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S.C. SUPREME COURT

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.

REPLY BRIEF OF SOUTH CAROLINA COASTAL CONSERVATION LEAGUE

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SUMMARY OF ARGUMENT ON REPLY

Kiawah Development Partners, II's ("KDP") arguments purport to support the unsupportable; namely, the errors of law in the Administrative Law Court's ("ALC") Orders that require reversal. In its previous decision in this case, this Court held that Section 48-39-30(D) "explicitly requires that tidelands be used in a way that provides maximum public benefit." Kiawah Development Partners, II v. S.C. Dep't of Health and Environmental Control and S.C. Coastal Conservation League (hereinafter "Kiawah"), 411 S.C. 16, 766 S.E.2d 707 (2014). Yet the ALC, and KDP, have rejected this Court's express holdings by concluding that the use of half a mile of the Kiawah River shoreline for a permanent erosion control structure somehow provides the maximum public benefit. This opinion results from an erroneous legal analysis, and no evidence, much less substantial evidence, supports the findings upon which that decision rests. The question is not whether there may be ***some*** beneficial public uses of this massive structure on the shoreline, but whether that use ensures the ***maximum*** beneficial use to the public. S.C. Code Ann. § 48-39-30(D). Yet rather than applying this Court's direction regarding the "maximum benefits to the people" of this "invaluable — in environmental, economic, and social terms — stretch of tidelands," Id. at 22, the ALC concluded that permanently sealing off the shoreline together with 8 parking spaces, a conservation easement and the Town of Kiawah Island's zoning provided greater public benefit than (1) allowing natural processes to continue as they have and (2) preserving the use of the sandy shoreline for walking, kayaking, boating picnicking and other recreational activities.

KDP's Brief, like the ALC's Amended Order, ignores the direct evidence in favor of drawing unsupported inferences to reach a predetermined result. (KDP's Response

Brief, p. 37; R. pp. 162, 170). Aside from the error of law in failing to ensure the maximum public beneficial uses as required by Section 48-39-30(D), reliable, probative and substantial evidence, even KDP's own evidence, contradicts these inferences. KDP's consistent position and assertion have been that the revetement is needed to protect the toe of the bulkhead structure and that it is an essential component of the erosion control system.[1] (R. pp. 614-16; 625; 838-40; 865-66). That is not the League's position, as KDP incorrectly asserts, although the League concurs that the bulkhead would be unstable without the revetment. (KDP's Response Brief, p. 45). Yet the ALC rejected the concept of the revetment in the face of the uncontradicted evidence (primarily from KDP). Similarly, KDP has consistently asserted that the shoreline along the Kiawah River is highly erosional and continuing to erode. That assertion forms the underlying basis of KDP's request for the erosion control structure in the first place. (Response Brief, p. 45). But KDP rejects its own assertion when it becomes inconvenient because it leads to the inevitable conclusion that once the erosion reaches the vertical bulkhead, public access will be completely eliminated. (R. pp. 1134-35).

I. Section 48-39-30(D) Requires Maximum Beneficial Uses of Critical Areas Tidelands

KDP and the ALC's interpretation of Section 48-39-30(D) of the Coastal Zone Management Act ("Act") is at odds with the statute's plain language. When a statute's language is unambiguous and clear, the rules of statutory construction are unnecessary and

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[1] KDP's experts even recommended widening the revetment from the proposed 40 feet to 50 feet to prevent scouring at the toe of the bulkhead which would worsen the erosion. (R. pp. 625-26; 865-66).

this Court need not look for, or impose, another meaning. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000); Timmons v. S.C. Tricentennial Comm'n, 254 S.C. 378, 175 S.E.2d 805 (1970) (Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature's language.).

The Act mandates that "critical areas shall be used" to provide the "maximum benefit to the people." S.C. Code Ann. § 48-39-30(D). This Court held that the Public Trust Doctrine and Section 48-39-30(D) explicitly require that "any use of tidelands must be to the public benefit." Kiawah at 41. To assess the maximum public benefit, a court looks at the public benefit of allowing continuation of the current uses of the critical area to continue compared to the public benefit of construction in the critical area. The Act does not allow uses that may provide some benefit, when those uses do not ensure the maximum benefit to the people. S.C. Code Ann. § 48-39-30(D). The assessment necessarily requires the South Carolina Department of Health and Environmental Control ("DHEC"), and the courts, to look at uses of the tidelands in question, and determine which combination of uses provides the maximum public benefit. Id.

KDP asserts that the ALC was to go back and try to find some public benefit, despite the significant loss of beneficial public uses that will occur by converting the sandy shoreline into a hardened erosion control structure. In doing so, KDP perpetuates the ALC's distortion of this Court's clear directives, and the Act itself. This Court explicitly stated that the ALC must reconsider its decision based on several legal principles: (1) that the Public Trust Doctrine is the lodestar guiding permit decisions regarding uses of the critical area tidelands; (2) that private use of critical areas is the exception to the general prohibition on alteration of the critical areas; (3) that this project must comply with 48-39-

30(D), which requires that if critical areas are going to be altered, the permitted use must "provide the maximum public benefit;" (4) that only KDP, not the public, would benefit from the construction of the erosion control structure; (5) that the public benefits from natural processes occurring along the Kiawah River; and (5) that allowing only KDP to benefit and to override the public's interest violates the Public Trust Doctrine and the Act. Kiawah at 29-31. This Court did not authorize the ALC to make further findings on remand, but that the ALC's consideration must be *consistent with* these holdings. Nothing in this Court's opinion permitted the ALC to reach *contrary* conclusions, yet that is exactly what happened.

A. Activities Unrelated to Use of Tidelands Cannot Override the Public's Beneficial Uses of Those Tidelands

This Court faulted the ALC for its failure to consider "whether and to what extent the public would benefit **from the proposed structure** as opposed to leaving the tideland in a natural state." 766 S.E.2d at 723. The inquiry turns on whether the maximum public benefit would lie in using the critical area for an erosion control structure or retaining it in its natural state for the existing recreational, aesthetic and environmental purposes. Nothing in the opinion could be construed to authorize consideration of other possible occurrences outside of the critical area completely unrelated to, or resulting from, KDP's use of the critical area for an erosion control structure. But even if it did, those other activities are no substitute for the **maximum** public beneficial uses.[2]

KDP relies on the ALC's bold conclusion that the "benefits from a project in the

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[2] The Act allows the exclusion of uses only when consistent with the purpose of the Act. S.C. Code Ann. § 48-39-30(D).

critical area" not only do not have to be related to the actual use of the critical area, they also do not have to be required as "conditions of the permit itself." (KDP Brief, p. 28, citing ALC Order, R. p. 163, fn. 7). In so concluding, the ALC has created a new rule where potentially beneficial uses of upland areas – with no direct connection to critical area uses – can supplant existing public beneficial uses of the critical areas. The ALC's novel interpretation of Section 48-39-30(D) substantially adds to the statutory requirement that "critical areas shall be used to provide the combination of uses which will ensure the maximum benefit to the people." That interpretation is clearly erroneous. An administrative order which materially alters or adds to the law is void. Lee v. Michigan Millers Mut. Ins. Co., 250 S.C. 462, 158 S.E.2d 774 (1968); Milliken & Co. v. S.C. Dep't of Labor, Div. of Occupational Safety & Health, 275 S.C. 264, 267, 269 S.E.2d 763, 764 (1980). That is the proper fate of the ALC's administrative order here.

While KDP faults the League for not citing legal precedent, neither KPD nor the ALC point to any legal authority for the conclusion that the ALC can look both at activities outside of the critical area and activities unrelated to the permit at issue in determining whether the critical area is being use to provide the maximum benefit to the people. Moreover, the League's arguments are supported by the plain language of the statute and this Court's opinion. Section 48-39-30(D) refers to how the critical area itself is being used: **"Critical areas shall be used** to provide the combination of uses which will insure the maximum benefit to the people . . . **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 purpose of this chapter." S.C. Code Ann. 48-30-30(D) (emphasis added).

In applying Section 48-39-30(D), the ALC itself has issued some instructive

opinions. In Pier 14 Ltd. P'ship v. SCDHEC, Docket No. 95-ALJ-07-0107-CC, 1995 WL 929698, at *3 (July 28, 1995), the ALC denied a critical area permit to expand a restaurant over the critical area because the "primary incentive . . . is to increase the monetary profit of the business." The ALC reasoned that the "proposed addition would neither provide the public with greater access to the pier or ocean, nor add a new benefit. The addition is sought to increase the efficiency of the restaurant and to facilitate serving a greater number of patrons." Id. Here, KDP's proposed erosion control structure will not provide the public with greater access to the tidelands, but rather will eliminate existing access. At base, the primary purpose of the proposed structure is to provide monetary benefit to the developer, just as the ALC recognized with Pier 14 Ltd.

In Gerald Mallon & Debra Keil v. SCDHEC, Docket No. 00-ALJ-07-0229-CC, 2000 WL 1902017 (Dec. 11, 2000), the ALC cited Section 48-39-30(D) in denying dock construction when that dock crossed extended property lines, which resulted "in the blocking of access for a property that is legally entitled to access the water." Id. at *7. The ALC's rationale was that the access to water was a public benefit that would have been eliminated by the proposed dock structure, and thus the permit could not issue.

In N. David Durant v. SCDHEC, Docket No. 99-ALJ-07-0081-CC, 2000 WL 1274292, at *9 (Aug. 24, 2000), the ALC, again citing Section 48-39-30(D), recognized that tidelands in a "pristine state provide[] a substantial benefit to this State." Id. at *9. The ALC denied the permit for a dock, noting that "as the areas around other marshes have become more developed, the uniqueness of Oaks Creek and the Marsh as a pristine area free of piers and docks warrants even more protection." Id. at *9. The ALC reasoned that the public benefits significantly from leaving pristine tidelands untouched, as there are

fewer and fewer pristine areas free of man-made structures. The same analysis holds true here: leaving the pristine tidelands along the Kiawah River untouched benefits the public, particularly since it is one of only three places in the State where the public has access to walk along a pristine, undeveloped oceanfront property. (R. p. 1266). But instead the ALC's order would artificially wall off these tidelands, and allow this pristine area to become a hardened shoreline inaccessible to the public, eliminating the existing public benefit.

In this case, eight parking spaces, a conservation easement, or the Town's land use decisions are nothing like the "uses of the critical area" discussed in the cases above because none of the activities or factors identified by KDP and the ALC result from the proposed use of the critical area tidelands. Indeed, it would make no sense to include such extraneous and disconnected activities or factors to be considered as "uses of the critical area" because any of these "uses" would not themselves amount to "using" the affected critical area.[3] In other words, the statutory directive goes unfulfilled if critical area uses are compared to upland uses. The Act unequivocally requires consideration of the existing uses of the critical area, as well as the uses of the critical area a permit applicant desires, and a determination of which combination of these uses provides the maximum benefit to the people. S.C. Code Ann. § 48-39-30(D).

With respect to the eight parking spaces, KICA is not "the public at large," who is entitled to receive the maximum benefit, as this Court recognized. Kiawah at 30-31. KICA

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The eight parking spaces, conservation easement, and Town's land use plans are not tied to/dependent upon/causally related to the erosion control structure – they are dictated by the 2005 Development Agreement.

is a membership entity, and membership is exclusive to those who own property within the private, gated Kiawah Island community. The ALC's conclusion ignores this Court's explicit directives on who and what constitutes "the public." (See also KDP's Brief at p. 22). The conclusion that eight parking spaces for KICA members is a benefit to "the public at large" is an error of law.

While protection of Beachwalker Park, i.e., the parking lot, may offer some benefit by protecting existing parking spaces, the parking lot only extends 270 feet along the Kiawah River. (R. pp. 1254, 1286, 1755-61). Charleston Parks and Recreation applied for a stand-alone permit to address the erosion along the parking lot. (R. pp. 612-13, 630). And DHEC permitted the structure only for 270 feet along the parking lot, but eliminated the remaining 2,513 feet of structure along the pristine shoreline where no houses or other infrastructure are threatened. (R. pp. 1755-61). KDP would misuse the protection of the Park's parking lot, which only extends 270 feet, in an effort to extend it to a structure running the entire 2,783 feet – ten times the amount of structure needed to protect the parking lot at the Park. Any public benefit in protecting the parking lot cannot automatically extend to the remaining 2,5013 remaining feet of natural shoreline.

The 2005 Development Agreement requires the imposition of a conservation, as KDP fully acknowledges (KDP Brief, pp. 27-28; R. pp. 1788-1830), which is not contingent or conditioned upon the critical area permit at issue here. KDP asserts that "there is abundant evidence that KDP cannot proceed with the limited residential development without the protection of the entrance road and utilities through the Access Corridor . . ." (KDP Brief, pp. 28-29). This claim lacks support for two reasons. First, the 2005 Development Agreement does not require any "protection of the entrance road

and utilities" or otherwise make the development contingent upon receiving a permit for an erosion control structure from DHEC/OCRM. Second, and more importantly, KDP has received authorization for the construction of a road, sewer and water lines, and other infrastructure in connection with the proposed development that does not include the bulkhead/revetment structure at issue in this appeal.[4] A contested case appeal of these permits and certifications is currently pending before the ALC. See ALC Docket No. 15-ALJ-07-0369-CC.

It bears restating: the conservation easement is required for development to occur, regardless of whether or not KDP constructs the erosion control structure sought through this appeal. (R. pp. 1788-1830). Indeed, KDP acknowledges that it is the 2005 Development Agreement between KDP and the Town which is the "binding agreement that conditions the limited development of [Captain Sams] Spit on the granting of the conservation easement." (KDP's Brief, p. 27, 28). Instead of treating this provision as a requirement, KDP and the ALC engage in a series of speculative hypotheses to conclude that no protected areas will exist on the Spit unless the bulkhead structure is constructed. (KDP's Brief, pp. 14 & 17; Reconsideration Order, R. p. 169; Order on Remand, R. pp. 193, 198). Of course, this conclusion overlooks the obvious: protection of the entire Spit and continuation of the natural processes is best for the public. Kiawah at 31.

Since no evidence in the record supports a finding that this limited conservation easement would provide any public benefit, KDP identifies none. (Brief, p. 23-24).

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In administrative appeals "an appellate court can take judicial notice of something that was not before the trial court if it is indisputable." Wise v. Wise, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011); S.C. Code Ann. §1-23-330(4).

Instead, the ALC and KDP point to the Conservation Easement Act to arrive at its findings. The ALC erroneously makes findings regarding "public benefits" arising from conservation easement (R. p. 163), despite the absence of such supporting language in the Act. See, S.C. Code Ann. § 27-8-10, et seq. KDP's citation to a New Jersey case involving a state statute with different language is not binding, instructive or relevant to the question of whether there is substantial evidence in the record to support a finding that a conservation easement would provide a beneficial use of the critical area at stake here. (Brief, p. 24). That case involved a challenge to a property tax assessment and the general statement beyond the legal issue of whether the property value could be reduced for property tax assessment purposes is dicta. Village of Ridgewood v. Bolger Foundation, 104 N.J. 337, 517 A.2d 135 (1986). But at least the court's gratuitous statement regarding public benefits associated with conservation easements had a basis in the New Jersey statute, which explicitly states that it is in the "public interest" to "encourage" dedication to "public use."[5] Id. at 137. Of course, in this case any conservation dedication would not be for public use.

The South Carolina Conservation Easement Act makes general statements encouraging dedication of private land, but to convert such general statements into a declaration that the statutory requirement can be met simply through a conservation easement does not satisfy the purpose, intent, and plain language of Section 48-39-30(D)'s maximum public beneficial use in critical areas requirement.

B. Permitted Uses Can Provide Economic Benefit, But Not When They Completely Eliminate Proven Public Beneficial Uses

No evidentiary support exists for the ALC's sweeping conclusion that "a developer would scarcely, if ever, derive a direct benefit from use within the critical area (R. p. 161). KDP and the ALC fail to recognize that numerous economic benefits occur from direct uses in the critical area. (KDP's Brief, p. 14). For example, marinas and boat landings are constructed in the critical area and result in economic benefits from revenue generated by selling, leasing or providing access to those facilities in the critical area.[6] In addition, use of the tidelands critical area for marinas and boat landings provides public benefits by giving the public access to public trust tidelands and coastal waters. But these activities can be permitted only if the applicant's uses of the particular critical area in question do not supplant the maximum public beneficial uses. If an activity does not effect existing public beneficial uses of the critical area, then no public benefits are lost.

KDP similarly suggests that this plain language reading of Section 48-39-30(D) would eliminate the possibility that any erosion control structure would ever be permitted. (Brief, p. 14). KDP's "all-or-nothing" argument is long on hyperbole, but short on reason and logic. If an erosion control structure does not affect established public uses of a critical area, then it would qualify for a critical area permit. In other words, if no public

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This Court can take judicial notice that public and private marinas and boat landings are constructed and operated in our State. In administrative appeals "an appellate court can take judicial notice of something that was not before the trial court if it is indisputable." Wise v. Wise, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011). If the accuracy of the fact is capable of verification by reference to readily available sources of indisputable reliability, it is subject to judicial notice. State v. Odom, 412 S.C. 253, 267, 772 S.E.2d 149, 155–56 (2015), reh'g denied (June 5, 2015)

beneficial uses of a critical area exist, then an applicant's use of the critical area would not eliminate existing public beneficial uses.[7] Such is not the case here. As this Court acknowledged, if any place should be protected, it is here: "If there ever were a case of a substantial adverse effect on public access, it is this case." Kiawah at 42. The substantial and undisputed evidence of public use of the shoreline which the League and DHEC presented supports those words. That evidence demonstrates that the shoreline of the Kiawah River at Captain Sams Spit benefits the public with recreational opportunities, in addition to preserving the benefits associated with allowing natural processes to continue. Yet the ALC discarded this evidence of substantial adverse effect on public beneficial uses in favor of eight parking spaces, a conservation easement on 11.4 acres, and perceived Town zoning decisions.[8] Even if the eight parking spaces and conservation easement could be considered tideland uses, those use would have to be providing the ***maximum*** beneficial uses to the public at large. The ALC's decision does exactly what this Court said must be avoided: "To allow 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." Kiawah at 31.

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The impact of particular structures on the beneficial public uses of particular areas will vary from case to case. When weighing the beneficial public uses before and after construction of private structures in tidelands, DHEC may find, depending on the particular facts, that the beneficial public use of the salt marsh is not impaired, while a similar structure on a sandy beach would adversely affect public use. See, e.g., Sierra Club v. Kiawah Resort Assoc., 318 S.C. 119, 456 S.E.2d 397 (1995).

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No evidence or testimony from the Town or its representatives was presented at the hearing.

C. Critical Area Tidelands Have Greater Protection than Land Under the CZMA and the Public Trust Doctrine

The CZMA provides heightened protection to critical areas – more than just the entire coastal zone, as KDP suggests. (Brief, pp. 13-14). In the coastal zone, critical areas are the areas that are most sensitive and most in need of protection.[9] These precious resources are held in trust by the State for use by the public under the Public Trust Doctrine. Estate of Tenney, 393 S.C. 101, 712 S.E.2d 395 (2011). Section 48-39-30(D) is a codification of the Public Trust Doctrine, and requires that "any use of tidelands must be to the public benefit." Kiawah at 41. Indeed, this Court recognized that the Public Trust Doctrine is the lodestar in determining uses of public trust resources pursuant to the CZMA. Id. at 29. However, ***lands*** in the coastal zone are generally not owned by the public, unless they are designated as state or federal property. KDP's suggestion that critical areas are commensurate with the entire coastal zone lacks legal support.

This Court stated that because "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. . . . [but the] public interest is usually best served by preserving tidelands in their natural state." Id.

D. The ALC Failed to Consider the Public Benefit from the Natural Processes and the No Action Alternative

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The League did not challenge conclusion that development is consistent with CZMP because the permit is for the bulkhead/revetment, not the development. (KDP Brief, p. 8). The development itself will require its own permit and certification of consistency with the CZMP because it is in the coastal zone; however that was not a consideration in this case.

As noted by this Court, the public benefits from the natural erosional and accretional processes of the Spit. Kiawah at 31. Yet KDP argues the natural processes are no longer occurring because of previous inlet relocations, which is short-sighted and misguided. (KDP's Brief, p. 17). And the ALC's Order implies that very point. (R. pp. 162-63). However, the simple fact that the inlet has been artificially relocated in the past is no basis for a conclusion or inference that all other natural processes have completely ceased; and certainly no evidentiary support in this record exists for such a claim. (KDP's Brief, p. 17). Although it appears to be the premise for KDP's argument and the ALC's conclusions, the breach and inlet relocation are not the only natural processes acting upon the Spit. (Brief, p. 18). The natural processes are the forces that are acting on the Spit continuously. Mother Nature will act, whether or not a man-made, engineered event occurs sometime in the future. The ALC's conclusion that the natural cycle would not continue if the structure was not constructed overlooks the obvious: the "natural cycle" is what happens naturally, without any human interference. (Order, R. p. 163). The ALC's conclusion cannot alter the fact that the natural cycle will **only** continue without the structure. The structure cannot help but change the natural cycle. The conclusion that no natural processes are affecting the pristine Spit, which has no man-made structures, because of three engineered inlet relocations ignores the reality of daily diurnal natural processes of the tides, wind and the moon.

The consideration given to the natural processes which the ALC and KDP describe is limited to whether or not the structure would influence the historic breach and migration of the Spit. KDP asserts that relocations of the Inlet have permanently altered those natural processes. (KDP's Brief, p. 17). KDP provides no support for that broad statement, which

is contradicted by the fact that any such relocations must go through the permitting process and are certainly not guaranteed. This Court recognized that substantial benefit accrues to the public by to leaving the system in a natural state.[10] Kiawah at 42. Yet the ALC failed to consider the impacts on the natural processes that occur continuously. Aside from the historic breaching of the Spit, other "natural processes" include the constant wave action along the shoreline of the Spit, which acts to transport sand; weather and systematic events that cause sand to build up along the Spit or, alternatively, erode sand from the Spit, which maintains the sandy shoreline. (R. pp. 1134-35). Without dispute, erosion along the escarpment is feeding the sandy shoreline of the Kiawah River, which naturally maintains the sandy beach that is widely and regularly used by the public. Id. An erosion control structure like the vertical bulkhead permit designed by the ALC will terminate those natural processes to the detriment of the public's beneficial uses, regardless of whether or not an inlet breach occurs again.

II. Reliance on Unsupported Inferences Instead of the Direct, Undisputed and Substantial Evidence is Erroneous

Evidence is either direct or circumstantial. Direct evidence is based on actual knowledge and proves a fact without inference or presumption. See BLACK'S LAW DICTIONARY 577 (7th ed.1999). Direct evidence immediately establishes the main fact it

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KDP's statement of facts reinforces the rationale underlying this Court's opinion: prior to 1999 no development at all could occur on the Spit because it was all seaward of the State's jurisdictional baseline. (KDP's Brief, p. 3). That the State's jurisdictional lines changed to include 31.4 acres of highland landward of the baseline does nothing to undermine this Court's recognition of the dynamic and unstable nature of the Spit. At one point all of Captain Sams Spit was seaward of the baseline and thus could not be developed at all.

is intended to prove. Herrick, Underhill's Criminal Evidence § 15 (Supp.1970)). Circumstantial evidence immediately establishes collateral facts from which the main fact may be inferred and is typically characterized by inference or presumption. See BLACK'S LAW DICTIONARY 576 (7th ed.1999) (circumstantial evidence is "evidence based on inference and not on personal knowledge or observation."); see also 75B AM.JUR.2D Trial § 1390 (1992) ("If the main fact sought to be proved is a matter of inference, the case is one of circumstantial evidence."). 31A C.J.S. Evidence § 5 (2008) ("Direct evidence is evidence that proves the fact in dispute without inference or presumption."). Here, despite multiple sources of direct and substantial evidence, the ALC reached inferences to prove disputed (and even some undisputed) facts. Those inferences are contrary to the direct testimony and evidence. KDP relies on those inferences which only undermine its arguments.

Specifically, KDP asserts that the evidence supports a "reasonable inference" that "a sandy riverbank will subsist over all or a significant portion of the length of the bulkhead."[11] (KDP's Brief, p. 37). The only evidence KDP identifies to support this "inference" relates evidence that erosion rates vary along the river. Id. But that evidence actually supports the League's assertion that the sandy shoreline will be lost if the bulkhead is constructed because the erosion will eventually (and rapidly) reach the wall, albeit at varying rates and times. The fact that erosion rates vary simply cannot support any inference that the shoreline will remain intact once fixed by an erosion control structure,

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KDP fails to counter the undisputed direct evidence from Dr. Rob Young that an eroding bluff like that along the Kiawah River provides the source of sand for the sandy beach, and that if you seal off that bluff (and thereby the source of sand), you will eliminate the public sandy beach.

particularly in the face of undisputed evidence of erosion.

KDP similarly infers that the public can make beneficial use of the shoreline beyond the westernmost end of the erosion control structure. (KDP's Brief, p. 37). The evidence supports no such finding; indeed, it supports the opposite. 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. In this case, Greg VanDerwerker testified that he would not walk along the west end of the Spit, as KDP suggested is possible, because that area is salt marsh and you would not walk in marsh grass. (R. pp. 1141-42). The inference that there is someplace along the Kiawah River to recreate is without evidentiary support. Indeed, the direct evidence contradicts it.

This Court remanded the permit for further consideration consistent with its opinion in light of the fact that the question of whether the decision that DHEC made to issue the conditional permit should be affirmed. But this Court did not remand the case explicitly "to make further findings of fact," as the ALC erroneously interpreted the opinion. (Order, R. p. 178). With its review of the full record, this Court was not persuaded that it contained any evidence, much less substantial evidence, of a public benefit in use of the critical area for an erosion control structure. KDP points to multiple "inferences" that the ALC had to make to arrive at its decision. Yet the evidence cited by KDP and used by the ALC requires an exercise in illogic in order to arrive at the new findings that public beneficial uses will not be lost and that even if they are, the public can enjoy its present uses in another location. Scant evidence, much less substantial evidence to establish any kind of showing of maximum public benefit inuring from the construction of this structure in

critical area tidelands, exists, even though this Court explicitly held that showing was required. Kiawah at 30.

To the extent the ALC reviewed the evidence, certainly no substantial evidence of a public benefit to the critical area being used for an erosion control structure exists.

III. The ALC Acted as an "Agency of One" in Creating an Engineered Structure Which is Contrary to KDP's Expert Testimony and Ignores DHEC's Experience and Specialized Knowledge

In effect, KDP urges this Court to reject completely DHEC's review, analysis and rationale for its decision, as well as its specialized knowledge and expertise. Instead, KDP advocates that the ALC should act as an "agency of one" and make permitting decisions despite the DHEC's statutory duties and role. (KDP Brief, p. 10). KDP cites no law in support of its assertion that the ALC should completely reject DHEC's findings and conclusions. The opinion in Lexington County School Dist. One Bd. of Trustees v. Bost does not establish a principle or proposition to authorize rejection of DHEC's findings. 282 SC 32, 316 S.E.2d 677 (1984). The Administrative Procedures Act directs that "[t]he agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence." S.C. Code Ann. §1-23-330(4). General references to cases reciting the de novo standard of review cannot contradict or override the statutory language directing the ALC to utilize DHEC's specialized knowledge and experience.

Not only did the ALC reject DHEC's findings and conclusions, but it also rejected KDP's evidence that both the revetment and bulkhead are necessary components to address

the erosion along the river.[12] Because the ALC arrived at the opposite determination regarding the necessity of the revetment component, KDP seeks to distance itself from its own witnesses' testimony. (KDP's Brief, pp. 36-37). However, KDP's consistent position is that the revetment is needed to protect the toe of the bulkhead. (KDP's Brief, p. 45; R. pp. 614-16, 625, 838-40, 865-66).

Ironically, if the Spit is so unstable that development cannot proceed without stabilization of the riverbank with a half-mile long, forty foot wide revetment/bulkhead system, then perhaps the proper conclusion is that it is not a safe place for development.

CONCLUSION

For the above reasons, as well as those contained it its opening brief, the Coastal Conservation League requests that this Court reverse the ALC and deny the permit request in its entirety.

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12 KDP's expert witness testified that the vertical bulkhead could be eliminated for the most westerly 1,000 feet. (R. p. 868).

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

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June 20, 2017

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 placing copies of the foregoing in the U.S. Mail addressed to:

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