STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

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

Grand Bees Development, LLC, ... Respondent,

vs.

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

BRIEF OF RESPONDENT
(IN RESPONSE TO APPELLANT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL'S BRIEF)

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STATEMENT OF ISSUES ON APPEAL

I. WAS THE ADMINISTRATIVE LAW COURT'S FINDING AND CONCLUSION THAT DHEC VIOLATED S.C. CODE ANN. §44-96-290(F) SUPPORTED BY SUBSTANTIAL EVIDENCE AND NOT AFFECTED BY ERROR OF LAW WHERE DHEC ADMITTED IT NEVER CONSIDERED CHARLESTON COUNTY'S LONGSTANDING SOLID WASTE ORDINANCE, MUCH LESS MADE A DETERMINATION WHETHER THE PERMIT AMENDMENT SOUGHT BY THE COUNTY ITSELF WAS CONSISTENT WITH THIS ORDINANCE?

II. WAS THE ADMINISTRATIVE LAW COURT'S FINDING AND CONCLUSION THAT DHEC VIOLATED S.C. CODE ANN. §44-96-290(F) SUPPORTED BY SUBSTANTIAL EVIDENCE AND NOT AFFECTED BY ERROR OF LAW WHERE DHEC GRANTED THE PERMIT AMENDMENT SOUGHT BY THE COUNTY EVEN THOUGH IT WAS INCONSISTENT WITH AND VIOLATED THE VEGETATIVE BUFFER REQUIREMENTS OF THE COUNTY'S ZONING AND LAND DEVELOPMENT REGULATIONS?

III. WAS THE ADMINISTRATIVE LAW COURT'S FINDING AND CONCLUSION THAT THE PERMIT AMENDMENT SOUGHT BY THE COUNTY VIOLATED S.C. CODE ANN. REGS. 61-107.19, PART IV(B)(1)(a) SUPPORTED BY SUBSTANTIAL EVIDENCE AND NOT AFFECTED BY ERROR OF LAW WHERE THE PERMIT AMENDMENT AUTHORIZES A CLASS II LANDFILL THAT IS CLOSER THAN ONE THOUSAND FEET TO APPROXIMATELY ONE HUNDRED AND THIRTY PLANNED RESIDENCES THAT PREVIOUSLY RECEIVED SITE PLAN APPROVAL FROM THE CITY OF CHARLESTON?

STATEMENT OF THE CASE

On September 1, 2011, the South Carolina Department of Environmental Control ("DHEC") approved Charleston County's (the "County") application to modify DHEC Permit Number 101001-1201, pertaining to the construction, demolition, and land clearing debris ("C&D" or "Class II") component (the "Mound") of the County-owned Bees Ferry Landfill (the "Second Permit Modification"). (R.p. 0006, ¶29).

Respondent, Grand Bees Development, LLC ("Grand Bees"), the owner of property adjacent to the landfill, timely filed a request for a final review conference with the DHEC Board on September 12, 2011. (R.p. 0001). The DHEC Board denied the request on October 13, 2011. (R.p. 0001).

Grand Bees subsequently filed a timely Request for Contested Case Hearing on November 2, 2011. (R.p. 0001). The Honorable Shirley C. Robinson, Administrative Law Judge, conducted the contested case hearing on March 20, 2012. (R.p. 0002).

By Order entered March 19, 2013, Judge Robinson reversed and vacated the Second Permit Modification, finding that DHEC and the Second Permit Modification itself violated state statutes and regulations (the "Order"). (R.pp. 0011-0018). Specifically, the Order found: (1) DHEC failed to perform a complete and correct consistency determination pursuant to S.C. Code Ann. §44-96-290(F) because it failed to identify and review Section 10-22 of the Charleston County Code of Ordinances; (2) the Second Permit Modification was inconsistent with the County's vegetative buffer and landscaping regulations found in Article 9.5 of its Zoning and Land Development Regulations ("ZLDR"); and (3) the Second Permit Modification violated S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a) because approximately one hundred and thirty (130)

planned residences on Grand Bees' Property are located within one thousand (1,000) feet of the Landfill's fill area boundary under the Second Permit Modification. (R.pp. 0011-0018).

On March 29, 2013 both the County and DHEC filed their respective motions for reconsideration. (R.p. 0022). The ALC denied both by order dated May 8, 2013. (R.pp. 0020-0021). The County and DHEC both filed Notice of Appeals with the Court of Appeals on May 29, 2013. (R.p. 0033). The Court of Appeals consolidated these appeals of the ALC's Order.

STATEMENT OF FACTS

Respondent, Grand Bees, is the owner of approximately three hundred and eleven (311) acres located off Bees Ferry Road within the City of Charleston (the "City") (Charleston County TMS # 301-00-00-035) (the "Grand Bees Property"). (R.p. 0002, ¶2). Appellant Charleston County is the owner and operator of the Bees Ferry Landfill (Charleston County TMS # 301-00-00-026) (the "Landfill") that is also located off Bees Ferry Road outside the City limits in an unincorporated part of Charleston County. (R.p. 0002-0003, ¶7). The Grand Bees Property abuts the Landfill and shares a common boundary along the Grand Bees Property's southwest property line. (R.p. 0002-0003, ¶7; R.p. 0518).

The City has zoned the Grand Bees Property as "Planned Unit Development" ("PUD"), specifically designating it for residential use. (R.p. 0002, ¶3; R.p. 0068, page 38, lines 4-18; R.pp. 0338-0412, R.p. 0515). The Grand Bees Property consists of approximately twenty-five (25%) percent of the land area of a larger PUD within the City of Charleston known as Grand Oaks that was first approved by City Council in 1993. (R.p. 0002, ¶4). At the time of the hearing before the ALC, Grand Oaks consisted of nine districts and completed neighborhoods totaling approximately 1,500 homes, infrastructure, parks, and other amenities. (R.p. 0002, ¶3; R.p. 0096, page 149, lines 11-21; R.p. 0096, page 150, line 24-page 152, line 10; R.p. 0097, page 153, lines 3-16; R.pp. 0338-0412). Various other existing residential PUDs are located in the immediate vicinity of Grand Oaks and the Landfill including The Hunt Club and Long Savannah. (R.p. 0002, ¶6; R.p. 0073, page 58, lines 2-15; R.p. 0073, page 59, line 12-page 60, line 9; R.pp. 516-517).

Grand Bees is in the business of residential development; it purchased the Grand Bees Property on November 15, 2004 for $4,141,518.00. (R.p. 0003, ¶¶9,12; R.p. 0332). Prior to purchase, Respondent Grand Bees conducted due diligence on, among other things, the Landfill and the County's zoning and land use ordinances applicable to the Landfill. (R.p. 0003, ¶10; R.pp. 0067-0068, page 34, line 18-page 40, line 20). In February 2006, Grand Bees obtained site plan approval from the City for 507 residential units on the Grand Bees Property. In reliance on this approval, Grand Bees spent approximately four million dollars ($4,000,000.00) more in engineering and other development costs towards realization of its residential development (R.pp. 0038-0039, ¶¶13,14; R.pp. 0069-0070, page 42, line 10-page 48, line 2; R.p. 0074, page 61, line 23-page 62, line 4; R.p. 0514).

Grand Bees' planned residential development consists of various engineered phases, including Phase 7 adjacent to the Class II Landfill's common boundary. (R.pp. 0010, ¶47; R.p. 0070, page 45, lines 21-24; R.p. 0513). At the time the County initially applied to DHEC to expand the Landfill, Phase 7 had been both permitted for residential development by the City and engineered for water, sewer, storm system, and roadway infrastructure improvements. (R.pp. 0010, ¶47; R.p. 0070, page 46, line 19-page 47, line 17; R.p. 0513).

The County has operated the Landfill at its present location since 1977. (R.p. 0004, ¶15). Pursuant to the S.C. Solid Waste Policy and Management Act of 1991 (the "Act"), the Landfill includes several cells. (R.p. 0004, ¶15). One of the cells consists of construction, demolition, and land clearing debris that is classified as a "Class II" mound (the "Mound") under current regulations. The County operates the Landfill under DHEC

Permit Number 101001-1201 issued in October 17, 1997 (the "Permit"). (R.pp. 0167-0331; R.pp. 0413-0417; R.pp. 0425-0434).

In 2007 the County applied to DHEC to modify the Permit so as to enlarge the Mound's vertical height limitation from seventy-four (74) feet above mean sea level ("MSL") to one hundred sixty-eight (168) feet above MSL and to expand the footprint of the Mound by five and a half (5.5) acres. (R.p. 0004, ¶16; R.p. 0174). The modification would more than double the size of the Mound by increasing the maximum disposal capacity from approximately 2.5 million cubic yards to 5.4 million cubic yards. (R.p. 0004, ¶16; R.pp. 0185). The County's application was subsequently amended in November 2007. (R.p. 0004, ¶16; R.pp. 0167). DHEC granted the modification of DHEC Permit Number 101001-1201 on January 17, 2008 (the "First Permit Modification"). (R.p. 0004, ¶19).

Despite knowing Grand Bees was developing residences on the adjoining property, the County did not directly notify Grand Bees about its application to DHEC to modify the Permit to authorize this enormous expansion of the height and size of the Mound. (R.p. 0004, ¶18; R.p. 0068, page 37, lines 1-4; R.p. 0071, page 49, line 9-page 50, line 5; R.p. 0073, page 57, lines 9-15). Respondent Grand Bees first learned of the County's permit expansion plans a few days after the First Permit Modification was issued. (R.p. 0004, ¶19; R.p. 0071, page 49, line 9-page 50, line 5).

On April 18, 2008, Respondent Grand Bees requested a contested case hearing to challenge the First Permit Modification. (R.p. 0004, ¶20). By Order dated June 2, 2009, the Honorable Ralph King Anderson, III, held that DHEC erred in granting the First Permit Modification. (R.p. 0004, ¶20). Judge Anderson held the County failed to

obtain a "special exception" for the expansion of the Mound in accordance with the terms of its own Zoning and Land Development Regulations ("ZLDR") (R.p. 0004, ¶20). For this reason Judge Anderson found that the First Permit Modification violated S.C. Code Ann. §44-96-290(F) that requires landfill permits be consistent with local zoning, land use and other ordinances. (R.p. 0004, ¶20). Judge Anderson vacated the First Permit Modification and remanded it to DHEC for further analysis. (R.p. 0004, ¶20).

After the First Permit Modification was reversed and remanded by Judge Anderson, the County amended its ZLDR to eliminate the requirement of a "special exception" as a prerequisite to expanding its Landfill. (R.pp. 0005, ¶21; R.pp. 0105-0106, page 188, line 14-page 189, line 12). Once DHEC learned of this zoning amendment, it again took up the County's 2007 permit modification application.[1] (R.p. 0005, ¶22). DHEC did not require the County to submit a new application, but the

[1] In its Brief, DHEC claims that "[u]pon [DHEC's] review of the amended ZLDR, it determined that the Modified Permit was consistent with the County's local zoning **and land use ordinances**." (Initial Brief of DHEC, p. 6). (emphasis added). The only evidence of DHEC's consistency determination in the record subsequent to Judge Anderson's decision, namely DHEC's "Consistency Memorandum" dated April 12, 2011, provides that the Second Permit Modification was "consistent with the Charleston County land-use planning and zoning." (R. pp. 0005-0006, ¶¶26,27; R. p. 0436). The Consistency Memorandum makes it clear that DHEC reviewed *only the ZLDR*, which contains the County's land-use planning and zoning ordinances, and not any other land use ordinances appearing in the Charleston County Code of Ordinances (a body of law distinct from the ZLDR). The only other evidence in the record of a consistency determination, namely, a similar memorandum from 2009, also does not state that the Code of Ordinances were ever reviewed by DHEC. (R. p. 0436). Therefore, there is no evidence in the record that DHEC determined that the Second Permit Modification to be consistent will *all County land use ordinances*, including those in the Code of Ordinances, because the consistency documents refer only to the ZLDR. As such, DHEC's assertion that DHEC "determined that the Modified Permit was consistent with the County's local zoning **and land use ordinances**" should be disregarded for the purposes of this appeal insofar as it suggests the Code of Ordinances were ever reviewed. S.C. Code Ann. §1-23-610(B) ("t]he review of the administrative law judge's order must be confined to the record.").

County did provide some additional information, primarily dealing with zoning, to supplement its 2007 application. (R.p. 0005, ¶22; R.pp. 0113-0114, page 220, line 19-page 221, line 18). Additional information involving groundwater monitoring was also submitted to account for regulatory changes since the County's initial application.[2] (R.p. 0005, ¶24).

During the contested case hearing over the Second Permit Modification, Kent Coleman, Director of DHEC's Division of Mining and Solid Waste Management testified that, on remand from the ALC, DHEC reviewed the County's application under DHEC's new landfill regulations, but only as to whether it complied with the ordinances in the ZLDR that had been the basis for Judge Anderson's ruling vacating the First Permit Modification. (R.p. 0005, ¶24; R.p. 0110, page 207, lines 1-23). Mr. Coleman also testified that, on remand, DHEC once more relied on the vicinity map on Page G-04 of the 2007 application that is dated 2004 and utilizes an aerial photograph from 2001. (R.p. 0004, ¶17; R.p. 0005, ¶25; R.pp. 0113-0114, page 220, line 7-page 221, line 18; R.p. 0224; R.p. 0515). This map identifies the adjoining Grand Bees Property as being zoned PUD with the land use denoted as "residential." (R.p. 0224; R.p. 0515). Mr. Coleman further testified that "numerous aerial photographs throughout the process . . . that were more updated through time" were consulted, but none of these photographs

[2] S.C. Code Ann. Regs. 61-107.19 repealed and replaced S.C. Code Ann. Regs. 61-107.11 on May 23, 2008. These regulatory changes, among other things, reclassified C&D landfills as Class II landfills. (R. p. 0005, ¶23).

are in the record.[3] (R.p. 0005, ¶25, R.pp. 0118-0119, page 240, line 23-page 241, line 3).

DHEC rendered a "Consistency Memorandum" dated April 12, 2011, that found the Second Permit Modification to be "consistent with the Charleston County land-use planning and zoning." (R.pp. 0005-0006, ¶¶26, 27; R.p. 0436). The Consistency Memorandum is the sole written documentation of the consistency determination in the record. Mr. Coleman testified that DHEC made a determination of consistency after DHEC learned the County had amended its ZLDR to remove the special exception requirement for the expansion of the landfill. (R.pp. 0006-0007, ¶32; R.p. 0110, page 207, lines 1-8; R.p. 0111, page 209, lines 15-18). DHEC did not consider any other pertinent local laws. (R.pp. 0006-0007, ¶32).

Counsel for all parties stipulated that Section 10-22 of the Charleston County Code of Ordinances ("Disposal Sites and Facilities") was in effect at all times relevant to the application for the Second Permit Modification. (R.p. 0007, 33; R.p. 0068, page 39, line 10-page 40, line 8; R.pp. 0437-0444). Section 10-22(1) is a local land use ordinance, which appears outside of the ZLDR that applies to "[a]ll owners or operators of solid waste disposal facilities including governmental units or agencies," and is triggered "[w]hen a new sanitary landfill is constructed or an existing site is extensively re-designed." (R.p. 0007, ¶33; R.p. 0012, ¶¶9, 10; R.p. 0443). Among other things, Section 10-22(2)(d) requires that all solid waste disposal sites "conform with the

[3] The aerial photographs from 2008 and 2012 introduced as Trial Exhibits 14 and 15 were prepared by Respondent's experts. (R.pp. 0516-0517). They are not part of DHEC's official permit review file, and there is no evidence in the record that DHEC ever consulted these photographs.

surrounding environment," and Section 10-22(2)(e) requires that the sites "conform with future development of the area." (R.p. 0007, ¶34; R.p. 0443).

DHEC's "Consistency Memorandum" does not refer to Section 10-22 or the Charleston County Code of Ordinances, more generally. (R.p. 0007, ¶35; R.p. 0436). Moreover, there is no evidence DHEC ever reviewed Section 10-22 prior to issuing the Second Permit Modification. (R.pp. 0006-0007, ¶¶32,35; R.p. 0436). Mr. Coleman testified at his deposition that the first time he saw Section 10-22 was a week before the hearing before the ALC. (R.p. 0111, page 212, lines 8-15).

John S. Lester, P.E. (Grand Bees' expert and the President of HLA, Inc., a civil engineering and landscape architecture firm in Charleston), Wallace A. Jack (a board member of the Grand Oaks Boulevard Association), and Taylor Bush (on behalf of Grand Bees) all testified about the rapidly expanding residential development in the immediate area surrounding the landfill since 2001. (R.pp. 0007-0008, ¶¶37,38; R.p. 0073, page 57, line 9-page 60, line 25; R.pp. 0089-0090, page 123, line 21-page 125, line 2; R.p. 0096, page 150, line 24-page 151, line 11). They also testified that the landfill expansion allowed by the Second Permit Modification would be incompatible with these residential uses and would not conform with the future development in the area. (R.pp. 0007-0008, ¶¶37,38; R.pp. 0071-0072, page 50, line 22-page 54, line 13; R.p. 0087, page 115, lines 13-21; R.p. 0098, page 157, line 24-page 158, line 11; R.p. 0098, page 160, lines 2-12). At the hearing, Grand Bees entered into evidence two aerial photographs from 2008 and 2012 that show several new residential neighborhoods near the Landfill constructed since 2001 and others under construction. (R.p. 0008, ¶39; R.pp. 0516-0517). Grand Bees also introduced several surveys and

computer generated sketch-ups that depict the effect of the proposed landfill on the surrounding area. (R.p. 0010, ¶48; R.pp. 0518-0526).

In addition, the Second Permit Modification and DHEC's consistency determination neither addressed nor incorporated the landscaping, screening, and buffering regulations found in Article 9.5 of the County's ZLDR. (R.p. 0009, ¶43; R.p. 0114, page 223, line 16-page 224, line 8; R.pp. 0167-0331; R.pp. 0413-0417; R.pp. 0425-0434) Article 9.5 provides as follows:

> [T]he landscaping, screening and buffering standards of [Article 9.5] shall apply to all new non-residential development . . . "[w]hen 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 . . . .

(R.p. 0469, §9.5.1). Article 9.5 provides for specific vegetative buffers between residential and industrial uses. (R.pp. 0469-0478, §9.5.4; R.p. 0084, page 101, line 12-page 102, line 16). Neither the Second Permit Modification nor DHEC's consistency determination references these County standards, describes or requires what type and amount of vegetation must be planted, and contains or incorporates a planting or landscaping plan. (R.p. 0044, ¶43; R.pp. 0167-0331; R.pp. 0413-0417; R.pp. 0425-0434; R.p. 436; R.p. 0085, page 105, line 21-page 107, line 11). No landscaping plan or similar documentation was included in the 2007 application either, even though, according to Mr. Lester, it is standard professional practice to prove compliance with buffer regulations as a precondition of permit approval. (R.p. 0044, ¶44; R.p. 0085, page 105, lines 12-24; p. 0114, page 223, line 16-page 224, line 8).

Furthermore, S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a) imposes a one thousand (1,000) foot buffer between the boundary of the fill area of a Class II Landfill

and any "residence." (R.pp. 0044-0045, ¶46). According to a survey performed by Mr. Lester, approximately one hundred and thirty (130) residential lots that have received site-plan approval from the City are located on the Grand Bees Property within one thousand (1,000) feet of the fill area boundary of the Class II Landfill. (R.p. 0045, ¶48; R.p. 0082, page 96, lines 1-10; R.pp. 0513-0514). The Parties stipulated that these planned and proposed residences on the property are within one thousand (1,000) feet of the proposed Mound. (R.p. 0010, ¶51; R.p. 0081, page 90, line 17-page 91, line 8). In granting the Second Permit Modification, DHEC admitted it did not consider these planned and approved residences on the Grand Bees Property. (R.p. 0010, ¶50; R.p. 0106, page 190, lines 19-23).

Judge Robinson reversed and vacated the Second Permit Modification. (R.p. 0054). In her Order, Judge Robinson additionally ruled that if the County continued to pursue modification of the DHEC permit to expand the Mound, it must submit "an entirely new and updated permit application . . . given the long period of time between this Order and the County's initial application in 2007, the rapid changes in residential development in the surrounding area since that time, the repeal and replacement of the governing regulation, and the outdated materials on which the permit relies including, but not limited to, the vicinity map from 2001." (R.p. 0054).

STANDARD OF REVIEW

"The standard of review that an appellate court is to apply to appeals from the ALC is set forth in the South Carolina Administrative Procedures Act (APA), specifically in section 1-23-610 of the South Carolina Code (Supp. 2012)." Murphy v. S.C. Dep't of Health & Envtl. Control, 396 S.C. 633, 639, 723 S.E.2d 191, 191, 194 (2012). "Under section 1-23-610(B), a reviewing court may reverse or modify a decision by the ALC if the substantive rights of the appellant have been prejudiced because of a finding, conclusion, or decision that:

1. violates constitutional or statutory provisions;
2. exceeds the agency's statutory authority;
3. is made upon unlawful procedure;
4. is affected by other error of law;
5. is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
6. is arbitrary, capricious, or characterized by either abuse of discretion or clearly unwarranted exercise of discretion."

See *Bailey* v. S.C. Dep't of Health & Envtl. Control, 388 S.C. 1, 4-8, 693 S.E.2d 426, 428-30 (Ct. App. 2010).

"The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact." S.C. Code Ann. §1-23-610(B). Moreover, "[t]he review of the administrative law judge's order must be confined to the record." Id. "As to factual issues, judicial review of administrative agency orders is limited to a determination [of] whether the order is supported by substantial evidence." MRI at Belfair, LLC v. S.C. Dept. of Health & Envtl. Control, 379 S.C. 1, 6, 664 S.E.2d 471, 474 (2008). "In determining whether the ALC's decision was supported by substantial evidence, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALC

reached." Hill v. S.C. Dept. of Health and Envtl. Control, 389 S.C. 1, 9-10, 698 S.E.2d 612, 617 (2010)).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE ADMINISTRATIVE LAW COURT'S FINDING AND CONCLUSION THAT DHEC VIOLATED S.C. CODE ANN. §44-96-290(F) IN GRANTING THE PERMIT AMENDMENT. DHEC FAILED TO EVALUATE WHETHER THE PROPOSED LANDFILL EXPANSION SOUGHT BY THE COUNTY WAS CONSISTENT WITH CHARLESTON COUNTY'S SOLID WASTE ORDINANCE, REQUIRING, AMONG OTHER THINGS, THAT ALL EXPANSIONS OF SOLID WASTE DISPOSAL SITES CONFORM WITH THE SURROUNDING ENVIRONMENT AND WITH FUTURE DEVELOPMENT OF THE AREA.

A. The County's Solid Waste Ordinance is an Applicable Local Land Use Ordinance Under S.C. Code Ann. §44-96-290(F).

DHEC argues that Section 10-22 of the Charleston County Code of Ordinances titled "Disposal Sites and Facilities" ("Section 10-22") is not an applicable local land use ordinance under S.C. Code Ann. §44-96-290(F).[4] As Judge Robinson concluded, DHEC is incorrect.

Section 44-96-290(F) requires DHEC to review all local laws to determine whether the application is consistent with them. This statutory section provides as follows:

> [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**, if any . . . ."

[4] Section 10-22 is the current citation to the ordinance at hand which was formerly classified as "Ordinance 180" in the Charleston County Code of Ordinances, adopted on March 5, 1974. (R.pp. 0437-0444).

(Emphasis added). The South Carolina Supreme Court interprets S.C. Code Ann. §44-96-290(F) to mean that consistency with local land use ordinances is a *condition precedent* to DHEC issuing a solid waste permit. See Southeast Resource Recovery, Inc. v. S.C. Dept. of Health and Envtl. Control, 358 S.C. 402, 407-08, 595 S.E.2d 468, 471 (S.C. 2004) ("DHEC cannot issue a permit unless the proposed facility is consistent with "local zoning, land use, and other applicable ordinances.").

The ALC's conclusion, as a matter of fact and law, that Section 10-22 is an applicable local land use ordinance is supported by substantial evidence. Admitted as a trial exhibit, Section 10-22 has been an operative ordinance of the County since its adoption in 1974. (R.p. 0437). In addition, County Council has never chosen to repeal Section 10-22. It remains a valid, enforceable local law. Moreover, it is undisputed that Section 10-22 was in effect both when the original permit application was filed and when the Second Permit Modification was issued.

Section 10-22(1) applies to "[a]ll owners or operators of solid waste disposal facilities including governmental units or agencies." It is triggered "[w]hen a new sanitary landfill is constructed or an existing site is extensively re-designed." (R.p. 0443). (Emphasis added). Section 10-22(2)(d) requires that all solid waste disposal sites "conform with the surrounding environment." Section 10-22(2)(e) requires that sites "conform with future development of the area." (R.p. 0443).

The ALC concluded that "Section 10-22 is an applicable local land use ordinance under S.C. Code Ann. §44-96-290(F) [because] it specifically governs solid waste disposal facilities (both new and expanded), including those owned and operated by governmental entities, including the County." (R.p. 0012, ¶9). Moreover, the ALC

"reject[ed] Respondents' argument that Section 10-22 is less specific and more vague than the ZLDR and therefore superseded by the ZLDR, making section 10-22 irrelevant for the purposes of consistency review." (R.p. 0013, ¶14). The ALC supported this conclusion by correctly observing that "zoning ordinances are not the only means by which local governments can regulate land use." See Greenville County v. Kenwood Enterprises, 353 S.C. 157, 165, 577 S.E.2d 428, 432 (2003), *overruled on other grounds by,* Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005). (R.p. 0012, ¶11). Therefore, she reasoned, zoning ordinances do not necessarily preempt land use ordinances appearing in the general code of ordinances.

DHEC takes the position that Section 10-22 is not an applicable ordinance "[b]ecause the ZLDR is a more specific ordinance regarding local zoning and land use requirements." (Initial Brief of DHEC, p. 9). In support of its argument, DHEC offers the trial testimony of Kent Coleman who described Section 10-22 as "very general . . . not specific." (Initial Brief of DHEC, p. 10). However, as already shown, Section 10-22 contains several specific criteria. Further, as the ALC pointed out, "Respondents have presented no authority to support the view that the ZLDR preempts . . . an otherwise applicable [and] valid land use ordinance simply due to the latter's being more specific." (R.p. 0013, ¶14).

Issues involving the construction of an ordinance are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact. Eagle Container LLC v. County of Newberry, 379 S.C. 564, 666 S.E.2d 892 (2008). Whether one ordinance preempts another calls for an ascertainment of legislative intent, which

too is a question of law. Mikell v. County of Charleston, 386 S.C.153, 158, 687 S.E.2d 326 (2009).

Here, as previously mentioned, there is no debating that Section 10-22 was a valid ordinance in effect at all times relevant to this case. Moreover, Charleston County Council has taken no action to repeal or otherwise invalidate Section 10-22, and the County itself is the permit applicant. Equally, there is no doubt that the ZLDR does not specifically reference, so as to preempt, Section 10-22. Therefore, ALC concluded that Section 10-22 is a distinct, independent, and, most important, "applicable ordinance" for the purposes of S.C. Code Ann. §44-96-290(F) based on this clear record of legislative intent.

Additionally the ZLDR consists of only zoning ordinances and does not include the County's solid waste policies. As part of the Solid Waste Policy and Management Act, the General Assembly required that each county implement policies in furtherance of the Act. S.C. Code §44-96-80 ("County or regional solid waste management plans; local government responsibilities; local Solid Waste Advisory Councils")[5] Section 10-22 constitutes the County's expression of some of those policies in response to the mandate of the General Assembly. Neither DHEC nor the County presented any other

[5] S.C. Code §44-96-80 provides, in part, as follows: "(A) Not later than fifteen months after the date on which the department submits its state solid waste management plan to the Governor and to the General Assembly, the governing body of each county, if the county intends to submit a single county plan, or the governing bodies of the counties in a region, if two or more counties intend to submit a regional plan, in cooperation with the local governments located in the county or region, shall prepare a solid waste management plan for the area within that county or region. Local governments within the county or region shall participate in the development of the county or regional plan and are required to be a part of the plan. This plan must provide for public participation and include, at a minimum, the following: ...."

County ordinances specifically implementing the County's solid waste management policies.

Contrary to DHEC's arguments, as a solid waste ordinance, Section 10-22 is far more specific than the general zoning provisions in the ZLDR applicable to the Landfill site. For example, according to the Consistency Memorandum, the Landfill property is zoned "I" (Industrial) district. (R.p. 0436). The ZLDR provides certain zoning conditions governing any landfill located in any "I" district. (R.p. 0436). In contrast, Section 10-22 mandates each proposed landfill (or landfill expansion), including government owned and operated facilities, "conform with the surrounding environment," and "conform with future development of the area." (R.p. 0443). Section 10-22 thereby directs a case-by-case comparison of the nature of the specific landfill proposal against the current and future condition of the surrounding environment.

As further testament to its specificity in its governance of solid waste facilities, Section 10-22(3) calls for "properly prepared plans and specifications by a registered professional engineer" to be submitted for review. (R.p. 0443). Specifically, a "[m]ap or aerial photograph of the area showing land use and zoning within one-fourth mile of the solid waste disposal site" must be submitted. (R.p. 0443). None of these materials are required by the general zoning provisions of the ZLDR. In comparison, Section 10-22 sets forth specific standards for the location and expansion of solid waste landfills.

Finally, there is no evidence in the record that DHEC, in performing its §44-96-290(F) consistency review, or the County itself, determined that Section 10-22 was preempted, replicated, or otherwise subsumed by provisions in the ZLDR or the state laws and regulations governing solid waste permitting. In fact, as the ALC found, "[t]here

is no evidence in the record that Section 10-22 or the County's Code of Ordinances, more generally, was ***ever reviewed*** by DHEC to determine whether the requested permit modification was consistent with all applicable local ordinances." (R.pp. 0006-0007, ¶¶32,35; R.p. 0436). DHEC did not even know Section 10-22 existed until Respondent brought it to its attention soon before the hearing before the ALJ. (R.p. 0111, page 212, lines 8-15).

Given the foregoing, based on the express terms of Section 10-22 and the total lack of evidence in the record that DHEC ever acknowledged Section 10-22 during its review of the Second Permit Modification, the ALC's finding and conclusion that Section 10-22 was an applicable local land use ordinance under S.C. Code Ann. §44-96-290(F) is supported by substantial evidence and not an error of law.

B. The County's Solid Waste Ordinance is not void for vagueness as it contains specific standards and calls for the review of up-to-date, detailed, and objective data.

DHEC also attacks the substantive criteria expressed in Section 10-22 as being too subjective and indefinite for DHEC to have applied during its consistency determination. (Initial Brief of DHEC, pp. 11-14). On this very point, the ALC found that, on its face, "the critical language of Section 10-22, namely 'conform with the surrounding environment' and 'conform with future development of the area,' are not the sort of 'broad, general statements of goals' that worried the Supreme Court in Southeast Resource Recovery." (R.p. 0013, ¶16). (citing Southeast Resource Recovery, Inc. v. S.C. Dept. of Health and Envtl. Control, 358 S.C. 402, 595 S.E.2d 468 (S.C. 2004)).

Instead, the ALC found that Section 10-22 contains "specific standards, requirements and criteria" that "simply do not lend themselves to more precise,

quantitative measures" and that these standards "are sufficiently specific and fact-based to guard against an arbitrary and capricious determination that *any* proposed landfill violates Section 10-22." (R.pp. 0013-0014, ¶16). (Emphasis in original). For one thing, unlike the "broad, general statement of goals" that were improperly relied upon in Southeast Resource Recovery, Sections 10-22(2)(d) and 10-22(2)(e) are both actual regulatory criteria carrying the force of law. Furthermore, as previously discussed, unlike the ZLDR, in implementing specific criteria governing solid waste disposal sites, Section 10-22 requires the submission of a myriad of site-specific plans, maps and schematics. These materials provide an objective basis to apply the specific criteria contained in the ordinance. The ALC found these features prevent Section 10-22 from being void for vagueness, and this decision is not affected by an error of law.

C. DHEC violated S.C. Code Ann. §44-96-290(F), as a matter of law, by not reviewing the County's Solid Waste Ordinance because DHEC is required by law to review and analyze all applicable land use ordinances in making its consistency determination.

DHEC does not challenge the ALC's finding that "DHEC never considered Section 10-22 in its consistency review." (R.p. 0012, ¶12).[6] Rather, its argument seems to be that S.C. Code Ann. §44-96-290(F) does not require DHEC to have reviewed Section 10-22 because "the determination of consistency with the ZLDR encompassed a consistency." (Initial Brief of DHEC, p. 17). In other words, Section 10-22 review would have been superfluous.

[6] An appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling. E.g., Biales v. Young, 315 S.C. 166, 432 S.E.2d 482 (1993). Therefore, since DHEC has not challenged the ALC's findings that it never considered Section 10-22 during its consistency review, this finding is the law of the case.

By making this argument, DHEC takes for granted that the ZLDR preempts or otherwise subsumes Section 10-22. However, for the reasons discussed above, the ALC found that Section 10-22 is materially distinct from and not preempted or otherwise subsumed by the ZLDR. Substantial evidence supports the ALC's decision, and the decision is not otherwise affected by an error of law. In addition, DHEC's argument misapprehends the role of the ALC in contested case hearings, DHEC's obligations under S.C. Code Ann. §44-96-290(F), and the South Carolina Supreme Court's holding in Southeast Resource Recovery, Inc. v. S.C. Dept. of Health and Envtl. Control, 358 S.C. 402, 595 S.E.2d 468 (S.C. 2004).

In contested case hearings, the ALC serves as the fact finder and makes a de novo determination regarding the matters at issue. Brown v. S.C. Dept. of Health and Envtl. Control, 348 S.C. 507, 520, 560 S.E.2d 410, 417 (2002). Here, the matter before the ALC was whether DHEC performed a proper consistency determination under S.C. Code Ann. §44-96-290(F) and Southeast Resource Recovery, Inc. – not only whether the permit issued by DHEC was actually consistent with local laws.

Consistency with local land use ordinances is a *condition precedent* to DHEC issuing a solid waste permit. See Southeast Resource Recovery, Inc. v. S.C. Dept. of Health and Envtl. Control, 358 S.C. 402, 407-08, 595 S.E.2d 468, 471 (S.C. 2004) (interpreting S.C. Code Ann. §44-96-290(F)). "Consistent with" means "comply with." See, id. at 408, 595 S.E.2d at 471. The Court's holding in Southeast Resource Recovery provides that, in order to comply with S.C. Code Ann. §44-96-290(F), DHEC, not any other party, must ensure that a permit is consistent will all applicable local land use ordinances. Id. ("DHEC, not the county, is charged with ensuring such facilities

meet the requirements for permitting."). Logically, the only way this can be done is for DHEC to identify all potentially applicable local land use ordinances and review them for consistency with the proposed permitted activity. However, in order to determine which local land use ordinances are applicable, DHEC must, necessarily, perform a comprehensive review in order to discern which ordinances apply and which do not.

By omitting from its review Section 10-22, a materially significant and applicable land use ordinance governing solid waste facilities, DHEC failed to perform a proper consistency determination as a matter of law. Having failed to even consider Section 10-22, as a matter of pure logic, DHEC could not have made any determination with regards to Section 10-22 during its consistency review, much less a determination that it was preempted or otherwise subsumed by the ZLDR. In any event, DHEC appears to be taking the a posteriori position that even though it did not review Section 10-22, it does not matter because the Second Permit is actually consistent with Section 10-22.

DHEC's "exclusive outcome based approach" for determining compliance with S.C. Code Ann. §44-96-290(F) ignores the holding in Southeast Resource Recovery that consistency is a *condition precedent* for permit issuance. DHEC's hypothetical approach, taken to its logical extension, would allow a permit to satisfy S.C. Code Ann. §44-96-290(F) *even if DHEC never reviewed any local ordinances prior to a permit's being issued*, just so long as an ALC, conducting de novo review, finds, in fact, that the permit is consistent with local law. This result completely jettisons DHEC's role from the consistency review process, which is neither what the General Assembly intended when it adopted S.C. Code Ann. §44-96-290(F) nor what the South Carolina Supreme Court held was DHEC's obligation in Southeast Resource Recovery.

Given the foregoing, substantial evidence supports the ALC's finding that DHEC's failure to review all applicable ordinances, including Section 10-22, means it violated S.C. Code Ann. §44-96-290(F) as a matter of law.

D. Had DHEC reviewed the County's Solid Waste Ordinance, substantial evidence in the record indicates that the Second Permit Modification would have been deemed inconsistent with said ordinance.

Having found that DHEC failed to perform a proper consistency determination as a matter of law, the ALC did not need to determine whether the Second Permit Modification was, in fact, inconsistent with Section 10-22. As previously mentioned, this is DHEC's job – and DHEC's job alone – under Southeast Resource Recovery. Nevertheless, the only evidence in the record on this topic supports inconsistency with Section 10-22, and, as such, the ALC's finding that DHEC's failure to review Section 10-22 made a material difference in its decision to issue the permit is supported by substantial evidence.

The ALC found and concluded that "[g]iven the evidence of substantial existing residential development in the area and future development in the area, including, but not limited to Petitioner's development on the Grand Bees Property, consideration of Section 10-22 would have materially influenced DHEC's permitting decision." (R.p. 0013, ¶13). The ALC further found that DHEC's omission of Section 10-22 from its consistency review to be "significant" because "unlike other County ordinances, such as the ZLDR, Section 10-22 (which is found in the Code of Ordinances) requires consideration of conformity with the surrounding environment and *future* development of the area." (R.p. 0013, ¶13). (Emphasis in original).

Several witnesses testified at the ALC hearing about, what the ALC ultimately found to be, "the rapidly expanding and residential character of the area surrounding the Landfill since 2001." (R.p. 0007, ¶37; R.p. 0073, page 57, line 9-page 60, line 25; R.pp. 0089-0090, page 123, line 21-page 125, line 2; R.p. 0096, page 150, line 24-page 151, line 11). For example, at the hearing, Taylor Bush, one of Respondent Grand Bees' principals, reviewed the vicinity map on page G-04 of the County's original permit application, which utilizes an aerial photograph from 2001,[7] and he testified as follows:

DIRECT EXAMINATION BY MR. WALKER

Q: . . . has there been a change to this land since 2001, which is the date of this aerial?
A: Yes.
Q: Has there been a residential development constructed since then?
A: Yes.
Q: What would that be --
A: Well --
Q: -- in proximity to the landfill?
A: Well, there's several.
Q: Okay.
A: First of all –
Q: And we're not contending these are within 1,000 feet, okay?
A: This is the Grand Oaks PUD (indicating) and all of this now is developed, this whole area. There are hundreds of homes now here. There's a public park with -- I think it's a city park with a gymnasium that is located here (indicating) in this general area and – and then there's development all back through here now. This is called Hunt Club. This was the first phase of Hunt Club and now it's -- it's been developed all back in here and actually now connects

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[7] According to the record, DHEC relied on the aerial photograph that went all the way back to 2001 in issuing the Second Permit Modification. (R. p. 0004-0005, ¶¶17,25; R. pp. 0113-0114, page 220, line 7-page 221, line 18; R. p. 0224). DHEC never required the County to submit an updated aerial photograph after the First Permit Modification was reversed and remanded, and there is no evidence in the record that DHEC consulted other, more recent aerial photographs. (R. p. 0005, ¶25; R. pp. 0118-0119, page 240, line 23-page 241, line 3).

over to this road (indicating). And then there's a development down here that is by Centex in Carolina Bay, I believe, and it's -- it's expanded dramatically. In fact, it's -- it's expanded up into this -- I believe it's expanded up into this industrial land use area. It's all -- I -- I can't say for certain. I know that there's interconnectivity now back out to this area and so there's -- I'm just speculating that may have been rezoned residential (indicating).

Q: Okay.

A: Again, there's another development over here called Fulton's Landing. There are apartments here now, several other uses.

Q: Mr. Bush, does this 2001 aerial reasonably depict the condition of that land that it shows as of the time of the first application, which is in July of 2007?

A: No.

Q: Does it depict the condition of the land accurately as of the date of the issuance of the first permit in January 2008?

A: No.

Q: Same question as to the issuance of the permit after it was vacated on September 1, 2007?

A: No.

(R.p. 0073, page 58, line 24-page 60, line 25).

Similarly, substantial evidence to support the ALC's finding concerning the relevance of Section 10-22 came from John S. Lester, P.E. (the president of HLA, Inc. a civil engineering and landscape architecture firm in Charleston). He offered expert testimony that aerial photographs from 2008 and 2012 showed several new residential developments that had been constructed and approved for development, all of which were absent in 2001. (R.pp. 0089-0090, page 123, line 21-page 125, line 2; R.pp. 0516-0517). Finally, Wallace A. Jack (a board member of the Grand Oaks Boulevard Association, the master homeowners association for the Bees Landing PUD (commonly known as Grand Oaks)) testified about current and future residential development near the landfill as follows:

DIRECT EXAMINATION BY MR. KHAN

Q: Tell the Court a little bit about Grand Oaks. We touched on it. Do you have an estimate of how many different neighborhoods are inside of it right now?

A: There are nine neighborhoods with housing units in it right now.

Q: Okay. Are there other neighborhoods that are coming forward?

A: There are two other tracts that are designated as residential.

Q: Okay. Does one of those include Grand Bees Development?

A: Yes.

Q: Okay. Do you have a rough figure of how many homes we're talking about in Grand Oaks?

A: My best estimate is, looking at the density of my own neighborhood, knowing -- since how -- treasurer, that's how we bill people is by acreage, using that as a rough estimate. There are townhouses and apartment buildings, which are more dense, but just using the density of my neighborhood, it's around 1,500 as a rough guess of how many there now.

(R.p. 0096, page 150, line 24-page 151, line 21).

Aside from the surge in residential development in the area since 2001 and the future residential development planned in the surrounding area, such as Respondent Grand Bees, Mr. Bush, Mr. Lester, and Mr. Jack all testified that dramatically expanding the footprint, capacity, and height of the Mound, as the Second Permit Modification would do, "would neither be compatible with nor conform to current and future development in the area." (R.pp. 0007-0008, ¶37; R.pp. 0071-0072, page 50, line 22-page 54, line 13; R.p. 0087, page 115, lines 13-21; R.p. 0098, page 157, line 24-page 158, line 11; R.p. 0098, page 160, lines 2-12). For example, Mr. Bush further testified as follows:

DIRECT EXAMINATION BY MR. WALKER

Q: Now, before we talk about that, I want you to tell the Court your specific concerns as a person in the development business, who's been doing this for a long, long time with a proposed expansion, the increasing elevation, the increase in footprint, the increase in volume.

A: Well, the increased elevation would become a visual -- a visual problem from the marketing of the property and -- and from a lifestyle point of view, someone living there. It had -- it had changed from something that was basically treetop level to something that was the height of a 13- or 14-story high-rise building. And so from that point of view, it was extremely concerning, because now we had what was an adjacent land use that we felt was compatible because of its -- of its height, but then obviously by increasing the -- in order to increase the height, they had to increase the footprint. It's just geometry, you know.

Q: Right.

A: And so that increase of a footprint also increased the life of the landfill. And when you increase the life of the landfill, it means it's going to be going on for a long, long time. Before it had an end of life that was probably consistent with the point at which we would be developing phase eight, nine and ten. But now the end of life is the people living there, their kids would be in college by then. And so it -- it was a dramatic change to us.

Q: Did those concerns that you had include aspects of the operation of the landfill, not just its elevation?

A: Absolutely.

Q: Tell us about that.

A: Well, I'm not an expert on the operation of landfills. I'm sure there's some experts in this room that could testify better than I could. But there's -- it's undeniable that it's -- there's dump trucks, there's bulldozers, there's all kind of activity like that that go on during the day, and so that -- that noise is concerning.

Q: Would that activity be going on at a higher elevation above the tree line?

A: Once the mound with this -- with this modification to this permit, it would be.

Q: And is there noise, to your knowledge, associated with those activities?

A: Yes.

(R.p. 0071, page 50, line 22-page 52, line 23).

Moreover, Mr. Lester offered expert testimony that the landfill expansion is "too large vertically and it's a very significant feature on the landscape" and that "[t]his will be seen for quite a distance away." (R.p. 0087, page 115, lines 18-21). Mr. Jack testified that his constituents would not welcome dramatic expansions of the neighboring landfill given the lights and other impacts it would cause. (R.p. 0098, page 157, line 24-page 158, line 11).

For these reasons, the ALC's finding of the materiality and pertinence of Section 10-22 is supported by substantial evidence. Therefore, given the import of Section 10-22, the ALC correctly concluded that "it is apparent in this instance that DHEC's consistency determination is materially incomplete and, therefore, facially invalid" under S.C. Code Ann. §44-96-290(F) and <u>Southeast Resource Recovery</u>. (R.p. 0013, ¶13).

Given the foregoing, the ALC's finding and conclusion that DHEC's failure to review Section 10-22, during its statutorily mandated consistency review, was "significant" is supported by substantial evidence and should be affirmed.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE ADMINISTRATIVE LAW COURT'S DECISION TO REVERSE AND VACATE THE PROPOSED LANDFILL EXPANSION SOUGHT BY THE COUNTY BECAUSE IT FOUND AND CONCLUDED THAT THE PERMIT AMENDMENT IS INCONSISTENT WITH CHARLESTON COUNTY'S LANDSCAPING, SCREENING AND BUFFERING REGULATIONS.

A. The Permit Amendment is Inconsistent with Article 9.5 of the ZLDR, as a Matter of Fact Supported by Substantial Evidence, Because it Fails to Incorporate the County's Landscaping, Screening and Buffering Requirements.

The ALC's finding that the Second Permit Modification, as issued, was inconsistent with Article 9.5 and violated S.C. Code Ann. §44-96-290(F) is supported by substantial evidence.[8]

First, the ALC correctly found Article 9.5 to be an applicable local land use ordinance for the purposes of S.C. Code Ann. §44-96-290(F). Article 9.5 of the ZLDR ("Landscaping, Screening and Buffers"), Section 9.5.1 ("Applicability") provides that "[w]hen 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 . . . ." (R.p. 0469, §9.5.1). Article 9.5 provides specific vegetative buffer regulations applicable between residential and industrial uses. (R.pp. 0471-0478,

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[8] The ALC found that the Second Permit Modification was inconsistent with Section 10-22 because the record revealed that DHEC never considered Section 10-22 during its consistency review. The consistency review *itself* was fatally defective for failing to consider Section 10-22. Regarding Article 9.5, however, the ALC found this local land use ordinance to be actually inconsistent with the Second Permit Modification, as granted. In other words, the ALC found that even if DHEC did consider Article 9.5 along with the other provisions of the ZLDR, which the record does demonstrate, the permit as granted conflicts with Article 9.5. The ALC concluded the expansion of the Mound approved in the Second Permit Modification was substantively defective since it failed to comply with the landscaped buffer requirements of this section of the ZLDR.

§9.5.4). The ALC found and concluded 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 ZLDR." (R.p. 0015, ¶22). This finding is supported by substantial evidence because the expanded use is a landfill that is a non-residential use and the height expansion applies to and impacts the entire landfill site.

Having found Article 9.5 to be relevant for the purposes of S.C. Code Ann. §44-96-290(F), the ALC then found the Second Permit Modification to be inconsistent with Article 9.5 "because no landscaping plan or other documentation demonstrating compliance was made part of the permit application or the Second Permit Modification." (R.p. 0015, ¶22). Specifically, the ALC found that "[i]n this instance, the County's regulations require a one hundred (100) foot vegetative buffer between the Class II Landfill and Petitioner's property, specifically containing nine (9) canopy trees, eleven (11) understory trees and fifty (50) shrubs per one hundred (100) feet of linear buffer along the property line." (R.p. 0009, ¶43). Finally, the ALC found that "the approved Second Permit Modification drawings contain no reference to the County's landscaping regulations, no description or requirement of the vegetation that would be required to be planted, and no planting or landscaping plan." (R.p. 0009, ¶43).

B. Article 9.5 of the ZLDR is Not Rendered Inapplicable, for the Purposes of S.C. Code Ann. §44-96-290(F), Because the Planning Director Has Discretion under Section 9.5.1.

DHEC suggests that "determination of compliance with Article 9.5 of the ZLDR does not rest with DHEC." (Initial Brief of DHEC, p. 17). However, as previously discussed, this statement conflicts with S.C. Code Ann. §44-96-290(F), as interpreted

by our Supreme Court. Southeast Resource Recovery at 408 ("Although 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**.") (emphasis added).

South Carolina law provides that DHEC may only issue permits that are consistent, in fact, with local land use ordinances, including applicable ordinances such as Section 9.5 of the ZLDR. The wording of the ZLDR, which may provide the Planning Director a measure of discretion in implementing the regulations, *as a matter of local law*, cannot be read so as to render moot S.C. Code Ann. §44-96-290(F) and Southeast Resource Recovery. Instead, DHEC was required to ensure that the landfill, as permitted, would comply with Section 9.5 of the ZLDR, but the record shows this did not occur.

DHEC also argues, in its Brief, that its responsibility in performing a consistency review is simply "to make sure there is nothing impeding the implementation of [Section 9.5] if required by the Planning Director." (Initial Brief of DHEC, p. 19). This argument suggests that DHEC's charge under S.C. Code Ann. §44-96-290(F) and Southeast Resource Recovery is simply to require that the permit has *the potential to be consistent* with local land use laws. However, this is not what the law requires.[9] As stated above, DHEC, may **only** issue permits which are, *in fact*, consistent with local land use laws.

[9] DHEC points to no authority supporting the contention that S.C. Code Ann. §44-96-290(F) and Southeast Resource Recovery applies only to non-discretionary local ordinances. The mere fact that there may be a discretionary exception to a requirement of a local land use ordinance does not, in and of itself, make it irrelevant for the purposes of DHEC's consistency review. S.C. Code Ann. §44-96-290(F) requires DHEC consider all "local zoning, land use, and other applicable local ordinances, if any." It is undisputed that Article 9.5, as an applicable local ordinance, is within the purview of S.C. Code Ann. §44-96-290(F).

Anything less would enable local government to become the final arbiter of landfill permitting decisions, by allowing local government staff to prevent landfills already permitted by DHEC. Such a result was expressly rejected in Southeast Resource Recovery.

As mentioned above, the ALC found that the Second Permit Modification conflicts with Section 9.5, and this decision is supported by substantial evidence. There is no evidence in the record that DHEC, during its mandatory consistency review, made any determinations regarding Article 9.5 whatsoever or that the Planning Director made a determination or granted a waiver to the County for its own landfill expansion. The Consistency Memorandum is silent both as to Article 9.5 specifically and the Planning Director's determination of applicability. (R.p. 0436). This is precisely because DHEC never considered the applicability of Article 9.5 during its consistency review as evidenced by the permit file, DHEC's Consistency Memorandum, and the Second Permit Modification. However, under Southeast Resource Recovery, DHEC was required to make a consistency determination regarding Article 9.5.

Given the foregoing, the ALC's conclusion that the Second Permit Modification violated S.C. Code Ann. §44-96-290(F), as a matter of fact, is supported by substantial evidence in the record and is not controlled by an error of law; therefore, it should be affirmed by this Court.

III. THE ALC'S INTERPRETATION OF "RESIDENCE" AS SET FORTH IN S.C. CODE ANN. REGS. 61-107.19, PART IV(B)(1)(a) IS NOT AN ERROR OF LAW. SUBSTANTIAL EVIDENCE SUPPORTS THE ALC'S FINDING THAT, UNDER THE PERMIT AMENDMENT, APPROXIMATELY ONE HUNDRED AND THIRTY RESIDENCES ARE LOCATED WITHIN ONE THOUSAND FEET OF THE LANDFILL AND THIS VIOLATES THE AFOREMENTIONED REGULATION.

A. The ALC Correctly Interpreted "Residence" as Used in S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a).

The ALC interpreted the term "residence" in the mandatory buffer requirement of S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a) to encompass residences that are planned and shown on an approved site plan, refusing to limit "residences" in this context to fully constructed and occupied residential dwellings as argued by DHEC. (R.pp. 0017-0018, ¶¶35-40). DHEC asserts "residence" can mean only existing structures where people actually live – not planned residences. (Initial Brief of DHEC, p. 23). The ALC rejected DHEC's limited interpretation.

The ALC concluded that DHEC's interpretation would produce absurd results. The ALC's construction of "residence" conforms with settled principles of statutory construction and furthers the purpose of the solid waste management regulations. The ALC's construction of "residence" for purposes of the applicable regulation was not legally erroneous.

S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a) imposes the following mandatory setback for solid waste facilities from adjoining properties: "The boundary of the fill area shall not be located within 1,000 feet of any residence, school, day-care center, church, hospital, or publically owned recreational park area." The ALC first observed that "'residence' for purposes of measuring the minimum regulatory buffer is

neither defined by S.C. Code Ann. Regs. 61-107.19, Part IV, nor elsewhere in the regulations." (R.p. 0016, ¶30).

The ALC then correctly set forth and applied the rules guiding the interpretation of regulations in its Order. (R.pp. 0016-0017, ¶¶32-34). The rules of statutory construction apply to regulations, Converse Power Corp. v. S.C. Dept. of Health and Envtl. Control, 350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002), and the cardinal rule of statutory interpretation is to ascertain and effectuate the legislature's intent. Chem-Nuclear Sys., LLC v. S.C. Bd. of Health and Envtl. Control, 374 S.C. 201, 205, 648 S.E.2d 601, 603 (2007). A statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose. Mun. Ass'n of S.C. v. AT&T Communications of the Southern States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004). An ambiguity in a statute should be resolved in favor of a just, beneficial, and equitable operation of the law. State v. Hudson, 336 S.C. 237, 247, 519 S.E.2d 577, 582 (Ct. App. 1999). Finally, the goal of statutory construction is to harmonize statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd, Clemson Univ. v. Speth, 344 S.C. 310, 313, 543 S.E.2d 572, 573 (Ct. App. 2001), because courts will reject statutory interpretations that lead to absurd results clearly unintended. S.C. Coastal Conservation League v. S.C. Dept. of Health and Envtl. Control, 380 S.C. 349, 369, 669 S.E.2d 899, 909 (Ct. App. 2008).

Examining legislative intent, the ALC found the purpose of S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a) to be as follows:

> The purpose of the regulations relevant to this case is to establish a setback distance to protect residences . . . from the obvious adverse effects of landfills on surrounding property. Moreover, the purposes and findings of the [Solid Waste Policy and Management Act] express the

importance of, among other things, preserving and protecting public health and coordinating landfill planning between state and local government. These purposes would be considerably undermined if "residence" was interpreted in a way that effectively eliminates this basic protection for property next to landfills.

(R.p. 0017, ¶35). (citing S.C. Code Ann. §44-96-290(B) and S.C. Code Ann. Regs. 61-107.19, Part IV(A)). This finding is further supported by the purposes of the Act, which among other things, are as follows:

> (1) protect the public health and safety, protect and preserve the environment of this State, and recover resources which have the potential for further usefulness by providing for, in the most environmentally safe, economically feasible and cost-effective manner, the storage, collection, transport, separation, treatment, processing, recycling, and disposal of solid waste;
>
> . . .
>
> (3) require local governments to adequately plan for and provide efficient, environmentally acceptable solid waste management services and programs;
>
> . .
>
> (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)(1), (3), (5).

Interpreting "residence" to mean, as DHEC suggests, <u>only</u> completed and final-permitted dwellings frustrates these purposes. Under DHEC's interpretation, an adjacent parcel next to a landfill could be previously planned and permitted for hundreds of residences, but DHEC could nonetheless ignore them completely. Under its proposed interpretation DHEC could also ignore *active* construction of houses or even *fully built* houses lacking certificates of occupancy within 1000 feet of the expansion of a landfill. As the ALC found, "since many of these ignored, planned developments are likely to ultimately be constructed and occupied after the permit has been granted, under [DHEC's] interpretation, they will end up being located within 1,000 feet of the Class II

Landfill – a result the regulations seek to avoid." (R.pp. 0017-18, ¶36). This view succinctly summarizes why adopting DHEC's narrow definition of "residence" would do violence to the stated policy and purposes of the Act as well as lead to absurd results.

DHEC suggests that the ALC should have interpreted "residence" based on the dictionary definition that, according to its Brief, includes only existing structures (Initial Brief of DHEC, p. 23), without any reference to the context of the regulation itself. However, a reviewing court "will reject the plain meaning of the words used in a statute if it would lead to an absurd result and will 'construe the statute so as to escape the absurdity and carry the intention into effect.'" Ventures South Carolina, LLC v. South Carolina Dept. Rev. 378 S.C. 5, 9, 661 S.E.2d 339, 341 (2008) (citing Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998)). Adopting DHEC's interpretation would lead to such absurdity and thwart the purpose of the regulation.

DHEC's interpretation turns S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a) -- a buffering rule intended by the legislature to promote efficient and orderly planning -- into a race between a landfill owner/operator and its neighbors to see who can obtain its permits first. The ALC found as follows:

> Under [DHEC's] interpretation, the necessity of having a CO ["Certificate of Occupancy"] for there to be a "residence" under the regulation would mean that DHEC must continuously monitor (up to the minute before making its consistency determination) the activities of local building departments to determine when and if a CO has been issued. Additionally, should a CO be granted for a residence adjacent to the proposed landfill during the permitting process, this sort of "springing" residence could essentially stop a permit in its tracks.

(R.p. 0018, ¶37). From this, the ALC concluded that "[t]his narrow interpretation could not have been intended by the legislature because it creates extreme administrative

difficulty for DHEC and the potential for unforeseen, yet easily avoidable, expenses and problems for all parties."

The ALC properly concluded, as a matter of law, that DHEC's interpretation of "residence" produces absurd results and, instead, adopted a meaning of "residence" that considers the salutary purposes of the regulation, furthers these protective goals, and avoids absurd results. The ALC's construction of "residence" was, therefore, not controlled by an error of law and therefore should be affirmed.

B. DHEC Staff's Interpretation of "Residence" is Not Entitled to Deference Because the Interpretation is Unreasonable and Produces Absurd Results.

Regarding the above discussion of the proper definition of "residence," DHEC argues that DHEC's staff member's interpretation should have been given deference by the ALC, and the ALC exceeded its authority by interposing its own view of what "residence" means. (Initial Brief of DHEC, pp. 24-26). However, the ALC found that DHEC staff's interpretation, in this case, was not entitled to deference precisely because it was unreasonable.

The South Carolina Supreme Court recently commented that under certain circumstances DHEC staff's interpretation of an undefined term in its regulations may be entitled to deference. Murphy v. South Carolina Dept. of Envtl. Control, 396 S.C. 633, 723 S.E.2d 191 (2012). Murphy makes clear, however, that this deference is due only when the interpretation is "both reasonable and consistent with the plain language of the regulation." Id. at 640-41, 723 S.E.2d at 195.[10] To the extent Murphy applies to

[10] As DHEC points out in its brief, another recently decided Supreme Court case holds that "courts defer to the relevant administrative agency's decisions with respect to its

this case, the ALC rightly dispensed with DHEC's interpretation of "residence" because it is not reasonable and leads to absurd results.

As set forth above, the ALC concluded DHEC's interpretation conflicts with the protective purposes of the overall regulatory framework and produces absurd results not intended by the General Assembly. For these reasons, the ALC did not commit legal error by not deferring to a DHEC staff member's interpretation of "residence" in S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a).

C. The ALC Correctly Concluded that the Permit Amendment Violates S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a).

According to a survey performed by Mr. Lester, an expert surveyor and landscape architect, approximately one hundred and thirty (130) approved and permitted residential lots on Respondent Grand Bees' Property are closer than one thousand (1,000) feet to the fill area boundary of the Mound. (R.p. 0010, ¶48; R.p. 0082, page 96, lines 1-10; R.p. 0514). In addition, based on the testimony of Mr. Bush, the ALC found that the planned residential development for the Grand Bees Property consists of various engineered phases, including Phase 7 adjacent to the Class II Landfill's common boundary. (R.p. 0010, ¶47; R.p. 0070, page 45, lines 21-24). Phase 7, for instance, has been both permitted for residential development by the City and

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own regulations unless there is a compelling reason to differ." (Initial Brief of DHEC, p. 25). (citing Kiawah Development Partners, II v. South Carolina Dept. of Envtl. Control, 2013 WL 696729 * 2). To this point, Kiawah Development Partners, II is not a final decision, binding on this Court, because the Supreme Court granted a petition for rehearing that case. An opinion of an appellate court is not final until the remittitur is filed in the lower court, and the timely filing of a petition for rehearing stays the sending of the remittitur, thereby depriving the decision of finality. See, e.g., Harleysville Mutual Ins. Co. v. State, 401 S.C. 15, 736 S.E.2d 651, n. 2 (2012).

engineered for water, sewer, storm system, and roadway infrastructure improvements. (R.p. 0010, ¶ 47; R.p. 0070, page 46, line 19-page 47, line 17; R.p. 0513).

Given the evidence in the record of approximately 130 planned and approved houses to be constructed within 1,000 feet of the boundary of the expanded Mound, the ALC properly concluded that the Second Permit Modification violated S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a).

Having found "residence" to encompass houses that are planned and shown on an approved site plan – not only fully constructed and occupied residential dwellings, as suggested by DHEC – the ALC concluded that the Second Permit Modification violated S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a). This decision is supported by substantial evidence and should be affirmed as there is no error of law.

CONCLUSION

For the foregoing reasons, the ALC's Order should be affirmed in all respects and DHEC's appeal should be denied.

[SIGNATURE APPEARS ON NEXT PAGE]

Respectfully Submitted,

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The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINSITRATIVE COURT

Shirley C. Robinson, Administrative Law Judge

Case No.: 2011-ALJ-07-0556-CC

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Grand Bees Development, LLC, ... Respondent,

vs.

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

PROOF OF SERVICE

I, Nancy Jane Dennis, an employee of Pratt-Thomas Walker, P.A., hereby certify that I have served this 23rd day of October 2013, a copy of the **Respondent's Brief [in response to Appellant SCDHEC]** on counsel of record by placing the same in the United States mail, first-class postage pre-paid, to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Respondent's Briefs in Response to Appellant S.C. Department of Health & Environmental Control and in Response to Appellant County of Charleston are in compliance with the Supreme Court's Order of August 13, 2007.

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