

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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AUG 21 2014

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,

REPLY BRIEF OF PETITIONER

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REPLY ARGUMENT

I. The Court of Appeals and the Respondent Misapply the “Substantial Evidence” Standard.

Respondent states that “[t]he Court of Appeals correctly held that the substantial evidence on the record supported the ALC’s findings that Tract D was ‘geologically, geographically, and by legal description on and within the boundaries of Folly Island.’” (Respondent’s Brief, p. 4). Respondent then draws the erroneous conclusion that the Court of Appeals correctly determined that the evidence in the record supporting the ALC’s “geology, geography and legal description” factual finding was a proper basis to *reverse* the ALC’s decision upholding the Department’s denial of the bridge permit application. Both the Respondent and the Court of Appeals misapply the “substantial evidence” standard set forth in S.C. Code Ann. §1-23-610(B).

In applying this statute (S.C. Code Ann. §1-23-610(B)) to a review of an ALC’s decision, this Court stated that “[a] *decision* of the ALC should be upheld, therefore, if it is supported by substantial evidence in the record.” Risher v. South Carolina Dept. of Health & Env’tl. Control, 393 S.C. 198, 204, 712 S.E.2d 428, 431 (2011) (Emphasis added). In this case, the ALC’s *decision* was not merely the finding of fact that Respondent relies on almost exclusively (i.e., her “property, geologically, geographically and by legal description, is on and within the boundaries of Folly Island.”). Rather, the ALC’s *decision* was its affirmation of the Department’s denial of Respondent’s permit application. So in order to determine whether the Court of Appeals opinion should be reversed and the ALC Order upheld, according to Risher, this Court must determine if there is substantial evidence in the record to support the ALC’s decision affirming the Department’s denial of the bridge permit application. Id. Specifically, this Court stated

in Risher (within the context of making a substantial evidence analysis) that the ALC's determination of whether an island is exempt as one of the named islands listed in Reg. 30-1(D)(11) as islands not considered a coastal island (such as Fripp Island or Folly Island), "is not a legal question that is determined under the rubric of a regulation; instead, it is a finding of fact properly left within the purview of the fact finding body, and only reversible if unsupported by substantial evidence in the record." Risher, at 210, 712 at 434.

In Risher, the ALC had found that a .27 area of high ground above the critical line was a part of Fripp Island and not a distinct coastal island. This Court relied upon the evidence of tidal datum, which established that the tidelands between Risher's .27 acres of upland and Tarpon Blvd. on Fripp Island were all above mean high water. The Court stated, "[i]n our view, the ALC's determination that the Lot is a part of Fripp Island, based on the tidal datum introduced at trial, is a reasonable one which is supported by substantial evidence." Id.

In this case, the ALC's findings of fact previously highlighted on pages 12 thru 13 of the Petitioner's Brief (particularly the ALC's statements that "Tract D is an island" (App. p. 77) and "I find that Tract D constitutes a 'coastal island'" (App. p. 76)) are undoubtedly supported by substantial evidence in the record. In fact, because much of this supporting evidence was actually provided by Mrs. Dreher's own witnesses, the Department contends that such evidence is not only substantial, but also quite compelling. (App. pp. 73, 75, 77). All four of Dreher's witnesses testified that Tract D was surrounded by lands below mean high water. Petitioner respectfully calls the Court's

attention to the following colloquy that occurred on cross examination of Mr. Poplin, Dreher's expert in archaeology:

- Q: --well, is it consistent that it used to be that the peninsula extended, it used to extend from the mainland to Folly Island but it no longer does?
- A. That's—that's correct.
- Q. Okay. Or Tract D, rather.
- A. Or Tract D, yes.
- Q. And now what's in that break between the mainland and [sic] Folly Island and Tract D?
- A. **There's water.**
- Q. Okay. Is there *Spartina* growing?
- A. There's grass growing in there, marsh grass.
[Witness drew on DHEC 9, photo 7, traced the mainland of Folly Island with a red line and Tract D with a green line]
- Q. Okay. And **that area between the red and the green line is coastal waters, is that right?**
- A. **Yes.**
- Q. Okay. And is it also tidelands?
- A. Yes.

(App. p. 244, line 7-p. 245, line 17) (emphasis added).

- Q. And today we know that there are coastal waters and tideland in that area between Tract D and the mainland of Folly, right?
- A. Correct.

(App. p. 258, lines 10-13). Similarly, the following exchange occurred with Mr. Fronabarger, Dreher's expert geologist:

- Q. Okay. You did four site visits?
- A. Yes, I did.
- Q. And I think you said that you took four site visits because you were trying to find when you could cross the canal?
- A. The third site visit I went out there thinking that I could cross the canal, but I had not looked at the tide tables. It was dead-high tide.
- Q. Okay. And the first three site visits you took, there was water in the canal, was there not?
- A. There was.
- Q. And the canal separates the Dreher Tract, Tract D from the mainland of Folly?
- A. You're talking about what I call the ditch, you're calling the canal?
- Q. Yeah, you're calling it a ditch today.
- A. Right.

Q. Okay.

A. And that—the first three visits, there was enough water in it and I didn't have any way wading boots with me so I didn't cross over. The fourth visit, I did.

Q. And you testified that's below mean high tide, that ditch, what you're calling a ditch?

A. Yes, I did testify to that.

Q. Okay. Are you changing your opinion on that?

A. Nope.

[...]

Q. In fact, the entire Tract D is below mean high tide, is it not? It's surrounded by lands below mean high tide?

A. The entire Tract D?

Q. The Tract D is surrounded—is separated from Folly Island by lands below mean high tide?

A. Oh, I understand your question. Yes, it is.

Q. Okay. And that area is inundated with saline waters?

A. During the tidal flux it is, yes, sir.

Q. Twice a day—

A. Yes.

Q. --water comes into that ditch?

A. Sure does.

Q. Okay. And then it's marsh—

A. Yes, sir.

Q. --around her property?

A. Yes.

Q. There's no dispute of that?

A. Not from a geologic point of view, no, sir.

Q. And that water comes from the Folly River, right?

A. Yes, sir, it does.

[...]

Q. Okay. And this area between the mainlined of Folly and Tract D is twice a day flooded by waters straight from the Folly River?

A. Yes, sir, it is.

(App. p. 338, line 6-p. 341, line 25). Indeed, as previously stated, using Fronabarger's own definition of an island¹, Tract D is an island. (App. p. 342, lines 12-22). Mr. Riggs, Dreher's consultant who used to work for the Corps of Engineers, testified similarly that it was his guess that the forty foot wide tidal canal over which the bridge would go is a couple feet deep at mean high tide. (App. p. 385, line 5-p. 386, line 18). Similarly,

¹ He testified that "an island [is] a piece of land that [is] surrounded by water," (App. p. 342, lines 5-11).

Dreher testified that the Folly River goes up to the canal, which she called a trench. (App. p. 393, line 7-p. 394, line 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. 747-761).

Given all of this evidence from Dreher's own witnesses, it cannot be said that there is *not* substantial evidence to support the ALC's statements that "Tract D is an island" (App. p. 77) and "I find that Tract D constitutes a 'coastal island'" (App. p. 76) and is thus a separate island from Folly Island.² Nor can it be said that there is *not* substantial evidence to support the ALC's *decision* denying the permit application. Both Tract D and Folly Island are surrounded by water and separated from each other by lands below mean high water.

II. As Part of a Risher Analysis, A Factual Finding's Location in the Final Order Is Not Relevant.

Respondent mistakenly places great significance on the *location* of the "geology, geography and legal description" finding of fact within the final order. In particular, the Respondent asserts that because this factual finding "is set forth in the part of the Final Order and Decision bearing the heading 'Findings of Fact,'" it is "[t]he key fact in this case." (Respondent's Brief, pp.4-5). Respondent provides no basis for her assertion that the above-referenced factual finding is the "key fact" when compared with the ALC's

²As this Court held in Risher as well as numerous other opinions, "[s]ubstantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached." Southeast Res. Recovery, Inc. v. S.C. Dep't of Health & Envtl. Control, 358 S.C. 402, 407, 595 S.E.2d 468, 470 (2004) (quoting Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981)). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Palmetto Alliance, Inc. v. Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)." Risher, at 211, 712 at 434.

other contrary factual findings (i.e., “I find that Tract D constitutes a ‘coastal island’” (App. p. 76) and “Tract D is an island” (App. p. 77)).³ Nonetheless, in an effort to persuade this Court to affirm the Court of Appeals reversal of the ALC’s Final Order, the Respondent isolates this one factual finding and entirely ignores the trial court’s analysis regarding the underlying reasons why Tract D is a separate island that does not fall within the Folly Island exemption.⁴

A factual finding’s relevance as part of a Risher analysis (or any other basis for appellate review) is not determined by its *location* in the Final Order under a heading captioned “Findings of Fact.” The Court of Appeals held that “[f]indings of fact and conclusions of law need not be presented in any particular format. They need only be sufficiently detailed to enable a reviewing court to determine whether fact findings are supported by evidence and whether the law has been correctly applied.” Cloyd v. Mabry, 295 S.C. 86, 90-91, 367 S.E.2d 171, 173 (Ct. App. 1988) (citing Able Communications, Inc. v. S.C. Public Service Comm'n 290 S.C. 409, 410-411, 351 S.E.2d 151, 152 (1986)). In fact, this Court held that it is not even “necessary that findings of fact and conclusions of law be stated or enumerated under separate headings.” Seabrook Island Property

³ Respondent also ignores the inconvenient reality that the ALC made within the “Findings of Fact” heading the contradictory factual finding that “Tract D meets the general legal criteria of an island.” (App. p. 73). Using Respondent’s apparent logic, she is compelled to concede that the above-referenced statement is also a finding of fact.

⁴ The ALC found that “while Tract D technically falls within the geographical and legal boundaries of Folly Island, which is specifically excluded from Regulation 30-1(D)(11)’s definition of ‘coastal island,’ the legislature’s stated reason for excluding Folly Island does not apply to Tract D. According to Regulation 30-1(D)(11), Folly Island was excluded from the ‘coastal island’ definition because of its ‘large size and developed nature.’ Here, Tract D is less than one acre in size and is not developed. Thus, unlike the case with Folly Island, constructing a bridge to Tract D cannot be justified based upon Tract D’s size or state of development.” (App. p. 77). (Emphasis added).

Owners Ass'n v. S.C. Public Service Comm'n, 303 S.C. 493, 497, 401 S.E.2d 672, 674 (1991) (citing Airco, Inc. v. Hollington, 269 S.C. 152, 236 S.E.2d 804 (1977)).

Thus, because headings are not required nor is a particular format even required for a Final Order, the ALC's factual findings (i.e., "I find that Tract D constitutes a 'coastal island'" (App. p. 76) and "Tract D is an island" (App. p. 77)) are properly recognized as factual findings regardless of their location in the "Conclusions of Law" portion of the Final Order.

The significance of these factual findings ("I find that Tract D constitutes a 'coastal island'" and "Tract D is an island" (App. p. 77)), is obvious. Since "[a] reviewing court may reverse or modify an administrative *decision* if the findings of fact are *not* supported by substantial evidence"⁵ and since these factual findings that Tract D is an island *are* supported by substantial evidence, the ALC's *decision* to uphold the Department's denial of Dreher's permit application for a bridge should have been affirmed by the Court of Appeals. In contrast, the Respondent urges this Court to affirm the Court of Appeals reversal of the Final Order, not based on a lack of substantial evidence to support the ALC's actual decision, but rather on what she describes as the "key" factual finding itself. In particular, Respondent asserts that "once that [geology, geography and legal description] factual finding was set forth by the ALJ, reversal of DHEC's denial of the permit should have followed perforce." (Respondent's Brief, p. 6). Such a singular focus on this one factual finding, rather than focusing on the substantiality or insubstantiality of the evidence supporting the ALC's decision, is not in

⁵ Risher, at 211, 712 at 434 (citing S.C. Code Ann. § 1-23-380(A)(6)(e) (2005)) (Emphasis added).

accord with this Court's application of the standard for appellate review found in S.C. Code Ann. §1-23-380(A)(6)(e) (2005). Risher, at 211, 712 at 434.

III. As The Prevailing Party Before The ALC, The Department Was The "Winner" According To I'On, LLC v. Town Of Mt. Pleasant In Contrast To One Stop Mortgage Who Was The "Loser" According To I'On, LLC v. Town Of Mt. Pleasant.

The Department will not restate its first argument from Petitioner's Brief regarding the applicability of I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716, (2000). However, the Department would simply point out that in Respondent's effort to explain why the Court of Appeals correctly applied Commercial Credit Loans, Inc. v. Riddle, 334 S.C. 176, 512 S.E.2d 123 (Ct. App. 1999), she never explains how One Stop Mortgage could possibly be viewed as the "winner" in that case. Respondent attempts to side step this issue by asserting that "the overall effect of the decision was to disallow enforcement of Commercial Credit's judgment as time barred." (Respondent's Brief, p. 6). While this statement is partially correct, it is incomplete. A more complete and accurate summary would be that the end result of the Commercial Credit case was that the debtors were released from their obligation to repay *both* Commercial Credit Loans, Inc. and One Stop Mortgage. As such, since both Commercial Credit Loans, Inc. and One Stop Mortgage were barred from collecting the money they each separately lent to the debtors, they were both "losers" in that case. However, because the ALC upheld the Department's permitting decision, DHEC is the "winner" according to I'On. Thus, as previously articulated in the Petitioner's Brief, Commercial Credit is not controlling in this case.

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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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date she has served the *Reply Brief of Petitioner* in this matter upon the following, by placing copies of same in the United States Mail, first class postage prepaid, addressed to:

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August 21, 2014