

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

S.C. Supreme Court

Appellate Case No. 2013-000364

Ann Dreher,.....Respondent

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the substantial evidence on the whole record support the ALC's finding that Dreher's property "geologically, geographically, and by legal description is on and within the boundaries of Folly Island?"
2. Did the Court of Appeals correctly hold that the ALC's finding that Tract D is a part of Folly Island is the law of the case?
3. Did the Court of Appeals correctly hold that Tract D "is exempt from the definition of coastal island and thereby exempt from the Small Islands Regulation."?
4. Does the substantial evidence on the whole record support the ALC's finding that the permit application demonstrates *de minimus* environmental impact and compliance with the Transportation regulation?
5. Did the Court of Appeals correctly hold that the ALC's finding that the permit application demonstrates *de minimus* environmental impact and compliance with the Transportation regulation constitute the law of the case?
6. Does the Court of Appeals' reversal of the denial of the bridge permit, coupled with its affirmation of the unchallenged finding that Dreher's proposed bridge complies with the Transportation Regulation, require that the permit be issued?

STATEMENT OF THE CASE

On December 10, 2009, Petitioner, South Carolina Department of Health and Environmental Control (hereafter "DHEC"), denied a permit requested by Respondent Ann Dreher (hereafter "Dreher") to construct a 9' x 51' bridge across a man-made canal to access property she owns on Folly Island in Charleston County. Dreher timely filed a Request for Final Review ("RFR") of that decision with the DHEC Board, and on January 19, 2010, was notified that the Board declined to hear the request. Thereafter, on January 27, 2010, Dreher filed a request for a contested case hearing with the Administrative Law Court (hereafter "ALC" or "ALJ") and the case was docketed and assigned to the Honorable Ralph King Anderson, III, Chief Administrative Law Judge.

On July 13, 2010, the case was heard at the ALC in Columbia. On October 19, 2010, Judge Anderson filed his Final Order and Decision denying the permit. Both parties filed and served timely Motions to Reconsider or to Alter or Amend with the ALC, and both parties filed responses to each other's motions. DHEC also filed a Reply to Dreher's Return to its Motion. The ALC did not issue any ruling on these motions and, by rule, they were deemed denied after thirty (30) days.

Dreher appealed to the Court of Appeals which heard the case on May 23, 2012, and issued its decision reversing the ALC on July 25, 2012. DHEC petitioned for rehearing which was denied by order of the Court on January 18, 2013. This Petition for Writ of Certiorari followed.

STATEMENT OF FACTS

In January of 1994, Dreher purchased two parcels of property located on Folly Island. The first parcel is designated as 806 East Cooper Avenue and has measurements of 70' in width and 150' of depth. The second parcel is identified as Tract D and is described in the deed as commencing at the southeast corner of lot 809 East Cooper Avenue and extending to the edges of the marsh of Folly River and then approximately 290' to the west and back to the eastern line of 805 East Cooper Avenue and then back to the starting point at lot 809. R. p. 437. The title abstract for Dreher's property demonstrates that her title derives from an original grant on November 8, 1918, to Folly Island Company of a tract described as "the 'Folly Islands' or more commonly known collectively as 'Folly Island,' being bounded on the East by the Atlantic Ocean, on the South by the channel of Stono Inlet, on the west by the channel of Folly River and Folly Creek and on the North by the channel of Lighthouse Inlet'." R. p. 414. Attached to the deed is a plat recorded on December 9, 1895, showing the described property. (oversized Petitioner's exhibit 8b filed separately).

There is a man-made excavation that occurred prior to Dreher's purchase of this property which extends between 806 East Cooper Avenue and Tract D and has resulted in a channel approximately 40' in width extending for the entire 70' width of 806 East Cooper Avenue. While the channel has marsh grass growing in it and no standing water at low tide, at normal high tide stages approximately 2' of water is present. Dreher seeks permission to construct a bridge to access Tract D.

ARGUMENT

1. The Court of Appeals correctly held that the substantial evidence on the record supported the ALJ's findings that Tract D was "geologically, geographically, and by legal description on and within the boundaries of Folly Island" and that the proposed bridge is "the least environmentally damaging alternative for access to Tract D and . . . would have *de minimus* environmental impact." Questions 1 and 4.

An appellate court's review of an ALJ's findings of fact in a contested case proceeding are limited. The court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." S. C. Code Ann. § 1-23-380(A)(6) (Supp.2009). A court can reverse an agency's findings, inferences, conclusions or decisions only if they are "(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." *id.*

"In determining whether the ALJ'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 ALJ reached. The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence. (Internal citations omitted)" Hill v. South Carolina Dept. of Health and Environmental Control, 389 S.C. 1, 9, 698 S.E.2d 612, 617 (S.C.,2010).

The key fact in this case is the ALJ's finding that, "Notwithstanding the man-made excavation, [Dreher's] property, geologically, geographically and by legal description, is on and within the boundaries of Folly Island" R. p. 2. That statement is set forth in the part of the Final

Order and Decision bearing the heading “Findings of Fact.” The finding is key because this Court previously has held that whether property such as Dreher’s Tract D is part of a larger, exempt coastal island “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 v. South Carolina Dept. of Health and Environmental Control, 393 S.C. 198, 210, 712 S.E.2d 428, 434 (S.C.,2011)(emphasis added).

Notwithstanding its citation to the Risher case in its petition, DHEC has consistently argued, before the ALC and the Court of Appeals, that the status of Tract D is a legal question to be decided by application of “the unambiguous plain language of the regulation.” See, Initial Brief of Respondent, Appendix p.55. However, like an ostrich with its head in the sand, DHEC refuses to read beyond the first sentence of the definition of Coastal Islands or to give any weight or deference to that part of the definition which provides that Folly Island “shall not be deemed a coastal island subject to this section.” S. C. Code Ann. Regs. 30-1D(11) (Supp. 2009).

DHEC makes much of Dreher’s alleged “failure” to challenge the “overwhelming number of factual findings . . . that bring [Tract D] within the statutory definition of a coastal island” (Petition for Writ, p. 13). Actually, Dreher has never denied that Tract D is surrounded by water and marsh. That is why she needs a bridge to get to it. As the Court of Appeals noted, “Dreher concedes that Tract D is a high ground area above the critical line delineation separated from the upland immediately adjacent to 806 East Cooper Avenue by navigable¹, saline waters.” Dreher v. South Carolina Dept. of Health and Environmental Control 399 S.C. 259, 264, 730 S.E.2d 922, 925

¹Actually, Dreher has never conceded the area to be crossed by the bridge is navigable in fact due to the presence of vegetation and limited amounts of water, even at periods of high tide.

(S.C.App.,2012). DHEC has doggedly maintained that concession by Dreher ends any debate on the question of the applicability of the Access to Coastal Islands² regulation (S. C. Code Ann. Regs. 30-12(N)). Dreher has just as consistently maintained it is merely the beginning of the inquiry. That Tract D cannot be viewed as separate and distinct from Folly Island has always been the thrust of Dreher's appeal of the permit denial, and it was for this reason Dreher produced expert witnesses and extensive cartographic, photographic and title documents to establish the geologic and geographic characteristics of Tract D, evidence which unequivocally demonstrates that Tract D has always been a part of Folly Island and consistently has been treated as such from a legal ownership standpoint.

The ALC found that expert testimony and those documents credible and persuasive and cited them in support of his factual finding that “notwithstanding the man-made excavation, [Dreher's] property, geologically, geographically and by legal description, is on and within the boundaries of Folly Island.” The Court of Appeals likewise referenced this evidence and found it to be substantial. It is Dreher's contention that once that factual finding was set forth by the ALJ, reversal of DHEC's denial of the permit should have followed perforce. DHEC certainly recognized the inconsistency of that finding of fact with the subsequent conclusion of law upholding denial of the permit when it argued in its Motion to Alter or Amend that the finding was “misleading in light of the court's correct legal conclusions.” R. p. 75 (Emphasis added). Whatever legal conclusions are drawn from that finding, it cannot be disputed that the record conclusively establishes the fact of Tract D's historic relationship to Folly Island.

Likewise, DHEC recognized the problem presented by the ALJ's factual finding that “[t]he

²While the Court of Appeals correctly cited the regulation (30-12(N)), the actual title is “Access to Coastal Islands” which replaced the previously named “Access to Small Islands” regulation.

proposed bridge was the least environmentally damaging alternative for access to Tract D and, in fact, would have *de minimus* environmental impact,” (R p. 2) and sought by its Motion to have that language removed as well. DHEC’s argument on this point rested on its misplaced assumption that it had correctly applied the language of the regulation to the facts as it saw them and “there was therefore no need for the Court to analyze the potential environmental impacts” and “no need for the Department to present evidence” on those impacts. R p. 75. On the other hand, Dreher was arguing Tract D was exempt from the Access to Coastal Islands regulation and, if she prevailed on that point in the contested case proceeding, needed to demonstrate compliance with the regulations which would be applicable, in this case that being the Transportation regulations found at S. C. Code Ann. Regs. 30-12F(Supp. 2011). To that end, and contrary to the assertion by DHEC, she presented testimony from her permitting consultant³ who thoroughly addressed the issues involved with a DHEC bridge permit and how the application, including supporting information (R. pp. 622-648), was prepared to meet the regulatory standards. R. p. 302, l. 9- p. 303, l. 17; p. 306, l. 24 - p. 309, l. 14. These documents and testimony constitute substantial evidence and are demonstrably present in the record. When coupled with DHEC’s admission that it presented no evidence on this point, the only conclusion is that the ALJ’s finding must stand.

Because substantial evidence in the record supports these factual findings, the Court of Appeals decision should be affirmed.

³This witness had 37 years experience with the U. S. Army Corps of Engineers before retiring as chief of the regulatory division and, at the time of his testimony, had been senior consultant with an environmental consulting firm for the preceding 7 years. R. p. 291, ll. 10-22.

2. The Court of Appeals correctly found that the ALC’s unchallenged findings that Tract D was “geologically, geographically, and by legal description on and within the boundaries of Folly Island” and that the proposed bridge is “the least environmentally damaging alternative for access to Tract D and . . . would have *de minimus* environmental impact” constitutes the law of the case. Questions 2 and 5.

The Court of Appeals held that DHEC’s failure to raise on appeal any argument against the ALC’s factual finding that “notwithstanding the man-made excavation, [Dreher’s] property, geologically, geographically and by legal description, is on and within the boundaries of Folly Island,” despite having challenged that finding in its Motion to Alter or Amend, rendered that finding the law of the case. Similarly, the ALJ’s finding that “the proposed bridge was the least environmentally damaging alternative for access to Tract D and, in fact would have *de minimus* environmental impact,” while challenged in its motion but not raised on appeal, constituted the law of the case. The court cited Commercial Credit Loans, Inc. v. Riddle 334 S.C. 176, 512 S.E.2d 123 (S.C.App.,1999) for the principle that a lower court's finding becomes the law of the case when the respondent fails to cross appeal the issue. See also, Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co., Inc. 355 S.C. 605, 610, 586 S.E.2d 581, 584 (S.C.,2003)(“finding is the law of the case because neither party has taken issue with that finding.”).

DHEC argues that since it was “the winner” in the contested case before the ALJ, it “did not bear the burden of appealing” those findings (Petition p. 8) and cites for support I'On, L.L.C. v. Town of Mt. Pleasant 338 S.C. 406, 526 S.E.2d 716, (S.C.,2000). “Under the present 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.” 388 S.C. at 419, 526 S.E. 2d at 723. The problem for

DHEC is that, burden or not, it never raised or argued any additional sustaining grounds before the Court of Appeals addressing those two findings.

DHEC attempts in its Petition to distinguish itself from the facts in Commercial Credit *supra*. The inconvenient truth is DHEC's position is actually quite similar to that of One Stop Mortgage. One Stop's goal was to prevent Commercial Credit from having a foreign judgment enforced to the detriment of One Stop's own financial interest. Although the referee ruled that One Stop's mortgage did not have priority over Commercial Credit because it was not a purchase money mortgage, the overall effect of the decision was to disallow enforcement of Commercial Credit's judgment as time barred. As a result, One Stop apparently felt its position was secure. When Commercial Credit appealed, One Stop did not raise as an issue the ruling on its loan priority. As a consequence, it was prevented on appeal from arguing the failure of the referee to determine the amount to which its mortgage was entitled to priority in the event the judgment was determined to be viable, which it ultimately was. "We need not address this issue because One Stop did not appeal the special referee's finding that One Stop did not have a purchase money mortgage. Burris v. Electro Motive Manuf. Co., 247 S.C. 579, 583, 148 S.E.2d 687, 688 (1966) (unappealed ruling becomes the law of the case); Rule 203(C), SCACR (proper procedure for filing a cross appeal). Thus, this issue is not properly before this court for review." Commercial Credit *supra* 334 S.C. at 187, 512 S.E.2d at 129.

Commercial Credit has been subsequently cited for the proposition that "a holding contested by a respondent is the law of the case where the respondent failed to cross-appeal that holding." See, Martin v. Bay 400 S.C. 140, 154, 732 S.E.2d 667, 675 (S.C.App.,2012).

By comparison, DHEC's goal was to have its permit denial upheld. However, DHEC also was well aware of the fragile and tenuous foundation on which its "victory" rested if the finding that

“Notwithstanding the man-made excavation, [Dreher’s] property, geologically, geographically and by legal description, is on and within the boundaries of Folly Island” remained in the decision. As DHEC pointed out in its Motion to Alter or Amend, “as written, the Order reads that in spite of the excavation, Tract D is still geologically and geographically and by legal description ‘on Folly Island.” R. p. 75. The “problematic” language, DHEC instructed the ALJ in a footnote, “are the words ‘notwithstanding’ and ‘is on and within.’ ” *id.* Dreher could not agree more with DHEC’s parsing of the language of the Order and the import thereof. The finding of fact reached by the ALJ was exactly the one she had urged upon the court throughout the presentation of her case. When the ALJ failed to remove or alter that sentence, it was incumbent upon DHEC to press the issue when the Order was appealed rather than rely solely on its satisfaction with the ultimate upholding of the permit denial. Failure to do so then precludes it from challenging that fact now.

Likewise, DHEC recognized the problem presented by the ALJ’s factual finding that “[t]he proposed bridge was the least environmentally damaging alternative for access to Tract D and, in fact, would have *de minimus* environmental impact,” and sought to have that language removed as well. As noted in Argument 1 *supra*, DHEC believed it had correctly applied the regulation to the facts and “there was therefore no need for the Court to analyze the potential environmental impacts” and “no need for the Department to present evidence” on those impacts. R. p. 75. However, since Dreher had presented evidence to establish her proposed bridge complied with the Transportation regulations and the ALJ had made a specific fact finding with respect thereto, DHEC was not free to complacently accept the affirmation of its denial of the permit when that decision was appealed. Dreher specifically identified as an issue on appeal and argued in its brief that she was entitled to a permit under the Transportation regulation if the exemption was found to apply to Tract D. Initial

brief of Appellant, Appendix pp. 30, 43-44. DHEC chose to ignore this issue or argue the point in its brief.

Both of these factual findings - the status of Tract D and compliance with the Transportation regulations - threatened the viability and validity of the denial of the permit. DHEC recognized that jeopardy, particularly with respect to Tract D's exempt status, in its Motion to Alter or Amend. When that motion was denied and the ALJ decision appealed, DHEC was on the record as acknowledging the legal conclusion was not in agreement with the facts as found by the ALJ. Given that state of affairs, DHEC needed to address that problem in its brief and arguments to the Court of Appeals or lose the right to do so. ("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." *Idon supra*, 338 S.C. at 420, 526 S.E.2d at 723).

DHEC argues that it did raise a challenge to the finding as to Tract D, and points to three particular items. One, its Motion to Alter or Amend was made a part of the record on appeal; second, the motion was referenced in its brief, and; third, its third Statement of Issues on Appeal and the arguments in its brief "clearly challenges this factual finding (i.e., 'Tract D today is a separate island from Folly Island')." Petition page 11.⁴

As to item one, inclusion of the motion in the record merely underscores DHEC's knowledge that the quoted language conflicted with the ultimate decision, that it had asked the ALJ to remove or change that sentence, and that the request had been denied. As to the second point, the only reference to the motion in its brief is in the Statement of the Case. Those two factors are hardly a

⁴Actually, nowhere in the Final Order and Decision, and definitely not under the Findings of Fact, does the statement "Tract D today is a separate island from Folly Island" appear.

solid basis from which to argue issue preservation.

Examination of the referenced statement of issue and cited pages of the brief also fail, upon scrutiny, to support DHEC's contention. The issue was framed by DHEC as being "When a canal is dredged across the base of a peninsula such that the severed portion is surrounded on all sides by water, does the severed portion become an island distinct from the land mass from which it was severed?" Initial Brief of Respondent, Appendix p. 52. This statement, standing alone, is more than a little misleading. The actual question being raised was, given those conditions, does the "severed portion" become a "coastal island" within the meaning of DHEC's regulatory definition. Stated in that manner, and given the context in which it is found in its brief, this clearly represented a legal argument on regulatory interpretation and not a challenge to the factual finding that Tract D is on Folly Island.

The arguments DHEC made in its brief were that substantial evidence and the case law supported the "ALC's finding that Tract D is not part of Folly Island." Initial Brief of Respondent, Appendix p.55. The problem here - in addition to the not insignificant one that the ALC made no such express finding of fact - is that the ALC's conclusion regarding Tract D and its relationship to Folly Island that DHEC has reference to was the legal conclusion that Tract D was a coastal island under the regulation. That legal conclusion, as the Court of Appeals held (and DHEC clearly recognized), is entirely undercut by the explicit, unappealed factual finding that Tract D is on Folly Island.

While DHEC has certainly raised as an issue and argued for upholding the ALC's legal conclusion that Tract D meets the definition of a "coastal island," its failure to challenge or raise as an issue on appeal the ALC's findings of fact that Tract D is on Folly Island and that the proposed

bridge is the least environmentally damaging alternative, renders those findings the law of the case and immune to contest.

3. The Court of Appeals correctly held that Tract D “is exempt from the definition of coastal island and thereby exempt from the Small Islands Regulation”. Question 3.

The ALJ set forth under his Conclusions of Law, “the issue in this case is whether Tract D ceased to be a part of Folly Island and became a ‘coastal island’ as a result of the creation of the man-made canal that separates Tract D from Folly Island.” R. p. 4. Since he had already determined as a fact that “Notwithstanding the man-made excavation, [Dreher’s] property, geologically, geographically and by legal description, is on and within the boundaries of Folly Island,” it cannot be contended that the ALJ was doing anything other than viewing the determinative issue as presenting a question of the correct legal interpretation of the regulation. Under this Court’s holding in Risher supra, this was error on the ALJ’s part and a proper basis for reversal under the statute. S. C. Code Ann. § 1-23-380(A)(6)(d) (Supp.2008)(“other error of law”). As this Court said, the determination of whether a lot is a part of a larger coastal island and not a separate coastal 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.” 393 S.C. at 210, 712 S.E.2d at 434. Because the ALJ had already reached - and set forth the reasons supporting - his factual conclusion that Tract D “is on and within the boundaries of Folly Island,” the inquiry the ALJ pursued in his conclusions of law was unnecessary and an error.

Proper application of the regulation requires two questions to be answered, not one as DHEC

would have it. The first question is whether the property meets the commonly accepted geologic definition of an island; i.e., high ground separated from other high ground by water or tidelands. If that answer is “yes,” the next question is whether the property is on, within the boundaries of, or otherwise properly considered a part of one of the listed exempt islands. Both of these questions are answerable through examination of the facts presented. In this case the ALJ answered both questions in the affirmative. Since the purpose of an exemption is to prevent the imposition of an otherwise applicable legal provision, once it was determined that, “notwithstanding” its general physical characteristics, Tract D is, in fact, on Folly Island, exemption from the Access to Coastal Islands regulation should have been recognized.

DHEC made no attempt to counter or refute the geographic and geologic testimony and evidence or the title history of the site. Rather, it continued - and continues still - to harp on the conceded facts that at some point in the recent past a ditch was excavated through Dreher’s lot causing a part of it to be separated from the remainder by tidal waters or marsh. Despite this Court’s pronouncement in Risher, DHEC insists on pressing its previously rejected argument that applicability of the regulation can only be “determined under the rubric of a regulation.” Dreher concurs with DHEC that “the unambiguous plain language of the regulation” should be applied to the facts. The problem here is that DHEC obstinately refuses to consider and apply any other language in this regulation beyond its first sentence (“an area of high ground above the critical area delineation that is separated from other high ground areas by coastal tidelands or waters”) to Tract D. That myopic focus is contrary to the proper administration of the law.

“A statute should be read as a whole.” Bryant v. State, 384 S.C. 525, 529, 683 S.E.2d 280, 283 (2009), citing Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69 476 S.E.2d

690 (1996). “The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in light of its manifest purpose.” Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005). (emphasis added).

Because availability of the exemption rests on a factually supportable finding that a parcel of property is included within the boundaries of a named island, it was improper for DHEC to disallow the exemption. Dreher demonstrated, and the ALJ found, Tract D is on Folly Island. Applying “the unambiguous plain language of the regulation,” Tract D is not a coastal island under the definition to be applied in making that factual determination and, accordingly, is exempt from the Access to Coastal Islands regulation.

4. Because the Court of Appeals held that Dreher’s property was exempt from the Small Island Regulation and that her application complies with the Transportation Regulation, the effect of reversing the ALC is that the permit is granted. Question 6.

DHEC claims it is unclear what action it should take in light of the Court of Appeals ruling. While it arguably would have been helpful if the court had specifically directed that DHEC issue the requested permit, there should be no question that is the effect of the decision. There can be no question the ALC has the power to order issuance of a permit when it reverses an agency permit decision. See, Kiawah Development Partners, II v. South Carolina Dept. of Health and Environmental Control 738 S.E.2d 455 (S.C.,2013) (administrative law court (ALC) did not exceed its authority in ordering approval of permit with modifications presented during review). There also is no dispute that the ALC serves as the ultimate finder of facts in contested cases. (“[I]n environmental permitting cases, the ALJ presides as the finder of fact.” Brown v. South Carolina

Dept. of Health and Environmental Control, 348 S.C. 507, 520, 560 S.E.2d 410, 417 (S.C.,2002)).

In this case the ALC found two important facts. First, that Tract D is on Folly Island; second, that the application submitted by Dreher met the standards required by the Transportation regulations to receive a bridge permit. Thus, if the ALC had found, as the Court of Appeals held it should have, that Tract D was exempt from the Access to Coastal Islands regulation, that finding would have inextricably led to an order issuing the permit. There is nothing more to be done by DHEC or required of Dreher. Her permit application clearly satisfies the Transportation requirements. Those requirements set forth at S. C. Code Ann. Regs. 30-12(F)(2)(b)(Supp. 2009) provide that “[t]he location and design of public and private transportation projects must avoid the critical areas to the maximum extent feasible. Where coastal waters and tidelands cannot be avoided, bridging rather than filling of these areas will be required to the maximum extent feasible.” (emphasis added). It is not possible for Dreher to avoid crossing the waters and tidelands created by the cut through her property to gain access to Tract D; accordingly, and pursuant to the regulation, bridging is the preferred means of access. The permit application proposes minimal construction – a bridge approximately 51 feet long spanning only 41.06 feet of critical area. There is no evidence that wetlands will be destroyed (R. 30-12(F)(2) (c), that the bridge will alter the flow of water or create excessive shoaling; R. 30-12(F)(2)(d), that the bridge will impact navigation *id.*, or trigger any of the other concerns expressed in the regulations. The ALC agreed that Dreher has demonstrated that she meets the bridging requirements of S. C. Code Reg. 30-12(F): “... the environmental impact of crossing this canal is *de minimus* and the requested means is well within the requisites of this State’s regulations.” R. p. 6, fn. 3. All of the foregoing is set forth in the permit application and supporting documents submitted by Dreher. R. pp. 622-648. DHEC had the opportunity - indeed the

responsibility - to review the application and presumably did so. In addition, it had the opportunity to question and challenge that evidence at the contested case hearing. By its own admission it declined to do so. Sending this permit back to DHEC to afford it the opportunity to find some other basis to deny Dreher access to Tract D would be giving it an unfair second bite at the apple. (“no party may afford itself two bites at the apple.” Parker v. South Carolina Public Service Commission, 288 S.C. 304, 307, 342 S.E.2d 403, 405. (1986).). “Fundamental fairness would seem to indicate that there should be one basic fact-finding process, and that review thereafter should be on the record made in that fact-finding process or procedure.” Milliken and Co. v. South Carolina Dept. of Labor, Division of Occupational Safety and Health 275 S.C. 264, 266-267, 269 S.E.2d 763, 764 (S.C., 1980).

In the absence of any evidence challenging or refuting the benign environmental nature of Dreher’s proposal and her compliance with the regulations, she is entitled to a permit authorizing construction of a bridge to her property.

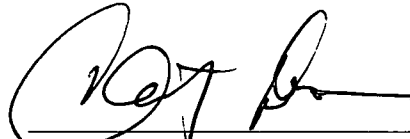
CONCLUSION

The substantial evidence in the record on appeal clearly supports the factual findings of the ALC that Tract D is properly considered as a part of Folly Island and the proposed method of accessing it fully complies with the applicable regulation. Those findings also support the reversal of the ALC’s finding that the Access to Coastal Islands regulation prohibit a bridge permit to Tract D. Because Dreher’s application is in compliance with the Transportation regulation, the permit should be issued.

DHEC has not identified any novel question of law, conflicts with prior decisions of this Court, or substantial constitutional issues which would warrant granting a writ of certiorari.

For all of these foregoing reasons, Respondent Ann Dreher requests this Court decline to grant a Writ of Certiorari in this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Chris Holmes", written over a horizontal line.

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April 19, 2013
Mt. Pleasant, SC

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Appellate Case No. 2013-000364

Ann Dreher,.....Respondent

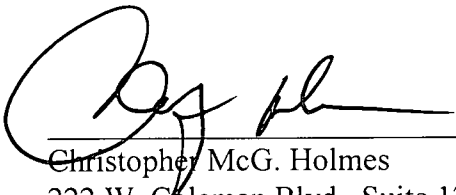
v.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 19, 2013, he served Respondent's **RETURN TO PETITION FOR WRIT OF CERTIORARI** via United States mail, first class, postage prepaid, on the following parties and counsel of record as listed below:

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