opportunity to clarify and distill our deference doctrine, we have not changed the existing doctrine as evidenced by the plethora of decisions by South Carolina courts applying the doctrine consistent with our understanding. *See, e.g., Jasper Cnty. Tax Assessor v. Westvaco Corp.*, 305 S.C. 346, 348, 409 S.E.2d 333, 334 (1991) ("We find Tax Commission's interpretation of § 12-43-230(a) reasonable and conclude there is no compelling reason to overrule it."); *Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991) ("Moreover, we find Coastal Council's construction of the statute reasonable and find no compelling reason to overrule it."); *Howard v. Owen Steel Co.*, 303 S.C. 304, 305, 400 S.E.2d 149, 149 (1991) (finding no compelling reason to not defer to an agency's interpretation and accordingly, deferring to the interpretation); *Dunton*, 291 S.C. at 223, 353 S.E.2d at 133 (finding "[t]he Circuit Court's order cites no compelling reasons for rejecting the Board of Examiners'

Here, DHEC's interpretation is neither arbitrary, capricious, nor manifestly contrary to the statute. To the contrary, DHEC's interpretation is reasonable and consistent with its statutory authority. Under the CZMA, DHEC was required to develop a comprehensive coastal zone management program—the CZMP—for the coastal zone, and was given responsibility to enforce and administer the CZMP. *See* S.C. Code Ann. § 48-39-80 (2008); *Spectre, LLC v. S.C. Dep't of Health & Envtl. Control*, 386 S.C. 357, 688 S.E.2d 844 (2010). DHEC was also required by statute to promulgate regulations to execute the CZMP. S.C. Code Ann. § 48-39-80. Parts of the CZMA explicitly require DHEC to consider the larger coastal zone. As previously discussed, section 48-39-150 requires DHEC to consider the policies set forth in section 4-39-20 and those policies repeatedly refer to the coastal zone. The CZMA also provides that the "basic state policy" behind the Act is to "protect the quality of the coastal environment and to promote the economic and social improvement of the *coastal zone* . . . ." S.C. Code Ann. § 48-39-30. Therefore, DHEC's interpretation is sound because it cannot be expected to protect

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interpretation of these statutes . . . .," and thus, holding "the Circuit Court erred in rejecting the Board of Examiners' interpretation . . . ."); *Faile*, 267 S.C. at 540, 230 S.E.2d at 221–22 (finding no cogent reason to not give deference to an agency's interpretation and accordingly, deferring to the interpretation); *Barton v. Higgs*, 372 S.C. 109, 118, 641 S.E.2d 39, 44 (Ct. App. 2007) (after finding that the agency's interpretation did not conflict with the literal meaning of the statute, concluding there was no compelling reason to not defer, and thus, giving deference to the agency's interpretation); *Comm'rs of Pub. Works v. S.C. Dep't of Health & Envtl. Control*, 372 S.C. 351, 361, 641 S.E.2d 763, 768 (Ct. App. 2006) ("We find the statute is ambiguous and, therefore, defer to the Board's interpretation. . . . We find no compelling reasons to overrule the Board's interpretation as it is neither arbitrary nor capricious, and does not constitute an abuse of discretion."); *Koenig v. S.C. Dep't of Pub. Safety*, 325 S.C. 400, 405, 480 S.E.2d 98, 100 (Ct. App. 1996) (deferring to agency's interpretation after concluding it was "reasonable"); *Ruocco v. S.C. State Bd. of Registration for Prof'l Eng'rs & Land Surveyors*, 314 S.C. 111, 115, 441 S.E.2d 829, 831 (Ct. App. 1994) (finding "no compelling reason to reject the Board's interpretation of the statute" and thus, deferring to the Board's interpretation). Therefore, contrary to the dissent's charge, our view does not "fundamentally undermine" any longstanding approach and is instead faithful to our precedent.

the coastal zone as instructed by the General Assembly if it cannot consider how projects within the critical area may affect the broader coastal zone.[9]

Additionally, the ALC in part based the rejection of DHEC's interpretation on the premise that to accept it would improperly permit DHEC to "trump local zoning and development agreements" and control the uses of upland areas. This too was erroneous. No party has ever asserted that regulation 30-11 gives DHEC such powers, nor could the regulation confer upon DHEC such powers. DHEC's role under regulation 30-11 is limited solely to *consideration* of upland impacts. Regulation 30-11 does not give DHEC any power to prohibit upland development; rather, DHEC only has the power to grant or deny a permit for a project in the critical area, and that decision may be based in part on the upland impacts that would result from the project. Accordingly, the ALC erred in failing to give deference to DHEC's interpretation and construing regulation 30-11(C)(1) as not permitting consideration of upland impacts.

In an apparent attempt to insulate its holding from error, the ALC presented an alternative holding in which it purported to consider upland impacts. However, that consideration was fundamentally flawed. Accordingly, the error was not harmless and requires reversal.

The ALC summarily concluded there would be no upland impacts flowing from the construction of the revetment and bulkhead.[10] This conclusion is plainly

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[9] Moreover, DHEC has consistently interpreted its regulatory power as limited to the critical area but requiring consideration of the larger coastal zone. The CZMP provides:

> Two types of management authority are granted in two specific areas of the State. [DHEC] has direct control through a permit program over critical areas . . . . Direct permitting authority is specifically limited to these critical areas. Indirect management authority of coastal resources is granted to [DHEC] in . . . the coastal zone.

South Carolina Coastal Zone Management Program, II-2 (1972), available at http://www.scdhec.gov/environment/ocrm/czmp.htm.

[10] The ALC's alternative holding as to uplands impact consisted only of the following:

contradicted by the evidence presented. Uncontroverted evidence was introduced of Kiawah's intent to build homes on Captain Sam's Spit following the construction of the proposed bulkhead and revetment. Thus, the upland area of the spit is to be transformed from a completely natural area into a residential development. While the ALC found the development would be "sensitively planned," that finding does not obviate the error intrinsic in the ALC's decision—that there would be no impact on the upland here.

Thus, not only did the ALC err in holding that regulation 30-11 did not permit consideration of upland impacts, its alternative holding whereby it purported to consider upland impacts was also erroneous and reversal is required.

> Additionally, in this instance, the potential residential development will not have deleterious impacts even if the Court were to consider the effects of potential residential development. [DHEC's Office of Ocean and Coastal Resource Management (OCRM)] and [the League] do not challenge [Kiawah's] history of environmentally sensitive development methods, permit adherence record, or any of the specific strategies, methods, and approaches that [Kiawah] will use in its limited residential development of Captain Sam's. Rather, they urge that **any** residential development at all, regardless of safeguards and protections, on the now-undeveloped Captain Sam's highland peninsula along the ocean and river, is **per se** "ill-planned." The Court concludes that the numerous measures and safeguards [Kiawah] intends to utilize in its development of Captain Sam's demonstrate that this limited residential use would be sensitively planned, responsive to the natural features of the peninsula, attentive to its flora and fauna, and without significant negative effects on the critical area. Even though consideration of the effects of [sic] the upland is beyond the purview of the regulation, the Court concludes that there was no evidence adduced that the residential development would have any material adverse environmental effects on the upland. The development team also has a twenty-two year unblemished "track record" for compliance with all OCRM permits.

III. REGULATION 30-12(C)

The appellants also challenge the ALC's holding that regulation 30-12(C) which creates public access requirements for bulkheads and revetments was satisfied. Specifically, the appellants contend the ALC erred in finding the project would have no adverse effect on public access and there is no feasible alternative. We agree.

The public access requirements of regulation 30-12(C) provide:

> (c) Bulkheads and revetments will be prohibited where marshlands are adequately serving as an erosion buffer, where adjacent property could be detrimentally affected by erosion or sedimentation, or 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.

The ALC found any adverse effect on public access caused by the proposed bulkhead and revetment would be so insignificant it would not implicate the requirements of regulation 30-12(C). Additionally, the ALC found that even if there was a sufficient effect on public access, regulation 30-12(C) was satisfied because upland was being lost to erosion and no feasible alternatives exist.

While we find substantial evidence exists to support the ALC's finding that upland is being lost due to tidally induced erosion, we believe the ALC erred both in finding that public access would not be adversely affected and that no feasible alternatives exist.

A. Adverse Effects on Public Access

The ALC's order essentially acknowledges that public access would be adversely affected by the proposed bulkhead and revetment, finding "public access to the riverbank at low tide may be affected on a very limited basis" and "the [articulated concrete block] mat degrades the public uses of the shoreline where the mat is approved." However, the ALC erroneously read the regulation as requiring consideration of the degree to which public access is affected, concluding that

regulation 30-12(C) is not implicated when the adverse effect on public access is insubstantial.

The ALC erred in inserting a substantiality requirement into the regulation. With the exception of a *de minimis* effect which cannot be argued here, the regulation is implicated whenever a proposed bulkhead or revetment would have an adverse effect on public access. That reading is supported not only by the plain language of the regulation, but also by the statutory and common law basis for it.

By its terms the regulation applies "where public access is adversely affected." The language of the regulation contains no indication that the adverse effect on public access must be substantial; rather, it only states that public access must be affected. Our role is to apply and interpret, not rewrite, regulations. Where the language of a regulation is plain, unambiguous, and conveys a clear and definite meaning, interpretation of the regulation is unnecessary and improper. *See Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012) ("Regulations are interpreted using the same rules of construction as statutes."); *Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995) ("If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning. Where the terms of the statute are clear, the court must apply those terms according to their literal meaning." (citation omitted)). To read a substantiality requirement into the regulation ignores its clear wording and effectively rewrites the regulation.

Furthermore, reading regulation 30-12(C) as not containing a substantiality requirement and considering the entirety of the regulation, it presents a nuanced balancing of economic and environmental, and public and private considerations. This balancing neatly comports with the statutory foundation for the regulation and solidifies our conclusion that this is the correct interpretation of the regulation. In order to protect public access, the regulation limits when bulkheads or revetments that affect public access may be permitted. The regulation does not prohibit outright any bulkhead or revetment that would adversely affect public access; rather, it balances the need for public access against the need for a bulkhead or revetment. It does so by providing that a bulkhead or revetment that affects public access may still be permitted where upland is being lost due to tidally induced erosion and no feasible alternative exists.

The balancing provided by regulation 30-12(C) is not only supported by the CZMA and the public trust doctrine foundation for the CZMA, but more closely comports with those policies than a substantiality requirement. A substantiality requirement would improperly favor private interests over public interests in contravention of the CZMA and the public trust doctrine. It seems to begin with the principle that bulkheads and revetments should be built and the burden is on the State, representing the public interest, to prove that the structure should not be built. This skews the consideration in favor of the private interest, treating public lands as if they are held in trust waiting for private development, rather than held in trust for the public to use as they truly are.

Such an elevation of economic development over the importance of public access would also be inconsistent with the significance the CZMA accords to public access. The CZMA's focus on protecting public access from economic development is evidenced by its findings that "the coastal zone is rich in a variety of natural, commercial, *recreational* and industrial resources" and that "[t]he increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development . . . have resulted in . . . decreasing open space for public use . . . ." S.C. Code Ann. § 48-39-20(A), (B) (emphasis added). As previously discussed, the CZMA provides that "[c]ritical areas shall be used to provide the combination of uses which will insure [sic] the maximum benefit to the people . . . ." S.C. Code Ann. § 48-39-30(D). The CZMA also enumerates specific factors to consider in deciding whether to grant or deny a permit which include:

> (5) The extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources.
>
> . . .
>
> (7) The extent of the economic benefits *as compared with* the benefits from preservation of an area in its unaltered state.

S.C. Code Ann. § 48-39-150 (emphasis added). Considering those statutory provisions, we believe the CZMA was intended to achieve a balance between environmental and public considerations on the one hand and economic and private considerations on the other. However, it recognizes that environmental and public considerations had historically been sacrificed at the altar of economic

development and must be protected going forward.[11] Regulation 30-12(C) fulfills those statutory goals by protecting public access while balancing the need for public access against economic development.

Regulation 30-12(C)'s balancing also comports with the public trust doctrine which is the guiding principle behind the CZMA. Under that doctrine, any use of tidelands must be to the public benefit, which is embodied in section 48-39-30(D)'s "maximum benefit" to the public requirement. Therefore, as reflected in regulation 30-12(C), public access is to be accorded great protection while private economic development is suspect and only permitted when in the public interest. For those reasons, we hold the ALC erred in finding regulation 30-12(C) was not applicable because there would be no substantial adverse effect on public access.

Moreover, even if we were to accept the ALC's conclusion that regulation 30-12(C) is only implicated when there is a substantial impact on public access, we believe the ALC's finding that the impact on public access will be insignificant is not supported by substantial evidence, and thus, reversal is still required. If there ever were a case of a substantial adverse effect on public access, it is this case. The undisputed evidence at trial established that the effect of the proposed bulkhead and revetment would be to cover 2,783 feet by 40 feet——over 9 football fields in length and an area of over 2.5 acres—of sandy beach with concrete. That stretch of sandy beach, a rare feature for a tidal river, is the only sandy beach on the Kiawah River. When the sandy beach is replaced by the

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[11] The General Assembly expressed this sentiment in its legislative finding that:

> The increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal and harvesting of fish, shellfish and other living marine resources have resulted in the decline or loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use and shoreline erosion.

S.C. Code Ann. 48-39-20(B) (2008).

enormous concrete revetment, members of the public will not be able to walk or land a boat or kayak on it as they have done in the past.

Also, in view of the uncontroverted evidence, the ALC's conclusion that public use of the beach is insignificant is not supported by substantial evidence.[12] All of the evidence presented at the hearing was that the public regularly uses the beach for a variety of recreational purposes. Dr. Greg VanDerwerker testified that he kayaks in the Kiawah River a couple of times per month and each trip he pulls his kayak out onto the beach where the revetment would be constructed. While there, he routinely observes others using the beach as a place to land their kayaks and to fish. Sophia McAllister testified that she kayaks in the Kiawah River on a weekly basis and regularly swims near the bank of the river where the revetment would be located. Sidi Limehouse testified that he goes to the spit once or twice per year and pulls his boat up on the beach where the revetment would exist. He also testified that he has taken several groups of people out to the spit in recent years. Bill Eiser, the DHEC project manager assigned to Kiawah's permit application, testified that he conducted four site visits in order to review the project area and observed people walking on the beach, kayaks pulled up on the beach, and people fishing or crabbing from the beach. Thus, the record establishes that the public use of the beach was much more significant than the "limited" use ascribed to it by the ALC.

The ALC's misapprehension about public use and the failure to accord it the importance it deserves is fundamentally at odds with the public nature of the tidelands at issue here. Accordingly, we hold the ALC erred in interpreting regulation 30-12(C) as only applying where there would be a substantial impact on public access, in finding there would be no adverse effect on public access, and in finding the public did not use the critical area where the bulkhead and revetment would be constructed. For those reasons, reversal is warranted.

B. Feasible Alternatives

Finally, the ALC's consideration of feasible alternatives was erroneous in two respects. First, the ALC erred in only considering alternatives that would stop

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[12] While not at issue here because the public uses the banks of the Kiawah River along Captain Sam's Spit, we note the regulation does not require that the public's actual use of particular portions of the critical area be adversely affected, rather it only requires that the public's *access* to the critical area be adversely affected.

the natural erosion process. The ALC addressed feasible alternatives in one sentence: "Clearly, [Kiawah]'s upland is being lost due to tidally induced erosion, and there is no feasible alternative that will stabilize this eroding riverbank." As that limited analysis makes clear, the ALC only considered alternatives that would "stabilize this eroding riverbank." That constrained analysis directly contravenes the CZMA and applicable regulations and thus, was erroneous.

As previously discussed, the CZMA specifically provides for and encourages the preservation of natural processes. Pointedly, the General Assembly's findings expressed in the CZMA state that there is an "urgent need to protect and to give high priority to natural systems in the coastal zone," and the accretion, erosion, and breach of the spit is a natural system. S.C. Code Ann. § 48-39-20(F). In fact, the term "feasible alternatives" is specifically defined in the CZMA to include "a 'no action' alternative." 2 S.C Code Ann. Regs. 30-1(D)(23) (2011). Thus, in applying regulation 30-12(C), the feasibility of taking no action and permitting natural processes to continue should not be given short shrift but rather must be given serious consideration.

Additionally, the ALC found the "evidence did not establish that there was a feasible alternative to the bulkhead/revetment that would stabilize the river shoreline . . . ." The ALC thereby erroneously placed the burden on DHEC and the League to show there were no feasible alternatives. Regulation 30-12(C) creates a presumption that a structure which will adversely affect public access is prohibited unless the applicant shows there are no feasible alternatives, and thus the burden to show the structure fits within an exception to the prohibition falls on the applicant, here Kiawah.

Therefore, we reverse the ALC's order as to regulation 30-12(C) because it was error to fail to accord sufficient consideration to the feasibility of taking no action and permitting the natural process to continue unabated and to place the burden to show the lack of a feasible alternative on DHEC and the League.

CONCLUSION

Captain Sam's Spit and the public tidelands along its margins are of great importance to the people of South Carolina. The tidelands present a bounty of benefits to the people ranging from environmental to recreational. Unlike much of our State's coastline which is now armored and unnatural, the spit remains untouched by human alteration. The area, particularly the pristine sandy beach, is

undoubtedly one of this State's natural treasures. Admittedly, this alone is not a valid reason to reverse the ALC's approval of a permit to construct a huge bulkhead and revetment there.

However, reversal is warranted due to the several errors of law committed by the ALC. First, the CZMA requires that uses of the public tidelands be to "the maximum benefit to the people," but the ALC did not consider whether and to what extent the public would benefit from the proposed structure as opposed to leaving the tidelands in their natural state. Accordingly, the ALC erred in finding section 48-39-150 satisfied. Second, the ALC erred in finding the project met the requirements of regulation 30-11 both because that regulation requires consideration of the factors in section 48-39-150 and because the ALC's consideration of upland impacts was flawed. Finally, the ALC erred in finding regulation 30-12(C) satisfied because this finding is tainted by the erroneous conclusion that there was no adverse effect on public access and the failure to consider the alternative of leaving the critical area in its natural state. For all of those reasons, we reverse and remand for further consideration consistent with this decision.

PLEICONES and BEATTY, JJ., concur. TOAL, C.J., dissenting in a separate opinion in which KITTREDGE, J., concurs.

CHIEF JUSTICE TOAL: This will be the third time this Court has issued divided opinions on this matter. This tortured procedural history underscores the deep division within this Court regarding the proper role of the judicial branch of government in reviewing final administrative decisions of an executive branch agency under the Constitution of South Carolina and under the statutory law of our state.

My disagreement with the majority is not in any way intended as a criticism of the majority opinion's very learned review of the development of environmental protection laws in South Carolina. As a young lawyer, I brought several cases seeking to invoke the public trust doctrine to prevent unrestrained construction in the coastal zone. As a member of the General Assembly, I co-sponsored and floor led "Tidelands" legislation that resulted in the enactment of the Coastal Zone Management Act and the creation of the Coastal Council as a regulatory authority. As a judge, I must temper my support of environmental protection policy considerations with the requirements of our state Constitution regarding due process in administrative proceedings.

In 1993, the increased use of agency regulatory authority in South Carolina was balanced by the creation of a professional Administrative Law Court (the ALC) as the final decision maker for contested regulatory litigation within executive branch agencies. The ALC was created to provide for a cadre of neutral hearing officers not employed exclusively by or tethered to any specific agency. The General Assembly was motivated by its desire to achieve the fairness in administrative hearings mandated by Article I, § 22 of the South Carolina Constitution. Today, the majority reverses the administrative law judge in this case on the ground that he wrongly failed to defer to the decision of the DHEC staff regarding the permit contested here.

With the best of intentions, the majority's view of deference to the opinions of an agency bureaucracy on not only facts but also on the agency's interpretation of statutory law fundamentally undermines South Carolina's longstanding approach to controlling unrestrained bureaucratic decisions regarding private property rights.

Accordingly, I am compelled to dissent. I would affirm the ALC's decision authorizing Kiawah to construct a proposed bulkhead and revetment structure (the proposed structure) on the Spit on Kiawah Island at the size specified in its order.

ANALYSIS

I. CZMA & CZMP

Because, in my opinion, the ALC properly considered the relevant statutes and made detailed findings of fact to support its conclusions, I would hold that the ALC did not err in concluding that the proposed structure complies with sections 48-39-20, -30, and -150 of the South Carolina Code.

A. The CZMA

The CZMA expresses the General Assembly's intent to protect the coastal zone. *See* S.C. Code Ann. § 48-39-10 to -360. (2008 & Supp. 2013). The General Assembly defined the coastal zone as

> all coastal waters and submerged lands seaward to the State's jurisdictional limits and all lands and waters in the counties of the State which contain any one or more of the critical areas. These counties are Beaufort, Berkeley, Charleston, Colleton, Dorchester, Horry, Jasper and Georgetown.

Id. § 48-39-10(B). Additionally, the General Assembly defined "critical areas," like that in this case, as any of the following:

> (1) coastal waters;
>
> (2) tidelands;
>
> (3) beaches;
>
> (4) beach/dune system which is the area from the mean high-water mark to the setback line as determined in Section 48-39-280.

Id. § 48-39-10(J).

Section 48-39-20 of the South Carolina Code contains the "legislative declaration of findings," explaining the General Assembly's intent to control the regulation of critical coastal zone areas by developing a management program. *Id.* § 48-39-20(C) ("The key to accomplishing this is to encourage the state and local governments to exercise their full authority over the lands and waters in the coastal

zone."). The General Assembly noted the coastal zone's important features in finding:

> (E) Important ecological, cultural, natural, geological and scenic characteristics, industrial, *economic and historical values in the coastal zone are being irretrievably damaged* or lost by ill-planned development that threatens to destroy these values.
>
> (F) In light of competing demands and the *urgent need to protect and to give high priority to natural systems in the coastal zone while balancing economic interests*, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate.

Id. § 48-39-20(E), (F) (emphasis added). Consequently, the General Assembly provided specific guidance regarding proposed development of critical areas:

> Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.

Id. § 48-39-30(D). The General Assembly intended DHEC to rely on the policy statements contained in sections 48-39-20 and 48-39-30, and ten general considerations found in section 48-39-150 when reviewing a permit to utilize a critical area. *See id.* § 48-39-150 ("In determining whether a permit application is approved or denied [DHEC] shall base its determination on the individual merits of each application, the policies specified in Sections 48-39-20 and 48-39-30 and be guided by the following general considerations."). Those ten general considerations require DHEC consider:

> (1) The extent to which the activity requires a waterfront location or is economically enhanced by its proximity to the water.
>
> (2) The extent to which the activity would harmfully obstruct the natural flow of navigable water. If the proposed project is in one

or more of the State's harbors or in a waterway used for commercial navigation and shipping or in an area set aside for port development in an approved management plan, then a certificate from the South Carolina State Ports Authority declaring the proposed project or activity would not unreasonably interfere with commercial navigation and shipping must be obtained by the department prior to issuing a permit.

(3) The extent to which the applicant's completed project would affect the production of fish, shrimp, oysters, crabs or clams or any marine life or wildlife or other natural resources in a particular area including but not limited to water and oxygen supply.

(4) The extent to which the activity could cause erosion, shoaling of channels or creation of stagnant water.

(5) The extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources.

(6) The extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable historic and archeological sites of South Carolina's coastal zone.

(7) The extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state.

(8) The extent of any adverse environmental impact which cannot be avoided by reasonable safeguards.

(9) The extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project.

(10) The extent to which the proposed use could affect the value and enjoyment of adjacent owners.

Id. § 48-39-150.

In the text of its decision, the ALC listed these ten general considerations and explained that the evidence presented at the de novo hearing demonstrated the

proposed structure complied with those considerations, and would not result in an adverse environmental impact. The ALC then analyzed the proposed structure in light of the policy statements of sections 48-39-20 and -30 of the South Carolina Code.

As referenced *supra*, in section 48-39-20, the General Assembly noted that the coastal zone is rich in a variety of natural, commercial, recreational, and industrial resources. *Id.* § 48-39-20 (2008). The General Assembly observed that ill-planned development threatened to destroy important ecological, cultural, and natural characteristics, as well as industrial and economic values. *Id.* § 48-39-20(E). Thus, the General Assembly acted with *competing demands* between the urgent need to protect natural systems in the coastal zone and balancing economic interests in mind. *See id.* § 48-39-20(F). In section 48-39-30, the General Assembly declared the state policy of protecting the quality of the coastal environment *and* promoting the economic improvement of the coastal zone. *Id.* § 48-39-30(A). In subsection (B), the General Assembly expressed its intent to promote the economic *and* social improvement of the citizens of this State and to encourage development of coastal resources. *Id.* at § 48-39-30(B). The General Assembly realized that such improvement should only be achieved with due consideration for the environment, and that measurable maximum dollar benefits should be subordinate to insuring the maximum benefit to the people. *Id.* at § 48-39-30(B),(D).

The ALC considered all of these competing policies and concluded:

> These policy statements require a balancing of economic development benefits and environmental preservation. Even though the focus of the inquiry is on the effects of the project, neither the bulkhead/revetment nor the potential limited residential development will result in any significant harm to the public resources or marine or other plant or animal life, nor significantly impair public access to critical areas . . . . The potential residential development is not ill-planned and will be implemented in a low density, environmentally sensitive manner. It will be subject to local, state, and possibly federal permitting requirements. Neither the proposed bulkhead/revetment nor the potential limited residential development transgresses the policies set forth in these two statutes.

Further, the ALC engaged in an extensive analysis regarding the erosion issues facing the Spit and the consequences this erosion would have on Kiawah's ability to prevent the loss of further upland, and determined:

> Moreover, evidence did not establish that there was a feasible alternative to the bulkhead/revetment that would stabilize the river shoreline and prevent the continued erosion of [Kiawah]'s upland . . . . That evidence clearly establishes a need for erosion control along the disputed shoreline.[13]

The majority fails to acknowledge the ALC's thorough findings of fact supporting its conclusions regarding sections 48-39-20 and 48-39-30. Instead—resting its conclusion on the public trust doctrine—the majority criticizes the ALC's finding that the proposed structure satisfies section 48-39-30(D)'s requirement of "maximum benefit to the people" because "the ALC failed to identify any benefit flowing to the public at large."

In assigning error to the ALC's findings on this issue, the majority discounts the General Assembly's intent to *balance* economic interests with the protection of the coastal zone's natural systems. In my opinion, the term "people," as used in the statute, should be read to include members of the general public wishing to make proper use of our coastal resources, *and* those members of the public with an ownership interest located in or around the coastal zone.

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[13] The ALC also examined the testimony regarding possible adverse effects on marine resources and wildlife, and made a detailed analysis of the facts presented regarding wintering piping plovers, a threatened species under the Endangered Species Act, and diamond-back terrapins. The ALC observed that there had never been a single sighting of a piping plover in the proposed structure's construction area. The ALC also observed that the United States Fish and Wildlife Service propounded a final determination of the critical habitat for piping plovers, and this determination specified the critical area of piping plover habitat as extending one mile north of Captain Sam's inlet, but not extending above the building setback line on the Spit. The ALC cited this fact in rejecting DHEC's contention that future residential development, apart from the proposed structure itself, would have an adverse effect on the piping plover.

The CZMA does not contemplate the loss of status as a member of the public simply because an individual happens to own property in a protected area. Moreover, the CZMA does not anticipate a thumb on the scale in DHEC's favor simply because of the opposing party's property interest. Alternatively, the CZMA's statutory scheme clearly contemplates permitting a landowner within the coastal zone to complete a construction project that preserves the owner's property rights while causing minimal disruption to the surrounding coastal area.

Therefore, I would hold that the ALC did not err in concluding that the proposed structure does not contravene the CZMA.

B. The CZMP

I would also hold that the ALC did not err in concluding that the proposed structure does not contravene the CZMP. DHEC developed the CZMP for the coastal zone, as required by the CZMA. *See* S.C. Code § 48-39-80 (2008). All state and federal permits must be reviewed for compliance with the CZMP. *Spectre L.L.C.*, 386 S.C. 357, 360, 688 S.E.2d 844, 845 (2010). The CZMP classifies barrier islands as areas of special significance and dune areas, which fall landward of the beach zones, as areas of "special resource significance." Thus, project proposals for barrier islands "must demonstrate reasonable precautions to prevent or limit any direct negative impacts on adjacent critical areas." CZMP Chapter III (C)(3)(XII)(A)(2). Additionally, project proposals for sand dune areas in close proximity to those dunes in critical areas must also comply with these same direct precautions. *Id.* Chapter III (B). The CZMP also sets forth a policy of increasing the amount of public space in the coastal zone, and protecting those areas in the coastal zone which are inhabited by endangered or threatened species. *Id.*

The ALC concluded that the proposed structure did not contravene the CZMP:

> The development techniques and safeguards [Kiawah] intends to implement are consonant with the policies in the CZMP. More specifically, I find the low density development . . . that would be employed in the residential development of [the Spit] entail [sic] reasonable precautions. *No evidence was offered to alter this important point.* The many rows of dunes seaward of the setback line would remain essentially intact on a permanent basis to enjoy for their

> beauty and protection, thereby preserving the strong natural protections deemed desirable by the policies in the CZMP.
>
> . . . .
>
> The potential residential development on private property will also not impair public open space at Beachwalker Park or along the beach. Finally, the developable area of Captain Sam's peninsula is well outside . . . boundaries of designated critical habitat . . . . It is thus not a Geographic Area of Particular Concern (GAPC) under the CZMP.

(Emphasis added).

In my opinion, the ALC's findings on this issue are well supported. The Record contains evidence of the "environmentally-friendly" nature of the proposed residential development. Kiawah placed before ALC evidence of the proposed structure's effect on public access, and the lack of adverse impact on critical habitats. I would find that this evidence constituted substantial evidence supporting the ALC's conclusions regarding the proposed structure's compliance with the CZMP. *See S.C. Coastal Conservation League v. S.C. Dep't. of Health & Envtl. Control*, 363 S.C. 67, 77, 610 S.E.2d 482, 487 (2005) ("The record contains conflicting evidence concerning the direct and cumulative effects of building the bridge to Park Island. The evidence that the effects will be minimal constitutes substantial evidence supporting the finding that the permit complies with the Effects Regulation.").

II. Regulation 30-11

Like the majority, I would hold the ALC erred in concluding that DHEC may not take into account the proposed structure's impact on upland areas within the larger coastal zone. However, I would not find that the ALC committed an error of law in failing to give deference to DHEC's interpretation of regulation 30-11.

a. Deference

The General Assembly placed significant authority in the boards and directors of administrative agencies, a decision which evinces the legislature's intent that courts defer to administrative agency decisions when appropriate. However, the General Assembly also created the ALC to provide a dispassionate

forum for the public to challenge administrative agency decisions. Moreover, the judicial branch retains the ultimate authority in deciding when agency decisions comport with established law. Thus, judicial review of administrative decisions requires a balancing between an agency's specialization and authority, and the checks and balances deeply rooted in our democratic government.

Article I, Section 22 of the South Carolina Constitution provides:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

S.C. Const. Art. 1, § 22.

The General Assembly codified these constitutional concerns through the enactment of the APA. James B. Richardson, *Judicial Review of Agency Decisions*, in South Carolina Administrative Practice and Procedure 459 (Randolph R. Lowell ed. 2008) [hereinafter Practice and Procedure]. Additionally, the General Assembly placed the ALC in a central role providing a "neutral forum for fair, prompt, and objective administrative hearings" for members of the public affected by the actions of governmental agencies. Randolph R. Lowell, *The Contested Case Before the ALC*, Practice and Procedure 148. Prior to the ALC's creation, citizens seeking an evidentiary hearing challenging a state agency's action appeared before that regulatory agency's *own* hearing officers. *Id.* One of the central motivations supporting the ALC's formation was to improve the consistency and objectivity of the administrative adjudicatory process. *Id.* The General Assembly created the ALC in 1993, as part of Act No. 181 of that year, commonly known as the "Restructuring Act." *Id.* As part of the Restructuring Act, the legislature replaced many board and commissions with cabinet style agency directors. *Id.* The resulting regime empowered these directors to administer the regulatory function of the agencies. *Id.* Concomitantly, the General Assembly established the ALC, creating the functional separation contemplated by Article 1, Section 22, and the general separation of powers principle. *Id.* (explaining that central panels of ALC's "provide a more efficient and professional forum for the resolution of administrative disputes").

The instant case concerns a "contested case," one of several classes of proceedings the ALC is authorized to conduct. The APA defines a contested case proceeding, in pertinent part, as

> a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law or by Article I, Section 22, Constitution of the State of South Carolina, 1895, to be determined by an agency or the Administrative Law Court after an opportunity for hearing.

S.C. Code Ann. § 1-23-505(A). The General Assembly specifically granted ALCs the significant right to render final decisions based on de novo review. Lowell, Practice and Procedure 152 ("In contrast to [ALCs] in other states and within the Federal system, South Carolina's [ALC's] *render final agency decisions*, subject only to judicial review." (Emphasis added)). The ALC's de novo review hearing is best explained as

> one in which the decisionmaker does not review the decision of someone else, but *makes the determination himself.* Thus, the [ALC], while he may use the record compiled earlier as part of the evidence in the case, may receive additional evidence and decides the issue *without regard* to the decisions made by the agency.

Id. (emphasis added); *see Blizzard v. Miller*, 306 S.C. 373, 375, 412 S.E.2d 406, 407 (1991) ("A trial de novo is one in which 'the whole case is tried as if no trial whatsoever had been had in the first instance.'"). *See State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 864 (2012) (explaining that questions decided under de novo review may be decided without any deference to the court below); *Lexington Cnty. Sch. Dist. One Bd. of Trs. v. Bost*, 282 S.C. 32, 34, 316 S.E.2d 677, 678 (1984) (explaining that de novo review of an agency decision record may be entered into evidence but accorded no deference); *see also William F. Funk and Richard H. Seamon*, Administrative Law: Examples and Explanations at 71 n.1 (2001)) ("Thus the de novo hearing at the ALC closely resembles a civil bench trial in terms of procedure, evidentiary rules and standards, protocol, and finality of decision.").

Consequently, I disagree with the majority's conclusion that the ALC committed an error of law in failing to give deference to DHEC's interpretation of

applicable statutes and regulations. I would find that in a contested case, the ALC is under no obligation to defer to an agency interpretation, but instead, provides the final agency determination based on the ALC's view of the record.[14] The ALC's final decision is of course subject to judicial review, and in that context, courts sitting in an appellate capacity must review the ALC's decision under the standard provided by section 1-23-610. In my opinion, this perspective of agency review comports perfectly with the APA's substantial evidence requirements contained in section 1-23-610, the de novo paradigm of the contested case hearing, and the constitutional safeguards contained in Article 1, Section 22 of the South Carolina Constitution. A contrary position places a contesting party at a significant disadvantage when contesting an agency decision. There is simply no support for the notion that the General Assembly intended such a result, or to constrain the ALC's ability to conduct a thorough de novo analysis.[15]

Nevertheless, I do not contend the reviewing court should ascribe nominal value to an agency's statutory and regulatory interpretations, or that the agency's interpretations are without merit—outside the ALC's final determinations. Instead, as this Court's precedent provides, an agency's well-established and consistent interpretation of statutes and regulations that the agency is charged with administering are entitled to deference. Richard Seamon, *Administrative Agencies: General Concepts and Principles*, Practice and Procedure 17 (Randolph R. Lowell ed. 2004). This principle recognizes the General Assembly's decision to make the agency initially responsible for enforcing certain statutes and regulations and acknowledges the agency's expertise and experience in this regard. *Id.*

However, within the administrative scheme, judicial deference to an administrative interpretation is not the functional equivalent of section 1-23-610's

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[14] *See, e.g.*, S.C. Code Ann. § 1-23-380 ("A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review . . . . ").

[15] Of course, section 1-23-380 of the South Carolina Code provides administrative agencies the right to appeal, despite the fact that the ALC's decision is viewed as the final agency decision. *See* S.C. Code Ann. § 1-23-380 (Supp. 2012) ("A *party* who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article and Article 1." (emphasis added)).

restrictive standard of review. This Court's willingness to defer to a long-standing agency interpretation should not translate into review of an agency's interpretation or action under a special abuse of discretion standard tailored to the administrative agency's own view of its decision. Instead, in my opinion, judicial deference is best articulated as the attachment of "great weight" to an agency's understanding of its own responsibilities, and applying that understanding absent a convincing or persuasive reason for the reviewing court to diverge. *See Stone Mgf. Co. v. S.C. Emp't Sec. Comm'n*, 219 S.C. 239, 249, 64 S.E.2d 644, 648 (1951) (explaining that administrative practice is a "weight on the scale," but not conclusive, and that final responsibility for the interpretation of the law rests with the courts).

According to the majority, South Carolina's "deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations 'unless there is a compelling reason to differ.'" (Citation omitted). In my opinion, the terms "defer" and "compelling" should not be used to disrupt the critical balance between the courts' role in interpreting the law and the administrative agencies' duty to execute the law. This balance is not reflected in a standard which implies that bureaucratic interpretations serve as a snare to judicial and administrative courts in their ability to review agency decisions using all constitutionally and statutorily conferred powers.

Thus, I would find that in a contested case hearing the ALC is not compelled to defer to an agency interpretation regarding applicable laws or regulations. As a result, I do not base my conclusion on principles of deference, and I find the majority's deference analysis unnecessary.

b. ALC's Interpretation of Regulation 30-11

I would hold that the ALC misconstrued regulation 30-11 of the South Carolina Code of Regulations, and erroneously concluded that DHEC lacked authority to consider impacts "outside critical areas when reviewing applications to alter or utilize critical areas."

Regulation 30-11 provides general guidelines for all critical areas. The regulation contains DHEC's rules and regulations for permit applications in "an effort to reduce the irreversible loss of productive tidelands, coastal waters, beaches, and dunes while meeting long-range State development needs." S.C.

Code Ann. Regs. 30-11(A)(1999). Subsection (C) of Regulation 30-11's provides, in pertinent part:

> In the fulfilling of its responsibility under Section 48-39-150, the Department must in part base its decisions regarding permit applications on the policies specified in Sections 48-39-20 and 48-39-30, and thus, be guided by the following:
>
> > (1) The extent to which long range cumulative effects of the project may result within the context of other possible development and the general character of the area.

Id. Regs. 30-11(C)(1).

Appellants argue that the "area" referred to under this regulation extends beyond the critical area to adjacent upland. Appellants' argument necessarily means that sections 48-39-20 and 48-39-30 permit DHEC, when considering a critical area permit, to consider a proposed structure's impact on anything surrounding the critical area, as long as the area is within the coastal zone. According to Appellants, these statutes indicate the "General Assembly's intent that [DHEC], when acting on critical area permit applications, would not just protect and restore or enhance the critical areas, but rather that the Department would protect . . . all of the resources within the coastal zone."

The ALC viewed DHEC's authority more narrowly:

> [T]he area for which [DHEC] has regulatory authority is the critical area, not the high ground outside the critical area. Construing this provision otherwise would lead to a substantial expansion of [DHEC's] authority to regulate the development of entire communities. Conceivably, [DHEC] could deny critical area permits near towns or cities simply because it believes the permits would facilitate upland sprawl and general over-development . . . . [DHEC] avers that it has the authority through coastal permitting to deny upland development even against the Town's approval of that development through its zoning process. If the General Assembly had intended to authorize such a considerable expansion of [DHEC's]

authority it is inconceivable that it would have done so with such general language.

In my opinion, both the ALC's and Appellants' views of Regulation 30-11 present competing, and equally defensible views of the force of Regulation 30-11. Section 48-39-20 plainly sets forth the General Assembly's findings regarding the importance of the coastal zone. The General Assembly acknowledged the coastal zone's "rich" variety of "natural, commercial, recreational, and industrial resources" of both immediate and potential value to South Carolina's present and future well-being. S.C. Code Ann. § 48-39-20(A). The General Assembly observed the adverse impacts caused by the increasing and competing demands on the coastal zone

> occasioned by population growth and economic development, including requirements for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal and harvesting of fish, shellfish and other living marine resources have resulted in the decline or loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use and shoreline erosion.

Id. § 48-39-20(B).

The General Assembly then noted the encroachment of federal regulation into land use and permit controls in the coastal zone, and made an affirmative statement that state and local governments must exercise their full authority over lands and waters in the coastal zone. *Id.* § 48-39-20(C). The statute then provides that ill-planned development threatens to destroy important scenic, natural, geological, industrial, and economic values in the coastal zone, as well as ecologically fragile marine resources and wildlife. *Id.* § 48-39-20(D), (E) (specifically citing "man's alterations" as a source of destruction). Finally, section 48-39-20 labels the environmental protection regime in place at the time of the provision's adoption as insufficient, stating:

> In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone while balancing economic interests, present state and local institutional

arrangements for planning and regulating land and water uses in such areas are inadequate.

Id. § 48-39-20 (E). Unlike the overarching findings stated in section 48-39-20, section 48-39-30 provides specific state policies "to be followed in the implementation" of the CZMA. The statute provides for policies promoting economic and social improvement, encouraging and developing coastal resources that protect sensitive and fragile areas from inappropriate development, and providing adequate environmental safeguards. *Id.* § 48-39-30(A),(B)(1). Additionally, section 48-39-30 provides that a primary goal of the CZMA is to protect the coastal zone, specifically tidelands and sand dunes, and to prevent beach erosion. *Id.* § 48-39-30(B)(2)–(4). However, subsection (C) relays the balance to be struck between protecting and preserving coastal resources, in that "no government agency shall adopt a rule or regulation or issue any order that is unduly restrictive so as to constitute a taking of property without the payment of just compensation in violation of the Constitution of this State or of the United States." *Id.* § 48-39-30(C). Of course, as discussed *supra*, subsection (D) of section 48-39-30 allows for combination of uses in critical areas insuring maximum benefit to the people, but not necessarily yielding measurable maximum dollar benefits. *Id.* § 48-39-30 (D).

Based on these policies, DHEC argues that in reviewing critical area construction permits pursuant to Regulation 30-11(C), consideration of impacts outside the critical area is appropriate. In my opinion—and as the majority also concludes—this position is logical. After all, DHEC cannot be expected to protect the coastal zone as instructed by the General Assembly if it cannot decipher how projects within the critical area might affect the coastal zone. One can envision a scenario in which a proposed structure would have minimal, or at least acceptable, adverse impacts on the critical area, and at the same time cause adverse impacts to areas outside the critical area, but within the coastal zone.

Nevertheless, in my opinion, the ALC raises a salient point regarding the reach of DHEC's permitting authority. There is no indication within sections 48-39-20 or -30 that the General Assembly intended DHEC's permitting authority within the coastal zone to run roughshod over individual property interests and, disturbingly, the authority of local governments to carry out their constitutionally protected duties. To the contrary, section 48-39-20 speaks to state *and* local governments exercising their full authority over the lands and waters of the coastal

zone. S.C. Code Ann. § 48-39-20(C). Moreover, that section refers to state and local institutions operating under "arrangements," not a regime in which state regulations eviscerate local authority. Significantly, section 48-39-30 provides for promotion of "economic and social improvement" and specifically addresses the role of entities outside DHEC in preserving the coastal zone:

> To encourage and assist state agencies, counties, municipalities and regional agencies to exercise their responsibilities and powers in the coastal zone through the development and implementation of comprehensive programs to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values as well as to the needs for economic and social development and resources conservation.

Id. § 48-39-30 (B)(5). Thus, section 48-39-30 calls for a balance between competing interests and regulatory concerns within the coastal zone, which in turn directly contradicts DHEC's assertion of superior regulatory power throughout this broad geographic area.

I find two prior decisions reviewing DHEC permitting actions instructive. In *Spectre*, DHEC denied Spectre's storm-water/land disturbance permit because the Department found it inconsistent with various provisions of the CZMP. *Spectre L.L.C.*, 386 at 364–65, 688 S.E.2d at 847–48. Spectre appealed and in reversing DHEC, the ALC held that the CZMP did not apply to the property in question. *Id.* at 362, 688 S.E.2d at 846. This Court reversed, finding that the language of the CZMP set forth broad jurisdiction over the coastal zone, thereby supporting DHEC's interpretation of the CZMP regarding the Spectre site. *Id.* at 369, 688 S.E.2d at 850.

Spectre sought to fill isolated freshwater wetlands for commercial development. The CZMP specifically prohibited this activity, and most commercial construction requiring fill of freshwater wetlands. Moreover, unlike the present case, any adverse effects arose from the immediate impact of the proposed fill, and not later development which might have occurred if the fill permit had been granted. In the instant case, as the ALC observed, DHEC did not deny the proposed structure permit based on immediate adverse impacts on the critical area, but instead upon an assumption that the revetment would lead to residential development of the upland portion of the Spit. While *Spectre* made it clear that the CZMP had the full force of law, the case did not hold that the CZMP

authorizes DHEC to deny critical area permits because of the effects of later development of the upland area simply because of the upland's location within the coastal zone.

In *Spectre*, this Court noted DHEC's indirect authority and then pointed to a provision of the CZMP which *explicitly sanctioned*, and served to legitimize, DHEC's denial of the permit. No such language exists here. Thus, in my view, it is reasonable to conclude that if the General Assembly intended to grant DHEC the power to deny critical area permits based on possible upland construction, or permitting authority superior to that of almost all local zoning laws within the coastal zone, specific and enabling language would have been provided. Simply put, DHEC's explicit statutory power would seem to narrow and confine the Department's indirect authority over the coastal zone.

In *Murphy v. South Carolina Department of Health and Environmental Control*, 396 S.C. 633, 723 S.E.2d 191 (2012), proposed renovations to Chapin High School required filling a portion of a stream on the property. *Id.* at 636, 723 S.E.2d at 193. DHEC issued a permit to District 5 of Lexington and Richland Counties authorizing the project. *Id.* at 636–38, 723 S.E.2d at 193–94. Regulation 61–101 of the South Carolina Code of Regulations requires DHEC to deny certification if the proposed activity permanently alters the aquatic ecosystem in the *vicinity* of the project, or if there is a "feasible alternative" with less adverse consequences. *Id.* at 637, 723 S.E.2d at 193 (citing S.C. Code Ann. Regs. 61–101.F.5(a) & (b) (Supp. 2011)). Kim Murphy, a nearby resident, claimed that in considering the vicinity of the project under regulation 61–101, DHEC's inquiry should have been limited to the actual 727 feet of stream DHEC planned to fill. *Id.* at 638, 723 S.E.2d at 194. The ALC rejected this claim, and affirmed the certification. *Id.* Murphy appealed. *Id.*

Although the regulation did not define the term *vicinity*, this Court "interprets an undefined term in accordance with its usual and customary meaning." *Id.*, 723 S.E.2d at 640. Thus, this Court concluded:

> Merriam–Webster defines vicinity as meaning "the quality or state of being near: proximity" . . . . Using this accepted meaning of the word vicinity, the regulation clearly includes more than just the project; it logically incorporates the surrounding area. Moreover, a reading to the contrary would render it impossible to ever obtain a certification

to fill a portion of a stream as the functions and values of that area would always necessarily be eliminated.

Id. (citation omitted).

In enacting regulation 61–101, the General Assembly intended for DHEC to consider the impacts proposed construction might have on the surrounding area, and thus provided the term *vicinity* in the regulation.

In my opinion, these two cases stand for the proposition that when the General Assembly intends to provide DHEC with specific permitting authority, specific and enabling language is afforded. However, I cannot deny the import of sections 48-39-20 and 30 and would interpret DHEC's regulatory authority pursuant to Regulation 30-11(C) in harmony with those provisions and the overall policies set forth in the CZMA. *See, e.g., Crisp v. SouthCo., Inc.*, 401 S.C. 627, 644, 738 S.E.2d 835, 843 (2013) ("This interpretation is in harmony with the entire purpose of our workers' compensation regime and recognizes the other avenues of compensation available under the scheme . . . ."); *Hodges v. Rainey*, 341 S.C. 79, 91, 533 S.E.2d 578, 585 (2000) (recognizing the goal of statutory construction is to harmonize conflict and avoid absurd results).

Construction of a regulation is a question of law to be determined by the courts, and regulations must be construed using the same canons of constructions as statutes. *See S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012) (citations omitted). Thus, I would hold that the ALC erred in concluding that DHEC may not take into account the proposed structure's impact on the coastal zone.

The General Assembly clearly intended to halt construction which would destroy important ecological interests and other coastal resources, but there is no evidence that this policy should place property owners and local governments in a disadvantaged position. Thus, in my view, sections 48-39-20 and -30 do not authorize DHEC to restrict the rights of property owners or the power of local governments unless those entities act in ways that would *destroy* coastal resources, or *harm* those resources under otherwise preventable conditions. DHEC's review of permit applications must comport with the language contained in applicable statutes and regulations. DHEC's authority cannot be used to transform the Department into a broad-based governmental entity with unfettered authority over all citizens in the coastal zone. An administrative agency with this type of power

runs counter to the South Carolina Constitution, the clear text of the CZMA, and the APA's intent.

Despite the ALC's error, reversal is not warranted in my opinion. The ALC concluded that the potential residential development would "not have deleterious impacts even if the [c]ourt were to consider the effects of the potential residential development." According to the ALC:

> [T]he numerous measures and safeguards [Kiawah] intends to utilize in its development of Captain Sam's demonstrate that this limited residential use would be sensitively planned, responsive to the natural features of the peninsula, attentive to its flora and fauna, and without significant negative effects in the critical area . . . . [T]he [c]ourt concludes that there was no evidence adduced that the residential development would have any material adverse environmental effects on the upland.

The majority concludes that "*even the most* environmentally sensitive development will necessarily have some negative effects of the environment." (Emphasis added). In my opinion, this observation is not grounded in the CZMA's language. Moreover, in my view, this conclusion is far too broad to encompass the General Assembly's specific intent evident in the CZMA.

The ALC may choose between conflicting evidence, and that decision is no less supported by substantial evidence. *See Coastal*, 363 S.C. at 77, 610 S.E.2d at 487. "Substantial evidence" is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (quoting *Law v. Richland Cnty. School Dist. No. 1*, 270 S.C. 492, 243 S.E.2d 192 (1978)).

In my view, reasonable minds could reach the same conclusion as the ALC—that even if DHEC considered possible upland effects under a proper construction of Regulation 30-11, DHEC should not have denied Kiawah's permit pursuant to the regulation. Thus, I would hold that the ALC's error regarding Regulation 30-11(C) does not require reversal, and that substantial evidence in the record supports the ALC's decision that the proposed structure complies with that regulation.

III. Regulation 30-12(C)

Further, I would hold that the ALC did not err in concluding that the proposed structure met the specific criteria for bulkheads and revetments set forth in regulation 30-12(C).

Pursuant to regulation 30-12(C), bulkheads and revetments are prohibited where they restrict public access unless upland is eroding due to tidally-induced erosion, or no feasible alternative to the installation of the structure exists. S.C. Code Ann. Regs. 30-12(C) (2008). In my opinion, substantial evidence supports the ALC's determination that the proposed structure did not adversely affect public access pursuant to the regulation. However, even if public access is affected, I would find that the demonstrated loss of upland[16] and lack of feasible alternatives to the proposed structure support the ALC's determination that the project plainly satisfies regulation 30-12.

In my opinion, there is substantial evidence that no environmentally-responsible feasible alternatives existed. For example, Kiawah's project engineer testified regarding alternative systems:

> We looked at . . . a number of alternatives investigated [sic], bulkhead, riprap, to geo-tubes, a number of things that could have been used, and it was our recommendation that they use the concrete mats . . . . [F]rom all the systems that we were aware of, it seemed like that is the softest most compatible system out there . . . . We've seen them used in other locations where they become completely naturalized. It's kind of in keeping with the whole essence of Kiawah where . . . we also need engineering solutions that blend with the environment we're creating.

In response, as the ALC also noted, the South Carolina Coastal Conservation League (CCL) urged that the "alternative" was to do nothing, because according to the CCL, only minor erosion may have occurred in the last 10-12 months. The ALC disagreed, finding that the testimony clearly established a trend of continuous and significant shoreline erosion along the riverbank for several decades. In my

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[16] I agree with the majority's finding that substantial evidence exists to support the ALC's finding that upland is being lost due to tidally induced erosion.

opinion, that evidence clearly establishes a need for erosion control along the disputed shoreline.

CONCLUSION

The ALC carefully considered the evidence contained in the six-volume, 2,380 page record in this case. The ALC provided factual findings regarding the proposed structure's potential effects on wildlife and public use, and the proposed structure's compliance with the controlling statutes. In my view, the ALC's decision to modify the final plan fits squarely within his discretion and de novo review.[17] *See Risher v. S.C. Dep't of Health and Envtl. Control*, 393 S.C. 198, 207–08, 712 S.E.2d 428, 433 (2011) (explaining that the ALC is the ultimate fact finder in a contested case, and is not restricted by the findings of the administrative agency); *Brown v. S.C. Dep't of Health and Envtl. Control*, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002) (recognizing that the ALC sits de novo in a contested case proceeding). The General Assembly did not vest the ALC with broad authority to hear permit disputes, and conduct a trial, to only then have this Court restrain the ALC from issuing a decision which reflects the best outcome gleaned from that trial. *See B & A Dev., Inc. v. Georgetown Cnty.*, 372 S.C. 261, 268–69, 641 S.E.2d 888, 893 (2007) (recognizing the principle that when the legislature intends to confine expansive authority, it will expressly provide for such a limitation).

The net result of the majority decision is that a permit for construction of the proposed structure to extend 270 feet is approved, because the majority approach is to defer to the DHEC staff's decision. In my view, the majority's position gives

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[17] As Kiawah and the Savannah River Maritime Association (SRMC) note, the General Assembly has broadly defined the authority of the ALC. The ALC has the same "power at chambers or in open hearing as do circuit court judges" and the authority to issue writs necessary to give effect to its jurisdiction. S.C. Code Ann. § 1-23-630 (2005) (granting circuit judges the power to grant, decline, or modify injunctions). The ALC presides over hearings of all contested cases and must issue a decision in a final written order. *Id.* § 1-23-505(3) (Supp. 2012). If the ALC's final order is not appealed in accordance with the provisions of section 1-23-610 of the South Carolina Code, the certified order has the same effect as a judgment of the court where filed and may be recorded, enforced, or satisfied in the same manner as a judgment of that court. *Id.* § 1-23-600(I) (Supp. 2012).

unbridled deference to executive branch agency personnel and thus contravenes the protection provided by Article I, § 22 of the South Carolina Constitution. For this reason, and the reasons heretofore discussed, I would affirm the ALJ's decision, as modified by my analysis of Regulation 30-11 discussed *supra*.

KITTREDGE, J., concurs.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Petitioner, vs. South Carolina Department of Health and Environmental Control and Kiawah Development Partners, II, Respondents.	Docket No. 09-ALJ-07-0029-CC (consolidated cases) **ORDER DENYING KDP'S MOTION TO OPEN RECORD ON REMAND**
Kiawah Development Partners, II Petitioners, vs. South Carolina Department of Health and Environmental Control Respondent.	Docket No. 09-ALJ-07-0039-CC

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to a motion filed by Kiawah Development Partners, II (KDP) to open the Record in this case on remand from the South Carolina Supreme Court. For the reasons set forth below, KDP's motion is denied.

BACKGROUND

This Court originally held a consolidated contested case hearing on challenges from both KDP and the South Carolina Coastal Conservation League (Coastal) to a permit issued by the South Carolina Department of Health and Environmental Control (DHEC) for KDP to construct a bulkhead and concrete revetment extending 270 feet along the shoreline of Captain Sam's Spit around the bend in the Kiawah River to stop the erosion occurring there. KDP sought a permit to

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construct the remainder of the 2,783 feet of bulkhead and revetment that it had originally requested, whereas Coastal opposed the issuance of the permit for the 270 feet of bulkhead and revetment. This Court granted KDP a permit for the full 2,783 feet of bulkhead and revetment with special conditions. DHEC and Coastal appealed to the South Carolina Supreme Court.

In *Kiawah Development Partners, II v. South Carolina Dept. of Health and Environmental Control, et al.*, 411 S.C. 16, 766 S.E.2d 707 (2014), the South Carolina Supreme Court concluded that this Court erred in several respects and thus "revers[ed] and remand[ed] for further consideration consistent with [its] decision." Among the errors that the Supreme Court cited were that this Court did not make any findings, pursuant to The Coastal Zone Management Act (CZMA), specifically Section 48-39-30(D) of the South Carolina Code (2008 & Supp. 2012) as applied through section 48-39-150, as to whether the public at large – not just KDP – would benefit from the bulkhead and revetment and to what extent, "as opposed to leaving the tidelands in their natural state." On remand, KDP filed a motion seeking to open the Record to provide further proof that the bulkhead and revetment will benefit the public at large, or "the people." Coastal and DHEC each filed a Response/Return to Motion.

DISCUSSION

In its Motion to Open Record on Remand, KDP argues that the Supreme Court set forth a "newly crafted legal standard . . . with respect to public benefit" that was "neither finally decided nor fully addressed" and therefore requests the opportunity to submit into the Record "additional proof of the public benefit associated with the proposed project." Coastal argues, however, that this Court lacks jurisdiction to take additional evidence upon remand because the Supreme Court, in its opinion, did not did not instruct the ALC to do so. Coastal also argues that the public benefit question has been fully decided and sufficiently addressed by the Supreme Court and this Court, and both Coastal and the Department note that evidence regarding the benefit to the public/public interest was already presented at the hearing. Finally, Coastal argues that the Supreme Court did not create a new legal standard but instead simply applied the plain meaning of the statute (S.C. Code Ann. § 48-39-30(D)) to the facts of the case in reversing the Amended Final Order and Decision of this Court.

The general rule is that a party cannot submit additional evidence in a case that has been remanded unless the appellate court has given leave to submit that evidence, or where a party was not given a sufficient opportunity to provide evidence upon which a fair and reasonable

determination could be made on the issue on remand, such as where an issue is not directly addressed previously. *See Spinx Oil Co., Inc. v. Federated Mut. Ins. Co.*, 310 S.C. 477 477, 427 S.E.2d 649 (1993) (no abuse of discretion in declining to reopen the record when party could have provided the same evidence at trial) (*cited in Brenco v. S.C. Dep't of Transp.*, 377 S.C. 124, 128, 659 S.E.2d 167, 169 (2008)). *See also, e.g., Re S. Bell Tel. & Tel. Co.*, 25 P.U.R.4th 14 (May 30, 1978) WL 459654 (S.C.P.S.C.) (refusing to reopen the record before the South Carolina Public Service Commission because the record contained "sufficient evidence to make a fair and reasonable determination on each of the issues returned to the commission by the circuit court."). Also, leave to submit additional evidence should be tempered by the objective to keep a party from unfairly receiving a "second bite at the apple." *Therrell v. Jerry's Inc.*, 370 S.C. 22, 30, 633 S.E.2d 893, 897 (2006).

The Supreme Court in *Kiawah, supra* did not specifically give leave for the submission of additional evidence, but this does not end the inquiry. The next question in this matter is whether the Supreme Court fully decided the public benefit question. The position of Coastal and the Department is that the public benefit question has been fully decided and sufficiently addressed by the Supreme Court. I disagree. In its reasoning for reversal of this Court's decision, the Supreme Court noted that "the ALC made no findings of any public benefit that would result from the bulkhead and revetment." Rather, the ALC only considered the benefit to KDP. The Court also held that the ALC erred in finding that erosion of the neck of the spit had no positive benefit, and pointed out the benefits to the public resulting from the erosion. However, the Supreme Court also pointed out in its conclusion that the benefits to the public of the erosion, i.e. an untouched, "pristine sandy beach" with its "bounty of benefits to the people ranging from environmental to recreational[,]" was "alone . . . not a valid reason to reverse the ALC's approval of a permit to construct a huge bulkhead and revetment there." The Supreme Court's opinion did not address whether the proposed bulkhead and revetment would also benefit the public, because again, the ALC did not make any findings on that issue, which the Supreme Court found was in error.

Therefore, the Supreme Court, upon remand, expected this Court to consider both the benefit to the public, if any; the extent of any such benefit of constructing the bulkhead and revetment as well as the comparative public benefit, if any; and the extent of any such benefit of leaving the tidelands in their natural state. As the Court noted in its conclusion, "reversal is

warranted due to the several errors of law committed by the ALC, [including that] the ALC did not consider whether and to what extent the public would benefit from the proposed structure as opposed to leaving the tideland in their natural state." It is thus clear that the Supreme Court expected this Court to make further findings of fact and not to simply enter judgment in favor of Coastal on the issue of the public benefit of the proposed bulkhead and revetment. Therefore, I find that the Supreme Court did not fully decide the public benefit question.

The next question is whether the issue of the public benefit with respect to the bulkhead and revetment was directly addressed at the original hearing before the ALC such that KDP was given a sufficient opportunity to provide evidence upon which the ALC could make a fair and reasonable determination on the issue upon remand. But in order to answer this question, the Court must first look at the question of whether the Supreme Court in *Kiawah*, *supra* created a new legal standard for determining "public benefit" such that the public benefit issue was not directly addressed in the original hearing before the ALC, thus depriving KDP the opportunity to provide sufficient evidence upon which the ALC could make a fair and reasonable determination of the issue upon remand.

Petitioner argues that the Supreme Court set forth a new legal standard for "public benefit" when it stated that in determining whether Section 48-39-30(D) is satisfied, "'the people' should be construed as the public at large rather than a single developer." However, though the Supreme Court may not have set forth this definition in a prior decision, this definition is based on the plain language of the statute, which requires that "[c]ritical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses that will generate measurable maximum dollar benefits." S.C. Code Ann. § 48-39-30(D). Interpreting "the people" to be the public at large rather than a single developer was a foreseeable interpretation for which Petitioner should have been prepared to argue and support with evidence at the hearing. At any rate, the Supreme Court's interpretation does not create a new standard for determining the public benefit.

The final question is whether the issue of the public benefit with respect to the bulkhead and revetment was directly addressed at the original hearing before the ALC such that KDP was given a sufficient opportunity to provide evidence upon which the ALC could make a fair and reasonable determination on the issue upon remand. The record reflects that the issue of public benefit with respect to the bulkhead and revetment was directly addressed at the original hearing

before this Court. Bill Eiser testified that the intended beneficiary under Section 48-39-30(D) was "to ensure the maximum benefit to the people." That testimony responded to Davis Whitfield-Cargile's question about the relevance of Section 48-39-30(D) in their decision. Similarly, Leonard Long, when asked about the benefits of the revetment, testified that "it would be a benefit to stop the erosion at a public park that serves 50,000 people a year." The testimony of both witnesses coincided with the Supreme Court's definition of "the benefit to the people" as being the benefit to the public at large. Moreover, in KDP's own Motion to Reopen, it admittedly "seeks an opportunity to present **further** proof" (emphasis added) as to this particular issue and requests that the record be reopened "to receive **additional** proof of the public benefit associated with the proposed project." (emphasis added). These references by KDP imply that it recognizes that it already provided proof of the public benefit at the hearing. Therefore, KDP cannot argue that it was not given the opportunity to present evidence on this issue at the hearing.

The existence of this evidence presented at the hearing, together with the foreseeable, plain meaning definition of the public benefit provided by the Supreme Court that was suggested in the testimony at the hearing, leads this Court to conclude that KDP was given a sufficient opportunity to present evidence on the public benefit issue, which was directly addressed at the hearing. Consequently, the Court declines to reopen the record on this issue.

ORDER

IT IS THEREFORE ORDERED that KDP's Motion to Open Record on Remand is **DENIED**.

IT IS FURTHER ORDERED that the parties' arguments regarding the remaining issues in this case be heard on Tuesday, May 19, 2015 beginning at 10:00 am.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

April 8, 2015
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

E. Harvin Belser Fair
Judicial Law Clerk

April 8, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Kiawah Development Partners, II Petitioner, vs. South Carolina Department of Health and Environmental Control, Respondent.	Docket No. 09-ALJ-07-0029-CC (consolidated cases) **FINAL ORDER AND DECISION ON REMAND**
South Carolina Coastal Conservation League Petitioner, vs. South Carolina Department of Health and Environmental Control, and Kiawah Development Partners, II, Respondents.	Docket No. 09-ALJ-07-0039-CC

FILED
December 2, 2015
SC ADMIN. LAW COURT

This matter is before the South Carolina Administrative Law Court (ALC or Court) on remand from the South Carolina Supreme Court (Supreme Court) for further consideration of certain issues where the Supreme Court found that this Court committed errors of law. *See Kiawah Dev. Partners, II v. S.C. Dep't of Health and Envtl. Control, et al.*, 411 S.C. 16, 766 S.E.2d 707 (2014) (Opinion).

STATEMENT OF THE CASE

This matter involves two contested cases challenging a critical area permit issued by the South Carolina Department of Health and Environmental Control (DHEC) to Kiawah Development Partners, II (KDP). DHEC issued a permit for the construction of a 270-foot long and 40-foot wide articulated concrete block revetment and a vertical bulkhead system along the banks of the Kiawah River at Captain Sam's Spit (Spit), at Kiawah Island in Charleston County. Both KDP and Coastal filed requests for contested case hearings, with KDP challenging the denial

of 2,513 feet of the requested 2,783 foot revetment/bulkhead system and Coastal challenging the issuance of the 270 feet of revetment/bulkhead system and seeking to uphold the denial of the 2,513 feet of structure, respectively.

The Court consolidated the cases for the hearing which was conducted August 24-28, 2009. On January 22, 2010, this Court issued a Final Order and Decision authorizing the construction of 2,783 feet of bulkhead and revetment, with limiting conditions. Both KDP and Coastal filed motions for reconsideration. On February 26, 2010, this Court issued an Amended Final Order and Decision (Amended Final Order).

Coastal and DHEC filed appeals in the South Carolina Court of Appeals, after which Coastal successfully moved to transfer the case to the South Carolina Supreme Court. On November 21, 2011, the Supreme Court issued an Opinion reversing this Court's decision. KDP filed a petition for rehearing, which was granted and resulted in a second Opinion on February 27, 2013, this time upholding this Court's Order. Coastal successfully petitioned for rehearing, which resulted in a third and final Opinion, dated December 10, 2014, reversing this Court's Amended Final Order based on several errors of law and remanding the case to this Court.

In considering and addressing the matters returned to this Court by the Supreme Court on remand, this Court recognizes that the Supreme Court's holdings are the law of the case and cannot be altered on remand. *See Prince v. Beaufort Mem'l Hosp.*, 392 S.C. 599, 606, 709 S.E.2d 122, 126 (Ct. App. 2011) ("[T]he appellate court's instructions circumscribe the trial court's authority on remand. The trial court's duty is to follow the instructions it received from the appellate court."). With that in mind, this Court has again reviewed the record of testimony and exhibits that were admitted in the contested case hearing in light of the legal principles set forth in the Opinion.[1] The portions of the Amended Final Order that the Supreme Court did not hold were affected by legal error or without factual support stand. Those findings and conclusions remain as set forth in the Amended Final Order and will not be repeated herein since this Court was not directed to further consider them.

[1] This Court previously denied the motion of KDP to open the record in an Order dated April 8, 2015. Therefore, no new matter or subsequent information was considered in drafting this Order.

As set forth in the Opinion, this Court is to consider the following:

1. Whether and to what extent the public, as distinct from KDP alone, would benefit from the proposed bulkhead and revetment, as opposed to leaving the tidelands in their natural state;

2. Whether the project, including the proposed residential development it will facilitate, meets the requirements of 2 S.C. Code Ann. Regs. 30-11 (2011), both as to the factors in S.C. Code Ann. § 48-39-150 (2008 & Supp. 2012) and as to the long-range cumulative impacts of the bulkhead and revetment on the upland; and

3. Whether the project meets the requirements of Reg. 30-12(C), in particular, whether KDP proved there are no feasible alternatives to the bulkhead and revetment under Reg. 30-12(C)(1)(d) when strong consideration is given to leaving the riverbank in its natural state.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and closely passed upon their credibility, taking into consideration the burden of persuasion of the parties, I make the following Findings of Fact by a preponderance of the evidence:

Public Benefit

In its reasoning for reversal of this Court's decision, the Supreme Court, in considering the application of Section 48-39-30(D) through Section 48-39-150, noted that "the ALC made no findings of any public benefit that would result from the bulkhead and revetment. . . ." *Kiawah*, 411 S.C. at 30, 766 S.E.2d at 716. Rather, the Supreme Court found that the ALC only considered the benefit to KDP. As the Supreme Court also noted in footnote 5 of its Opinion, though KDP is a member of the public, "the ALC erred in considering only the benefits to [KDP] to the exclusion of the public as a whole." *Id.* at 31, 766 S.E.2d at 716. The Supreme Court also held that the ALC erred in finding that erosion of the neck of the Spit had no positive benefit, and pointed out the benefits to the public resulting from the natural erosion process. However, the Supreme Court also pointed out in its conclusion that the benefits to the public of an untouched, "pristine sandy beach" with its "bounty of benefits to the people ranging from environmental to recreational[,]" was "alone . . . not a valid reason to reverse the ALC's approval of a permit to construct a huge bulkhead and revetment there." *Id.* at 44, 766 S.E.2d at 723. The Supreme Court's opinion did not address whether the proposed bulkhead and revetment would also benefit the public because the ALC erred in not making any findings on that issue.

Therefore, the Supreme Court remanded the cases to this Court to consider both the benefit to the public, if any, and the extent of any such benefit of constructing the bulkhead and/or revetment. As the Supreme Court noted in its conclusion, "the ALC did not consider whether and to what extent the public would benefit from the proposed structure as opposed to leaving the tideland in their natural state." *Id.* Thus, in conducting its analysis of the public benefit, this Court is to also consider the public benefit, if any, of leaving the tidelands in their natural state. The following findings address the Supreme Court's charge to make further findings of fact on this issue.

Protection of Beachwalker Park

The Charleston County Park and Recreation Commission (PRC) operates Beachwalker Park (Park) to provide the general public access to the oceanfront beach on the west end of Kiawah Island. The Park consists primarily of a parking lot, changing facilities, a tiny snack bar, and a boardwalk to the beach. Approximately 50,000 members of the public use the Park on an annual basis. The use of the Park is not limited to residents of Kiawah Island but is used primarily by non-residents, as the Park provides the only public access to the beaches in this mostly private island community. Indeed, Beachwalker Park functions as a public park that provides the general public access to the beaches of Kiawah Island. Although the Park is along the bank of the Kiawah River, there are no stairs or other improved access from the parking lot down the escarpment to the bank of the Kiawah River. To the contrary, the public benefit to the use of the shoreline in the area immediately abutting Beachwalker Park is speculative.

Importantly, the general public use and benefit of the Park is dependent upon the parking lot of the Park, as parking spaces allow for greater utility of the park and increased access to the beach. However, the riverbank along Beachwalker Park has been eroding, creating a significant vertical escarpment against the bank holding the parking lot, imperiling some of the parking spaces. The Park's split rail fence at the edge of the parking lot on the riverbank has had to be moved inland to prevent people from falling down the escarpment and is now perched on the edge of the escarpment leaning outwards. The erosion has caused the loss of the land where the Park's gazebo was initially located. Erosion is jeopardizing the Park's infrastructure and is fairly severe up to the narrowest point on the neck, beyond which the erosion begins to decrease. Therefore, the Park provides a significant public benefit in granting the general public a means by which to

access the beaches of Kiawah Island, and that benefit greatly exceeds impairment to any speculative use of the shoreline immediately abutting the Park.

PRC previously applied for a 270-foot bulkhead in this area but withdrew the application, opting for the protection of the bulkhead and revetment along the entire shoreline. In fact, DHEC approved 270 feet of both a bulkhead and revetment in the same location as the bulkhead shown on the withdrawn plan of PRC. These structures protect the portion of the eroding riverbank along the Park where the erosion is the worst. The stabilization of the river shoreline with the bulkhead and revetment across the front of the Park therefore furthers the public use.

Coastal argues that protecting the bank along the Park is not in the public interest because the location of the Park could change at some time in the future. However, the Court rejects this contention as conjectural. There was no proof of an agreement between KDP and PRC to move the location of the Park, even though some discussions had occurred. This Court affirms its finding that the bulkhead and revetment are clearly necessary to protect the Park's high ground and improvements from falling into the river in light of its current location and additionally finds that this benefits the general public.

Beach Parking for KICA

The terms of the Development Agreement, dated October 12, 2005, between the Town of Kiawah Island and KDP provide that the limited upland development allowed on the Spit that will be facilitated by the bulkhead-revetment shall include beach parking and beach access near the western end of the Spit for the members of Kiawah Island Community Association (KICA). The relevant provision provides as follows:

> Property Owner shall provide to KICA (by quitclaim deed conveyance) 8 parking spaces at the western end of the road access authorized above upon completion of same and shall improve the spaces with pervious material. An easement to KICA shall be limited to its members' use for access along the road to the 8 parking space area. A beach access path from such parking area shall also be granted by Property Owner to KICA by quitclaim deed for its members' convenient usage.

All property owners on Kiawah Island are members of KICA and are, likewise, members of the general public who will benefit from this beach parking area and beach access.[2] KDP is obligated to provide and convey this beach parking and beach access upon completion of the road to the

[2] As with KDP, the members of KICA are included in "the people," and benefits to them are therefore considerations to take into account along with benefits to other members of "the people" when considering the benefit to the public as a whole, *See* footnote 5 of *Kiawah*.

western end of the Spit. The bulkhead and revetment is a necessary component to construction of this road. This beach parking and beach access west of the Park toward Captain Sam's Inlet does not now exist and constitutes a public benefit that will be realized through the construction of the bulkhead-revetment that will allow the limited development that includes this community facility.

Conservation Easement

The 2005 Development Agreement between KDP and the Town of Kiawah Island granted KDP the right to subdivide no more than fifty lots on a maximum of twenty acres. KDP obtained the right to this limited development from the Town of Kiawah Island in the 2005 Development Agreement. As part of that agreement, KDP relinquished the right under the prior Development Agreement to construct a 325-room hotel immediately to the east of the Park.

In addition to specifying numerous guidelines for an environmentally sensitive development, the 2005 Development Agreement requires KDP, upon completion of the limited development, to permanently encumber the remainder of the Spit with a restrictive covenant mandating that it remain in its natural state and to grant a conservation easement to Kiawah Island Natural Habitat Conservancy (KINHC) over that same acreage. The specific provision of the Development Agreement imposing this obligation on KDP upon completion of the limited development provides as follows:

> Prior to the Termination Date, Property Owner also agrees to restrict all remaining highlands not devoted to the uses or purposes authorized herein, to non-developable, passive green space by restrictive covenant recorded in the Charleston County RMC Office. Property Owner shall grant an easement to KINHC (provided KINHC accepts) for any acreage not subject to Development, including such acreage as is to be conveyed, ultimately, to KICA.[3]

KDP is the fee simple owner of the entirety of the Spit. This ownership includes the entirety of the highland outside of the critical area – from above the mean high water mark on the oceanfront to the critical line along the Kiawah River. The Development Agreement describes the Spit as "approximately 118.3 acres of highland." KPD's development of the Spit is limited to "no more than 20 acres" for single family detached dwellings plus the acreage necessary for the infrastructure for this limited residential development, such as road rights of way, utilities, beach

[3] The Court shall refer to the restriction and easement mandated by this provision at the completion of development jointly as the "Conservation Easement."

access easements, community beach parking for beach access, and community dock[4] access with associated parking. The only acreage excluded from permanent protection in a natural state by the conservation easement is the land subject to the limited development. At the hearing, the evidence revealed that the highland consisted of 150 acres with the conservation easement encompassing over 80% of the entirety of the Spit.

As the Supreme Court explained, the ALC must consider the impact of the upland development of the Spit in determining whether to approve the requested permits. Here, the owner's encumbrance of the vast majority of the highland of the Spit by a conservation easement preserving it in a natural state provides a significant public benefit. Even if the baseline on the Spit were to move seaward again, as it did in 1999, the new area above the setback line could not be developed. Dr. Kana's testimony at trial established that the ocean beach along the Spit, fed by sand from enormous shoals in the Stono River Inlet, has been accreting on the ocean side for decades and will continue to accrete for decades, if not centuries. The conservation easement would protect this additional "new" acreage from any development or man-made alteration. Since this protection is assured by legal restriction and a recorded easement, any changes to state or local laws that would allow further development would be of no effect, thus ensuring the permanency of this public benefit from the bulkhead and revetment.

Mr. Eiser, who testified on behalf of the Department to the rationale for the staff's decision, attested to the "extraordinary" value to the public if the entirety of the Spit, though owned by KDP and not the public, forever remained in a natural state for all the people of South Carolina to enjoy. The preservation of approximately 80% of the Spit in a natural state, and all land accreting to it in the future, bestows this same public benefit, albeit to a slightly less extent than if there was no development at all on the Spit. This public benefit can only be realized if the development that depends on the stabilization of the riverbank through the bulkhead and revetment occurs.

Though, as explained below, this benefit does not offset the impact to the public by extending the revetment beyond, it does factor into the efficacy of granting a permit to construct the bulkheads.

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[4] The Development Agreement allows KDP to construct up to two community docks along the Kiawah River.

No-action Alternative

In addition to consideration of the public benefit resulting from the construction of a bulkhead and revetment, the Court must also consider the public benefit if the bulkhead and revetment are not constructed.

In its Opinion, the Supreme Court held that this Court erred in finding that erosion of the neck of the Spit had no positive benefit. The Supreme Court referenced S.C. Code Ann. § 48-39-20(F), in which the General Assembly made the following finding in support of the Coastal Zone Management Act (CZMA): "In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone while balancing economic interests, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate." The Supreme Court also stated that there was "evidence that the repetitive accretion of Captain Sam's Spit, followed by the erosion of the neck of the spit[,] served as the supply of sand for Seabrook Island to the southwest." *Kiawah*, 411 S.C. 16 at 31, 44, 766 S.E.2d at 716, 723. The Supreme Court thus pointed out some potential benefits to the public resulting from natural processes like erosion, including the protection of "natural processes like the cyclical erosion, breach, and accretion of the spit"[5] and a "pristine sandy beach," with its "bounty of benefits to the people ranging from environmental to recreational."[6] *Id.*, 411 S.C. at 31, 44, 766 S.E.2d at 716, 723. While the public could still access the shore on the proposed concrete mat and pull their boats or kayaks onto it, their recreational enjoyment of a portion of the river shoreline would be lessened. However, the Court also noted that these benefits were "alone . . . not a valid reason to reverse the ALC's approval of a permit to construct a huge bulkhead and revetment there." *Id* at 44, 766 S.E.2d at 723.

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[5] The evidence in the record indicates that the supply of sand for Seabrook Island did not come from repetitive accretion of the Spit and erosion of the neck and spit (i.e., natural systems), but rather from manmade alterations, such as the mechanical relocation of Captain Sam's Inlet to the east of its then-existing tip, opposite Captain Sam's Creek. This allowed the detached tip of the peninsula to provide sand for Seabrook Island and resulted in the significant accretion of sand on the shoreline on Captain Sam's Spit. This man-initiated process, rather than the historic process suggested by the Supreme Court, appears to be the dominant factor in the renourishment of the shoreline on Seabrook Island. Nevertheless, regardless of how the sand was supplied for the renourishment of Seabrook Island, this Court agrees with the Supreme Court that there is a public benefit to having a pristine sandy shoreline, which would occur if the Spit was left in its natural state. However, as the Supreme Court noted in its Opinion, this is not dispositive.

[6] In remanding this case to the ALC, the Supreme Court pointed out both the public benefits that emanate from the use of the shoreline and its "pristine" condition. Ostensibly, the greater the public use, the less pristine the shoreline will be. This begs the question: which is of greater importance – the preservation of the shoreline in its natural state or the public benefit gained by its use?

Considerations Under Section 48-39-150 and Regulation 30-11(C)(1)

The Supreme Court also concluded that "the ALC erred in finding the project met the requirements of regulation 30-11 both because that regulation requires consideration of the factors in section 48-39-150 and because the ALC's consideration of upland impacts was flawed." The Supreme Court held that the Court erred in not interpreting the general considerations and, in particular, the further guidelines in Reg. 30-11(C)(1) as applicable to the upland development facilitated by the bulkhead and revetment. The Supreme Court also held this Court erred in finding there would be no impact at all to the upland and in failing to sufficiently support the factual findings related to the upland development.

Section 48-39-150

Because the Supreme Court did not take issue with this Court's findings and conclusions in its analysis of the general considerations applicable to the impacts in the critical area, with the exception of public access to tidal resources, the Court will not repeat them. Instead, the Court will consider and apply the general considerations as they apply to the future residential development of the upland. The pertinent general considerations under S.C. Code Ann. § 48-39-150(A), and the Court's findings as to their application to the limited residential development, are as follows:

Section 48-39-150(A)(3) calls for consideration of:

> The extent to which the applicant's completed project would affect the production of fish, shrimp, oysters, crabs, or clams or any marine life or wildlife, or other natural resources in a particular area[,] including but not limited to water and oxygen supply.

The Court finds that based on the numerous precautions and environmentally aware development methods described and found below, the limited residential development of the upland will not adversely affect the production of fish, shrimp, oysters, crabs, or clams or any marine life or wildlife. In making this finding, the Court reaffirms its findings as to the lack of negative effect on wintering piping plovers and diamond back terrapins, the two species at issue in the hearing, which are covered in the Amended Final Order.

Section 48-39-150(A)(4) calls for consideration of:

> The extent to which the activity could cause erosion, shoaling of channels or creation of stagnant water.

The Court finds that the limited residential development of the upland will not cause erosion, shoaling of channels, or creation of stagnant water. Rather, the purpose of the bulkhead and revetment is to stop further erosion that is occurring at the riverbank along Beachwalker Park.

Section 48-39-150(A)(5) calls for consideration of:

> The extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches[,] or other recreational coastal resources.

The Court finds that the limited residential development of the upland will not affect existing public access to tidal and submerged lands, navigable waters and beaches, or other recreational coastal resources. In fact, the public will benefit from the development because of the conservation easement that covers 80% of the Spit. The proposed revetment, not the limited residential development of the upland, will affect public access to the sandy riverbank at low tide.

Section 48-39-150(A)(6) calls for consideration of:

> The extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable historic and archeological sites of South Carolina's coastal zone.

This Court found that limited residential development will not affect wintering piping plovers and diamond back terrapins, neither of which is endangered nor threatened. The limited residential development is far removed from the designated critical habitat for wintering piping plovers near Captain Sam's Inlet and is not a Geographic Area of Particular Concern.[7] Also, there was no proof of irreplaceable historic and archeological sites on Captain Sam's Spit.

Section 48-39-150(A)(7) calls for consideration of:

> The extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state.

KDP asserts that the limited residential development facilitated by the bulkhead and revetment will provide considerable economic benefits both to the developer and to the public by increasing the real property tax base. Though that assertion regarding the real property tax base appears reasonable, there was no evidence supporting that contention.

Section 48-39-150(A)(8) calls for consideration of:

> The extent of any adverse environmental impact which cannot be avoided by reasonable safeguards.

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[7] "Geographic Area of Particular Concern" is coterminous with "critical habitat."

As demonstrated by the findings below concerning Reg. 30-11(C)(1), the safeguards to be implemented by KDP will avoid any adverse environmental impacts.

Section 48-39-150(A)(9) calls for consideration of:

> The extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project.

As substantiated by the findings below concerning Reg. 30-11(C)(1), KDP demonstrated that significant safeguards will be taken to avoid adverse environmental impact resulting from the limited residential development. There was also no proof of KDP failing to exercise any feasible safeguards.

Section 48-39-150(A)(10) calls for consideration of:

> The extent to which the proposed use could affect the value and enjoyment of adjacent owners.

KDP is the adjacent owner. The limited residential development will not adversely affect the value and enjoyment of KDP. The Court rejects the notion advanced by Coastal that the public is the adjacent owner by virtue of the Park.

Regulation 30-11(C)(1)

The Court now turns to the application of Reg. 30-11(C)(1), the focus of the Supreme Court's discussion in the Opinion. Regulation 30-11(C)(1) provides as follows:

> C. Further Guidelines: In the fulfilling of its responsibility under Section 48-39-150, the Department must in part base its decisions regarding permit applications on the policies specified in Sections 48-39-20 and 48-39-30, and thus, be guided by the following:
>
> 1. The extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area.

By stabilizing the river shoreline in the neck, the proposed bulkhead and revetment will enable the limited residential development on Captain Sam's Spit allowed under the terms of the Development Agreement. This development will alter less than 20% of the total area of the Spit, converting it from a natural area to a residential development. There will thus be some impact from this limited residential development. But as stated in this Court's findings and conclusions associated with its analysis under the Coastal Zone Management Plan (CZMP), the CZMP does not prohibit the residential development of barrier islands. Residential development on barrier islands is consistent with the CZMP; as this Court found and concluded, when it complies with the

CZMP's policies and conditions for such development. Additionally, the remainder of the Spit will be under a conservation easement and unable to be developed.

Since the upland development will have an impact on what is now an undeveloped natural area of the Spit, as the Supreme Court noted, this Court must assess those impacts under Reg. 30-11(C)(1). Because this development has yet to occur, the Court looks to the testimony and exhibits as to the plans and intent for this limited residential development. KDP offered considerable proof as to the precautions that will be taken in this upland development and the methods to be used. Based on that proof, as further explained below, the Court finds that the proposed development is not only consistent with the CZMP for reasons stated in the Amended Final Order, but also that the cumulative impacts from that development will not have a long-range negative effect and are in keeping with other developments on Kiawah Island and the general character of the island itself, including Captain Sam's Spit, and adjacent Seabrook Island.

The Spit itself is undeveloped. Yet, the Spit is part of Kiawah Island, which has been clearly developed in a manner consistent with the ecologically friendly development proposed in this case. Therefore, it appears from the record that the general character of the greater area is residential, with some commercial development. Furthermore, the proposed development is of less than 20% of the Spit, and that residential development by the owners of the private property will be implemented in an environmentally sensitive manner that will be consistent with, if not more environmentally protective than, the existing development. In support of this Court's findings that the limited residential development will be done sensitively and not have long-term negative cumulative impacts, the Court finds the following:

KDP has a history of environmentally sensitive development and has developed many similar features on Kiawah Island, such as tidal islands and marsh peninsulas, in a minimally impactful manner. Also, the Development Agreement requires that KDP use care to minimize its impacts:

> Such developable acreage shall be based on environmentally-sensitive approaches to Development, including limited and careful infrastructure construction. The Town will assist Property Owner in facilitating provision of access strategies that minimize impacts with narrow rights-of-ways to 20' widths or less and narrower road profiles to 16', provided such access is appropriate for emergency vehicles. Property Owner may use pervious material for same.

The environmentally sensitive approaches that will be implemented in the limited residential development on Captain Sam's include the following:

- Eschewing the development of typical grass yards and focusing on native grasses, xeriscaping (zero-scaping);
- Imposing significant setbacks of the development from not only the ocean but the primary, secondary, and tertiary dunes, with four to six rows of dunes between the beach and the developed area;
- Prohibiting houses from being taller than one and a half stories;
- Placing the houses among the trees;
- Using pervious materials instead of asphalt on driveways and the road wherever practicable;
- Combining dune walkovers for access from the houses to the beach so there would be a reduced number across the dune field on the Spit;
- Eliminating individual docks and limiting the docks along the Kiawah River to no more than one or two community docks;
- Prohibiting development on more than 80% of the Spit through a restriction and conservation easement;
- Working with a number of experts and scientists to enhance, restore, and enlarge the habitat available for a variety of birds and animals on the Spit;
- Placing the development, generally, within the forest canopy;
- Furnishing public utility services of water and sewer and prohibiting wells and septic tanks; prohibiting the random cutting of vegetation;
- Prohibiting anyone from building on the dunes;
- Using natural building sites and making them as small as practicable;
- Keeping the land around the buildable site in as close to an existing state as possible, retaining natural vegetation;
- Featuring indigenous plant material rather than imported plants;
- Implementing the development with a light touch, erring on the side of less rather than more, with infrastructure improvements as narrow as practical and minimizing runoff;
- Implementing shared pervious driveways;
- Making the homes and structures less prominent, treating them more as background;
- Eliminating parking under houses since it increases the elevation of the houses;
- Trying to limit lot sizes to the developed area;
- Imposing strict restrictive covenants; and
- Limiting the development to a total of between twenty-five and fifty home sites on the twenty acres.

The extended period of development further reduces the potential for long-range cumulative impacts. The houses will be constructed over a long period of time, perhaps up to twenty to thirty years. Also, most of the houses probably will be second homes that are occupied on an infrequent basis, usually six to eight weeks over the course of a year.

As for the Department's concern that the upland development may impact wetlands, the Court finds that no wetlands have been identified on the upland at this time. If any wetlands are located, any proposed modification of them will be subject to the Department's separate permitting process, and KDP would abide thereby. However, the Court affirms its earlier findings in response to this purported concern.

Although the Department and Coastal did not have the burden of proof as to the cumulative effects of the project, including on the upland, neither presented any testimony to contradict the findings above or evidence suggesting that the method of development would not be environmentally sound. Indeed, the Department's witness, Mr. Eiser, acknowledged that the Department's decision was not based on the environmental effects of the development, but simply on the fact that a portion of a natural area was going to be developed.

The Court finds that the residential development of the portion of the upland intended to be developed will not have deleterious impacts for the reasons set forth above. In fact, the only evidence on this matter was that these environmentally sensitive development methods will not have an adverse effect. The only adverse effect in the estimation of the Department is that there will be development where now there is natural land and no development. However, there is no public policy against development of private property that has never been developed. In fact, the CZMP contemplates such development and provides guidelines, all of which will be satisfied by this proposed development. KDP has exercised considerable care to ensure that the limited residential development will be sensitively planned, responsive to the natural features of the site, and attentive to its flora and fauna, as previously determined in the Amended Final Order.

Regulation 30-12(C)

The Supreme Court determined that this Court erred in its factual findings and conclusions in the application of the project-specific standards in Reg. 30-12 (C). In particular, the Supreme Court held that this Court "erred in interpreting regulation 30-12(C) as only applying where there would be a substantial impact on public access, in finding there would be no adverse effect on

public access, and in finding the public did not use the critical area where the bulkhead and revetment would be constructed." *Kiawah*, 411 S.C. at 43, 766 S.E.2d at 722-23.

Coastal argues that the Supreme Court ruled that the uncontroverted evidence is that the impairment of public access would be substantial in this case. First, the Supreme Court rejected what it called a "substantiality" requirement for measuring adverse effects of public access and instead held that this Court should have applied a balancing test "of economic and environmental, and public and private considerations." The Supreme Court specifically found:

> "[Reg. 30-12(C)] does not prohibit outright any bulkhead or revetment that would adversely affect public access; rather, it balances the need for public access against the need for a bulkhead or revetment. It does so by providing that a bulkhead or revetment that affects public access may still be permitted where upland is being lost due to tidally induced erosion and no feasible alternative exists."

Id., 411 S.C. at 39-40, 766 S.E.2d at 721. Thus, the simple finding that there would be an adverse impact on public access does not end the inquiry for the Court; otherwise, the permitting of a bulkhead or revetment would never be possible.

Based on the testimony of Dr. Greg VanDerwerker, Sidi Limehouse, Sophia McAllister, and Bill Eiser, this Court finds that the public uses the sandy riverbank that is exposed at low tide for recreational purposes, such as kayaking and fishing.[8] The Court further finds that the revetment would adversely affect this recreational use where the sandy shore line would be replaced by an ACB mat. The Court finds, as it did in its previous order, that "the ACB mat degrades the public uses of the shoreline where the mat is approved." However, the evidence did not establish that the bulkhead would adversely affect the recreational use of the sandy shore line.

Having determined again that public access would be adversely affected in those locations where the proposed revetment extends along roughly 1900 feet of the shore line, except for the marsh area on the northwestern end of Beachwalker Park, the Court must determine whether KDP proved that there are no feasible alternatives to the proposed bulkhead and revetment, as mandated by Reg. 30-12(C)(1)(d), which provides: "(d) Bulkheads and revetments will be prohibited where public access is adversely affected unless no feasible alternative exists."

As the Supreme Court pointed out, Reg. 30-1(D)(23) addresses feasible alternatives for purposes of the analysis under the regulations:

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[8] The extent of this use, however, appears questionable.

> Feasible (feasibility) - 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 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.

Reg. 30-1(D)(23). The Supreme Court directed this Court, in making its determination, to give serious consideration to the no-action alternative and not give it short shift. *Kiawah*, 411 S.C. at 43, 766 S.E.2d at 723. The Supreme Court emphasized the legislative finding in S.C. Code Ann. § 48-39-20(F) "that there is an 'urgent need to protect and to give high priority to natural systems in the coastal zone . . . .'" *Id.* The Supreme Court added that "the accretion, erosion, and breach of the spit is a natural system." *Id.*

Allowing the riverbank to remain in its natural state would allow the existing quality of the recreational use of the river bank at low tide to continue because there obviously would be no manmade structure obstructing the sandy shoreline. The Court recognizes this as an important consideration, and agrees with the Supreme Court that it would benefit the public to protect the natural processes; however, as the Supreme Court also noted, this benefit alone is not enough to justify denial of the permit: "The area, particularly the pristine sandy beach, is undoubtedly one of this State's natural treasures. Admittedly, this alone is not a valid reason to reverse the ALC's approval of a permit to construct a huge bulkhead and revetment there." *Id.* at 44, 766 S.E.2d at 723. As the Supreme Court noted, environmental and public benefits must be balanced against other public, economic, and private benefits in order to determine the maximum benefit to the public.

In initially considering the natural processes of this river shoreline and the entire Spit, the expert testimony at trial clearly established that it is highly unlikely that the Spit will breach at the neck even if the bulkhead and revetment were not installed.[9] Rather, the natural historical

[9] As explained by Dr. Kana, the primary influence changing the historical cycle has been and will be the artificial relocations of Captain Sam's Inlet to the east of its natural location, thereby providing Seabrook Island with a source of sand from the end of Captain Sam's Spit and fortifying Captain Sam's Spit east of the relocated inlet. The first inlet relocation in 1983 was well after the 1974 Environmental Inventory of Kiawah Island relied upon by the League that references this historical cycle of breach of the Spit; so obviously, the 1974 Inventory could not have considered the effect of the first and subsequent inlet relocation.

phenomenon of gradual elongation of Captain Sam's Spit followed by its breach has been interrupted and altered by engineered relocations of the inlet. Therefore, failing to construct the bulkhead and revetment would not result in the continuation of the natural cycle, nor would it interfere with a breach at the neck if there were ever a major hurricane. Whether the bulkhead and revetment are constructed is not a variable in determining the natural cycle of a breach.

On the other hand, allowing the erosion to continue unabated where the bulkhead and revetment were originally authorized jeopardizes the parking lot of the popular public facility of Beachwalker Park. This would be detrimental to the public as access to the park would be more limited over time. Additionally, the evidence reflects that the Town of Kiawah Island, as expressed in Section 16(f) of the Development Agreement, specifically agreed to limited residential development of the Spit. The denial of the permit for the bulkhead and revetment contradicts that local legislative land use decision by making the residential development it sanctioned probably incapable of realization. It is unlikely that KDP can satisfy the Town of Kiawah Island's ordinances governing subdivision and road construction without stabilization of the riverbank and a protected right of way. Stabilization of the riverbank is thus most likely essential to the realization of the limited residential development, which further gives rise to the obligation to impose the conservation easement.

Giving serious consideration to the alternative of leaving the shoreline in a natural state without the bulkhead and revetment, the Court nonetheless finds that leaving the shoreline in its natural state is not a better alternative than stabilizing the bank. The Supreme Court held that all "private economic development" involving the tidelands, which certainly includes KDP is "suspect" (*Kiawah*, 411 S.C. at 41, 766 S.E.2d at 722). It nevertheless held that KDP is still a component of the citizenry and thus its economic benefits are a consideration in determining whether there is a public benefit (*Id.* at 31 n.5, 766 S.E.2d at 716 n.5). Moreover, the Town of Kiawah clearly represents "the citizens of a particular jurisdiction." Therefore, the actions of the Town of Kiawah in approving the development is also a consideration in determining whether the development upon the Spit is in the "public interest."[10] In short, the benefits to the public in

[10] *See Kiawah*, 411 S.C. at 29, 41 766 S.E.2d at 715, 722 ("[T]he State enacted statutes and promulgated regulations which generally prohibit alterations to the tidelands except when the public interest requires otherwise. . . [P]ublic access is to be accorded great protection while private economic development is suspect and only permitted when in the public interest.").

general, to the Town of Kiawah's purposes of developing the Spit, and to KDP[11] from the stabilization of the shoreline via a bulkhead and revetment outweigh leaving the shoreline in a natural state. This determination, however, does not end the Court's inquiry. Rather, the Court must next consider whether KDP established that there were any other feasible alternatives to the bulkhead and revetment that would stabilize the river bank in this location.

The record reflects that KDP considered a number of alternative methods of erosion control, including a bulkhead without revetment, riprap, and geo-tubes. However, these other methods were rejected, because the bulkhead and revetment structure was considered the "best solution" – the most environmentally sensitive solution that effectively dealt with the erosion of the bank. Professional engineer Mitchell Bohannon responded to questioning on this matter as follows:

> Q: In this particular design, does the revetment part, which is the articulated concrete block matted over the bank, play into reflective wave energy?
>
> A: Yes.
>
> Q: How so?
>
> A: Well, it prevents that reflected wave from causing erosion on the bottom.
>
> Q: With respect to the bottom, does it help stabilize the bottom?
>
> A: Yes.

Tr. p. 465, line 16 to 466, line 1. The revetment therefore "helps" to stabilize the bulkhead. As explained above, the Park provides a significant public benefit. Indeed, some of the area is covered by marsh grass and certainly is not "pristine" sandy beach. Given the importance of the Park to the public and the limited use and access of the public in that particular area, help in stabilizing the bulkhead is warranted.

Turning to the consideration of a bulkhead and/or revetment beyond the Beachwalker Park area, I find that the public benefit to the use of the shoreline in the area immediately abutting the Park is speculative. There is "some public use" of the riverbank at low tide. This limited use occurs when individuals occasionally land their boats or kayaks upon the shoreline and use the

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[11] Just as the financial benefit to KDP alone cannot be considered a benefit to the public at large, as the Court noted in *Kiawah*, it also cannot be the lone consideration in the feasible alternative analysis under Reg. 30-1(D)(23). However, since the financial benefit to KDP is part of the benefit to the public at large (KDP being "included in 'the people'" according to footnote 5 in the Opinion), the financial benefit to KDP may also be considered as a factor for purposes of the feasible alternative analysis ("... consideration of factors of environmental, *economic*, social, legal and technological suitability of the proposed activity and its alternatives....") (emphasis added).

area.[12] Notably, the Spit is privately owned, thereby precluding the public's access from the highlands. Therefore, permitting the installation of a bulkhead as previous approved by this Court is clearly supported by the evidence. The bulkhead will not cover the sandy shoreline and thus will have de minimus impact upon the public use of shoreline. Therefore the remaining issue is whether permitting the revetment outweighs the benefit of leaving the shoreline in a natural state.

KDP asserts that the bulkhead and revetment must be considered in tandem. Instead of contributing to erosion, the combination of a bulkhead with the revetment extending from its base, unlike the rejected alternative methods of erosion control, prevents erosion. Interestingly, though Coastal emphatically challenges the use of a revetment, Coastal, other than suggesting that the shoreline be left in its natural state, offered no expert testimony regarding the need of a revetment. Nevertheless, the stabilizing benefits of a revetment must be weighed against the environmental impact and other public benefits of the structure.

In this instance, as stated by the Supreme Court, the revetment would be laid upon a "pristine sandy" shoreline of the Kiawah River. However, all of the experts agree that the outside bank of this large bend in the Kiawah River at the neck of Captain Sam's Spit is eroding. This erosion is caused by a slow advance by the marsh point bar on the other side of the river and the high velocity of the water against the outside bank. If the revetment terminates in a high velocity zone, the shoreline may be susceptible to erosion around its terminus. Nevertheless, I find that the need to further protect the bulkhead along the remaining shoreline beyond the Park using a revetment is outweighed by the public benefit of protecting the use and nature of the shoreline. Consequently, the Court finds that the bulkhead and full revetment of forty feet in width should extend for only 270 feet, the length of Beachwalker Park. I further find that the ACB mat shall be covered with one foot of similar quality sand, so as to expedite the naturalization process of the mat being covered with sand.[13]

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[12] Though Mr. Eisner explain that there is some public use of the shoreline, the Court nevertheless also noted in its Amended Decision that:

> CCL entered into evidence pictures of a party of kayakers on the bank of the area of the proposed revetment. However, that evidence appears contrived. The persons depicted in the photographs were attending a planned event to raise funds to pay for CCL legal expenses to contest the granting of this permit. CCL also presented testimony by other individuals that used the river bank area on a limited basis.

[13] This finding does not preclude the Department from reviewing the functioning of this stabilization system and expanding it in keeping with the need to protect the public usage of the shoreline.

CONCLUSIONS OF LAW

Based on the above Findings of Fact, the Court concludes the following as a matter of law:[14]

General Conclusions

The ALC has jurisdiction over this case pursuant to the South Carolina Administrative Procedures Act, S.C. Code Ann. §§ 44-1-60; 1-23-600 et seq. (APA) and S.C. Code Ann. § 48-39-10 et seq. (Coastal Tidelands and Wetlands Act).

Both S.C. Code Ann. Section 48-39-150 and S.C. Code Ann. Regs. 30-11 instruct that the permitting decision shall be guided by the policy statements in Sections 48-39-20 and 48-39-30 in assessing the potential impacts of projects in critical areas. The Supreme Court ruled that this Court committed legal error in finding the proposed bulkhead and revetment complied with the policies of the Coastal Zone Management Act, S.C. Code §§ 48-39-10 et seq. Having re-considered the proof and made findings in light of that ruling, the Court must reconsider its analysis of the statutory findings and policies, now applying the legal standard directed by the Supreme Court.

The pertinent portions of Section 48-39-20 and Section 49-38-30 are as follows:

48-39-20. Legislative declaration of findings.

The General Assembly finds that:

(A) The coastal zone is rich in a variety of natural, commercial, recreational and industrial resources of immediate and potential value to the present and future well-being of the State.

* * *

(D) The coastal zone and the fish, shellfish, other living marine resources and wildlife therein, may be ecologically fragile and consequently extremely vulnerable to destruction by man's alterations.

(E) Important ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historical values in the coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values.

(F) In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone while balancing economic interests, present state and local institutional

[14] The Court also confirms and adopts all findings of fact and conclusions of law in the Amended Final Order that were not determined to be in error in the Opinion of the Supreme Court.

arrangements for planning and regulating land and water uses in such areas are inadequate.

48-39-30. Legislative declaration of state policy.

(A) The General Assembly declares the basic state policy in the implementation of this chapter is to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State.

(B) Specific state policies to be followed in the implementation of this chapter are:

(1) To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;

(2) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations;

* * *

(5) To encourage and assist state agencies, counties, municipalities and regional agencies to exercise their responsibilities and powers in the coastal zone through the development and implementation of comprehensive programs to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values as well as to the needs for economic and social development and resources conservation.

* * *

(D) Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.

As this Court previously stated and the Supreme Court commented in *Kiawah*, these statutory findings and policies require a balancing of economic-development benefits on the one hand, and preservation of our natural coastal resources and processes on the other hand. As stated

in legislative finding (F) of Section 49-38-20, there is an "urgent need to protect and to give high priority to natural systems in the coastal zone while balancing economic interests . . . ." The Supreme Court emphasized this "urgent need" to protect and give high priority to natural systems in the coastal zone when engaging in the necessary policy analysis.

The Supreme Court also underscored for this Court the policy of public benefit expressly stated in Section 48-39-30(D) – "Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits." The Supreme Court ruled that in this context, where there is an impairment of the public's access to and use of those tidelands, the benefit to be considered is the benefit to the public at large, not just the economic benefit to the proponent of the project in the critical area. The Supreme Court implied, if not held, that benefit to the public at large is an essential showing for a permit to be granted. Without it, the Department or this Court must find against the permit.

In determining how to achieve the maximum benefit to the public at large, both the legislative findings and policies prescribe consideration/balancing of natural/ecological systems and public access as well as economic, social, and other benefits. S.C. Code Ann. § 48-39-20(F) ("In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone *while balancing economic interests* . . .) (emphasis added); *Id.* § 48-39-30(A) ("The General Assembly declares the basic state policy in the implementation of this chapter is to protect the quality of the coastal environment and *to promote the economic* and social *improvement* of the coastal zone and of all the people of the State.") (emphasis added); *Id.* § 48-39-30(B)(1) ("[One of the s]pecific state policies to be followed in the implantation of this chapter [is] . . . [t]o *promote economic* and social *improvement* of the citizens of this State and *to encourage development of coastal resources* in order to achieve such improvement *with due consideration for the environment* and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from *inappropriate* development and *provide adequate environmental safeguards* with respect to the construction of facilities in the critical areas of the coastal zone . . . .") (emphasis added); *id.* § 48-39-30(B)(5) ("[One of the s]pecific state policies to be followed in the implementation of this chapter [is] . . . to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values *as well as to the needs for economic* and social *development* and resources conservation.") (emphasis added).

With these maxims in mind, the Court first considers the natural processes. The proposed bulkhead and revetment will not have any material effect on what was described as the historical process of cyclical erosion, breach, and accretion, nor on the sand supply for the beaches of Seabrook Island. The proposed bulkhead and revetment will only affect the continued erosion of the shoreline alongside the Park and other properties of KDP. Currently, there is a fence between the parking lot of the park and the vertical escarpment at the riverbank that impedes the public's ability to reach the river. While a portion of the revetment would lessen the public's access to the existing sandy shoreline for recreational use, denying the permit would not, in the long-term, preserve that sandy shoreline for continued use and enjoyment by the public. To the contrary, allowing the erosion in this stretch of the river to proceed unabated could ultimately turn the sandy shoreline into a steep escarpment inaccessible to kayakers and unsafe to anyone approaching from the land side.

The Court also finds and concludes that there will be public benefit if the shoreline is stabilized. The stabilization will protect the parking lot of the Park, allowing access west of the Park for the general public as well as the thousands of members of KICA. It will also allow the limited development to continue and trigger the creation of the conservation easement, which would result in the permanent and legally enforceable protection of around 80% of Captain Sam's Spit in its natural state with no possibility of any further alteration or improvements other than the limited development allowed under the 2005 Development Agreement. These public benefits tip the balance in favor of granting the permit subject to certain conditions and limitations. Here, these benefits warrant extension of the revetment for the length of Beachwalker Park in order to further protect the bulkhead; but beyond the Park, the benefits of using a revetment is outweighed by the public benefit of protecting the use and nature of the shoreline. Consequently, the Court finds that the bulkhead and full revetment of forty feet in width should extend for only 270 feet, the length of Beachwalker Park.

The Court also concludes that KDP has taken a sufficiently environmentally sensitive approach, as discussed above in the Regulation 30-11(C)(1) section of the Findings of Fact. Additionally, the residential development will be subject to further permitting approvals that will afford a more precise look at specific development techniques and processes under the further local, state, and federal regulatory schemes.

Also important to concluding that the balance favors issuing the permit is the legislative land use determinations of the Town of Kiawah Island. While the town's policies and enactments are not binding, and certainly do not override the necessity that KDP prove that its project meets all the statutory and regulatory requirements for issuance of the permit, they are nevertheless entitled to consideration. Denying the permit will thwart the implementation of the local government's land planning; granting it will provide an opportunity for the local government's land planning to be accomplished.

Therefore, applying the principles instructed by the Supreme Court, this Court nevertheless again concludes that the issuance of the permit is consistent with the legislative findings and policies of the Coastal Zone Management Act as set forth in Sections 48-39-20 and 48-19-30. However, after reconsideration, the Court concludes that the balancing of these policies weighs in favor of issuance of the permit although on different terms from those in the Amended Final Order. Instead of approving the bulkhead and revetment for 2,783 feet, the Court approves only 270 feet for the project, finding that the need to further protect the bulkhead along the remaining shoreline beyond the Park using a revetment is outweighed by the public benefit of protecting the use and nature of the shoreline. I further find that the ACB mat shall be covered with one foot of similar quality sand as exists upon the shoreline, so as to expedite the naturalization process of the mat being covered with sand.

Having found and concluded the proposed permit is not in violation of the findings and policies in sections 48-39-20 and 48-39-30, respectively, the Court moves to consideration of the remaining general considerations of section 48-39-150, repeated in Reg. 30-11(B), as they apply to the proposed structure in the critical area. The only change from the Amended Final Order in the application of the general considerations concerns subsection (5): "The extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches, or other recreational coastal resources." The Court finds and concludes that the revetment will degrade public access to and use of the sandy shoreline; but, for the reasons previously explained, the Court finds and concludes that this alone does not warrant denial of the permit, as acknowledged by the Supreme Court in the conclusion of its Opinion, and is outweighed by other benefits to the public.

As for the application of the general considerations to the upland development that the bulkhead and revetment will facilitate, the Court concludes, based on the findings previously made

and the reasons stated, that the limited residential development does not run afoul of the general considerations; indeed, the Court concludes that they weigh heavily in favor of the permit with respect to the upland development.

Turning to the remaining analysis, Reg. 30-11(C)(1) requires consideration of "[t]he extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area." Looking first at the bulkhead and revetment, the Court concludes that the revetment will have a long-range negative impact on the sandy riverbank at low tide (the bulkhead will have no negative impact on recreational activity). However, this negative effect is not of such magnitude as to alone justify denial of the permit requested, particularly where the use of the shoreline is intermittent and there will still be a sandy riverbank for most of the area west of the termination of the ACB mat.

Considering the proposed future residential development of the upland in light of the guidelines of Reg. 30-11 (C)(1), the Court concludes that the permit as approved below will not have a negative long-range, cumulative effect. It appears that much of Kiawah Island is developed and that the proposed development will be implemented in an environmentally sensitive manner that will be consistent with, if not more environmentally protective than, the existing development. The developer will employ a panoply of precautions and methods to minimize the impacts from the residential development area. The numerous reasonable measures, techniques, and safeguards that KDP intends to utilize in its development of Captain Sam's demonstrate that this limited residential use would be sensitively planned, responsive to the natural features of the peninsula, attentive to its flora and fauna, and without significant negative effects on the critical area. On top of these precautionary measures, KDP will protect the remainder of Captain Sam's Spit in its natural state in perpetuity via a conservation easement.

Nowhere do the governing statutes and regulations prohibit the development of lawfully zoned real estate on highland parts of barrier islands above the critical line and landward of the ocean setback line in the coastal zone. Instead, they caution against "**ill-planned** development." *See* Reg. 30-11(D)(5) (emphasis added). Further, the CZMP specifically contemplates and allows residential development of barrier islands, provided the planned development is consistent with its policies and guidelines. As found and concluded in the Amended Final Order, the limited residential development complies with all the applicable precepts of the CZMA.

It also bears mentioning that Reg. 30-11(C) specifies that the Department "must **in part** base its decisions regarding permit applications on the policies specified in Sections 48-39-20 and 48-39-30, and thus be guided by the following . . . ." (Emphasis added). This regulation does not state that the sole consideration, or even the primary consideration, is "the extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area." Rather, the cumulative effects are but one of many considerations to be taken into account.

Section 48-39-30(D) provides that "[c]ritical areas shall be used to provide the **combination of uses** which will insure the maximum benefit to the people." (Emphasis added). Furthermore, as explained in *Kiawah*, "[Reg. 30-12-(C)] does not prohibit outright any bulkhead or revetment that would adversely affect public access; rather, it balances the need for public access against the need for a bulkhead or revetment." 411 S.C. at 39—40, 766 S.E.2d at 721. Thus, "a bulkhead or revetment that affects public access may still be permitted where upland is being lost due to tidally induced erosion and no feasible alternative exists." *Id.*

In this instance, that analysis involves four separate considerations:

- The use of a revetment to protect Beachwalker Park;
- The use of a bulkhead to protect Beachwalker Park;
- The use of a bulkhead to protect the remaining shoreline of the Spit;
- The use of a revetment to protect the remaining shoreline of the Spit;

Here, though public access for a limited area will be adversely affected, "upland is being lost due to tidally induced erosion"; so, pursuant to Reg. 30-12(C)(1)(c), these four enumerated considerations will be acceptable if no feasible alternatives exist. Therefore, the remaining analysis is whether there are feasible alternatives to the revetments or bulkheads, pursuant to Reg. 30-12(C)(1)(d). This consideration is also made in the context of the lodestar – the public's interests – and balancing those interests to determine the maximum benefit to the people of the particular jurisdiction. Regulation 30-12(C)(1) sets forth standards for the construction of bulkheads and revetments for erosion control. It provides as follows:

> C. Bulkheads and Revetments (Rip-rap) (Other than ocean front, as covered under R.30-13(N)):
>
> (1) In an attempt to mitigate certain environmental losses that can be caused by these structures, the following standards are adopted:

(a) Structures must be designed to conform to the critical area line (upland boundary), to the maximum extent feasible, and constructed so that reflective wave energy does not destroy stable marine bottoms or constitute a safety hazard;

(b) Structures 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;

(c) Bulkheads and revetments will be prohibited where marshlands are adequately serving as an erosion buffer, where adjacent property could be detrimentally affected by erosion or sedimentation, or 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.

The Court reaffirms its findings and conclusions as to Reg. 30-12(C)(1)(a)-(c) stated in the Amended Final Order, except as previously modified. The Court concludes that the public's use and access will be degraded in the limited location where the bulkhead and revetment are to be constructed. The Court also concludes that upland will be lost due to tidally induced erosion if the bulkhead and revetment are not employed.

As to subsection (d), "[f]easibility in each case is based on the best available information, including, but not limited to, technical input from relevant agencies with expertise in the subject area, and consideration of factors of environmental, economic, social, legal and technological suitability of the proposed activity and its alternatives. Use of this word includes, but is not limited to, the concept of reasonableness and likelihood of success in achieving the project goal or purpose." Reg. 30-1(D)(23).

Turning to the Park, based on this Court's previous findings concerning feasible alternatives, the Court concludes, even after giving strong consideration to a no-action alternative, that there is no feasible alternative but to stabilize the riverbank using a bulkhead and a revetment of forty feet in width. From 2002 to 2009, unabated erosion took more than an acre of KDP's highland. As found in the Amended Final Order, the erosion will continue unless the bank is stabilized. The Court further concludes that there is no feasible alternative to the bulkhead and

revetment in order to accomplish the long-term stabilization of the shoreline while providing the opportunity for the growth of marsh grass and aquatic organisms.

In sum, the Court concludes that the proposed bulkhead and revetment at the Park meet all the specific criteria for bulkheads and revetments set forth in Reg. 30-12(C). Mr. Eiser came to this identical conclusion during his evaluation of the permit application, testifying that "there was nothing in 30-12(C) that would explicitly require me to deny the entire permit . . . ." In addition, the Court concludes that the revetment should be tapered along the additional thirty feet of shoreline, to prevent wash from occurring around the terminus of the revetment.

As to the remaining shoreline of the Spit stretching thirty feet beyond Beachwalker Park, the Court concludes that there are no other feasible alternatives than to use a bulkhead, for the reasons mentioned above. In fact, using a bulkhead without a revetment affords a combination of uses that protects the use of shoreline beyond the Park and protects the uplands, as well as the public benefits gained from their development, by preventing erosion at these locations to the extent possible, thereby providing the maximum benefit to all the people in the jurisdiction of the area.

ORDER

Based upon the above Findings of Fact and Conclusions of Law and those in the Amended Final Order, it is hereby:

ORDERED that the permit issued by the Department (KDP Exhibit 44) is approved except that the terms and conditions in the permit limiting the bulkhead and revetment to 270 feet in Special Condition No. 1 are deleted and the following shall be substituted for Special Condition No. 1:

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 the bulkhead and full revetment of forty feet in width shall extend for 270 feet, the length of Beachwalker Park;

(iii) that the ACB mat shall be covered with one foot of similar quality sand as exists upon the shoreline, so as to expedite the naturalization process of the mat being covered with sand; 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 commencing initial construction of the erosion control structure.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

December 2, 2015
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

E. Harvin Belser Fair
Judicial Law Clerk

December 2, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Kiawah Development Partners, II Petitioner, vs. South Carolina Department of Health and Environmental Control, Respondent.	Docket No. 09-ALJ-07-0029-CC (consolidated cases) **ORDER GRANTING MOTIONS FOR CLARIFICATION AND DENYING MOTIONS FOR RECONSIDERATION**
South Carolina Coastal Conservation League Petitioner, vs. South Carolina Department of Health and Environmental Control, and Kiawah Development Partners, II, Respondents.	Docket No. 09-ALJ-07-0039-CC

This matter is before the South Carolina Administrative Law Court (ALC or Court) upon Petitioner Kiawah Development Partners II, LLC's (KDP) Motion to Alter or Amend for Clarification, Respondent South Carolina Coastal Conservation League's (Coastal) Motion for Reconsideration and for Clarification of Final Order and Decision on Remand, and Respondent South Carolina Department of Health and Environmental Control's (DHEC) Motion for Reconsideration and for Clarification (collectively, Motions) of this Court's December 2, 2015 Final Order and Decision on Remand (Order on Remand). This case is on remand from the South Carolina Supreme Court (Supreme Court) for further consideration of certain issues where the Supreme Court found that this Court committed errors of law. *See Kiawah Dev. Partners, II v. S.C. Dep't of Health and Envtl. Control, et al.*, 411 S.C. 16, 766 S.E.2d 707 (2014) (Opinion).

FILED
March 22, 2016
SC ADMIN. LAW COURT

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

1. Whether and to what extent the public, as distinct from KDP alone, would benefit from the proposed bulkhead and revetment, as opposed to leaving the tidelands in their natural state;
2. Whether the project, including the proposed residential development it will facilitate, meets the requirements of 2 S.C. Code Ann. Regs. 30-11 (2011), both as to the factors in S.C. Code Ann. § 48-39-150 (2008 & Supp. 2012) and as to the long-range cumulative impacts of the bulkhead and revetment on the upland; and
3. Whether the project meets the requirements of Reg. 30-12(C), in particular, whether KDP proved there are no feasible alternatives to the bulkhead and revetment under Reg. 30-12(C)(1)(d) when strong consideration is given to leaving the riverbank in its natural state.

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

DISCUSSION

Coastal's Reconsideration Arguments

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

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

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

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

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

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

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

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

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

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

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

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

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

Consideration of the Natural State and Public Benefits

Natural State

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

Parking at Beachwalker Park

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

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

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

Conservation Easement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Regulation 30-11(C)(1) requires the Court to base its decision in part on "(1) The extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area." As the Supreme Court noted in its Opinion, "area" under the provision is ambiguous. The Supreme Court also rebuked the ALC for not deferring to the Department's interpretation of the provision "as requiring it to consider not only a proposed project's impact on the critical area, but also the project's impacts on upland areas within

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

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

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

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

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

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

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

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

Authorization of the Bulkhead

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

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

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

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

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

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

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

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

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

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

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

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

Additional Findings

Local Zoning, Land Use Decisions, and Development Approval

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

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

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

Moreover, this Court is entitled to consider the local government's zoning of the adjacent upland, especially as pertains to "the context of other possible development and the general character of the area" under Reg. 30-11(C)(1). Further, the Court's observation is appropriate under the policy set forth in S.C. Code §48-39-30(B)(5): "To encourage and assist . . . municipalities . . . to exercise their responsibilities and powers in the coastal zone through the development and implementation of comprehensive programs to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values as well as to the needs for economic and social development and resources conservation."

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

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

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

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

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

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

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

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

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

Authorization of a Structure Beyond What Was Approved by DHEC

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

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

DHEC's Reconsideration Arguments

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

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

ORDER

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

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

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

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

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

March 22, 2016
Columbia, South Carolina

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

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

E. Harvin Belser Fair
Judicial Law Clerk

March 22, 2016
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Kiawah Development Partners, II Petitioner, vs. South Carolina Department of Health and Environmental Control, Respondent.	Docket No. 09-ALJ-07-0029-CC (consolidated cases) **AMENDED FINAL ORDER AND DECISION ON REMAND**
South Carolina Coastal Conservation League Petitioner, vs. South Carolina Department of Health and Environmental Control, and Kiawah Development Partners, II, Respondents.	Docket No. 09-ALJ-07-0039-CC

FILED
March 22, 2016
SC ADMIN. LAW COURT

This matter is before the South Carolina Administrative Law Court (ALC or Court) on remand from the South Carolina Supreme Court (Supreme Court) for further consideration of certain issues where the Supreme Court found that this Court committed errors of law. *See Kiawah Dev. Partners, II v. S.C. Dep't of Health and Envtl. Control, et al.*, 411 S.C. 16, 766 S.E.2d 707 (2014) (Opinion).

STATEMENT OF THE CASE

This matter involves two contested cases challenging a critical area permit issued by the South Carolina Department of Health and Environmental Control (DHEC) to Kiawah Development Partners, II (KDP). DHEC issued a permit for the construction of a 270-foot long and 40-foot wide articulated concrete block revetment and a vertical bulkhead system along the banks of the Kiawah River at Captain Sam's Spit (Spit), at Kiawah Island in Charleston County. Both KDP and Coastal filed requests for contested case hearings, with KDP challenging the denial

of 2,513 feet of the requested 2,783 foot revetment/bulkhead system and Coastal challenging the issuance of the 270 feet of revetment/bulkhead system and seeking to uphold the denial of the 2,513 feet of structure, respectively.

The Court consolidated the cases for the hearing which was conducted August 24-28, 2009. On January 22, 2010, this Court issued a Final Order and Decision authorizing the construction of 2,783 feet of bulkhead and revetment, with limiting conditions. Both KDP and Coastal filed motions for reconsideration. On February 26, 2010, this Court issued an Amended Final Order and Decision (Amended Final Order).

Coastal and DHEC filed appeals in the South Carolina Court of Appeals, after which Coastal successfully moved to transfer the case to the South Carolina Supreme Court. On November 21, 2011, the Supreme Court issued an Opinion reversing this Court's decision. KDP filed a petition for rehearing, which was granted and resulted in a second Opinion on February 27, 2013, this time upholding this Court's Order. Coastal successfully petitioned for rehearing, which resulted in a third and final Opinion, dated December 10, 2014, reversing this Court's Amended Final Order based on several errors of law and remanding the case to this Court.

In considering and addressing the matters returned to this Court by the Supreme Court on remand, this Court recognizes that the Supreme Court's holdings are the law of the case and cannot be altered on remand. *See Prince v. Beaufort Mem'l Hosp.*, 392 S.C. 599, 606, 709 S.E.2d 122, 126 (Ct. App. 2011) ("[T]he appellate court's instructions circumscribe the trial court's authority on remand. The trial court's duty is to follow the instructions it received from the appellate court."). With that in mind, this Court has again reviewed the record of testimony and exhibits that were admitted in the contested case hearing in light of the legal principles set forth in the Opinion.[1] The portions of the Amended Final Order that the Supreme Court did not hold were affected by legal error or without factual support stand. Those findings and conclusions remain as set forth in the Amended Final Order and will not be repeated herein since this Court was not directed to further consider them.

[1] This Court previously denied the motion of KDP to open the record in an Order dated April 8, 2015. Therefore, no new matter or subsequent information was considered in drafting this Order.

As set forth in the Opinion, this Court is to consider the following:

1. Whether and to what extent the public, as distinct from KDP alone, would benefit from the proposed bulkhead and revetment, as opposed to leaving the tidelands in their natural state;
2. Whether the project, including the proposed residential development it will facilitate, meets the requirements of 2 S.C. Code Ann. Regs. 30-11 (2011), both as to the factors in S.C. Code Ann. § 48-39-150 (2008 & Supp. 2012) and as to the long-range cumulative impacts of the bulkhead and revetment on the upland; and
3. Whether the project meets the requirements of Reg. 30-12(C), in particular, whether KDP proved there are no feasible alternatives to the bulkhead and revetment under Reg. 30-12(C)(1)(d) when strong consideration is given to leaving the riverbank in its natural state.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and closely passed upon their credibility, taking into consideration the burden of persuasion of the parties, I make the following Findings of Fact by a preponderance of the evidence:

Public Benefit

In its reasoning for reversal of this Court's decision, the Supreme Court, in considering the application of Section 48-39-30(D) through Section 48-39-150, noted that "the ALC made no findings of any public benefit that would result from the bulkhead and revetment. . . ." *Kiawah*, 411 S.C. at 30, 766 S.E.2d at 716. Rather, the Supreme Court found that the ALC only considered the benefit to KDP. As the Supreme Court also noted in footnote 5 of its Opinion, though KDP is a member of the public, "the ALC erred in considering only the benefits to [KDP] to the exclusion of the public as a whole." *Id.* at 31, 766 S.E.2d at 716. The Supreme Court also held that the ALC erred in finding that erosion of the neck of the Spit had no positive benefit, and pointed out the benefits to the public resulting from the natural erosion process. However, the Supreme Court also pointed out in its conclusion that the benefits to the public of an untouched, "pristine sandy beach" with its "bounty of benefits to the people ranging from environmental to recreational[,]" was "alone . . . not a valid reason to reverse the ALC's approval of a permit to construct a huge bulkhead and revetment there." *Id.* at 44, 766 S.E.2d at 723. The Supreme Court's opinion did not address whether the proposed bulkhead and revetment would also benefit the public because the ALC erred in not making any findings on that issue.

Therefore, the Supreme Court remanded the cases to this Court to consider both the benefit to the public, if any, and the extent of any such benefit of constructing the bulkhead and/or revetment. As the Supreme Court noted in its conclusion, "the ALC did not consider whether and to what extent the public would benefit from the proposed structure as opposed to leaving the tideland in their natural state." *Id.* Thus, in conducting its analysis of the public benefit, this Court is to also consider the public benefit, if any, of leaving the tidelands in their natural state. The following findings address the Supreme Court's charge to make further findings of fact on this issue.

Protection of Beachwalker Park

The Charleston County Park and Recreation Commission (PRC) operates Beachwalker Park (Park) to provide the general public access to the oceanfront beach on the west end of Kiawah Island. The Park consists primarily of a parking lot, changing facilities, a tiny snack bar, and a boardwalk to the beach. Approximately 50,000 members of the public use the Park on an annual basis. The use of the Park is not limited to residents of Kiawah Island but is used primarily by non-residents, as the Park provides the only public access to the beaches in this mostly private island community. Indeed, Beachwalker Park functions as a public park that provides the general public access to the beaches of Kiawah Island. Although the Park is along the bank of the Kiawah River, there are no stairs or other improved access from the parking lot down the escarpment to the bank of the Kiawah River. To the contrary, the public benefit to the use of the shoreline in the area immediately abutting Beachwalker Park is speculative.

Importantly, the general public use and benefit of the Park is dependent upon the parking lot of the Park, as parking spaces allow for greater utility of the park and increased access to the beach. However, the riverbank along Beachwalker Park has been eroding, creating a significant vertical escarpment against the bank holding the parking lot, imperiling some of the parking spaces. The Park's split rail fence at the edge of the parking lot on the riverbank has had to be moved inland to prevent people from falling down the escarpment and is now perched on the edge of the escarpment leaning outwards. The erosion has caused the loss of the land where the Park's gazebo was initially located. Erosion is jeopardizing the Park's infrastructure and is fairly severe up to the narrowest point on the neck, beyond which the erosion begins to decrease. Therefore, the Park provides a significant public benefit in granting the general public a means by which to

access the beaches of Kiawah Island, and that benefit greatly exceeds impairment to any speculative use of the shoreline immediately abutting the Park.

PRC previously applied for a 270-foot bulkhead in this area but withdrew the application, opting for the protection of the bulkhead and revetment along the entire shoreline. In fact, DHEC approved 270 feet of both a bulkhead and revetment in the same location as the bulkhead shown on the withdrawn plan of PRC. These structures protect the portion of the eroding riverbank along the Park where the erosion is the worst. The stabilization of the river shoreline with the bulkhead and revetment across the front of the Park therefore furthers the public use.

Coastal argues that protecting the bank along the Park is not in the public interest because the location of the Park could change at some time in the future. However, the Court rejects this contention as conjectural. There was no proof of an agreement between KDP and PRC to move the location of the Park, even though some discussions had occurred. This Court affirms its finding that the bulkhead and revetment are clearly necessary to protect the Park's high ground and improvements from falling into the river in light of its current location and additionally finds that this benefits the general public.

Beach Parking for KICA

The terms of the Development Agreement, dated October 12, 2005, between the Town of Kiawah Island and KDP provide that the limited upland development allowed on the Spit that will be facilitated by the bulkhead-revetment shall include beach parking and beach access near the western end of the Spit for the members of Kiawah Island Community Association (KICA). The relevant provision provides as follows:

> Property Owner shall provide to KICA (by quitclaim deed conveyance) 8 parking spaces at the western end of the road access authorized above upon completion of same and shall improve the spaces with pervious material. An easement to KICA shall be limited to its members' use for access along the road to the 8 parking space area. A beach access path from such parking area shall also be granted by Property Owner to KICA by quitclaim deed for its members' convenient usage.

All property owners on Kiawah Island are members of KICA and are, likewise, members of the general public who will benefit from this beach parking area and beach access.[2] KDP is obligated to provide and convey this beach parking and beach access upon completion of the road to the

[2] As with KDP, the members of KICA are included in "the people," and benefits to them are therefore considerations to take into account along with benefits to other members of "the people" when considering the benefit to the public as a whole, *See* footnote 5 of *Kiawah*.

western end of the Spit. The bulkhead and revetment are components of this road's construction. This beach parking and beach access west of the Park toward Captain Sam's Inlet does not now exist and constitutes a public benefit that will be realized through the construction of the bulkhead and revetment that will allow the limited development that includes this community facility.

Conservation Easement

The 2005 Development Agreement between KDP and the Town of Kiawah Island granted KDP the right to subdivide no more than fifty lots on a maximum of twenty acres. KDP obtained the right to this limited development from the Town of Kiawah Island in the 2005 Development Agreement. As part of that agreement, KDP relinquished the right under the prior Development Agreement to construct a 325-room hotel immediately to the east of the Park.

In addition to specifying numerous guidelines for an environmentally sensitive development, the 2005 Development Agreement requires KDP, upon completion of the limited development, to permanently encumber the remainder of the Spit with a restrictive covenant mandating that it remain in its natural state and to grant a conservation easement to Kiawah Island Natural Habitat Conservancy (KINHC) over that same acreage. The specific provision of the Development Agreement imposing this obligation on KDP upon completion of the limited development provides as follows:

> Prior to the Termination Date, Property Owner also agrees to restrict all remaining highlands not devoted to the uses or purposes authorized herein, to non-developable, passive green space by restrictive covenant recorded in the Charleston County RMC Office. Property Owner shall grant an easement to KINHC (provided KINHC accepts) for any acreage not subject to Development, including such acreage as is to be conveyed, ultimately, to KICA.[3]

KDP is the fee simple owner of the entirety of the Spit. This ownership includes the entirety of the highland outside of the critical area – from above the mean high water mark on the oceanfront to the critical line along the Kiawah River. The Development Agreement describes the Spit as "approximately 118.3 acres of highland." KPD's development of the Spit is limited to "no more than 20 acres" for single family detached dwellings plus the acreage necessary for the infrastructure for this limited residential development, such as road rights of way, utilities, beach

[3] The Court shall refer to the restriction and easement mandated by this provision at the completion of development jointly as the "Conservation Easement."

access easements, community beach parking for beach access, and community dock[4] access with associated parking. The only acreage excluded from permanent protection in a natural state by the conservation easement is the land subject to the limited development. At the hearing, the evidence revealed that the highland consisted of 150 acres with the conservation easement encompassing over 80% of the entirety of the Spit.

As the Supreme Court explained, the ALC must consider the impact of the upland development of the Spit in determining whether to approve the requested permits. Here, the owner's encumbrance of the vast majority of the highland of the Spit by a conservation easement preserving it in a natural state provides a significant public benefit. Even if the baseline on the Spit were to move seaward again, as it did in 1999, the new area above the setback line could not be developed. Dr. Kana's testimony at trial established that the ocean beach along the Spit, fed by sand from enormous shoals in the Stono River Inlet, has been accreting on the ocean side for decades and will continue to accrete for decades, if not centuries. The conservation easement would protect this additional "new" acreage from any development or man-made alteration. Since this protection is assured by legal restriction and a recorded easement, any changes to state or local laws that would allow further development would be of no effect, thus ensuring the permanency of this public benefit from the bulkhead and revetment.

Mr. Eiser, who testified on behalf of the Department to the rationale for the staff's decision, attested to the "extraordinary" value to the public if the entirety of the Spit, though owned by KDP and not the public, forever remained in a natural state for all the people of South Carolina to enjoy. The preservation of approximately 80% of the Spit in a natural state, and all land accreting to it in the future, bestows this same public benefit, albeit to a slightly less extent than if there was no development at all on the Spit. This public benefit can only be realized if the development that depends on the stabilization of the riverbank through the bulkhead and revetment occurs.

Though, as explained below, this benefit does not offset the impact to the public by extending the revetment beyond, it does factor into the efficacy of granting a permit to construct the bulkheads.

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[4] The Development Agreement allows KDP to construct up to two community docks along the Kiawah River.

No-action Alternative

In addition to consideration of the public benefit resulting from the construction of a bulkhead and revetment, the Court must also consider the public benefit if the bulkhead and revetment are not constructed.

In its Opinion, the Supreme Court held that this Court erred in finding that erosion of the neck of the Spit had no positive benefit. The Supreme Court referenced S.C. Code Ann. § 48-39-20(F), in which the General Assembly made the following finding in support of the Coastal Zone Management Act (CZMA): "In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone while balancing economic interests, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate." The Supreme Court also stated that there was "evidence that the repetitive accretion of Captain Sam's Spit, followed by the erosion of the neck of the spit[,] served as the supply of sand for Seabrook Island to the southwest." *Kiawah*, 411 S.C. 16 at 31, 44, 766 S.E.2d at 716, 723. The Supreme Court thus pointed out some potential benefits to the public resulting from natural processes like erosion, including the protection of "natural processes like the cyclical erosion, breach, and accretion of the spit"[5] and a "pristine sandy beach," with its "bounty of benefits to the people ranging from environmental to recreational."[6] *Id.*, 411 S.C. at 31, 44, 766 S.E.2d at 716, 723. While the public could still access the shore on the proposed concrete mat and pull their boats or kayaks onto it, their recreational enjoyment of a portion of the river shoreline would be lessened. However, the Court also noted that these benefits were "alone . . . not a valid reason to reverse the ALC's approval of a permit to construct a huge bulkhead and revetment there." *Id* at 44, 766 S.E.2d at 723.

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[5] The evidence in the record indicates that the supply of sand for Seabrook Island did not come from repetitive accretion of the Spit and erosion of the neck and spit (i.e., natural systems), but rather from manmade alterations, such as the mechanical relocation of Captain Sam's Inlet to the east of its then-existing tip, opposite Captain Sam's Creek. This allowed the detached tip of the peninsula to provide sand for Seabrook Island and resulted in the significant accretion of sand on the shoreline on Captain Sam's Spit. This man-initiated process, rather than the historic process suggested by the Supreme Court, appears to be the dominant factor in the renourishment of the shoreline on Seabrook Island. Nevertheless, regardless of how the sand was supplied for the renourishment of Seabrook Island, this Court agrees with the Supreme Court that there is a public benefit to having a pristine sandy shoreline, which would occur if the Spit was left in its natural state. However, as the Supreme Court noted in its Opinion, this is not dispositive.

[6] In remanding this case to the ALC, the Supreme Court pointed out both the public benefits that emanate from the use of the shoreline and its "pristine" condition. Ostensibly, the greater the public use, the less pristine the shoreline will be. This begs the question: which is of greater importance – the preservation of the shoreline in its natural state or the public benefit gained by its use?

Considerations Under Section 48-39-150 and Regulation 30-11(C)(1)

The Supreme Court also concluded that "the ALC erred in finding the project met the requirements of regulation 30-11 both because that regulation requires consideration of the factors in section 48-39-150 and because the ALC's consideration of upland impacts was flawed." The Supreme Court held that the Court erred in not interpreting the general considerations and, in particular, the further guidelines in Reg. 30-11(C)(1) as applicable to the upland development facilitated by the bulkhead and revetment. The Supreme Court also held this Court erred in finding there would be no impact at all to the upland and in failing to sufficiently support the factual findings related to the upland development.

Section 48-39-150

Because the Supreme Court did not take issue with this Court's findings and conclusions in its analysis of the general considerations applicable to the impacts in the critical area, with the exception of public access to tidal resources, the Court will not repeat them. Instead, the Court will consider and apply the general considerations as they apply to the future residential development of the upland. The pertinent general considerations under S.C. Code Ann. § 48-39-150(A), and the Court's findings as to their application to the limited residential development, are as follows:

> Section 48-39-150(A)(3) calls for consideration of:
>
> > The extent to which the applicant's completed project would affect the production of fish, shrimp, oysters, crabs, or clams or any marine life or wildlife, or other natural resources in a particular area[,] including but not limited to water and oxygen supply.

The Court finds that based on the numerous precautions and environmentally aware development methods described and found below, the limited residential development of the upland will not adversely affect the production of fish, shrimp, oysters, crabs, or clams or any marine life or wildlife. In making this finding, the Court reaffirms its findings as to the lack of negative effect on wintering piping plovers and diamond back terrapins, the two species at issue in the hearing, which are covered in the Amended Final Order.

> Section 48-39-150(A)(4) calls for consideration of:
>
> > The extent to which the activity could cause erosion, shoaling of channels or creation of stagnant water.

The Court finds that the limited residential development of the upland will not cause erosion, shoaling of channels, or creation of stagnant water. Rather, the purpose of the bulkhead and revetment is to stop further erosion that is occurring at the riverbank, including along Beachwalker Park.

Section 48-39-150(A)(5) calls for consideration of:

> The extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches[,] or other recreational coastal resources.

The Court finds that the limited residential development of the upland will not affect existing public access to tidal and submerged lands, navigable waters and beaches, or other recreational coastal resources. Indeed, there is currently no public access from the land owned by KDP that is to be developed. In fact, the public will benefit from the development because of the conservation easement that covers 80% of the Spit. The proposed revetment, not the limited residential development of the upland, will affect public access to the sandy riverbank at low tide.

Section 48-39-150(A)(6) calls for consideration of:

> The extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable historic and archeological sites of South Carolina's coastal zone.

This Court found that limited residential development will not affect wintering piping plovers and diamond back terrapins, neither of which is endangered nor threatened. The limited residential development is far removed from the designated critical habitat for wintering piping plovers near Captain Sam's Inlet and is not a Geographic Area of Particular Concern.[7] Also, there was no proof of irreplaceable historic and archeological sites on Captain Sam's Spit.

Section 48-39-150(A)(7) calls for consideration of:

> The extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state.

KDP asserts that the limited residential development facilitated by the bulkhead and revetment will provide considerable economic benefits both to the developer and to the public by increasing the real property tax base. Though that assertion regarding the real property tax base appears reasonable, there was no evidence supporting that contention.

Section 48-39-150(A)(8) calls for consideration of:

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[7] "Geographic Area of Particular Concern" is coterminous with "critical habitat."

The extent of any adverse environmental impact which cannot be avoided by reasonable safeguards.

As demonstrated by the findings below concerning Reg. 30-11(C)(1), the safeguards to be implemented by KDP will avoid any adverse environmental impacts.

Section 48-39-150(A)(9) calls for consideration of:

The extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project.

As substantiated by the findings below concerning Reg. 30-11(C)(1), KDP demonstrated that significant safeguards will be taken to avoid adverse environmental impact resulting from the limited residential development. There was also no proof of KDP failing to exercise any feasible safeguards.

Section 48-39-150(A)(10) calls for consideration of:

The extent to which the proposed use could affect the value and enjoyment of adjacent owners.

KDP is the adjacent owner. The limited residential development will not adversely affect the value and enjoyment of KDP.

Regulation 30-11(C)(1)

The Court now turns to the application of Reg. 30-11(C)(1), the focus of the Supreme Court's discussion in the Opinion. Regulation 30-11(C)(1) provides as follows:

C. Further Guidelines: In the fulfilling of its responsibility under Section 48-39-150, the Department must in part base its decisions regarding permit applications on the policies specified in Sections 48-39-20 and 48-39-30, and thus, be guided by the following:

1. The extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area.

By stabilizing the river shoreline in the neck, the proposed bulkhead and revetment will enable the limited residential development on Captain Sam's Spit allowed under the terms of the Development Agreement. This development will alter less than 20% of the total area of the Spit, converting it from a natural area to a residential development. There will thus be some impact from this limited residential development. But as stated in this Court's findings and conclusions associated with its analysis under the Coastal Zone Management Plan (CZMP), the CZMP does not prohibit the residential development of barrier islands. Residential development on barrier islands is consistent with the CZMP, as this Court found and concluded, when it complies with the

CZMP's policies and conditions for such development. Additionally, the remainder of the Spit will be under a conservation easement and unable to be developed.

Since the upland development will have an impact on what is now an undeveloped natural area of the Spit, as the Supreme Court noted, this Court must assess those impacts under Reg. 30-11(C)(1). Because this development has yet to occur, the Court looks to the testimony and exhibits as to the plans and intent for this limited residential development. KDP offered considerable proof as to the precautions that will be taken in this upland development and the methods to be used. Based on that proof, as further explained below, the Court finds that the proposed development is not only consistent with the CZMP for reasons stated in the Amended Final Order, but also that the cumulative impacts from that development will not have a long-range negative effect and are in keeping with other developments on Kiawah Island and the general character of the island itself, including Captain Sam's Spit, and adjacent Seabrook Island.

The Spit itself is undeveloped. Yet, the Spit is part of Kiawah Island, which has been clearly developed in a manner consistent with the ecologically friendly development proposed in this case. Therefore, it appears from the record that the general character of the area around the Spit is residential, with some commercial development. Furthermore, the proposed development is approximately 20% of the Spit, and the residential development by the owners of the private property will be implemented in an environmentally sensitive manner that will be consistent with, if not more environmentally protective than, the existing development. In support of this Court's findings that the limited residential development will be done sensitively and not have long-term negative cumulative impacts, the Court finds the following:

KDP has a history of environmentally sensitive development and has developed many similar features on Kiawah Island, such as tidal islands and marsh peninsulas, in a minimally impactful manner. Also, the Development Agreement requires that KDP use care to minimize its impacts:

> Such developable acreage shall be based on environmentally-sensitive approaches to Development, including limited and careful infrastructure construction. The Town will assist Property Owner in facilitating provision of access strategies that minimize impacts with narrow rights-of-ways to 20' widths or less and narrower road profiles to 16', provided such access is appropriate for emergency vehicles. Property Owner may use pervious material for same.

The environmentally sensitive approaches that will be implemented in the limited residential development on Captain Sam's include the following:

- Eschewing the development of typical grass yards and focusing on native grasses, xeriscaping (zero-scaping);
- Imposing significant setbacks of the development from not only the ocean but the primary, secondary, and tertiary dunes, with four to six rows of dunes between the beach and the developed area;
- Prohibiting houses from being taller than one and a half stories;
- Placing the houses among the trees;
- Using pervious materials instead of asphalt on driveways and the road wherever practicable;
- Combining dune walkovers for access from the houses to the beach so there would be a reduced number across the dune field on the Spit;
- Eliminating individual docks and limiting the docks along the Kiawah River to no more than one or two community docks;
- Prohibiting development on more than 80% of the Spit through a restriction and conservation easement;
- Working with a number of experts and scientists to enhance, restore, and enlarge the habitat available for a variety of birds and animals on the Spit;
- Placing the development, generally, within the forest canopy;
- Furnishing public utility services of water and sewer and prohibiting wells and septic tanks; prohibiting the random cutting of vegetation;
- Prohibiting anyone from building on the dunes;
- Using natural building sites and making them as small as practicable;
- Keeping the land around the buildable site in as close to an existing state as possible, retaining natural vegetation;
- Featuring indigenous plant material rather than imported plants;
- Implementing the development with a light touch, erring on the side of less rather than more, with infrastructure improvements as narrow as practical and minimizing runoff;
- Implementing shared pervious driveways;
- Making the homes and structures less prominent, treating them more as background;
- Eliminating parking under houses since it increases the elevation of the houses;
- Trying to limit lot sizes to the developed area;
- Imposing strict restrictive covenants; and
- Limiting the development to a total of between twenty-five and fifty home sites on the twenty acres.

The extended period of development further reduces the potential for long-range cumulative impacts. The houses will be constructed over a long period of time, perhaps up to twenty to thirty years. Also, most of the houses probably will be second homes that are occupied on an infrequent basis, usually six to eight weeks over the course of a year.

As for the Department's concern that the upland development may impact wetlands, the Court finds that no wetlands have been identified on the upland at this time. If any wetlands are located, any proposed modification of them will be subject to the Department's separate permitting process, and KDP would abide thereby. However, the Court affirms its earlier findings in response to this purported concern.

Although the Department and Coastal did not have the burden of proof as to the cumulative effects of the project, including on the upland, neither presented any evidence suggesting that the method of development would not be environmentally sound. Indeed, the Department's witness, Mr. Eiser, acknowledged that the Department's decision was not based on the environmental effects of the development, but simply on the fact that a portion of a natural area was going to be developed.

The Court finds that the residential development of the portion of the upland intended to be developed will not have deleterious impacts for the reasons set forth above. In fact, the only evidence on this matter was that these environmentally sensitive development methods will not have an adverse effect. The only adverse effect in the estimation of the Department is that there will be development where now there is natural land and no development. However, there is no public policy against development of private property that has never been developed. In fact, the CZMP contemplates such development and provides guidelines, all of which will be satisfied by this proposed development. KDP has exercised considerable care to ensure that the limited residential development will be sensitively planned, responsive to the natural features of the site, and attentive to its flora and fauna, as previously determined in the Amended Final Order.

Regulation 30-12(C)

The Supreme Court determined that this Court erred in its factual findings and conclusions in the application of the project-specific standards in Reg. 30-12 (C). In particular, the Supreme Court held that this Court "erred in interpreting regulation 30-12(C) as only applying where there would be a substantial impact on public access, in finding there would be no adverse effect on

public access, and in finding the public did not use the critical area where the bulkhead and revetment would be constructed." *Kiawah*, 411 S.C. at 43, 766 S.E.2d at 722-23.

Coastal argues that the Supreme Court ruled that the uncontroverted evidence is that the impairment of public access would be substantial in this case. First, the Supreme Court rejected what it called a "substantiality" requirement for measuring adverse effects of public access and instead held that this Court should have applied a balancing test "of economic and environmental, and public and private considerations." The Supreme Court specifically found:

> "[Reg. 30-12(C)] does not prohibit outright any bulkhead or revetment that would adversely affect public access; rather, it balances the need for public access against the need for a bulkhead or revetment. It does so by providing that a bulkhead or revetment that affects public access may still be permitted where upland is being lost due to tidally induced erosion and no feasible alternative exists."

Id., 411 S.C. at 39-40, 766 S.E.2d at 721. Thus, the simple finding that there would be an adverse impact on public access does not end the inquiry for the Court; otherwise, the permitting of a bulkhead or revetment would never be possible.

Based on the testimony of Dr. Greg VanDerwerker, Sidi Limehouse, Sophia McAllister, and Bill Eiser, this Court finds that the public uses the sandy riverbank that is exposed at low tide for recreational purposes, such as kayaking and fishing.[8] The Court further finds that the revetment would adversely affect this recreational use where the sandy shore line would be replaced by an ACB mat. The Court finds, as it did in its previous order, that "the ACB mat degrades the public uses of the shoreline where the mat is approved." However, the evidence did not establish that the bulkhead would adversely affect the recreational use of the sandy shore line.

Having determined again that public access would be adversely affected in those locations where the proposed revetment extends along roughly 1900 feet of the shore line, except for the marsh area on the northwestern end of Beachwalker Park, the Court must determine whether KDP proved that there are no feasible alternatives to the proposed bulkhead and revetment, as mandated by Reg. 30-12(C)(1)(d), which provides: "(d) Bulkheads and revetments will be prohibited where public access is adversely affected unless no feasible alternative exists."

As the Supreme Court pointed out, Reg. 30-1(D)(23) addresses feasible alternatives for purposes of the analysis under the regulations:

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[8] The extent of this use, however, appears questionable.

> Feasible (feasibility) - 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 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.

Reg. 30-1(D)(23). The Supreme Court directed this Court, in making its determination, to give serious consideration to the no-action alternative and not give it short shift. *Kiawah*, 411 S.C. at 43, 766 S.E.2d at 723. The Supreme Court emphasized the legislative finding in S.C. Code Ann. § 48-39-20(F) "that there is an 'urgent need to protect and to give high priority to natural systems in the coastal zone . . . .'" *Id.* The Supreme Court added that "the accretion, erosion, and breach of the spit is a natural system." *Id.*

Allowing the riverbank to remain in its natural state would allow the existing quality of the recreational use of the river bank at low tide to continue because there obviously would be no manmade structure obstructing the sandy shoreline. The Court recognizes this as an important consideration, and agrees with the Supreme Court that it would benefit the public to protect the natural processes; however, as the Supreme Court also noted, this benefit alone is not enough to justify denial of the permit: "The area, particularly the pristine sandy beach, is undoubtedly one of this State's natural treasures. Admittedly, this alone is not a valid reason to reverse the ALC's approval of a permit to construct a huge bulkhead and revetment there." *Id.* at 44, 766 S.E.2d at 723. As the Supreme Court noted, environmental and public benefits must be balanced against other public, economic, and private benefits in order to determine the maximum benefit to the public.

In initially considering the natural processes of this river shoreline and the entire Spit, the expert testimony at trial clearly established that it is highly unlikely that the Spit will breach at the neck even if the bulkhead and revetment were not installed.[9] Rather, the natural historical

[9] As explained by Dr. Kana, the primary influence changing the historical cycle has been and will be the artificial relocations of Captain Sam's Inlet to the east of its natural location, thereby providing Seabrook Island with a source of sand from the end of Captain Sam's Spit and fortifying Captain Sam's Spit east of the relocated inlet. The first inlet relocation in 1983 was well after the 1974 Environmental Inventory of Kiawah Island relied upon by the League that references this historical cycle of breach of the Spit; so obviously, the 1974 Inventory could not have considered the effect of the first and subsequent inlet relocation.

phenomenon of gradual elongation of Captain Sam's Spit followed by its breach has been interrupted and altered by engineered relocations of the inlet. Therefore, failing to construct the bulkhead and revetment would not result in the continuation of the natural cycle, nor would it interfere with a breach at the neck if there were ever a major hurricane. Whether the bulkhead and revetment are constructed is not a variable in determining the natural cycle of a breach.

On the other hand, allowing the erosion to continue unabated at Beachwalker Park, where the bulkhead and revetment were originally authorized, jeopardizes the parking lot of the popular public facility. This would be detrimental to the public, as access to the park would be more limited over time. Additionally, the evidence reflects that the Town of Kiawah Island, as expressed in Section 16(f) of the Development Agreement, specifically agreed to limited residential development of the Spit. The denial of the permit for the bulkhead and/or revetment contradicts that local legislative land use decision by making the residential development it sanctioned probably incapable of realization. It is unlikely that KDP can satisfy the Town of Kiawah Island's ordinances governing subdivision and road construction without stabilization of the riverbank and a protected right of way. Stabilization of the riverbank is thus most likely essential to the realization of the limited residential development, which further gives rise to the obligation to impose the conservation easement.

Giving serious consideration to the alternative of leaving the shoreline in a natural state without the bulkhead and revetment, the Court nonetheless finds that leaving the shoreline in its natural state is not a better alternative than stabilizing the bank at Beachwalker Park.[10] The Supreme Court held that all "private economic development" involving the tidelands, which certainly includes KDP is "suspect" (*Kiawah*, 411 S.C. at 41, 766 S.E.2d at 722). It nevertheless held that KDP is still a component of the citizenry and thus its economic benefits are a consideration in determining whether there is a public benefit (*Id.* at 31 n.5, 766 S.E.2d at 716 n.5). Moreover, the Town of Kiawah clearly represents "the citizens of a particular jurisdiction." Therefore, the actions of the Town of Kiawah in approving the development is also a consideration in determining whether the development upon the Spit is in the "public interest."[11]

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[10] It is noteworthy that the reason why the Court limits its present discussion of stabilization at the bank to that along Beachwalker Park is because the discussion at present is on the area that will be covered by both the bulkhead **and** revetment. The Court, will later discuss permitting the bulkhead alone to extend beyond Beachwalker Park.

[11] *See Kiawah*, 411 S.C. at 29, 41 766 S.E.2d at 715, 722 ("[T]he State enacted statutes and promulgated regulations which generally prohibit alterations to the tidelands except when the public interest requires otherwise. . . [P]ublic

In short, the benefits to the public in general, to the Town of Kiawah's purposes of developing the Spit, and to KDP[12] from the stabilization of the shoreline via a bulkhead and revetment outweigh leaving the shoreline in a natural state. This determination, however, does not end the Court's inquiry. Rather, the Court must next consider whether there were any other feasible alternatives to the bulkhead and revetment that would stabilize the river bank in this location.

The record reflects that KDP considered a number of alternative methods of erosion control, including a bulkhead without revetment, riprap, and geo-tubes. However, these other methods were rejected, because the bulkhead and revetment structure was considered the "best solution" – the most environmentally sensitive solution that effectively dealt with the erosion of the bank. Professional engineer Mitchell Bohannon responded to questioning on this matter as follows:

> Q: In this particular design, does the revetment part, which is the articulated concrete block matted over the bank, play into reflective wave energy?
>
> A: Yes.
>
> Q: How so?
>
> A: Well, it prevents that reflected wave from causing erosion on the bottom.
>
> Q: With respect to the bottom, does it help stabilize the bottom?
>
> A: Yes.

Tr. p. 465, line 16 to 466, line 1. The revetment therefore "helps" to stabilize the bulkhead. As explained above, the Park provides a significant public benefit. Indeed, some of the area is covered by marsh grass and certainly is not "pristine" sandy beach. Given the importance of the Park to the public and the limited use and access of the public in that particular area, help in stabilizing the bulkhead is warranted.

Turning to the consideration of a bulkhead and/or revetment beyond the Beachwalker Park area, I find that the public benefit to the use of the shoreline in the area immediately abutting the

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access is to be accorded great protection while private economic development is suspect and only permitted when in the public interest.").

[12] Just as the financial benefit to KDP alone cannot be considered a benefit to the public at large, as the Court noted in *Kiawah*, it also cannot be the lone consideration in the feasible alternative analysis under Reg. 30-1(D)(23). However, since the financial benefit to KDP is part of the benefit to the public at large (KDP being "included in 'the people'" according to footnote 5 in the Opinion), the financial benefit to KDP may also be considered as a factor for purposes of the feasible alternative analysis ("... consideration of factors of environmental, *economic*, social, legal and technological suitability of the proposed activity and its alternatives....") (emphasis added).

Park is speculative. There is "some public use" of the riverbank at low tide. This limited use occurs when individuals occasionally land their boats or kayaks upon the shoreline and use the area.[13] Notably, the Spit is privately owned, thereby precluding the public's access from the highlands. Therefore, permitting the installation of a bulkhead as previous approved by this Court is clearly supported by the evidence. The bulkhead will not cover the sandy shoreline and thus will have de minimus impact upon the public use of shoreline. Therefore the remaining issue is whether permitting the revetment outweighs the benefit of leaving the shoreline in a natural state.

KDP asserts that the bulkhead and revetment must be considered in tandem. Instead of contributing to erosion, the combination of a bulkhead with the revetment extending from its base, unlike the rejected alternative methods of erosion control, prevents erosion. Interestingly, though Coastal emphatically challenges the use of a revetment, Coastal, other than suggesting that the shoreline be left in its natural state, offered no expert testimony regarding the need of a revetment. Nevertheless, the stabilizing benefits of a revetment must be weighed against the environmental impact and other public benefits of the structure.

In this instance, as stated by the Supreme Court, the revetment would be laid upon a "pristine sandy" shoreline of the Kiawah River. However, all of the experts agree that the outside bank of this large bend in the Kiawah River at the neck of Captain Sam's Spit is eroding. This erosion is caused by a slow advance by the marsh point bar on the other side of the river and the high velocity of the water against the outside bank. If the revetment terminates in a high velocity zone, the shoreline may be susceptible to erosion around its terminus. Nevertheless, I find that the need to further protect the bulkhead along the remaining shoreline beyond the Park using a revetment is outweighed by the public benefit of protecting the use and nature of the shoreline. Consequently, the Court finds that a full revetment of forty feet in width should extend for only 270 feet, the length of Beachwalker Park, and that the bulkhead may extend not only the length of Beachwalker Park but the entire 2,783 feet. I further find that the ACB mat shall be covered with

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[13] Though Mr. Eisner explain that there is some public use of the shoreline, the Court nevertheless also noted in its Amended Decision that:

> CCL entered into evidence pictures of a party of kayakers on the bank of the area of the proposed revetment. However, that evidence appears contrived. The persons depicted in the photographs were attending a planned event to raise funds to pay for CCL legal expenses to contest the granting of this permit. CCL also presented testimony by other individuals that used the river bank area on a limited basis.

one foot of similar quality sand, so as to expedite the naturalization process of the mat being covered with sand.[14]

CONCLUSIONS OF LAW

Based on the above Findings of Fact, the Court concludes the following as a matter of law:[15]

General Conclusions

The ALC has jurisdiction over this case pursuant to the South Carolina Administrative Procedures Act, S.C. Code Ann. §§ 44-1-60; 1-23-600 et seq. (APA) and S.C. Code Ann. § 48-39-10 et seq. (Coastal Tidelands and Wetlands Act).

Both S.C. Code Ann. Section 48-39-150 and S.C. Code Ann. Regs. 30-11 instruct that the permitting decision shall be guided by the policy statements in Sections 48-39-20 and 48-39-30 in assessing the potential impacts of projects in critical areas. The Supreme Court ruled that this Court committed legal error in finding the proposed bulkhead and revetment complied with the policies of the Coastal Zone Management Act, S.C. Code §§ 48-39-10 et seq. Having re-considered the proof and made findings in light of that ruling, the Court must reconsider its analysis of the statutory findings and policies, now applying the legal standard directed by the Supreme Court.

The pertinent portions of Section 48-39-20 and Section 49-38-30 are as follows:

48-39-20. Legislative declaration of findings.

The General Assembly finds that:

(A) The coastal zone is rich in a variety of natural, commercial, recreational and industrial resources of immediate and potential value to the present and future well-being of the State.

* * *

(D) The coastal zone and the fish, shellfish, other living marine resources and wildlife therein, may be ecologically fragile and consequently extremely vulnerable to destruction by man's alterations.

(E) Important ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historical values in the

[14] This finding does not preclude the Department from reviewing the functioning of this stabilization system and expanding it in keeping with the need to protect the public usage of the shoreline.

[15] The Court also confirms and adopts all findings of fact and conclusions of law in the Amended Final Order that were not determined to be in error in the Opinion of the Supreme Court.

coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values.

(F) In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone while balancing economic interests, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate.

48-39-30. Legislative declaration of state policy.

(A) The General Assembly declares the basic state policy in the implementation of this chapter is to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State.

(B) Specific state policies to be followed in the implementation of this chapter are:

(1) To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;

(2) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations;

* * *

(5) To encourage and assist state agencies, counties, municipalities and regional agencies to exercise their responsibilities and powers in the coastal zone through the development and implementation of comprehensive programs to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values as well as to the needs for economic and social development and resources conservation.

* * *

(D) Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a

> combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.

As this Court previously stated and the Supreme Court commented in *Kiawah*, these statutory findings and policies require a balancing of economic-development benefits on the one hand, and preservation of our natural coastal resources and processes on the other hand. As stated in legislative finding (F) of Section 49-38-20, there is an "urgent need to protect and to give high priority to natural systems in the coastal zone while balancing economic interests . . . ." The Supreme Court emphasized this "urgent need" to protect and give high priority to natural systems in the coastal zone when engaging in the necessary policy analysis.

The Supreme Court also underscored for this Court the policy of public benefit expressly stated in Section 48-39-30(D) – "Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits." The Supreme Court ruled that in this context, where there is an impairment of the public's access to and use of those tidelands, the benefit to be considered is the benefit to the public at large, not just the economic benefit to the proponent of the project in the critical area. The Supreme Court implied, if not held, that benefit to the public at large is an essential showing for a permit to be granted. Without it, the Department or this Court must find against the permit.

In determining how to achieve the maximum benefit to the public at large, both the legislative findings and policies prescribe consideration/balancing of natural/ecological systems and public access as well as economic, social, and other benefits. S.C. Code Ann. § 48-39-20(F) ("In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone *while balancing economic interests* . . .) (emphasis added); *Id.* § 48-39-30(A) ("The General Assembly declares the basic state policy in the implementation of this chapter is to protect the quality of the coastal environment and *to promote the economic* and social *improvement* of the coastal zone and of all the people of the State.") (emphasis added); *Id.* § 48-39-30(B)(1) ("[One of the s]pecific state policies to be followed in the implantation of this chapter [is] . . . [t]o *promote economic* and social *improvement* of the citizens of this State and *to encourage development of coastal resources* in order to achieve such improvement *with due consideration for the environment* and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from *inappropriate* development and *provide adequate environmental safeguards* with respect to the construction of facilities in the critical areas of the

coastal zone . . . .") (emphasis added); *id.* § 48-39-30(B)(5) ("[One of the s]pecific state policies to be followed in the implementation of this chapter [is] . . . to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values *as well as to the needs for economic* and social *development* and resources conservation.") (emphasis added).

With these maxims in mind, the Court first considers the natural processes. The proposed bulkhead and revetment will not have any material effect on what was described as the historical process of breach and accretion, nor on the sand supply for the beaches of Seabrook Island. Currently, there is a fence between the parking lot of the park and the vertical escarpment at the riverbank that impedes the public's ability to reach the river. While a portion of the revetment would lessen the public's access to the existing sandy shoreline for recreational use, denying the permit would not, in the long-term, preserve that sandy shoreline for continued use and enjoyment by the public. To the contrary, allowing the erosion in this stretch of the river to proceed unabated could ultimately turn the sandy shoreline into a steep escarpment inaccessible to kayakers and unsafe to anyone approaching from the land side.

The Court also finds and concludes that there will be public benefit if the shoreline is stabilized. The stabilization will protect the parking lot of the Park, allowing access west of the Park for the general public (at least 50,000 people a year) as well as the thousands of members of KICA. It will also allow the limited development to continue and trigger the creation of the conservation easement, which would result in the permanent and legally enforceable protection of around 80% of Captain Sam's Spit in its natural state with no possibility of any further alteration or improvements other than the limited development allowed under the 2005 Development Agreement. These public benefits tip the balance in favor of granting the permit subject to certain conditions and limitations. Here, these benefits warrant extension of the revetment for the length of Beachwalker Park in order to further protect the bulkhead; but beyond the Park, the benefits of using a revetment are outweighed by the public benefit of protecting the use and nature of the shoreline. Consequently, the Court finds that though the bulkhead may run the entire 2,783 feet, the full revetment of forty feet in width should extend for only 270 feet, the length of Beachwalker Park.

The Court also concludes that KDP has taken a sufficiently environmentally sensitive approach, as discussed above in the Regulation 30-11(C)(1) section of the Findings of Fact. Additionally, the residential development will be subject to further permitting approvals that will

afford a more precise look at specific development techniques and processes under the further local, state, and federal regulatory schemes.

Also important to concluding that the balance favors issuing the permit is the legislative land use determinations of the Town of Kiawah Island. While the town's policies and enactments are not binding, and certainly do not override the necessity that KDP prove that its project meets all the statutory and regulatory requirements for issuance of the permit, they are nevertheless entitled to consideration. Denying the permit will thwart the implementation of the local government's land planning; granting it will provide an opportunity for the local government's land planning to be accomplished.

Therefore, applying the principles instructed by the Supreme Court, this Court nevertheless again concludes that the issuance of the permit is consistent with the legislative findings and policies of the Coastal Zone Management Act as set forth in Sections 48-39-20 and 48-19-30. However, after reconsideration, the Court concludes that the balancing of these policies weighs in favor of issuance of the permit although on different terms from those in the Amended Final Order. Instead of approving both the bulkhead and revetment for 2,783 feet, the Court approves the bulkhead for 2,783 feet and the revetment for only 270 feet, finding that the need to further protect the bulkhead along the remaining shoreline beyond the Park using a revetment is outweighed by the public benefit of protecting the use and nature of the shoreline. I further find that the ACB mat shall be covered with one foot of similar quality sand as exists upon the shoreline, so as to expedite the naturalization process of the mat being covered with sand.

Having found and concluded the proposed permit is not in violation of the findings and policies in sections 48-39-20 and 48-39-30, respectively, the Court moves to consideration of the remaining general considerations of section 48-39-150, repeated in Reg. 30-11(B), as they apply to the proposed structure in the critical area. The only change from the Amended Final Order in the application of the general considerations concerns subsection (5): "The extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches, or other recreational coastal resources." The Court finds and concludes that the revetment will degrade public access to and use of the sandy shoreline; but, for the reasons previously explained, the Court finds and concludes that this alone does not warrant denial of the permit, as acknowledged by the Supreme Court in the conclusion of its Opinion, and is outweighed by other benefits to the public.

As for the application of the general considerations to the upland development that the bulkhead and revetment will facilitate, the Court concludes, based on the findings previously made and the reasons stated, that the limited residential development does not run afoul of the general considerations; indeed, the Court concludes that they weigh heavily in favor of the permit with respect to the upland development.

Turning to the remaining analysis, Reg. 30-11(C)(1) requires consideration of "[t]he extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area." Looking first at the bulkhead and revetment, the Court concludes that the revetment will have a long-range negative impact on the sandy riverbank at low tide (the bulkhead will have no negative impact on recreational activity). However, this negative effect is not of such magnitude as to alone justify denial of the permit requested, particularly where the use of the shoreline is intermittent and there will still be a sandy riverbank for most of the area west of the termination of the ACB mat.

Considering the proposed future residential development of the upland in light of the guidelines of Reg. 30-11 (C)(1), the Court concludes that the permit as approved below will not have a negative long-range, cumulative effect. It appears that much of Kiawah Island is developed and that the proposed development will be implemented in an environmentally sensitive manner that will be consistent with, if not more environmentally protective than, the existing development. The developer will employ a panoply of precautions and methods to minimize the impacts from the residential development area. The numerous reasonable measures, techniques, and safeguards that KDP intends to utilize in its development of Captain Sam's demonstrate that this limited residential use would be sensitively planned, responsive to the natural features of the peninsula, attentive to its flora and fauna, and without significant negative effects on the critical area. On top of these precautionary measures, KDP will protect the remainder of Captain Sam's Spit in its natural state in perpetuity via a conservation easement.

Nowhere do the governing statutes and regulations prohibit the development of lawfully zoned real estate on highland parts of barrier islands above the critical line and landward of the ocean setback line in the coastal zone. Instead, they caution against "**ill-planned** development." *See* Reg. 30-11(D)(5) (emphasis added). Further, the CZMP specifically contemplates and allows residential development of barrier islands, provided the planned development is consistent with its

policies and guidelines. As found and concluded in the Amended Final Order, the limited residential development complies with all the applicable precepts of the CZMA.

It also bears mentioning that Reg. 30-11(C) specifies that the Department "must **in part** base its decisions regarding permit applications on the policies specified in Sections 48-39-20 and 48-39-30, and thus be guided by the following . . . ." (Emphasis added). This regulation does not state that the sole consideration, or even the primary consideration, is "the extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area." Rather, the cumulative effects are but one of many considerations to be taken into account.

Section 48-39-30(D) provides that "[c]ritical areas shall be used to provide the **combination of uses** which will insure the maximum benefit to the people." (Emphasis added). Furthermore, as explained in *Kiawah*, "[Reg. 30-12-(C)] does not prohibit outright any bulkhead or revetment that would adversely affect public access; rather, it balances the need for public access against the need for a bulkhead or revetment." 411 S.C. at 39—40, 766 S.E.2d at 721. Thus, "a bulkhead or revetment that affects public access may still be permitted where upland is being lost due to tidally induced erosion and no feasible alternative exists." *Id.*

In this instance, that analysis involves four separate considerations:

- The use of a revetment to protect Beachwalker Park;
- The use of a bulkhead to protect Beachwalker Park;
- The use of a bulkhead to protect the remaining shoreline of the Spit;
- The use of a revetment to protect the remaining shoreline of the Spit;

Here, though public access for a limited area will be adversely affected, "upland is being lost due to tidally induced erosion"; so, pursuant to Reg. 30-12(C)(1)(c), these four enumerated considerations will be acceptable if no feasible alternatives exist. Therefore, the remaining analysis is whether there are feasible alternatives to the revetment or bulkhead, pursuant to Reg. 30-12(C)(1)(d). This consideration is also made in the context of the lodestar – the public's interests – and balancing those interests to determine the maximum benefit to the people of the particular jurisdiction. Regulation 30-12(C)(1) sets forth standards for the construction of bulkheads and revetments for erosion control. It provides as follows:

> C. Bulkheads and Revetments (Rip-rap) (Other than ocean front, as covered under R.30-13(N)):

(1) In an attempt to mitigate certain environmental losses that can be caused by these structures, the following standards are adopted:

(a) Structures must be designed to conform to the critical area line (upland boundary), to the maximum extent feasible, and constructed so that reflective wave energy does not destroy stable marine bottoms or constitute a safety hazard;

(b) Structures 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;

(c) Bulkheads and revetments will be prohibited where marshlands are adequately serving as an erosion buffer, where adjacent property could be detrimentally affected by erosion or sedimentation, or 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.

The Court reaffirms its findings and conclusions as to Reg. 30-12(C)(1)(a)-(c) stated in the Amended Final Order, except as previously modified. The Court concludes that the public's use and access will be degraded in the limited location where the bulkhead and revetment are to be constructed. The Court also concludes that upland will be lost due to tidally induced erosion if the bulkhead and revetment are not employed.

As to subsection (d), "[f]easibility in each case is based on the best available information, including, but not limited to, technical input from relevant agencies with expertise in the subject area, and consideration of factors of environmental, economic, social, legal and technological suitability of the proposed activity and its alternatives. Use of this word includes, but is not limited to, the concept of reasonableness and likelihood of success in achieving the project goal or purpose." Reg. 30-1(D)(23).

Turning to the Park, based on this Court's previous findings concerning feasible alternatives, the Court concludes, even after giving strong consideration to a no-action alternative, that there is no feasible alternative but to stabilize the riverbank using a bulkhead and a revetment of forty feet in width. From 2002 to 2009, unabated erosion took more than an acre of KDP's highland. As found in the Amended Final Order, the erosion will continue unless the bank is

stabilized. The Court further concludes that there is no feasible alternative to the bulkhead and revetment in order to accomplish the long-term stabilization of the shoreline while providing the opportunity for the growth of marsh grass and aquatic organisms.

In sum, the Court concludes that the proposed bulkhead and revetment at the Park meet all the specific criteria for bulkheads and revetments set forth in Reg. 30-12(C). Mr. Eiser came to this identical conclusion during his evaluation of the permit application, testifying that "there was nothing in 30-12(C) that would explicitly require me to deny the entire permit . . . ."

As to the remaining shoreline of the Spit stretching beyond Beachwalker Park, the Court concludes that there are no other feasible alternatives than to use a bulkhead, for the reasons mentioned above. In fact, using a bulkhead without a revetment affords a combination of uses that protects the use of shoreline beyond the Park and protects the uplands, as well as the public benefits gained from their development, by preventing erosion at these locations to the extent possible, thereby providing the maximum benefit to all the people in the jurisdiction of the area. Moreover, the bulkhead will have little, if any, impact upon public use. As noted above, the Spit is privately owned, thereby precluding the public's access from the highlands. The bulkhead will also not cover the sandy shoreline and thus will have de minimus impact upon the public use of shoreline.[16] Therefore, regarding the remaining shoreline, the Court finds that there is no feasible alternative to stabilizing the shoreline other than the installation of a bulkhead.

ORDER

Based upon the above Findings of Fact and Conclusions of Law and those in the Amended Final Order, it is hereby:

ORDERED that the permit issued by the Department (KDP Exhibit 44) is approved except that the terms and conditions in the permit limiting the bulkhead and revetment to 270 feet in Special Condition No. 1 are deleted and the following shall be substituted for Special Condition No. 1:

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[16] Notably, it is a well-founded principle of law that

> statutes or ordinances in derogation of natural rights of persons over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly within their scope and purpose. It follows that the terms limiting the use of the property must be liberally construed for the benefit of the property owner.

Purdy v. Moise, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953) (citations omitted).

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 the full revetment of forty feet in width shall extend 270 feet, the length of Beachwalker Park;

(iii) that the bulkhead shall extend the entire 2,783 feet;

(iv) that the ACB mat shall be covered with one foot of similar quality sand as exists upon the shoreline, so as to expedite the naturalization process of the mat being covered with sand; and

(v) 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 commencing initial construction of the erosion control structure.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

March 22, 2016
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

E. Harvin Belser Fair
Judicial Law Clerk

March 22, 2016
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Kiawah Development Partners, II, Petitioner, vs. South Carolina Department of Health and Environmental Control, Respondent.	Docket No. 09-ALJ-07-0029-CC (consolidated cases) **ORDER GRANTING STAY**
South Carolina Coastal Conservation League, Petitioner, vs. South Carolina Department of Health and Environmental Control, and Kiawah Development Partners, II, Respondents.	Docket No. 09-ALJ-07-0039-CC

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to a Motion to Stay filed by the South Carolina Coastal Conservation League (Coastal) following the Court's issuance of its Clarification and Reconsideration Order, and Amended Final Order and Decision on Remand (Order) in this matter. The Court issued the two orders following a remand of this case from the South Carolina Supreme Court (Supreme Court) for further consideration of certain issues where the Supreme Court found that this Court committed errors of law. *See Kiawah Dev. Partners, II v. S.C. Dep't of Health and Envtl. Control, et al.*, 411 S.C. 16, 766 S.E.2d 707 (2014) (Opinion). Coastal seeks to stay the Court's Order permitting Kiawah Development Partners, II, LLC (KDP) to install a forty-foot wide articulated concrete block revetment extending 270 feet and a bulkhead extending 2,783 feet long along the banks of the Kiawah River at Captain Sam's Spit (Spit), at Kiawah Island in Charleston County. KDP opposes the Motion to Stay.

FILED
April 15, 2016
SC ADMIN. LAW COURT

DISCUSSION

Coastal and KDP make several arguments for and against, respectively, the granting of a stay in this matter. However, the Court will focus on the arguments revolving around two main issues raised by the parties: mootness and the South Carolina Supreme Court's prior actions in this matter.[1] Rule 241(c)(1), (2) of the South Carolina Appellate Court Rules (SCACR) provide in pertinent part:

> (1) In a case subject to an exception [– in this case, an appeal from an administrative tribunal as provided in S.C. Code Ann. § 1-23-380(A)(2) and 1-23-600(G)(5), pursuant to subsection (b)(11) of the Rule –] any party may move for an order imposing a supersedeas of matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal. The effect of the granting of a supersedeas is to suspend or stay the matters decided in the order, judgment, decree or decision on appeal[.]
>
> * * *
>
> (2) In determining whether an order should issue pursuant to this Rule, the . . . administrative tribunal . . . should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.

Coastal argues that the Court should stay the Order because it would preserve the *status quo*, which Coastal argues is "the natural, undisturbed condition of the Kiawah River and the Spit." Coastal contends that interference with the natural processes occurring at the Spit would cause its appeal to become "moot by causing the loss of the shoreline, rendering it unusable by the public and marine life." Coastal thus believes that "the League's members will be prejudiced if the structure is constructed and damage is done to the natural area and marine life, as well as to their recreational uses."

To support its argument, Coastal relies on the testimony of its expert, Dr. Robert Young, quoting specifically from Tr. p. 935, line 2 – p. 937, line 2.[2] However, notwithstanding Coastal's

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[1] Coastal also raises a due process argument, asserting that its case would become moot and meaningless if it did not obtain judicial review until after the harm it seeks to prevent has already occurred. However, under this logic, Coastal would be automatically entitled to a stay every time it challenged a perceived harm from the actions of its opponents, which would undermine the stay process. As will be discussed in this Order, the installation of the bulkhead and revetment would be removed and the Spit returned to its prior condition if this Court's decision is reversed so any harm to Coastal would not be permanent. Because the Court disagrees that Appellant's case would become moot on appeal, the Court rejects Coastal's due process argument. Nevertheless, as discussed above, *infra*, because the Supreme Court has granted and maintained supersedeas to Coastal in this matter based on similar arguments made by both sides, the Court will grant Coastal's petition for stay.

[2] In Coastal's Reply to KDP's Response to Motion for Stay of Amended Final Order and Decision on Remand, Coastal cites, apparently incorrectly, to Tr. p. 934, line 23 – p. 937, line 10.

interpretation of that testimony, after having heard the evidence in this case, the Court found that the testimony simply did not carry the implications propounded by Coastal. First, Young's testimony was given in the context of the impact a revetment, not a bulkhead, would have upon the shoreline. Indeed, the testimony that Coastal cites was in response to the following question:

> **We were talking about** – earlier about **this actual revetment structure itself** and I'm wondering **what would be the impacts of a revetment like the one that's proposed on the physical environment of Captain Sam's Spit**.

(emphasis added). Here, however, we are dealing with the effects of a bulkhead for the full length of 2,783 feet, not a revetment. Also, when Young testified that the "entire beach" would disappear if the "entire shoreline" was "seal[ed] off," he was assuming the existence of the "fairly wide structure" consisting of a bulkhead **and** revetment that had been proposed for the full length of 2,783 feet.

Moreover, Young's testimony was vague about the removal of the sand. In one place, he refers to the "entire beach" being lost if a revetment is installed (Tr. 936, lines 13-15), but in another place, Young testified that if a "half a mile of shoreline" is "wall[ed] off," then "you're going to be losing a **certain amount** of your sand supply." (Tr. 935, lines 24-25) (emphasis added). He concluded his testimony by stating that "**[t]he secondary impacts are a little bit harder to gauge**, and, you know, **that's which neighboring environments are going to be diminished over the long term cumulatively** because they're no longer receiving sand from that shoreline that had **at least some amount of erosion along it**." (Tr. p. 937, lines 3-9) (emphasis added).

Furthermore, even if Young's vague testimony regarding the revetment were specifically pertinent to the installation of a bulkhead, there was contradicting testimony from Engineer Mitch Bohanon. He testified that if a revetment were installed, the structure "**could fill with sand**. We've seen them used in other locations where they've become completely naturalized." (Tr. p. 448, lines 21-24) (emphasis added). Likewise, Mr. Bohanon testified that "we believe that very likely it will [be] filled with sand and just sand would cover it." (Tr. p. 546, lines 10-12). That testimony was made in the context of an existing bulkhead and revetment. Since a bulkhead would block the erosion of sand from the escarpment, Mr. Bohanon's testimony necessarily implies that sand would be coming from another source to cover the revetment placed on the shoreline. Therefore, even if erosion were to remove certain amounts of sand from the area, natural forces would replenish it from another source.

However, neither Young's testimony nor Bohanon's testimony confirmed where, specifically, sand was coming from or going to. For instance, Young stated:

> When there is a certain amount of erosion along a bluff shoreline, like the one on the back side of Kiawah, the sand from that retreating bluff builds the beach that we looked at in those photographs. The sand that comes from that eroding bluff feeds other environments that are in the river and also end up on top of wetlands to allow them to accumulate.

But again, Young surmised that sand comes from eroding bluffs along a shoreline "**like** the one on the back side of Kiawah" (emphasis added); but this provides no details about how much sand is eroding and where. Moreover, though Young speculated that there would be a "certain amount" of sand lost along the shoreline, his imprecise opinion did not explain where along the shoreline it would be lost. Indeed, based on the pictures included in the record, the sandy shore of the beach exists both where the escarpments are high and where the escarpments are small. Therefore, based upon the entire record, it is questionable whether the escarpments are a significant source of the sand on the shoreline of the Spit. For all of these reasons, the evidence did not establish that the permitted bulkhead would negatively impact the sandy beach along the Kiawah River shoreline. As a result, Coastal failed to meet its burden of proof.

On the other hand, KDP argues that granting the stay would likely render moot KDP's purpose for seeking the permit. If the erosion is allowed to continue unabated, then KDP's proposed residential development, and the access corridor thereto, are at an even greater risk of being lost than they were six years ago when the ALC first denied Coastal's request for stay. The record supports this position. It reflects that due to erosion, the access corridor has diminished in width by thirty-six feet in less than seven years, and KDP's highland has been reduced by .98 acres between July 27, 2010 and May 11, 2015. The record also reflects that the erosion would also continue to damage the public utilities of the parking lot of Beachwalker Park and the emergency beach access for the Town of Kiawah's emergency vehicles. Consequently, the public would suffer injury by losing access to the areas for responding emergency personnel. The public would also lose parking spaces and thus more access to Beachwalker Park.

Moreover, the impact of allowing the installation of the bulkhead is significantly lessened by KDP's proposed remediation. KDP stipulated that it would remove its structures if this Court's Order was reversed or if KDP violates the conditions of its permit. Conversely, KDP would suffer irreparable harm if the stay was granted because there is no way to restore the land lost to erosion while this case is on appeal.

In sum, considering the impacts a stay would have upon Coastal and KDP's appeals, a stay would have a much greater impact upon KDP. The disparity of the impact is even more substantial in light of KDP's argument that its structure can be removed and the beach returned to its pristine condition should Coastal prevail on appeal. I therefore agree with KDP's argument that a stay would cause irreparable harm to its appeal if granted and respectively disagree with Coastal's argument that its case could become moot if the stay is not granted.

However, these arguments have generally been made to the South Carolina Supreme Court several times in this case, and each time, the Supreme Court has rejected these arguments, first granting supersedeas to Coastal in *Kiawah Dev. Partners, II v. S.C. Dep't of Health and Envtl. Control, et al.*, Op. No. 2010-UP-155629, filed July 23, 2010, and then maintaining that supersedeas on July 11, 2014, following KDP's motion to lift it. As such, the Supreme Court has stated its position that any finding in favor of any construction at the location at issue warrants a stay while the case is pending on appeal.

ORDER

IT IS THEREFORE ORDERED that Coastal's Motion to Stay is **GRANTED**.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

April 15, 2016
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

E. Harvin Belser Fair
Judicial Law Clerk

April 15, 2016
Columbia, South Carolina

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December 30, 2008

VIA FACSIMILE TRANSMITTAL 803-898-3393
and U.S. FIRST CLASS MAIL
Clerk of the Board
Board of Department of Health and Environmental Control
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

RE: Written Request for Final Review
OCRM Permit: OCRM-08-117-E
Project: Kiawah River Bend Revetment
Applicant: Kiawah Development Partners II, Inc

Dear Members of the Board:

I and Gedney M. Howe, III, represent Kiawah Development Partners II, Inc. ("KDP"), the applicant for the above OCRM permit seeking to construct a revetment along the eroding bank of the Kiawah River. On December 18, 2008, OCRM approved the permit with conditions that severely undermine the effectiveness of the revetment. The conditions allow the construction of the revetment along the bank for only 270 feet, a distance that is but 10% of the requested distance. The conditional permit completely fails to protect the remaining shoreline that continues to slough off into the Kiawah River.

I am writing on behalf of the applicant to request final review of the permit by your board as provided in S.C. Code § 44-1-60(E). I have enclosed a copy of the permit as attachment No. 1.

THE PROJECT

The location of the proposed revetment is on the backside of Kiawah Island along the bank of the Kiawah River, a tidal river that connects to the Atlantic Ocean through Captain Sam's Inlet that separates Kiawah Island from Seabrook Island. The river bank in question is on the "inland" side of the southwestern peninsula of Kiawah Island that is known as Captain Sam's Spit. This peninsula is about 1.3 miles in length and bounded on one side by the ocean and on the other by the Kiawah River. The proposed revetment is along the bank in the bend of the river at the beginning of the peninsula.

The purpose of the revetment is to stop continual erosion of high ground above the OCRM critical line on the riverbank for about a distance of 2783 feet (extending about 30% of the length of the Spit). I have enclosed a copy of color photographs of the location as attachment No. 2. These show the extensive, rapid, destructive erosion in this area. The bank in question is adjacent to a public park operated by the Charleston County Park and Recreation Commission ("PRC") known as Beachwalker Park. The erosion has already damaged the PRC 's parking lot and riverside gazebo. PRC's other park improvements will soon be severely damaged. The park leases the land from a sister entity of KDP which owns the upland for the park as well as the upland along the river bank for the length of the proposed revetment.

The proposed revetment is not a typical vertical bulkhead. It would consist of a retaining wall working in combination with a sloped matt of articulated concrete block on the intertidal riverbank that would facilitate and foster the growth of marsh grass and other vegetation. Enclosed are a copy of the permit application as attachment No. 3 and a photo of a similarly constructed revetment OCRM permitted recently in Charleston County as attachment 4. The 2,783' length of the revetment was recommended by nationally recognized experts in shoreline dynamics and tidal flows who were retained by KDP to come up with the most environmentally and aesthetically appropriate solution for elimination of the erosion problem along the bank at the river's bend. Short bulkheads adjacent to tidal waters such as the Kiawah River often transfer the erosion from the location of bulkhead to the land on either end. The length proposed was specifically to *prevent* a shifting of the problem along the bank and thus accomplish a lasting solution.

THE EMERGENCY

The significant, continuing, and rapid erosion presents an emergency. KDP requests that the board conduct a conference to hear the appeal at its earliest convenience. KDP daily suffers irreparable harm to its land from this incessant erosion and winter storms are on the near horizon.

This erosion has been advancing unabated during the inordinate time the staff took to act on KDP's application. KDP submitted its application on February 28, 2008. Three months after filing the staff improperly cancelled the application. After the application was reinstated, no action was taken for more than 6 additional months. Staff did not render its decision until nearly ten months after filing, despite the requirement of R. 30-4(C) that staff decide applications for permits for minor development activity "within 30 days" after an application is complete. *See*, S.C. Code § 48-39-10 (N) and S.C. Reg. R 30-1(D)(34) ("Minor Development Activity - the construction, maintenance, repair or alteration of any ... erosion control structure, the construction of which does not involve dredging.").

THE APPEAL

The fundamental grounds for appeal are that (a) the proposed revetment complies with the controlling statures and regulations and (b) there are no significant negative impacts anywhere from the revetment, much less any significant negative impacts to the "critical areas" under OCRM's jurisdiction. OCRM staff's ground for denying the permit for the majority of the revetment is its contention that potential residential development of a part of the highland of Captain Sam's Spit (*i.e.*, behind the state's beachfront setback line) as allowed under the Town's zoning ordinance would have a negative effect on rare and endangered species as well as the protected dune area. This unsupported assertion is inaccurate and speculative.

The applicant's grounds for challenging the staff's decision, in particular Special Condition No. 1 limiting the length of the revetment to a small fraction of the requested distance, include, but are not limited to, the following:

1. The application and proposed revetment comply with the statutes and regulations governing bulkheads and revetments.
2. The proposed revetment will have no significant negative impacts, including no negative impacts at all in the critical area.
3. The enormously reduced distance for the revetment approved by staff will, if built, possibly worsen and hasten erosion on either end of the 270' structure unless the remainder of the proposed revetment is constructed.
4. The staff's decision was based on factors beyond its purview, *i.e.*, whether any development should be allowed on Captain Sam's Spit on the highland behind both the critical line and beachfront setback line. This development authorization rests with the local municipality, not the Department.
5. As the applicant does not have a development plan and no development plan was submitted to the staff. The staff's determination of alleged negative effects is inaccurate, has no factual support, and is pure speculation.
6. If and when the applicant commences development of the upland, the applicant will be required to comply with all applicable laws and regulations, including those of the Department governing stormwater and land disturbance. This later event, if it should occur, is the appropriate stage in the permitting process for measuring any effects of the development of the upland with respect to stormwater runoff and land disturbance. "Uses," however, such as low density, single family residential houses are outside the purview of the Department in acting on an application such as this one.
7. Staff's determination appears to be based also on several incorrect assumptions and conclusions that include, but are not limited to, the following:

a. Staff provides in the much-reduced permit that the issuance of a permit for the requested distance will facilitate development in a "pristine dune area." This is an incorrect statement on two counts: 1) the dunes are not being developed -- all land subject to any potential future development will occur behind the OCRM regulated beach/dune system, and 2) local zoning by the Town of Kiawah Island is the sole legal authority for any potential uses and development outside protected dunes and critical areas.

b. The staff implies in the conditional permit that it evaluated "overall plans and designs of a project" and was concerned about "the extent and significance of negative impacts on GAPCs." As stated earlier, there were no "overall plans and designs" in existence and *none were submitted, requested, nor required.* Without them it is impossible to assess the cumulative foreseeable impacts, positive or negative, from the upland development, which is, in any event, well beyond the scope of this application.

c. The staff states in the reduced permit that "this area" is a barrier island. This is misleading. It is true that this revetment would extend partially along the side of a peninsula that is a tiny part of a barrier island over ten miles long and having 5,000 acres of upland; however, the particular land subject to the development is not a barrier island.

d. The staff states in the reduced permit that "this area" is a dune area. The revetment is not being built in, or anywhere near, a dune area. It is being constructed on a river bank on the side of the peninsula away from the ocean. Additionally, possible future development of a small part of the peninsula, well away from Captain Sam's Inlet, will not be in the dune area. Using the OCRM definition, all development would occur outside of the "beach/dune system." *See*, definition in S. C. Code § 48-39-10 (J)(4) ("beach/dune system ... is the area from the mean high-water mark to the setback line as determined in Section 48-39-280").

c. The staff suggests that granting the permit to stop erosion of highland on the river "could affect the habitats for rare and endangered species." The staff refers to the habitat for piping plovers. As the materials submitted by the applicant demonstrate, there will be no adverse impact on piping plover habitat. Their habitat is the intertidal hard sand *beach* more than a half mile from the end of the proposed revetment.

f. The staff incorrectly considered the "project" to be the potential future development of the upland as allowed by the zoning authorities. The "project" is instead the revetment area itself.

g. As there was no development plan of any kind before the staff, the staff incorrectly determined that possible undefined development unrelated to this revetment project, at some unknown future date, might damage areas of special resource significance.

8. The staff's determination is not supported by the facts that were before it, is contrary to the controlling regulations, statutes, and law, and is arbitrary and capricious.

9. The staff considered matters that were not properly before it including matters that the regulations prohibit the staff from considering in making the determination on the application for this minor project.
10. The staff's determination deprives the applicant of its constitutional rights to substantive and procedural due process as well as equal protection. The failure of the Department to base its decision on the controlling law and its failure to render a decision in a timely manner as required by its own regulations has destroyed and taken high land of the Applicant.

In summary, the Department improperly cancelled the application, improperly delayed its decision, and improperly rendered a flawed decision granting a partial permit, all in violation of the applicable statutes and regulations.

The applicant respectfully requests that the board reverse the staff's determination and grant the applicant the permit without Special Condition No. 1 that limited the revetment to a "270' section...located along the southwest portion of the parking lot in Beachwalker Park...." Instead, the permit should be for the length requested without further delay and damage.

We look forward to the opportunity to appear before the Board in this matter.

Sincerely,

PRATT-THOMAS, WALKER, P.A.

G. Trenholm Walker

GTW\yye
Enclosures
cc: Elizabeth A. Dieck, Esq.
Carolyn R. Boltin, Deputy Commissioner DHEC-OCRM
Tom O'Rourke, Director of PRC
Gedney M. Howe, III, Esq.
Leonard L. Long, Jr.
Ray Pantlik
Townsend Clarkson
Charles P. Darby, III
Mitchell Bohannon

STATE OF SOUTH CAROLINA

BEFORE THE BOARD
OF THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

South Carolina Coastal Conservation League,

Appellant,

vs

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

Respondents

RE Critical Area Permit No OCRM-08-117-E
Kiawah Development Partners II, Inc

REQUEST FOR FINAL REVIEW CONFERENCE

The South Carolina Coastal Conservation League hereby requests that the Board of Health and Environmental Control conduct a final review conference to review the DHEC staff's decision to issue Critical Area Permit and Coastal Zone Consistency Certification # OCRM-08-117-E to Kiawah Development Partners II, Inc to construct an erosion control structure at Beachwalker Park, Kiawah Island, Charleston County, South Carolina

The basis for this request is as follows

1 The South Carolina Coastal Conservation League ("League") is a non-profit membership corporation organized and existing under the laws of the State of South Carolina Members of the League live on Kiawah Island and use and enjoy the waters, wetlands, and other natural resources that would be adversely affected by the erosion control structure proposed by the permit applicant Members of the League boat and otherwise recreate in the waters, wetlands

and beaches surrounding Kiawah Island, including the spit on which Kiawah Development Partners II, Inc , proposed to construct a bulkhead and revetment

2 On December 18, 2008, the DHEC staff issued notice that it was authorizing the construction of 270' of bulkhead and articulated concrete block revetment along the northeastern end of the proposed project area, which is along the southwest portion of the parking lot at Beachwalker Park

3 The indicated location of the proposed bulkhead and revetment is the site of a pristine, undeveloped spit at the tip of the Island This spit supports a thriving wildlife community, including the endangered Loggerhead sea turtle and the Diamondback terrapin

4 The Appellant is informed and believe that the staff's permit decision was made in violation of applicable statutes, regulations and rules contained in the S C Coastal Zone Management Act, S C Code Ann §48-39-10, *et seq* , OCRM Regulations 30-1, *et seq* , and the Coastal Management Program

5 The permit and certification violates the State policies of protecting sensitive and fragile areas from inappropriate development, of protecting resources of the coastal zone, and to protect the quality of the coastal environment S C Code Ann §48-39-30

6 The permit and certification is inconsistent with general considerations of the project's impact on the production of fish shrimp, oysters, crabs, clams, other marine life, wildlife or other natural resources, the extent to which the activity could cause erosion, the extent to which the development could affect the habitats for rare and endangered species, the extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state, and the extent to which the project will affect the value and enjoyment of adjacent owners

S C Code Ann §48-39-150(A) and S C Code Ann Regs 30-11 B

7 The permit and certification violates the DHEC Regulation that bulkheads and revetments "will be prohibited where marshlands are adequately serving as an erosion buffer, where adjacent property could be detrimentally affected by erosion, sedimentation, or where public access unless upland is lost due to tidally induced erosion ' S C Code Ann Regs 30-12(C)(1)(c) There are no structures on this spit, thus there is nothing that will be protected by the bulkhead and revetment and, in fact, the proposed bulkhead and revetment could cause acceleration of the existing erosion patterns and have detrimental impacts on the spit and adjacent properties

8 The permit and certification violates the Coastal Management Program in that it fails to consider the extent of up or downdrift damage due to installation of the structures, it is not part of a comprehensive erosion control program to ensure that it does not cause adverse affects on adjoining property owners or accelerate erosion, and it fails to promote the use of natural features of the system, rather than artificial protections Coastal Management Program, IV-56 & 57

9 The Appellant is informed and believes that the impacts of the proposed bulkhead and revetment will cause significant degradation of the environment on the spit, reduce the value of surrounding property and have severe negative impacts on wildlife within the impact area, as well as have negative impacts on erosional patterns on Kiawah Island

10 As a direct and proximate result of these violations and the proposed by the applicant, the Appellant and its members will suffer injury in fact in that the natural resources and environment of this area will be degraded, resulting in material harm to their recreational, environmental and aesthetic interests

11 The Appellant reserves all rights under Section 44-1-60 and other applicable laws to present evidence and argument during the review proceeding

WHEREFORE, the Appellant requests that the Board conduct a final review proceeding and issue an order reversing the proposed decision to issue the permit and certification

Respectfully submitted,

Amy E Armstrong
James S Chandler, Jr
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

Attorneys for the Appellant S C Coastal Conservation League

Georgetown, South Carolina

December 31, 2008

BOARD:
Paul C. Aughtry, III
Chairman
Edwin H. Cooper, III
Vice Chairman
Steven G. Kisner
Secretary

D H E C

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BOARD:
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M. David Mitchell, MD
Glenn A. McCall
Coleman F. Buckhouse, MD

Promoting and protecting the health of the public and the environment

S.C. Board of Health and Environmental Control; Telephone (803) 898-3309 Fax: (803) 898-3393

January 14, 2009

U.S. Mail - CERTIFIED – Return Receipt

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Francis Boyd
5 Greensward
Kiawah Island, SC 29455

91 7108 2133 3935 6746 1142

Via Interagency Mail Delivery
Elizabeth A. Dieck, Esquire
SCDHEC – Office of General Counsel
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

RE: **Docket No. 08-RFR-147** – *Request review of staff decision dated December 18, 2008, to issue Permit No. OCRM-08-117-E for the construction of an erosion control structure (revetment) at Beachwalker Park, Kiawah Island, with conditions that modify the application.*

The S.C. Board of Health and Environmental Control decided on January 8, 2009, not to conduct a Final Review Conference on the above-referenced matter.

S.C. Code Section 44-1-60(F), 2006 Act No. 387, Section 48, provides, "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 before the Administrative Law Court, in accordance with the Administrative Procedures Act, within thirty days after the deadline for the final review conference."

A request for a contested case hearing before the Administrative Law Court (ALC) must be filed in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

Clerk's Office
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: http://www.scalc.net. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,

Lisa Lucas Longshore
Clerk

The above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy; parties before the ALC are responsible for complying with all applicable requirements of the Court.

OCG # 20826

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KIAWAH DEVELOPMENT PARTNERS, II, Petitioner, vs. SCDHEC OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT, Respondent, In Re: OCRM 08-117-E	**NOTICE OF REQUEST FOR CONTESTED CASE HEARING** DATE: January 20, 2009 DOCKET NO. ___-ALJ-___-__-___

Notice is hereby given that the Petitioner, Kiawah Development Partners, II, does hereby appeal and request a contested case hearing regarding the decision (OCRM 08-117-E) issued by the South Carolina Department of Health and Environmental Control ("DHEC") Office of Coastal Resource Management ("OCRM") on Petitioner's application to construct a revetment.

A copy of OCRM Permit 08-117-E, dated December 18, 2008, is attached as Exhibit A. Petitioner timely filed a Written Request for Final Review to the South Carolina Board of Health and Environmental Control dated December 30, 2008, copy attached as Exhibit B. The DHEC Board denied Petitioner's request on January 14, 2009, by letter, copy attached as Exhibit C.

The grounds for Petitioner's appeal and request for contested case hearing are set forth in Exhibit B.

The Petitioner seeks a determination by the Administrative Law Court reversing the final decision of the agency, ruling that the Permit should be granted without Special

Condition No. 1 and allowing the construction of the revetment for the entire length requested.

Respectfully Submitted:

PRATT-THOMAS WALKER, P.A.

BY: G. Trenholm Walker

G. Trenholm Walker
Post Office Drawer 22247
Charleston, SC 29413-2247
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Gedney M. Howe, III
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ghowe@gedneyhowe.com

ATTORNEYS FOR PETITIONER

January 20, 2009
Charleston, SC

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of January, 2009, in Charleston, South Carolina, a copy of the foregoing Request for Contested Case Hearing was served on all parties to this matter by depositing the same in the United States Mail, via certified mail and return receipt requested, with postage paid and addressed as follows:

Lisa Lucas Longshore
Clerk, SC Board of Health & Environmental Control
2600 Bull Street
Columbia, SC 29201

Elizabeth A. Dieck, Esq.
SCDHEC – Office of General Counsel
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

Amy E. Armstrong, Esq.
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Nancy Jane D. Murphy
Legal Assistant

D H E C

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C. Earl Hunter, Commissioner

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EXHIBIT
tabbies
A

December 18, 2008

Mr. Ray Pantlik
Kiawah Development Partners II, Inc.
PO Box 12001
Charleston, SC 29422

SEE SPECIAL CONDITION(S)

Re: OCRM-08-117-E
Kiawah Development Partners II, Inc.

Dear Mr. Pantlik:

The SCDHEC Office of Ocean and Coastal Resource Management has reviewed your application to construct an erosion control structure at Beachwalker Park, Kiawah Island, Charleston County, South Carolina and has issued a permit for this work. You should carefully read the description of the authorized project and the special conditions that have been placed on the permit, as these conditions may modify the permitted activity. In addition, there are a series of general conditions that should be reviewed. The original and one photocopy of the permit, as issued, are enclosed. After carefully reading the permit, if you wish to accept the permit as issued, sign and date in the signature block entitled "PERMITTEE" on the original version of the permit **and return it to this Department. Keep the photocopy for your records.**

PLEASE READ CAREFULLY: You are required to sign and return the original version of your permit to this Department. If this permit is not signed and returned within thirty (30) days of issuance, *OR* appealed within 15 days as described on the enclosed "Notice of Appeal Procedure", the Department reserves the right to cancel this permit. Please carefully review the enclosed "Notice of Appeal Procedure" for information and deadlines for appealing this permit.

We have also enclosed a "request for a construction placard" card. You must send in this card before the time you wish to start construction. At that time a construction placard will be sent to you to post at the construction site.

PLEASE NOTE: You are not authorized to commence work under the permit until we have received the original version of the entire permit signed and accepted by you, and a construction placard has been issued and posted at the construction site. The receipt of this permit does not relieve you of the responsibility of acquiring any other federal or local permits that may be required.

Sincerely,

William C. Eiser

William C. Eiser
Wetland Section Project Manager

cc: Blair Williams, Acting Wetland Section Manager
/enclosure

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Ocean and Coastal Resource Management
Charleston Office · 1362 McMillan Avenue, Suite 400 · Charleston, SC 29405
Phone: 843-953-0200 · Fax: 843-953-0201 · www.scdhec.gov

(1)

D H E C

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C. Earl Hunter, Commissioner

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SEE SPECIAL CONDITION(S)

Notice of Appeal Procedure

The following procedures are in effect beginning July 1, 2006, pursuant to 2006 Act No. 387:

1. This decision of the S.C. Department of Health and Environmental Control (Department) becomes the final agency decision 15 days after notice of the decision has been mailed to the applicant or respondent, unless a written request for final review is filed with the Department by the applicant, permittee, licensee, or affected person.

2. An applicant, permittee, licensee, or affected person who wishes to appeal this decision must file a written request for final review with the Clerk of the Board at the following address or by facsimile at 803-898-3393.

   Clerk of the Board
   SC DHEC
   2600 Bull Street
   Columbia, SC 29201

3. The request for final review should include the following:
   a. the grounds on which the Department's decision is challenged and the specific changes sought in the decision
   b. a statement of any significant issues or factors the Board should consider in deciding how to handle the matter
   c. a copy of the Department's decision or action under review

4. In order to be timely, a request for final review must be received by the Clerk of the Board within 15 days after notice of the decision has been mailed to the applicant or respondent. If the 15th day occurs on a weekend or State holiday, the request is due to be received by the Clerk of the Board on the next working day. The request for final review must be received by the Clerk of the Board by 5:00 p.m. on the date it is due.

5. If a timely request for final review is filed with the Clerk of the Board, the Clerk will provide additional information regarding procedures.

6. The Board of Health and Environmental Control has 60 days from the date of receipt of a request for final review to conduct a final review conference. The conference may be conducted by the Board, its designee, or a committee of three members of the Board appointed by the chair.

7. If a final review conference is not conducted within 60 days, the Department decision becomes the final agency decision, and a party may request a contested case hearing before the Administrative Law Court within 30 days after the deadline for the final review conference.

The above information is provided as a courtesy; parties are responsible for complying with all applicable legal requirements.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Ocean and Coastal Resource Management
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(2)

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT

CRITICAL AREA PERMIT & COASTAL ZONE CONSISTENCY CERTIFICATION

Permittee(s):	**Kiawah Development Partners II, Inc.**
Permit Number(s):	**OCRM-08-117-E**
Date of Issuance:	**December 18, 2008**
Expiration Date:	**December 18, 2013**
Location:	**On and adjacent to the Kiawah River at Beachwalker Park, Kiawah Island, Charleston County, South Carolina**

SEE SPECIAL CONDITION(S)

This permit is issued under the provisions of S. C. Code Ann. Section 48-39-10, *et seq.*, and 23A S.C. Code Ann. Regs. 30-1 through 30-18 (Supp. 2007). Please carefully read the project description and the special conditions that appear on this permit/certification as they will affect the work that is allowed. The general conditions are also a part of this permit/certification and should be read in their entirety. The S. C. Contractor's Licensing Act of 1999, enacted as S.C. Code Ann. Section 40-11-5 through 430, requires that all construction with a total cost of $5,000 or more be performed by a licensed contractor with a valid contractor's license for marine class construction, except for construction performed by a private landowner for strictly private purposes. Your signature on and acceptance of this permit denotes your understanding of the stated law regarding use of licensed contractors. **All listed special and general conditions will remain in effect for the life of the project if work commences during the life of the permit. This applies to permittee, future property owners, or permit assignees.**

DESCRIPTION OF THE PROJECT, AS AUTHORIZED

The permit has been issued with significant modifications from the original request to build a 2,783' erosion control structure. Specifically a 270' section of bulkhead and articulated concrete block revetment has been approved for the northeastern end of the project area, along the southwest portion of the parking lot in Beachwalker Park, but the remaining 2,513' of the proposed erosion control structure to the southwest of the park is not authorized.

With the exception of the parking lot and associated infrastructure for Beachwalker Park there is currently no high-ground development in the general vicinity of the project area. The applicant provided general information that indicated up to 50 residential homes on approximately 20 acres is planned and approved by the local government. If issued as requested, the permit will prevent the shoreline movement in an area that historically has seen inlet formation and facilitate development in a pristine dune area that is currently undeveloped and adjacent to federally designated critical habitat for the piping plover, a threatened species and as such is designated a Geographic Area of Particular Concern (GAPC). This area is also federally designated as a COBRA unit. Regulation 30-11(C) requires that consideration must be given to the extent to which long-range cumulative impacts of the project may result within the context of other possible development and the general character of the area, the extent to which overall plans and designs of a project can be submitted together and evaluated as a whole, and the extent and significance of negative

impacts on GAPCs, in this case the piping plover habitat and the Retreat Policy in its broadest sense. Regulation 30-11(B) requires that consideration must be given to the extent to which the development could affect the habitats for rare and endangered species. Section III(C)(3)(XII)(A) of the Coastal Management Program Document identifies barrier islands and dune areas outside of the critical area as areas of special resource significance that are unique and environmentally fragile, which would apply to this area. Consequently, the permit will be issued to authorize a 270' erosion control structure adjacent to Beachwalker Park parking lot and the remainder of the proposed structure will not be authorized. The purpose of the proposed activity is for erosion control.

SPECIAL CONDITIONS

1. Provided that a 270' section of the proposed erosion control structure located along the southwest portion of the parking lot in Beachwalker Park is approved, but the remaining 2,513' of the proposed structure is not approved.

2. Provided that an as-built survey of the erosion control structure must be submitted to the Department within 90 days of the expiration date of the final construction placard. The survey must be performed by a registered land surveyor, must show all edges of the structure, and must list the starting and ending coordinates of the structure in the SC State Plane Coordinate System, which can be obtained by survey-grade Global Positioning System equipment.

3. Provided that in the event that archaeological or paleontological remains are found during the course of work, the applicant should notify the South Carolina Institute of Archaeology and Anthropology (Mr. James Spirek at 803-777-8170) pursuant to South Carolina Underwater Antiquities Act of 1991, (Article 5 Chapter 7, Title 54, Code of Laws of South Carolina, 1976). Archaeological remains consist of any materials made or altered by man, which remain from past historic or prehistoric times (ie, older than 50 years). Examples include old pottery fragments, metal, wood, arrowheads, stone implements or tools, human burials, historic docks, structures, or non-recent vessel remains. Paleontological remains consist of old animal remains, original or fossilized, such as teeth, tusks, bone, or entire skeletons.

PERMITTEE'S ATTENTION IS DIRECTED TO GENERAL CONDITIONS NUMBERS FOUR (4) AND FIVE (5). BY ACCEPTANCE OF THIS PERMIT, PERMITTEE IS PLACED ON NOTICE THAT THE STATE OF SOUTH CAROLINA, BY ISSUING THIS PERMIT, DOES NOT WAIVE ITS RIGHTS TO REQUIRE PAYMENT OF A REASONABLE FEE FOR USE OF STATE LANDS AT A FUTURE DATE IF SO DIRECTED BY STATUTE.

THE PERMITTEE, BY ACCEPTANCE OF THIS PERMIT AGREES TO ABIDE BY THE TERMS AND CONDITIONS CONTAINED HEREIN AND TO PERFORM THE WORK IN STRICT ACCORDANCE WITH THE PLANS AND SPECIFICATIONS ATTACHED HERETO AND MADE A PART HEREOF. ANY DEVIATION FROM THESE CONDITIONS, TERMS, PLANS AND SPECIFICATIONS SHALL BE GROUNDS FOR REVOCATION, SUSPENSION OR MODIFICATION OF THIS PERMIT AND THE INSTITUTION OF SUCH LEGAL PROCEEDINGS AS THE DEPARTMENT MAY CONSIDER APPROPRIATE.

2 of 11

SEE SPECIAL CONDITION(S)

(4)

SEE SPECIAL CONDITION(S)

Permit Number: OCRM-08-117-E

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.

(PERMITTEE(S)) (DATE)
Kiawah Development Partners II, Inc.

This permit becomes effective when the State official, designated to act for the Office of Ocean and Coastal Resource Management, has signed below.

William C. Eiser 12/18/2008

(PROJECT MANAGER, WETLAND SECTION) (DATE)
William C. Eiser
Or his Designee
Other Authorized State Official

GENERAL CONDITIONS:

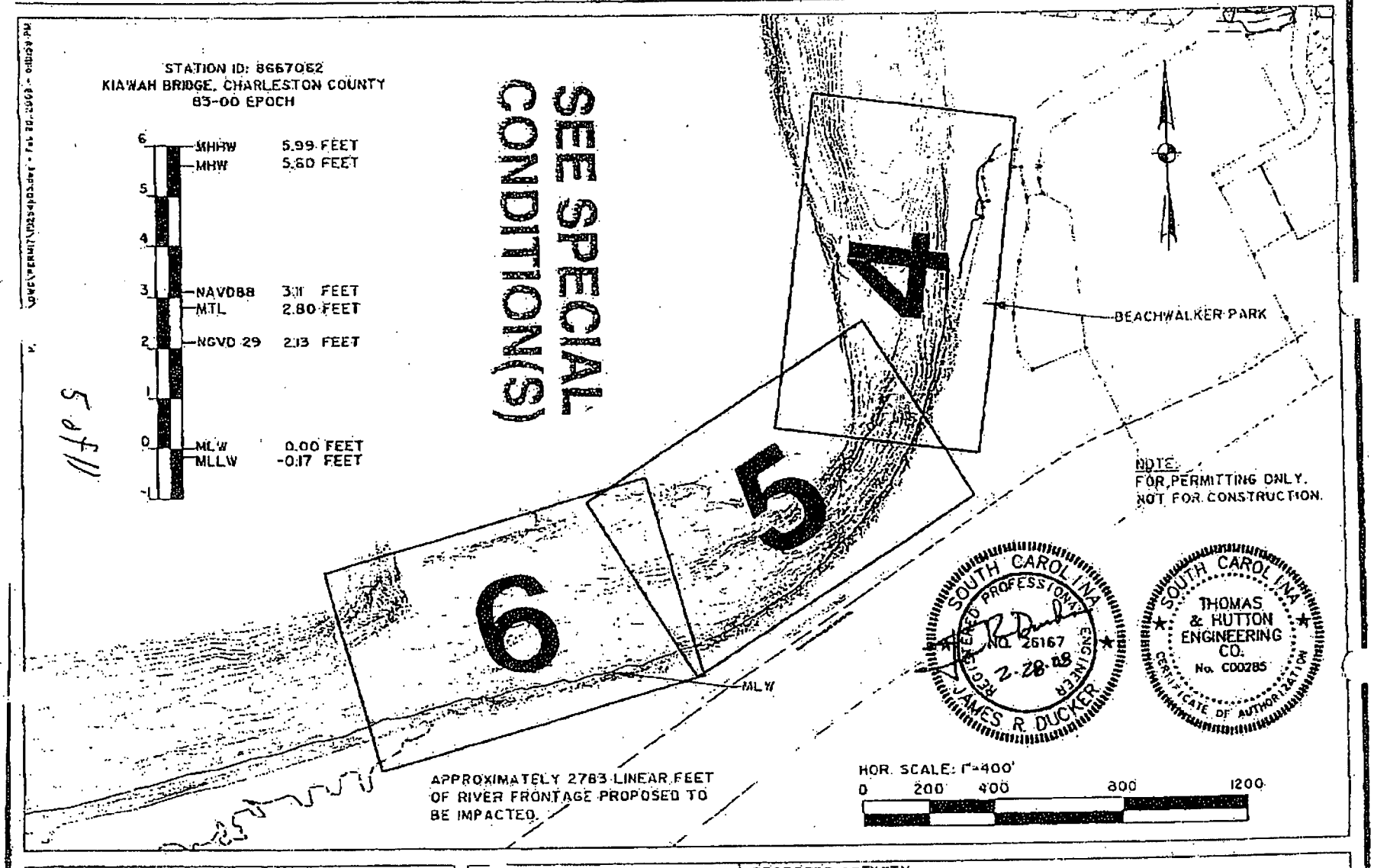
This construction and use permit is expressly contingent upon the following conditions which are binding on the permittee:

1. That the permittee, in accepting this permit, covenants and agrees to comply with and abide by the provisions and conditions herein and assumes all responsibility and liability and agrees to save OCRM and the State of South Carolina, its employees or representatives, harmless from all claims of damage arising out of operations conducted pursuant to this permit.
2. That if the activity authorized herein is not constructed or completed within five years of the date of issuance, this permit shall automatically expire. A request, in writing, for an extension of time shall be made not less than thirty days prior to the expiration date.
3. That all authorized work shall be conducted in a manner that minimizes any adverse impact on fish, wildlife and water quality.
4. That this permit does not relieve the permittee from the requirements of obtaining a permit from the U. S. Army Corps of Engineers or any other applicable federal agency, nor from the necessity of complying with all applicable local laws, ordinances, and zoning regulations. This permit is granted subject to the rights of the State of South Carolina in the navigable waters and shall be subject, further, to all rights held by the State of South Carolina under the public trust doctrine as well as any other right the State may have in the waters and submerged lands of the coast.
5. That this permit does not convey, expressly or impliedly, any property rights in real estate or material nor any exclusive privileges; nor does it authorize the permittee to alienate, diminish, infringe upon or otherwise restrict the property rights of any other person or the public; nor shall this permit be interpreted as appropriating public properties for private use.
6. That the permittee shall permit OCRM or its authorized agents or representatives to make periodic inspections at any time deemed necessary in order to ensure that the activity being performed is in accordance with the terms and conditions of this permit.
7. That any abandonment of the permitted activity will require restoration of the area to a satisfactory condition as determined by OCRM.
8. That this permit may not be transferred to a third party without prior written notice to OCRM, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferee subscribing to this permit and thereby agreeing to comply.
9. That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and special signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.
10. That the permit construction placard or a copy of the placard shall be posted in a conspicuous place at the project site during the entire period of work.
11. That the structure or work authorized herein shall be in accordance with the plans and drawing attached hereto, and shall be maintained in good condition. Failure to build in accordance with the plans and drawings attached hereto, or failure to maintain the structure in good condition, shall result in the revocation of this permit.
12. That the authorization for activities or structures herein constitutes a revocable license. OCRM may require the permittee to modify activities or remove structures authorized herein if it is determined by OCRM that such activity or structures violates the public's health, safety, or welfare, or if any activity is inconsistent with the public trust doctrine. Modification or removal under this condition shall be ordered only after reasonable notice stating the reasons therefore and provision to the permittee of the opportunity to respond in writing. When the Permittee is notified that OCRM intends to revoke the permit, Permittee agrees to immediately stop work pending resolution of the revocation.
13. That OCRM shall have the right to revoke, suspend, or modify this permit in the event it is determined the permitted structure (1) significantly impacts the public health, safety and welfare, and/or is violation of Section 48-39-150, (2) adversely impacts public rights, (3) that the information and data which the permittee or any other agencies have provided in connection with the permit application is either false, incomplete or inaccurate, or (4) that the activity is not in compliance with the drawings submitted by the applicant. That the permittee, upon receipt of OCRM's written intent to revoke, suspend, or modify the permit has the right to a hearing. Prior to revocation, suspension, or modification of this permit, OCRM shall provide written notification of intent to revoke to the permittee, and permittee can respond with a written explanation to OCRM. (South Carolina Code Section 1-023-370 shall govern the procedure for revocation, suspension or modification herein described).
14. That any modification, suspension or revocation of this permit shall not be the basis of any claim for damages against OCRM or the State of South Carolina or any employee, agent, or representative of OCRM or the State of South Carolina.
15. That all activities authorized herein shall, if they involve a discharge or deposit into navigable waters or ocean waters, be at all times consistent with all applicable water quality standards, effluent limitations and standards of performance, prohibitions, and pretreatment standards established pursuant to applicable federal, state and local laws.
16. That extreme care shall be exercised to prevent any adverse or undesirable effects from this work on the property of others. This permit authorizes no invasion of adjacent private property, and OCRM assumes no responsibility or liability from any claims of damage arising out of any operations conducted by the permittee pursuant to this permit.

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(6)

12/23/2008 18:35 9530268 OCRM CHARLESTON PAGE 08
000235



THOMAS & HUTTON ENGINEERING CO.
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

EXISTING SITE CONDITIONS & SHEET INDEX

OCRM-08-117-E

KIAWAH RIVER BEND EROSION CONTROL

PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.

FEBRUARY 14, 2008

SCALE 1" = 400'

SHEET 3 OF 7

12/23/2008 10:35 9536760 OCRM CHARLESTON PAGE 09

000236

THOMAS & HUTTON ENGINEERING CO.
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

SITE DEVELOPMENT

OCRM-08-117-E

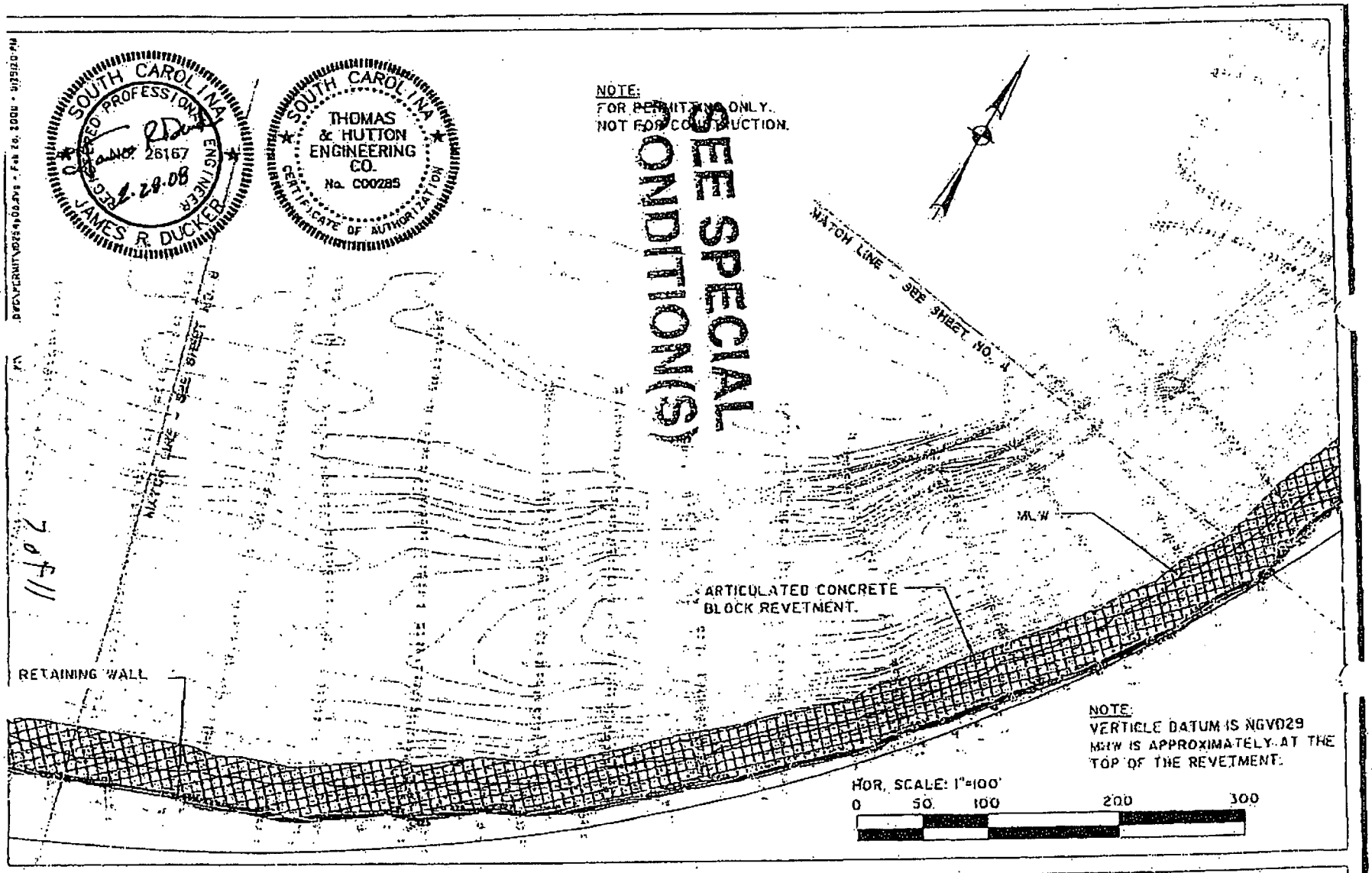
PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.
FEBRUARY 14, 2008

KIAWAH RIVER BEND EROSION CONTROL

SCALE 1" = 100'

SHEET 4 OF 7

12/23/2008 10:35 9530250 OCRM CHARLESTON PAGE 10
432000



THOMAS & HUTTON ENGINEERING CO.
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

SITE DEVELOPMENT

OCRM-08-117-E

PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.

FEBRUARY 14, 2008

KIAWAH RIVER BEND
EROSION CONTROL

SCALE 1" = 100'

SHEET 5 OF 7

12/23/2008 10:35 9530260 832000 OCRM CHARLESTON PAGE 11

SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER
No. 26167
JAMES R. DUCKER
2-28-08

SOUTH CAROLINA
THOMAS & HUTTON ENGINEERING CO.
No. C00285
CERTIFICATE OF AUTHORIZATION

SEE SPECIAL CONDITION(S)

NOTE: FOR PERMITTING ONLY. NOT FOR CONSTRUCTION.

NOTE:
VERTICLE DATUM IS NGVD29.
MHW IS APPROXIMATELY AT THE TOP OF THE REVETMENT.

ARTICULATED CONCRETE BLOCK REVETMENT.

MLW

RETAINING WALL.

HOR. SCALE: 1"=100'

0 50 100 200 300

THOMAS & HUTTON ENGINEERING CO.
935 HOUSTON NORTHCUTT BOULEVARD.
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

SITE DEVELOPMENT

OCRM-08-117-E

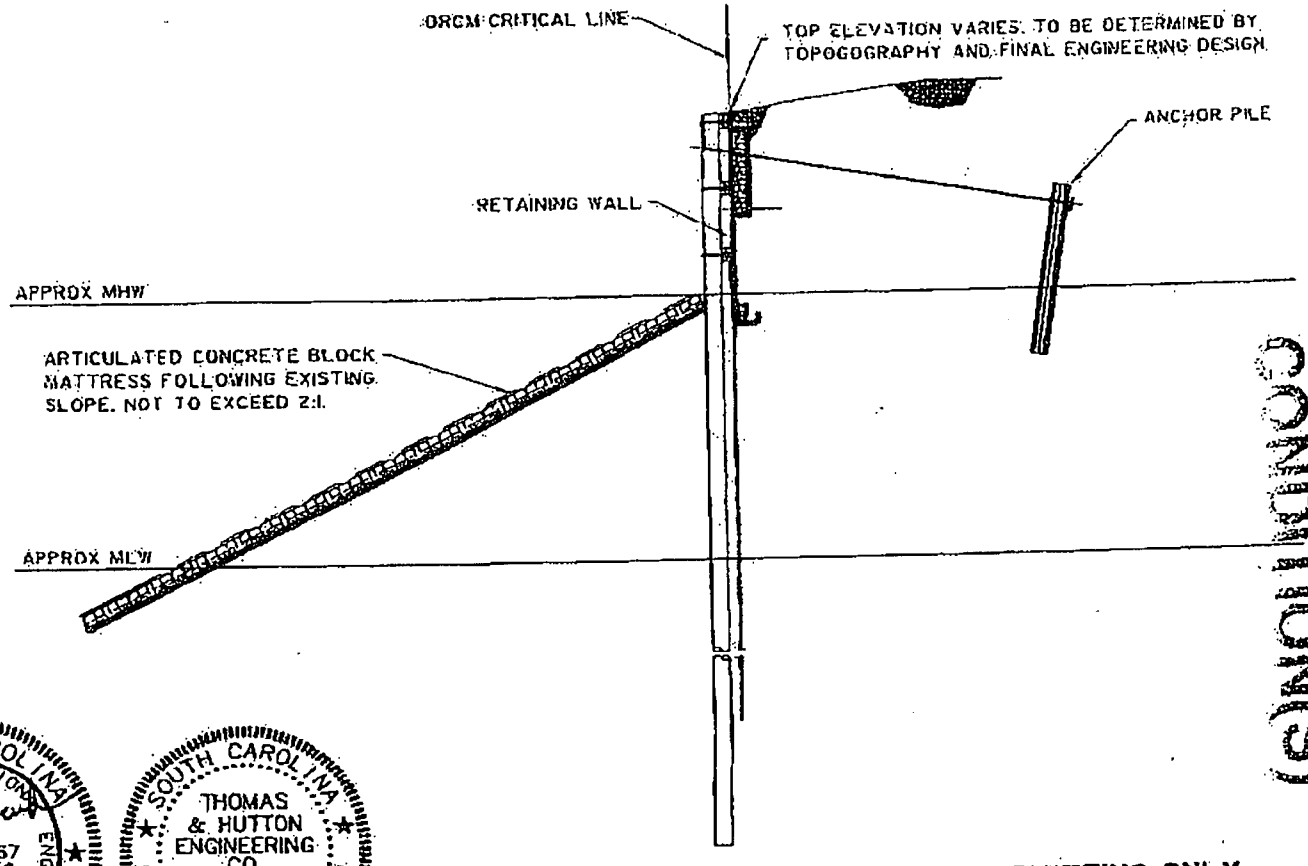
PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.

FEBRUARY 14, 2008

KIAWAH RIVER BEND
EROSION CONTROL

SCALE 1" = 100'

SHEET 6 OF 7



SEE SPECIAL CONDITION(S)

SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER
JAMES R. DUCKER
NO. 26167
2-28-08

SOUTH CAROLINA
THOMAS & HUTTON ENGINEERING CO.
No. C00285
CERTIFICATE OF AUTHORIZATION

FOR PERMITTING ONLY.
NOT FOR CONSTRUCTION.

THOMAS & HUTTON ENGINEERING CO.
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

SECTION DETAIL

OCRM-08-117-E

PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.

FEBRUARY 14, 2008

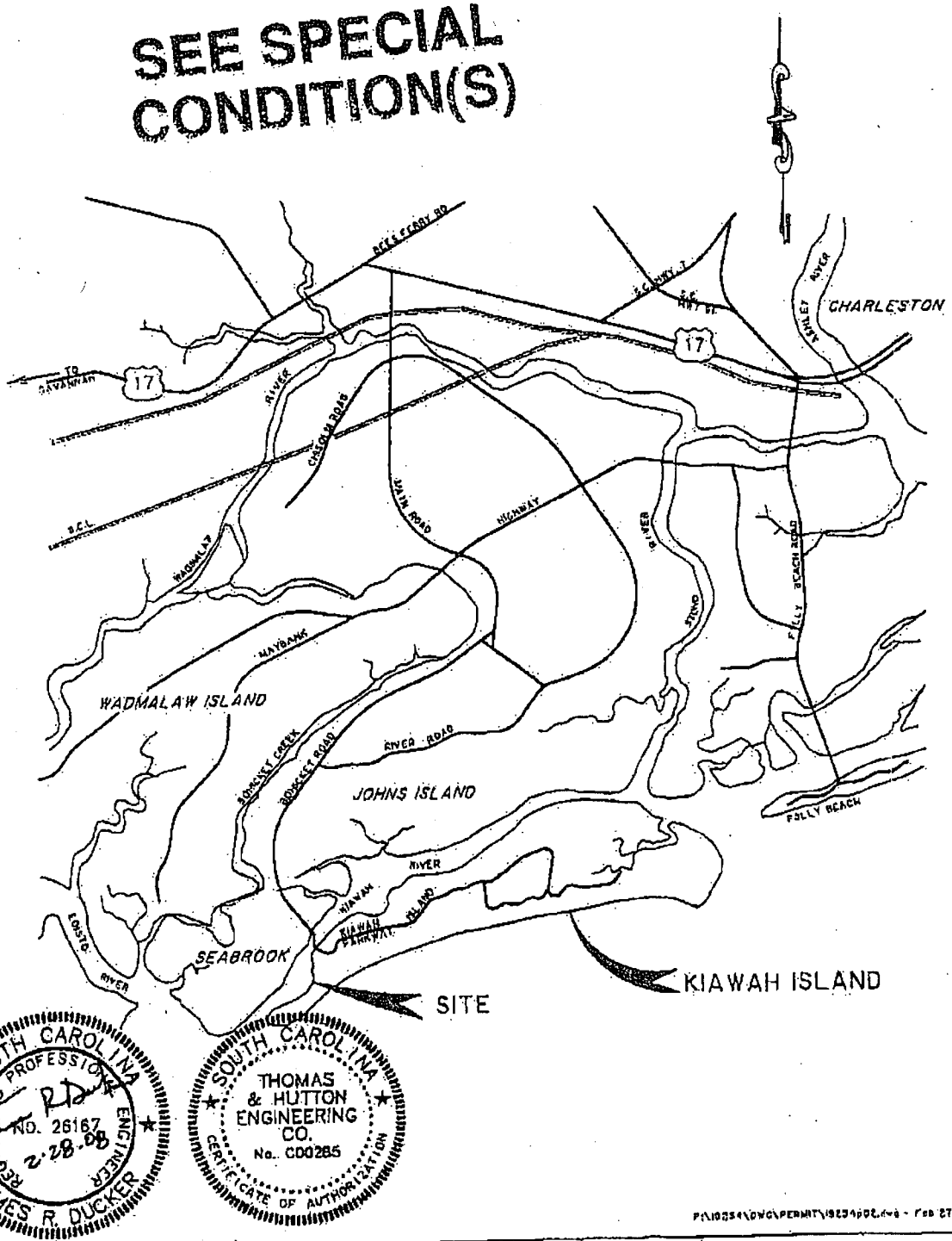
KIAWAH RIVER BEND EROSION CONTROL

NOT TO SCALE

SHEET 7 OF 7

12/23/2008 10:35 9530250 623000 OCRM CHARLESTON PAGE 12

SEE SPECIAL CONDITION(S)



SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER No. 26167 JAMES R. DUCKER 2-28-08

SOUTH CAROLINA THOMAS & HUTTON ENGINEERING CO. No. C00285 CERTIFICATE OF AUTHORIZATION

P:\10054\DWG\PERMIT\10054002.dwg - Feb 27, 2008 - 1:43:37 PM

THOMAS & HUTTON ENGINEERING CO.
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

10 of 11

VICINITY MAP

OCRM-08-117-E

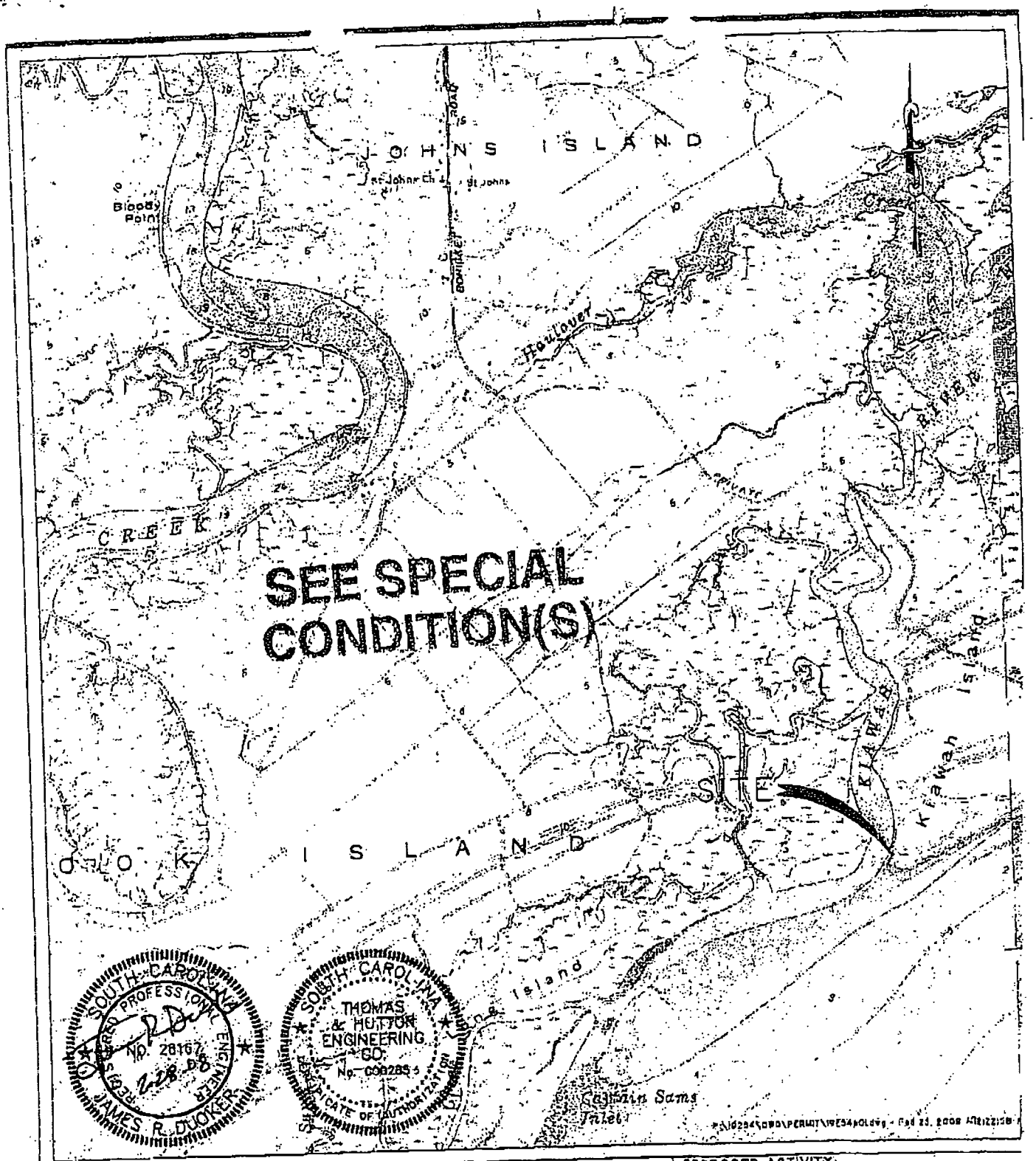
PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.
FEBRUARY 14, 2008

KIAWAH RIVER BEND EROSION CONTROL

NOT TO SCALE

SHEET 2 OF 7

12



SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER No. 28167 JAMES R. DUCKER 1-28-08

SOUTH CAROLINA THOMAS & HUTTON ENGINEERING CO. No. C00285 CERTIFICATE OF AUTHORIZATION

THOMAS & HUTTON ENGINEERING CO.

935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

11 of 11

QUAD MAP

OCRM-08-117-E

PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.
FEBRUARY 14, 2008

LAT: 32° 35' 12"
LONG: 80° 07' 54"
SOURCE: ROCKVILLE, SC QUADRANGLE MAP
KIAWAH ISLAND, SC QUADRANGLE MAP

SCALE 1" = 200'

SHEET 1 OF 7

13

PRATT-THOMAS | WALKER
PROFESSIONAL ASSOCIATION

ATTORNEYS AT LAW

16 CHARLOTTE STREET
CHARLESTON, SC 29403

PO DRAWER 22247
CHARLESTON, SC 29413-2247

PHONE: 843.727.2200
FAX: 843.727.2238

WWW.WISELAW.COM

E. DOUGLAS PRATT-THOMAS
G. TRENHOLM WALKER
W. ANDREW GOWDEY, JR.
JOE I. LUSTER
I. KEITH McCARTY (SC, TN)
LINDSAY K. SMITH-YEAGEY (SC, FL)
CLAYTON D. McCULLOUGH
THOMAS H. HESSE (SC, GA)
IAN P. FREEMAN (SC, CT)
FRANCIS M. ERVIN II (SC, MD)
DANIEL S. JACQUEERY, JR.
JAMIE L. KNOX

EXHIBIT
tabbies
B

December 30, 2008

VIA FACSIMILE TRANSMITTAL 803-898-3393
and U.S. FIRST CLASS MAIL
Clerk of the Board
Board of Department of Health and Environmental Control
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

RE: Written Request for Final Review
OCRM Permit: OCRM-08-117-E
Project: Kiawah River Bend Revetment
Applicant: Kiawah Development Partners II, Inc

Dear Members of the Board:

I and Gedney M. Howe, III, represent Kiawah Development Partners II, Inc. ("KDP"), the applicant for the above OCRM permit seeking to construct a revetment along the eroding bank of the Kiawah River. On December 18, 2008, OCRM approved the permit with conditions that severely undermine the effectiveness of the revetment. The conditions allow the construction of the revetment along the bank for only 270 feet, a distance that is but 10% of the requested distance. The conditional permit completely fails to protect the remaining shoreline that continues to slough off into the Kiawah River.

I am writing on behalf of the applicant to request final review of the permit by your board as provided in S.C. Code § 44-1-60(E). I have enclosed a copy of the permit as attachment No. 1.

THE PROJECT

The location of the proposed revetment is on the backside of Kiawah Island along the bank of the Kiawah River, a tidal river that connects to the Atlantic Ocean through Captain Sam's Inlet that separates Kiawah Island from Seabrook Island. The river bank in question is on the "inland" side of the southwestern peninsula of Kiawah Island that is known as Captain Sam's Spit. This peninsula is about 1.3 miles in length and bounded on one side by the ocean and on the other by the Kiawah River. The proposed revetment is along the bank in the bend of the river at the beginning of the peninsula.

The purpose of the revetment is to stop continual erosion of high ground above the OCRM critical line on the riverbank for about a distance of 2783 feet (extending about 30% of the length of the Spit). I have enclosed a copy of color photographs of the location as attachment No. 2. These show the extensive, rapid, destructive erosion in this area. The bank in question is adjacent to a public park operated by the Charleston County Park and Recreation Commission ("PRC") known as Beachwalker Park. The erosion has already damaged the PRC 's parking lot and riverside gazebo. PRC's other park improvements will soon be severely damaged. The park leases the land from a sister entity of KDP which owns the upland for the park as well as the upland along the river bank for the length of the proposed revetment.

The proposed revetment is not a typical vertical bulkhead. It would consist of a retaining wall working in combination with a sloped matt of articulated concrete block on the intertidal riverbank that would facilitate and foster the growth of marsh grass and other vegetation. Enclosed are a copy of the permit application as attachment No. 3 and a photo of a similarly constructed revetment OCRM permitted recently in Charleston County as attachment 4. The 2,783' length of the revetment was recommended by nationally recognized experts in shoreline dynamics and tidal flows who were retained by KDP to come up with the most environmentally and aesthetically appropriate solution for elimination of the erosion problem along the bank at the river's bend. Short bulkheads adjacent to tidal waters such as the Kiawah River often transfer the erosion from the location of bulkhead to the land on either end. The length proposed was specifically to *prevent* a shifting of the problem along the bank and thus accomplish a lasting solution.

THE EMERGENCY

The significant, continuing, and rapid erosion presents an emergency. KDP requests that the board conduct a conference to hear the appeal at its earliest convenience. KDP daily suffers irreparable harm to its land from this incessant erosion and winter storms are on the near horizon.

This erosion has been advancing unabated during the inordinate time the staff took to act on KDP's application. KDP submitted its application on February 28, 2008. Three months after filing the staff improperly cancelled the application. After the application was reinstated, no action was taken for more than 6 additional months. Staff did not render its decision until nearly ten months after filing, despite the requirement of R. 30-4(C) that staff decide applications for permits for minor development activity "within 30 days" after an application is complete. *See*, S.C. Code § 48-39-10 (N) and S.C. Reg. R 30-1(D)(34) ("Minor Development Activity - the construction, maintenance, repair or alteration of any ... erosion control structure, the construction of which does not involve dredging.").

THE APPEAL

The fundamental grounds for appeal are that (a) the proposed revetment complies with the controlling statures and regulations and (b) there are no significant negative impacts anywhere from the revetment, much less any significant negative impacts to the "critical areas" under OCRM's jurisdiction. OCRM staff's ground for denying the permit for the majority of the revetment is its contention that potential residential development of a part of the highland of Captain Sam's Spit (*i.e.*, behind the state's beachfront setback line) as allowed under the Town's zoning ordinance would have a negative effect on rare and endangered species as well as the protected dune area. This unsupported assertion is inaccurate and speculative.

The applicant's grounds for challenging the staff's decision, in particular Special Condition No. 1 limiting the length of the revetment to a small fraction of the requested distance, include, but are not limited to, the following:

1. The application and proposed revetment comply with the statutes and regulations governing bulkheads and revetments.
2. The proposed revetment will have no significant negative impacts, including no negative impacts at all in the critical area.
3. The enormously reduced distance for the revetment approved by staff will, if built, possibly worsen and hasten erosion on either end of the 270' structure unless the remainder of the proposed revetment is constructed.
4. The staff's decision was based on factors beyond its purview, *i.e.*, whether any development should be allowed on Captain Sam's Spit on the highland behind both the critical line and beachfront setback line. This development authorization rests with the local municipality, not the Department.
5. As the applicant does not have a development plan and no development plan was submitted to the staff. The staff's determination of alleged negative effects is inaccurate, has no factual support, and is pure speculation.
6. If and when the applicant commences development of the upland, the applicant will be required to comply with all applicable laws and regulations, including those of the Department governing stormwater and land disturbance. This later event, if it should occur, is the appropriate stage in the permitting process for measuring any effects of the development of the upland with respect to stormwater runoff and land disturbance. "Uses," however, such as low density, single family residential houses are outside the purview of the Department in acting on an application such as this one.
7. Staff's determination appears to be based also on several incorrect assumptions and conclusions that include, but are not limited to, the following:

a. Staff provides in the much-reduced permit that the issuance of a permit for the requested distance will facilitate development in a "pristine dune area." This is an incorrect statement on two counts: 1) the dunes are not being developed -- all land subject to any potential future development will occur behind the OCRM regulated beach/dune system, and 2) local zoning by the Town of Kiawah Island is the sole legal authority for any potential uses and development outside protected dunes and critical areas.

b. The staff implies in the conditional permit that it evaluated "overall plans and designs of a project" and was concerned about "the extent and significance of negative impacts on GAPCs." As stated earlier, there were no "overall plans and designs" in existence and *none were submitted, requested, nor required.* Without them it is impossible to assess the cumulative foreseeable impacts, positive or negative, from the upland development, which is, in any event, well beyond the scope of this application.

c. The staff states in the reduced permit that "this area" is a barrier island. This is misleading. It is true that this revetment would extend partially along the side of a peninsula that is a tiny part of a barrier island over ten miles long and having 5,000 acres of upland; however, the particular land subject to the development is not a barrier island.

d. The staff states in the reduced permit that "this area" is a dune area. The revetment is not being built in, or anywhere near, a dune area. It is being constructed on a river bank on the side of the peninsula away from the ocean. Additionally, possible future development of a small part of the peninsula, well away from Captain Sam's Inlet, will not be in the dune area. Using the OCRM definition, all development would occur outside of the "beach/dune system." *See*, definition in S. C. Code § 48-39-10 (J)(4) ("beach/dune system ... is the area from the mean high-water mark to the setback line as determined in Section 48-39-280").

e. The staff suggests that granting the permit to stop erosion of highland on the river "could affect the habitats for rare and endangered species." The staff refers to the habitat for piping plovers. As the materials submitted by the applicant demonstrate, there will be no adverse impact on piping plover habitat. Their habitat is the intertidal hard sand *beach* more than a half mile from the end of the proposed revetment.

f. The staff incorrectly considered the "project" to be the potential future development of the upland as allowed by the zoning authorities. The "project" is instead the revetment area itself.

g. As there was no development plan of any kind before the staff, the staff incorrectly determined that possible undefined development unrelated to this revetment project, at some unknown future date, might damage areas of special resource significance.

8. The staff's determination is not supported by the facts that were before it, is contrary to the controlling regulations, statutes, and law, and is arbitrary and capricious.

9. The staff considered matters that were not properly before it including matters that the regulations prohibit the staff from considering in making the determination on the application for this minor project.
10. The staff's determination deprives the applicant of its constitutional rights to substantive and procedural due process as well as equal protection. The failure of the Department to base its decision on the controlling law and its failure to render a decision in a timely manner as required by its own regulations has destroyed and taken high land of the Applicant.

In summary, the Department improperly cancelled the application, improperly delayed its decision, and improperly rendered a flawed decision granting a partial permit, all in violation of the applicable statutes and regulations.

The applicant respectfully requests that the board reverse the staff's determination and grant the applicant the permit without Special Condition No. 1 that limited the revetment to a "270' section...located along the southwest portion of the parking lot in Beachwalker Park...." Instead, the permit should be for the length requested without further delay and damage.

We look forward to the opportunity to appear before the Board in this matter.

Sincerely,

PRATT-THOMAS, WALKER, P.A.

G. Trenholm Walker

GTW\yye
Enclosures
cc: Elizabeth A. Dieck, Esq.
Carolyn R. Boltin, Deputy Commissioner DHEC-OCRM
Tom O'Rourke, Director of PRC
Gedney M. Howe, III, Esq.
Leonard L. Long, Jr.
Ray Pantlik
Townsend Clarkson
Charles P. Darby, III
Mitchell Bohannon

ATTACHMENTS

ATTACHMENT 10.1

D H E C
PROMOTE PROTECT PROSPER

C. Earl Hunter, Commissioner
Promoting and protecting the health of the public and the environment.

December 18, 2008

Mr. Ray Pantlik
Kiawah Development Partners II, Inc.
PO Box 12001
Charleston, SC 29422

SEE SPECIAL CONDITION(S)

Re: OCRM-08-117-E
Kiawah Development Partners II, Inc.

Dear Mr. Pantlik:

The SCDHEC Office of Ocean and Coastal Resource Management has reviewed your application to construct an erosion control structure at Beachwalker Park, Kiawah Island, Charleston County, South Carolina and has issued a permit for this work. You should carefully read the description of the authorized project and the special conditions that have been placed on the permit, as these conditions may modify the permitted activity. In addition, there are a series of general conditions that should be reviewed. The original and one photocopy of the permit, as issued, are enclosed. After carefully reading the permit, if you wish to accept the permit as issued, sign and date in the signature block entitled "PERMITTEE" on the original version of the permit and **return it to this Department. Keep the photocopy for your records.**

PLEASE READ CAREFULLY: You are required to sign and return the original version of your permit to this Department. If this permit is not signed and returned within thirty (30) days of issuance, *OR* appealed within 15 days as described on the enclosed "Notice of Appeal Procedure", the Department reserves the right to cancel this permit. Please carefully review the enclosed "Notice of Appeal Procedure" for information and deadlines for appealing this permit.

We have also enclosed a "request for a construction placard" card. You must send in this card before the time you wish to start construction. At that time a construction placard will be sent to you to post at the construction site.

PLEASE NOTE: You are not authorized to commence work under the permit until we have received the original version of the entire permit signed and accepted by you, and a construction placard has been issued and posted at the construction site. The receipt of this permit does not relieve you of the responsibility of acquiring any other federal or local permits that may be required.

Sincerely,

William C. Eiser

William C. Eiser
Wetland Section Project Manager

cc: Blair Williams, Acting Wetland Section Manager
/enclosure

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Ocean and Coastal Resource Management
Charleston Office · 1362 McMillan Avenue, Suite 400 · Charleston, SC 29405
Phone: 843-953-0200 · Fax: 843-953-0201 · www.scdhec.gov

(1)

D H E C

PROMOTE PROTECT PROSPER

G. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

SEE SPECIAL CONDITION(S)

Notice of Appeal Procedure

The following procedures are in effect beginning July 1, 2006, pursuant to 2006 Act No. 387:

1. This decision of the S.C. Department of Health and Environmental Control (Department) becomes the final agency decision 15 days after notice of the decision has been mailed to the applicant or respondent, unless a written request for final review is filed with the Department by the applicant, permittee, licensee, or affected person.

2. An applicant, permittee, licensee, or affected person who wishes to appeal this decision must file a written request for final review with the Clerk of the Board at the following address or by facsimile at 803-898-3393.

   Clerk of the Board
   SC DHEC
   2600 Bull Street
   Columbia, SC 29201

3. The request for final review should include the following:
   a. the grounds on which the Department's decision is challenged and the specific changes sought in the decision
   b. a statement of any significant issues or factors the Board should consider in deciding how to handle the matter
   c. a copy of the Department's decision or action under review

4. In order to be timely, a request for final review must be received by the Clerk of the Board within 15 days after notice of the decision has been mailed to the applicant or respondent. If the 15th day occurs on a weekend or State holiday, the request is due to be received by the Clerk of the Board on the next working day. The request for final review must be received by the Clerk of the Board by 5:00 p.m. on the date it is due.

5. If a timely request for final review is filed with the Clerk of the Board, the Clerk will provide additional information regarding procedures.

6. The Board of Health and Environmental Control has 60 days from the date of receipt of a request for final review to conduct a final review conference. The conference may be conducted by the Board, its designee, or a committee of three members of the Board appointed by the chair.

7. If a final review conference is not conducted within 60 days, the Department decision becomes the final agency decision, and a party may request a contested case hearing before the Administrative Law Court within 30 days after the deadline for the final review conference.

The above information is provided as a courtesy; parties are responsible for complying with all applicable legal requirements.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Ocean and Coastal Resource Management
Charleston Office · 1362 McMillan Avenue, Suite 400 · Charleston, SC 29405
Phone: 843-953-0200 · Fax: 843-953-0201 · www.scdhec.gov

(2)

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT

CRITICAL AREA PERMIT & COASTAL ZONE CONSISTENCY CERTIFICATION

Permittee(s):	**Kiawah Development Partners II, Inc.**
Permit Number(s):	**OCRM-08-117-E**
Date of Issuance:	**December 18, 2008**
Expiration Date:	**December 18, 2013**
Location:	**On and adjacent to the Kiawah River at Beachwalker Park, Kiawah Island, Charleston County, South Carolina**

SEE SPECIAL CONDITION(S)

This permit is issued under the provisions of S. C. Code Ann. Section 48-39-10, *et seq.*, and 23A S.C. Code Ann. Regs. 30-1 through 30-18 (Supp. 2007). Please carefully read the project description and the special conditions that appear on this permit/certification as they will affect the work that is allowed. The general conditions are also a part of this permit/certification and should be read in their entirety. The S. C. Contractor's Licensing Act of 1999, enacted as S.C. Code Ann. Section 40-11-5 through 430, requires that all construction with a total cost of $5,000 or more be performed by a licensed contractor with a valid contractor's license for marine class construction, except for construction performed by a private landowner for strictly private purposes. Your signature on and acceptance of this permit denotes your understanding of the stated law regarding use of licensed contractors. **All listed special and general conditions will remain in effect for the life of the project if work commences during the life of the permit. This applies to permittee, future property owners, or permit assignees.**

DESCRIPTION OF THE PROJECT, AS AUTHORIZED

The permit has been issued with significant modifications from the original request to build a 2,783' erosion control structure. Specifically a 270' section of bulkhead and articulated concrete block revetment has been approved for the northeastern end of the project area, along the southwest portion of the parking lot in Beachwalker Park, but the remaining 2,513' of the proposed erosion control structure to the southwest of the park is not authorized.

With the exception of the parking lot and associated infrastructure for Beachwalker Park there is currently no high-ground development in the general vicinity of the project area. The applicant provided general information that indicated up to 50 residential homes on approximately 20 acres is planned and approved by the local government. If issued as requested, the permit will prevent the shoreline movement in an area that historically has seen inlet formation and facilitate development in a pristine dune area that is currently undeveloped and adjacent to federally designated critical habitat for the piping plover, a threatened species and as such is designated a Geographic Area of Particular Concern (GAPC). This area is also federally designated as a COBRA unit. Regulation 30-11(C) requires that consideration must be given to the extent to which long-range cumulative impacts of the project may result within the context of other possible development and the general character of the area, the extent to which overall plans and designs of a project can be submitted together and evaluated as a whole, and the extent and significance of negative

impacts on GAPCs, in this case the piping plover habitat and the Retreat Policy in its broadest sense. Regulation 30-11(B) requires that consideration must be given to the extent to which the development could affect the habitats for rare and endangered species. Section III(C)(3)(XII)(A) of the Coastal Management Program Document identifies barrier islands and dune areas outside of the critical area as areas of special resource significance that are unique and environmentally fragile, which would apply to this area. Consequently, the permit will be issued to authorize a 270' erosion control structure adjacent to Beachwalker Park parking lot and the remainder of the proposed structure will not be authorized. The purpose of the proposed activity is for erosion control.

SPECIAL CONDITIONS

1. Provided that a 270' section of the proposed erosion control structure located along the southwest portion of the parking lot in Beachwalker Park is approved, but the remaining 2,513' of the proposed structure is not approved.

2. Provided that an as-built survey of the erosion control structure must be submitted to the Department within 90 days of the expiration date of the final construction placard. The survey must be performed by a registered land surveyor, must show all edges of the structure, and must list the starting and ending coordinates of the structure in the SC State Plane Coordinate System, which can be obtained by survey-grade Global Positioning System equipment.

3. Provided that in the event that archaeological or paleontological remains are found during the course of work, the applicant should notify the South Carolina Institute of Archaeology and Anthropology (Mr. James Spirek at 803-777-8170) pursuant to South Carolina Underwater Antiquities Act of 1991, (Article 5 Chapter 7, Title 54, Code of Laws of South Carolina, 1976). Archaeological remains consist of any materials made or altered by man, which remain from past historic or prehistoric times (ie, older than 50 years). Examples include old pottery fragments, metal, wood, arrowheads, stone implements or tools, human burials, historic docks, structures, or non-recent vessel remains. Paleontological remains consist of old animal remains, original or fossilized, such as teeth, tusks, bone, or entire skeletons.

PERMITTEE'S ATTENTION IS DIRECTED TO GENERAL CONDITIONS NUMBERS FOUR (4) AND FIVE (5). BY ACCEPTANCE OF THIS PERMIT, PERMITTEE IS PLACED ON NOTICE THAT THE STATE OF SOUTH CAROLINA, BY ISSUING THIS PERMIT, DOES NOT WAIVE ITS RIGHTS TO REQUIRE PAYMENT OF A REASONABLE FEE FOR USE OF STATE LANDS AT A FUTURE DATE IF SO DIRECTED BY STATUTE.

THE PERMITTEE, BY ACCEPTANCE OF THIS PERMIT AGREES TO ABIDE BY THE TERMS AND CONDITIONS CONTAINED HEREIN AND TO PERFORM THE WORK IN STRICT ACCORDANCE WITH THE PLANS AND SPECIFICATIONS ATTACHED HERETO AND MADE A PART HEREOF. ANY DEVIATION FROM THESE CONDITIONS, TERMS, PLANS AND SPECIFICATIONS SHALL BE GROUNDS FOR REVOCATION, SUSPENSION OR MODIFICATION OF THIS PERMIT AND THE INSTITUTION OF SUCH LEGAL PROCEEDINGS AS THE DEPARTMENT MAY CONSIDER APPROPRIATE.

2 of 11

SEE SPECIAL CONDITION(S)

(4)

SEE SPECIAL CONDITION(S)

Permit Number: OCRM-08-117-E

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.

(PERMITTEE(S)) (DATE)
Kiawah Development Partners II, Inc.

This permit becomes effective when the State official, designated to act for the Office of Ocean and Coastal Resource Management, has signed below.

William C. Eiser 12/18/2008

(PROJECT MANAGER, WETLAND SECTION) (DATE)
William C. Eiser
Or his Designee
Other Authorized State Official

3 of 11

(5)

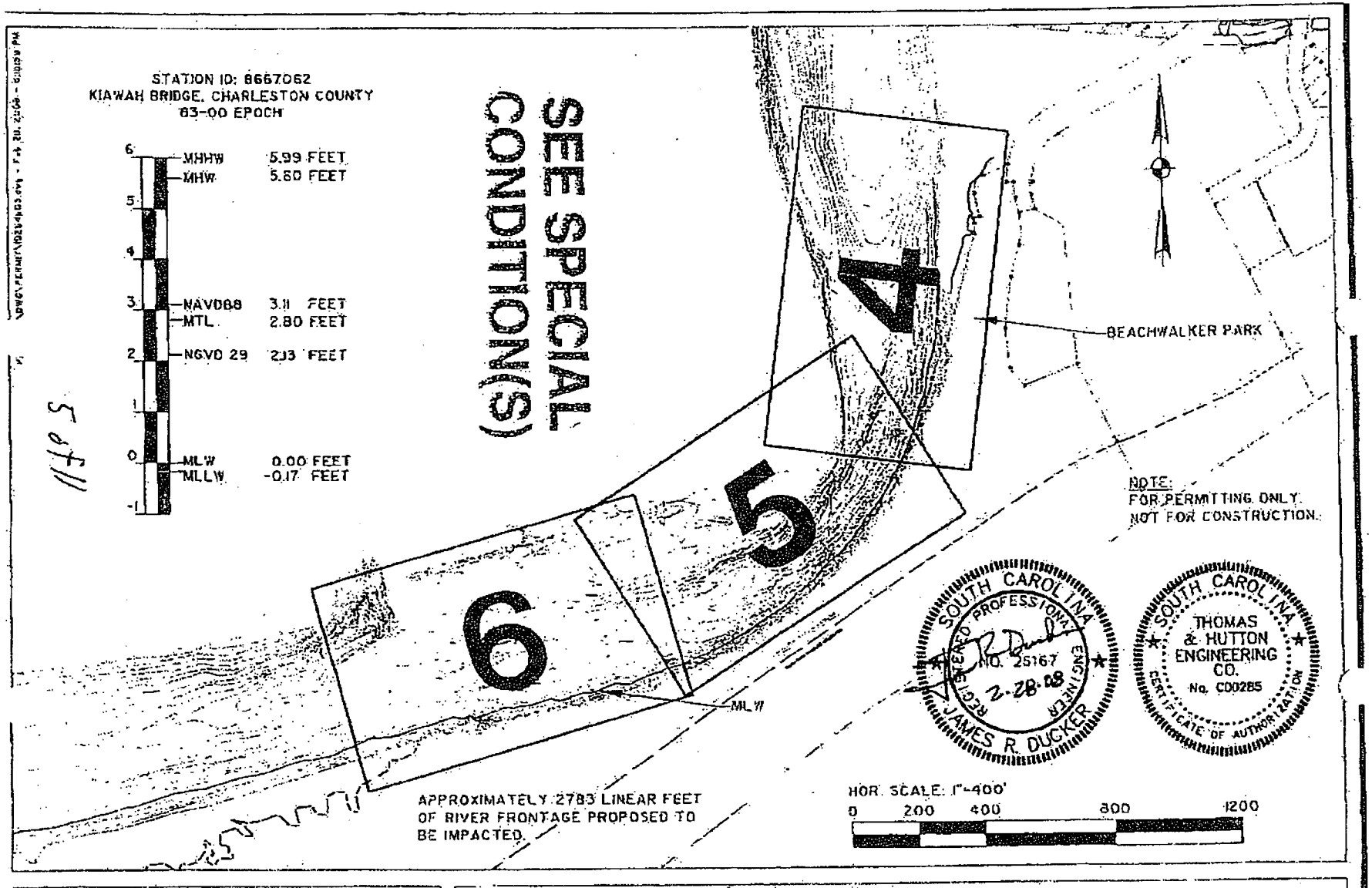
GENERAL CONDITIONS:

This construction and use permit is expressly contingent upon the following conditions which are binding on the permittee:

1. That the permittee, in accepting this permit, covenants and agrees to comply with and abide by the provisions and conditions herein and assumes all responsibility and liability and agrees to save OCRM and the State of South Carolina, its employees or representatives, harmless from all claims of damage arising out of operations conducted pursuant to this permit.
2. That if the activity authorized herein is not constructed or completed within five years of the date of issuance, this permit shall automatically expire. A request, in writing, for an extension of time shall be made not less than thirty days prior to the expiration date.
3. That all authorized work shall be conducted in a manner that minimizes any adverse impact on fish, wildlife and water quality.
4. That this permit does not relieve the permittee from the requirements of obtaining a permit from the U. S. Army Corps of Engineers or any other applicable federal agency, nor from the necessity of complying with all applicable local laws, ordinances, and zoning regulations. This permit is granted subject to the rights of the State of South Carolina in the navigable waters and shall be subject, further, to all rights held by the State of South Carolina under the public trust doctrine as well as any other right the State may have in the waters and submerged lands of the coast.
5. That this permit does not convey, expressly or impliedly, any property rights in real estate or material nor any exclusive privileges; nor does it authorize the permittee to alienate, diminish, infringe upon or otherwise restrict the property rights of any other person or the public; nor shall this permit be interpreted as appropriating public properties for private use.
6. That the permittee shall permit OCRM or its authorized agents or representatives to make periodic inspections at any time deemed necessary in order to ensure that the activity being performed is in accordance with the terms and conditions of this permit.
7. That any abandonment of the permitted activity will require restoration of the area to a satisfactory condition as determined by OCRM.
8. That this permit may not be transferred to a third party without prior written notice to OCRM, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferee subscribing to this permit and thereby agreeing to comply.
9. That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and special signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.
10. That the permit construction placard or a copy of the placard shall be posted in a conspicuous place at the project site during the entire period of work.
11. That the structure or work authorized herein shall be in accordance with the plans and drawing attached hereto, and shall be maintained in good condition. Failure to build in accordance with the plans and drawings attached hereto, or failure to maintain the structure in good condition, shall result in the revocation of this permit.
12. That the authorization for activities or structures herein constitutes a revocable license. OCRM may require the permittee to modify activities or remove structures authorized herein if it is determined by OCRM that such activity or structures violates the public's health, safety, or welfare, or if any activity is inconsistent with the public trust doctrine. Modification or removal under this condition shall be ordered only after reasonable notice stating the reasons therefore and provision to the permittee of the opportunity to respond in writing. When the Permittee is notified that OCRM intends to revoke the permit, Permittee agrees to immediately stop work pending resolution of the revocation.
13. That OCRM shall have the right to revoke, suspend, or modify this permit in the event it is determined the permitted structure (1) significantly impacts the public health, safety and welfare, and/or is violation of Section 48-39-150, (2) adversely impacts public rights, (3) that the information and data which the permittee or any other agencies have provided in connection with the permit application is either false, incomplete or inaccurate, or (4) that the activity is not in compliance with the drawings submitted by the applicant. That the permittee, upon receipt of OCRM's written intent to revoke, suspend, or modify the permit has the right to a hearing. Prior to revocation, suspension, or modification of this permit, OCRM shall provide written notification of intent to revoke to the permittee, and permittee can respond with a written explanation to OCRM. (South Carolina Code Section 1-023-370 shall govern the procedure for revocation, suspension or modification herein described).
14. That any modification, suspension or revocation of this permit shall not be the basis of any claim for damages against OCRM or the State of South Carolina or any employee, agent, or representative of OCRM or the State of South Carolina.
15. That all activities authorized herein shall, if they involve a discharge or deposit into navigable waters or ocean waters, be at all times consistent with all applicable water quality standards, effluent limitations and standards of performance, prohibitions, and pretreatment standards established pursuant to applicable federal, state and local laws.
16. That extreme care shall be exercised to prevent any adverse or undesirable effects from this work on the property of others. This permit authorizes no invasion of adjacent private property, and OCRM assumes no responsibility or liability from any claims of damage arising out of any operations conducted by the permittee pursuant to this permit.

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(6)



11 of 5

THOMAS & HUTTON ENGINEERING CO.

935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

EXISTING SITE CONDITIONS & SHEET INDEX

OCRM-08-117-E

PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.

FEBRUARY 14, 2008

KIAWAH RIVER BEND EROSION CONTROL

SCALE 1" = 400'
SHEET 3 OF 7

12/23/2008 10:35 9530?cd OCRM CHARLESTON PAGE 08

000254

7

12/23/2008 10:35 9530200 OCRM CHARLESTON PAGE 09

THOMAS & HUTTON ENG. CO.
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

SITE DEVELOPMENT

OCRM-08-117-E

PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.
FEBRUARY 14, 2008

KIAWAH RIVER BEND EROSION CONTROL

SCALE 1" = 100'

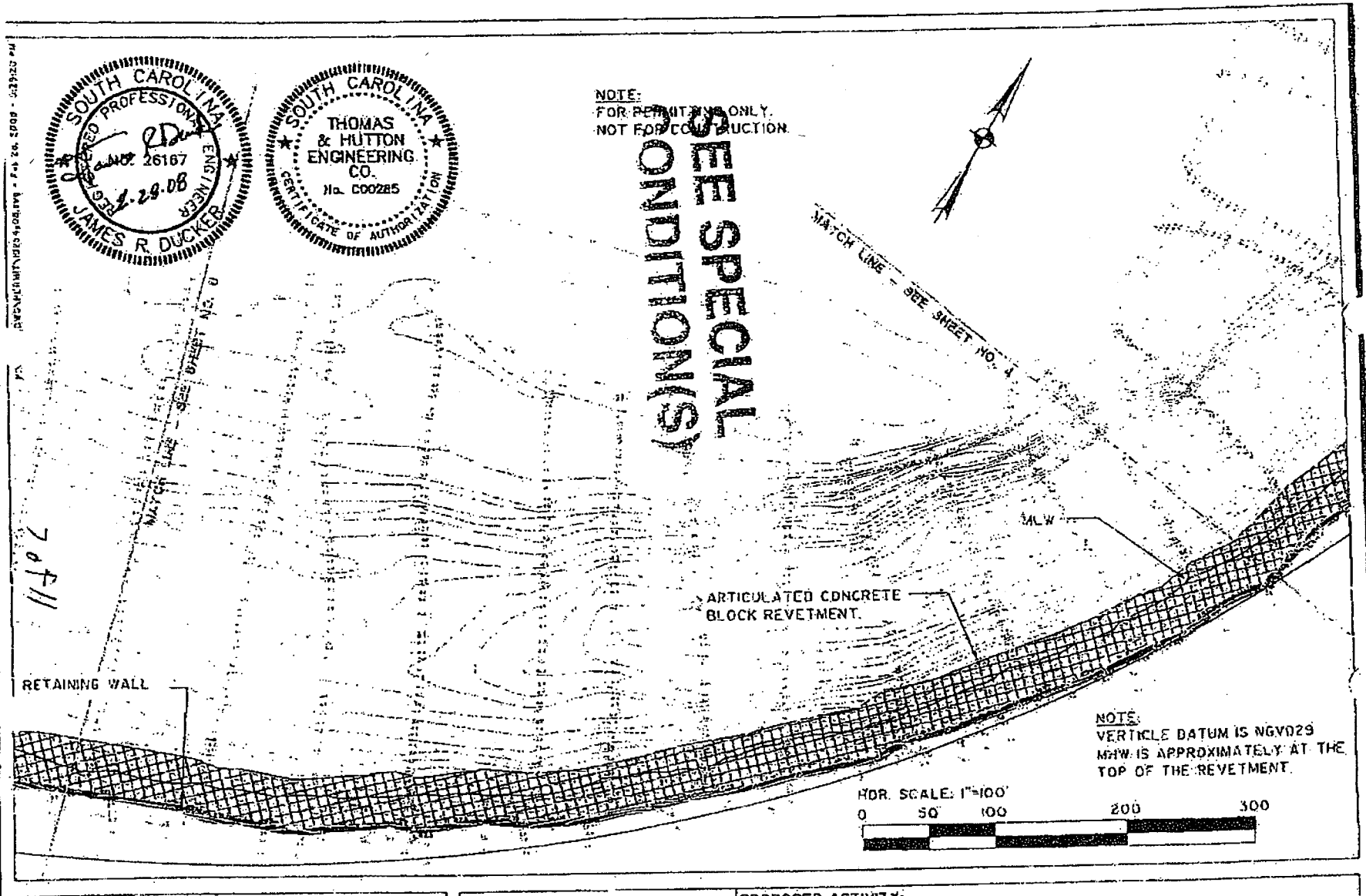
SHEET 4 OF 7

000255

8

12/23/2008 10:35 9530260 OCRM CHARLESTON PAGE 10

000256



THOMAS & HUTTON ENGINEERING CO.

935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

SITE DEVELOPMENT

OCRM-08-117-E

PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.

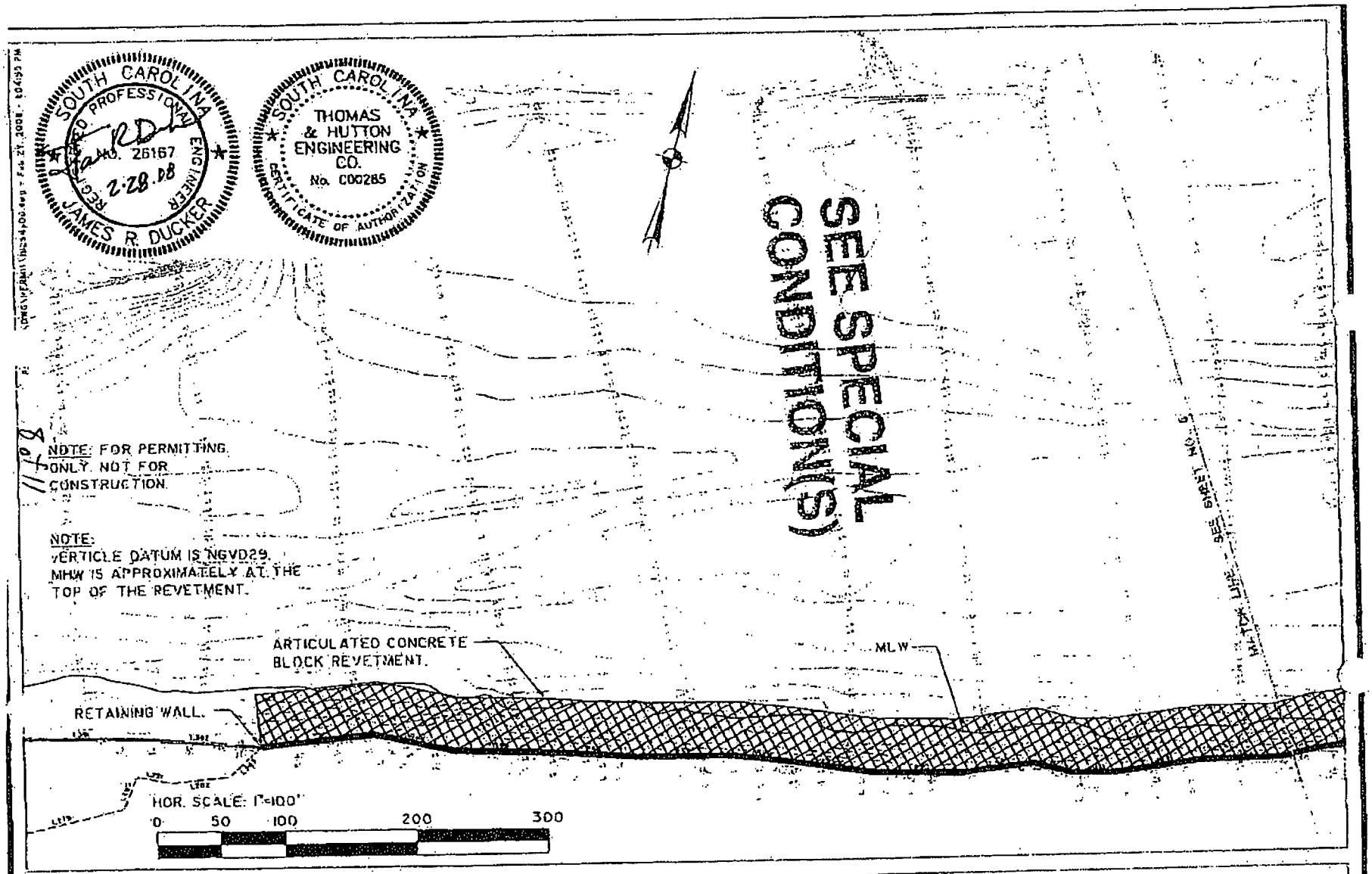
FEBRUARY 14, 2008

KIAWAH RIVER BEND EROSION CONTROL

SCALE 1" = 100'

SHEET 5 OF 7

12/23/2008 10:35 9530255 OCRM CHARLESTO PAGE 11



THOMAS & HUTTON ENGINEERING CO.
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

SITE DEVELOPMENT

OCRM-08-117-E

PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.

FEBRUARY 14, 2008

KIAWAH RIVER BEND EROSION CONTROL

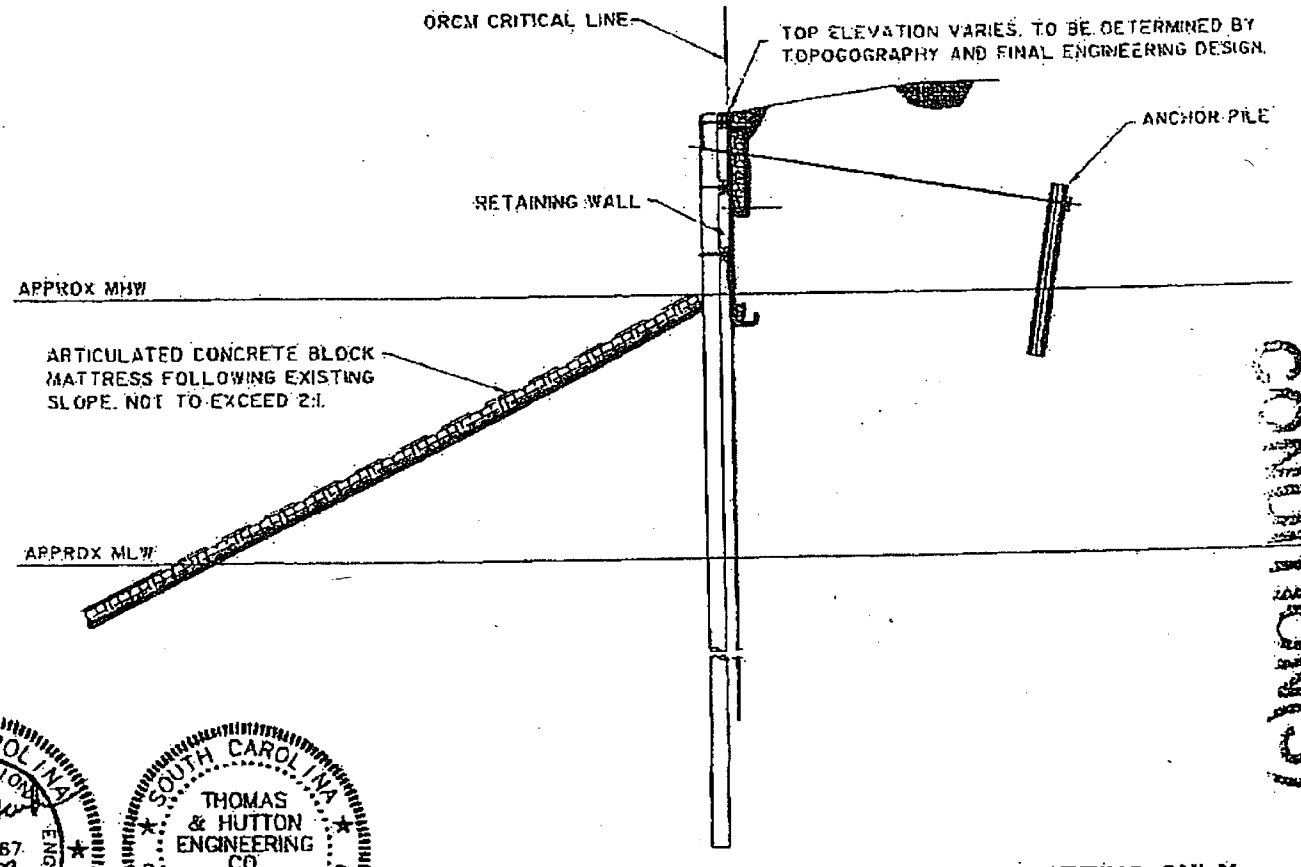
SCALE 1" = 100'

SHEET 6 OF 7

000257

10

12/23/2008 10:35 9530250 DCRM CHARLESTON PAGE 12



SEE SPECIAL CONDITION(S)

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000258

SOUTH CAROLINA PROFESSIONAL ENGINEER
REGISTERED
JAMES R. DUCKER
NO. 26167
2.28.08

SOUTH CAROLINA
THOMAS & HUTTON ENGINEERING CO.
No. C00285
CERTIFICATE OF AUTHORIZATION

FOR PERMITTING ONLY.
NOT FOR CONSTRUCTION.

THOMAS & HUTTON ENGINEERING CO.
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

SECTION DETAIL

OCRM-08-117-E

PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.

FEBRUARY 14, 2008

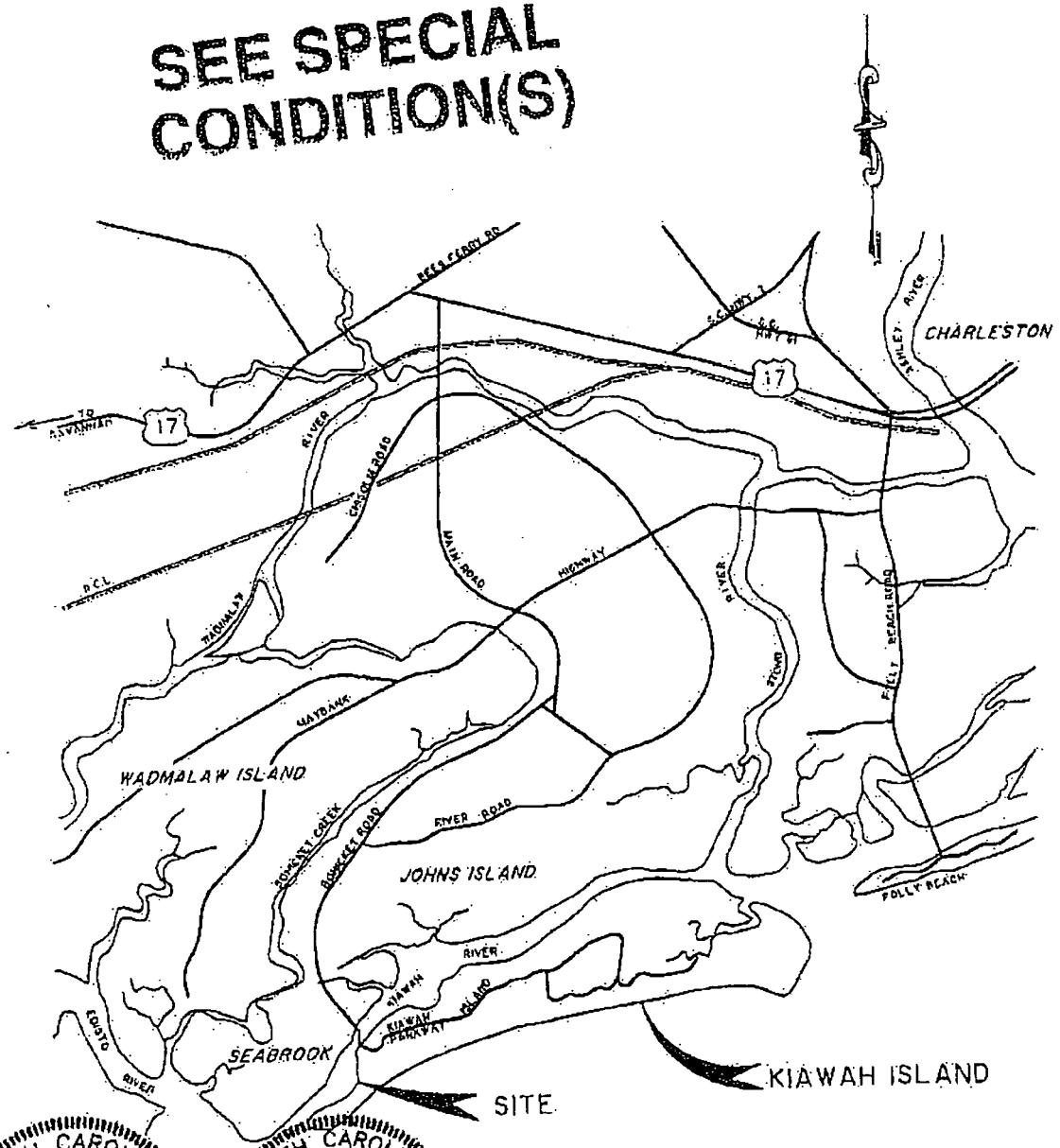
KIAWAH RIVER BEND EROSION CONTROL

NOT TO SCALE

SHEET 7 OF 7

11

SEE SPECIAL CONDITION(S)



SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER No. 25167 JAMES R. DUCKER 2.28.08

SOUTH CAROLINA THOMAS & HUTTON ENGINEERING CO. No. C00285 CERTIFICATE OF AUTHORIZATION

P:\10858\DWG\PERMIT\15Z34pD2.dwg - Feb 27, 2008 - 7:42:37 PM

THOMAS & HUTTON ENGINEERING CO.

935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

10 of 11

VICINITY MAP

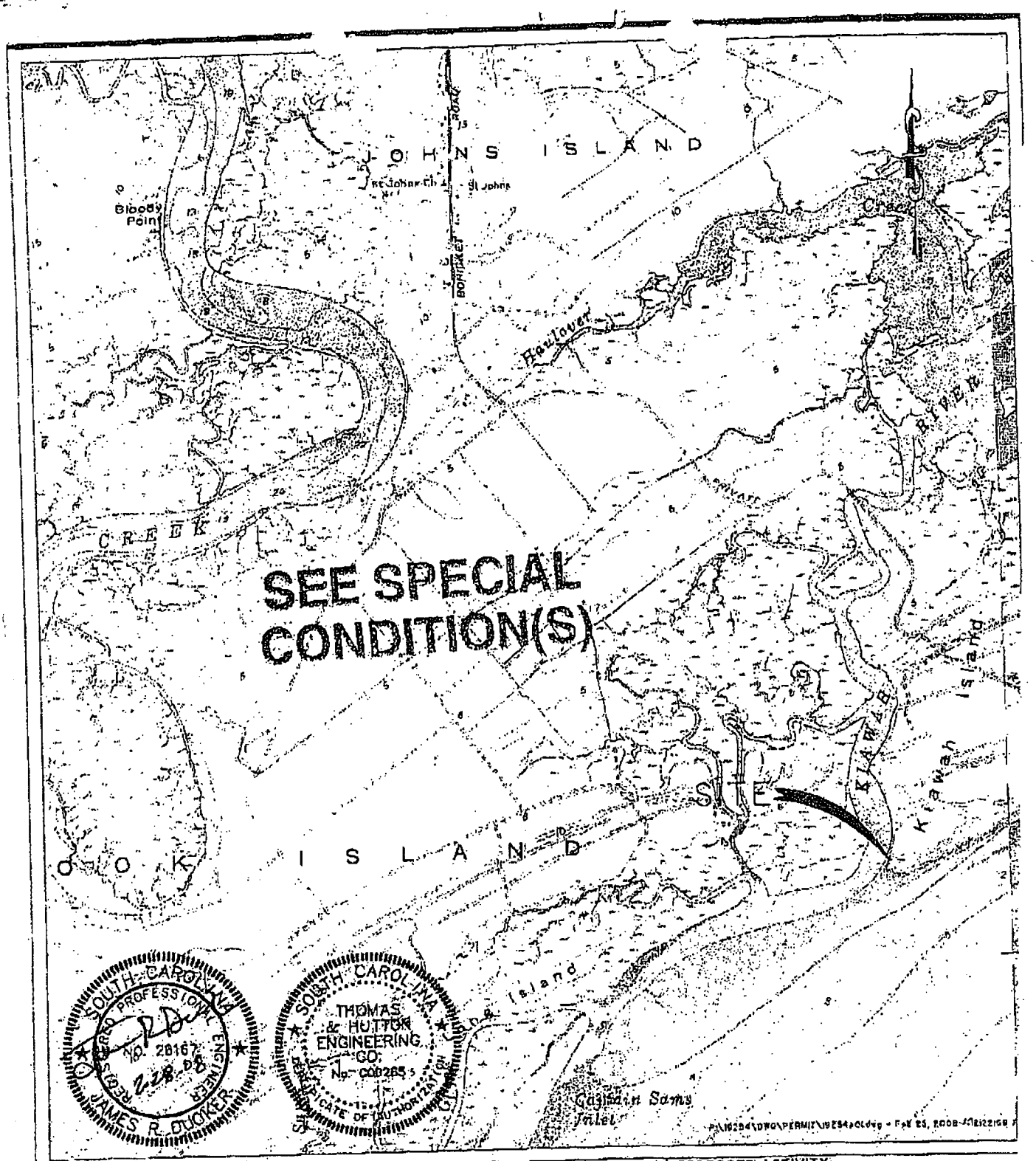
OCRM-08-117-E

PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.
FEBRUARY 14, 2008

KIAWAH RIVER BEND EROSION CONTROL

NOT TO SCALE

SHEET 2 OF 7



THOMAS & HUTTON ENGINEERING CO.
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

11 of 11

QUAD MAP

OCRM-08-117-E

PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.
FEBRUARY 14, 2008

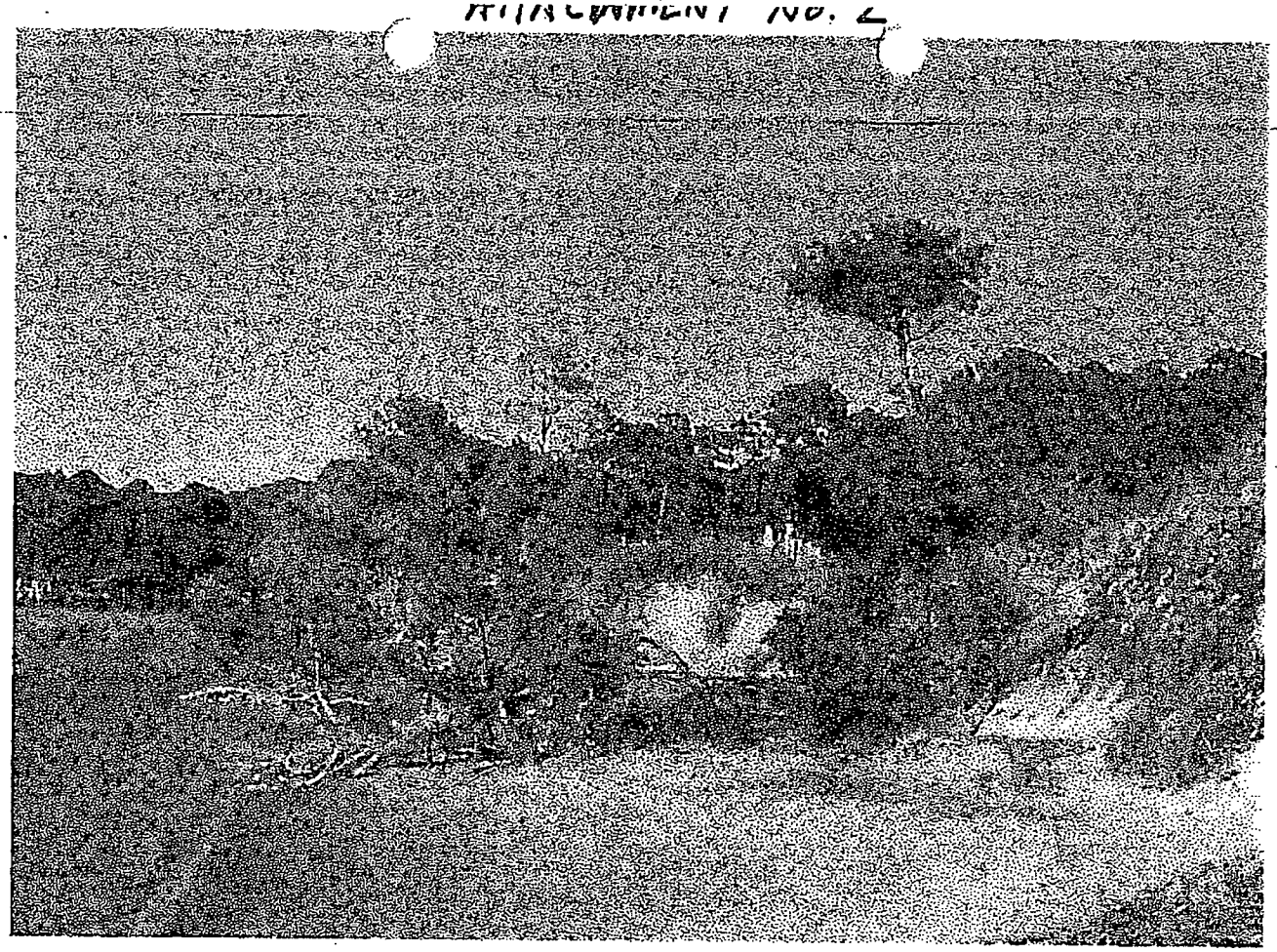
LAT: 32° 35' 12"
LONG: 80° 07' 54"
SOURCE: ROCKVILLE, SC QUADRANGLE MAP
KIAWAH ISLAND, SC QUADRANGLE MAP

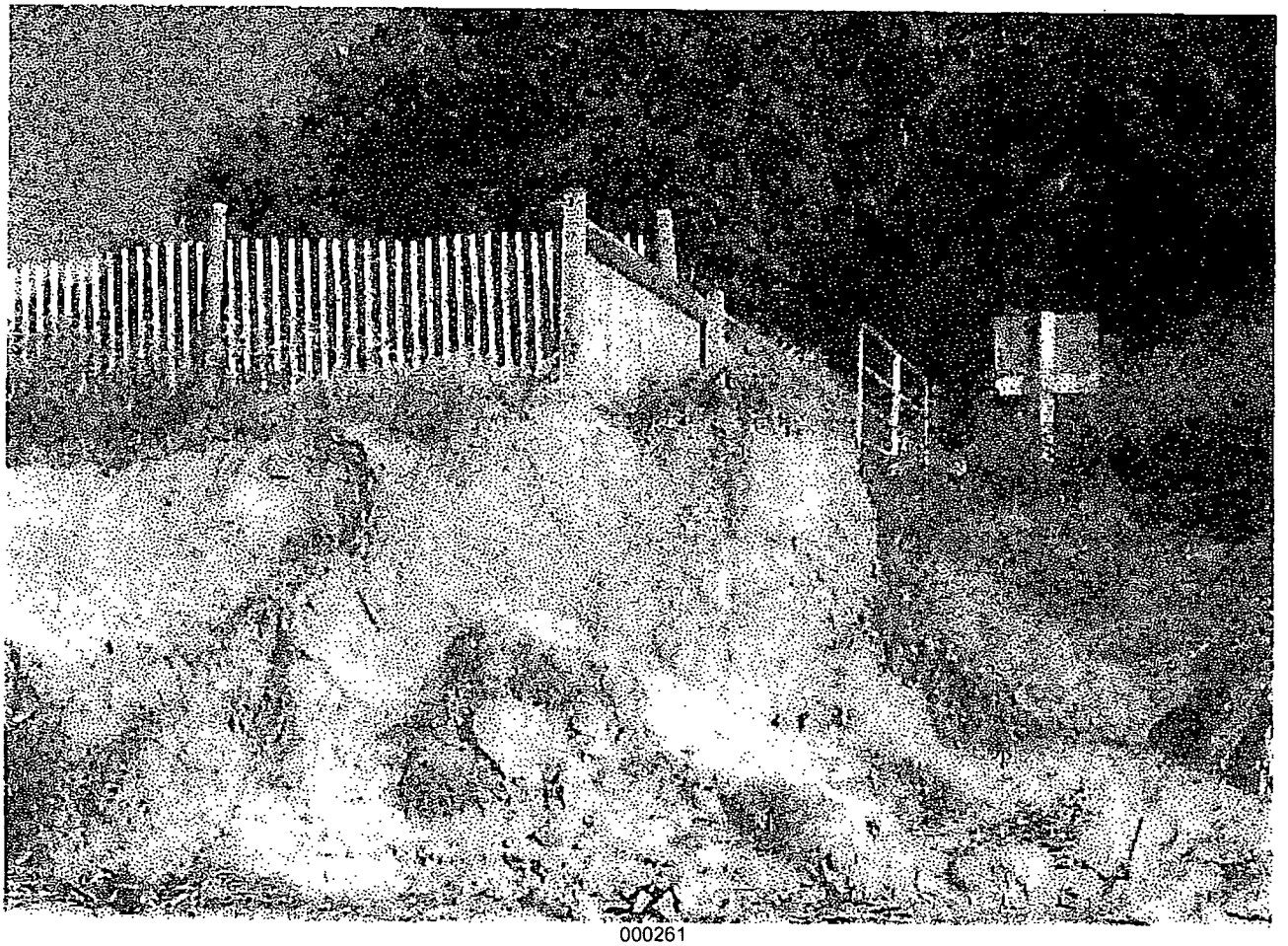
SCALE 1" = 2000'

SHEET 1 OF 7

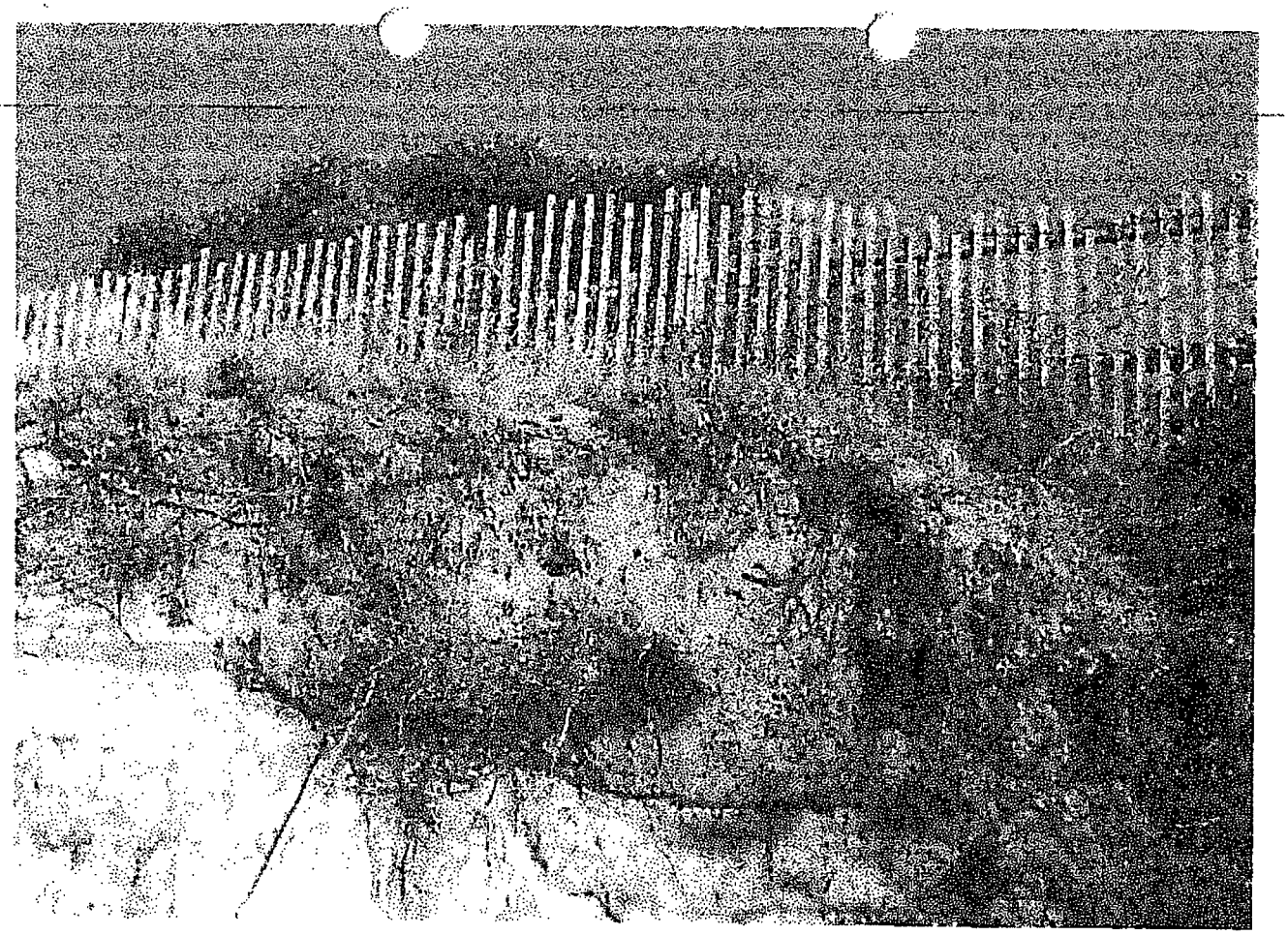
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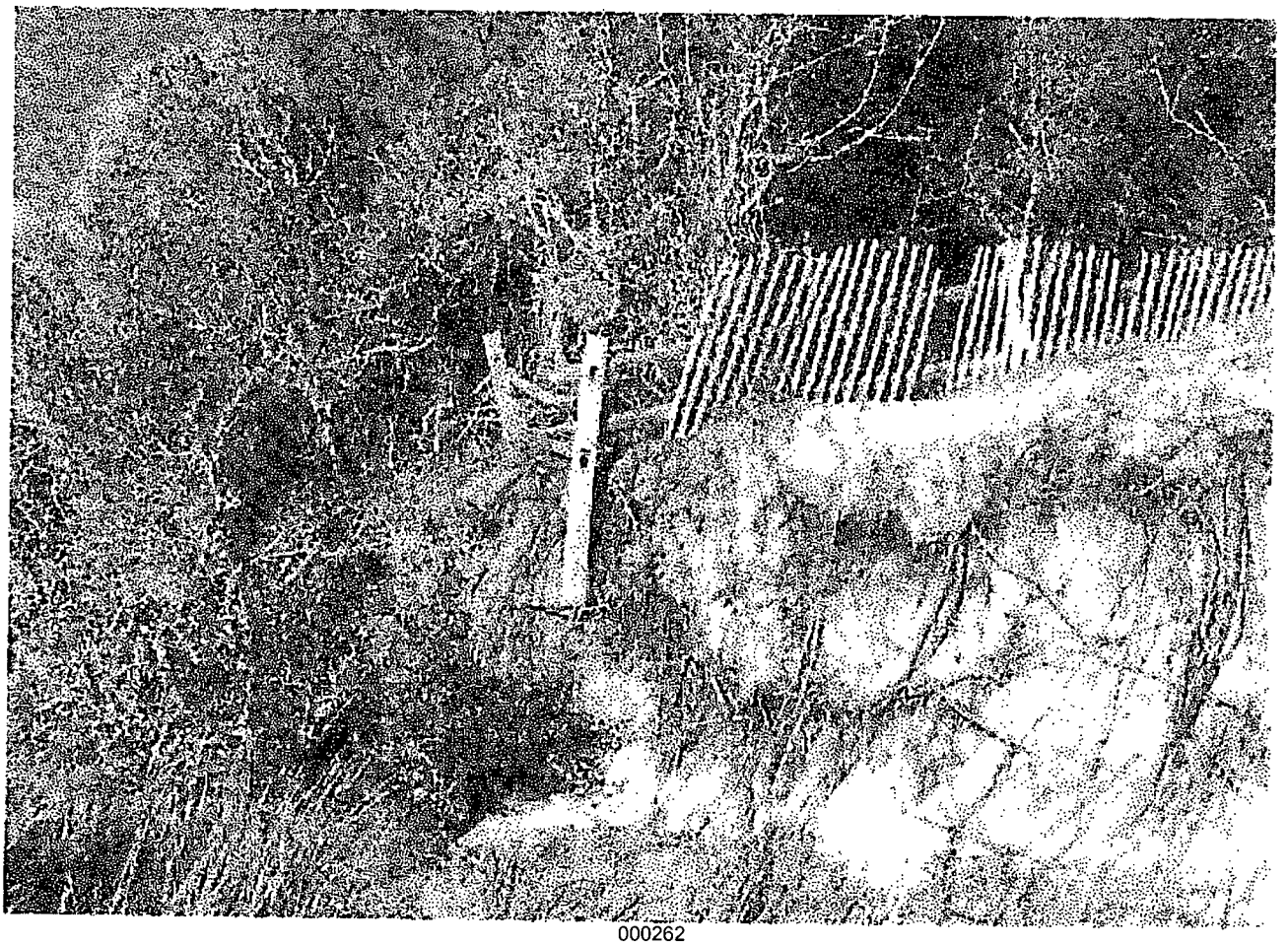
ATTACHMENT NO. 2



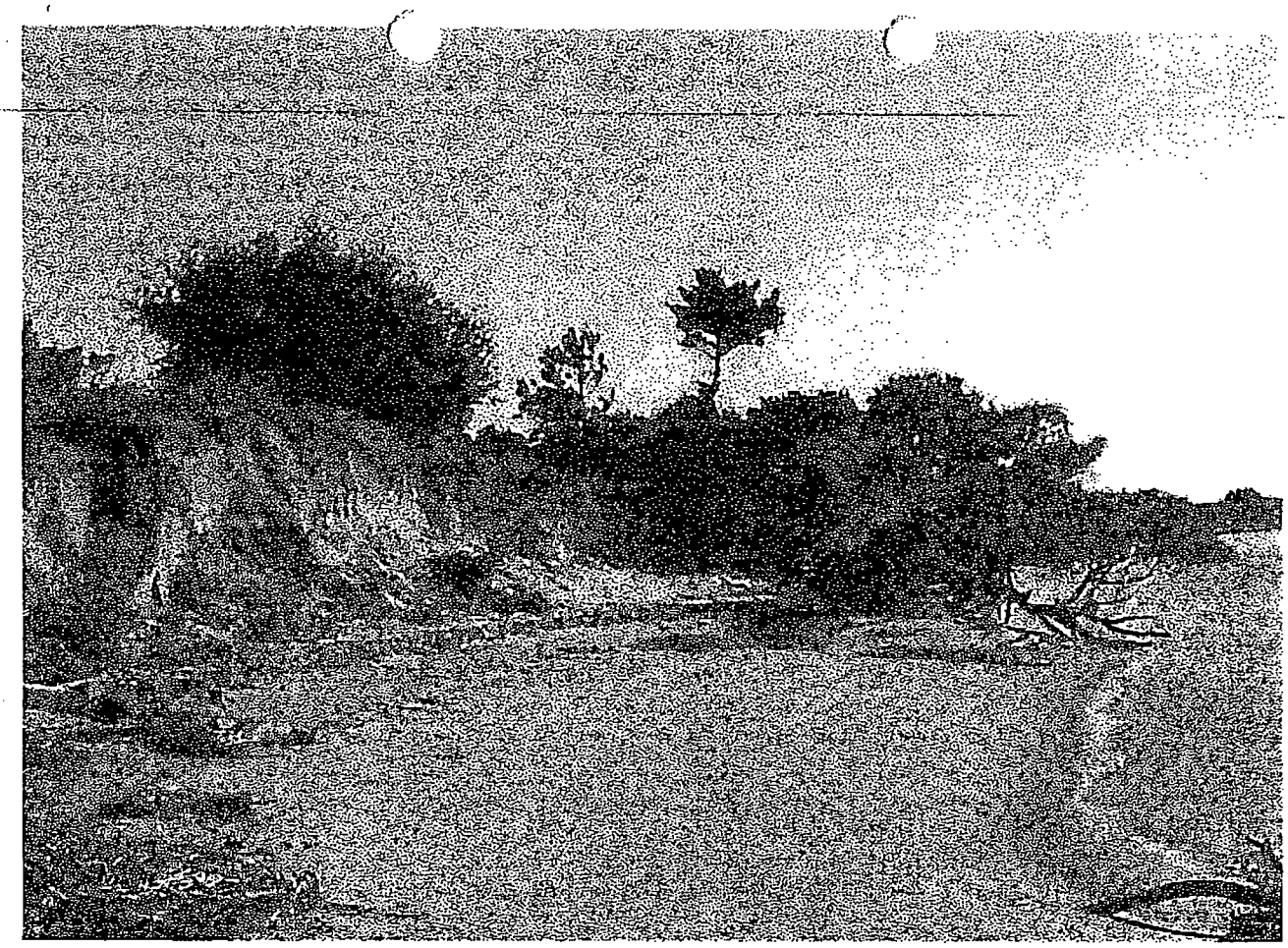


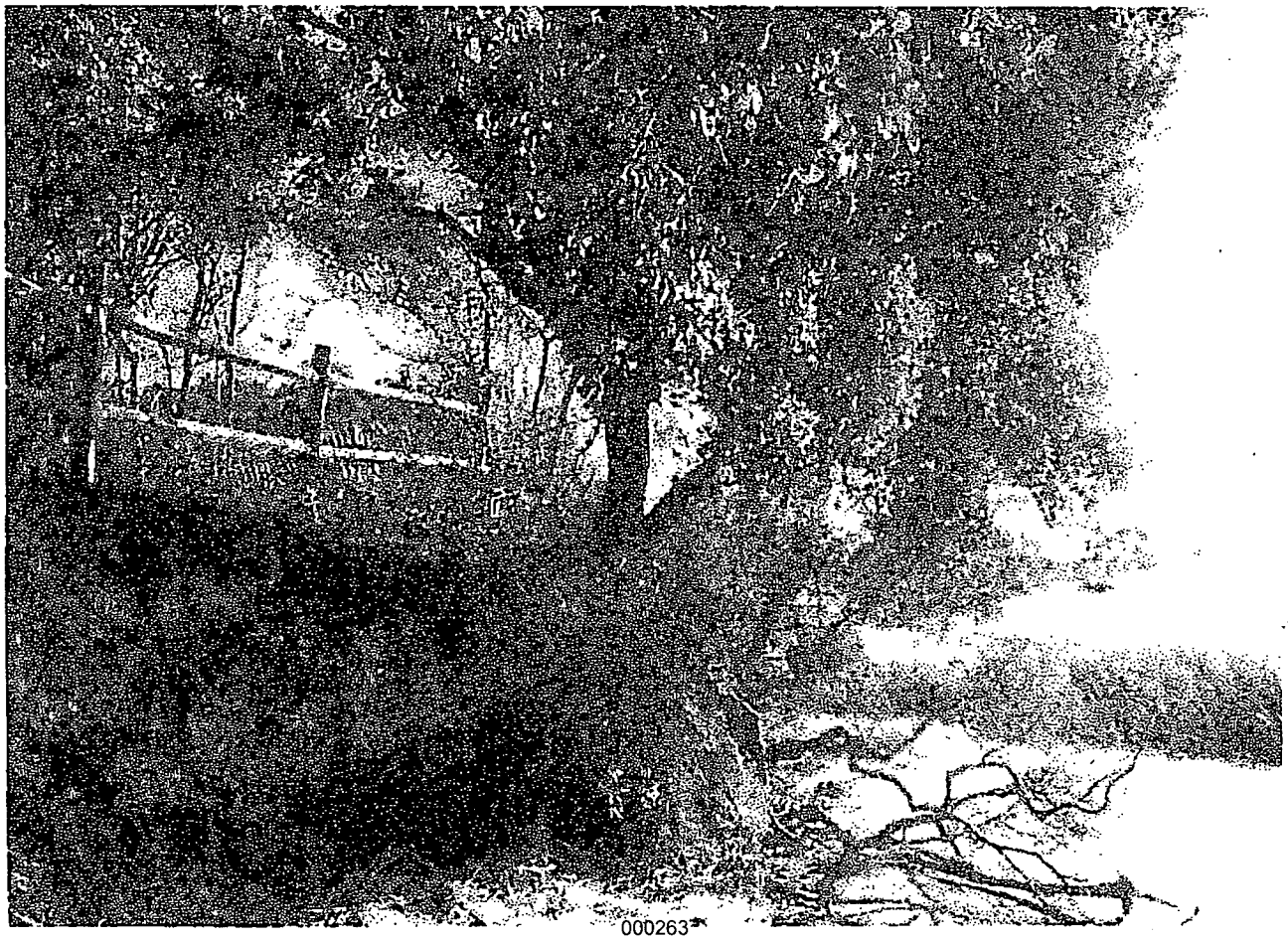
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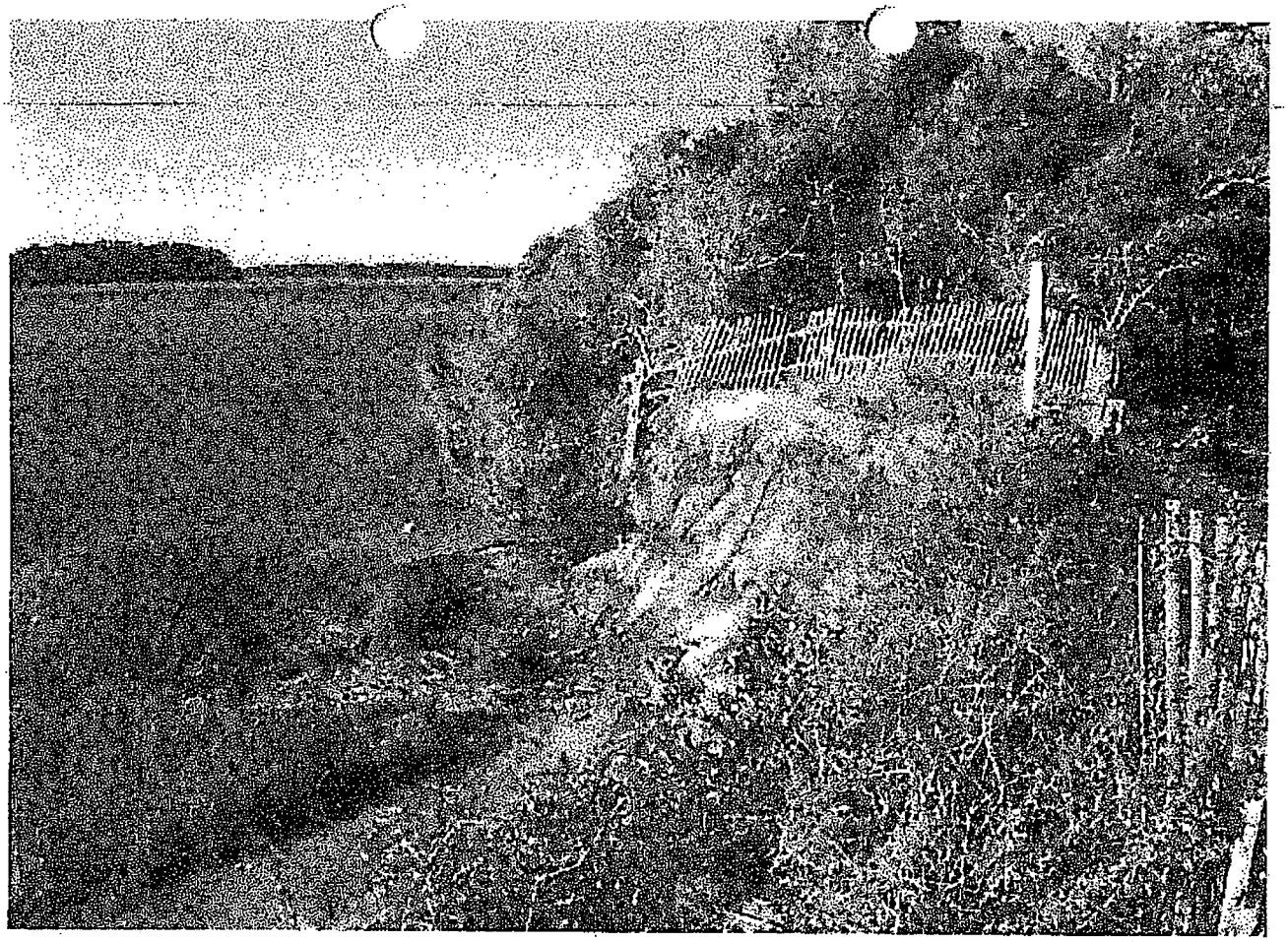


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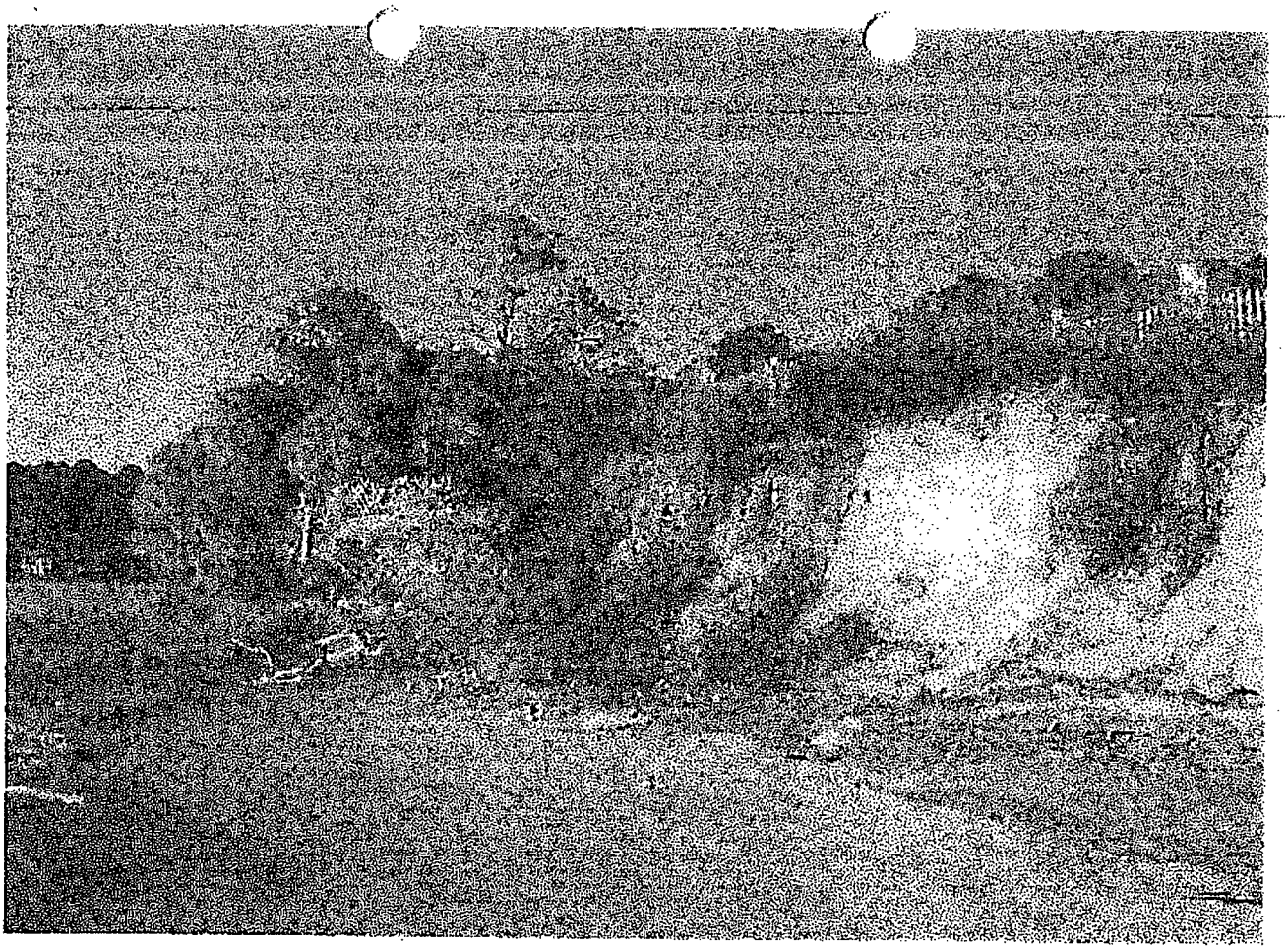




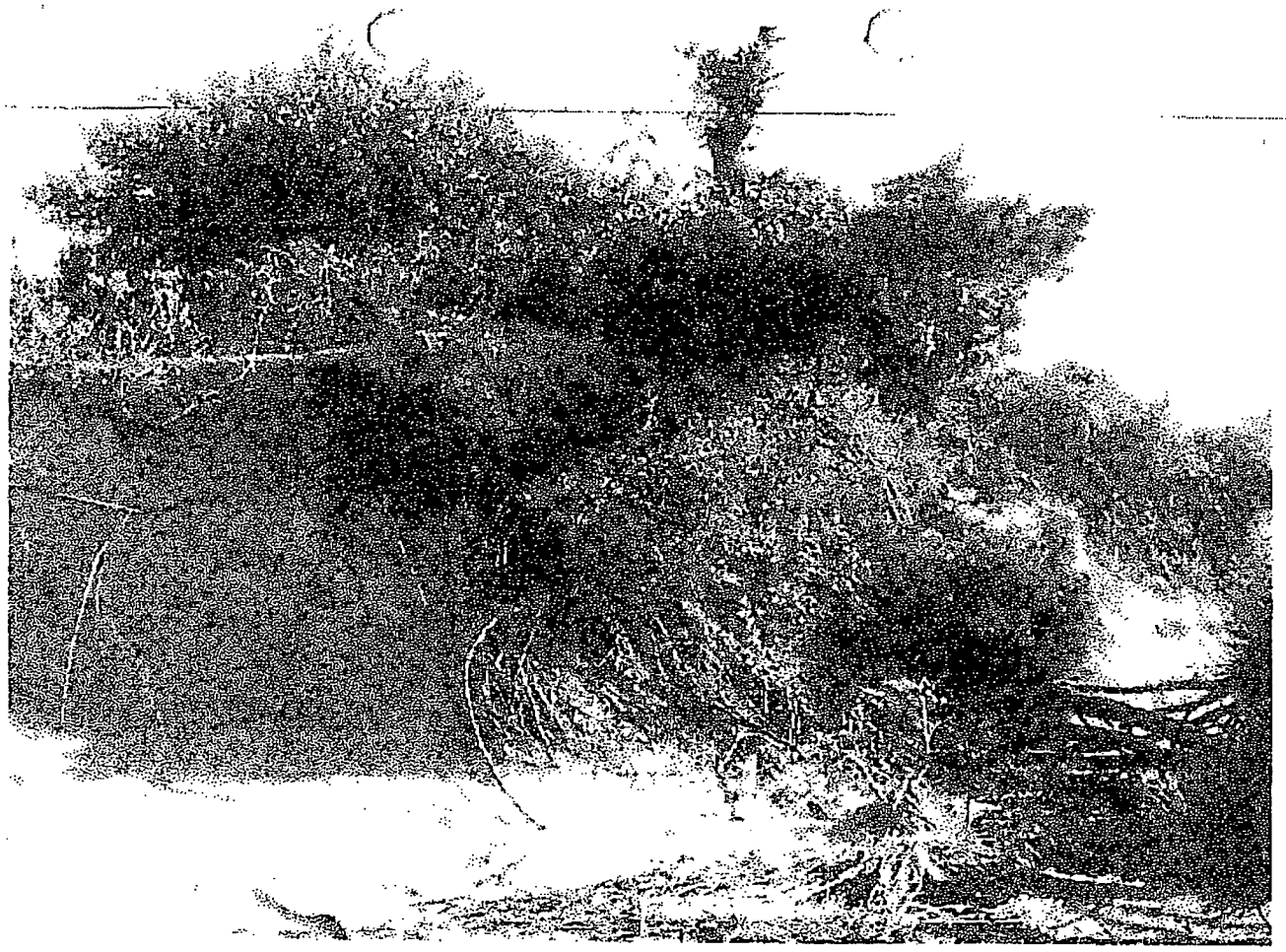
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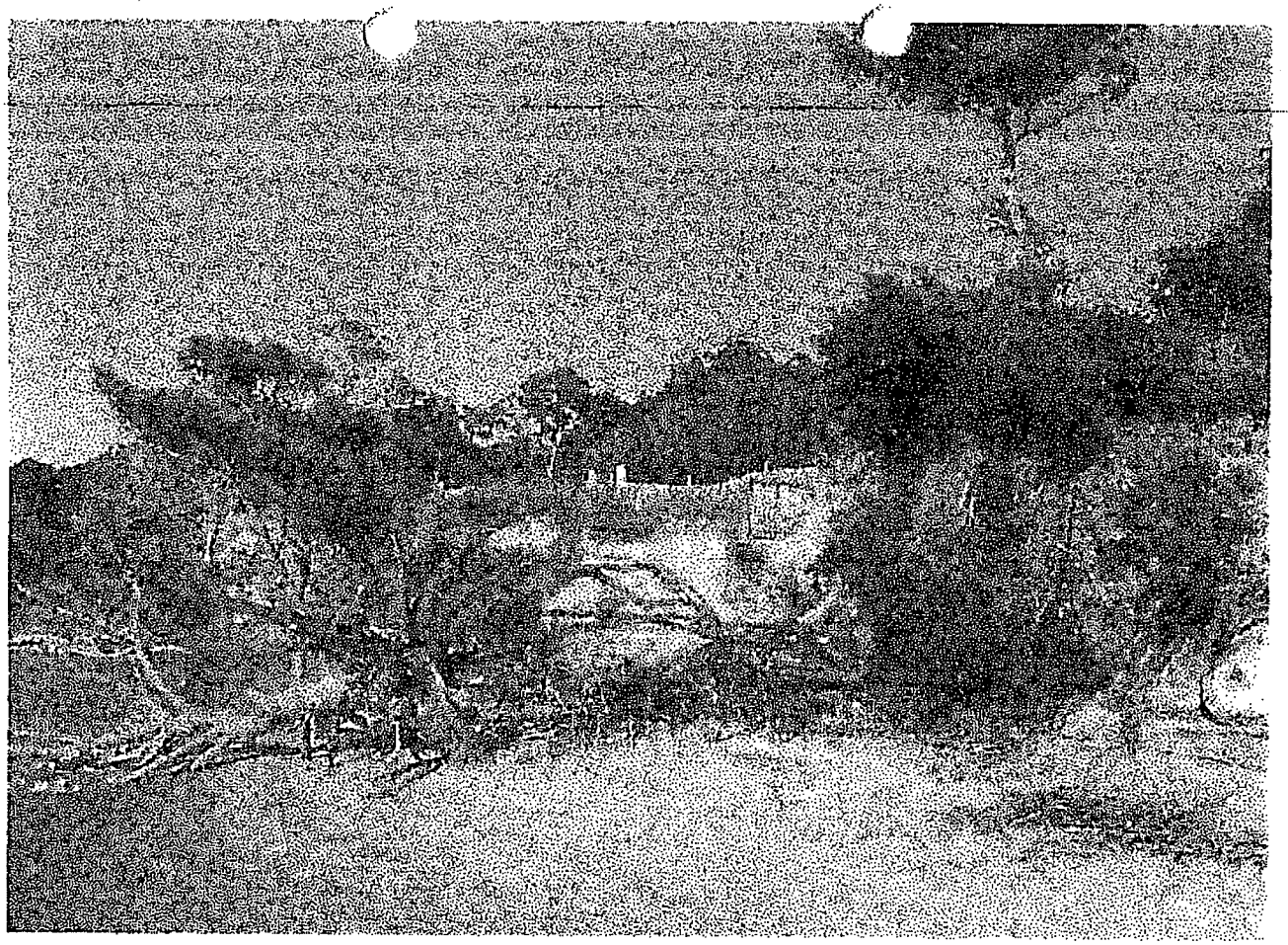






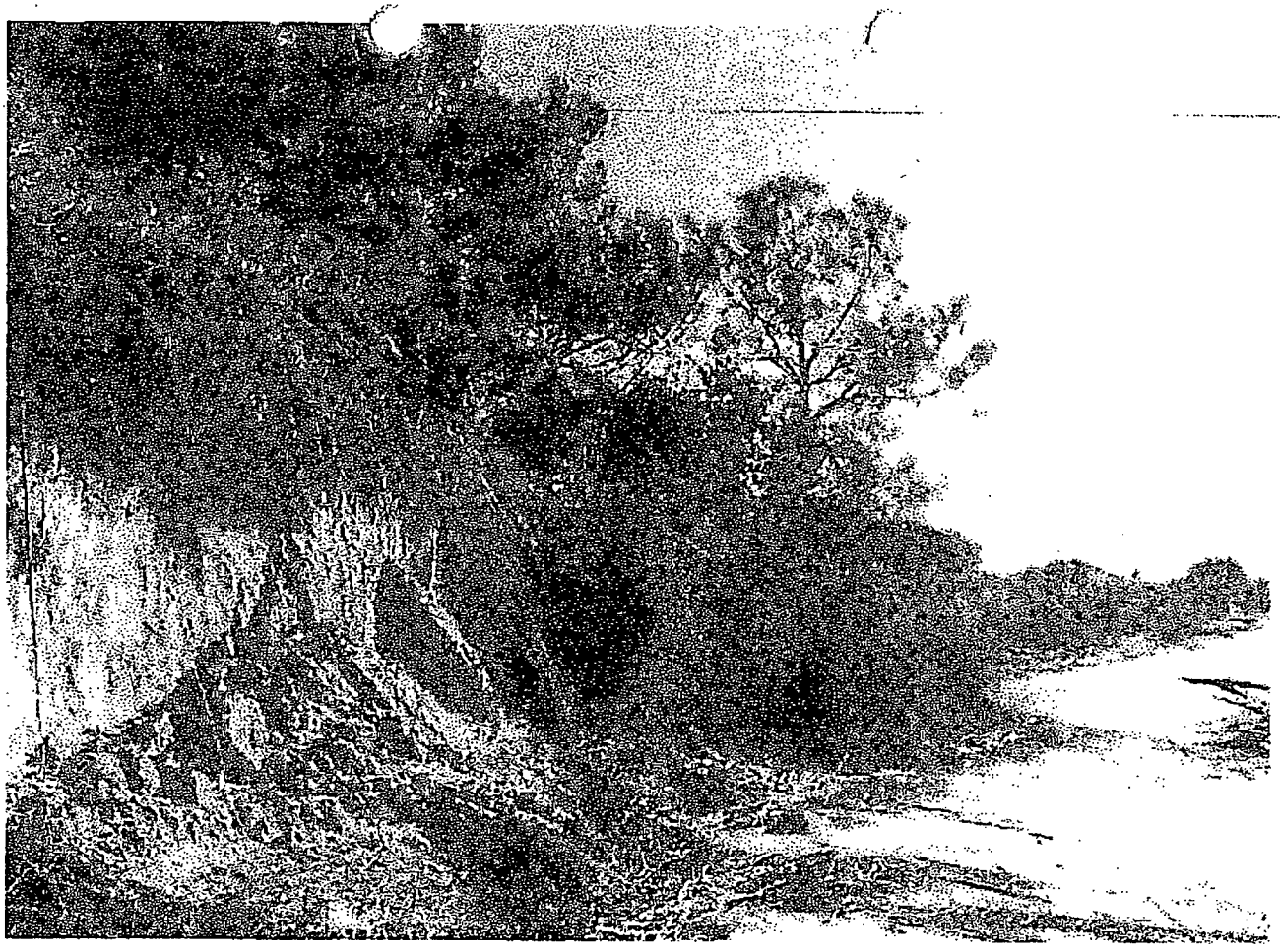


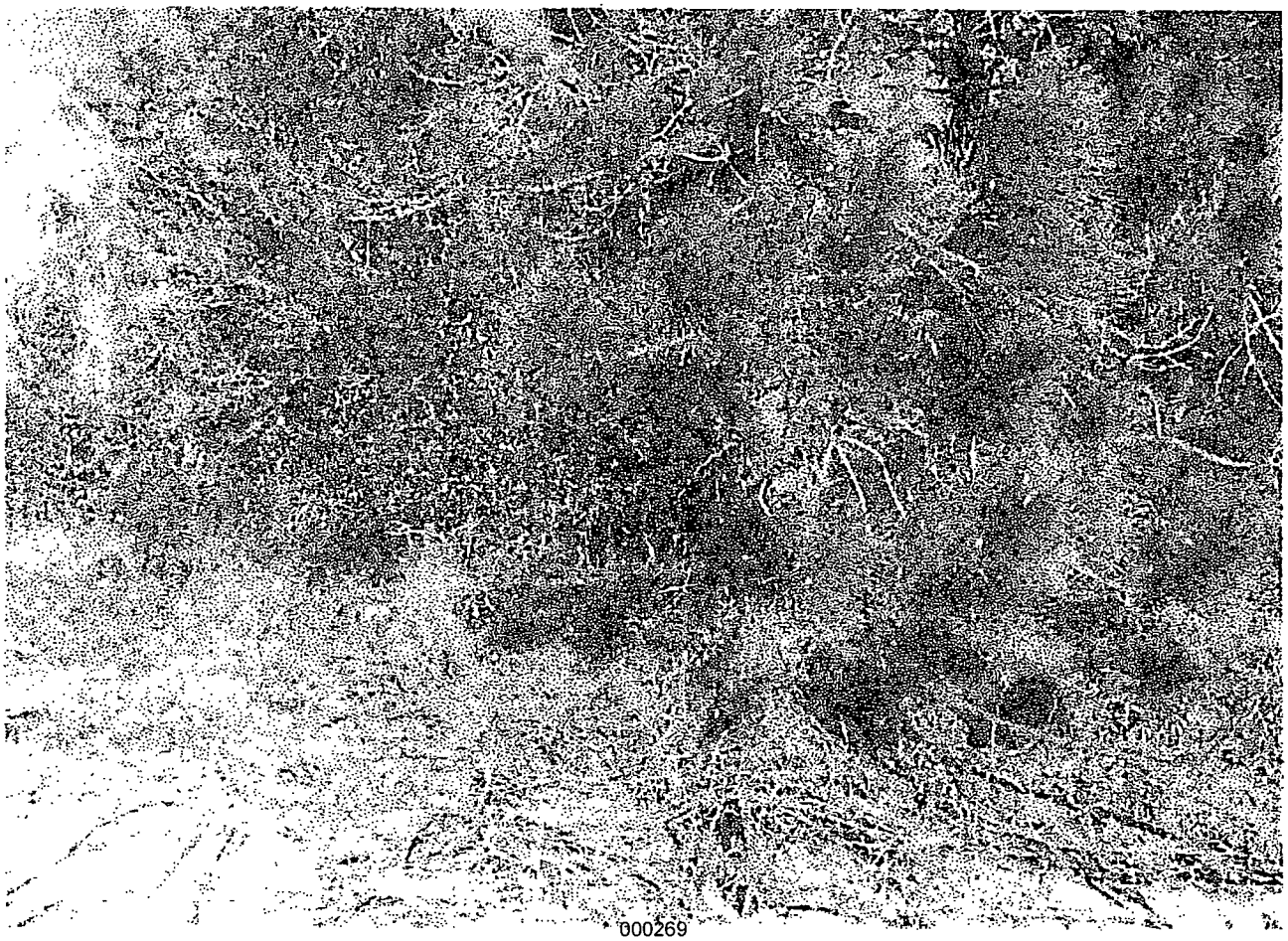
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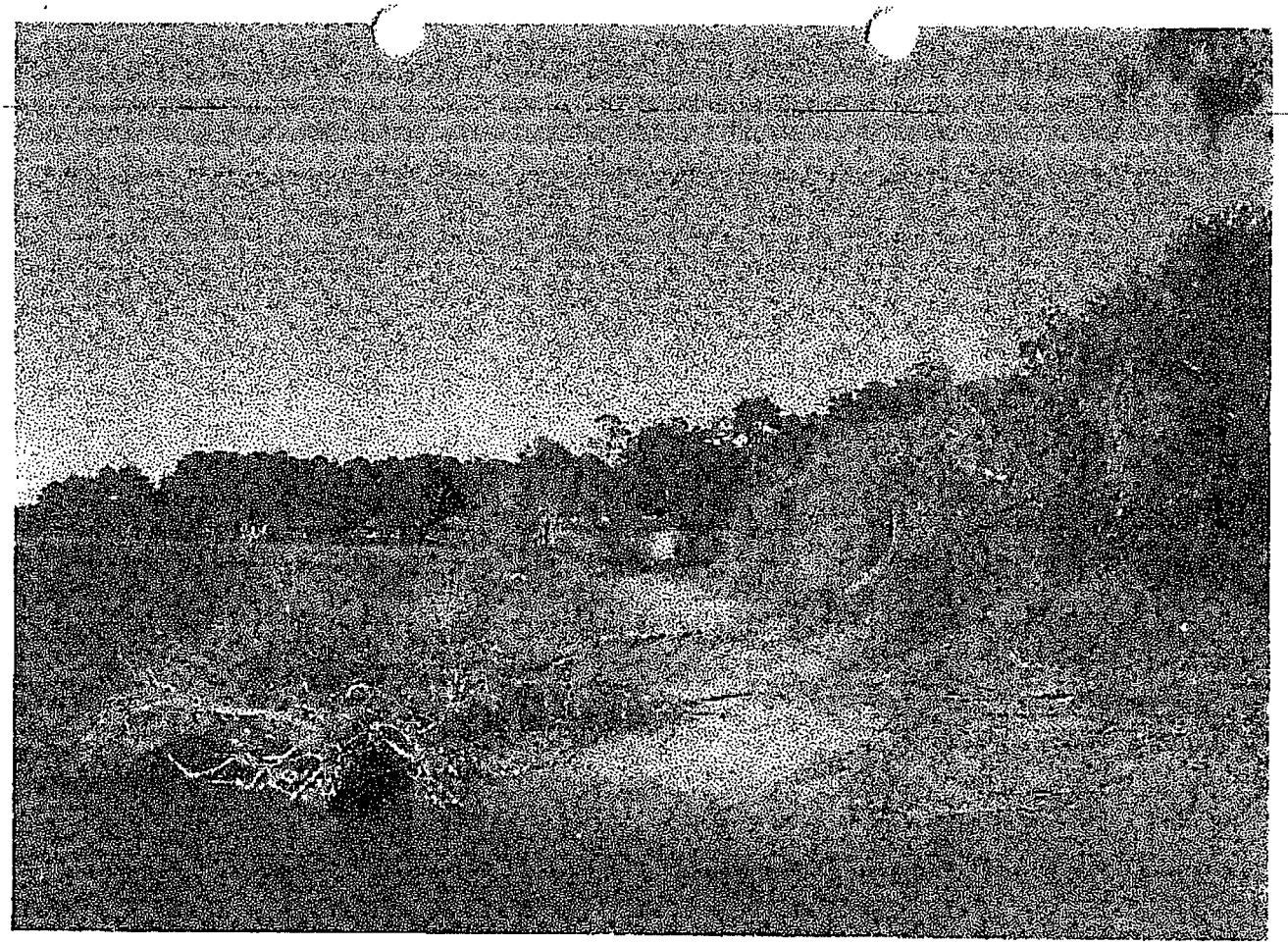


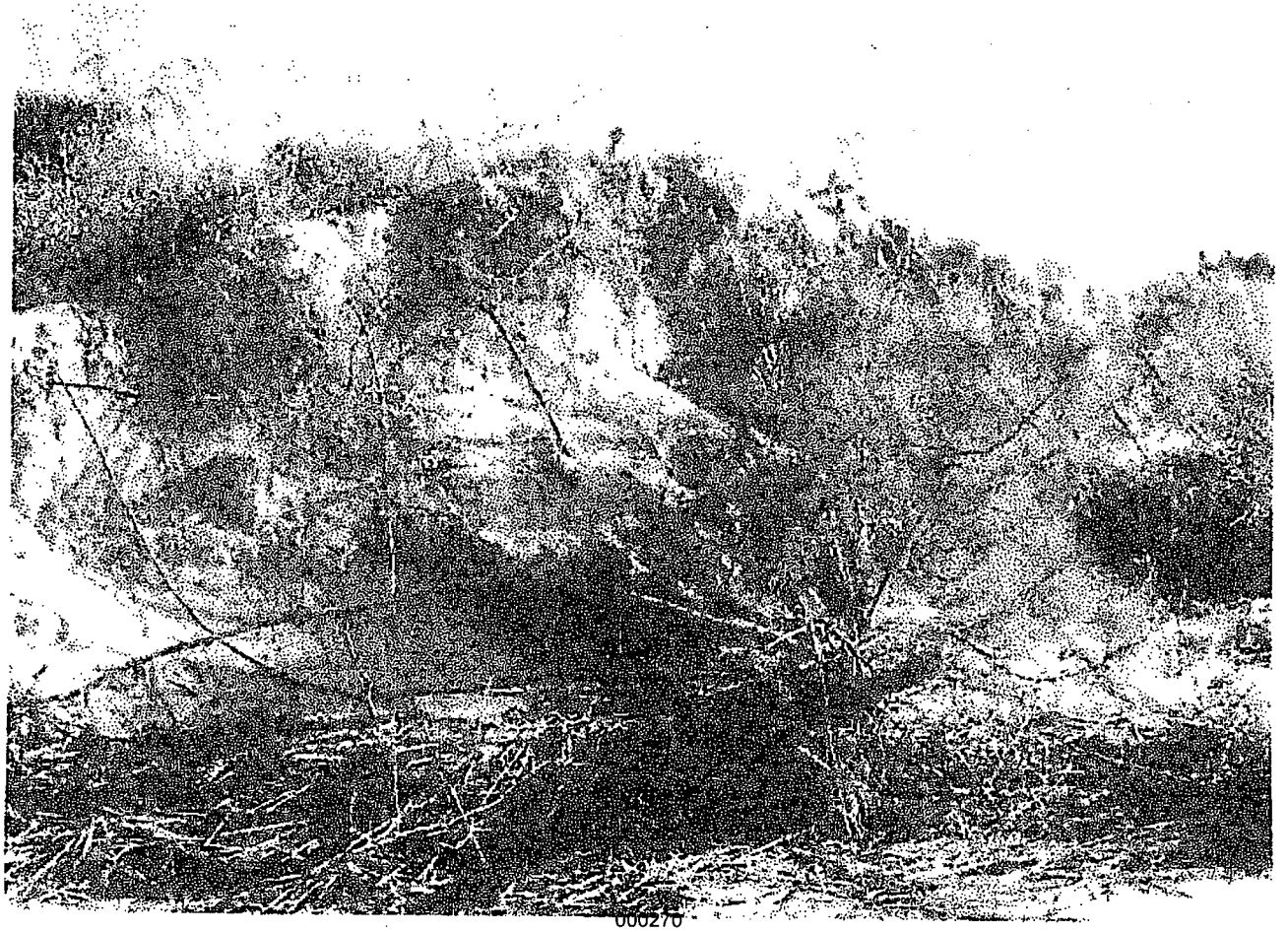
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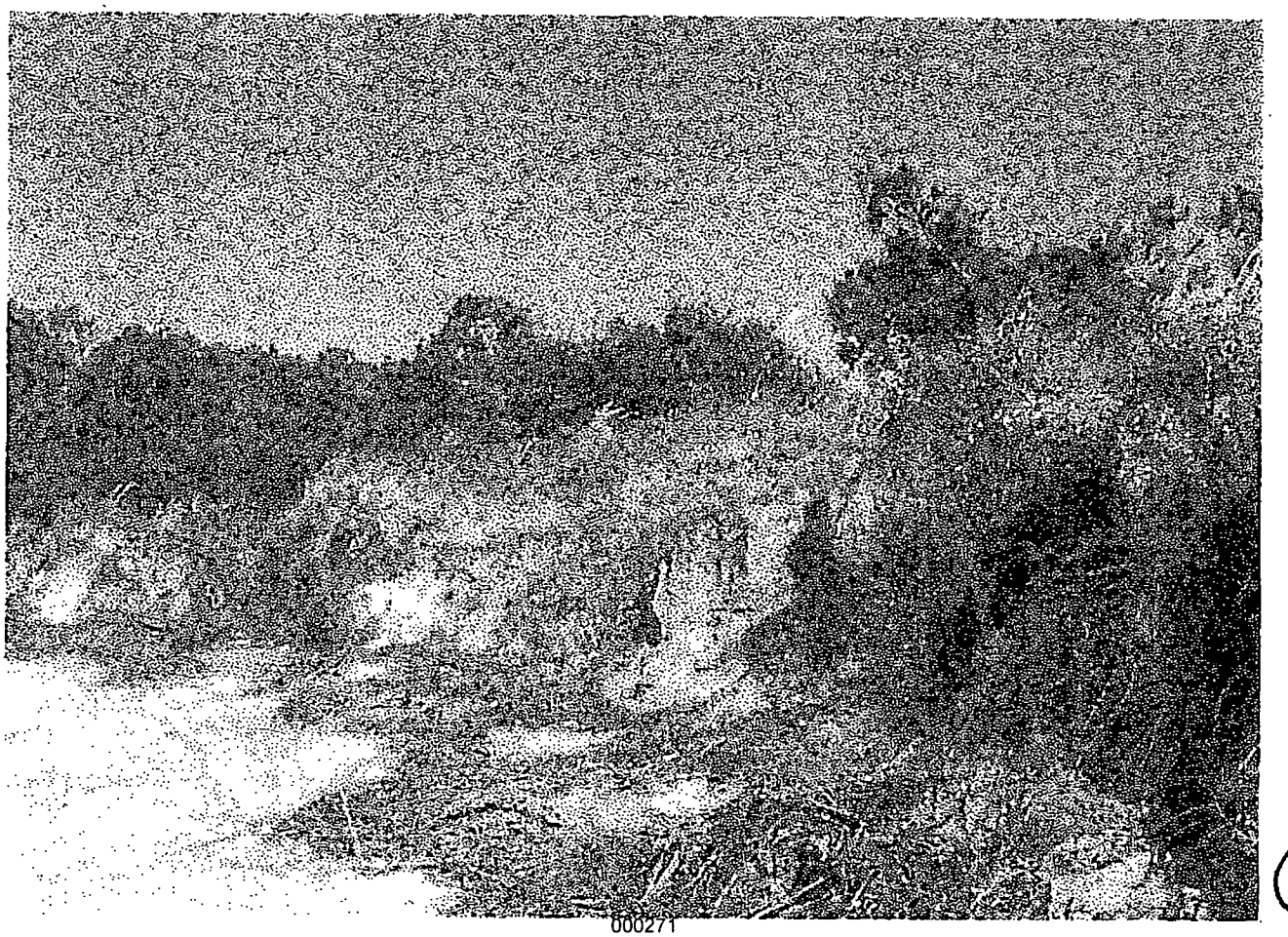
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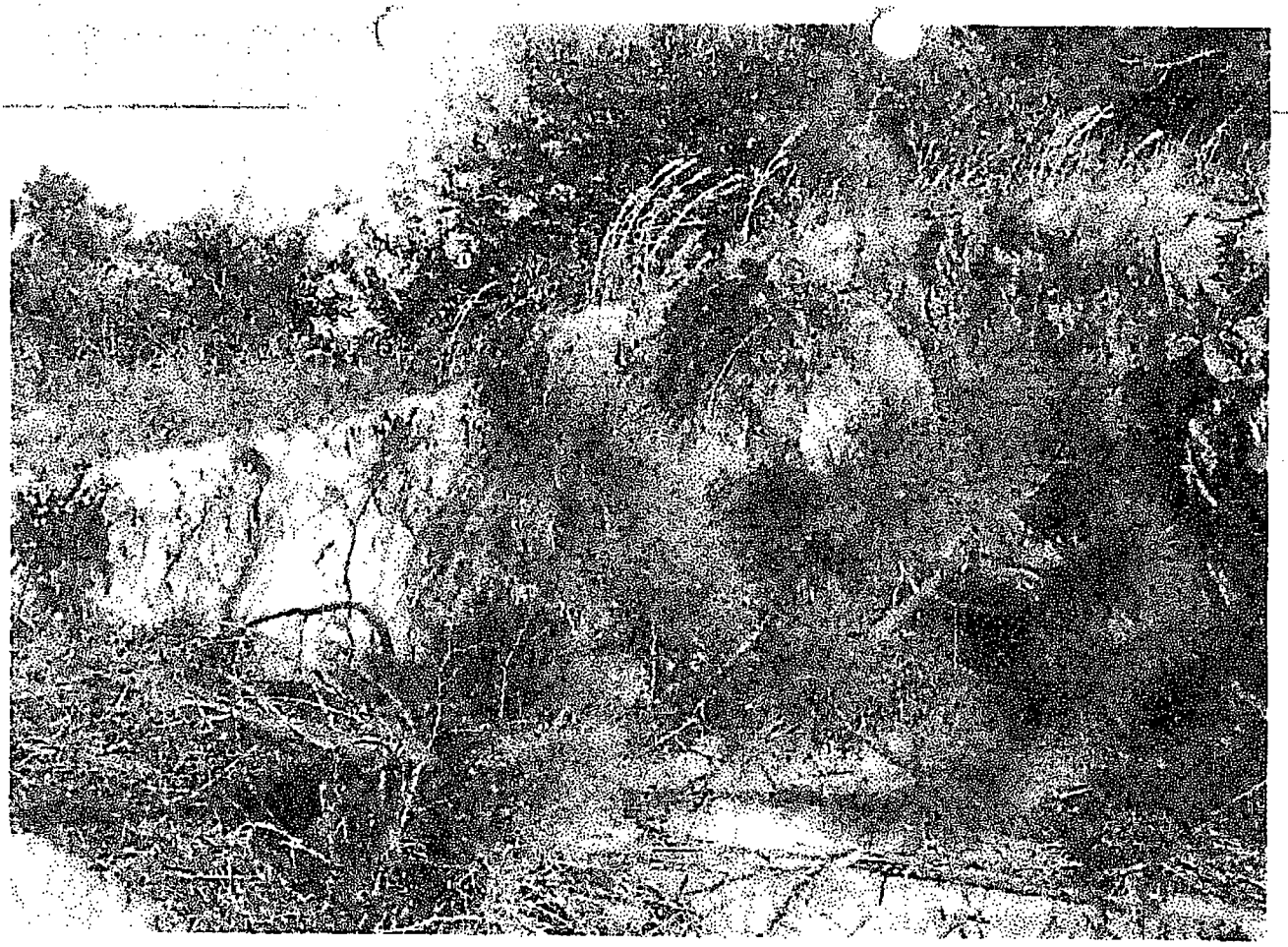


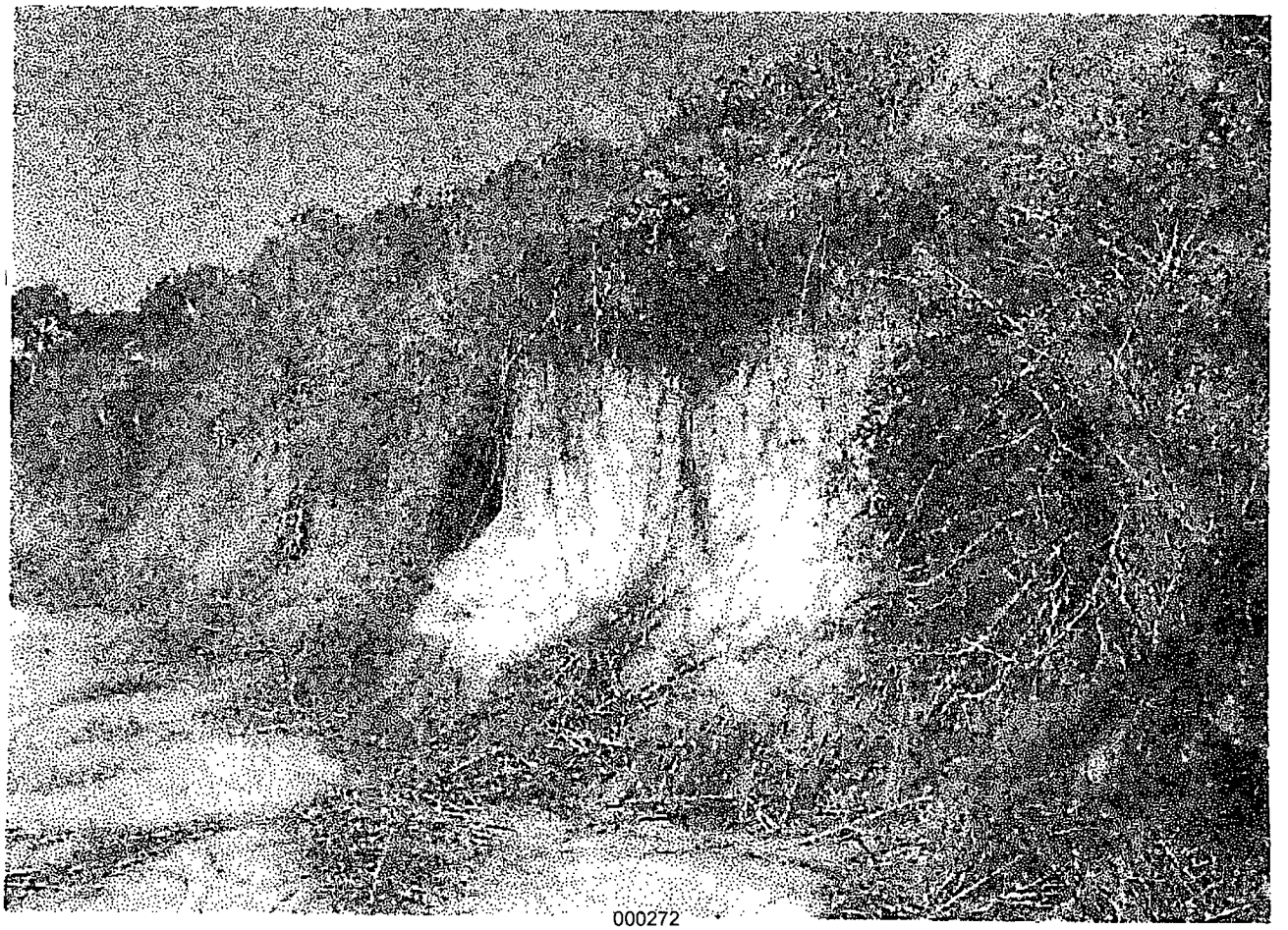
(10)





11





12

ATTACHMENT NO. 2

Joint Federal and State Application Form For Activities Affecting Waters of the United States or Critical Areas of the State of South Carolina	This Space for Official Use Only. Application # Date Received: Project Manager:

Authorities: 33 USC 401, 33 USC 403, 33 USC 407, 33 USC 408, 33 USC 1341, 33 USC 1344, 33 USC 1413 and Section 48-39-10 et. seq of the South Carolina Code of Laws. These laws require permits for activities in, or affecting, navigable waters of the United States, the discharge of dredged or fill material into waters of the United States, and the transportation of dredged material for the purpose of dumping it into ocean waters. The Corps of Engineers and the State of South Carolina have established a joint application process for activities requiring both Federal and State review or approval. Under this joint process, you may use this form, together with the required drawings and supporting information, to apply for both the Federal and/or State permit(s).

Drawings and Supplemental Information Requirements: In addition to the information on this form, you must submit a set of drawings and, in some cases, additional information. A completed application form together with all required drawings and supplemental information is required before an application can be considered complete. See the attached instruction sheets for details regarding these requirements. You may attach additional sheets if necessary to provide complete information.

1. Applicant's Name. Kiawah Development Partners II, Inc.	4. Agent's Name (an agent is not required). Thomas & Hutton Engineering Co. Attn: Patrick Rogers
2. Applicant's Address. 2 North Adger's Wharf. Charleston, SC 29401	5. Agent's Address. 935 Houston Northcutt Blvd. Mt. Pleasant, SC 29464
3. Applicant's Contact Number (include area code). Residence: Business: (843) 958-8472 FAX:	6. Agent's Contact Number (include area code). Residence: N/A Business: (843) 849-0200 FAX: (843) 849-0203
7. Project Title. Kiawah River Bend Erosion Control	9. Project Location: Street Address: County: Charleston Latitude: 32° 35' 12" N Longitude: 80° 07' 54" W
8. Nearest Waterbody to project site (if known). Kiawah River	

10. Directions to the Site (attach additional sheets if needed).

From Highway Bohicket Road towards Kiawah Island follow signs to Beachwalker county park.

11. Description of the Overall Project and of Each Activity In or Affecting U. S. Waters or State critical areas (attach additional sheets if needed).

Construction of a combination bulkhead/Articulated concrete Block revetment erosion control device along approximately 2783 linear feet river frontage.

12. Overall Project Purpose and the Basic Purpose of Each Activity In or Affecting U. S. Waters (attach additional sheets if needed).

Erosion control.

Revision May 1995

(1)

13. Type and Quantity of Materials To Be Discharged.		14. Type and Quantity of Impacts to U. S. Waters (including wetlands).			
Dirt or Topsoil: _____ cy		Filling:	_____ ☐ acres ☐ sq. ft.		_____ cy
Clean Sand: _____ cy		Backfill & Bedding:	_____ ☐ acres ☐ sq. ft.		_____ cy
Mud: _____ cy		Landclearing:	_____ ☐ acres ☐ sq. ft.		_____ cy
Clay: _____ cy		Dredging or Excavation:	_____ ☐ acres ☐ sq. ft.		_____ cy
Gravel, Rock, or Stone: _____ cy		Flooding:	_____ ☐ acres ☐ sq. ft.		_____ cy
Concrete: 1240 cy		Draining:	_____ ☐ acres ☐ sq. ft.		_____ cy
Other (describe): _____ cy		Shading:	_____ ☐ acres ☐ sq. ft.		_____ cy
TOTAL: 1240 cy		TOTALS:	0 ☒ acres ☐ sq. ft.		0 cy

15. Names and Addresses of All Adjoining Property Owners (attach additional sheets if needed).

Kiawah Resort Associates, L.P., P.O. Box 22497, Charleston, SC 29413
Kiawah Development Partners II, Inc., 2 North Adger's Wharf, Charleston, SC 29401

16. Has any portion of the work already commenced? If yes, describe all work that has been done and the dates of the work.

No

17. List all Certifications, Approvals, and Denials received from Federal, State, or Local Agencies for work described in this application.

A similar activity, P/N OCRM-06-396-B was submitted by tidewater Environmental Services as Agent for Charleston county Parks and Recreation Commission in 2006.

18. Authorization of Agent.
I hereby authorize the agent whose name is given in block number 4 of this application to act in my behalf in the processing of this application and to furnish supplemental information in support of this application.

See Attached
Applicant's Signature Date

19. Certification.
Application is hereby made for a permit or permits to authorize the work and uses of the work as described in this application. I certify that the information in this application is complete and accurate. I further certify that I possess the authority to undertake the work described herein or am acting as the duly authorized agent for the applicant.

Applicant's Signature Date

Agent's Signature 2/29/08
Date

The application must be signed by the person who desires to undertake the proposed activity or it may be signed by a duly authorized agent if the authorization statement in blocks 4 and 18 have been completed and signed. 18 U.S.C. Section 1001 provides that: Whoever, in any manner within the jurisdiction of any department of the United States knowingly and willfully falsifies, conceals, or covers up any trick, scheme, or disguises a material fact or makes any false, fictitious or fraudulent statements or representations or makes or uses any false writing or document knowing same to contain any false, fictitious or fraudulent statements or entry, shall be fined not more than $10,000 or imprisoned not more than five years or both.

Submit the completed application form with the required drawings and all supporting information as indicated below.

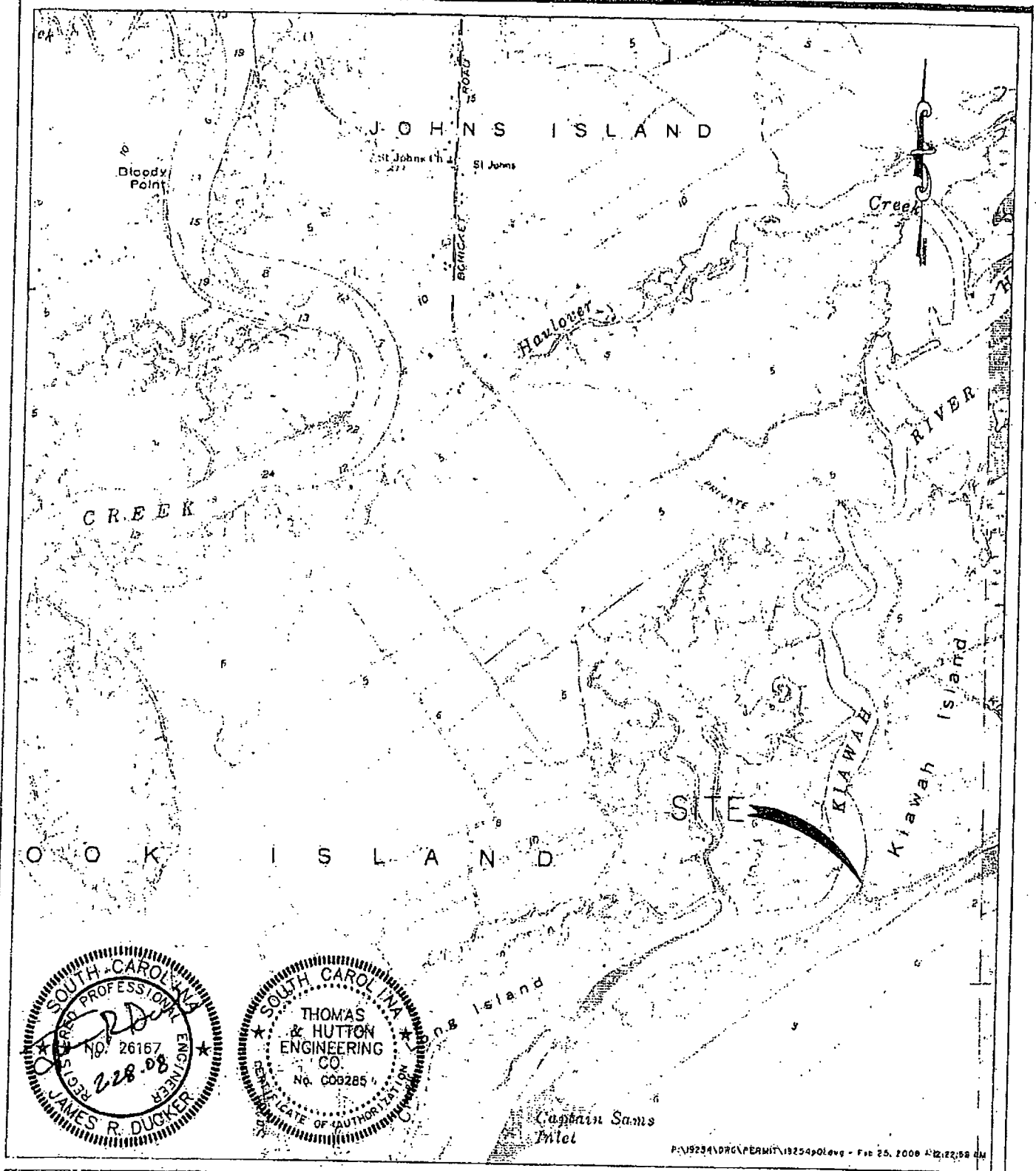
Send all original application materials to:
U. S. Army Corps of Engineers
Charleston District, Regulatory Branch
P. O. Box 919, Attn: CESAC-CO-P
Charleston, South Carolina 29402
(803) 727-4330

Send one complete copy to:
S. C. Dept of Health & Environmental Control
Office of Ocean and Coastal Resource Management
1362 McMillan Avenue, Suite 400
Charleston, South Carolina 29405
(803) 744-5838

Send one complete copy to:
S. C. Dept. of Health & Environmental Control
Office of Environmental Quality Control
2600 Bull Street
Columbia, South Carolina 29201
(803) 734-5300

Revision May 1995

(2)



SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER No. 26167 JAMES R. DUCKER 2.28.08

SOUTH CAROLINA THOMAS & HUTTON ENGINEERING CO. No. C09285 CERTIFICATE OF AUTHORIZATION

THOMAS & HUTTON ENGINEERING CO.

935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

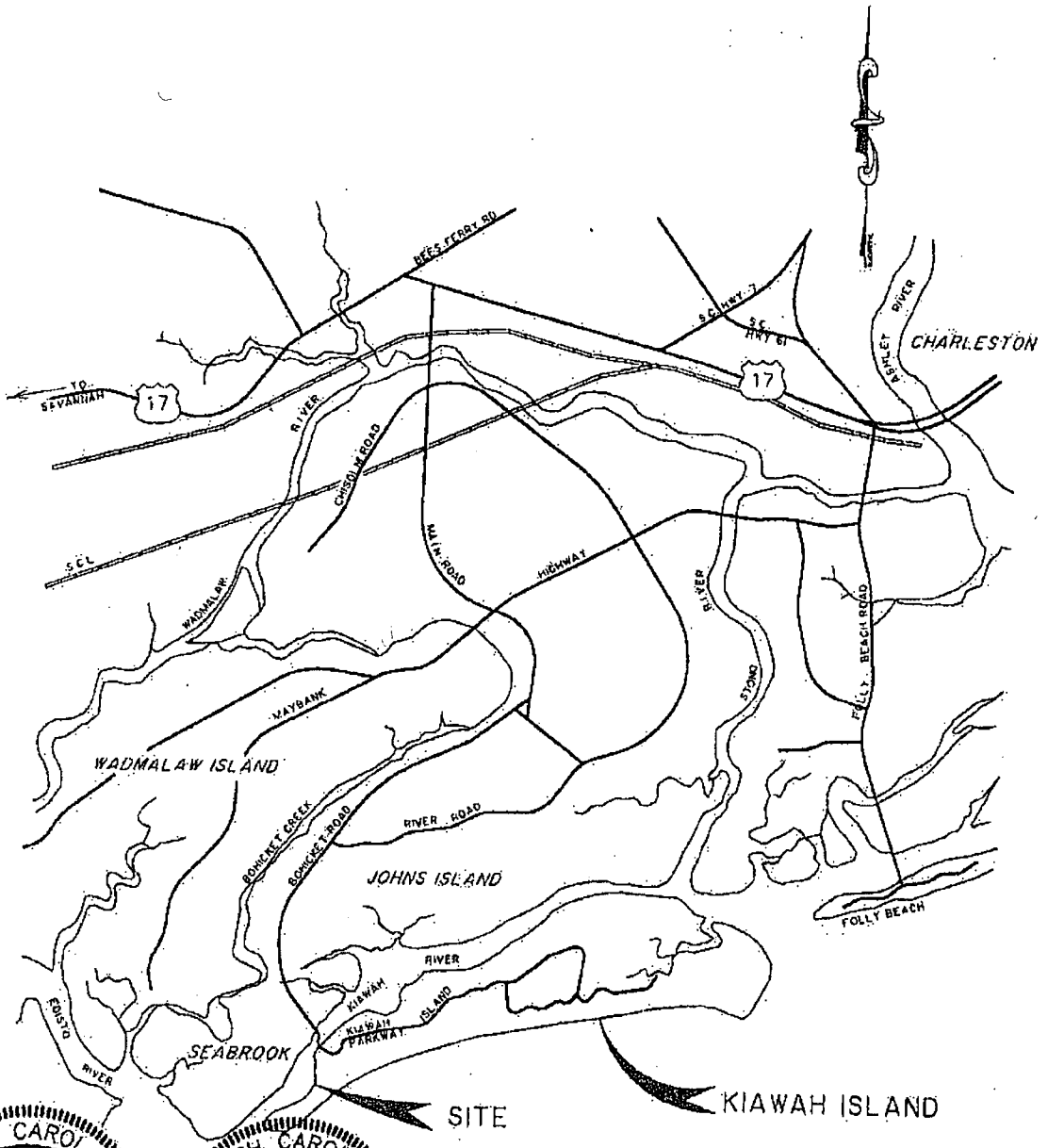
QUAD MAP

PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.
FEBRUARY 14, 2008

LAT: 32° 35' 12"
LONG: 80° 07' 54"
SOURCE: ROCKVILLE, SC QUADRANGLE MAP
KIAWAH ISLAND, SC QUADRANGLE MAP

SCALE 1" = 2000'

SHEET 1 OF 7



SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER
No. 26167
2.28.08
JAMES R. DUCKER

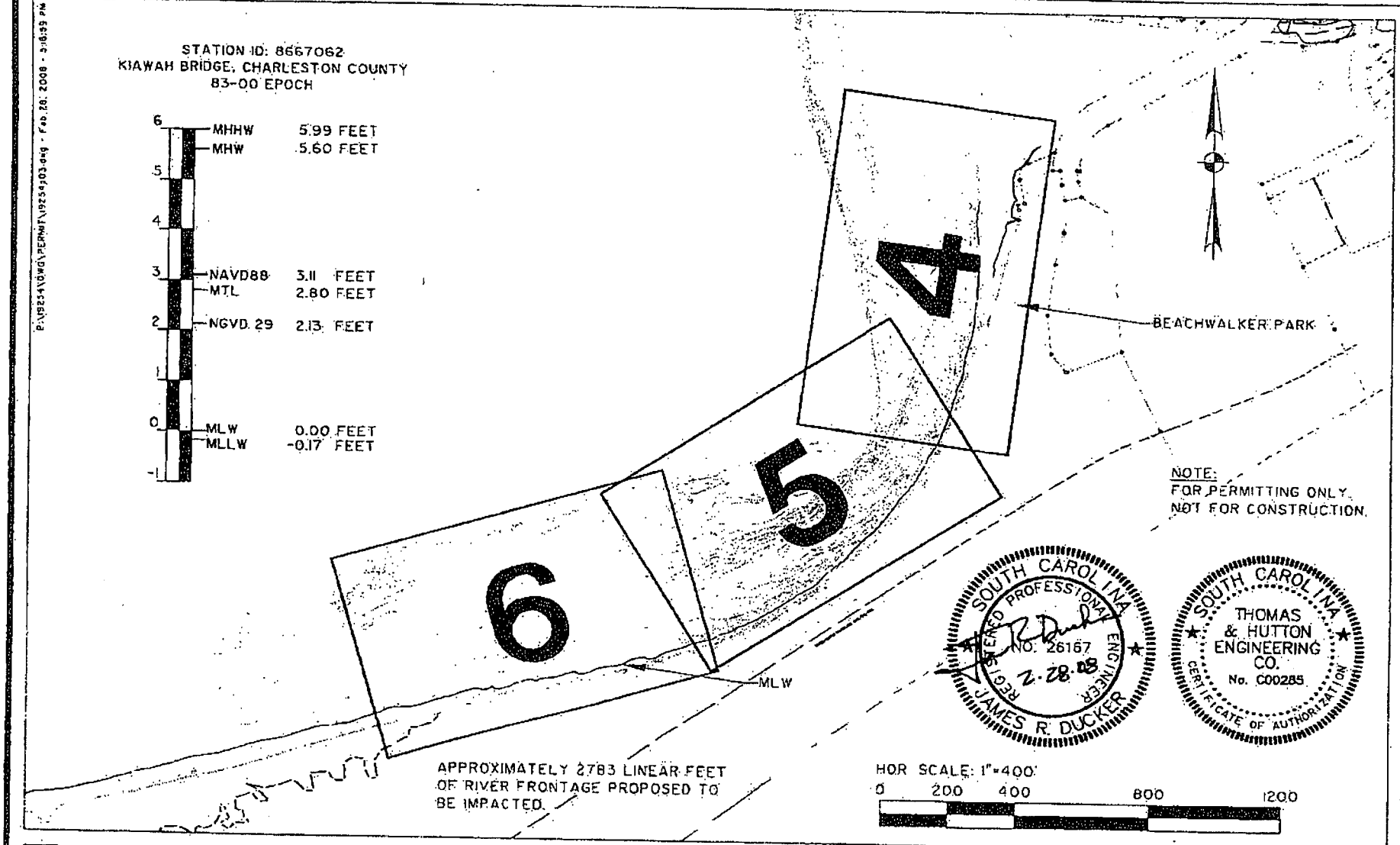
SOUTH CAROLINA
THOMAS & HUTTON ENGINEERING CO.
No. C00285
CERTIFICATE OF AUTHORIZATION

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THOMAS & HUTTON ENGINEERING CO.

935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

VICINITY MAP	PROPOSED ACTIVITY: EROSION CONTROL DEVICE COUNTY: CHARLESTON APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC. FEBRUARY 14, 2008
KIAWAH RIVER BEND EROSION CONTROL	NOT TO SCALE SHEET 2 OF 7



THOMAS & HUTTON ENGINEERING CO.
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

EXISTING SITE CONDITIONS & SHEET INDEX

PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.

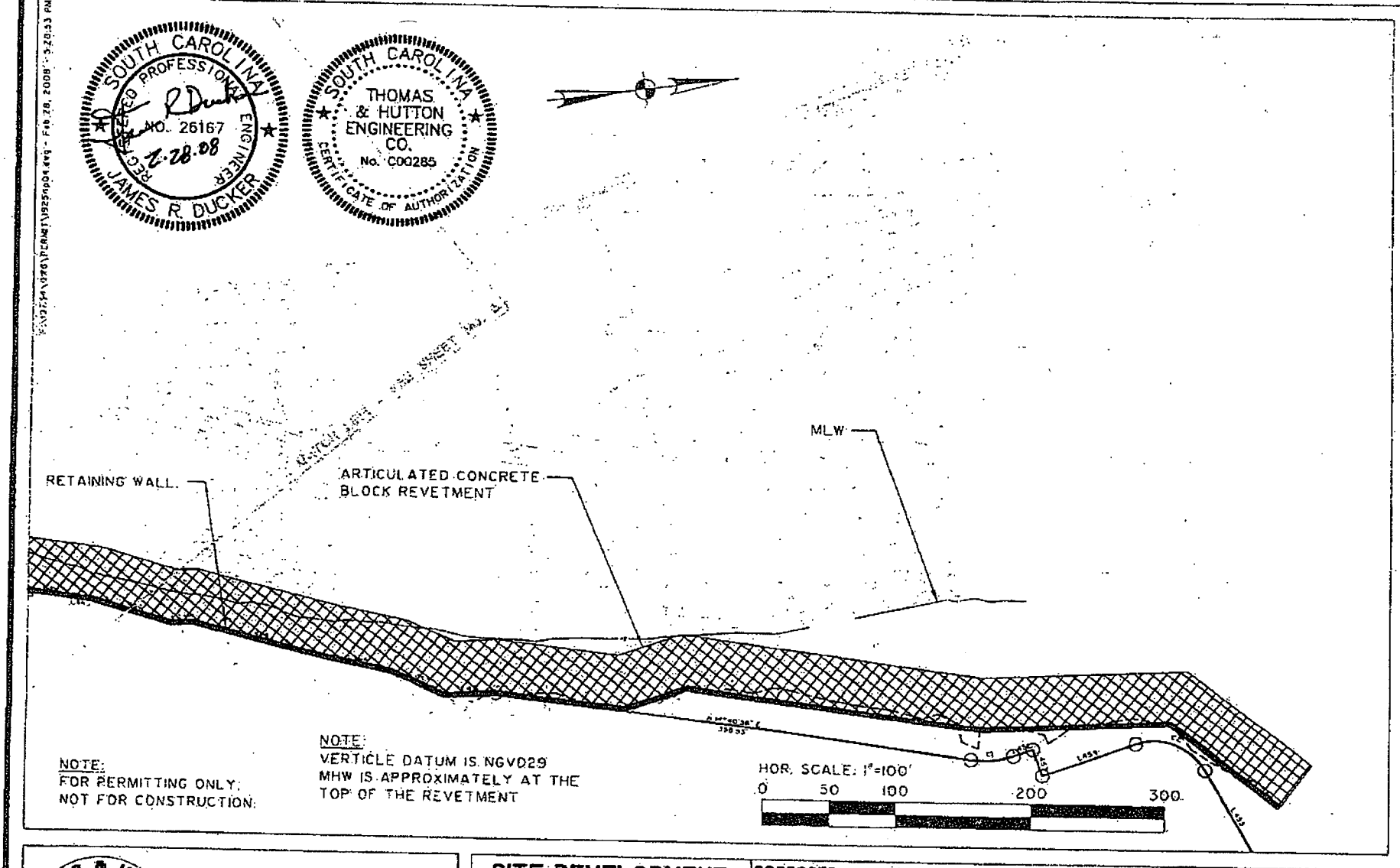
FEBRUARY 14, 2008

KIAWAH RIVER BEND EROSION CONTROL

SCALE 1" = 400'

SHEET 3 OF 7

000277



THOMAS & HUTTON ENGINEERING CO.
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

SITE DEVELOPMENT

PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.
FEBRUARY 14, 2008

KIAWAH RIVER BEND EROSION CONTROL

SCALE 1" = 100'

SHEET 4 OF 7

000278

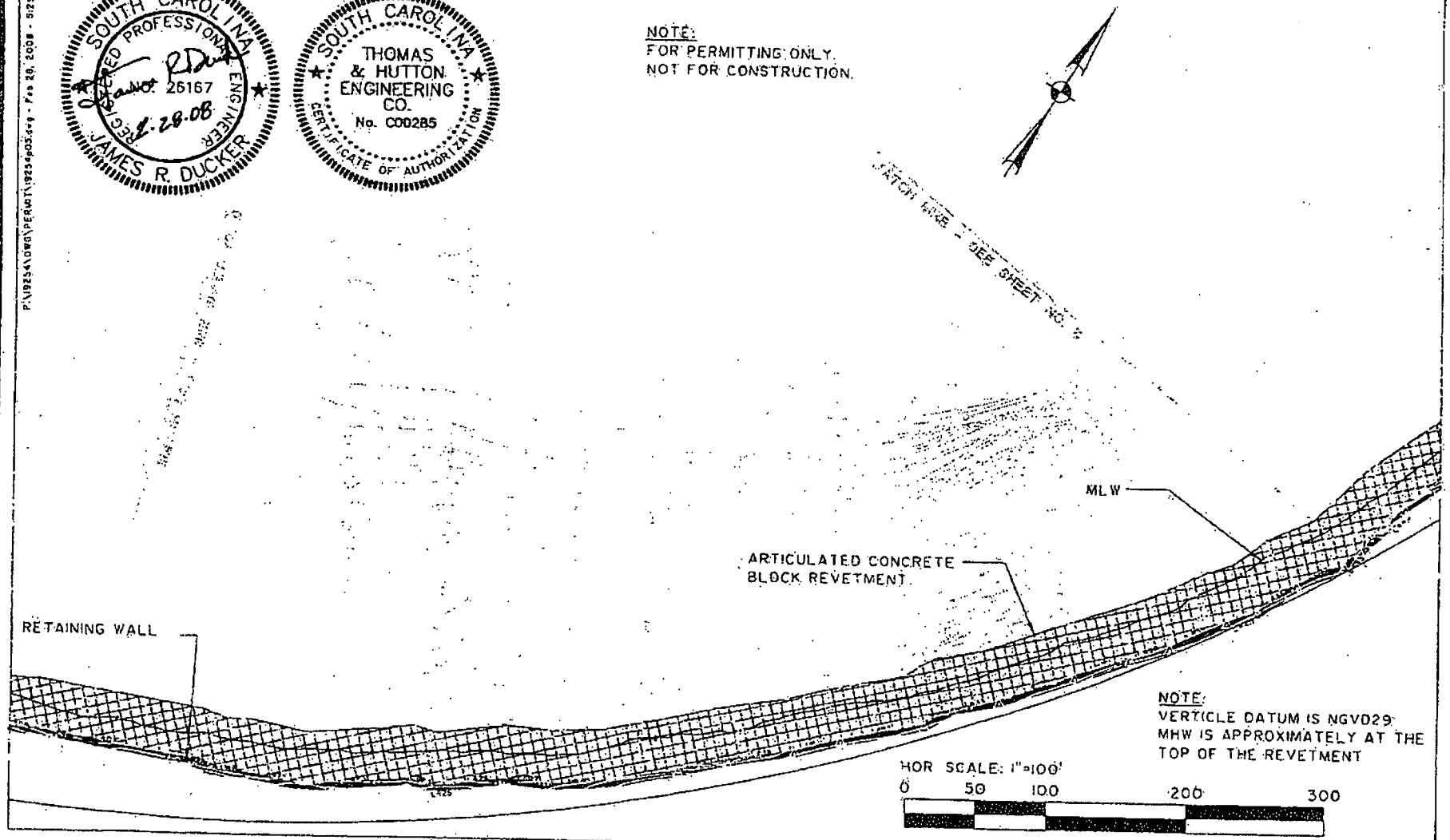
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SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER
No. 26167
2.28.08
JAMES R. DUCKER

SOUTH CAROLINA
THOMAS & HUTTON ENGINEERING CO.
No. C00285
CERTIFICATE OF AUTHORIZATION

NOTE:
FOR PERMITTING ONLY.
NOT FOR CONSTRUCTION.



THOMAS & HUTTON ENGINEERING CO.
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

SITE DEVELOPMENT

PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.

FEBRUARY 14, 2008

KIAWAH RIVER BEND EROSION CONTROL

SCALE 1" = 100'

SHEET 5 OF 7

000279

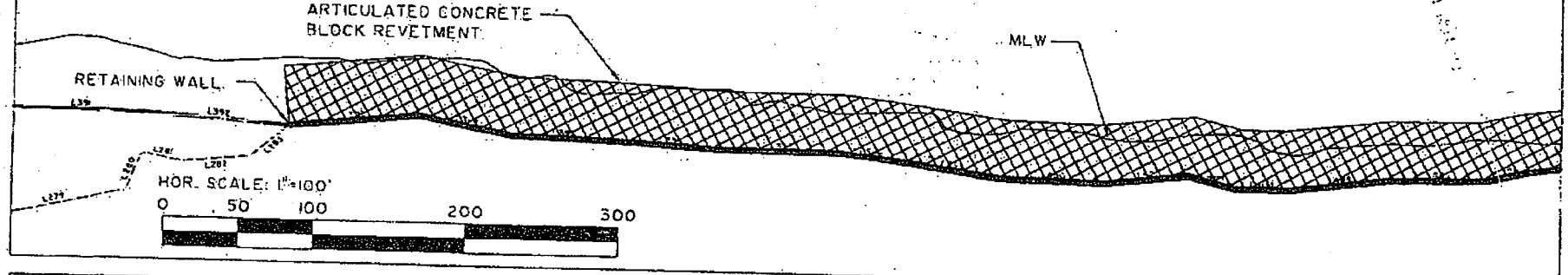
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SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER
No. 26167
2-28-08
JAMES R. DUCKER

SOUTH CAROLINA
THOMAS & HUTTON ENGINEERING CO.
No. C00285
CERTIFICATE OF AUTHORIZATION

NOTE: FOR PERMITTING ONLY. NOT FOR CONSTRUCTION.

NOTE:
VERTICLE DATUM IS NGVD29.
MHW IS APPROXIMATELY AT THE TOP OF THE REVETMENT.



THOMAS & HUTTON ENGINEERING CO.
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

SITE DEVELOPMENT

PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.

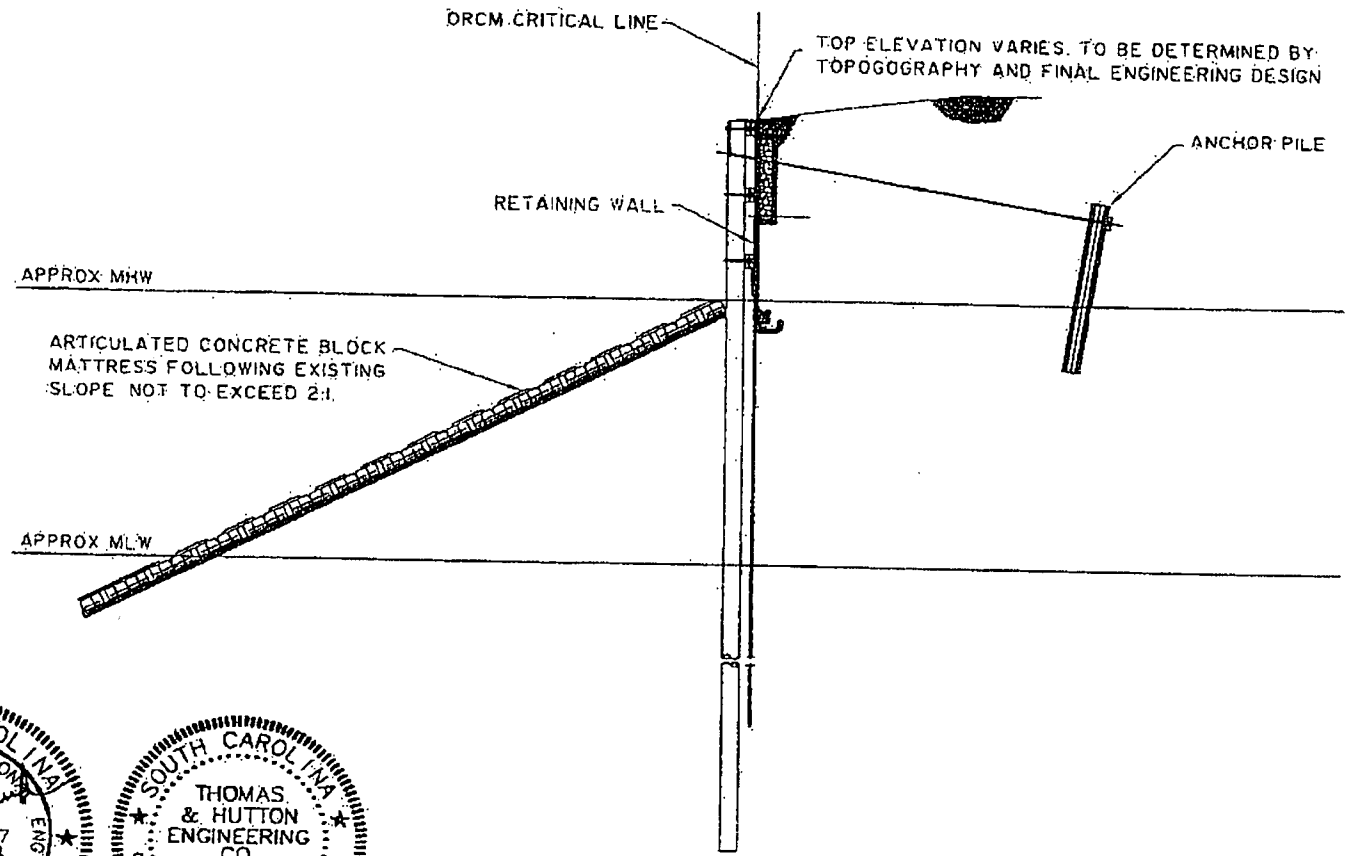
FEBRUARY 14, 2008

KIAWAH RIVER BEND EROSION CONTROL

SCALE 1" = 100'

SHEET 6 OF 7

000280



SOUTH CAROLINA PROFESSIONAL ENGINEER
NO. 26167
1-28-08
JAMES R. DUCKER

SOUTH CAROLINA
THOMAS & HUTTON ENGINEERING CO.
No. C00285
CERTIFICATE OF AUTHORIZATION

FOR PERMITTING ONLY.
NOT FOR CONSTRUCTION.

THOMAS & HUTTON ENGINEERING CO.
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

SECTION DETAIL

PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.

FEBRUARY 14, 2008

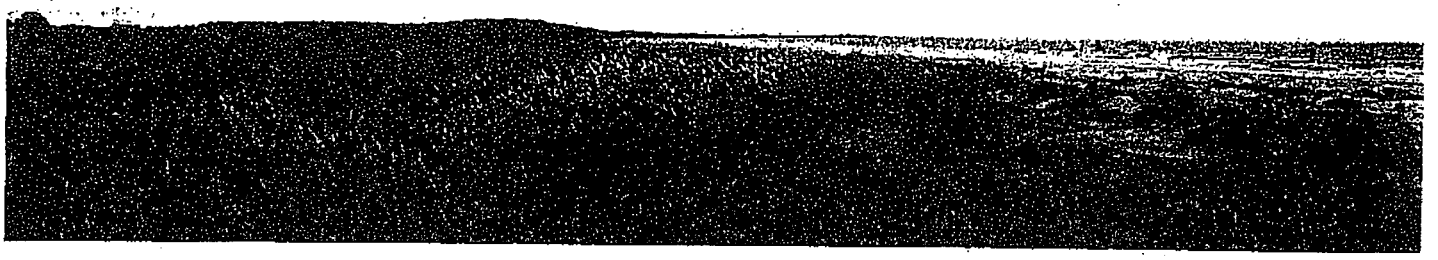
KIAWAH RIVER BEND EROSION CONTROL

NOT TO SCALE

SHEET 7 OF 7

000281

9



Leonard L. Long, Jr.
EXECUTIVE VICE PRESIDENT

Kiawah Island

P: 843.958.8472
F: 843.723.2058
C: 843.860.6265
E: leonard_long@kiawahisland.com

February 26, 2008

To Whom It May Concern:

Kiawah Development Partners II, Inc. hereby gives THOMAS & HUTTON ENGINEERING CO. the authority to act as its agent in matters of waterfront permitting.

Thomas & Hutton Engineering Co.
935 Houston Northcutt Blvd.
P.O. Box 1522
Mount Pleasant, SC 29465

If there are any questions regarding this, please contact this office. Thank you.

Sincerely,

Leonard L. Long, Jr.

Leonard L. Long, Jr.
Executive Vice President
Kiawah Development Partners II, Inc.

D H E C
PROMOTE PROTECT PROSPER

AFFIDAVIT OF OWNERSHIP OR CONTROL

S. C. Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management

Charleston	Beaufort	Myrtle Beach
744-5838	846-9400	238-4528
744-5847(fax)	846-9810(fax)	238-4526(fax)

I hereby certify that I am the (check one):

- [X] Record Owner
- [ ] Lessee
- [ ] Record Easement Holder
- [ ] Applicant To Record Owner For Easement
- [ ] Contract To Purchase Property

of the below described property situated in Charleston County, South Carolina; and that said property is all of that said property that is contiguous to and landward of the area in which the work proposed in the permit application is to be conducted. Furthermore, I certify that as record owner, lessee, or record easement holder, I have, or will have prior to undertaking the work, necessary approvals or permission from all other persons with a legal interest in said property to conduct the work proposed in the permit application.

WRITE LEGAL DESCRIPTION OF HIGHLAND (as described in deed, lease, etc.) BELOW OR WRITE "SEE ATTACHED" (in large bold letters) AND ATTACH A COPY OF THE DEED, LEASE, EASEMENT, OR MOST RECENT CERTIFIED PLAT OF THE PROPERTY. IF YOU ARE NOT THE RECORD OWNER, LESSEE OR EASEMENT HOLDER, YOU MUST ALSO SUBMIT WRITTEN PERMISSION FROM THE OWNER OF THE PROPERTY TO CARRY OUT THE PROPOSED ACTIVITY.

– See attached –

I also certify that the project as proposed does not cross any wetlands or areas below mean high water which is in the ownership of other private persons or public or private entities and that there is no disputed claim to the wetlands or areas below mean high water by private person or other entities due to a Kings Grant, State Grant, easement or conveyance or other legal document evidencing ownership of these areas.

Leonard H. Long, Jr.

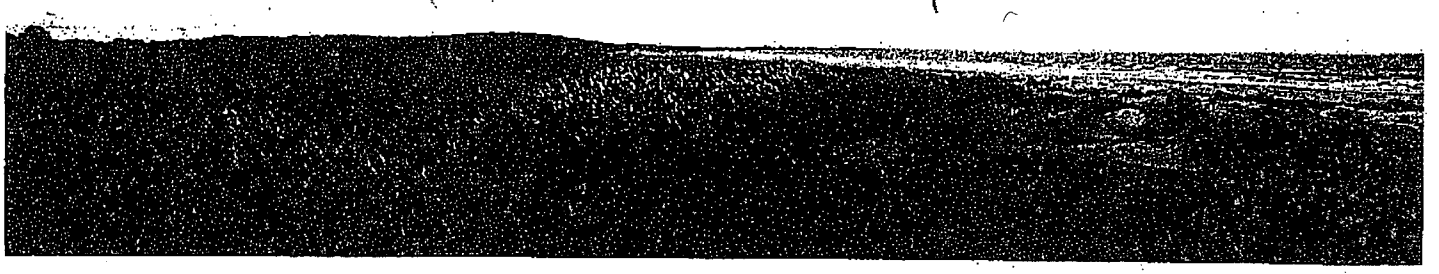
Signature of Record Holder or Lessee
Leonard H. Long, Jr. Executive Vice President of Hiawah Development Partners II, Inc.

Sworn to and subscribed before me at 2 North Adger's Wharf, Charleston, Charleston County, South Carolina, this 26th day of February, 2008.

Notary Public

My commission expires: 1-19-2011

11



Leonard L. Long, Jr.
EXECUTIVE VICE PRESIDENT

Kiawah Island

P: 843.768.8472
F: 843.723.2058
C: 843.860.6265
E: leonard_long@kiawahisland.com

February 26, 2008

To Whom It May Concern,

By means of this letter, Kiawah Resort Associates, L.P. ("KRALP"), does hereby grant permission for Kiawah Development Partners II, Inc. to seek permits in connection with revetment and other activities along the Kiawah River adjacent to or contiguous with properties owned by KRALP.

Should you have any questions, please feel free to contact this office.

Sincerely,

Leonard L. Long, Jr.
Executive Vice President
Kiawah Resort Associates, L.P.

BK L 647PG293

Return to:
Elisabeth F. Nimmons
2 North Adger's Wharf
Charleston, SC 29401

STATE OF SOUTH CAROLINA)
) CORRECTIVE AND
) CONFIRMATORY QUIT-CLAIM DEED
COUNTY OF CHARLESTON) (Captain Sam's and Beachwalker Park Parcels)

Index: Book S557, page 226
Book S557, page 234
Book M623, page 509

GRANTORS: KIAWAH RESORT ASSOCIATES, L.P. and KIAWAH LAND DEVELOPMENT, LLC

GRANTEE: KIAWAH DEVELOPMENT PARTNERS II, INC.,

WHEREAS, the property described on Exhibit "A" attached hereto and incorporated herein by reference (the "Property") was conveyed by KIAWAH RESORT ASSOCIATES, L.P. (a Delaware limited partnership hereinafter sometimes referred to as "KRALP") to KIAWAH LAND DEVELOPMENT, LLC (a South Carolina limited liability company hereinafter sometimes referred to as "KLD") by (i) deed of conveyance dated October 11, 2005, and recorded in Book S557, page 226, (the "Initial Deed") in the R.M.C. Office for Charleston County, S.C. (the "R.M.C. Office"); (ii) deed of conveyance dated October 11, 2005, and recorded in Book S557, page 234 in the R.M.C. Office; and (iii) Confirmatory Quit-Claim Deed dated March 2, 2007, and recorded in Book M623, page 509, in the R.M.C. Office; and

WHEREAS, the consideration for the Initial Deed was based on an apportioned valuation for ad valorem property tax purposes based on the approved zoning for the Property which, at the time of the Initial Deed, allowed no residential or other related development; and

WHEREAS, after the recording of the Initial Deed, on October 12, 2005, the Town of Kiawah Island approved and entered into a development agreement that allowed certain residential development and other limited development and, either contemporaneously or soon thereafter, adopted zoning for the Property consistent with the development agreement; and

WHEREAS, the approval and entry of the development agreement and adoption of zoning consistent therewith significantly increased the market value of the Property; and

WHEREAS, it has been determined by KRALP and KLD that the consideration paid for and recited in the Initial Deed did not take into account the effect of the development agreement and change in zoning, and, as a result, the consideration in the Initial Deed recited only a portion of the consideration to be paid for the Property; and

WHEREAS, as a result of the development agreement and zoning changes, the consideration for the Initial Deed became the first payment under an installment sale; and

WHEREAS, KRALP has several related and affiliated entities that include but are not limited to KLD and KIAWAH DEVELOPMENT PARTNERS II, INC. (a South Carolina corporation hereinafter sometimes referred to as "KDPII" and/or the "Grantee"); and

WHEREAS, KLD is constructively owned by KDPII and it has been determined by KRALP, KLD, and KDPII, that through administrative or clerical error, the Property was conveyed to KLD and should have been conveyed to KDPII; and

WHEREAS, the parties have agreed to enter into this Corrective and Confirmatory Quit-Claim Deed (i) to state correctly the full consideration for the conveyance by KRALP of the Property in the Initial Deed recorded in Book S557, page 226; to reflect the increase in market value resulting from the development agreement and zoning changes as well as the installment sale to KDPII, and (ii) to convey the Property to the correct affiliated entity as originally intended,

NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS, THAT for/and in consideration of the above recitals and the additional sum of Seventeen Million Five Hundred Thousand and No/100 ($17,500,000.00) Dollars (which, when combined with the $2,500,000.00 previously paid and referenced in the Initial Deed, totals the complete consideration of Twenty Million and No/100 ($20,000,000.00) Dollars), to **KIAWAH RESORT ASSOCIATES, L.P.** in hand paid at and before the sealing of these presents by **KIAWAH DEVELOPMENT PARTNERS II, INC.**, in the County and State aforesaid, the receipt whereof is hereby acknowledged; and in further consideration of the sum of One and No/100 ($1.00) Dollar to **KIAWAH LAND DEVELOPMENT, LLC**, in hand paid at and before the sealing of these presents by **KIAWAH DEVELOPMENT PARTNERS II, INC.**, in the County and State aforesaid, the receipt whereof is hereby acknowledged, the said **KIAWAH RESORT ASSOCIATES, L.P.** and **KIAWAH LAND DEVELOPMENT, LLC** have remised, released and forever quit-claimed, and by these presents does hereby remise, release and forever quit-claim, subject to the covenants, conditions, obligations, restrictions, exceptions, reservations, encumbrances, easements, and plats hereinafter set forth, unto the said **KIAWAH DEVELOPMENT PARTNERS II, INC.**, the following described property, to-wit:

See Exhibit "A" attached hereto and incorporated herein by reference
for a description of the "Beachwalker Park" and "Captain Sam's" Parcels

Portions of the Property hereby conveyed may be located in part seaward of the Interim Setback Line as established by the South Carolina Coastal Council (n/k/a DHEC - Office of Ocean and Coastal Resource Management) as of January 20, 1989, and South Carolina Code Sections 48-39-270 through 48-39-360, as amended, effective July 1, 1977 (the "Beach Protection Act"). The following information concerning the location and circumstances of the Property is hereby disclosed:

The proximity and location of the Interim Setback Line and the Interim Baseline areas are shown on plats of record in the R.M.C. Office. There are no habitable structures on the Property seaward of the setback line. The most recently published annual erosion rate for the Property is not set forth herein because the Property shown on such plats has over the 40 year period prior to July 1, 1988, been determined to not have an erosion rate. Reference must be had to the Beach Protection Act itself regarding the significance of these disclosures as well as the potential for movement and relocation of the lines in the future.

This conveyance is made subject to all applicable covenants, conditions, restrictions, easements and limitations of record in the R.M.C. Office and in addition thereto, the following:

(a) Easements, construction/improvement setbacks, and other building/use criteria as shown on the Plat, and the DHEC-OCRM Critical Line, Setback Line and Baseline as the same may vary from time to time.

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(b) Any lawful, constitutional interest in either the State of South Carolina or Federal Government created, or limitations on use imposed, by the Federal Coastal Management Act or other Federal law or by S. C. Code Sections 48-39-10 through 48-39-220, as amended, and Sections 48-39-250 through 48-39-360, as amended, or any regulations promulgated pursuant to said State or Federal laws, inclusive of DHEC - Office of Ocean and Coastal Resource Management and U. S. Army Corps of Engineers regulations, and such rights as the public may enjoy to the use of the Property, if any, lying below the mean high water mark.

(c) Zoning ordinance of the Town of Kiawah Island.

(d) Assessments as may become due and payable.

(e) Charleston County, S.C. ad valorem taxes for the year 2007, and ad valorem taxes for all subsequent years.

The said Kiawah Development Partners II, Inc. has joined in the execution of the within Corrective and Confirmatory Quit-Claim Deed to evidence its concurrence with the recitals referenced herein and acknowledge that it was the intended grantee under the previous deeds.

This is a portion of the property conveyed (i) to KRALP by deed of conveyance of Kiawah Resort Associates, South Carolina joint venture, dated June 26, 1992, and recorded in Book L215, page 486 in the R.M.C. Office, (ii) by KRALP to KLD by deed of conveyance dated October 11, 2005, and recorded in Book S557, page 226, in the R.M.C. Office, deed of conveyance dated October 11, 2005, and recorded in Book S557, page 234 in the R.M.C. Office, and Confirmatory Quit-Claim Deed dated March 2, 2007, and recorded in Book M623, page 509, in the R.M.C. Office.

TMS Numbers:	207-05-00-001 and 001-1
Tax District:	5-4
Address of Grantee:	P.O. Box 12001 Charleston, SC 29422

TOGETHER with, all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned unto the said KIAWAH DEVELOPMENT PARTNERS II, INC., its successors and assigns, forever.

SUBJECT TO all applicable covenants, conditions, restrictions, easements, and limitations of record and/or as set forth herein, the said KIAWAH RESORT ASSOCIATES, L.P. and KIAWAH LAND DEVELOPMENT, LLC do hereby bind themselves and their successors and assigns, to warrant and forever defend, all and singular, the highland portion of the said premises, above the mean high water mark of abutting tidal waters, unto the said KIAWAH DEVELOPMENT PARTNERS II, INC., its successors and assigns, against themselves, their successors and assigns, and all other persons whomsoever lawfully claiming or to claim the same or any part thereof.

IN WITNESS WHEREOF, Kiawah Resort Associates, L.P., has caused these presents to be executed in its name by its General Partners thereunto duly authorized and its seal to be hereunto affixed, this 28th day of December, 2002.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

J. E. Moss

Elizabeth G. Cannon

KIAWAH RESORT ASSOCIATES, L.P.
(SEAL)

By: D&W Investments, Inc.,
a South Carolina corporation
(CORP.SEAL)

Its: General Partner

By: _____
Charles P. Darby, III

Its: President

By: TWD Investments, LLC
a South Carolina limited liability company
(SEAL)

Its: General Partner

By: _____
Charles P. Darby, III

Its: Manager

J. E. Moss

Elizabeth G. Cannon

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

THE FOREGOING INSTRUMENT was acknowledged before me by Kiawah Resort Associates, L.P., by D&W Investments, Inc., a South Carolina corporation, its General Partner, by Charles P. Darby, III, its President, this 28th day of December, 2007.

_____ (SEAL)
Notary Public for South Carolina
My commission expires: 1-19-11

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

THE FOREGOING INSTRUMENT was acknowledged before me by Kiawah Resort Associates, L.P., by TWD Investments, LLC, a South Carolina limited liability company, its General Partner, by Charles P. Darby, III, its Manager, this 28th day of December, 2007.

_____ (SEAL)
Notary Public for South Carolina
My commission expires: 1-19-11

IN WITNESS WHEREOF, Kiawah Land Development, LLC has caused these presents to be executed in its name by its Manager thereunto duly authorized, and its seal to be hereunto affixed, this 28th day of December, 2007.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

KIAWAH LAND DEVELOPMENT, LLC
(SEAL)
By: Kiawah Development Partners II, Inc.
Its: Manager
(CORP.SEAL)

By: _____
Charles P. Darby, III

Its: President

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

THE FOREGOING INSTRUMENT was acknowledged before me by Kiawah Land Development, LLC, by Kiawah Development Partners II, Inc., its Manager, by Charles P. Darby, III, its President, this 28th day of December, 2007.

_____ (SEAL)
Notary Public for South Carolina
My commission expires: 1-19-11

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IN WITNESS WHEREOF, Kiawah Development Partners II, Inc. has caused these presents to be executed in its name by its officer thereunto duly authorized, and its seal to be hereunto affixed, this 28th day of December, 2007.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

KIAWAH DEVELOPMENT PARTNERS II, INC.
(SEAL)

By: _____
Charles P. Darby, III
Its: President

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

THE FOREGOING INSTRUMENT was acknowledged before me by Kiawah Development Partners II, Inc. by Charles P. Darby, III, its President, this 28th day of December, 2007.

_____ (SEAL)
Notary Public for South Carolina
My commission expires: 1-19-11

(19)

EXHIBIT "A" BK L 647PG300

Description of the "Property"

All that certain piece, parcel, or tract of land situate, lying and being at the west end of Kiawah Island proper, in the Town of Kiawah Island, Charleston County, South Carolina; containing 133.490 acres acres, more or less, known generally as the "Beachwalker Park" and "Captain Sam's" Parcels and shown on a plat prepared by Southeastern Surveying of Charleston, Inc., entitled "A BOUNDARY SURVEY OF CAPTAIN SAM'S SPIT CONTAINING A TOTAL OF 133.490 ACRES OWNED BY KIAWAH LAND DEVELOPMENT, LLC LOCATED IN THE TOWN OF KIAWAH ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA" dated July 17, 2006, last revised on August 9, 2006, and recorded in Plat Book EK at pages 031-034, (the "Plat"), in the office of the Register of Mesne Conveyances for Charleston County, S.C., said tracts having such location, butts and bounds, metes, courses, and distances as will by reference to said plat more fully appear.

R L 64 / PG 301

STATE OF SOUTH CAROLINA)
) AFFIDAVIT
COUNTY OF CHARLESTON)

Date of Transfer of Title
Closing Date: December 28, 2007

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this Affidavit and I understand such information.

2. That certain parcel of land containing 133.490 acres, more or less in the Town of Kiawah Island, Charleston County, S.C., being a portion of the property bearing Charleston County Tax Map Number 207-05-00-001 and 207-05-00-001-1 is being transferred by Kiawah Resort Associates, L.P. and Kiawah Land Development, LLC, to Kiawah Development Partners II, Inc. on the 28th day of December, 2007.

3. Check one of the following: The DEED is
a) XX Subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
b) ____ Subject to the deed recording fee for a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
c) ____ EXEMPT from the deed recording fee because the within conveyance is a quit-claim deed to confirm title in the Grantee with no additional consideration being paid (Exemption #12)

4. Check one of the following if either item 3a or item 3b above has been checked.
a) XX The fee is computed on the balance of consideration paid or to be paid in money or money's worth in the amount of Seventeen Million Five Hundred Thousand and No/100 ($17,500,000.00) Dollars.
b) ____ The fee is computed on the fair market value of the realty which is $_____
c) ____ The fee is computed on the fair market value of the realty as established for property tax purposes which is $_____.

5. Check YES XX or NO __ to the following: A lien or encumbrance existed on the land, tenement, or realty before this Corrective and Confirmatory Quit-Claim Deed and remained on the land, tenement or realty after the transfer. If "YES," the amount of the outstanding balance of this lien or encumbrance is $34,371,055.50. Said lien is additional security for a Note from Kiawah Development Partners, Inc. and KLD to Bank of America. However, no lien existed on the land as of the date of the Initial Deed, and accordingly the deed recording fee is computed on the balance of consideration paid as aforesaid.

6. The DEED Recording Fee is computed as follows:
a) XX the amount listed in item 4 above
b) ____ the amount listed in item 5 above (no amount place zero)
c) ____ Subtract line 6b from Line 6a and place the result.

7. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: Chief Operating Officer for the Grantors.

8. Check if Property other than Real Property is being transferred on this Deed.
a) _____ Mobile Home
b) _____ Other

9 ___ DEED OF DISTRIBUTION - ATTORNEY'S AFFIDAVIT: Estate of _____ deceased CASE NUMBER _____. Personally appeared before me the undersigned attorney who, being duly sworn, certified that (s)he is licensed to practice law in the State of South Carolina; that (s)he has prepared the Deed of Distribution for the Personal Rep. in the Estate of _____ deceased and that the grantee(s) therein are correct and confirm to the estate file for the above named decedent.

10. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

Sworn before me this 28th day of Dec, 2007.

Elizabeth L Dawson (SEAL)
Notary Public For South Carolina
My Commission Expires: 1-8-2011

Signed: _____
Grantor, Grantee, or Attorney that prepared this form

Terrence L. Connelly
Print or Type Name here

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BK L 647PG302

RECORDER'S PAGE

NOTE: This page MUST remain with the original document

FILED

December 28, 2007

2:23:01 PM

BK L 647PG293

Charlie Lybrand, Register
Charleston County, SC

Filed By:

Klawah Development Partners, Inc

Two North Adger's Wharf
Charleston SC 29401

Number of Pages: 10

DESCRIPTION	AMOUNT Corr/Con
Recording Fee	$ 15.00
State Fee	$ 45,500.00
County Fee	$ 19,250.00
Postage	
TOTAL	$ 64,765.00

$ Amount (In thousands): 17500

DRAWER: C - slw

AUDITOR STAMP HERE

JAN 3 2008

PID VERIFIED BY ASSESSOR

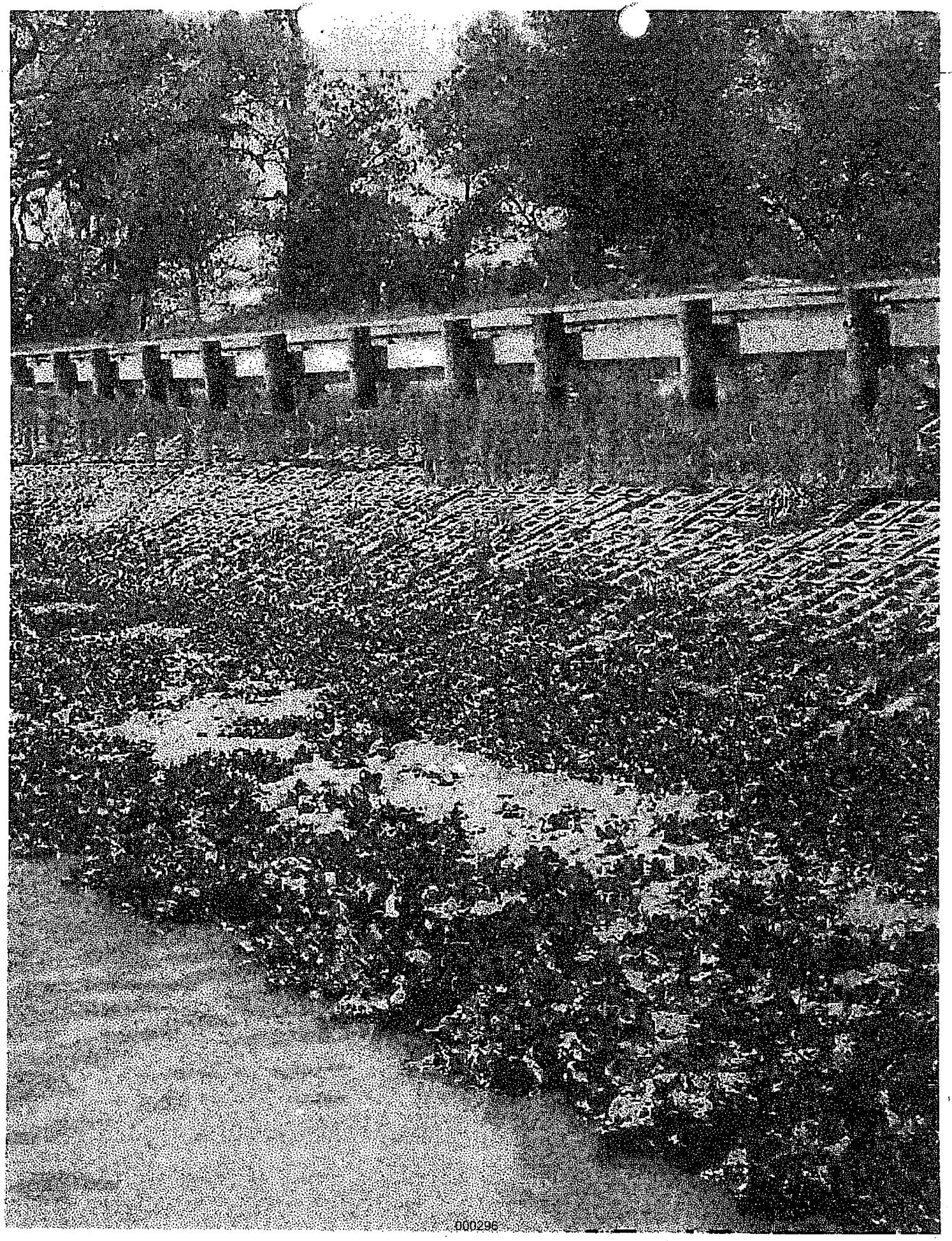
REP

JAN - 3 2008

DATE

DO NOT STAMP BELOW THIS LINE

KIAWAH RIVER
ATLANTIC OCEAN
VICINITY MAP
Southeastern Surveying of Charleston, Inc.
A BOUNDARY SURVEY OF
CAPTAIN SAM'S SPIT
CONTAINING 131.190 ACRES
GRAPHIC SCALE



BOARD:
Paul C. Aughtry, III
Chairman
Edwin H. Cooper, III
Vice Chairman
Steven G. Kisner
Secretary

D H E C

FROMOTE PROTECT PROSPER

C. Earl Hunter, Commissioner

EXHIBIT
labbies
C

BOARD:
Henry C. Scott
M. David Mitchell, MD
Glenn A. McCall
Coleman F. Buckhouse, MD

Promoting and protecting the health of the public and the environment

S.C. Board of Health and Environmental Control; Telephone (803) 898-3309 Fax: (803) 898-3393

January 14, 2009

U.S. Mail - CERTIFIED – Return Receipt

G. Trenholm Walker, Esquire
Pratt-Thomas/Walker
PO Drawer 22247
Charleston, SC 29403

91 7108 2133 3935 6630 6895

Gedney M. Howe, III, Esquire
PO Box 1034
Charleston, SC 29402

91 7108 2133 3935 6630 6901

Amy E. Armstrong, Esquire
South Carolina Environmental Law Project
PO Box 1380
Pawleys Island, SC 29585

91 7108 2133 3935 6630 6918

Sidi Limehouse
Flowers at Rosebank Farms
4455 Betsy Kerrison Parkway
John's Island, SC 29455

91 7108 2133 3935 6630 6925

John and Lynda Leffler
60 Sunlet Bend, Inlet Cove
Kiawah Island, SC 29455

91 7108 2133 3935 6630 6932

Edward and Harriet Molnar
1354 Dunlin Court
Kiawah Island, SC 29455

91 7108 2133 3935 6630 6949

Joseph and Christie Owens
119 Sheridan Terrace
Ridgewood, NJ 07450

91 7108 2133 3935 6630 6956

Arthur S. Morgenstern
164 Marsh Island Drive
Kiawah Island, SC 29455

91 7108 2133 3935 6630 6963

Willem M. Roosenburg, Co-Director
Diamondback Terrapin Working Group
2883 Dickie Court
Jacksonville, FL 32216

91 7108 2133 3935 6630 6970

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
2600 Bull Street • Columbia, SC 29201 • Phone: (803) 898-3432 • www.scdhec.gov

Wendy K. Kulick
38 Marsh Edge Lane
Kiawah Island, SC 29455

91 7108 2133 3935 6630 6987

Jack Berlin
Diamondback Terrapin Advocate
4207 Saltwater Blvd.
Tampa, FL 33615

91 7108 2133 3935 6630 6994

Cynthia L. Mynatt
131 Turnberry
Kiaway Island, SC 29455

91 7108 2133 3935 6630 7007

Morton Matuny
30 Rutledge Avenue
Charleston, SC 29401

91 7108 2133 3935 6746 1012

John H. Moore
114 Surfscoter Lane
Kiawah Island, SC 29455

91 7108 2133 3935 6746 1029

Kay Ethridge
5516 Gorham Drive
Charlotte, NC 28226

91 7108 2133 3935 6746 1036

Diane Lehder
306 Palm Warbler
Kiawah Island, SC 29455

91 7108 2133 3935 6746 1043

Marilyn Blizard
Diamondback Terrapin Advocate
736 B Virginia Rail
Kiawah Island, SC 29455

91 7108 2133 3935 6746 1050

Peter Mugglestone
1651 Roslyn Drive
Columbia, SC 29206

91 7108 2133 3935 6746 1067

Paula R. Feldman
8 Sundown Bend
Kiawah Island, SC 29455

91 7108 2133 3935 6746 1074

Robert J. Feldman
23 Sunlit Bend
Inlet Cove
Kiawah Island, SC 29455

91 7108 2133 3935 6746 1081

Kelly and Gregg Bragg
176 Marsh Island Drive
Kiawah Island, SC 29455

91 7108 2133 3935 6746 1098

John R. Dinkelspiel
Barbara A. Burgess
3131 Marsh Gate Drive
Seabrook Island, SC 29455

91 7108 2133 3935 6746 1104

Diane and Charles Beck
97 Jackstay Court
Kiawah Island, SC 29455

91 7108 2133 3935 6746 1111

Margaret B. Harvin
318 Country Club Drive
Columbia, SC 29206

91 7108 2133 3935 6746 1128

Laura Pulleyn
3029 Edenvale Road
Johns Island, SC 29455

91 7108 2133 3935 6746 1135

Francis Boyd
5 Greensward
Kiawah Island, SC 29455

91 7108 2133 3935 6746 1142

Via Interagency Mail Delivery
Elizabeth A. Dieck, Esquire
SCDHEC – Office of General Counsel
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

RE: **Docket No. 08-RFR-147** – *Request review of staff decision dated December 18, 2008, to issue Permit No. OCRM-08-117-E for the construction of an erosion control structure (revetment) at Beachwalker Park, Kiawah Island, with conditions that modify the application.*

The S.C. Board of Health and Environmental Control decided on January 8, 2009, not to conduct a Final Review Conference on the above-referenced matter.

S.C. Code Section 44-1-60(F), 2006 Act No. 387, Section 48, provides, "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 before the Administrative Law Court, in accordance with the Administrative Procedures Act, within thirty days after the deadline for the final review conference."

A request for a contested case hearing before the Administrative Law Court (ALC) must be filed in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

Clerk's Office
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: http://www.scalc.net. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,

Lisa Lucas Longshore
Clerk

The above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy; parties before the ALC are responsible for complying with all applicable requirements of the Court.

OCG # 20826

I:\Share\LEGAL\ALL\MATTERS\20826 RFR OCRM Kiawah Development Partners II\rcd.doc

JAN 15 2009

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Petitioner, vs. Kiawah Development Partners, II, and South Carolina Department of Health and Environmental Control, Respondents.	Docket No. 09-ALC-07-_____-CC **REQUEST FOR CONTESTED CASE HEARING**

TO: THE ADMINISTRATIVE LAW COURT AND THE RESPONDENTS

The South Carolina Coastal Conservation League, pursuant to Administrative Law Court Rule 11, hereby requests a contested case hearing in connection with the decision of the South Carolina Department of Health and Environmental Control ("DHEC") to issue Critical Area Permit and Coastal Zone Consistency Certification # OCRM-08-117-E to Kiawah Development Partners II, Inc. to construct an erosion control structure at Beachwalker Park, Kiawah Island, Charleston County, South Carolina.

The basis for this request is as follows:

1. The South Carolina Coastal Conservation League ("League") is a non-profit membership corporation organized and existing under the laws of the State of South Carolina. Members of the League live on Kiawah Island and use and enjoy the waters, wetlands, and other natural resources that would be adversely affected by the erosion control structure proposed by the permit applicant. Members of the League boat and otherwise recreate in the waters, wetlands

and beaches surrounding Kiawah Island, including the spit on which Kiawah Development Partners II, Inc., proposed to construct a bulkhead and revetment.

2. On December 18, 2008, the DHEC staff issued notice that it was authorizing the construction of 270' of bulkhead and articulated concrete block revetment along the northeastern end of the proposed project area, which is along the southwest portion of the parking lot at Beachwalker Park, see attached Critical Area Permit, Exhibit A.

3. On December 31, 2008, the S.C. Coastal Conservation League filed a request that the DHEC board conduct a final review conference in connection with the DHEC staff proposed decision. A number of requests for DHEC board review were filed by other parties, including a request made by the Respondent Kiawah Development Partners, II, on December 31, 2008.

4. During a DHEC Board meeting conducted on January 8, 2009, the Board decided not to conduct a final review conference and notified the League in writing of its decision on January 14, 2009, see attached letter from the DHEC Clerk, Exhibit B.

5. The indicated location of the proposed bulkhead and revetment is the site of a pristine, undeveloped spit at the tip of the Island. This spit supports a thriving wildlife community, including the endangered Loggerhead sea turtle and the Diamondback terrapin.

6. The Petitioner is informed and believes that the staff's permit decision was made in violation of applicable statutes, regulations and rules contained in the S.C. Coastal Zone Management Act, S.C. Code Ann. §48-39-10, *et seq.*, OCRM Regulations 30-1, *et seq.*, and the Coastal Management Program.

7. The permit and certification violate the State policies of protecting sensitive and fragile areas from inappropriate development; of protecting resources of the coastal zone; and to

protect the quality of the coastal environment. S.C. Code Ann. §48-39-30.

8. The permit and certification is inconsistent with general considerations of the project's impact on the production of fish, shrimp, oysters, crabs, clams, other marine life, wildlife or other natural resources; the extent to which the activity could cause erosion; the extent to which the development could affect the habitats for rare and endangered species; the extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state; and the extent to which the project will affect the value and enjoyment of adjacent owners. S.C. Code Ann. §48-39-150(A) and S.C. Code Ann. Regs. 30-11.B.

9. The permit and certification violates the DHEC Regulation that bulkheads and revetments "will be prohibited where marshlands are adequately serving as an erosion buffer, where adjacent property could be detrimentally affected by erosion, sedimentation, or where public access is adversely affected unless upland is being lost due to tidally induced erosion." S.C. Code Ann. Regs. 30-12(C)(1)(c). There are no structures on this spit, thus there is nothing that will be protected by the bulkhead and revetment and, in fact, the proposed bulkhead and revetment could cause acceleration of the existing erosion patterns and have detrimental impacts on the spit and adjacent properties.

10. The permit and certification violates the Coastal Management Program in that it fails to consider the extent of up or downdrift damage due to installation of the structures; it is not part of a comprehensive erosion control program to ensure that it does not cause adverse affects on adjoining property owners or accelerate erosion; and it fails to promote the use of natural features of the system, rather than artificial protections. Coastal Management Program, IV-56 & 57.

11. The Petitioner is informed and believes that the impacts of the proposed bulkhead and revetment will cause significant degradation of the environment on the spit, reduce the value of surrounding property and have severe negative impacts on wildlife within the impact area, as well as have negative impacts on erosional patterns on Kiawah Island.

12. As a direct and proximate result of these violations and the proposed by the applicant, the Petitioner and its members will suffer injury in fact in that the natural resources and environment of this area will be degraded, resulting in material harm to their recreational, environmental and aesthetic interests.

13. The Petitioner reserves all rights under Section 44-1-60 and other applicable laws to present evidence and argument during the review proceeding.

WHEREFORE, the Petitioner requests that the Administrative Law Court conduct a contested case hearing and issue an order reversing the proposed decision to issue the permit and certification.

[signature block on following page]

Respectfully submitted,

Amy E. Armstrong
James S. Chandler, Jr.
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

Attorneys for the Petitioner S.C. Coastal Conservation League

Georgetown, South Carolina

January 27 2009

D H E C

PROMOTE PROTECT PROSPER

C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment.

MEMORANDUM

TO: **ALL INTERESTED PARTIES**

FROM: **BILL EISER**

RE: **Kiawah Development Partners II Inc**
P/N# **OCRM-08-117-E**

DATE: **December 18, 2008**

This is to inform you that the above referenced permit was issued and validated on December 18, 2008.

Any person adversely affected by this decision has the right to appeal as outlined in the enclosed "Notice of Appeal Procedure."

Exhibit A

D H E C

PROMOTE PROTECT PROSPER

C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment.

Notice of Appeal Procedure

The following procedures are in effect beginning July 1, 2006, pursuant to 2006 Act No. 387:

1. This decision of the S.C. Department of Health and Environmental Control (Department) becomes the final agency decision 15 days after notice of the decision has been mailed to the applicant or respondent, unless a written request for final review is filed with the Department by the applicant, permittee, licensee, or affected person.

2. An applicant, permittee, licensee, or affected person who wishes to appeal this decision must file a written request for final review with the Clerk of the Board at the following address or by facsimile at 803-898-3393:

   Clerk of the Board
   SC DHEC
   2600 Bull Street
   Columbia, SC 29201

3. The request for final review should include the following:
   a. the grounds on which the Department's decision is challenged and the specific changes sought in the decision
   b. a statement of any significant issues or factors the Board should consider in deciding how to handle the matter
   c. a copy of the Department's decision or action under review

4. In order to be timely, a request for final review must be received by the Clerk of the Board within 15 days after notice of the decision has been mailed to the applicant or respondent. If the 15th day occurs on a weekend or State holiday, the request is due to be received by the Clerk of the Board on the next working day. The request for final review must be received by the Clerk of the Board by 5:00 p.m. on the date it is due.

5. If a timely request for final review is filed with the Clerk of the Board, the Clerk will provide additional information regarding procedures.

6. The Board of Health and Environmental Control has 60 days from the date of receipt of a request for final review to conduct a final review conference. The conference may be conducted by the Board, its designee, or a committee of three members of the Board appointed by the chair.

7. If a final review conference is not conducted within 60 days, the Department decision becomes the final agency decision, and a party may request a contested case hearing before the Administrative Law Court within 30 days after the deadline for the final review conference.

The above information is provided as a courtesy; parties are responsible for complying with all applicable legal requirements.

D H E C

PROMOTE PROTECT PROSPER

C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment.

December 18, 2008

Mr. Ray Pantlik
Kiawah Development Partners II, Inc.
PO Box 12001
Charleston, SC 29422

SEE SPECIAL CONDITION(S)

Re: OCRM-08-117-E
Kiawah Development Partners II, Inc.

Dear Mr. Pantlik:

The SCDHEC Office of Ocean and Coastal Resource Management has reviewed your application to construct an erosion control structure at Beachwalker Park, Kiawah Island, Charleston County, South Carolina and has issued a permit for this work. You should carefully read the description of the authorized project and the special conditions that have been placed on the permit, as these conditions may modify the permitted activity. In addition, there are a series of general conditions that should be reviewed. The original and one photocopy of the permit, as issued, are enclosed. After carefully reading the permit, if you wish to accept the permit as issued, sign and date in the signature block entitled "PERMITTEE" on the original version of the permit **and return it to this Department. Keep the photocopy for your records.**

PLEASE READ CAREFULLY: You are required to sign and return the original version of your permit to this Department. If this permit is not signed and returned within thirty (30) days of issuance, *OR* appealed within 15 days as described on the enclosed "Notice of Appeal Procedure", the Department reserves the right to cancel this permit. Please carefully review the enclosed "Notice of Appeal Procedure" for information and deadlines for appealing this permit.

We have also enclosed a "request for a construction placard" card. You must send in this card before the time you wish to start construction. At that time a construction placard will be sent to you to post at the construction site.

PLEASE NOTE: You are not authorized to commence work under the permit until we have received the original version of the entire permit signed and accepted by you, and a construction placard has been issued and posted at the construction site. The receipt of this permit does not relieve you of the responsibility of acquiring any other federal or local permits that may be required.

Sincerely,

William C. Eiser

William C. Eiser
Wetland Section Project Manager

cc: Blair Williams, Acting Wetland Section Manager
/enclosure

D H E C

PROMOTE PROTECT PROSPER

C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

SEE SPECIAL CONDITION(S)

Notice of Appeal Procedure

The following procedures are in effect beginning July 1, 2006, pursuant to 2006 Act No. 387:

1. This decision of the S.C. Department of Health and Environmental Control (Department) becomes the final agency decision 15 days after notice of the decision has been mailed to the applicant or respondent, unless a written request for final review is filed with the Department by the applicant, permittee, licensee, or affected person.

2. An applicant, permittee, licensee, or affected person who wishes to appeal this decision must file a written request for final review with the Clerk of the Board at the following address or by facsimile at 803-898-3393.

   Clerk of the Board
   SC DHEC
   2600 Bull Street
   Columbia, SC 29201

3. The request for final review should include the following:
   a. the grounds on which the Department's decision is challenged and the specific changes sought in the decision
   b. a statement of any significant issues or factors the Board should consider in deciding how to handle the matter
   c. a copy of the Department's decision or action under review

4. In order to be timely, a request for final review must be received by the Clerk of the Board within 15 days after notice of the decision has been mailed to the applicant or respondent. If the 15th day occurs on a weekend or State holiday, the request is due to be received by the Clerk of the Board on the next working day. The request for final review must be received by the Clerk of the Board by 5:00 p.m. on the date it is due.

5. If a timely request for final review is filed with the Clerk of the Board, the Clerk will provide additional information regarding procedures.

6. The Board of Health and Environmental Control has 60 days from the date of receipt of a request for final review to conduct a final review conference. The conference may be conducted by the Board, its designee, or a committee of three members of the Board appointed by the chair.

7. If a final review conference is not conducted within 60 days, the Department decision becomes the final agency decision, and a party may request a contested case hearing before the Administrative Law Court within 30 days after the deadline for the final review conference.

The above information is provided as a courtesy; parties are responsible for complying with all applicable legal requirements.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT

CRITICAL AREA PERMIT & COASTAL ZONE CONSISTENCY CERTIFICATION

Permittee(s):	**Kiawah Development Partners II, Inc.**
Permit Number(s):	**OCRM-08-117-E**
Date of Issuance:	**December 18, 2008**
Expiration Date:	**December 18, 2013**
Location:	**On and adjacent to the Kiawah River at Beachwalker Park, Kiawah Island, Charleston County, South Carolina**

SEE SPECIAL CONDITION(S)

This permit is issued under the provisions of S. C. Code Ann. Section 48-39-10, *et seq.*, and 23A S.C. Code Ann. Regs. 30-1 through 30-18 (Supp. 2007). Please carefully read the project description and the special conditions that appear on this permit/certification as they will affect the work that is allowed. The general conditions are also a part of this permit/certification and should be read in their entirety. The S. C. Contractor's Licensing Act of 1999, enacted as S.C. Code Ann. Section 40-11-5 through 430, requires that all construction with a total cost of $5,000 or more be performed by a licensed contractor with a valid contractor's license for marine class construction, except for construction performed by a private landowner for strictly private purposes. Your signature on and acceptance of this permit denotes your understanding of the stated law regarding use of licensed contractors. **All listed special and general conditions will remain in effect for the life of the project if work commences during the life of the permit. This applies to permittee, future property owners, or permit assignees.**

DESCRIPTION OF THE PROJECT, AS AUTHORIZED

The permit has been issued with significant modifications from the original request to build a 2,783' erosion control structure. Specifically a 270' section of bulkhead and articulated concrete block revetment has been approved for the northeastern end of the project area, along the southwest portion of the parking lot in Beachwalker Park, but the remaining 2,513' of the proposed erosion control structure to the southwest of the park is not authorized.

With the exception of the parking lot and associated infrastructure for Beachwalker Park there is currently no high-ground development in the general vicinity of the project area. The applicant provided general information that indicated up to 50 residential homes on approximately 20 acres is planned and approved by the local government. If issued as requested, the permit will prevent the shoreline movement in an area that historically has seen inlet formation and facilitate development in a pristine dune area that is currently undeveloped and adjacent to federally designated critical habitat for the piping plover, a threatened species and as such is designated a Geographic Area of Particular Concern (GAPC). This area is also federally designated as a COBRA unit. Regulation 30-11(C) requires that consideration must be given to the extent to which long-range cumulative impacts of the project may result within the context of other possible development and the general character of the area, the extent to which overall plans and designs of a project can be submitted together and evaluated as a whole, and the extent and significance of negative

impacts on GAPCs, in this case the piping plover habitat and the Retreat Policy in its broadest sense. Regulation 30-11(B) requires that consideration must be given to the extent to which the development could affect the habitats for rare and endangered species. Section III(C)(3)(XII)(A) of the Coastal Management Program Document identifies barrier islands and dune areas outside of the critical area as areas of special resource significance that are unique and environmentally fragile, which would apply to this area. Consequently, the permit will be issued to authorize a 270' erosion control structure adjacent to Beachwalker Park parking lot and the remainder of the proposed structure will not be authorized. The purpose of the proposed activity is for erosion control.

SPECIAL CONDITIONS

1. Provided that a 270' section of the proposed erosion control structure located along the southwest portion of the parking lot in Beachwalker Park is approved, but the remaining 2,513' of the proposed structure is not approved.

2. Provided that an as-built survey of the erosion control structure must be submitted to the Department within 90 days of the expiration date of the final construction placard. The survey must be performed by a registered land surveyor, must show all edges of the structure, and must list the starting and ending coordinates of the structure in the SC State Plane Coordinate System, which can be obtained by survey-grade Global Positioning System equipment.

3. Provided that in the event that archaeological or paleontological remains are found during the course of work, the applicant should notify the South Carolina Institute of Archaeology and Anthropology (Mr. James Spirek at 803-777-8170) pursuant to South Carolina Underwater Antiquities Act of 1991, (Article 5 Chapter 7, Title 54, Code of Laws of South Carolina, 1976). Archaeological remains consist of any materials made or altered by man, which remain from past historic or prehistoric times (ie, older than 50 years). Examples include old pottery fragments, metal, wood, arrowheads, stone implements or tools, human burials, historic docks, structures, or non-recent vessel remains. Paleontological remains consist of old animal remains, original or fossilized, such as teeth, tusks, bone, or entire skeletons.

PERMITTEE'S ATTENTION IS DIRECTED TO GENERAL CONDITIONS NUMBERS FOUR (4) AND FIVE (5). BY ACCEPTANCE OF THIS PERMIT, PERMITTEE IS PLACED ON NOTICE THAT THE STATE OF SOUTH CAROLINA, BY ISSUING THIS PERMIT, DOES NOT WAIVE ITS RIGHTS TO REQUIRE PAYMENT OF A REASONABLE FEE FOR USE OF STATE LANDS AT A FUTURE DATE IF SO DIRECTED BY STATUTE.

THE PERMITTEE, BY ACCEPTANCE OF THIS PERMIT AGREES TO ABIDE BY THE TERMS AND CONDITIONS CONTAINED HEREIN AND TO PERFORM THE WORK IN STRICT ACCORDANCE WITH THE PLANS AND SPECIFICATIONS ATTACHED HERETO AND MADE A PART HEREOF. ANY DEVIATION FROM THESE CONDITIONS, TERMS, PLANS AND SPECIFICATIONS SHALL BE GROUNDS FOR REVOCATION, SUSPENSION OR MODIFICATION OF THIS PERMIT AND THE INSTITUTION OF SUCH LEGAL PROCEEDINGS AS THE DEPARTMENT MAY CONSIDER APPROPRIATE.

2 of 11

SEE SPECIAL CONDITION(S)

SEE SPECIAL CONDITION(S)

Permit Number: **OCRM-08-117-E**

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.

(PERMITTEE(S)) (DATE)
Kiawah Development Partners II, Inc.

This permit becomes effective when the State official, designated to act for the Office of Ocean and Coastal Resource Management, has signed below.

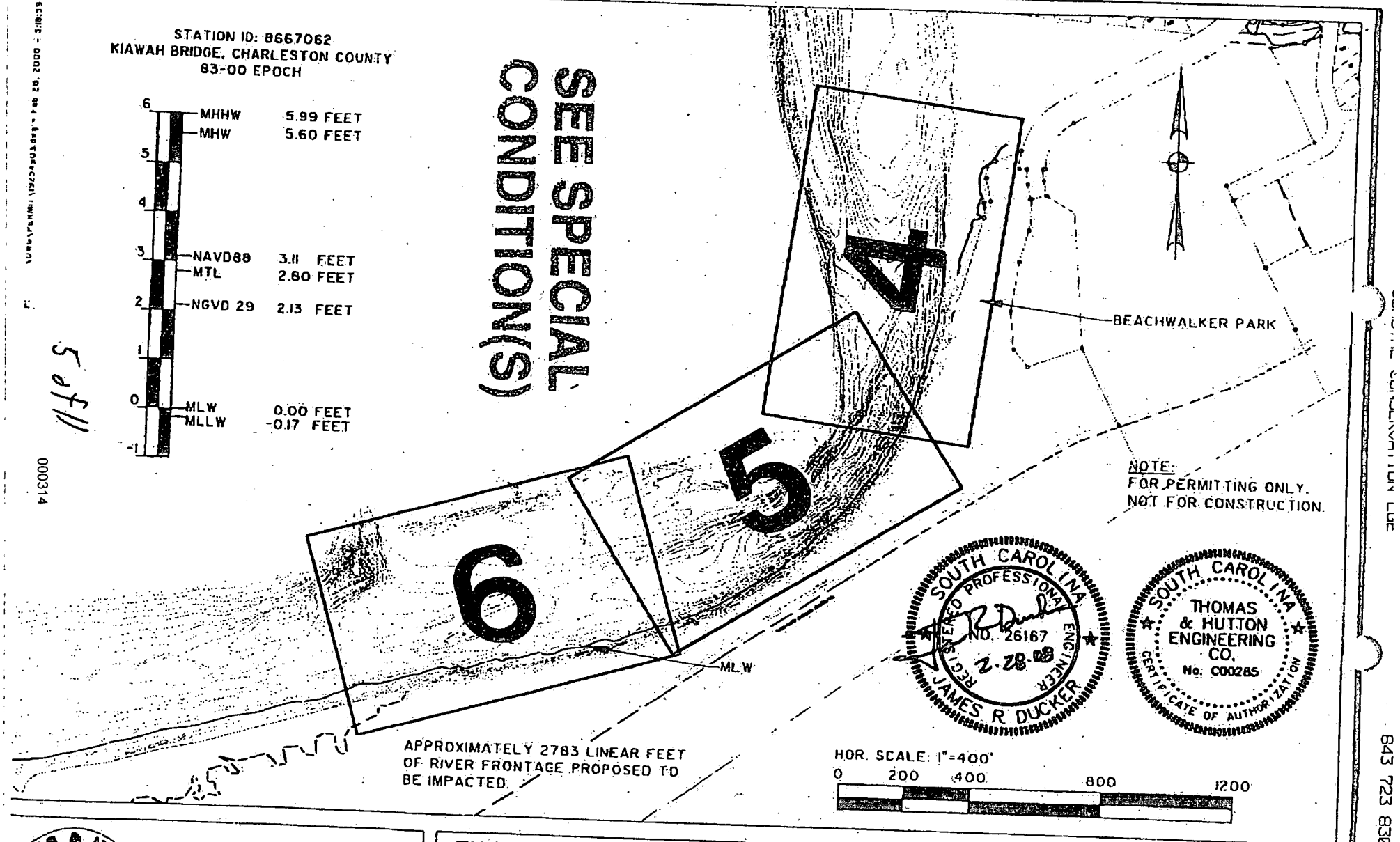
William C. Eiser 12/18/2008

(PROJECT MANAGER, WETLAND SECTION) (DATE)
William C. Eiser
Or his Designee
Other Authorized State Official

GENERAL CONDITIONS:

This construction and use permit is expressly contingent upon the following conditions which are binding on the permittee:

1. That the permittee, in accepting this permit, covenants and agrees to comply with and abide by the provisions and conditions herein and assumes all responsibility and liability and agrees to save OCRM and the State of South Carolina, its employees or representatives, harmless from all claims of damage arising out of operations conducted pursuant to this permit.
2. That if the activity authorized herein is not constructed or completed within five years of the date of issuance, this permit shall automatically expire. A request, in writing, for an extension of time shall be made not less than thirty days prior to the expiration date.
3. That all authorized work shall be conducted in a manner that minimizes any adverse impact on fish, wildlife and water quality.
4. That this permit does not relieve the permittee from the requirements of obtaining a permit from the U. S. Army Corps of Engineers or any other applicable federal agency, nor from the necessity of complying with all applicable local laws, ordinances, and zoning regulations. This permit is granted subject to the rights of the State of South Carolina in the navigable waters and shall be subject, further, to all rights held by the State of South Carolina under the public trust doctrine as well as any other right the State may have in the waters and submerged lands of the coast.
5. That this permit does not convey, expressly or impliedly, any property rights in real estate or material nor any exclusive privileges; nor does it authorize the permittee to alienate, diminish, infringe upon or otherwise restrict the property rights of any other person or the public; nor shall this permit be interpreted as appropriating public properties for private use.
6. That the permittee shall permit OCRM or its authorized agents or representatives to make periodic inspections at any time deemed necessary in order to ensure that the activity being performed is in accordance with the terms and conditions of this permit.
7. That any abandonment of the permitted activity will require restoration of the area to a satisfactory condition as determined by OCRM.
8. That this permit may not be transferred to a third party without prior written notice to OCRM, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferee subscribing to this permit and thereby agreeing to comply.
9. That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and special signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.
10. That the permit construction placard or a copy of the placard shall be posted in a conspicuous place at the project site during the entire period of work.
11. That the structure or work authorized herein shall be in accordance with the plans and drawing attached hereto, and shall be maintained in good condition. Failure to build in accordance with the plans and drawings attached hereto, or failure to maintain the structure in good condition, shall result in the revocation of this permit.
12. That the authorization for activities or structures herein constitutes a revocable license. OCRM may require the permittee to modify activities or remove structures authorized herein if it is determined by OCRM that such activity or structures violates the public's health, safety, or welfare, or if any activity is inconsistent with the public trust doctrine. Modification or removal under this condition shall be ordered only after reasonable notice stating the reasons therefore and provision to the permittee of the opportunity to respond in writing. When the Permittee is notified that OCRM intends to revoke the permit, Permittee agrees to immediately stop work pending resolution of the revocation.
13. That OCRM shall have the right to revoke, suspend, or modify this permit in the event it is determined the permitted structure (1) significantly impacts the public health, safety and welfare, and/or is violation of Section 48-39-150, (2) adversely impacts public rights, (3) that the information and data which the permittee or any other agencies have provided in connection with the permit application is either false, incomplete or inaccurate, or (4) that the activity is not in compliance with the drawings submitted by the applicant. That the permittee, upon receipt of OCRM's written intent to revoke, suspend, or modify the permit has the right to a hearing. Prior to revocation, suspension, or modification of this permit, OCRM shall provide written notification of intent to revoke to the permittee, and permittee can respond with a written explanation to OCRM. (South Carolina Code Section 1-023-370 shall govern the procedure for revocation, suspension or modification herein described).
14. That any modification, suspension or revocation of this permit shall not be the basis of any claim for damages against OCRM or the State of South Carolina or any employee, agent, or representative of OCRM or the State of South Carolina.
15. That all activities authorized herein shall, if they involve a discharge or deposit into navigable waters or ocean waters, be at all times consistent with all applicable water quality standards, effluent limitations and standards of performance, prohibitions, and pretreatment standards established pursuant to applicable federal, state and local laws.
16. That extreme care shall be exercised to prevent any adverse or undesirable effects from this work on the property of others. This permit authorizes no invasion of adjacent private property, and OCRM assumes no responsibility or liability from any claims of damage arising out of any operations conducted by the permittee pursuant to this permit.



5 of 11

000314

THOMAS & HUTTON ENGINEERING CO.
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

EXISTING SITE CONDITIONS & SHEET INDEX

OCRM-08-117-E

KIAWAH RIVER BEND EROSION CONTROL

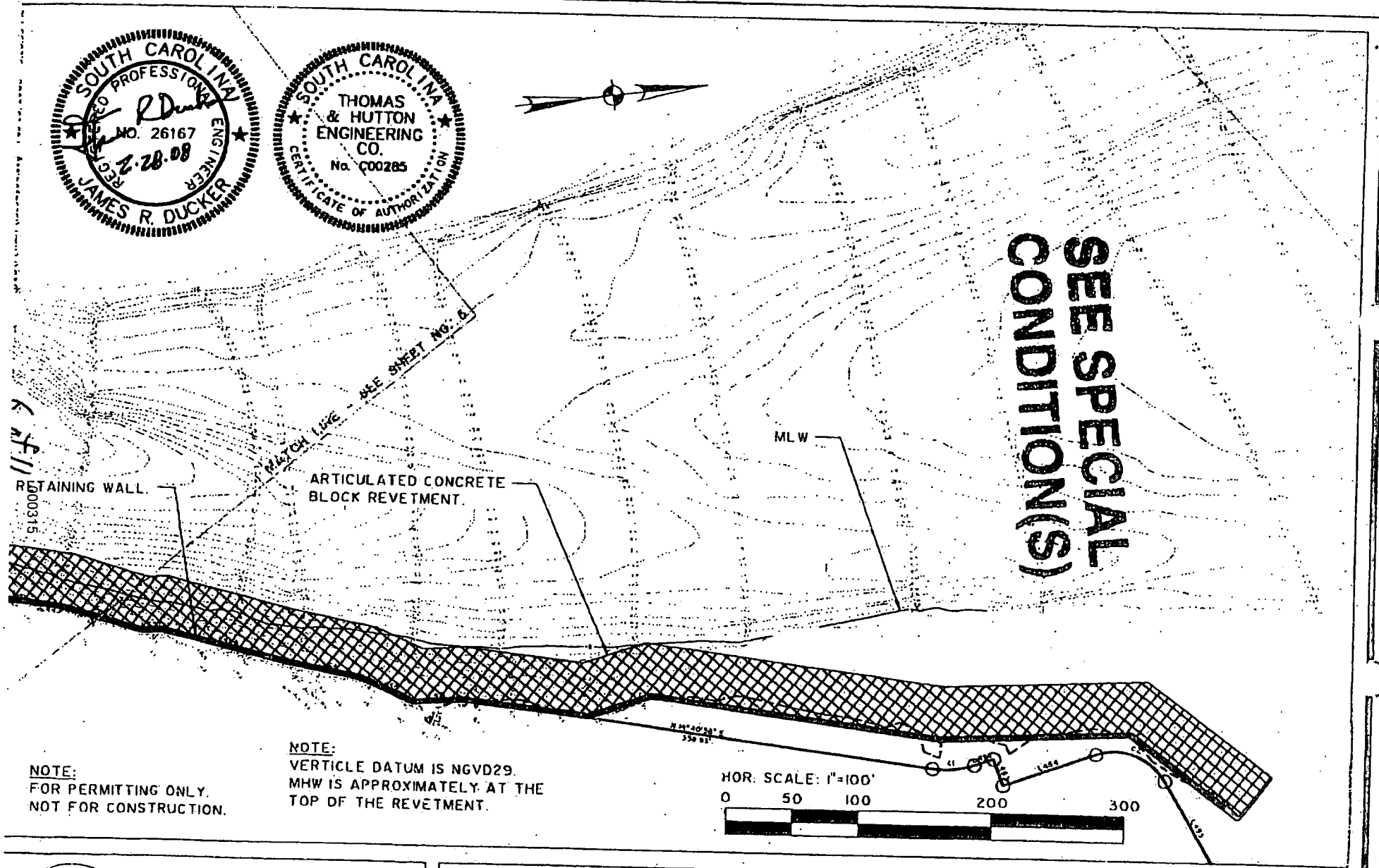
PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.

FEBRUARY 14, 2008

SCALE 1" = 400'

OCRM - 2008 02 28 - Exhibit.dwg

843 723 8308 P.09



NOTE:
FOR PERMITTING ONLY.
NOT FOR CONSTRUCTION.

NOTE:
VERTICLE DATUM IS NGVD29.
MHW IS APPROXIMATELY AT THE TOP OF THE REVETMENT.

THOMAS & HUTTON ENGINEERING CO.
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

SITE DEVELOPMENT

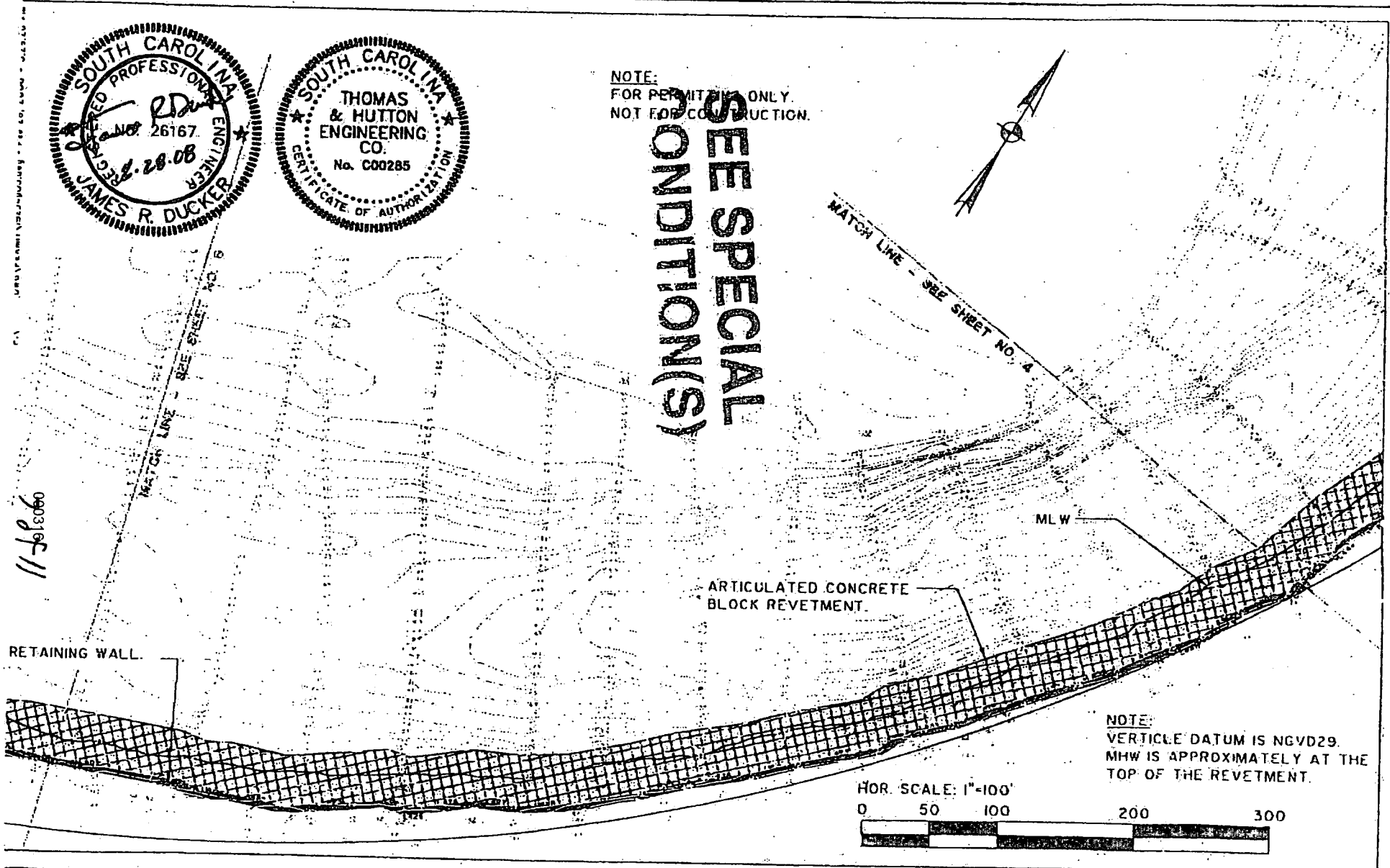
OCRM-08-117-E

PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.
FEBRUARY 14, 2008

KIAWAH RIVER BEND EROSION CONTROL

SCALE 1" = 100'

843 723 8308 P.10



THOMAS & HUTTON ENGINEERING CO.
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

SITE DEVELOPMENT

OCRM-08-117-E

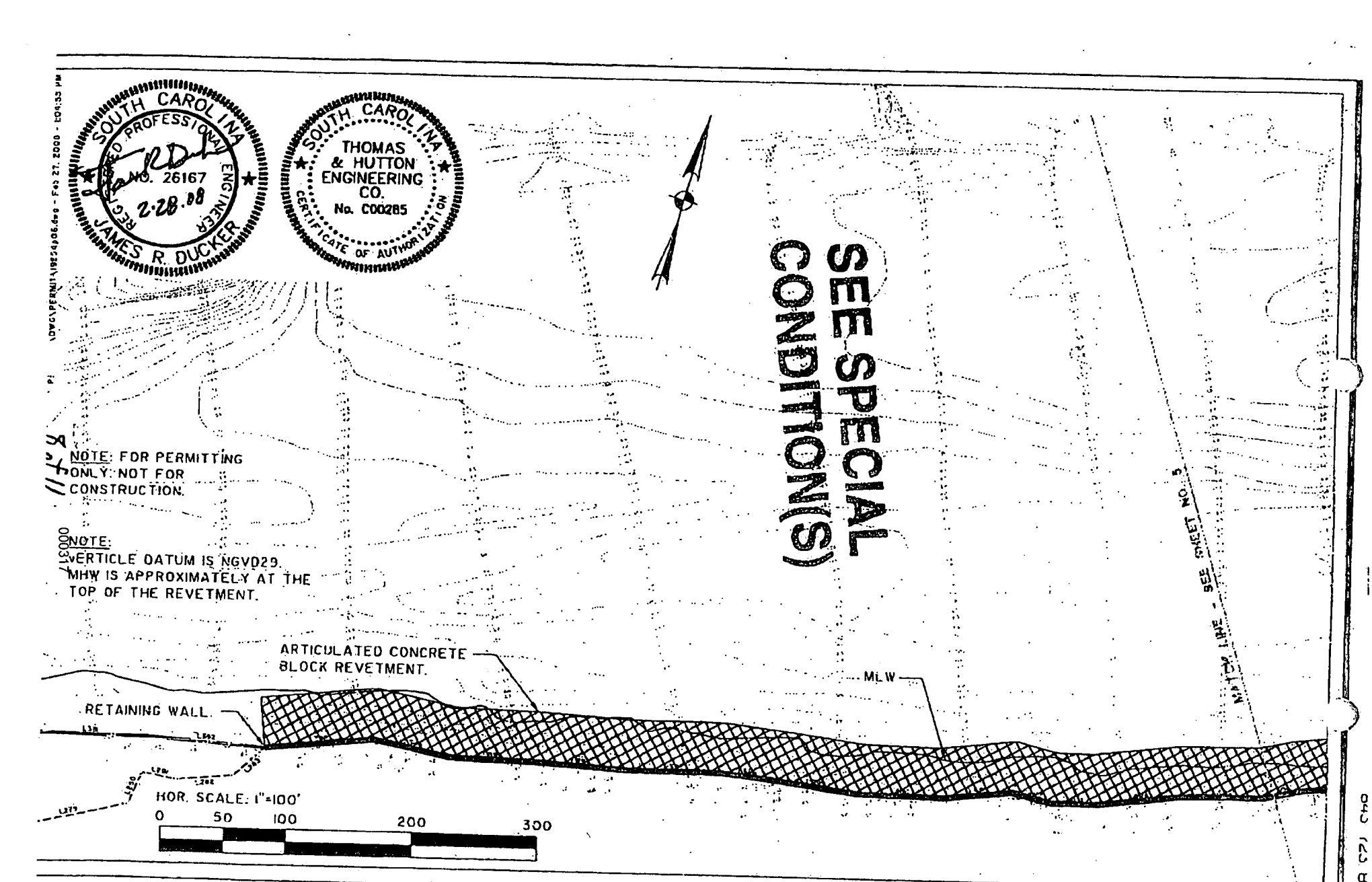
KIAWAH RIVER BEND EROSION CONTROL

PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.

FEBRUARY 14, 2008

SCALE 1" = 100'

CONSERVATION LAW
843 723 8308 P.11



THOMAS & HUTTON ENGINEERING CO.

935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

SITE DEVELOPMENT

OCRM-08-117-E

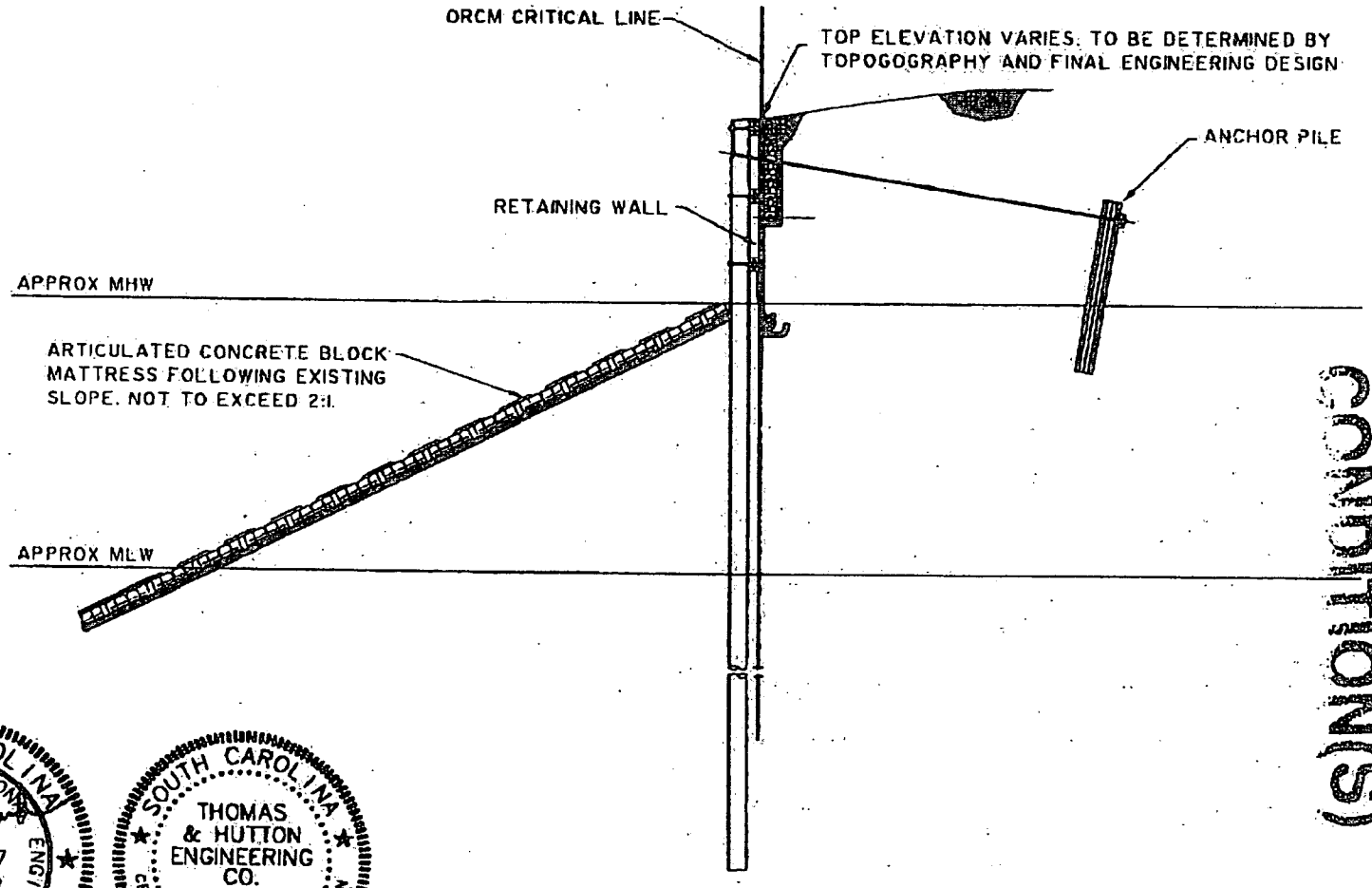
PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.

FEBRUARY 14, 2008

KIAWAH RIVER BEND EROSION CONTROL

SCALE 1" = 100'

P.12



SEE SPECIAL CONDITION(S)

9 of 9 pgs

SOUTH CAROLINA PROFESSIONAL ENGINEER
NO. 26167
2-28-08
JAMES R. DUCKER

SOUTH CAROLINA
THOMAS & HUTTON ENGINEERING CO.
No. C00285
CERTIFICATE OF AUTHORIZATION

FOR PERMITTING ONLY.
NOT FOR CONSTRUCTION.

THOMAS & HUTTON ENGINEERING CO.
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

SECTION DETAIL

OCRM-08-117-E

PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.

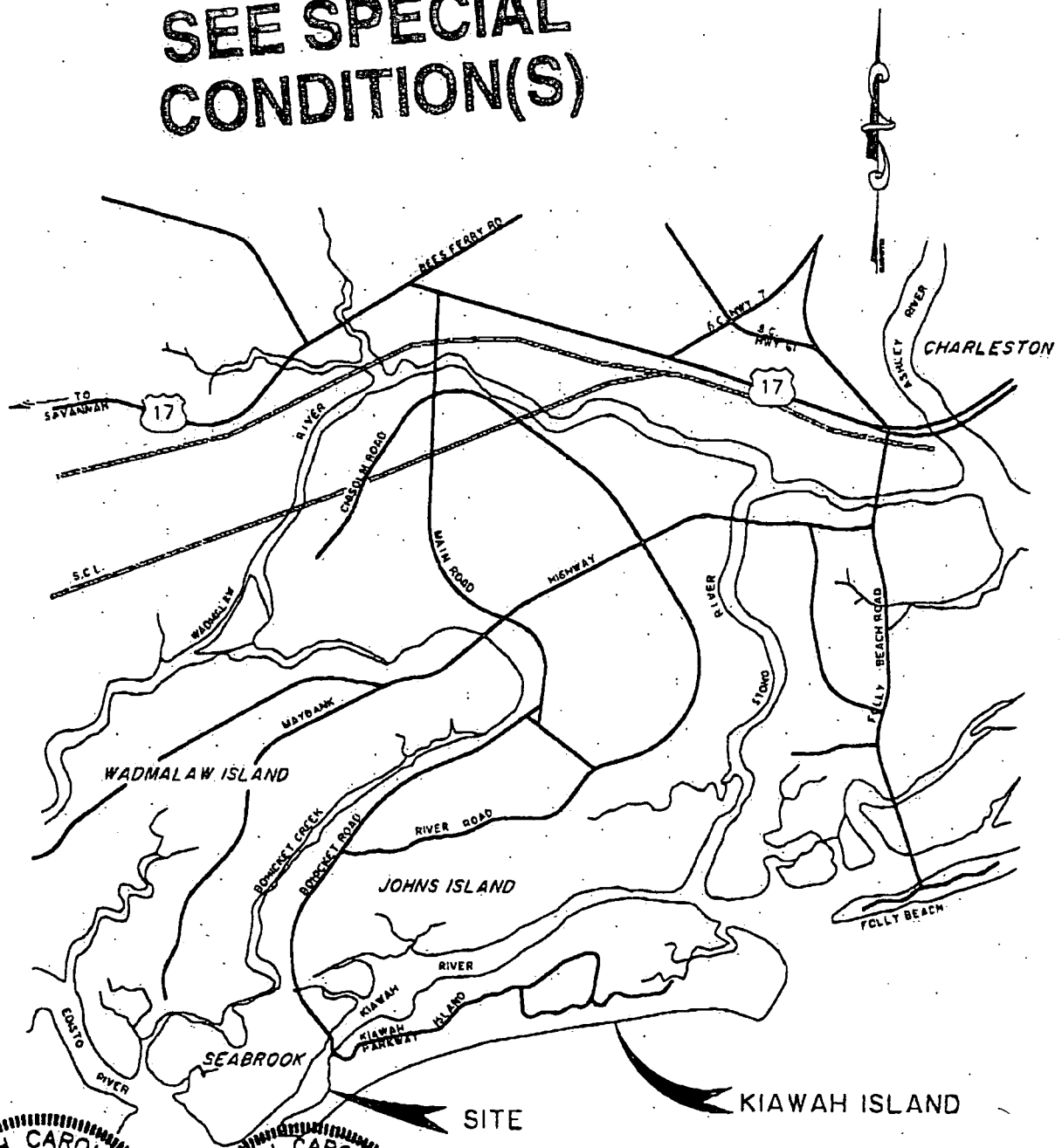
FEBRUARY 14, 2008

KIAWAH RIVER BEND EROSION CONTROL

NOT TO SCALE

SHEET 7 OF 7

SEE SPECIAL CONDITION(S)



SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER No. 26167 JAMES R. DUCKER 2.28.08

SOUTH CAROLINA THOMAS & HUTTON ENGINEERING CO. No. C00285 CERTIFICATE OF AUTHORIZATION

P:\19254\DWG\PERMIT\19254pD2.dwg - Feb 27, 2008 - 1:42:37 PM

THOMAS & HUTTON ENGINEERING CO.
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

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VICINITY MAP

OCRM-08-117-E

PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.
FEBRUARY 14, 2008

KIAWAH RIVER BEND EROSION CONTROL

NOT TO SCALE

SHEET 2 OF 7



THOMAS & HUTTON ENGINEERING CO.
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT, SC 29464
(843)849-0200
SAVANNAH, GA
MYRTLE BEACH, SC

11 of 11

QUAD MAP

OCRM-08-117-E

PROPOSED ACTIVITY:
EROSION CONTROL DEVICE
COUNTY: CHARLESTON
APPLICANT: KIAWAH DEVELOPMENT PARTNERS II, INC.
FEBRUARY 14, 2008

LAT: 32° 35' 12"
LONG: 80° 07' 54"
SOURCE: ROCKVILLE, SC QUADRANGLE MAP

SCALE 1" = 2000'

SHEET 1 OF 7

BOARD:
Paul C. Aughtry, III
Chairman

Edwin H. Cooper, III
Vice Chairman

Steven G. Kisner
Secretary

D H E C

PROMOTE PROTECT PROSPER

C. Earl Hunter, Commissioner

BOARD:
Henry C. Scott

M. David Mitchell, MD

Glenn A. McCall

Coleman F. Buckhouse, MD

Promoting and protecting the health of the public and the environment

S.C. Board of Health and Environmental Control; Telephone (803) 898-3309 Fax: (803) 898-3393

January 14, 2009

U.S. Mail - CERTIFIED – Return Receipt

G. Trenholm Walker, Esquire
Pratt-Thomas/Walker
PO Drawer 22247
Charleston, SC 29403
91 7108 2133 3935 6630 6895

Gedney M. Howe, III, Esquire
PO Box 1034
Charleston, SC 29402
91 7108 2133 3935 6630 6901

Amy E. Armstrong, Esquire
South Carolina Environmental Law Project
PO Box 1380
Pawleys Island, SC 29585
91 7108 2133 3935 6630 6918

Sidi Limehouse
Flowers at Rosebank Farms
4455 Betsy Kerrison Parkway
John's Island, SC 29455
91 7108 2133 3935 6630 6925

John and Lynda Leffler
60 Sunlet Bend, Inlet Cove
Kiaway Island, SC 29455
91 7108 2133 3935 6630 6932

Edward and Harriet Molnar
1354 Dunlin Court
Kiaway Island, SC 29455
91 7108 2133 3935 6630 6949

Joseph and Christie Owens
119 Sheridan Terrace
Ridgewood, NJ 07450
91 7108 2133 3935 6630 6956

Arthur S. Morgenstern
164 Marsh Island Drive
Kiawah Island, SC 29455
91 7108 2133 3935 6630 6963

Willem M. Roosenburg, Co-Director
Diamondback Terrapin Working Group
2883 Dickie Court
Jacksonville, FL 32216
91 7108 2133 3935 6630 6970

Exhibit B

Wendy K. Kulick
38 Marsh Edge Lane
Kiawah Island, SC 29455

91 7108 2133 3935 6630 6987

Jack Berlin
Diamondback Terrapin Advocate
4207 Saltwater Blvd.
Tampa, FL 33615

91 7108 2133 3935 6630 6994

Cynthia L. Mynatt
131 Turnberry
Kiaway Island, SC 29455

91 7108 2133 3935 6630 7007

Morton Matuny
30 Rutledge Avenue
Charleston, SC 29401

91 7108 2133 3935 6746 1012

John H. Moore
114 Surfscoter Lane
Kiawah Island, SC 29455

91 7108 2133 3935 6746 1029

Kay Ethridge
5516 Gorham Drive
Charlotte, NC 28226

91 7108 2133 3935 6746 1036

Diane Lehder
306 Palm Warbler
Kiawah Island, SC 29455

91 7108 2133 3935 6746 1043

Marilyn Blizard
Diamondback Terrapin Advocate
736 B Virginia Rail
Kiawah Island, SC 29455

91 7108 2133 3935 6746 1050

Peter Mugglestone
1651 Roslyn Drive
Columbia, SC 29206

91 7108 2133 3935 6746 1067

Paula R. Feldman
8 Sundown Bend
Kiawah Island, SC 29455

91 7108 2133 3935 6746 1074

Robert J. Feldman
23 Sunlit Bend
Inlet Cove
Kiawah Island, SC 29455

91 7108 2133 3935 6746 1081

Kelly and Gregg Bragg
176 Marsh Island Drive
Kiawah Island, SC 29455

91 7108 2133 3935 6746 1098

John R. Dinkelspiel
Barbara A. Burgess
3131 Marsh Gate Drive
Seabrook Island, SC 29455

91 7108 2133 3935 6746 1104

Diane and Charles Beck
97 Jackstay Court
Kiawah Island, SC 29455

91 7108 2133 3935 6746 1111

Margaret B. Harvin
318 Country Club Drive
Columbia, SC 29206

91 7108 2133 3935 6746 1128

Laura Pulleyn
3029 Edenvale Road
Johns Island, SC 29455

91 7108 2133 3935 6746 1135

Francis Boyd
5 Greensward
Kiawah Island, SC 29455

91 7108 2133 3935 6746 1142

Via Interagency Mail Delivery
Elizabeth A. Dieck, Esquire
SCDHEC – Office of General Counsel
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

RE: **Docket No. 08-RFR-147** – *Request review of staff decision dated December 18, 2008, to issue Permit No. OCRM-08-117-E for the construction of an erosion control structure (revetment) at Beachwalker Park, Kiawah Island, with conditions that modify the application.*

The S.C. Board of Health and Environmental Control decided on January 8, 2009, not to conduct a Final Review Conference on the above-referenced matter.

S.C. Code Section 44-1-60(F), 2006 Act No. 387, Section 48, provides, "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 before the Administrative Law Court, in accordance with the Administrative Procedures Act, within thirty days after the deadline for the final review conference."

A request for a contested case hearing before the Administrative Law Court (ALC) must be filed in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

Clerk's Office
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: http://www.scalc.net. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,

Lisa Lucas Longshore
Clerk

The above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy; parties before the ALC are responsible for complying with all applicable requirements of the Court.

OCG # 20826

I:\Share\LEGAL\ALL\MATTERS\20826 RFR OCRM Kiawah Development Partners II\rcd.doc

JAN 15 2008

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Appellants, vs. Kiawah Development Partners, II, and South Carolina Department of Health and Environmental Control, Respondents.	Docket No. 09-ALC-07-_____-CC **CERTIFICATE OF SERVICE**

I hereby certify that on this date I served Respondents Kiawah Development Partners II, Inc., and DHEC, in addition to parties that filed Requests for Final Review Conference before the DHEC Board, by placing copies of the foregoing Request for Contested Case Hearing in the U.S. Mail addressed to:

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Amy E. Armstrong

Georgetown, South Carolina

January 29, 2009

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KIAWAH DEVELOPMENT PARTNERS, II, Petitioner, vs. SCDHEC OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT, Respondent. SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, Petitioner, vs. SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL AND KIAWAH DEVELOPMENT PARTNERS, II, Respondents.	DOCKET NO. 09-ALJ-07-0029-CC **KIAWAH DEVELOPMENT PARTNERS' MOTION TO OPEN RECORD ON REMAND**

TO: AMY E. ARMSTRONG, ATTORNEY FOR SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, AND BRADLEY D. CHURDAR, ATTORNEY FOR SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIROMENTAL CONTROL- OCEAN AND COASTAL RESOURCE MANAGEMENT

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorneys for Kiawah Development Partners, II, hereby move, pursuant to Rule 19 of the Rules of Procedure of the Administrative Law Court, before the Honorable Ralph King Anderson, III, Chief Judge of the Administrative Law Court, to open the record in these proceedings for the limited purpose of allowing certain additional proof on public benefit in response to the decision of the Supreme

Court of South Carolina in opinion number No. 27065 issued December 10, 2014 (the "Opinion"). In its three-two decision, the majority of the Supreme Court reversed the Amended Final Decision and Order of this Court and remanded these permit proceedings, "for further consideration consistent with this decision."

In holding that this Court committed errors of law, the majority in the Opinion articulated on the legal standards to be employed by this Court in assessing whether the requested permit should be issued under the controlling statutes, regulations, and provisions of the Coastal Zone Management Program ("CZMP"). The majority enunciated the specific standards to be applied where they disagreed with the standard used by this Court.

KDP seeks a fair opportunity to respond to the newly crafted legal standard of the majority opinion with respect to public benefit, and requests that the record be opened to receive additional proof of the public benefit associated with the proposed project.

Rule 46 of the Rules of Procedure for the Administrative Law Court, grants the Court considerable discretion, stating in pertinent part, as follows:

> **Rule 46. Powers of Administrative Law Judge**
>
> Consistent with law, the Administrative Law Judge is authorized to do all things necessary and proper to the performance of the foregoing and to promote justice, fairness, and economy including but not limited to the power to preside at the hearing; administer oaths or affirmations; hear and rule on objections and motions: questions witnesses when appropriate to make a complete record; rule on the admissibility of evidence;...

Although the general rule is that a party cannot submit additional evidence in a case that has been remanded unless the appellate court has given leave to submit that evidence, there is an exception where, as here, an issue has not been finally decided or sufficiently addressed. Brian Thomas Pinson Appellant, 07-ALJ-21-0159-AP, 2008 SC ALJ LEXIS 333, 2008 WL 4659552, at *5 (Sept. 8, 2008) (stating that Ferguson v. Charleston Lincoln/Mercury, Inc., 344 S.C. 502,

510, 544 S.E.2d 285, 289 (Ct. App. 2001) was remanded for a determination by the trial court for an issue which had not been finally decided and Hamm v. S.C. Pub. Serv. Comm'n, 298 S.C. 309, 312, 380 S.E.2d 428, 430 (1989) was remanded for findings of fact where the underlying issue was not previously directly addressed). "In making this determination, the trial court's function of considering the evidence to educate it as to the surrounding circumstances giving rise to the issues raised must be considered." Brian Thomas Pinson Appellant, supra. "The leave to submit additional evidence nevertheless should be tempered by the objective to keep a party from unfairly receiving a 'second bite at the apple.'" Id.

Moreover, reopening the record for evidence responsive to the South Carolina Supreme Court's opinion is proper where, as here, specific instructions regarding the trial court's review on remand were not set forth in its decision.

> A mandate does not generally preclude further proceedings not inconsistent with the mandate; thus, the lower court's actions after the mandate is issued need not be specifically mentioned in the opinion of the appellate court, but only need be consistent with it.
>
> Where the remanding court does not give specific instructions, the trial court on remand is required to examine the appellate court's decision and determine what further proceedings would be proper and consistent with the opinion. Thus, a court on remand may be required to take actions not specified in the mandate, but which are necessary to effectuate the appellate court's decision. . . .
>
> Where a case is remanded without direction or restriction as to the method to be utilized for determining the issues in the case, it is up to the trial court on remand to determine, in its discretion, whether the record before it is sufficient, or whether additional evidence should be taken. Indeed, it has been said that an appellate court may reverse a trial court's refusal to receive new evidence on remand only where the refusal constitutes an abuse of discretion, or the appellate court has expressly called for a new trial or evidentiary hearing. However, it has also been found that parties are entitled to introduce additional evidence, supplement pleadings and expand issues in the trial on remand from a reversed judgment, unless there are specific limitations imposed by the mandate.

5 Am. Jur. 2d Appellate Review § 737. See also Ducworth v. Neely, 319 S.C. 158, 165, 459 S.E.2d 896, 900 (Ct. App. 1995) (Court of Appeals specifically advised that determinations on remand in that case were to be made from reviewing the trial record); Christy v. Christy, 354 S.C. 203, 207, 580 S.E.2d 444, 446 (2003) (Supreme Court permitted the parties in that case, on remand, the option of consenting to have all or some of the issues decided based upon the existing record).

In this case, the South Carolina Supreme Court held that "the ALC did not consider whether and to what extent the public would benefit from the proposed structure as opposed to leaving the tidelands in their natural state." Kiawah Dev. Partners, II v. S. Carolina Dep't of Health & Envtl. Control, 766 S.E.2d 707, 723 (S.C. 2014). The majority of the Supreme Court fashioned a new definition of "public benefit" that had not been pronounced in any earlier decisions:

> When that term ['the people"] is correctly construed, any benefit to Kiawah is irrelevant to whether section 48-39-30(D) is satisfied. ...Reading the provision in the light of the public trust doctrine – the legal bedrock upon which the statute rests – bolsters the conclusion that 'the people' should be construed as the public at large rather than a single developer.

766 S.E.2d 716.

KDP does not seek a second bite at the apple; rather, as stated above, KDP seeks an opportunity to present further proof only as to this particular issue in light of the detailed explanation of the appropriate legal standard by the Supreme Court, since the issue was neither finally decided nor fully addressed.

For the foregoing reasons, KDP requests that this Court provide KDP the opportunity to admit further evidence bearing on the public benefit as now defined by the majority of the Supreme Court. The admission of such evidence promotes justice, fairness and economy.

PRATT-THOMAS WALKER, P.A.

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ATTORNEYS FOR KIAWAH DEVELOPMENT PARTNERS, II

February 3, 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand, or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 3rd day of February, 2015, in Charleston, South Carolina.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Petitioner, vs. South Carolina Department of Health and Environmental Control and Kiawah Development Partners, II, Respondents.	DOCKET NO. 09-ALJ-07-0029-CC (consolidated cases)
Kiawah Development Partners, II Petitioners, vs. South Carolina Department of Health and Environmental Control Respondent.	**DEPARTMENT'S RETURN TO KDP'S MOTION TO OPEN RECORD ON REMAND**

TO: TRENHOLM WALKER AND GEDNEY HOWE, ATTORNEYS FOR KIAWWAH DEVELOPMENT PARTNERS, II

The undersigned, on behalf of the South Carolina Department of Health & Environmental Control, (DHEC, or the "Department") respectfully requests that the Court deny Kiawah Development Partners, II's ("KDP") Motion to Open Record on Remand.

KDP's Motion is based in part on the following statement from the South Carolina Supreme Court's most recent majority opinion in this matter: "the ALC did not consider whether and to what extent the public would benefit from the proposed structure as opposed to leaving the tidelands in their natural state." Kiawah Dev. Partners, II v. S. Carolina Dep't of Health & Envtl. Control, 766 S.E.2d 707, 723 (S.C. 2014). KDP attempts to justify its desire to open the

record by asserting that the Supreme Court has articulated "a new definition of 'public benefit' that had not been pronounced in any earlier decisions." Specifically, opposing counsel cites the following Supreme Court language creating this so-called new definition of "public benefit":

> When that term ['the people"] is correctly construed, any benefit to Kiawah is irrelevant to whether section 48-39-30(D) is satisfied. ...Reading the provision in the light of the public trust doctrine – the legal bedrock upon which the statute rests – bolsters the conclusion that 'the people' should be construed as the public at large rather than a single developer.

Kiawah Dev. Partners, II v. S. Carolina Dep't of Health & Envtl. Control, 766 S.E.2d 707, 716 (S.C. 2014).

Contrary to KDP's assertion that additional evidence is needed in light of this supposedly new definition of "public benefit", the trial transcript reveals that evidence *was* presented to the ALC regarding the scope of the application of "public benefit." Granting KDP's Motion to open the record and present more evidence regarding the meaning of "public benefit" would serve no useful purpose and would in fact give KDP the second bite at the apple that it claims it is not seeking. The following testimony from Bill Eiser was provided to the ALC at trial addressing who was the intended beneficiary under S.C. Code § 48-39-30(D):

> MR. WHITFIELD-CARGILE: Okay. Let's look at 48-39-30(D), and that's to provide -- "the critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter." How did that specific statute come into play in your decision?
>
> MR. EISER: That was relevant, as well.
>
> MR. WHITFIELD-CARGILE: How?
>
> MR. EISER: Well, we're -- I think we know that the property could be enhanced economically if the revetment was constructed, and I think that talks about the "measurable maximum dollar benefits." But it says we're not necessarily supposed to look at combination of permits or development that results in that. We're supposed to

ensure the maximum benefit to the people. And I think the maximum benefit to the people is to try to preserve the Kiawah Spit in as unaltered a state as we can.

(Trial Transcript, page 1341, line 16 thru page 1342, lines 1-15).

Furthermore, when Mr. Leonard Long was asked at trial about the benefits of the revetment, he testified that "it would be a benefit to stop the erosion at a public park that serves 50,000 people a year." (Trial Transcript, page 198, lines 18-20).

While this Court may not have considered the above-referenced evidence persuasive regarding S.C. Code § 48-39-30(D), the evidence was nonetheless presented at trial and reopening the record would serve no beneficial purpose. As opposing counsel rightly quoted, "[t]he leave to submit additional evidence nevertheless should be tempered by the objective to keep a party from unfairly receiving a 'second bite at the apple.'" Brian Thomas Pinson Appellant, 07-ALJ-21-0159-AP, 2008 SC ALJ LEXIS 333, 2008 WL 4659552, at *5 (Sept. 8, 2008).

WHEREFORE, the Department respectfully requests this Court deny KDP's Motion to Open Record on Remand.

Respectfully submitted,

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Charleston, South Carolina
February 13, 2015

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Kiawah Development Partners, II, Petitioner, vs. SCDHEC Office of Ocean and Coastal Resource Management, Respondents.	Docket No. 09-ALC-07-0029-CC Docket No. 09-ALJ-07-0039-CC **COASTAL CONSERVATION LEAGUE'S RESPONSE TO MOTION TO OPEN RECORD ON REMAND**
South Carolina Coastal Conservation League, Petitioner, vs. Kiawah Development Partners, II, and South Carolina Department of Health and Environmental Control, Respondents.	

The Coastal Conservation League ("League") hereby opposes Kiawah Development Partners' motion to open the record on remand. The League seeks denial of this motion because: (1) this Court does not have jurisdiction or authority to consider new evidence, (2) the question of public benefit has been sufficiently addressed and finally decided by the Administrative Law Court and the Supreme Court; and (3) the Supreme Court did not craft a new legal standard that would require additional evidence.

This Court Does Not Have Jurisdiction or Authority to Consider New Evidence

"[A] trial court has no authority to exceed the mandate of the appellate court on remand." S.C. Dep't of Soc. Servs. v. Basnight, 346 S.C. 241, 250–51, 551 S.E.2d 274, 279 (Ct.App.2001) (citing 5 Am.Jur.2d Appellate Review § 784, at 453 (1995)).The mandate of the appellate court is jurisdictional. Id "When we remand a case, the trial court has only the jurisdiction and authority mandated by this court." Prince v. Beaufort Memorial Hosp.,392 S.C. 599, 709 S.E.2d 122 (Ct. App. 2011). Importantly, the reviewing court must provide for the taking of additional evidence on remand. Parker v. S.C. Public Service Commission, 288 S.C. 304, 342 S.E.2d 403 (1986) ("circuit court erred in sustaining the Commission's refusal to limit the scope of the hearing after remand to the evidence previously existing in the record").

In Parker, Duke Energy asserted that the Court's opinion directing the Commission to consider the case on remand meant that they were allow them to introduce additional evidence at a subsequent hearing since it did not establish a record adequate to support the 4% depreciation rate. Id. The Parker Court stated that "[t]he use of the word 'consideration' reveals that we intended the Commission merely to review the evidence which was admitted in the record of the hearing in 1980, not hold a new hearing for the admission of additional evidence." Id. at 307, 405.

Nearly identical to the Court's direction in Parker, here the Court's Opinion directs the ALC to consider the case consistent with its decision enunciating the proper legal standard. KDP II, v. DHEC & SCCCL, 766 S.E.2d 707, 723 (2014). The Court did not direct the ALC to conduct a new hearing to take new evidence on any issue in this appeal. Indeed, if the Court had concluded that new evidence must be heard in able to address the legal issue, it would have

remanded the case expressly for further hearing by the ALC as it has done in other cases. See, e.g., State v. Torrence, 317 S.C. 45, 451 S.E.2d 883 (1994) (remanding for competency hearing and specifically allowing the introduction of testimony and evidence); Bobo v. Marshane Corp., 302 S.C. 86, 88-89, 394 S.E.2d 2, 4 (Ct. App. 1990) (reversing the full workers compensation commission for exceeding its authority in failing to follow directions of the court on remand and going much further to reverse the panel's decision and substitute a new decision with a different result); Parker v. S.C. Public Service Commission, 288 S.C. 304, 342 S.E.2d 403 (1986) (the Public Service Commission could not consider additional evidence where the Supreme Court reversed a judgment and remanded the issues to the Commission for further consideration in accordance with the views in the Supreme Court's opinion unless the Court provided for the taking of additional evidence, which it did not do). It did not do so here, and there is no basis in fact or law for allowing new evidence. Thus, this Court does not have jurisdiction or authority to hear new evidence because there is no mandate from the Supreme Court to do so.

The Question of Public Benefit Has Been Finally Decided and Sufficiently Addressed

"Matters decided by the appellate court cannot be reheard, reconsidered, or relitigated in the trial court, even under the guise of a different form." Ackerman v. McMillan, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct. App. 1996) (citing 5 C.J.S. Appeal and Error § 975(a) (1993)) (holding reversible error in reconsidering an issue addressed by the appellate court on remand). The decision of the appellate court is final as to all questions decided. Id. The issue of "public benefit" has been finally decided and sufficiently addressed by the Supreme Court, as well as by this Court.

This Court heard this contested case matter over the course of five days. The hearing

involved ten witnesses, 1,656 pages of testimony, over 70 exhibits and a record on appeal that is 2,278 pages. Without doubt, this Court conducted a thorough hearing with extensive evidence on the issues raised by the parties.

One of the issues raised by the League at the outset of the case is the public benefit/public interest in the revetment/bulkhead structure. In its Amended Prehearing Statement, dated July 23, 2009, the League identified as an issue: "Will the project violate the State policies of . . . using critical areas in a manner that insures the maximum benefit to the people, but not necessarily a combination of uses that generates measurable maximum dollar benefits, all in violation of S.C. Code Ann. §48-39-30?" See Exhibit A, Amended Prehearing Statement. The League presented substantial evidence from four witnesses regarding the public interest/public benefit in leaving the Kiawah River in its unaltered state, as well as the significant harm to the public from loss of the 2.5 acres of sandy shoreline. See, Hearing Tr. pp. 955-964; 998-1012; 1018-1045; 1233; 1324-1325. KDP had a full and fair opportunity to present evidence to refute the League's contention that covering a half mile of sandy shoreline would provide the maximum benefit to the people of South Carolina. In its Proposed Order, the League identified the legal standard and evidence supporting a conclusion that §48-39-30(D) would be violated because the maximum benefit to the people would be leaving the shoreline in its natural, unaltered state as opposed to covering it with concrete blocks See CCL's Proposed Order, pp. 9-13; 18-20; 28-29; 44. And finally, this Court issued its Amended Order and Decision concluding that the project did not violate §48-39-30(D)'s requirement that the critical areas be used for the maximum benefit of the people. See Amended Final Order and Decision, p. 20-21.

This Court may look to another administrative proceeding that bears relevance here. On

remand from a decision of the Supreme Court, the South Carolina Public Service Commission rejected a request from a telecommunications utility to reopen the record. On reviewing the record, the Commission concluded that there was sufficient evidence to make a fair and reasonable determination on each of the issues on remand. The Commission stated, "[t]o reopen the record in this matter would be neither necessary nor consistent with the public interest. The commission therefore, is of the opinion, and so finds, that the requisite determinations as directed by the courts in this matter should be made in reliance on the existing record in this proceeding." Re S. Bell Tel. & Tel. Co., 25 P.U.R.4th 14 (May 30, 1978) WL 459654 (S.C.P.S.C.)

The Brian Thomas Pinson case cited by KDP involved the ALC's remand of a decision back to the Department of Motor Vehicles. 2008 WL 4659552 (S.C.A.L.J.D. 2008). In that case, Pinson requested a continuance which was denied by the hearing officer. Because the hearing proceeded without Pinson's participation, Pinson presented no evidence. The court concluded that the hearing officer abused her discretion by denying Pinson's continuance request and remanded the matter to the DMVH. This case is nothing like the case in Pinson where the error was abuse of discretion in denying a continuance, thereby preventing a party from presenting any evidence whatsoever. Here, KDP had ample opportunity to, and, in fact, did, present considerable evidence on the issues, including the one that was identified by the League in its Prehearing Statement. The cases cited by the court in Pinson, Fergueson v. Charleston Lincoln/Mercury, Inc., 344 S.C. 502, 544 S.E.2d 285 (Ct. App. 2001) and Hamm v. S.C. Pub. Serv. Comm'n, 298 S.C. 309, 380 S.E.2d 428 (1989) are similarly irrelevant. Both cases involve remand where the underlying issue had not been finally decided. In this case, this Court finally decided the issue of whether the critical area at issue will be used "in a manner that insures the

maximum benefit to the people, but not necessarily a combination of uses that generates measurable maximum dollar benefits" under Section 48-39-30(D).

There is simply no legal basis to accept more evidence in this case where the issue was squarely presented and fully developed both factually and legally.

The December 10, 2014 Opinion Did Not Craft a New Legal Standard

Kiawah Development Partners asserts that the Supreme Court's opinion represents a "newly crafted legal standard . . . with respect to public benefit," requesting the opportunity to provide "additional proof" and "further proof" of the public benefit of the project. (Motion, pp. 2 & 4). KDP's own characterization of the relief sought indicates that it already provided proof of public benefit of the project, but that somehow it should be allowed an opportunity to provide more proof because the Supreme Court rejected the notion that covering 2.5 acres of publicly-accessible sandy shoreline with concrete blocks would benefit the public.

Nothing in the Supreme Court's Opinion suggested that it crafted a new legal standard to establish public benefit. The statute requires that "Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses that will generate measurable maximum dollar benefits." S.C. Code Ann. § 48-39-30(D). This Court did not enunciate an interpretation of that provision, instead it merely concluded that this provision had been met. All the Supreme Court did was to apply the plain language of the statute to the facts of this case in reversing the Amended Final Order and Decision. The Court's conclusion that "the people" means "the public at large rather than a single developer" can hardly be said to create a new standard.

CONCLUSION

Because the Supreme Court did not mandate that the ALC hear additional evidence and did not craft a new legal standard and because the issue of the maximum benefit to the people has already been decided, KDP's motion to hear more evidence on an issue that has been resolved factually and legally should be denied.

Respectfully submitted,

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February 18, 2015

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Kiawah Development Partners, II, Petitioner, vs. SCDHEC Office of Ocean and Coastal Resource Management, Respondents.	Docket No. 09-ALC-07-0029-CC Docket No. 09-ALJ-07-0039-CC **CERTIFICATE OF SERVICE**
South Carolina Coastal Conservation League, Petitioner, vs. Kiawah Development Partners, II, and South Carolina Department of Health and Environmental Control, Respondents.	

I hereby certify that on this date I served the Coastal Conservation League's Response to Motin to Open Record on Kiawah Development Partners II, Inc., and DHEC, by placing copies of the foregoing in the U.S. Mail addressed to:

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Georgetown, SC
February 18, 2015

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

COPY

Kiawah Development Partners, II,. Petitioner, vs. SCDHEC Office of Ocean and Coastal Resource Management, Respondents.	Docket No. 09-ALC-07-0029-CC Docket No. 09-ALJ-07-0039-CC **AMENDED PREHEARING STATEMENT OF SOUTH CAROLINA COASTAL CONSERVATION LEAGUE**
South Carolina Coastal Conservation League, Petitioner, vs. Kiawah Development Partners, II, and South Carolina Department of Health and Environmental Control, Respondents.	**FILED** JUL 27 2009 SC ADMIN. LAW COURT

The Petitioner, South Carolina Coastal Conservation League, submits the following as its Prehearing Statement in this matter:

1. **The nature of this proceeding.**

This proceeding is a contested case appeal of the decision of the South Carolina Department of Health and Environmental Control ("DHEC"), Office of Ocean and Coastal Resource Management, to issue a critical area permit and coastal zone consistency certification to Kiawah Development Partners, II, for the proposed construction of 270' of a bulkhead and revetment system along the banks of the Kiawah River near Captain Sam's Inlet in Charleston County, SC. The South Carolina Coastal Conservation League appeals the issuance of the permit and Kiawah Development Partners, II, appeals the limitation of the permit to 270 feet of bulkhead and revetment instead of the applied-for permit of more than 2700 feet. The appeals have been consolidated for hearing.

Exhibit A

2. **The statutory provision(s) conferring subject matter jurisdiction to the Administrative Law Court (Court) and other applicable statutes and regulations - specific, not general.**

Subject matter jurisdiction: (1) S.C. Administrative Procedures Act, S.C. Code Ann. §§ 1-23-310, 1-23-370, 1-23-600; (2) the S.C. Coastal Zone Management Act, S.C. Code Ann. § 48-39- 150; (3) S.C. Code Ann. § 48-1-10, *et seq.*; and (4) S.C. Code Ann. § 44-1-60 2006 Act No. 387.

Other applicable statutes and regulations: (1) the S.C. Coastal Zone Management Act, S.C. Code Ann. § 48-39-10, *et seq.*, and in particular §§ 48-39-10, 20, 30, 80, 120, 130, 150, 250, 260; (2) the Critical Area Regulations, S.C. Code Ann. Reg. 30-1, *et seq.*, and in particular, R. 30-11.A, B and C; (3) DHEC Regulations for 401 water quality certifications, SC Code Ann. Regs. § R.61-101; (4) the South Carolina Coastal Management Program, and in particular the policies set forth on pages III-69 – III-71, III-73, IV-3, IV-16 & 17, IV-57.

3. **The issues to be presented for determination, including any claims or defenses expected to be raised.**

1. Will the project restrict or limit the public's use of State owned lands and waters in violation of the Public Trust Doctrine?

2. Will the project convert tidelands owned by the State in trust for all of its citizens to an area unusable by the public and in effect turn this State public trust property over to a private development?

3. Will the proposed project have adverse impacts on State owned lands and waters?

4. Will the project violate the State policies of protecting sensitive and fragile areas from inappropriate development; of protecting resources of the coastal zone; of protecting the quality of the coastal environment; and of using critical areas in a manner that insures the maximum benefit to the people, but not necessarily a combination of uses that generates measurable maximum dollar benefits, all in violation of S.C. Code Ann. §48-39-30?

5. Will the proposed project result in a development that will place life and property at risk?

6. Does the proposed project violate the considerations and guidelines for critical area permits in the following respects:

A. Will the project affect the production of any marine life or wildlife, in

particular diamondback terrapins, in the project area?

B. Will the proposed project affect existing public access to tidal and submerged lands, navigable waters and beaches, or other recreational coastal resources?

C. Will the development affect the habitats for rare and endangered species of wildlife?

D. Will the proposed project affect the value and enjoyment of adjacent owners?

E. Will there be long-range, cumulative affects of the project that may result within the context of other possible development and the general character of the area?

F. Have overall plans and designs of the project been submitted together and evaluated as a whole to avoid piecemeal and fragmented evaluation?

G. Will the project have negative impacts on Geographic Areas of Particular Concern (GAPC)?

7. Will the project violate the State's policy of protecting and preserving the beach/dune system for the highest and best use which is protection of life and property by allowing the beach/dune system to act as a buffer from high tides, storm surge, hurricanes, and normal erosion and of preserving existing public access, in violation of S.C. Code Ann. §48-39-260?

8. Will the project violate DHEC's water quality certification regulations, specifically:

A. Will the project adversely impacts waters containing State or Federally recognized rare, threatened or endangered species, which is prohibited by R. 61-101(F)(5)(c)?

B. Is there a lack of feasible alternatives to the proposed project, as required by R. 61-101(F)(5)(b)?

9. Will the proposed violate the policies of the South Carolina Coastal Management Program in the following respects:

A. Would the proposed project alter the fragile and dynamic nature of Captain Sam's Spit?

B. Is Captain Sam's Spit an unstable area, prone to erosion and other hazard risks?

C. Will the project result in negative impacts on adjacent beaches, dunes, coastal waters and wetlands?

D. Will the proposed project restrict or limit the continued public use of a recreational open area?

E. Will the project result in damage to a Geographic Area of Particular Concern?

F. Will the project alter or damage the natural functions of areas identified as critical habitat areas of the Federally endangered Piping Plover?

G. Will the project violate the integrity of the Endangered Species Act?

H. Will the proposed project interfere with existing public access to public trust tidelands?

I. Will the proposed project impede public use of areas below the mean high water line?

10. Are there feasible alternatives to the proposed bulkhead and revetment system?

11. Is there a need for the proposed bulkhead and revetment system?

12. Did the agency properly deny the KDP application because it is inconsistent with the State policies specified in Sections 48-39-20 and 48-39-30 and the ten general considerations set forth in Section 48-39-150 of the Coastal Zone Management Act?

4. A brief summary of the facts to be presented at the hearing.

Kiawah Development Partners II, Inc. ("KDP") has applied for a permit to construct a 2,783' long articulated revetment and bulkhead in public trust tideland areas along the banks of the Kiawah River near Captain Sam's Inlet on Kiawah Island.

KDP is proposing to construct a residential development consisting of 50 houses on the southern tip of Kiawah Island, an area known as Captain Sam's Spit. In order to facilitate development of this area, KDP proposes to construct a revetment and bulkhead on state-owned public trust tidelands. KDP asserts that this revetment and bulkhead is necessary to protect an access corridor for a road to the area it proposes to develop.

Although KDP has announced plans to construct up to 50 houses on the property, KDP has not provided DHEC with specific development plans, nor has it submitted an application for a stormwater permit for the proposed residential development to DHEC/OCRM for review.

The proposed bulkhead and revetment would be constructed along the banks of the Kiawah River in critical area tidelands below the Mean High Water mark. These critical area tidelands are owned by the State of South Carolina and held in trust for the benefit of all of the

people of the state, pursuant to the Public Trust Doctrine.

The Spit also falls entirely within a federally-designated COBRA zone under the Coastal Barrier Resources Act, which prohibits federal flood insurance in these areas in an effort to deter development on unstable, dynamic barrier islands. In 2008, Congressman Henry Brown made an unsuccessful attempt at removing Captain Sam's Spit from its COBRA designation.

Captain Sam's Spit, the site of the proposed development, is pristine and undeveloped. It supports a thriving wildlife community, including designated critical habitat for the federally endangered Piping Plover and nesting grounds for the federally endangered Loggerhead Seaturtle and the rare Diamondback Terrapin. Piping Plovers are a migratory bird species that use Captain Sam's Spit as resting and feeding grounds. Human and animal activities that accompany development decrease the birds' ability to rest and feed. Prominent scientists have been conducting research on the terrapins that inhabit the Kiawah River since 1983 and have documented population declines. The terrapin nests in the dunes along the Kiawah River specifically in the area of the proposed bulkhead/revetment system. The proposed structure would inhibit the terrapin from reaching the dunes and utilizing the dunes for nesting activities, potentially leading to further population declines.

In 1974 a comprehensive, 16 month study of Kiawah Island and its resources was conducted by a group of prominent scientists. That study, entitled Environmental Inventory of Kiawah Island, contains a section devoted to Geology and Coastal Processes. In that section the scientists reviewed historical changes in Captain Sam's Inlet dating back to 1661. They found that the Captain Sam's Spit had been completely eroded and redeposited at least twice in the last 200 years. They concluded that due to its instability and susceptible to erosion and storm damage it would be very unwise to develop Captain Sam's Spit.

The Spit is located in an inlet erosion zone, which is the most dangerous place for development. When severe storms or hurricanes hit coastal South Carolina, the portion of the barrier island that is within the inlet erosion zone, or within 300 meters of an inlet, is extremely vulnerable to flood damage because of its proximity to the inlet that carries storm waters. Residential development on the Spit will inevitably be subject to severe storms and/or hurricanes that could cause significant damage to life and property. When homes, vehicles, docks and other improvements are strewn about public trust waters, tidelands, and marshes, the developer would not be responsible for any losses or damage because the lots will have been sold to ill-informed purchasers. Instead, the citizens of South Carolina will be financially responsible for the resulting clean up.

Yet it is the very citizens of the State that will suffer a loss if the bulkhead/revetment is constructed. The Spit and Inlet are used for recreational purposes by the public, including members of the Coastal Conservation League. League members and the public use the Kiawah River and lands below the mean high water mark for boating, kayaking, fishing, viewing wildlife and other recreational activities.

Public trust tidelands are owned by the state but pursuant to the public trust doctrine are held in trust by the State for the benefit of the citizens of the State. Under the public trust doctrine, the State has a duty to protect this area for the benefit of all of the people of the State. Accordingly, both the State and its citizens have significant property rights in this area. The proposed bulkhead/revetment system would take over a half mile of public trust tidelands and convert it to private use to facilitate private development. The hardened structure, in addition to having negative impacts upon wildlife, would limit or restrict use of this publicly-owned property.

Both the SC Department of Natural Resources and the US Fish & Wildlife Service recommended denial of the permit because of pristine, undeveloped nature of the spit and potential damage that could result if it were developed.

On December 18, 2008, the DHEC staff issued notice that it was authorizing the construction of 270' of bulkhead and articulated concrete block revetment along the northeastern end of the proposed project area. The proposed bulkhead/revetment would be along the southwest portion of the parking lot at Beachwalker Park, the current public-access area at Kiawah. Staff denied the remainder of the structure.

The banks of the River in the area of the permitted structure on Beachwalker Park contain vegetation, which indicates that there is no current, active erosion occurring at the Park. At best, the structure would protect ten parking spaces that could be moved to another location on the Park property and is therefore not necessary.

5. **The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citations.**

The Petitioner requests that the Court reverse the agency decision to issue a permit and certification to Kiawah Development Partners, II.

The law which supports reversal is as follows:

-the project would violate the Public Trust Doctrine, *McQueen v. South Carolina Coastal Council*, 354 S.C. 142, 580 S.E.2d 116 (2003). "[N]ot only does the State hold title to this land in jus privatum, it holds it in jus publicum, in trust for the benefit of all the citizens of this State." *Id.* at 149, 119. *See also, Sierra Club v. Kiawah Resort Associates*, 318 S.C. 119, 456 S.E.2d 397 (1995).

-the project as proposed would violate the State policies of protecting sensitive and fragile areas from inappropriate development; of protecting resources of the coastal zone; of protecting the quality of the coastal environment; and of using critical areas in a manner that insures the maximum benefit to the people of South Carolina, but not necessarily a combination

of uses that generates measurable maximum dollar benefits. S.C. Code Ann. §48-39-30.

-the project as proposed would violate the State's policy of protecting and preserving the beach/dune system for the highest and best use which is protection of life and property by allowing the beach/dune system to act as a buffer from high tides, storm surge, hurricanes, and normal erosion and of preserving existing public access. S.C. Code Ann. §48-39-260.

-the project would violate S.C. Code Ann. Regs. 30-12.B, which requires consideration of the impacts on production of marine life or wildlife or other natural resources; the impacts on existing public access to tidal and submerged lands, navigable waters and beaches, or other recreational resources; the extent to which the project could affect habitats for rare and endangered species; and the extent to which the project could affect the value and enjoyment of adjacent owners.

-the project as proposed would violate S.C. Code Ann. Regs. 30-12.C because it would have negative long-range and cumulative effects on marine life, wildlife habitat, and public use of a public trust tideland, particularly when considered within the context of other possible development and the general character of the area; because the KDP project and proposed development have not been presented in totality but instead this application has been submitted in a piecemeal manner, preventing comprehensive evaluation; and because it would have negative impacts on a Geographic Area of Particular Concern (GAPC).

-the project as proposed would violate S.C. Code Ann. Regs. 61-101(F)(5) because it will adversely impacts waters containing State or Federally recognized rare, threatened or endangered species, and because there are feasible alternatives to the proposed project.

-the project will result in negative impacts on adjacent beaches, dunes, coastal waters and wetlands; it will restrict or limit the continued public use of a recreational open area and interfere with public access to a public trust tideland area; it will damage a GAPC; it will alter or damage the natural functions of areas identified as critical habitat areas of the Federally endangered Piping Plover; and it will impede public use of areas below the mean high water line, which are inconsistent with Coastal Management Program policies at III-69 – III-71, III-73, IV-3, IV-16 – IV-17, and IV-57.

- the project is inconsistent with the state policies set forth in the Coastal Zone Management Act, S.C. Code Ann. § 48-39-30, § 48-39-80, § 48-39-260.

6. **A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion.**

No motions are expected at this time.

7. **A list of proposed witnesses and exhibits.**

Witnesses:

Bill Eiser

Rob Young

Jeff Mollenhauer

John Mark Dean

Greg VanDerwerker

Sophia McAllister

Barbara Winslow

Sidi Limehouse

Heather Preston

Josh Martin

Michael Dorcas

All witnesses listed by all other parties

Petitioner will supplement this list as additional witnesses are identified

Exhibits:

All documents appearing in DHEC/OCRM files related to this critical area permit

Maps and photographs of the subject property and surrounding area

Environmental Inventory of Kiawah Island

All exhibits listed by any other party

Petitioner will supplement this list as additional exhibits are identified

8. **A statement regarding the necessity for discovery, if any.**

This is a relatively complex case that requires extensive discovery. Seven depositions have been taken already and at least four more depositions are being scheduled.

9. **Whether the party deems it necessary by the undersigned Judge to conduct a Pre-Hearing Scheduling Conference or issue an order regarding motions, discovery, etc.**

Petitioner does not believe it is necessary to conduct a scheduling conference or issue and order regarding motions and discovery at this time.

10. **The estimated time required for the hearing.**

Four to five days.

11. **Any dates in the next ninety (90) days when you will not be available for a hearing.**

The hearing date has been set for the week of August 24, 2009. All witnesses identified by the Coastal Conservation League as of this date are available to testify the week of August 24, 2009.

Respectfully submitted,

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Georgetown, South Carolina

July 23, 2009

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Petitioner, vs. South Carolina Department of Health and Environmental Control and Kiawah Development Partners, II, Respondents.	DOCKET NO. 09-ALJ-07-0029-CC (consolidated cases)
Kiawah Development Partners, II Petitioners, vs. South Carolina Department of Health and Environmental Control Respondent.	DHEC'S BRIEF ON SCOPE OF CONSIDERATION ON REMAND

On December 10, 2014 the Supreme Court issued its opinion in the above-referenced matter (Kiawah Development Partners, II v. South Carolina Dept. of Health and Environmental Control, et al., 411 S.C. 16, 766 S.E.2d 707 (2014)). The Supreme Court reversed the Administrative Law Court's (ALC) Final Order and remanded the matter back to this Court for further consideration consistent with that decision. This Court asked counsel for the parties to brief the Court regarding the scope of that consideration by the ALC.[1]

The Supreme Court's opinion raises the following four issues regarding the scope of consideration on remand:

[1] Given the exhaustive briefing that all counsel have previously provided to this Court, DHEC's counsel did not understand this Court's February 4th status conference instructions to include a factual and procedural history of this permitting decision and subsequent litigation as part of the requested Briefs. If that understanding is incorrect, DHEC's counsel will amend this Brief to include such a factual and procedural history.

(1) The Supreme Court determined that this Court erred as a matter of law in finding the bulkhead and revetment authorized by the ALC satisfy the public benefit requirement of S.C. Code Ann. § 48-39-30(D). With this finding of error, the only remaining issue for the ALC to possibly consider on remand is whether the Supreme Court's ruling on the absence of any public benefit might also apply to the originally-permitted 270' revetment.

(2) The Supreme Court determined that the ALC erred in failing to defer to DHEC's interpretation of S.C. Code Ann. Regs. 30-11 requiring consideration of upland impacts within the larger coastal zone.[2] Furthermore, the Supreme Court affirmed the "uncontroverted evidence"[3] that KDP intends to "transform[] [the upland area of the spit] from a completely natural area into a residential development"[4] following the construction of the proposed bulkhead and revetment. Accordingly, there is nothing further for this Court to consider on remand regarding S.C. Code Ann. Regs. 30-11.

(3) Regs. 30-12C prohibits bulkheads and revetments where public access is adversely affected unless upland is being lost due to tidally induced erosion *and* no feasible alternative exists.[5] The Supreme Court concluded that the ALC's order "essentially acknowledges that public access would be adversely affected by the proposed bulkhead and revetment."[6] Consequently, there is nothing further for this Court to consider on remand regarding *public access* under Regs. 30-12C.

(4) Because the Supreme Court determined that the ALC erred in failing to consider a "no action alternative" in its Regs. 30-12C(1)(d) feasible alternatives analysis, this Court could consider a "no action alternative" on remand. However, since the portion of the bulkhead and revetment authorized by the ALC was denied on other grounds, a "no action alternative" analysis would be moot.

The Extent of the Applicability of the Supreme Court's Public Benefit Analysis

The Supreme Court stated that "in determining whether to grant or deny a permit to alter the critical area, DHEC must find the project complies with the policies set forth in sections 48–39–20 and 48–39–30, as well as with ten 'general considerations' set forth in section 48–39–150." (Emphasis added). Kiawah, 411 S.C. at 24, 766 S.E.2d at 715. The Court found that "the ALC erred as a matter of law in finding the proposed bulkhead and revetment comply with the

[2] Id. at 717.
[3] Id. at 721.
[4] Id. at 721.
[5] Id. at 721.
[6] Id. at 720.

requirements of the CZMA." Id. Specifically, S.C. Code Ann. § 48-39-30(D) provides that "[c]ritical areas shall be used to provide the combination of uses which will insure [sic] the maximum benefit to the people ..." (Emphasis added). But in this case, the Supreme Court found that the ALC misinterpreted the term "the people" in S.C. Code Ann. § 48-39-30(D)

> "because it failed to identify any benefit flowing to the public at large,[7] instead stating only that 'elimination of [the] erosion will further provide an economic benefit to [Kiawah].' Kiawah is not synonymous with 'the people.' When that term is correctly construed, any benefit to Kiawah is irrelevant to whether section 48–39–30(D) is satisfied. 'The people,' as used here, is a term meaning the citizens of a particular jurisdiction." (Emphasis added). Id. at 716.

In determining the scope of consideration on remand, the Supreme Court affirmed that a critical area project *must* comply with S.C. Code Ann. § 48-39-30(D). Id. at 715. When a statute such as this contains the term "shall", the action referenced in the statute is "mandatory". Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003) (citing Montgomery v. Keziah, 277 S.C. 84, 282 S.E.2d 853 (1981)). The Supreme Court affirmed that compliance with the "maximum benefit to the people" requirement found in S.C. Code Ann. § 48-39-30(D) *must* be satisfied before an activity in the critical area can be permitted. The Court said "[t]o allow the benefits to a private developer to override the interests of the people of South Carolina undermines the statute and defeats the very purpose of the public trust doctrine. Thus, only those benefits which inure to the public as a whole may satisfy section 48-39-30(D)."[8]

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[7] It is worth mentioning that the reason this Court "failed to identify any benefit flowing to the public at large" is because (with the notable exception of the obvious public benefit in protecting the Beachwalker County Park parking lot), KDP presented no evidence of benefit to "the people" as required by S.C. Code Ann. § 48-39-30(D). It is also worth reiterating the point made in DHEC's *Return to KDP's Motion to Open the Record* that this lack of "public benefit" evidence does not give KDP a second bite at the apple nor does it justify reopening the record on remand.

[8] S.C. Code Ann. Regs. 30-1.D(44) defines "public interest" as follows: "As used within these Rules and Regulations, 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. To the extent that, in the opinion of the Department, the value of such public benefits is greater than the public costs embodied in adverse

Kiawah, 411 S.C. at 24, 766 S.E.2d at 716. Accordingly, because the Supreme Court found that the proposed bulkhead and revetment authorized by the ALC fails to satisfy this requirement, there is nothing further for this Court to consider on remand regarding the portion of the proposed bulkhead and revetment authorized by the ALC.

However, because the South Carolina Coastal Conservation League opposes the permit issued for the 270' bulkhead and revetment, this Court could possibly consider on remand whether the Supreme Court's section 48-39-30(D) analysis also applies to that portion of the structure permitted by DHEC. In determining whether the permitted structure satisfies the "maximum benefit to the people" requirement, it is important to note that the permitted portion of the structure is fundamentally different from the unpermitted portion in one important regard. Specifically, the permitted portion of the bulkhead and revetment actually *does* benefit the public, because it is adjacent to and will help protect the Beachwalker County Park parking lot from damage caused by erosion along the Kiawah River.[9] When Mr. Leonard Long was asked at trial about the benefits of the revetment, he testified that "it would be a benefit to stop the erosion at a public park that serves 50,000 people a year."[10] (Trial Transcript, page 198, lines 18-20). It is axiomatic that protecting the Beachwalker County Park parking lot is plainly a "benefit

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environmental, economic and fiscal effects, a proposed project may be credited with net public benefits. (Emphasis added).

[9] At trial, Mr. Bill Eiser testified that "[p]ortions of the area where the revetment will be located were obviously eroding, to me, particularly the area adjacent to Beachwalker Park, the parking lot there ... I think there's a significant erosion problem that's jeopardizing the park infrastructure." (Trial Transcript, page 1234, lines 17-23). Furthermore, Dr. Tim Kana testified that "[t]he worst erosion along Beachwalker Park at present is along the parking lot ..." (Trial Transcript, page 753, lines 5-6).

[10] Mr. Leonard Long further testified that the Charleston County Parks and Recreation Commission (PRC) entered into a 99 year lease with KRA for the property where Beachwalker County Park is located and he stated at trial that there was 60 to 65 years remaining on the life of the lease. (Trial Transcript, page 91, lines 11-15).

flowing to the public at large" and not merely an economic benefit to KDP.[11] Id. at 716. With such an obvious public benefit, common sense compels the conclusion that the Supreme Court was *not* referring to the permitted 270' bulkhead and revetment when it stated that "only the developer, not the *public,* would benefit from the construction of this enormous bulkhead and revetment." (Emphasis in original text). Id. at 716. Nevertheless, as previously stated, this question about the applicability of the "maximum benefit to the people" requirement to the 270' permitted portion of the bulkhead and revetment is the only remaining issue for the ALC to possibly consider on remand.

S.C. Code Ann. Regs. 30-11

In determining whether to grant a permit for alteration of a critical area, S.C. Code Ann. Regs. 30-11 requires DHEC to consider "[t]he extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area." DHEC interpreted this regulation as requiring it to deny the permit as requested due to the project's impacts on upland areas within the larger coastal zone. The Supreme Court affirmed the "soundness" of DHEC's regulatory interpretation by stating that the Department "cannot be expected to protect the coastal zone as instructed by the General Assembly if it cannot consider how projects within the critical area may affect the broader coastal zone." Id. at 719. The Supreme Court determined that the ALC erred in failing to defer to DHEC's interpretation of S.C. Code Ann. Regs. 30-11 regarding this issue of upland impacts within the

[11] At trial, the Coastal Conservation League called Mr. Tom O'Rourke, Executive Director of the Charleston County PRC to testify about his discussions with KDP about relocating Beachwalker County Park. (Trial Transcript, pages 1122-23). While Mr. O'Rourke testified that he "hoped" there will be further discussions between KDP and PRC about relocating Beachwalker County Park, at this point counsel for DHEC is unaware of any information that the park is actually moving locations or that the lease agreement related to the park has been dissolved. (Trial Transcript, pages 1128, lines 3-6). Accordingly, the park continues to remain a "benefit flowing to the public at large."

larger coastal zone. Because the Supreme Court found that the evidence was uncontrovertible[12] that KDP intends to "transform[] [the upland area of the spit] from a completely natural area into a residential development"[13] following the construction of the proposed bulkhead and revetment, there is nothing further for this Court to consider on remand regarding S.C. Code Ann. Regs. 30-11.

S.C. Code Ann. Regs. 30-12C(1)(d) – Public Access

The public access requirements of regulation 30–12C(1)(d) provide that "[b]ulkheads and revetments will be prohibited where public access is adversely affected unless no feasible alternative exists." In this case, the ALC found that "public access to the riverbank at low tide may be affected on a very limited basis" and "the [articulated concrete block] mat degrades the public uses of the shoreline where the mat is approved." Kiawah, 411 S.C. at 28, 766 S.E.2d at 720 (quoting from this Court's Final Order). The ALC found any adverse effect on public access caused by the proposed bulkhead and revetment would be so insignificant it would not implicate the requirements of regulation 30–12C.

The Supreme Court concluded that the ALC's order "essentially acknowledges that public access would be adversely affected by the proposed bulkhead and revetment,"[14] thus implicating the Regs. 30-12C prohibition. The Supreme Court found that the ALC erred in inserting a substantiality requirement into the regulation. Id. at 720. "With the exception of a *de minimis* effect which cannot be argued here, the regulation is implicated whenever a proposed bulkhead or revetment would have an adverse effect on public access." Id. at 720.

Accordingly, since the Supreme Court affirmed this Court's finding that public access would be adversely affected by the proposed bulkhead and revetment and the Supreme Court

[12] Id. at 721.
[13] Id. at 721.
[14] Id. at 720.

further found that this implicates the regulatory prohibition, there is nothing further for this Court to consider on remand regarding *public access* under S.C. Code Ann. Regs. 30-12C(1)(d).

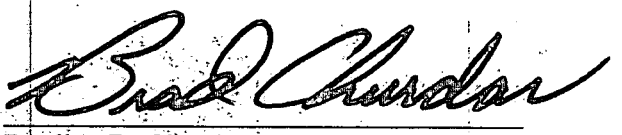
S.C. Code Ann. Regs. 30-12C(1)(d) – Feasible Alternatives

"Feasible alternatives" is specifically defined in the CZMA to include "a 'no action' alternative." S.C. Code Ann. Regs. 30-1(D)(23). In this instance, this Court "only consider[ed] alternatives that would stop the natural erosion process" and did not consider a "no action" alternative. Id. at 723. The Supreme Court determined that this Court's failure to consider a "no action alternative" was error. Accordingly, on remand this Court could consider a "no action alternative." However, since the portion of the bulkhead and revetment authorized by the ALC was denied on other grounds, a "no action alternative" analysis would be moot.

Conclusion

WHEREFORE, for the foregoing reasons, DHEC asserts that the only remaining issue for the ALC to possibly consider on remand is whether the Supreme Court's ruling on the absence of any public benefit should also apply to the originally-permitted 270' revetment.

Respectfully submitted,



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Charleston, South Carolina
February 27, 2015

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KIAWAH DEVELOPMENT PARTNERS, II, Petitioner, vs. SCDHEC OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT, Respondent.	DOCKET NO. 09-ALJ-07-0029-CC **KIAWAH DEVELOPMENT PARTNERS II'S MEMORANDUM ON SCOPE OF CONSIDERATION ON REMAND**
SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, Petitioner, vs. SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL AND KIAWAH DEVELOPMENT PARTNERS, II, Respondents.	

Kiawah Development Partners II ("KDP") submits this memorandum in response to this Court's request at the status conference on February 4, 2015, for the parties to submit briefs on their respective interpretations of the decision of the Supreme Court of South Carolina[1] as to what this Court is to address and decide on remand -- what did the majority of the Supreme Court mean in reversing and remanding "for further consideration consistent with this decision"?

[1] Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 766 S.E.2d 707 (2014).

I. The Supreme Court intended for this Court to consider the legal principles stated by the majority and apply them to the evidence.

The Supreme Court intended for this Court to take action on remand. As this Court commented at the status conference, the Supreme Court would not have remanded for further consideration if this Court was not to consider anything. Nor would the Supreme Court have remanded for further consideration if the Supreme Court was instructing this Court to deny the requested permit.

The Supreme Court could have reversed outright and not remanded (or remanded for entry of judgment) if it concluded that there was no substantial evidence in the record to support the issuance of the requested permit. The Court did not do that. Instead, as further explained below, the Supreme Court held that this Court committed specific errors of law requiring its reconsideration of the evidence in light of the legal principles the Supreme Court has instructed be applied.

II. Matters to be Considered Upon Remand

The majority of the Supreme Court based its reversal on their determination this Court committed errors of law in (1) its interpretation and application of the policies of the Coastal Zone Management Act ("CZMA") set forth in Sections 48-39-20 and 48-39-30 S.C. Code as required by S.C. Code § 48-39-150, (2) its interpretation and application of Reg. 30-11(C)(1), and (3) its interpretation and application of Reg. 30-12(C). The majority of the Supreme Court did not take issue with the other findings and conclusions of this Court in its Amended Final Order and Decree.

For this reason, KDP submits this Court's further consideration and decision on remand should extend only to those portions of this Court's prior determinations where the Supreme Court found legal error. This Court's consideration would be further limited to the specific

provisions of the statute or regulation where the Supreme Court found this Court's analysis to be deficient.

A. Section 48-39-150

S.C. Code § 48-39-150 (A) sets forth ten project specific considerations applicable to the department's review of every permit application. Along with these ten criteria, the introductory sentence to Section 48-39-150(A) adds that "[I]n determining whether a permit application is approved or denied the Department shall base its determination on the individual merits of each application, [and] the policies specified in Sections 48-39-20 and 48-39-30. . . ." Section 48-39-150(B) repeats that a permit cannot be issued if the application is "contrary to the policies specified in this chapter. . . ." These policies inform the application of the ten considerations but do not override or eliminate these specific criteria.

In particular, the Supreme Court ruled this Court erred in its interpretation of Section 48-39-30(D)'s public benefit requirement and in its determination that it could be satisfied solely by finding benefit to the applicant rather than the "public at large." 766 S.E.2d 716. Although in the text of its opinion the Supreme Court stated that "any benefit to Kiawah is irrelevant to whether § 48-39-30(D) is satisfied" (Ibid), the Supreme Court clarified what it meant in footnote 5:

> 5. Contrary to the dissent's characterization, we do not exclude the developer from being included in "the people." Rather, our point is that the ALC erred in considering only the benefits to the developer to the exclusion of the public as a whole.

766 S.E.2d 716.

"While § 48-39-30(D), as applied through § 48-39-150, explicitly requires that tidelands be used in a way that provides maximum public benefit, the ALC made no findings of any public benefit that would result from the bulkhead and revetment." 766 S.E.2d 716. "[T]he ALC did not consider whether and to what extent the public would benefit from the proposed structure as

opposed to leaving the tidelands in their natural state." 766 S.E.2d 723. As these excerpts instruct, the task of this Court on remand is to review the evidence and make new findings under the clarified standard as to whether the bulkhead-revetment provides the type of public benefit necessary to satisfy the general policy pronouncement set forth in § 48-39-30(D).

An example of the public benefit exclusive of any direct benefit to KDP, includes the protection of Beachwalker Park, a widely used public facility that provides the only public access to the beaches of Kiawah Island. The ongoing erosion is causing significant damage to Beachwalker Park's parking area. Another example of public benefit would be the developer's conservation easement over the remainder of Captain Sams (over 100 acres of highland) not part of the limited residential development, which will protect it in perpetuity in a natural state, in return for being allowed to pursue the limited development.

On February 2, 2015, KDP filed its motion to open the record to allow further proof of public benefit. As set forth in the motion, the Supreme Court had never before espoused that §48-39-30(D) requires maximum benefit to the public at large. Based on this clarified, new standard, KDP submits that fairness and justice would be served by allowing further proof on public benefit, as requested in its motion.

B. Regulation 30-11

The majority of the Supreme Court determined that this Court committed legal error in holding that Reg. 30-11(C)(1) does not authorize the department to consider the effects of a project outside the critical area when acting on a permit for activity in the critical area.

Reg. 30-11(C)(1) provides as follows:

> C. Further Guidelines: In the fulfilling of its responsibility under Section 48-39-150, the department must in part base its decisions regarding permit applications on the policies specified in §§ 48-39-40 and 48-39-30 and thus, be guided by the following:

> (1) the extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area.

Reg. 30-11(C)(1).

The Supreme Court held that the wording of the regulation was ambiguous and, accordingly, that this Court should have given deference to the department's interpretation and construction of this regulation to include areas outside the critical area. The Supreme Court found that DEHC's interpretation was "neither arbitrary, capricious, nor manifestly contrary to the statute." 766 S.E.2d 719. The Supreme Court went on to clarify the import of its ruling. "Reg. 30-11 does not give DHEC any power to prohibit upland development; rather, DHEC only has the power to grant or deny a permit for a project in the critical area, and that decision may be based in part on the upland impacts that would result from the project." 766 S.E.2d 719.

With respect to this consideration under Reg. 30-11(C)(1), the Supreme Court also held that the evidence plainly contradicted this Court's finding that there would be **no** upland impacts flowing from the construction of the revetment and bulkhead. The Supreme Court found the intended residential development of the Captain Sams following the installation of the bulkhead-revetment was proof of upland impacts associated with the construction of the bulkhead-revetment. The Supreme Court held that this Court's finding that the development would be sensitively planned did not "obviate" the error that there would be no impacts at all on the upland.

Based on the Supreme Court's holdings, KDP submits that on remand this Court is to re-apply Reg 30-11(C)(1) and consider the long-range, cumulative effect to the upland along with the long-range, cumulative effect to the critical area.

C. Regulation 30-12(C)(1)

Regulation 30-12(C)(1) sets forth the project-specific standards for bulkheads and revetments. The Supreme Court found that this Court incorrectly applied subparts (c) and (d):

> (c) Bulkheads and revetments will be prohibited where marshlands are adequately serving as an erosion buffer, where adjacent property could be detrimentally affected by erosion or sedimentation, or 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.

30-12(C)(1)(c) and (d).

The Supreme Court concluded that this Court committed legal error in interpreting these two subsections to require that the adverse effect on public access must be *substantial* to trigger the requirement that no feasible alternative exists. Reg. 30-12(C)(1)(d). Rather, the Supreme Court directed that Regulation 30-12(C)(1) "...balances the need for public access against the need for a bulkhead and revetment...by providing that a bulkhead or revetment that affects public access may still be permitted where upland is being lost due to tidally induced erosion and no feasible alternative exists." 766 S.E.2d 721-722.

The Supreme Court then found two legal errors in this Court's assessment of whether there was no feasible alternative. First, the Supreme Court stated that the Court's consideration of feasible alternatives should include the possibility of taking no action and allowing the natural erosion cycle to continue. 766 S.E.2d 723. The Supreme Court said that this alternative "should not be given short shrift but rather must be given serious consideration." 766 S.E.2d 723. Next, the Supreme Court held that this Court "erroneously placed the burden on DHEC and the League to show there were no feasible alternatives." 766 S.E.2d 723.

Thus, as to Reg. 30-12(C), this Court should determine on remand whether KDP carried its burden of proof to establish there is no feasible alternative to the bulkhead-revetment.

III. **Further Proceedings**

Once the Court has satisfied itself as to the scope of its reconsideration of the evidence on remand, KDP is prepared to present argument and a proposed order on the limited range of issues if the Court determines they will be helpful. KDP will demonstrate that the evidence establishes (1) the considerable public benefit from the proposed structure, (2) the absence of any significant negative impacts from the upland development that is vested under the development agreement with the Town of Kiawah Island, and (3) there is no feasible alternative to the bulkhead-revetment.

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ATTORNEYS FOR KIAWAH DEVELOPMENT PARTNERS, II

February 27, 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand, or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 27 day of February, 2015, in Charleston, South Carolina.

Yvette J. Epps

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Kiawah Development Partners, II, Petitioner, vs. SCDHEC Office of Ocean and Coastal Resource Management, Respondents.	Docket No. 09-ALC-07-0029-CC Docket No. 09-ALJ-07-0039-CC **SOUTH CAROLINA COASTAL CONSERVATION LEAGUE'S BRIEF ON SCOPE OF REVIEW ON REMAND**
South Carolina Coastal Conservation League, Petitioner, vs. Kiawah Development Partners, II, and South Carolina Department of Health and Environmental Control, Respondents.	

TO: ADMINISTRATIVE LAW JUDGE RALPH KING ANDERSON, III

The South Carolina Coastal Conservation League ("League") submits the following brief on scope of review on remand in response to the Court's request to elucidate any elements of the case that might have been unanswered in the Supreme Court's Opinion and might need to be addressed on remand. In essence, the extent, tone, and finality of the Opinion limit this Court's review to a determination of the appropriate remedy given the competing challenges to the

Department's permitting decision at issue.[1] The League asserts that the Supreme Court has left this Court the authority on remand to address only the issue of whether KDP should be allowed to construct the 270 feet of seawall authorized by the permit which DHEC issued.

I. This Court is Bound on the Merits to the Supreme Court's Findings Based on the Existing Record

As discussed in the League's response to KDP's motion to open the record, this Court's consideration of that single issue is confined to the existing record without authority to consider new evidence. "When we remand a case, the trial court has only the jurisdiction and authority mandated by this court." Prince v. Beaufort Memorial Hosp.,392 S.C. 599, 709 S.E.2d 122 (Ct. App. 2011). The mandate of the appellate court is jurisdictional. S.C. Dep't of Soc. Servs. v. Basnight, 346 S.C. 241, 250–51, 551 S.E.2d 274, 279 (Ct.App.2001) (citing 5 Am.Jur.2d Appellate Review § 784, at 453 (1995)). Importantly, the reviewing court must expressly provide for the taking of additional evidence on remand. Parker v. S.C. Public Service Commission, 288 S.C. 304, 342 S.E.2d 403 (1986) (explaining that the "use of the word 'consideration' reveals that we intended the Commission merely to review the evidence which was admitted in the record of the hearing in 1980, not hold a new hearing for the admission of additional evidence.") The Supreme Court here did not do so.

Similar to the decision in Parker, the Supreme Court's Opinion in this case reversed this Court and remanded "for further consideration consistent with this decision." KDP II, v. DHEC

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[1]The League challenged DHEC's authorization of 270 feet of revetment/bulkhead while KDP challenged DHEC's denial of 2,513 feet of revetment/bulkhead. The Supreme Court's Opinion was decisive on the question of whether there is any public benefit to constructing this "enormous" structure on the banks of the Kiawah River; however, the Court did not specifically affirm or deny the DHEC permit.

& SCCCL, 766 S.E.2d 707, 723 (2014). When an appellate court remands a case, the lower court must implement both the letter and spirit of the mandate, and this rule applies with equal authority and weight to administrative agencies. Scott v. Mason Coal Co., 289 F.3d 263 (4th Cir. 2002); 18 Charles Alan Wright et al., Federal Practice and Procedure § 4478, at 794 (1981). Indeed, the holdings of the appellate court's opinion become the law of the case and cannot be altered on remand. Ables v. Gladden, 378 S.C. 558, 664 S.E.2d 442 (2008); Prince v. Beaufort Mem'l Hosp., 392 S.C. 599, 709 S.E.2d 122 (Ct. App. 2011); Ackerman v. McMillan, 324 S.C. 440, 477 S.E.2d 267 (Ct. App. 1996) (holding reversible error in reconsidering an issue addressed by the appellate court on remand). The decision of the appellate court is final as to all questions decided. Id.; see also Bobo v. Marshane Corp., 302 S.C. 86, 88-89, 394 S.E.2d 2, 4 (Ct. App. 1990) (reversing the full workers compensation commission for exceeding its authority in failing to follow directions of the court on remand and going much further to reverse the panel's decision and substitute a new decision with a different result). The Supreme Court's holdings could hardly be more clear about the ultimate result upon remand.

II. The Supreme Court's Holding that KDP's Project Fails to Meet the Threshold Statutory Requirement of Section 48-39-30(D) is Controlling

Altering tidelands is the exception to the rule of prohibition rooted in the Coastal Zone Management Act. KDP II v. SCDHEC & SCCCL, 766 S.E.2d 707, 715 (2014). "In determining whether a permit application is approved or denied the department shall base its determination on the individual merits of each application, the policies specified in Sections 48-39-20 and 48-39-30 and be guided by the . . . general considerations." S.C. Code Ann. § 48-39-150. Thus, the threshold question in coastal environmental permitting cases is whether a project complies with

the State's policies as expressed in Sections 48-39-20 and 48-39-30 of the Coastal Zone Management Act. Before DHEC or this Court can even consider whether specific regulations have been met, a determination must be made as to whether the project is consistent with those State policies. Indeed, the Court specifically held that "in determining whether to grant or deny a permit to alter the critical area, DHEC must find the project complies with the policies set forth in sections 48-39-20 and 48-39-30." Id.

Examining the threshold question of whether the project complies with those State policies specifically implicates section 48-39-30(D). That policy requires that **"critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people,** but not necessarily a combination of uses which will generate maximum measurable dollar benefits." S.C. Code Ann. § 48-39-30(D) (emphasis added). The word "shall" is mandatory; thus, if a proposed use of a critical area will not provide a combination of uses that will insure the maximum benefit to "the people"[2] then the proposed use violates this policy. In this case, the Court held that "it was clear that only the developer, not the *public*, would benefit from the construction of this enormous bulkhead and revetment." KDP at 716. The Supreme Court rejected this Court's finding that public benefit could be satisfied through financial benefit to the developer. Instead, the Court held that it was "a basic misinterpretation of the term 'the people' in section 48-39-30(D) because it failed to identify any benefit flowing to the public at large." Id. The Court's conclusion is that to "allow the benefits to a private developer to override the interest of the people of South Carolina undermines the statute and defeats the very purpose of the public trust doctrine." Id. Further sealing the future of the Kiawah River, the Court found

[2]The Court applied the plain language of the term "the people" as "the public at large rather than a single developer." KDP at 716.

that "it is to the public's benefit to protect natural processes like the cyclical erosion, breach, and accretion process of the spit" and overturned this Court's finding that the "erosion has no positive benefit for anyone." Id. The clarity and tone of these conclusions simply leave no room for this Court to reach the contrary conclusion that KDP's project would provide a combination of uses that insures the maximum benefit to the people. Any suggestion by KDP that this Court may, or should, do so would contradict the language and intent of the Supreme Court's Opinion.

The Supreme Court determined that the project would impair the public's interest by destroying the public benefit in leaving the spit in its natural, unaltered state and by adversely affecting public access. That determination is the law of the case and cannot be altered on remand. Ables v. Gladden, 378 S.C. 558, 664 S.E.2d 442 (2008); Prince v. Beaufort Mem'l Hosp., 392 S.C. 599, 709 S.E.2d 122 (Ct. App. 2011); Ackerman v. McMillan, 324 S.C. 440, 477 S.E.2d 267 (Ct. App. 1996). Because KDP's project fails to provide the combination of uses which will insure the maximum benefit to the people, it violates this State's policy in S.C. Code Ann. § 48-39-30(D). This Court's inquiry should stop there.

As to the regulatory provisions addressed by the Court, a regulation may not alter or add to a statute. Soc'y of Prof'l Journalists v. Sexton, 283 S.C. 563, 567, 324 S.E.2d 313, 315 (1984). Insofar as a regulation increases the threshold requirements of a statute, the specifications set forth in the statute must prevail. Goodman v. City of Columbia, 318 S.C. 488, 491, 458 S.E.2d 531, 532 (1995). In Goodman, the Court concluded that because Regulation 67-701 adds to a statutory requirement, the petitioner only needed to comply with the statute. In this case the project does not comply with the statute, thus any regulatory analysis would be fruitless because the project cannot overcome this statutory hurdle.

Furthermore, the Court's Opinion leaves no room for assessing, much less concluding, that the project complies with the provisions of Regulation 30-11(C) and 30-12(C). Even assuming, for the sake of argument, that the project was fully consistent with all the applicable regulations, it cannot be authorized because it is inconsistent with the threshold requirement of section 48-39-30(D).

Based upon this record, further consideration of the legal questions consistent with the Court's Opinion would not change the ultimate result, namely that KDP's proposed use would not provide a combination of uses that would ensure the maximum benefit to the people. For that reason, a reassessment of any issue relating to compliance with the policy of section 48-39-30(D) would not alter the outcome and would merely prolong final resolution of this matter. Thus, reason, logic and consistency with the Supreme Court's Opinion lead inexorably to the conclusion that further proceedings would be substantially fruitless and administratively inefficient.

III. This Court Should Rescind DHEC's Permit in Accordance with the Reasoning of the Supreme Court

The only unanswered question then would be whether the permit issued by DHEC can stand in light of the Court's Opinion. It cannot. KDP applied for 2,783 feet of bulkhead/revetment on public trust critical area tidelands of the Kiawah River. DHEC issued a permit authorizing 270 feet and denying the remaining 2,513 feet of the structure. The League appealed DHEC's issuance of the permit authorizing 270 feet of revetment/bulkhead and KDP appealed DHEC's denial of the remaining 2,513 feet of revetment/bulkhead sought in its application.

Upon transmission of a remittitur, the lower court "acquires jurisdiction to enforce the judgment and take any action consistent with the appellate court's ruling." Muller v. Myrtle Beach Golf & Yacht Club, 313 S.C. 412, 414–15, 438 S.E.2d 248, 250 (1993), see also Spartanburg Reg'l Med. Ctr. v. Oncology & Hematology Associates of S. Carolina, LLC, 387 S.C. 79, 690 S.E.2d 783 (2010). Denying the permit as issued by the Department in its entirety would be consistent with both the Supreme Court's Opinion and the record.

First, as to the Opinion, the Court states that:

-"those lands below the high water line are owned by the State and held in trust for the benefit of the public." KDP II, Inc. v. DHEC & CCL at 715.

-"the public's interest must be the lodestar which guides our legal analysis . . ." Id.

-the "statutes . . . generally prohibit alternations to the tidelands except when the public interest requires otherwise." Id.

-"altering tidelands remains the exception to the rule." Id.

-"tidelands [must] be used in a way that provides maximum public benefit, the ALC made no findings of any public benefit . . . Quite to the contrary, it was clear that only the developer, not the *public*, would benefit from the construction of this enormous bulkhead and revetment." KDP at 716.

These statements, individually and collectively, demonstrate that the Supreme Court recognized that the proposed bulkhead/revetment would contravene the statute and public trust doctrine.

Second, the record lacks any probative evidence to support a finding that the structure which DHEC authorized would provide the required combination of uses that ensures maximum

benefit to the people. The area known as "Beachwalker Park," adjacent to Captain Sam's Spit, is owned by Kiawah Resort Associates. Even though the park property consists only of the parking lot and limited facilities, there is some indication that the public generally believes that the park property goes all the way to the inlet and includes the spit. (Tr. 1355). The Charleston County Park and Recreation Commission ("Commission") holds a 100 year lease of the Park from KRA/KDP and has held the lease for over 30 years. (Tr. 1127). The Commission does not own the land, but maintains that it would be best for the citizens of Charleston County if the County had a permanent deed with an understanding that would occur at another site. (Tr. 1127). Tom O'Rourke, the Commission's Executive Director, has had ongoing discussions with KRA/KDP about relocating the Park. (Tr. 1122-26; CCL Exs. 12 & 13). The Commission created a map depicting an 3.2 acre alternate site for the Park, which has been used to discuss relocating the Park. (CCL Ex. 13).

DHEC approved the 270 feet of revetment to be built along the park's leased property on the grounds that there would not be any additional development in the Park that could have a cumulative adverse impact. (Tr. 1337). DHEC's determination that the 270 feet of revetment would "allow for the continued use of the public recreational facility at the County park" is plainly contradicted by the evidence of the plans to move the parking lot and facilities and the fact that the revetment would only serve to protect parking spaces. (DHEC Ex.2, Technical Summary). No evidence supports a conclusion that a use of the critical area to protect parking spaces at a park that is owned by a developer and that will ultimately be moved to another location could somehow provide the maximum benefit to the people. Instead, the Supreme Court's conclusion recognizing the benefits to the public in protecting the "natural processes like

the cyclical erosion, breach, and accretion process of the spit" would apply equally to 270 feet of revetment/bulkhead approved by DHEC as it does to the 2,500 feet denied by DHEC.

CONCLUSION

For these reasons, the League requests that this Court deny the proposed revetment/bulkhead in its entirety and rescind the permit as authorized by DHEC.

Respectfully submitted,

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Attorney for South Carolina Coastal Conservation League

Georgetown, South Carolina

February 27, 2015

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Kiawah Development Partners, II, Petitioner, vs. SCDHEC Office of Ocean and Coastal Resource Management, Respondents.	Docket No. 09-ALC-07-0029-CC Docket No. 09-ALJ-07-0039-CC **CERTIFICATE OF SERVICE**
South Carolina Coastal Conservation League, Petitioner, vs. Kiawah Development Partners, II, and South Carolina Department of Health and Environmental Control, Respondents.	

I hereby certify that on this date I served the Coastal Conservation League's Brief on Scope of Review on Remand on Kiawah Development Partners II, Inc., and DHEC, by placing copies of the foregoing in the U.S. Mail addressed to:

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Gedney M. Howe, III, Esquire
P.O. Box 1034
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Brad Churdar, Esquire
DHEC/OCRM
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Amy E. Armstrong

Georgetown, SC
February 27, 2015

SC Coastal Conservation League v. SCDHEC and Kiawah Development Partners, II, Docket No. 09-ALJ-07-0029-CC and-0039CC

Harvin Fair <hfair@scalc.net>

Mon 3/9/2015 2:53 PM

To:amy@scelp.org <amy@scelp.org>; Churdar, Bradley <churdabd@dhec.sc.gov>; Crawford, Denise <crawfomd@dhec.sc.gov>; Gedney Howe <ghowe@gedneyhowe.com>; Jessie <jessie@scelp.org>; Trenholm Walker <gtw@p-tw.com>;

Cc:Samuel Johnson <sjohnson@scalc.net>; Nancy B. Riley <nriley@scalc.net>;

Judge Anderson asked me to send the following to the parties:

The Department cites the Supreme Court's language that "only those benefits which inure to the public as a whole may satisfy section 48-39-30(D)" as limiting the grant of a permit. Furthermore, in setting forth that "there is nothing further for this Court to decide," the Department appears to take the position that the grant of a permit is limited only to instances where a permit specifically benefits the public at large. In seeking to understand the application of the Department's interpretation, the ALC requests that the Department provide further explanation. For instance, does the Department still grant the following permits in light of the Supreme Court's holding:

- Permits for recreational docks owned by private property owners;
- Bulkheads to protect individually owned property;
- Boat lifts for recreational docks owned by private property owners.

If the Department grants those permits, under what theory are those permits allowed? Similarly, how does the Department interpret the granting of a permit for a structure which is placed in the coastal zone for the benefit of a private property owner, as benefiting the public at large?

The Department should respond to these questions no later than 5:00 p.m. on Wednesday, March 11, 2015. Coastal Conservation League and Kiawah Development Partners may respond no later than 5:00 p.m. on Friday, March 13, 2015.

Thank you.
Harvin

Harvin Fair
Law clerk to the Honorable Ralph King Anderson, III
office phone 803-734-6409

Any views or opinions expressed in this email are those of the author and do not necessarily represent those of the SC Administrative Law Court. South Carolina Administrative Law Court Trusted Root Certificate https://cn.arx.com/?options=7&bselected=MTU2

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Petitioner, vs. South Carolina Department of Health and Environmental Control and Kiawah Development Partners, II, Respondents.	DOCKET NO. 09-ALJ-07-0029-CC (consolidated cases)
Kiawah Development Partners, II Petitioners, vs. South Carolina Department of Health and Environmental Control Respondent.	DHEC'S RESPONSE TO THE ALC'S § 48-39-30(D) FOLLOW UP INQUIRY

TO: ADMINISTRATIVE LAW JUDGE RALPH KING ANDERSON, III

The Department submits this response to the Court's inquiry regarding the application of S.C. Code Ann. § 48-39-30(D) to Department permitting decisions. The Court requested clarification on the following:

> The Department cites the Supreme Court's language that "only those benefits which inure to the public as a whole may satisfy section 48-39-30(D)" as limiting the grant of a permit. Furthermore, in setting forth that "there is nothing further for this Court to decide," the Department appears to take the position that the grant of a permit is limited only to instances where a permit specifically benefits the public at large. In seeking to understand the application of the Department's interpretation, the ALC requests that the Department provide further explanation. For instance, does the Department still grant the following permits in light of the Supreme Court's holding:
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> If the Department grants those permits, under what theory are those permits allowed? Similarly, how does the Department interpret the granting of a permit for a structure which is placed in the coastal zone for the benefit of a private property owner, as benefiting the public at large?

In the Department's February 27, 2015 Brief, DHEC stated that "because the Supreme Court found that the proposed bulkhead and revetment authorized by the ALC fails to satisfy this requirement, there is nothing further for this Court to consider on remand regarding the portion of the proposed bulkhead and revetment authorized by the ALC." Stated another way, because the Supreme Court concluded that there was no benefit to the public and, rather, that the public would be harmed by the grant of this permit because it would impair access, the above-referenced statement from the Department's Brief is simply a recognition that the Supreme Court's opinion precludes this Court from going back and reassessing the question of public benefit and whether this permit will provide the maximum benefit to the people, because this issue has been conclusively resolved. In its Brief to this Court, the Department was not referencing OCRM critical area permits generally, but was addressing its argument only to the permit under review and was specifically ruled on by the Supreme Court.

In its earlier Brief, the Department quoted and does rely on the Supreme Court's statement that "only those benefits which inure to the public as a whole may satisfy section 48-39-30(D)." However, the prior sentence in the Court's opinion helps put that quote in fuller context:

> "To allow the benefits to a private developer to override the interests of the people of South Carolina undermines the statute and defeats the very purpose of the public trust doctrine. Thus, only those benefits which inure to the public as a whole may satisfy section 48-39-30(D)."

The Court was addressing only the circumstances of the case before it. However, to help clarify how it was applying 48-39-30(D), the Court noted in footnote 5 that it would not exclude a

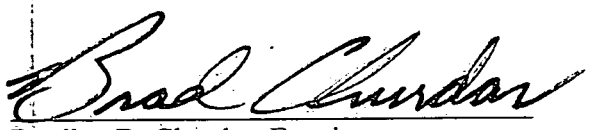
developer from ever being included as part of "the people." The Court pointed out that the ALC erred in considering only the benefits to the developer to the exclusion of the public as a whole. There is no indication in its opinion that the Supreme Court is directing its ruling to apply to cases where there is no significant countervailing public interest such as is present in this case.

Regarding the ALC's question about future permit applications for recreational docks, bulkheads and boatlifts, the Department must consider the unique aspects of each permit application independently.

Conclusion

Because the Supreme Court ruled that this Court erred "in finding section 48-39-30(D)'s public benefit requirement satisfied," the Department believes that holding is the law of this case and there is nothing further for this Court to consider on remand regarding the portion of the proposed bulkhead and revetment authorized by this Court.

Respectfully submitted,



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Charleston, SC
March 20, 2015

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Kiawah Development Partners, II, Petitioner, vs. SCDHEC Office of Ocean and Coastal Resource Management, Respondents.	Docket No. 09-ALC-07-0029-CC Docket No. 09-ALJ-07-0039-CC **SOUTH CAROLINA COASTAL CONSERVATION LEAGUE'S BRIEF ON PUBLIC BENEFITS**
South Carolina Coastal Conservation League, Petitioner, vs. Kiawah Development Partners, II, and South Carolina Department of Health and Environmental Control, Respondents.	

TO: ADMINISTRATIVE LAW JUDGE RALPH KING ANDERSON, III

The South Carolina Coastal Conservation League submits this brief in response to the Court's inquiry to further elucidate the application of section 48-39-30(D) to DHEC permitting decisions. The Court requested briefing on the following:

> The Department cites the Supreme Court's language that "only those benefits which inure to the public as a whole may satisfy section 48-39-30(D)" as limiting the grant of a permit. Furthermore, in setting forth that "there is nothing further for this Court to decide," the Department appears to take the position that the grant of a permit is

limited only to instances where a permit specifically benefits the public at large. In seeking to understand the application of the Department's interpretation, the ALC requests that the Department provide further explanation. For instance, does the Department still grant the following permits in light of the Supreme Court's holding:

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- Boat lifts for recreational docks owned by private property owners.

If the Department grants those permits, under what theory are those permits allowed? Similarly, how does the Department interpret the granting of a permit for a structure which is placed in the coastal zone for the benefit of a private property owner, as benefiting the public at large?

The League's perception of DHEC's statement that "there is nothing further for this Court to decide" is that because the Supreme Court concluded that there was no benefit to the public and, rather, that the public would be harmed by the grant of this permit because it would impair access, that conclusion is decisive on compliance with section 48-39-30(D). In other words, this Court cannot go back and reassess the question of public benefit and whether this permit will provide the maximum benefit to the people because it has been conclusively resolved.

Section 48-39-30(D) does not impose a requirement that a project must provide a public benefit in order to be permitted. The fact that the League (and the Department) take the position that there is nothing left for this Court to decide does not in any way mean that a permit must actively benefit the public at large. The language of section 48-39-30(D), "critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate maximum measurable dollar benefits," requires an assessment of the existing combination of uses compared to the proposed combination of uses. See S.C. Code Ann. § 48-39-30(D).

Undertaking an assessment of the existing combination of uses versus proposed combination of uses would allow the Department to continue authorizing permits for private recreational docks, bulkheads for individually owned property, private boat lifts, as well as a host

of other activities authorized under the Coastal Zone Management Act. The structures identified by the Court's email of March 9, 2015, generally, are easily distinguishable from the structure sought in this matter. In this case, the existing combination of uses of the critical area that would be impacted by the proposed project include: members of the public walking along the sandy shoreline; members of the public launching from and pulling kayaks up onto the sandy shoreline; members of the public fishing and crabbing from the sandy shoreline; members of the public enjoying picnics on the sandy shoreline; and members of the public just sitting on the sandy shoreline watching birds, dolphins and the pristine environs. In sum, these are the benefits experienced by the public. And if the permit is issued, the proposed construction would eliminate the beneficial combination of these public uses. Furthermore, the proposed bulkhead/revetment would not add any public uses to offset the significant loss of 2.63 acres of sandy beach for the public's enjoyment.

All of the structures posited by the court: a private dock, boat lift or bulkhead on a single lot, would be much smaller and have far less impact than the construction project at issue in this case. In addition, those structures are usually located in salt marsh environs and not on sandy shoreline which effects the combination of uses available. Thus the assessment of the combination of uses of the critical area in this case compared with private docks and boat lifts is distinguishable. A private dock or boat lift is, most often, constructed over a limited area of critical area salt marsh and/or open water. In addition, a trip to any of our coastal creeks and rivers would demonstrate that nearly all of the bulkhead/revetment systems constructed in critical areas are constructed in areas where there is salt marsh, as opposed to open, sandy shoreline.

Salt marsh habitat is certainly valuable nursery grounds and habitat for a variety of species that the public enjoys harvesting and consuming; however, the public cannot walk, sit or

picnic in salt marsh. Greg VanDerwerker testified in this case that an individual would not walk beyond the revetment/bulkhead proposed by KDP because that area is salt marsh and you would not walk in marsh grass. (Hearing Transcript pp. 962-963). For these reasons, it would be difficult to establish that a single dock structure over salt marsh would impair the public's ability to make the types of uses currently undertaken on Captain Sams Spit. Thus, when weighing the loss of public use before and after construction of a private structure on a salt marsh, the Department may find, depending on the particular facts of that case, that the beneficial public use of the salt marsh is not impaired, while a similar structure on a sandy beach would impede public use. See, e.g., Sierra Club v. Kiawah Resort Assoc., 318 S.C. 119, 456 S.E.2d 397 (1995).

The League is aware of an instance where a private dock was proposed over a sandy shoreline widely used by the public. In that case, the Department did weigh the existing uses of that critical area and the public benefits derived from those uses against the proposed use, which would impinge on public access to and use of critical areas, i.e., the structure would diminish the existing public benefit with no resultant public benefit because the dock was private and not open for use by the public. The attached article summarizes the public benefit associated with the pre-construction uses. See Exhibit A. The state ultimately rejected the permit for constructing a private dock over a public beach in that case because of the loss of beneficial public uses.

Furthermore, some of the regulations that apply to small private structures are different than those at issue in this case, and provide additional protects for the public use. For example, the critical areas regulations that pertain to docks intentionally place limits on such structures, requiring that the Department cannot permit dock structures if they impede navigation. This regulation recognizes the public's use of boating in open water areas – an important use to be protected by ensuring navigability – there would still need to be evidence that the public benefits

from having the particular location where the dock is proposed open for boating.

As to a bulkhead on a private individual's lot, bulkheads and revetments can only be constructed up to 18 inches from the escarpment or critical area line. S.C. Code Ann. Reg. 30-12(C)(1)(b) ("Structures may be constructed up to 18 inches from the existing escarpment."); See also Hill v. DHEC, 389 S.C. 1 (2010). This 18 inch limitation provides assurance that such structures will have limited encroachment on critical areas. The proposed bulkhead/revetment at issue in this case would be up to 40 feet from the escarpment or critical area line. Thus, it would not have the same limited encroachment on public use as a private bulkhead that complied with the regulations.

In sum, the nature of the area impacted, the size of the structures, some of the regulations, and the types of beneficial public uses and losses of such uses distinguish this case from the private permits posited in the Court's email. DHEC has authority to issue permits for structures in critical areas pursuant to the Coastal Zone Management Act and corresponding critical area regulations. Section 48-39-30(D) does not impose a requirement that a project must provide a public benefit in order to be permitted, but ensures protection of public uses threatened by a proposed project.

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March 23, 2015

Exhibit A

beaufortgazette.com
The Beaufort Gazette

Case of Lands End dock shows broader view of law

Published Saturday, May 15, 2010
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The state's rejection of a permit for a dock over a public beach in northern Beaufort County is based on a factor that is very important in this high-growth area: the cumulative effects of one person's plans on the community as a whole.

Neighbors in the Lands End area of St. Helena Island objected to the proposed dock, saying it would cross over a sandy beach on the shores of Port Royal Sound that is a rare jewel for the public.

"It's one of the few places left in Beaufort County where you can swim, sunbathe or do whatever and not have to pay," one neighbor said.

Another said, "If you or your family use this beach for swimming, picnicking, walking, rafting, sailing, power boating, fishing, shrimping, gigging, horseback riding or any other activity, this dock will severely affect those activities."

Another cited concerns about the dock's effect on wildlife when the state Office of Ocean and Coastal Resource Management held a public hearing on the permit application this spring.

By one measure, the proposed 585-foot dock fit well within state dock regulations. The applicant had even agreed to raise the dock's height over the beach to address concerns. In an earlier editorial, we had warned that opponents should prepare for disappointment.

But OCRM used a broader measurement and denied the permit. The applicant can appeal, but OCRM officials say they are confident the decision has a solid foundation in law.

The agency cites five sections of the Coastal Zone Management Act, five OCRM regulations and two Coastal Zone policies in denying the dock permit.

OCRM took into account, as provided for in state law, "the extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources."

The ruling took into account, as provided for in OCRM regulations, "the extent to which long-range, cumulative effects of the project may result within the context of other possible development and general character of the area" and the "extent to which the proposed use could affect the value and the enjoyment of the adjacent owners."

These are important considerations for the community as a whole. They have, so far, given teeth to those who think docks can be measured in terms of general character, aesthetics, and such values as preservation of public open space for succeeding generations. These factors can be harder to measure than a linear foot, but they are just as real.

We are glad to see laws and regulations applied with a broader, longer view of the coastal zone's assets. County and municipal regulations also should protect community interests, as well as individual property rights.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KIAWAH DEVELOPMENT PARTNERS, II, Petitioner, vs. SCDHEC OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT, Respondent.	DOCKET NO. 09-ALJ-07-0029-CC **KIAWAH DEVELOPMENT PARTNERS, II'S MEMORANDUM IN RESPONSE TO BRIEFS ON PUBLIC BENEFIT**
SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, Petitioner, vs. SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL AND KIAWAH DEVELOPMENT PARTNERS, II, Respondents.	

Kiawah Development Partners, II, ("KDP") submits this memorandum in response to the separate submissions of DHEC-OCRM on March 20, 2015, and of the South Carolina Coastal Conservation League on March 23, 2015. In responding to this Court's questions, both the Department and the League advance the argument that the statutory policy requiring maximum benefit to the public does not need to be taken into account if an application for a critical area permit for a dock, boatlift, or bulkhead, does not impair public resources. The opinion of the Supreme Court makes no such exception.

S.C. Code section 48-39-150 and the considerations therein apply to all applications for permits to conduct activities in the critical area. As the Supreme Court pointed out, the permit analysis must include consideration of the policies expressed in SC Code § 48-39-30(D). The Supreme Court ruled that "section 48-39-30(D), as applied through section 48-39-150, explicitly requires that tidelands be used in a way that provides maximum public benefit. . . . ." Kiawah Development Partners, II verses S.C. Department of Health and Environmental Control et al, 766 S.E.2d 707, 716 (S.C. 2014). As footnote 5 to the opinion makes clear, the owner may be included among "the people" in considering public benefit. However, there is nothing in the opinion that excludes any applications for critical area permits from this analysis.

Both the Department and the League argue in their briefs that the Supreme Court conclusively decided the public benefit analysis and that there is nothing for the Court to consider regarding it on remand. Their arguments are incorrect. If the Supreme Court had conclusively determined the issue, then it would have reversed the decision of this Court, vacated the permit, and held that the permit could not be issued as a matter of law because there was no evidence of any public benefit.

Instead, the Supreme Court found that this Court framed the analysis of the policy incorrectly. The Supreme Court held that this Court committed legal error in considering *only* the benefit to the applicant in the assessment required by SC Code § 48-39-30(D). In its conclusion, the Supreme Court made clear that this Court is to re-consider the question of public benefit based on the Supreme Court's interpretation of the applicable legal standard:

> [T]he CZMA requires that uses of the public tidelands be to 'the maximum benefit to the people,' but the ALC did not consider whether and to what extent the public would benefit from the proposed structure as opposed to leaving the tideland in their natural state. Accordingly, the ALC erred in finding Section 48-39-150 satisfied.

***

> For all of those reasons, we reverse and remand for further consideration consistent with this decision.

766 S.E.2d 723.

As this excerpt from the conclusion states, this Court is to consider on remand "whether and to what extent the public would benefit from the proposed structure as opposed to leaving the tidelands in their natural state." The Supreme Court would not have remanded the issue to this Court for further consideration if there was nothing for this Court to consider.

Respectfully Submitted,

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ATTORNEYS FOR KIAWAH DEVELOPMENT PARTNERS, II

March 24, 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand, or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 24th day of March, 2015, in Charleston, South Carolina.

Yevette Y. Epps

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Petitioner, vs. South Carolina Department of Health and Environmental Control and Kiawah Development Partners, II, Respondents.	DOCKET NO. 09-ALJ-07-0029-CC (consolidated cases)
Kiawah Development Partners, II Petitioners, vs. South Carolina Department of Health and Environmental Control Respondent.	DEPARTMENT'S MOTION FOR RECONSIDERATION AND FOR CLARIFICATION

TO: COUNSEL FOR PETITIONERS, RESPONDENTS AND THE COURT:

PLEASE TAKE NOTICE that the Respondent Department of Health and Environmental Control (DHEC, or "the Department") hereby submits this Motion for Reconsideration[1] in accordance with Rule 59(e), SCRCP and respectfully requests this Court reconsider its December 2, 2015 Final Order and Decision on Remand ("Remand Order") permitting the

[1] "It is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court to 'alter or amend the judgment,' but also a vehicle to seek 'reconsideration' of issues and arguments. A motion under Rule 59(e) long has been viewed as a 'motion for reconsideration' despite the absence of those words from the rule." Elam v. South Carolina Dept. of Transportation, 361 S.C. 9, 602 S.E.2d 772, (2004). Additionally, the United States Supreme Court has stated that the purpose of a Rule 59(e) motion is to request that the trial judge "reconsider matters properly encompassed in a decision on the merits." Budinich v. Becton Dickinson and Co., 486 U.S. 196, 200, 108 S.Ct. 1717, 1720, 100 L. Ed. 2d 178, 11 Fed. R. Serv. 3d 1 (1988).

bulkhead and revetment beyond the Department's originally-permitted 270 foot structure and also to clarify its Remand Order.

Before addressing the specific issues the Department is asking the Court to reconsider, it is important to bear in mind that when a case such as this is remanded after appellate review, "the trial court has only the jurisdiction and authority mandated by [the appellate] court." Prince v. Beaufort Memorial Hosp., 392 S.C. 599, 605, 709 S.E.2d 122, 125 (Ct. App. 2011); (see also 5 Am. Jur. 2d Appellate Review § 734 (2015) ("[a] trial court's proceedings on remand should be in accordance with the mandate and the result contemplated in the appellate court's opinion").[2] "Matters decided by the appellate court cannot be reheard, reconsidered, or relitigated in the trial court, even under the guise of a different form. The decision of the appellate court is final as to all questions decided. It is the duty of the trial court to follow the decision of the appellate court." Ackerman v. McMillan, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct. App. 1996) (citing 5 C.J.S. Appeal and Error § 975(a) (1993)); (see also Bobo v. Marshane Corp., 302 S.C. 86, 88-89, 394 S.E.2d 2, 4 (Ct. App. 1990) (reversing the full workers compensation commission for exceeding its authority in failing to follow directions of the court on remand and going "much further" to reverse the panel's decision and substitute a new decision with a different result)).

In a circumstance such as this case "[w]here the remanding court does not give specific instructions,[3] the trial court on remand is required to examine the appellate court's decision and determine what further proceedings would be proper and consistent with the opinion." 5 Am.

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[2] Citing Jerry Bennett Masonry Contractor, Inc. v. Crossland Const. Co., Inc., 213 S.W.3d 733 (Mo. Ct. App. S.D. 2007).

[3] The Supreme Court only said "we reverse and remand for further consideration consistent with this decision." Kiawah Development Partners, II v. South Carolina Dept. of Health and Environmental Control, et al., 766 S.E.2d 707, 723, 411 S.C. 16, 32 (2014).

Jur. 2d Appellate Review § 737 (2015) (citing Aguilar v. Safeway Ins. Co., 221 Ill. App. 3d 1095, 164 Ill. Dec. 418, 582 N.E.2d 1362 (1st Dist. 1991)). When a case is appealed and remanded, the decision of the appellate court establishes the law of the case and ordinarily will be followed by the trial court on remand. 5 Am. Jur. 2d Appellate Review § 734 (2015) (citing U.S. v. MacKay, 20 F. Supp. 3d 1287 (D. Utah 2014)). Stated another way, when an appellate court has remanded a case for further proceedings consistent with its mandate, a district court is obliged to effectuate the mandate and *may consider only those matters essential to the implementation of the ruling of the appellate court*. 5 Am. Jur. 2d Appellate Review § 734 (2015) (citing State v. Dumars, 154 P.3d 1120 (Kan. Ct. App. 2007) (Emphasis added)).

Clarification

The Remand Order creates confusion as to the nature and extent of the structure which it authorizes to be constructed on Captain Sam's Spit. On page 19 and again on page 23 of the Remand Order this Court states that "the bulkhead and full revetment of forty feet in width should extend for only 270 feet, the length of Beachwalker Park." On page 24 of the Remand Order, this Court further states that "[i]nstead of approving the bulkhead and revetment for 2,783 feet, the Court approves only 270 feet for the project, finding that the need to further protect the bulkhead along the remaining shoreline beyond the Park using a revetment is outweighed by the public benefit of protecting the use and nature of the shoreline." This language from the Remand Order could be interpreted as stating that while a revetment is being permitted for only 270 feet, a bulkhead is being permitted for the entire 2,783 feet as applied for.[4] However, on page 28 of the Remand Order, the Court states that

> "[a]s to the remaining shoreline of the Spit stretching *thirty feet beyond Beachwalker Park*, the Court concludes that there are no other feasible alternatives than to use a

[4] Counsel for KDP informs me that he interprets the Remand Order as permitting KDP to build a 2,783 foot bulkhead.

> bulkhead, for the reasons mentioned above. In fact, using a bulkhead without a revetment affords a combination of uses that protects the use of shoreline beyond the Park and protects the uplands, as well as the public benefits gained from their development, by preventing erosion at these locations to the extent possible, thereby providing the maximum benefit to all the people in the jurisdiction of the area." [Emphasis added].

It appears on page 28 of the Remand Order that the Court may be authorizing a bulkhead without a revetment for thirty feet beyond the Park, but even that is unclear. The Department is left with the possibility that this Court intended to allow something more than 270' x 40' of structure based on the discussion portions of the order, but the extent of the structure envisioned by the Court is unclear and Department's counsel seeks clarification from this Court.

Public Benefit Analysis

The Department believes that the Remand Order misapplies S.C. Code Ann. § 48-39-30(D) which states that "critical areas shall be used to provide the combination of uses which will insure [sic] the maximum benefit to the people, but not necessarily a combination of uses which will generate maximum measurable dollar benefits."[5] (Emphasis added).

The Supreme Court affirmed that compliance with the "maximum benefit to the people" requirement found in S.C. Code Ann. § 48-39-30(D) is a threshold inquiry that *must* be satisfied before an activity in the critical area can be permitted. However, in this case, the Supreme Court found that this Court misinterpreted the term "the people" in S.C. Code Ann. § 48-39-30(D)

"because it failed to identify any benefit flowing to the public at large,[6] instead

[5] When a statute such as this contains the term "shall", the action referenced in the statute is "mandatory". Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003) (citing Montgomery v. Keziah, 277 S.C. 84, 282 S.E.2d 853 (1981)). See also 73 Am. Jur. 2d Statutes § 10 ("Generally, courts construe a statutory provision as mandatory when the power or duty to which it relates is for the public good. Accordingly, a statute affecting the public interest and promoting justice which prescribes the manner of performance is generally mandatory").

[6] It is worth mentioning that the reason this Court "failed to identify any benefit flowing to the public at large" is because (with the notable exception of the obvious public benefit in protecting the Beachwalker County Park parking lot), KDP presented no evidence of benefit to "the people" as that term is interpreted by the Supreme Court. Kiawah, 766 S.E.2d at 716. The Supreme

> stating only that 'elimination of [the] erosion will further provide an economic benefit to [Kiawah].' Kiawah is not synonymous with 'the people.' When that term is correctly construed, any benefit to Kiawah is irrelevant to whether section 48–39–30(D) is satisfied. 'The people,' as used here, is a term meaning the citizens of a particular jurisdiction." (Emphasis added). Kiawah, 766 S.E.2d at 716.

The Supreme Court said "[t]o allow the benefits to a private developer to override the interests of the people of South Carolina undermines the statute and defeats the very purpose of the public trust doctrine. Thus, only those benefits which inure to the public as a whole may satisfy section 48-39-30(D)."[7] Kiawah, 766 S.E.2d at 716. The Supreme Court concluded that "it was clear that only the developer, not the *public,* would benefit from the construction of this enormous bulkhead and revetment." Kiawah, 766 S.E.2d at 716. (Emphasis in original text). As such, according to Ackerman v. McMillan, this Court has a duty to follow the Supreme Court's public benefit decision, because "[t]he decision of the appellate court is final as to all questions decided." Ackerman v. McMillan, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct. App. 1996).

On remand, however, this Court responded to the Supreme Court's analysis by attempting to demonstrate the following public benefits: (1) protection of the Beachwalker Park parking lot; (2) KDP's provision of eight (8) parking spaces and beach access to members of the Kiawah Island Community Association (KICA); (3) KDP's agreement, upon completion of its development, to permanently encumber the remainder of the Spit with a restrictive covenant

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Court further stated that "the ALC erred as a matter of law in finding the proposed bulkhead and revetment comply with the requirements of the CZMA." Kiawah, 766 S.E.2d at 715.

[7] The Supreme Court's opinion above is also consistent with the regulatory definition of "public interest". S.C. Code Ann. Regs. 30-1.D(44) defines "public interest" as follows: "As used within these Rules and Regulations, 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. To the extent that, in the opinion of the Department, the value of such public benefits is greater than the public costs embodied in adverse environmental, economic and fiscal effects, a proposed project may be credited with net public benefits." (Emphasis added).

mandating that it remain in its natural state and to grant a conservation easement to Kiawah Island Natural Habitat Conservancy (KINHC) over that same acreage.

1. *Beachwalker Park parking lot*

The Department concurs with the Court's public benefit analysis regarding the parking lot. The evidence presented at trial undeniably demonstrated that the portion of the bulkhead and revetment originally permitted by the Department *will* benefit the public, because it will protect the heavily-used[8] Beachwalker Park parking lot from damage caused by erosion along the Kiawah River. The Department contends that, despite the Supreme Court's failure to articulate whether the lack of public benefit analysis also applies to the originally-permitted 270 foot revetment and bulkhead, such a conclusion of public benefit by this Court is entirely consistent with their remand "for further consideration consistent with this decision." Kiawah, 766 S.E.2d at 723.

2. *Eight (8) parking spaces and beach access to KICA members*

The eight (8) parking spaces and beach access to KICA members, however, do not satisfy the public benefit requirement of S.C. Code Ann. § 48-39-30(D).

In footnote 2 on page 5 of the Remand Order, this Court stated that "[a]s with KDP, the members of KICA are included in 'the people,' and benefits to them are therefore considerations to take into account along with benefits to other members of 'the people' when considering the benefit to the public as a whole." The Department believes that the members of KICA are such an infinitesimally small group of people that they do not satisfy the Supreme Court's interpretation of S.C. Code Ann. § 48-39-30(D). The Supreme Court said that the commonly understood definition of "the people" is "'[t]he mass of ordinary persons; the populace.' The

[8] When Mr. Leonard Long was asked at trial about the benefits of the revetment, he testified that "it would be a benefit to stop the erosion at a public park that serves 50,000 people a year."

American Heritage Dictionary 919 (2d College ed.1982). Additionally, the use of the article 'the' before 'people' indicates that 'the people' is a single, unified thing. See Centex Int'l, Inc. v. S.C. Dep't of Revenue, 406 S.C. 132, 142, 750 S.E.2d 65, 70 (2013) ("The word 'the' is a word of limitation—a word used before nouns, with a specifying or particularizing effect, opposed to the indefinite or generalizing force of 'a' or 'an.'" (quoting People v. Enlow, 135 Colo. 249, 310 P.2d 539, 546 (1957)). Reading the provision in light of the public trust doctrine—the legal bedrock upon which the statute rests—bolsters the conclusion that 'the people' should be construed as the public at large ..." Kiawah, 766 S.E.2d at 716. The Supreme Court went on to further clarify that "only those benefits which inure to the public *as a whole* may satisfy section 48–39–30(D)." Id. at 716. While the total number of members of KICA is larger than the one beneficiary (KDP) that comprised this Court's public benefit analysis in the Amended Final Order, such a small group of property owners cannot convincingly be called "the mass of ordinary people" or "the populace" or "the public at large." Additionally, there is no evidence in the record establishing that there is actually even a need for eight (8) parking spaces for KICA members who already live on Kiawah and have access to Captain Sam's Spit. No KICA member testified at trial that he or she drives their car to Beachwalker Park, or that they cannot find parking spaces or that they are otherwise unable to access the public trust lands of Captain Sam's Spit. The availability of eight (8) additional parking spaces cannot rise to the level of providing "public benefit" that would override the public's benefit in actual use of the critical areas, particularly when there is no evidence that such a need for eight (8) additional parking spaces even exists.

3. *Conservation Easement*

The word "easement" in the context of a conservation easement on Captain Sam's Spit

was used only twice (page 166 of the hearing transcript) during the week-long hearing. No evidence even suggested that the public would benefit from a privately-held conservation easement. There is no evidence in the record on appeal that the placement of a conservation easement is contingent upon, or even relevant to, the construction of the bulkhead or revetment. No conservation easement is required by the Department's permit. When the conservation easement was mentioned during the contested case hearing, KDP's witness (Mr. Leonard Long) generally referred to a letter admitted solely for the purpose of notice and inquiry that "30 acres will one day be placed under a . . . conservation easement." (Tr. 166, lines 3-5). No evidence in the record on appeal could reasonably be inferred to suggest, much less establish, that a conservation easement that "will one day" (quoting Mr. Long) be placed on the Spit would provide a benefit to the people, certainly as pertains to the tidelands[9] which would be covered with articulated concrete blocks.

In any event, the conservation easement arises as a result of KDP's agreement with the Town of Kiawah Island, not as a result of the use of critical area for a hard erosion control device as S.C. Code Ann. § 48-39-30(D) mandates. The minimal evidence regarding the conservation easement could only be an appropriate consideration under S.C. Code Ann. Regs. 30-11(C)'s requirement to consider the "extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area." S.C. Code Ann. Regs. 30-11(C)(1). While that regulation allows consideration of impacts outside

[9] S.C. Code Ann. § 48-39-30(D) mandates that the public benefit analysis must be applied to the critical areas such as the tidelands along the edge of the Kiawah River (i.e., "*critical areas* shall be used to provide the combination of uses which will insure [sic] the maximum benefit to the people ..."). (Emphasis added).

the critical area,[10] S.C. Code Ann. § 48-39-30(D) does not.

The Supreme Court noted that this Court had "made no findings of any public benefit" and "failed to identify any benefit flowing to the public at large," explaining that "[q]uite to the contrary [of finding any public benefit], it was clear that only [KDP], not the *public*, would benefit from the construction of this enormous bulkhead and revetment." Kiawah, 766 S.E.2d at 716. (Emphasis in original text). As the law of the case, the Supreme Court's holdings cannot be altered on remand. Ables v. Gladden, 378 S.C. 558, 664 S.E.2d 442 (2008); Prince v. Beaufort Mem'l Hosp., 392 S.C. 599, 709 S.E.2d 122 (Ct. App. 2011); Ackerman v. McMillan, 324 S.C. 440, 477 S.E.2d 267 (Ct. App. 1996) (holding reversible error in reconsidering an issue addressed by the appellate court on remand). Thus the law of the case is that KDP, not the public, would benefit from the construction of the bulkhead and revetment beyond the 270 feet which would protect the Beachwalker Park parking lot and this Court cannot go further and substitute a new decision with a different determination on the existence and nature of public benefits. While the Remand Order is unclear, that is what this Court appeared to do by departing from the Supreme Court's decision.

Long-Range Cumulative Effects

In determining whether to grant a critical area permit, S.C. Code Ann. Regs. 30-11 requires DHEC to consider "[t]he extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area." In this case, there is nothing further for this Court to consider on remand regarding S.C. Code Ann. Regs. 30-11, because the Supreme Court found that the unpermitted portion of the bulkhead and revetment provided no public benefit. Kiawah, 766 S.E.2d at 723. Accordingly, a

[10] "DHEC's role under regulation 30–11 is limited solely to consideration of upland impacts." Kiawah, 766 S.E.2d at 719.

long-range cumulative effects analysis is not required in order to "follow the decision of the appellate court." Ackerman, 477 S.E.2d at 268.

WHEREFORE, for the reasons stated above, the Department respectfully requests that the Court amend the Remand Order to only permit KDP to install a 270 foot bulkhead and revetment along the Beachwalker Park parking lot.

Respectfully submitted,

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Charleston, SC
December 16, 2015

The undersigned hereby certifies that on this day he has served all parties in the above-captioned action with a copy of ***DEPARTMENT'S MOTION FOR RECONSIDERATION*** by emailing and by mailing a copy of the same to Amy Armstrong, Esq., SCELP, P.O. Box 1380, Pawleys Island, SC 29585 and to G. Trenholm Walker, Esq., Pratt-Thomas Walker, P.O. Drawer 22247, Charleston, SC 29413.

By:

Date: December 16, 2015

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KIAWAH DEVELOPMENT PARTNERS, II, Petitioner, vs. SCDHEC OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT, Respondent.	DOCKET NO. 09-ALJ-07-0029-CC
SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, Petitioner, vs. SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL AND KIAWAH DEVELOPMENT PARTNERS, II, Respondents.	**PETITIONER KIAWAH DEVELOMENT PARTNERS II, LLC'S MOTION TO ALTER OR AMEND FOR CLARIFICATION** DOCKET NO. 09-ALJ-07-0039-CC

TO: AMY E. ARMSTRONG, ATTORNEY FOR SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, AND BRADLEY D. CHURDAR, ATTORNEY FOR SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIROMENTAL CONTROL- OCEAN AND COASTAL RESOURCE MANAGEMENT

The undersigned, as attorneys for Kiawah Development Partners II, LLC ("KDP") hereby move to alter or amend the Final Order and Decision on Remand (the "Decision") of this Court filed December 2, 2015, determining the issues remanded to this Court for further consideration by the Supreme Court of South Carolina in Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 766 S.E.2d 707 (2014).

KDP requests that this Court clarify that the Court is approving a permit for the installation of the bulkhead for the entire distance that was requested for the bulkhead and revetment although the Court is limiting the revetment to 300 feet total.

KDP understands from review of the entire Decision that the Court approved the combined bulkhead and revetment as requested in the permit application for 270 feet next to Beachwalker Park and an additional 30 feet to the west where the articulated concrete mat revetment will taper from 40 feet to the shoreline at the foot of the bulkhead. KDP also understands that the Court approved the bulkhead alone for the entire distance requested in the application (i.e., 2,783 feet).

In a news article published shortly after the issuance of the Decision, the Petitioner South Carolina Coastal Conservation League (the "League") asserted that the bulkhead approved was only that along the 300 linear feet where the revetment was also approved. Additionally, in a conversation with counsel for KDP, counsel for the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (the "Department") expressed uncertainty as to whether the Court approved the bulkhead outside of the 300 feet associated with the approved revetment location.

In the Decision, this Court specifically found and concluded that the bulkhead met the regulatory criteria, did not violate the policies of the Coastal Zone Management Plan ("CZMP"), and did not impair public access. KDP's conclusion that the Court intended to allow the installation of the bulkhead for the entire requested distance is supported by the full text of the Decision including, but not limited to, the following excerpts:

> "Though, as explained below, this benefit does not offset the impact to the public by extending the revetment beyond, it does factor into the efficacy of granting a permit to construct the bulkheads." Decision at 7.

"However, the evidence did not establish that the bulkhead would adversely affect the recreational use of the sandy shore line." Decision at 15.

"Giving serious consideration to the alternative of leaving the shoreline in a natural state without the bulkhead and revetment, the Court nonetheless finds that leaving the shoreline in its natural state is not a better alternative than stabilizing the bank." Decision at 17.

"Therefore, permitting the installation of a bulkhead as previous[ly] approved by this Court is clearly supported by the evidence." Decision at 19.

"Nevertheless, I find that the need to further protect the bulkhead along the remaining shoreline beyond the Park using a revetment is outweighed by the public benefit of protecting the use and nature of the shoreline." Decision at 19.

"These public benefits tip the balance in favor of granting the permit subject to certain conditions and limitations." Decision at. 23.

"(the bulkhead will have no negative impact on recreational activity)." Decision at 25.

"As to the remaining shoreline of the Spit stretching thirty feet beyond Beachwalker Park, the Court concludes that there are no other feasible alternatives than to use a bulkhead, for the reasons mentioned above." Decision at 28.

It is this last excerpt (on page 28) that appears, in part, to have led some persons to question whether the Court intended to approve the bulkhead beyond Beachwalker Park. KDP requests that the Court clarify this sentence. KDP believes, based on the Decision's previous findings and conclusions, that the Court intended that sentence to read as follows: "As to the remaining shoreline of the Spit stretching beyond Beachwalker Park, the Court concludes that there are no other feasible alternatives than to use a bulkhead, for the reasons mentioned above."

KDP also suggests the **Order** section of the Decision be amended for clarification as well. This section starts with the following: "**ORDERED** that the permit issued by the Department (KDP Exhibit 44) is approved except that the terms and conditions of the permit limiting the bulkhead and revetment to 270 feet in Special Condition No. 1 are deleted and the

following shall be substituted for Special Condition No. 1 ...." [1] In eliminating Special Condition No. 1, the Court eliminated the restriction that the erosion control structure be limited to the 270 feet adjacent to Beachwalker Park. In the replacement Special Condition No. 1 that follows, the Court approved to the combination of the bulkhead and revetment for a total distance of 300 feet, with the modification of the width of the revetment over the western most 30 feet. The court did not limit the length of the bulkhead.

For these reasons, to eliminate any purported uncertainty or ambiguity as to this Court's determination, KDP also requests that the Court amend its Decision to renumber subparagraph (iv) to (v), and to insert in the subparagraphs of replacement Special Condition No. 1 the following additional subparagraph: "(iv) that the bulkhead is approved for the entire 2783 feet."

KDP makes these requests merely as suggestions to eliminate any doubt as to the specific structure the Court approved. The Court may prefer to accomplish this clarification, if the Court deems it necessary, in some other manner or by some other wording.

Respectfully Submitted,

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[1] Special Condition No. 1 reads as follows: "Provided that a 270' section of the proposed erosion control structure located along the southwest portion of the parking lot in Beachwalker Park is approved, but the remaining 2,513' of the proposed structure is not approved. KDP Exhibit 44.

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ATTORNEYS FOR KIAWAH DEVELOPMENT PARTNERS, II

December 16, 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand, or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 16th day of December, 2015, in Charleston, South Carolina.

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Kiawah Development Partners, II, Petitioner, vs. SCDHEC Office of Ocean and Coastal Resource Management, Respondents.	Docket No. 09-ALC-07-0029-CC Docket No. 09-ALJ-07-0039-CC **MOTION FOR RECONSIDERATION AND FOR CLARIFICATION OF FINAL ORDER AND DECISION ON REMAND**
South Carolina Coastal Conservation League, Petitioner, vs. Kiawah Development Partners, II, and South Carolina Department of Health and Environmental Control, Respondents.	

The Coastal Conservation League ("League") hereby moves the Administrative Law Court to reconsider and clarify its Final Order and Decision on Remand, dated December 2, 2015 ("Order on Remand"). Rather than applying the Supreme Court's decision in KDP II, v. DHEC & SCCCL, 766 S.E.2d 707, 411 S.C. 16 (2014) (hereinafter "KDP") as consistent with the holdings in the Opinion, the Order on Remand substantially departs from the reviewing Court's directives. The Order on Remand makes numerous new factual findings that are neither

supported by the evidence, nor relevant in light of the applicable legal standards. The result is a decision that is confusing and illogical. Without reconsideration and clarification, additional appeals will ensue in a case that has already received extensive review with clear directives from the appellate court.

At the most basic level, the Order on Remand creates confusion as to the nature and extent of the structure which it authorizes to be constructed on Captain Sams Spit. The decretal section of the Order indicates that this Court has modified the permit requested by KDP and specifically authorizes construction of a revetment and bulkhead system limited to 270' in length and 40' in width. Beyond that, the Order lacks clarity and leaves room for multiple and competing conclusions. The paragraph immediately preceding the decretal section blurs the clear limitation of 270' x 40' of structure by referencing the "remaining shoreline of the Spit stretching thirty feet beyond Beachwalker Park." It appears there that the Court may be authorizing a bulkhead without revetment for the thirty feet beyond the Park, but even that is unclear. The League is left with the presumption that the Court intended to allow something more than 270' x 40' of structure based on the discussion portions of the order, but it is entirely unclear as to the extent of the structure envisioned by the Court.

More significantly, the Order evidences a fundamental misapplication of the narrow and clear guidelines established by the Supreme Court. In reversing this Court's Final Order and Decision, the Supreme Court cited several errors of law and remanded the case "for further consideration consistent with this decision." The Order on Remand, however, is inconsistent with that decision in many respects.

I. The Order Misapplies and Misunderstands Section 48-39-30(D) Because it Fails to Consider Public Benefit in the Critical Area

The fundamental flaw in the Order on Remand is its misapplication of Section 48-39-30(D). Section 48-39-30(D) states that "***critical areas* shall be used to provide the combination of uses which will insure the maximum benefit to the people**, but not necessarily a combination of uses which will generate maximum measurable dollar benefits." This provision requires an assessment of the existing combination of uses ***of the critical area*** compared to the proposed combination of uses ***of the critical area***. See S.C. Code Ann. § 48-39-30(D). **It is use of the critical areas that is to provide the maximum public benefits, not other activities that will flow from an applicant's use of that critical area**. In discussing public benefits, the Supreme Court consistently discusses these public benefits in the context of how the critical area will be used, i.e., the benefits accruing to the public if the critical areas are left in their natural state or if structures are constructed over and on the critical areas. Order on Remand at 30-31. The Order on Remand appears to confuse the requirement that critical areas be used to provide maximum benefits to the people with the requirement to consider the long-range and cumulative impacts of a project, including those impacts outside the critical area. Section 48-39-30(D) is confined to consideration of uses of the **critical area**.

Instead of assessing how the public would benefit from any structures on the shoreline, the Order only considers public benefits ***outside and beyond the critical area uses*** that this provision seeks to protect. The Order discusses what it calls "public benefits"[1] on lands that are **not critical areas.** The General Assembly was clear that it is the use of the critical areas

[1]As discussed below, there is no evidentiary support for the efforts the Order on Remand takes to arrive at what it suggests are findings of public benefit.

themselves that must be balanced to provide the combination of uses that provides the maximum benefit to the public.

The Order recognized that "leaving the area in its natural state" was to be given "strong consideration," (Order on Remand, p. 3), yet it fails include strong consideration in the analysis. The public benefits from allowing the cyclical erosion, breach and accretion processes on the Spit. KDP II, v. DHEC & SCCCL, 766 S.E.2d 707, 723, 411 S.C. 16 (2014). KDP at 716 ("undisputed evidence . . . established that the accretion of the spit followed by the erosion of the neck of the spit and the formation of a new inlet is a natural process . . . [the Act] provides that it is to the public's benefit to protect natural processes like the cyclical erosion, breach and accretion process of the [Spit].") Construction of a bulkhead or revetment in the critical area is hardly "leaving the area in its natural state."

There was no finding of public benefit from armoring the shoreline because there was no evidence in the record of the contested case hearing of any such benefits. The fact that this Court did not make findings regarding public benefit in building the structure does not mean that the Court may create some public benefit where none exists. The belated, new identification of public benefit is unsupported by any evidence and erroneous. Moreover, the Supreme Court made clear that Section 48-39-30(D) requires consideration of "**benefit flowing to the public at large.**"[2] Id at 716 (emphasis added). Instead of considering the public at large, the Order on Remand restricts its analysis to very small segments, not the public at large.

A. Parking Spaces Are Not in the Critical Area and Thus Improper to Include in the Public Benefit Analysis

[2]As the Supreme Court said, to "allow the benefits to a private developer to override the interest of the people of South Carolina undermines the statute and defeats the very purpose of the public trust doctrine." Id at 716.

The Order's suggestion that eight (8) parking spaces which can only be used by an exclusive group of people fortunate enough to own property on Kiawah Island is a "public benefit" utterly fails to conform to the Supreme Court's interpretation of the law. Eight (8) parking spaces for members of a private, gated community does not provide sufficient "public benefit" to override the benefit to the millions of citizens of this state for whom the General Assembly declared benefit from the critical area remaining in a natural state.[3]

People living within the exclusive Kiawah Island development who are members of the Kiawah Island Community Association ("KICA") who will be able to use the eight (8) parking spaces do not constitute "the public at large." KICA members are, like KDP, an infinitesimal segment of the "public at large." Even if KICA members were the "public at large," no evidence establishes that eight (8) parking spaces for people who already live in and have access to Captain Sams Spit are needed. No KICA member testified that he or she drives their car to Beachwalker Park, that presently drivers cannot find places to park or that they are otherwise unable to access the public trust lands of Captain Sams Spit. Rather they testified that they would not be able to use and enjoy the shoreline of the Kiawah River if a revetment and bulkhead were constructed upon it. The availability of eight parking spaces cannot rise to the level of providing "public benefit" that would override the public's benefit in actual use of the critical areas.

B. Easement is Not in the Evidence and Not in the Critical Area and Thus Improper to Include in the Public Benefits Analysis

The Order on Remand continues to search for supposed "public" benefits **outside** the critical area, rather than identifying uses of the **critical area** that would provide maximum

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[3]The only two members of KICA who testified, Greg VanDerwerker and Sophia McAllister, both testified definitively that they benefitted from using the sandy shoreline for recreational and aesthetic purposes.

benefit to the people, in discussing a conservation easement that will presumably be placed on part of the Spit. The word "easement" in the context of a conservation easement on Captain Sams Spit was used only twice (page 166 of the hearing transcript) during the week-long hearing. No evidence even suggested that the public would benefit from a privately held conservation easement. There is no evidence that the placement of a conservation easement is contingent upon, or even relevant to, the construction of the bulkhead or revetment. No conservation easement is required by the DHEC permit. When the conservation easement was mentioned during the contested case hearing, KDP's witness merely and generally referred to a letter admitted solely for the purpose of notice and inquiry that "30 acres will one day be placed under a . . . conservation easement." (Tr. 166, lines 3-5). No evidence could reasonably be inferred to suggest, much less establish, that a conservation easement that "will one day" (presumably) be placed on the Spit would provide a benefit to the people, certainly as pertains to the tidelands which would be covered with concrete blocks.

In any event, the conservation easement arises as a result of KDP's agreement with the Town of Kiawah Island, not as a result of the use of critical area for a hard erosion control device. The minimal evidence regarding the conservation easement could only be an appropriate consideration under Regulation 30-11(C)'s requirement to consider the "extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area." R. 30-11(C)(1). While that regulation allows consideration of impacts outside the critical area, Section 48-39-30(D) does not.

Moreover, consideration of the upland impacts resulting from the development must be compared with the Spit as it exists in its natural, undisturbed state. The fact that there will be fifty (50) mansions covering 20% of the Spit while the remaining 80% may be placed under

conservation easement is a substantial encroachment and disturbance from the Spit's present condition. The Order on Remand completely ignores the fact that by authorizing some form of hard erosion control structure, the Court is allowing development of the Spit, otherwise it would remain in its present condition. The finding that the "public benefit can only be realized if the development . . . occurs" is unsupported by the evidence. Again, no evidence indicates that the public benefits from the development, instead the probative evidence establishes that the public benefits from the Spit remaining in an untouched state.

The Supreme Court noted that this Court had "made no findings of any public benefit" and "failed to identify any benefit flowing to the public at large," explaining that "[q]uite to the contrary [of finding any public benefit], it was clear that only [KDP], not the *public*, would benefit from the construction of this enormous bulkhead and revetment." As the law of the case, the Supreme Court's holdings cannot be altered on remand. Ables v. Gladden, 378 S.C. 558, 664 S.E.2d 442 (2008); Prince v. Beaufort Mem'l Hosp., 392 S.C. 599, 709 S.E.2d 122 (Ct. App. 2011); Ackerman v. McMillan, 324 S.C. 440, 477 S.E.2d 267 (Ct. App. 1996) (holding reversible error in reconsidering an issue addressed by the appellate court on remand); see also Bobo v. Marshane Corp., 302 S.C. 86, 88-89, 394 S.E.2d 2, 4 (Ct. App. 1990) (reversing the full workers compensation commission for exceeding its authority in failing to follow directions of the court on remand and going much further to reverse the panel's decision and substitute a new decision with a different result). Thus the law of the case is that KDP, not the public, would benefit from the construction of the bulkhead and revetment and this Court cannot go further and substitute a new decision with a different determination on the existence and nature of public benefits. Yet that is what this Court appeared to do by departing from the Supreme Court's decision.

The Order on Remand contorts the Supreme Court's opinion by concluding that economic benefits to KDP are factors to consider in examining the uses of the critical area that provide the maximum benefit to the people. (Order on Remand, p. 15). Certainly any permit authorizing use of the critical area is going to provide some benefit to the applicant. The question is whether the applicant's use of the critical area provides the combination of uses that maximizes the public benefit.

Simply stated, parking spaces and a conservation easement are not public benefits as contemplated by Section 48-39-30(D) because those activities are not uses of the critical area. At most they would be an ancillary result of other agreements made in connection with the development of the Spit that may or may not come to fruition.

This Court's failure to recognize that covering the sandy shoreline with concrete mat would make public trust resources unusable is genuinely perplexing. Even more perplexing is the Court's suggestion that public use of the shoreline is incompatible with maintaining the shoreline in its natural state. (Order, fn. 6).The natural state would not allow for man-made structures on the shoreline. The general prohibitions on such structures in the critical area are expressly intended to allow public use of those public trust resources, as currently happens on the banks of the Kiawah River.

II. The Order on Remand Fails to Apply the Supreme Court's Directives Related to the Policies and Findings of the Coastal Zone Management Act

The Order on Remand references Section 48-39-150(A)(7)'s requirement to balance the economic benefits compared with the benefits from preservation of an area in its unaltered state, but gives only limited and passing treatment to that provision. The Order on Remand concedes that there is no evidence to support the contention that increased tax base would be an economic

benefit. It provides no further analysis and fails to consider, much less apply, the Supreme Court's conclusions regarding the significant benefit of leaving the area in its natural state. The League and the Department assert that there is no more than minimal evidence, if that, of economic benefit, yet substantial evidence, as found by the Supreme Court, of public benefit to leaving the area in its natural state.

In this Court's discussion of Section 48-39-150(A)(10), the Order on Remand entirely and repeatedly misunderstands the League's assertion about public ownership of lands adjacent to Captain Sams Spit. The League **has never asserted that the public is the adjacent owner by virtue of the Park**, and the Order erroneously makes this statement. Captain Sams Spit is surrounded on three sides by water and on one side by land. The League acknowledges that the public has no ownership interest in the land or the Park. However, on the other three sides of the Spit that are surrounded by critical areas, the public is the owner; under the Public Trust Doctrine the State holds those lands below the mean high water mark in trust for the public's use. It cannot seriously be disputed that the public owns the lands below the mean high water mark and that the vast majority of the Spit is surrounded by such public trust lands. Indeed, the Supreme Court recognized that the Public Trust Doctrine undergirds this case because the project is proposed to impact public property.

III. The Order on Remand's Findings and Conclusions on 30-11(C)(1) are Erroneous and Inconsistent with the Evidence and the Supreme Court's Opinion

The Court's new finding that the "general character of the area" is "residential, with some commercial development" (Order, p. 12) is inconsistent with ***all*** of the testimony and evidence describing the character and nature of the Spit. The Order on Remand would escape this inescapable conclusion by altering the language of R. 30-11(C)(1) to the "general character

of the **greater** area." (Order, p. 12). That is not the standard, and the Court may not lawfully inject a new standard and add to the regulation. Most of the new findings in the Order on Remand are unsupported by the evidence[4] and ignore the Department's specialized knowledge, which was utilized in determining that there would be long-range cumulative impacts that were sufficiently significant to weigh conclusively against authorization of the structure. Only by ignoring the testimony can the Court determine that the League and the Department did not present evidence of the cumulative impacts.[5] That there is "no public policy against development of private property that has never been developed" (Order on Remand, p. 14) does not end the inquiry.

The Supreme Court held that the uncontroverted evidence demonstrated that there *would* be upland impacts in that "the upland area of the spit is to be transformed from a completely

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[4]For example, the findings that "most of the houses probably will be second homes;" that these homes would be "occupied on an infrequent basis, usually six to eight weeks" per year; and that the houses on the spit would be constructed over "twenty to thirty years." (Order, p. 13).

[5]The League and the Department presented evidence that the spit experiences "geomorphic instability" which means that at any given time there could be changes in the channels, adjacent beaches and entire shifting of the inlet. (Tr. 709). It is a dynamic area in that it is in a constant state of movement. The inlet zone is unstable and is subject to immediate and drastic changes. (Tr. 599).

Captain Sam's Spit was designated a "COBRA Zone" under the federal Coastal Barrier Resources Act ("CBRA"). 16 U.S.C. 3501, *et seq.* (Tr. 340; CCL Ex. 8). Areas designated as COBRA Zones are ineligible for any federal subsidies, including federal flood insurance. The purpose of this prohibition on federal expenditures is to discourage development on areas that are pristine, sensitive and potentially dangerous to build on. (Tr. 341, 933).

Dr. Young said that "there is absolutely no doubt from a coastal hazard's perspective that the most vulnerable places on this island .. . are the areas near the inlet." (Tr. 928, lines 12-16). If a severe storm were to hit Captain Sam's Spit and if there is residential development on the spit, the impacts to the houses and infrastructure on the spit could be devastating. Such a storm could result in significant damage, not only to homes, but also to the surrounding beach, inlet and river that would be littered with debris. The long-term, cumulative impacts of such a storm event would be loss of property and saddling the taxpayers with the financial burden of cleaning up and rebuilding after the storm event.

natural area into a residential development." Id. at 720. Thus, the law of the case is that impacts to the uplands would occur cannot be disturbed. Even the "limited" development that would result from the revetment would change the pristine, undeveloped character of the Spit. (Tr. 1365). It will no longer be a natural, pristine environment where the land can respond to forces that occur naturally in an unstabilized inlet area. (Tr. 1365).

A revetment along the banks of the Kiawah River would represent a "rather significant manmade influence in an area that previously has not had any sort of development impacts or madmade impacts to it. So it would certainly change the character of that section of shoreline and . . . the overall character of [the] Spit." (Tr. 1243, lines 14-21).

IV. The Order on Remand Appears to Authorize a Structure Without Any Evidence to Support the Viability of that Structure

One of the most troubling aspects of the Order on Remand is the purported authorization of a vertical bulkhead structure without the supporting revetment that the Court seems to permit. There is absolutely no support for the Court to find and conclude that such a structure complies with the statutory and regulatory requirements. Every one of KDP's witnesses who testified on the subject said that the revetment was critical and necessary to make the overall structure feasible. No evidence supports the finding that a bulkhead without a supporting revetment would be technically possible, feasible or advisable, much less whether it would serve the project purpose. Mitchell Bohannon testified at length, as a qualified engineer, as to why the revetment is necessary:

> A: Well, clearly, whenever you put a vertical face against -- on a shoreline in any kind of waterway, you're going to get some kind of wave action up against that. And if you don't do something to protect that toe against that reflective energy, it's going to cause even more exacerbated erosion. So that's just one of the things --
>
> Q: And when that happens --

A: -- you'd have to do.

Q: -- Mr. Bohannon, does that erosion occur on the bottom?

A: Oh, yes.

Q: And it disrupts it?

A: Yes.

Q: In this particular design, does the revetment part, which is the articulated concrete block matted over the bank, play into reflective wave energy?

A: Yes.

Q: How so?

A: Well, it prevents that reflected wave from causing erosion on the bottom.

Q: With respect to the bottom, does it help stabilize the bottom?

A: Yes.

Q: There's been some discussion about the length of the revetment. How is the length and the location of the revetment determined?

A: Well, we went out in the field. I mean, we've had survey data and a number of studies done. We've actually been in the field and located kind of the beginning and end the erosion zones and that's where the revetment -- we're asking to put a revetment. It's pretty clear when you go in the field where it starts and stops.

Q: And when you scaled it out, did it come to whatever the distance is, 2,763 or 83 feet?

A: I think it's 2,783.

THE COURT: How far would the block go out?

THE WITNESS: About 40 feet (indicating).

THE COURT: Well, if the block went out 40 feet, it would pretty well cover all the sand that's in that picture?

THE WITNESS: Yes. Yes, sir.

THE COURT: Why does the block have to go out that far?

THE WITNESS: Well, because this is the zone of erosion and we believe that the shoreline is going to continue to erode. There's some velocity erosion occurring along here, as well, as the erosion's coming -- and that's part of what's causing this whole phenomenon.

(Tr. 465 – Tr. 476, line 8).

All of the testimony indicates that from an engineering perspective it is the revetment that is the key component to the project and that if any structure is eliminated, it would be the bulkhead. (Tr. 465-478; 543-544). The bulkhead alone will undisputably cause problems identified by KDP's witnesses.

Similarly, there is no evidence that a bulkhead standing alone would have "de minimus impact upon the public use of the shoreline." (Order, p. 16/17). The essential purpose of the bulkhead/revetment system is to fix an eroding shoreline. Once the erosion reaches the bulkhead, there will be no more shoreline which the public can access and enjoy. The Order on Remand overlooks this critical aspect of the project and its impacts.

V. The Order on Remand Makes Additional Findings Unsupported by Any Evidence

Whether denial of the permit "contradicts [a] local legislative land use decision" and whether "KDP can satisfy the Town['s] ordinances . . . without stabilization of the riverbank" are irrelevant to the inquiry of whether the project meets the statutory and regulatory requirements, provide no justification for authorizing and structure and should be deleted. (Order on Remand, p. 17). Similarly, whether the Town of Kiawah approved development on the Spit does not establish public benefit and the Order on Remand should not address that point. (Id.) The suggestion that the Town has a goal of "developing the Spit," and much less that the Town's approval of the development is a public benefit, are unsupported by any evidence.

The Court's conclusions that the "bulkhead and revetment will not have any material effect on . . . the historical process of cyclical erosion, breach, and accretion" is unsupported by

the evidence. (Order on Remand, p. 23). The entire purpose of the bulkhead and revetment is to halt erosion, and, if it works as intended, the structure would doubtlessly affect the natural erosion cycle that is occurring along the Kiawah River shoreline. The Court seems to acknowledge that, but these two conclusions are in contradiction.

Though not stated in its conclusions of law, the Court finds that "allowing the erosion . . . to proceed unabated could ultimately turn the sandy shoreline into a steep escarpment inaccessible to kayakers and unsafe." (Order on Remand, p. 23). No evidence supports this finding. Dr. Rob Young's testimony was that the as the bank erodes, the sand feeds the shoreline and maintains it as a sandy shoreline. Only if a hard erosion control structure is placed on the shoreline will it become inaccessible and unsafe as the erosion advances to the structure. The uncontested evidence was that "the people" have a right to beach kayaks and boats on the sandy banks of the Kiawah River, and to swim, fish and crab on the banks of the river in the location of the proposed revetment. S.C. Opinion Attorney General 329 (Dec. 10, 1970); US v. Kane, 461 F.Supp. 554 (EDNY 1978); Martin v. Waddell, 41 U.S. 367 (1842). The Supreme Court relied on undisputed evidence of public benefit in leaving the shoreline unarmored and allowing the natural processes to take place. Id. at 716. ("undisputed evidence . . . established that the accretion of the spit followed by the erosion of the neck of the spit and the formation of a new inlet is a natural process . . . [the Act] provides that it is to the public's benefit to protect natural processes like the cyclical erosion, breach and accretion process of the [Spit].") The Act recognizes that "there is often great value in allowing nature to take its course, rather than having our coast become an armored, artificial landscape." Id. at 716-717.

The regulations "generally prohibit alterations to the tidelands except when the public interest requires otherwise" and "altering tidelands remains the exception to the rule." Id. The

State's policy is "that the public interest is usually best served by preserving tidelands in their natural state." Id. (citing §§ 48-39-20 to -30).

"If there ever were a case of a substantial adverse effect on public access, it is this case," as the evidence is that public access impacts would be significant. Id. 722. In support of its conclusion, the Supreme Court cites to "uncontroverted evidence" indicating that effects on public access would be substantial.

VI. Supreme Court Opinion Constrains Authorization of Any Structure Beyond What Was Approved by DHEC

The League maintains its position that the combination of uses that provides the maximum benefit to the people of South Carolina is to leave the banks of the Kiawah River in their natural and unaltered state without any hard erosion control structure. This position is based both on the public benefits to allowing natural processes of erosion and accretion to occur, as well as the public benefits to use and enjoy the shoreline for a variety of activities, including launching and landing boats, picnicking, watching dolphins strand feed, and just sitting on the sandy banks.

The League also asserts that the location of Beachwalker Park is in question because the parking lot and other structures are on lands owned by KDP and are only leased by the Charleston Parks and Recreation Commission ("PRC"). In addition, KDP and PRC have been negotiating a new location that would allow KDP to incorporate the current park location into its proposed development.

However, the Supreme Court opinion could be read to allow this Court to consider construction of erosion control structures where the use of a critical area for erosion control would provide maximum benefits to the public, i.e., erosion control structures adjacent to

Beachwalker Park. Notwithstanding its position that denial of the entire 2,783' of revetment and bulkhead would be the most obvious, clear, direct and simple way to comply with the Supreme Court's directives, the League is attaching a Proposed Order on Remand that reflects what it believes could be a defensible basis for authorizing the limited 270' of structure adjacent to Beachwalker Park for the Court's consideration.

CONCLUSION

For all of these reasons the Coastal Conservation League asks the Court to reconsider, clarity and amend its Final Order and Decision to conform with the analysis of the Supreme Court's Opinion.

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December 16, 2015

Georgetown, South Carolina

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Kiawah Development Partners, II, Petitioner, vs. SCDHEC Office of Ocean and Coastal Resource Management, Respondents.	Docket No. 09-ALC-07-0029-CC Docket No. 09-ALJ-07-0039-CC **CERTIFICATE OF SERVICE**
South Carolina Coastal Conservation League, Petitioner, vs. Kiawah Development Partners, II, and South Carolina Department of Health and Environmental Control, Respondents.	

I hereby certify that on this date I served the Coastal Conservation League's Motion for Reconsideration and Clarification on Kiawah Development Partners II, Inc., and DHEC, by placing copies of the foregoing in the U.S. Mail addressed to:

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STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Kiawah Development Partners, II, Petitioner, vs. SCDHEC Office of Ocean and Coastal Resource Management, Respondents.	Docket No. 09-ALC-07-0029-CC Docket No. 09-ALJ-07-0039-CC **KDP'S RESPONSE TO COASTAL CONSERVATION LEAGUE'S MOTION FOR RECONSIDERATION AND FOR CLARIFICATION OF FINAL ORDER AND DECISION ON REMAND**
South Carolina Coastal Conservation League, Petitioner, vs. Kiawah Development Partners, II, and South Carolina Department of Health and Environmental Control, Respondents.	

Kiawah Development Partners, II ("KDP") hereby submits this memorandum in response to the Motion for Reconsideration and for Clarification of Final Order and Decision on Remand of the South Carolina Coastal Conservation League (the "League"). As set forth below, this Court properly applied the directives of the Supreme Court of South Carolina in Kiawah Development Partners, II v. South Carolina Department of Health and Environmental Control and the South Carolina Coastal Conservation League, 766 S.E.2d 707, 411 S.C. 16 (2014) (the "Opinion"). Further, the factual findings of this Court in its Final Order and Decision on Remand dated December 2, 2015 (the "Order on Remand") are fully supported by the evidence. Finally, as explained in KDP's Motion to Alter or Amend for Clarification, KDP requests that the Court

clarify the Order on Remand to leave no doubt that the Court approved the bulkhead portion of the erosion control structure for the entire linear distance requested.

Indignant about this Court's findings and conclusions in the Order on Remand, the League attacks the Order on Remand through inflammatory rhetoric, unfounded assertions about the record, and a mischaracterization of the holdings in the Opinion. Contrary to the League's suggestion, the Opinion did not prohibit this Court from making factual findings. Instead, the Opinion directed this Court to apply the majority's legal standards to the facts and derive findings under the guidance of those legal precepts. The last paragraph of the majority in the Opinion directed this Court to reconsider the record consistent with the majority's rulings with no limitation on what testimony or exhibits this Court might rely upon in rendering its determination on remand:

> First, the CZMA requires that uses of the public tidelands be to "the maximum benefit to the people," but the ALC did not consider whether and to what extent the public would benefit from the proposed structure as opposed to leaving the tidelands in their natural state. Accordingly, the ALC erred in finding section 48-39-150 satisfied. Second, the ALC erred in finding the project met the requirements of regulation 30-11 both because that regulation requires consideration of the factors in section 48-39-150 and because the ALC's consideration of upland impacts was flawed. Finally, the ALC erred in finding regulation 30-12(C) satisfied because this finding is tainted by the erroneous conclusion that there was no adverse effect on public access and the failure to consider the alternative of leaving the critical area in its natural state. For all of those reasons, we reverse and remand for further consideration consistent with this decision.

766 S.E.2d 723.

When an appellate court reverses and remands for further consideration, the trial court is entitled to consider the entire record and to make findings based thereon. A remand for further "consideration" means that the trial court is "to review the evidence which was admitted in the record of the hearing." Parker v. South Carolina Public Service Comm'n, 288 S.C. 304 at 307, 342 S.E.2d 403 at 405 (1986); Accord, Ducworth v. Neely, 319 S.C. 158, 165, 459 S.E.2d 896, 900 (Ct. App. 1995) (On remand the trial judge should determine whether the party met the party's

burden of proof with respect to the correct legal standard from reviewing the trial record.").

I. The Order on Remand correctly applies the policies of S.C. Code §48-39-30 and, in particular, subsection (D). Nothing in the wording of the subsection nor the Opinion requires that the public benefit occur within the critical area, as argued by the League.

S.C. Code §48-39-30, titled "Legislative Declaration of State Policy," provides in pertinent part as follows:

> (A) The General Assembly declares the basic state policy in the implementation of this chapter is to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State.
>
> (B) Specific state policies to be followed in the implementation of this chapter are:
>
> (1) To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;
>
> (2) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations;
>
> (5) To encourage and assist state agencies, counties, municipalities and regional agencies to exercise their responsibilities and powers in the coastal zone through the development and implementation of comprehensive programs to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values as well as to the needs for economic and social development and resources conservation.
>
> (D) Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.

S.C. Code §48-39-30.

The majority of the Supreme Court ruled that this Court erred in its assessment of public

benefit under subsection (D). The majority held that the "CZMA requires that uses of the public tidelands be to 'the maximum benefit to the people,' but the ALC did not consider whether and to what extent the public would benefit from the proposed structure as opposed to leaving the tidelands in their natural state." 766 S.E.2d 723.

Contrary to the argument of the League, Section 48-39-30(D) does not confine the public benefit analysis to the effects in the critical area. The benefits to the public can ensue from either the project in the critical area or outside the critical area that flow from the project in the critical area.

If the League's argument were correct, there could be no private use structures in the critical area–including private docks, bridges, and boat landings--since they do not benefit the public's use of the critical area. Under the League's argument, no erosion control structures could ever be permitted. The purpose of an erosion control structure, even structures as simple and widespread as a bulkhead or riprap, is to protect the highland not the critical area. None bestows benefit on the public's use of the critical area. The League's interpretation of subsection (D) would effectively repeal S.C. Code §48-39-120(F)[1] and S.C. Reg. 30-12(C) that both allow erosion control structures to protect highland being lost to erosion even though those structures do nothing to promote the public's use of the critical area.

Further, the Supreme Court did not state that the only benefit that could be considered had to occur within the critical area. If that were the case, the benefit to the owner outside the critical area could never be considered. Yet, footnote 5 of the Opinion specifically states that the benefit

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

to the owner may be considered, but that it is the benefit to the public, other than the owner, that controls. 766 S.E.2d 716, n. 5 ("Contrary to the dissent's characterization, we do not exclude the developer from being included in "the people." Rather, our point is that the ALC erred in considering only the benefits to the developer to the exclusion of the public as a whole.").

Finally, S.C. Reg. 30-11(c) specifically requires an analysis of the cumulative effects of a project that "may result within the context of other possible development and the general character of the area." At the behest of the League in its appeal, the Supreme Court agreed that the effects that need to be considered include those *outside* the critical area. The League's position would create a total anomaly. In assessing cumulative impacts, impacts outside the critical area must be considered, but for purposes of determining benefits, only the impacts in the critical area may be considered. As the Supreme Court ruled in the Opinion, the positive and negative impacts from a critical area project that are to be considered are the impacts within and outside the critical area.

The League's position that the Court may consider only beneficial effects occurring in the critical area is not supported by the text of the statutes and regulations, is without legal precedent, and is completely at odds with the specific holding in the Opinion that the cumulative effects analysis must consider the effects of a project within and outside the critical area..

II. The additional beach parking spaces with accompanying beach access and the conservation easement were both properly considered in the public benefit analysis.

The League attacks the Court's consideration of the new beach parking spaces and accompanying beach access as well as the required conservation easement in the Court's public benefits analysis. The League asserts: (1) both benefits are on the upland and cannot be considered because those benefits do not occur within the critical area; (2) the additional beach parking is available only to the thousands of owners on Kiawah rather than the entire people of South

Carolina; (3) there was no proof the additional beach parking is beneficial or needed; (4) the document that would constitute the future conservation easement was not in evidence; (5) there was no proof the public would benefit from a conservation easement requiring that the undeveloped portions of Captain Sams Spit be preserved forever in a natural state; (6) the conservation easement is not a condition of the DHEC permit but rather a requirement of the Development Agreement between KDP and the Town of Kiawah Island; (7) there is little public benefit from a conservation easement over 80% of Captain Sams Spit if there "will be 50 mansions covering 20% of the Spit" (League Motion at 6): and (8) the majority's ruling in the Opinion that this Court made no findings of any public benefit precludes this Court from now making findings whether there is proof the project would benefit the public.

As just explained, there is no express or implied restriction in the policies set forth in S.C. Code §48-39-30, the CZMA, or S.C. Reg. 30-11(C)(1) limiting the consideration of benefits or other effects to those occurring in the critical area. To the contrary, the policies apply to the entire "coastal zone" which are comprised of the eight designated coastal counties. S.C. Code §48-39-10(B). Moreover, the Supreme Court ruled that the analysis of long-range cumulative effects must include the adjacent upland area as well as the critical area. Benefits to members of the public that will be bestowed on the upland that depend on the permitted critical area activity may be properly considered.

The thousands of members of Kiawah Island Community Association ("KICA") are members of the public.[2] Just because these thousands of persons own property in "a private, gated community" (League Motion at 5) does not remove their status as members of the public.

The establishment of eight new parking spaces west of Beachwalker Park in the middle of

[2] Mr. Long testified that there are 4500 owners on Kiawah Island. (Tr. 175:24).

Captain Sams Spit, with associated beach access, improves beach access for all the property owners on Kiawah Island. In making factual findings, this Court is entitled to consider reasonable inferences from the evidence. The Town of Kiawah Island would not have bargained for and imposed a requirement in the Development Agreement that KDP furnish and pay for the construction of this additional beach parking if it were not beneficial. (KDP Exh. 2 at 22-23). The question is whether there is proof that establishes benefit, not whether there is proof that the additional parking spaces "are needed." (League Motion at 5).

The League is incorrect in asserting that KICA members already "have access to Captain Sams Spit." (League Motion at 5). They don't. KDP owns Captain Sams Spit. The members of KICA have no access to or right to use the upland of Captain Sams Spit, but will have such access and beneficial use if the road is built and the beach parking spaces are constructed.

This Court's findings as to the future conservation easement are amply supported by the evidence. (Order on remand at 6-8). The Development Agreement between KDP and the Town of Kiawah Island was admitted into evidence. (KDP's Exhibit 2). The extensive terms of the Development Agreement dealing with Captain Sams Spit include KDP's obligation as "Property Owner" to place a conservation easement on all of Captain Sams Spit other than the 20 acres of lots and associated infrastructure, requiring it to remain as "non-developable, passive green space." (KDP Exhibit 2 at 23). The Development Agreement is a binding, enforceable contract between KDP and the Town of Kiawah Island. Even though the instrument setting forth the exact terms of the conservation easement does not yet exist, the future conservation easement's mandatory force and effect are established by the terms of the Development Agreement.

There is abundant evidence that the public would benefit from the conservation easement. Bill Eiser testified to his opinion of the immense value to the public if no development occurred

on Captain Sams Spit:

> It would be very difficult to put a dollar value on that benefit, but I guess what I can tell you is that this is, as I mentioned, one of three tracts of oceanfront land in the entire state where the public has good access, where you can drive and park and walk out and see what a pristine undeveloped piece of ocean front property looks like, and I think there is an extraordinary value to the people of South Carolina in preserving that.

(Tr. 1332).

This same public benefit, albeit to a slightly lesser extent, will be bestowed by preserving 80% of Captain Sams Spit in a natural state. As this Court pointed out, the conservation easement guards the protection of the remainder of Captain Sams Spit despite its continued future accretion, changes in state or local laws, or other physical or legal changes that might allow expanded development on Captain Sams Spit. (Order on Remand at 7).

The League misunderstands the nature of a conservation easement by suggesting there would be no "benefit from a privately held conservation easement." (League's Motion at 6). The fact that the easement is held and enforced by a private entity does not diminish the public's benefit from the preservation of land in a natural state. The South Carolina Conservation Easement Act of 1991, S.C. Code §§27-8-10 et seq., specifically allows private party holders of conservation easements. S.C. Code §27-8-20 (2)("'Holder' means: ... (b) a charitable, not-for-profit or educational corporation, association, or trust the purposes or powers of which include one or more of the purposes listed in subsection (1)"). Most grantees of easements are private entities such as The Nature Conservancy or Ducks Unlimited. It is the nature of the restriction rather than the identity of the grantee of the easement that is the foundation of the public benefit.

The League also misguidedly questions how the conservation easement "placed on the Spit would provide a benefit to the people, certainly as pertains to the tidelands which would be covered

with concrete blocks." (League's Motion at 6). The conservation easement will only apply to the land owned by KDP. It does not extend into the critical area. As to the League's statement that the tidelands "would be covered with concrete blocks," an apparent reference to the mat of articulated concrete blocks ("ACB"), the League overlooks that this Court reduced the linear length of the 40-foot ACB mat to 270 feet and did not grant the revetment for the remaining 2500 feet requested.

There is no statutory or regulatory requirement that the benefits from a project in the critical area flow from conditions of the permit itself as argued by the League. In assessing the effects of a project in the critical area, consideration is given to all the effects that flow from the project in the critical area, including those on the upland. As held by all members of the Supreme Court in the Opinion, including the minority, the effects analysis includes the consequences of the upland development that will be facilitated by this erosion control structure.

As this Court found, the additional beach parking as well as the conservation easement will occur only if the access road is constructed and the limited residential development of Captain Sams Spit occurs. This development will only happen if there is an erosion control structure protecting the access corridor. These benefits are the direct result of the installation of an erosion control device. As already shown, there is considerable public benefit from the mandatory conservation easement if the limited development proceeds.

In its zeal and fury, the League ramps up its hyperbole in erroneously asserting that "50 mansions will cover 20% of the Spit." That is completely false and known to be false. The Development Agreement allows up to 20 acres to be *subdivided* into no more than 50 lots to be conveyed to purchasers. As Mark Permar and Leonard Long testified, and this Court found, extensive steps will be taken to assure the development is environmentally sensitive and attentive

to the natural conditions of the Spit. There will be no mansions covering 20% of the Spit. The undisputed proof is that the home sites will be limited to a small portion of the lots, that the houses will be no more than a story and a half tall, and that every effort will be made to make them less prominent than the surrounding trees and landscape. (Tr. 98, 318, 322).

The League misconstrues the holding of the majority in the Opinion in arguing that this Court is prohibited from making findings of benefit. While the majority held that this Court had made no findings of public benefit and failed to identify any benefit to the public at large, the whole purpose for the remand on the question of benefit to the public was to allow this Court to scrutinize the record to determine if there were benefits to members of the public other than KDP. The majority of the Court did not state that there was no evidence at all of any public benefit but rather that this court made no findings. If the Supreme Court had held that there could never be any finding of public benefit based on the entire record, there would have been no need to remand the matter for further consideration. Instead, the Supreme Court would have vacated the permit with finality and not remanded the case. The Administrative Law Court, not the Supreme Court, is the finder of fact.

For the foregoing reasons, this Court correctly found and concluded that the project will bestow benefit to the public in the form of the additional beach parking with associated pedestrian beach access as well as the conservation easement.

III. The record supports the findings and conclusions of this Court in the Order on Remand as to sections 48-39-150(a)(7) and (10).

The League argues there is no evidence that supports the finding of economic benefit under S.C. Code §48-39-150(a)(7). Contrary to the League's position, a reasonable inference from the record is that KDP will receive significant economic benefit from the limited residential development facilitated by the erosion control structure. There is no legal requirement that KDP

exactly quantify that economic benefit. KDP would not plan the proposed limited residential development and incur all the costs it has if it received no economic benefit from proceeding with the project.

Moreover, there is evidence that suggests that the economic benefit will be considerable based on the $50 million mortgage that KDP's lender placed on Captain Sams Spit. (Trans. 192-3). As Mr. Long testified, "[T]hat shows the level of interest and maybe level of value we placed in—and the bank placed in the property." (Trans. 193).

The described proof supports this Court's finding of economic benefit under S.C. Code §48-39-150(a)(7), for purposes of weighing the economic benefit against the benefit of leaving the area in its unaltered state. The Court's findings as to the relative benefit of leaving the shoreline and spit in its natural condition are also supported.

As ruled by the Supreme Court, "area" includes the upland and critical area. As far as leaving the upland in a natural state, the limited development will occur on less than 20% of Captain Sams Spit, leaving the remainder in a natural state in perpetuity. Turning to the supposed "benefit" of the historical cycle of accretion and breach mentioned by the Court and described in the 1974 environmental inventory of Kiawah Island (League Exhibit 1), the proof at trial supports this Court's finding that this cycle has been radically altered by the man-made relocations of Captain Sams Inlet. (Order on Remand at 16-17 and n. 9). It is this manmade relocation of the inlet that now periodically supplies additional sand for the beach of Seabrook Island rather than the previous historical cycle of accretion, elongation, and breach noted by the Supreme Court. 766 S.E.2d 716 ("...the repetitive accretion of Captain Sam's Spit, followed by the erosion of the neck of the spit served as the supply of sand for Seabrook Island to the southwest."). Both Dr. Kana and Dr. Young testified that the beach and dune ridges on Captain Sams Spit continue to grow as

a result of these relocations, and it is highly unlikely that the Spit will breach naturally. (Tr. 593-4).

As for the alteration of the critical area, the portion of the critical area most affected by the permit approved in the Order on Remand is the 300 linear feet adjacent to Beachwalker Park where the revetment will be allowed. This limited span of the bulkhead and revetment serves to protect the parking lot of Beachwalker Park used by 50,000 people a year, an enormous public benefit. To lessen its effect on access to the shoreline, the Court required that the revetment be covered in one foot of sand.

The League's argument that the public is the "adjacent owner" to Captain Sams Spit for purposes of the consideration described in S.C. Code §48-39-150(A)(10)[3] is nonsensical and entirely unsupported by the law. The statutory reference to "the value and enjoyment of adjacent owners" clearly refers to owners of upland. Value is a reference to economic value. The League cites no authority for its imaginative interpretation that the public trust doctrine makes the public the adjacent owner, and there is none. If the League were correct, then any member of the public could challenge a critical area permit asserting that it affected his value and enjoyment of the tidelands. The protection of the intrinsic value of tidelands is accomplished through the extensive regulatory scheme established by the Coastal Zone Management Act and not through a fanciful claim that the public is an adjacent owner under S. C. Code §48-39-150(10).[4]

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[3] "(10) The extent to which the proposed use could affect the value and enjoyment of adjacent owners." S.C. Code §48-39-150(A)(10).

[4] The Supreme Court of South Carolina recently rejected a similar argument where private property owners asserted their purported interest in public trust tidelands as a basis for claiming they were owners of annexed tidelands for purposes of challenging a municipal annexation: "Under Appellants' position, every member of the public would have standing, even though our precedent states that standing to challenge annexations by 100% petition is limited. We adhere to our precedent and reject this argument. Ex parte State ex rel. Wilson, 391 S.C. 565, 574, 707 S.E.2d 402, 407 (2011).

IV. The Court's findings and conclusions under S.C. Reg. 30-11(C)(1) are supported by the evidence and consistent with the Opinion.

The League is incorrect in its assertions that this Court's findings in its cumulative impacts analysis are unsupported and in its position that the Supreme Court did not authorize the Court to make findings.

This Court did not commit legal error in considering more than Captain Sams Spit in its assessment of the "area" for purposes of determining the project's cumulative long-range effects. The holding of the Supreme Court instructed this Court to consider the greater area, not just the critical area or a portion of the Spit. In ruling this Court committed legal error in interpreting S.C. Reg. 30-11(C)(1) to limit the cumulative impacts analysis to the critical area, the Supreme Court held this Court should have accepted DHEC's interpretation of S.C. Reg. 30-11(C)(1). According to the majority, "DHEC has interpreted this Regulation as requiring it to consider not only a proposed project's impact on the critical area, but also the project's impacts on upland areas *within the larger coastal zone*." 766 S.E.2d 717 (emphasis added). Under S.C. Code §48-39-10(B) "coastal zone" includes much, much more than the upland immediately next to the critical area in question.[5]

Further, the record supports the Court's finding that this greater area includes mostly residential development with some commercial development. The proposed structure would run from the northeastern end of Beachwalker Park southwesterly on the bank of the river along the isthmus, or neck, of Captain Sams Spit. For the easternmost 400 feet of the proposed structure, it

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

would be on the bank of developed land, namely the parking lot and other improvements of Beachwalker Park. Beachwalker Park and Captain Sams Spit are both part of Kiawah Island. Further, the master development plan for Kiawah Island embodied in the Development Agreement (KDP Exhibit 2), treats Captain Sams Spit as part of the overall development of the island. Captain Sams Spit is identified as "Parcel 12B" and addressed at length in section 16(f) of the Development Agreement. (KDP Exh. 2 at 21-23).

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

The findings in the Order on Remand regarding the effects of the proposed residential development are fully supported by the evidence. The record shows that the only analysis of the proposed future residential development conducted by DHEC was a comparison of the Spit in its natural, undeveloped state with its developed state. DHEC sought no information on the specifics of the future residential development. Consequently, DHEC did not assess or critique the development methods, did not evaluate the impacts from the specific development planned by KDP, and did not determine whether those specific development measures were consistent with the CZMP. (Tr. 1363-4, 1409)

The League must not have reviewed the record before assailing this Court by stating that "most of the new findings in the Order on Remand are unsupported by the evidence. . . "(League

Motion at 10). After this rash statement, the only specific findings the League chooses to reference as being unsupported are the ones listed in Footnote 4: "The findings that 'most of the houses probably will be second homes;' that these homes would be 'occupied on an infrequent basis, usually six to eight weeks' per year; and that the houses on the Spit would be constructed over 'twenty to thirty years.' (Order, p. 13)." These findings are fully grounded in the testimony of Mr. Long:

> Q: Do you, as a developer, based on what you know in your experience, just doing what you do day to day, do you foresee adverse impacts from what you're going to do at Captain Sams?
>
> A: I don't. We have maximum 150 people or probably about 120 people that would live in ten -- excuse me, that would live in 50 homes at the most. The average household has two and a half people at Kiawah. Almost all of them at Kiawah -- we're unusual, say, compared to Seabrook or Isle of Palms or Sullivan's Island, where I live. ***It's a second home community.*** The people are generally from the Northeast and the Midwest and ***they spend on average six to eight weeks at Kiawah.***

Tr. 171:25-172:14

> Q: Based on what you have observed as far as

populations and the island in general and seasonal shifts, do you anticipate that they're going to be a lot of people on the beach from these 50 houses?

A: First of all, we sell homesites; we don't build houses. And our average build-out, from sell of the homesite to building, is usually three to four years before people actually build.

THE WITNESS: We don't release much property per year, Your Honor. It might be surprising to some people, but we only release about 20 to 30 homesites a year and usually at different price points and different locations.

I can't see, even if we say -- decided this was a 40-lot subdivision on Captain Sams, releasing more than six or eight at the most per year. That would be very unusual to release more than six or eight in any one locale. It would be very atypical of our 20-year record of releasing property.

So if you consider that and you consider the time it takes to finally build houses, to build 40 houses would probably take 20 to 30 years.

Even if you had them all today, two and half people were there six weeks a year -- per house, six weeks a year is not much of an impact, compared to, say, the 50,000 visitors right next door at the park or five or 6,000 visitors up and down the beach from the existing 4500 property owners. That's how many property owners there are. I think there's 3500 dwellings of one type or another: condos, houses, villas.

(Tr. 174:19-176:2)(double emphasis added).

Q: Mr. Long, what is the seasonal occupation of houses on Kiawah?

A: Well, this goes to the intensity of the use that Mr. Eiser mentioned. Kiawah's very unusual in that about ***90 percent of our property owners historically and today are second homeowners***, which means ***they aren't there but six or eight weeks a year*** and -- unlike, say, Seabrook, which is almost all permanent residents and -- probably 80 percent, anyway, permanent residents. So we've got people who, at our neighborhoods around the

island, and there's 3500 or so dwellings, are

90 percent second homeowners who are there six or eight weeks. That shows a different

intensity.

(Tr. 1580:5-10) (double emphasis added).

As these excerpts demonstrate, the evidence fully supports this Court's findings in its impacts analysis. KDP will not belabor the Court with record references to every finding since the League chose to feature only the three findings listed in footnote 4.

The League also misconstrues the ruling of the Supreme Court on the cumulative impacts analysis as well. The Supreme Court held only that this Court erred as a matter of law in concluding there would be ***no*** impacts on the upland when in fact the erosion control structure would facilitate development of a portion of the upland that is now undeveloped. 766 S.E.2d 719-720 ("... That finding does not obviate the error intrinsic in the ALC's decision-that there would be no impact on the upland here."). The Supreme Court did not find that the cumulative negative effects were such that the permit could not be sustained. The Supreme Court instead remanded this issue to the ALC for a proper analysis of the upland impacts, which is exactly what this Court did in the Order on Remand.

V. The Court's authorization of the bulkhead is supported by the evidence and within the Court's discretion as fact finder.

Apparently also construing the Order on Remand to approve the installation of a bulkhead for the entire distance requested, just as KDP believes, the League asserts that there is no evidence to support the Court's findings and conclusion approving this component of the requested erosion control structure. In a *de novo* contested case hearing, the Administrative Law Court is the finder of fact and free to draw its own conclusions. Risher v. S. C. Dep't of Health & Envtl. Control,

393 S.C. 198, 207, 712 S.E.2d 428, 433 (2011).

The Court did not conceive of a new control structure. The bulkhead approved by this Court is part of the combined erosion control structure sought in the application. Its location remains the same as in the application. The Court simply approved a part but not all of the structure requested.

A stand-alone bulkhead is one of the types of erosion control structures that may be permitted. The governing regulations defines a bulkhead and distinguishes it from a seawall:

> (a) Seawall-a special type of retaining wall that is specifically designed to withstand weigh forces.
> (b) Bulkhead-a retaining wall designed to retain fill material, but not to withstand weigh forces on an exposed shoreline.
>
> S. C. Reg. 30-1(D)(22)(a) and (b)

Bulkheads have been approved for use without an accompanying revetment throughout coastal South Carolina. There is nothing revolutionary or unusual about a bulkhead. In fact, DHEC previously approved a stand-alone bulkhead for the 270 feet adjacent to Beachwalker Park in the only location of the combination bulkhead and revetment approved by DHEC staff.

The conceptual illustration of the bulkhead in combination with the revetment is shown on page 9 of the approved permit, KDP Exhibit 44. The illustration shows the bulkhead retaining wall extending for a significant length below the top of the revetment. Mr. Bohanon testified that the top of the bulkhead would be installed just below the top of the escarpment ". . . . so it would stop the erosion." (Trans. p. 475).

As the League notes, the revetment helps retard erosion at the toe of the bulkhead, i.e. where the vertical face of the bulkhead penetrates the riverbank. However, the absence of a revetment does not eliminate the erosion control qualities of the bulkhead that is designed to retain the highland behind it.

The Court's finding that the bulkhead alone would have "de minimus" impact on the public use of the shoreline is substantiated as well. The bulkhead does not extend over the riverbank. The exposed portion of the bulkhead would be against the exposed vertical escarpment. Persons would be able to walk on the riverbank. The existing erosion has already reached the location where the bulkhead would be, as is evidenced by the escarpment.

This Court's finding and conclusion approving a portion of the requested structure is supported by testimony in the record.

VI. The additional findings challenged by the League are supported by evidence in the record.

The League takes issue with a variety of miscellaneous findings claiming they are unsupported or irrelevant, when they in fact are both substantiated by the record and are relevant. (League Motion at 13-15).

The League argues that this Court approved a portion of the requested structure because the refusal to permit the erosion control structure would contradict the planning and zoning of the Town of Kiawah Island. This Court did not do that. This Court approved the modified permit because it satisfied the applicable statutory and regulatory requirements.

The Court mentioned the frustration of the zoning and land use determinations of the Town of Kiawah Island in its calculus of the comparative merits of leaving the shoreline in a natural state versus stabilizing the location of the riverbank with an erosion control structure. (Order on Remand at 17). There is nothing in the statutes or regulations that prohibits the agency or this Court from taking zoning into account as one of the considerations when determining the pros and cons of letting the erosion continue. The zoning also may be considered in the feasibility analysis under Reg. 30-11(D)(23) ("... consideration of factors of environmental, *economic*, social, legal and technological *suitability of the proposed activity and its alternatives*....")(emphasis added).

Above and beyond the regulatory requirements applicable to a permit application, this Court is entitled to consider the local government's zoning of the adjacent upland especially as pertains to "the context of other possible development and the general character of the area" under S.C. Reg. 30-11(C)(1). Further, the Court's observation appears to be appropriate under the policy set forth in S.C. Code §49-38-30(B)(5): "To encourage and assist. . . municipalities. . . to exercise their responsibilities and powers in the coastal zone through the development and implementation of comprehensive programs to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values as well as to the needs for economic and social development and resources conservation."

The finding that KDP cannot satisfy the ordinances of the Town of Kiawah Island that govern subdivisions without stabilization of the riverbank is pertinent to KDP's need for the erosion control structure. This proof also shows the link between the erosion control structure and the economic benefit to KDP as well as the benefit to the public that flows from the additional beach parking and conservation easement. All of these depend on KDP's ability to comply with the town's development ordinances which it cannot do without stabilization of the shoreline.

The Court's findings that the bulkhead and revetment will not have a material effect on the previous historical process of elongation, breach, and accretion is also fully supported by the testimony of Dr. Kana and Dr. Young. In making its argument, the League confuses the bulkhead and/or revetment's retardation of erosion with whether the Spit would breach naturally in the absence of the erosion control structure, which the experts agreed was extremely unlikely.

Dr. Kana testified that the periodic relocations of Captain Sams Inlet eastward have both added to the accretion of the beach and made it highly unlikely the Spit would breach. In effect, the historical natural elongation-and-breach cycle no longer exists. Rather than nature moving the

inlet east every hundred years or so, the inlet is relocated east by engineering design every ten to fifteen years. Dr. Kana testified that the adjoining inlet provides an outlet for storm surge. (Tr. 604-5). With the periodic man-made relocations of the inlet that rapidly increase the sand accumulation on Captain Sams Spit, Dr. Kana expects the neck of the spit to get wider and stated the chances of the spit breaching are very small. (Tr. 607, 702, 754, 797-9)

Dr. Young's testimony as to the vitality of the Spit did not vary in substance from Dr. Kana's. Dr. Young testified that the beach and dune ridges on the Spit are extremely robust, even at the neck, and that he has "not seen an area with that volume of sand and that elevation breach." (Tr. 912, 915). He posited that the only way the Spit could possibly breach would be if it took a direct hit of a category five hurricane that "was the mother of all storms," a storm that would wipe out any beach community. (Tr. 916).

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

This Court honored the majority's detemination in the Opinion that the revetment would have a substantial adverse effect on public access. For this reason, the Court limited the revetment to no more than 300 feet adjacent to Beachwalker Park and required it be covered with a foot of sand. The effect on public access is essentially one tenth of the effect as the permit originally approved by this court in early 2010.

VII. The authorization of the revetment adjacent to Beachwalker Park as originally approved by DHEC provides significant public benefit and is consistent with the legal standards in the Opinion.

The League maintains that this Court should not have authorized the combination bulkhead and revetment for the 300 feet adjacent to Beachwalker Park. The League claims that a greater public benefit would be accomplished by allowing the erosion to continue. The League also asserts that protection of the park from erosion is unnecessary since there is a possibility the park may move to some other location on Kiawah Island at some time in the future.

Contrary to the League's argument that there is little public benefit from protecting Beachwalker Park against further damage from erosion, the overwhelming, uncontroverted proof was that there is significant public benefit from protecting the upland improvements of Beachwalker Park. Around 50,000 people a year use the park's parking facility to gain access to what the League argued was one of the top ten beaches in the nation. (Tr. 198:25-199:9). The photographs admitted into evidence show significant erosion of the bluff adjacent to the parking area, threatening the stability of a portion of the parking lot and other improvements. (KDP Exh.5, KDP 0563-0567, 0569, 0582-0584). Charleston County Parks and Recreation Commission, which operates the park, is fully supportive of the permit to protect the park's improvements against "the very chronic problem" of erosion. (Tr. 1128-9). The public's use of the park far exceeds any proof of the public's occasional use of the river shoreline in this vicinity. Additionally, since the revetment is being approved for its full length for only 270 feet, there will be little to no impairment of available kayak landing areas over the half mile bank east of Beachwalker Park.

There was no proof that the location of Beachwalker Park will be changing anytime soon. Mr. O'Rourke testified there had been exploratory discussions with KDP about possible relocation but that there was no agreement. (Tr. 1126-8). This Court properly found that the relocation of

the park at some time in the future is completely speculative. Even if the park were moved years from now, there will be immediate public benefit by protecting the highly used parking lot and other improvements of Beachwalker Park.

CONCLUSION

For the foregoing reasons, KDP requests that this Court deny the League's Motion for Reconsideration and Clarification, except for clarifying that the bulkhead is approved for the entire requested distance.

Respectfully Submitted,

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January 7, 2016
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STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Kiawah Development Partners, II, Petitioner, vs. SCDHEC Office of Ocean and Coastal Resource Management, Respondents.	Docket No. 09-ALC-07-0029-CC Docket No. 09-ALJ-07-0039-CC **CERTIFICATE OF SERVICE**
South Carolina Coastal Conservation League, Petitioner, vs. Kiawah Development Partners, II, and South Carolina Department of Health and Environmental Control, Respondents.	

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand, or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 6th day of January, 2016, in Charleston, South Carolina.

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Kiawah Development Partners, II, Petitioner, vs. SCDHEC Office of Ocean and Coastal Resource Management. Respondents.	Docket No. 09-ALC-07-0029-CC Docket No. 09-ALJ-07-0039-CC **RESPONSE TO PETITIONER KIAWAH DEVELOPMENT PARTNERS II, LLC'S MOTION TO ALTER OR AMEND FOR CLARIFICATION**
South Carolina Coastal Conservation League, Petitioner. vs. Kiawah Development Partners, II, and South Carolina Department of Health and Environmental Control. Respondents.	

The Coastal Conservation League ("League") hereby responds to the Motion of Kiawah Development Partners, II ("KDP") which asks this Court to revisit its Order on Remand. The League reasserts and incorporates herein arguments contained in its Motion for Reconsideration, which urges this Court to follow the Supreme Court's mandates in KDP II, v. DHEC & SCCCL, 766 S.E.2d 707, 411 S.C. 16 (2014). KDP's motion relies exclusively upon findings that are wholly unsupported by the record and contrary to the Supreme Court's decision.

ANALYSIS

KDP seeks approval to construct 2,780 feet of bulkhead without the supporting revetment component despite the lack of evidentiary basis and in contravention of the Supreme Court's analysis.

No evidence supports a finding that the bulkhead without a revetment would be structurally sound or appropriate in this circumstance. The evidence in the record indicates the opposite, that a bulkhead in this high-energy system cannot stand alone without a revetment component. No evidence supports the finding that a bulkhead without a supporting revetment would be technically possible, feasible or advisable, much less whether it would serve the project purpose. Furthermore, no evidence supports a finding and conclusion that such a structure complies with the statutory and regulatory requirements. All of the testimony uniformly establishes that from an engineering perspective it is the revetment that is the key component to the project, and that the bulkhead cannot withstand high-energy wave action without the revetment component. (Tr. 465-478; 543-544).

Similarly, no evidence supports a finding that a bulkhead standing alone would have "de minimus impact upon the public use of the shoreline," as there was no testimony about impacts that would result from a bulkhead standing alone. (Order on Remand, 16-17). The essential purpose of the bulkhead/revetment system is to fix an eroding shoreline. Once the erosion reaches the bulkhead, logic dictates that there will be no more shoreline which the public can access and enjoy. The untouched sandy shoreline is precisely what the Supreme Court deemed to be worth protecting for the public interest, so that the public can continue to access, use and enjoy that public resource.

Yet, KDP asserts that this Court should clarify its Order on Remand to expressly

authorize such activity. (KDP Motion 4). In addition to asking this Court to authorize the bulkhead without a revetment despite the lack of evidence in the record to support such a measure. KDP asks this Court to veer away from the explicit directives of the Supreme Court by finding that the bulkhead structure would be in the public interest. First, there is no evidence that the public would benefit from the bulkhead being constructed. Second, the bulkhead would result in converting pristine sandy beach into a hardened structure inaccessible to the public, and would degrade the public interest. The Supreme Court already made this finding, and thus this Court must adhere to that ruling in the Order on Remand as the law of the case. As explained in the League's motion for reconsideration no hard structure should be authorized, but if this Court determines that some structure should be authorized it cannot authorize more than the 270 feet adjacent to Beachwalker Park and remain consistent with the Supreme Court's directives and analysis.

CONCLUSION

For all of these reasons the Coastal Conservation League asks the Court to deny KDP's Motion to Alter or Amend for Clarification.

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STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Kiawah Development Partners, II, Petitioner. vs. SCDHEC Office of Ocean and Coastal Resource Management. Respondents.	Docket No. 09-ALC-07-0029-CC Docket No. 09-ALJ-07-0039-CC **RESPONSE TO RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL'S MOTION FOR RECONSIDERATION AND FOR CLARIFICATION**
South Carolina Coastal Conservation League, Petitioner, vs. Kiawah Development Partners, II, and South Carolina Department of Health and Environmental Control, Respondents.	

The Coastal Conservation League ("League") hereby responds to the Motion of South Carolina Department of Health and Environmental Control ("DHEC") which asks this Court to revisit its Order on Remand. The League reasserts and incorporates herein arguments contained in its Motion for Reconsideration, which urges this Court to follow the Supreme Court's mandates in KDP II, v. DHEC & SCCCL, 766 S.E.2d 707, 411 S.C. 16 (2014). DHEC's motion substantially conforms to the League's motion and the mandates of the Supreme Court, but the

League believes some distinctions warrant a response.

ANALYSIS

As DHEC reminds this Court in its memorandum, the Supreme Court's opinion in KDP is the law of the case that must be followed. (DHEC Motion 2-3.) This Court needs to clarify the obvious confusion among the parties as to precisely what structure(s) this Court intended to authorize. (DHEC Motion 3-4.) However, the most important point made by DHEC's motion is that the Order on Remand does not comply with the law of the case, and thus it must be modified to do so. While the League's position is almost entirely aligned with DHEC's position, the League does not agree with DHEC's assertion that even 270 feet of structure to protect the park is warranted.

Beachwalker Park is not a Public Benefit in the Critical Area, and the Construction of 270' of Bulkhead and Revetment does not Provide more Public Benefit than Allowing the Shoreline to Remain in its Natural State.

The fundamental flaw in the Order on Remand is its misapplication of Section 48-39-30(D). Section 48-39-30(D) states that "***critical areas* shall be used to provide the combination of uses which will insure the maximum benefit to the people**, but not necessarily a combination of uses which will generate maximum measurable dollar benefits." This provision requires an assessment of the existing combination of uses ***of the critical area*** compared to the proposed combination of uses ***of the critical area***. See S.C. Code Ann. § 48-39-30(D). **It is use of the critical areas that is to provide the maximum public benefits, not other activities that will flow from an applicant's use of that critical area**. In discussing public benefits, the Supreme Court consistently discusses these public benefits in the context of how the critical area will be used, i.e., the benefits accruing to the public if the critical areas are left in their natural

state or if structures are constructed over and on the critical areas. The Order on Remand appears to confuse the requirement that critical areas be used to provide maximum benefits to the people with the requirement to consider the long-range and cumulative impacts of a project, including those impacts outside the critical area. Section 48-39-30(D) is confined to consideration of uses of the **critical area**. Since Beachwalker Park parking lot is not in the critical area, it is not a public benefit to be included in the analysis. Thus, as explained more fully in the League's motion, DHEC's adoption of this Court's analysis on that point is incorrect. (DHEC Motion 6.)

The Order recognized that "leaving the area in its natural state" was to be given "strong consideration," (Order on Remand, p. 3), yet it fails include strong consideration in its analysis. The public benefits from allowing the cyclical erosion, breach and accretion processes on the Spit. KDP II, v. DHEC & SCCCL, 766 S.E.2d 707, 723, 411 S.C. 16 (2014). KDP at 716 ("undisputed evidence . . . established that the accretion of the spit followed by the erosion of the neck of the spit and the formation of a new inlet is a natural process . . . [the Act] provides that it is to the public's benefit to protect natural processes like the cyclical erosion, breach and accretion process of the [Spit].") Construction of a bulkhead or revetment in the critical area cannot be considered "leaving the area in its natural state," even for the limited structure to protect the park.

Furthermore, Section 48-39-150(A)(7) requires the balancing of economic benefits compared with the benefits from preservation of an area in its unaltered state. There is no evidence of economic benefits, and the law of the case from the Supreme Court is that there is substantial evidence of public benefit to leaving the area in its natural state.

Thus, the League maintains its position that the combination of uses that provides the maximum benefit to the people of South Carolina is to leave the banks of the Kiawah River in

their natural and unaltered state without **any** hard erosion control structure. This position is based both on the public benefits to allowing natural processes of erosion and accretion to occur, as well as the public benefits to use and enjoyment of the shoreline for a variety of activities.[1]

CONCLUSION

For all of these reasons the Coastal Conservation League asks the Court to grant in part and deny in part DHEC's Motion for Reconsideration and for Clarification.

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[1] However, to the extent any structure is allowed, it should not be beyond the 270' structure along Beachwalker Park, as reflected in the League's Proposed Order on Remand attached to its Motion for Reconsideration.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Kiawah Development Partners, II, Petitioner, vs. SCDHEC Office of Ocean and Coastal Resource Management, Respondents.	)	Docket No. 09-ALC-07-0029-CC Docket No. 09-ALJ-07-0039-CC **CERTIFICATE OF SERVICE**
South Carolina Coastal Conservation League, Petitioner, vs. Kiawah Development Partners, II, and South Carolina Department of Health and Environmental Control, Respondents.	)	

I hereby certify that on January 7, 2016, I served the foregoing South Carolina Coastal Conservation League's Response to Respondent South Carolina Department of Health and Environmental Control's Motion for Reconsideration and for Clarification upon counsel for the Respondents by placing in the U.S. Mail addressed to:

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January 7, 2016

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Kiawah Development Partners, II, Petitioner, vs. SCDHEC Office of Ocean and Coastal Resource Management, Respondents. South Carolina Coastal Conservation League, Petitioner, vs. Kiawah Development Partners, II, and South Carolina Department of Health and Environmental Control, Respondents.	Docket No. 09-ALC-07-0029-CC Docket No. 09-ALJ-07-0039-CC **KDP'S RESPONSE TO DHEC-OCRM'S MOTION FOR RECONSIDERATION AND FOR CLARIFICATION**

Kiawah Development Partners, II ("KDP") hereby submits this memorandum in response to the Motion for Reconsideration and for Clarification of the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management ("DHEC").

The DHEC Motion seeks clarification from the Court on the extent of the bulkhead approved by the Court, similar to the request of KDP and South Carolina Coastal Conservation League (the "League"). KDP understands the Court's Decision and Final Order on Remand ("Order on Remand") approved the issuance of a permit for the bulkhead for the entire length requested for the reasons set forth in KDP's Motion to Alter and Amend for Clarification. Instead of repeating the basis for KDP's belief, KDP refers the Court to KDP's motion.

The second aspect of DHEC's motion is a challenge to the Court's public benefits analysis. DHEC asserts that the Court's findings of public benefit are not supported by the record and do not qualify as benefits to the public under the rule of decision of the Supreme Court of South Carolina in Kiawah Development Partners, II v. South Carolina Department of Health and Environmental Control and the South Carolina Coastal Conservation League, 766 S.E.2d 707, 411 S.C. 16 (2014) (the "Opinion"). DHEC also argues that the majority in the Opinion made a conclusive determination that the project afforded no benefit at all to the public. DHEC reasons that the majority, therefore, precluded this Court on remand from making any findings of public benefit even if the record supports them.

The League argues the same grounds for setting aside the findings and conclusions in the Order on Remand as to public benefit. In opposition to DHEC's grounds attacking the Court's public benefit analysis, KDP refers the Court to KDP's extensive response in sections I, II, VI, and VII of its Response to Coastal Conservation League's Motion for Reconsideration and for Clarification of Final Order and Decision on Remand that address the identical issues raised by DHEC.

As set forth in KDP's Response to the League's Motion, the Supreme Court did not hold that, as a matter of law, there was no public benefit from the requested erosion control structure. Rather, the majority held that this Court erred "because it failed to identify any benefit flowing to the public at large." 766 S.E.2d 716. The Supreme Court remanded the matter to this Court, in part, because "the ALC did not consider whether and to what extent the public would benefit from the proposed structure as opposed to leaving the tidelands in their natural state." 766 S.E.2d 723. In its Order on Remand this Court fully considered "whether and to what extent the public would benefit from the proposed structure as opposed to leaving the tidelands in their natural state," as

directed by the Supreme Court.

KDP notes that if DHEC's position were correct – that the Supreme Court conclusively determined there was no public benefit from the project (as opposed to no findings of that benefit) – then there would be no basis for finding any benefit from the prevention of further erosion of the parking lot and other improvements of Beachwalker Park. Yet, DHEC agrees that the "evidence presented at trial undeniably demonstrated that the portion of the bulkhead and revetment originally permitted by the Department *will* benefit the public, because it will protect the heavily-used Beachwalker Park parking lot from damage caused by erosion along the Kiawah River." (DHEC Motion at 6). [1]

The third and final ground of the DHEC Motion is that the Court should not have reached the cumulative impacts analysis required by S.C. Reg. 30-11(C)(1) because, in DHEC's estimation, the Supreme Court ended the matter by making a conclusive finding there was no public benefit from the proposed structure. As previously discussed, if the Supreme Court had conclusively determined there was no proof in the record that could support a finding of any public benefit (as opposed to no finding of any public benefit), there would have been no reason to remand for further consideration and no reason for the Supreme Court to have ruled on the grounds for appeal related to this Court's interpretation and application of S.C. Code Regs. 30-11(C)(1) and 30-12(C)(1)(b) and (c).

Instead, the Supreme Court returned the case to this Court for further consideration of the record in light of its rulings as to the correct principles of law to be applied. This Court did not

[1] The Supreme Court did not distinguish between the portion of the proposed structure adjacent to Beachwalker Park and the remainder of it as DHEC suggests. DHEC is incorrect in asserting that "the Supreme Court found that the unpermitted portion of the bulkhead and revetment provided no public benefit." DHEC Motion at 9. In its public benefit discussion the Supreme Court addressed the proposed structure in its entirety. 766 S.E.2d 715-717.

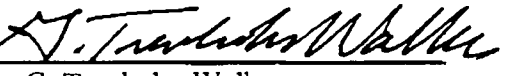
commit an error of law in reviewing the record and engaging in the cumulative effects analysis of S.C. Reg. 30-11(C)(1) applying the correct legal interpretation of the regulation as determined by the Supreme Court.

CONCLUSION

For the foregoing reasons, KDP requests that this Court deny DHEC's Motion for Reconsideration and Clarification, except for clarifying that the bulkhead is approved for the entire requested distance.

Respectfully Submitted,

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January 7, 2016
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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

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.

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

Kiawah Development Partners, II, ... Respondent,

v.

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

NOTICE OF APPEAL

The South Carolina Coastal Conservation League hereby appeals from the Amended Final Order and Decision on Remand of the Honorable Ralph King Anderson, III, Administrative Law Judge, dated March 22, 2016, and from the Order Grating Motions for Clarification and Denying Motions for Reconsideration of the Honorable Ralph King Anderson, III, dated March

22, 2016.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

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.

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

Kiawah Development Partners, II, ... Respondent,

v.

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

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the Coastal Conservation League's Notice of Appeal on Kiawah Development Partners II, Inc., and DHEC, by placing copies of the foregoing in the U.S. Mail addressed to:

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Honorable Jana E. Shealy
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March 30, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

RECEIVED
APR 21 2016
SC Court of Appeals

Docket No. 09-ALJ-07-0029-CC
Appellate Case No. 2016-000707

Kiawah Development Partners, II, ... Petitioner,

vs.

South Carolina Department of Health and Environmental Control ..... Appellant, Respondent below

South Carolina Coastal Conservation League..... Appellant,

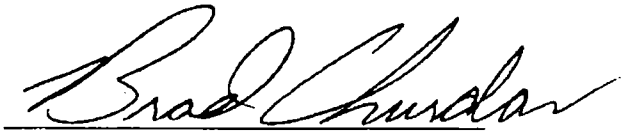
vs.

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

Of which Kiawah Development Partners, II is the Respondent

NOTICE OF APPEAL

The South Carolina Department of Health and Environmental Control ("DHEC" or the "Department") hereby appeals the following decisions of the Honorable Ralph King Anderson, III, Administrative Law Judge: the Amended Final Order and Decision on Remand dated March 22, 2016 and the Order Granting Motions for Clarification and Denying Motions for Reconsideration, dated March 22, 2016.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APR 21 2016
SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

Docket No. 09-ALJ-07-0029-CC
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Kiawah Development Partners, II, ... Petitioner,

vs.

South Carolina Department of Health and
Environmental Control ..... Appellant, Respondent below

South Carolina Coastal Conservation League.....Appellant,

vs.

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

Of which Kiawah Development Partners, II is the Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he/she has this day served the ***Department's Notice of Appeal*** by mailing a copy of the same by **U.S. First Class Mail,** postage pre-paid:

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