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 COUNTY OF CHARLESTON'S BRIEF)

G. Trenholm Walker
PRATT-THOMAS WALKER, P.A.
P.O. Drawer 22247
Charleston, SC 29413-2247
Phone: (843) 727-2200

Jamie A. Khan
Ross A. Appel
MCCULLOUGH KHAN, LLC
68 1/2 Queen Street
Charleston, SC 29401
Phone: (843) 937-0705

ATTORNEYS FOR RESPONDENT
GRAND BEES DEVELOPMENT, LLC

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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 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. (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 (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"), which is also located off Bees Ferry Road but in the unincorporated part of Charleston County. (R.pp. 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.pp. 0002-0003, ¶7; R.p. 0518).

The Grand Bees Property is zoned "Planned Unit Development" ("PUD") by the City of Charleston (the "City") and is designated for residential land use. (R.p. 0002, ¶3; R.p. 0068, page 38, lines 4-18; R.pp. 0338-0412, R.p. 0515). The Grand Bees Property represents 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 and 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 and afterwards proceeded to spend approximately four million dollars ($4,000,000.00) 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 of the County's initial application 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 is a construction, demolition, and land clearing debris or "Class II" mound (the "Mound") that

the County operates 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.[1] (R.p. 0004, ¶16; R.pp. 0185). The County's application was subsequently amended in November 2007. (R.p. 0004, ¶16; R.pp. 0167).

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 an 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). DHEC granted the modification of DHEC Permit Number 101001-1201 on January 17, 2008 (the "First Permit Modification"). (R.p. 0004, ¶19). 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).

[1] In its Brief, the County claims that the landfill expansion is needed "to protect the public health, safety and general welfare of the citizens of the County by providing a central location for disposal of this type of waste and thereby minimizing unlawful dumping and littering throughout the County and surrounding municipalities." This statement, however, appears nowhere in the record, does not have a citation in the County's Initial Brief, and must be ignored for the purposes of this appeal pursuant to S.C. Code Ann. § 1-23-610(B)("t]he review of the administrative law judge's order must be confined to the record.").

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 because the County failed to obtain a "special exception" for the expansion of the Mound in accordance with the terms of its own ZLDR (R.p. 0004, ¶20). As such, 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.pp. 0004-0005, ¶¶20,21).

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. (R.p. 0005, ¶22). DHEC did not require the County to submit a new application, but the 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).

[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).

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 the DHEC's new landfill regulations, but only as to whether it complied with the County's ZLDR that had been the subject of the prior contested case proceeding. (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 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 zoning ordinance to remove the special exception requirement for the expansion of the landfill. (R.pp. 0006-0007, ¶32; R.p.

[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.

0110, page 207, lines 1-8; R.p. 0111, page 209, lines 15-18). DHEC did not consider any other applicable local laws that may have been pertinent to the application for the Second Permit Modification. (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 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 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. (R.p. 0007, ¶35; R.p. 0436). 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 had seen 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 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 that have been constructed since 2001 and others that are 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 addresses nor incorporates 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 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 from the boundary of the fill area of a Class II Landfill from 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 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 further stipulated that there are planned and proposed residences on the property within one thousand (1,000) feet of the landfill fill area. (R.p. 0010, ¶51; R.p. 0081, page 90, line 17-page 91, line 8). In granting the Second Permit Modification, DHEC admitted to not taking into account the 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 sought to continue pursuing its landfill expansion permit, 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

"In an appeal from an ALC decision, the Administrative Procedures Act (APA) provides the appropriate standard of review." Kiawah Development Partners, II v. S.C. Dept. of Health and Envtl. Control, 401 S.C. 570, 738 S.E.2d 455, 458 (2013) (citing S.C. Code Ann. §1-23-610(B)). An appellate court will only reverse the decision of an ALC if that decision is:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(f) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

Id. at 459. "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." Kiawah Development Partners, II, 401 S.C. 570, 738 S.E.2d at 459 (citing 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). DHEC FAILED TO EVALUATE WHETHER THE PROPOSED LANDFILL EXPANSION SOUGHT BY THE COUNTY WAS CONSISTENT WITH CHARLESTON COUNTY'S SOLID WASTE ORDINANCE THAT REQUIRES, 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).

The County 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] That statute requires DHEC to perform a consistency review with all local laws, stating 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 . . . ."

(Emphasis added) The South Carolina Supreme Court has interpreted 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.")

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[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).

The ALC concluded, as a matter of fact and law, that Section 10-22 is an applicable local land use ordinance. This conclusion 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).

Section 10-22(1) 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. 0443). (Emphasis added).Among other things, Section 10-22(2)(d) requires that all solid waste disposal sites "conform with the surrounding environment," and 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). 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).

Realizing that the proposed expansion of the Mound is incompatible with Section 10-22, the County takes the unusual position of disclaiming its own valid ordinance. The County refers to Section 10-22 as "archaic" and "outdated." (Initial Brief of County, p. 11-12) However, County Council has never chosen to repeal Section 10-22. It is

undisputed it is a valid local law in effect both when the original permit application was filed and when the Second Permit Modification was issued.

What is more, the ALC found "no authority to support the view that the ZLDR [the County's Zoning and Land Development Regulations] preempts, for the purposes of DHEC's consistency analysis, an otherwise applicable and valid land use ordinance [such as Section 10-22] simply due to the latter's being more specific." (R.p. 0013, ¶14). (citing Mikell v. County of Charleston, 386 S.C.153, 687 S.E.2d 326 (2009)). Nor has the County cited in its brief to any section of the ZLDR that purported to repeal Section 10-22.

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.p. 0007, ¶35). 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.

The County also attacks the substantive criteria expressed in Section 10-22 as being too subjective and indefinite for DHEC to apply during its consistency

determination. (Initial Brief of County, p. 11-14) On this 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.)

Moreover, the ALC did not find that the Second Permit Modification was inconsistent with Section 10-22 per se, although the only evidence in the record on this topic supports inconsistency with Section 10-22. Rather, the ALC found simply that Section 10-22 is an applicable ordinance for the purposes of consistency review, and that DHEC failed to identify and review it in violation of S.C. Code Ann. §44-96-290(F) and Southeast Resource Recovery.

For the aforementioned reasons, the ALC's finding and conclusion that Section 10-22 is an applicable land use ordinance is supported by substantial evidence and not based on any errors of law.

B. By Failing to Identify and Assess the County's Solid Waste Ordinance, DHEC's Consistency Determination Under §44-96-290(F), was Incomplete and Materially Insufficient.

The County does not challenge the ALC's finding that "DHEC never considered Section 10-22 in its consistency review." (R.p. 0012, ¶12).[5] Rather, the County's argument seems to be that this omission was harmless error and the ALC erred by not "finding that the permit modification was *in fact* inconsistent with [Section 10-22]." (Initial Brief of County, p. 9) (Emphasis added) However, in so doing, the County 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. The doctrine of harmless error applies to judicial decisions on appeal. Snipes v. Augusta-Aiken Railway & Electric Corp., 151 S.C. 391, 149 S.E. 111 (1929). It has no application to administrative consistency determinations or the review thereof. See S.C. Code Ann. §1-23-600(E) (setting forth standard of review by ALC in contested case hearings).

[5] 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 the County has not challenged the ALC's findings that DHEC never considered Section 10-22 during its consistency review, this finding is the law of the case.

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.") The only way this can be done is for DHEC to identify all applicable local land use ordinances and review them for consistency with the proposed permitted activity sought, but DHEC failed to do this.

The record demonstrates that DHEC was entirely unaware of Section 10-22 (of Charleston County's Code of Ordinances) during its official, statutorily-mandated consistency review, and, as a result, DHEC never considered Section 10-22 in its consistency review. Therefore, the ALC's findings and conclusions that DHEC should have considered Section 10-22, but did not, are supported by substantial evidence.

The County's "exclusive outcome based approach" for determining compliance with S.C. Code Ann. §44-96-290(F) also ignores the holding in Southeast Resource Recovery that consistency is a *condition precedent* for permit issuance. The County'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 drafted S.C. Code Ann. §44-96-290(F) nor what the South Carolina Supreme Court held was DHEC's obligation in Southeast Resource Recovery.

Moreover, even if there were a legal basis for the County's misplaced argument of harmless error, there is substantial evidence to support the ALC's finding and conclusion 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 found 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,[6] and he testified as follows:

[6] According to the record, DHEC relied on the aerial photograph that went all the way back to 2001 when it issued 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

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 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.

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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).

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, 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) Finally, 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. 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 Southeast Resource Recovery. (R.p. 0013, ¶13)

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, as a Matter of Fact, with Article 9.5 of the ZLDR 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.[7]

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

[7] 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. In other words, the consistency review *itself* was defective. This can be referred to as a "procedural defect" in DHEC's consistency review. Regarding Article 9.5, however, the ALC found this local land use ordinance to be actually inconsistent, as granted, with the Second Permit Modification. In other words, the ALC found that even if DHEC did consider Article 9.5 along with the other provisions of the ZLDR, the permit as granted conflicts with Article 9.5. This can be referred to as a "substantive defect" in DHEC's consistency review.

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, §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)

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, and, therefore, should be affirmed by this Court.

B. The Entire Mound is Subject to Article 9.5 of the ZLDR Due to the Permit Amendment's Dramatic Height Expansion.

The County does not argue that Article 9.5 is not triggered. Instead, the County disputes that under Article 9.5 "a one hundred (100) foot vegetative buffer between the Class II Landfill and [Respondent Grand Bees'] property" is required because the proposed expansion of Landfill will not cause additional impacts in the direction of the current one hundred (100) foot buffer.[8] (Initial Brief of County, p. 14-15) Since "[t]he proposed expansion is contained entirely within the existing permitted boundaries and existing buffer zones for the facility," the County contends no landscaping, screening or buffering need be located within the current buffer under Article 9.5. However, this argument misapprehends the extent and nature of the landfill expansion authorized by the Second Permit Modification.

In addition to expanding the landfill laterally, the Second Permit Modification would more than double 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. (R.p. 0004, ¶16) The ALC found, based on expert testimony from Mr. Lester, an expert surveyor and landscape architect, that one hundred sixty-eight (168) feet above MSL "would match or exceed many of the tallest structures in Charleston County, including

[8] The current one hundred (100) foot buffer between the Grand Bees Property and the Class II Landfill is the product of DHEC regulations, namely S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(e), not the ZLDR and this state regulation is a siting requirement of general applicability that must be present no matter what local regulations require. (R. p. 0015, ¶23). There are no plantings in this current buffer that would satisfy Article 9.5 of the ZLDR. (R. p. 0086, page 109, line 9-page 110, line 24).

the driving surface of the Arthur Ravenel, Jr. Bridge as well as what is possibly Charleston's tallest building, the Holiday Inn along the Ashley River." (R.p. 0008, ¶38; R.p. 0087, page 113, line 9-page 114, line 5; R.p. 0526).

Since this height expansion applies to the entire Mound, the entire Mound is directly affected by the proposed improvements contained in the Second Permit Modification. Therefore, 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 requirements contained in Article 9.5 would have to be implemented.

C. 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.

The County argues that the landscaping, screening and buffering regulations contained in Article 9.5 are irrelevant, for the purposes of consistency review, because the Planning Director has discretion whether to apply them or not on a case-by-case basis. (Initial Brief of County, p. 16-18) It is true that Section 9.5.1 provides a measure of discretion to the Planning Director, *as a matter of local law*. However, 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. In making this argument, the County also overlooks that in failing to consider Article 9.5, an applicable local land use law, in its consistency determination, DHEC violated its non-delegable responsibility under Southeast Resource Recovery. As that case makes clear, DHEC, not the County, is the ultimate arbiter of land fill permitting decisions.

There is no evidence in the record that DHEC, during its consistency review, considered the applicability of Article 9.5 nor sought any input or a determination from the Planning Director. The Consistency Memorandum is silent both as to Article 9.5 specifically and the Planning Director's determination of applicability. (R.p. 0436). In fact, the County concedes that, to this very day, the Planning Director has never made a determination whether the landscaping standards apply. (Initial Brief of County, p. 16). 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.

As such, the County's assertion that "DHEC determined [Article 9.5] was not applicable" is not supported by any evidence in the record. (Initial Brief of County, p. 17). Under Southeast Resource Recovery, DHEC, not the local government or the Planning Director, must make the consistency determination with respect to all applicable local ordinances. 358 S.C. at 407-08, 595 S.E.2d at 471. Here, DHEC abdicated its charge by failing to address Article 9.5 and requiring the Second Permit Modification to be consistent with it.

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). Moreover, the County 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.

Given the foregoing, the ALC properly found and concluded, based on substantial evidence, that DHEC violated S.C. Code Ann. §44-96-290(F) in failing to consider Article 9.5.

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. (R.pp. 0017-0018, ¶¶ 35-40). The County's position is that "residence" means only existing structures with occupancy permits. (Initial Brief of County, p. 18-20) The ALC's interpretation is proper because it conforms with settled principles of statutory construction and honors the purpose of the solid waste regulations. Moreover, the ALC found that the County's interpretation produces absurd results.

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 correctly 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 correctly set forth and applied the rules guiding the interpretation of regulations in its Order. (R.pp. 0016-0017, ¶¶ 32-34). For example, 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). Also, 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).

The County first suggests that the ALC should have interpreted "residence" based only on the dictionary definition that, according to the County's Brief, is "a building used as a home," not one that is permitted and planned (Initial Brief of County, p. 19). 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)). In other words, a court should reject a dictionary definition (put forth to establish a regulatory term's "plain meaning") where doing so yields absurd results and fails to honor legislative intent. This is precisely why the ALC rejected the foregoing dictionary definition in this case. The ALC's determination is supported by substantial evidence and not affected by an error of law.

The County's other suggestion is that the definition of "residence" in S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a) should be interpreted according to the definition of "residence" found in S.C. Code Ann. Regs. 61-107.18(B)(29).[9] However, as mentioned above, the ALC correctly observed that the term "residence" is not defined in the regulations governing the permitting of the landfill class at issue in this case. The legislature could have, but did not, define "residence" to mirror the definition found in S.C. Code Ann. Regs. 61-107.18(B)(29). Since the legislature chose not to do so, this demonstrates legislative intent that the term not be defined in this manner. See Hainer

[9] S.C. Code Ann. Regs. 61-107.18(B)(29) is titled "Sold Waste Management: Off-site Treatment of Contaminated Soil" and it has nothing to do with the permitting of solid waste landfills under S.C. Code Ann. Regs. 61-107.19, which contain the regulations under which the Second Permit Modification was processed and issued by DHEC.

v. American Med. Int'l, Inc., 328 S.C. 128, 492 S.E.2d 103 (1997) (if legislature had intended a certain result in statute, it would have said so). As with the dictionary definition of "residence," the definition found in S.C. Code Ann. Regs. 61-107.18(B)(29), also produces absurd results since it includes only existing structures, and was therefore properly rejected by the ALC.

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 the County suggests, only completed and final-permitted dwellings frustrates these purposes. Under this view, an adjacent parcel next to a landfill could be previously planned and permitted for hundreds of residences, but this would not impact DHEC's application of S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a) in any way. Under the County's proposed interpretation of the regulation, DHEC must ignore residential development within one thousand (1,000) feet even if it involves active construction of houses or fully built structures without certificates of occupancy. 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 [the County'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 the County's narrow definition of residence would do violence to the stated policy and purposes of the Act and lead to absurd results.

Finally, the County's interpretation of "residence" produces absurd results that could not have been intended by the legislature and should be rejected. Essentially, the County'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 [the County'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." (R.p. 0018, ¶ 37).

The ALC properly concluded, as a matter of law, that the County's interpretation of "residence" produces absurd results because it creates a permit race between neighbors that interferes with sound solid waste facility planning and permit administration, creates major administrative demands and strains on DHEC, and requires DHEC permits to be completely re-engineered prior to issuance when a residential structure, within the one thousand (1,000) foot buffer, is finally permitted prior to the DHEC permit's issuance. These findings are supported by substantial evidence in the record and 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," the County argues that DHEC's staff 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 County, p. 21-22) 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 found that under certain circumstances DHEC staff's interpretation of regulatory, undefined terms and phrases

are entitled deference. Murphy v. South Carolina Dept. of Envtl. Control, 396 S.C. 633, 723 S.E.2d 191 (2012). However, Murphy makes clear 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.

Here, for the reasons set forth in the previous subsection, the ALC found that DHEC's interpretation that "residence" means only completed and final-permitted residential dwellings both frustrates the policy behind the Act, generally, and the buffer regulations, specifically. Moreover, as set forth above, the ALC found that both DHEC's and the County's interpretation produces absurd results, which could not have been intended by the General Assembly. For these reasons, the ALC was not persuaded to give deference to DHEC staff as it relates to the interpretation of "residence" in S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a) as it was not reasonable and consistent with the plain language of the regulation and should be affirmed.

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 planned 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 has been both permitted for residential development by the City and 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 there being approximately one hundred and thirty (130) planned and permitted residences within one thousand (1,000) feet of the fill boundary, which will be constructed, 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 residences that are planned and shown on an approved site plan – not only fully constructed and occupied residential dwellings, as suggested by the County – 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 the County's appeal should be denied.

[SIGNATURE APPEARS ON NEXT PAGE]

Respectfully Submitted,

BY: G. Trenholm Walker

G. Trenholm Walker, Esquire
PRATT-THOMAS WALKER, P.A.
Post Office Drawer 22247
Charleston, SC 29413-2247
Phone: 843.727.2200
gtw@p-tw.com

Jamie A. Khan, Esquire
Ross A. Appel, Esquire
MCCULLOUGH KHAN, LLC
68 1/2 Queen Street
Charleston, SC 29401
Phone: 843-937-0400
jamie@mklawsc.com

Charleston, South Carolina
October 22, 2013

ATTORNEYS FOR RESPONDENT,
GRAND BEES DEVELOPMENT, LLC

Certificate of Counsel

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

October 23, 2013 BY: G. Trenholm Walker

G. Trenholm Walker
PRATT-THOMAS WALKER, P.A.
Post Office Drawer 22247
Charleston, SC 29413-2247
T: 843.727.2200
gtw@p-tw.com

Jamie A. Khan
Ross A. Appel
McCULLOUGH KAHN, LLC
68 ½ Queen Street
Charleston, SC 29401
T: 843.937.0400
jamie@mklawsc.com
ross@mklawsc.com

ATTORNEYS FOR RESPONDENT
GRAND BEES DEVELOPMENT, LLC

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

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 County of Charleston]** on counsel of record by placing the same in the United States mail, first-class postage pre-paid, to:

Etta R. Williams Linen
Jacquelyn S. Dickman
South Carolina Department of
Health and Environmental Control
2600 Bull Street
Columbia, SC 29201-1708
(803) 898-3350

ATTORNEYS FOR APPELLANT
SOUTH CAROLINA DEPARTMENT
OF HEALTH AND ENVIRONMENTAL
CONTROL

Joseph Dawson, III
Bernard E. Ferrara, Jr.
Austin A. Bruner
Bradley A. Mitchell
Johanna S. Gardner
Charleston County Attorney's Office
4045 Bridge View Drive
North Charleston, SC 29405
(843) 958-4101

ATTORNEYS FOR APPELLANT
COUNTY OF CHARLESTON

Nancy Jane Dennis