

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM ADMINISTRATIVE LAW COURT **S.C. Supreme Court**

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

Appellate Case No. 2013-000364

Ann Dreher,

Respondent,

vs.

South Carolina Department of Health and Environmental Control,  
Office of Ocean and Resource Management,

Petitioner,

**PETITION FOR REHEARING BY PETITIONER SOUTH CAROLINA  
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL**

Pursuant to Rule 221, SCACR, the South Carolina Department of Health and Environmental Control, (hereinafter, the "Department" or "DHEC"), respectfully petitions this Court for a rehearing of Opinion Number 27507, (hereinafter, the "Opinion"), filed on March 18, 2015. Rehearing is warranted when the Court has overlooked or misapprehended an argument. Kennedy v. S.C. Retirement System, 349 S.C. 531, 564 S.E.2d 322 (2001).

**GROUND FOR REHEARING**

The Department respectfully submits that Opinion No. 27507 ("the Opinion") overlooks or misapprehends the following points:

- I. The Court misapprehends or overlooks the legislative intent reflected in the language of S.C. Code Ann. Reg. 30-1(D)(11).
- II. The Court misapprehends or overlooks the detrimental impact the Opinion will have on a proper application of the access to coastal islands regulation to future permit applications where the coastal islands at issue are geographically proximate to specifically exempt coastal islands.
- III. The Court misapprehends or overlooks substantial evidence supporting the conclusion that Tract D is separate and distinct from Folly Island.

## ARGUMENT

### **I. The Court misapprehends or overlooks the legislative intent reflected in the language of S.C. Code Ann. Reg. 30-1(D)(11).**

“As when seeking to determine the meaning of statutes, the rules of statutory construction are employed to discern the meaning of regulations.” See S.C. Ambulatory Surgery Center Ass’n v. S.C. Workers’ Compensation Comm’n, No. 26875, 2010 WL 3489112, at \*5 (S.C. Sept. 7, 2010); Converse Power Corp. v. S.C. Dep’t of Health and Envtl. Control, 350 S.C. 39, 47-48, 564 S.E.2d 341, 346 (Ct. App. 2002). “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 County 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)).

In this case, the Court misapprehended or overlooked the legislative intent reflected in the language of S.C. Code Ann. Reg. § 30-1(D)(11). That section defines a “coastal island” as:

an area of high ground above the critical area delineation that is **separated from other high ground areas by coastal tidelands or waters**. An island connected to the mainland or other island only by a causeway is also considered a coastal island. **The purpose of this definition is to include all islands except those that are essentially mainland, i.e., those that already have publicly accessible bridges and/or causeways. The following islands shall not be deemed a coastal island subject to this section due to their large size and developed nature:** Waites Island in Horry County; Pawleys Island in Georgetown County; Isle of Palms, Sullivans Island, **Folly Island**, Kiawah Island, Seabrook Island, Edisto Island, Johns Island, James Island, Woodville Island, Slann Island and Wadmalaw Island in Charleston County; Daniel Island in Berkeley County; Edisto Beach in Colleton County; Harbor Island, Hunting Island, Fripp Island, Hilton Head Island, St. Helena Island, Port Royal Island, Ladies Island, Spring Island and Parris Island in Beaufort County.

2 S.C. Code Ann. Regs. 30-1(D)(11) (2011) (Emphasis added).

Folly Island, like Tract D, is “an area of high ground above the critical area delineation that is separated from other high ground areas by coastal tidelands or waters.” However, due to its size, which makes it essentially a mainland, its developed nature, and the fact that it already has publicly accessible bridges and/or causeways, the regulation specifically exempted Folly Island from the definition of a “coastal island.”

Unlike Folly Island, Tract D is small (less than two acres in size) and undeveloped. See 2 S.C. Code Ann. Regs. 301-12(N)(2)(c) (2011) (“The Department

will not consider applications for bridge access to islands less than two acres in size.”). It has no existing publicly accessible bridges or causeways. It is separated from other high grounds, including Folly Island, by coastal tidelands or waters. *See* 2 S.C. Code Ann. Regs. 30-1(D)(50) (2011) (defining “tidelands” as including “all areas which are at or below mean high tide.”). The legislative purposes set forth in Reg. 30-1(D)(11) for excluding Folly Island from the definition of “coastal island” do not apply to Tract D. Therefore, the interpretation advanced by the Department is consistent with the regulatory language and intent, is reasonable, and should be accorded deference. See *Kiawah Development Partners v. S.C. Dep’t of Health and Env’tl. Control*, 411 S.C. 16, 766 S.E.2d 707 (2014). This Court misapprehended or overlooked the stated purpose and intent of applying the Folly Island exemption to Tract D.

**II. The Court misapprehends or overlooks the detrimental impact the Opinion will have on a proper application of the access to coastal islands regulation to future permit applications where the coastal islands at issue are geographically proximate to specifically exempt coastal islands.**

Prior to the issuance of this Opinion, when the Department received a bridge permit application to access a coastal island, if the land in question was “an area of high ground above the critical area delineation that is separated from other high ground areas by coastal tidelands or waters,” then the permit application was evaluated under 2 S.C. Code Ann. Regs. 30-1(D)(11)<sup>1</sup> and 30-12(N) generally as well as subsection 30-12(N)(2)(c) particularly.<sup>2</sup> Prior to the issuance of this Opinion, a coastal island’s geographic proximity to an exempt island or the fact that a channel was “man made” was

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<sup>1</sup> 2 S.C. Code Ann. Regs. 30-1(D)(11) (2011) defines a “Coastal Island” in pertinent part as “an area of high ground above the critical area delineation that is separated from other high ground areas by coastal tidelands or waters.”

<sup>2</sup> 2 S.C. Code Ann. Regs. 30-12(N) (2011) applies to permit applications for bridges and docks as a means of obtaining access to coastal islands. Subsection (2)(c) states that “[t]he Department will not consider applications for bridge access to islands less than two acres in size.”

not relevant to the permitting decision.<sup>3</sup> The Department followed the regulatory definition of an island. *See* 2 S.C. Code Ann. Regs. 30-1(D)(11). However, the consequence of this Opinion is uncertainty.

During oral argument the Court expressed appropriate concern as to where the “cut out point” is in terms of when a permit applicant can or cannot get a bridge permit to a coastal island that is within the penumbra of a bigger exempt coastal island.<sup>4</sup> Respondent’s Counsel answered by asserting that “if you had a geologist to say ‘yes, that is actually notwithstanding that it’s out in the marsh *a couple hundred yards away*, it ... it is physically within the confines of Edisto Island,’ the argument could be made to try and access it,”<sup>5</sup> referring to his interpretation of what constitutes the outer limits of the ‘penumbral ring’ of an exempt island. The Court followed up on Respondent’s Counsel’s above-referenced statement by expressing concern about “a lot of other places that are within the parameters of barrier islands where ditches have been cut.”<sup>6</sup> Even though the Court asked this fundamental question (which would also apply to naturally-occurring, non-“man made” coastal islands), the Opinion provides the Department with no guidance whatsoever in making future permitting decisions when a coastal island:

- (1) meets the regulatory definition of a coastal island per S.C. Code Ann. Regs. 30-1(D)(11); and
- (2) is less than two acres per S.C. Code Ann. Regs. 30-12(N)(2)(c); and
- (3) is in geographic proximity to an exempt coastal island such as Folly Island.

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<sup>3</sup> It is noted that the Supreme Court of North Carolina decided in a separate but illustrative context that it is irrelevant whether a channel is “man made” or natural in applying a statutory definition of the term “island.” *State v. Barco*, 150 N.C. 792, 53 S.E. 673 (1909).

<sup>4</sup> SCETV Live Streaming of oral arguments, starting at 37 minutes and 45 seconds.

<sup>5</sup> SCETV Live Streaming of oral arguments, starting at 39 minutes and 50 seconds.

<sup>6</sup> SCETV Live Streaming of oral arguments, starting at 40 minutes and 36 seconds.

Without providing any regulatory analysis for its conclusion, the Majority Opinion stated that “we agree with Respondent that Tract D is not a ‘coastal island’ in and of itself; rather, it is part of Folly Island, which is specifically exempted in the regulation.” Ann Dreher v. South Carolina Department of Health and Environmental Control, Op. No. 27507, (S.C. Sup. Ct. filed March 18, 2015) (Shearouse Adv. Sh. No. 11 at 21). Even though the Majority Opinion does not specifically articulate the basis for its conclusion that Tract D is part of Folly Island, the Department surmises this conclusion is based on the Court’s reference to Respondent’s contention that “because Tract D remains within the geographical and legal boundaries of Folly Island, it is expressly exempt from being considered a ‘coastal island.’”<sup>7</sup> Ann Dreher v. South Carolina Department of Health and Environmental Control, Op. No. 27507, (S.C. Sup. Ct. filed March 18, 2015) (Shearouse Adv. Sh. No. 11 at 21).

If the Court fails to grant the Department’s Petition for Rehearing requesting guidance on this issue, when the Department receives a future permit application requesting access to a coastal island under two acres that is within the penumbra of an exempt island, this Opinion provides the Department with no way of knowing whether to apply S.C. Code Ann. Regs. 30-1(D)(11) and 30-12(N)(2)(c) or whether to apply the geography, geology and legal description “standard.” If the Court affirms that geography, geology and legal description is indeed the proper basis for determining when a small coastal island such as Tract D is within the penumbra of an exempt island and

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<sup>7</sup> Further supporting the Department’s inference that the Majority Opinion used “geology, geography and legal description” to conclude that Tract D was part of Folly Island, the Chief Justice asked Respondent’s Counsel during oral arguments “how are we going to speak with clarity to say when something is within the legal description and maybe even the geographic and geologic description of one of those exempt barrier islands? What’s the cut out point at which it becomes a ‘coastal island analysis’ and not a ‘legal description and geographic and geologic analysis’?” SCETV Live Streaming of oral arguments, starting at 42 minutes and 40 seconds.

thus exempt as well, then both the Department and the ALC must know what standards to use in order to determine the outer limits of the “penumbral ring” around these exempt islands that capture and thereby also exempt these smaller coastal islands.

The Majority Opinion fails to instruct the Department how far away a coastal island (that would otherwise fall within the definition of a coastal island) can be from an exempt island and still derive the benefit of being within the exempt island’s penumbra. As previously mentioned, during oral arguments, Respondent asserted that a coastal island can be literally hundreds of yards away from the exempt island and still be part of that exempt island as long as a geologist says it is “physically within the confines of” the exempt island.<sup>8</sup> Without any framework for applying the Majority Opinion’s conclusion that Tract D is part of Folly Island, the Department has no way of knowing when to apply the coastal island regulation to a future permitting decision if the island is anywhere near an exempt island. The fact that a large portion of the state’s small coastal islands are near these exempt islands greatly exacerbates the uncertainty caused by the Majority Opinion’s lack of clear guidance. If this Petition for Rehearing is not granted to clarify the above-referenced ambiguities, then the result will undoubtedly be more litigation regarding future permitting decisions involving coastal islands less than two acres that are geographically proximate to an exempt island.

The Department requests the Court grant the Petition for Rehearing to clarify how the Department should apply S.C. Code Ann. Regs. 30-1(D)(11) and 30-12(N)(2)(c) in the future.

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<sup>8</sup> SCETV Live Streaming of oral arguments, starting at 39 minutes and 50 seconds.

**III. The Court misapprehends or overlooks substantial evidence supporting the conclusion that Tract D is separate and distinct from Folly Island.**

The Supreme Court found that the Court of Appeals erred in applying the law of the case doctrine so as to bar the prevailing party below from raising an additional sustaining ground. Ann Dreher v. South Carolina Department of Health and Environmental Control, Op. No. 27507, (S.C. Sup. Ct. filed March 18, 2015) (Shearouse Adv. Sh. No. 11 at 20). This Court further held that “DHEC properly raised its challenge to the ALC's finding in its brief to the court of appeals, and thus did not concede or abandon the argument. Even though this Court corrected the lower court’s misapplication of the law of the case doctrine, however, it misapprehended or overlooked how that reversal applied to the substantial evidence test found in S.C. Code Ann. §1-23-610(B).

In applying S.C. Code Ann. §1-23-610(B) to a review of an ALC’s decision, this Court previously 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 the finding of fact that Respondent relies on almost exclusively (i.e., the “property, geologically, geographically and by legal description, is on and within the boundaries of Folly Island.”). Rather, the ALC’s *decision* was that Tract D is itself a coastal island within the meaning of Reg. 30-1(D)(11), and that the Department therefore properly denied 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 S.C. Code Ann. §1-23-610(B) and Risher, this Court should have applied the substantial evidence test to the ALC’s *decision*

affirming the Department's denial of the bridge permit application; not to a single factual finding.

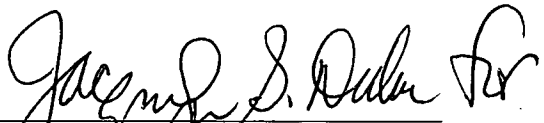
“The ALC's findings are supported by substantial evidence if, looking at the record as a whole, there is evidence from which *reasonable minds could reach the same conclusion the administrative agency reached.*” Olson, 379 S.C. at 64 (citing Neal, 374 S.C. at 648, 649 S.E.2d at 167). (Emphasis added). “The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence.” Id. (citing 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)).

Given all of the above-referenced evidence, there is 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 this Court 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.” Id. at 64.

**CONCLUSION**

WHEREFORE, based on the foregoing, the Department respectfully requests that the Court grant this petition for rehearing and that this Court issue an Opinion upholding the ALC's Final Order in this matter.

Respectfully submitted,

By 

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S.C. Bar No. 12829

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Charleston, South Carolina  
April 2, 2015

THE STATE OF SOUTH CAROLINA  
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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

**S.C. Supreme Court**

Opinion No. 5011 (S.C. Ct. App., Heard May 23, 2012 – Filed July 25, 2012)

Ann Dreher

Respondent.

vs.

South Carolina Department of Health and Environmental Control

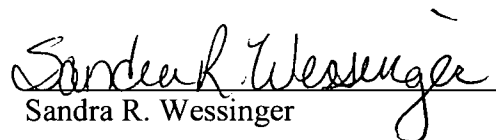
Petitioner,

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this date she has served the Petitioner's *Petition for* Rehearing on behalf of Petitioner SCDHEC in this matter upon the following, by placing copies of same in the United States Mail, first class postage prepaid, addressed to:

Leslie S. Riley, Esquire  
McNair Law Firm, P.A.  
Post Office Box 1431  
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Mt. Pleasant, SC 29464

  
Sandra R. Wessinger

April 2, 2015



W. Marshall Taylor Jr., Acting Director

*Promoting and protecting the health of the public and the environment*

April 2, 2015

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**S.C. Supreme Court**

Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11629  
Columbia, SC 29211

Re: ~~SCDHEC~~ *Ann Dreher* v. **SCDHEC**  
Case Tracking No.: 2010181586; OGC #20991

Dear Mr. Shearouse:

Please find enclosed for filing the original and six (6) copies of the *Petition for Rehearing* filed on behalf of the Petitioner, South Carolina Department of Health and Environmental Control, in the above-referenced matter. I would appreciate your returning a clocked copy of the petition with the filer.

By copy of this letter, I am serving all parties of record.

Thank you for your attention in this matter.

Very truly yours,

Bradley D. Churdar  
Chief Counsel

cc: Leslie S. Riley, Esquire  
Christopher McG. Holmes, Esquire