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.

REPLY BRIEF OF APPELLANT COUNTY OF CHARLESTON

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INTRODUCTION

Respondent Grand Bees Development, LLC owns a 310-acre tract of land located in the City of Charleston adjacent to Appellant County of Charleston's Bees Ferry Landfill. Grand Bees purchased the property in 2004, twenty-seven years after the Bees Ferry Landfill was established, with an eye for developing residential lots sometime in the future. Approximately 110-130 lots would eventually sit within 150 feet of the unmodified construction and demolition cell based on the conceptual plan for the development. Grand Bees believes continued modifications and use of the Bees Ferry Landfill will adversely affect its ability to market and sell lots in the future. Grand Bees sought and obtained zoning approval to build residential units adjacent to the Landfill, and now Grand Bees claims there are local ordinances that make the County's Second Permit Modification inconsistent with what Grand Bees sought approval to do.

ARGUMENT

Appellant County of Charleston submits this Reply to the Initial Brief of Respondent (In Response to Appellant County of Charleston's Initial Brief) pursuant to Rule 208(a)(3). In that regard, Appellant would respectfully show as follows:

I. RESPONDENT MISCHARACTERIZES THE COUNTY'S BASIS FOR CHALLENGING THE ALC'S ORDER BY SUGGESTING THAT IT IS BASED ON A "SUBSTANTIAL EVIDENCE IN THE RECORD" TEST, RATHER THAN THE COUNTY'S ACTUAL POSITION THAT THE ALC'S ORDER IS BASED ON AN ERROR OF LAW AND IS ARBITRARY AND CAPRICIOUS.

A. Charleston County Solid Waste Disposal Ordinance Section 10-22.

The County does not argue that the Charleston County Solid Waste Disposal Ordinance, Section 10-22 (hereinafter "Charleston County Code of Ordinances Section 10-

22") is not an applicable local land use ordinance under S.C. Code Ann. § 44-96-290(F). Instead, the County argues that the ALC failed to make a finding that the Charleston County Code Ordinances, Section 10-22's requirements, i.e., "(d) conform with the surrounding environment; and (e) Conform with future development of the area," are inconsistent with the Second Permit Modification; and therefore, the permit application must be disapproved pursuant to S.C. Code Ann. § 44-96-290(F). Since the ALC did not make a finding of inconsistency pursuant to the Solid Waste Policy and Management Act regarding Charleston County Code of Ordinances, Section 10-22, the ALC erred as a matter of law when it reversed DHEC's Second Permit Modification approval.

The premise of Respondent's "failure to review Charleston County Code of Ordinances, Section 10-22" argument is based on a misread of S.C. Code Ann. § 44-96-290(F). Respondent claims that the "statute requires DHEC to perform a consistency review with all local laws . . . ." (Resp't Br. 13.) To the contrary, S.C. Code Ann. § 44-96-290(F) reads, in part:

> [n]o 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.

Nowhere does the statute require DHEC to review all local laws before it can make a consistency determination, and much less, it offers no substantive criteria for DHEC to consider. "The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature." Eagle Container Co. v. County of Newberry, 366 S.C. 611, 621, 622 S.E.2d 733, 738 (Ct. App. 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. at 621-

22, 738 (citations omitted). Here, the legislature does not utilize the word "all" to modify "local zoning, land use, and other applicable local ordinances." It merely requires that DHEC's issuance of a permit to expand an existing solid waste management facility be consistent. Consistent does not mean each and every ordinance must be reviewed. The fact that DHEC did not review Charleston County Code of Ordinances Section 10-22 prior to issuing the County's permit does not make the Second Permit Modification inconsistent on its face.

Respondent admits that the ALC did not find the Second Permit Modification was inconsistent with Charleston County Code of Ordinances Section 10-22 per se, but rather the ALC found Charleston County Code of Ordinances Section 10-22 is an applicable ordinance for purposes of consistency review and that DHEC failed to identify and review it. (Resp't Br. 16.) Respondent agrees with Appellant that the ALC only found Charleston County Code of Ordinances Section 10-22 was an applicable ordinance and did not determine whether the expansion of the landfill was consistent with the ordinance.

Again, the standard outlined in S.C. Code Ann. § 44-96-290(F) is one of consistency and Respondent freely admits that the ALC did not find the County's Second Permit Modification inconsistent. Further, Respondent again admits that the ALC correctly concluded that it is apparent in this instance that DHEC's consistency determination is materially incomplete. (Resp't Br. 23.) The standard as outlined in the text of the statutes is clear; it is whether or not the permit is consistent with local ordinances. A claim that something is "materially incomplete" is not the same as the standard for determining consistency. Since the ALC made no finding of inconsistency, then it cannot invalidate the permit.

B. Consistency Determination.

Contrary to Respondent's argument in section B of its brief on page 17, the County does challenge the ALC's finding that DHEC never considered Charleston County Code of Ordinances Section 10-22 in its consistency review. The life line of Respondent's "failure to review argument" is predicated on the fact that it believes the Second Permit Modification cannot be consistent with Charleston County Code of Ordinances Section 10-22, because Respondent believes the construction and demolition debris ("C&D") height modification makes its residential lots adjacent to the landfill less marketable. However, nowhere in Charleston County Code of Ordinances Section 10-22, the S.C. Solid Waste Policy and Management Act ("Act"), the S.C. Code of Regulations ("Regulations"), or the Charleston County's Zoning and Land Use Regulations Ordinance ("ZLDR") does it state that landfills are prohibited to be located adjacent to residential developments because the development may be less valuable. DHEC is mandated by State law to consider the environmental impact of a new landfill or landfill expansion permit on adjacent communities from a health, safety, and welfare prospective, and DHEC did so.

Section 44-96-20(B) of the Act states:

> It 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.

If DHEC or the ALC believed that the Second Permit Modification was inconsistent with these concepts or principals, either agency would have said so. Charleston County Code

of Ordinances Section 10-22, embodies these concepts and offers no new standard to measure consistency. The standard to determine consistency is a results-based standard, i.e., is it consistent? It is not a procedural-based standard, i.e., did DHEC review the ordinance?

II. RESPONDENT MISUNDERSTANDS THE APPLICABILITY OF ARTICLE 9.5.

A. Article 9.5.

Respondent's reliance on the ALC's finding that the Second Permit Modification was inconsistent with Article 9.5 and violated S.C. Code Ann. 44-96-290(F) is based on an error of law and is arbitrary and capricious because Charleston County Zoning Ordinance Section 9.5 is not applicable. Section 9.5.1 of the ZLDR states in pertinent 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, provided that when modifications or additions are proposed that would increase the number of parking spaces, the area of vehicular use areas or gross floor area of buildings by more than 25 percent (above existing), then the entire parcel shall be brought into compliance with all applicable standards of this Article.

Respondent claims that because the modification is to a non-residential site, the provisions of Article 9.5 are automatically triggered and that the landscaping, screening, and buffering requirements must be implemented. Article 9.5 clearly defines three prerequisites for triggering its application: (1) modifications being made to an existing non-residential building or site; (2) applies to those portions of the subject parcel that are directly affected by the proposed improvements; and (3) as determined by the Planning Director. The County's Second Permit Modification is a 5.5 acre lateral expansion on the interior of the County's property and a vertical increase to 168 feet. The Second Permit Modification

does not encroach into the existing 100 foot buffer that separates the C&D cell from Respondent's property line.

It is undisputed that a modification is being made to an existing non-residential site. However, Respondent and the ALC completely ignore the remaining prerequisites to determine applicability of the Article by acknowledging that the first element is met and bypassing the second and third elements. (Resp't Br. 24; Final Order and Decision 15, ¶ 22.) According to the Respondent's application of Article 9.5, every property owner in Charleston County would be required to place a vegetative buffer on his property every time the property is modified, regardless of the complexity, size, or location of the change, or be in violation of the County's Zoning Ordinance. Moreover, Respondent's interpretation of Article 9.5 would also mandate that the County place the 100 foot vegetative buffer completely around the C&D cell even on the interior of the property to separate the C&D cell from the other uses on the landfill like the composting facility or the municipal solid waste disposal cells. Clearly, Respondent's application of Article 9.5 would lead to an absurd result.

B. The Entire Mound.

Respondent claims that the ALC properly applied Article 9.5 to this case because "there is substantial evidence in the record to support the ALC's finding that Article 9.5 is triggered and that the current one hundred (100) foot buffer between the Grand Bees Property and the Class II Landfill is where the specific vegetative buffer requirement contained in Article 9.5 would have to be implemented." (Resp't Br. 27.) Respondent cites to testimony in the record to support this position. However, Respondent's testimony

cannot cure the ALC's error of law in applying Article 9.5 to the entire C&D cell. Article 9.5 has limited application. Article 9.5 provides that the standards of the Article:

> shall apply to **those portions of the subject parcel that are directly affected by the proposed improvements**, as determined by the Planning Director, provided that when modifications or additions are proposed that would increase the number of parking spaces, the area of vehicular use areas or gross floor area of buildings by more than 25 percent (above existing), **then the entire parcel shall be brought into compliance with all applicable standards of this Article**.

Respondent wrongly concludes that because the height expansion applies to the entire C&D cell that the entire cell is directly affected by the proposed improvements, thus the buffer requirements of Article 9.5 apply to the entire Bees Ferry Landfill perimeter. The County's ZLDR does not require vegetative buffers as a matter of policy to any change or modification made on a parcel. Buffers are limited to the areas directly affected by the proposed improvements and only if determined by the Planning Director. Therefore, it was arbitrary and capricious for the ALC to determine that a 100 foot vegetative buffer is needed for the entire Bees Ferry landfill parcel, the C&D cell, or between the Class II landfill and the Respondent's property.

C. Planning Director has discretion.

Respondent admits that Article 9.5, if applicable, is a discretionary requirement as determined by the Charleston County Planning Director. Nevertheless, Respondent claims that DHEC violated its non-delegable responsibility under Southeast Resource Recovery by not challenging the Planning Director's discretionary determination whether to apply the landscaping, screening and buffer standards of Article 9.5 to the expansion of the C&D cell of the landfill. Southeast Resource Recovery, Inc. v. S.C. Dep't of Health & Envtl. Control,

358 S.C. 402, 595 S.E.2d 468 (2004) Respondent contends that DHEC failed to address Article 9.5, and therefore, failed to make a consistency determination regarding it. The Planning Director nor DHEC can be in violation of an act that was discretionary to perform or do.

III. RESPONDENT MISCONSTRUES THE LEGISLATIVE INTENT OF THE S.C. REGUALTIONS IN DEFINING THE TERM "RESIDENCE" AND UNREASONABLY IGNORES DHEC STAFF'S INTERPRETATION OF "RESIDENCE."

A. The term "residence."

Contrary to Respondent's third argument on page 29, S.C. Regulation 61.107.19, Part IV(B)(1)(a) does not impose a mandatory setback for solid waste facilities from adjoining properties. Again, Respondent fails to cite the relevant language of the Regulation. S.C Regulation 61-107.19, Part IV(B)(1) titled Location Restrictions provides:

> Buffers. **Unless otherwise approved by the Department**, the site for a new landfill or expansion of an existing landfill shall meet the following standards:
>
> a. 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 of an existing landfill meets this requirement prior to publication of the Notice of Intent to File a Permit Application pursuant to Part I. Section D.1 of this Regulation.

The prefatory language of the Regulation is not mandatory. Instead, it provides that "unless otherwise approved by the Department" the site shall meet the standards. The Regulation provides unfettered discretion for DHEC to decide whether to require the landfill or expansion of the landfill to be located within 1,000 feet of any residence, school, day-care, etc. Respondent completely disregards the plain meaning of the Regulation.

The parties stipulated at trial that no residences exist within 1,000 feet of the C&D

cell's boundary. Notwithstanding this fact, Respondent now attempts to bootstrap its arguments on the ALC's erroneous ruling and is incorrect for the following reasons.

First, Respondent mistakenly states that the ALC's interpretation of "residence" is proper because it confirms with settled principles of statutory construction and honors the purpose of the solid waste regulations. (Resp't Br. 29.) Respondent attempts to create its own rule for statutory construction and states that because "residence" is defined in Regulation 61-107.19, Part IV(B)(1)(a) but not in Regulation 61-107.18(B)(29), then there is clear legislative intent **not** to mirror the definition of "residence." In support of this proposition, Respondent cites Hainer v. American Med. Int'l Inc., 328 S.C. 128, 492 S.E.2d 103 (1997) (if legislature had intended a result in a statute, it would have said so). The plain reading of the parenthetical applies more appropriately to the County's position that the regulations would have stated a definition contrary to the one in Regulation 61-107.19 had it intended that specific result in the regulation. In fact, the preceding sentence in the cited case above captures the County's argument: "[One] cannot construe a statute without regard to its plain and ordinary meaning, and may not resort to subtle or forced construction in an attempt to limit or **expand** a statute's scope." Id. (emphasis added). Here, Respondent clearly attempts to expand the scope of the regulation by including the words "permitted" and "planned." The word "planned" is nebulous and places no definite timeframe for when the building or structure will actually be constructed. To read these words into a definition would seem to allow any testimony regarding a "planned" residence to automatically negate a permit approval in this context and as the ALC has incorrectly done here.

Respondent also contends that the County's interpretation of the term will produce absurd results. Respondent reaches this conclusion by rewriting and mischaracterizing the County's argument in a way that would produce absurd results. However, the County simply believes that the definition as defined in the context of minimum standards for the off-site treatment of contaminated soil, which is a part of the Solid Waste Management Regulations, also applies to the permitting of a landfill. Even more fundamentally, the County's definition also accords with the plain meaning of the definition – a building used as a home. This definition, however, directly contravenes the definition the ALC found, which includes a "planned or proposed" residence. It further contravenes the definition of the Respondent's version of the County's definition – "only completed and final-permitted dwellings." The County's plain reading of the definition is broader than that.

Respondent narrowly envisions a race between a landfill owner/operator and its neighbors to see who can obtain permits first; this is an extreme exaggeration. To demonstrate, the County has operated this landfill since 1977, and the County sought this particular permit in July 2007. Respondent purchased the adjacent property in November 2004. This matter has been the subject of litigation since 2009, and as late as 2012, testimony shows that the 130 proposed or planned residences that Respondent contends are within 1,000 feet of the landfill have yet to be built – approximately 8 years after the Respondent purchased the property. In this vein, any planned or proposed residence, without regard to the likelihood of actually being built or when it would be built—whether it be one, eight, or twenty years from now—would prohibit the County from effectively managing the landfill for the public benefit of all and without consideration of the fact that the landfill was located at the site long before Respondent was an adjacent landowner.

Respondent attempts to veil legislative intent with the stated purpose of the regulations. In this context, Respondent limits the purpose of the regulations and places undue emphasis on establishing a setback distance to protect residences. Notwithstanding the fact that all "residences"—as defined in the regulations—are protected, Respondent still fails to balance the importance and public benefit of the permit, which is to provide a safe, efficient and effective way to dispose of the County residents' and businesses' solid waste. Without the ability to receive a permit due to the ALC adopting a much more restrictive definition of the term residence than applicable, the purposes of the regulations are undeniably frustrated.

B. DHEC's Interpretation of the term "residence."

Respondent also summarily concludes that DHEC's interpretation of the term was unreasonable because the ALC found it to be unreasonable. Respondent does not cite any reasons why, other than to refer back to its discussion on legislative intent. Even the case Respondent cites acknowledges that "DHEC staff's interpretation of regulatory, undefined terms and phrases are entitled to deference...when the interpretation is 'both reasonable and consistent with the plain language of the regulation.'" Murphy v. S.C. Dep't of Health & Envtl. Control, 396 S.C. 633, 723 S.E.2d 191 (2012). Without more, there appears to be no reason for the ALC's finding that DHEC's interpretation was unreasonable. Instead, it is more than reasonable for DHEC to utilize a specific definition found within the regulations applicable to solid waste management in a section lacking a definition for the same exact term.

C. 130 Planned Residences.

Lastly, evidence in the record shows that the 130 planned and permitted residences cannot qualify as residences under the applicable regulations. There is no certainty in planned and permitted structures as future residences. Although the phrase "substantial evidence" was riddled throughout Respondent's Initial Brief, no ounce of evidence is offered to demonstrate the certainty of when the structures will be built, if at all. And without actually existing, these hypothetical structures (whether they are residences, schools, day-care centers, churches, hospitals, or public owned recreational park areas) should not be considered residences as defined by the regulations. The fact remains that nothing prohibits Respondent from selling or otherwise amending, altering, or modifying the plans for these 130 structures. Therefore, these structures, planned or proposed, should not be considered residences until such time as they meet the plain, ordinary and specific meaning of the term as found in the regulations.

CONCLUSION

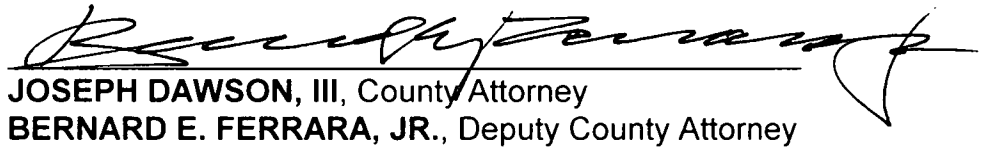
The Administrative Law Court erred when it found that the Second Permit Modification for the Bees Ferry Landfill construction and debris cell was inconsistent with the County's local ordinances because the Court based its decision on DHEC's failure to review the ordinance, not on whether the modification was inconsistent with 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 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. Therefore, this Honorable Court should reverse the ALC's Final Order and Decision and affirm the Second Permit Modification.

Respectfully submitted,

COUNTY OF CHARLESTON



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PROOF OF SERVICE

I certify that I have served the **Reply Brief of Appellant County of Charleston** on the all counsel of record by depositing a copy of the same in the United States Mail, postage prepaid, on September 3, 2013, addressed as follows:

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