IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

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

Docket No. 09-ALJ-07-00029-CC

Kiawah Development Partners, II, Respondent,

v.

South Carolina Department of Health and Environmental Control, Appellant.

Docket No. 09-ALJ-07-00039-CC

South Carolina Coastal Conservation League, Appellant,

v.

South Carolina Department of Health and Environmental Control and Kiawah Development Partners, II,

Of Whom
South Carolina Department of Health and Environmental Control is, Appellant,

and Kiawah Development Partners, II, is Respondent.

RESPONDENT KIAWAH DEVELOPMENT PARTNERS, II'S REPLY TO AMICI CURIAE BRIEFS OF SOUTH CAROLINA PADDLESPORTS INDUSTRY ASSOCIATION; INLET COVE HOMEOWNERS ASSOCIATION; KAYAK CHARLESTON, LLC; FRIENDS OF THE KIAWAH RIVER; AND SOUTH CAROLINA NATURE-BASED TOURISM ASSOCIATION

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2. DID AMICI WAIT TOO LONG TO MOVE FOR LEAVE TO SUBMIT BRIEFS, ESPECIALLY WHERE, AS HERE, THEY WAITED FIVE YEARS TO ACT, DID NOT SEEK TO INTERVENE OR FILE A BRIEF BEFORE NOW, AND RELY, IN PART, ON NEW MATTERS NOT IN EVIDENCE?

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Statement of Issues in Reply to Amici Curiae

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Summary of Argument in Reply

The above-named amici curiae (collectively, "Amici") fail to establish that the Court overlooked any material issue in its comprehensive consideration of the exhaustive legal and factual findings of the Administrative Law Judge ("ALJ"), the multiple extensive briefs, petitions, and returns of the parties, and their two oral arguments. Amici rehash arguments made by Appellants in their briefs and by Appellant South Carolina Coastal Conservation League (the "League") in its petition for rehearing. To the extent Amici rely on the purported adverse impact of the ALJ's decision on Amici and their members, Amici's new evidence and new arguments come far too late.

Amici repeat the argument made by Appellants throughout this appeal—that the ALJ committed legal error in his interpretation of the scope of the cumulative impacts analysis. This

cumulative impacts analysis is only one of multiple factors to be considered in the determination whether to issue a critical area permit under the Coastal Zone Management Act (the "CZMA").[1]

As pointed out several times in the recent plurality opinion and by Respondent Kiawah Development Partners, II, ("KDP"), any alleged error in interpretation of Regulation 30-11.C(1)[2] is harmless. The ALJ fully considered the proof as to the long-range cumulative effects of the limited residential development on the upland (even though this development was not the project for purposes of this permit) and made specific, fully supported findings that there would be no significant adverse effects on the upland area and that this limited residential development was consistent with the Coastal Zone Management Program ("CZMP"). Neither the proof nor the ALJ's findings on the nature and effects of the limited future development were cursory as argued by Amicus South Carolina Nature Based Tourism Association ("NBTA").

Furthermore, this argument of the Appellants and Amici is premised on a fallacy that they never disclose to the Court. Appellants and Amici neglect to mention Appellants put up no proof in the Administrative Law Court of alleged adverse effects from the limited residential development on the upland outside the critical area. For all of their linear feet of argument about the legal standard, the Appellants and Amici are unable to recite one inch of testimony in the record of any adverse cumulative effects on the *upland* from the limited residential development. They argue the legal principle *ad nauseum*, but do not refer this Court to any proof of adverse impacts of the project on the surrounding upland area because there were none.

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[1] See S.C. Code Ann. §§49-38-10 to -360 (Supp. 2008).

[2] See 23A S.C. Ann. Regs. 30-11.C(1) (Supp. 2008) ("In the fulfilling of its responsibility under Section 48-39-150, the Department must in part base its decisions regarding permit applications on the policies specified in Sections 48-39-20 and 48-39-30, and thus, be guided by the following: (1) The extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area."). Hereinafter, this regulation will be referred to as "Regulation 30-11.C(1)."

On the other hand, KDP put into evidence extensive testimony from witnesses Leonard Long and Mark Permar as to the nature and extent of the future limited development, the numerous environmentally sensitive measures that will be used to integrate the improvements into their surroundings with minimal interference, and the permanent preservation of over 80% of the spit in a natural state through a conservation easement. The only proof Appellants offered was the testimony of Bill Eiser, the permitting official. He expressed that there should be no residential development at all on the 180 acres of highland owned by KDP because of his belief that the land should remain in its natural state for the people of South Carolina.

For the reasons stated below and in KDP's return to the League's petition for rehearing, as further addressed herein, rehearing should be denied.

Statement of the Case/Facts

KDP hereby incorporates herein by reference the Statement of the Case and Statement of the Facts from KDP's Final Brief, filed with this Court on November 4, 2010, as well as the facts emphasized in KDP's Petition for Rehearing dated December 6, 2010, and KDP's Return to the League's Petition for Rehearing dated March 24, 2013.

Argument

I. Amici fail to establish that the Court overlooked any material issue of law or fact warranting a rehearing where, as here, the Court reviewed the ALJ's order in two separate opinions after two separate hearings.

The Court fully considered the legal and factual arguments raised by the parties. See Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) ("In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument."). There is no need for further hearings or opinions. In fact, the disagreement

among the plurality, concurring, and dissenting opinions compelled each authoring justice to not only address each argument in detail, but also defend their positions against one another.

Additionally, with the exception of the new evidence and arguments raised by Amici, which should not be considered, Amici regurgitate previous arguments raised by Appellants. See Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234, 238 (1933) ("[T]he purpose of a petition for rehearing is not just to have the case tried in this court a second time."). Rehearing is not appropriate merely because a party—much less amici curiae—disagrees with the outcome.

The Court's opinion fully considered and addressed the ALJ's interpretation of the CZMA (Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 738 S.E.2d 455, 461-63 (S.C. 2013); Id. at 469-70; Id. at 471); Regulation 30-11.C(1) (Id. at 463-66; Id. at 469-70; Id. at 470-73); Regulation 30-12.C(1)(d)[3] (Id. at 466-67); the impact of the project on the public (Id. at 466-67; Id. at 471); the authority of the ALJ and OCRM (Id. at 460-61); and the lack of need for remand (Id. at 469; Id.at 473).

Simply put, there is nothing warranting further consideration or discussion. Consequently, rehearing should be denied notwithstanding Amici's arguments.

II. Amici waited too long to move for leave to submit briefs, especially where, as here, they rely, in part, on supposed facts not in the record.

Amici South Carolina Paddlesports Industry Association, Inlet Cove Homeowners Association, Kayak Charleston, LLC, and Friends of the Kiawah River each purports to have critical interests detrimentally affected by the construction of the subject bulkhead-revetment

[3] See 23A S.C. Code Ann. Regs. 30-12.C(1)(d) (Supp. 2008) ("In an attempt to mitigate certain environmental losses that can be caused by these structures, the following standards are adopted . . . Bulkheads and revetments will be prohibited where public access is adversely affected unless no feasible alternative exists."). Hereinafter, this regulation will be referred to as "Regulation 30-12.C(1)(d)."

structure, yet none lifted a finger to challenge the ALJ's decision until after the Supreme Court issued its second opinion. The interests raised by this first group of amici curiae were implicated from day one of the permit application. These amici purport to be damaged by the construction of the bulkhead-revetment, not by the wording of this Court's opinion, yet they never sought to intervene in the administrative proceedings before or after the contested case.

Even on appeal, Amici failed to act during briefing, before the first hearing, before the Court's first decision, before the Court granted rehearing, before the Court held the second hearing, or before the Court issued its current opinion. Now, at the eleventh hour and fifty-ninth minute, Amici have suddenly decided to formally oppose the bulkhead/revetment project based on the purported interests of their members they claim were in jeopardy from the time the application was submitted on February 29, 2008.[4]

At a very minimum, Amici should have moved to file their briefs before the first oral argument. See Rule 213, SCACR (establishing amicus briefing guidelines which contemplate the participation of amicus curiae at the time other briefs are filed: "The brief shall be limited to argument of the issues on appeal as presented by the parties and shall comply with the requirements of Rule 208(b) [the procedure for initial briefing] and 211 [the procedure for final briefing]."); see also United Air Lines, Inc. v. McMann, 434 U.S. 192, 194 note 3 (1977)[5] ("The Rules of this Court do not allow the filing of briefs *amicus* after oral argument."); 4 Am. Jur. 2d

[4] KDP considerably doubts that the erosion control structure will be as apocalyptic as these amici have portrayed, but, if that is indeed their *perception*, then there was no reason to wait until now to pipe up. As the ALJ recognized, the structure will have little impact on public access or public use of the shoreline. **R.pp.2-3, 6-8, 10, 13, 15-17, 19, 27-28.** In addition, Judge Anderson noted that a majority of the highland acreage on Captain Sam's peninsula will be subject to a conservation easement and conveyed to the Kiawah Island Community Association as natural "green space." **R.pp.16-17.** As the ALJ also explained, additional shoreline will be available for these activities. **R.p.28.**

[5] McMann was superseded by statute on other, unrelated grounds.

Amicus Curiae § 11 ("[A]n amicus curiae is not ordinarily entitled to apply for a rehearing by a trial or an appellate court.").

This failure to act in a timely manner is compounded by these particular amici's attempts to inject new evidence as to the purported effects on their members and the nature of the project's impacts in the final minute. See S.C. Code Ann. § 1-23-610(C) (Supp. 2008) ("The review of the administrative law judge's order must be confined to the record.")[6]; Rule 210(h), SCACR ("[T]he appellate court will not consider any fact which does not appear in the Record on Appeal."); Rule 213, SCACR (amicus curiae restricted to "the issues on appeal as presented by the parties . . . ."); 4 Am. Jur. 2d Amicus Curiae § 8 ("[T]he brief of an amicus curiae, or attachments thereto, cannot be used as a vehicle to present additional evidence or new evidence to an appellate court.").[7]

The Court designed its rules regarding amicus curiae briefs to track the issues presented by the parties *before* the case is argued, not to claim foul after the decision is rendered. The first group of amici curiae's arguments and unsworn statements about the impact of the proposed structure on its members should not be considered. As for amicus NBTA, its brief should be disregarded since it makes no effort to show standing in its brief and has none.

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[6] Section 1-23-610 was amended effective June 16, 2008. The language from section 1-23-610(C) cited in this brief is exactly the same; however, the amendment re-codified the pertinent language as section 1-23-610(B).
The amendment has no impact on the outcome of this appeal; however, section 1-23-610(C) (Supp. 2008) was moved to section 1-23-610(B) (Supp. 2013).

[7] While Rule 213, SCACR, requires an applicant seeking to file an amicus curiae brief to "identify the interest of the applicant" as part of its motion for leave to file the brief, nothing permits an amicus to inject these same interests into their briefs. Moreover, even a motion requires applicants to "file affidavits and other documents in support of their positions." Rule 240(c)(3), SCACR. The statements included in the cited brief also are not admissible on several grounds, including the hearsay rule. See, e.g., Anderson, S.C. Requests to Charge - Civil, § 1-8 (2009) ("Statements of counsel do not constitute evidence, rather counsel is articulating the position and contention of his client.").

III. Amici's legal arguments regarding the CZMA, Regulation 30-11.C(1), Regulation 30-12.C(1)(d), and the public trust doctrine are unnecessary to the outcome of this case where, as here, the Court's majority recognized that the ALJ's factual findings on these issues are supported by substantial evidence.

It is unnecessary for the Court to address yet a third time the issues covered by Amici's allegations of legal error in the interpretation of the CZMA, the consideration of Regulation 30-11.C(1), the impact of the CZMA on section 30-12.C(1)(d), and the application of the public trust doctrine. The ALJ considered each party's interpretations of applicable law, evaluated the evidence submitted at the contested case hearing in light of these interpretations, and found facts accordingly. The Court has considered these issues extensively in two opinions. Most important, the Court's majority in the recent opinion recognized the ALJ's findings were supported by substantial evidence. Nothing more is necessary or required.

A. The applicable standard of review emphasizes that the Court should affirm the ALJ if substantial evidence supports the ALJ's findings of fact and that the Court should disregard purported errors of law which have no impact on the outcome of the proceeding.

"In permitting cases, the ALC serves as the finder of fact." Neal v. Brown, 383 S.C. 619, 623, 682 S.E.2d 268, 269 (2009). "The proceeding before the ALJ was a de novo hearing, which included the presentation of evidence and testimony." Hill v. S.C. Dep't of Health & Envtl. Control, 389 S.C. 1, 9, 698 S.E.2d 612, 616 (2010). An appellate court's review is limited to determining whether the findings were supported by substantial evidence or were controlled by an error of law. Id. at 9, 698 S.E.2d at 617. "In determining whether the ALJ's decision was supported by substantial evidence, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALJ reached." Id. at 9-10, 698 S.E.2d at 617.

Pursuant to section 1-23-610(C) of the South Carolina Code (Supp. 2008), the appellate court should reverse the ALJ only "if the substantive rights of the petitioner have been

prejudiced" by the ALJ's purported "error of law." See also White v. S.C. Dep't of Health & Envtl. Control, 392 S.C. 247, 257, 708 S.E.2d 812, 817 (Ct. App. 2011) ("Even if the ALJ's interpretation of navigation as used in Regulation 30–12 was too broad, the error is harmless and therefore not reversible."). "The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR; see also Weir v. Citicorp Nat. Servs., Inc., 312 S.C. 511, 517, 435 S.E.2d 864, 868 (1993) ("A correct decision of the trial court on the wrong ground will be affirmed on appeal."). "Where a decision is based on alternative grounds, either of which independent of the other is sufficient to support it, the decision will not be reversed even if one of the grounds is erroneous." Weeks v. McMillan, 291 S.C. 287, 292, 353 S.E.2d 289, 292 (Ct. App. 1987).

In this respect, Amici's reliance on Brownlee v. S.C. Dep't of Health & Envtl. Control, 382 S.C. 129, 137, 676 S.E.2d 116, 120 (2009) is misplaced. In Brownlee, this Court reversed the Court of Appeals because the ALJ's factual findings were influenced by his legal error. Id. Here, the Court's majority affirmed the ALJ primarily because the ALJ's "secondary findings under the proper legal framework" were supported by substantial evidence. Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 738 S.E.2d 455, 470 (S.C. 2013) (Kittredge, J., concurring in result).

B. As the Court's majority concludes, substantial evidence supports the ALJ's findings of fact under each party's interpretation of the CZMA, Regulation 30-11.C(1), Regulation 30-12.C(1)(d), and the public trust doctrine.

While differing in their view of the law on the scope of the cumulative impacts to be considered when evaluating a critical area permit, the Court's plurality, concurring, and dissenting opinions each agree that the CZMA requires permitting decisions to include a balancing of the varying interests at stake. See Kiawah Dev. Partners, II v. S.C. Dep't of Health

& Envtl. Control, 738 S.E.2d 455, 461-63 (S.C. 2013) (Toal, C.J., with one justice concurring) (recognizing the CZMA's emphasis on the balancing of competing interests in considering critical area permits); Id. at 471 (Pleicones, J., dissenting with one justice concurring) ("The ALC and the majority misunderstand and misapply the balancing test required by CZMA . . . ."); Id. at 470 (Kittredge, J., concurring in result) ("[W]hile I agree with the analytical framework and view of legislative intent as set forth in the dissent, I would affirm the ALC in result only due to its secondary findings under the proper legal framework.").

The Honorable Ralph King Anderson, III, who served as the ALJ in this matter, also recognized the CZMA's emphasis on a balancing of interests: "These policy statements [in the CZMA] require a balancing of economic-development benefits and environmental preservation." **R.p.21.** Further, Judge Anderson specifically considered and ruled upon the impacts of the project on these interests.

Contrary to Amici's assertions, Judge Anderson's findings regarding the cumulative impacts of the critical area project *and* the highland development were exhaustive, not cursory. The last-second amicus curiae—NBTA—apparently did not read Judge Anderson's decision very closely or is confused. NBTA mistakenly argues: "[T]he ALC admitted that it gave only 'cursory treatment' to 'the impact resulting from potential residential development that may occur as a result of the permitting of a bulkhead and revetment" because the upland impact "does not appear to be a pertinent inquiry for [the ALC]." **SCNTB Br. p.6.** Judge Anderson *actually* stated: "Two other issues were raised by the parties that warrant only cursory treatment." **R.p.11 note 13.**

Judge Anderson then proceeded, nonetheless, to conduct a full analysis of Appellants' contentions that the residential development possibly could be destroyed by a "very powerful

hurricane" and OCRM's argument that "the potential residential development may result in impacts to freshwater and saltwater wetlands." **R.p.11 note 13.** Judge Anderson rejected the first contention because a very powerful hurricane could potentially destroy *any* residential development located anywhere on Kiawah Island. **R.p.11 note 13.** He rejected the second argument because there was no evidence of any adverse impact on wetlands from the residential development (there are no upland wetlands), and OCRM could address any purported impact in a future permit application. **R.p.11 note 13.** These findings are supported by substantial evidence.

Judge Anderson's use of the word "cursory" was NOT in reference to consideration of the effects of the limited future residential development on the upland. He was merely referring to two of Appellants' contentions on the issue. His consideration of the evidence on the proposed future upland development and the extensive protective measures that are to be taken in finding that there will be no material adverse effect on the upland was exhaustive.

As quoted in the opinions of both Chief Justice Toal and Justice Kittredge, Judge Anderson explained the factual bases for his conclusions that the proposed highland development would have no significant adverse effects and that the proposed highland development was consistent with the Coastal Zone Management Plan ("CZMP"):

> [T]he planned future development of detached single family dwellings on Captain Sam's will occur behind the State's setback line; be served by appropriate utilities; be separated by four to seven rows of established, high dunes well back from the beach; be placed primarily within the trees and other evolving vegetation on the northern side of Captain Sam's; be implemented in an environmentally sensitive manner by an experienced developer that has historically abided by its permits; and the development is both limited and accommodating to the natural features of Captain Sam's peninsula.

R.p.16. As demonstrated in multiple submissions by KDP in this appeal, Judge Anderson made specific findings in support of his ultimate determination in this regard, all of which are

supported by substantial evidence. See **R.pp.6, 14-17, 19, 21, 25** (Judge Anderson's findings on the impact of the bulkhead/revetment *and* upland development); **R.pp.1996-2039, pp.2255-2256; pp.274NN:24-274OO:6; pp.274PP:1-274QQ:10; pp.275:17-281:15; p.329:4-14; pp.332:18-333:2; p.405:2-11; pp.437:24-480:8; p.464:10-17; p.473:1-21; p.932:19-25; pp.936:24-938:20; pp.944:10-945:4; p.948:10-25; p.950:7-11; pp.952:3-958:10; p.960:14-23; p.962:3-12; pp.965:14-966:6; pp.966:20-967:15; pp.969:23-970:11; p.274AAA:7-15; pp.619:24-620:12; pp.1124:9-1125:5; p.1561:3-17; p.1564:18-23; p.1571:1-13; p.1576:7-9; p.1581:1-8; pp.2040; 2042; 2044-2045** (evidence supporting these findings).[8]

As Judge Anderson and Chief Justice Toal point out, Appellants, like Amici here, offered no contrary evidence as to the effects of the potential residential development. Likewise, Appellants offered no evidence critiquing or finding any shortcoming at all in the environmental safeguards that KDP will employ in its limited development. Neither do Amici.

The League and Amici clamor that the alleged legal error on the scope of impacts to be considered requires a remand, all the while overlooking or marginalizing Judge Anderson's thorough consideration of the evidence of the effects of the limited residential development on the upland. Not only was any such error harmless, but there is no proof in the record that would support a different finding on remand. Appellants made the decision to sit on their hands at the contested case hearing on this issue. They offered no witnesses to counter the testimony of Long and Permar, i.e., they offered no witnesses to establish that the environmentally sensitive

[8] These findings of fact are not dicta, as Amici contend. They are alternative sustaining grounds for the ALJ's decision, as the Court's majority recognized. See Nash v. Tindall Corp., 375 S.C. 36, 40-41, 650 S.E.2d 81, 83 (Ct. App. 2007) ("Dicta or, as it is also known, dictum is a statement on a matter not necessarily involved in the case, and is not binding as authority."). In addition, "dicta" refers to non-binding statements of the *law*, not findings of fact. See, e.g., 20 Am. Jur. 2d Courts § 36 ("Mere dicta are not binding under the doctrine of stare decisis.").

techniques that KDP will use are somehow deficient or that there will still be adverse effects on the upland or the surrounding highland area or the entirety of Kiawah Island for that matter. The Appellants even opted not to cross examine Long and Permar on their extensive testimony that there would be no significant, enduring adverse effects, foregoing this opportunity to try to create some doubt. A remand is not only legally unnecessary since the appropriate findings have been made, but also would be entirely futile.

Amici additionally mischaracterize Judge Anderson's interpretation of Regulation 30-11.C(1). Judge Anderson never separately analyzed the cumulative impacts of the bulkhead/revetment structure and the residential highland development, as Amici contend. Each time he addressed the cumulative impacts of the project, he addressed the cumulative impacts of *both* the bulkhead/revetment structure and the adjacent proposed residential highland development on Captain Sam's on the critical area and the surrounding highland. **R.pp.6; 14-15, 19, 21, 25** (Judge Anderson's findings on the impact of the bulkhead/revetment *and* upland development).

Amici also contend that there is no public benefit from the project. Even though none of the project-specific criteria or applicable regulations and statutes require the applicant for an erosion control structure of this nature to demonstrate public benefit, Judge Anderson nonetheless considered that the bulkhead/revetment would protect Beachwalker Park, highland property which is leased and operated by the Charleston County Parks and Recreation Commission ("PRC"). **R.pp.2-3** (structure will begin at park); **p.3 note 3** (park includes changing rooms and parking lot; operated under long-term lease); **p.3 note 4** (park operated by PRC); **pp.6-7** (erosion most prominent at park); **p.8** (no agreement to relocate park); **p.10** (erosion most prominent at park); **p.13** (park has over 50,000 annual visitors); **p.19** (PRC

supports permit). In addition, Judge Anderson noted that a majority of the highland acreage on Captain Sam's peninsula will be subject to a conservation easement and conveyed to the Kiawah Island Community Association as natural "green space." **R.pp.16-17.** This green space will also be protected from erosion by the bulkhead/revetment.

Amici further assert the ALJ failed to consider the impact of the bulkhead/revetment on public access and use of the sandy shoreline along the Kiawah River, as well as access to tidelands held in public trust. Quite the opposite. Judge Anderson extensively evaluated these impacts. **R.pp.15** (impact on public use of the riverbank); **p.19** (revetment will have little adverse impact on public access); **p.27** (limited impact on public access; other sandy areas in immediate vicinity); **p.28** (structure will not substantially impair recreational activities of boaters, kayakers, and others or unreasonably restrict public's use of tidelands); **pp.27-28** (impact on access to public trust tidelands); **p.30** (project will not impair public open space).

Amici incorrectly state that the structure approved by Judge Anderson is a "half-mile long, forty foot wide concrete block wall/mat." **Paddlesports Br., p. 4.** The western thousand feet of the permitted structure will not have a bulkhead, and the ACB mat will extend only eight feet from the short escarpment for this length of the riverbank. **R.p.31.** Kayakers and other boaters will still have a significant width of sandy river bank, up to 32 feet, between the river and ACB mat to land their crafts at low tide. **R.pp.619:24-620:12, p.2040, p.2042, pp.2044-2045.** Further, the sandy river bank extends westward for another 1500 feet after the terminus of the eight foot wide ACB mat.[9] **R.pp.619:24-620:12, p.2040, p.2042, pp.2044-2045.**

[9] Applicants also incorrectly state that the "structure will be constructed on submerged lands below mean high water. . . ." **Paddlesports' Br., p. 4.** The bulkhead will be a vertical structure against the existing escarpment, above high water. Portions of the ACB mat will be above high water during the normal tidal cycle.

As the Court's majority emphasizes, all Judge Anderson's findings on these many points are supported by substantial evidence and, therefore, warrant affirming his decision. The Court need not address these issues a third time simply to assuage Amici's last-minute efforts.

C. Contrary to Amici's assertions, the CZMA requires a balancing of interests and supports a combination of uses in the critical area. It does not solely focus on the public benefit.

Amici go to great lengths to emphasize only the portions of the CZMA which mention the public's use of critical areas. What Amici fail to do is recognize the remaining provisions of the CZMA, which require a balancing approach and support a combination of uses in the critical area. As Justice Pleicones states in his dissenting opinion, "permitting decisions are not to be made in a vacuum." Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 738 S.E.2d 455, 471 (S.C. 2013).

For example, Amici cite to section 48-39-20(B) of the South Carolina Code in contending that the ALJ should consider the impact of the structure on the "public open space." However, section 48-39-20(A) emphasizes the rich variety of "commercial, recreational and industrial resources" in the coastal zone, and section 48-39-20(B) also stresses the prevention of shoreline erosion. Unlike Amici, Judge Anderson weighed *both* the impact on public open space **(R.p.30)** *and* the prevention of shoreline erosion **(R.p.19)** in his Amended Final Order and Decision.

Likewise, Amici focus on one specific part of section 48-39-30 of the South Carolina Code to support their arguments. As the Chief Justice and the ALJ recognized, other parts of section 48-39-30 show intent to protect economic interests, as well. See, e.g,. §48-39-30(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. (emphasis added)); §48-39-

30(B)(1) (a specific policy is "[t]o promote *economic* and social improvement of the citizens of this State and *to encourage development of coastal resources* . . . ." (emphasis added)).

As Amici also point out, section 48-39-30(D) provides:

> Critical areas shall be used to provide the *combination of uses* which will insure the maximum benefit to the people, but not *necessarily* a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.

(emphasis added). Contrary to Amici's assertions, this statutory emphasis on a combination of uses in the critical area again implements the General Assembly's desire to balance competing interests. As Justice Pleicones explains in his dissenting opinion: "It is the policy of the State to *balance* development in the coastal zone with concern for sensitive and fragile coastal areas." Kiawah Dev. Partners, II, 738 S.E.2d at 470 (emphasis added).

But Amici oppose a combination of uses. They seek to limit use of the critical area to recreation. They oppose the owner of Captain Sam's from making any improvements at all on the mile-long 150+ acre peninsula and insist this highland acreage remain in an entirely natural state without compensation of the owner. Amici also ignore evidence of the public interests, described *supra* in Section III.B, *supporting* the subject erosion control device. They further ignore any benefit to the current owner from the use of the critical area.[10] They advocate against economic benefits as a consideration.

Amici overlook that the CZMA expressly authorizes the issuance of a permit to protect private property from erosion. See S.C. Code Ann. §49-39-120(F) (authorizing permitting of

[10] They also ignore the full context of the plurality's opinion by intimating that the Chief Justice focused exclusively on "promoting the economic improvement of the coastal zone." This portion of the Chief Justice's plurality opinion *actually* provides: "In section 48–39–30, the General Assembly declared the state policy of *protecting the quality of the coastal environment and* promoting the economic improvement of the coastal zone." Id. at 462 (emphasis added).

erosion control devices to protect "public and private property"); 23A S.C. Code Ann. Regs. 30-12.C(1)(c) ("Bulkheads and revetments will be prohibited ... where public access is adversely affected unless upland is being lost due to tidally induced erosion").

In arguing about public benefit, Amici's reliance on S.C. Wildlife Fed'n v. S.C. Coastal Council, 296 S.C. 187, 189, 371 S.E.2d 521, 522 (1988) is misplaced. They argue that this case states that a benefit which is "purely economic" is insufficient to establish a public interest. Unlike the regulation in this case, S.C. Wildlife Fed'n involved the application of a provision in the CZMP governing the standard for filling freshwater wetlands that expressly required the applicant to establish "overriding public interest." The specific permitting regulation at issue here—Regulation 30-12.C(1)(d)—does not mention the public interest at all. There is no requirement that an applicant seeking an erosion control structure to prevent the continued loss of his valuable highland must demonstrate the project is in the public interest.

Moreover, unlike the applicant in S.C. Wildlife Fed'n, KDP is not relying upon the "overriding public interest" to obtain the permit. It is requesting the permit to protect its highland property from further erosion. Regulation 30-12.C(1)(c) expressly states that a bulkhead/revetment structure may be authorized when "upland is being lost due to tidally induced erosion."

Further, even though public benefit is not a criterion for this permit, Judge Anderson recognized that the public interest in the project includes the protection of highland acreage in the adjacent Beachwalker Park. Further, as explained in Judge Anderson's decision, a majority of the highland acres on Captain Sam's will be held as green space. The protection of this green space will also serve the public interest.

D. Amici's narrow interpretation of Regulation 30-12.C(1)(d) is also unsupported.

Amici state that Judge Anderson improperly applied the burden of proof as to this issue. Judge Anderson's Final Amended Order and Decision expressly undermines this assertion: "KDP bears the burden of proving that the 2783 foot bulkhead/revetment complies with the Coastal Wetlands and Tidelands Act . . ., the regulations promulgated thereunder, 23A S.C. Code Reg. §§30-1 through 30-18, and the CZMP." **R.p.17.**

Amici also mistakenly assert that the Court's majority erred in affirming the ALJ because Regulation 30-12.C(1)(d) *required* the ALJ to deny the permit, since there were purportedly feasible alternatives to the structure.[11] The ALJ, relying on the testimony of KDP's engineer for the project, found that, "although public access to the riverbank at low tide would be affected on a very limited basis," the permit should be granted because "KDP's upland is being lost due to tidally induced erosion, and there is no feasible alternative that will stabilize this eroding riverbank." **R.p.27.** Likewise, the Chief Justice explained: "The ALC determined that Respondent lost upland due to tidal erosion, and that no feasible alternatives existed to stop continuing loss." Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 738 S.E.2d 455, 469 (S.C. 2013). "The regulation contemplates an adverse impact on public access when these conditions are met." Id. "Therefore, the ALC did not err in the application of regulation 30–12, and substantial evidence in the Record supports the court's determinations." Id.

[11] On this point, Amici contend Regulation 30-12.C(1)(d) should be read in context with the CZMA. Nevertheless, Amici's interpretations of the CZMA and Regulation 30-12.C(1)(d) focus exclusively on the public interest, to the exclusion of the balancing approach articulated in the CZMA and applied by the ALJ. In this respect, the ALJ did not replace the "no feasible alternatives" language with a "most environmentally sensitive design" standard, as Amici advocate. To the contrary, the ALJ found the proposed structure constitutes the only feasible alternative that balances the environmental, public, and economic interests in the critical area, as required in the CZMA.

The decision of the Court of Appeals in 330 Concord St. Neighborhood Ass'n v. Campsen, 309 S.C. 514, 519, 424 S.E.2d 538, 541 (Ct. App. 1992), is instructive on this issue. The Court of Appeals, like the ALJ and the Chief Justice, focused on whether there was a feasible alternative which would accomplish the same objective as the requested permit:

> The third criterion is 'no feasible alternatives exist.' In reviewing the evidence, the Coastal Council and the circuit court found the criterion had been met.
>
> The respondents presented the testimony of the restaurant architect, restaurant consultant, and a real estate appraiser. Their testimony related to alternative floor plans for the restaurant, the need for service access, problems with setback restrictions, the value of offstreet parking in the city and the potential loss of parking spaces by further moving the restaurant, and the economic viability of a smaller restaurant. The appellants cross-examined these witnesses but did not offer evidence on this matter. Based upon the evidence, the agency and circuit court found the criterion was met.
>
> . . . Given our standard of review, we find no error since the conclusion reached by Coastal Council based upon the record before it is one a reasonable mind might have reached.

The same result should apply here. KDP submitted testimony establishing that its engineers evaluated all potential alternatives to the proposed structure and determined the bulkhead/revetment was the most feasible in terms of preventing highland erosion. No contrary evidence was submitted. The ALJ relied upon KDP's evidence to determine that there were no feasible alternatives, and the Court's majority agreed that this evidence supported the ALJ's decision. There is no error and no reason to rehear this issue.

E. The public trust doctrine is not violated where, as here, the State retains ownership of the critical area, OCRM retains control over the critical area, and there is no substantial impairment of the public interest.

In addressing the impact of the structure on the public trust, Judge Anderson recognized: "Clearly, the above laws [the CZMA and regulations adopted pursuant to the CZMA] set forth

the parameters of when coastal public trust land may be used for private purpose." **R.p.27.** Accordingly, Judge Anderson held "the bulkhead/revetment will not substantially impair the recreational activities of boaters, kayakers, and others, nor will it substantially impair or unreasonably restrict their use of the public trust tidelands including a portion of the southerly bank of the Kiawah River." **R.p.28.**

The ALJ's conclusions in this regard are supported not only by substantial evidence, but by this Court's decision in Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995): "Since no interest in the land or water within the public trust is conveyed by the permit, the relevant inquiry is whether the docks substantially impair the public interest in the public trust lands and waters." "As there was testimony that the docks would not substantially impair marine life, water quality, or public access to the area, we hold that the permits at issue do not violate the public trust doctrine." Id.[12]

McQueen v. S.C. Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003), relied upon by Amici, is to the same effect: "The State has the exclusive right to control land below the high water mark for the public benefit . . . and cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access."[13] Here, as in Sierra Club, Judge Anderson held that the project did not substantially impair the public interest in

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[12] For the same reason, Amici's assertion that the permit should be denied because KDP does not own the critical area holds no water. KDP requests a permit to use the critical area, not a transfer of ownership.

[13] Unlike the present case, McQueen involved an action by the property owner for just compensation arising from a purported regulatory taking. Id. The property owner sought a permit to backfill or place bulkheads on public trust property. Id. In McQueen, unlike here, the property owner requested the permit to *restore* highland property he had previously lost due to tidally-induced erosion. Id. The Court concluded: "Any taking McQueen suffered is not a taking effected by State regulation but by the forces of nature and McQueen's own lack of vigilance in protecting his property." Id. at 150, 580 S.E.2d at 120. In the present case, KDP took notice of the Court's warning in McQueen by vigilantly seeking a critical area permit to protect its highland property from eroding *before* it is too late.

marine life, water quality, or public access. This ruling is supported by substantial evidence, and the public trust doctrine is not implicated.

F. As the Court's majority recognized, there is no reason to remand this case.

Amicus NBTA asserts the Court's majority should have remanded the matter for additional findings of fact. The arguments in support of this position have never been raised by Appellants. Rule 213, SCACR, therefore prohibits them from consideration.

Notwithstanding, as discussed *supra* in Section III.A, an appellate court should affirm the ALJ where, as here, the ALJ's purported error of law has no impact on the outcome. See S.C. Code Ann. §1-23-610(C) (Supp. 2008) (appellate court should affirm unless "the substantive rights of petitioner have been prejudiced" by the ALJ's purported "error of law"); Weeks v. McMillan, 291 S.C. 287, 292, 353 S.E.2d 289, 292 (Ct. App. 1987) ("Where a decision is based on alternative grounds, either of which independent of the other is sufficient to support it, the decision will not be reversed even if one of the grounds is erroneous.").

None of the cases cited by NBTA changes this result. These cases all stand for the proposition that an *appellate court* should not engage in fact finding when it finds an error of law, but instead should remand for appropriate findings by the trial court or administrative tribunal. See Bartley v. Allendale Cnty. Sch. Dist., 392 S.C. 300, 310, 709 S.E.2d 619, 624 (2011) (Court of Appeals "arguably made findings of fact . . . that were not made by the Commission"); N.L.R.B. v. Enter. Ass'n of Steam, 429 U.S. 507, 522 (1977) (explaining that the Court would have remanded its previous decision for additional findings of fact if the Court had articulated a new legal standard in such decision); Hasan v. U.S. Dep't of Labor, 545 F.3d 248, 252 (3d Cir. 2008) ("Because the ARB's sole basis for its summary disposition of the case rests

upon an erroneous conclusion of law, we must remand the case to the ARB for further proceedings in conformance with this opinion.").

In fact, in Int'l Light Metals v. United States, 279 F.3d 999, 1003 (Fed. Cir. 2002), cited by SCNTB in support of its argument for remand, the Court explained:

> The government invokes the settled principle of administrative law that "[w]hen an administrative agency has made an error of law, the duty of the Court is to 'correct the error of law committed by that body, and, after doing so to remand the case to the [agency] so as to afford it the opportunity of examining the evidence and finding the facts as required by law.'" *In determining whether and how that principle is to be applied, however, its purpose must always be kept in mind: it is designed to insure that the reviewing court does not intrude impermissibly on the authority of the administrative agency by itself taking action that implicates the agency's expertise and discretion. Whether the principle is to be applied necessarily turns upon the precise issues the reviewing court has decided and what questions remain for the agency to decide on remand.*

(internal citations omitted; emphasis added); see also Banks v. Asture, 537 F. Supp. 2d 75, 80 (D.D.C. 2008) (refusing to remand to ALJ where error has no impact on outcome).

In this case, Judge Anderson carefully considered the evidence under each party's interpretation of the applicable law. There is no reason to remand for further fact finding. See Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 738 S.E.2d 455, 470 (S.C. 2013) (Kittredge, J., concurring in result) ("[W]hile I agree with the analytical framework and view of legislative intent as set forth in the dissent, I would affirm the ALC in result only due to its secondary findings under the proper legal framework."). Furthermore, as previously explained, Appellants offered no proof at the contested case hearing of any specific cumulative effects on the upland or its natural resources from the limited residential development on less than 20% of the acreage, other than they want it to remain in its natural state. Neither did Amici.

IV. The Court properly ruled that the ALJ may modify OCRM's permitting decision as part of its *de novo* review of such decision by adding conditions reducing the size of the proposed structure but not changing its design.

In her plurality opinion, the Chief Justice explained: "[T]he ALC held a de novo review of the partial denial of Respondent's permit." Kiawah Dev. Partners, II v. S. Carolina Dep't of Health & Envtl. Control, 738 S.E.2d 455, 461 (S.C. 2013). "The evidence and testimony before the ALC in this matter amounted to a Record six volumes and 2,380 pages in length." Id. "The ALC then ordered approval of the permit *issued by* DHEC with modifications based on evidence presented during the review." Id. (emphasis in original). "The ALC did not enlarge or otherwise approve a permit substantially different than that requested by Respondent, or originally reviewed by DHEC." Id. "The ALC acted in accordance with its authority as conferred and defined by the General Assembly." Id.

This conclusion is well supported by applicable law. Despite Amici's contentions to the contrary, Judge Anderson never redesigned the bulkhead/revetment structure. Instead, in reviewing OCRM's decision *de novo*, Judge Anderson focused on the persuasive testimony of the project's engineer and held the permit should have been granted, subject to additional conditions limiting the size of the structure. See 23A S.C. Code Ann. Regs. 30-4(H) ("An amendment to a permit can be made without the requirements of a new permit if the proposed change on the amendment does not significantly increase the size or change the use of the permitted project.").

The ALJ presides as the fact-finder in the hearing of contested permitting cases. See S.C. Code Ann. §1-23-600(B); Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002). "Although this case reached the ALJ in the posture of an appeal, the ALJ was not sitting in an appellate capacity and was not restricted to a review of OCRM's

permit decision." Id. "Instead, the proceeding before the ALJ was in the nature of a de novo hearing with the presentation of evidence and testimony." Id.

"Each administrative law judge of the division has the same power at chambers or in open hearing as do circuit court judges and to issue those remedial writs as are necessary to give effect to its jurisdiction." S.C. Code Ann. § 1-23-630(1); see Carolina Water Serv., Inc. v. S.C. Pub. Serv. Comm'n, 272 S.C. 81, 87, 248 S.E.2d 924, 927 (1978) ("In order to effectively comply with Section 58-5-290 the Commission must, of necessity, possess the requisite authority to determine whether Carolina and Kingfisher intended the disputed charge to be a tap fee or a customer contribution in aid of construction.").

Judge Anderson's decision to modify the permit by placing additional conditions on the proposed structure considered by OCRM is thus well within his discretion.[14]

Conclusion

Based on the foregoing, the Amici briefs add nothing and the rehearing should be DENIED for the reason stated herein and in KDP's Return to the League's Petition for Rehearing.

Respectfully Submitted,

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[14] Amici also contend that the ALJ's decision infringes upon OCRM's purportedly exclusive authority to determine whether the application impacts the public. This runs contrary to the ALJ's authority as the fact finder. Notwithstanding Amici's mistaken interpretation of the law, Amici also incorrectly assert that "OCRM determined that this proposed structure would not be in the public interest." To the contrary, OCRM determined the permit application *complied* with Regulation 30-12.C(1). **R.p.1966.** If OCRM is entitled to deference as to this issue, KDP would benefit, not Appellants or Amici.

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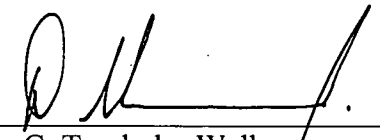
The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

BY: 

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Docket No. 09-ALJ-07-0029-CC

Kiawah Development Partners, II, ... Respondent,

v.

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

Docket No. 09-ALJ-07-0039-CC

South Carolina Coastal Conservation League, ... Appellant,

v.

South Carolina Department of Health and Environmental Control and
Kiawah Development Partners, II,

Of Whom

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

and Kiawah Development Partners, II, is ..... Respondent.

Appellate Case No. 2019-155629

PROOF OF SERVICE

I, Nancy Jane Dennis, an employee of Pratt-Thomas Walker, P.A., hereby certify that I have served this 22tnd day of April 2013, a copy of the Respondent's Reply to Amici Curiae Briefs of South Carolina Paddlesports Industry Association, Inlet Cove Homeowners Association, Kayak Charleston, LLC, Friends of the Kiawah River, and South Carolina Nature-Based Tourism Association on counsel of record by placing the same in the United States mail,

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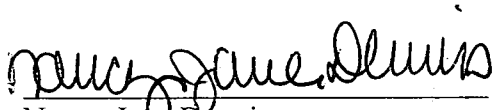

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