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**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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

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

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

vs.

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

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**BRIEF OF APPELLANT**

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## **STATEMENT OF ISSUES ON APPEAL**

1. Did the ALC err in finding that proposed permit does not violate S.C. Code Ann. §48-39-290(A)(8), which states that new groins are only allowed “on beaches that have high erosion rates”?
2. Did the ALC err in finding that proposed 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”?
3. Did the ALC err in finding that proposed permit does not violate S.C. Code Ann. §48-39-290(A)(8)(b), which states that “[g]roins may be permitted only after thorough analysis demonstrates that the groin will not cause a detrimental effect on adjacent or downdrift areas”?

## STATEMENT OF THE CASE

Respondent, Debordieu Colony Community Association (“DCCA”) submitted an application for a critical area permit (“Permit”) to Respondent, South Carolina Department of Health and Environmental Control (“DHEC”) to construct three erosion control structures known as groins on November 10, 2017. (R. p. 1094). The DHEC staff issued the Permit on January 24, 2019. (R. p. 3844). On February 7, 2019, Appellant, South Carolina Coastal Conservation League (“Appellant”) filed its Request for Final Review Conference with the DHEC Board (R. p. 54) and on March 7, 2019, the DHEC Board denied Appellant’s Request. (R. p. 255).

Appellant filed its Request for Contested Case Hearing on April 5, 2019. The Belle Baruch Foundation (“Baruch”) also filed a Request for Contested Case Hearing (R. p. 236) and the two contested cases were consolidated for hearing. (R. p. 3). Prior to the hearing on the merits, Baruch, DCCA and DHEC entered into a settlement agreement (R. p. 11) whereby DHEC would amend the Permit and the ALC dismissed Baruch’s contested case. (R. p. 6). DHEC issued an Amended Permit on April 15, 2020. (R. p. 1089). A contested case hearing was conducted on August 24-27, 2020. The Administrative Law Judge issued his Final Order on August, 2020. (R. p. 19). Appellant filed a timely Notice of Appeal on February 16, 2021.

## STANDARD OF REVIEW

This Court may affirm the ALC or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the Appellant have been prejudiced because the finding, conclusion, or 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. § 1-23-380(5).

The appellate court “will correct the decision of the ALC if it is affected by an error of law, S.C. Code Ann. § 1–23–380(5)(d) (Supp.2010), and questions of law are reviewed de novo.” S.C. Dept. of Revenue v. Blue Moon of Newberry, Inc., 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012), reh'g denied (May 4, 2012) (citing Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)). When the evidence gives rise to but one reasonable inference the question becomes one of law for the courts to decide. Kinsey v. Champion Am. Service Center, 268 S.C. 177, 181, 232 S.E.2d 720, 722 (1977); Sharpe v. Case Produce Co., 329 S.C. 534, 545, 495 S.E.2d 790, 795 (Ct. App.1997) (rev'd on other grounds). Under this standard, a reviewing court may reverse or modify an agency decision based on errors of law. Turner v. South Carolina Dept. of Health & Env'tl. Control, 377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008).

## STATEMENT OF FACTS

### I. Factual Background Concerning the Permit in Question.

DeBordieu Colony is a private community that includes some beachside residences in Georgetown County and Respondent, DeBordieu Colony Community Association (“DCCA”) is the entity that oversees DeBordieu Colony. DeBordieu Colony and DCCA are not to be confused with the island and beach where DeBordieu is situated. The island and beach are called Debidue. DeBordieu Colony installed a wooden bulkhead in 1981. (R. p. 789 ll.1-3). Despite the obvious erosion issue that prompted the installation of the bulkhead, approximately four years after the bulkhead was installed another section of DeBordieu Colony, Ocean Green, was constructed to the south of the bulkhead. (R. p. 745-746). In 1989 the bulkhead was damaged, like so much of the coast, by Hurricane Hugo. (R. p. 746 l.12 - p. 747 l.14). Prompted by the devastation that Hurricane Hugo caused, DCCA funded its first beach renourishment project in 1990. (R. p. 746-747). Since that initial project, DCCA has funded a beach renourishment project every 8 to 9 years with renourishments occurring in 1998, 2006 and 2015. (R. p. 851 ll. 18-22; p. 915 l.25 – p. 916 l.6). In conjunction with its latest renourishment project, DCCA has sought approval to construct three groins with each measuring several hundred feet on the public beach.

Groins are “hard” erosion control structures that trap sand from moving down the beach and, when operating, effectively starve the downdrift beach of sand. This effect is well-documented.<sup>1</sup> (R. p. 483 ll.6-10; p. 853 ll.2-6). For several years, DHEC-OCRM permitted the construction of new groins on South Carolina beaches even though they were not among the exceptions to the prohibition of new construction seaward of the baseline. See South Carolina

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<sup>1</sup> S.C. Code Reg. 30-1(D)(26) defines a groin as “a structure designed to stabilize a beach by trapping littoral drift.”

Coastal Conservation League v. South Carolina Dep't of Health and Env'tl. Control, 354 S.C. 585, 588-89, 582 S.E.2d 410, 412 (2003) (citing S.C. Code Ann. § 48-39-290).

In 2002, the South Carolina General Assembly amended the Beachfront Management Act and specifically allowed construction of new groins but the Legislature, recognizing the inherent dangers of groins, limited the areas in which new groins could be constructed. “New groins may be allowed only on beaches that have high erosion rates with erosion threatening existing development or public parks.” S.C. Code Ann. §48-39-290(A)(8). New groins are also only allowed “after thorough analysis demonstrates that the groin will not cause a detrimental effect on adjacent or downdrift areas.” *Id.* Even after an applicant has met these criteria, the legislation also requires that several safeguards be implemented to prevent neighboring beaches from being victimized by the structures.

## **II. The Beach Where the New Groins are to be Located Experiences a Moderate Erosion Rate.**

South Carolina beaches are dynamic with some areas relatively stable while others erode at great rates and still others gain sand through accretion. (R. p. 726 ll.1-13). There is a wide variance of erosion rates along the coast in particular. (R. p. 725 l.23 – p. 726 l.8). S.C. Code Reg. 30-21 documents various erosion rates along South Carolina beaches. Some rates are minimal; for example, Garden City only registers erosion rates of -1.25 to -1.5 ft/yr while Surfside Beach’s erosion rate is listed as -0.9 ft/yr. However, several other areas have erosion rates exceeding -9 ft/yr including the following: Daufuskie Island -11.1 ft/yr at one marker, -10.1 at another marker; Bay Point Island upcoast erosion ranging from -18 ft/yr to -25 ft/yr; Little Capers Island erosion rate of -25 ft/yr; Pritchards Island southwest -11.54 ft/yr; Hunting Island has six markers ranging from -15.5 ft/yr and -10.0 ft/yr; Kiawah Island shows a rate of -12.63 ft/yr at one marker; Morris

Island erosion rates range as high as -19.5 ft/yr; Dewees Island has its central portion measured at -10.3 ft/yr; Waites Island has one marker at -9.4 ft/yr and another at -9.5 ft/yr. S.C. Code Regs. 30-21, Table 7.

Although it was measured by different entities in different ways, the erosion rate along Debidue beach where the groins are to be installed was not in question. Dr. Tim Kana, President of Coastal Science and Engineering (“CSE”) and DCCA’s expert witness, stated on direct examination that the erosion rate for the project area, or Reach 3, was -4.2 cubic yards per foot per year and that multiplying this number by 1.3 would yield the average linear erosion rate for Reach 3. ( R. p. 818 ll.14-18 –p. 841 l.11-14). Although Dr. Kana testified that multiplying these numbers together would yield an erosion rate of approximately -6 or -5.8 ft/yr (R. p. 818 ll.17-18), the actual result is -5.46 ft/yr. As will be evident, this discrepancy is irrelevant to the overall issue. Meanwhile, DHEC’s witness, Matt Slagel testified that erosion rates that DHEC has recorded for the stations in or near the project area are -8.8 ft/yr at station 4125 and -6.6 ft/yr at station 4130. (R. p. 609 ll.1-2).

Petitioner’s witness, Dr. Robert Young, was qualified by the Court as an expert in coastal geology, coastal processes and coastal management policies. (R. p. 640 ll.2-24). Dr. Young has a Ph.D. in Coastal Geology and is the Director of the Program for the Study of Developed Shorelines and a professor of Coastal Geology. (Pet. Ex. 55; R. p. 632 ll.3-9; p. 633 ll.6-7; R. p. 1073). Dr. Young has also served on South Carolina’s Blue Ribbon Committee for Shoreline Change by appointment of the Governor. (R. p. 635 ll.1-8). Dr. Young has studied the South Carolina coast for decades and is familiar with the erosion rates throughout the State. (R. p. 634 ll.17-18; p. 644 ll.13-14; p.648 ll.21-25).

With regard to the erosion rate on Debidue Beach, Dr. Young opined to a reasonable degree of scientific certainty that the beach within the project area does not experience a high erosion rate compared to other beaches along the South Carolina coast. (R. p. 649 1.1 – p. 650 1.20). In support of his opinion, Dr. Young compared the rates at the proposed project site to various beaches along the South Carolina coast, including those at Hunting Island, Folly Island and Pritchards Island, that experience erosion rates “that approach 15, 20 feet a year. Places that clearly have very high rates of erosion.” (R. p. 650 ll.11-15). When Dr. Young was asked a hypothetical question as to whether erosion rates of -6.6 feet per year to -8.8 feet per year qualify as high erosion, Dr. Young stated that “[i]n a state that has shorelines that have extremely high erosion rates that are on the order of tens of feet, this --this would be moderate erosion in the State of South Carolina.” (R. p. 665 ll.9-23).

In addition to relying on his experience and knowledge of erosion rates and erosion “hot spots” along South Carolina’s coast, Dr. Young also relied on “The United States Geological Surveys, National Shoreline Change Database” and “DHEC’s own online information on their Coastal Hazard Vulnerability Assessment website” which is based upon Dr. Chester Jackson’s “shoreline change assessment for the State of South Carolina that DHEC funded.” (R. p. 651 ll.1-22). DHEC’s Coastal Hazard Vulnerability Assessment classified the area throughout the Colony “as being moderate to low. The only place on the entire area of [Debidue] Island that is shown as having a higher rate of erosion is the very south end, the Barony property. And of course, the groins aren’t being designed to protect that particular area.” (R. p. 651 1.23 – p. 652 1.10).

Dr. Young also relied on Dr. Chester Jackson’s underlying study entitled Mapping Coastal Erosion Hazards Along Sheltered Coastlines in South Carolina, 1849 to 2015 in which Dr. Jackson calculated the mean erosion rate for the South Carolina coast as -2.2 to -2.4 meters per year. (R.

p. 655 ll.1-14; p. 663 l.8- p. 665 l.8). DHEC's Mr. Slagel confirmed that Dr. Jackson calculated the mean erosion rate as -2.44 meters per year for oceanfront shorelines for the 1930s to 2000 and -2.12 m/yr from the years 1800s to 2000. (Tr. p. 654 l.5- p. 656 l.19, R. p. 1068 l.5 – p. 1070 l.19). "One meter is 3.28 feet." (R. p. 1049 ll.10-12). Therefore, -2.44 m/yr equates to -8.0032 ft/yr while -2.12 m/yr equals -6.9536 ft/yr for South Carolina's mean erosion rate along the coast.

Despite the numerous erosion rates exceeding -10 ft/yr documented in the Regulation and the mean erosion rate calculated at DHEC's behest, DHEC's Mr. Slagel testified that the Department considers any erosion rate greater than -3 ft/yr as "high" for purposes of satisfying the statutory requirement for constructing a new groin. (R. p. 488 ll.23-24). Mr. Slagel admitted, however, that the -3 feet per year threshold is not contained in any statute, regulation, or even internal written guidance for project managers evaluating proposals. (Tr. p. 74 l.21 - p. 75 l.21; R. p. 488 l.21 – p.489 l.21). The Department's interpretation that -3 ft/yr constitutes a "high" erosion rate in South Carolina is allegedly based on a review of the "statewide network of beach monuments." (R. p. 488 l.25 – p. 489 l.1). In his testimony, Mr. Slagel stated that this review included not only erosional beaches "like at Hunting Island" but "also plenty of beaches where -- that are stable to accretional, where their -- their long-term rate is actually positive." (R. p. 489, ll.5-11). Thus, the review of beach monuments was not limited to erosion rates and included non-erosional beach measurements. (R. p. 491 l.22- p. 492 l.6).

It is noteworthy that Dr. Jackson, whom DHEC engaged to conduct a study, characterized the coastal erosion rate separately from the overall shoreline change rate, which would have included not only erosion, but accretion and thus would not be the actual erosion rate. (R. p. 1068 ll.9-12). One of DHEC's bases for contending that -3 ft/yr constitutes a high erosion rate for South Carolina is a reliance on the overall shoreline change rate. (R. p. 621 l.23 – p. 622 l.6; p. 1069 l.17

- p. 1070 l.9). The overall shoreline change is, as Dr. Jackson's calculations show, distinct from the erosion rate. (R. p. 1068 -1071).

Mr. Slagel also believed that [the -3 ft/yr number] was "based on prior studies of erosion in South Carolina that had taken place" when the Coastal Council was created. (R. p. 490 ll.14-16). Mr. Slagel never identified any studies nor did he calculate the mean erosion rate for South Carolina. (R. p. 490 ll.1-25). Mr. Slagel could not say where the -3.0 ft/yr rate fell on the spectrum from low to high in relation to the mean erosion rate for South Carolina. (R. p. 492 ll.15-18).

Bill Eiser, who testified on behalf of Respondent DCCA, is a former employee of DHEC-OCRM and was responsible for reviewing permits for beachfront erosion control structures during his tenure there. (R. p. 1002 l.1 – p. 1004 l.18). He stated he first concluded that -3 feet per year is a high erosion rate for South Carolina back in the 1990s. (R. p. 1049 l.13 – 1050 l.2). In formulating his opinion back in the 1990s, Mr. Eiser relied on a 1977 study that was not peer-reviewed conducted by Hubbard, Baze and Brown. (R. p. 1052 ll.7-24). According to Mr. Eiser, this document simply stated that "erosion rates in the State of South Carolina are typically 30 centimeters to 1 meter per year." (R. p. 1010 ll.14-17). There was no testimony that the authors had actually performed a calculation of the mean or median erosion rates or the import of the use of the word "typically."

Instead, the Hubbard report identified several areas of the State where the erosion rates were exceeded -3 meters per year including Morris Island that had an erosion rate of -15 meters per year, Eddingfield Beach with an erosion rate of -3 meters per year and Cape Romain with an erosion of over four meters a year. (R. p. 1053 ll.1-25). Mr. Eiser also claimed to rely on a 1988 report prepared by Dr. Kana but this report did not purport to establish average erosion rates and

instead only noted that 26 of the 88 miles of South Carolina shoreline was eroding at a rate in excess of one foot per year. (R. p. 1010 l.18 – p. 101 l.5). It is remarkable that a -3 ft/yr erosion rate was not considered high by Dr. Kana in his testimony. (R. p. 912 l.25 – p. 913 l.4). Mr. Eiser, like the Department, offered no testimony about having calculated the mean or median erosion rate for the State at any time. (R. p. 1056 ll.23-25).

Dr. Tim Kana, DCCA's expert witness, admitted that he characterized an erosion rate of -2- to -3 meters per year as moderate. (R. p. 427 l.23; p. 841 l.23- p. 841 l.1). Although Dr. Kana stated that he doesn't "have a hard and fast rule as to what is defined in terms of [the] statute as high, medium, low, whatever[,]” (R. p. 842 ll.19-21), on cross-examination Dr. Kana confirmed that he had testified that a three to eight, ten feet per year rate of erosion is moderate, getting toward high. (R. p. 912 l.25 -p. 913 l.4).

Even though Dr. Kana testified that, in his opinion, a moderate erosion rate would extend up to -3 m/yr or -10 ft/yr, Dr. Kana stated that the erosion at “DeBordieu south” is high “because of this gradient.” (R. p. 842 l.23 – p. 843 l.2). Dr. Kana then explained that the “gradient” is the increased rate of loss from North to South and noted rates of loss following the 2006 renourishment of “19 and a half cubic yards per foot per year” and a rate of loss following the 2015 renourishment of “37 cubic yards per foot per year in the first year. [] Those are high rates of loss, in my opinion.” (R. p. 843 ll.10-17). Of course, if those were the actual erosion rates, they would be “high” but they are not. Upon questioning by the Court, Dr. Kana admitted that those rates were artificially high because of the renourishment. (Tr. p. 429 ll.18-20; R. p. 843 ll.18-20).

Dr. Young noted that “renourishment may make the erosion rate appear to be extremely high because beach nourishment projects tend to erode very quickly after they've been placed

because they're out of equilibrium with the system. So if you took a short-term change rate after the placement of a beach nourishment project, you might believe that that project has a very high -- or that the shoreline has [a] very high erosion rate." (R. p. 724 ll.6-22). Dr. Kana confirmed that the erosion rates at Debidue following the 2015 renourishment were artificially inflated far in excess of the historical erosion rate he calculated when he testified that the rate was as high as "37 cubic yards per foot per year in the first year." (R. p. 843 ll.14-15).

Dr. Kana echoed Dr. Young's testimony and admitted that one should exclude renourishment efforts when calculating the actual background erosion rate because adding renourishment sand would change the actual measurements. (R. p. 822 l.22 – p. 823 l.12). On cross-examination, Dr. Kana confirmed that any erosion rates for Reach 3, the project area, that take into account renourishment efforts do not represent the background or actual erosion rate. (R. p. 920 ll.7-20).

Dr. Kaczkowski, DCCA's other expert witness, confirmed that, in her opinion, the "magic number" for a volumetric erosion rate threshold below which softer solutions, such as renourishment, without the use of hard structures, like groins, is -5 cubic yards per foot per year (cy/ft/yr). (R. p. 991 l.10 – p. 992 l.9; p. 996 ll.6-11). Specifically, Dr. Kaczkowski testified that the -5 cy/ft/yr demarcation opinion applies in South Carolina. (R. p. 996 ll.12-14). The volumetric erosion rate for the project area in which the groins are proposed, or Reach 3, was calculated by Dr. Kana and CSE to be -4.2 cy/ft/yr which is, obviously, below Dr. Kaczkowski's own threshold. (R. p. 841 ll.11-14).

Moreover, Dr. Kaczkowski confirmed that, despite her -5 cy/ft/yr demarcation opinion, a renourishment project with which she was involved in North Carolina included areas of a beach

that were eroding rates as high as -18 ft/yr in certain places and -10 ft/yr in others. (R. p.990 l.6 - p. 991 l.1). Although these rates exceeded the -5 cy/ft/yr “magic number,” the Nags Head project did not involve the use of groins. (R. p. 991 ll.7-9).

The two areas in which CSE has been involved with the installation of new groins in South Carolina (Hunting Island and the Folly Beach terminal groin) had erosion rates well in excess of those in the current project site. (R. p. 913 ll.5-25). Hunting Island had erosion rates that were approximately -20 ft/yr and the Folly Beach project area had an erosion rate well over -10 ft/yr prior to the new groin. (R. p. 913 ll.10-25).

### **III. There was no Evidence Presented that any Existing Development is Threatened by Erosion.**

During the hearing, neither of the Respondents presented any evidence that any of the homes located along Debidue beach are threatened by water except when there is a tropical storm or hurricane present. The evidence showed that water approached homes or surmounted the bulkhead only when a hurricane was either coming ashore or was in close proximity to the coast but remained offshore. (R. p. 455 ll.7-12; p. 518 l.24 – p. 519 l.9; p. 666 ll.7-22; p. 1030 ll.9-17; p. 933 l.11 – p. 937 l.10). Though Mr. Eiser testified that he reviewed a Google Earth image that showed water approaching existing houses south of the existing bulkhead, he clarified the photo predates the renourishment and creation of the artificial dune. (R. p. 1031 ll.10-23).

Dr. Young also opined about whether the erosion is threatening existing structures. He testified that a storm event is not necessarily a sign that a structure is threatened. (R. p. 703 ll.7-24). He remarked that if the standard of threatened is met whenever there is a storm event, then

every structure on the beachfront is threatened. (R. p. 667 ll.3-13). In short, Dr. Young stated that “I don’t see coastal erosion threatening structures on [Debidue].” (R. p. 667 ll.7-8).

Mr. Slagel testified that in determining whether a structure is threatened, DHEC relies on the regulatory process allowing for the issuance of emergency orders by local governments. (R. p. 517 l.18 – p. 518 l.1). The emergency orders relied upon by DHEC to guide them in determining when structures are threatened are temporary approvals issued in the context of storm events.<sup>2</sup> (R. p. 518 ll.2-11).

Mr. Eiser concluded there were structures that are sufficiently threatened on Debidue Beach in part because of the existence of the seawall and that the seawall failed as a result of damage from Hurricane Hugo, a category 4 hurricane that hit the South Carolina coast in 1988. (R. p. 1032 l.18 – p. 1033 l.10). Tellingly, Mr. Eiser stated that, in his opinion, “the bulkhead is not going to provide protection to those houses in a storm event.” (R. p. 1033 ll.8-10). This is a threat that is distinct from typical coastal erosion.

#### **IV. All of the Evidence Presented Established that the Groins in Question Would Inevitably Prevent Sand from Reaching the Adjacent or Downcoast Property.**

DHEC’s Matt Slagel admitted the clear purpose of a groin is to retain sand on its updrift side. Once any sand placed on the beach through renourishment is inevitably washed downdrift, the groins will prevent sand migration downdrift. (R. p. 483 ll.9-23). Specifically, Mr. Slagel stated that once the initial excess sand is exhausted “then yes, the structures would – would retain sand

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<sup>2</sup> S.C. Code Reg. 30-1(D)(20) defines emergency orders as “orders issued by an appointed official or municipality or of the state acting to protect the public health and safety, upon written notification to the Department. “Emergency situations before or after a storm event may prompt local governments to issue Emergency Orders to conduct temporary barriers against wave uprush.” S.C. Code Reg. 30-15(H).

that might otherwise reach downdrift properties.” (R. p. 483 l.9 – p. 484 l.10). Despite Mr. Slagel conceding this point, he concluded that the placement of sand through the renourishment authorized under the Permit would slow the movement of sand and therefore recommended that the Permit be issued. (R. p. 486 l.7 – p. 487 l.6).

Both Respondents expect the groins at issue here to trap sand, which would increase erosion along the downcoast beach. Indeed, both the Permit and the Amended Permit contain monitoring requirements and operative trigger levels for erosion downdrift that would create an obligation on DCCA’s part to conduct renourishment of the beach. (R. p. 3844; p. 1089). Not only is increased erosion downdrift predicted, it is expected and, if the groins work as designed, inevitable.

Dr. Young opined that the proposed project runs afoul of the Beachfront Management Act’s requirement that new groins may only be installed if a thorough analysis demonstrates that the groin will not cause a detrimental effect on the adjacent or downdrift areas. (R. p. 667 ll.14-23). The basis for this conclusion is not in question. First, the proposed project would be in the middle of a littoral cell and that would necessarily deprive the downcoast areas of sand. (R. p. 668 ll.3-25). Dr. Young testified that a groin is designed to “hold sand in one place on the updrift side of that [longshore] sediment transport. [] And the problem with constructing a structure like this is that any sand that you’re holding on this one side was on its way some place. [] But if you halt that flow of sand, you’re going to cause a deficit of sand on the other side of the groin.” (R. p. 646 l.15 - p. 647 l.2).

Even though Respondent DCCA plans to renourish the beach prior to the groins’ installation, Dr. Young recognized that “the statute doesn’t say you can pre-mitigate the harm that

a shore perpendicular structure is going to cause. It just says, you have to prove that the groin will not cause a downdrift impact.” (R. p. 668 ll.16-25). Second, and in addition to relying on his “professional experience,” Dr. Young relied on the downdrift impacts analysis submitted to DHEC by agents of DCCA, which failed to demonstrate that the structures would have no detrimental impacts. (R. p. 668 l.25 – p. 669 l.8). Instead, the downdrift impacts analysis “showed an incremental decrease in long shore sediment transport on the downdrift side of the groins.” (R. p. 670 ll.1-8).

Downdrift impacts are not experienced if the groin is at the end of a littoral cell and “isn’t going to have the same kind of detrimental downdrift impact to the shoreline” because sand would have traveled into the ocean. (R. p. 692 ll.10-16; p. 691 ll.2-5). “Littoral” was defined by Dr. Kana as a “zone over which waves break and move sediment in the cross shore direction between the dune and the low tide area, as well as mov[ing] sand along shore, down the beach[.]” (R. p. 778 ll.13-19). Another situation would be where the same property owner owns property on either side of a groin or groin field such that there is no neighboring property owner who would be detrimentally affected by the groin’s presence. (R. p. 692 ll.16-24).

Dr. Young’s conclusion about detrimental effects was confirmed by DCCA’s expert witnesses, Dr. Kana and Dr. Kaczowski. Dr. Kaczowski, DCCA’s modeling expert, testified the modeling performed for this project indicated that “these three groins would increase the erosion to [the] downdrift” area. (R. p. 970 l.25 – p. 971 l.1; p. 974 ll.8-15). During his direct examination, Dr. Kana confirmed that if there is no additional renourishment after the initial renourishment, the groins would “create a downdrift impact problem[.]” (R. p. 876 ll.2-10). Moreover, Dr. Kana stated that when areas near the groins become exposed, “you won’t be able to walk directly across. You’ll have to hop over the structure and it may be a one-foot hop or a

three-foot hop or sometimes maybe a five-foot hop after a storm in -- in one area.” (R. p. 867 ll.14-22).

## **ARGUMENT**

The Beachfront Management Act (“BMA”), passed by the General Assembly in 1988, increased the protection that had been afforded the state’s beaches under the 1977 Coastal Tidelands and Wetlands Act, S.C. Code Ann. § 48-39-10 et seq. As enacted and amended, the BMA has consistently maintained a policy of severely restricting “the use of hard erosion control devices to armor the beach/dune system” and encouraging the replacement of hard erosion control devices with “soft technologies” such as beach renourishment. S.C. Code Ann. § 48-39-260. The General Assembly recognized that “[i]t is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle.” S.C. Code Ann. §48-39-250(6).

It is within this framework and with these policies in mind that the statutory requirements should be interpreted. “The language [of a statute] must be read in a sense which harmonizes with its subject matter and accords with its general purpose.” State v. Sweat, 379 S.C. 367, 384, 665 S.E.2d 645, 649-650 (Ct.App. 2008) (citing Mun. Ass’n of S.C. v. AT&T Commc’ns of S. States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004)) (additional citations omitted).

“What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.” Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)(quoting Norm J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992)); Boiter v. South Carolina Dep’t of Transp., 393 S.C. 123, 132, 712 S.E.2d 401, 405 (2011) (“[q]uestions of statutory

construction are a matter of law”) (citing Charleston County Parks & Recreation Comm’n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995)).

The determination of this appeal hinges on whether certain statutory requirements have been met such that Respondents may construct new groins on the public beach. Although there are, at times, conflicting comments in the Order about whether the Court was determining whether the statutory prerequisites have been met as a matter of law or factually, (See R. p. 43), the determination are questions of law. Therefore, the standard of review is *de novo*. Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

**1. Did the ALC err in finding that proposed permit does not violate S.C. Code Ann § 48-39-290(A)(8) which states that new groins are only allowed “on beaches that have high erosion rates”?**

The ALC made a finding that “the preponderance of the evidence shows the erosion rate at the Project area is high.” (R. p. 30). South Carolina Code Ann. § 48-39-290(A)(8) states that “[n]ew groins may be allowed only on beaches that have high erosion rates....” The word “high” is defined by Merriam Webster’s dictionary many ways but the most pertinent definition reads as follows: “of greater degree, amount, cost, value, or content than average, usual or expected[.]” MERRIAM-WEBSTER’S ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/high> (last visited May 17, 2021). The area where these new groins are proposed to be constructed does not experience a “high erosion rate[.]” when compared to other erosion rates in South Carolina because the rates are below or near the average or usual erosion rates for the State.

The evidence presented during the hearing showed that many beaches in South Carolina are eroding at rates exceeding -9 ft/yr. The evidence also showed that the mean average erosion rate for all of the South Carolina coast has most recently been calculated as -8.0032 ft/yr. This was the only evidence presented of a calculated average erosion rate for the coast of South Carolina. The evidence showed that the most recent average erosion rate for the area where the groins are proposed to be installed, which factors out all renourishment effects, is -5.46 ft/yr.

Appellant's expert witness, Dr. Young, stated that the erosion rate measured at the project site was not "high" when compared with other rates in South Carolina that reach as high as -15 to -20 ft/yr. Appellant's expert also relied on the mean average erosion rate for comparison's sake and DHEC's own Coastal Hazard Vulnerability Assessment classified the area "as being moderate to low". This opinion was shared by Respondent's expert, Dr. Kana. Dr. Kana testified that he considered a moderate erosion rate to encompass -2 to -3 m/yr and affirmed his deposition testimony in which he testified that he considered a moderate erosion rate as -3 ft/yr to -8 to -10 ft/yr. DCCA's other expert, Dr. Kazcowski, testified that in her opinion soft solutions that do not include groins are appropriate for an area that has an average volumetric erosion rate less than -5 cy/ft/yr. The area where the groins are to be situated has an average volumetric erosion rate of -4.2 cy/ft/yr. The ALC's Order discounted all of this evidence in its ruling but perhaps nowhere is the Court's error shown more directly than its disregard of Dr. Jackson's Report which provided the only evidence of an average Statewide coastal erosion rate.

The Court concluded that the Jackson Report was not "as reliable or probative as other evidence introduced in this case" but none of the bases offered by the Court are defensible and instead reveal that the Jackson Report is the most probative and reliable evidence on the actual issue in question. The first point on which the Court quibbled with the Jackson Report establishes

its unique relevance to the issue at hand. The Court complained that the Jackson Report contained “the mean shoreline change rate for erosional areas only.” (R. p. 29). Presumably, the perceived deficiency is that the Jackson Report did not address overall shoreline change rates. The Jackson Report contains this information, as Mr. Slagel testified, but the disregard of the average erosion rate by the Court constitutes a disregard of the plain language of the statute. The statute states expressly that “[n]ew groins may be allowed only on beaches that have **high erosion rates**....” S.C. Code Ann. §48-39-290(A)(8)(emphasis added). There is no mention of shoreline change rates. Apples must be compared to apples for any comparison to be worthwhile. What constitutes a high erosion rate necessarily requires a comparison of various erosion rates, not shoreline change rates.

Next the Court stated that the Jackson Report “likely did not filter out the renourishment events when establishing shoreline changes for the report.” Besides revealing the Court’s continued and mistaken fixation on “shoreline” change rates, this comment also fails to acknowledge that the Jackson Report contained data from the 1800s, the 1930s and the 2000s. The erosion rates for all of these eras are consistently above -2 m/yr respectively. There were no beach renourishment projects occurring in the 1800s or 1930s which the Jackson Report needed to filter out. Moreover, there was no indication that any renourishment projects were taking place on a sufficient scale on a statewide basis such that it would affect the overall mean erosion rate. Regardless, the erosion rates over time are similar and the Department’s shoreline change rates do not factor out renourishment efforts in any event.

The Court also disparaged the long intervals between data sets as compared to the Department’s calculation of shorelines every “seven to nine years” but there is no indication that this data is less accurate than the Department’s data, as the Court implies. The long time periods

between the data sets just shows that the overall mean erosion rate is consistent and remains in excess of -2 m/yr over decades. If the Department thought this data was inaccurate, it is unlikely to have commissioned the Report much less to have utilized the data for its Coastal Hazard Vulnerability Assessment which is maintained on the Department's own website. What is revealing is that the Department, instead of actually offering its own calculation of a mean or even median erosion rate, chose to offer testimony only on the overall shoreline change rate. Again, this is not the standard for new groins as memorialized in the statutory text.

In support of its conclusion about what constitutes a "high" erosion rate, the Court relied on the "Department's long-standing interpretation" but the discussion that follows shows that the Court again confuses a shoreline change rate with an erosion rate. The Court stated that "the Department's shoreline rate change threshold of -3 cy/ft/yr is not recorded in any statute or regulation[,]'" which is accurate as far as the lack of memorialization by DHEC of its determination but inaccurate for two other reasons. (R. p. 30). First, what the Department considers a "high erosion rate" is -3 ft/yr and second, it is not a "shoreline rate". Moreover, the length of time the Department has subscribed to this rate is not persuasive because the statute in question was passed years after the Department's internal habit of concluding -3 ft/yr constitutes a "high" erosion rate.

The Court then compared Dr. Kana's testimony about whether the erosion rate at the project site is "high" which has been discussed earlier, to "the average shoreline change rate for the State in 2017" which was "-1.5 ft/yr" and the "median shoreline change rate for 2017, which was -0.11 ft/yr." (R. p. 30). This analysis, yet again, disregards the plain meaning of the statute which only allows new groins on beaches with high "erosion rates."

The Court attempted to insulate its Order by hedging that "whether the Department's interpretation is a legal one or a factual one does not matter in this case because under the facts of

this case, the Project is in the area of high erosion.” (R. p. 43). The Court claimed that the Department’s interpretation was based on “review of data” from “500 monuments across the State and prior studies of the erosion rates in the State.” (R. p. 43). The defects in this analysis have been noted earlier and were ignored by the Court. The review of the 500 monuments included stable and accretional beach areas and yielded an overall shoreline change rate which is not the standard supplied in the statute. The “prior studies” were never identified by DHEC’s Matt Slagel and the only two identified by Bill Eiser do not support this conclusion. The un-peer-reviewed Hubbard report simply concluded that erosion on certain South Carolina beaches is “typically 30 centimeters to 1 meter per year.” (R. p. 1010 ll.14-17). There was no testimony that this observation constituted a calculation of the mean or median erosion rates or was just a passing observation about certain beaches. There was no question, however, that the report noted several examples of erosion rates exceeding -3 m/yr. (R. p. 1053 ll.1-25). The only other report mentioned was a 1988 document prepared by Dr. Kana but this report did not calculate any average erosion rates for South Carolina.

The Court “found Dr. Kana’s analysis of what is high erosion in South Carolina persuasive and his opinion that the uncontested erosion rate of -4.2 cy/ft/yr or -5.5 ft/yr was high is consistent with the Department’s interpretation.” (R. p. 43). Dr. Kana never testified that an erosion rate in excess of -3 ft/yr is “high.” To the contrary, Dr. Kana specifically testified that this value was “moderate” and at the bottom of the moderate range at that. (R. p. 912 l.25 -p. 913 l.4). This was after Dr. Kana had testified that, for the purposes of the new groin statute, he did not subscribe to “a hard and fast rule as to what is defined in terms of [the] statute as high, medium, low, whatever[.]” (R. p. 842 ll.19-21).

The Court discounted the issues surrounding the Department's consideration of the overall shoreline change rate "because [it] found Dr. Kana's factual opinion that the Project was located in an area of high erosion to be persuasive." (R. p. 43). This conclusion ignores Dr. Kana's testimony that an erosion rate of -3 ft/yr to -8 to -10 ft/yr is moderate and the temporary and artificial basis of the high erosion rates Dr. Kana reported for the project area. The high erosion rates referred to by Dr. Kana related to the project area were listed as -37 cy/ft/yr and -19.5 cy/ft/yr. This is the "gradient" to which he referred in his testimony. (R. p. 843 ll.10-17). As the Court pointed out, these are artificially inflated due to the excess renourishment sand and do not represent the actual erosion rate for the area. These are, admittedly, temporary as a result of a renourishment and do not reflect the underlying or background erosion rates. Using them as a basis to conclude the area in question has a high erosion rate is unjustifiable.

The Court further erred by reasoning that even though the statute in question uses the term "high 'erosion rate' and not high 'shoreline change rate, it does not instruct that when determining what a high erosional rate is, the change rates across the State, including accretional ones, cannot be considered." (R. p. 43). The statute in question uses the phrase "high erosion rates" and makes no mention of a comparison between erosion rates and overall shoreline change rates. S.C. Code Ann § 48-39-290(A)(8). Using a shoreline change rate to determine whether an erosion rate is high, moderate or low would not make sense and would not further the purpose of the statute which is to only allow new groins on beaches where erosion is excessive. It is not "reasonable" for DHEC to measure what constitutes a high erosion rate except by assessing whether a rate of erosion is high when compared to other erosion rates along the coast of South Carolina. If a portion of a beach is stable or accreting then it is, by definition, not eroding.

The vast difference in outcomes in comparisons is evident when one compares the mean erosion rates of South Carolina over the past one hundred and fifty years and compares them to the overall shoreline change rate. The mean average erosion rate exceeds -8 ft/yr while the mean shoreline change rate for 2017, if Mr. Slagel is accurate, is only -0,11 ft/yr. Using shoreline change rate when evaluating whether an erosion rate is high defeats the entire purpose of the statutory limitation of new groins only for beaches with high erosion rates. If that was the case, then why not look at the overall shoreline change rate of a beach when determining if it has a high erosion rate for groins? Debidue beach's overall change rate is, according to Regulation 30-21, only -2.5 cy/ft/yr. S.C. Code Regs 30-21, Table 2. It would be nonsensical to evaluate whether the site of a proposed groin has a high erosion rate by looking at the overall shoreline change rate of the entire beach in question. Similarly, it is nonsensical to evaluate whether an erosion rate is "high" by including large stretches of South Carolina's coastline that are not actually eroding.

While a Court should "generally give[] deference to an administrative agency's interpretation of an applicable statute or its own regulation[...] where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838(2003) (citing Brown v. South Carolina Dep't of Health and Env'tl. Control, 348 S.C. 507, 560 S.E. 2d 410 (2002); Richland County School Dist. Two v. South Carolina Dep't of Educ., 335 S.C. 491, 517 S.E.2d 444 (Ct.App. 1999)). Put another way, when the plain language of a statute is at odds with the Department's interpretation, the Court "is free to read the statute based on its plain language without deference to the State's position." State v. Sweat, 379 S.C. 367, 384, 665 S.E.2d 645, 655 (Ct.App. 2008). Here, DHEC's interpretation that -3 ft/yr is a "high" erosion rate for the State is contrary to the evidence, is based upon rates that are not erosion rates and would serve to

contravene the purpose of the statute because it would allow groins to be installed on beaches with erosion rates on the lowest end of moderate. Under DHEC's interpretation, presumably a low erosion rate could be from -0.01 to -1.5 ft/yr and a moderate erosion rate could be -1.5 to -2.99 ft/yr. We know that, as far as DHEC is concerned, a high erosion rate extends from -3 ft/yr to in excess of -20 ft/yr. That interpretation is contrary to the plain language of the statute which limits new groins only to beaches with "high erosion rates." The evidence in this case is that the stretch of beach where these groins are to be located experiences a moderate rate. Therefore, the Court's decision that this permit complied with S.C. Code Ann. § 48-39-290(A)(8) was in error and should be reversed.

**2. Did the ALC err in finding that proposed 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"?**

An application for a groin project must show and DHEC must find existing threatened development in order for a permit to issue. S.C. Code Ann. §48-39-290(A)(8). After his review of the application, Mr. Slagel concluded there were existing structures that were threatened on Debidue Beach. (R. p. 517 ll.1-4), relying on another portion of the regulations addressing where a local government can issue emergency orders on the beachfront. (R. p. 517 l.18 - p. 518 l.7). Again, there are no statutory, regulatory or other written guidelines that define what constitutes a threatened structure. (R. p. 517 ll.5-24). Mr. Slagel also admitted the status of a threatened structure can change over time (R. p. 519 ll.2-21) and, there is no guidance on what length of time a structure must be "threatened" according to DHEC in order to justify a groin. (R. p. 519 ll.22-25).

There was no evidence that structures in the project area are currently threatened by erosion. Instead, the evidence showed only that certain houses may have been threatened in the context of storm events. The plain language of the statute requires that “erosion” must be “threatening existing development or public parks.” S.C. Code Ann. § 48-39-290(A)(8). Apparently, the Court concluded that the “development” prong of the statute was fulfilled by waves touching the bulkhead. (R. p. 44) (“Water does not necessarily overtop the bulkhead on a daily basis, but the bulkhead is exposed to wave action on a daily basis”). That is not “development” as contemplated by the statute. Instead, the statute uses development to mean residential or commercial development which is consistent with its other exception for “public parks” but not with erosion control structures necessarily situated close to water. There was no evidence of erosion threatening existing residential or commercial development and the public park portion of the statute is inapplicable here. Therefore, the Court erred in holding that this requirement of the new groin statute had been met and should be reversed.

**3. Did the ALC err in finding that proposed permit does not violate S.C. Code Ann § 48-39-290(A)(8)(b) which states that “[g]roins may be permitted only after thorough analysis demonstrates that the groin will not cause a detrimental effect on adjacent or downdrift areas”?**

A groin is defined as “a structure designed to stabilize a beach by trapping littoral drift.” S.C. Code Regs. 30-1(D)(26). Subsection (b) of the statute relating to the installation of new groins states that “[g]roins 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)(emphasis added).

The plain language of the statute requires that a groin must not be permitted where there is a negative impact on downdrift areas. “[W]here the terms of the statute are clear, the court must apply those terms according to their literal meaning, without resort to subtle or forced construction to limit or expand the statute’s operation. Thus, the court will reject the agency’s interpretation where it is specifically contrary to the statute or regulation.” [internal citations omitted] Commissioners of Pub. Works v. S.C. Dep’t of Health & Env’tl. Control, 372 S.C. 351, 359 (Ct. App. 2007). When a statute, regulation, or enforceable policy “is unambiguous [agencies] are confined to what the statute says, not what it ought to say, for [agencies] have no right to modify a statute’s application ‘under the guise of [] interpretation.’ [] In other words, when a statute is clear on its face, it is ‘improvident to judicially engraft extra requirements to legislation’ just because doing so may further the intent behind the statute.” Grier v. AMISUB of South Carolina, Inc., 397 S.C. 532, 540, 735 S.E.2d 693, 698 (2012) (quoting Berkebile v. Outen, 311 S.C. 50, 55-56, 426 S.E.2d 760, 763 (1993))(additional citation omitted); see also Converse Power Corp. v. S.C. Dep’t of Health & Env’tl. Control, 350 S.C. 39, 47, 564 S.E.2d 341, 346 (Ct. App. 2002) (“[w]hen interpreting a regulation, [a Court looks] for the plain, ordinary meaning of the words of the regulation, without resort[ing] to subtle or forced construction to limit or expand [its] operation”).

The plain language of the statute prohibits the issuance of groins unless the applicant proves that “the groin” will not cause detrimental effects on downdrift areas. Therefore, DHEC’s interpretation, allowing detrimental impacts to occur if there is mitigation proposed, should not be entitled to any deference in this case.

Respondents offered no evidence to contradict the facts in the record that the proposed groins will cause detrimental effects on downdrift areas. Respondent, DCCA’s expert witnesses,

Dr. Kana and Dr. Kaczkowski both testified that the erosion downdrift of the groins would be increased due to the installation of the structures. Indeed, DHEC obviously anticipates that there will be an increase in erosion downdrift because both the initial and amended permits contain mitigation triggers based upon the erosion rate downdrift exceeding certain parameters. Dr. Young, in his testimony about how groins operate in general explained that they ultimately, when sufficiently uncovered, serve as barriers to the transport of sand to the downdrift beach which then increases erosion. These downdrift effects are not only possible at the outset, it is already known that they will occur. The only question is how long before the effects are felt.

This distinguishes this situation from one in which groins do not cause a detrimental effect on the downdrift or adjacent property because either the groin is located at the end of a littoral cell or the downdrift or adjacent property is owned by the same individual or entity and thus this individual or entity has decided the groins will be a benefit overall and not cause a detrimental effect to his or her or its other property. Here, these groins are proposed to be installed in the middle of a littoral cell and there is another entity, the Belle M. Baruch Foundation, that owns real property immediately downdrift from where these structures are intended to be installed. Moreover, all the parties acknowledge that sooner or later the renourishment sand will be exhausted and then the groins will begin to increase erosion downdrift beyond the background rate. Such an occurrence is not a surprise or unforeseen result of the project. This erosion downdrift constitutes a detrimental effect to a downdrift or adjacent property owner. Therefore, these groins are prohibited under the statute.

The policies noted in the statute support the conclusion that the Legislature favors renourishment only solutions instead of the use of structures, such as groins, that can have long-term adverse impacts. For example, the policy noted in subsection (3) is to “severely restrict the

use of hard erosion control devices to armor the beach/dune system and to encourage the replacement of hard erosion control devices with soft technologies ... for the protection of the shoreline without long-term adverse effects[.]” S.C. Code Ann. § 48-39-260 (3). This valuation is related to section (5) which states that it is the policy of the State to “promote carefully planned nourishment as a means of beach preservation and restoration where economically feasible[.]” S.C. Code Ann. § 48-39-260 (5).

Given these policies, there can be little question that when the Legislature wrote that one seeking to install new groins but demonstrate that “the groin” will not cause a detrimental impact on an adjacent property, the Legislature intended that the “thorough analysis” be focused on “the groin” and not on whether the applicant could concoct a scenario in which the detrimental impact of a groin could be masked for some period of time. The Court erred in concluding that the inclusion of a mitigation requirement for inevitable downdrift effects relieved Respondent from meeting this statutory requirement for new groins.

## **CONCLUSION**

WHEREFORE, Appellant, South Carolina Coastal Conservation League respectfully requests this Court issue an Opinion reversing the Final order of the Administrative Law Court authorizing the Respondent DCCA’s installation of groins on Debidue Beach.

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