THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kiawah Development Partners, II, Respondent,

v.

South Carolina Department of Health and Environmental Control, Appellant.

and

South Carolina Coastal Conservation League, Appellant,

v.

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

Appellate Case No. 2010-155629

Appeal From The Administrative Law Court
Ralph K. Anderson, III, Administrative Law Judge

Opinion No. 27065
Heard April 17, 2012 – Refiled February 27, 2013

AFFIRMED

Jaquelyn Sue Dickman and Bradley David Churder, of South Carolina Department of Health and Environmental Control, both of Columbia, for Appellant. Amy Armstrong, of Pawley's Island, for Appellant.

Gedney M. Howe, III of Gedney M. Howe III, PA, and George Trenholm Walker of Pratt-Thomas Walker, PA, both of Charleston, for Respondent

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Deputy Attorney General Robert Cook, Assistant Attorney General Parkin Hunter, all of Columbia, for Amicus Curiae of Savannah. C. Mitchell Brown and A. Mattison Bogan, of Nelson Mullins Riley & Scarborough LLP, both of Columbia, for Amicus Curiae.

CHIEF JUSTICE TOAL: This case is an appeal from an administrative law court's (ALC) decision authorizing Kiawah Development Partners (Respondent) to construct a bulkhead and revetment on Captain Sam's Spit (the Spit) on Kiawah Island. We affirm.

FACTS/PROCEDURAL BACKGROUND

Kiawah Island is a barrier island fronting the Atlantic Ocean with over ten miles of beachfront. The island is bounded on the south by the Atlantic Ocean, on the east by the Stono River Inlet, on the north by the Kiawah River, and on the west by the Kiawah River where the river enters the Atlantic through Captain Sam's Inlet. The Spit is located adjacent to Captain Sam's Inlet at the southwest end of Kiawah Island. The Spit is a sandy land

formation surrounded on three sides by water—the Atlantic Ocean, Captain Sam's Inlet, and the Kiawah River. Respondent owns Captain Sam's peninsula.

In 1999, the Office of Coastal Resource Management (OCRM) of the South Carolina Department of Health and Environmental Control (DHEC) established a baseline and building set back line twenty feet landward based on information that the Spit had accreted, or grown, and had not been subject to any significant, measurable erosion between 1959 and 1999. The movement of the baseline prompted Respondent to consider development of the Spit. On February 29, 2008, Respondent submitted an application to DHEC for a permit to construct a combination bulkhead and revetment in the area. The application sought authorization to construct a 2,783 foot bulkhead and 2,783 foot by 40 foot articulated concrete block revetment on the shoreline of the Kiawah River.

On December 18, 2008, DHEC issued a conditional permit approving the construction of the erosion control structure for a distance of 270 feet. DHEC refused the permit request for the remaining 2,513 feet based on its concerns regarding cumulative negative impacts, including interference with natural inlet formation and possible adverse effects on wintering piping plovers. DHEC also determined that the project was contrary to the policies set forth in the Coastal Zone Management Program (CZMP). Respondent requested a final review conference by the DHEC Board (the Board), but the Board declined to hold a review conference.

Respondent then requested a contested case hearing before the ALC, and challenged the denial of the construction of a bulkhead and revetment along the remaining 2,513 feet. The Coastal Conservation League (CCL) opposed the construction of any bulkhead or revetment on the Spit, and also requested a contested case hearing challenging the decision to authorize the 270 foot structure, but supporting denial of the remainder. The cases were consolidated. The ALC granted Respondent's permit to construct the bulkhead and revetment, subject to certain conditions reducing and altering its size. DHEC and CCL (collectively, Appellants) appealed the ALC's order. This Court reversed the ALC and remanded the issue in a decision

published November 21, 2011. We subsequently granted Respondent's petition for rehearing, and accepted an amicus brief from the Savannah River Maritime Commission (the SRMC). We now withdraw our initial opinion, and issue this opinion, affirming the decision of the ALC.

ISSUES PRESENTED

The issues in this case are consolidated and clarified as follows:

I. Whether the ALC erred in failing to defer to DHEC's interpretation of the applicable statutes and regulations and whether the ALC had the authority to modify the proposed bulkhead/revetment.

II. Whether substantial evidence supports the ALC's findings that the proposed bulkhead/revetment complies with the Coastal Zone Management Act (CZMA) and the CZMP.

III. Whether the ALC erred in concluding that potential long-range cumulative impacts on the adjacent upland area should not be considered in a critical area permitting decision pursuant to regulation 30-11 of the South Carolina Code of Regulations, and whether substantial evidence supports the ALC's finding that the proposed bulkhead and revetment comply with regulation 30-12 of the South Carolina Code of Regulations.

STANDARD OF REVIEW

In an appeal from an ALC decision, the Administrative Procedures Act (APA) provides the appropriate standard of review. S.C. Code Ann. § 1-23-610(B) (Supp. 2011). This Court will only reverse the decision of an ALC if that 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 an abuse of discretion or clearly unwarranted exercise of discretion.

Id. "The Court may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact." *Id.* In determining whether the ALC'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 ALC reached. *Hill v. S.C. Dep't of Health and Envtl. Control*, 389 S.C. 1, 9–10, 698 S.E.2d 612, 617 (2010).

LAW/ANALYSIS

I. Whether the ALC erred in not deferring to DHEC, and whether the ALC had the authority to modify the proposed construction.

A. Deference

Appellants claim that the ALC erred in failing to defer to DHEC's conclusions in this case, and improperly focused on the fact that DHEC did not conduct a final review process formally adopting the "staff's" findings. Respondent and the SRMC, assert the challenged permitting decision was that of the DHEC staff, because the DHEC Board never acted on the permitting decision. Thus, the decision was not entitled to deference as a matter of law. We disagree.

Courts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ. *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005). "[The Board], not OCRM staff, is entitled to deference from the courts." *Id.* Section 44-1-60(F) of the South

Carolina Code provides, "If a final review conference is not conducted within sixty days, the department decision becomes the final agency decision, and an applicant . . . may request a contested case hearing before the [ALC]." S.C. Code Ann. § 44-1-60(F) (Supp. 2011).

In *South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control*, 363 S.C. 67, 70, 610 S.E.2d 482, 484 (2005), LandTech of Charleston, L.L.C. (LandTech) applied to OCRM for a permit to build a bridge across the marshes of the Wando River to Park Island in the Town of Mount Pleasant. OCRM staff deemed Park Island a small island and determined the access-to-small islands regulation, regulation 30-12(N) of the South Carolina Code of Regulations, applied. *Id.* LandTech claimed that the application was governed by the transportation-projects regulation, regulation 30-12(F). *Id.* at 71, 610 S.E.2d at 484. OCRM disagreed, processed the application under the more stringent small island regulation, and granted the permit. *Id.* CCL objected and requested a hearing before the ALC. *Id.* The ALC held that the application was actually governed by the transportation projects regulation, but upheld the permit. *Id.* CCL appealed to the Panel, which affirmed *without analysis*. *Id.* at 72, 610 S.E.2d at 484. CCL then appealed to the circuit court which reversed. *Id.* The court found that Park Island was in fact governed by the access-to-small islands regulation, but that issuance of the permit did not comply with the regulation. *Id.* This Court held that the circuit court should have deferred to the Panel's decision because, "there was no compelling reason to overrule the Panel's decision that the Transportation Regulation governed." *Id.* at 75, 610 S.E.2d at 486.

In the instant case, DHEC's decision to refuse to conduct a Final Review Conference, pursuant to section 44-1-60(F) of the South Carolina Code, is analogous to the Panel decision in *Coastal* to affirm the ALC's decision without analysis. In both situations, regardless of the mechanism, the staff decision became the agency decision and was entitled to deference. Thus, the appropriate question is not whether DHEC's decision was entitled to deference, but instead whether there was a compelling reason for the ALJ not to defer to this decision.

Where 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). In *Brown*, the employee sustained a compensable injury while working for the employer. *Id.* at 438, 581 S.E.2d at 837. Several years later a question arose whether medical treatment sought by the employee for subsequent falls was related to the injury and thus, whether the employer was required to pay for medical treatment. *Id.* The employer hired a rehabilitation nurse to contact the employee's treating physicians regarding the nature of her conditions. *Id.* The employee's attorney wrote a letter to the rehabilitation nurse and the treating physicians threatening legal action if they discussed the employee's medical condition. *Id.* The employer complained to the Workers' Compensation Commission (the Commission) which ordered the employee's attorney to cease and desist from obstructing contact. *Id.*

This Court held that the South Carolina Workers Compensation Act required physicians to provide employers with pertinent information regarding the treatment of a compensation claimant, but mandated the exchange of *existing* information, and did not authorize other ex parte methods of communication such as that sought by the employer. *Id.* at 439–40, 581 S.E.2d at 838. Thus, the Court reversed because the Commission's conclusions in the case were affected by an error of law. *Id.* at 441, 581 S.E.2d at 839 (citing S.C. Code Ann. § 1-23-380 (A)(6) (Supp. 2002)).

In this case, the ALC noted significant and compelling reasons why deference to DHEC's interpretation of the CZMA, and associated statutes and regulations, would be improper. For example, as discussed *infra*, the ALC disagreed that regulation 30-11(C) authorized DHEC to account for the impact of the proposed project outside the actual areas where DHEC has direct permitting authority. This Court's prior decisions and substantial evidence in the Record support that determination. In other words, the ALC owed no deference to DHEC's interpretation of statutes and regulations that were erroneous or controlled by an error of law.

B. Modification

Furthermore, the ALC did not exceed its authority by modifying the structure requested by Respondent. As described previously, Respondent sought authorization to construct a 2,783 foot bulkhead and a 2,783 foot by 40 foot articulated concrete block revetment. DHEC approved a structure of

270 feet and refused the request for the remaining 2,513 feet. The ALC concluded that the full extent of the proposed structure was not currently necessary to stabilize the river bank:

> In many locations along the western section, the bulkhead may not be necessary and an ACB mat much shorter in width than forty feet may well suffice to stabilize the riverbank . . . . More specifically, the western section is best suited now and perhaps permanently to the soft approach.

The ALC deleted DHEC's size restriction, and instituted different special conditions limiting the size of the structure.[1]

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[1] The ALC limited the structure in the following pertinent parts:

1. Provided:

(i) That care is used in the installation of the requested erosion control structure near its eastern end, adjacent to Beachwalker Park, to avoid covering marsh grass, where practical, unless necessary to prevent significant upland erosion;

(ii) That, for the portion of the proposed erosion control structure to be located west of survey point "F" on [Respondent]'s Exhibit 77, a bulkhead shall not be used where the vertical face of the escarpment is less than 24 inches;

(iii) That for this same western section of the proposed erosion control structure, the ACB mat shall be no greater than eight feet in width; and,

(iv) That [Respondent] shall submit final construction plans to [DHEC] consistent with the permit requested, as modified and approved by the [ALC], before commencing initial construction of the erosion control structure.

Appellants argue that the ALC exceeded its authority and committed an error of law:

> After determining that the structure applied for by [Respondent] was not necessary, rather than affirming [DHEC]'s decision, the ALC went on to design an erosion control structure for [Respondent] . . . . The ALC relied upon off-the-cuff testimony . . . . If the structure designed by the ALC were to be constructed, neither DHEC nor interested members of the public would be able to determine whether it is constructed in accordance with the permit, as it is unclear what the ALC authorizes.

As Respondent and the SRMC correctly note, the General Assembly has broadly defined the authority of the ALC. The ALC has the same "power at chambers or in open hearing as do circuit court judges" and the authority to issue writs necessary to give effect to its jurisdiction. S.C. Code Ann. § 1-23-630 (2005) (granting circuit judges the power to grant, decline, or modify injunctions). The ALC presides over hearings of all contested cases and must issue a decision in a final written order. *Id.* § 1-23-505(3) (Supp. 2011). If the ALC's final order is not appealed in accordance with the provisions of section 1-23-610 of the South Carolina Code, the certified order has the same effect as a judgment of the court where filed and may be recorded, enforced, or satisfied in the same manner as a judgment of that court. *Id.* § 1-23-600(I) (Supp. 2011).

The ALC is the ultimate fact finder in a contested case, and is not restricted by the findings of the administrative agency. *Risher v. S.C. Dep't of Health and Envtl. Control*, 393 S.C. 198, 207–08, 712 S.E.2d 428, 433 (2011). Additionally, in a contested case proceeding, the ALC sits de novo. *Brown v. S.C. Dep't of Health and Envtl. Control*, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002). It is unlikely the General Assembly intended to vest the ALC with broad authority to hear permit disputes, and conduct a trial on the dispute, but then restrain the court from issuing a decision which reflects the best outcome gleaned from that trial. *See B & A Dev., Inc. v. Georgetown*

Cnty., 372 S.C. 261, 268–69, 641 S.E.2d 888, 893 (2007) (recognizing the principle that when the legislature intends to confine expansive authority, it will expressly provide for such a limitation).

In the instant case, the ALC held a de novo review of the partial denial of Respondent's permit. The evidence and testimony before the ALC in this matter amounted to a Record six volumes and 2,380 pages in length. The ALC then ordered approval of the permit *issued by* DHEC with modifications based on evidence presented during the review. The ALC did not enlarge or otherwise approve a permit substantially different than that requested by Respondent, or originally reviewed by DHEC. The ALC acted in accordance with its authority as conferred and defined by the General Assembly.

II. Whether substantial evidence supports the ALC's findings that the proposed bulkhead/revetment complies with the CZMA and the CZMP.

Appellants argue that the proposed project violates the plain language of the CZMA, and that the ALC erred in concluding that the proposed bulkhead/revetment structure complies with sections 48-39-20,-30, and -150 of the South Carolina Code. We disagree.

A. The CZMA

The CZMA 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 that will generate measurable maximum dollar benefits." S.C. Code Ann. § 48-39-30(D) (2008). Critical areas include coastal waters, tidelands, beaches, and dune systems. *Id.* § 48-39-10 (2008). Section 48-39-150 of the South Carolina Code sets forth ten general considerations that OCRM must take into account when reviewing any permit concerning activity in a critical area. *Id.* § 48-39-150. Section 48-39-150 also states that "the Department will be guided by the policy statements in Sections 48-39-20 and 48-39-30," along with the ten considerations. *Id.* § 48-39-150 (2008).

The ALC listed all of the relevant considerations of section 48-39-150 and then explained why the evidence presented in the case demonstrated that the proposed construction complied with those considerations and would not

have "adverse environmental impacts." The ALC then analyzed the proposed construction in light of the policy statements of sections 48-39-20 and 30 of the South Carolina Code. In section 48-39-20, the General Assembly noted that the coastal zone is rich in a variety of natural, commercial, recreational, and industrial resources. *Id*. § 48-39-20 (2008). The General Assembly observed that ill-planned development threatened to destroy important ecological, cultural, and natural characteristics, as well as, industrial and economic values. *Id.*§ 48-39-20(E). Thus, the legislature enacted regulations in light of competing demands between the urgent need to protect natural systems in the coastal zone "while balancing economic interests." *Id.* at 48-39-20(F). 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.* § 48-39-30(A). Two subsections of that section are particularly pertinent:

> (B) Specific state policies to be followed in the implementation of this chapter are:
>
> (1)To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development.
>
> . . . .
>
> (D) 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 measureable maximum dollar benefits.

Id. § 48-39-30.

The ALC noted the policy considerations of the CZMA and concluded:

> These policy statements require a balancing of economic development benefits and environmental preservation. Even though the focus of the inquiry is on the effects of the project,

> neither the bulkhead/revetment nor the potential limited residential development will result in any significant harm to the public resources or marine or other plant or animal life, nor significantly impair public access to critical areas . . . . The potential residential development is not ill-planned and will be implemented in a low density, environmentally sensitive manner. It will be subject to local, state, and possibly federal permitting requirements. Neither the proposed bulkhead/revetment nor the potential limited residential development transgresses the policies set forth in these two statutes.

Appellants fail to recognize the ALC's thorough findings of fact supporting the conclusions regarding sections 48-39-20 and 48-39-30. The ALC engaged in an extensive analysis regarding the erosion issues facing the Spit and the consequences this erosion would have on Respondent's ability to prevent the loss of further upland, and concluded:

> Moreover, evidence did not establish that there was a feasible alternative to the bulkhead/revetment that would stabilize the river shoreline and prevent the continued erosion of KDP's upland . . . . That evidence clearly establishes a need for erosion control along the disputed shoreline.

The ALC also examined both the testimony regarding possible adverse effects on marine resources and wildlife, and a detailed analysis of the facts presented regarding wintering piping plovers, a threatened species under the Endangered Species Act, and diamond-back terrapins. In this regard, the ALC noted that there had never been a single sighting of a piping plover in the proposed construction area. The ALC also observed that the United States Fish and Wildlife Service propounded a final determination of the critical habitat for piping plovers. That final determination specified the critical area of piping plover habitat as extending one mile north of Captain Sam's inlet, but not extending above the building setback line on the Spit. The ALC cited this fact in rejecting DHEC's contention that future residential development, apart from the proposed project itself, would have an adverse effect on the piping plover. Therefore, if the proposed project and residential development do not occur in critical plover habitat, or in close proximity, it is unlikely to have an adverse effect.

The ALC noted that the diamond-back terrapin has not been listed as an endangered or threatened species in South Carolina. Moreover, the testing data relied upon by CCL's expert was gathered more than fifteen years before the sharp decline in the terrapin population in tidal creeks surrounding Kiawah. CCL's expert could not testify to a reasonable degree of certainty that the proposed construction would have any significant effect on terrapins.

The preceding findings of fact regarding the impact of the proposed project, and the absence of feasible alternatives, demonstrate the substantial evidence in the Record supporting the ALC's conclusion that the project complies with the CZMA.

B. The CZMP

Appellants also claim that that the proposed activity contravenes the CZMP, including the plan's policies for public open space and the protection of barrier islands, dune areas (outside the critical area), erosion control, and beach and shoreline access.

DHEC developed the CZMP for the coastal zone as required by the CZMA. *See* S.C. Code § 48-39-80 (2008). All state and federal permits must be reviewed for compliance with the CZMP. *Spectre LLC v. S.C. Dep't of Health and Envtl. Control*, 386 S.C. 357, 360, 688 S.E.2d at 844, 845 (2010). The CZMP classifies barrier islands as areas of special significance and dune areas, which fall landward of the beach zones, as areas of "special resource significance." Thus, project proposals for barrier islands "must demonstrate reasonable precautions to prevent or limit any direct negative impacts on adjacent critical areas." CZMP Chapter III (C)(3)(XII)(A)(2). Additionally, project proposals for sand dune areas in close proximity to those dunes in critical areas must also comply with these same direct precautions. *Id*. Chapter III (B). The CZMP also sets forth a policy of increasing the amount of public space in the coastal zone, and protecting those areas in the coastal zone which are inhabited by endangered or threatened species. *Id.*

The ALC concluded that the proposed project did not contravene the CZMP:

> The development techniques and safeguards [Respondent] intends to implement are consonant with the policies in the CZMP. More specifically, I find the low density development . . . that would be employed in the residential development of [the Spit] entail [sic] reasonable precautions. *No evidence was offered to alter this important point.* The many rows of dunes seaward of the setback line would remain essentially intact on a permanent basis to enjoy for their beauty and protection, thereby preserving the strong natural protections deemed desirable by the policies in the CZMP.
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> . . . .
>
> The potential residential development on private property will also not impair public open space at Beachwalker Park or along the beach. Finally, the developable area of Captain Sam's peninsula is well outside . . . boundaries of designated critical habitat . . . . It is thus not a Geographic Area of Particular Concern (GAPC) under the CZMP.

(emphasis added).

The ALC's findings on this issue are well supported. The Record contains evidence of the "environmentally-friendly" nature of the proposed residential development. Respondent placed before the court evidence of the proposed structure's effect on public access, and the lack of adverse impact on critical habitats. Thus, reasonable minds could conclude from the evidence in the Record that Respondent's proposed construction complies with the CZMA and the CZMP.

III. Whether the ALC erred regarding the consideration of potential long-range cumulative impacts, and whether the ALC correctly found that the proposed bulkhead/revetment complies with regulations 30-11, and 30-12 of the South Carolina Code of Regulations.

A. Regulation 30-11(C)(1)

Appellants argue that the ALC misconstrued regulation 30-11(C)(1) of the South Carolina Code of Regulations, and erroneously concluded that DHEC lacked authority to consider impacts "outside critical areas when reviewing applications to alter or utilize critical areas." We disagree.

Regulation 30-11(C) provides in pertinent part:

> Further Guidelines: 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.

S.C. Code Ann. Regs. 30-11(C)(1) (1999).

Appellants argue that the "area" referred to under this regulation extends beyond the critical area to adjacent upland. According to Appellants, the declarations of section 48-39-20 and -30 of the South Carolina Code indicate the "General Assembly's intent that [DHEC], when acting on critical area permit applications, would not just protect and restore or enhance the critical areas, but rather that the Department would protect . . . all of the resources within the coastal zone."

The ALC concluded that DHEC misconstrued its authority:

> In other words, the area for which [DHEC] has regulatory authority is the critical area, not the high ground outside the critical area. Construing this provision otherwise would lead to a substantial expansion of [DHEC]'s authority to regulate the development of entire communities. Conceivably, [DHEC] could deny critical area permits near towns or cities simply because it believes the permits would facilitate upland sprawl and general over-development . . . . [DHEC] avers that it has the authority through coastal permitting to deny upland development even against the Town's approval of that development through its zoning process. If the General Assembly had intended to

> authorize such a considerable expansion of [DHEC]'s authority it is inconceivable that it would have done so with such general language.

We agree with the ALC's conclusion. The importance of the coastal zone is undisputed, as evidenced by the robust statutory regime of the CZMA. However, the expansive power sought by DHEC is not reflected within that framework. Administrative agencies possess only those powers expressly conferred or necessarily implied to effectively fulfill the duties with which they are charged. *See Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991). Appellants' argument lacks a necessary link between the critical permit authority of regulation 30-11(C) and the fulfilling of DHEC's responsibility under the CZMA. Appellants rely on this statutory language to justify their position that critical area permits may be denied due to possible development outside an actual critical area, but within the coastal zone. However, there is no evidence that the General Assembly intended such a reading.[2]

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[2] Our decision in *Spectre, LLC v. South Carolina Department of Health and Environmental Control*, 386 S.C. 357, 688 S.E.2d 844 (2010), is consistent with this holding. In that case, DHEC denied Spectre's storm-water/land disturbance permit because the department found it inconsistent with various provisions of the CZMP, including the following:

> (1) In the coastal zone, OCRM review and certification of permit applications for commercial buildings will be based on the following policies:
>
> (b) Commercial proposals which require fill or other permanent alteration of . . . wetlands will be denied unless no feasible alternatives exist and the facility is water-dependent . . . . The cumulative impacts of the commercial activity which exists or is likely to exist in the area will be considered.

Id. at 364–65, 688 S.E.2d at 847–48.

Spectre appealed and in reversing DHEC, the ALC held that the CZMP did not apply to the property in question. *Id.* at 362, 688 S.E.2d at 846. This Court reversed, finding that the language of the CZMP set forth broad jurisdiction over the coastal zone, thereby supporting DHEC's interpretation of the CZMP regarding the Spectre site. *Id.* at 369, 688 S.E.2d at 850.

Spectre sought to fill isolated freshwater wetlands for commercial development. The CZMP specifically prohibited this activity, and most commercial construction requiring fill of freshwater wetlands. Moreover, unlike the present case, any adverse effects arose from the immediate impact of the proposed fill, and not later development which might have occurred if the fill permit had been granted. In the instant case, as the ALC observed, DHEC did not deny the proposed bulkhead/revetment permit based on immediate adverse impacts on the critical area, but instead upon an assumption that the revetment would lead to residential development of the upland portion of the Spit. While *Spectre* made it clear that the CZMP had the full force of law, the case did not hold that the CZMP authorizes DHEC to deny critical area permits because of the effects of later development of the upland area simply because of its location within the coastal zone.

In *Spectre*, this Court noted DHEC's indirect authority and then pointed to a provision of the CZMP which *explicitly sanctioned*, and served to legitimize, DHEC's denial of the permit. No such language exists here. Had the General Assembly intended to grant DHEC the power to deny critical area permits based on possible upland construction, or permitting authority superior to that of almost all local zoning laws within the coastal zone, specific and enabling language would have been provided. Simply put, DHEC's explicit statutory power narrows and confines the department's indirect authority over the coastal zone.

According to the dissent, there is a parallel in the instant case. Section 48-39-150(A) directs DHEC to base its permitting decision in part on the policies specified in sections 48-39-20 and 48-39-30, and ten general considerations. S.C. Code Ann. § 48-39-150(A) (2008). Subsection 10 requires DHEC to consider the extent to which the "proposed use could affect the value and enjoyment of adjacent landowners." *Id.* § 48-39-150(A)(10). Thus, necessarily, the dissent argues that subsection 10's language provides

Our recent decision in *Murphy v. South Carolina Department of Health and Environmental Control*, 396 S.C. 633, 723 S.E.2d 191 (2012), is instructive. In that case, proposed renovations to Chapin High School required filling a portion of a stream on the property. *Id.* at 636, 723 S.E.2d at 193. DHEC issued a permit to District 5 of Lexington and Richland Counties authorizing the project. *Id.* at 636–38, 723 S.E.2d at 193–94. Regulation 61–101 of the South Carolina Code of Regulations requires DHEC to deny certification if the proposed activity permanently alters the aquatic ecosystem in the *vicinity* of the project, or if there is a "feasible alternative" with less adverse consequences. *Id.* at 637, 723 S.E.2d at 193 (citing S.C. Code Ann. Regs. 61–101.F.5(a) & (b) (Supp. 2011)). Kim Murphy, a nearby resident, claimed that in considering the vicinity of the project under regulation 61–101, DHECs inquiry should have been limited to the actual 727 feet of stream to be filled. *Id.* at 638, 723 S.E.2d at 194. The ALC rejected this claim, and affirmed the certification. *Id.* Murphy appealed. *Id.*

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direct permitting authority over the entire coastal zone via regulation 30-11(C). Reasonable minds may differ as to whether language referring to the "value and enjoyment of adjacent landowners" is analogous to the type of explicit mandate we cited in *Specter*. To the extent the dissent argues that it does, we disagree. However, there can be no difference of opinion as to whether that subsection constitutes enabling language granting DHEC supreme permitting authority throughout the broadly defined coastal zone. It clearly cannot.

Section 48-39-150 is mentioned in Part II, A only with general reference to the ten general considerations provided for by the statute. Thus, it is unclear as to how this provision might serve as the basis of that section. In fact, Part II, A is grounded in a description of the ALC's cogent findings regarding the erosion issues within the critical area, and the impact of the construction on marine resources and wildlife within that area. Nevertheless, bringing clarity to this point is of no moment with respect to the crucial issues of this case.

Although the regulation did not define the term *vicinity*, this Court "interprets an undefined term in accordance with its usual and customary meaning." *Id.*, 723 S.E.2d at 640. Thus, we concluded:

> Merriam–Webster defines vicinity as meaning "the quality or state of being near: proximity" . . . . Using this accepted meaning of the word vicinity, the regulation clearly includes more than just the project; it logically incorporates the surrounding area. Moreover, a reading to the contrary would render it impossible to ever obtain a certification to fill a portion of a stream as the functions and values of that area would always necessarily be eliminated.

Id. (citation omitted).

In enacting regulation 61–101, the General Assembly intended for DHEC to consider the impacts proposed construction might have on the surrounding area, and thus provided the term *vicinity* in the regulation. However, regulation 30–11 does not contain such language, and the use of the term *area*, and to what it refers, is not ambiguous. *Comm'rs of Pub. Works v. S.C. Dep't of Health & Envtl. Control*, 372 S.C. 351, 361, 641 S.E.2d 763, 768 (Ct. App. 2009) ("We find the statute is ambiguous and, therefore, defer to the Board's interpretation."). Therefore, the ALC correctly concluded that regulation 30-11 does not authorize DHEC to deny a critical area permit based on its assessment of impacts outside that critical area.

The ALC concluded that the potential residential development would "not have deleterious impacts even if the [c]ourt were to consider the effects of the potential residential development." Moreover, the ALC concluded that:

> [T]he numerous measures and safeguards [Respondent] intends to utilize in its development of Captain Sam's demonstrate that this limited residential use would be sensitively planned, responsive to the natural features of the peninsula, attentive to its flora and fauna, and without significant negative effects in the critical area . . . . [T]he [c]ourt concludes that there was no

evidence adduced that the residential development would have any material adverse environmental effects on the upland.

Appellants claimed that any residential development at all is per se ill-planned and should be denied under the regulation. However, the ALC may choose between conflicting evidence, and that decision is no less supported by substantial evidence. *See Coastal*, 363 S.C. at 77, 610 S.E.2d at 487 ("The record contains conflicting evidence concerning the direct and cumulative effects of building the bridge to Park Island. The evidence that the effects will be minimal constitutes substantial evidence supporting the finding that the permit complies with the Effects Regulation."). Thus, the ALC did not err in refusing to consider impacts outside the critical area under regulation 30–11(C), and substantial evidence in the record supports the ALC's decision that the proposed project complies with that regulation.[3]

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[3] We recognize the dissent's contrary position with respect to our interpretation of regulation 30-11(C). However, we respectfully disagree with the notion that we seek to "have it both ways." Instead, we simply have a different view of "incorporation." Regulation 30-11(C) clearly references sections 48-39-20 and 48-39-30. However, this reference does not translate into a grant of permitting authority outside that enumerated by the regulation. Thus, the General Assembly delineated the agency's authority by promulgating three specified criteria to guide its decision making process. Had the General Assembly actually *incorporated* sections 48-39-20 and 48-39-30 to the extent the dissent suggests, subsections (1)–(3) would likely have been unnecessary.

In addition, the dissent misapprehends our reliance on regulation 61-101. It is quite obvious that we do not intend to apply the substance of a water quality certification regulation to the facts of the instant case. Instead, careful reading of our analysis demonstrates that the General Assembly saw fit to provide in regulation 61-101 the appropriate term in directing DHEC to consider the impacts of proposed construction on the surrounding area. If the General Assembly intended for DHEC to do the same pursuant to regulation 30-11(C), similar language would have been provided. Contrary to the dissent's opinion, we do not conclude that regulation 30-11(C) should contain

B. Regulation 30-12(C)

The ALC did not err in concluding that the proposed revetment met the specific criteria for bulkheads and revetments set forth in regulation 30-12(C) of the South Carolina Code of Regulations.

Regulation 30-12(C) provides in pertinent part:

> (c) Bulkheads and revetments will be prohibited where marshlands are adequately serving as an erosion buffer, where adjacent property could be detrimentally affected by erosion or sedimentation or where public access is adversely affected unless upland is being lost due to tidally induced erosion.
>
> (d) Bulkheads and revetments will be prohibited where public access is adversely affected unless no feasible alternative exists.

S.C. Code Ann. Regs. 30-12(C) (2008).

Thus, bulkheads and revetments will be prohibited where they restrict public access unless upland is being lost to tidally induced erosion, or no feasible alternative to the installation of the structure exists.

i. Adverse Effects on Public Access

The ALC concluded that the proposed structure would degrade public use of the shoreline, but not eliminate public access. The ALC's order states, "Nevertheless, there are other sandy landing spots at low tide in the immediate vicinity in general and specifically as a result of the reduction of the mat as ordered below."

Appellants argue that the ALC's conclusion that some elimination of public access is acceptable ignores a "plain standard of whether public access

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the word "vicinity" or any specific word at all. That is a legislative determination. Instead, we merely assert that the word "area," as used in regulation 30-11(C), is unambiguous and refers only to the "critical area" governed by the regulation. Thus, we described our reasoning in *Murphy* as "instructive."

is affected period." Appellants assert that the regulatory standard does not allow any adverse effect on public access. However, this interpretation is inconsistent with the balancing of economic and environmental uses in the coastal zone. *See, e.g.,* S.C. Code Ann. § 48-39-30 (2008) ("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."). The ALC noted that public use in the area was "limited." The evidence demonstrates that even this characterization may be generous.

Appellants entered into evidence pictures of a party of kayakers on the bank of the area of the proposed revetment. However, the persons depicted in the photographs were attending a planned event to pay for CCL legal expenses to contest the granting of the permit at issue in this case. Evidence presented at the hearing confirmed that the sandy bank of the Kiawah River would continue for up to 1500 feet beyond the end of the revetment, and that the structure would not significantly impact or eliminate public access. The OCRM project manager testified:

> Q: I recall in your deposition and in your decision document you said that you determined that the specific project standards found in regulation 30-12(C) do not bar this project; do you recall that?
>
> A: Yeah, the 30-12(C) is the specific regulation that talks about bulkheads.
>
> . . . .
>
> A: And I didn't feel that the regulation gave me the guidance that would require me to out and out deny this permit application.
>
> Q: Why?
>
> A: Well, I think to some extent the structure will affect public access, but I didn't conclude that it's going to be adversely affected to the level where the entire structure should be denied.
>
> Q: Okay. What did you conclude?

. . . .

A: That there might be some minimal adverse effect on public access that was not strong enough to bar the permit from being issued.

Q: Based on the specific project standards?

A: Yes, based . . . yea, just based on that regulation. In other words, I could not read 30-12(C) and conclude that I had to deny this permit.

We agree with Respondent's view that Appellants incorrectly equate their ability to access the area subject to the revetment with the public ability to use that area. As Respondent notes, "There is no contention that the public could not enter upon this area, even if the public's recreational use of the area would be slightly modified."

Substantial evidence in the Record supports the ALC's determination that the proposed structure did not adversely affect public use pursuant to the regulation. However, even if public access is affected, the demonstrated loss of upland and lack of feasible alternatives to the proposed structure support the ALC's determination that the project plainly satisfies regulation 30-12.

ii. Loss of Upland

Appellants also argue that Respondent is not losing upland property. However, Respondent presented a horde of evidence demonstrating their loss of upland due to tidally induced erosion. One witness for Respondent, a licensed surveyor, testified that the current distance between what he determined to be the critical line boundary and the setback line in 2009 was 66 feet. In April 2005, the distance was 90 feet, and in September 2002, the distance was 104 feet. From 2002 to 2009, the distance has moved approximately 38 feet. The witness also calculated that Respondent lost approximately 49,856 square feet of upland between September 2002 and October 2008.

Another witness for Respondent, a licensed engineer, explained the proposed structure's extension onto the shoreline area:

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

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

In response, Appellants claim that the Spit is accreting, and that it has actually increased 63.24 acres between 1974 and 2009. Appellants also claim that Respondent's own expert, a coastal geologist, testified that the Spit will continue to grow for 20–25 years. However, Appellants present an incomplete recitation of this testimony.

The expert testified that he expected the oceanfront side of the Spit to continue to sustain itself from incoming sand from the nearby Stono Inlet, but that the stretch of bank on the Kiawah River side, the location of Respondent's upland, was eroding. He further stated that the proposed construction would slow or stop erosion, as is the intended purpose, while at the same time posing no danger to Captain Sam's Inlet. Appellants simply do not demonstrate a lack of evidence of upland erosion, or that the ALC erred in assessing Respondent's evidence. Moreover, Appellants urge this Court to adopt an interpretation of the evidence which runs afoul of the clear language of section 48-39-30 of the South Carolina Code. That section provides:

> In the implementation of this chapter, no government agency shall adopt a rule or regulation or issue any order that is unduly restrictive so as to constitute a taking of property without the payment of just compensation in violation of the Constitution of this State or of the United States.

S.C. Code Ann. § 48-39-30 (C) (2008).

The Record supports a view that upland has been lost to tidal erosion, and to hold otherwise would appear to come close to denying Respondent the use of its upland property without just compensation.[4]

iii. Feasible Alternatives

Appellants argue that the ALC made a conclusory finding that there were no feasible alternatives to the proposed structure, and failed to provide any evidentiary support for this finding.

Regulation 30-12(C)(1)(d) provides that bulkheads and revetments will be prohibited where public access is adversely affected unless no feasible alternative exists. S.C. Code Ann. Regs. 30-12(C)(1)(d) (2008). Respondent presented evidence that the proposed structure is the most environmentally-sensitive solution. Specifically, Respondent's project engineer testified regarding alternative systems:

> We looked at . . . a number of alternatives investigated [sic], bulkhead, riprap, to geo-tubes, a number of things that could have been used, and it was our recommendation that they use the concrete mats . . . . [F]rom all the systems that we were aware of, it seemed like that is the softest most compatible system out there . . . . We've seen them used in other locations where they become completely naturalized. It's kind of in keeping with the whole

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[4] In *Lucas v. South Carolina Coastal Council*, 304 S.C. 376, 379–82, 404 S.E.2d 895, 897–98 (1991), the General Assembly enacted legislation that prevented development seaward of setback lines, in an effort to protect the state's beach and dune environment in the interest of the public. An affected landowner claimed that the legislation was a regulatory taking without just compensation because he was unable to construct more than a walkway on his property. *Id.* This Court upheld the regulation, and the United States Supreme Court reversed. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 (1992). The Supreme Court refused to allow a taking without compensation based solely on the public's interest in preserving the beach area, and remanded the case to this Court for a determination as to whether a principle of common law nuisance or property existed for denying the landowner's intended use of his property. *Id.*

> essence of Kiawah where . . . we also need engineering solutions that blend with the environment we're creating.
>
> The ALC also noted:
>
> CCL urged that the "alternative" is to do nothing and leave the property as status quo since, they suggested, little erosion may have occurred in the last 10-12 months. However, the testimony . . . clearly established a trend of continuous and significant shoreline erosion along the riverbank for several decades. That evidence clearly establishes a need for erosion control along the disputed shoreline.

The ALC determined that Respondent lost upland due to tidal erosion, and that no feasible alternatives existed to stop continuing loss. The regulation contemplates an adverse impact on public access when these conditions are met. Therefore, the ALC did not err in the application of regulation of 30-12, and substantial evidence in the Record supports the court's determinations.

CONCLUSION

The essence of Appellants' argument is rooted in dissatisfaction with the verbiage and structure of the ALC's order, and not in actual errors of law or the absence of substantial evidence. The ALC acted within the permissible scope of its authority in modifying the existing permit to include a structure no larger than that requested by Respondent or initially reviewed by DHEC. On appeal of a contested case, we must affirm the ALC if the findings are supported by substantial evidence. *Comm'rs. of Pub. Works*, 372 S.C. at 357–58, 641 S.E.2d at 766.

AFFIRMED.

BEATTY, J., concurs. KITTREDGE, J., concurring in result in a separate opinion. PLEICONES, J., dissenting in a separate opinion in which HEARN, J., concurs.

JUSTICE KITTREDGE: I concur in result. I write separately because I agree with Justice Pleicones that the administrative law court (ALC) erred in its construction of the relevant statutes and regulations. As Justice Pleicones persuasively articulates, "permitting decisions are not to be made in a vacuum." For example, Reg. 30-11 speaks broadly to the parameters of what the Office of Coastal Resource Management (OCRM) should consider in assessing whether to issue a permit in the critical area, as OCRM must consider "the general character of the area." Reg. 30-11(C)(1). Subsection (B) of Reg. 30-11 further mandates that OCRM must be guided by the broad policies found in §§ 48-39-20 and -30, including "the urgent need to protect and give high priority to natural systems in the coastal zone while balancing economic interests." *See* S.C. Code Ann. § 48-39-20(F). Thus, the ALC erred in construing the law to restrict the Department of Health and Environmental Control's consideration to the permit's effect on the critical area only. The dissent's view of legislative intent fits like a glove with the statutory and regulatory language, as well as the common sense understanding that a project in a critical area may indeed have a profound impact on the surrounding area.

However, unlike the dissent, I do not believe the error requires reversal. This is so because, in my judgment, the learned trial judge further and carefully considered the evidence concerning the effect of the permit on the "uplands," and found the permit was properly granted under what I believe to be the proper construction of the relevant law:

> Additionally, in this instance, the potential residential development will not have deleterious impacts even if the Court were to consider the effects of the potential residential development. OCRM and [Coastal Conservation League] do not challenge KDP's history of environmentally sensitive development methods, permit adherence record, or any of the specific strategies, methods, and approaches that KDP will use in its limited presidential development of Captain Sam's. Rather, they urge that **any** residential development at all, regardless of safeguards and protections, on the now-undeveloped Captain Sam's highland peninsula along the ocean and river, is *per se* "ill-planned." The Court concludes that the numerous measures and safeguards KDP intends to utilize in its development of Captain Sam's demonstrate that this limited residential use would be sensitively planned, responsive to the natural features of the peninsula, attentive

> to its flora and fauna, and without significant negative effects on the critical area. Even though consideration of the effects of the upland is beyond the purview of the regulation, the Court concludes that there was no evidence adduced that the residential development would have any material adverse environmental effects on the upland.

These additional findings of the ALC are supported by substantial evidence. As a result, while 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.

JUSTICE PLEICONES: I respectfully dissent because, in my opinion, this appeal presents legal questions of regulatory and statutory interpretation and not, as the majority views it, questions of substantial evidence. In my opinion, the Administrative Law Judge (ALJ) committed an error of law in interpreting 23A S.C. Reg. 30-11(C), and the error requires we reverse the appealed order and remand for further proceedings. Moreover, the entirety of the order is affected by the ALJ's erroneous view of the balancing required by statutes in the coastal permitting process, an error which also mandates reversal and reconsideration.

The Spit is part of South Carolina's coastal zone,[5] and the structure which is at issue here would be constructed in the critical area.[6] It is the policy of the State to balance development in the coastal zone with concern for sensitive and fragile coastal areas.[7]

Under the Coastal Zone Management Act (CZMA), appellant Department of Health and Environmental Control (DHEC), through the Office of Coastal Resource Management (OCRM), was required to develop a comprehensive coastal management program (CMP) for the coastal zone, and was given the responsibility to enforce and administer the CMP. S.C. Code Ann. § 48-39-80 (2008); *Spectre, LLC v. South Carolina Dep't of Health and Enviro. Cont.*, 386 S.C. 357, 688 S.E.2d 844 (2010). DHEC was also required by statute to enact rules and regulations to enforce the CMP. S.C. Code Ann. § 48-39-80. Section 48-39-150 states the general considerations to be used by OCRM in determining whether to issue a permit for construction in the critical area, and reiterates that the policies found in § 48-39-20 and § 48-39-30 must be honored. The General Assembly required that, in determining whether to permit erosion devices such as the ones at issue here, OCRM must act in the manner it "deem[ed] most advantageous to the State" in order to promote public health, safety, and welfare; to protect public and private property from beach and shore destruction; and to ensure the continued use of tidelands, submerged lands, and waters for public purposes. S.C. Code Ann. § 48-39-120(F).

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[5] S.C. Code Ann. § 48-39-10(B).
[6] S.C. Code Ann. § 48-39-10(J).
[7] S.C. Code Ann. § 48-39-30(B)(1); 49-39-20(F).

OCRM is charged with two separate, but interrelated responsibilities. As explained in the CMP,

> Two types of management authority are granted in two specific areas of the State. [OCRM][8] has direct control through a permit program over critical areas…Direct permitting authority is specifically limited to these critical areas. Indirect management authority of coastal resources is granted to [OCRM] in…the coastal zone…."
>
> CMP, Chapter II, cited in *Spectre, LLC, supra*.

Pursuant to the authority granted it by the CZMA, DHEC has promulgated permitting regulations "to guide the wise preservation and utilization of coastal resources." Regulation 30-11 is entitled "General Guidelines for All Critical Areas." Subsection (B) restates the general considerations for permitting in critical areas found in § 48-39-150, and specifically states that "In assessing the potential impacts of projects in the critical area, [OCRM] will be guided by the policy statements in Sections 48-39-20 and 48-39-30 . . . ." Subsection (C), entitled "Further Guidelines" reiterates that OCRM's permit decisions in the critical areas must be based in part on the policies in §§ 48-39-20 and-30, and specifically requires that OCRM take into consideration:

> (1) The extent to which long-range, cumulative effects of the project may result within the context of other possible developments and the general character of the area.
>
> Reg. 30-11 C(1)

Read in its entirety, Reg. 30-11 is consistent with the two-prong management approach stated in the CMP. While OCRM's permitting authority is limited to critical areas, it is charged with managing the entire coastal zone, and thus permitting decisions are not to be made in a vacuum. For example, Reg. 30-11(B)

specifically provides that in assessing the potential impact of critical area projects, OCRM must be guided by the CZMA policies found in §§ 48-39-20 and -30, both of which are concerned with the coastal zone and its vulnerability to manmade alterations. *See* § 48-39-20(B), (D), (E), and (F); § 48-39-30(A), (B)(1), (2), (5),

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[8] The CMP refers to the Coastal Council, which was abolished in 1994 when its authority was transferred to OCRM. *See* 1993 Act. No. 181.

and (E). Reg. 30-11(C) reiterates the need for the public policies found in these two statutes to be considered in making permitting decisions pursuant to § 48-39-150, the statute governing this bulkhead and revetment. Subsection (C)(1) specifically refers to the long-range cumulative effects of permitting a project in the critical area "within the context of other possible development and the general character of the area."

Both appellants contend the ALC misconstrued Reg. 30-11(C)(1) and misunderstood and misapplied the CZMA. I agree.

A. CZMA

The majority first discusses the ALC's application of the CZMA, that is, §§ 48-39-20 and -30. *See* Part II A, *supra*. In holding that the ALC correctly found that "the proposed construction" met the policy concerns expressed in the statutes, the ALC and the majority focus not solely on the bulkhead/revetment erosion device sought to be permitted, but also on whether the "potential limited residential development transgresses the policies set forth in these two statutes." As the majority notes, the ALC weighed the cost of permitting construction of an erosion control device in a critical area against the benefit to KDP if it can build on the reinforced Spit. I strongly disagree with the ALC's and the majority's focus on the potential economic benefit to a private landowner if the proposed bulkhead/revetment is built, rather than on the benefit, if any, to the public at large of such construction.

We have long held that a purely economic benefit is insufficient as a matter of law to establish an overriding public interest and "does not meet the stated purpose of the [CZMA] to protect, restore, or enhance resources of the State's coastal zone for present and succeeding generations. This public interest must counterbalance the good of economic improvement. *See* S.C. Code Ann. § 48-39-30(B)(1) and (2)." *South Carolina Wildlife Fed. v. South Carolina Coastal Council,* 296 S.C. 187, 371 S.E.2d 521 (1988); *see also 330 Concord Street Neighborhood Ass'n v. Campsen*, 309 S.C. 514, 424 S.E.2d 538 (Ct. App. 1992). The ALC and the majority misunderstand and misapply the balancing test required by CZMA, allowing a "purely economic benefit" inuring only to a private landowner to outweigh our State's public policy mandate that "[c]ritical 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." S.C. Code Ann. § 48-39-30(D). This error in construction and application of the CZMA mandates reversal.

B. Regulation 30-11(C)

The majority concludes that "there is no evidence that the General Assembly intended that critical area permits may be denied due to possible development outside an actual critical area but within the coastal zone," and that appellants failed to establish "a necessary link between the critical permit authority of Regulation 30-11(C) and the fulfilling of DHEC's responsibility under the CZMA." In my opinion, "the missing link" is found in the language of the Regulation 30-11(C) itself, which specifically references the policies found in § 48-39-20 and § 48-39-30, i.e., the CZMA. As explained below, I cannot reconcile the majority's discussion of § 48-39-20 and -30 in Part II A with its analysis in Part III of Regulation 30-11(C)(1).

In construing §§ 48-39-20 and 48-39-30, the majority considers KDP's residential development plans for the upland areas of the Spit, part of the coastal zone, not just the erosion control issue, a critical area project, to be the proper subject of inquiry. *See* Part II A, *supra*. When called upon to interpret Reg. 30-11, however, the majority holds that there is no evidence that the General Assembly intended for OCRM to consider anything other than the bulkhead/revetment's impact on the critical area itself. *See* Part III A, *supra*. This holding ignores that Reg. 30-11 itself requires DHEC to be guided by, and base its decisions at least in part "on the policies specified in Sections 48-39-20 and 48-39-30 . . . ." Reg. 30-11(B); Reg. 30-11(C). The majority cannot have it both ways, first holding that the residential development is the proper focus under the statutes, but also that under Reg. 30-11, which specifically incorporates these two statutes, only the bulkhead/revetment's impact on the critical area may be considered. The ALC's order is affected by an error of law in that he misapprehended the proper scope of inquiry under Reg. 30-11. This error requires reversal.

In my opinion, the majority also errs when it adopts the ALC's narrow reading of the term "area" as used in Reg. 30-11(C)(1). "Critical Area" is a defined term in Regulation 30. *See* Reg. 30-1(D)(15). The majority ignores that when the regulation refers to a "critical area" it uses both words, and that to read "area" as "critical area" in this subsection deprives OCRM of its statutory obligation to enforce the public policy of this State in the coastal zone.[9] Thus, when Reg. 30-11 uses the term "Critical Area," it is referring to a specific defined term. "Critical

[9] The majority finds much comfort in the fact that 25A Reg. 61-101 (2011), which is titled "Water Quality Certification," and which "establishes procedures and

Area" is not the same as "Area" when used in this regulation. *Young v. SCDHEC*, 383 S.C. 452, 680 S.E.2d 784 (Ct. App. 2009) [ALC properly considered area surrounding proposed dock site under Reg. 30-11(C)(1)]. Since the ALJ's decision was controlled by his erroneous belief that all permitting decisions in the critical area must be decided in a vacuum, this error of law requires we reverse and remand.

In determining that he could not consider the impact beyond the critical area, the ALJ also opined that to do so would allow OCRM to "deny critical area permits near towns or cities simply because it believes the permits would facilitate upland sprawl and general over-development." He went on to state, "In fact, [an OCRM witness] testified he denied the revetment . . . other than adjacent to Beachwalker Park, because he believed potential residential development would destroy the pristine habitat of Captain Sam's. Thus [OCRM] avers that it has the authority through coastal permitting to deny upland development even against [municipal] approval of that development through its zoning process." In my opinion, by law OCRM must take into account the impact of any critical area permit on upland sprawl, general overdevelopment, and pristine habitats since Reg. 30-11(C) specifically incorporates the policies found in §§ 48-39-20 and -30, as well as specifying that the regulation is in aid of fulfilling DHEC's permitting

responsibility under § 48-39-150.[10] As the ALJ is the fact finder in this proceeding,[11] he too is charged with these duties and responsibilities.

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policies for implementing State water quality certification requirements of Section 401 of the Clean Water Act, 33 U.S.C. Section 1341" instructs DHEC to take into consideration the impact of the proposed project on "the aquatic ecosystem in the vicinity of the project." The majority concludes that since Reg. 30-11 does not use the term "vicinity" as does Reg. 61-101, and since "area" is not an ambiguous term, DHEC cannot deny a permit based on its assessment of impacts outside the critical area. I fail to see the relevance of a term used in the water quality regulation to a Coastal Division regulation, especially a regulation that requires DHEC to "to be guided by . . . long-range, cumulative effects of the [bulkhead/revetment on] . . . the general character of the area."

[10] The majority reads *Spectre LLC* to limit DHEC's authority to deny critical area permits based upon possible future construction to situations when such a consideration is "explicitly sanctioned." Assuming that such an explicit sanction by the General Assembly is required, I refer the reader to S.C. Code Ann. § 48-39-150(A) (2008), which reiterates that the decision on any critical area permit must

Further, the ALC misapprehends the interplay between the DHEC permitting process and local zoning laws. The granting of an OCRM permit does not preempt local zoning requirements any more than a project permitted by local zoning ordinances is exempt from state environmental regulation. *See Rockville Haven LLC v. Town of Rockville*, 394 S.C. 1, 714 S.E.2d 277 (2011). Local zoning ordinances serve one purpose in the coastal zone, while State statutes, the CMP, and regulations serve another. The ALJ's order is affected by an error of law requiring reversal.

I would reverse and remand as the ALJ's order rests on a fundamental misunderstanding of the role of OCRM in managing the State's coastal zone, and of the considerations pertinent to issuance of a permit for an erosion control device in the critical area. The ALJ's errors of law require that he reevaluate the evidence and reexamine his findings of fact and conclusions of law using the correct legal standards. Moreover, despite the dissent's repeated specific references to OCRM's permitting authority in the critical area, more than ten by my count, the majority insists that I would give the agency "direct permitting authority over the entire coastal zone." I am compelled to respond to the majority's patently erroneous characterization of my position.

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be based in part upon "the policies specified in Sections 48-39-20 and 48-39-30" and § 48-39-150(A)(10), requiring permitting decisions to consider "The extent to which the proposed use could affect the value and enjoyment of adjacent owners." Thus, consideration of a critical area permit's effect on future use of property outside the critical area itself is "sanctioned," and in fact is the basis of the majority's analysis in Part II A of its opinion.

[11] S.C. Code Ann. § 1-23-600(A) (Supp. 2010).