THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Docket No. 2011-ALJ-07-0556-CC

Grand Bees Development, LLC, ... Respondent,

v.

South Carolina Department of Health and
Environmental Control and County of Charleston, ... Appellants.

INITIAL BRIEF OF APPELLANT COUNTY OF CHARLESTON

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STATEMENT OF THE CASE

On November 8, 2007, the County of Charleston ("Charleston County" or the "County") submitted an application for a permit modification to the South Carolina Department of Health and Environmental Control ("DHEC"). The permit sought to modify the existing construction, demolition, and land-clearing debris cell by increasing the disposal limit from 182,000 tons per year to 200,000 tons per year, expanding the footprint by 5.5 acres, and increasing the elevation from 74 feet to 168 feet mean sea level of the Bees Ferry Landfill in Charleston County, South Carolina.

On January 17, 2008, the Division of Mining and Solid Waste Management, Bureau of Land and Waste Management of the DHEC issued its Permit No. 1010001-1201 for the requested modification of the construction, demolition and land-clearing debris ("C&D") cell.

On April 18, 2008, Grand Bees Development, LLC ("Grand Bees") appealed the permit modification to the South Carolina Administrative Law Court ("ALC") filing a request for a contested case hearing. On January 13-14, 2009, the ALC held a contested case hearing. On June 2, 2009, the ALC issued its final order and decision that the modification did not comply with the Charleston County Zoning and Land Development Regulations Ordinance (the "ZLDR") because Charleston County had not obtained a special exception for the expansion. The ALC vacated DHEC's decision granting the modification of the permit and remanded the matter to DHEC for its review in accordance with the County's ZLDR. On July 2, 2009, the County appealed the decision of the ALC to the South Carolina Court of Appeals (the "Court of Appeals").

At the time the County appealed the decision to the Court of Appeals, the Charleston County Planning Department introduced an amendment to the ZLDR to change the provisions interpreted by the ALC requiring the County to obtain a special exception before modifying the Landfill. The Charleston County Planning Commission approved the text changes and forwarded its recommendation to Charleston County Council ("County Council") to remove the provisions at issue in the ZLDR and accept the text amendment. County Council adopted the amendment to the ZLDR on August 11, 2009.

On October 8, 2009, the Court of Appeals issued its order dismissing the County's appeal and finding that until DHEC reviewed the permit modification as required by the ALC's order, there was no decision of DHEC on the merits of the case.

Thereafter, DHEC reviewed the permit in accordance with the ZLDR and subsequently determined that the permit application was consistent with the County's zoning, land use, and other applicable ordinances pursuant to S.C. Code Ann. § 44-96-290(F) and S.C. Regulations 61-109.19. DHEC subsequently issued Permit No. 101001-1201 to the County of Charleston on September 1, 2011, for modification of the C&D cell ("Second Permit Modification").

Grand Bees appealed DHEC's issuance of the Second Permit Modification. Grand Bees claims that the permit was issued contrary to the S.C. Regulations 61.109.19 and the statutes contained in the S.C. Solid Waste Policy and Management Act and that it was inconsistent with the County of Charleston's zoning, land use and other applicable ordinances as required by S.C. Code Ann. § 44-96-290(F) and its implementing

regulations. That petition was the subject matter of a contested case hearing on March 20-21, 2012.

On March 19, 2013, the ALC issued its final order and decision that the Second Permit Modification (1) was inconsistent with local land use ordinances, (2) did not comply with the vegetative buffer requirements of the County's ZLDR, and (3) violated the set back requirement of the Solid Waste Policy and Management Act. On March 29, 2013, the County and SCDHEC filed respective motions for reconsideration. On May 8, 2013, the ALC issued its order denying the County's motion for reconsideration. The County filed its notice of appeal with this Court on May 29, 2013.

STATEMENT OF FACTS

Since 1977, Charleston County has operated the Bees Ferry Landfill, which is located along Bees Ferry Road in an unincorporated portion of the County. As part of its operations, the County operates and maintains a DHEC Class II Landfill that includes a C&D cell.

On November 15, 2004 - 27 years after the County began operating the landfill - Grand Bees purchased a tract of land of approximately 311 acres located adjacent to the County's landfill off Bees Ferry Road. The Grand Bees property is zoned planned unit development ("PUD") by the City of Charleston and is designated for residential land use. The property is part of a larger PUD that was first approved by the City Council in March 1993 -16 years after the County began operating its landfill.

The County has operated the C&D cell under DHEC Permit Number 101001-1201 since October 17, 1997. In July 2007, the County applied to DHEC to amend its construction and demolition permit and revised its application in November 2007. The County's application sought to increase the vertical height limitation of the C&D cell from 74 feet above mean sea level ("MSL") to 168 feet MSL. In addition, the application sought to expand the footprint of the cell by 5.5 acres in order to allow for the effective and efficient disposal of construction, demolition, and land clearing debris by expanding the cell's maximum disposal capacity from approximately 2.5 to 5.4 million cubic yards. This action would enable the County to continue to protect the public health, safety and general welfare of the citizens of the County by providing a central location for disposal of this type of waste and thereby minimizing unlawful dumping and littering throughout the County and

surrounding municipalities. DHEC granted the First Permit Modification on January 17, 2008.

Grand Bees subsequently requested a contested case hearing challenging DHEC's issuance of the First Permit Modification. By order dated June 2, 2009, the ALC vacated the First Permit Modification and remanded the matter back to DHEC. The order was based on the grounds that the modified permit was inconsistent with local zoning, land use, and other applicable regulations in violation of S.C. Code Ann. § 44-96-290(F) because the County did not first obtain a special exception in accordance with the County's ZLDR.

In 2010, the County amended the ZLDR and eliminated the requirement of a special exception for the expansion of the Bees Ferry Landfill. The County supplemented its 2007 application so that it could comply with revised state regulations. DHEC approved a draft permit modification on April 18, 2011, and on the same day published the notice in *The Post & Courier*, the Charleston daily newspaper. DHEC held a public hearing on the draft permit modification on July 13, 2011. Representatives of Grand Bees attended the public hearing.

On September 1, 2011, DHEC rendered its final decision on remand and issued the Second Permit Modification, which allowed for the same increases in height and size sought under the First Permit Modification.

Again, Grand Bees subsequently requested a contested case hearing challenging DHEC's issuance of the Second Permit Modification. The ALC reversed DHEC's decision and vacated the Second Permit Modification. The ALC further ordered that should the County wish to continue pursuing an expansion permit, an entirely new application must be

filed given the long period of time since the initial application in 2007 and the rapid changes in residential development in the surrounding area since that time. (Final Order and Decision 19).

The ALC based its decision on the grounds that the modified permit was inconsistent with local zoning, land use, and other applicable regulations in violation of S.C. Code Ann. § 44-96-290(F). The ALC found that there was no evidence that Section 10-22 of the Charleston County Code of Ordinances "was ever reviewed by DHEC to determine whether the requested permit modification was consistent with all applicable local ordinances" (Final order and Decision 7, ¶ 34). The ALC also found that the County did not meet the County's own ZLDR landscaping regulations requiring a 100 foot vegetative buffer between the landfill and Grand Bees property, "specifically nine (9) canopy trees, eleven (11) understory trees and fifty (50) shrubs per one hundred (100) feet of linear buffer along the property line" (Final Order and Decision 9, ¶ 43). As a further ground, the ALC found that there were "130 approved and planned residential lots on the Grand Bees Property located within 1,000 feet of the fill area boundary of the Class II Landfill Permit" and therefore the Second Permit Modification must be nullified (Final Order and Decision 10, ¶ 48).

STANDARD OF REVIEW

"The Administrative Procedures Act (APA) establishes the standard of review for appeals from the ALC. The APA provides this court may reverse or modify the ALC's decision only if the substantive rights of a party have been prejudiced due to: constitutional or statutory violations; an agency exceeding its authority; unlawful procedure; an error of law; a clearly erroneous view of evidence in the record; or an abuse of discretion. S.C. Code Ann. § 1–23–610(B) (Supp.2011). 'As to factual issues, judicial review of administrative agency orders is limited to a determination [of] whether the order is supported by substantial evidence.' 'Substantial evidence' sufficient to support a finding of the ALC is 'evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached.' 'The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" Greeneagle, Inc. v. S.C. Dep't of Health & Envtl. Control, 399 S.C. 91, 95, 730 S.E.2d 869, 871 (Ct.App. 2012), reh'g denied (July 23, 2012) (citations omitted).

ARGUMENT

I. THE ALC ERRED WHEN IT REVERSED DHEC'S DECISION TO GRANT A SOLID WASTE PERMIT TO THE COUNTY BASED ON DHEC'S FAILURE TO REVIEW A LOCAL SOLID WASTE DISPOSAL ORDINANCE.

A. No Finding of Inconsistency.

The ALC erred when it reversed DHEC's decision granting the County's permit modification for lack of consistency with the Charleston County Solid Waste Disposal Ordinance, Chapter 10, Article II, Section 10-22, based on DHEC's failure to review it, without a finding that the permit modification was in fact inconsistent with the Ordinance. The Charleston County Solid Waste Disposal Ordinance, Section 10-22 provides:

> All collectors shall dispose of all solid waste collected at an approved facility in a sanitary manner. A properly operated sanitary landfill shall be considered acceptable to meeting this requirement and shall meet the following minimum standards . . . (2) Site location. The disposal shall:
>
> (a) Be easily accessible to collection vehicles, and where applicable, transfer vehicles;
> (b) Safeguard against water pollution originating from the disposal of solid waste;
> (c) Have an adequate quantity of acceptable earth cover. The cover material should be easily workable and compactible, should be free of large objects that would hinder compaction, and should not contain large amounts of organic matter. It shall be of sufficient quantity and distributed in such a manner as to prevent the harborage and breeding of insects, rodents, and other animal vectors;
> (d) **Conform with the surrounding environment; and**
> (e) **Conform with future development of the area**.

Charleston County Code of Ordinances No. 864, Chapter 10, Article II, Solid Waste Disposal Ordinance No. 180, Section 10-22, Adopted March 5, 1974 (emphasis added).

The ALC found that "DHEC never considered Section 10-22 in its consistency review."

(Final Order and Decision 12, ¶ 12). The ALC's findings on "Consistency with Local Land Use Ordinances" misapplies S.C. Code Ann. § 44-96-290(F) and the South Carolina Supreme Court's decision in." Southeast Resource Recovery, Inc. v. S.C. Dep't of Health & Envtl. Control, 358 S.C. 402, 595 S.E.2d 468 (2004) because it does not find that the Second Permit Modification is inconsistent with the County's Solid Waste Disposal Ordinance, Section 10-22, which is a prerequisite for denying the County's permit modification. Rather, the ALC found that "DHEC's failure to review Section 10-22 is significant. . . . It is apparent in this instance that DHEC's consistency determination is materially incomplete and, therefore, facially invalid. As a result, DHEC violated the applicable law in granting the Second Permit Modification." (Final Order and Decision 13, ¶ 13).

The ALC's "failure to review standard" has not been established in the Act or in case law. The South Carolina Solid Waste Policy and Management Act and the Southeast Resource Recovery, Inc. decision do not require DHEC to "consult **all** applicable land use ordinances . . . to fulfill the consistency requirement of S.C. Code Ann. § 44-96-290(F)." (Final Order and Decision12, ¶ 12) (emphasis added). Instead, South Carolina law simply prohibits landfill expansions that are inconsistent with local ordinances. Therefore, the failure to review or consider a local ordinance on its face does not *necessarily* defeat the consistency requirement found in South Carolina law.

B. Charleston County Solid Waste Disposal Ordinance, Section 10-22 is a Subjective Standard and Does Not Create an Objective Standard For DHEC To Review And Apply.

The County's Solid Waste Disposal Ordinance, Section 10-22 requires landfill's to

conform with the environment and future development. DHEC is charged with determining if a proposed expansion is consistent with local zoning and other applicable local ordinances. S.C. Code Section 44-96-290(F) prohibits DHEC from issuing a permit to expand a solid waste management facility unless the expansion is consistent with local zoning, land use, and other applicable ordinances. Specifically, it provides:

> No permit to construct a new solid waste management facility or to expand an existing solid waste management facility within a county or municipality may be issued by the department unless the proposed facility or expansion is consistent with local zoning, land use, and other applicable local ordinances, if any.

South Carolina Code Ann. Section 44-96-290(F)(2002).

Under Section 44-96-290(F), consistency with local zoning, land use, and other applicable local ordinances is a condition precedent to DHEC issuing a permit for an expansion of an existing solid waste facility. See, Southeast Resource Recovery, Inc. v. S.C. Dep't of Health and Envtl. Control, 358 S.C. 402, 407-08, 595 S.E.2d 468, 471 (2004) ("'DHEC' cannot issue a permit unless the proposed facility is consistent with local zoning, land use, and other applicable local ordinances.").

DHEC found that the Second Permit Modification was consistent with local zoning, land use, and other applicable local ordinances, if any. Its failure to review the County's Solid Waste Disposal Ordinance Section 10-22 before or after its consistency decision does not alter whether or not the Second Permit Modification is consistent with the County's ordinances. The standards in the County's archaic 1974 Solid Waste Disposal Ordinance Section 10-22 are not unique. In fact, they are embodied in the S.C. Solid Waste Policy and Management Act, the S.C. Code of Regulations, and the Charleston

County's Zoning and Land Use Regulations; and therefore, DHEC was mandated by law to consider the same concepts.[1]

The County's Solid Waste Disposal Ordinance Section 10-22 does not alter or add new criterion. Instead, it is simply a recognition that landfills must fit within the infrastructure of local communities. Similarly the Act states "[i]t is the purpose of this article to . . . (3) require local governments to adequately plan for and provide efficient, environmentally acceptable solid waste management services and programs; (4) promote the establishment of resource recovery systems that preserve and enhance the quality of air, water, and land resources; (5) ensure that solid waste is transported, stored, treated, processed, and disposed of in a manner adequate to protect human health, safety, and welfare and the environment; . . . ." S.C. Code Ann. § 44-96-20(B). The ALC's application of the Solid Waste Policy and Management Act and the DHEC Solid Waste Regulations did not lead to a finding of inconsistency.

C. There Are No Objective Standards To Measure.

The County's Solid Waste Disposal Ordinance Section 10-22 contains outdated, subjective industry standards, which cannot be objectively measured, whereas the ALC found that the language is specific.[2] (Final Order and Decision 13, ¶ 15). In Southeast Resource Recovery, Inc., the Court analyzed similar language when it rejected a similar

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[1] For example, see Regulation 61-107.19, Part IV(B)(1)(a),(d), & (f).

[2] The minimum standards for site location include that the disposal conform with the surrounding environment and future development of the area. Those standards are silent on any specific standards, specific requirements, and specific criteria to measure conformity. The terms "conform with" and "surrounding environment" and "future development" and "of the area" are all subjective standards. Each standard means something potentially different to this Court, the ALC, Charleston County, DHEC and Grand Bees. Without more specificity, those standards are immeasurable and require a lack of precision upon which an effective application may be made.

attempt to invalidate a permit modification. In Southeast Resource Recovery Inc., the Court opined:

> Section 10.2 discusses the goals associated with Newberry County's solid waste disposal. Section 10.2 states, in relevant part, that one of the goals is to "preserve, protect, and enhance the environmental quality of Newberry County." This broad, general statement of goals cannot serve as a basis for concluding the proposed facility is inconsistent with Newberry County's plan. To hold otherwise would invite a reviewing court to conclude, on an arbitrary and capricious basis, any proposed landfill facility falls within the ambit of such general language. Therefore, the circuit court erred in relying on Section 10.2 in holding the proposed facility inconsistent with the Plan.

Southeast Resource Recovery, Inc. v. S.C. Dep't of Health & Envtl. Control, 358 S.C. 402, 409, 595 S.E.2d 468, 471-72 (2004).

Here, the ALC has fallen prey to the same trap, without making a finding of inconsistency on the record. The ALC denied the Second Permit Modification ostensibly because it is not consistent with the County's Solid Waste Disposal Ordinance Section 10-22. This proposition is not supported by substantial evidence in the record. "Substantial evidence sufficient to support a finding of the ALC is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached." Greeneagle, Inc. v. S. Carolina Dep't of Health & Envtl. Control, 399 S.C. 91, 95, 730 S.E.2d 869, 871 (Ct.App. 2012), reh'g denied (July 23, 2012). The ALC concluded that consideration of Section 10-22 would have materially influenced DHEC's permitting decision because of "future development in the area," including, but not limited to, Petitioner's development (Final Order and Decision 13, ¶ 13). However, Grand Bees submitted limited evidence demonstrating future development in the area.

The ALC heard testimony from Grand Bees' own expert that the City of Charleston's

intention behind planned unit developments is to ensure compatibility of developments with surrounding areas. (Trial Tr. 138:9-22). This testimony was given in the context of the expert's review of the City's ordinances in preparing Grand Bees' application for a planned unit development for submittal to the City and subsequent amendments. The expert testified that the City's criteria for approval (zonings and rezoning) addresses the zoning for adjacent undeveloped areas and their uses and looks at what is going on with neighboring properties. (Trial Tr. 140:1-21). The City approved Grand Bees' application and amendments for a planned unit development after taking those criteria into consideration. The criteria the City considered are specific - it looked at undeveloped areas, those areas' uses, and those of neighboring properties.

In the same vein as the City approved the PUD as a compatible development with the pre-existing landfill, DHEC found the same in the situation involving its review of the C&D cell in terms of the future development of the Grand Bees PUD. Therefore, this Court should find that DHEC's failure to consider the County's 1974 Solid Waste Disposal Ordinance Section 10-22 does not invalidate its consistency finding, and the permit modification should be affirmed.

II. THE COURT ERRED WHEN IT CONCLUDED THAT THE SECOND PERMIT MODIFICATION DID NOT COMPLY WITH THE REGULATION BECAUSE THE COURT EXPANDED THE APPLICATION OF THE COUNTY'S VEGETATIVE BUFFER REGULATION AND IGNORED THE COUNTY'S LEGISLATIVE ACT AND INTENT.

A. Directly Affected by the Proposed Improvement.

The ALC incorrectly found that ". . . the Second Permit Modification is not consistent with the County's vegetative and landscaping standards because no landscaping plan or

other documentation demonstrating compliance was made part of the permit application or the Second Permit Modification." (Final Order and Decision 15, ¶ 22). The ALC based this finding on the fact that "[t]hese regulations, as applied, require a one hundred (100) foot vegetative buffer between the Class II Landfill and Petitioner's property." (Final Order and Decision 15, ¶ 22). The ZLDR does not mandate that all landfills must have a 100-foot vegetative buffer separating it from adjacent properties as indicated in the ALC's Order; however, DHEC Regulations do require a 100-foot buffer, with which the Bees Ferry Landfill is in compliance.

The Charleston County ZLDR Ordinance, Article 9.5 titled Landscaping, Screening and Buffers, does not apply to the Second Permit Modification because the buffer standards only apply to portions of the landfill property directly affected by the proposed improvement.

Section 9.5.1 titled Applicability provides in part:

> When **modifications** or additions **are being made to an existing non-residential** building or **site**, **the standards of this Article shall apply to those portions of the subject parcel that are directly affected by the proposed improvements, as determined by the Planning Director** . . . .

Charleston County ZLDR Ordinance, Article 9.5 Landscaping, Screening and Buffers, Section 9.5.1. Applicability (emphasis added).

"'The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature.'" Eagle Container Co., LLC v. County of Newberry, 366 S.C. 611, 621, 622 S.E.2d 733, 738 (2005) (citations omitted). "'What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.'" Id., supra, at 621-22, 738 (citations omitted).

The County intended to apply Article 9.5 to portions of property directly affected by the proposed improvements and by DHEC Regulations, the County could not encroach into the existing 100-foot buffer that separates the landfill from Grand Bees. The expansion is not along the boundary of the Grand Bees' property. It is approximately 1,100 feet away from the boundary of the fill area next to the 100 foot buffer abutting the Grand Bees' property. (Pet'r Ex. No.1). Plan Sheet C-04 of the application shows no modification, expansion or addition being made to the boundary of the fill area next to the 100 foot buffer abutting the Grand Bees' property. (Petr.'s Ex. No. 1, March 20, 2012). Moreover, the vertical expansion will not encroach into the existing 100-foot buffer around the entire landfill parcel. The proposed expansion is contained entirely within the existing permitted boundaries and existing buffer zones for the facility. This is shown on Grand Bees' Exhibit No.1., Plan Sheet G-01 of the County's application shows that the proposed expansion of area of the construction and demolition portion of the landfill is a 5.5 acre area that is located interior to the property. Article 9 of the ZLDR applies "to those portions of the subject parcel that are directly affected by the proposed improvement." ZLDR Art. 9, Section 9.5.1. There is no proposed improvement in the buffer.

B. As Determined by the Planning Director.

The Planning Director must make a determination of need before Article 9, Section 9.5.1 is applicable. That did not happen here. Equally, DHEC has not made a determination that the landscaping, screening, and buffers are needed pursuant to Article 9.5, beyond the 100-foot buffer required by the Regulations. See, Regulation 61-107.19,

Part IV(B)(1)(e).[3] The County utilizes an existing 100-foot buffer adjacent to Grand Bess property for drainage, vehicular access, and as a maintenance shelf for the roads and drainage ditches. It is clear under South Carolina law that ". . . Section 44-96-290(F) requires a proposed facility comply with local standards, it does not designate the county as the final arbiter on whether the proposed facility complies with its local zoning, land use, and other ordinances." Southeast Resource Recovery, Inc. v. S.C. Dep't of Health & Envtl. Control, 358 S.C. 402, 408, 595 S.E.2d 468, 471 (2004). However, the Court in Southeast Resource Recovery, Inc. did not abrogate the final arbiter decision to oblivion.

The ALC has not made a determination that buffers are needed pursuant to the ZLDR, nor has anyone else with authority to do so. Instead, the ALC found that "the Second Permit Modification constitutes a modification to a non-residential site, thereby triggering the County's landscaping, screening, and buffering regulations contained in Article 9.5 of the ZLDRs." (Final Order and Decision 15, ¶ 22). This finding is completely silent regarding Article 9.5's limited applicability and more importantly its discretionary application, which DHEC determined was not applicable. Here again, the ALC has found a provision in a local ordinance that was not specifically addressed in DHEC's Second Permit Modification and has determined that the permit modification must be inconsistent with the ZLDR because its provisions were not applied, without affirming its discretionary applicability, as needed. The Solid Waste Management Act does not mandate this ridged

[3] Regulation 61-107.19, Part IV(B)(1)(e) provides: 1. Buffers. Unless otherwise approved by the Department, the site for a new landfill or expansion of an existing landfill shall meet the following standards . . . e. The boundary of the fill area shall not be located within 100 feet of any property line. An exemption may be issued by the Department upon receipt of written approval from adjacent property owners.

application of the statute and regulations. Because the proposed expansion of the C&D cell is on the interior portion of the landfill and not within 100 feet of the Grand Bees' property line, the ALC's conclusion is a misapplication of the County's ordinance, State law, and DHEC regulations.

III. THE ALC ERRED WHEN IT EXPANDED THE APPLICATION OF THE 1,000-FOOT RESIDENCE SETBACK RESTRICTION FOR SOLID WASTE DISPOSAL FACILITIES TO INCLUDE PLANNED RESIDENCES AND RESIDENCES SHOWN ON AN APPROVED SITE PLAN.

A. Residence Means Structure for Human Habitation.

The ALC erred when it expanded the plain meaning of the word "residence" to include planned or proposed residences with 1,000 feet of the boundary of the fill area of a landfill. Although the ALC did not adopt a specific definition for residence, the ALC did apply the rules of statutory construction to reach the conclusion that the purposes of the South Carolina Solid Waste Policy and Management Act would be "considerably undermined if 'residence' was interpreted in a way that effectively eliminates this basic protection for property located next to landfills" by looking at what was planned or shown on an approved plat as the basis to reverse DHEC's permit modification approval. (Final Order and Decision 17-18, ¶¶ 35, 38). The South Carolina DHEC Regulations provide that:

> Buffers. Unless approved by the Department, the site for a new landfill or expansion of an existing landfill shall meet the following standards:
>
> The boundary of the fill area shall not be located within 1,000 feet of any residence, school, day-care center, church, hospital, or publicly owned recreational park area. The Department will determine whether the new landfill or expansion meets this requirement prior to the publication of the Notice of Intent to File a Permit Application pursuant to Part I, Section D.1. of this Regulation.

S.C. Regulation 61-107.19, Part IV, B.1.a.

The word "residence" is not defined in S.C. Regulation 61-107; however, its plain meaning in this context is "a building used as a home." Merriam-Webster Online, http://www.merriam-webster.com/dictionary/residence (last visited June 24, 2013). The ALC incorrectly found that the landfill's waste disposal boundaries shall not be located within 1,000 feet of any planned or proposed residence by adding words to the Regulation that do not exist and inserting the words "planned" or "proposed" residence. The parties stipulated that no residences exist within 1,000 feet of the construction and demolition cell disposal boundary. (Trial Tr. 91:1-7; 15-20; 93:21-25; 94:7-9; 108:14-16). Further, a Grand Bees witness testified that according to its 2006 site plan, no actual residences have been constructed on the property. (Trial Tr. 63:17-25).

"'The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature.'" Eagle Container Co., LLC v. County of Newberry, 366 S.C. 611, 621, 622 S.E.2d 733, 738 (2005) (citations omitted). "'What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.'" Id., supra, at 621-22, 738 (citations omitted). "'The legislature's intent should be ascertained primarily from the plain language of the statute.'" Id. at 622, 738 (citations omitted). "'When the terms of a statute are clear the court must apply those terms according to their literal meaning.'" Id. at 622-23, 739 (citations omitted).

"'A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.'" Id. at 624, 740 (citations omitted). "'Courts will reject a statutory interpretation which would lead to a

result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.'" Id. at 624, 740 (citations omitted). "'The language must also be read in a sense which 'harmonizes with its subject matter and accords with its general purpose.'" Id. at 624, 740 (citations omitted).

The legislative intent of residence can be found by looking at the regulation as a whole. The ALC incorrectly notes that "[w]hat is meant by residence for purposes of measuring the minimum regulatory buffer is neither defined by S.C. Regulation 61-107.19, Part IV, **nor elsewhere in the regulations**." (Final Order and Decision 16, ¶ 30) (emphasis added). Although "residence" may not be defined for purposes of measuring the minimum regulatory buffer in Regulation 61-107.19, the term is defined in the Regulations. It is defined in Regulation 61-107.18, which precedes the Section (61-107.19) that does not define it.

"Residence" is defined in the context of minimum standards for the off-site treatment of contaminated soil, which is part of the Solid Waste Management Regulations that include Regulation 61-107.19. Regulation 61-107.18(B)(29) defines "residence" as "any structure, all or part of which is designed or used for human habitation that has received a final permit for electricity, permanent potable water supply, permanent sewage disposal, and a certificate of occupancy, if required by the local government." See S.C. Regulation 61-107.18(B)(29). The definition conforms with the definition adopted by the County and DHEC. (Final Order and Decision 18, ¶ 37).

Here, the planned residences do not physically exist. There is no structure, nor is there any final permit for electricity, permanent potable water supply, permanent sewage

disposal, and a certificate of occupancy.

B. The ALC Erred When it Failed to Give Deference to DHEC's Application of the Term "Residence."

The Court did not give deference to DHEC staff's interpretation of the term residence. Instead, the Court accepted Grand Bees' definition of "planned residence," which in effect allows any person or entity to prevent DHEC from permitting a site for a new landfill, or expansion of an existing landfill, if the landfill or expansion is located within 1,000 feet of any "planned residence." "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Buist v.Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006). In addition, where an agency is charged with the execution of a statute, the agency's interpretation should not be overruled without cogent reason. Nucor Steel v. S.C. Public Serv. Comm'n, 310 S.C. 539, 426 S.E.2d 319 (1992).

The ALC did not give deference to the agency charged with the administration of the Solid Waste Management Act's Regulations, and it did not give cogent reasons for disregarding the agency's universal application of the definition of residence. Instead, the ALC's reasoning was based on the following hypothetical scenario:

> Under the Respondents' interpretation, if the permit applicant to DHEC can 'win the race' - that is, succeed in obtaining a permit before a planned house, school, hospital, or park is finished with construction - these neighbors will be ignored for the purposes of S.C. Code Regs. 61-107.19, Part IV(B)(1)(a). The logical extension of the Respondents' argument is that any planned "residence" - no matter how far along the development or construction process - must be ignored. And since many of these ignored, planned developments are likely to ultimately be constructed and occupied after the permit has been granted, under Respondents interpretation, they will end up being located within 1,000 feet of the Class II Landfill - a result the regulations seeks to avoid.

(Final Order and Decision 17-8, ¶ 36).

The above-referenced hypothetical does not exist for Grand Bees. The tract of land Grand Bees purchased in 2004 is in the City of Charleston and zoned planned unit development. No structures exist on the site, habitable or under construction.[4] The property's zoning classification is subject to change through the approval of a rezoning of the tract or portions of the tract by the appropriate City board or commission. In fact, the City approved Grand Bees' recent submittal of an amendment to its planned unit development application on February 14, 2012. (Trial Tr. 137:8-10).

Interpreting the Regulation in the fashion the ALC seeks to have this Court do produces not only an absurd result, but also leads to a potential disastrous result for all of the existing or expanding landfills in the State. The ALC's interpretation of the Regulation is inconsonant with the common-sense reading of it.

CONCLUSION

The Administrative Law Court erred when it found that the Second Permit Modification for the Bees Ferry Landfill construction and debris cell was inconsistent with the County's local land use ordinance because the Court based its finding not on whether the modification was inconsistent with the ordinance, but on DHEC's failure to review the ordinance. The Court further erred when it expanded the application of the County's vegetative buffer regulations and ignored the County's legislative act intending to have its

[4] When Grand Bees purchased the property and proposed to sell lots within 100 feet from the boundary line of the landfill that are depicted on its development application, it had full knowledge that the residences would be within 1,000 feet of the boundary of the construction and demolition fill area and any future expansion of that portion of the landfill.

ordinance mean exactly what it already says.

The ALC disregarded the rules of statutory construction when it found that "residence" includes a planned or proposed residence designated as a lot on site plan. The ALC's construction is unreasonable and leads to an absurd and potentially disastrous result. Therefore, this Honorable Court should reverse the ALC's Final Order and Decision and affirm the Second Permit Modification.

Respectfully submitted,

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