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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

Appellate Case No. 2016-000707

Kiawah Development Partners, II, ... Respondent,

v.

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

and

South Carolina Coastal Conservation League ..... Appellant,

v.

South Carolina Department of Health and Environmental Control, and Kiawah Development Partners, II, of whom South Carolina Department of Health and Environmental Control is, Appellant, and Kiawah Development Partners, II, is Respondent.

BRIEF OF RESPONDENT

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Table of Contents

Table of Authorities

Cases

Statutes

Regulations

Regulatory Sources

Secondary Sources

Statement of Issues on Appeal

1. Did the Administrative Law Court commit legal error on remand by reconsidering the record to conduct an analysis of public benefit in accordance with the standards expressed by the majority in Kiawah Development Partners, II v. South Carolina Department of Health & Environmental Control and South Carolina Coastal Conservation League, 411 S.C. 16, 766 S.E. 2d 707 (2014)?

2. Is the public benefit to be considered from a project in the critical area limited only to benefit occurring inside the critical area even though there is no such restriction in S.C. Code Ann. Sections 48-39-20 and 48-39-30 that clearly refer to the coastal zone?

3. Should the Administrative Law Court's findings of fact and conclusions of law of public benefit be sustained where they are supported by substantial evidence and the applicable law?

4. Should the Administrative Law Court's findings of fact and conclusions of law in finding that granting the permit with conditions fulfills the findings and policies in S.C. Code Ann. Sections 48-39-20 and 48-39-30 be sustained where the Administrative Law Court seriously considered the no-action alternative and its findings are supported by substantial evidence and the applicable law?

5. Should the Administrative Law Court's determinations under S.C. Code Ann. 48-39-150 and cumulative impacts analysis under S.C. Code Ann. Regs. 30-11(C)(1) be sustained where the Administrative Law Court thoroughly assessed the upland impacts of the residential development, found and concluded that the development would be sensitively implemented with numerous safeguards and in compliance with the Coastal Zone Management Program's guidelines for residential development on barrier islands, and made findings to this effect that are fully supported by the evidence?

6. Should the Administrative Law Court's findings that there were no feasible alternatives to the proposed structure (as modified by the court to eliminate 90% of the proposed revetment) under S.C. Code Ann. Regs. 30-12(C) be sustained where the court seriously considered the no-action alternative and its findings are supported by substantial evidence?

7. Does the Administrative Law Court as the finder of fact have authority to determine the facts support a reduced version of the proposed structure that consists of the vertical bulkhead without the revetment for all but 270 feet of the shoreline adjacent to Beachwalker Park and is that determination supported by substantial evidence?

Statement of the Case

Respondent, Kiawah Development Partners, II (Respondent or "KDP"), accepts the Statement of the Case set forth in the initial brief of the South Carolina Coastal Conservation League (the "League").

Statement of the Facts

This is an appeal from final orders of Ralph King Anderson, III, chief judge of the Administrative Law Court, ruling on the matters remanded to him for further consideration by this Court in Kiawah Development Partners, II v. South Carolina Department of Health & Environmental Control and South Carolina Coastal Conservation League, 411 S.C. 16, 766 S.E. 2d 707 (2014) (the "2014 Opinion").

At the center of this controversy is an application filed on February 29, 2008, by KDP, as owner, with the South Carolina Department of Health & Environmental Control, Office of Ocean & Coastal Resource Management ("DHEC") requesting permission to install an erosion control structure for 2,783 feet along the bank of the Kiawah River to protect KDP's valuable highland on the western end of Kiawah Island known as Captain Sams Spit from continued erosion. R. pp. 1385-1412, KDP Exh, 10. Captain Sams Spit is zoned for limited residential development and that development is part of the master plan of the island's developer. R. pp. 1804-1805, 1808-1810, 1831, KDP Exh. 2, Exhibit 16.2 thereto. The proposed erosion control structure consists of a vertical bulkhead installed against the vertical escarpment of the eroded riverbank coupled with a revetment composed of a mattress of articulated concrete blocks (the "revetment" or "ACB mat"). The ACB mat would rest on the riverbank and extend from the toe of the bulkhead, i.e., where the vertical bulkhead enters the ground, over the sloping riverbank 40 feet towards the channel of the Kiawah River. R. pp.1394-1398, KDP Exh. 10.

KDP obtained the right for a limited residential development for up to fifty lots on up to twenty acres on Captains Sams Spit in a development agreement entered in 2005 between KDP and the Town of Kiawah Island ("Town"). R. pp. 1804-1805, 1808-1810, KDP Exh. 2. In 1999 as part of a process mandated by statute,[1] DHEC re-determined the baseline along South Carolina's coast and extended the baseline and setback line on Captain Sams Spit for "4,600 feet past the [Beachwalker] Park, down the oceanfront shoreline toward the southwest," making KDP's property landward of the setback line available for development. R. p. 1760, DHEC Exh. 2; R. pp. 594:11-596:3. In exchange for the right to proceed with this limited residential development, KDP gave up its right under the previous development agreement with the Town to construct a 325-room hotel on oceanfront property very near to Captain Sams Spit. R. pp. 608:7-24; 763:18-765:1.

The fifty lots would be on twenty acres in a larger area of approximately 31.4 acres landward of the baseline on the ocean side and seaward of the critical line along the Kiawah River. R. pp. 1808-1810, 2039, KDP Exh. 2, Exhibit 16.2 thereto; R. pp. 605:2-608:24. An isthmus approximately 400 to 500 feet wide connects the area available for this limited residential development to the remainder of Kiawah Island. R. pp. 670:19-671:21; 766 S.E. 2d 707 at 712. This isthmus is at the extreme end of a deep bend in the Kiawah River. The river bank in the river bend is eroding while the front beach is accreting. "The ocean side of the Spit has steadily accreted

[1] At that time S.C. Code Ann. 48-39-280(C) provided, in pertinent part, as follows: "The department, before July 3, 1991, must establish a final baseline and setback line for each erosion zone based on the best available scientific and historical data as provided in subsection (B) and with consideration of public input. The baseline and setback line must not be revised before July 1, 1998, nor later than July 1, 2000. **After that revision, the baseline and setback line must be revised not less than every eight years but not more than every ten years after each preceding revision**." (Emphasis added).

sand for the past sixty years and at present the accretion is occurring at a faster rate than the rate of erosion on the River side." 766 S.E. 2d 707 at 712.

As the bank erodes, the critical line on the river side migrates towards the static setback line, diminishing the width of the land available on the isthmus for the installation of the access road and utilities (the "Access Corridor"). R. pp. 670:19-671:21; 673:20-674:11. Even though the setback line is more than 300 feet and four to five large dune ridges from the front beach, no infrastructure installation can occur seaward of the setback line. Id. The Access Corridor available for infrastructure was 104 feet in width in September 2002, 90 feet in April 2005, and only 66 feet in August 2009. R. pp.807:17-808:22; R. p. 1428, KDP Ex. 48. From September 2002 to October 2008, the erosion on the riverside of the Property reduced the Access Corridor by 49,856 square feet, about 1.1 acres. R. pp. 807:17-808:22; R. p. 1428, KDP Ex. 48.

After deliberating over the permit application for almost ten months, DHEC denied the permit request except for the 270 feet of the structure adjacent to the eroding parking lot of Beachwalker Park. Beachwalker Park is a public beach access park immediately adjacent to Captain Sams Spit used by 50,000 persons a year. It includes changing rooms and a 150-space parking lot. The park is operated by the Charleston County Parks and Recreation Commission ("PRC") pursuant to a 99-year lease on land owned by KDP. R. pp. 595:7-15, 662:18-20, 1204:4-8, 1204:17-20, and 1218:22-1219:3.

DHEC staff determined that the proposed erosion control structure met the project-specific requirements for bulkheads and revetments set forth in S.C. Code Ann. Regs. 30-12(C), but nonetheless denied the permit for the remaining 2513 feet along the riverbank for a separate reason. R. pp. 1259:11-23; 1262:18-22; 1288:24-1289:7; 1290:16-1291:10. DHEC refused to issue the remainder of the permit because, in DHEC staff's estimation, the proposed structure would

facilitate the limited residential development; DHEC staff decided it would be better to keep KDP's land in an undeveloped, natural state for the people of South Carolina. R. p. 1276:12-15 ("And I think the maximum benefit to the people is to try to preserve the Kiawah Spit in as unaltered a state as we can."); 1342:13-15 ("We felt that that particular regulation [48-39-30(B)] indicated that we should not facilitate development of the Kiawah Spit by issuing the permit for that half-mile-long revetment."); 1282:19-1283:18; 1284:18-1285:7; 1304:25-1305:11.

The League and KDP requested review of the staff decision by the board of DHEC.[2] R. pp. 211-219, KDP and League Requests for Final Review Conf. The DHEC Board declined to conduct a review conference. R. pp. 220-213. The League and KDP then filed separate requests for contested case hearings with the Administrative Law Court. R. pp. 224-225, 301-305, KDP and League Requests for Contested Case Hearing. The Administrative Law Court consolidated the requests for contested case hearings. Judge Anderson conducted the consolidated contested case hearing from August 24 to August 28, 2009. R. p. 573.

On February 26, 2010, Judge Anderson rendered his 31-page Amended Final Order and Decision (The "2010 Decision," R. pp. 32-62). That same day Judge Anderson entered a separate order denying Appellants' motions to reconsider and CCL's motion to open the record and admit new evidence. R. pp. 63-70, Order Denying Mots. for Reconsideration.

In the 2010 Decision Judge Anderson granted the critical area permit to KDP to construct the erosion control structure subject to certain conditions. Judge Anderson approved the bulkhead with revetment for the easternmost 1900 feet. For the remaining 900 feet on the western end, he granted permission for an eight-foot wide revetment without a bulkhead. R. p. 62, 2010 Decision.

[2] The League challenged the permit in so far as it granted permission for an erosion control structure to protect the 270 feet of eroding river bank undermining the parking lot of Beachwalker Park. R. pp. 216-219, League Request for Final Review Conf.

He also ruled that the revetment was not to be installed on the eastern end next to Beachwalker Park in locations where existing marsh grass was containing the erosion. R. p. 62, 2010 Decision.

DHEC and the League appealed the 2010 Decision. By order dated July 22, 2010, this Court granted the League's petition for writ of supersedeas of the permit and expedited the appeal in response to KDP's position that it would suffer irreparable harm if the erosion were allowed to continue over the course of the appeal. R. pp. 71-73, Order of July 22, 2010. This Court heard oral argument three times and rendered three opinions. This Court issued a 4-1 decision in favor of the Appellants reversing Judge Anderson on November 21, 2011. Kiawah Development Partners, II v. South Carolina Dept. of Health and Environmental Control, 2011 WL 5840326 (S.C.) rehearing granted (Feb 03, 2012). After granting KDP's petition for rehearing, the Court issued a second opinion on February 27, 2013 rendering a 3-2 decision affirming Judge Anderson. Kiawah Development Partners, II v. South Carolina Dept. of Health and Environmental Control, 401 S.C. 570, 738 S.E.2d 455 (2013), rehearing granted (May 01, 2013). After granting the League's petition for rehearing of the second opinion,[3] the Court rendered its third decision on December 10, 2014.

In the 2014 Opinion in a 3-2 decision, this Court reversed and remanded the case to Judge Anderson for further consideration consistent with the majority's specific determinations of legal error. More particularly, this Court held that the ALC made legal errors in: (1) the ALC's determination the proposed structure satisfied the findings and policies of the Coastal Zone Management Act ("CZMA") set forth in S.C. Code §§ 48-39-20 and 48-39-30, specifically the policies on public benefit and the importance of natural coastal processes; (2) the ALC's

[3] DHEC did not file a petition for rehearing after this Court issued its second opinion that affirmed Judge Anderson's 2010 Decision.

cumulative impacts analysis under S.C. Code Ann. Regs. § 30-11(C)(1) based on the ALC's misinterpretation of the regulation to require consideration of only impacts in the critical area and the ALC's failure to consider fully the effects of the upland development that will be facilitated by the erosion control structure; and (3) the ALC's analysis under S.C. Code Ann. Regs. § 30-12(C)(1)(c) and (d) - the project-specific regulation for bulkheads and revetments - for finding the impairment of recreational public access at low tide from the ACB mat was insubstantial and for not seriously considering the no-action alternative in its determination of whether there are feasible alternatives to the bulkhead-revetment. The majority let stand all other findings and conclusions in the lengthy 2010 Decision.

Judge Anderson issued his Amended Final Order and Decision on Remand on March 22, 2016 (R. pp. 175-204, Final Order on Remand). On the same day Judge Anderson rendered his Order Granting Motions for Clarification and Denying the Motions for Reconsideration denying the motions to reconsider of the Appellants. (R. pp. 157-174, "Order on Remand Denying Motions to Reconsider").

In his Final Order on Remand Judge Anderson approved a permit for a bulkhead for the full length of 2783 feet but eliminated the ACB revetment for all but the 270 feet adjacent to the parking lot of Beachwalker Park. Employing the test of the majority in the 2014 Opinion, Judge Anderson made factual findings of identified public benefit and found the benefits from approving an erosion control structure outweighed the benefits from allowing the bank to continue to erode. Judge Anderson found that the proposed development would alter KDP's natural upland to developed land, that the extensive sensitive development methods would not cause harm, and that the planned development is consistent with the Coastal Zone Management Program ("CZMP"). In particular, Judge Anderson made extensive findings of fact that listed all the "environmentally

sensitive approaches that will implemented in the limited residential development on Captain Sams." R. pp. 186-188, Final Order on Remand.

In again concluding that the upland development was consistent with the CZMP, Judge Anderson noted, contrary to Appellants' arguments, that "[i]n fact, the CZMP contemplates such development and provides guidelines, all of which will be satisfied by the proposed development." R. pp. 188, 198, Final Order on Remand. In his 2010 Decision, Judge Anderson made numerous findings of the consistency of the upland development and erosion control structure with the CZMP, referring to each of the provisions of the CZMP applicable to residential development on barrier islands. R. pp. 59-62, 2010 Decision. Judge Anderson reaffirmed his factual findings and conclusions that neither the erosion control structure nor the limited upland development would cause any material harm to any flora or fauna including wintering piping plovers and diamond back terrapins. R. p. 183, Final Order on Remand ("In making this finding, the Court reaffirms its findings as to the lack of negative effect on wintering piping plovers and diamond back terrapins, the two species at issue in the hearing which are covered in the Amended Final Order [the 2010 Decision]."); R. pp. 42-46, 49-56, 2010 Decision.

Last, in his Final Order on Remand Judge Anderson made the factual finding that after giving serious consideration to the no-action alternative as instructed by this Court, the better alternative was to approve an erosion control structure in the river bend. He further found and concluded there were no feasible alternatives to the smaller structure he approved for stabilizing the river shoreline. R. pp. 190-194, 197-202.

Neither the League nor DHEC challenges on this appeal that the proposed upland development is consistent with the CZMP nor that the development methods KDP will use are environmentally sensitive, as found by Judge Anderson. Appellants also do not assert on this

appeal that Judge Anderson committed any error in his findings and conclusions that neither the structure nor the limited residential development will harm any species. Instead, Appellants assert that KDP should be denied the permit because the erosion control structure would allow it to proceed with residential development on roughly 20% of its property, thereby transforming a portion of KDP's land on Captain Sams Spit from undeveloped to developed. Finally, the Appellants assert that the ALC's analysis of whether there are feasible alternatives was flawed because they contend the ALC's consideration of the no-action alternative was not serious enough and they disagree with his findings even though supported by substantial evidence.

The upshot of Appellants' arguments and positions is their effort to use this critical area permit proceeding to thwart any development on KDP's high land even though it is zoned for limited residential development and KDP has a vested right to this limited residential development under the terms of its Development Agreement with the Town.[4]

Argument

Standard of Review

"In an appeal from an ALC decision, the Administrative Procedures Act provides the appropriate standard of review." 2014 Opinion, 766 S.E.2d 715. Section 1-23-610 S.C. Code Ann. provides, in pertinent part:

> (B) The review of the administrative law judge's order must be confined to the record. **The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact.** The court of appeals may affirm the decision or remand the case for further

[4] The 2005 Development Agreement with the Town specifies that KDP may develop up to 50 lots on 20 acres of the 118.3 acres of highland of the Spit (identified as Parcel 12B) provided KDP abides by certain conditions associated with that development, including encumbering all the remaining acreage of the Spit that is not part of this limited development. R. pp. 1808-1810, KDP Exh. 2. Under section 10(b) of the 2005 Development Agreement, "all rights and prerogatives accorded the Property Owner [KDP] by this Agreement shall immediately constitute vested rights for the Development of the Real Property." R. p. 1791, KDP Exh. 2.

> proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
> (a) in violation of constitutional or statutory provisions;
> ...
> (d) affected by other error of law;
> ...
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; ...

S.C. Code Ann. § 1-23-610(B)(emphasis added).

Although a contested case reaches the ALC in the posture of an appeal, the ALC does not sit in an appellate capacity; the ALC hears the matter de novo upon the evidence presented. Brown v. S.C. Dept. of Health and Envtl. Control, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002). The ALC presides as the fact-finder in the de novo hearing. Hill v. S.C. Dept. of Health and Envtl. Control, 389 S.C. 1, 9, 698 S.E.2d 612, 616 (2010).

This Court's review is limited to determining whether the findings were supported by substantial evidence or were controlled by an error of law. Id. at 9, 698 S.E.2d at 617. "In determining whether the ALJ's decision was supported by substantial evidence, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALJ reached." Id. at 9-10, 698 S.E.2d at 617. Substantial evidence includes the reasonable inferences from the evidence. Radcliffe v. S. Aviation Sch., 209 S.C. 411, 40 S.E.2d 626, 629 (1946).

This de novo review is "one in which the [ALJ] does not review the decision of [the department], but makes the determination himself"—the ALC "***decides the issue without regard to the decisions made by the agency***." South Carolina Administrative Practice and Procedure 152 (Randolph R. Lowell ed. 2008) (double emphasis added); see also generally, Blizzard v. Miller, 306 S.C. 373, 375, 412 S.E.2d 406, 407 (1991) (de novo trial is where the whole case is tried "as if no trial whatsoever had been had in the first instance."); State v. Whitner, 399 S.C. 547, 552,

732 S.E.2d 861, 864 (2012) (explaining that questions decided under de novo review may be decided without any deference to the court below); Lexington Cnty. Sch. Dist. One Bd. of Trs. v. Bost, 282 S.C. 32, 34, 316 S.E.2d 677, 678 (1984) (explaining that de novo review of an agency decision record may be entered into evidence but accorded no deference).

1. **The Administrative Law Court did not commit legal error on remand by reconsidering the evidence in the record and conducting an analysis of public benefit in accordance with the ruling of the majority in the 2014 Opinion.**

Appellants assert Judge Anderson should not have reviewed the record to determine the benefits, if any, to the public even though this Court remanded the matter to him for further consideration. Both the League and DHEC argue that this Court remanded the case to Judge Anderson solely for him to accomplish the ministerial task of entering a ruling in favor of the Appellants on all determinations under S.C. Code Ann. 48-39-30(D) and S.C. Code Ann. Regs. 30-11(C) and 30-12(C). League Initial Brief, pp. 11, 26; DHEC Initial Brief, pp. 7-10.

It is worth noting that DHEC's position that this Court instructed Judge Anderson to make a finding that there is no proof of public benefit in the record is directly contradicted by DHEC's other assertion that a permit should be issued to protect the parking lot at Beachwalker Park. "DHEC concurs with the ALC's public benefit analysis on remand regarding the parking lot at Beachwalker Park when limited to the 270 foot structure permitted by DHEC." DHEC Initial Brief, p. 10. DHEC asserts the ALC should have approved this segment of the erosion control structure (DHEC Initial Brief at 8-9), yet the ALC would not be able to do so without consideration of the record and making findings according to the legal precepts of this Court in the 2014 Opinion. This Court did not mention, much less made an exception for, the public benefit associated with the protection of the Beachwalker Park parking area.

When a case is remanded, the trial court has only the jurisdiction and authority mandated by this Court. Prince v. Beaufort Meml. Hosp., 392 S.C. 599, 605, 709 S.E.2d 122, 125 (Ct. App. 2011). Here, this Court remanded to the ALC "for further consideration consistent with this decision." 766 S.E. 2d 707 at 723. "The use of the word 'consideration' reveals that we intended the Commission merely **to review the evidence which was admitted in the record of the hearing** in 1980, not hold a new hearing for the admission of additional evidence." Parker v. S.C. Pub. Serv. Commn., 288 S.C. 304, 307, 342 S.E.2d 403, 405 (S.C. 1986) (emphasis added). In this case, Judge Anderson merely conducted a review of the evidence admitted in the record of the 2009 hearing as he was supposed to do.

If this Court had intended to tie Judge Anderson's hands so that he could rule only that there is no proof of public benefit in the record to satisfy the policy set forth in 48-39-30(D), this Court would have reversed and vacated the conditional permit in its entirety based on its public benefit analysis, would not have addressed the legal errors under 30-12(C)(1) and 30-12(C)(1)(c) and (d), and would not have remanded the case for further consideration. In remanding for further consideration, this Court was requiring the ALC to review the record and make findings consistent with the legal rulings in the 2014 Opinion. As stated by Judge Anderson:

> Had the Court concluded that no public benefit flowed to the public at large based on the entire record, the Supreme Court would presumably not have remanded the case to this Court but would instead have vacated the permit. But the Supreme Court remanded the case to this Court to make further findings of fact, as this Court is the sole finder of the fact.

R. pp. 163-164, Order on Remand Denying Motions to Reconsider.

Further, as pointed out by Judge Anderson, "[a]s the Supreme Court noted in its conclusion, 'the ALC did not consider whether and to what extent the public would benefit from the proposed structure as opposed to leaving the tideland in its natural state.'" R. p. 178, Final Order on Remand,

referring to 766 S.E.2d at 723. It necessarily follows that when this Court remanded the matter to Judge Anderson, this Court intended the ALC to consider the entire record to determine whether and to what extent the public would benefit from the proposed structure as opposed to leaving the tideland in its natural state.

Judge Anderson did not commit legal error or exceed the instruction of this Court "for further consideration consistent with this decision," by reviewing the entire record and making findings and conclusions that applied the legal rulings of this Court that were the basis for reversal and remand.

2. **Under S.C. Code Ann. Sections 48-39-20 and 48-39-30 the determination of public benefit from an activity in the critical area is not limited to consideration of the benefit occurring in the critical area itself and encompasses consideration of benefit outside the critical area facilitated by or resulting from the activity in the critical area.**

The League asserts that the factual determination of the benefits from a proposed activity in the critical area under S.C. Code Ann. §48-39-30(D) looks only at benefits that occur in the critical area and that the ALC committed legal error in considering benefits occurring outside the critical area. The League cites no legal precedent at all in support of its argument.

The legislative policy set forth in S.C. Code Ann. 48-39-30 (D) states: "(D) Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter." As is evident from the text, the statute contains no semblance of the restricted view argued by the League that the only benefit to be considered is benefit occurring in the critical area.

S.C. Code Ann 48-39-20 and 48-39-30 refer to the "coastal zone" no fewer than nine times in expressing the legislative findings and purposes of the CZMA. " 'Coastal zone' means all coastal

waters and submerged lands seaward to the State's jurisdictional limits and **all lands** and waters in the counties of the State which contain any one or more of the critical areas. These counties are Beaufort, Berkeley, Charleston, Colleton, Dorchester, Horry, Jasper and Georgetown." S.C. Code Ann. 48-39-10(B) (emphasis added). A primary purpose of the CZMA is to manage "[t]he increasing and competing demands upon the **lands** and waters of our coastal zone ...." S.C. Code Ann. 48-39-20(B) (emphasis added).

One of the several policies of the CZMA is to "promote economic and social improvement of the citizens of this State...." S.C. Code Ann. 48-39-30(B)(1). It is impossible to conceive how this benefit could ever occur within the critical area itself under the interpretation argued by the League. Economic benefit does not occur in the critical area, rather it may flow from permitted activity in the critical area. Under the League's interpretation of the statutory policy, the benefit of protecting and preserving the parking lot at Beachwalker Park that provides oceanfront beach access to 50,000 members of the public each year would have to be disregarded.

If the League's argument were correct, there could be no private use structures in the critical area - including private docks, bridges, and boat landings - since they do not benefit the public's use of the critical area. Under the League's argument, **an erosion control structure could never be permitted**. **Never**. The purpose of an erosion control structure, even structures as simple and widespread as bulkheads or the placement of riprap, is to protect the highland of a property owner, not the critical area. None bestows benefit on the public's use of the critical area. The League's interpretation of subsection (D) would effectively repeal S.C. Code § 48-39-120(F)[5]

[5] "DHEC, for and on behalf of the State, may issue permits not otherwise provided by state law, for erosion and water drainage structure in or upon the tidelands, submerged lands and waters of this State below the mean high-water mark as it may deem most advantageous to the State **for the purpose of** promoting the public health, safety and welfare, **the protection of** public and **private**

and S.C. Code Ann. Reg. 30-12(C) that both allow erosion control structures to protect highland being lost to erosion even though those structures do nothing to promote the public's use of the critical area.

As noted by Judge Anderson, the League's argument is also entirely counter to this Court's ruling in the 2014 Opinion that the cumulative impacts analysis under S.C. Code of Regs. 30-11(C)(1) requires consideration of any impacts outside the critical area from a proposed project in the critical area:

> [T]he Supreme Court held that this Court should have deferred to DHEC's interpretation of Reg. 30-11(C)(1) that it must "consider not only a proposed project's impact on the critical area, but also the project's impacts on upland areas within the larger coastal zone." Kiawah, 411 S.C. at 32, 766 S.E.2d at 717. Coastal asserts that the Court "Confus[ed] the requirement that critical areas be used to provide maximum benefits with the requirement to consider the long-range and cumulative impacts of a project, including those impacts outside the critical area." However, it would defy logic to require this Court to consider cumulative impacts both outside and inside the critical area, but only consider benefits within the critical area. Additionally, the Supreme Court never required this Court to limit its consideration of public benefits to only those occurring within the critical area and to only existing activities. Indeed, such a requirement would lead to absurd results, such as dock permits (or any other private-use structure) always being rejected since docks do not benefit the public's use in the critical areas in which they are installed. Rather, benefits to the public can occur either within the critical area or can flow outside the critical area from a project within the critical area.
>
> Furthermore, the Supreme Court stated in footnote 5 of the Opinion, that the developer is considered part of the 'the people' in determining public benefit. But a developer would scarcely, if ever, derive a direct benefit from use within the critical area. Therefore, under Coastal's theory, the Court would hardly, if ever, consider the benefits to the developer as a member of the public. However, in this Court's view, the Supreme Court did not intend to exclude the developer's benefits but rather opposed focusing 'only [on] benefits to the developer . . . .'

R. pp. 160-161, Order on Remand Denying Motions to Reconsider.

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property from beach and **shore destruction** and the continued use of tidelands, submerged lands and waters for public purposes." S.C. Code § 48-39-120(F)(emphasis added).

This Court should reject the League's novel and unsupported interpretation of S.C. Code Ann. 48-39-30(D) that the only benefits that may be taken into account are those that might occur in the critical area.

3. The Administrative Law Court's findings of fact and conclusions of law of public benefit are supported by substantial evidence and the applicable law.

Following the direction of this Court, Judge Anderson considered the benefit from leaving the shoreline unprotected as well as the benefits from approving a permit that would allow the construction of an erosion control structure. Guided by this Court's ruling, Judge Anderson noted that while this Court recognized in footnote no. 5 to the 2014 Opinion that KDP is a member of the public, S.C. Code Ann. 48-39-30(D) requires benefit to the public at large. "The Supreme Court ruled that in this context, where there is an impairment of the public's access to and use of those tidelands, the benefit to be considered is the benefit to the public at large, not just the economic benefit to the proponent of the project in the critical area." R. p. 196, Final Order on Remand.

Judge Anderson identified five elements of benefit to the public if the riverbank was stabilized by an erosion control structure: (1) protection of Beachwalker Park's facilities from further erosion; (2) creation of eight new parking spaces with dedicated beach access on the Spit west of Beachwalker Park for use by the all members of the island-wide Kiawah Island Community Association ("KICA"); (3) the permanent legal restriction of all of the Spit other than the 20 acres that is available for the limited residential development requiring it to remain forever in a natural state; (4) the economic benefit to KDP; and (5) the realization of the local municipal government's approved zoning plan for the Spit.

The League challenges each of these findings of benefit from stopping the erosion of the riverbank; DHEC challenges all but the protection of Beachwalker Park. As described below, each

of the findings involves the type of benefit that may be considered under 48-39-30(D), and each is supported by evidence in the record. KDP will address them one by one.

a. Public benefit from letting the natural process of erosion proceed unchecked.

As instructed by this Court, Judge Anderson performed an analysis of the benefits from allowing the river shoreline to continue to erode KDP's land, the no-action alternative. R. pp. 182, 190-191, Final Order on Remand. Judge Anderson discussed the two primary benefits of the no-action alternative identified by this Court: (1) the historical process of the elongation of the spit followed by a breach that provided a sand supply for the beach of Seabrook Island on the western side of Captain Sams Inlet, and (2) the public's recreational use of the sandy river shoreline at low tide.

As to the first of these potential benefits mentioned by this Court, Judge Anderson found that the engineered relocations of the inlet, cutting off the tip of the Spit every ten to fifteen years through the excavation of a new channel for the inlet, has altered the historical process of elongation and breach.[6] The breaching of the spit is no longer a natural phenomenon. It is an engineered event designed to occur at periodic intervals. It is this event that dictates when the spit will be breached. R. pp. 182, fn. 5, 190, fn. 9, Final Order on Remand. Judge Anderson also found as a fact that, as a result of the continual accretion of the oceanfront beach and growth of the dune ridges, "the expert testimony at trial clearly established that it is highly unlikely that the Spit will breach at the neck even if the bulkhead and revetment were not installed." R. p. 190, Final Order on Remand. Judge Anderson made further findings in this respect: "Therefore, failing to construct the bulkhead and revetment would not result in the continuation of the natural cycle, nor would it

[6] The first two engineered relocations of Captain Sams Inlet occurred in 1983 and 1996. R. p. 910:3-14. As a matter of public information, the third re-location occurred in 2015.

interfere with a breach at the neck if there were ever a major hurricane. Whether the bulkhead and revetment are constructed is not a variable in determining the natural cycle of a breach." R. p. 191, Final Order on Remand. In other words, the installation of an erosion control structure will not interfere with the benefit of this historical natural process mentioned by this Court in the 2014 Opinion.

Neither the League nor DHEC has appealed these particular findings that are fully supported by the testimony of two expert geomorphologists – Tim Kana, PhD, and Rob Young, PhD - who were called as witnesses by KDP and the League respectively. R. pp. 909:5-910:14; 914:21-918:16; 920:21-922:15; 990:1-24; 999:8-13; 999:20-1000:7; 1001:15-1005:19; 1006:8-13; 1011:7-17; 1018:22-1019:21; 1118:26-1121:12.

Even though leaving the shoreline unprotected would not continue the historical natural cycle of elongation and breach that is now dictated by engineered relocations of the inlet, Judge Anderson did make a finding of the public benefit from recreational use of the sandy riverbank at low tide by kayakers and other recreational users if there were no erosion control structure: "Allowing the riverbank to remain in its natural state would allow the existing quality of the recreational use of the river bank at low tide to continue because there obviously would be no manmade structure obstructing the sandy shoreline." R. p. 190, Final Order on Remand.

b. Public benefit from the protection of the facilities of Beachwalker Park from further damage caused by erosion of the riverbank.

The public benefit to Beachwalker Park from an erosion control structure is self-evident and does not warrant much elaboration. Even though the League opposes allowing any erosion control structure at all, it begrudgingly concedes in its brief that the people benefit from the protection of the park and its parking area from further erosion. League Initial Brief, p. 16, fn. 5.

In his decision on remand, Judge Anderson explained the public benefit from stabilizing the shoreline adjacent to Beachwalker Park to protect the parking lot and other improvements:

> Approximately 50,000 members of the public use the Park on an annual basis. The use of the Park is not limited to residents of Kiawah Island but is used primarily by non-residents, as the Park provides the only public access to the beaches in this mostly private island community. Indeed, Beachwalker Park functions as a public park that provides the general public access to the beaches of Kiawah Island. Although the Park is along the bank of the Kiawah River, there are no stairs or other improved access from the parking lot down the escarpment to the bank of the Kiawah River....
>
> Importantly, the general public use and benefit of the Park is dependent upon the parking lot of the Park, as parking spaces allow for greater utility of the park and increased access to the beach. However, the riverbank along Beachwalker Park has been eroding, creating a significant vertical escarpment against the bank holding the parking lot, imperiling some of the parking spaces. The Park's split rail fence at the edge of the parking lot on the riverbank has had to be moved inland to prevent people from falling down the escarpment and is now perched on the edge of the escarpment leaning outwards. The erosion has caused the loss of the land where the Park's gazebo was initially located. Erosion is jeopardizing the Park's infrastructure and is fairly severe up to the narrowest point on the neck, beyond which the erosion begins to decrease. Therefore, the Park provides a significant public benefit in granting the general public a means by which to access the beaches of Kiawah Island, and that benefit greatly exceeds impairment to any speculative use of the shoreline immediately abutting the Park.

R. pp. 178-179, Final Order on Remand.

The League chastises Judge Anderson's findings of benefit asserting that "the ALC's reliance on public benefits associated with the Park is tenuous" League Initial Brief, p. 25.[7] Against the entire weight of the evidence, the League asserts that the park itself is not the highland parking lot and facilities that are used by the public to gain access to the oceanfront beach. Rather, the

[7] The League floats a new concept as a standard for judicial review in asserting Judge Anderson's findings are "tenuous." Of course the standard is whether a finding is supported by substantial evidence, not whether one of the parties dislikes a finding and characterizes it as tenuous, especially here where there is a landslide of evidence in support of the ALC's finding.

League makes the untenable assertion the park is the sandy shoreline of the river below the parking area exposed at low tide. There is no proof to support the League's contention.

The photographs admitted during the contested case hearing clearly show that there are no stairs or other improved access from the park's parking area to the riverbank below and that the shore of the river at low tide is now virtually inaccessible from Beachwalker Park because of the steep escarpment caused by erosion. KDP Exh. 5, photos at R. pp, 1356, 1357, 1359, 1361, 1362, 1373, 1374, 1375, 1376, 1378, and 1379. The fence shown in the photos that is precariously positioned because of the erosion is obviously to discourage persons from trying to access the riverbank below. The Judge's finding that the public's use of Beachwalker Park is for access to the oceanfront beach is supported by all the evidence.

The League asserts that there was no evidence to support the "ALC's finding that the Park's fence had to be moved 'to prevent people from falling down the escarpment." Even though this is simply an observation of Judge Anderson and by no means material to his finding of public benefit from stabilizing the riverbank of Beachwalker Park, the League is incorrect in this assertion as well. Tom O'Rourke, executive director of PRC, testified that both the fence and the gazebo had to be moved because of the erosion. R. pp. 1216:18-1217:5. The League is correct that there was no testimony of people falling down the escarpment, but that was not Judge Anderson's comment. The ALC said the fence had to be moved to *prevent* people from falling down the escarpment which is supported by evidence in the record. R. p. 612:7-9 ("I think basically that fence keeps moving to prevent people from falling down the escarpment.").

Judge Anderson's finding of public benefit from protecting the public facilities of popular Beachwalker Park is not tenuous but in fact supported in the record without contradiction.

c. KDP's obligations under the 2005 Development Agreement with the Town to provide a new beach parking area for KICA members on Captain Sams Spit west of Beachwalker Park and to impose permanent restrictions on most of the acreage on Captain Sams Spit requiring it to remain in its natural state.

The two next findings of benefit by the ALC stem from KDP's obligations under the 2005 Development Agreement provided KDP is able to proceed with the limited residential development on 20 acres of the Spit.

The 2005 Development Agreement imposes the obligations on KDP to construct a new beach parking lot on the Spit for KICA members and to restrict forever in a natural state the remainder of the Spit that is not part of the limited residential development:

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

(R. pp. 1809-1810, KDP Exhibit 2).

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

(R. p. 1810, KDP Exhibit 2).

Appellants make an array of challenges to these findings and conclusions of benefit by Judge Anderson. They assert (1) that the members of KICA cannot be considered part of the "people" for purposes of 48-39-30(D), (2) that there is no need for new beach parking and beach access on Captain Sams, (3) that the conservation easement provides no benefit to the people, (4) that the Development Agreement might be amended to eliminate one or both these obligations, (5) that the conservation easement is not a condition of the permit and DHEC is not the grantee of the

conservation easement and therefore is unable to enforce it, and (6) that there is no connection between the erosion control structure and KDP's ability to proceed with the limited residential development of a portion of the Spit.

Judge Anderson dealt with all of these contentions seeking to undermine his findings of benefit in the order on the motions to reconsider. Order on Remand Denying Motions to Reconsider, R. pp. 161-164 (responding to the League's arguments); 172-173 (responding to the DHEC's arguments).

d. Public benefit from the new beach parking area for KICA members on Captain Sams Spit west of Beachwalker Park.

As discussed by Judge Anderson in his Final Order on Remand, this Court's ruling in the 2014 Opinion cannot be read to exclude the members of KICA, the island-wide property owners association, from being considered members of the public: "All property owners on Kiawah Island are members of KICA and are, likewise, members of the general public who will benefit from this beach parking area and beach access." R. p. 179, Final Order on Remand. In the footnote to this sentence, Judge Anderson added: "As with KDP, the members of KICA are included in 'the people,' and benefits to them are therefore considerations to take into account along with benefits to other members of 'the people' when considering the benefit to the public as a whole, See footnote 5 of *Kiawah*." Id. Judge Anderson made this same point again in his order denying the League's motion to reconsider where he also commented that this new beach parking was not by any means a controlling factor in his consideration of public benefit but rather proof of additional benefit from the erosion control structure. R. pp. 161-162, Order on Remand Denying Motions to Reconsider.

This Court did not hold the only benefit that counts under section 48-39-30(D) is benefit that inures to every single citizen of South Carolina, as argued by Appellants. Rather, the people

as used in the statutory section are members of the public other than the applicant. "The 'people,' as used here, is a term meaning the citizens of a particular jurisdiction." 766 S.E.2d 716. The 4500 owners of property on Kiawah Island are certainly citizens of a particular jurisdiction who may be considered as part of the "people." (R. p. 642:24).

Just as the parking at Beachwalker Park is a critical component of the public's ability to access and use Kiawah Island's beach in that location, the eight new parking spaces much farther west of Beachwalker Park on the Spit in an area now inaccessible by vehicle is a critical component to assuring new beach access to the members of KICA to the front beach on the extreme west end of the island. The question is not whether there is a need, but whether there is a benefit. This beach parking and beach access west of Beachwalker Park toward Captain Sam's Inlet does not now exist and constitutes a benefit by providing a new community facility. As Judge Anderson noted, it was by no means a controlling benefit is his analysis under section 48-39-30(D) but it is a benefit to be considered nevertheless.

e. Benefit from the permanent restriction requiring most of Captain Sams Spit to remain in a natural state forever.

Turning to the conservation easement[8], Appellants assert that Judge Anderson's finding that there is benefit to the public from the conservation easement is not supported. They assert that there is no benefit to the people from the permanent protection of roughly 80% of the Spit in a natural state in perpetuity. Contrary to these arguments, there is proof in the record to support Judge Anderson's findings the conservation easement provides significant public benefit.

[8] In referring to the "conservation easement," KDP is referring to both the recorded restriction and the conservation easement that KDP must deliver under the terms of the 2005 Development Agreement if it is able to proceed with the limited residential development. See, fn. 3 to the Final Order on Remand: "The Court shall refer to the restriction and easement mandated by this provision at the completion of development jointly as the 'Conservation Easement.'" R. p. 180, fn. 3, Final Order on Remand.

As held by Judge Anderson, our state legislature codified the benefit to the public from the preservation of open land in a natural state in perpetuity in The South Carolina Conservation Easement Act of 1991, S.C. Code Ann. §§ 27-8-10 et seq.:

> Second, the very nature of a conservation easement is that it benefits the public. See S.C. Code Ann. § 27-8-20(1) (2007) (providing that the purposes of a "conservation easement" include such public benefits as "retaining or protecting natural, scenic, or open-space aspects of real property; ensuring the availability of real property for agricultural, forest, recreational, educational, or open-space use; protecting natural resources; maintaining or enhancing air or water quality; and preserving the historical, architectural, archaeological, or cultural aspects of real property").

R. p. 163, Order on Remand Denying Motions to Reconsider.

In Village of Ridgewood v. Bolger Found., 104 N.J. 337, 517 A.2d 135 (N.J. 1986), the Supreme Court of New Jersey commented on the per se public benefit from a conservation easement protecting land in perpetuity as natural open space. In Village of Ridgewood the local authorities refused to consider the de-valuing effects of a conservation easement on the owner's property for ad valorem tax purposes. The Supreme Court of New Jersey reversed the two lower court decisions that sided with the local taxing authorities. In so ruling, the Supreme Court of New Jersey remarked on the self-evident public benefit from a conservation easement for open space granted under New Jersey's equivalent of South Carolina's Conservation Easement Act:

> **The public benefits flowing from such a conservation easement are beyond debate**, as shown by the following legislative findings and declaration in *N.J.S.A.* 54:4-3.63:
>
> > The Legislature hereby finds and declares that natural open space areas for public recreation and conservation purposes are rapidly diminishing; that public funds for the acquisition and maintenance of public open space should be supplemented by private individuals and conservation organizations; and that it is therefore in the public interest to encourage the dedication of privately-owned open space to public use and enjoyment as provided for in this act.

Village of Ridgewood v. Bolger Found., 517 A.2d 135, 137 (N.J. 1986)(emphasis added).

The record in this case supports the finding below that a permanent restriction preventing any further development provides benefit to the people of South Carolina. DHEC initially denied the permit for any erosion control to the west of Beachwalker Park specifically because it wanted to prevent the limited development that would be facilitated by the erosion control structure thereby forcing KDP's land on the Spit to remain in a natural state. Tr. p. 1346:17-20. ("We felt that that particular regulation [48-39-30(B)(1)] indicated that we should not facilitate development of the Kiawah Spit by issuing the permit for that half-mile-long revetment."); R. p. 1266:16-18 ("I think there is an extraordinary value to the people of South Carolina in preserving [the Spit in an unaltered state]"); R. p. 1276:12-14 ("[T]he maximum benefit to the people is to try to preserve the Kiawah Spit in as unaltered a state as we can.");

If preservation of the entirety of KDP's land in a natural state provides incalculable benefit to the people of South Carolina, then the perpetual preservation of 80% of that same land in a natural state would yield a similar benefit, even if not to the same degree, as Judge Anderson pointed out:

> Mr. Eiser, who testified on behalf of the Department to the rationale for the staff's decision, attested to the "extraordinary" value to the public if the entirety of the Spit, though owned by KDP and not the public, forever remained in a natural state for all the people of South Carolina to enjoy. The preservation of approximately 80% of the Spit in a natural state, and all land accreting to it in the future, bestows this same public benefit, albeit to a slightly less extent than if there was no development at all on the Spit. This public benefit can only be realized if the development that depends on the stabilization of the riverbank through the bulkhead and revetment occurs.
>
> Though, as explained below, this benefit does not offset the impact to the public by extending the revetment beyond [Beachwalker Park], it does factor into the efficacy of granting a permit to construct the bulkheads.

R. p. 181, Final Order on Remand.

Appellants alternatively assert that the conservation easement does not bestow a benefit because the only development that can occur on the Spit is that allowed under the 2005 Development Agreement, i.e., no currently available development is being prevented. They also assert that while the conservation easement may encumber all of the 150 acres now comprising the highland except for the 20 acres permitted to be developed under the 2005 Development Agreement, there are only 11.4 additional acres within the developable envelope that is landward of the setback line on the ocean side and seaward of the critical line on the river side that could now be developed under CZMA. (R. pp. 605:17-22; 608:13-19: 697:13-19).

Needless to say, the Town was not as confident as the Appellants that the land outside the 20 acres could never be developed. Otherwise, the Town would not have required KDP to impose a legal restriction in perpetuity preventing any development on all the land on the Spit other than the 20 acres of residential development and related infrastructure.

What Appellants' arguments fail to acknowledge is circumstances could change tomorrow that would easily make more acreage on the Spit available for development. A different town council might in future years be permissive and allow the entire 31.4 acres to be developed. The Spit is growing in size and will continue to grow. R. pp. 913:16-19; 950:21-951:16. The law requires DHEC to re-set the baseline and setback line every eight to ten years. S.C. Code Ann. 48-39-280(C). This adjustment could result in significantly more acreage being available for development. The 1999 re-setting produced 31.4 acres of developable land on the Spit that were not subject to development in the previous delineation. Why? Because the oceanfront beach of the Spit has accreted continuously over the last 60 years, building "seaward by hundreds of feet forming multiple dune ridges." R., p. 908:5-7. "[T]here's probably about four or five rows of dunes that have formed just within the last 30 years." R. p. 916:15-17. "[T]he average rate of

accretion ranges from four to ten feet per year anywhere along the spit for just about any period of time in the last 40 years." R. p. 1010:15-19.

Judge Anderson recognized the obvious public value of the permanent protection of the conservation easement that would shield the accreting land from exposure to development from changes in the local government, changes in the laws of the state, and changes in the configuration of Captain Sams Spit through the steady accretion of highland acreage (e.g., 63.24 acres since 1974 with 32 of those acres since 1994) (R. p. 814:18-24):

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

R. p. 181, Final Order on Remand.

Even if there were no accretion, or movement of the setback line, the prohibition of development of 11.4 acres alone has immeasurable public benefit.

Appellants further complain that the Development Agreement might be amended to eliminate the requirement of the conservation easement and that its benefits are speculative because it has not yet been recorded. However, the only evidence is that KDP and the Town have a binding agreement that conditions the limited development of the Spit on the granting of the conservation easement, among other requirements. R. pp. 1808-1810, KDP Exh. 2. There was no

proof at all in the record of any indication of Appellants' speculative assertion that the Town intended to relieve KDP of this obligation if it was able to proceed with the limited development.

Another stone Appellants throw at the Judge's finding of benefit from the conservation easement is their assertion that the benefit does not count because it would not be a condition of the DHEC permit for the erosion control structure and that it is not enforceable by DHEC. As noted by Judge Anderson in response to the League's argument that the conservation easement is not imposed by the DHEC permit: "[T]here is no statutory or regulatory requirement that the benefits from a project in the critical area flow from the conditions of the permit itself. In assessing the effects of a project in the critical area, consideration is given to all the effects that flow from the project in the critical area, including those on the upland, as recognized by the Supreme Court in the [2014] Opinion." R. p. 163, fn. 7, Order on Remand Denying Motions to Reconsider.

In the same vein, there is no requirement that DHEC be the enforcer of all obligations of the permittee. Here, there was proof of at least three parties that could enforce KDP's obligation under the 2005 Development Agreement to impose a binding conservation easement requiring the remaining land to be left in a natural state in perpetuity and to enforce the provisions of the conservation easement once it is recorded: the Town as party to the agreement imposing the obligation; Kiawah Island Natural Habitat Conservancy ("KINHC") as the land trust grantee of the conservation easement; and KICA as the grantee of the fee for a large portion of the remaining land as required under section 16(f) of the 2005 Development Agreement. R. pp. 1808-1810, KDP Exh. 2. In sum, there is substantial evidence to support the finding that the conservation easement is a valid enforceable obligation even though not made a requirement of the DHEC permit and even though DHEC is not the designated enforcer.

Last, both Appellants argue that neither the new KICA beach parking on the western end of Captain Sams Spit nor the conservation easement can be counted as benefits because, they contend, there is no connection between the realization of them and the proposed erosion control structure. They assert that the limited residential development is not dependent on an erosion control structure and that KDP could proceed with the limited residential development without it.

As Judge Anderson noted, 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 from further erosion and that both benefits accrue only if KDP is able to proceed with the limited development:

> The Court thus finds that KDP has a legitimate need for the bulkhead/revetment. The bulkhead/revetment will prevent its high land from being lost and assure that there is sufficient distance between the critical line and setback line in the neck of the peninsula to install a road, underground utilities, landscaping, and improvements. In fact, it is unlikely that KDP could satisfy the Town of Kiawah Island's ordinances governing subdivision and road construction without stabilization of the river bank and a protected right of way. Moreover, as to the Department's and CCL's argument that KDP can still sell lots on Captain Sam' s without the revetment, the Court finds that the developable land on the peninsula would not likely be readily marketable if the bank was not stabilized and the erosion were allowed to continue unabated into the future. The bulkhead/revetment's stabilization of the bank is essential to being able to market and sell the riverside homesites, especially given today's informed buyers.

R. pp. 38-39, 2010 Final Decision.

The testimony of Leonard Long and Mark Permar provides extensive factual foundation for Judge Anderson's findings and conclusions that as a practical matter and matter of local development ordinances, the limited residential development cannot proceed without the stabilization of the riverbank along the Access Corridor. R. pp. 658:5-659:13 (Lots are unmarketable without stabilization of the bank next to the Access Corridor); R. pp. 673:20-674:11 (Lots cannot be developed unless erosion of Access Corridor is retarded); R. p. 706:3-25 (Denial

of permit for Access Corridor is prohibiting KDP from developing the 20 acres on the Spit); R. pp. 715:9-18, 674:12-22 (The Town's road code specifies a 50-foot minimum right-of-way in almost all places); R. pp. 765:23-769:6 (KDP's planner would not recommend proceeding with development while access way is at risk).[9]

Judge Anderson's finding that the benefits of the new KICA beach parking and conservation easement flow from a permit that would allow a structure to protect the riverbank along the Access Corridor is also supported by substantial evidence. Without the stabilization of the riverbank, KDP cannot proceed with the construction of the access road and limited residential development. Without the access road, there is no road to the western end of the Spit that would allow the construction of the KICA beach parking spaces. Without the access road and the lots, the property encumbered by the conservation easement cannot be determined and the obligation to impose the conservation easement is not triggered. Judge Anderson so found:

> The finding that KDP cannot satisfy the ordinances of the Town of Kiawah Island that govern subdivisions without stabilization of the riverbank is pertinent to KDP's need for the erosion control structure. Without the erosion control structure, the evidence establishes that KDP cannot stabilize the shoreline, and without stabilizing the shoreline, KDP cannot comply with the town's development ordinances. If KDP cannot comply with these ordinances, then there will be no additional beach parking (and thus increasingly limited access to Beachwalker Park), and therefore no attending economic benefits to KDP, the Town, and the rest of the general public.

R. p. 170, Order on Remand Denying Motions to Reconsider.

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[9] DHEC argues in its brief that the erosion control structure is not necessary for the development to proceed because it may be possible to build a "deep-bed road." DHEC's record reference to engineer Mitchell Bohannon's testimony omits the portion where he said he had no idea what kind of structure the DHEC lawyer was referring to. When it was explained that the DHEC lawyer was talking about a bridge over land, Bohannon said "in theory" it may be hypothetically possible to build such a structure. R. pp. 897:9-898:22. This speculation about a hypothetical unpermitted structure does nothing to undermine Judge Anderson's finding and conclusion the accomplishment of the limited residential development depends on an erosion control structure that stabilizes the riverbank of the Access Corridor.

Judge Anderson's factual findings of benefit from the new KICA beach parking and the conservation easement requiring the remainder of the Spit to be preserved in perpetuity in a natural state that flow from a permit to stabilize the shoreline along the Access Corridor are supported by substantial evidence.

f. The economic benefit to KDP and the public benefit to the Town from realization of its zoning plan.

The other two benefits that Judge Anderson found would be realized from granting a permit to stop the erosion of the riverbank - economic benefit to KDP and realization of the local government's plan for the limited development of the Spit - are also supported by substantial evidence.

While KDP did not introduce evidence of an exact projected financial return, there was proof from which it could be reasonably inferred that if the limited residential development proceeds the economic benefit to KDP is between $50,000,000 and $150,000,000. KDP's bank loaned it $50,000,000, which shows a "level of value" KDP and its lender placed on the Spit if the development of a portion of it was allowed. R. p. 164, Order Denying Motions to Reconsider; R. pp. 659:25-660:7. Further, Long testified that he figured if there were 50 lots, the average sales price per lot would be around $3,000,000, resulting in $150,000,000 in sales proceeds. R. pp. 668:9-669:14.

As Judge Anderson commented, section 48-39-30(D) allows consideration of the economic benefit to KDP but requires benefit to the people other than KDP: "The Supreme Court held that all 'private economic development' involving the tidelands, which certainly includes KDP is 'suspect' (*Kiawah*, 411 S.C. at 41, 766 S.E.2d at 722). It nevertheless held that KDP is still a component of the citizenry and thus its economic benefits are a consideration in determining

whether there is a public benefit (*Id.* at 31 n.5, 766 S.E.2d at 716 n.5)." R. p. 191, Final Order on Remand.

The last benefit noted by Judge Anderson was the benefit to the Town from the realization of the land use approved in its zoning and the 2005 Development Agreement: "Moreover, the Town of Kiawah clearly represents 'the citizens of a particular jurisdiction.' Therefore, the actions of the Town of Kiawah in approving the development is also a consideration in determining whether the development upon the Spit is in the 'public interest.'" R. p. 191, Final Order on Remand. In his order denying Appellants' motions to reconsider, Judge Anderson further elaborated on the reason that the zoning of the municipality can be considered on the benefit side of the scales:

> The Court mentioned the frustration of the zoning and land use determinations of the Town of Kiawah Island in its calculus of the comparative merits of leaving the shoreline in a natural state versus stabilizing the location of the riverbank with an erosion control structure. There is nothing in the statutes or regulations that prohibits the agency or this Court from taking zoning into account as one of the considerations when determining the pros and cons of allowing the erosion to continue. ...
>
> Further, the Court's observation is appropriate under the policy set forth in S.C. Code §48-39-30(B)(5): 'To encourage and assist . . . municipalities . . . to exercise their responsibilities and powers in the coastal zone through the development and implementation of comprehensive programs to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values as well as to the needs for economic and social development and resources conservation.'

R. p. 170, Order on Remand Denying Motions to Reconsider.

Judge Anderson did not commit legal error in taking into account the economic benefit to KDP and the public benefit from realization of the Town's zoning in his findings, both of which are supported by substantial evidence.

4. **The Administrative Law Court's findings of fact that granting the permit with conditions is consonant with the findings and policies in S.C. Code Ann. Sections 48-39-20 and 48-39-30 are supported by substantial evidence and not affected by error of law.**

As required by S.C. Code Ann. 48-39-150 and S.C. Code Ann. Regs. 30-11, Judge Anderson weighed the findings and policies in S.C. Code Ann. 48-39-20 and 48-39-30 in determining whether to approve or deny the requested permit. Judge Anderson found and concluded that issuance of the permit as modified by him fulfilled these statutory findings and policies more than allowing the erosion and loss of KDP's land to continue unabated. Those findings and conclusions are supported by substantial evidence.

S.C. Code Ann. 48-39-20 and 48-39-30 list numerous findings and policies that boil down to balancing the need to protect coastal resources on the one hand and the advancement of economic development on the other. This balancing of these two main competing considerations is best summarized in the policy statements of 48-39-30(B)(1) and (D):

> (B)(1) To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;
>
> * * *
>
> (D) Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.

S.C. Code Ann. 48-39-30(B)(1) and (D).

On reconsideration of the record and employing the legal precepts emphasized by this Court in the 2014 Opinion, including seriously considering leaving the shoreline in its current condition, Judge Anderson again concluded that the scales tipped in favor of stabilizing the eroding

riverbank over letting the erosion continue. In so finding, Judge Anderson approved a slim downed version of the erosion control structure requested by KDP. Judge Anderson authorized a bulkhead with the ACB revetment (covered with a foot of sand) for the 270 feet adjacent to the parking lot of Beachwalker Park and the vertical bulkhead, with no revetment at all, along the riverbank for the remaining 2513 feet.

Judge Anderson determined that this reduced version of the structure best satisfied the statutory findings and purposes of the CZMA, making factual findings to this effect. R. pp. 190-193, Final Order on Remand. "Giving serious consideration to the alternative of leaving the shoreline in a natural state without the bulkhead and revetment, the Court nonetheless finds that leaving the shoreline in its natural state is not a better alternative than stabilizing the bank at Beachwalker Park." R. p. 191, Final Order on Remand.

Next, Judge Anderson addressed whether the application of the statutory policy considerations tipped in favor of granting an erosion control structure for the remaining 2513 feet. He found and concluded that the policy considerations weighed in favor of granting a permit for the bulkhead *without a revetment* for this long span of the eroding shoreline. "[P]ermitting the installation of a bulkhead as previously approved by this Court is clearly supported by the evidence. The bulkhead will not cover the sandy shoreline and thus will have de minimus impact upon the public use of shoreline." R. p. 193, Final Order on Remand. Judge Anderson removed the revetment from the bulkhead outside of Beachwalker Park because he found "the need to further protect the bulkhead along the remaining shoreline beyond the Park using a revetment is outweighed by the public benefit of protecting the use and nature of the shoreline." R. p. 193, Final Order on Remand.

Judge Anderson summarized his findings and conclusions later in his Conclusions of Law as follows:

> The Supreme Court implied, if not held, that benefit to the public at large is an essential showing for a permit to be granted. Without it, the Department or this Court must find against the permit.
>
> In determining how to achieve the maximum benefit to the public at large, both the legislative findings and policies prescribe consideration/balancing of natural/ecological systems and public access as well as economic, social, and other benefits. ....
>
> With these maxims in mind, the Court first considers the natural processes. The proposed bulkhead and revetment will not have any material effect on what was described as the historical process of breach and accretion, nor on the sand supply for the beaches of Seabrook Island. Currently, there is a fence between the parking lot of the park and the vertical escarpment at the riverbank that impedes the public's ability to reach the river. While a portion of the revetment would lessen the public's access to the existing sandy shoreline for recreational use, denying the permit would not, in the long-term, preserve that sandy shoreline for continued use and enjoyment by the public. To the contrary, allowing the erosion in this stretch of the river to proceed unabated could ultimately turn the sandy shoreline into a steep escarpment inaccessible to kayakers and unsafe to anyone approaching from the land side.
>
> The Court also finds and concludes that there will be public benefit if the shoreline is stabilized. The stabilization will protect the parking lot of the Park, allowing access west of the Park for the general public (at least 50,000 people a year) as well as the thousands of members of KICA. It will also allow the limited development to continue and trigger the creation of the conservation easement, which would result in the permanent and legally enforceable protection of around 80% of Captain Sam's Spit in its natural state with no possibility of any further alteration or improvements other than the limited development allowed under the 2005 Development Agreement. These public benefits tip the balance in favor of granting the permit subject to certain conditions and limitations. Here, these benefits warrant extension of the revetment for the length of Beachwalker Park in order to further protect the bulkhead; but beyond the Park, the benefits of using a revetment are outweighed by the public benefit of protecting the use and nature of the shoreline. Consequently, the Court finds that though the bulkhead may run the entire 2,783 feet, the full revetment of forty feet in width should extend for only 270 feet, the length of Beachwalker Park.
>
> ***
>
> Also important to concluding that the balance favors issuing the permit is the legislative land use determinations of the Town of Kiawah Island. While the town's policies and enactments are not binding, and certainly do not override the necessity that KDP prove that its project meets all the statutory and regulatory requirements

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

R. pp. 196-198, Final Order on Remand.

These findings and conclusions of Judge Anderson with respect to the policies in S.C. Code Ann. 48-39-20 and 48-39-30 are factual and supported by substantial evidence. Displeased with the findings, Appellants charge that Judge Anderson did not consider the no action alternative seriously enough. Yet, two times in his decision, Judge Anderson states he gave serious consideration to not interfering with the natural processes. R. pp. 190-191, Final Order on Remand. Judge Anderson in fact began his analysis in the above excerpt by considering the no-action alternative: "With these maxims in mind, the Court first considers the natural processes." R. p. 196, Final Order on Remand. Appellants' contention that Judge Anderson did not consider the natural processes and leaving the tidelands in their current condition is further undermined by Judge Anderson's detailed analysis of the effect of the engineered re-locations of the inlet on the historical process of elongation and breach as well as his denial of the revetment for 90% of the requested length because it diminished the quality of the recreational use of the sandy river shoreline at low tide.

Appellants also contend that even though there will be no ACB mat revetment covering the sandy shoreline at low tide for 90% of the length of the bulkhead, the sandy shoreline will soon disappear because of the bulkhead. They point to Dr. Young's testimony about the effects of using a hard erosion control structure to stabilize a shoreline and Bohannon's testimony that the revetment was intended to protect the toe of the revetment from scour. Yet, there is other evidence in the record that the water velocities and extent of erosion vary along the length of the river shoreline. R. pp. 867:3-21; 888:9-889:5; 889:13-892:22. Bohannon testified that the erosion is far less on the western third of the proposed location, so much so that the escarpment is less than two feet and he recommended starting with an ACB mat only eight feet wide without a bulkhead. Id. The evidence supports the reasonable inference that a sandy riverbank will subsist over all or a significant portion of the length of the bulkhead.

To the extent the width of the sandy shoreline may diminish over time in some locations on the eastern end of the bulkhead, there was proof that the sandy shoreline extends for another 1600 feet from the western end of the bulkhead towards Captain Sams Inlet, affording additional recreational areas that will not be affected by the bulkhead. R. pp. 1316:9-1317:25.

Finally, even if there were some reduction of the length of the sandy shoreline for landing by kayakers and others next to some locations of the bulkhead, Judge Anderson found that the recreational use warranted only *the elimination of the large revetment* that would have covered the sandy shoreline with an ACB mat. Judge Anderson did not find that the benefit from the recreational use of the sandy shoreline at low tide outweighed all the benefits that would flow from stabilization of the eroding riverbank with *a bulkhead.* He found the contrary. As such, the slow erosion of the sandy river shoreline in some locations would not tip the balance in favor of having no erosion control structure at all.

Further, Judge Anderson found that without an erosion control structure over time the sandy riverbank "**could** turn the shoreline into a steep escarpment (as the photographs suggest), making it inaccessible to kayakers and unsafe." R. pp. 170-171, Order Denying Motions to Reconsider. In other words, with or without a bulkhead, the sandy shoreline at low tide next to the bulkhead could become less accessible to kayakers and other recreational users. This finding is fully supported by the photographs mentioned by Judge Anderson which constitute substantial evidence.[10]

Judge Anderson's factual findings as to the maximum benefit to the people and the application of the findings and policies of 48-39-20 and 48-39-30 to this permit application are supported by substantial evidence. There is nothing in Judge Anderson's orders to suggest that the possible deterioration of the sandy shoreline over time would tip the scale against issuing a permit for the bulkhead, especially since he considered that may happen anyway. Finally, this Court observed that the impairment of the sandy riverbank does not alone justify denying a permit: "The area, particularly the pristine sandy beach, is undoubtedly one of this State's natural treasures. Admittedly, this alone is not a valid reason to reverse the ALC's approval of a permit to construct a huge bulkhead and revetment there." 766 S.E.2d 723. If the sandy riverbank at low tide was not

[10] "The Court's finding that allowing erosion to proceed unabated could ultimately turn the shoreline into a steep escarpment is also supported by the evidence, contrary to Coastal's argument otherwise. The photographs admitted into evidence show various locations where the escarpment is extremely high and steep. (R. pp. 1355-1379, KDP Ex. 5). The Court did not find that allowing the erosion to proceed unchecked would necessarily eliminate the sandy shoreline, only that it could turn the shoreline into a steep escarpment (as the photographs suggest), making it inaccessible to kayakers and unsafe. If this were to occur, Coastal's position of allowing the natural process to take place would ultimately prove antithetical to the public's use of the shoreline, which is the primary evidentiary impetus for Coastal's case." R. pp. 171-172, Order Denying Motions to Reconsider.

reason alone to deny a permit where it was to be covered with a 2-acre ACB mat, it is definitely not reason alone if 90% of the revetment is eliminated.

5. **The Administrative Law Court's determinations under S.C. Code Ann. 48-39-150 and cumulative impacts analysis under S.C. Code Ann. Regs. 30-11(C)(1) should be sustained where the Administrative Law Court thoroughly assessed the upland impacts of the residential development, found and concluded that the development would be sensitively implemented with numerous safeguards and in compliance with the Coastal Zone Management Program's guidelines for residential development on barrier islands, and made findings to this effect that are fully supported by the evidence.**

As instructed by this Court, Judge Anderson reconsidered the application of the ten general considerations of 48-39-150 and re-did his cumulative impacts assessment under S.C. Code Regs. 30-11(C)(1) to include a more thorough evaluation of the impacts from the possible limited residential development. Judge Anderson recognized the limited construction and improvements authorized in the 2005 Development Agreement between the Town and KDP would result in an impact to KDP's now undeveloped land. R. p. 185, Final Order on Remand ("This development will alter less than 20% of the total area of the Spit, converting it from a natural area to a residential development. There will thus be some impact from this limited residential development.") Judge Anderson then studied the proof presented by KDP of the environmentally sensitive development practices that will be used and made exhaustive findings that detail each one of these. R. pp. 186-188, Final Order on Remand. Judge Anderson found and concluded that the upland development did not run afoul of the ten general considerations, was consistent with the policies and guidelines of the CZMP for residential development on barrier islands, would not cause any long term negative impacts, and was in keeping with the general character of the area.

DHEC does not appeal any of Judge Anderson's findings and conclusions with respect to his analysis under S.C. Code Ann. 48-39-150 and S.C. Code Ann. Regs. 30-11(C)(1). The League does. It asserts that Judge Anderson committed legal error (1) in not deferring to DHEC staff's

decision when it denied most of the permit request and (2) in considering more than the project area in his cumulative effects assessment. League Initial Brief, pp. 25-30. Significantly, the League does not contend on this appeal substantial evidence does not support Judge Anderson's findings that the limited residential development is in compliance with the ten general considerations under 49-38-150 and consistent with the CZMP.

The League's assertion that Judge Anderson should have deferred to DHEC staff's *application* of the cumulative impacts regulation that concluded most of the permit should be denied because it would allow limited development on KDP's land is based on a fundamental misunderstanding of the doctrine of deference to an agency's interpretation of a statute or regulation. As this Court explained in the 2014 Opinion, courts defer to an agency's longstanding *interpretation* of a statute or regulation that is *ambiguous* unless there are compelling reasons not to do so. 766 S.E.2d 707, 717-719. In this case, this Court ruled DHEC's interpretation of "area" in 30-11(C)(1)[11] to include the area outside the critical area was fully supported by the CZMA and CZMP.

The League nonetheless asserts, incorrectly, that deference applies to the agency's *factual findings*. It makes the bold statement that "This Court ruled that DHEC is entitled to deference in these *findings* [that the structure would inhibit shoreline migration and alter the general character

[11] 30(C)(1) provides:

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

of the area]." League Initial Brief, pp. 27-28 (emphasis added). Nowhere in the 2014 Opinion did this Court come anywhere close to stating that the ALC must defer to the *findings* of the agency.

The League tries to stretch the deference doctrine far beyond its borders and would turn the entire body of administrative law on its head. The League's gross distortion of the deference principle runs completely counter to the ALC's authority as the finder of the facts in a de novo proceeding.

The League is equally as far afield in asserting that Judge Anderson should have made the factual determination that upland "area" for purposes of 30-11(C)(1) is only the footprint of the upland residential development on the Spit. The League's assertion is both legally incorrect and not supported by the facts.

This Court stated in its legal interpretation of "area" that the regulation meant that the impact of the development should be considered in the context of the "coastal zone." This Court adopted DHEC's interpretation of the term "area." "DHEC has interpreted this regulation as requiring it to consider not only a proposed project's impact on the critical area, but also the project's impacts on upland areas within the larger coastal zone." 766 S.E.2d 717. In the discussion of the meaning of the term "area" this Court equated the term with the "coastal zone" six different times. As previously discussed, S.C. Code Ann. 48-39-10(B) broadly defines the coastal zone.

Judge Anderson found the "area" for purposes of 30-11(C)(1) to encompass the western end of Kiawah Island and the eastern end of Seabrook Island on the other side of the Kiawah River from the Spit, both of which are developed. He found the future limited residential development to be in keeping with other development in the area:

> Since the upland development will have an impact on what is now an undeveloped natural area of the Spit, as the Supreme Court noted, this Court must

> assess those impacts under Reg. 30-11(C)(1). Because this development has yet to occur, the Court looks to the testimony and exhibits as to the plans and intent for this limited residential development. KDP offered considerable proof as to the precautions that will be taken in this upland development and the methods to be used. Based on that proof, as further explained below, the Court finds that the proposed development is not only consistent with the CZMP for reasons stated in the Amended Final Order, but also that the cumulative impacts from that development will not have a long-range negative effect and are in keeping with other developments on Kiawah Island and the general character of the island itself, including Captain Sam's Spit, and adjacent Seabrook Island.
>
> The Spit itself is undeveloped. Yet, the Spit is part of Kiawah Island, which has been clearly developed in a manner consistent with the ecologically friendly development proposed in this case. Therefore, it appears from the record that the general character of the area around the Spit is residential, with some commercial development. Furthermore, the proposed development is approximately 20% of the Spit, and the residential development by the owners of the private property will be implemented in an environmentally sensitive manner that will be consistent with, if not more environmentally protective than, the existing development.

R. p. 186, Final Order on Remand.

The League does not challenge the factual findings about the character of the lands in the immediate vicinity, rather it contends Judge Anderson should never have looked beyond the undeveloped land on the Spit, an interpretation that equates "area" with the project and is contrary to the meaning imposed on the term by this Court in the 2014 Opinion. Judge Anderson's cumulative impacts analysis was not affected by legal error and his factual findings are fully supported by the evidence.

6. The Administrative Law Court's findings that there were no feasible alternatives to the proposed structure (as modified by the Court to eliminate 90% of the proposed revetment) should be sustained where the Court seriously considered the no-action alternative and its findings are supported by substantial evidence.

In the 2014 Opinion, this Court ruled that Judge Anderson committed legal error in his analysis under S.C. Code Ann Regs. 30-12(C)(1)(c) and (d). This Court held that that if the erosion control structure would have any adverse effect on public access, the burden was on the applicant to establish no feasible alternatives. In conducting the feasible alternatives analysis on remand,

Judge Anderson was directed that the no-action alternative "should not be given short shrift but rather must be given serious consideration." 766 S.E.2d 723.

In his Final Order on Remand, Judge Anderson fully evaluated leaving the eroding shoreline as it is, compared to stabilizing it. He determined that the better alternative was to stabilize the eroding escarpment for the same reasons that he found stabilization best satisfied the statutory findings and policies including maximizing the benefit to the people. He found that stabilizing 2513 feet of riverbank west of Beachwalker Park would be best accomplished by the permitting requested bulkhead without the revetment that this Court disdainfully described as covering "2,783 feet by 40 feet - over 9 football fields in length and an area of over 2.5 acres - of sandy beach with concrete." 766 S.E.2d 722.

The League asserts that Judge Anderson's feasible alternative analysis was flawed because he found as a fact that the benefits to KDP from authorizing the bulkhead outweighed leaving the bank unprotected. The League also claims Judge Anderson did not afford the no-action alternative serious consideration, or at least consideration to its liking.

DHEC asserts Judge Anderson erred in his analysis under 30-12(C) because (1) he did not find that the vertical bulkhead against the escarpment would adversely affect public access to the sandy river shoreline at low tide, (2) there is no evidence to support his finding that the bulkhead without the revetment is feasible, and (3) there was no proof of economic benefit to KDP for Judge Anderson to consider it as part of the feasibility analysis. DHEC's position on appeal is a total about face from its staff's position when it issued the initial permit decision and found that the permit satisfied the criteria of 30-12(C). ("These specific regulatory provisions [30-12(C)] do not bar this project."). R. p. 1326, Technical Summary of Review, DHEC Exh. 2.

The two particular subparts of 30-12(C) that are at issue state as follows:

(1) In an attempt to mitigate certain environmental losses that can be caused by these structures, the following standards are adopted:

* * *

(c) Bulkheads and revetments will be prohibited where marshlands are adequately serving as an erosion buffer, where adjacent property could be detrimentally affected by erosion or sedimentation, or where public access is adversely affected unless upland is being lost due to tidally induced erosion.

(d) Bulkheads and revetments will be prohibited where public access is adversely affected unless no feasible alternative exists.

S.C. Code Ann. Regs. 30-12(C)(1)(c) and (d).

Contrary to the League's contentions, Judge Anderson gave extensive consideration to the no-action alternative, spending over three pages discussing it before reviewing the proof in the record of alternative methods for stabilizing the riverbank. R. pp. 186-912, Final Order on Remand. In a two-step analysis Judge Anderson first found as a fact that the benefits from stabilizing the bank were better than the benefits from letting the erosion continue. Id. Judge Anderson then discussed the proof at trial of the erosion control alternatives and the reasons the bulkhead and revetment were determined to be most suitable. R. pp. 192-194, Final Order on Remand. Judge Anderson continued to determine that revetment should be eliminated west of Beachwalker Park because it degraded the recreational use of the river shoreline at low tide. R. p. 193, Final Order on Remand:

> In this instance, as stated by the Supreme Court, the revetment would be laid upon a "pristine sandy" shoreline of the Kiawah River. However, all of the experts agree that the outside bank of this large bend in the Kiawah River at the neck of Captain Sam's Spit is eroding. This erosion is caused by a slow advance by the marsh point bar on the other side of the river and the high velocity of the water against the outside bank. If the revetment terminates in a high velocity zone, the shoreline may be susceptible to erosion around its terminus. Nevertheless, I find that the need to further protect the bulkhead along the remaining shoreline beyond the Park using a revetment is outweighed by the public benefit of protecting the use and nature of the shoreline. Consequently, the Court finds that a full revetment of forty feet in width should extend for only 270 feet, the length of Beachwalker Park, and that the bulkhead may extend not only the length of Beachwalker Park but the entire 2,783 feet.

* * *

> Turning to the Park, based on this Court's previous findings concerning feasible alternatives, the Court concludes, even after giving strong consideration to a no-action alternative, that there is no feasible alternative but to stabilize the riverbank using a bulkhead and a revetment of forty feet in width. From 2002 to 2009, unabated erosion took more than an acre of KDP's highland. As found in the Amended Final Order, the erosion will continue unless the bank is stabilized. The Court further concludes that there is no feasible alternative to the bulkhead and revetment in order to accomplish the long-term stabilization of the shoreline while providing the opportunity for the growth of marsh grass and aquatic organisms.
>
> In sum, the Court concludes that the proposed bulkhead and revetment at the Park meet all the specific criteria for bulkheads and revetments set forth in Reg. 30-12(C). Mr. Eiser came to this identical conclusion during his evaluation of the permit application, testifying that 'there was nothing in 30-12(C) that would explicitly require me to deny the entire permit . . . .'

R. pp. 193, 201-202, Final Order on Remand.

In the previous appeal DHEC and the League argued, and this Court agreed, that the large revetment had significant adverse effects on the recreational use of the riverbank. Now that Judge Anderson has eliminated the revetment, they have changed direction and argue that the revetment is needed to protect the toe of the bulkhead (addressed in the final section below) and that access will be adversely affected in the future based on testimony that the sandy shoreline may erode over time if there is a fixed erosion control structure of any kind. In other words, they assert that while there is no immediate adverse effect to physical access and use, the sandy shoreline that is exposed at low tide may erode and even disappear in places in the future if the bulkhead is allowed.

When considering this argument, it is important to keep in mind 30-12(C)(1)(c) and (d) refer to public *access*. Neither 30-12(C)(1)(c) and (d) nor any other provision in the CZMA requires that a bulkhead and/or revetment preserve tidelands in the same state and position they were in at the time of installation or decrees that any change to the tidelands caused by the structure is an adverse effect on public access. If that were the case, revetments or bulkheads would never

be allowed, but the legislature has specifically authorized them under 30-12(C) and 48-39-120(F), provided certain conditions are met.

Even if this possible reduction of the riverbank exposed at low tide were to occur sometime in the future and that process of change were, arguendo, considered as an adverse effect on public access, the bulkhead without the revetment still satisfies the requirements of 30-12(C)(1)(c) and (d) because Judge Anderson found and concluded there were no feasible alternatives. 30-12(C)(1)(c) and (d) specify an adverse effect on public access does **not** prevent an erosion control structure to protect upland against tidally induced erosion if there are no feasible alternatives: "(d) Bulkheads and revetments will be prohibited where public access is adversely affected ***unless*** no feasible alternative exists." S.C. Code Regs. 30-12(C)(1)(d)(double emphasis added). Even this Court acknowledged that the sandy riverbank at low tide "alone is not a valid reason to reverse the ALC's approval of a permit to construct a huge bulkhead and revetment there." 766 S.E. 2d 723. This observation stands with even more vigor with the elimination of the large revetment and a factual finding there are no feasible alternatives.

Further, there was substantial evidence to support Judge Anderson's findings that the bulkhead without the revetment would not degrade the public's access to the sandy shoreline at low tide. He eliminated the physical structure that caused the degradation of the access and use. The photos and other proof also support his finding and conclusion 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." R. p. 197, Final Order on Remand; p. 171, Order Denying Motions to Reconsider (Referring to photos admitted as KDP Exh. 5).

As to DHEC's final argument, there was both direct and inferential proof in the record to support Judge Anderson's findings of economic benefit to KDP from the residential development of the upland that the erosion control structure would facilitate for purposes of his feasible alternative analysis under S.C. Code Ann. Regs. 30-1(D)(23). See, Part 3(f), supra, and the Final Order Denying the Motions to Reconsider, R, p. 164.

7. The Administrative Law Court as the finder of fact has authority to determine the facts support a reduced version of the proposed structure and that determination is supported by substantial evidence

DHEC and the League assert that Judge Anderson had no authority to approve a permit for a bulkhead without a revetment and there are no facts that would support that finding. As discussed below, the ALC was fully vested with authority to impose conditions on the permit that are supported by factual findings.

In a de novo contested case hearing, the ALC is the finder of fact and free to draw its own conclusions. Risher v. S. C. Dep't of Health & Envtl. Control, 393 S.C. 198, 207, 712 S.E.2d 428, 433 (2011). When conducting a de novo review, the ALC has the authority to modify the permit or impose additional conditions. See S.C. Code § 48-39-150 (B) ("The permit may be conditioned upon the applicant's amending the proposal to take whatever measures the department feels are necessary to protect the public interest"); S.C. Code Regs. 30-4 (A)(1); see e.g., Jones v. SC Dept. of Health and Envtl. Control, 384 S.C. 295, 682 S.E.2d 282 (Ct. App. 2009) (ALC imposed conditions on permit including changes to location and design of dock from that requested in application). Indeed, the League has resolved other matters before the ALC by entry into consent orders that imposed conditions on the issuance of the permit. Southern Dunes, South Carolina Coastal Conservation League, et al v. S.C. Department of Health And Environmental Control, 1997 WL 441731 (S.C.A.L.C. 1997); Wilco, LLC, v. S.C. Department of Health And

Environmental Control, Respondent and South Carolina Coastal Conservation League, Intervenor, 2005 WL 1634468 (S.C.A.L.C. 2005).

Judge Anderson did not create a new erosion control structure. The bulkhead approved by Judge Anderson is one of the two erosion structures sought in the application. Its location remains the same as in the application. The Court simply approved a part, but not all, of the structures requested.

A stand-alone bulkhead is one of the many types of erosion control structures that may be permitted:

> (b) Bulkhead-a retaining wall designed to retain fill material, but not to withstand wave forces on an exposed shoreline.

S. C. Code Ann. Regs. 30-1(D)(22)(a).

As noted by Judge Anderson, bulkheads have been approved for use without an accompanying revetment throughout coastal South Carolina. R. pp. 167-168, Order on Remand Denying Motions to Reconsider. ("Bulkheads have been approved for use without an accompanying revetment throughout coastal South Carolina. In short, there is nothing revolutionary or unusual about a bulkhead being an erosion control device in and of itself."). "[T]he absence of a revetment does not eliminate the erosion control qualities of the bulkhead that is designed to retain the highland behind it." R. p. 168, Order on Remand Denying Motions to Reconsider. In fact, PRC had applied to DHEC for a stand-alone bulkhead for the 270 feet adjacent to Beachwalker Park - same river, same bend, same erosion - an application that PRC withdrew at the request of KDP to allow KDP to seek this permit for a holistic solution to the erosion of the entire bank in the deep bend of the Kiawah River. R. pp. 630:3-20; 823:18-825:11; 1217:11-24.

There is also additional proof in the record supporting that a bulkhead will function without the revetment. The conceptual illustration of the bulkhead in combination with the revetment is

shown on page 9 of the approved permit, KDP Exhibit 44. R. p. 1425. The illustration shows the bulkhead retaining wall extending for a significant length below the top of the revetment secured by an anchor pile behind it. R. p. 1425, KDP Exhibit 44; pp. 624:24-625:3. Bohannon testified that the top of the bulkhead would be installed just below the top of the escarpment ". . . . so it would stop the erosion." (R. p. 849). Long testified that bulkheads are "oftentimes not combined with a revetment," including a number at Kiawah, and that KDP chose a more expensive approach of including a revetment at the toe because it would look better, provide an opportunity for habitat of species, and help with the overall functionality of the structure, even though KDP "could have asked for just the vertical bulkheading." R. pp. 614:3-24; 616:7-9.

Judge Anderson had the authority as the sole fact finder in a de novo proceeding, essentially substituting for the department, to impose conditions on the permit that eliminated a portion of the structure requested based on the substantial evidence in the record.

Conclusion

KDP's valuable highland has continued to erode since submitting its application to DHEC nine years ago. This Court recognized the urgency of this matter in expediting the appeal in July 2010, yet because of the many unusual twists and turns of this appeal KDP has not been allowed to do anything to protect its property.

Judge Anderson did what this Court directed him to do on remand - he reconsidered the entire record and applied the legal rulings of this Court in making his factual findings. Appellants' multiple appeal grounds are nothing more than their disagreement with those factual findings, but that disagreement does not provide a basis for reversal. Judge Anderson's findings are supported by substantial evidence.

For the foregoing reasons, KDP respectfully requests that this Court move this matter to disposition at the Court's earliest convenience and affirm the orders of the Administrative Law Court under appeal.

Respectfully Submitted,

By: _____

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June 29, 2017

Charleston, South Carolina

Certificate of Counsel

The undersigned certifies that this Brief complies with Rule 211(b), SCACR.

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

Appellate Case No. 2016-000707

Kiawah Development Partners, II,..... Respondent,

v.

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

and

South Carolina Coastal Conservation League ..... Appellant,

v.

South Carolina Department of Health and Environmental Control, and Kiawah Development Partners, II, of whom South Carolina Department of Health and Environmental Control is, Appellant, and Kiawah Development Partners, II, is Respondent.

PROOF OF SERVICE

I, Nancy Jane Dennis, an employee of Walker Gressette Freeman & Linton, LLC, hereby certify that I have served this 29th day of June 2017, a copy of the **Brief of Respondent** on counsel of record by placing the same in the United States mail, first-class postage pre-paid, to:

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