THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Appellate Case No. 2016-000707

Kiawah Development Partners, II, Respondent,

v.

South Carolina Department of Health and Environmental Control, Appellant,

and

South Carolina Coastal Conservation League, Appellant,

v.

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

APPELLANT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL'S FINAL REPLY BRIEF OF APPELLANT

Bradley D. Churdar, SC Bar # 12829
Associate General Counsel
SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
1362 McMillan Avenue, Suite 400
Charleston, South Carolina 29405
Tel: (843) 953-0213
Fax: (843) 953-0201
Email: churdabd@dhec.sc.gov

Attorney for Appellant SCDHEC

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Tel: (843) 953-0213
Fax: (843) 953-0201
Email: churdabd@dhec.sc.gov

Attorney for Appellant SCDHEC

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ARGUMENT

I. Respondent's 30-12(C) argument does not rehabilitate the ALC's legally and factually flawed "no action alternative" analysis of the natural process.

This Court held in Kiawah Development Partners, II, in review of the ALC's prior feasible alternatives analysis, that

> "the CZMA specifically provides for and encourages the preservation of natural processes. Pointedly, the General Assembly's findings expressed in the CZMA state that there is an 'urgent need to protect and to give high priority to natural systems in the coastal zone,' and the accretion, erosion, and breach of the spit is a natural system. S.C. Code Ann. § 48–39–20(F). In fact, the term 'feasible alternatives' is specifically defined in the CZMA to include 'a no action alternative.' 2 S.C Code Ann. Regs. 30–1(D)(23) (2011). Thus, in applying regulation 30–12(C), the feasibility of taking no action and permitting natural processes to continue should not be given short shrift[1] but rather must be given serious consideration." Kiawah Development Partners, II v. South Carolina Dept. of Health and Environmental Control, et al., 411 S.C. 16, 32, 766 S.E.2d 707, 723 (2014).

Accordingly, part of the ALC's requirement on remand was to conduct a "no action alternative" analysis per S.C Code Ann. Regs. §30-12(C) that accounts for the "urgent need to protect and to give high priority to natural systems in the coastal zone." S.C. Code Ann. § 48–39–20(F). Unfortunately however, the ALC's 30-12(C) analysis on remand was more "short shrift" than "serious consideration." Kiawah, 766 S.E.2d at 723 Judge Anderson erroneously relied on the temporary impact of past inlet relocations as well as the prospect of future inlet relocations to truncate his "no action alternative" analysis, which should have been focused on preserving the natural process. Specifically, Judge Anderson dismissed the "no action alternative" on the premise that "... *the natural historical phenomenon of gradual elongation of Captain Sam's Spit followed by its breach has been interrupted and altered by engineered relocations of the inlet.*

[1] The "short shrift" this Court was referring to was the ALC's one sentence feasible alternatives analysis (i.e., "[c]learly, [Kiawah]'s upland is being lost due to tidally induced erosion, and there is no feasible alternative that will stabilize this eroding riverbank."). Kiawah, 766 S.E. 2d at 723.

Therefore, failing to construct the bulkhead and revetment [i.e., 'no action alternative'] would not result in the continuation of the natural cycle ..." (R. pp. 190-191, Remand Order, pp. 16-17). (Emphasis added). Judge Anderson erroneously relies on past and future man-made interference with the accretion, erosion, and breach cycle in order to reject a "no action alternative," thus paving the way for modifying the permit to allow the enormous bulkhead.

Respondent attempts to rehabilitate the ALC's flawed "no action alternative" analysis. by asserting that the past inlet relocations have "altered the historical process of elongation and breach. The breaching of the spit is no longer a natural phenomenon." Respondent's Brief, p. 17. In contrast, Dr. Kana testified that the Seabrook Island Property Owners Association was in the process of applying for a third Critical Area Permit to relocate the inlet. (R. p. 911, lines 3-6). If the natural phenomenon was not ongoing, this additional inlet relocation would not be necessary. Any future relocations of Captain Sam's Inlet will require a Critical Area Permit and there was no evidence in the record ensuring that future inlet relocations permits *will be* applied for or granted. In other words, Respondent fails to acknowledge the ALC's legal and factual error in basing his rejection of the "no action alternative" solely on past and future inlet relocations. The ALC's "no action alternative" analysis once again gives short shrift to allowing the natural process of accretion, erosion, and breach to continue. Respondent endorses this error and fails to acknowledge that the ALC's reliance on man-made intervention of this natural process is fundamentally flawed.

II. Both the ALC and Respondent fail to follow this Court's broad definition of "the people" as "the public at large" and "*all* people of South Carolina."

S.C. Code Ann. § 48-39-30(D) states that "[c]ritical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people ..." Respondent argues to this Court that the Kiawah Island Community Association (KICA) members, limited to the

4,500 property owners, are a group of people the General Assembly had in mind when referring to "the people" in S.C. Code Ann. § 48-39-30(D). Respondent's Brief, p. 22. To bolster this assertion, Respondent refers to only a portion of the definition of the "people" used by this Court (i.e., "citizens of a particular jurisdiction"). Kiawah, 766 S.E. 2d at 716. Respondent ignores that this Court further defined "the people" per S.C. Code Ann. § 48-39-30(D) as "the public at large" and "*all* people of South Carolina." Kiawah, 766 S.E. 2d at 716 (citing Estate of Tenney, 393 S.C. 100, 106, 712 S.E.2d 395, 398). (Emphasis added). This Court held that "only those benefits which inure to the public *as a whole* may satisfy section 48–39–30(D)." Kiawah, 766 S.E. 2d at 716. (Emphasis added).

The Development Agreement presents another problem for Respondent's interpretation of what constitutes "the people" when it acknowledges that "[a]n 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, Development Agreement, pp. 22-23, Paragraph 16(f)). (Emphasis added). Despite the fact that this Court said "the people" should be construed as "the public at large" and "*all* people of South Carolina," the Development Agreement plainly does not provide for the "public at large" to use or even have access to this members-only parking lot. Kiawah, 766 S.E. 2d at 716. (Emphasis added). By asserting that "[t]he 4500 owners of property on Kiawah Island are certainly citizens of a particular jurisdiction who may be considered as part of the "people" (Respondent's Brief, p. 22), Respondent follows the same flawed logic this Court rejected in footnote 5 of the Majority opinion (i.e., "we do not *exclude* the developer from being included in 'the people.' Rather, our point is that the ALC erred in considering only the benefits to the developer to the exclusion of the public *as a*

whole"). Kiawah, 766 S.E. 2d at 735. (Emphasis added). Here the Respondents again asks this Court to affirm that S.C. Code Ann. § 48-39-30(D) is satisfied by considering only the benefits to a limited group of property owners to the exclusion of the public *as a whole.*[2]

III. In addition to the eight members-only parking spaces failing to provide a public benefit, Respondent asserts without evidentiary support that (1) these exclusive parking spaces will be built "*on* the Spit" and (2) the currently-nonexistent conservation easement provides public benefits based on currently-unknown future contingencies.

A. No evidence the eight exclusive parking spaces will be built "on the Spit."

In an effort to support the ALC's conclusion that the eight new parking spaces for KICA property owners provides a public benefit as required by S.C. Code Ann. § 48-39-30(D), Respondent asserts that "the eight new parking spaces *much further 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." Respondent's Brief, page 23. (Emphasis added). This above-referenced assertion as to the location of the parking lot *on the Spit* is without evidentiary support. Nobody knows where these eight parking spaces will be built, because the Development Agreement gives the Property Owner discretion regarding the specific location, other than to require that it be built "at or near the west end of the road *to* such spit."[3] (R. pp. 1804-1805). (Emphasis added). Respondent's

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[2] In pointing out the lack of public benefit from the eight proposed parking spots, the Department does not concede that there is public benefit (from a regulatory perspective) in KDP following a "local legislative land use decision" or satisfying the Town's ordinances, or in the economic boon to KDP developers. (R. p. 191, Remand Order, p. 17). These matters were adequately addressed in the Department's Appellant Brief.

[3] Paragraph 15(a)(1)(B) of the Development Agreement (at pages 17-18) states that "[i]f the Property Owner should develop Parcel 12B as allowed by this Agreement, Property Owner shall construct a parking area of coquina shell or better for eight (8) cars *at or near the west end of the road to such spit* (which may be conveyed to KICA) and convey to KICA by quitclaim deed such parking area, *at a location in the discretion of the Property Owner*, to allow KICA members access to the beach. If necessary, the Property Owner shall convey by quitclaim deed a

assertion that these eight parking spaces will be built "*on* the Spit" is not required by the Development Agreement. (Emphasis added). The eight parking spaces "at or near the west end of the road to such spit" could be built virtually anywhere in the general vicinity. Such broad, inexact language in the Development Agreement differs from Respondent's representation in its Brief. Because nobody knows where the eight parking spaces will be built, it is impossible to draw a nexus or "trade off" between the use of the critical area and the provision of a combination of uses that maximally benefit the people.[4]

B. Public benefits of the currently-nonexistent conservation easement is speculative.

Regarding the public benefit of the currently-nonexistent conservation easement, Respondent asserts that "circumstances could change tomorrow that would easily make more acreage on the Spit available for development." (Respondent's Brief, p. 26). Specifically, Respondent argues that the currently-nonexistent conservation easement provides a public benefit that satisfies S.C. Code Ann. §48-39-30(D) regarding the following three future contingencies: (1) the *future* growth of the Spit; (2) a more "permissive" *future* Kiawah Town Council (regarding development); and (3) the *future* location of the baseline and setback line at the Spit. (Respondent's Brief, page 26). This claim of public benefit based on speculation about future contingencies is without evidentiary support in the Record on Appeal and is beyond the scope of S.C. Code Ann. §48-39-30(D).

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pedestrian path to KICA for pedestrian access of its members from the parking area to the beach." (R. pp. 1804-1805). (Emphasis added).

[4] S.C. Code §48-39-30(D) states that "critical areas shall be used *to provide* the combination of uses which will insure the *maximum benefit to the people* ..." (Emphasis added).

IV. **Regarding the non-existent conservation easement, there is no assurance that there will be any benefit to the public because DHEC cannot enforce any easement that might come to exist.**

Respondent attempts to downplay the fact that the Department will have no enforcement authority regarding the supposed future benefits from the non-existent conservation easement by asserting that "there was proof of at least three parties that could enforce KDP's obligation under the 2005 Development Agreement." Respondent's Brief, page 28. Under the scheme advanced by Respondent, a third party, non-governmental entity that has a financial interest in the development of Captain Sam's Spit would be the protector of whatever public benefit the non-existent conservation easement might confer.

In contrast to Respondent's assertion that "there is no requirement that DHEC be the enforcer of all obligations of the permittee,"[5] S.C. Code Ann. § 48-39-50, mandates that the Department shall have the following powers and duties:

1. "enforce the provisions of this chapter and all rules and regulations promulgated by the department and institute or cause to be instituted in courts of competent jurisdiction of legal proceedings to compel compliance with the provisions of this chapter;"[6]
2. "administer the provisions of this chapter and all rules, regulations and orders promulgated under it;"[7]
3. "revoke and suspend permits of persons who fail or refuse to carry out or comply with the terms and conditions of the permit;"[8]
4. "implement the state policies declared by this chapter;"[9] and

[5] Respondent's Brief, p. 28.
[6] S.C. Code Ann. § 48-39-50(I).
[7] S.C. Code Ann. § 48-39-50(F).
[8] S.C. Code Ann. § 48-39-50(H).

5. "exercise all incidental powers necessary to carry out the provisions of this chapter."[10]

The limited enforcement scheme for the non-existent conservation easement advanced by Respondent would have the Department abandon its statutory enforcement authority of an issue as important as "public benefit" to third parties with a financial interest in this development project.

V. The reliable evidence in the record is that the 2,513 foot bulkhead does adversely affect public access.

In an attempt to bolster the ALC's unsubstantiated conclusion that the additional 2,513 foot bulkhead beyond the 270 foot bulkhead and revetment does not adversely affect public access per S.C. Code Ann. Regulation §30–12(C), Respondent claims "there is other evidence in the record that the water velocities and extent of erosion varies along the length of the river shoreline." Respondent's Brief, pp. 36-37.

Respondent does not argue that there would be *no* erosion along the 2,513 foot bulkhead beyond the 270 foot bulkhead and revetment. Rather, Respondent's argument is essentially quibbling over the amount and the extent of that erosion. According to Dr. Young, the bulkhead will cause a cumulative loss of sand along the sandy shoreline of the Kiawah River.[11] According to the testimony of Dr. Young and KDP's expert, Mr. Bohannon, a 2,513 foot bulkhead without

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[9] S.C. Code Ann. § 48-39-50(M).

[10] S.C. Code Ann. § 48-39-50(O).

[11] Dr. Young testified at trial that "[w]hen there is a certain amount of erosion along a bluff shoreline, like the one on the back side of Kiawah, *the sand from that retreating bluff builds the beach that we looked at in those photographs*. The sand that comes from that eroding bluff feeds other environments that are in the river and also end up on top of wetlands to allow them to accumulate. So if you wall off a half a mile of shoreline from, you know, even small amounts of retreat and erosion, then over the long term you're going to be losing a certain amount of your sand supply. And those impacts are cumulative over the long term." (R. p. 1134, line 14-p. 1135, line 2). (Emphasis added).

a revetment *will* cause the sandy shoreline to continue eroding and that erosion is cumulative. (R. p. 839, line 1-p. 840, line 1; R. p. 1134, line 14-p. 1135, line 2). Therefore, contrary to Respondent's assertions, there is no reliable evidence in the record that supports the "reasonable inference that a sandy riverbank will subsist over all or a significant portion of the length of the bulkhead." Respondent's Brief, p. 37.

Respondent acknowledges that the sandy shoreline "may diminish over time in some locations on the eastern end of the bulkhead," but tries to distract from this fact by asserting that "the sandy shoreline extends for another 1600 feet from the western end of the bulkhead towards Captain Sam's Inlet, affording additional recreational areas that will not be affected by the bulkhead." Respondent's Brief, p. 37. Any shoreline available for public use beyond the shoreline adjacent to the structure authorized by the ALC does not negate the fact that public access is adversely impacted by the proposed bulkhead.

Respondent further asserts that

> "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.' Order Denying Motions to Reconsider, pp. 15-16. 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." Respondents Brief, p. 37.

This assertion is problematic because, there is no evidence to conclude that the *shoreline* could or will turn into a steep escarpment without an erosion control structure. Judge Anderson attempts to bolster his conclusion about the future impact of erosion on the public's ability to use the shoreline by stating that "[t]he photographs admitted into evidence show various locations where the escarpment is extremely high and steep. (KDP Ex. 5)." (R. p. 171, Clarification and Reconsideration Order, p. 15). However, every one of these KDP Ex. 5 photographs that the ALC

and Respondent relies upon shows that the escarpment is along the *upland*, not along the *shoreline.* (R. pp. 1355-1379). Accordingly, there is no evidence to support this public access analysis.

VI. Contrary to Respondent's assertion, the Department has not been inconsistent in applying 30-12(C).

Respondent asserts that

> "DHEC's position on appeal [regarding S.C Code Ann. Regs. 30–12(C)] 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.'). Technical Summary of Review, DHEC Exh.2, p. 4." Respondents Brief, p. 43.

This assertion is patently false. The context for evaluating compliance with criteria in the Technical Summary of Review back in 2008 is that the Department only permitted a 270 foot section of bulkhead and revetment along the Beachwalker Park parking lot. The remainder of this enormous bulkhead and revetment engineered by the ALJ after the 2010 trial was not permitted or reviewed by the Department. It is in the context of a 270 foot section of bulkhead and revetment that the Project Manager stated in the Technical Summary of Review that "[t]hese specific regulatory provisions do not bar this project." Respondent attempts to superimpose these words from the earlier review onto a 2,513 foot bulkhead that was never contemplated by the Department in the original permitting process[12] and was engineered by Judge Anderson for the first time in the 2016 Remand Order. Contrary to Respondent's assertion, the Department has not done a "total about face." Rather, the Department's arguments address this new structure that Judge Anderson engineered without the Department's or any technical input and without any supporting evidence.

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[12] S.C. Code Ann. § 48-39-140(B)(2) states that "[e]ach application for a permit shall be filed with the department and *shall include ... [a] plan or drawing showing the applicant's proposal and the manner or method by which the proposal shall be accomplished.*" (Emphasis added). The plans and drawings submitted by KDP with its permit application did not show a 2,513 foot bulkhead without a revetment.

CONCLUSION

WHEREFORE, for the reasons stated above as well as in the Department's Appellant Brief, the Department respectfully requests that the Court reverse the Remand Order and the Clarification and Reconsideration Order to only permit KDP to install a 270 foot bulkhead and revetment along the Beachwalker Park parking lot.

Respectfully submitted,

Bradley D. Churdar by Jacqueline S. Ruderman S.C. Bar #001681 with permission

Bradley D. Churdar, SC Bar #72829
Associate General Counsel
SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
1362 McMillan Avenue, Suite 400
Charleston, South Carolina 29405
Tel: (843) 953-0213
Fax: (843) 953-0201
Email: churdabd@dhec.sc.gov

Attorney for Appellant
South Carolina Department of Health and Environmental Control

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date she has served the **Final Brief of Appellant and Final Reply Brief of Appellant** in this matter upon the following, by placing copies of same in the United States Mail, first class postage prepaid, addressed to:

Amy E. Armstrong, Esquire
Jessie White, Esquire
Amelia Thompson, Esquire
SC Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585

G. Trenholm Walker, Esquire
Thomas P. Gressette, Jr., Esquire
Pratt-Thomas Walker
Post Office Drawer 22247
Charleston, SC 29413

Sandra R. Wessinger

July 7, 2017

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CERTIFICATE OF COUNSEL

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

Respectfully submitted,

Bradley D. Churdar by Jaclyn J. Dale
SC Bar # 001687
with permission

Bradley D. Churdar, SC Bar #72829
Associate General Counsel
SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
1362 McMillan Avenue, Suite 400
Charleston, South Carolina 29405
Tel: (843) 953-0213
Fax: (843) 953-0201
Email: churdabd@dhec.sc.gov

Attorney for Appellant
South Carolina Department of Health
and Environmental Control

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