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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Docket No. 19-ALJ-07-0089-CC

Appellate Case No.: 2021-000158

South Carolina Coastal Conservation League, Appellant,

vs.

South Carolina Department of Health and Environmental Control and
Debordieu Colony Community Association, Respondents,

INITIAL BRIEF OF RESPONDENT SOUTH CAROLINA
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

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August 16, 2021

Charleston, South Carolina

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STATEMENT OF ISSUES ON APPEAL

1. Did the ALC commit reversible error in finding that the issued permit does not violate S.C. Code Ann Section 48-39-290(A)(8), which states that new groins are only allowed on beaches that have high erosion rates?

2. Did the ALC commit reversible error in finding that the issued permit does not violate S.C. Code Ann. Section 48-39-290(A)(8)(b), which states that “groins may be permitted only after thorough analysis demonstrates that the groin will not cause a detrimental effect on adjacent or downdrift areas”?

3. Did the ALC commit reversible error in finding that the issued permit does not violate S.C. Code Ann. 48-39-290(A)(8), which states that new groins are only allowed on beaches “with erosion threatening existing development or public parks”?

STATEMENT OF THE CASE

On November 10, 2017, Respondent Debordieu Colony Community Association (hereafter “DCCA”) submitted an application for a critical area permit to the Office of Ocean and Coastal Resource Management (hereafter “OCRM”), a division of Respondent South Carolina Department of Health and Environmental Control (hereafter “SCDHEC”). (Resp. Ex. 1). This application requested permission to renourish sand and construct erosion control structures on Debidue Beach. (Resp. Ex. 1). After review, SCDHEC granted the critical area permit on January 24, 2019. (Resp. Ex. 1).

On April 3, 2019, the Belle Baruch Foundation submitted a Request for Contested Case. (Belle Baruch Request for Contested Case, Debordieu-ALC-Appeal from Belle Baruch).

On April 5, 2019, the Coastal Conservation League (hereafter “CCL”) submitted its own Request for Contested Case. (CCL Request for Contested Case, Debordieu-ALC-Appeal from CCL).

On July 1, 2019, the Administrative Law Court issued a Consolidation Order, joining the CCL and Belle Baruch cases. (Consolidation Order).

On April 3, 2020, Belle Baruch’s claim was dismissed after Belle Baruch entered into a settlement with SCDHEC. (Resp. Ex. 42).¹ SCDHEC then amended the initial permit pursuant to the terms of the settlement agreement. (Resp. Ex. 43). CCL then filed another Request for Final Review Conference on April 30, 2020. (Resp. Ex. 44a). Both SCDHEC and DCCA opposed CCL’s request for final review conference. (Resp. Exs. 44b & 44c).

¹ The settlement agreement can be found in its entirety in Resp. Ex.42, “Exhibit A”.

On May 21, 2020, the SCDHEC Board declined to hold a second Final Review Conference for the permit amendments, thereby producing the Final Agency Decision. (Resp. Ex. 44d).

On August 24-26, 2020, the case was heard before the Administrative Law Court. (*See generally* Trial Transcript). The Administrative Law Court issued a Final Order upholding SCDHEC's issuance of the permits on January 15, 2021. (*See Generally* Final Order).

STANDARD OF REVIEW

The Order of the Administrative Law Court satisfies the standard of review. When reviewing decisions from the Administrative Law Court, "the Court may not substitute its judgement for the judgement of the administrative law judge as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-610(B). The Court may only reverse or modify the decision of the Administrative Law Court when the rights of the petitioner have been prejudiced because the prior decision 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 or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B)(a-f).

Decisions from the Administrative Law Court “should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law.” *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 670 S.E.2d 674 (Ct. App. 2008). A decision is supported by substantial evidence when reasonable minds could reach the same conclusions as the Administrative Law Court when analyzing the entire record on appeal. *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 766 S.E.2d 707 (2014). Unless the interpretation is contrary to the plain language of the statute, the Court will generally give deference to an agency’s interpretation of its own language. *Id.* When the Court is presented with a mixed issue of law and fact, the Court will only overturn findings of fact based on plain error. *State v. Samuel*, 422 S.C. 596, 813 S.E.2d 487 (2018). The court then decides issues of law de novo based on the prior factual findings. *Id.*

STATEMENT OF FACTS

I. The Critical Area Permit

On November 17, 2017, DCCA submitted its application to SCDHEC for a critical area permit (hereafter “permit”). (Resp. Ex. 1). This permit application requested permission to deposit 650,000 cubic yards of sand and to construct three erosion control structures (groins) on Debidue Beach.² (Tr. p. 58 l.6- p.59 l.7). A groin is a hard erosion control structure that, when placed on beach, retains sand and prevents it from going downdrift. (Tr. p. 69 ll.9-10). Historically, groins are large and impermeable structures. (Tr. p. 15 ll.17-22). However, the proposed groins in this case are known as “low-profile” groins, which are designed to sit below the beach surface, thereby allowing beachgoers to pass over them. (Tr. p.58 ll.15-17). The proposed groins are also

semi-permeable, as they allow sand to pass through them once their trapping capacity has been reached. (Tr. p. 233 ll.20-23).

The permit application itself analyzed several different consequences of the proposed beach renourishment and installation of the groins. The reports contained within the initial permitting application analyzed the proposed project's impacts on downdrift areas, local fish habitats, and sediment composition. (Tr. p. 117 l.17- p.118 l.7). The permit application also included all public comments on the proposed project, as well as correspondence between the various entities involved in the permitting process. (Tr. p.118 ll.10-17). Finally, all appeals from both the original and amended permits were included, as well as SCDHEC's responses thereto. (Tr. p.118 ll.17-25). The permit application submitted to SCDHEC was approximately 2,600 pages. (Tr. p.119 ll.1-4).

Upon reviewing the permit application, SCDHEC granted the permit on January 24, 2019. (Tr. p. 53 ll.16-18). After SCDHEC issued the permit, both CCL and the Belle Baruch Foundation challenged the permit by submitting requests for contested cases to the Administrative Law Court. (Belle Baruch Request for Contested Case, CCL Request for Contested Case). SCDHEC then issued an amended permit on April 15, 2019, pursuant to a settlement agreement with the Belle Baruch Foundation. (Tr. p. 62 ll.10-15). This amended permit included newly-added provisions, such as mitigation triggers, which were included to address the possible detrimental effects of groins on downdrift properties. (Tr. p. 518 ll.12-24).² Generally, the function of a mitigation trigger is to set a rate of erosion that, once observed on a downdrift tract, prompts a response from the permit holder. In this case, the amended permit set a mitigation trigger of -6.0

² See also Settlement Agreement, Resp. Ex. 42a. Specific information regarding the mitigation trigger can be found under Special Condition 22.

cubic yards per foot per year (-6.0 cy/ft/yr).³ (Tr. p. 160 ll.14-20). If an erosion rate of -6.0 cy/ft/yr or greater is observed on a tract downdrift from the project site, the mitigation trigger will take effect, requiring that the groins either be removed or that the downdrift tract be renourished. (Tr. p. 162 ll.4-17). The amended permit also required that DCCA demonstrate its financial commitment to carrying out mitigation measures. (Tr. p. 518 ll.12-24). In response to this requirement, DCCA obtained a \$1 million letter of credit from South State Bank for the purpose of restoring adversely affected beaches. (Resp. Ex. 46).

Pursuant to the settlement agreement, Belle Baruch dismissed its complaint against SCDHEC, while CCL continued to challenge the issuance of the permit, requesting a contested case challenging the amended permit. (Final Order, p.2). A hearing on the merits was conducted before the Administrative Law Court on August 24-26, 2020. (Final Order, p.2). The Administrative Law Court issued an order upholding the permit on January 15, 2021. (*See Generally* Final Order).

II. History of Debordieu Colony

Debordieu Colony (located on Debidue Island) was first developed in the 1970s. (Resp. Ex. 29, Biological Assessment and Essential Fish Habitat, p.2). Debidue Island is located in Georgetown County, one of the eight designated coastal counties under South Carolina's coastal management program. S.C. Code Ann. § 48-39-10. Debidue Beach (situated on Debidue Island) is located between two tidal inlets, Pawleys Inlet to the north and North Inlet to the south. (Resp. Ex. 29, 30 Year Plan pp. 5-6 [45-46]). These inlets draw sand rapidly from the south end of

³ The original permit set a mitigation trigger of -8.1 cy/ft/yr. The amended value would trigger mitigation at an earlier juncture than the original number.

Debidue Beach, causing the shoreline to bulge out and erode more rapidly due to its prominence. (Tr. p.374 ll.10-21) (*See also* Resp. Ex. 29, 30 Year Plan, pp. 5-7 [pp. 45-47 of Ex. 29]).

Residents of Debordieu Colony have been fighting the erosion on Debidue Beach since the area's development. In 1970, timber groins were installed on Debidue Beach, but lost their functionality and were overrun by waves by the 1980s. (Resp. Ex. 29, 30 Year Plan, p. 15 [p. 55 of Ex. 29]). Developers also implemented a beach scraping program in the mid-1970s, where sand from the wet beach was pushed and molded into a protective dune after erosion events. *Id.* This project took place primarily on the south end of Debordieu Colony. *Id.* Attempting to establish a more permanent solution, developers installed a bulkhead in 1981.⁴ (Tr. p. 331 ll.9-22). However, the bulkhead was not properly designed, causing areas to be exposed beginning in the mid-1980s. (Resp. Ex. 29, 30 Year Plan p. 17 [p. 57 of Ex. 29]). The bulkhead suffered a complete structural failure in 1989 under the stress of Hurricane Hugo. (Tr. p.616 ll.9-24). This failure caused significant damage to several homes landward of the bulkhead. *Id.*

Developers and residents of Debordieu Colony have also attempted to implement "soft" erosion solutions, such as beach renourishment.⁵ The first of these renourishment projects took place in 1990 as a response to Hurricane Hugo's decimation of Debidue Beach. (Tr. p.362 ll.3-8). The following renourishment projects took place in eight-year increments, occurring in 1998 and 2006. *Id.* The most recent renourishment occurred in 2015. (Tr. p.151 ll.7-11). The first two projects (1990 & 1998) were smaller in scale, depositing approximately 100,000 cubic yards of

⁴ A bulkhead is a retaining wall that sits along a waterfront, protecting the landward side from erosion.

⁵ Beach renourishment is considered a "soft" solution to erosion, while the construction of hard structures (like groins) is considered a "hard solution." (Tr. p.577 ll.10-17).

sand on the beach. (Tr. p. 151 ll. 12-24). The latter projects (2006 & 2015) were much larger, depositing approximately 500,000-600,000 cubic yards of sand each. *Id.*

Currently, the same bulkhead/seawall that was constructed in 1981 stands on Debidue Beach.⁶ (Tr. p.107 ll.6-10). This structure runs along the southern half of Debidue Beach. (Tr. p. 391 ll.5-14). There are no current structural defects with the bulkhead, but functionally, it has recently been overtopped by a Category One hurricane that did not make landfall. (Tr. p. 107 ll.17-24). The bulkhead was also overrun by Hurricane Isaias in 2020 and is frequently exposed. (*See* Tr. p. 106 ll.12-14 & Tr. p.375 ll.1-5). The beach surrounding the bulkhead is currently not walkable at high tide and is predicted to disappear without renourishment. (*See* Tr. p. 215 ll.16-18 & Tr. p.278 ll.8-16). This structure does not affect erosion rates, as the exposure of the southern end of Debidue caused by the tidal inlets would persist with or without the seawall/bulkhead. (Resp. Ex. 29, 30 Year Plan, p.13 (53)).

III. Current Erosion

Debidue Beach is currently experiencing chronic erosion and is classified as being “highly erosional” in South Carolina’s Beachfront Management Plan. S.C. Code Ann. Regs. 30-21. Erosion occurs on a gradient at Debidue Beach, increasing from the north end of the island to south end of the island. (Tr. p.373 ll.19-24). Because of the gradient and influence of the inlets, waves tend to carry sand away from Debidue more rapidly than sand can be deposited. (Tr. p.374 ll.12-21). The resulting effect is an absence of dry sand beach at the south end of Debidue Beach and an absence of dry sand beach in front of the bulkhead. (*See* Tr. p.375 ll.5-7 & Tr. p.155 l.18- p.156 l.9).

⁶ While the structure on Debidue Island is technically a bulkhead and not a seawall due to its height, the two terms have been used interchangeably to describe the structure throughout this litigation.

For this project, Debidue Island was divided into four different sections known as “reaches.” (Final Order p.9). Reaches 1 and 2 sit on the northern end of the island, while Reach 3 sits in the area where the proposed project is to take place. *Id.* Reach 4 is comprised of downdrift properties from Debidue Beach, such as Hobcaw Beach. *Id.*

Dr. Timothy Kana, who was qualified as an expert in coastal processes,⁷ testified that “erosion” is measured in this context by evaluating volumetric sand loss, as opposed to linear shoreline change. (Tr. p.375 l.23- p.376 l.6). When evaluating erosion at Debidue Beach, Dr. Kana measured volumetric erosion by factoring out sand loss that was likely to return to the beach profile. (Tr. p. 376 ll.19-23). Using these methods, Dr. Kana testified that Reach 3 (the proposed project area) is experiencing an erosion rate of -4.2cy/ft/yr.⁸ (Tr. p.423 l.23- p.424 l.1). Dr. Kana classified this rate as “moderate to high.” (Tr. p.424 ll.2-9). Dr. Kana further testified that when a coastal area is in “equilibrium”, there is no net change in sand volume and that Debidue Beach was not in equilibrium, as it is losing sand volume to erosion. (*See* Tr. p.385 ll.13-22 & Tr. p.387 ll.12-15).

Matt Slagel, a Beachfront Permitting Project Manager with SCDHEC, testified that SCDHEC considers any shoreline change rates above -3ft/yr as “high”. (Tr. p.73 ll.21-24). Although this number is not derived from statute or regulation, it has been used as the historic baseline for “high” erosion since the creation of the Office of Ocean and Coastal Resource

⁷ Dr. Kana was qualified as an expert in beach erosion, coastal geomorphology and processes, sediment buckets and transport, beach restoration, planning design and implementation, and tidal inlet sediment dynamics. (Tr. p.367 ll.5-10).

⁸ This equates to an approximately -5.5ft/yr linear shoreline rate. (Final Order p.9).

Management⁹ program area of SCDHEC.¹⁰ (Tr. p.75 1.14-p.76 1.22). Furthermore, the most recently-published average shoreline change rate for South Carolina was -1.5ft/yr. (Final Order, p.10). In order to determine the validity of this figure, Mr. Slagel analyzed beach profile data from across the state and confirmed that the -3ft/yr number was “reasonable.” (Tr. p.77 11.7-13). However, the -3ft/yr threshold used by SCDHEC is a linear number based on shoreline change, different from the volumetric figure submitted by DCCA in its original permit application. (Tr. p.78 1.21-p.80 1.5). In order to analyze DCCA’s application in accordance with the -3ft/yr threshold, SCDHEC converted the volumetric rate submitted by DCCA to a linear/shoreline change rate. (Tr. p.81 1.1-p.82 1.2). Using this conversion, SCDHEC equated the -8.1cy/ft/yr volumetric erosion rate submitted by DCCA to an approximately -10ft/yr linear/shoreline rate. (Tr. p.81 11.22-25).

IV. Downdrift Impacts of Proposed Project

Property owned by the Baruch Foundation (hereafter “Baruch property”) sits downdrift from the proposed project site. (Tr. p. 28 1.3- Tr. p. 30 1.3). The Baruch property contains a beach known as “Hobcaw Beach” and is designated as a National Estuarine Research Reserve (NERR).¹¹ *Id.* As a part of the permit application, DCCA submitted a “Downdrift Impacts Report.” (Resp. Ex. 1f). This analysis reviewed erosion rate calculations and ran models to predict the impact of the groin’s construction on area’s like Hobcaw Beach. (Tr. p.56 1.22-p.57 1.11). These models indicated that if the groins are constructed, it is possible that up to 7,000 cubic yards of sand may

⁹ The Office of Ocean and Coastal Resource Management was originally created by the General Assembly as the “Coastal Council.”

¹⁰ This shoreline change rate figure was not only recognized by Mr. Slagel, but also endorsed by expert witness and former SCDHEC employee, Bill Eiser. (Tr. p.595 1.19-p.596 1.5).

¹¹ The purpose of a NERR is to protect and study estuaries in an effort to support coastal management. The reserve is located on the Baruch property and is approximately 18,000 acres. The program is managed by the University of South Carolina.

not reach downdrift tracts like Hobcaw Beach. (Tr. p.72 l.7- p.73 l.6). This would result in a 1.6cy/ft/yr increase in erosion on Hobcaw Beach. (Resp. Ex. 1f p.78). However, the construction of the groins does place the obligation of renourishment on DCCA, an obligation that would not be present under the so-called “no structures-alternative.” (Tr. p. 73 ll.7-12). Also, past renourishment efforts have had a greater net positive impact on downdrift erosion than the predicted 1.6cy/ft/yr impact of the proposed groins. (Resp. Ex. 1f p.78). Furthermore, the bulkhead on Debidue Beach will likely fail without renourishment and without the construction of the groins, renourishment is not required and unlikely to occur. (Tr. p.271 l.17-p. 272 l.10). The Downdrift Impacts Report also found that the construction of the groins would have no significant impact on the NERR located on the Baruch Property. (Tr. p.109 l.1-p.110 l.9).

One specific concern associated with the downdrift impacts of the proposed project is that certain areas of Hobcaw Beach would be disproportionately impacted, and that impacts at these smaller sites would not be reflected when analyzing erosion rates on the entire tract. (Tr. p.141 l.19- 142 l.2). SCDHEC recognized the validity of this concern, and added Special Condition 22 into the amended permit, which shrank the spacing between monitoring points from every 500 ft to every 200 ft. (Tr. p.141 l.19-p.142 l.12) (*See also* Resp. Ex. 44c). This more focused approach ensures that disproportionate impacts on smaller areas of Hobcaw Beach are accounted for. *Id.* Special Condition 22 also lowered the mitigation trigger for these areas from -8.1cy/ft/yr of erosion to -6.0cy/ft/yr. (Tr. p.158 l.19-p.160 l.10). This trigger is lower than the historical erosion rate, allowing mitigation to occur before the historical rate of erosion is reached. *Id.*

In determining the validity of the submitted Downdrift Impacts Report, SCDHEC relied on input from the U.S. Bureau of Fish and Wildlife and the U.S. Army CORE of Engineers, both of whom found the methodology of the study to be sound. (Tr. p.136 l.22-p.137 l.25). At trial, the

validity of the Downdrift Impacts Analysis was disputed by Appellant's expert Dr. Robert Young on the grounds that the analysis used inappropriate modeling to predict the impacts of the proposed project.¹² (Tr. p.256 l.20-p.257 l.25). However, Respondent's expert, Dr. Haiqing Kaczkowski,¹³ testified that she excluded data from the surrounding inlets when running the Genesis model and that the erosion rate for the proposed project area was "high". (Final Order, pp.9 and 15). Furthermore, the Administrative Law Court found the findings of Dr. Kaczkowski to be credible, and that downdrift tracts such as Hobcaw Beach would not be detrimentally impacted by the proposed project. (Final Order, p.16).¹⁴

The proposed groins have a trapping capacity of 50,000 to 75,000 cubic yards of sand. (Tr. p.440 l.21-p.442 l.24). Once this trapping capacity is reached, excess sand will flow freely downdrift as it normally would. *Id.* The initial proposed renourishment that is to occur in conjunction with the installation of the groins will deposit sand in excess of the groins' trapping capacity. (Tr. p.627 l.16- p.628 l.2). The installation of the groins also places an ongoing renourishment obligation upon DCCA, so the downdrift areas will continue to receive excess sand. *Id.* Furthermore, the anticipated post-installation downdrift sand loss is less than the historical net positive gains of past renourishment efforts. (Resp. Ex. 1f p.93).

¹² Dr. Young testified that in his opinion, the "GENESIS" modeling software relied upon in the Downdrift Impacts Report was inappropriate due to Debordieu's proximity to inlets.

¹³ Dr. Kaczkowski is an employee at Coastal Science & Engineering and ran the models for the Downdrift Impacts Report. Dr. Kaczkowski was qualified as an expert in modeling studies and evaluation of coastal engineering projects, and design and engineering of erosion control structures. (Tr. p.533 ll.15-20).

¹⁴ The weight and credibility given to expert testimony is to be determined by the trier of fact. *Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 402, 411, 563 S.E.2d 109, 114 (Ct. App. 2002). In the Administrative Law Court, the judge acts as the trier of fact. *Risher v. S.C. Dep't of Health & Env't Control*, 393 S.C. 198, 207, 712 S.E.2d 428, 433 (2011). Findings of fact should only be reversed upon a finding of plain error. *See supra State v. Samuel*, 422 S.C. 596, 813 S.E.2d 487 (2018). Therefore, the ALC's findings as to the weight of expert testimony should only be reversed upon a finding of plain error.

Pre-renourishment¹⁵ land loss rates of downdrift Hobcaw Beach hovered around 1 acre per year. (Resp. Ex. 1f p.93). This rate decreased to approximately .25 acres per year after renourishment efforts on Debidue Beach began. *Id.* While the proposed project will not reverse the historic land loss rate on Hobcaw Beach, it will keep it below the historic rate of 1 acre/yr. *Id.* The monitoring provisions of the amended permit will ensure that land loss stays below this rate. *Id.* Furthermore, the net effect of the proposed project is positive along all affected reaches relative to each reach's long-term erosion rates. (Resp. Ex. 1f p.98 Table 5.1). The proposed project will also stabilize Debidue Beach and allow the shoreline to move towards equilibrium.¹⁶ (Resp. Ex. 1f p.98, Table 5.1).

V. Threatened Structures on Debidue Island

Residents of Debordieu Colony consider homes located behind the bulkhead/seawall to be threatened by erosion. (Tr. p.39 ll.1-5). Up to eight homes at the southern end of Debordieu Colony have had ocean water come very close to their front doors. (Tr. p.40 l.23-p.42 l.2). Although no regulatory guidance exists for when a structure is classified as “threatened”, SCDHEC made the determination that structures south of the bulkhead are threatened by erosion. (*See* Tr. p.103 ll.5-14 & Tr. p. 104 l.24-p.105 l.9). This determination was made using observations from site visits and SCDHEC precedent¹⁷ regarding threatened structures. (Tr. p.105 ll.2-5). Using NOAA imagery, SCDHEC observed that after major storms, the dunes protecting the landward homes had largely eroded away and erosion occurred landward of the bulkhead. (Tr. p.106 ll.11-24).

¹⁵ Time period between 1939-1992.

¹⁶ The proposed groins will bring Debidue Beach to approach equilibrium by anchoring the northern end of Hobcaw and allowing a more natural shoreline to form between the southernmost groin and the shoal. (Resp. Ex. 1f p.50).

¹⁷ This precedent may include past SCDHEC practices of determining whether or not a structure is threatened. One of these past precedents involves reliance on emergency guidelines, which state that any structure within 20ft of erosion is “eminently threatened”. (Tr. p.103 l.18-p.104 l.1).

Furthermore, Debordieu is listed as “highly erosional” in S.C. Code Ann. Regs. 30-21, which further informed SCDHEC’s decision to classify the structures in this case as threatened. (Tr. p.146 l.17-p.147 l.20). As previously mentioned, no clear guidelines exist for when a structure is so threatened that it necessitates a hard structure solution. (Tr. p.152 l.7-p.153 l.7). Emergency guidelines provide some guidance to when a structure is threatened (structures within 20ft of erosion are “eminently threatened”), but even so, SCDHEC is forced to predict which structures may need protection in the future when erosion brings them within the 20ft boundary. *Id.*

Appellant’s witness, Dr. Robert Young, testified that water has run over the bulkhead during storm events. (Tr. p.252 ll.12-14). Dr. Young also testified that in his opinion, a structure can be threatened before it falls into the sea. (Tr. p.271 ll.3-7). The structures south of the bulkhead have already had storm surge at their doorsteps during storm events, and the dry sand beach in front of the bulkhead will fail without renourishment. (Tr. p.271 ll.8-16). Furthermore, the beach in front of the bulkhead is currently impassible at high tide. (Tr. p.342 ll.12-13). Having this dry sand beach in front of the bulkhead acts as a buffer to protect landward structures. (Tr. p.622 l.17-p.623 l.2). Respondent’s expert Bill Eiser testified that there are threatened structures at Debidue Beach, as the structures south of the bulkhead are threatened due to its poor design.¹⁸ (Tr. p. 616 ll.11-24). Many homes south of the bulkhead have no “shoreline armory” for protection on a highly erosional section of the beach, where renourishment depositions and artificial dunes are quickly lost. *Id.*

¹⁸ The bulkhead does not protect against storm surges due to its poor design. The main design flaws of the bulkhead are its dimensions, as it is not high enough to keep storm water from washing over it and not deep enough into the ground to prevent water from daily wave impacts from washing underneath and behind the bulkhead. (Tr.p.619 l.8- p.620 l.5).

ARGUMENT

Statutory Overview

The Legislature established the Coastal Division (a/k/a Office of Ocean and Coastal Resource Management or “OCRM”) of SCDHEC on July 1, 1994. S.C Code Ann. § 48-39-35. Under the Coastal Tidelands and Wetlands Act, SCDHEC (through OCRM) has the power to grant and deny permits, promulgate and administer rules and regulations of the Coastal Tidelands and Wetlands Act, and to “direct and coordinate the beach and coastal shore erosion activities among the various state and local governments.” S.C. Code Ann. §48-39-50. While the General Assembly acknowledges in S.C. Code Ann. §48-39-250 that hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach has not proven effective, S.C. Code Ann. §48-39-290 allows groins to be constructed when an applicant demonstrates a high rate of erosion that threatens existing development. Furthermore, groins may be constructed when an applicant demonstrates that the proposed groins will not cause a detrimental impact to downdrift tracts.¹⁹ S.C. Code Ann. §48-39-290(A)(8)(b). The amended permit in this case meets these conditions, and each will be addressed in turn.

I. The ALC did not commit reversible error in finding that the issued permit does not violate S.C. Code Ann Section 48-39-290(A)(8), which states that new groins are only allowed on beaches that have “high erosion rates.”

Upon reviewing the entire record, reliable, probative, and substantial evidence is present to support the ALC’s conclusion that erosion at Debordieu colony is “high” as required by S.C. Code § 48-39-290 (A)(8). Dr. Kana²⁰ testified that the erosion rate for the proposed project area

¹⁹ This section also requires a demonstrated financial commitment on behalf of the applicant. This requirement has not been disputed in Appellant’s Initial Brief and DCCA has obtained a letter of credit for removal of the groins and beach renourishment. (See Resp. Ex. 46).

²⁰ See *supra* f.14 regarding the ALC’s duty to determine the weight and credibility of expert testimony.

(Reach 3) was -4.2cy/ft/yr. (Tr. p.423 l.23-p.424 l.1). This equates to a -5.5ft/yr linear shoreline change rate, a rate almost twice the -3ft/yr threshold historically used by SCDHEC. *Id.* This evidence demonstrates that SCDHEC’s classification of the erosion within Reach 3 as “high” is not arbitrary, capricious, or contrary to the statutory intent. Rather, this interpretation is consistent with SCDHEC’s historical classification of erosion rates based on the -3ft/yr threshold. Furthermore, Dr. Haiqing Liu Kaczkowski²¹ testified that the erosional rate of Debidue Island was “high”, providing further corroboration for SCDHEC’s determination.

The robust methods used by SCDHEC in determining that erosion on Debidue Island was “high” demonstrate that the determination was not arbitrary nor capricious. SCDHEC relied upon a historic erosion threshold (-3ft/yr) that is standard for the department. (Tr. p.76 ll. 7-10). In order to validate this threshold, Matt Slagel of SCDHEC evaluated beach monument data from across the state. (Tr. p. 74 l.21- p. 75 l.15). After looking at the data and relying upon his experience with coastal processes, Mr. Slagel determined that the -3ft/yr figure was reasonable. (Tr. p. 77 ll. 7-13). Furthermore, Mr. Slagel converted the volumetric erosion rate submitted by DCCA to a linear erosion rate to ensure consistent units of measurement when evaluating the proposed project’s statutory compliance. (Tr. p.145 ll.4-19). Mr. Slagel then compared this converted erosion rate to the historic threshold and determined that erosion on Debidue Island was “high.” (Tr. p. 147 l.21- p. 148 l.11). This determination was corroborated by Dr. Kana and Dr. Kaczkowski, who both testified that at least some portions of Debidue Island were experiencing “high” erosion rates. *See* (Tr. p.428 ll.23-25). *See also* (Tr. p. 581 ll.21-24). The thoroughness of Mr. Slagel’s methods, along with the corroboration of his determination by experts in coastal processes, demonstrates

²¹ *See supra* fn. 14 regarding the ALC’s duty to determine the weight and credibility of expert testimony.

that there was more than sufficient evidentiary support in the record and that SCDHEC's determination of "high" erosion on Debidue Island is neither arbitrary nor capricious. Moreover, to the extent that there is any ambiguity, SCDHEC is entitled deference. *See Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 766 S.E.2d 707 (2014).

The Administrative Law Court determined that "the preponderance of the evidence shows that the erosion rate at the Project area is high." (Final Order p.12). In making this determination, the Court cited to SCDHEC's historical interpretation of "high" erosion²² and its consistency with Dr. Kana's testimony. The ALC's evidentiary conclusions upholding SCDHEC's determination are factual findings that should only be reversed upon a finding of plain error. *See Supra State v. Samuel*. However, the Administrative Law Court's Final Order affirming SCDHEC's determination was *not* plain error, as it was based on the aforementioned substantial evidence of historical precedent and expert testimony. Therefore, the Administrative Law Court's determination should not be overturned.

In sum, substantial evidence exists for SCDHEC to reasonably determine that erosion rates are "high", and the proposed project area meets the standards of S.C. Code Ann. §48-39-290(A)(8). Furthermore, SCDHEC's determination that the proposed project complies with the erosion rate requirement set forth in S.C. Code Ann. §48-39-290(A)(8) is neither arbitrary nor capricious, as the determination was based on standard departmental methodology and was corroborated by expert testimony. Finally, sufficient evidence exists in the record to support the Administrative

²² Which based on the testimony of experts Matt Slagel and Bill Eiser, the Court found to be "significantly persuasive." (Final Order p.12).

Law Court’s finding that the “uncontested erosion rate of -4.2 cy/ft/yr or -5.5 ft/yr is a high erosion rate under section 48-39-290 (A)(8).”²³ See Final Order, p. 26.

II. The ALC did not commit reversible error in finding that the issued permit does not violate S.C. Code Ann. Section 48-39-290(A)(8)(b), which states that “groins may be permitted only after thorough analysis demonstrates that the groin will not cause a detrimental effect on adjacent or downdrift areas.”

S.C. Code Ann. §48-39-290(A)(8)(b) states that a hard erosion control structure may be constructed once an applicant demonstrates that the proposed project “will not cause a detrimental effect on adjacent or downdrift areas.” The Appellant argues that 48-39-290(A)(8)(b) should be construed so narrowly as to exclude the Department’s mitigation requirement as beyond the scope of the *detrimental-effect* statutory language. (See Appellant’s Brief, pp. 26-28). Such a restrictive statutory reading would constrain SCDHEC’s ability to issue groin permits to such a degree as to make the statute a meaningless grant of authority by the General Assembly. The Supreme Court has stated that proper statutory construction/interpretation should consider “not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law.” *Whitner v. State*, 492 S.E.2d 777, 779 (S.C. 1997) (citing *South Carolina Coastal Council v. South Carolina State Ethics Comm’n*, 306 S.C. 41, 410 S.E.2d 245 (1991)). Similarly, this Court held that “[l]anguage in a statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose.” *Consumer Advoc. for State v. S.C. Dept. of Ins.*, 725 S.E.2d 708, 710 (S.C. App. 2012) (citing

²³ In evaluating the testimony of Appellant’s expert Dr. Robert Young, the Administrative Law Court “found Dr. Young’s testimony to be less credible than the opposing evidence. See Final Order p.12. Dr. Young testified that the undisputed erosion rate was “moderate”, relying on his own qualitative observations and the “Jackson Report.” The Administrative Law Court doubted the accuracy of the Jackson Report, reasoning that the report’s finding of a mean shoreline change rate of -6 to -7 ft/yr was artificially high. See Final Order p.11. This artificial inflation was due to the Jackson Report’s failure to filter out renourishment events when evaluating shoreline change. (See Final Order p.11; Tr. p.655 l.17- p. 656 l.4).

Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992)”. One of the state’s policies under S.C. Code Ann. § 48-39-30(B) is to “encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone.”²⁴ The Appellant’s restrictive reading of S.C. Code Ann. §48-39-290(A)(8) excluding a mitigation requirement undercuts the state’s policies and would make the statute a meaningless grant of authority.

S.C. Code Ann. §48-39-290(A)(8) forbids groins that have a “detrimental effect” on downdrift areas. The Administrative Law Court found Appellant’s evidence of detrimental impacts to be unpersuasive due to the anticipated renourishment attached to the proposed project.²⁵

²⁴ S.C. Code Ann. § 48-39-30(A)-(B):

(A) The General Assembly declares the basic state policy in the implementation of this chapter is to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State.

(B) Specific state policies to be followed in the implementation of this chapter are:

(1) To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;

(2) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations;

(3) To formulate a comprehensive tidelands protection program;

(4) To formulate a comprehensive beach erosion and protection policy including the protection of necessary sand dunes.

(5) To encourage and assist state agencies, counties, municipalities and regional agencies to exercise their responsibilities and powers in the coastal zone through the development and implementation of comprehensive programs to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values as well as to the needs for economic and social development and resources conservation.

²⁵ The ALC found that “Indeed, Hobcaw will receive a benefit from the Project...” (Final Order p.16). The ALC made this determination because it gave more credibility to the testimony of

Furthermore, it is unclear whether the groins have sufficient trapping capacity to significantly increase downdrift erosion in a way that is harmful, as the initial proposed renourishment will deposit sand in excess of the trapping capacity of the groins. (Tr. p.627 l.16- p.628 l.2). Also, the anticipated erosion rate increases resulting from the proposed project are less than the measured net positives of past renourishment projects, making it possible for erosion rates on Hobcaw Beach to decrease or remain constant from the future renourishment efforts that are attached to the proposed project. (Resp. Ex. 1f p.78). Furthermore, no negative long-term effects are anticipated for erosion rates in any of the four reaches. (Resp. Ex. 1f p.78).

While the installation of the groins will cause some effects in the downdrift tract, the Administrative Law Court found that these effects will not be *per se* “detrimental” as required by statute. (Final Order p.16). Because of the aforementioned mitigation measures, the installation of the groins will not be harmful or damaging to the areas downdrift of the project site, thus satisfying the statutory requirement under S.C. Code Ann. §48-39-290(A)(8).

The ALC’s favorable consideration and affirmation of the mitigation component of the permit in its statutory analysis was not reversible error, but rather was a recognition of OCRM’s general purpose and the state’s policies under S.C. Code Ann. § 48-39-30. SCDHEC did not exceed its statutory power in allowing mitigation. S.C. Code Ann. §48-39-50 allows SCDHEC to administer and interpret regulations contained in the Coastal Tidelands and Wetlands Act, including §48-39-290(A)(8). The evidentiary findings made by the ALC in support of SCDHEC’s interpretation are factual. *See supra* fn.14. Therefore, the ALC’s findings may only be reversed upon a finding of plain error. *See supra State v. Samuel*. The ALC’s findings were based upon the

Respondent’s experts Dr. Kana and Dr. Kaczkowski. As previously mentioned, credibility of expert witnesses is a determination for the trier of fact and should only be reversed upon a finding of plain error. *See supra* fn. 14.

testimony of multiple experts, thereby foreclosing Appellant's assertion of reversible error. For this same reason, the findings of the ALC were neither arbitrary nor capricious, nor were they clearly erroneous based on the evidence on the whole record. Moreover, SCDHEC's interpretation of S.C. Code Ann. §48-39-290(A)(8)(b) so as to include a mitigation requirement is neither arbitrary, capricious, nor contrary to statutory intent and thus, according to *Kiawah Dev. Partners*, is entitled to deference. *Kiawah*, 411 S.C. at 16, 766 S.E. 2d at 707.

III. The ALC did not commit reversible error in finding that the issued permit does not violate S.C. Code Ann. Section 48-39-290(A)(8), which states that new groins are only allowed on beaches "with erosion threatening existing development or public parks."

S.C. Code Ann. §48-39-290(A)(8) requires permit applicants for groins to demonstrate that erosion is threatening existing development. Currently, eight structures landward of the bulkhead in Debordieu Colony have had ocean water wash to their doorsteps during storm events. (Tr. p.40 l.12- p.42 l.2). Based on site observations and post-storm satellite imagery,²⁶ SCDHEC made the determination that the structures landward of the bulkhead were "threatened." (Tr. p.105 ll.2-5). Current erosion along Debidue Beach is also threatening structures landward of the bulkhead. (Tr. p.106 ll.11-24). The dry sand beach seaward of the bulkhead is currently impassible at high tide, with ocean water reaching the bottom of the bulkhead. (Tr. p.342 ll.12-13). Furthermore, the poor design of the bulkhead itself threatens the landward structures. (Tr. p.619 ll.8-19). The bulkhead is not tall enough to prevent waves from overtopping it during storm events and not deep enough to prevent water from daily wave action from slipping underneath the bulkhead.²⁷ Both design defects cause erosion to occur landward of the bulkhead, resulting in structures being threatened by loss of dry sand protection. *See* (Tr. p. 619 ll.8-19), *see also* fn. 18.

²⁶ This imagery showed that storm events had caused erosion to occur landward of the bulkhead. (Tr. p. 106 ll.11-24).

²⁷ *See supra* fn. 17.

Appellant argues that structures landward of the bulkhead are only threatened “in the context of storm events” and that S.C. Code Ann. § 48-39-280 (A)(8) only allows for groin construction when existing developments are threatened by *daily* erosion. (See Appellant’s Brief, p. 25). As cited by Appellants, the Administrative Law Court found that “the bulkhead is exposed to wave action on a daily basis.” (Final Order, p.26). Due to the design flaws in the bulkhead, water from the daily wave action is able to seep underneath the bulkhead, potentially causing landward erosion. (Tr. p. 616 ll.11-24).

Contrary to CCL’s Argument (See Appellant’s Brief p. 12), S.C. Code Ann. § 48-39-280 (A)(8) does not specify that only erosion from *daily* wave action can “threaten” structures. The statutory language simply reads “erosion”, without qualification. Appellant urges a narrow reading of the statute that is not present when reading the plain language. Statutory interpretation should not expand nor limit a statute’s operation and should affirm the statute’s plain meaning whenever possible. See *Peake v. S.C. Dep’t of Motor Vehicles* 375 S.C. 589, 654 S.E. 2d 284 (Ct. App. 2007). Appellant’s interpretation would thrust a limitation upon the *threatened structures* requirement that is not present in the statute. Conversely, both SCDHEC and the Administrative Law Court interpreted the term “erosion” to refer to both storm-induced erosion and daily wave-induced erosion.²⁸ (Final Order p.16). This interpretation does not inject a limitation into the statute but allows it to be interpreted in accordance with its plain meaning and in accordance with the standards of statutory interpretation.

²⁸ Appellant’s expert Dr. Robert Young testified that in order for a structure to be threatened, it must be within ten times the annual erosion rate of the mean high tide line. (Final Order p.18, fn.17). However, this opinion was not based on any particular regulation or statute. *Id.* For this reason, the ALC “did not find (Dr. Young’s) testimony to be persuasive.” *Id.*

Conclusion

WHEREFORE, Respondent, South Carolina Department of Health & Environmental Control (SCDHEC), respectfully requests that the Court affirm the decision of the Administrative Law Court, upholding SCDHEC's decision to grant the permit.

Respectfully submitted,



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August 16, 2021
Charleston, South Carolina

*Attorney for Respondent
South Carolina Department of Health
and Environmental Control*

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Aug 16 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Docket No.: 19-07-0089-CC

Appellate Case No.: 2021-000158

South Carolina Coastal Conservation League,Appellant

vs.


South Carolina Department of Health and Environmental
Control and DeBordieu Colony Community Association,Respondents,

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing *Initial Brief of Respondent South Carolina Department of Health and Environmental Control and Designation of Matter to be Included in the Record on Appeal* upon the Appellants by via electronic delivery addressed as follows:

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August 16, 2021
Charleston, South Carolina



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Aug 16 2021

SC Court of Appeals

August 16, 2021

Via email to ctappfilings@sccourts.org

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
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Re: *South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control & DeBordieu Colony Community Association*
Docket No. 19-ALJ-07-0089-CC
Appellate Case No. 2021--000158

Dear Ms. Kitchings:


Please find enclosed for filing Initial Brief of Respondent South Carolina Department of Health and Environmental Control and Designation of Matter to be Included in the Record on Appeal in the above-referenced matter.

By copy hereof, we are serving same via electronic delivery to all counsel of record as reflected in the enclosed Certificate of Service.

Please address all correspondence in this matter to my attention at 1362 McMillan Avenue, Suite 400, Charleston, South Carolina, 29405 and/or churdabd@dhec.sc.gov.

Thank you for your attention in this matter.

Very truly yours,


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BDC/jhd

Enclosures

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