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 BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case involves an application by Kiawah Development Partners, II ("KDP") to the Department of Health and Environmental Control (the "Department") for a Critical Area Permit to construct a 2,783 foot bulkhead and 2,783 x 40 foot articulated concrete block revetment along the sandy shoreline of the Kiawah River at Captain Sam's Spit on Kiawah Island. The Department's Ocean and Coastal Resource Management ("OCRM") issued a permit that authorized a 270 foot bulkhead and revetment immediately adjacent to the Beachwalker Park parking lot, where park facilities are being threatened by chronic erosion along that portion of the Kiawah River shoreline. The Department denied the remaining 2,513 foot bulkhead and 2,513 x 40 foot revetment.

KDP appealed the Department's decision to deny the remaining 2,513 foot bulkhead and 2,513 x 40 foot revetment to the Administrative Law Court ("ALC"). The South Carolina Coastal Conservation League ("SCCCL") also requested a contested case hearing at the ALC, appealing the Department's decision to authorize 270 foot bulkhead/revetment adjacent to the Beachwalker Park parking lot. SCCCL supported the Department's decision to deny the remaining 2,513 foot requested by KDP. The ALC consolidated the contested cases.

Following a five day hearing at the ALC the week of August 24, 2009, the ALC Judge Ralph King Anderson, III, issued a Final Order and Decision dated January 22, 2010 ("Order"), which deleted the condition imposed by the Department limiting the bulkhead/revetment to 270 feet. The ALC agreed that the entire 2,783 foot bulkhead and 2,783 foot by 40 foot revetment applied for by the KDP should not be granted. The ALC then authorized an erosion control structure which it designed. The ALC authorized the full structure for the first approximately 1000 feet; for the structure after survey point "F" on Exhibit 77, "a bulkhead shall not be used

where the vertical face of the escarpment is less than 24 inches" and "the ACB mat shall be no greater than eight feet in width." SCCCL and the Department filed Motions to Reconsider or Alter and Amend. The ALC issued an Order On Motions For Reconsideration ("Motions Order") and an Amended Final Order and Decision ("Amended Order") on March 1, 2010.

The Department and SCCCL both filed a Notice of Appeal. Since then, this Court has issued three separate opinions, the most recent opinion filed December 10, 2014 (Kiawah Development Partners, II v. South Carolina Dept. of Health and Environmental Control, et al., 411 S.C. 16, 766 S.E.2d 707 (2014)).

In the December 10, 2014 opinion, this Court reversed and remanded the case back to the ALC based on the following errors of law: (1) the Coastal Zone Management Act (CZMA) requires that uses of the public tidelands be to "the maximum benefit to the people," but the ALC did not consider whether and to what extent the public would benefit from leaving the tidelands in their natural state. Accordingly, the ALC erred in finding section S.C. Code Ann. §48–39–150 satisfied; (2) the ALC erred in finding the project met the requirements of S.C. Code Ann. Regulation §30–11 both because that regulation requires consideration of the factors in S.C. Code Ann. §48–39–150 and because the ALC's consideration of upland impacts was flawed; and (3) the ALC erred in finding that S.C. Code Ann. Regulation §30–12(C) was satisfied because this finding was tainted by the erroneous conclusion that there was no adverse effect on public access and the failure to consider the alternative of leaving the critical area in its natural state.

On December 2, 2015, the ALC issued a Final Order and Decision on Remand. KDP, the Department and SCCCL all filed Motions to Reconsider or Alter and Amend. On March 22, 2016, the Court issued a Clarification and Reconsideration Order as well as an Amended Final

Order and Decision on Remand ("Remand Order"). On remand, the ALC affirmed the placement of a 270 foot bulkhead and revetment along the Kiawah River adjacent to the Beachwalker County Park parking lot. The ALC further ordered that a 2,513 foot bulkhead alone continue beyond the 270 foot bulkhead and revetment along the banks of the Kiawah River. The ALC found that this 2,513 foot structure (1) satisfied the maximum benefit to the people requirement of S.C. Code Ann. § 48-39-30(D); (2) the 2,513 foot bulkhead without a revetment did not adversely affect public access per S.C. Code Ann. Regs. §30-12(C)(1)(d); and (3) no feasible alternative existed to installing the 2,513 foot bulkhead per S.C. Code Ann. Regs. §30-12(C)(1)(d).

The Department filed a Notice of Appeal of both the Remand Order and the Clarification and Reconsideration Order on April 21, 2016. SCCCL filed its Notice of Appeal of both Orders on March 30, 2016.

FACTS

KDP purchased Kiawah Island in 1988. Captain Sam's Spit (the "Spit") is on the southwestern tip of Kiawah Island adjacent to Beachwalker County Park ("Beachwalker Park" or "the Park"). At the time of purchase, the Spit was designated as "not suitable for development" and was zoned for use as park space and open area. The previous development agreement between the Town of Kiawah and KDP limited its use to park space and open area. Until 2005, KDP had no expectation of developing the Spit. (R. p. 708, line 24-p. 709, line 3). In 2005, KDP and the Town of Kiawah renegotiated the Development Agreement to authorize KDP to develop up to fifty home-sites on the Spit in exchange for KDP giving up rights to construct a 325 room hotel adjacent to the Spit. (R. pp. 763-764; R. pp. 766-768).

The Spit is surrounded on three sides by coastal tidal waters subject to the daily ebb and flood of the tide; the "front side" faces the Atlantic Ocean, the "backside" is bordered by the Kiawah River and the western side is separated from Seabrook Island by Captain Sam's Inlet. As littoral property, the boundary of KDP's upland property is the mean high water mark. The property boundary is not fixed, but meanders with gradual erosion or accretion of the adjacent tidal water bodies. On the front (ocean) side, the Spit has experienced years of steady accretion for well over a decade. On the back (river) side, the Spit has experienced years of gradual erosion as the Kiawah River migrates southwestwardly. The erosion on the backside is at a lower rate than the front side is accreting. As a result, KDP' upland property has grown in size while shifting towards the Ocean.

Beachwalker Park is operated by Charleston County Parks and Recreation Commission ("PRC") on lands leased from KDP. The Park, which has public parking spaces and facilities for visitors, is the only public beach access on Kiawah Island. In recent years the southwestward migration of the Kiawah River has caused upland to slough off into the river, threatening the parking lot. As a result, PRC submitted a critical area permit application to the Department for a 270 foot long erosion control structure immediately adjacent to the park where erosion was most severe. The PRC request was held in abeyance at the joint request of PRC and KDP and subsequently withdrawn. (R. p. 1255, line 12-p. 1257, line 2).

KDP subsequently submitted a critical area permit application to the Department seeking to fix the location of the Kiawah River shoreline (KDP's property boundary) for a length of 2,783'. The application proposed a 2,783' vertical bulkhead and a 2,783' x 40' Articulated Concrete Block revetment, to be constructed of concrete blocks, laid on its side, holes-up, and linked together—referred to as a concrete block mattress. The proposed length of

the structure far exceeds (triples) the length of any other erosion control structure for which an application has been sought from the Department. (R. p. 677, lines 10-25). KDP's stated purpose for the bulkhead and revetment proposal is to facilitate and increase the marketability of potential homesites on the Spit. (R. p. 656, lines 11-19 and R. p. 659, lines 5-13). Currently, the Kiawah River shoreline is gently sloped, sandy, and readily used by the public. The adjacent spit is pristine and without human improvements. It is one of only three such spits in South Carolina. (R. p. 1292, line 16-p. 1293, line 16).

The Department permitted the 270 foot bulkhead and revetment adjacent to the Beachwalker Park parking lot and denied the remainder of the application. The Department relied primarily on S.C. Code Ann. Reg. §30-11(C)(1) and the policies in S.C. Code Ann. §48-39-20 and S.C. Code Ann. §48-39-30. The decision was based on the Department's determination that the proposed bulkhead and revetment would be contrary to the statutory requirement that the critical areas of the coastal zone be used in a manner that is most beneficial to the public and other grounds.

STANDARD OF REVIEW

This Court's review of the ALC's Order is governed by the Administrative Procedures Act, which provides that the Court may reverse the decision of the ALC if the ALC's Order is "(a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary and capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380(5); S.C. Code Ann. § 1-23-610; Bailey v.

South Carolina Dept. of Health and Environmental Control, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010).

ARGUMENT
Introduction

"Matters decided by the appellate court cannot be reheard, reconsidered, or relitigated in the trial court, even under the guise of a different form. The decision of the appellate court is final as to all questions decided. It is the duty of the trial court to follow the decision of the appellate court." Ackerman v. McMillan, 324 S.C. 440, 477 S.E.2d 267, (Ct. App. 1996) (citing 5 C.J.S. Appeal and Error § 975(a) (1993)); (see also Bobo v. Marshane Corp., 302 S.C. 86, 88-89, 394 S.E.2d 2, 4 (Ct. App. 1990) (reversing the full workers compensation commission for exceeding its authority in failing to follow directions of the court on remand and going "much further" to reverse the panel's decision and substitute a new decision with a different result)).

This Court determined that "the ALC erred in finding Section 48–39–30(D)'s public benefit requirement satisfied" and that "it was clear that only [KDP], not the *public*, would benefit from the construction of this enormous bulkhead and revetment." Kiawah, 766 S.E.2d at 717 and Kiawah, 766 S.E.2d at 716. (Emphasis in original text). This is the law of the case and, as such, the Supreme Court's holdings cannot be altered on remand.[1] Ables v. Gladden, 378 S.C. 558, 664 S.E.2d 442 (2008); Prince v. Beaufort Mem'l Hosp., 392 S.C. 599, 709 S.E.2d 122 (Ct. App. 2011); Ackerman v. McMillan, 324 S.C. 440, 477 S.E.2d 267 (Ct. App.

[1] In determining whether to grant a critical area permit, S.C. Code Ann. Regs. §30-11 requires DHEC to consider "[t]he extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area." In this case, there is nothing further for this Court to consider regarding S.C. Code Ann. Regs. 30-11, because this Court previously found that the bulkhead and revetment provided no public benefit. Kiawah, 766 S.E.2d at 723. Accordingly, additional long-range cumulative effects analysis is not required.

1996) (holding reversible error in reconsidering an issue addressed by the appellate court on remand). Specifically, the law of the case is that KDP, not the public, would benefit from the construction of the 2,513 foot bulkhead and revetment. The ALC erred as a matter of law in going beyond this Court's December 2014 opinion and substituting a different standard on the nature of public benefits.

When an appellate court has remanded a case for further proceedings consistent with its mandate, a district court is obliged to effectuate the mandate and *may consider only those matters essential to the implementation of the ruling of the appellate court.* 5 Am. Jur. 2d Appellate Review § 734 (2015) (citing State v. Dumars, 154 P.3d 1120 (Kan. Ct. App. 2007) (Emphasis added)). The central mandate of this Court was that "... simply because the State permits alterations in limited circumstances does not change the fact that altering tidelands remains the exception to the rule. The State, through the General Assembly, has adopted the policy that the public interest is usually best served by preserving tidelands in their natural state." Kiawah, 766 S.E.2d at 715. The ALC's March 22, 2016 Remand Order ignores this Court's ruling and mandate regarding public benefit. The Court remanded this matter back to the ALC "for further consideration consistent with this decision," but the ALC did not adhere to the Supreme Court's mandate. Kiawah, 766 S.E.2d at 723.

I. Supreme Court Opinion Constrains Authorization of Any Structure Beyond What Was Originally Permitted by DHEC

Authorization of any structure beyond what was originally permitted by the Department does not accord with this Court's mandate in Kiawah Development Partners, II vs. South Carolina Dept. of Health and Environmental Control, et al., 411 S. C. 16, 766 S.E.2d 707 (2014). The Department's original permitting decision provides the maximum benefit to the people of South Carolina as mandated by this Court. Affirming the Department's original

decision will allow a 270 foot bulkhead and revetment along the banks of the Kiawah River adjacent to Beachwalker Park and leave the remainder of the banks of the Kiawah River in their natural and unaltered state without any hard erosion control structure. This position follows the constraints of the Supreme Court's Opinion and is based on the public benefit of (1) maintaining the parking lot at Beachwalker Park; (2) allowing the natural processes of erosion and accretion to occur on the remaining unpermitted portion of the Kiawah River; and (3) allowing the public to use and enjoy the shoreline for a variety of activities, including launching and landing boats, picnicking, watching dolphins strand feed, and just sitting on the sandy bank.

II. The ALC Erred Because it Did Not Follow This Court's Ruling Regarding Public Benefit

S.C. Code Ann. § 48-39-30(D) states that "critical areas *shall* be used to provide the combination of uses which will insure [sic] the maximum benefit to the people, but not necessarily a combination of uses which will generate maximum measurable dollar benefits."[2] (Emphasis added). This Court held that compliance with the "maximum benefit to the people" requirement found in S.C. Code Ann. § 48-39-30(D) is a threshold inquiry that *must* be satisfied before an activity in the critical area can be permitted.

This Court found that the ALC's January 22, 2010 Final Order and Decision misinterpreted the term "the people" in S.C. Code Ann. § 48-39-30(D):

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[2] When a statute such as this contains the term "shall", the action referenced in the statute is "mandatory". Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003) (citing Montgomery v. Keziah, 277 S.C. 84, 282 S.E.2d 853 (1981)). See also 73 Am. Jur. 2d Statutes § 10 ("Generally, courts construe a statutory provision as mandatory when the power or duty to which it relates is for the public good. Accordingly, a statute affecting the public interest and promoting justice which prescribes the manner of performance is generally mandatory").

> "because it failed to identify any benefit flowing to the public at large,[3] instead stating only that 'elimination of [the] erosion will further provide an economic benefit to [Kiawah].' Kiawah is not synonymous with 'the people.' When that term is correctly construed, any benefit to Kiawah is irrelevant to whether section 48–39–30(D) is satisfied. 'The people,' as used here, is a term meaning the citizens of a particular jurisdiction." (Emphasis added). Kiawah, 766 S.E.2d at 716.

This Court said "[t]o allow the benefits to a private developer to override the interests of the people of South Carolina undermines the statute and defeats the very purpose of the public trust doctrine. Thus, only those benefits which inure to the public as a whole may satisfy section 48-39-30(D)."[4] Kiawah, 766 S.E.2d at 716. This Court further asserted that "it was clear that only the developer, not the *public,* would benefit from the construction of this enormous bulkhead and revetment." Kiawah, 766 S.E.2d at 716. (Emphasis in original text). The Supreme Court stated that "the ALC erred as a matter of law in finding the proposed bulkhead and revetment comply with the requirements of the CZMA." Kiawah, 766 S.E.2d at 715. The ALC had a duty to follow this Court's public benefit rulings and mandate, because "[t]he decision of the appellate court is final as to all questions decided." Ackerman v. McMillan, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct. App. 1996).

While this Court plainly rejected "an enormous bulkhead and revetment" (Kiawah, 766 S.E.2d at 716), the ALC ignored the Supreme Court's analysis when it found an "enormous"

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[3] It is worth mentioning that the reason the ALC "failed to identify any benefit flowing to the public at large" is because (with the notable exception of the obvious public benefit in protecting the parking lot at Beachwalker Park), KDP presented no evidence of benefit to "the people" as that term is interpreted by this Court. Kiawah, 766 S.E.2d at 716.

[4] The Supreme Court's opinion above is consistent with the regulatory definition of "public interest". S.C. Code Ann. Regs. 30-1.D(44) defines "public interest" as follows: "As used within these Rules and Regulations, public interest refers to the beneficial and adverse impacts and effects of a project upon members of the general public, especially residents of South Carolina who are not the owners and/or developers of the project. To the extent that, in the opinion of the Department, the value of such public benefits is greater than the public costs embodied in adverse environmental, economic and fiscal effects, a proposed project may be credited with net public benefits." (Emphasis added).

2,513 foot bulkhead satisfies the "maximum benefit to the people" mandate. The ALC found the following to be adequate public benefits: (A) protection of the Beachwalker Park parking lot; (B) KDP's provision of eight (8) parking spaces[5] and beach access to members of the Kiawah Island Community Association ("KICA"); and (C) KDP's agreement, upon completion of its development, to permanently encumber the remainder of the Spit with a restrictive covenant mandating that it remain in its natural state and to grant a conservation easement to Kiawah Island Natural Habitat Conservancy ("KINHC") over that same acreage. The eight (8) parking spaces, future restrictive covenants and future conservation easement do not satisfy the Court's mandate regarding the nature of the public benefit that would allow alteration of the tidelands critical area.

A. Beachwalker Park parking lot

The Department 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 the Department. The Department's position before the ALC on remand was that this was the only matter properly under consideration by the ALC. The evidence presented at trial undeniably demonstrated that the portion of the bulkhead and revetment (270 feet) originally permitted by the Department *will* benefit the public, because it will protect the heavily-used[6] Beachwalker Park parking lot from damage caused by erosion along the Kiawah River. This is clearly distinct from the "enormous bulkhead and revetment" the Court eschewed and the enormous bulkhead the ALC designed. The Department contends that the ALC's conclusion of public

[5] These additional eight (8) parking spaces are not part of the Beachwalker Park parking lot.
[6] When Mr. Leonard Long was asked at trial about the benefits of the revetment, he testified that "it would be a benefit to stop the erosion at a public park that serves 50,000 people a year." (R. p. 662, lines 18-20).

benefit regarding the parking lot at Beachwalker Park is proper and consistent with this Court's remand directive.

B. Eight (8) parking spaces and beach access to KICA members does not satisfy the Court's mandate for maximum public benefit

1. *The ALC erred in finding that eight (8) parking spaces and beach access to KICA members satisfies the public benefit requirement of S.C. Code Ann. § 48-39-30(D).*

In footnote 2 on page 5 of the ALC's Remand Order, the ALC stated that "[a]s with KDP, the members of KICA are included in 'the people,' and benefits to them are therefore considerations to take into account along with benefits to other members of 'the people' when considering the benefit to the public as a whole." (R. p. 179). Clearly, given the Court's ruling and mandate, the members of KICA are such a small group of people that they do not satisfy this Court's interpretation of S.C. Code Ann. § 48-39-30(D). The Supreme Court said that the commonly understood definition of "the people" is

> "'[t]he mass of ordinary persons; the populace.' The American Heritage Dictionary 919 (2d College Ed.1982). Additionally, the use of the article 'the' before 'people' indicates that 'the people' is a single, unified thing. See Centex Int'l, Inc. v. S.C. Dep't of Revenue, 406 S.C. 132, 142, 750 S.E.2d 65, 70 (2013) ("The word 'the' is a word of limitation—a word used before nouns, with a specifying or particularizing effect, opposed to the indefinite or generalizing force of 'a' or 'an.'" (quoting People v. Enlow, 135 Colo. 249, 310 P.2d 539, 546 (1957)). Reading the provision in light of the public trust doctrine—the legal bedrock upon which the statute rests—bolsters the conclusion that 'the people' should be construed as the public at large ..." Kiawah, 766 S.E.2d at 716.

This Court went on to further clarify that "only those benefits which inure to the public *as a whole* may satisfy section 48–39–30(D)." Kiawah, 766 S.E.2d at 716. While the total number of members of KICA is larger than the one beneficiary (KDP) that comprised the ALC's previous public benefit analysis in its 2010 Amended Final Order, such a small group of property owners falls woefully short of "the mass of ordinary people" or "the populace" or "the

public at large." The ALC has failed to follow the Court's ruling that "the public's interest must be the lodestar which guides our legal analysis in regards to the State's tidelands." Kiawah, 766 S.E.2d at 715. In this regard, the ALC committed error of law.

2. *The ALC erred in concluding that these eight (8) parking spaces satisfy the "maximum benefit to the people" requirement of S.C. Code §48-39-30(D), because the KICA members' access to these eight (8) future parking spaces is not contingent upon KDP impacting the critical area.*

The ALC assumes that without the construction of the bulkhead and revetment, these eight (8) future parking spaces cannot be built in accordance with the Development Agreement. This assumption is legally and factually erroneous. On page 6 of the Remand Order, the ALC asserts that the

> "beach parking and beach access west of the Park toward Captain Sam's Inlet does not now exist and constitutes a public benefit that will be realized *through the construction of the bulkhead and revetment* that will allow the limited development that includes this community facility." (Emphasis added). (R. p. 180).

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). The statute contemplates that there will be some nexus or "trade off" between the use of the critical area and the provision of a combination of uses that maximally benefit the people.[7] If the same benefit to KICA members can be achieved *without* impacting the critical area, then the ALC must follow this Court's holding that "altering tidelands remains the exception to the rule." Kiawah, 766 S.E.2d at 715). To this point, the evidence in the record is that these eight (8) parking spaces *can* be built without impacting the critical area.

[7] The ALC seems to adhere to this interpretation. On page 6 of the Clarification and Reconsideration Order, the ALC stated that "it is reasonable to infer and conclude the conservation easement *given in exchange for* development requiring the bulkhead and revetment would benefit the public by preventing further development on the Spit." (Emphasis added). (R. p. 162).

At trial, KDP's expert witness (Mitchell Bohannon) conceded that it is possible for KDP to build a "deep foundation supported road" to such a depth that if the erosion along the Kiawah River continued underneath that road because no bulkhead and revetment was built, then it (the road) would essentially become a bridge.[8] (R. p. 897, line 13-p. 898, line 7). Without installing a bulkhead and revetment and "thereby permanently altering 111,320 square feet or over 2.5 acres of pristine tidelands,"[9] the KICA members could nonetheless have access to these eight (8) future parking spaces if KDP chose to locate this parking lot on the Spit.[10] KDP cannot plausibly assert that "but for" the installation of the bulkhead along the Kiawah River beyond Beachwalker County Park, the eight (8) additional future parking spaces for KICA members cannot be built or accessed. Based on Mr. Bohannon's trial testimony, a "deep foundation supported road" could be built that would allow KICA members to access these eight (8) future parking spaces regardless of the existence or non-existence of the 2,513 foot bulkhead the ALC ordered. Accordingly, the 2,513 foot bulkhead authorized by the ALC falls within this Court's

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[8] Q: It's entirely possible to build a deep foundation road, where the foundation is deeper than mean low water, right?
A: (No response.)
Q: Essentially a bridge over land?
A: Is it possible to build a bridge over land? Normally, a bridge means you're -- I mean, you're bridging something.
Q: Okay.
A: So to build a bridge out at grade on land – I mean, you could build a structure. I don't think it'd be called a "bridge," because you're not really bridging anything. (Emphasis added).
(R. p. 897, lines 13-25).
...
Q: [Y]ou can build a road, a deep foundation supported road, where you wouldn't need -- where if the river keeps eroding towards that road, if it ever got underneath the road, you'd have essentially a bridge in place, right?
A: In theory, I guess you could.
(R. p. 898, lines 2-7).

[9] Kiawah, 766 S.E.2d at 711.

[10] Paragraph 15(a)(1)(B) of the Development Agreement (at pages 17-18) gives KDP discretion regarding *where* to locate this parking lot. (R. pp. 1804-1805).

general rule *against* altering tidelands.[11] Kiawah, 766 S.E.2d at 715. The ALC erred as a matter of law and fact in finding otherwise.

It is telling that the ALC continues to err on the side of altering the tidelands, not for the public benefit, but for purposes of facilitating the proposed development. The ALC asserts that the reason the bulkhead and revetment is "required" for development is that this structure "ensure[s] that such development can occur by protecting its access corridor." (R. p. 162, Clarification and Reconsideration Order, p. 6). Thus, even on remand, the ALC's focus is to "ensure" development, even though the evidence is that alteration of the tidelands is not required to ensure development.

3. *The Development Agreement does not specify where the KICA parking lot is to be located.*

Even if these eight (8) parking spaces actually did provide any benefit to "the people" as defined by this Court, there is no evidentiary basis for the ALC to assume that building eight (8) parking spaces for KICA members "near the west end of the road to such spit" limits the location of these eight (8) parking spaces to being built *on* the Spit itself.[12] Without knowing where the parking lot will be built, it is impossible to conclude there is a nexus or a need for the critical area impact of the 2,513 foot bulkhead and the supposed public benefit of this KICA-

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[11] "[S]imply because the State permits alterations in limited circumstances does not change the fact that altering tidelands remains the exception to the rule." Kiawah, 766 S.E.2d at 715.

[12] Paragraph 15(a)(1)(B) of the Development Agreement (at pages 17-18):

> "B Captain Sam's Spit - If 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 pedestrian path to KICA for pedestrian access of its members from the parking area to the beach." (Emphasis added). (R. pp. 1804-1805).

members-only parking lot. The ALC asserts that "[t]he bulkhead and revetment are components of this road's construction." (R. p. 180). This may be true for certain portions of the road, but the ALC points to no evidence regarding whether or not the bulkhead and revetment will positively impact the portion of the road where the future parking lot may be built. The ambiguous language in the Development Agreement regarding the location of these eight (8) future parking spaces rules out the ALC's conclusion that the critical area impact of the bulkhead and revetment is needed for eight (8) parking spaces. (R. pp. 1804-1805).

4. The ALC erred in assuming a need exists for the eight (8) parking spaces

There is no evidence in the record establishing that there is actually even a need for eight (8) parking spaces for KICA members who already live on Kiawah and have access to Captain Sam's Spit. No KICA member testified at trial that he or she drives their car to Beachwalker County Park, or that they cannot find parking spaces or that they are otherwise unable to access the public trust lands of Captain Sam's Spit. In fact, the only two members of KICA who testified at trial (Greg VanDerwerker and Sophia McAllister) spoke in favor of not armoring the shoreline. Both of these witnesses testified to the benefits they derive from using the sandy shoreline for recreational and aesthetic purposes. (R. p. 1140, line 5-p. 1141, line 25; and R. p. 1198, line 4-p. 1201, line 21).

In light of this Court's affirmation that "altering tidelands remains the exception to the rule,"[13] the ALC clearly erred as a matter of law and fact in determining that eight (8) additional parking spaces rises to the level of providing "public benefit" that would override the public's benefit in the actual use and enjoyment of the sandy shoreline critical area. This is particularly egregious when there is no evidence that a need for eight (8) additional parking spaces even

[13] Kiawah, 766 S.E.2d at 715.

exists.

C. The ALC Erred in Finding the Conservation Easement Provides a Public Benefit

1. The Conservation Easement Referenced by the ALC Does Not Provide a Public Benefit Because It Does Not Exist

The ALC erred in finding that a currently-non-existent conservation easement satisfies the public benefit requirement of S.C. Code Ann. § 48-39-30(D). On page 6 of the ALC's March 22, 2016 Clarification and Reconsideration Order, Judge Anderson stated that

> "according to the Development Agreement between KDP and the town of Kiawah Island, which is in the record, KDP agreed to give up most of its property (98.3 acres out of the Spit's 118.3 acres) on the Spit via the conservation easement if it could develop the other twenty acres.[14] The bulkhead and revetment ensure that such development can occur by protecting its access corridor.[15] Therefore, *it is reasonable to infer and conclude the conservation*

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[14] Judge Anderson also makes a similar assertion on page 7 of his March 22, 2016 Amended Final Order and Decision on Remand (R. p. 181) stating that

> "[t]he only acreage excluded from permanent protection in a natural state by the conservation easement is the land subject to the limited development. At the hearing, the evidence revealed that the highland consisted of 150 acres with the conservation easement encompassing over 80% of the entirety of the Spit."

While this assertion may be correct in the broadest sense, the vast majority of the easement encompasses portions of the Spit that *cannot* be developed. At trial, KDP's witness Leonard Long testified that only 31.4 acres of the Spit is "developable" upland and that "we (KDP) only could sell 20 (acres) of it, so the other 11.4 from the 31.4 (acres) is -- can't be developed, either, under the development agreement." (R. p. 607, lines 12-15). Putting the supposed public benefit of this future conservation easement into proper perspective, KDP plans to develop two-thirds of the upland. The remainder of Parcel 12B is critical area that cannot be developed. As such, if this future conservation easement provides any public benefit as required by S.C. Code Ann. § 48-39-30(D) (which the Department does not concede for multiple reasons mentioned hereafter), such public benefit cannot plausibly be characterized as a conservation easement that encompasses over 80% of the entirety of the Spit.

[15] Protecting the access corridor is an erroneous basis to order a 2,513 foot bulkhead without a revetment. The Department's Project Manager for this permitting decision (Mr. Bill Eiser) testified that an access corridor outside the Department's critical area jurisdiction currently exists. The following colloquy bears this out:

Q: Would denying this permit – the Department in denying the permit would result in a loss of an access corridor?

A: I don't think it would, no.

Q: Why?

easement given in exchange for development requiring the bulkhead and revetment would benefit the public by preventing further development on the Spit."[16] (Emphasis added). (R. p. 162).

While the ALC's March 22, 2016 Clarification and Reconsideration Order asserts on page 7 that "the very nature of a conservation easement is that it benefits the public" (R. p. 163), no evidence was presented at trial or referenced in the ALC's Order to suggest how the public would benefit from this privately-held conservation easement, because the easement does not exist at this time.[17]

2. *The Conservation Easement Referenced by the ALC Does Not Ensure a Public Benefit Because The Department Has No Enforcement Authority Over This Future Easement*

Judge Anderson references S.C. Code Ann. § 27-8-20(1) (2007) in his Order in an attempt to show that this easement, which will be held by the Kiawah Island Natural Habitat Conservancy and later granted to KICA,[18] axiomatically provides public benefit. In particular, Judge Anderson states on page 7 of his Order that, according to S.C. Code Ann. § 27-8-20(1) (2007)

> "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).

A: Well, I mean, there is an existing access corridor that's out of the Agency's critical area jurisdiction and it may not be as wide as they would like it to be, but it's obviously an access corridor and it's out of the Agency's critical area jurisdiction. (R. p. 1277, lines 7-17).

[16] Putting this issue in proper perspective, the word "easement" in the context of a conservation easement on Captain Sam's Spit was used only twice during the week-long hearing. (R. p. 633).

[17] Paragraph 7 of the Development Agreement states at page 3 that "[t]he Town and the Property Owner enter this Agreement in order to serve benefits and burdens referenced in § 6-31-10 *et seq.*" (R. p. 1790). According to S.C. Code Ann. § 6-31-120, "the benefits of the agreement shall inure to, all successors in interest to the parties to the agreement."

[18] R. p. 633, lines 2-7.

However, the statute he references states that a "conservation easement" means a "nonpossessory interest of a holder in real property imposing limitations or affirmative obligations ..." Because the Department is not the easement "holder", it does not have the power to impose those limitations or affirmative obligations referenced in S.C. Code Ann. § 27-8-20(1). If this easement does in fact come to fruition, those enforcement powers will not be vested in the Department or the public, but rather the Kiawah Island Natural Habitat Conservancy and later to KICA. (R. p. 633, lines 2-7). Likewise, the Department would not have any authority to ensure that the easement is executed and recorded with the Charleston County RMC office. If the Kiawah Island Natural Habitat Conservancy or KICA (as easement holders) choose to ignore the terms of the easement, the Department is powerless to take any action to ensure any public benefit.

3. *The Conservation Easement Referenced by the ALC Does Not Provide a Public Benefit Because The Currently-Required Easement Can Be Eliminated By Amending The Development Agreement*

The ALC further erred in relying on a future conservation easement to satisfy the public benefit requirement of S.C. Code Ann. § 48-39-30(D), because this currently-non-existent conservation easement originates from a document that can be modified without the Department's knowledge or input. (R. p. 162, Clarification and Reconsideration Order, p. 6). Specifically, this future conservation easement originates from the Development Agreement between KDP and the Town of Kiawah Island. This Development Agreement was originally entered into by the parties in 1994. That version of the Development Agreement limited the use of Captain Sam's Spit to "park space and green space." (R. p. 695, lines 10-12). Then eleven years later in 2005 the Development Agreement was changed to allow for residential development on Captain Sam's Spit. (R. p. 695, lines 17-21). Leonard Long testified at trial

that the 2005 Development Agreement could also be changed again by the parties. (R. p. 696, lines 2-5). As such, it was error for the ALC to (1) admit the Development Agreement into evidence over the Department's "relevance" objection[19]; and (2) to conclude that a public benefit is derived from a future easement that (a) neither the Department nor the public has any authority to enforce and (b) originates from a Development Agreement that can be changed by the Kiawah Island Natural Habitat Conservancy or later changed by KICA with or without the Department's knowledge or consent.

4. *The Conservation Easement Referenced by the ALC Does Not Provide a Public Benefit Because The Future Execution of This Easement Is Not Contingent Upon or Connected to The Construction of The 2,513 Foot Bulkhead*

S.C. Code §48-39-30(D) contemplates that there will be some nexus between the use of the critical area and the provision of a combination of uses that maximally benefit the people. There is no evidence in the record on appeal that the execution of a currently-non-existent conservation easement is contingent upon or even relevant to the construction of the 2,513 foot bulkhead approved by the ALC on remand.[20] This lack of evidence is borne out on page 6 of the Clarification and Reconsideration Order. (R. p. 162). Judge Anderson makes no reference

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[19] At trial, the following colloquy took place regarding the admission of the Development Agreement into evidence:

> THE COURT: All right. Any objection?
> MR. CHANDLER: No objection.
> THE COURT: Mr. Whitfield-Cargile?
> MR. WHITFIELD-CARGILE: I would object on relevance, Your Honor. I don't see how this [Development Agreement] is relevant to whether or not they can utilize the critical area for a revetment. (R. p. 599, lines 12-18).

[20] When the conservation easement was mentioned during the contested case hearing, KDP's witness (Mr. Leonard Long) generally referred to a letter admitted solely for the purpose of notice and inquiry that "30 acres will one day be placed under a . . . conservation easement." (R. p. 633, lines 3-5). No evidence in the record on appeal could reasonably be inferred to suggest, much less establish, that a conservation easement that "will one day" (quoting Mr. Long) be placed on the Spit would provide a benefit to the people.

to any specific evidence beyond the future easement, but rather he makes what he describes as a *reasonable inference* in concluding that "the conservation easement given in exchange for development *requiring the bulkhead and revetment* would benefit the public by preventing further development on the Spit." (Emphasis added). (R. p. 162). Nobody knows if this future easement will *require* a bulkhead and revetment, because the easement does not exist. The relevant portion of the Development Agreement does not *require* a bulkhead and revetment as a precondition to the execution of the future conservation easement.[21] However, an equally reasonable inference, based on Mr. Bohannon's trial testimony, is that it is possible to construct a "deep foundation supported road" that could preserve the "access corridor" Judge Anderson referred to in his Order, regardless of whether the additional 2,513 foot section of bulkhead is installed or not. (R. p. 897, line 13-p. 898, line 7). Either way, it is indisputable that this future conservation easement arises as a result of KDP's agreement with the Town of Kiawah Island, not as an enforceable condition of the Department's critical area permit.

III. The ALC Erred in Concluding the Additional 2,513 Foot Bulkhead Beyond the 270 Foot Bulkhead and Revetment Did Not Adversely Affect Public Access

In establishing a guiding principle for the ALC to use on remand when applying S.C. Code Ann. Regs. §30-12(C)(1)(d),[22] this Court said that "public access is to be accorded great protection while *private economic development is suspect* and only permitted when in the public interest." Kiawah, 766 S.E.2d at 722. (Emphasis added). In this context, on remand the ALC

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[21] Paragraph 16(f) of the Development Agreement states at page 23 that

> "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).

[22] S.C. Code Ann. Regs. §30-12(C)(1)(d) provides that "[b]ulkheads and revetments will be prohibited where public access is adversely affected unless no feasible alternative exists."

erred both in his "adverse affect on public access" analysis as well as his "no feasible alternatives" analysis.

A. Will Adversely Affect Public Access

The ALC made the following findings regarding public access to the sandy shoreline in its Remand Order: "[b]ased on the testimony of Dr. Greg VanDerwerker, Sidi Limehouse, Sophia McAllister, and Bill Eiser, *this Court finds that the public uses the sandy riverbank that is exposed at low tide for recreational purposes, such as kayaking and fishing. The Court further finds that the revetment would adversely affect this recreational use where the sandy shore line would be replaced by an ACB mat.* The Court finds, as it did in its previous order, that 'the ACB mat degrades the public uses of the shoreline where the mat is approved.' However, the evidence did not establish that the bulkhead would adversely affect the recreational use of the sandy shore line." (R. p. 189). (Emphasis added). This second conclusion is contrary to the expert testimony as a whole and is not based on substantial evidence in the record.

As an initial matter, it is important to bear in mind that a 2,513 foot bulkhead without a revetment was never contemplated or advocated by KDP in their original permit application nor was it evaluated by the Department staff. In designing this structure, the ALC exceeded its authority, committed error of law and an abuse of discretion. This structure was not submitted for review in accordance with the requirements of S.C. Code Ann. §48-39-140(B) and S.C. Reg. §30-2(B) for a permit application. The law contains minimum requirements for a permit application, *including a requirement that the applicant submit "a plan or drawing showing the applicant's proposal and the manner or method by which the proposal shall be accomplished."* S.C. Code Ann. §48-39-140(B)(2). (Emphasis added). No party to this action considered this

structure (2,513 foot bulkhead alone) to be an option. The expert testimony from both sides regarding erosion and shore migration is that the currently-existing sandy shoreline will disappear with a 2,513 foot bulkhead alone. By any standard, the disappearance of the sandy shoreline would be an adverse affect on public access.[23]

Dr. Tim Kana (KDP's expert witness) testified that "without any type of revetment ... the channel of the Kiawah River in the river bend, is ... going to continue to migrate southerly towards ... the direction of the ocean." (R. p. 927, line 20-p. 928, line 5). Dr. Rob Young (SCCCL's expert witness) testified that "as the river channel migrates towards the structure, the beach is going to disappear." (R. p. 1135, lines 19-21). The most compelling testimony that undercuts the ALC's finding that the bulkhead alone would not adversely affect the recreational use of the sandy shoreline came from Mitchell Bohannon, KDP's expert engineer. He testified at length regarding why the revetment is necessary:

> A: Well, clearly, whenever you put a vertical face against -- on a shoreline in any kind of waterway, you're going to get some kind of wave action up against that. And if you don't do something to protect that toe against that reflective energy, it's going to cause even more exacerbated erosion. So that's just one of the things --
>
> Q: And when that happens –
>
> A: -- you'd have to do.
>
> Q: -- Mr. Bohannon, does that erosion occur on the bottom?
>
> A: Oh, yes.

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[23] This Court stated that "[w]ith the exception of a de minimis effect which cannot be argued here, the regulation [S.C. Code Ann. Regs. 30-12(C)] is implicated whenever a proposed bulkhead or revetment would have an adverse effect on public access." There is no evidence that a bulkhead standing alone would have only "de minimus impact upon the public use of the shoreline." (R. p. 193, Remand Order, p. 19). The essential purpose of the bulkhead/revetment system is to fix an eroding shoreline. Once the erosion reaches the bulkhead, there will be no more shoreline which the public can access and enjoy. The ALC overlooks this critical aspect of the project and its impacts.

Q: And it disrupts it?

A: Yes.

Q: In this particular design, does the revetment part, which is the articulated concrete block matted over the bank, play into reflective wave energy?

A: Yes.

Q: How so?

A: Well, it prevents that reflected wave from causing erosion on the bottom.

Q: With respect to the bottom, does it help stabilize the bottom?

A: Yes.

(R. p. 839, line 1-p. 840, line 1).

Q: There's been some discussion about the length of the revetment. How is the length and the location of the revetment determined?

A: Well, we went out in the field. I mean, we've had survey data and a number of studies done. We've actually been in the field and located kind of the beginning and end the erosion zones and that's where the revetment -- we're asking to put a revetment. It's pretty clear when you go in the field where it starts and stops.

Q: And when you scaled it out, did it come to whatever the distance is, 2,763 or 83 feet?

A: I think it's 2,783.

(R. p. 842, line 19-p. 843, line 6).

THE COURT: So the bulkhead there appears – it would only be about two or three feet?

THE WITNESS: Right. Correct. Yes, sir. Very, very ...

THE COURT: How far would the block go out?

THE WITNESS: About 40 feet (indicating).

THE COURT: Well, if the block went out 40 feet, it would pretty well cover all the sand that's in that picture?

THE WITNESS: Yes. Yes, sir.

THE COURT: Why does the block have to go out that far?

THE WITNESS: Well, because this is the zone of erosion and we believe that the shoreline is going to continue to erode. There's some velocity erosion occurring along here, as well, as the erosion's coming -- and that's part of what's causing this whole phenomenon.

(R. p. 849, line 16-p. 850, line 8).

Notwithstanding this and similar expert testimony, the ALC, without supportive evidence, found that a 2,513 foot bulkhead without a revetment would work and not adversely affect the public's access to the sandy shoreline. On page 12 of the ALC's March 22, 2016 Clarification and Reconsideration Order, Judge Anderson references testimony from Mr. Bohannon that supposedly supports this conclusion of no adverse affect on public access. Specifically, the ALC found that

> "[a]s to the viability of the stretch of bulkhead without a revetment, KDP's Exhibit 44 shows the bulkhead retaining wall extending for a significant length below the top of the revetment. Mr. Bohanon [sic] testified that the top of the bulkhead would be installed just below the top of the escarpment '. . . . so it would stop the erosion.' (Tr., p. 475:13-14).[24] As the Coastal notes [sic], the revetment helps retard erosion at the toe of the bulkhead, i.e. where the vertical face of the bulkhead penetrates the riverbank. However, the absence of a revetment does not eliminate the erosion control qualities of the bulkhead that is

[24] Mr. Bohannon's testimony immediately following that cited by the ALC above indicates that what he contemplated at the western terminus of this structure would not be just a bulkhead alone as the ALC asserts, but rather *both* a bulkhead and a revetment for the entire 2,783 feet of shoreline. (R. p. 849, lines 16-25). This testimony is consistent with and corroborates KDP's description of the structure in its joint Federal and State permit application. (R. p. 273). Question 11 on this permit application requests a "Description of the Overall Project and of Each Activity In or Affecting U.S. Waters or State critical areas." KDP described this project as follows: "Construction of a combination bulkhead/Articulated concrete Block revetment erosion control device along approximately 2783 linear feet river frontage." (R. p. 273). As such, while the ALC correctly noted on pages 11-12 of the Clarification and Reconsideration Order that "[b]ulkheads have been approved for use without an accompanying revetment throughout coastal South Carolina" (in an apparent effort to justify ordering a 2,513 foot bulkhead without a revetment), such a structure was neither applied for by KDP nor contemplated by the Department during the permitting process. (R. pp. 167-168).

designed to retain the highland behind it." (R. p. 168).

The ALC isolated Mr. Bohannon's very short statement ("so it [the bulkhead] would stop the erosion") without reference to either the context of his testimony immediately thereafter or the broader context of his above-referenced testimony where he clearly indicated that a bulkhead without a revetment will cause exacerbated erosion of the sandy shoreline. The ALC focused on these six words ("so it would stop the erosion"), rather than the entirety of Mr. Bohannon's testimony, to erroneously decide that a bulkhead alone is a solution that will maintain the public's access to the sandy shoreline while at the same time permanently hardening the location of KDP's upland. Mr. Bohannon testified that "if you don't do something to protect that toe [of the bulkhead] against that reflective energy, it's [the bulkhead] going to cause even more exacerbated erosion." (R. p. 839, lines 4-7). Nonetheless, based on only a few words taken out of context, the ALC made his own engineering determination that a 2,513 foot bulkhead would be a good solution. This is beyond the ALC's appropriate discretion.

The immediate context of his (Mr. Bohannon's) testimony referenced by the ALC in his Order is in response to questions about a photographic exhibit identified as seventy-five-E. (R. p. 848, line 18-p. 850, line 17). He testified that the area represented in this photograph

> "...is almost at the terminus. We are standing pretty close to the terminus on the western end looking -- and it's interesting because you can see how the marsh juts out here (indicating) and the escarpment ends right along here (indicating). That's the terminus of the revetment at this point. I mean, it's just so clear when you go out there where the erosion -- this erosion ends." (R. p. 848, line 22-p. 849, line 5).

As such, Mr. Bohannon's testimony is limited to the area depicted in exhibit seventy-five-E, which is where the terminus of the proposed structure at the western end would be installed if it were permitted. Plainly, he was not testifying to the entire 2,513 foot stretch of sandy shoreline

about which the ALC granted a bulkhead without a revetment. In addition to the limited context of Mr. Bohannon's testimony that the bulkhead would stop the erosion, when the ALC asked him (Mr. Bohannon) why the block revetment had to extend out forty feet in this same section of the sandy shoreline also depicted in exhibit seventy-five-E, he testified "[w]ell, because this is the zone of erosion and we believe that the shoreline is going to continue to erode. There's some velocity erosion occurring along here, as well, as the erosion's coming -- and that's part of what's causing this whole phenomenon." (R. p. 849, line 20-p. 850, line 8).

While the ALC's "adverse affect on public access" analysis focuses on the sandy shoreline, Judge Anderson also sees the public's loss of access to this sandy shoreline as an inevitable certainty at some point in the future, regardless of whether a 2,513 foot bulkhead is installed or not. Specifically, in footnote 11 of the ALC's Clarification and Reconsideration Order, Judge Anderson asserts that

> "[e]ven had the erosion not reached where the bulkhead would be, *regardless of whether a bulkhead were installed, the erosion would still occur and the sandy beach would be lost*, leaving either the bulkhead (if installed) or an escarpment (if the bulkhead is not installed). At least with a bulkhead, the public could still enjoy the beach while it exists and property owners within the development can protect their property from being lost to erosion. And either way, people will still be able to walk the riverbank." (R. p. 169). (Emphasis added).

The ALC's assertion that the sandy beach will be lost "*regardless of whether a bulkhead is installed*" is without evidentiary support and Judge Anderson failed to even attempt to identify any such evidence from the trial record to support this assertion. He simply made the kind of conclusory finding this Court proscribed in Able Communications, Inc. v. S.C. Pub. Serv. Comm'n, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986).[25]

[25] In Able Communications, Inc. v. S.C. Pub. Serv. Comm'n, this Court has made clear that "[t]he findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether

In contrast to Judge Anderson's assertion that the sandy beach will be lost *regardless of whether a bulkhead is installed*, Dr. Young testified to a cause and effect coastal process that occurs if you wall off a half a mile of shoreline. In particular, he testified 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).

On remand, the ALC has approved a structure of 2,513 additional feet of bulkhead without a revetment that will, as Dr. Young describes it, "wall off a half a mile of shoreline" and choke off the sand supply thus making the sandy shoreline disappear. (R. p. 1134, line 22).

Because the ALC wrongly assumed the inevitable loss of the sandy shoreline, he erroneously shifted the focus of his "adverse affect" analysis away from the public's access to and recreational use of the sandy shoreline. Specifically, he found that "the 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, Clarification and Reconsideration Order, p. 12). (Emphasis added). The ALC erred, as a matter of law and fact, and exceeded his discretion in

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the law has been properly applied to those findings." Able Communications, Inc. v. S.C. Pub. Serv. Comm'n, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986); Spartanburg Regional Medical Center v. Oncology and Hematology Associates of South Carolina, LLC, 387 S.C. 79, 91-92, 690 S.E.2d 783, 789 (2010). In Able, the order contained no findings of fact at all and a conclusory finding that the proposed paging service rates were reasonable. Id. The Able Court held that appellate review was "impossible" because all it could do was speculate as to "the reasons underlying the decision." Id. "This Court will not accept an administrative agency's decision at face value without requiring the agency to explain its reasoning." Kiawah Prop. Owners Group v. Pub. Serv. Comm'n of S.C., 338 S.C. 92, 96, 525 S.E.2d 863, 865 (1999); Spartanburg Regional Medical Center, 387 S.C. at 93, 690 S.E.2d at 790 (Toal, C.J., dissenting).

approving a structure without any engineering support that is designed to retain the privately-owned upland behind it while simultaneously choking off the sand supply that will cause the disappearance of the sandy shoreline. This Court stated in its 2014 opinion that "public access is to be accorded great protection *while private economic development is suspect and only permitted when in the public interest.*" Kiawah, 766 S.E.2d at 722. (Emphasis added). Instead of according great protection to the public's use and access to this sandy shoreline,[26] the ALC marginalized public use in favor of a bulkhead that will, according to the experts, exacerbate erosion and is based on an ALC-engineered structure with no substantial supporting evidence. This Court warned that favoring private interests over public interests in contravention of the CZMA and the public trust doctrine

> "begin[s] with the principle that bulkheads and revetments *should* be built and the burden is on the State, representing the public interest, to prove that the structure should not be built. This skews the consideration in favor of the private interest, treating public lands as if they are held in trust waiting for private development, rather than held in trust for the public to use as they truly are." Kiawah, 766 S.E.2d at 721. (Emphasis added).

The ALC's "adverse affect on public access" analysis erroneously favors KDP's private interests over public access in contravention of the CZMA and the public trust doctrine and without a substantial factual basis.

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[26] In 2014, this Court said that "we hold the ALC erred in interpreting regulation 30–12(C) ... in finding the public did *not* use the critical area where the bulkhead and revetment would be constructed." Kiawah, 766 S.E.2d at 722-723. (Emphasis added). Accordingly, the law of the case on remand is that the public *did* in fact use the critical area where the bulkhead and revetment would be constructed. However, on remand the ALC minimizes the evidence of the public's use and enjoyment of this sandy shoreline without justification. In footnote 8 on page 15 of the ALC's Remand Order, when referring to the testimony from Dr. Greg VanDerwerker, Sidi Limehouse, Sophia McAllister, and Bill Eiser about the public's use of the sandy shoreline, the ALC states that "[t]he extent of this use, however, appears questionable." (R. p. 189).

IV. The ALC Erred in Concluding There Was No Feasible Alternative to the Additional 2,513 Foot Bulkhead Beyond the 270 Foot Bulkhead and Revetment Along Beachwalker County Park

S.C. Code Ann. Regs. §30-12(C)(1)(d) provides that "[b]ulkheads and revetments will be prohibited where public access is adversely affected unless no feasible alternative exists." The ALC determined on remand that "there is no feasible alternative to stabilizing the shoreline other than the installation of a bulkhead."[27] (R. p. 202, Remand Order, p. 28). The evidence does not support the ALC's conclusion that the bulkhead alone is feasible.

In making his feasible alternative analysis, the ALC properly referenced S.C. Code Ann. Regs. 30-1(D)(23) as the benchmark for determining feasibility. That regulation states that "[f]easibility in each case is based on the best available information, including, but not limited to, *technical input from relevant agencies with expertise in the subject area*, and consideration of factors of environmental, economic, social, legal and technological suitability of the proposed activity and its alternatives." (Emphasis added). The ALC's feasible alternatives analysis erred in two ways.

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[27] The full text of the ALC's conclusion of law on this issue is as follows: "As to the remaining shoreline of the Spit stretching beyond Beachwalker Park, the Court concludes that there are no other feasible alternatives than to use a bulkhead, for the reasons mentioned above. In fact, using a bulkhead without a revetment affords a combination of uses that protects the use of shoreline beyond the Park and protects the uplands, as well as the public benefits gained from their development, by preventing erosion at these locations to the extent possible, thereby providing the maximum benefit to all the people in the jurisdiction of the area. *Moreover, the bulkhead will have little, if any, impact upon public use.* As noted above, the Spit is privately owned, thereby precluding the public's access from the highlands. The bulkhead will also not cover the sandy shoreline and thus will have de minimus impact upon the public use of shoreline. Therefore, regarding the remaining shoreline, the Court finds that there is no feasible alternative to stabilizing the shoreline other than the installation of a bulkhead." (R. p. 202, Remand Order, p. 28). (Emphasis added).

A. The ALC Erroneously Modified The Critical Area Permit Allowing a 2,513 Foot Bulkhead Alone Without Any Technical Support

As referenced above, S.C. Code Ann. Regs. 30-1(D)(23) requires a feasible alternatives analysis to consider "the best available information, including, but not limited to, *technical input from relevant agencies with expertise in the subject area.*" (Emphasis added). However, no such technical input exists for a 2,513 foot bulkhead without a revetment, because this alternative was raised for the first time in the ALC's Remand Order. As previously mentioned, this structure was neither applied for nor advocated by KDP nor considered by the Department. As part of his remand analysis, the ALC could have either *sua sponte* opened the record on appeal for the limited purpose of soliciting such technical input from the Department or else required KDP to submit an amended permit application for a 2,513 foot bulkhead *without a revetment* in accordance with S.C. Code Ann. §48-39-140(B)[28] and S.C. Ann. Regs. §30-2(B). Either option would have provided the Department with an opportunity to present the type of technical input required by S.C. Code Ann. Regs. 30-1(D)(23).

Without any supporting technical evidence, and specifically lacking "*technical input from relevant agencies with expertise in the subject area,*" namely the Department, the ALC's feasible alternatives analysis is erroneous and fatally flawed.

B. The ALC's Consideration of Economic Factors In Its Feasible Alternatives Analysis was Based on Assumptions Without Evidentiary Support

S.C. Code Ann. Regs. 30-1(D)(23) requires a feasible alternatives analysis to also consider economic factors associated with the proposed activity and its alternatives. In this case, the ALC considered the economic benefits of KDP developing Captain Sam's Spit.

[28] 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).

However, Judge Anderson's economic benefits analysis is flawed, because it is based on assumptions that are speculative and without evidentiary support. Specifically, the ALC said that

> "the evidence reflects that the Town of Kiawah Island, as expressed in Section 16(f) of the Development Agreement, specifically agreed to limited residential development of the Spit. The denial of the permit for the bulkhead and/or revetment contradicts that local legislative land use decision by making the residential development it sanctioned *probably incapable of realization.* It is *unlikely that KDP can satisfy the Town of Kiawah Island's ordinances* governing subdivision and road construction without stabilization of the riverbank and a protected right of way. *Stabilization of the riverbank is thus most likely essential* to the realization of the limited residential development, which further gives rise to the obligation to impose the conservation easement." (R. p. 191, Remand Order, p. 17). (Emphasis added).

None of the ALC's above-referenced highlighted assertions from the Remand Order are connected to any testimony or documentary evidence. Accordingly, the ALC's consideration of economic factors in its feasible alternatives analysis is speculative and erroneous as a matter of law.

V. The Order on Remand Makes Additional Findings That are Legally Erroneous and Unsupported by Any Evidence

Whether denial of the permit "contradicts [a] local legislative land use decision" and whether "KDP can satisfy the Town['s] ordinances . . . without stabilization of the riverbank" are irrelevant to the inquiry of whether the project meets the applicable statutory and regulatory requirements and provides no justification for authorizing the 2,513 foot bulkhead. (R. p. 191, Order on Remand, p. 17). The ALC erred in considering these factors. Similarly, whether the Town of Kiawah approved development on the Spit does not establish public benefit and it was error for the Order on Remand to address that point. (Id.) The suggestion that the Town has a goal of "developing the Spit," and that the Town's approval of the development is a public benefit, are unsupported by any evidence and not determinative of whether this project qualifies

for a critical area permit.

The Court's conclusions that the "bulkhead and revetment will not have any material effect on . . . the historical process of cyclical erosion, breach, and accretion" is unsupported by the evidence in the record. (R. p. 171). The entire purpose of the bulkhead and revetment is to halt erosion, and, if it works as intended, the structure will affect the natural erosion cycle that is occurring along the Kiawah River shoreline. The Court seems to acknowledge this fact, but the conclusions are in contradiction of the facts.

The Court finds that "allowing the erosion . . . to proceed unabated could ultimately turn the sandy shoreline into a steep escarpment inaccessible to kayakers and unsafe." (R. p. 197, Order on Remand, p. 23). No evidence supports this finding. As previously mentioned, Dr. Rob Young's testimony was that as the bank erodes, the sand feeds the shoreline and maintains it as a sandy shoreline. (R. p. 1134, line 14-p. 1135, line 2). Only if a hard erosion control structure is placed on the shoreline will it become inaccessible and unsafe as the erosion advances to the structure. The uncontested evidence was that "the people" have a right to beach kayaks and boats on the sandy banks of the Kiawah River, and to swim, fish and crab on the banks of the river in the location of the proposed revetment. S.C. Opinion Attorney General 329 (Dec. 10, 1970); US v. Kane, 461 F.Supp. 554 (EDNY 1978); Martin v. Waddell, 41 U.S. 367 (1842). This Court relied on undisputed public benefit in leaving the shoreline unarmored and allowing the natural processes to take place. Id. at 716. ("undisputed evidence . . . established that the accretion of the spit followed by the erosion of the neck of the spit and the formation of a new inlet is a natural process . . . [the Act] provides that it is to the public's benefit to protect natural processes like the cyclical erosion, breach and accretion process of the [Spit].") The Act recognizes that "there is often great value in allowing nature to take its course,

rather than having our coast become an armored, artificial landscape." Id. at 716-717.

The regulations "generally prohibit alterations to the tidelands except when the public interest requires otherwise" and "altering tidelands remains the exception to the rule." Id. The State's policy is "that the public interest is usually best served by preserving tidelands in their natural state." Id. (citing §§ 48-39-20 to -30).

This Court has already held that "[i]f there ever were a case of a substantial adverse effect on public access, it is this case," as the evidence is that public access impacts would be significant. Id. at 722. In support of its conclusion, the Supreme Court cites to "uncontroverted evidence" indicating that effects on public access would be substantial.

CONCLUSION

WHEREFORE, for the reasons stated above, 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,

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July 7, 2017
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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.

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:

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CERTIFICATE OF COUNSEL

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

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