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**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

S.C. Supreme Court

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Ralph K. Anderson, III, Administrative Law Judge

On Certiorari to the Court of Appeals of South Carolina
Opinion No. 5011 (S.C. Ct. App., Heard May 23, 2012-Filed July 25, 2012)

Ann Dreher,.....Respondent

v.

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

BRIEF OF PETITIONER

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TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities.....	iii
Statement of Issues on Appeal.....	1
Statement of the Case.....	2
Statement of the Facts.....	3
Arguments.....	4
I. <u>The Court of Appeals Overlooked or Misapprehended the Law of <u>I’On, LLC v. Town of Mt. Pleasant</u> by Holding the Law of the Case to be That “Tract D is a Part of Folly Island” Based on the Department’s Failure to Appeal This Particular Finding of Fact by the ALC.</u>	4
a. A Respondent –the “Winner” in the Lower Court—May Raise on Appeal Any Additional Reasons Why the Appellate Court Should Affirm the Lower Court’s Ruling, Regardless of Whether Those Reasons Have Been Presented To or Ruled Upon by the Lower Court	5
b. Requiring the Department to Appeal the ALC’s Finding of Fact After Winning in the Lower Court Would Have Been Inefficient and Pointless.....	8
II. The Court of Appeals Misapprehended the Scope of the Law of the Case Doctrine by Overlooking the ALC’s Other Findings of Fact.....	8
III. Even Though the Law of the Case is Inconsistent, There is Substantial Evidence That Tract D is a Separate Island From Folly Island.....	11
IV. The Court of Appeals Misapprehended or Overlooked the Legislative Intent Reflected in the Language of S.C. Code Ann. Reg. § 30-1(D)(11), Thereby Erroneously Concluding That Tract D is Exempt From the Definition of a Coastal Island and the Small Islands Regulation.....	14
V. The Court of Appeals Did Not Specify What, if any, Action the Department Must Undertake	17
Conclusion.....	17

TABLE OF AUTHORITIES

CASE LAW

Browning v. Hartvigsen, 307 S.C. 122, 414 S.E.2d 115 (1992).....14

Bursey v. S.C. Dep't of Health and Env'tl. Control, 369 S.C. 176, 631 S.E.2d 899 (2006).....12

Charleston Cnty. Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993).....14

Commercial Credit Loans, Inc. v. Riddle, 334 S.C. 176, 512 S.E.2d 123 (Ct. App. 1999).....5, 6

Converse Power Corp. v. S.C. Dep't of Health and Env'tl. Control, 350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002).....14

Dreher v. S.C. Dep't of Health & Env'tl. Control, 399 S.C. 259, 730 S.E.2d 922 (Ct. App. 2012).....11

DuRant v. S.C. Dep't of Health & Env'tl. Control, 361 S.C. 416, 604 S.E.2d 704 (Ct. App. 2004).....12

Hoffman v. Powell, 298 S.C. 338, 380 S.E.2d 821 (1989).....9

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).....4,5,6,7,8,9

Lexington Cnty. Health Servs. Dist. v. S.C. Dep't of Revenue, 384 S.C. 647, 682 S.E.2d 508 (Ct. App. 2009).....14

Maxey v. R.L. Bryan Co., 295 S.C. 334, 368 S.E.2d 466 (Ct. App. 1998).....5

May v. Hopkinson, 289 S.C. 549, 347 S.E.2d 508 (Ct. App. 1986).....5

Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue, 388 S.C. 138, 694 S.E.2d 525 (2010).....14

Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690 (1996).....14

Neal v. Brown, 374 S.C. 641, 649 S.E.2d 164 (Ct. App. 2007).....12

Olson v. S.C. Dep't of Health & Env'tl. Control, 379 S.C. 57, 663 S.E.2d 497 (Ct. App. 2008)..... 12, 13

<u>Pelican Bldg. Centers of Horry- Georgetown, Inc. v. Dutton</u> , 311 S.C. 56, 427 S.E.2d 673 (1993).....	9
<u>S.C. Ambulatory Surgery Center Ass'n v. S.C. Workers' Compensation Comm'n</u> , 389 S.C. 380, 699 S.E.2d 146 (2010).....	14
<u>Smith v. Phillips</u> , 318 S.C. 453, 458 S.E.2d 427 (1995).....	9
<u>State v. Sweat</u> , 386 S.C. 339, 688 S.E.2d 569 (2010).....	14
<u>State v. Williams</u> , 303 S.C. 410, 401 S.E.2d 168 (1991).....	9
<u>Sumter Building & Loan Ass'n v. Winn</u> , 45 S.C. 381, 23 S.E. 29 (1895).....	9

STATUTES and REGULATIONS

S.C. Code Ann. § 1-23-610(C) (Supp. 2011).....	12
S.C. Code Ann. § 48-39-130(C) (2008).....	3
23A S.C. Code Ann. Regs. 30-1(D)(11) (Supp. 2011).....	1, 5, 7, 10, 14, 15, 16, 17
23A S.C. Code Ann. Regs. 30-1(D)(50) (Supp. 2011)	15
23A S.C. Code Ann. Regs. 30-11(B)(5) (Supp. 2011).....	3
23A S.C. Code Ann. Regs. 30-12 (Supp. 2011).....	15
23A S.C. Code Ann. Regs. 30-12(N) (Supp. 2011).....	3, 15
23A S.C. Code Ann. Regs. 30-12(N)(2)(f) (Supp. 2011).....	16

COURT RULES

Rule 220(a), SCACR.....	17
Rule 220(c), SCACR.....	4

STATEMENT OF ISSUES ON APPEAL

1. DID THE COURT OF APPEALS ERR IN REVERSING THE ALC'S DENIAL OF A CRITICAL AREA PERMIT BY MISAPPREHENDING THE APPLICABLE CASE LAW?
2. DID THE COURT OF APPEALS ERR BY MISAPPREHENDING THE SCOPE OF THE LAW OF THE CASE DOCTRINE WHEN IT RELIED ON ONE OF THE ALC'S FINDINGS OF FACT, AND OVERLOOKED THE OTHER FINDINGS OF FACT?
3. DID THE COURT OF APPEALS ERR IN DETERMINING THAT THERE WAS NOT SUBSTANTIAL EVIDENCE THAT TRACT D WAS SEPARATE FROM FOLLY ISLAND?
4. DID THE COURT OF APPEALS MISAPPREHEND THE LEGISLATIVE INTENT OF S.C. CODE REGS. 30-1(D)(11), AND THEREBY ERRONEOUSLY CONCLUDE THAT TRACT D IS EXEMPT FROM THE DEFINITION OF A COASTAL ISLAND AND THE SMALL ISLANDS REGULATION?
5. DID THE COURT OF APPEALS ERR BY FAILING TO SPECIFY WHAT, IF ANY, ACTION THE DEPARTMENT MUST UNDERTAKE?

STATEMENT OF THE CASE

This matter arises from a challenge by Ann Dreher (Respondent or Ms. Dreher) to the decision of Petitioner, South Carolina Department of Health and Environmental Control (DHEC or Department), to deny a permit to construct a vehicular bridge over the critical area to a small island adjacent to Folly Island that she owns. The Petitioner denied Respondent's application for a critical area permit because the island is too small to qualify for a bridge under the Department's regulations. Furthermore, the Department cited concerns from upstream property owners that the bridge could hinder navigation and access to the Folly River. The Administrative Law Court (ALC) upheld DHEC's denial of a permit, but the Court of Appeals reversed, and denied the Department's Petition for Rehearing.

The Department respectfully contends that the Court of Appeals misapprehended the applicable case law by holding the law of the case to be that "Tract D is a part of Folly Island." The Court of Appeals also misapprehended the law of the case by overlooking the ALC's other findings of fact that fall within the law of the case doctrine. Even though the law of the case is inconsistent, there is substantial evidence that Tract D is a separate island from Folly Island. The Department also asserts that the Court of Appeals misapprehended or overlooked the legislative intent reflected within the Department's regulations. Lastly, the Court of Appeals' Opinion does not articulate what specific action the Department is required to undertake.

STATEMENT OF FACTS

On February 20, 2009, Ann Dreher through her agent, Newkirk Environmental Inc. (“Newkirk”), submitted to the Department a critical area permit application to construct a one-lane, 51-foot vehicle bridge over an “unnamed canal connecting to the Folly River.” (App. p. 100). The purpose of the bridge is to link one portion of Ms. Dreher’s property at 806 E. Cooper Ave., Folly Beach, Charleston County, South Carolina with another portion of her property, referred to as Tract “D” (App. p. 101). State law requires Department approval and permits before “erect[ing] any structure on or in any way alter[ing] any critical area,” including coastal waters and tidelands. S.C. Code Ann. 48-39-130(C) (2008). This includes access to coastal islands under 23A S.C. Code Ann. Regs. 30-12(N) (Supp. 2011). Based on a review of aerial photographs, the Respondent’s “expert” archaeologist determined the canal bisecting the property was dug sometime before 1963. (App. p. 109). Ms. Dreher purchased the property in January 1994. (App. pp. 502-03).

On December 10, 2009, DHEC notified Ms. Dreher and her agent that it had denied her permit request in large part because the island is too small to qualify for a bridge under 23A S.C. Code Ann. Regs. 30-12(N) (Supp. 2009) (App. p. 111). There is no dispute that the island is less than one acre in size. (App. p. 102); (App. p. 111). The Department also cited concerns from upstream property owners that the bridge could hinder navigation and access to the Folly River (App. p. 111), which the Department must consider under 23A S.C. Code Ann. Regs. 30-11(B)(5) (Supp. 2009). Ms. Dreher sought a review of the decision by the Board of Health and Environmental Control on Dec. 21, 2009. (App. p. 88). The Board voted to deny that request on Jan. 14, 2010. (App. p. 84). Respondent on Jan. 27, 2010, filed a Notice of Request for Contested Case

Hearing before the Administrative Law Court. (App. p. 82). Following a hearing on July 13, 2010 (App. p. 157), the ALC issued a Final Order and Decision on October 19, 2010 (App. pp. 72-80), and both parties filed timely motions to reconsider. (App. pp. 137-43); (App. pp. 145-48); (App. pp. 150-55). The ALC did not issue a ruling on either party's motions, and by rule, they were deemed denied after thirty days. (SCALCR 29(D)). The Department appealed, and the case was heard before the South Carolina Court of Appeals on May 23, 2012. The Court of Appeals Opinion reversing the ALC's Final Order and Decision was filed on July 25, 2012. (App. pp. 2-8). DHEC filed a Petition for Rehearing with the Court of Appeals on September 7, 2012 (App. pp. 9-22), and the Order Denying the Petition for Rehearing was issued on January 18, 2013. (App. pp. 25-26). By order dated April 16, 2014, the Supreme Court granted the Department's Petition for Writ of Certiorari.

ARGUMENT

I. **The Court of Appeals Overlooked Or Misapprehended The Law of *I'On, LLC v. Town of Mt. Pleasant* By Holding The Law Of The Case To Be That "Tract D Is A Part Of Folly Island" Based On The Department's Failure To Appeal This Particular Finding Of Fact By The ALC.**

"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. "An appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). "Under the present rules, a respondent [DHEC] – the 'winner' in the lower court – may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." *Id.* at 419, 526 S.E.2d at 723. "The basis for respondent's

additional sustaining grounds must appear in the record on appeal, but other requirements contained in former rules and pre-1990 precedent no longer apply.” *Id.* at 420, 526 S.E.2d at 723. “Of course, a respondent may abandon an additional sustaining ground under the present rules—just as a respondent could under the former rules—by failing to raise it in the appellate brief.” *Id.*¹

a. A Respondent – The “Winner” In The Lower Court – May Raise On Appeal Any Additional Reasons The Appellate Court Should Affirm The Lower Court’s Ruling, Regardless Of Whether Those Reasons Have Been Presented To Or Ruled On By The Lower Court.

Because the ALC held that the Department correctly denied the Respondent’s (Dreher’s) bridge permit application, the Department did not bear the burden of appealing the ALC’s errant finding of fact (i.e., “Petitioner’s [Dreher’s] property, geologically, geographically and by legal description, is on and within the boundaries of Folly Island”). In Section I of the Court of Appeals’ Opinion, the Court held the ALC’s finding that Tract D is a *part of* Folly Island to be the law of the case.² (App. p. 4). The Court concluded that because the ALC did not rule on the Department’s motion to reconsider this particular finding of fact³ and the Department failed to challenge it on appeal, that it became the law of the case. (App. p. 5). The Court bases this conclusion on Commercial Credit Loans, Inc. v. Riddle, 334 S.C. 176, 187, 512 S.E.2d 123, 129 (Ct. App. 1999). In that case, Commercial Credit Loans, Inc., sought to enforce a foreign judgment in South

¹ See also Maxey v. R.L. Bryan Co., 295 S.C. 334, 336 n. 2, 368 S.E.2d 466, 467 n. 2 (Ct. App. 1988); May v. Hopkinson, 289 S.C. 549, 558, 347 S.E.2d 508, 513 (Ct. App. 1986).

² As mentioned above, the ALC did not find that Petitioner’s property is a “*part of*” Folly island, but rather the Petitioner’s property, geologically, geographically and by legal description, is “*on and within the boundaries of*” Folly Island. Accordingly, because geology, geography and legal description are not mentioned in the definition of coastal island (S.C. Code Regs. 30-1(D)(11)), these factors are not controlling.

³ The Department argued in the Motion to Reconsider that “[t]he Court’s finding that ‘notwithstanding the man-made excavation, Petitioner’s property, geologically, geographically, and by legal description, is on and within the boundaries of Folly Island’ is inconsistent with the evidence presented and misleading in light of the court’s correct legal conclusions.” (App. p. 75).

Carolina that it had previously obtained against the judgment debtors in Illinois several years earlier. *Id.* at 178, 512 S.E.2d at 124. The special referee in that case found South Carolina's ten year enforcement period for execution on a judgment barred the enforcement proceedings. *Id.* at 178-79, 512 S.E.2d at 124. After what appears to be a fraudulent transfer of title to avoid Commercial Credit's judgment lien, the debtors then transferred title back into their names and refinanced the indebtedness on the property by giving a mortgage to One Stop Mortgage. *Id.* at 179, 512 S.E.2d at 125. The special referee entered judgment in favor of the debtors as to *both* Commercial Credit and One Stop Mortgage. *Id.* at 180, 512 S.E.2d at 125. In particular, the special referee concluded that Commercial Credit failed to pursue diligently its efforts to collect on the judgment and so any effort the debtors undertook to conceal property from Commercial Credit did not extend the time for executing on its judgment. *Id.* "With respect to One Stop Mortgage, the referee held its mortgage did not have priority over Commercial Credit's judgment because it was not a purchase money mortgage." *Id.*

Even though One Stop Mortgage and the debtors are both captioned as Respondents in this case (both parties were attempting to stop Commercial Credit's enforcement proceedings to protect their own distinctly separate financial interests), the special referee's findings in favor of the debtors means that only the debtors are the prevailing party (i.e., "winner") before the trial court. This fact is significant, because it fundamentally distinguishes One Stop Mortgage in the Commercial Credit Loans, Inc. case from the Department in the present case. In I'On, L.L.C. v. Town of Mt. Pleasant, this Court held that "[u]nder the present [appellate court] rules, a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate

court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.” 338 S.C. at 419, 526 S.E.2d at 723. The only basis for the additional sustaining grounds is that those grounds appear on the record on appeal. I’On, L.L.C., 338 S.C. at 420, 526 S.E.2d at 723. In this case, as mentioned above, the Department did in fact file a Motion for Reconsideration challenging the ALC’s errant finding of fact⁴. (App. pp. 145-48). This Motion was not only made part of the record on appeal as I’On, L.L.C. requires, but the Department also referenced the Motion in its Appellate Brief. (App. p. 814). Furthermore, the third Statement of Issues on Appeal and the argument in Respondent’s (DHEC’s) Final Brief clearly challenges this factual finding (i.e., “Tract D today is a separate island from Folly Island”). (App. pp. 819-20); (App. pp. 825-27).

Unlike One Stop Mortgage in Commercial Credit Loans, Inc., the Department was truly the “winner” in the lower court. The ALC upheld the Department’s permitting decision denying the Appellant’s bridge permit application based on the conclusion that Tract D is a coastal island under 23A S.C. Code Ann. Regs. 30-1(D)(11) (Supp. 2011) (App. p. 76), (despite its finding that Tract D is “geologically, geographically, and by legal description, [] on and within the boundaries of Folly Island”). (App. p. 73). Accordingly, as the “winner”, the Department did not bear the responsibility of appealing this particular factual finding by the ALC in order to preserve any additional sustaining grounds for review by the Court of Appeals. However, by holding that this factual finding became the law of the case by the Department’s failure to appeal it, the Court improperly shifted to the Department the responsibility of appealing the ALC’s order and

⁴ “Petitioner’s property, geologically, geographically and by legal description, is on and within the boundaries of Folly Island.”

deprived the Department of the opportunity to argue its additional sustaining grounds for why the ruling of the ALC should be affirmed.

In summary, according to I'On, L.L.C., the limitations on appellate review that emanate from the law of the case doctrine would not apply to the issue of whether Tract D was either “*a part of Folly Island*” as the Court of Appeals stated, or “*on and within the boundaries of Folly Island*” as the ALC held.

b. Requiring The Department To Appeal The ALC's Finding Of Fact Would Have Been Inefficient And Pointless.

Justice Waller stated that “[i]t would be inefficient and pointless to require a respondent⁵ to return to the judge and ask for a ruling on other arguments to preserve them for appellate review.” I'On, L.L.C., 338 S.C. at 419, 526 S.E.2d at 723. “[A] court usually should refrain from deciding unnecessary questions.” Id. As was mentioned above, I'On, L.L.C. dictates that the Department, as the “winner” in the lower court, does not bear the responsibility of appealing those findings of fact which the Department disagrees with in order to preserve those arguments for appellate review. By its holding, I'On, L.L.C., stresses the principle of judicial economy by not requiring litigants to resolve unnecessary questions. In this instance, requiring the Department to appeal this particular finding of the ALC, when the ALC had affirmed the Department's permitting decision, would force the Court to answer an unnecessary question and further encumber an already over-burdened system.

II. The Court Misapprehends The Scope Of The Law Of The Case Doctrine By Overlooking the ALC's Other Findings Of Fact.

“[D]ifferent preservation rules apply to an appellant—the losing party in the

⁵ i.e., the “winner” in the lower court.

lower court.” I’On, L.L.C., 338 S.C. at 421, 526 S.E.2d at 724. “An appellate court may not, of course, reverse for any reason appearing in the record.” Id. at 421-22, 526 S.E.2d at 724. “The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred.” Id. at 422, 526 S.E.2d at 724. “This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.” Id.; *e.g.*, Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995) (appellate court generally will not address an issue unless the issue was raised to and ruled upon by the trial court); State v. Williams, 303 S.C. 410, 401 S.E.2d 168 (1991) (same); Sumter Building & Loan Ass’n v. Winn, 45 S.C. 381, 23 S.E. 29 (1895) (same). “If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.” I’On, L.L.C., 338 S.C. at 422, 526 S.E.2d at 724; *e.g.*, Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993); Hoffman v. Powell, 298 S.C. 338, 380 S.E.2d 821 (1989); *see also* Rules 52(b) and 59(e), SCRCF.

Under the authority of I’On, L.L.C., because Dreher (as Appellant before the Court of Appeals) was the losing party in the lower court, she was required to present her issues and arguments to the ALC and obtain a ruling by the ALC in order for them to be preserved for appellate review. Dreher never challenged the ALC’s overwhelming number of factual findings regarding the characteristics of Tract D that bring this property within the statutory definition of a coastal island. According to I’On, L.L.C.,

these additional findings by the ALC also comprise the law of the case. Specifically, the following factual findings (unappealed by Dreher) are also the law of the case:

- 1) Tract D is an area of high ground above the critical area delineation that is separated from other high ground areas (Folly Island) by coastal tidelands and waters (App. p. 73) (Emphasis added);
- 2) Tract D is less than two acres (.94 acres) (App. p. 73);
- 3) Tract D is not developed (App. p. 77);
- 4) Tract D is completely surrounded by coastal tidelands and waters (App. p. 73) (Emphasis added);
- 5) at normal high tide stages there is approximately 2 feet of water in a 40 foot wide channel extending for the entire 70 foot coastline of 806 East Cooper Avenue (App. p. 73) (Emphasis added);
- 6) marsh grass grows in the 40 foot wide channel (App. p. 73) (Emphasis added);
- 7) Tract D is an island that does not have a publicly accessible bridge or causeway (App. p. 77) (Emphasis added);
- 8) Tract D is separated from Folly Island by coastal tidelands and water, including being surrounded by lands below mean high tide (App. p. 77) (Emphasis added);
- 9) Tract D constitutes a “coastal island” as that term is defined in 23A S.C. Code Ann. Regs. 30-1(D)(11) (Supp. 2011). (App. p. 76) (Emphasis added).

In holding that Tract D is not a coastal island, the Court of Appeals failed to consider the entire law of the case. In its deliberations, the Court relied solely upon the ALC’s finding of fact that Tract D is “*on and within the boundaries of Folly Island*” which the Court interprets as “*a part of Folly Island.*” (App. p. 5) (Emphasis added). The Court of Appeals referenced the ALC’s other factual findings in its Opinion as mere

concessions of the Appellant, (i.e., “there is no dispute that Tract D is a coastal island as defined in the regulations because Dreher *concedes* Tract D is a high ground area above the critical line delineation separated from the upland immediately adjacent to 806 East Cooper Avenue by navigable, saline waters.” Dreher v. S.C. Dep’t of Health & Env’tl. Control, 399 S.C. 259, 264-65, 730 S.E.2d 922, 925 (Ct. App. 2012) (Emphasis added)). These other unappealed factual findings by the ALC are not merely concessions by Ms. Dreher. These factual findings also constitute the law of the case and were overlooked by the Court in its deliberations. Without giving these other findings their due weight, the Court of Appeals failed to consider the law of the case in its entirety.

III. Even Though The Law Of The Case Is Inconsistent, There Is Substantial Evidence That Tract D Is A Separate Island From Folly Island.

“The review of the administrative law judge's order must be confined to the record. The reviewing tribunal may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because of the finding, conclusion, or decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

S.C. Code Ann. § 1-23-610(C) (Supp. 2011). The Appellate Court could have reversed “the ALC if the findings [were] affected by error of law, are not supported by substantial evidence, or [were] characterized by abuse of discretion or clearly unwarranted exercise of discretion.” Olson v. S.C. Dep’t of Health & Env’tl. Control, 379 S.C. 57, 64, 663 S.E.2d 497, 501 (Ct. App. 2008). “The ALC’s findings are supported by substantial evidence if, looking at the record as a whole, there is evidence from which *reasonable minds could reach the same conclusion the administrative agency reached.*” Id. at 63, 663 S.E.2d at 501 (citing Neal v. Brown, 374 S.C. 641, 648, 649 S.E.2d, 164, 167 (Ct. App. 2007)) (Emphasis added). “The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence.” DuRant v. S.C. Dep’t of Health & Env’tl. Control, 361 S.C. 416, 420, 604 S.E.2d 704, 707 (Ct. App. 2004) (citing Grant v. S.C. Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995)).

Even though the ALC found that Tract D is geologically, geographically and by legal description “on and within the boundaries of Folly Island,” the nine unappealed factual findings, referenced earlier in this Brief, supporting the ALC’s conclusion that Tract D falls within the regulatory definition of a coastal island also constitute the law of the case. Viewed in its entirety, the law of the case is inherently inconsistent. Nonetheless, there is substantial evidence by which reasonable minds could reach the conclusion of the ALC that Tract D is a coastal island, and that it is an island separate from Folly Island.⁷ The evidence established that Tract D is surrounded entirely by lands below mean high water. (App. pp. 73, 75, 77). Indeed, all four of Dreher’s witnesses

⁷See Burse v. S.C. Dep’t of Health & Env’tl. Control, 369 S.C. 176, 188-89, 631 S.E.2d 899, 906 (2006) (stating when conflicting evidence exists as to an issue, the court’s substantial evidence standard of review defers to the findings of the fact-finder).

testified that Tract D was surrounded by lands below mean high water. Even using Appellant Witness Fronabarger's own definition, "an island [is] a piece of land that [is] surrounded by water," (App. p. 342, lines 5-11), Tract D is an island. (App. p. 342, lines 12-22). Mr. Riggs, Dreher's consultant who previously worked for the U.S. Army Corps of Engineers, testified similarly that it was his guess that the forty foot wide tidal canal over which the proposed bridge would go is a couple feet deep at mean high tide. (App. p. 385, lines 5-25); (App. p. 386, lines 1-18). Similarly, Dreher testified that the Folly River goes up to the canal, which she called a trench. (App. p. 393, lines 7-25); (App. p. 394, lines 1-4). There was also photographic evidence submitted showing the existence of water, which indisputably comes from the Atlantic Ocean by way of the Folly River, surrounding Tract D and separating Tract D from Folly Island. (App. Pp. 747-61). Given all of this evidence, including the evidence from Dreher's own witnesses, it cannot be said that there is *not* substantial evidence to support the ALC's finding that Tract D today is a separate island from Folly Island. Both islands are surrounded by water and separated from each other by lands below mean high water. As the Court of Appeals stated in Olson, "[t]he mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." Olson, 379 S.C. at 63, 663 S.E.2d at 501.

IV. The Court Misapprehends or Overlooks The Legislative Intent Reflected In The Language of S.C. Code Regs. 30-1(D)(11), Thereby Erroneously Concluding Tract D Is Exempt From The Definition Of A Coastal Island And The Small Islands Regulation.

As when seeking to determine the meaning of statutes, the rules of statutory construction are employed to discern the meaning of regulations.⁸ “The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” Media Gen. Commc’ns, Inc. v. S.C. Dep’t of Revenue, 388 S.C. 138, 147-48, 694 S.E.2d 525, 529 (2010) (quoting Charleston Cnty. Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993)). “The legislative language used in a statute [or regulation] is considered the best evidence of [] legislative intent . . . , and courts are bound to implement the legislature’s expressed intent.” Lexington Cnty. Health Servs. Dist. v. S.C. Dep’t of Revenue, 384 S.C. 647, 651, 682 S.E.2d 508, 509 (Ct. App. 2009). In ascertaining legislative intent, “a court should not focus on any single section or provision but should consider the language of the statute as a whole.” Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). “A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.” State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (quoting Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992)).

The ALC looked to the language of Regulation 30-1(D)(11) to interpret the intent of the legislature. (App. p. 76). Regulation 30-1(D)(11) defines “coastal island” as “an area of high ground above the critical area delineation that is separated from other high

⁸ See, S.C. Ambulatory Surgery Center Ass’n v. S.C. Workers’ Comp. Comm’n, 389 S.C. 380, 389, 699 S.E.2d 146, 151 (2010); Converse Power Corp. v. S.C. Dep’t of Health & Env’t Control, 350 S.C. 39, 47-48, 564 S.E.2d 341, 346 (Ct. App. 2002).

ground areas by coastal tidelands⁹ or waters.” 23A S.C. Code Ann. Regs. 30-1(D)(11) (Supp. 2011). The regulation further provides that the purpose of the definition of “coastal island” is to “include all islands except those that are essentially mainland, i.e., those that already have publicly accessible bridges and/or causeways.” *Id.* The ALC held that the language of Regulation 30-1(D)(11) reflects a clear legislative intent to include islands like Tract D in the definition of “coastal island.” (App. p. 77). Therefore, the ALC correctly interpreted the legislative intent of Regulation 30-1(D)(11) to include Tract D.

The purpose of Regulation 30-1(D)(11) is to ensure that Folly Island is accessible to the public. The ALC held that “Regulation 30-1(D)(11) expressly provides that the purpose of the definition of the ‘coastal island’ is to ‘include **all** islands **except** those that are essentially mainland, i.e., those that already have publicly accessible bridges and/or causeways.’” (App. p. 77) (Emphasis added). Although Folly Island is essentially mainland according to the Regulation, it nevertheless remains an island. Therefore, it is necessary to build a bridge or causeway to reach it. For this reason Folly Island is specifically named as an exception to the definition of a “coastal island” under S.C. Code Regs. 30-1(D)(11) and is exempt from the Small Island Regulations set forth in 23A S.C. Code Ann. Regs. 30-12 (Supp. 2011).

The legislative intent and purpose of Regulation 30-1(D)(11) and Regulation 30-12(N) as they pertain to Folly Island will be abrogated if the Court of Appeals’ decision is upheld. The regulations were meant to allow public access to Folly Island from the mainland of South Carolina so as to allow the public to take advantage of the

⁹ 23A S.C. Code Ann. Regs. 30-1(D)(50) (Supp. 2011) (defines tidelands as “all areas which are at or below mean high tide”).

opportunities afforded by the Island's large size and developed nature. The regulations were not intended to provide private bridge access¹⁰ from Folly Island to islands adjacent to Folly Island, which is the result of the Court of Appeals' opinion.¹¹ The ALC was correct in its holding that because Tract D is an island that does not have a publicly accessible bridge or causeway, to find that Tract D falls within the definition of "coastal island" comports with the legislative purpose set forth in Regulation 30-1(D)(11). (App. p. 77). Accordingly, the legislature's stated reason for excluding Folly Island from Regulation 30-1(D)(11) does not apply to Tract D. (App. p. 77).

The Court of Appeals incorrectly applied the exemptions of S.C. Code Regs. 30-1(D)(11) to Tract D. The ALC held that the legislature's stated reason for the exclusion of Folly Island from the definition of "coastal island" under Regulation 30-1(D)(11) does not apply to Tract D. (App. p. 77). The ALC further held that, according to Regulation 30-1(D)(11), Folly Island was excluded from the definition of a "coastal island" under Regulation 30-1(D)(11) because of its "large size and developed nature." (App. p. 77). Tract D was found by the ALC to be less than one acre and undeveloped. (App. p. 77). For that reason, the ALC concluded that (unlike Folly Island) "constructing a bridge to Tract D [could not] be justified based upon Tract D's size or state of development." (App. p. 77). The language of Regulation 30-1(D)(11) reflects a clear legislative intent to exclude only those islands whose size and state of development were such that they did not fall into the definition of "coastal island." Accordingly, Tract D does not qualify for

¹⁰ As the private landowner of the property that includes Tract D, only the Appellant (Dreher) could use the bridge.

¹¹ In reality, if Tract D is "a part of Folly Island", then the Appellant would not even need a bridge to get from Tract D to Folly Island. The Regulations specifically envision that 23A S.C. Code Ann. Regs. 30-12(N)(2)(f) (Supp. 2011) will apply to bridges from Folly Island to islands adjacent to Folly Island.

the exemptions under Regulation 30-1(D)(11) due to its small size and its undeveloped state.

V. The Court Did Not Specify What If Any Action the Department Must Undertake.

The appellate court had authority to affirm, reverse, or modify the decision below or remand all or any issues for further proceedings. Rule 220(a), SCACR. The Court of Appeals concluded its Opinion by holding: (1) that the law of the case is that Dreher's property is geologically, geographically, and by legal description on, and a part of, Folly Island; (2) that Folly Island is specifically exempted from the Small Islands Regulation; (3) that it was error for the ALC to affirm DHEC's denial of Appellant's permit to build a bridge to Tract D; and (4) that the finding that Appellant's permit application to access Tract D complies with the Transportation Regulation is the law of the case. (App. p. 8). The Court then reversed the Order of the ALC. *Id.* At this time, it is unclear what specifically the Court is directing the Department to do.

CONCLUSION

WHEREFORE, based on the foregoing, the Department respectfully requests that the South Carolina Supreme Court reverse the decision of the Court of the Appeals.

Respectfully submitted,



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