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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. SUPREME COURT

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

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 is, Respondent.

**BRIEF OF APPELLANT COASTAL
CONSERVATION LEAGUE**

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STATEMENT OF ISSUES ON APPEAL

- I. **Did the Administrative Law Court Err in Ruling that the Combination of Uses of the Critical Area That Provide the Maximum Benefit to the People is the Construction of 2,783' of Bulkhead and 270' of Revetment?**
 - A. **Did the ALC Err in Rejecting This Court's Ruling that No Public Benefit Exists for a Structure That Would Eliminate Public Use of and Access to Public Trust Tidelands and in Failing to Give Due Consideration to the Public's Beneficial Uses of the Critical Area?**
 - B. **Did the ALC Err in Disregarding Uncontradicted Evidence that Fixing the Shoreline with a Bulkhead Will Eliminate the Public Sandy Beach Below the Mean High Water Mark?**
 - C. **Did the ALC Err in Finding that 8 Parking Spaces and a Possible Conservation Easement on 11.4 Acres of Developable Land, Neither of Which Involve a "Use" of the Critical Area, Provide a Sufficient Public Benefit to Override the Elimination of the Public Use of and Access to Critical Area?**
- II. **Did the Administrative Law Court Err in Failing to Give Deference to DHEC's Interpretation of Regulation 30-11(C) That the Development Facilitated by the Structure Would Change the General Character of the Area from Pristine and Untouched to Residential Development and Result in Long-Range, Cumulative Impacts Warranting Denial?**
- III. **Did the ALC Err in Rejecting the No Action Alternative and Concluding That the Benefits to KDP From Authorizing the Bulkhead Outweigh the Benefit of Leaving the Shoreline in Its Undisturbed State?**
- IV. **Did the Administrative Law Court Err in Authorizing an Engineered Structure that Was Not Applied for Nor Reviewed and is Neither Structurally Nor Environmentally Sound?**

STATEMENT OF THE CASE

The appeal arises from this Court's Opinion, filed December 10, 2014, reversing the Administrative Law Court's ("ALC") February 26, 2010 Amended Final Order and Decision ("2010 Order"), holding that the ALC made several errors of law, and remanding the case "for further consideration consistent with this decision." KDP II, v. DHEC & SCCCL, 766 S.E.2d 707, 723, 411 S.C. 16 (2014) ("2014 Opinion"). The Coastal Conservation League seeks review of the ALC's Amended Final Order and Decision on Remand and Order Granting Motions for Clarification and Denying Motions for Reconsideration issued by the Honorable Ralph K. Anderson, III, dated March 22, 2016

This Court's 2014 Opinion was the third opinion reviewing the ALC's 2010 Order. The ALC's 2010 Order arose from two consolidated challenges to a critical area permit issued by the S.C. Department of Health and Environmental Control ("DHEC") to Kiawah Development Partners, II, Inc. ("KDP") authorizing the construction of 270' long and 40' wide articulated concrete block revetment and vertical bulkhead system along the banks of the Kiawah River at Captain Sams Spit, Kiawah Island, Charleston County.

On December 31, 2008, both the South Carolina Coastal Conservation League ("League") and KDP filed requests for a Final Review Conference before the DHEC Board. (R. pp. 216-219). KDP challenged the denial of the 2,513' of the revetment/bulkhead system, while the League challenged the issuance of the 270' of revetment/bulkhead system and sought to uphold the denial of the 2,513' of structure. (R. pp. 211-219). The DHEC Board determined not to conduct a Final Review Conference of those decisions. (R. pp. 220-223).

On January 20, 2009, KDP filed a request for contested case hearing, and on

January 29, 2009, the League filed a request for contested case hearing. (R. pp. 224-228). On February 23, 2009, the Administrative Law Court issued a Consent Order of Consolidation, consolidating the two contested cases for hearing and decision.

Judge Anderson conducted a hearing August 24 – 28, 2009. On January 22, 2010, he issued a Final Order and Decision authorizing the structure for the entire length of 2,783' requested by KDP with some minor limitations in specific areas. (R. pp. 1-31). On February 26, 2010, the ALC issued the 2010 Order. (R. pp. 32-62).

On March 26, 2010, the League filed a Notice of Appeal and a Petition for Order of Supersedeas in the South Carolina Court of Appeals. On March 29, 2010, DHEC filed a Notice of Appeal in the Court of Appeals.

On April 22, 2010, the League filed a Motion to Transfer in this Court, which was granted on June 10, 2010. This Court issued an Order Granting Supersedeas on July 22, 2010.

On November 21, 2011, this Court issued an Opinion reversing the ALC's 2010 Order. KDP filed a Petition for Rehearing, which was granted. On February 27, 2013, this Court affirmed the 2010 Order. The League filed a Petition for Rehearing, which was granted. On December 10, 2014, this Court issued the 2014 Opinion reversing Judge Anderson's 2010 Order and remanding the case to the ALJ "for further consideration consistent with this Opinion."

On December 2, 2015, the ALC issued a Final Order and Decision on Remand. The League, DHEC and KDP all filed motions for reconsideration and/or for clarification.

On March 22, 2016, the ALC issued an Amended Final Order and Decision on Remand ("Amended Order on Remand") and an Order Granting Motions for Clarification

and Denying Motions for Reconsideration (“Order on Reconsideration”) (collectively “the 2016 Orders”). The Amended Order on Remand authorizes the total amount requested of 2,783' of vertical bulkhead, along with 270' of concrete block revetment in front of Beachwalker Park's parking lot.

On March 30, 2016, the League filed a Notice of Appeal of the 2016 Orders contemporaneously with a Motion to Transfer the appeal to this Court. On April 21, 2016, DHEC filed a Notice of Appeal. On March 23, 2016, the League filed a Motion for Stay with the ALC, which was granted on April 15, 2016. On May 20, 2016 this Court issued its Order of Transfer.

ARGUMENT

Summary of Argument

The ALC's 2016 Orders fail to apply the legal principles and holdings of this Court's 2014 Opinion, which explain and interpret the underlying purpose and policy of the S.C. Coastal Zone Management Act ("Act") and its regulations. The Act's policy is to "protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations." S.C. Code Ann. §48-39-30(B)(2). This Court emphasized the "urgent need to protect and give high priority to natural systems in the coastal zone" S.C. Code Ann. §48-39-20(F). This Court explained that protection of Public Trust resources is the paramount consideration, and that Captain Sams Spit, the resource that is at the heart of this appeal, is an "invaluable – in environmental, social and economic terms – stretch of tidelands" which is a "finite" and "precious public resource." Kiawah Development Partners, II, Inc. v. S.C. Dept. of Health and Env'tl. Control (hereinafter "Kiawah"), 411 S.C. 16, 22, 766 S.E.2d 707, 710-11 (2014). Indeed, the laws "generally prohibit alternations to the tidelands except when the public interest requires otherwise" because "the public interest is usually best served by preserving tidelands in their natural state," Id. at 29, 715 (citing 48-39-10, et seq., R. 30-1, et seq.)

Yet rather than applying these fundamental principles and considering the errors of law which this Court identified in its 2014 Opinion, the ALC's 2016 Orders compound those legal errors. Specifically, the ALC:

(1) failed to use the Public Trust Doctrine as the lodestar to protect the public's beneficial uses of the Kiawah River critical area by authorizing a structure that will fix the shoreline, thereby eliminating those public uses;

(2) concluded that a proposed conservation easement and eight (8) parking spaces for members of the Kiawah Island Community Association (“KICA”) provided “the people” maximum beneficial uses of the critical area, as opposed to the public’s use of the natural shoreline for recreational and aesthetic purposes, even though neither of those “uses” is of the critical area as contemplated under Section 48-39-30(D);

(3) failed to give deference to DHEC’s interpretation of its Regulation 30-11(C) that the residential development facilitated by the proposed structure would convert the pristine, untouched character of Captain Sams Spit to residential development, resulting in detrimental long-range and cumulative impacts and warranting denial of the permit;

(4) failed to meaningfully consider the feasibility of the “no action” alternative, instead merely concluding that the benefits to KDP from authorizing the structure outweigh the “no action” alternative of leaving the shoreline in its undisturbed state; and

(5) erroneously created an entirely new permit by ordering an engineered structure that was neither applied for by KDP nor reviewed by DHEC, and, in fact, will be deficient according to KDP’s own experts.

The ALC’s failure to address the issues “consistent with” this Court’s 2014 Opinion and its misapplication of the findings and policies of the Act can best be exemplified by the ALC’s statement that “[o]stensibly, 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?” (R. p. 182, fn. 6). This statement reflects a misunderstanding of the underlying purpose of the Act and the Public Trust Doctrine upon which the Act is premised: the maximum public beneficial recreational uses are concomitant with pristine shorelines, not the cause of their

degradation.

Instead of using the Public Trust Doctrine as the lodestar and assessing the recreational uses currently made of the shoreline, the ALC envisions the maximum beneficial “use” of the critical area as eight (8) parking spaces for private gated-community KICA members and a conservation easement covering 11.4 acres of potentially developable land. That narrowest of views hardly meets the intent of the Act and renders the Public Trust Doctrine a hollow shell.

Captain Sams Spit and the Kiawah River shoreline are natural systems which are being irretrievably damaged and lost by developments that destroy these values. S.C. Code Ann. 48-39-30. While paying lip service to the Act, the ALC concludes that the bulkhead and revetment “will not have any material effect” on natural processes. (R. p. 197). The undisputed evidence establishes that the bulkhead authorized by the ALC will damage the natural system, change the general character of the area, have long-range and cumulative impacts, and eliminate the public’s existing beneficial uses of public trust critical area tidelands.

I. The Administrative Law Court Erred in Ruling that the Combination of Uses That Provides the Maximum Benefit to the People is the Construction of a 2,783' Bulkhead and 270' Revetment

Section 48-39-30(D) of the Act states 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 which will generate measurable maximum dollar benefits.” (emphasis added). Under this statutory language, the General Assembly directs DHEC to assess uses of critical areas themselves, i.e., how the public uses, or any

permit applicant would use, the particular critical area in question. The language requires an assessment of the existing uses as compared with the proposed uses of the critical area. S.C. Code Ann. § 48-39-30(D).¹ 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” then the proposed use violates this policy. “The people” does not mean one developer.² Rather than assessing the existing and proposed uses of the critical area, the ALC focused on activities indirectly related to KDP’s desired use of the critical area that may or may not occur, regardless of whether KDP uses the critical area as desired. KDP’s proposed uses involve hardening the shoreline and preventing natural shoreline movement to stabilize the highground and prevent further erosion; there are no structures that would be protected by KDP’s proposed construction.

Section 48-39-30(D) requires that, when critical areas are being used in a manner that provides the maximum benefits to the public, those public uses and benefits must be given priority. Yet ALC acknowledges that “KDP and not the general public would be the **primary** economic beneficiary of the project.” (R. p. 164). The ALC concluded that “the benefit of KDP’s development of its property outweighs the benefits of leaving it in a natural state,” ignoring this Court’s ruling that only KDP, “not the public,” benefits from

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The ALC’s Order on Reconsideration states that “Coastal fails to explain how Section 48-39-30(D) limits consideration of public benefits to only benefits within critical areas and how uses are limited to only presently existing activities.” (R. p. 159). The failure is on the part of the ALC to apply the plain language of Section 48-39-30(D) requiring an assessment of how the critical areas are used and the benefits of the uses of the critical area.

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This Court recognized and applied the plain language of the term “the people” as “the public at large rather than a single developer.” Kiawah at 716.

fixing the shoreline. (R. p. 168).

Undertaking an assessment of the existing uses compared to the proposed uses allows DHEC 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 critical area regulations. In this case, the existing 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. (R. pp. 1139-66; 1176-1209). In sum, these are the critical area uses enjoyed by the public. And if the permit is issued, KDP's proposed use (fixing the shoreline to prevent further erosion and stabilize the upland) would include elimination of all of these beneficial public uses.

A. The ALC Erred in Rejecting This Court's Ruling that No Public Benefit Exists for a Structure That Would Eliminate Public Use of and Access to Public Trust Tidelands and Failing to Consider the Public's Beneficial Uses of the Critical Area

“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)). 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). This Court's holdings in its 2014 Opinion could hardly be more explicit about the ultimate result upon remand. The ALC exceeded its function on remand in failing to review the case consistent with that Opinion as this Court directed, and in substituting a new decision with a different result. Id.

The ALC erred in characterizing its scope of review on remand to consider "whether and to what extent the public . . . would benefit from the proposed bulkhead and revetment," as opposed to leaving the tidelands in their natural state. (R. p. 177). On remand, the ALC said it was to "consider the benefit to the public, if any, of leaving the tidelands in their natural state." (R. p. 178). Yet this Court had unequivocally addressed this public benefits question: "it was clear that only the developer, not the *public*, would

benefit from the construction of this enormous bulkhead and revetment.” Kiawah at 30, 716. Indeed, this Court explicitly concluded the public would be harmed by the grant of this permit because it would (1) impair public access and use and (2) prevent the natural processes the Act seeks to protect. This Court’s conclusion is decisive on compliance with section 48-39-30(D), yet the ALC reassessed the question of public benefit and whether this permit will provide the maximum benefit to the people despite this Court’s conclusion of no public benefit in fixing the shoreline.

The ALC recited this Court’s conclusion that it had erred in finding that erosion had no positive benefit, citing the legislative findings that the public benefits from natural erosion processes. (R. pp. 177-78; 194-95). But rather than acknowledging those benefits (which were supported by the substantial and uncontroverted evidence), the ALC took no assessment of public benefits from the natural processes, instead brushing aside these public beneficial uses because this Court stated that loss of the public beneficial uses “alone” is not a valid reason to overturn the decision. Id. at 723. The ALC’s Amended Order is devoid of any analysis of the benefits to leaving the shoreline of the Kiawah River in a natural state. While acknowledging this Court’s ruling that historic erosion, breach, and accretion processes benefit the public, the ALC gave no weight whatsoever to those benefits.

The ALC then turned its attention solely to an effort to identify public benefits in fixing the shoreline by constructing a hard erosion control structure, rather than assessing other regulatory provisions that similarly weigh against construction of the proposed structure. In short, the ALC failed to evaluate the public benefit to leaving the shoreline in its natural state compared to hardening it with an erosion control structure. The result of

such evaluation of the uses of the critical area must demonstrate the maximum benefit to “the people.”

The ALC’s determination that “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” is unsupported. (R. p. 191) This finding ignores evidence that the sandy shoreline now has a steep escarpment, but it still useable to the public because it is the escarpment that feeds the sandy stretch of beach at low tide. (R. p. 1134). There is no evidence that the public’s use of the shoreline will be protected if a bulkhead is installed, indeed the evidence indicates just the opposite. (R. pp. 198, 1134)

The ALC discards this Court’s conclusions that the public benefits from natural processes like the cyclical erosion, breach, and accretion of the spit as merely “potential” benefits. (R. p. 182). Then the ALC repeats the same error from the previous ruling that the public can “still access the shore on the proposed concrete mat and pull up their boats or kayaks onto it.” (R. p. 182). Once more, no evidence supports that conclusion. In fact, the record contains overwhelming evidence that the mat would damage boats; that the mat would be dangerous to walk on, particularly for children; that it would eliminate the enjoyment currently made of the sandy beach and that it would be “like partying on a parking lot, which would be no fun.” (R. p. 1143, lines 10-11; R. pp. 1139-45).

The ALC dismisses the public benefits to and use of the natural shoreline of the river, seizing on this Court’s conclusion that these benefits are “alone . . . not a valid reason to reverse the ALC’s approval . . .” ((R. p. 182, citing Kiawah at 44, 723). Indeed, depriving the public of the use of the critical area is but one of many reasons that the

structure should not be approved. This Court recognized other reasons, including that (1) the laws “generally prohibit alterations to the tidelands except when the public interest requires otherwise,” *Id.* at 29, 715 (citing 48-39-10, et seq., R. 30-1, et seq.), (2) that “the public interest is usually best served by preserving tidelands in their natural state,” *Id.*, (3) that the “lands below the high water line are owned by the State and held in trust for the benefit of the public,”³ (4) 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 31, 717 (citing Meg Caldwell & Craig Hold 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)). Yet rather than being inclusive of all the legal bases for denying a permit for the structure, the ALC’s opinion excludes them.

In short, the ALC failed to weigh the public benefit that would result from leaving the shoreline in its natural state versus hardening it with an erosion control structure. Such a weighing requires that the uses of the critical area must provide the maximum benefit to “the people.”

B. The ALC Erred in Disregarding Uncontradicted Evidence that Fixing the Shoreline with a Bulkhead Will Eliminate the Sandy Beach Currently Existing Below the Mean High Water Mark

“[P]ublic access is to be accorded great protection while private economic development is suspect and only permitted when in the public interest.” *Id.* at 41, 722. This

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The public has 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).

Court held that if “there ever were a case of substantial adverse effect on public access, it is this case.” *Id.* at 42, 722. Yet the ALC concluded that “the evidence did not establish that the bulkhead would adversely affect the recreational use of the sandy shoreline.” (R. p. 189). The ALC concluded that “with a bulkhead, people could still enjoy the beach . . . and people will still be able to walk the riverbank.” (R. p. 169, fn. 11). The ALC concluded that “the bulkhead will have no negative impact on recreational activity.”⁴ (R. p. 199). The ALC further concluded that “denying the permit would not, in the long-term, preserve the sandy shoreline for continued use and enjoyment by the public” and “would not result in the continuation of the natural cycle.” (R. pp. 191, 197). The ALC’s conclusions are contrary to the undisputed testimony and would allow a structure on the shoreline that will prevent its natural feeding with sand, ultimately eliminating the shoreline altogether.

Dr. Young explained that “if we didn’t have coastal erosion of bluffs and things like that, we wouldn’t have beaches.” (R. p. 1134, lines 8-10).

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 [CCL Exhibits 10A-10U, R. pp. 1730-50]. The sand that comes from that eroding bluff feeds other environments that are in the river So if you wall off a half mile of shoreline from . . . even small amounts of retreat and erosion, then over the long term you’re going to be losing a certain amount of your sand supply. And those impacts are cumulative over the long term. . . . a certain amount of erosion is responsible for maintaining some of those critical areas, like beach and that intertidal beach, especially in front of the revetment. *So if you seal off this entire shoreline, the first thing you’re going to do is eliminate that entire beach . . . Even if the structure doesn’t cover the entire beach, as the river channel migrates towards the structure, the beach is going to disappear.*”

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In an inconsistent statement, the ALC later concludes that “the public’s use and access will be degraded in the limited location where the bulkhead and revetment are to be constructed.” (R. p. 201).

(R. p. 1134, line 14 – p. 1135, line 21). Thus, once the natural sand supply is cut off with the bulkhead, the sandy shoreline that the ALC recognizes needs protection, will disappear. Id.

The ALC's Amended Order on Remand is affected by error in its "misapprehension about public use and the failure to accord it the importance it deserves" which "is fundamentally at odds with the public nature of the tidelands at issue here." Id. at 43, 722. The ALC's conclusion that the structure would result in "little to no impairment of available kayak landing areas over the half-mile bank east of Beachwalker Park" lacks evidentiary support, is directly contradicted by the testimony of Dr. Young and is inconsistent with the Opinion of this Court that a structure fixing the shoreline would have "substantial adverse effect on public access." Id. at 42, 722.

C. The ALC Erred in Concluding that "Benefits" Unrelated to Use of the Critical Area Satisfy 48-39-30(D) and Further Erred in Finding that 8 Parking Spaces and a Possible Conservation Easement on 11.4 Acres of Developable Land Provided a Sufficient Benefit to Override the Elimination of Beneficial Public Uses of the Critical Area

The ALC concluded that "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." (R. p. 160). The ALC tortures the statutory language by analysing "whether the development of the spit is in the 'public interest.'" (R. p. 170). This conclusion is inconsistent with the plain language of 48-39-30(D), and allows an applicant to "create" a public benefit by undertaking some activity unrelated to, and which does not flow from, the actual **use** of the critical area. Instead, the ALC should have assessed KDP's proposed use of the critical

area and whether that particular use, in and of itself, provided any public benefit.⁵

The ALC erred by equating the Section 48-39-30(D) analysis with the Regulation 30-11(C) analysis, which this Court held requires consideration of impacts on the uplands, not just the critical areas. The ALC's analysis conflates two separate regulatory requirements, even though each provision contains distinct criteria which can be read together without conflict. The result is that the ALC erroneously alters and adds to the statute and regulations. See Trustees of Wofford Coll. v. City of Spartanburg, 201 S.C. 315, 23 S.E.2d 9, 12 (1942) ("the language of a constitution should receive a natural and reasonable construction, and [] different portions thereof should, if possible, receive a construction which would give some meaning to each of such provisions"). 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).

The plain language of Section 48-39-30(D) requires consideration of the combination of **uses of the critical area that provide the maximum benefit to the public**, it does not require consideration of uses of upland areas that may or may not occur as a result of any particular use of the critical area. As a policy of the Act, compliance with this provision is a threshold question that must be answered before moving to consideration of the applicable regulations. The ALC failed to treat 48-39-30(D) as a separate and distinct

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While the League has challenged the portion of the 270' of structure in front of the parking lot at Beachwalker Park, at least the "use" of critical area in that instance would ostensibly benefit the public by protecting the parking lot used by the public to access the beach. In other words, a structure in front of the parking lot would have a direct connection to protecting public parking.

requirement from Regulation 30-11(C); specifically that 48-39-30(D) requires weighing the uses of the critical area whereas 30-11(C) requires an assessment of the long-range and cumulative impacts within and outside of the critical areas, i.e., upland impacts that will flow from the use of the critical area.

The ALC's treatment of these separate requirements ignores the different language and requirements of these two provisions. Nexsen v. Ward, 96 S.C. 313, 80 S.E. 599, 601 (1914) ("If it means anything, it means a purpose of the Legislature to adopt and make of force a Code of laws, *and hence to breathe into every provision in that Code the vitality of a legislative enactment*"); see also Trustees of Wofford Coll. at 12. Because the ALC's 48-39-30(D) analysis failed to look at the beneficial uses of the critical area, instead looking at "benefits" that will purportedly flow indirectly (though not by way of the ALC's Order) as a result of the desired use of the critical area, but do not themselves involve any use of the critical area. Both the eight (8) parking spaces and the conservation easement are independent of the desired use of the critical area in that they can occur whether or not any structure is authorized. Even if the parking spaces or conservation easement could be considered as "uses of the critical area," they do not provide maximum beneficial uses to the people in this instance.

The ALC acknowledged that the Spit, "particularly the pristine sandy beach, is undoubtedly one of this State's natural treasures," but when balancing this benefit, the ALC found that eight (8) parking spaces for KICA members and a conservation easement provided sufficient public benefit to override protecting the pristine sandy beach.⁶ (R. pp.

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The ALC also finds that the Town's approval of the development is a consideration under its "public interest" analysis because the Town's purpose is "development the Spit." (R. p.

116-63; 177-81). Instead of giving “strong consideration” to the natural state of the spit, the ALC fails to address the benefits derived therefrom, and concludes that the eight (8) parking spaces and conservation easement are “other factors more compelling” that leaving the shoreline in its natural state. (R. p. 161).

To find public benefit, the ALC relied extensively on a 2005 Development Agreement (“DA”) between the developer and the Town of Kiawah Island. That reliance is severely misguided: the DA hardly addresses public benefit. The DA was entered into several years before the developer applied for the permit at issue. The DA does not require the shoreline to be fixed with a bulkhead or revetment. The conditions of the DA are not incorporated into the permit or the ALC’s ruling. The conditions are not enforceable by the beneficiaries. The DA has already been amended once, and nothing prevents future amendments that would alter or eliminate existing rights and duties. The ALC’s findings with respect to the DA are findings which are predicated on the occurrence of other events and are outside the scope of the Court’s authority. In short, the ALC’s reliance on a DA to provide public benefits is tenuous and speculative.

i. Parking Spaces for KICA

The ALC concluded that eight (8) parking spaces for KICA members is a valuable public benefit supporting construction of the erosion control structure. (R. p. 179) The parking spaces are not part of the permitting decision and are not conditions to the permit, but rather subject to the DA between the Town and KDP to which KICA is not even a party. (R. pp. 1788-1830). The ALC’s reliance on a chain of events which has to come to

191). This finding is unsupported conjecture. It is KDP’s purpose to develop the Spit, not the Town’s, and there is no evidence to the contrary.

fruition for eight (8) parking spaces for residents of a private gated community, and which is unrelated to the permit, is both tenuous and speculative.

Moreover, the ALC's conclusion that the eight (8) parking spaces would "benefit thousands of KICA members" lacks evidentiary support. (R. p. 162). The evidence is that KDP would deed eight (8) parking spaces, if the spit is developed, but there is no evidence regarding KICA members' present ability to access the Park or lack of adequate parking and access to the Park, or that eight (8) parking spaces would provide a significant benefit even to KICA members, even had such a need been established.

This Court recognized that the term "the people" is inclusive and indicates "a single, unified group," – it does not mean "a people" or some subset of the people, but the public as a whole. (Kiawah at 30, 716). "Thus, only those benefits which inure to the public as a whole may satisfy section 48-39-30(D)." Id. While KICA members and the developer are members of the public, the benefits must be to the public as a whole, not just a subset of the people like KICA. The ALC's reliance on eight (8) parking spaces for KICA members cannot satisfy section 48-39-30(D).

ii. Conservation Easement is Not a Public Benefit Outweighing Public Use and Access

The ALC uses an erroneous standard to create a "public benefit" from the conservation easement. Rather than comparing the public benefits of the shoreline as it exists in its natural state to how it will exist if a structure fixes that shoreline, the ALC compares KDP's proposed residential development (outside the critical area) to an undefined development that would presumably impact more than what is proposed by KDP (or allowed under the DA). In doing so, the ALC concludes that placing an easement on

the remaining portions of the Spit not subject to development provides a “significant public benefit.” (R. p. 181). The ALC concludes that the “public benefit can only be realized if the development that depends on the stabilization of the riverbank through the bulkhead and revetment occurs.” (R. p. 181). The ALC further concludes that 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 of the Spit.”⁷ (R. p. 162).

Notwithstanding that any public benefit would not be in critical area uses, the nature and extent of development on Captain Sams Spit are limited by the DA, not by a conservation easement. (R. pp. 163;1788-1830). Moreover, the bulkhead/revetment is not required for the development to proceed, and thus the conservation easement is not contingent upon authorization of that structure. The evidence is that there can be no more development on the Spit outside of what is authorized by the DA, whether or not a conservation easement is placed on the remaining 11.4 acres of land between the critical area line and setback line which set the limits of development.

The ALC also sets up an imaginary comparison where the alternatives are either development of the entire 150 acres of the Spit or the 20 acres of development proposed by KDP. According to KDP’s witness Leonard Long, even though the spit is 150 acres, only 31.4 acres of the pit are between the critical area line and the setback line which set the

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The only time a conservation easement was mentioned during the contested case hearing was when KDP’s witness 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.” (R. p. 633, lines 3-5). No evidence suggests, much less establishes, that any conservation easement that “will one day” (presumably) be placed on the Spit would provide a benefit to the people.

limits for development. (R. p. 605). The remaining 120 acres of the spit is not developable because it is seaward of the setback line and critical area line. Thus, of the 31.4 acres of “developable” land, KDP would develop 20 acres, or roughly 2/3, and the remaining 11.4 acres, or 1/3, could not be developed. (R. p. 607). Thus, any conservation easement could only protect 11.4 acres of land from development. The ALC erred in considering restrictions by way of a conservation easement on 150 acres when only 31.4 acres of that amount could even be available for development. Any limitations would only apply to the 11.4 acres of potentially developable land between the critical area and setback lines, and this land is already restricted by the development agreement. Moreover, the ALC must discredit the benefits from the Spit in its natural state in order to conclude that the proposed development is the preferred beneficial future for the Spit.

Setting aside the fact that Section 48-39-30(D) requires consideration of the combination of uses of **critical area**, as opposed to uses (or benefits) outside the critical area, the ALC’s sole reliance for concluding that the public will benefit from a future conservation easement on KDP’s upland is a citation to the Conservation Easement Act and its general statement of the purposes of that Act. (R. p. 163). Other than these general statements referred to in the Order, there was no evidence of how the public in particular would benefit from this easement.⁸ The Order lists a number of benefits generally arising from conservation easements; no evidence supports the conclusion that this proposed conservation easement would provide any of those benefits. Moreover, the conservation

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Similarly, there is no evidence that the land that would purportedly be placed under conservation easement could be developed if there were no easement in place. The ALC assumes that the entire spit would be subject to development without an easement. That assumption ignores the DA’s limitation of 50 home sites. (R. pp. 1788-1830).

easement cannot be a substitute for the public's beneficial uses of the critical area because it applies to KDP's property which is inaccessible to the public.

Finally, the ALC's finding that "the owners' 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," has no factual support and is outside the purview of this permit decision. The conservation easement is not what would protect any "additional 'new' acreage from any development," but rather DHEC limitations on development seaward of the setback line and critical area line, as well as the very same DA on which the ALC relies for securing the easement. (R. p. 181). The DA states that only 50 home sites can be constructed, so whether or not there is a conservation easement, the DA itself limits the development. The ALC states that the "protection is assured by legal restriction and a recorded easement." (R. p. 181); however, no easement has been recorded and the property has not been restricted. At the hearing KDP stated only its intent to do so.

iii. The Structure is Not a Prerequisite for a Conservation Easement

There is no evidence that the development of the 20 acres cannot occur without the bulkhead and revetment. Nothing in the DA requires a bulkhead and revetment for the development to occur.⁹ The only evidence regarding the viability of the development without the bulkhead and revetment was Mr. Long's testimony that there would be "reticence" on the part of potential home buyers. (R. p. 706). Long's testimony is far from

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The DA was amended once and can be amended again, and aside from the consent of the Town, there is nothing to prevent the elimination of the conservation easement requirement, just as there was nothing to prevent the developer from changing its mind from leaving the entirety of the Spit as undisturbed open space to developing 50 home sites on the Spit. That change of mind was incorporated into the DA.

proof that the bulkhead is needed to undertake the development authorized under the DA or that the bulkhead is necessary for fulfillment of the conservation easement. In short, the bulkhead authorized by the ALC is not a necessary prerequisite to the imposition of a conservation easement or of the development itself.

Puzzlingly, the ALC states that the conservation easement offsets the impact of the bulkhead, but not the revetment. (R. p. 181).

ALC's finding that "denial of the permit . . . contradicts [a] local legislative land use decision by making the residential development it sanctioned probably incapable of realization" is not supported by the evidence. (R. p. 191). First, the DA does not require development, it only allows it under certain terms and conditions. Second, the evidence does not support a finding that denial of the permit would render the development unattainable. Nothing in the DA or any legal authority requires that KDP have a bulkhead and/or revetment installed in order to proceed with its proposed residential development.

iv. Beachwalker Park

ALC erroneously found that the "public use and benefit of the Park is dependent upon the parking lot of the Park." (R. p. 178). This finding confuses "the Park" with the actual sandy beach areas used by the public. "The Park" consists "primarily of a parking lot, changing facilities, a tiny snack bar and a boardwalk to the beach." (*Id.*) But "the Park" to which the ALC refers is the sandy beach areas below the mean high water mark, and the public's use and benefit of those sandy beach areas is not dependent upon a parking lot. Numerous members of the public testified about their uses of the sandy beach areas, which they access via boat and kayak. (R. pp. 1139-66; 1176-1209). None of that testimony was refuted.

The ALC's finding that the Park's fence had to be moved "to prevent people from falling down the escarpment" is unsupported by the evidence. There was no testimony regarding people falling down the escarpment. Again, the ALC failed to balance the public benefit of the actual parking lot with the natural erosional processes of the Spit. 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. (R. p. 1215). 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 transfer would occur at another site. (R. p. 1215). Tom O'Rourke, the Commission's Executive Director, has had ongoing discussions with KRA/KDP about relocating the Park. (R. pp. 1210-14; 1751-54). The Commission created a map depicting an 3.2 acre alternate site for the Park, which has been used to discuss relocating the Park. (R. p. 1754). For these reasons, the ALC's reliance on public benefits associated with the Park is tenuous.

II. The Administrative Law Court Erred in Failing to Give Deference to DHEC's Interpretation of Regulation 30-11(C) That the Development Facilitated by the Structure Would Change the General Character of the Area from Pristine and Untouched to Residential Development and Result in Long-Range, Cumulative Impacts that Warranted Denial¹⁰

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"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 the ALC can even consider whether specific regulations have been met, a determination must be made

“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.” Read Phosphate Co. V. S.C. Tax Comm’n, 169 S.C. 314, 330, 168 S.E. 722, 728 (1933); see also S.C. Coastal Conservation League v. SCDHEC, 363 S.C. at 75, 610 S.E.2d at 486. This Court held that DHEC is entitled to this deference “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.” Kiawah at 34, 718. 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 natural area into a residential development.” Id. at 720. Just as it failed to do in the previous appeal and despite that express language, the ALC’s Order on Remand fails to give DHEC any deference and fails to give any reason why it overruled DHEC’s R. 30-11(C) determination. That failure is hardly “consistent” with this Court’s 2014 Opinion.

The ALC erred in its findings and conclusions related to the long-range and cumulative impacts. Regulation 30-11(C) requires consideration of the “extent to which long-range, cumulative effects of a project may result within the context of other possible development and the general character of the area.” Breaking down this language, the

as to whether the project is consistent with those State policies. Indeed, this 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). This 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).

consideration includes:

1. A determination of the general character of the area;
2. A determination of other possible development;
3. A determination of the effects that will flow from that project and whether those effects will be long-range and/or cumulative considering both other possible development and the character of the area.

As this Court recognized, DHEC applied this standard and found that the erosion control 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.” Kiawah at 25, 713. This Court also acknowledged that DHEC found that the structure would “‘prevent normal shoreline migration and the cycle of creation and subsequent in-fill of a tidal inlet’ and the development facilitated by the structure would ‘have a significant impact on the general character of the area.’” Id. This Court ruled that DHEC is entitled to deference in these findings. Finally, this Court ruled 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 natural area into a residential development.” Id. at 720.

Once more, the ALC failed to give deference to DHEC’s interpretation and failed to provide any compelling reasons why it disagreed with DHEC’s interpretation. S.C. Coastal Conservation League v. S.C. Dep’t of Health & Envtl. Control, 363 S.C. 67, 610 S.E.2d 482 (2005). Despite DHEC’s interpretation that the general character of the area is untouched and pristine, the ALC concluded that the proposed development that would be facilitated by the bulkhead would be in keeping with the general character of the “area around the spit.” (R. p. 186). The ALC acknowledges that the “Spit itself is undeveloped,”

as DHEC found, but rather than assessing how the proposed development would impact the Spit's undeveloped character, the ALC dismisses the Spit itself, instead focusing on the "general character of the **area around the Spit** [which] is residential, with some commercial development."¹¹ (*Id.*) The ALC referred to the "greater area" around the Spit, instead of "the area" itself, again failing to give a compelling reason not to defer to DHEC's determination that "the area" is the Spit itself, and that area is pristine and undeveloped. (R. p. 165). Only by ignoring the character of the 150 acre Spit itself, and broadening the definition of the "general character of the area" to the "general character of the area around" the project area could the ALC conclude that the proposed development would be consistent with the general "developed" character of the area. (*Id.*) Neither law nor logic permits the ALC to do so.

The ALC erroneously focuses the inquiry on how the development would be implemented. The League asserts that any coastal development should be done in an "environmentally sensitive manner," but those development standards cannot substitute for a full consideration of how the development itself will effect the general character of an area or the long-range, cumulative impacts which that development will impose on the area. Instead, the ALC presumes that a residential development would have no impacts, as long as it is done in an "environmentally sensitive manner." This conclusion ignores DHEC's special expertise and interpretation that "a portion of natural area was going to be

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The ALC's finding that the development "will be consistent with . . . existing development" further evidences the problem of broadening the definition and scope of "the area." (R. p. 186). Under the ALC's new interpretation of the character of the areas as residential development, it is hard to imagine any "area" along our coast that would be pristine, natural or untouched, because somewhere, nearby, there will be some development. (R. p. 165).

developed” and “there will be development where now there is natural land and no development.” (R. p. 188).

The ALC seems to have misunderstood this Court’s ruling on impacts on the general character of the area. This Court did not “rebuke” the ALC for not considering “the area” more broadly, but among other things, reversed the 2010 Order for not considering long-range and cumulative impacts more broadly than just impacts to the critical area. (R. p. 166). The League has never argued that the Court must consider cumulative impacts solely to the critical area, as the ALC stated in the Order on Reconsideration. (R. p. 160). The cumulative impact analysis is designed to take a careful and complete look in consideration of all of the foreseeable impacts that could flow from a project within the coastal zone, as well as assess the impacts on the general character of the area. Regulation 30-11(C) does not require the public benefits analysis of 48-39-30(D) and is broader in considering impacts on upland areas as opposed to uses of the critical area. The ALC has failed to distinguish the two standards of Regulation 30-11(C) and 49-39-30(D).

The ALC’s Amended Order on Remand suffers from the same failure to consider the long-range, cumulative effects of building the erosion control structure: the structure will facilitate residential development on an undisturbed inlet erosion zone, which is the most dynamic system on our coast. Indeed, KDP’s witness Mark Permar testified that the company typically does not develop in unstable areas, and definitely not near inlets like the Spit. (R. p. 761).

The project – construction of the revetment/bulkhead system – will facilitate development of home sites on the Spit, along with the attendant expanded infrastructure and increased human activity. The long-range, cumulative effects include loss of public access

and recreational opportunities, as well as the transformation of a pristine barrier island spit into a developed island. Even limited development that would result from the revetment would change the pristine, undeveloped character of the Spit. (R. p. 1285). It will no longer be a natural, pristine environment where the land can respond to forces that occur naturally in an unstabilized inlet area. (*Id.*). These are the long-range and cumulative impacts that this Court held must be considered, yet the ALC failed to do so.

III. The ALC’s Feasible Alternative Analysis Was Erroneous in Concluding That the Benefits to KDP From Authorizing the Bulkhead Outweigh the Benefit of Leaving the Shoreline in Its Undisturbed State

This Court directed the ALC to accord sufficient consideration to the feasibility of the no action alternative and allowing the natural processes to continue in light of the Public Trust Doctrine and the mandates of the Act. *Kiawah* at 44, 723. The Amended Order purports to give “serious consideration to the alternative of leaving the shoreline in a natural state,” but this statement is followed by no consideration or analysis. Instead, the Amended Order summarily concludes that “leaving the shoreline in its natural state is not a better alternative than stabilizing the bank.” (R. p. 191). Instead of addressing the benefits of the sandy shoreline, the ALC discusses how man-made processes resulted in “renourishment of the shoreline on Seabrook Island” – an activity at a place completely unrelated to the permit at issue here. (R. p. 182, fn. 5).

The ALC concludes 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 coastal resources,” even while acknowledging that the structure itself “will affect public access.” (R. p. 184). The conclusion that the project complies with 30-12(C) and

48-39-150(A)(5)¹² ignores that the public access to and use of the shoreline would be eliminated by the bulkhead structure and is reversible error of law.

The ALC found that “it is highly unlikely that the Spit will breach at the neck even if the bulkhead and revetment were not installed.”¹³ (R. p. 190). If that is the case, then the “no action” alternative is certainly feasible. The ALC’s conclusion that natural processes occurring on the Spit would not continue even if the bulkhead and/or revetment were not constructed lacks logical and factual support. (R. p. 191). Logically, the natural processes are those that occur without the interference of man. In the absence of the imposition of man-made structures or the conduct of human activities in tidelands, then the system will behave naturally, without man’s interference.

This Court held that the ALC “erred in only considering alternatives that would

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The ALC’s conclusion that the project “will not adversely affect the value and enjoyment of KDP” and thus it is not a consideration warranting reversal under Section 48-39-150(A)(10) is legally and factually erroneous. (R. p. 185). That conclusion overlooks that the public is the owner of the tidelands which are adjacent to KDP’s land, and that the public’s value and enjoyment of the Kiawah River shoreline will be significantly adversely affected if the shoreline is hardened with a bulkhead. While the ALC acknowledges that the public is the owner of the adjacent tidelands, it swiftly dismisses consideration of adverse impacts on the public’s uses and enjoyment of public trust property because the League “lacks standing to challenge the proposed use’s effects on the value and enjoyment of the public on these lands.” (R. p. 165). The requirement to consider the impacts on adjacent owners is statutory and the League presented undisputed evidence of those impacts, specifically the elimination of public trust sandy shoreline that its members currently use for aesthetic and recreational purposes. The League need only established that its members would suffer injury caused by the project in order having standing; it need not prove standing to raise compliance with each and every specific statutory and regulatory provisions applicable to the permit review process.

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The League never implied that the bulkhead and/or revetment would prevent a breach at the neck of the Spit (R. p. 173), instead that such a breach would cause significant impacts by scattering debris throughout the coastal system if the project moves forward and the Spit is developed.

stop the natural erosion process.” Kiawah at 44, 723. Yet the ALC’s feasible alternative analysis narrowly and erroneously identifies the project purpose as to “stabilize the river bank in this location,” and propagates this same error. (R. p. 192). The project’s purpose must accomplish some end goal. Merely fixing the shoreline in its present location, in and of itself, does not have a purpose. Rather, the purpose is to facilitate residential development, and the alternatives analysis must be applied in light of that overall purpose. To conclude otherwise would be to allow an applicant to define the project’s purpose so narrowly that the chosen alternative becomes the only alternative that can accomplish that goal.

The ALC said it gave “serious consideration” to the no-action alternative, but concluded that other factors were “more compelling.” (R. p. 161). Those factors include eight (8) parking spaces for KICA members and a conservation easement on the portions of Captain Sams Spit that will not be developed. The ALC also identifies being “primarily swayed” by the “threat of erosion to the infrastructure of Beachwalker Park” as justification for its decision; however, Beachwalker Park is only 270', or 10%, of the 2,783' structure authorized by the ALC. In sum, the ALC’s 2016 Orders fail to give sufficient consideration to the no action alternative as directed by this Court, the Act, and the regulations.

IV. The ALC Erred in Authorizing an Engineered Structure that Was Not Applied for Nor Reviewed and is Neither Structurally Nor Environmentally Sound

The ALC cites no testimony or evidence in crafting its 2016 Order, which is effectively a new permit for which KDP did not apply, nor did the Department review it. This “new permit” authorizes a bulkhead for the entire 2,783' length, but eliminates the

concrete block revetment for all but the 270' in front of Beachwalker Park. The ALC's authorization of the full 2,873' bulkhead, while limiting the concrete revetment to 270' in front of Beachwalker Park, lacks evidentiary support. It is, in reality, contrary to the testimony of every witness who testified on the topic.

KDP's witness Mitchell Bohannon testified that he investigated a "number of alternatives" that could have been used, "and it was our recommendation that they use the concrete mats." (R. p. 826, lines 8-11). The engineering firm "felt like it was a good comprehensive solution" which took into account the essential consideration of reflective wave energy. (R. p. 831, lines 2-3; 841). All of KDP's witnesses opined that the revetment is a critical component to the overall erosion control structure because "it prevents that reflected wave from causing erosion on the bottom," i.e., at the base of the vertical bulkhead. (R. p. 192; see also R. p. 465, lines 22-23). According to Bohannon, the revetment stabilizes the bottom of the bulkhead. (*Id.*) He explained that the revetment was a necessary component to prevent (1) failure of the bulkhead and (2) erosion at the base of the bulkhead that would disrupt the marine bottom. He explained that "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 wave energy, it's going to cause even more exacerbated erosion." (R. p. 839, lines 1-7).

KDP's witness Long testified that KDP also hired "eminent scientists," Drs. Oretel and Basco, who similarly opined that stabilization of the bulkhead with a revetment was necessary, and further added the recommendation that "training jetties," which would extend out from the shoreline, be incorporated into the design in order to reduce the

velocity erosion occurring at the neck. (R. pp. 613-14; 625-26; 1762-74). The training jetties would direct water flow away from the bank so that you decrease the velocities along the edge of the bank. Drs. Oretel and Basco also recommended that the revetment be lengthened and widened at certain “hot spots” in the river from 40 to 60 feet. (R. pp. 625-26). The League’s witness Dr. Young noted that KDP’s experts shared concern about “whether or not the structure could withstand continued migration of the river channel.” (R. P. 1125, lines 16-18).

Dr. Young continued that: “[t]here was concern amongst their own experts about the possibility of the undermining of the structure. And, certainly, I share some of those concerns. If the structure is put in place, that will not halt the – necessarily halt the migration of the salt marsh point bar which is moving towards the island. That will further constrict the channel, increase the flow velocities in the channel, deepen the channel and put the toe of the revetment, as designed, at immediate risk.” (R. p. 1125, line 18 – p. 1126, line 4). The articulated concrete block proposed by KDP was specifically designed to prevent undermining of the wall, yet that is the portion of the project eliminated by the ALC. (R. p. 1126). Dr. Young’s uncontradicted testimony was that “if one bank of the river keeps moving and you hold the other in place, then the river channel may get smaller, but you have to put the same amount of water through there, so the water moves faster. And that increases the ability of the river to move sediment, to cause erosion and to deepen the channel. And . . . so the revetment is going to have to withstand those increasing forces and the deepening of the channel. And, in my professional opinion, over the long term, the structure will fail.” (R. p. 1126, line 24 – p. 1127, line 12). The structure will fail because the increased velocity and deepening of the channel will place stress on the base of the

structure. (R. p. 1127).

The ALC even acknowledges KDP's evidence and argument "that the bulkhead and revetment must be considered in tandem." (R. p. 193). Yet the ALC completely ignored this testimony, opting to craft an engineered structure out of thin air, in the face of evidence from all witnesses that this authorized structure would surely fail.

The ALC's conclusion that "installation of a bulkhead . . . is clearly supported by the evidence" is reversible error. (R. p. 193). No substantial evidence supports that conclusion. The ALC's conclusion that the bulkhead will have "little, if any, impact on public use" and "will have a de minimus impact upon the public use of the shoreline"¹⁴ (R. p. 202) is erroneous, ignoring the Act and the evidence regarding how the shoreline is created and maintained, as well as this Court's statement that "if ever there were a case of substantial effect on public access, it is this case." Kiawah at 42, 722. Erosion is necessary to maintaining the public's use of the shoreline. (R. p. 1134). Preventing that erosion by "stabilizing" the shoreline with a bulkhead will necessarily eliminate the public shoreline by eliminating the source of sand supply. (Id.) The ALC's conclusion that the bulkhead alone would protect the public benefit similarly lacks any evidentiary support. These conclusions completely overlook that (1) there will be an artificial structure on the natural shoreline, (2) the structure will interrupt natural processes, and (3) once the erosion reaches the wall, the sandy shoreline will be eliminated.

The ALC concluded that while the revetment would degrade public access to the

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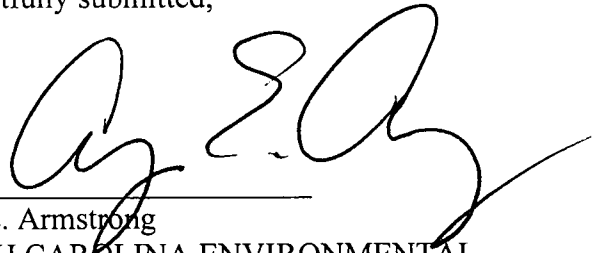
The ALC recognizes that terminating the revetment "in a high velocity zone" will make the shoreline "susceptible to erosion around its terminus;" yet authorizes that structure anyway. (R. p. 193).

shoreline, there is no evidence that the bulkhead alone would degrade use of the shoreline. (R. p. 189). The ALC faults the League for failing to introduce evidence that the bulkhead standing alone would degrade public use. (R. p. 168). Such evidence was unnecessary in light of (1) the ALC's scope of review and (2) KDP's testimony that the revetment was a critical component of the erosion control structure. Even so, the League did present ample evidence that **any** structure, including the bulkhead standing alone, that fixes the shoreline and prevents its natural movement degrades the critical area and eliminates public use of the shoreline. (R. pp. 1134-35).

CONCLUSION

WHEREFORE, the Appellant respectfully requests that this Court issue an Opinion reversing the Amended Final Order and Decision on Remand and Order on Reconsideration of the Administrative Law Judge authorizing an erosion control structure along the banks of the Kiawah River at Captain Sams Spit.

Respectfully submitted,



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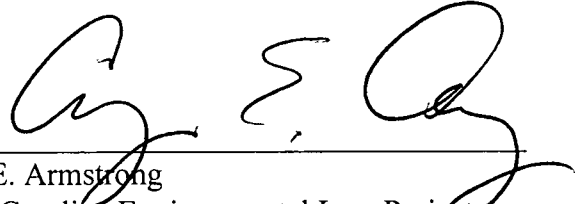
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Certificate of Counsel

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



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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case 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 is, Respondent.

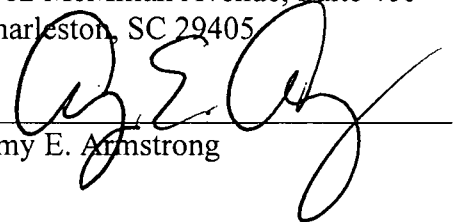
CERTIFICATE OF SERVICE

I hereby certify that on this date I served the Appellant Coastal Conservation League's
Final Brief and Final Reply Brief on Kiawah Development Partners II, Inc., and DHEC, by
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JUN 22 2017

June 20, 2017

S.C. SUPREME COURT