THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2011-001141

Grand Bees Development, LLC,

Respondent,

v.

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

Appellants.

INITIAL BRIEF OF APPELLANT SOUTH CAROLINA DEPARMENT OF HEALTH AND ENVIRONMENTAL CONTROL AND DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

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Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Regulations

STATEMENT OF ISSUES ON APPEAL

1. DID THE ADMINISTRATIVE LAW COURT ERR BY CONCLUDING THAT DHEC'S FAILURE TO REVIEW ORDINANCE 180, SECTION 10-22, IS SIGNIFICANT, AND IN CONCLUDING THAT THE SECTION IS AN APPLICABLE ORDINANCE?

2. DID THE ADMINISTRATIVE LAW COURT ERR AS A MATTER OF LAW BY CONCLUDING THAT DHEC IS REQUIRED TO CONSULT *ALL* APPLICABLE LAND USE ORDINANCES PURSUANT TO S.C. CODE ANN § 44-96-290(F) (REV. 2002)?

3. DID THE ADMINISTRATIVE LAW COURT ERR AS A MATTER OF LAW BY CONCLUDING THAT THE SECOND PERMIT MODIFICATION IS NOT COMPLIANT WITH LOCAL ZOINING AND LAND USE REGULATIONS AS IT RELATES TO THE COUNTY'S VEGETATIVE BUFFERING REQUIREMENTS?

4. DID THE ADMINISTRATIVE LAW COURT ERR AS A MATTER OF LAW BY CONCLUDING THAT THERE IS NO EVIDENCE IN THE RECORD THAT DHEC EVER PERFORMED A REGULATORY COMPLIANCE DETERMINATION WITH RESPECT TO ITS OWN ONE THOUSAND FOOT SETBACK REQUIREMENT BECAUSE THERE IS NO WRITTEN DETERMINATION IN THE RECORD OF COMPLIANCE WITH THE APPLICABLE REGULATION?

STATEMENT OF THE CASE

On January 17, 2008, Appellant South Carolina Department of Health and Environmental Control ("DHEC" or "the Department") issued to Appellant Charleston County ("County") a modification to the construction, demolition, and land-clearing debris ("C&D") landfill permit ("Modified Permit") for the Bees Ferry Landfill ("Landfill")[1], Facility ID # 101001-1201, located at 1344 Bees Ferry Road in Charleston County, South Carolina. The initial permit was issued on October 17, 1997, however, the County has operated the Landfill in its current location since 1977. (***Decision*, P. 4, *Findings of Fact* # 15**). The Modified Permit allowed an increase in the annual disposal

[1] Before a new landfill regulation went it effect in May 2008, the Landfill was referred to as a construction, demolition, and land-clearing debris ("C&D") landfill. After the promulgation of the regulation, R. 61-107.19, the Landfill became known as a Class II landfill.

limit, and in the expansion of the footprint and height of the existing landfill. These modifications were approved pursuant to S.C. CODE ANN. REGS. § 61-107.11 (Supp. 2006).

Respondent Grand Bees Development, LLC ("Grand Bees") filed a Request for Review of the Modified Permit by the DHEC Board on February 1, 2008. The Department informed Respondent by Memorandum dated February 19, 2008, that the DHEC Board had decided not to conduct a Final Review Conference. On April 18, 2008, Respondent filed a Notice of Request for a Contested Case Hearing with the Administrative Law Court ("ALC" or "Court").

The ALC held a hearing in the above-captioned matter on Tuesday, January 13th and Wednesday, January 14th, 2009, with the Honorable Ralph King Anderson, Jr. presiding. On June 2, 2009, the ALC issued its *Final Order and Decision* holding that "DHEC's decision to grant the Modified Permit is vacated and this case is remanded for review in accordance with the ZLDR." **(Tr., P. 180, lines 16-19)**. "ZLDR" is the acronym for County's Zoning Land Development Regulations.

Pursuant to the ALC's Order, Appellant DHEC reviewed the Modified Permit application in accordance with the ZLDR, which had been revised and amended by County on December 16, 2010. Upon Appellant's review of the amended ZLDR, it determined that the Modified Permit was consistent with the County's local zoning and land use ordinances. After review, Appellant re-issued the Modified Permit ("Second Modified Permit") on September 1, 2011.

On September 12, 2011, Respondent Grand Bees filed a Request for Review by the DHEC Board of the Second Modified Permit for a review of the issuance of the

Permit. Respondent was notified by Memorandum on October 13, 2011, that the Board declined to conduct a Final Review Conference. On November 2, 2011, Respondent requested a contested case hearing regarding Appellant DHEC's re-issuance of the Second Modified Permit.

This matter was assigned to the Honorable Shirley C. Robinson, ALC Judge, on November 7, 2011. On March 20, 2012, a hearing on the merits was held. One year later, on March 19, 2013, the Judge Robinson issued the *Final Order and Decision* ("*Decision*") in this matter, ordering "that DHEC'S decision on the Second Modified Permit (DHEC #101001-1201) is REVERSED and the Second Modified Permit is hereby VACATED." (***Final Order and Decision***, Page 19).

Both Appellants DHEC and Charleston County timely moved the Court for Reconsideration of the ALC's *Final Order and Decision ("Decision")*, but such Reconsideration was denied by formal Order on May 8, 2013.

FACTS

County's initial request for a modification to the Landfill's prior permit sought a five (5) acre expansion of the Class 2 Landfill within its three hundred and twelve (312) acre solid waste complex on Bees Ferry Road in Charleston, South Carolina. The expansion also sought to increase the Landfill's height to match the previously adjacent permitted Class 3 Landfill.

On September, 1, 2011, Appellant DHEC issued a Second Modified Permit for the Bees Ferry Landfill, Facility ID # 101001-1201, which is located at 1344 Bees Ferry Road in Charleston County, South Carolina. The initial permit was issued on October 17, 1997. The Second Modified Permit allowed an increase in the annual disposal limit

and the expansion of the footprint and height of the existing landfill. These modifications were approved pursuant to S.C. CODE ANN. REGS. § 61-107.19 (Supp. 2006).

STANDARD OF REVIEW

Appellate review of an ALC decision is governed by S.C. Code Ann. § 1-23-610, which states:

> (B) The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions or fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (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.

S.C. Code Ann. § 1-23-610(B) (Supp. 2012).

ARGUMENTS

I. THE ADMINISTRATIVE LAW COURT'S CONCLUSION OF LAW THAT DHEC'S FAILURE TO REVIEW ORDINANCE 180, SECTION 10-22, IS SIGNIFICANT, AND THAT THE SECTION IS AN APPLICABLE ORDINANCE, AND IS CLEARLY ERRONEOUS IN VIEW OF THE RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD.

The ALC's *Conclusions of Law* # 13 on page 13 of its *Decision* states that "DHEC's failure to review Section 10-22 is significant." This Conclusion is error of law and clearly erroneous in view of the reliable, probative, and substantial evidence on the

whole record. The Department's failure to review Section 10-22 is not significant for two reasons:

1) Since DHEC is required to approve issuance of permits that are consistent with applicable ordinances, DHEC achieved this by basing its consistency determination on the applicable, and more succinct, recent, and specific ordinance, the ZLDR, which encompassed any purported standards that could be ascertained from the less specific and inapplicable ordinance, Section 10-22 of Ordinance 180; and

2) Because Section 10-22 is vague, even if the ordinance was applicable, DHEC would have been unable to perform a succinct or meaningful review for the purpose of a consistency determination.

A. DHEC ensured that the Modified Permit issued to Charleston County was consistent with applicable ordinances.

1. <u>DHEC based its consistency determination upon the ZLDR, the more specific ordinance</u>.

Pursuant to S.C. Code Ann. § 44-96-290(F) (Rev. 2002), County Ordinance 180, Section 10-22 ("Section 10-22"), referenced in *Conclusions of Law* # 9 on page 12 of the *Decision,* is not an ***applicable*** local land use ordinance for a consistency determination. Because the ZLDR is a more specific ordinance regarding local zoning and land use requirements, Section 10-22 is inapplicable as an ordinance for determining whether the Landfill's proposed modification is consistent with local zoning and land use requirements. It is well-settled case law that "where two ordinance provisions deal with the same issue, one in a general and the other in a more specific and definite manner, the more specific prevails." <u>Mikell v. County of Charleston</u>, 386 S.C. 153, 687 S.E.2d 326,

330 (2009), *quoting* Capco of Summerville v. J.H. Gayle Constr. Co., Inc., 368 S.C. 137, 628 S.E.2d 38 (2006). It is well-settled case law that "if there be conflict between a **general** law and a special law on the same subject, the latter will **prevail**." South Carolina Elec. & Gas Co. v. South Carolina Public Service Authority, 215 S.C. 193, 54 S.E.2d 777 (1949), *quoting*, Truesdell v. Johnson, 144 S.C. 188, 142 S.E. 343 (1928); State ex rel. South Carolina Tax Commission v. Brown, 154 S.C. 55, 151 S.E.2d 218 (1930); Spartanburg County v. Pace, 204 S.C. 322, 29 S.E.2d 333 (1944). In this case, Section 10-22 is the general law because it fails to provide any criteria upon which DHEC can base a consistency determination, and the ZLDR is the "special law" because it is the more specific and detailed law, which provides specific criteria upon which DHEC can and did make a consistency determination.

Mr. Kent Coleman, DHEC's Director of Solid Waste and Mining, testified that the wording of Section 10-22 was "very general . . . not specific." **(Tr., P. 196, lines 9-10)**. He further testified that instead of reviewing Section 10-22, he would have looked "to how the County has implemented conformity through their zoning and other land use planning documents." **(Tr., P. 196, lines 14-17)**. Mr. Coleman also testified that local governments had made decisions regarding what is conforming, and that Charleston County had "a very detailed zoning ordinance that talks about all the various uses, how those uses are to be applied." **(Tr., P. 200, 14-16)**. He also testified that by reviewing the ZLDR and making a decision, "DHEC . . . determined that the permit that we issued is consistent with local zoning . . . and this generalized language is not applicable . . . in the sense that it doesn't change anything and doesn't specify anything about . . . the requirements that the local zoning does not already cover." (*Referencing Section 10-22*

of Ordinance 180). **(Tr., P. 200, lines 17-25)**. Mr. Coleman also answered an emphatic "yes" when he was asked whether DHEC reviewed the applicable zoning ordinances regarding the Landfill and made a consistency determination based upon the review of the applicable zoning ordinances. **(Tr., P. 201, lines 1-6)**.

Mr. Coleman's testimony is also the best evidence on the record explaining why Section 10-22 is inapplicable for consistency determination purposes. Also, after review of Mr. Coleman's testimony and of the ZLDR, which was enacted in 2001 – long after Section 10-22 - it is clear that the ZLDR encompassed any purported standards and/or criteria that Section 10-22 aimed to address. Therefore, *Conclusions of Law* # 9 on page 12 of the *Decision* is error of law and clearly erroneous, in view of the reliable, probative, and substantial evidence on the whole record.

2. <u>Vagueness made Section 10-22 inapplicable, but even if applicable, it is too vague for the Department to perform a meaningful review for the purpose of rendering a consistency determination; and the Supreme Court prefers the specific, when available, to the general</u>.

a. Section 10-22 provides no criteria upon which to base a consistency determination.

Section 10-22, which was adopted in 1974 **(Tr., P. 31, line 11)**, shows two short phrases that both include the word "conform" in (d.) and (e.) of the Section. Specifically, the Section states that "the disposal site shall: d. conform with the surrounding environment; and e. conform with future development of the area." A reading of Section 10-22 and the testimony of Mr. Kent Coleman, evidences that the general wording of the Section contains no definition of "conform"; and therefore, no criteria by which to make a judgment regarding whether a disposal site meets Section 10-22's requirements. Mr. Coleman also testified that in determining conformity with future uses, DHEC reviewed

the Charleston County ("County") ZLDR to ensure that the Landfill was properly zoned. **(Tr., P. 214, lines 10-12).**

The situation that Mr. Coleman has described is analogous to the situation in the case of S.C. Coastal Conservation League v. South Carolina Dept. of Health and Environmental Control, 363 S.C. 67, 610 S.E.2d 482, (2005). In this instance, the threshold issue was whether an island is "small" for the purposes of determining whether the Transportation Regulation or the Small Islands Regulation is the governing project-specific regulation. *Id.*, at 486. However, there was no statute or regulation defining "small island." The circuit court held that the ALJ and Panel's test for determining whether an island is small was invalid because it was not promulgated by regulation. The Supreme Court agreed and held that "'small' is a term of subjective relativity, and the regulations provide no benchmark for comparative size . . . The problem is that there is nothing to interpret or apply." *Id.* at 486. The Supreme Court further held "that there is no promulgated test means that the Small Islands Regulation fails for vagueness." *Id.* at 486.

The holding in S.C. Coastal Conservation League is instructive in this case. Because there is no definition of "conform" in Section 10-22, the term is one of subjective relativity, and as Mr. Coleman essentially testified, the word provides no "benchmark" for comparison and "nothing to interpret or apply." Therefore, Section 10-22 cannot be applied because of its vagueness and thus is inapplicable for use in a consistency determination for the proposed Landfill.

b. The South Carolina Supreme Court discourages the use of broad, general statements as the basis for a consistency determination.

Section 10-22's vague language is a prime example of one of the issues addressed in the holding of Southeast Resource Recovery, Inc. vs. South Carolina Department of Health and Environmental Control, 358 S.C. 402, 595 S.E.2d 488 (2004). In that case, the Supreme Court held that the Circuit Court erred by relying on Section 10.2 of the Newberry County Solid Waste Management Plan. Section 10.2 was a section in the Plan that discussed goals associated with waste disposal in Newberry County. The Court stated that "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." *Id.* at 472.

Analogous to SRRI, if DHEC had reviewed Section 10-22 and made its consistency determination based upon the Section, it would have done exactly what the Supreme Court has deemed improper, which is base a consistency determination on a vague, rather than a more specific local ordinance.

B. If this Court finds that Section 10-22 of Ordinance 180 is an applicable ordinance for the purpose of a consistency determination, then the Department fulfilled its responsibility by reviewing the more specific ordinance, the ZLDR, and finding that the proposed Landfill does "conform" with the surrounding environment and with future development of the area.

The Landfill's co-existence for several years with the overall Planned Unit Development ("PUD") and the residents in the developed communities in close proximity to the Landfill, and vice-versa, are evidence that the Landfill's Second Modified Permit

conforms to the surrounding environment and to the future development of the area as prescribed by the ZLDR.

Respondent Grand Bees stated that the Grand Bees development of Bees Landing, which is the tract of land that Grand Bees owns adjacent to the Bees Ferry Landfill, has been zoned Planned Unit Development ("PUD") residential since 1993. **(Tr., P. 8, lines 18-25)**. The zoning category for the Landfill is industrial. **(Tr., P. 11, lines 22-23)**. The Landfill received its original permit in 1997. **(*Decision*, P. 4, *Finding of Facts* # 15)**. The forgoing evidence on the record establishes that the Landfill has co-existed with the PUD property designation, and with residents in the surrounding residential developments in the Bees Ferry Community, such as Bees Landing (i.e. Grand Oaks), and vice-versa, for approximately twenty (20) years. **(Tr., P. 54, lines 19-25; P. 55, lines 1-10)**. Other developed communities that are in close proximity to the Landfill are Hunt Club, Carolina Bay, and Fulton's Landing. **(Tr., P. 59, lines 14-25; Tr., P. 60, line 1, and lines 11-12)**.

Mr. Kent Coleman testified that "DHEC doesn't make decisions for local governments on what conforms and what does not conform. Local governments do that through zoning and . . . they have made decisions of what types of uses can be next to other types of land uses . . . through their zoning . . . on . . . what is conforming, what conforms." **(Tr., P. 200, lines 2-12)**. Mr. Coleman also testified that "Charleston County . . . have a very detailed zoning ordinance that talks about all the various uses, how those uses are to be applied. So by reviewing that – that document and making a decision, DHEC has determined that the permit that we issued is consistent with local zoning." **(Tr., P. 200, lines 13-20)**. Mr. Coleman further testified that the generalized

language in Section 10-22 was not applicable to a consistency determination and did not change or specify anything about the requirements that the local zoning did not already cover. **(Tr., P. 200, lines 20-25)**. Therefore, based on Mr. Coleman's testimony, conformity with the surrounding environment and with future development of the area is evidenced by the fact that the County has designated the Landfill area as industrial and has designated the areas adjacent to the Landfill as "PUD", and the area designations have co-existed for a long period of time. Agreement with the co-existence of the two designations is further evidenced by the fact that Grand Bees purchased property in close proximity to the Landfill with the full realization that the Landfill was there and would be in operation for many years to come. All these things, taken together, is evidence that Grand Bees' agrees that the Landfill and Grand Bees' future development of the property can co-exist.

Section 10-22's vagueness; the lack of criteria by which to analyze "conformity"; Mr. Coleman's testimony regarding the Department's review of the Landfill's proposed modification pertaining to conformity with the surrounding area and future uses; the fact that the Landfill and the surrounding residents have co-existed with one another for several years; and, that developers have continued to purchase property adjacent to the Landfill, make it clear that pursuant to the statutory requirements, DHEC properly determined consistency with local zoning, land use, and other applicable ordinances.

Therefore, the ALC's Conclusions of Law that DHEC's failure to review Section 10-22 is significant, and that the Section is an applicable ordinance, is error of law and clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. However, if this Court finds that Section 10-22 is applicable, DHEC's

consistency review of the proposed Landfill against the ZLDR encompassed a consistency review of Section 10-22; therefore, DHEC's final consistency determination is proper.

II. THE ADMINISTRATIVE LAW COURT ERRED AS A MATTER OF LAW BY CONCLUDING THAT DHEC IS REQUIRED TO CONSULT *ALL* APPLICABLE LAND USE ORDINANCES PURSUANT TO S.C. CODE ANN § 44-96-290(F) (REV. 2002).

The ALC's *Conclusions of Law* # 12, on page 12 of its *Decision*, is in violation of statutory provisions, in excess of statutory authority, and is affected by error of law. The Conclusion stated that "DHEC was required to consult *all* applicable land use ordinances in the Code . . .." (*Emphasis in original quote*). However, S.C. Code Ann. § 44-96-290(F) (Rev. 2002), the statute governing this matter, states that "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* . . .." (*Emphasis added*). There is no requirement in the statute for DHEC to "consult *all* applicable land use ordinances . . .." (*Emphasis added*). (***Decision*, P. 12, *Conclusions of Law* # 12**). The statute's requirement is that DHEC approve the issuance of permits that are consistent with local zoning, land use, and other "applicable" local ordinances. DHEC fulfilled its requirements.

The ALC's Conclusion that DHEC was required to consult *all* applicable land use ordinances is an incorrect understanding of the statute, and thus creates an error of law. Nowhere in the statute does it state that *all* land use ordinances must be consulted. DHEC ensured that the Modified Permit issued to Charleston County for the Bees Ferry Landfill was consistent with local zoning, land use, and other applicable local ordinances.

It is well-settled case law that "the Court should give words their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." Sloan v. S.C. Bd. Of Physical Therapy Exam'rs, 370 S.C. 452, 459, 636 S.E.2d 598, 607 (2006). Here, the Court has resorted to a forced construction of the statute in order to expand DHEC's statutory requirements. Even if DHEC did not consult local land use ordinance, Section 10-22, prior to the issuance of its consistency determination, the requirement of the statute was complied with because the end result is that the determination of consistency with the ZLDR encompassed a consistency determination with Section 10-22. Therefore, if the Court finds that DHEC's consistency determination with local zoning, land use, and other applicable ordinances was proper, it will have also found that the proposed landfill is consistent with Section 10-22.

The ALC's interpretation of S.C. Code Ann. § 44-96-290(F) is error of law; thus, the ALC's *Decision* should be reversed and DHEC's issuance of the Second Modified Permit should be upheld.

III. THE ADMINISTRATIVE LAW COURT ERRED AS A MATTER OF LAW BY CONCLUDING THAT THE SECOND PERMIT MODIFICATION IS NOT COMPLIANT WITH LOCAL ZONING AND LAND USE REGULATIONS AS IT RELATES TO THE COUNTY'S VEGETATIVE BUFFERING REQUIREMENTS.

The *Decision's Conclusions of Law* # 25 on page 15, stating that "the Second Permit Modification is not compliant with local zoning and land use regulations, as it relates to the county's vegetative buffering regulations . . .," is affected by error of law and is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, because determination of compliance with Article 9.5 of the ZLDR does not rest with DHEC. Article 9.5 of the ZLDR places the decision of whether County was

required to adhere to "the standards of this Article . . .," squarely upon the County's Planning Director, not DHEC. This is supported by Grand Bees' own witness, Mr. John Stewart Lester, a licensed professional engineer and registered land surveyor employed by HLA, a land planning civil engineering, landscape architecture firm. **(Tr., P. 80, lines 12-20)**. "Mr. Lester testified that in practice, landscaping plans are submitted and required by **local government** to prove compliance with buffer regulations as a precondition to land development." (*Emphasis added*). **(*Decision*, Page 9, Finding of Facts # 44)**. There is no evidence on the record stating that an applicant is required to submit landscaping plans to DHEC or that DHEC is required to request plans. **(*Coleman's Testimony*, Tr., Pp. 201-205)**. In fact, DHEC is not required by statute or regulation to request landscaping plans from applicants, nor is it the Department's practice to request such plans, particularly in the County's situation where the vegetative buffer is determined, pursuant to ordinance, by the County's Planning Director.

Section § 9.5.1 of the ZLDR states that: "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 . . .." (ZLDR, P. 9-23). This passage makes it clear that standards, if any, requiring compliance with the Article, is within the purview and authority of the County's Planning Director. Therefore, it would be the Planning Director's responsibility to determine whether County's proposed modification to the Landfill affects those portions of the "subject parcel," which will require the implementation of landscaping, screenings, or buffers.

DHEC's consistency review involves: 1) review of the application including maps, etc., to make sure there is nothing impeding the implementation of the referenced landscaping, screenings, and buffers, if required by the Planning Director or a person to whom this authority is given (**Tr., P. 204, lines 1-10 and 20-25; P. 205, lines 1-4**); and 2) pursuant to S.C. Code Ann. § 44-96-290(F) (Rev. 2002), a consistency determination of "not consistent" is issued if it is determined from the Department's review that the implementation of the landscaping, screenings, and buffers would be impeded. During DHEC's review of County's proposed Landfill application, there was nothing that suggested that landscaping, screenings, or buffers could not be implemented if and when the County's Planning Director made the determination that such implementation was required. (**Tr., P. 224, lines 1-8 and lines 18-24**). Based on Mr. Lester's and Mr. Coleman's testimony, and upon a cogent reading of the ZLDR's Section 9.5.1, it is clear that it is the County's responsibility, not DHEC's, to determine whether vegetative buffers are required by the Landfill. DHEC did not err in granting the Second Permit Modification to the Landfill.

Therefore, pursuant to the foregoing, *Conclusions of Law* # 25 on page 15 of the *Decision* is affected by error of law, and is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

IV. THE ADMINISTRATIVE LAW COURT ERRED AS A MATTER OF LAW BY CONCLUDING THAT THERE IS NO EVIDENCE IN THE RECORD THAT DHEC PERFORMED A REGULATORY COMPLIANCE DETERMINATION WITH RESPECT TO ITS OWN ONE THOUSAND FOOT SETBACK REQUIREMENT.

The ALC's *Conclusions of Law* # 29 (on page 16), # 36 (on page 17) , #'s 37 and # 38 (both on page 18), in the *Decision,* are affected by error of law, and are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

A. The record establishes that DHEC performed a proper consistency determination regarding the setback requirement, pursuant to 8 S.C. Code Ann. Regs. 61-107.19, Part IV, (B)(1)(a).

Conclusions of Law # 29 erroneously states that "there is no evidence in the record that DHEC ever performed a regulatory compliance determination with respect to its own one thousand foot setback requirement . . . the permit file of DHEC the parties stipulated into evidence does not disclose a written determination of compliance with this regulation." (***Decision***, P. 16, *Conclusions of Law* # 29). DHEC's own setback requirement states that "the waste disposal boundary of the landfill shall not be located within one thousand feet of any residence, school, day-care center, hospital or publicly owned recreational park area." 8 S.C. Code Ann. Regs. 61-107.19, Part IV, (B)(1)(a). The ALC's holding regarding this matter is incorrect, as the issuance of the Second Modified Permit is evidence that DHEC determined that the Landfill's proposed modification was consistent with the one thousand foot setback requirement contained in R.61-107.19, Part IV(B)(1)(a). Moreover, Kent Coleman, DHEC Director of Solid Waste and Mining, testified that the DHEC staff did site visits to ensure the agency had the most up-to-date information to use in its consistency determination and that those visits did not reveal anything "new or different" from previous visits to the site as it

related to the permit application or the permit decision. **(Tr., Page 194, lines 2-23, and Page 219, lines 2-10)**. There was no evidence in the record that any "residences" existed adjacent to the Landfill at the time the Second Permit Modification was issued on September 1, 2011. Therefore, if no "residences" (or "school, day-care center, hospital or publicly owned recreational park"), pursuant to 8 S.C. Code Ann. Regs. 61-107.19, Part IV, (B)(1)(a), existed adjacent to the Landfill, the only determination that could be rendered by DHEC is that County's proposed Landfill modification was consistent with the referenced Regulation. Furthermore, there is no requirement that DHEC issue a written determination of compliance with each and every statutory or regulatory provision that it uses to evaluate whether a proposed modification is consistent.

There are several reasons why the ALC should have found that DHEC satisfactorily determined that the Landfill's proposed modification was consistent with its own "setback" regulation: 1) during the hearing, Kent Coleman attested to the proposed modification's consistency with the Regulation and testified staff had made site visits and that there were no residences or other factors requiring a buffer. **(Tr., P. 219, lines 8-10)**; 2) the evidence on the record showing that there were no "residences" within one thousand feet of the boundary of the landfill **(Tr., P. 25, lines 20-25; P. 26, lines 1-5; P. 63, lines 20-25; P. 191, lines 2-7; P. 237, line 25; and P. 238, lines 1-5)**; 3) the fact that Respondent Grand Bees stipulated to the fact that there were only "proposed" and "planned" residences to be built onto the Grand Bees property **(Tr., P. 108, lines 14-16)**; and 4) the fact that Grand Bees admitted that "residences do not exist at this time." **(Tr., P. 118, lines 7-8; *Decision*, P. 10, *Findings of Fact* # 51).** The foregoing reasons are ample evidence to find that the proposed Landfill is consistent with the referenced

Regulation and to conclude that DHEC properly considered and determined that the proposed Landfill modification is consistent with the Regulation.

B. The ALC's interpretation of the meaning of "residence" is incorrect.

The ALC states the following in its *Decision* in *Conclusions of Law* # 36 on pages 17 and 18:

> " . . . 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."

The way the ALC has interpreted the definition of residence, which is to include the word "planned" as a part of its definition, is not reasonable in light of the fact that the setback of one thousand feet, as required by the Regulation, would serve no purpose if there were no people occupying or utilizing a "residence, school, day-care center, church, hospital, or publically owned recreational park area" that is within 1000 feet of the landfill. Since the word "planned" is not a part of the dictionary definition of "residence," it is inappropriate to insert "planned" into the definition in an attempt to "harmonize" the definition with R. 61-107.19, Part IV(B)(I). A "planned" residence is no residence at all because unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. Mid–State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690, 692 (1996). When a statute's terms are clear and unambiguous on their face, there is no room

for statutory construction and a court must apply the statute according to its literal meaning. *Id.* "When statutory language is unambiguous, this Court may not impose a contrary meaning." Bayle v. South Carolina Dept. of Transp., 344 S.C. 115, 542 S.E.2d 736, 739 (Ct.App.2001). Here, the common meaning of *residence*, as found in Webster's Third New International Dictionary 1931 (1966) is "the act or fact of abiding or dwelling in a place for some time; an act of making one's home in a place; the place where one actually lives or has his home as distinguished from his technical domicile; the place where something is permanently established; a building used as a home." Therefore, to expand "residence" by including "planned" goes against case law that states that "words used in a statute must be given their ordinary meaning." Mid–State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690, 692 (1996).

The ALC further states that DHEC and County's position "conflicts with the legislative intent and produces an absurd result." (***Decision***, P. 18, *Conclusions of Law* # 37). Contrarily, by applying the plain language of the statute, the legislative intent is that there is a one thousand foot setback established from a "residence," not from a "planned" or "proposed" residence. It is improbable that the Legislature intended for DHEC to take into consideration planned residential lots, because the obvious intent of the regulation is to make sure that there is ample distance between where people actually reside or gather and the waste disposal boundary of the landfill. Construing the statute to include "planned" residences is an unauthorized reading of the statute and leads to an unreasonable and absurd result because one cannot institute a setback from a residence that is non-existent.

Moreover, if the Court's expanded definition were to be accepted, the Landfill

could be prohibited from expanding indefinitely because as long as the Grand Bees property is zoned "residential," it can continuously claim that there are "planned" residences to be built at the site. A residence that is "likely to ultimately be constructed and occupied" and "likely" to be situated within one thousand feet of a landfill, is the opposite of what the Regulation prescribes. The outcome of employing the ALC's interpretation would be to unjustly deny a Landfill the opportunity to expand because of something that may never happen and would be unreasonable. It would be the result of a forced and misconstrued construction of the referenced Regulation. Because of the absurd result that this type of action would create, this is why only a residence that is occupied or occupiable (*see* **Tr., P. 191, lines 2-7**), meets the definition of "residence" and is the only definition that should be used to determine if the Landfill's proposed modification meets the regulations' setback requirement. Therefore, the ALC's ruling that a "planned" residence must be considered is error of law, and is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

C. DHEC's staff interpretation of the meaning of "residence" is entitled to deference.

The ALC committed error of law when it rejected DHEC's and the County's argument that the Court must afford its staff's interpretation of "residence" deference. The ALC's position is that "only the interpretation of DHEC's Board is entitled to deference by this Court." (***Decision*, P. 18, *Conclusions of Law* # 38**).

The Supreme Court gave deference to Jennifer Haynes, a DHEC project manager, when she interpreted the "vicinity of the project," when there was no definition for "vicinity" in the applicable DHEC regulation. The Court stated that Ms. Haynes "considered the vicinity [to include] more than just the 727 feet of stream and noted that

although she did not have an exact area, it included many miles." Kim Murphy v. South Carolina Department of Health and Environmental Control and District 5 of Lexington and Richland Counties, 396 S.C. 633, 723 S.E.2d 191, 195 (2012). Further, the Court stated that "because this interpretation is both reasonable and consistent with the plain language of the regulation, we see no reason to deviate from DHEC's construction and application." *Id.* at 195. Here, analogous to the foregoing, the Department made an interpretation of the language in R. 61-107.19, Part IV (B)(I) of "residence" that was both reasonable and consistent, and there being no evidence to the contrary, the ALC committed error of law by failing to give deference to the DHEC staff's interpretation of "residence."

Since the Murphy case, another Supreme Court decision has been issued that further validates the fact that DHEC is entitled to deference. Kiawah Development Partners, II v. South Carolina Department of Health and Environmental Control, 2013 WL 696729 at *2, states that "courts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ." The Court further stated that:

> DHEC's decision to refuse to conduct a Final Review Conference, pursuant to section 44-1-60(F) of the South Carolina Code, is analogous to the Panel decision in Coastal to affirm the ALC's decision without analysis. In both situations, regardless of the mechanism, **the staff decision became the agency decision and was entitled to deference**. Thus, the appropriate question is not whether DHEC's decision was entitled to deference, but instead whether there was a compelling reason for the ALJ not to defer to this decision." (*Emphasis added*).

(Kiawah Development Partners at *3).[2]

[2] A second rehearing of KDP is pending.

Here, analogous to the opinion in Kiawah, the *Request for Review* by Grand Bees was denied by the Board on October 13, 2011. Thus, once Grand Bees' *Request for Review* was denied, DHEC's Staff decision became the Agency's final decision and was entitled to deference. Further, there are no significant or compelling reasons why DHEC's interpretation of the Regulation should not be afforded deference, and no such reasons are stated in the *Decision*. Therefore, the ALC committed error of law in rejecting DHEC's argument that it should be afforded deference and in not affording the Department deference, as required by case law.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Administrative Law Court.

Respectfully submitted,

July 29, 2013

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