**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2002-SA-01404-COA**

**MISSISSIPPI DEPARTMENT OF MARINE RESOURCES** **APPELLANT**

**v.**

**SYDNEY BROWN AND STEPHANNA BROWN** **APPELLEES**

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| DATE OF TRIAL COURT JUDGMENT: | 6/11/2002 |
| TRIAL JUDGE: | HON. GLENN BARLOW |
| COURT FROM WHICH APPEALED: | JACKSON COUNTY CHANCERY COURT |
| ATTORNEY FOR APPELLANT: | SHARON H. HODGE |
| ATTORNEY FOR APPELLEES: | NATHAN D. CLARK |
| NATURE OF THE CASE: | CIVIL - STATE BOARDS AND AGENCIES |
| TRIAL COURT DISPOSITION: | CHANCELLOR REVERSED DECISION OF COMMISSION ON MARINE RESOURCES TO DENY APPELLEES' WETLANDS PERMIT REQUEST. |
| DISPOSITION: | AFFIRMED - 12/16/2003 |
| MOTION FOR REHEARING FILED: | 01/14/2004 - GRANTED; REVERSED AND REMANDED - 05/25/2004 |
| CERTIORARI FILED: | |
| MANDATE ISSUED: | |

MODIFIED OPINION ON MOTION FOR REHEARING

**EN BANC.**

**MYERS, J. FOR THE COURT:**

¶1. The motion for rehearing is granted. The original opinions are withdrawn, and the following opinions are substituted. The Chancery Court of Jackson County reversed and rendered the Mississippi Commission on Marine Resource's (Commission) decision to deny the Browns' request for a wetlands

permit. Aggrieved by this result, the Mississippi Department of Marine Resources (Department) appeals the lower court's ruling and requests our review of the following issue:

> I. DID THE CHANCERY COURT ERR IN REVERSING AND RENDERING THE DECISION OF THE COMMISSION ON MARINE RESOURCES?

## STATEMENT OF FACTS

¶2. This case evolved from Sydney and Stephanna Brown's request for a wetlands permit. The Browns own a parcel of property in Jackson County located on Bayou Heron road. In October 1999, the Browns submitted an application to the Department requesting permission to fill approximately 1.64 acres of tidal marsh consisting primarily of Juncus grass. Approximately 7,937 cubic yards of fill was necessary to alleviate erosion, to accommodate public parking for fishermen, and to develop an on-site bait camp. In addition, the Browns requested permission to add 200 feet to an existing pier.[1]

¶3. The Browns submitted their application but the Department requested additional information. Pursuant to this request, the Browns hired a consultant to conduct an environmental assessment. The Browns also were required to submit a mitigation proposal, cross-sectional drawings of the area to be permitted, and additional permit fees of $450 for processing a commercial application.

¶4. The Department reviewed the Browns' completed application along with comments from members of the public and other interested governmental and non-governmental entities. Department scientists and staff members also conducted a site visit to inspect the property. After reviewing all of the information, the Department prepared a report recommending the denial of the Browns' application. The Commission, which is the reviewing body designated to decide whether to grant or deny permit applications, conducted

[1]In 1988, the Browns' requested and were granted a wetlands permit. Permit (BMR-M8702189-L) authorized the construction of a concrete boat ramp and two piers. However, one pier was never completed.

a coastal ecology meeting where the Browns' proposal was discussed. John Cirino, the Browns' environmental consultant, argued on their behalf. Becky Gillette argued in opposition of the proposed project on behalf of the Sierra Club.

¶5. The Commission stated that it had never allowed the direct filling of Juncus grass in the past, and found the public's interest in additional public boat launch facilities was unjustified since there were already two existing boat launches in the immediate area. Finally, the Commission considered the Browns' proposal as a commercial activity that would jeopardize the preservation of the adjoining wildlife reserves.[2] As a result, the Commission unanimously voted to deny the Browns' application. Three days later, a letter was mailed to the Browns notifying them as to the Commission's decision. The letter stated that "[b]ased upon the findings, the DMR found that this project would severely impact coastal resources and alteration of coastal wetlands at this site would be permanent and would not serve a higher public interest as required by Mississippi Code § 49-27-3." The Browns filed a petition for reconsideration which was denied at the Commission's next meeting.

¶6. Aggrieved, the Browns brought suit in the Chancery Court of Jackson County which acted in an appellate capacity in reviewing the Commission's decision. After reviewing briefs and hearing oral arguments from both sides, the lower court reversed and rendered the Commission's decision.

¶7. The chancellor found that the Commission had failed to provide feasibility studies or inspection reports from the premises as required by applicable law, and failed to provide any findings of fact or conclusions of law regarding adverse impacts on the property. In addition, the chancellor found that the Commission failed to consider the 416 signatures and 51 letters from the general public which illustrated

[2]The Grand Bay National Wildlife Refuge and the Grand Bay National Estuarine Research Reserve are located in the immediate vicinity.

the need and desire to have the type of public use for this area which would result from the Browns' project. The chancellor found that the Browns' due process rights were violated because the Department failed to timely inform them that their application was denied. Finally, the chancellor found that only one-third of an acre of the Browns' property was within the wetlands and subject to the Department's jurisdiction; thus, the Commission confiscated and deprived the Browns of the legal use of their land. The Commission filed a motion for reconsideration disputing those findings but it was denied.

¶8. The Department appeals to this Court arguing that the chancellor did not adhere to his standard of review in reversing and rendering the decision of the Commission. We find that the proper disposition would have been to remand the case to the Commission to enter an order with proper findings of fact and conclusions of law. As a result, we reverse and remand the ruling of the lower court.

## LEGAL ANALYSIS

### I. DID THE CHANCERY COURT ERR IN REVERSING AND RENDERING THE DECISION OF THE COMMISSION ON MARINE RESOURCES?

¶9. "The commission shall state, upon its record, its findings and reasons for all actions taken pursuant to Sections 49-27-23 through 49-27-37." Miss. Code Ann. § 49-27-35 (Rev. 2003). "When a permit is refused, the commission shall describe the public interest which would be adversely affected by granting the permit." *Id.* An appeal may be taken by an applicant aggrieved by the denial of a permit. Miss. Code Ann. § 49-27-39(a) (Rev. 2003). The chancery court is authorized to hear such an appeal and "[i]f the court finds that the order appealed from is supported by substantial evidence, consistent with the public policy set forth in this chapter, is not arbitrary or capricious and does not violate constitutional rights, it shall affirm the council's order." Miss. Code Ann. § 49-27-39(b) (Rev. 2003). The chancery court is also

authorized to grant, deny, revoke, suspend or place a condition on any permit. Miss. Code Ann. § 49-27-47 (Rev. 2003).

¶10. In the instant case, however, the chancellor's final ruling found the record "devoid of any findings of fact, feasibility study or inspection report of premises as required by the rules, statutes and regulations applicable to this type of proceeding." The chancellor went on to state that the Department "should have made specific findings of facts and conclusions of law as to any adverse impact on the property it had jurisdiction of as required by §49-27-45 of the Mississippi Code." Furthermore, the chancellor stated during oral arguments that "the record is made at this point that there is a great deal lacking in this record as to why [the Commission] did what they did."

¶11. The Department argues that once the chancellor found that the record was "devoid of any findings of fact" as to certain issues, the sole remedy at that point was to remand the case back to the Commission. In support of this argument, the Department directs our attention to the relevant statutory provision which states:

> If, upon hearing such appeal, it appears to the court that any testimony has been improperly excluded by the commission or that the facts disclosed by the record are insufficient for the equitable disposition of the appeal, it *shall* refer the case back to the commission to take such evidence as it may direct and report the same to the court with the commission's findings of fact and conclusions of law.

Miss. Code Ann. § 49-27-45 (Rev. 2003). (emphasis added).

¶12. Our interpretation of this statute leaves the chancellor with no discretion to render a decision when he has already determined that the record is devoid of any such findings of fact. A great deal of information seems to have been compiled by the Department including the petitions and signatures in support of the Browns' project so we disagree with the chancellor's finding on that point. In addition, the Commission's

record does contain a field inspection report and there is no requirement for feasibility studies under the Coastal Wetlands Protection Act.

¶13. The Department and its Commission are the most qualified and the most experienced at weighing the pros and cons of each proposal to alter the coastal wetlands. Inevitably, there will be evidence to the contrary along with public support and opposition. As a result, a great deal of deference is afforded to the Department especially with regards to the interpretation of its own regulations. *Bay St. Louis Cmty. Ass'n v. Comm'n on Marine Res.*, 808 So. 2d 885, 888 (¶ 8) (Miss. 2001); *Concerned Citizens to Protect the Isles and Point, Inc. v. Miss. Gaming Comm'n*, 735 So. 2d 368, 380 (¶ 31) (Miss. 1999).

¶14. However, in the instant case, the Department's order was purely perfunctory and gave the chancellor no understanding of the basis of its decision. We find it impossible for the chancellor to correctly apply Mississippi Code Section 49-27-39(b) in this case without sufficient findings of fact and conclusions of law.

¶15. If the Commission has not provided enough information for the chancellor to review the decision, then the chancellor must request what is missing and the Commission must provide it. As a result, we remand the case to the Commission to enter an order with proper findings of fact and conclusions of law. We refrain from reviewing the merits of the Browns' constitutional claims in light of our decision to remand the case.

¶16. **THE JUDGMENT OF THE JACKSON COUNTY CHANCERY COURT IS REVERSED AND REMANDED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEES.**

**KING, C.J., BRIDGES, P.J., THOMAS, IRVING AND CHANDLER, JJ., CONCUR. SOUTHWICK, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY LEE AND GRIFFIS, JJ.**

**SOUTHWICK, P.J., DISSENTING:**

¶17. With respect, I find that the majority on rehearing has not properly applied the statute that it employs to reverse. Moreover, on further review of the evidence in this case, I find sufficient support for the decision reached by the Commission on Marine Resources.[3] I would affirm.

¶18. The majority finds a statute that it quotes to be applicable when fact-*findings* by the Commission are deficient. The statute refers to an inability to resolve the appeal either because of improper exclusion of *evidence* at the Commission or because the record does not contain enough *evidence* "for the equitable disposition" by the appellate court. Miss. Code Ann. § 49-27-45 (Rev. 2003). The clear thrust of this statute is that a case shall be returned to the Commission when the evidentiary record is insufficient to resolve the appeal. The majority never determines that to be the situation here. We are not requiring more evidence to be taken on remand. Instead, we reverse because we want the Commission to provide a better explanation of its decision. That clearly is error if this statute is the sole basis for the remand. I also find it to be error for other reasons.

¶19. I agree that improved guidance from the Commission would be useful. I disagree, though, that we are in a position to require it. Instead, an arguably lamentable rule has been adopted in Mississippi for review of administrative agency decision-making. That rule allows for cursory fact-finding. Though in other settings I have argued that the rule ought to be changed to bring us in line with the usual and helpful practice of most states and of federal law, such a change is not for us to order. Southwick, *Administrative Law*,

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[3] There is in Mississippi both a Department of Marine Resources and within that Department, a Commission on Marine Resources. The Department is "to manage, control, supervise, enforce and direct any matters pertaining to saltwater aquatic life and marine resources under the jurisdiction of the commission." Miss. Code Ann. § 49-15-11 (1) (Rev. 2003). The Department is shown as the party on this appeal to enforce the Commission's decision.

in 1 ENCYCLOPEDIA OF MISSISSIPPI LAW §§2:66 - 2:68 (Jeffrey Jackson & Mary Miller ed. 2001), discussing *May v. Mississippi Bd. of Nursing*, 667 So. 2d 639 (Miss. Ct. App. 1995) (mem.).

¶20. I will review the current state of the law. Findings of fact assist the appellate court to understand the application of the expertise of an agency to a specific evidentiary record. Unfortunately, the general rule in Mississippi administrative practice is that findings of "ultimate facts" are sufficient. Such fact-finding usually requires nothing more than brief statements that the statutory standard being applied has been met or violated.

¶21. Difficulty of reviewing the record of administrative agency decisions is a common problem addressed on several occasions by the Mississippi Supreme Court. *See Duckworth v. Mississippi State Bd. of Pharmacy*, 583 So. 2d 200, 202 (Miss. 1991). Lack of detailed findings does not by itself result in reversal. The Supreme Court's consistent approach can be seen in a case in which the Court approved the use of boilerplate findings by the State Board of Nursing. *Mississippi State Bd. of Nursing v. Wilson*, 624 So. 2d 485, 495 (Miss. 1993). That form finding, which requires nothing from the Board and provides nothing to a court, is to state that the person charged is a nurse, that there was notice given, and that the nurse is guilty of the offenses charged. The offenses are not even restated in the findings, so the findings fit all cases. The Supreme Court restated the principle that "ultimate fact-finding" in the administrative process is adequate. *Wilson*, 624 So. 2d at 495-96. The ultimate fact found was that Wilson had a drug addiction during the preceding ten years.

¶22. This is not the usual administrative review standard. The conventional rule is that there must be "express findings in support of an administrative determination, [which] follows as a corollary to the established principle that, in general, administrative action is subject to judicial review, and that the reason behind the rule requiring the findings of detailed facts is to enable the reviewing court properly to exercise

its functions." E.H. Schopflocher, Comment, "Necessity, Form and Contents of Express Finding of Fact to Support Administrative Determinations,"146 A.L.R. 209, 234 (1943),*cited with approval in Planters Bank v. Garrott,* 239 Miss. 248, 275, 122 So. 2d 256, 265 (1960). The usual rule also holds that "[e]ven if the evidence in the record, combined with the reviewing court's understanding of the law, is enough to support the order, the court may not uphold the order unless it is sustainable on the agency's finding and for the reasons stated by the agency." 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE §14:29, at 128 (1980).

¶23. Ultimate fact-finding remains in Mississippi the only required statement supporting agency action. Appellate review then proceeds in this manner:

> The reviewing court is "only to determine whether substantial evidence supports the agency's decision and whether the agency exercised its discretion reasonably and with due consideration." 2 Am.Jur.2d Administrative Law § 537 Substantial Evidence Standard (1994). Substantial evidence is "more than a mere scintilla of evidence" or "something less than a preponderance of the evidence but more than a scintilla or glimmer." *Id.*

*Mississippi Dep't. of Envtl. Quality v. Weems*, 653 So. 2d 266, 280-81 (Miss. 1995). Even so, the court encourages the adoption of meaningful findings of fact by saying "it is better practice." *See, e.g.*, *Mississippi Public Serv. Comm'n. v. AAA Anserphone, Inc.*, 372 So. 2d 259, 264 (Miss. 1979).

¶24. Though this is the usual rule, an agency-specific statute could require more useful fact-findings. The Commission of Marine Resources must make these findings:

> The commission shall state, upon its record, its findings and reasons for all actions taken pursuant to Sections 49-27-23 through 49-27-37 . . . . When a permit is refused, the commission shall describe the public interest which would be adversely affected by granting the permit.

Miss. Code Ann. § 49-27-35 (Rev. 2003). The only specific requirement is that the Commission describe the public interest that would be adversely affected by a permit. The Commission staff concluded the following about the public interest:

> this project would severely impact coastal resources and that alteration of the coastal wetlands at this site would be permanent and would not serve a higher public interest as is required by the Mississippi Code.

This conclusion was adopted by the Commission. This is not much, but I find it to be enough. The statute defines public interest in the terms that the Commission used: public policy favors "the preservation of the natural state of the coastal wetlands and their ecosystems and to prevent the despoilation and destruction of them . . . ." Miss. Code Ann. § 49-27-3 (Rev. 2003)

¶25. The statute on the contents of the agency ruling more generally requires that "findings *and reasons*" must be stated. It might be argued that this is a requirement of a broad-based explanation by the Commission. That would be a radical departure from usual Mississippi administrative law. The word "reasons" would have to bear the entire weight of a requirement that the Commission write detailed findings on the evidentiary facts needed to uphold the decision. The statutory language is too weak to support such a change. I conclude that the Commission has stated the mandated findings and reasons when it adopted the recommendation of its staff to deny the permit request because of the various defects that the staff noted.

¶26. The statutes on review of Commission decisions also imposes the general judicial review requirements that the decision of the administrative body is to be upheld when, among other rules, it is supported by substantial evidence, consistent with statute, and is neither arbitrary nor capricious. Miss. Code Ann. § 49-27-39 (Rev. 2003). The statute on which the majority relies to remand is by its clear terms inapplicable to problems with fact-finding. It does, though, require a remand if there is inadequate

evidence in the record to make an informed judgment on the merits of the appeal. Miss. Code Ann. § 49-27-45 (Rev. 2003). This hardly means that we remand if all the evidence offered was admitted and there still is not enough to support the Commission's decision. Instead, if the "equitable disposition" of the appeal is impossible without a remand for more evidence, then we remand. So I examine the evidence, both to determine whether an equitable disposition is possible and if so, whether we should dispose by affirming or reversing.

¶27. In my review of the record, I find this evidence:

(1) The area to be filled was 1.64 acres of "high-quality, tidally-influenced marsh consisting primarily of Juncus roemerianus;" the land to be filled was adjacent to a national wildlife refuge and to the National Estuarine Research Reserve;

(2) The filling of the marsh was to be mitigated by thinning of pines and a ten-year fire program, which was said to be useless ecologically; mitigation by methods not directly related to the effect on the ecological system by the action covered by the permit was a bad precedent.

¶28. Some of the statements in the record were first offered by other entities like the U.S. Department of the Interior or the private Nature Conservancy. Still, I find that the Commission adopted them as part of the basis for its decision. There was adequate evidence and explanation.

¶29. So long as ultimate facts are stated, it is improper to remand to an administrative agency for more fact-finding. Cursory or perfunctory findings are of little utility to a court when it performs the judicial review function. That is why the requirements of agency fact-finding ought to be re-examined. For us though, and based on our appellate review obligations, the legal requirements for agency fact-finding are beyond change. I would affirm.

**LEE AND GRIFFIS, JJ., JOIN THIS SEPARATE WRITTEN OPINION.**