

PROFESSIONAL ASSOCIATION

16 CHARLOTTE STREET  
CHARLESTON, SC 29403

PO DRAWER 22247  
CHARLESTON, SC 29413-2247

PHONE: 843.727.2200  
FAX: 843.727.2238

WWW.WISELAW.COM

E-MAIL: gtw@wiseiaw.com  
DIRECT DIAL: 843.727.2208  
DIRECT FAX: 843.727.2231

RECEIVED  
S.C. DEPT OF HEALTH  
& ENVIRONMENTAL CONTROL

2008 DEC 31 AM 10:47

OFFICE OF THE COMMISSIONER  
CHIEF OF STAFF  
CLERK OF SCOREC BOARD

E. DOUGLAS PRATT-THOMAS  
G. TRENHOLM WALKER  
W. ANDREW GOWDER, JR.  
JON L. AUSTEN  
J. KEITH MCCARTY (SC, TN)  
LINDSAY K. SMITH-YANCEY (SC, NC)  
CLAYTON B. McCULLOUGH  
THOMAS H. HESSE (SC, GA)  
IRN W. FREEMAN (SC, GA)  
FRANCIS M. ERVIN II (SC, MA)  
DANIEL S. McQUEENEY, JR.  
DAMIE A. KHAN

December 30, 2008

**VIA FACSIMILE TRANSMITTAL 803-898-3393**

**and U.S. FIRST CLASS MAIL**

Clerk of the Board

Board of Department of Health and Environmental Control

South Carolina Department of Health

and Environmental Control

2600 Bull Street

Columbia, South Carolina 29201

RE: Written Request for Final Review  
OCRM Permit: OCRM-08-117-E  
Project: Kiawah River Bend Revetment  
Applicant: Kiawah Development Partners II, Inc

Dear Members of the Board:

I and Gedney M. Howe, III, represent Kiawah Development Partners II, Inc. ("KDP"), the applicant for the above OCRM permit seeking to construct a revetment along the eroding bank of the Kiawah River. On December 18, 2008, OCRM approved the permit with conditions that severely undermine the effectiveness of the revetment. The conditions allow the construction of the revetment along the bank for only 270 feet, a distance that is but 10% of the requested distance. The conditional permit completely fails to protect the remaining shoreline that continues to slough off into the Kiawah River.

I am writing on behalf of the applicant to request final review of the permit by your board as provided in S.C. Code § 44-1-60(E). I have enclosed a copy of the permit as attachment No. 1.

**THE PROJECT**

The location of the proposed revetment is on the backside of Kiawah Island along the bank of the Kiawah River, a tidal river that connects to the Atlantic Ocean through Captain Sam's Inlet that separates Kiawah Island from Seabrook Island. The river bank in question is on the "inland" side of the southwestern peninsula of Kiawah Island that is known as Captain Sam's Spit. This peninsula is about 1.3 miles in length and bounded on one side by the ocean and on the other by the Kiawah River. The proposed revetment is along the bank in the bend of the river at the beginning of the peninsula.

The purpose of the revetment is to stop continual erosion of high ground above the OCRM critical line on the riverbank for about a distance of 2783 feet (extending about 30% of the length of the Spit). I have enclosed a copy of color photographs of the location as attachment No. 2. These show the extensive, rapid, destructive erosion in this area. The bank in question is adjacent to a public park operated by the Charleston County Park and Recreation Commission ("PRC") known as Beachwalker Park. The erosion has already damaged the PRC's parking lot and riverside gazebo. PRC's other park improvements will soon be severely damaged. The park leases the land from a sister entity of KDP which owns the upland for the park as well as the upland along the river bank for the length of the proposed revetment.

The proposed revetment is not a typical vertical bulkhead. It would consist of a retaining wall working in combination with a sloped mat of articulated concrete block on the intertidal riverbank that would facilitate and foster the growth of marsh grass and other vegetation. Enclosed are a copy of the permit application as attachment No. 3 and a photo of a similarly constructed revetment OCRM permitted recently in Charleston County as attachment 4. The 2,783' length of the revetment was recommended by nationally recognized experts in shoreline dynamics and tidal flows who were retained by KDP to come up with the most environmentally and aesthetically appropriate solution for elimination of the erosion problem along the bank at the river's bend. Short bulkheads adjacent to tidal waters such as the Kiawah River often transfer the erosion from the location of bulkhead to the land on either end. The length proposed was specifically to *prevent* a shifting of the problem along the bank and thus accomplish a lasting solution.

## THE EMERGENCY

*The significant, continuing, and rapid erosion presents an emergency.* KDP requests that the board conduct a conference to hear the appeal at its earliest convenience. KDP daily suffers irreparable harm to its land from this incessant erosion and winter storms are on the near horizon.

This erosion has been advancing unabated during the inordinate time the staff took to act on KDP's application. KDP submitted its application on February 28, 2008. Three months after filing the staff improperly cancelled the application. After the application was reinstated, no action was taken for more than 6 additional months. Staff did not render its decision until nearly ten months after filing, despite the requirement of R. 30-4(C) that staff decide applications for permits for minor development activity "within 30 days" after an application is complete. *See*, S.C. Code § 48-39-10 (N) and S.C. Reg. R 30-1(D)(34) ("Minor Development Activity - the construction, maintenance, repair or alteration of any ... erosion control structure, the construction of which does not involve dredging.").

## THE APPEAL

The fundamental grounds for appeal are that (a) the proposed revetment complies with the controlling statutes and regulations and (b) there are no significant negative impacts anywhere from the revetment, much less any significant negative impacts to the "critical areas" under OCRM's jurisdiction. OCRM staff's ground for denying the permit for the majority of the revetment is its contention that potential residential development of a part of the highland of Captain Sam's Spit (*i.e.*, behind the state's beachfront setback line) as allowed under the Town's zoning ordinance would have a negative effect on rare and endangered species as well as the protected dune area. This unsupported assertion is inaccurate and speculative.

The applicant's grounds for challenging the staff's decision, in particular Special Condition No. 1 limiting the length of the revetment to a small fraction of the requested distance, include, but are not limited to, the following:

1. The application and proposed revetment comply with the statutes and regulations governing bulkheads and revetments.
2. The proposed revetment will have no significant negative impacts, including no negative impacts at all in the critical area.
3. The enormously reduced distance for the revetment approved by staff will, if built, possibly worsen and hasten erosion on either end of the 270' structure unless the remainder of the proposed revetment is constructed.
4. The staff's decision was based on factors beyond its purview, *i.e.*, whether any development should be allowed on Captain Sam's Spit on the highland behind both the critical line and beachfront setback line. This development authorization rests with the local municipality, not the Department.
5. As the applicant does not have a development plan and no development plan was submitted to the staff. The staff's determination of alleged negative effects is inaccurate, has no factual support, and is pure speculation.
6. If and when the applicant commences development of the upland, the applicant will be required to comply with all applicable laws and regulations, including those of the Department governing stormwater and land disturbance. This later event, if it should occur, is the appropriate stage in the permitting process for measuring any effects of the development of the upland with respect to stormwater runoff and land disturbance. "Uses," however, such as low density, single family residential houses are outside the purview of the Department in acting on an application such as this one.
7. Staff's determination appears to be based also on several incorrect assumptions and conclusions that include, but are not limited to, the following:

- a. Staff provides in the much-reduced permit that the issuance of a permit for the requested distance will facilitate development in a "pristine dune area." This is an incorrect statement on two counts: 1) the dunes are not being developed -- all land subject to any potential future development will occur behind the OCRM regulated beach/dune system, and 2) local zoning by the Town of Kiawah Island is the sole legal authority for any potential uses and development outside protected dunes and critical areas.
  - b. The staff implies in the conditional permit that it evaluated "overall plans and designs of a project" and was concerned about "the extent and significance of negative impacts on GAPCs." As stated earlier, there were no "overall plans and designs" in existence and *none were submitted, requested, nor required*. Without them it is impossible to assess the cumulative foreseeable impacts, positive or negative, from the upland development, which is, in any event, well beyond the scope of this application.
  - c. The staff states in the reduced permit that "this area" is a barrier island. This is misleading. It is true that this revetment would extend partially along the side of a peninsula that is a tiny part of a barrier island over ten miles long and having 5,000 acres of upland; however, the particular land subject to the development is not a barrier island.
  - d. The staff states in the reduced permit that "this area" is a dune area. The revetment is not being built in, or anywhere near, a dune area. It is being constructed on a river bank on the side of the peninsula away from the ocean. Additionally, possible future development of a small part of the peninsula, well away from Captain Sam's Inlet, will not be in the dune area. Using the OCRM definition, all development would occur outside of the "beach/dune system." *See*, definition in S. C. Code § 48-39-10 (J)(4) ("beach/dune system ... is the area from the mean high-water mark to the setback line as determined in Section 48-39-280").
  - e. The staff suggests that granting the permit to stop erosion of highland on the river "could affect the habitats for rare and endangered species." The staff refers to the habitat for piping plovers. As the materials submitted by the applicant demonstrate, there will be no adverse impact on piping plover habitat. Their habitat is the intertidal hard sand *beach* more than a half mile from the end of the proposed revetment.
  - f. The staff incorrectly considered the "project" to be the potential future development of the upland as allowed by the zoning authorities. The "project" is instead the revetment area itself.
  - g. As there was no development plan of any kind before the staff, the staff incorrectly determined that possible undefined development unrelated to this revetment project, at some unknown future date, might damage areas of special resource significance.
8. The staff's determination is not supported by the facts that were before it, is contrary to the controlling regulations, statutes, and law, and is arbitrary and capricious.

9. The staff considered matters that were not properly before it including matters that the regulations prohibit the staff from considering in making the determination on the application for this minor project.
10. The staff's determination deprives the applicant of its constitutional rights to substantive and procedural due process as well as equal protection. The failure of the Department to base its decision on the controlling law and its failure to render a decision in a timely manner as required by its own regulations has destroyed and taken high land of the Applicant.

In summary, the Department improperly cancelled the application, improperly delayed its decision, and improperly rendered a flawed decision granting a partial permit, all in violation of the applicable statutes and regulations.

The applicant respectfully requests that the board reverse the staff's determination and grant the applicant the permit without Special Condition No. 1 that limited the revetment to a "270' section...located along the southwest portion of the parking lot in Beachwalker Park...." Instead, the permit should be for the length requested without further delay and damage.

We look forward to the opportunity to appear before the Board in this matter.

Sincerely,

PRATT-THOMAS, WALKER, P.A.



G. Trenholm Walker

GTW\yye

Enclosures

cc: Elizabeth A. Dieck, Esq.  
Carolyn R. Boltin, Deputy Commissioner DHEC-OCRM  
Tom O'Rourke, Director of PRC  
Gedney M. Howe, III, Esq.  
Leonard L. Long, Jr.  
Ray Pantlik  
Townsend Clarkson  
Charles P. Darby, III  
Mitchell Bohannon